

Federal Court



Cour fédérale

**Date: 20181019**

**Docket: IMM-4856-17**

**Citation: 2018 FC 1048**

**Ottawa, Ontario, October 19, 2018**

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

**BETWEEN:**

**ABCHIR MOHAMED OSMAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicant, a 29-year-old claiming to be a Somalian citizen, seeks judicial review of a decision of the Refugee Appeal Division [RAD] dated October 18, 2017, upholding a decision of the Refugee Protection Division [RPD] that he is not a refugee or a person in need of protection

pursuant to sections 96 or 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. For the reasons that follow, the application for judicial review is allowed.

## II. Background

[2] The Applicant claims that he was born in Mogadishu, Somalia. He alleges that he lived there until 2001 which is when his older brother was killed due to fighting within their clan. The Applicant moved with his parents to the small village of Miirtaqwe where he had worked on his father farm since the age of 12.

[3] In 2009, his other brother was hired by the Somali Transnational Federal Government as a military officer. His brother-in-law worked as a police officer in Mogadishu. In May 2014, Al-Shabaab killed his brother-in-law for allegedly spying for the government. In June 2014, Al-Shabaab confiscated a vehicle that the Applicant owned and used it to operate a taxi business, and informed the taxi driver that they had condemned the Applicant to death for spying for the government through his brother-in-law. As a result, the Applicant fled to his friend's home, and with the assistance of his maternal uncle found a smuggler who agreed to help him travel to the United States.

[4] The Applicant travelled through South America to the United States and claimed refugee protection but was denied. He subsequently heard from his wife, Aayan Aaden (Ms. Aaden) in Somalia that his brother was killed by Al-Shabaab in March 2015, and that the rest of his family fled but their whereabouts were unknown. Fearing deportation from the United States to Somalia, the Applicant came to Canada and claimed refugee protection in May 2015. On

December 9, 2016, the RPD found that he was not a refugee or person in need of protection because he had not established his identity. The Applicant appealed to the RAD who found that he had failed to establish his identity. This is the decision under review.

### III. The RAD decision

[5] At issue before the RAD was the admissibility of new evidence pursuant to subsection 110(4) of the Act. The RAD noted the Federal Court of Appeal decision of (*Singh v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 96) [*Singh*] which held that the RAD may also consider the factors set out in (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385) [*Raza*] when determining to admit new evidence. The Applicant sought to admit the affidavit of Mohammed Omar (the “Interpreter”) who interpreted the affidavit of Ms. Osman (who was an identity witness), an affidavit of Abdikarim Idole (Mr. Idole) who was also an identity witness for the Applicant, and news articles related to country conditions such as attacks by al-Shabaab which were published after the RPD decision.

[6] As the RAD accepted no new evidence, it found it was not open to it to hold an oral hearing under subsections 110(3), (4), and (6) of the Act. The RAD proceeded to review the RPD’s decision.

[7] The main aspects of the RAD’s decision are set forth below.

A. *Affidavit of the Interpreter*

[8] The Interpreter's affidavit attested that he interpreted the affidavit of Ms. Osman, and that the terms "translation" and "interpretation" are often used interchangeably. The RAD found this evidence did not meet the requirements of subsection 110(4) as it reasonably could have been before the RPD. The RAD noted that RPD expressed concern at the hearing regarding the translation of Ms. Osman's affidavit, and that it was the responsibility of the Applicant to sufficiently address the RPD's concerns. The RAD also noted that there were a number of additional concerns with Ms. Osman's affidavit (i.e. she was not called to testify and she had never met the Applicant before the Applicant came to Canada) which the Interpreter's affidavit does not address, and thus even if accepted, it would not change the weight the RAD would grant to Ms. Osman's affidavit.

B. *Affidavit of Abdikarim Hassan Idole*

[9] Mr. Idole's affidavit attests that he was born in Somalia and grew up in Miirtaqwe, that he left over twenty years ago and is now a Canadian citizen. It states that he returned to Miirtaqwe in 2013 to visit his elderly mother and stayed for approximately 6 months, during which time he met the Applicant. It states that he met the Applicant by chance at a Somali restaurant in January 2017, and that he is happy to have resumed his friendship with the Applicant. It also states that the Applicant is a Somali citizen and lived in Miirtaqwe in 2013.

[10] The RAD found this document needed to be considered in light of the RPD's findings regarding the Applicant's other identity witness, Sharmarke Omar [Mr. Omar]. The RAD noted

that there were significant inconsistencies between Mr. Omar's and the Applicant's testimony, and that the Applicant knew very little about Mr. Omar. In particular the RAD noted that the Applicant characterized his meeting with Mr. Omar as coincidental and random, when the evidence indicated otherwise. In particular, the Applicant entered Canada with a piece of paper containing Mr. Omar's telephone number. The RAD found that the Applicant has "shown a lack of credibility with respect to the identity witness he represented to the RPD" and that this created a credibility concern regarding further witnesses. It also found that the Applicant's "ability to find identity witness by random chance" was too good to be true. Given these concerns, the RAD did not accept the affidavit of Mr. Idole as new evidence, finding that it was not credible.

