

Federal Court



Cour fédérale

Date: 20230713

Docket: IMM-1669-22

Citation: 2023 FC 958

Toronto, Ontario, July 13, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

**MOHAMMAD ABDALLAH SAEED
SHEIKHA ABDALLAH SALEEM
ABDALLAH MOHAMMAD SAEED**

Applicants

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

[1] The applicants asked this Court to set aside a decision of the Refugee Appeal Division (the “RAD”) dated January 27, 2022. The RAD dismissed an appeal from the Refugee Protection Division (the “RPD”). Both the RAD and the RPD concluded that the applicants are not Convention refugees or persons in need of protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act* (“IRPA”) SC 2001, c 27.

[2] The applicants sought to adduce new evidence on appeal, including three new affidavits, a driver's license, evidence from the principal applicant's former employer and evidence of a conversation on WhatsApp. The RAD concluded that some of this evidence was admissible but most of it was not.

[3] On this application, the applicants submitted that the RAD made reviewable errors by failing to admit all of the evidence and consider it on the appeal, and made reviewable errors in its determination of their claims for *IRPA* protection. The applicants referred to the principles described by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[4] For the following reasons, the application will be dismissed.

I. Events Leading to this Application

[5] The applicants are a family of two parents and their son. All of the applicants were born in Kenya and lived there throughout their lives before arriving in Canada.

[6] The applicants came to Canada on October 15, 2018, with the help of an agent. That month, they sought protection under the *IRPA*.

[7] In their claims for protection, the applicants claimed to have no status in Kenya. Rather, they claimed to hold Somali citizenship and fear persecution in Somalia because of they are members of the minority Bajuni clan.

[8] The RPD rejected their claim for failure to establish their identities as citizens of Somalia. The RPD concluded that the applicants had provided inconsistent evidence concerning their identities and travel route to Canada which seriously undermined their credibility.

[9] The applicants appealed to the RAD. At the request of the applicants, the RAD admitted some new evidence on the appeal, but found other evidence inadmissible under *IRPA* subsection 110(4). The RAD declined to convoke a hearing under subsection 110(6). The RAD agreed with the RPD that the applicants failed to establish their identities as citizens of Somalia.

[10] The applicants seek judicial review of the RAD's decision in this Court.

II. Standard of Review

[11] The default standard of review for the substantive administrative decisions is reasonableness. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61.

[12] The Court's analysis on a judicial review application does not decide whether the RAD came to the correct decision on the merits of the applicants' claim for *IRPA* protection. The Court does not consider the matter afresh, or reweigh or reassess the evidence. The questions for the Court concern whether there were flaws in the RAD's reasoning process, including whether it failed to respect the legal constraints bearing on its decision, or fundamentally misapprehended or ignored material evidence that constrained it. Absent such a reviewable error, there is no basis for the Court to intervene.

III. Analysis

[13] In this Court, the applicants raised three issues:

- A. Did the RAD err in the admission of new evidence on appeal?
- B. Did the RAD err by failing to convene an oral hearing? and
- C. Did the RAD make a reviewable error in its analysis of identity?

[14] I will analyze each issue in turn.

A. *Did the RAD err concerning the admission of new evidence on appeal?*

[15] The standard of review applicable to this question is reasonableness: *Gelle v Canada (Citizenship and Immigration)*, 2022 FC 1710, at para 38; *Faysal v Canada (Citizenship and Immigration)*, 2021 FC 324, at para 13; *Ifogah v Canada (Citizenship and Immigration)*, 2020 FC 1139, at para 35.

[16] Proposed new evidence before the RAD must meet both the express statutory requirements in *IRPA* subsection 110(4) and the factors set out in *Raza* (credibility, relevance,

newness and materiality) as approved in *Singh*: see *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, [2016] 4 FCR 230, at paras 38–49, 64; *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, at paras 13-15.

