

Federal Court



Cour fédérale

**Date: 20220330**

**Docket: IMM-1016-21**

**Citation: 2022 FC 442**

**Ottawa, Ontario, March 30, 2022**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**GULED YUSUF ALI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicant, Guled Yusuf Ali, seeks judicial review of a decision of the Refugee Appeal Division (“RAD”), dated December 30, 2020, confirming the determination of the Refugee Protection Division (“RPD”) that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] The Applicant fears persecution in Somalia by Al-Shabaab, having refused to join them. The Applicant also fears persecution by the majority clans in Afgoye, Somalia due to his membership in the minority Garre clan. The RAD dismissed the Applicant's appeal, concluding that the Applicant failed to establish his personal and national identity.

[3] The Applicant submits that the RAD failed to observe the principles of natural justice in making new credibility findings without giving the Applicant notice or an opportunity to respond. The Applicant further submits that the RAD erred in its negative credibility findings.

[4] For the reasons that follow, I find that the RAD breached the Applicant's right to procedural fairness. This application for judicial review is allowed.

## II. **Facts**

### A. *The Applicant*

[5] The Applicant is 22 years old and states that he is a citizen of Somalia and a member of the minority Garre clan. The Applicant and his family are from the town of Afgoye, Somalia, where they owned livestock and were herders.

[6] The Applicant alleges that in 2006, his father was killed by men from the majority Hawiye clan. In October 2007, the Applicant's mother married a man from the Garre clan who took over the family's livestock. The Applicant states that his stepfather was forced to pay taxation in the form of cash or livestock to Al-Shabaab, a Somalia-based terrorist organization.

[7] The Applicant claims that on June 14, 2018, three armed and masked men from Al-Shabaab attempted to forcibly recruit him. When the Applicant's stepfather attempted to offer more in taxation instead, the men accused the Applicant's stepfather of being against Al-Shabaab, and condemned the whole family to death. The Applicant's stepfather was later found dead. Following this incident, the Applicant and his family fled to his uncle's home and the Applicant's uncle arranged for a smuggler to bring the Applicant to Canada.

[8] On July 2, 2018, the Applicant travelled to Canada on false documents and made a claim for refugee protection on the basis of his fear of persecution by Al-Shabaab and the majority clans in Afgoye, Somalia.

B. *RPD decision*

[9] In a decision dated January 2, 2020, the RPD dismissed the Applicant's claim, determining that he had failed to establish his personal and national identity.

[10] The Applicant did not provide any identity documents and relied on his own testimony, the testimony of an identity witness, and supporting documents to establish his identity. The RPD determined that the vagueness of the Applicant's testimony, including his limited and undetailed knowledge about the Somali currency, the Garre clan, other clans in Afgoye, and his work as a herder undermined his alleged identity as someone who had lived his entire life in Afgoye, Somalia, as a member of the Garre clan and as a herder for almost 10 years. The RPD further found that the Applicant's lack of knowledge of the full name on the fraudulent passport he used to travel to Canada undermined his overall credibility.

[11] The RPD gave little weight to the testimony of the Applicant's identity witness on the basis that their relationship was casual and consisted of short visits. The RPD also gave little weight to the affidavits of the Applicant's mother and uncle on the basis that they did not provide further details about the Applicant's identity, other than confirming his name, Somali citizenship and membership in the Garre clan. The RPD considered the affidavit of a lawyer, who affirmed that a Somali identity witness had confirmed that the Applicant's mother was a Somali citizen as well as the Applicant's mother. However, the RPD gave no weight to the lawyer's affidavit, finding that it was a hearsay document and that there was no indication that the lawyer was in a position to affirm the Applicant or his mother's identities. The RPD further gave little weight to a letter from Midaynta Community Services, a Somalian association in Toronto, on the basis that the information provided was not determinative of the Applicant's identity.

[12] The RPD concluded that the Applicant provided insufficient credible testimony to establish his identity and that the supporting documents and the testimony from an identity witness were insufficient to overcome the RPD's credibility concerns.

### *C. Decision Under Review*

[13] On December 30, 2020, the RAD dismissed the Applicant's appeal and confirmed the RPD's decision. The determinative issues on appeal were credibility and identity. Similar to the RPD, the RAD made several negative credibility findings with regard to the Applicant's personal and national identity due to his vague and limited testimony before the RPD. The RAD found, however, that the RPD erred in drawing a negative credibility inference from the Applicant's testimony because he only knew the first name on the fraudulent passport he used to travel to

Canada. The RAD found that it was reasonable for the Applicant not to know further details about the false identity given he did not have personal possession of the passport.

[14] Further, the RAD confirmed the RPD's findings with respect to the testimony from the identity witness, determining that it called into question whether the Applicant and the identity witness had actually known each other growing up in Somalia. The RAD also found that the affidavits from the Applicant's mother, his uncle and the lawyer were unreliable and gave them no weight in establishing the Applicant's identity. Finally, the RAD confirmed the RPD's findings with regard to the letter from Midaynta Community Services and gave it little weight.

### III. **Preliminary Issue: New Evidence**

[15] The Applicant seeks to admit new evidence that was not before the RPD or RAD on judicial review. He seeks to admit an article about the Somali language, which he submits addresses the RAD's concerns with regard to the use of English words in the Applicant's uncle's affidavit. He argues that this article is admissible because it is submitted to demonstrate a breach of natural justice that cannot be proven by mere reference to the record. The Respondent does not object to the admission of this evidence.