C. *News articles published after the negative RPD decision*

[11] These articles pertain to the execution of perceived spies by Al-Shabaab, attacks by Al-Shabaab in Mogadishu and other areas, and the resurgence of Al-Shabaab in light of troop withdrawals. The RAD found these articles were not available before the RPD, but that they were not relevant as the key issues were the Applicant's identity and credibility, while they only discussed country conditions in Somalia.

D. *Affidavit of Sadia Muke Osman*

[12] The RPD noted that the translator involved in Ms. Osman's affidavit indicated he had translated an attached document from the Somali language to the English language, but that document attached was in English with no Somali version attached. Further the RPD noted that

Ms. Osman was not called to testify as a witness, and the Applicant had never met Ms. Osman prior to coming to Canada.

[13] The RAD found that even if Ms. Osman's affidavit was true, it did nothing to establish that Applicant was indeed Abchir Mohamed Osman. The RAD also noted the Applicant's identity witness (Mr. Omar) gave conflicting evidence regarding how he knew the Applicant, and that in light of this circumstance an affidavit from someone the Applicant had never met who cannot be questioned deserves no weight.

E. *Affidavit of Ayaan Yusuf Aaden*

[14] The RAD found that although the document indicated it was an affidavit, there was no indication that it was a verified statement made under oath or penalty of perjury. The RAD also found that although the letter was allegedly from the Applicant's wife, without identity documents or other trustworthy or reliable evidence the Notary Public would not have been able to confirm the individual's identity. The RAD further found there is nothing in the affidavit to establish the Applicant is who he claims to be, as it does not include photographs, identity documents, or provide the date of his birth, and once again noted the inconsistent evidence of the Applicant's identity witness. The RAD concluded there was thus no probative value in the document, as it was merely a statement from an individual who claims to be the wife of the Applicant.

F. *Omissions regarding schooling*

[15] The RAD found that the RPD was not wrong to draw a negative inference from the fact the Applicant indicated in his basis of claim form that he was home schooled in Mogadishu, while at the hearing he stated he attended Alfarji elementary school from 1999 to 2001.

G. *Drivers licence*

[16] The RPD drew a negative credibility inference from the fact the Applicant stated he drove without a licence when there were documents indicating it possible to apply for a drivers licence. The RAD found this inference was unreasonable, as the Applicant's statement that there was no government to provide a licence and that he did not use the system, was consistent and plausible. The RAD found the RPD's unreasonable finding was not fatal to its decision, as the Applicant had nonetheless failed to establish his identity.

H. *Questions regarding the Applicant's Somali passport*

[17] The RPD noted that the Applicant provided inconsistent responses to questions regarding his Somali passport. The RAD found the RPD reasonably drew a negative credibility inference because of these inconsistencies, and that it was reasonable to expect that an individual would report the loss of scarce identity documents such as a passport.

I. *Inconsistencies between the Applicant's US and Canadian refugee claims*

[18] The RAD found there were significant inconsistencies and omissions between these two claims that undermined the Applicant's credibility.

IV. Issues

[19] The issues raised during argument were:

1. Did the RAD err in its credibility assessment of the Applicant and his witnesses?
2. Did the RAD err in rejecting the new evidence proposed by the Applicant?
3. Did the RAD err in not convoking an oral hearing?
4. Were the Applicant's rights to procedural fairness breached?

V. Standard of Review

[20] This Court agrees with counsel for the Applicant and Respondent that the standard for review of the RAD decision is reasonableness. The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[21] The Applicant also submitted that the standard of review for any breaches of procedural fairness by the RAD is correctness. This Court agrees.



VI. Analysis

A. *Did the RAD err in its credibility assessment of the Applicant and his witnesses?*

[22] The Applicant submits that the RAD unreasonably adopted the findings of the RPD without conducting its own assessment of the evidence which it is authorized to do. The Applicant has concerns that there was an overemphasis on “form rather than substance” related to the affidavits of Ms. Osman and Ms. Aaden and the treatment given to their affidavits when linked with the findings related to the Applicant’s identity witness, Mr. Omar, and the Applicant. The Applicant submits that the reasons of the RAD in relation to this evidence are unintelligible and unreasonable.

[23] The Respondent submits that the RAD did not err. The Respondent further submits that the RAD’s reasons were not a blanket acceptance of the RPD’s reasons. The Respondent also submits, that from a plain reading of the decision, it is clear that the RAD reviewed every aspect of the RPD’s credibility findings and reconsidered the findings and provided a rationale for its own findings.

[24] This Court is persuaded by the argument of the Applicant. Notwithstanding the comments about the form of Ms. Osman’s affidavit and the issues the Officer had with it, the RAD nevertheless did consider the contents of Ms. Osman’s affidavit. After doing so, the RAD gave the affidavit no weight because the affidavit did not, in the RAD’s perspective, establish the identity of the Applicant. Rather the affidavit set out interactions Ms. Osman had with the Applicant’s uncle and the RAD noted that Ms. Osman had not met the Applicant before he came

to Canada. The RAD also found the affidavit lacking details such as photographs or the Applicant's date of birth. The RAD went on to indicate that in addition to these concerns with Ms. Osman's affidavit it had other concerns with Mr. Omar's evidence. Specifically, the RAD found the circumstances surrounding the encounter between Mr. Omar and the Applicant to be unbelievable and that the specific events of how they knew one another had some inconsistencies. This was an error to discount Ms. Osman's affidavit because it had concerns with Mr. Omar's evidence.