[17] The RAD referred to the credibility, relevance and newness elements of the legal test for admission of new evidence on appeal under *IRPA* subsection 110(4), citing *Raza* and *Singh*. I agree with the respondent that the applicants have not identified any error of law affecting the RAD's decision not to admit the new evidence on appeal.

[18] All of the applicants' arguments concerned the RAD's application of the proper legal test to the particular circumstances of this case.

[19] The applicants argued that the RAD should have admitted the new evidence, essentially because the new evidence was so important to the proof of their identity that it had to be admitted on its merits. While that argument may go to the relevance of proposed new evidence, it does not address all of the elements of the applicable legal test.

(1) Affidavit evidence from the applicant's father and father-in-law

[20] The RAD declined to admit the affidavits from Mr Saeed's father and the father-in-law in Kenya. The RAD held that the affidavits did not meet the criteria for new evidence, noting that even if Mr Saeed was not aware of the need to notarize affidavits from Kenya, the applicants were represented by legal counsel at the time and information about notarizing was in the National Documentation Package for Kenya.

[21] The applicants submitted that the RAD erroneously failed to give “consideration and weight” to the affidavits and that the applicant Mr Saeed provided a reasonable explanation for why they were not notarized. The applicants submitted that given the acknowledged difficulty of obtaining proof of identity in Somalia, “it was incumbent on the RAD to admit these documents, as they were relevant and probative to the determinative issue at hand”. As with the applicants’ overall argument, these submissions did not demonstrate a reviewable error in the application of the test for admission of new evidence on appeal to the RAD. On its own, the fact that the proposed evidence may be highly probative does not explain why the affidavits were not notarized and placed before the RPD in the first place or were not reasonably available to the applicants at that time.

[22] The applicants have not persuaded me that the RAD made a reviewable error in its conclusion not to admit the affidavits into evidence on the appeal. I note that the RAD and the RPD both considered the unsworn affidavits as evidence, giving them little weight because they were not sworn. In my view, the RAD committed no reviewable error by doing so.

(2) The driver’s licence

[23] The RAD did not admit Mr Saeed’s Kenyan driver’s licence as new evidence on appeal. The applicants acknowledged that the driver’s license was available at the time of the RPD hearing but submitted that the RAD failed to properly consider the explanation for why Mr Saeed did not provide it. However, the RAD explained that the driver’s license did not meet the criteria for admission as new evidence as it was not new. The RAD explained that Mr Saeed provided “contradictory evidence about what happened to his driver’s license and why he did not

present it to the RPD, and ... he did not adequately explain why it was not reasonably available, or could not reasonably have been expected in the circumstances to be presented at the time of the objection of the claims”. The applicants have not demonstrated a reviewable error in this analysis.

(3) WhatsApp Conversation

[24] The applicants challenged the RAD’s decision not to admit a WhatsApp conversation. They argued that the RAD appeared to misconstrue the purpose of filing the evidence, explaining that they intended to use the evidence to clarify concerns about the applicants’ travel route and manner of entry to Canada. This argument does not disclose a reviewable error in the application of the test under *IRPA* subsection 110(4).

(4) Supplementary affidavit from the applicant’s employer

[25] The applicants submitted that the RAD wrongly rejected a supplementary affidavit provided by the applicant’s employer. The RAD found they provided no submissions to explain why the affidavit met the criteria for acceptance of new evidence under subsection 110(4). In this Court, the applicants made the same argument that they did before the RAD: they described the purpose of the affidavit. However, the applicants did not identify any error in the RAD’s conclusion that describing the purpose of the new evidence did not meet the legal test for its admission on appeal. Although the applicants argued that the RAD “continued to exercise an over-vigilant and microscopic approach” to examining their evidence, there is no basis for this Court to intervene with respect to the RAD’s conclusion on this issue.

[26] The applicants have not demonstrated a reviewable error in the RAD's analysis concerning the admission of new evidence on appeal.

B. *Did the RAD err by failing to convene an oral hearing?*

[27] Generally, the RAD must proceed without an oral hearing: *IRPA*, subsection 110(3). The RAD has the discretion to hold a hearing if it admits new evidence and if the requirements of *IRPA* subsection 110(6) are met: *Ali v Canada (Citizenship and Immigration)*, 2022 FC 1166, at para 32; *Abdi v Canada (Citizenship and Immigration)*, 2019 FC 54, at paras 29-30; *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223, [2020] 2 FCR 299, at para 43; *Singh*, at para 71.

[28] Subsection 110(6) provides:

Appeal to Refugee Appeal Division

Appeal

110 (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

Appel devant la Section d'appel des réfugiés

Appel

110 (6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) sont essentiels pour la prise de la décision relative à la demande d'asile;

c) à supposer qu'ils soient admis, justifieraient que la

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

demande d'asile soit accordée ou refusée, selon le cas.

[29] The applicant did not allege that the RAD erred in law in interpreting or applying paragraph 110(6).

[30] When applying that provision, the RAD stated that it had accepted some of the applicants' new evidence but found that this evidence would not, on its own, justify allowing or rejecting their claims for protection. The RAD concluded that the former employer's affidavit was relevant to the claim, but was not sufficient to establish their identities and overcome the RAD's other significant credibility concerns. Later in its reasons, the RAD noted that while the affidavit confirmed some of the applicants' claims about their family origins in Somalia, the RAD found that it did not confirm their nationality. As a result, the RAD declined to convene an oral hearing.

[31] In this Court, the applicants submitted that the RAD erred by failing to convene a hearing, because it raised a serious issue as to Mr. Saeed's credibility in terms of how he obtained this evidence and how the contents to verify his identity.

[32] I am not persuaded by this submission. Reasonableness is the standard of review applicable to the question of whether the RAD properly applied the legal standard to the facts: *Singh*, at para 29. Having reviewed the evidence myself, I conclude that it was open to the RAD to conclude that the evidence was not sufficient to confirm the applicants' nationality. Equally, it

was open to the RAD to conclude that the employer's evidence did not overcome the credibility concerns identified by the RAD.

[33] I therefore find no reviewable error in the RAD's application of *IRPA* subsection 110(6).

C. *Did the RAD make a reviewable error in its analysis of identity?*

[34] As already explained, the key issue before the RAD and the RPD was whether the applicants had proven their identities. They were born in Kenya, had lived their lives entirely in Kenya and had Kenyan passports, but claimed that they were citizens of Somalia and feared persecution and ill-treatment in that country as members of the Bajuni clan. Their position was that their passports were procured by fraud with the assistance of agents who also assisted them to come to Canada.

[35] The applicants challenged the RAD's analysis, which concluded that the applicants had not established their identities as citizens of Somalia. They argued that RAD was unreasonably fixated on the evidence they provided about the travel route used to arrive in Canada, and ignored or failed to pay sufficient attention to the broader circumstances -- the false lives they lived in Kenya and their reasonable explanation for their evidence provided at the RPD hearing. They also argued that the RAD ignored the evidence about their reliance on the agent and ignored the circumstances of how they obtained their allegedly false passports.

[36] In my view, the applicants have not demonstrated a reviewable error in the RAD's analysis.

[37] First, the applicants' position should be placed in context. They travelled to Canada on Kenyan passports. An individual who presents their passport is presumed to be a citizen of the country that issued the passport; if the individual asserts another citizenship, the burden is on the individual to rebut the presumption and show the different citizenship: *Fadhili v Canada (Citizenship and Immigration)*, 2022 FC 1121, at para 32; *Abrha v Canada (Citizenship and Immigration)*, 2020 FC 226, at para 17. The applicants presented no Somali passports but claimed they were citizens of Somalia. They had the onus to prove their identities and that they were citizens of Somalia, in order to support their claim for *IRPA* protection in Canada because they feared persecution as members of a clan that would be targeted in Somalia if they returned there.

[38] Second, I do not agree that the RAD was "fixated" on the applicants' evidence of the travel route they used to arrive in Canada. It was a factor in the RAD's analysis, but was not the sole or overriding factor. Reading its reasoning, the RAD was also concerned with at least two other matters: that the applicants used their purportedly false Kenyan passports several times and misled Canadian authorities in doing so, and that the applicants persistently and continuously provided false information to Canadian authorities in making their *IRPA* protection claims even after they were represented by counsel and had an opportunity to correct their previous evidence.

[39] The RAD recognized that official identification documents were difficult to obtain in Somalia. However, the RAD concluded that there were significant credibility issues arising from the identity evidence that the applicants did provide. The RAD explained that the applicants:

... admit that they were not forthcoming or truthful regarding their travel route, the date that they entered Canada or regarding the

names on the passports that they allegedly used to enter Canada on their schedule 12 forms, and only corrected the false information provided after the Minister intervened in their claims providing evidence that contradicted their account. I agree with the RPD and find that the principal [applicant]'s testimony in explaining these inconsistencies was evasive and evolving, which further diminishes their credibility. They used their allegedly false Kenyan passports to successfully obtain temporary visitor visas to travel to Canada, to exit Kenya, to transit through another country and to enter Canada, which suggests that their Kenyan passports are genuine. The other evidence provided in support of the claimed identities has only limited credibility and weight, and does not overcome my other credibility concerns.

[40] The RAD found that the applicants provided a “false account of when and how they arrived in Canada” and “did not tell the truth” regarding the identity documentation they used. Importantly, the RAD found that the applicants “persisted in this false account even after arriving in Canada, obtaining legal representation and amending their Basis of Claim ... form months later, and only acknowledged that the information provided to Canadian authorities after the Minister provided his disclosure” for the purposes of the RPD hearing.

[41] The RAD recognized that it may be reasonable for refugee claimants to rely on false documentation if necessary to flee a dangerous situation, but that once safely in Canada and making a refugee claim, they are asked to be truthful and agreed to do so in their claim forms. The RAD noted that the applicants were represented by counsel, signed their claim forms swearing that the information was true and provided no evidence of any mental health restrictions: “Even if they were not forthcoming in their original forms because of a lack of advice or fear, they did provide an amended BOC when they were represented by a lawyer, but still did not provide a correction of the false information.”

[42] The applicant's submissions did not demonstrate that in reaching these conclusions, the RAD made a reviewable error. The applicants' main argument was that the RAD failed to consider the broader context of their "false lives" in Kenya as part of its analysis. In my view, that argument is tantamount to a re-argument of the merits of their position on identity and is not a viable basis for this Court's intervention on an application for judicial review.

[43] The applicants did not point to any other evidence that the RAD allegedly ignored entirely, or that should have been explained by the RAD because the evidence contradicting the RAD's conclusions. Instead, the applicant's submissions in substance constituted a re-argument of the merits and a request that the court come to a different conclusion than the RAD (and the RPD before it) on these issues. Absent exceptional circumstances, such as if the RAD fundamentally misapprehended or ignored evidence, the Court is not permitted to do so on judicial review: *Vavilov*, at paras 125-126.

[44] Accordingly, the applicants have not shown that the RAD committed a reviewable error.

IV. Conclusion

[45] The application will be dismissed.

[46] Neither party proposed a question to certify for appeal and none will be stated.

JUDGMENT IN IMM-1669-22

1. The application is dismissed.
2. No question is certified for appeal under paragraph 74(d) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1669-22

STYLE OF CAUSE: MOHAMMAD ABDALLAH SAEED, SHEIKHA
ABDALLAH SALEEM, ABDALLAH MOHAMMED
SAEED v MINISTER OF IMMIGRATION, REFUGEES
AND CITIZENSHIP

PLACE OF HEARING: TORONTO, ONTARIO

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