[16] Evidence not before the decision-maker is generally inadmissible on judicial review (*Brink's Canada Limited v Unifor*, 2020 FCA 56 at para 13; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 42). However, there are recognized exceptions, including where the evidence is relevant to an issue of natural justice or procedural fairness (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 25). Contrary to the Applicant's argument, I

do not find that the article properly speaks to an issue of natural justice or procedural fairness, and merely seeks to proffer evidence to rebut the RAD's findings. I therefore find that the evidence is inadmissible.

IV. **Issues and Standard of Review**

[17] The Applicant raises the following issues on judicial review:

- A. *Whether the RAD breached the principles of natural justice; and*
- B. *Whether the RAD erred by upholding the RPD's negative credibility assessments.*

[18] The Applicant submits that the applicable standard of review for issues of procedural fairness and natural justice is correctness. Both parties submit that the applicable standard of review in evaluating the RAD's decision is reasonableness.

[19] I agree with the Applicant that the applicable standard of review on the first issue is correctness, as it concerns an issue of procedural fairness (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). With respect to the second issue, I agree with the parties that the applicable standard of review is reasonableness, in accordance with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("Vavilov") (at paras 10, 16).

[20] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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 para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[21] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36).

[22] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

V. Analysis

A. *Whether the RAD breached the principles of natural justice*

[23] The Applicant submits that the RAD breached the principles of natural justice in making new credibility findings with regard to the Applicant's uncle's affidavit without providing notice to the Applicant and an opportunity to respond.

[24] While the RAD found that the Applicant's uncle's affidavit contained relevant details about the Applicant's personal and national identity, it ultimately gave it no weight due to concerns about the credibility of the document. The RAD took issue with the manner in which the untranslated affidavit was written—certain words like “Muslim, Suni, Sufi”, “Canada”, “Nairobi, Kenya” and dates were written in English, while the rest of the affidavit was written in Somali. There was no evidence that these parts of the affidavit had been interpreted to the uncle or that the uncle understood English – if this were the case, the RAD found that it would have been reasonable to expect that the uncle would have written the entire letter in English.

[25] Further, the RAD concluded that the uncle's involvement in arranging for the smuggler to bring the Applicant to Canada was indicative of his connections to “unscrupulous individuals” and his willingness and ability to use non-genuine documents. The RAD also found that the fact that the uncle was able to pay the Applicant's smuggler \$8,000 USD was indicative of his significant financial resources, implying that the uncle could afford to pay to have documents



falsified. Lastly, the RAD noted the prevalence of fraudulent documents in Somalia, and found that these concerns taken together meant that the document was, more likely than not, fabricated.

[26] The Applicant submits that he should have been given an opportunity to respond to the RAD's findings about his uncle's affidavit.

[27] The Respondent contends that it was open to the RAD to conduct its own independent assessment of the uncle's affidavit and that the credibility issues raised did not constitute a new issue as the RPD had previously determined that the affidavit lacked sufficient details.

[28] This Court has found that where new issues arise on appeal, the decision-maker must give the parties an opportunity to respond as a matter of procedural fairness (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 71; see also discussion in *Daodu v Canada (Citizenship and Immigration)*, 2021 FC 316 ("*Daodu*") at paras 15-24). In *Daodu*, this Court remarked that a "new issue" is "one which constitutes a new ground or reasoning on which a decision-maker relies, other than the ground of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from" (at para 18, citing *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 25).

[29] In the case at hand, the credibility of the uncle's affidavit was not raised as an issue by the RPD, nor were credibility concerns put to the Applicant (*Ortiz v Canada (Citizenship and Immigration)*, 2016 FC 180 at para 22). The RPD gave little weight to the Applicant's uncle's affidavit on the basis that the affidavit did not provide further details about the Applicant's

identity and that the uncle was not a neutral source. The RPD did not make negative credibility findings relating to the content of the affidavit, as the RAD did. As such, I find that a breach of procedural fairness has occurred. The RAD's credibility concerns about the uncle's affidavit were factually distinct from the concerns raised by the RPD. The Applicant was entitled to notice of the RAD's credibility concerns regarding the uncle's affidavit and an opportunity to respond.

[30] Having determined that the RAD's decision consists of a breach of procedural fairness, I do not find it necessary to address the remainder of the Applicant's arguments with respect to the reasonableness of the RAD's decision. However, in addition to the RAD's breach of procedural fairness, I also find that the RAD's credibility findings with respect to the Applicant's uncle's affidavit were unreasonable and fail to reveal an internally coherent and rational chain of analysis (*Vavilov* at paras 102-104). In particular, the RAD's finding that the uncle's affidavit was not genuine cannot flow from the fact that the uncle arranged for a smuggler to bring the Applicant to Canada, or that the uncle's ability to afford the smuggler fee was indicative of his ability and willingness to use non-genuine documents. There is simply no rational connection between this fact and the RAD's finding that the affidavit is not genuine.

## VI. **Conclusion**

[31] In my view, the RAD breached the principles of natural justice by raising a new issue without giving the Applicant an opportunity to respond to its concerns. Accordingly, this application for judicial review is allowed. No questions for certification were raised, and I agree that none arise.

**JUDGMENT in IMM-1016-21**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a differently constituted panel.
2. There is no question to certify.

"Shirzad A."

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1016-21

**STYLE OF CAUSE:** GULED YUSUF ALI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** BY VIDEOCONFERENCE

**DATE OF HEARING:** FEBRUARY 10, 2022

**JUDGMENT AND REASONS:** AHMED J.

**DATED:** MARCH 30, 2022

**APPEARANCES:**

Lina Anani FOR THE APPLICANT

Brad Gotkin FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Lina Anani FOR THE APPLICANT  
Barrister and Solicitor  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario