

Federal Court



Cour fédérale

Date: 20241022

Docket: IMM-5316-23

Citation: 2024 FC 1656

Ottawa, Ontario, October 22, 2024

PRESENT: Mr. Justice McHaffie

BETWEEN:

JAMA MUSE YUSUF

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant claims to be a Somali citizen named Jama Muse Yusuf. The Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB] found he had not credibly established his identity, and dismissed his refugee claim on this basis. The applicant seeks judicial review of this decision.

[2] Having reviewed the parties' submissions and the evidence in the matter, I conclude the RAD's analysis of a central piece of evidence—an affidavit purporting to be from the applicant's mother and identifying him as her son—was unreasonable. As the RAD recognized, this affidavit was from a close family member whose evidence regarding the applicant's identity could only have had very high probative value. The unreasonableness of the RAD's analysis of this important evidence therefore requires its decision to be set aside, regardless of its credibility findings and its analysis of the other identity evidence.

[3] The application for judicial review will therefore be allowed and the matter remitted to the RAD for redetermination.

II. Issues and Standard of Review

[4] This Court reviews the merits of RAD decisions in respect of the identity of refugee claimants on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Yusuf Adan v Canada (Citizenship and Immigration)*, 2022 FC 1383 at para 47. A reasonable decision is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker”: *Vavilov* at paras 85, 90, 99–100. Applying the reasonableness standard, the Court will only set aside the RAD's decision if it fails to demonstrate the necessary justification, intelligibility, and transparency required of a reasonable administrative decision: *Vavilov* at para 99.

[5] The sole issue on this application is therefore whether the RAD's decision that the applicant had not established his identity on a balance of probabilities was reasonable. In answering this question, the Court is not to reweigh and reassess evidence considered by a decision maker: *Vavilov* at para 125. At the same time, the requirement that a decision be justified in light of the facts means that a decision that misapprehends or fails to account for evidence may not be reasonable: *Vavilov* at para 126.

III. Analysis

A. *The Applicant's Evidence Regarding His Identity*

[6] As the RAD rightly pointed out, identity is a threshold issue in refugee claims. If a claimant's identity is not established, their refugee claim cannot be accepted, regardless of other aspects of the claim: *Elmi v Canada (Citizenship and Immigration)*, 2008 FC 773 at para 4. Section 106 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] underscores this. That section requires the Refugee Protection Division [RPD], and thus the RAD, to take into account whether a claimant has acceptable documentation establishing identity, or a reasonable explanation for not having such documentation, in assessing a claimant's credibility. The RPD's rules of procedure similarly require a claimant to provide acceptable documents establishing their identity and other elements of the claim, or explain why they did not provide the documents and what steps they took to obtain them: *Refugee Protection Division Rules*, SOR/2012-256, Rule 11.

[7] As this Court has recognized, Somalia is a country “where identity documents are often problematic and may not be readily available, or available at all”: *Warsame v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 118 at para 18; *Yusuf Adan* at para 57. The applicant did not have a Somali passport or any other identity cards. He therefore sought to establish his identity through evidence from others who were able to confirm he was who he said he was. The RPD and the RAD noted this was frequently the case for Somali refugee claimants, referring to evidence in the National Documentation Package [NDP] for Somalia published by the IRB.

[8] To establish his identity before the RPD, the applicant initially filed an affidavit from a family acquaintance who knew him in Somalia and had re-connected with him in Toronto. After the Minister intervened in the proceeding, as discussed further below, the applicant filed the following additional evidence:

- An affidavit from his mother, sworn in Kenya where she is living. The mother’s affidavit is covered by an affidavit from a High Court advocate practising in Nairobi, who noted that the mother was accompanied by another individual who knew the mother and confirmed her identity. The mother’s identity witness had a Somali passport. A copy of the identification page of that passport was attached to the advocate’s affidavit, and the advocate swore that the mother’s affidavit was authentic;
- An affidavit from a paternal cousin, a citizen of the United States with whom the applicant stayed after his release from US immigration detention in 2018;

- A letter from a community organization indicating their view, based on an interview with the applicant and a discussion with the family acquaintance, that there is a “very strong likelihood” the applicant is a citizen of Somalia;
- An affidavit from his maternal great-uncle (his mother’s uncle); and
- An affidavit from his paternal aunt (his father’s sister).

[9] In addition to this written evidence, the applicant called the family acquaintance to give in-person testimony at his hearing before the RPD.

B. *The Minister’s Intervention and the Kenyan Driver’s Licence*

[10] In early 2021, the Minister gave notice of intent to intervene in the applicant’s refugee claim, pursuant to paragraph 170(e) of the *IRPA*. The Minister’s intervention was based on documents the applicant presented when applying for an Ontario driver’s licence in January 2019. In support of that application, the applicant stated that he had held a Kenyan driver’s licence since 2014, and filed a copy of that driver’s licence together with a letter from the Kenya Revenue Authority dated October 8, 2018, that certified that he was the holder of a driver’s licence issued on April 6, 2014, valid for heavy commercial vehicles.

[11] The Minister’s intervention alleged that the existence of the Kenyan driver’s licence contradicted the applicant’s assertion in his refugee claim that he had lived and been employed as an animal farmer in rural Somalia. The Minister noted that the applicant had not declared his possession of a Kenyan driver’s licence in his refugee intake documents and alleged that the

evidence undermined the applicant's credibility, particularly regarding his identity and residence history. The Minister contended that if the driver's licence is genuine, this would undermine the applicant's claim that he was in Somalia in 2014 and beyond, noting that there are a large number of ethnic Somalis in Kenya who possess Kenyan citizenship. Conversely, if the driver's licence is not genuine, this would undermine the applicant's credibility generally, as it would show that the applicant could obtain fraudulent documents and was willing to file them with authorities.

[12] Before the RPD, the applicant testified that in 2014 his maternal great-uncle arranged for him to attend a driving course in Kenya to get a driver's licence to earn additional income for his family. He lived for about three months in Dhobley, a town in Somalia near the border, and crossed into Kenya for the classes. The classes were conducted in Swahili, a language he did not understand, but there was Somali interpretation given the number of Somali students. He said that he did not need to show identification at the Somalia-Kenya border, but crossed with the assistance of the uncle, who spoke Swahili.

[13] The RAD found the Kenyan driver's licence and confirmation letter to be fraudulent, and concluded that the applicant did not attend a driving course in Kenya as he claimed. Among other concerns, the RAD noted that the driver's licence was unsigned and did not have information it was supposed to have, while the date on the Kenya Revenue Authority letter coincided with a time the applicant was in detention in the United States, an anomaly for which he had no explanation. Although the applicant had not tendered the Kenyan documents to establish his identity, the RAD found them highly material to the identity assessment, as the

applicant's willingness to resort to using fraudulent documents in Canada was very damaging to his overall credibility.

[14] On this application, the applicant contests the RAD's assessment of the Kenyan documents, arguing it was unreasonable for the RAD to make broad adverse credibility findings based on documents proffered by the Minister that were irrelevant to both the basis of his claim and to his personal and national identity. I conclude that I need not address the RAD's findings on these documents, as its treatment of the mother's affidavit is determinative of this application.

C. *The RAD's Treatment of the Mother's Affidavit*

[15] Having assessed the Kenyan documents, the RAD appropriately went on to consider the various pieces of evidence the applicant tendered to prove his identity. This was a necessary part of the RAD's analysis, as the evidence may have credibly established the applicant's identity regardless of any concerns about the applicant's credibility arising from the Kenyan documents. Having conducted this review, the RAD found that the evidence presented was insufficient to credibly establish the applicant's identity.

[16] With respect to the affidavit purporting to be from the applicant's mother, the RAD noted that the affidavit attested to the mother's relationship with the applicant, his name and citizenship, and the circumstances of his departure from Somalia. The RAD recognized that such direct evidence from a close family member "who knew him for his entire life and who could easily speak to his identity and background, could only have had very high probative value."

[17] The RAD nonetheless concluded that the mother's affidavit was not sufficient to establish his identity. The RAD identified three concerns: (1) the person who vouched for the mother's identity when she swore the affidavit had a Somali passport that was unsigned; (2) the mother's affidavit did not address "the credibility issues that arose in the claim," such as the applicant's stay in Dhobley in 2014 or whether the family was living nomadically; and (3) the applicant did not call either his mother or his adult brother as a witness at the RPD hearing. The RAD concluded that the RPD was "correct to doubt the reliability of the mother's affidavit." I address these three stated concerns further below.

[18] The RAD went on to consider the other evidence presented, including the written and oral evidence from the family acquaintance, the written evidence from the cousin, great-uncle, and aunt, and the letter from the community organization. The RAD raised various concerns with respect to each of these pieces of evidence, assigning no weight at all to some of it and discounting the rest. The RAD concluded that, after considering the entirety of the evidence, it was not satisfied that the applicant had established his national or personal identity on a balance of probabilities.

D. *The RAD's Analysis of the Mother's Affidavit was Unreasonable*

[19] Despite the deference due to the RAD, particularly on issues of credibility, I conclude that its assessment of the mother's affidavit cannot be sustained as reasonable, as the three grounds given by the RAD for discounting the affidavit are not justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov* at para 99.

[20] The RAD first raised a concern regarding the absence of a signature on the passport of the individual who attested to the mother's identity. The RAD did not indicate why it concluded that the absence of a signature on a Somali passport rendered it less reliable. Notably, the only sample passport seen in the NDP, presented in Item 3.11 of the NDP for Somalia as an authentic passport, does not appear to have a signature, although it is unclear whether it has been redacted. This item, which addresses Somali identification documents, notes that the biographic data page includes the "Bearer's Signature" but does not assert that a passport from Somalia (a country with low overall literacy rates) will always contain a signature or that it is invalid without one. Further, as the applicant points out, the RAD does not account for or refer to the affidavit from the advocate of the High Court in Kenya who commissioned the mother's affidavit. The advocate swore that the mother's affidavit was authentic and that he was satisfied as to the mother's identity based on the confirmation and passport of the identity witness. Reaching an adverse conclusion on the reliability of the affidavit without considering this material indicator of reliability fails to account for the evidence: *Vavilov* at para 126.

[21] The RAD next raised a concern that the mother's affidavit was silent on other credibility issues that arose in the claim. These are described variously as the applicant's "stay in Dhobley in 2014 and the family's movements around that time," and "whether the family was living nomadically or semi-nomadically as animal herders." These phrases appear to refer to a concern raised by the RPD that the applicant's basis of claim [BOC] narrative did not refer to his family having moved villages while he was in Dhobley in 2014, or to the family being nomadic.

[22] I agree with the applicant that on this point, the RAD appears to be dismissing the mother's affidavit for what it does not say, rather than what it does say. This Court has held that this is generally an unsound basis for drawing a negative inference: *Gabila v Canada (Citizenship and Immigration)*, 2016 FC 574 at para 37, citing *Arslan v Canada (Citizenship and Immigration)*, 2013 FC 252 at para 88 and *Durrani v Canada (Citizenship and Immigration)*, 2014 FC 167 at para 7.

[23] Even leaving this aside, I am unable to understand the logic or reasoning in the RAD's reasons on this point. It appears to be that the mother's evidence regarding her son's identity is less reliable because her affidavit does not refer to the family's movements in 2014 or, more generally, to the family being nomadic. If this is the logic, it is not based on "internally coherent reasoning": *Vavilov* at paras 102–104. The RAD does not explain why it expected the mother to have addressed an issue that the RPD raised as a concern at the hearing, after the mother swore her affidavit. This is particularly so given that the RAD itself disagreed with the RPD's conclusions based on the family's movements in 2014 and the applicant not having mentioned them in his BOC narrative:

As for the omission about the displacement of the Appellant's family during his time in Dhobley, I again disagree with the RPD. The Appellant explained in his testimony that his family was worried that Al-Shabaab might find out that he had left, and that they moved to another area as they normally did as nomadic pastoralists, but nothing ever happened and so the Appellant did not think it was worth mentioning. As the RPD noted, the Appellant's family did not go very far – only about 30 minutes away on foot. I do not see why such a minor and precautionary move should have been included, especially if nothing ever came of it.

[Emphasis added.]

[24] In other words, the RPD made adverse credibility findings because the applicant did not include information about his family being nomadic or their movements in 2014 in his BOC narrative. The RAD rejected these adverse findings, effectively accepting it was reasonable for the applicant not to include the information in his BOC narrative because “nothing ever came of it.” Yet the RAD nonetheless asserts that the mother’s affidavit is less credible because it does not refer to this same information. This is internally incoherent and provides no basis for rejecting the mother’s affidavit.

[25] The RAD’s only remaining reason for discounting the mother’s affidavit is the applicant’s “failure to call either her or his adult brother as a witness.” With respect to the decision not to call the mother as a *viva voce* witness, it has long been established in the jurisprudence that it is unreasonable to discount affidavit evidence in refugee proceedings simply because the affiant is not presented as a witness: *Oria-Arebun v Canada (Citizenship and Immigration)*, 2019 FC 1457 at paras 51–52; *Shahaj v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1044 at para 9; *Fajardo v Canada (Minister of Employment and Immigration)*, [1993] FC No 915 (CA). As for the reference to the failure to call the applicant’s brother, I am unable to discern how the decision not to call the applicant’s brother as a witness can in any way undermine the credibility or reliability of the mother’s affidavit, particularly as it relates to the applicant’s identity.

[26] None of the three grounds on which the RAD discounted the mother’s affidavit is reasonable, considered independently or together. Given the highly probative nature of this evidence, the RAD’s analysis of the mother’s affidavit was clearly central to its conclusion that

the applicant had not established his identity on a balance of probabilities. I conclude that the RAD's unreasonable analysis of the affidavit renders its decision as a whole unreasonable, regardless of its analysis of the other identity evidence, and regardless of whether its credibility findings based on the Kenyan documents are reasonable. The RAD's decision dismissing the applicant's claim on the basis that he had not established his identity must therefore be set aside.

IV. Conclusion

[27] The application for judicial review is therefore granted. The RAD's decision rejecting the applicant's appeal is set aside and his appeal is remitted for redetermination by a differently constituted panel of the RAD.

[28] Neither party proposed a question for certification. I agree that none arises in the matter.

JUDGMENT IN IMM-5316-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada dated April 4, 2023, is set aside and the applicant's appeal is remitted for redetermination by a differently constituted panel of the Refugee Appeal Division.

“Nicholas McHaffie”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5316-23

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