[25] This Court is of the view that the RAD erred in discounting Ms. Aaden's affidavit. The RAD found that there was no identification to establish Ms. Aaden's identity and the document did not say she was swearing to the truth of its contents. The RAD also unreasonably discounted the Applicant's explanation for Ms. Aaden's inability to be called to testify such as the difficulty in obtaining access to a safe long-distance telephone line as well as the time zone difference.

[26] The RAD focussed a major part of its decision on the evidence of Mr. Omar who attended at the hearings as the Applicant's identity witness. The RAD reviewed some inconsistencies between Mr. Omar's testimony and that of the Applicant (including its view that the chance meeting was coincidental and random) which was then used to attack the credibility of the other witnesses such as Ms. Osman and Ms. Aaden. This was an unreasonable approach to take. Each piece of evidence should be dealt with and weighed on its own merit. It was an error for the RAD to treat the evidence in this manner.

B. *Did the RAD err in rejecting the new evidence proposed by the Applicant?*

[27] The Applicant submitted that the evidence of the Interpreter should have been admitted as it provided new evidence that established identity. The Applicant further submits that he could not reasonably have anticipated that the RPD would have rejected the Interpreter's earlier affidavit simply because the affidavit used of the word "translation" rather than "interpretation".

[28] The Respondent disagrees and submits the RAD treated this affidavit appropriately as it could have reasonably been before the RPD.

[29] The Court is persuaded by the Respondent's argument. While it is arguable that the RAD was overly formalistic in its treatment of this affidavit that does not change the fact that this affidavit could reasonably have been before the RPD. While it was an attempt to clarify an earlier affidavit that was before the RPD the Applicant did have an opportunity to address this before the RPD.

[30] With respect to Mr. Idole's affidavit, the Applicant submits that the RAD erred in accepting this affidavit by speculating how the Applicant contacted his other identity witness, Mr. Omar. The Applicant submits that the evidence of Mr. Idole should be assessed on its own as opposed to determining its credibility based on Mr. Omar's evidence.

[31] The Respondent submits that the chance meeting between the Applicant and Mr. Idole at a Somali restaurant in 2017 was coincidental and random as was the chance meeting of the

Applicant and Mr. Omar. In light of this, the Respondent submitted that Mr. Idole's affidavit did not meet the threshold requirement of credibility to be admissible as set out in *Singh*.

[32] This Court is persuaded by the argument of the Applicant. The dismissal of Mr. Idole's affidavit due to concerns with the Applicant's credibility being tied to Mr. Omar was unreasonable. Paragraph 110(6)(a) of the Act clearly states that new evidence that raises a serious question about the credibility of an applicant is a required ground for the RAD to hold an oral hearing. To dismiss a piece of otherwise credible evidence regarding an applicant would undermine the purpose of this section (*Zhao v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1536). Identity was an issue in this matter. It is well established that documentation is difficult to obtain in Somalia, so evidence that may assist in determining a claimant's identity should be considered.

C. *Did the RAD err in not holding an oral hearing?*

[33] Subsection 110(6) of the Act provides that new evidence that raises a serious question of the credibility of an applicant is a required ground for the RAD to hold an oral hearing. As stated above, the affidavit of Mr. Idole was new evidence that impacted the credibility of the Applicant. The RAD did not raise any credibility issues with Mr. Idole's affidavit. It did not find that it was vague, self-contradictory or that the affidavit raised any issues that would lead the RAD to question its credibility.

[34] As identity was a key issue, refusing to consider Mr. Idole's affidavit is a reviewable error. It is open to the RAD to disbelieve this evidence but it could not do so solely on its

credibility concerns regarding the Applicant and Mr. Omar without first holding a hearing to properly consider Mr. Idole's affidavit.

D. *Were the Applicant's rights to procedural fairness breached?*

[35] Having determined that the RAD's decision was not reasonable with its treatment of Mr. Idole's affidavit, it is not necessary for the Court to address whether the Applicant's rights to procedural fairness were breached.

#### Conclusion

[36] This Court finds that the RAD's refusal to consider the new evidence of Mr. Idole and to convene an oral hearing constituted a reviewable error. The application for judicial review is allowed. There is no question of general importance to be certified and no order as to costs.

**JUDGMENT in IMM-4856-17**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed and the matter is remitted back to a differently constituted panel of the RAD for re-determination.

There is no question for certification and no order as to costs.

“Paul Favel”

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Judge

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

**DOCKET:** IMM-4856-17  
**STYLE OF CAUSE:** ABCHIR MOHAMED OSMAN v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION  
**PLACE OF HEARING:** TORONTO, ONTARIO  
**DATE OF HEARING:** MAY 30, 2018  
**JUDGMENT AND REASONS:** FAVEL J.  
**DATED:** OCTOBER 19, 2018

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