Federal Court  Cour fédérale

Date: 20200224

Docket: IMM-3449-19

Citation: 2020 FC 296

Vancouver, British Columbia, February 24, 2020

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

YUSUF MOHAMED ELMI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant claims to be Yusuf Mohamed Elmi, a citizen of Somalia and a member of the minority Ashraf clan. He alleges that he fled Somalia in May 2017 after his brother killed a member of the majority Hawiye clan who came to rob their store. He found his way to Kenya and then travelled to Canada with the assistance of a smuggler who provided him false

documents. After entering Canada on September 27, 2017, he sought refugee protection claiming to fear members of the Hawiye clan.

[2] In December 2017, the Respondent intervened before the Refugee Protection Division [RPD] to introduce evidence from the Integrated Customs Enforcement System [ICES] that cast doubt on the Applicant's identity and credibility. A search of the ICES records found no entry of anyone entering Canada since January 1, 2017 with either (i) the Applicant's alleged name or (ii) the name that the Applicant claims was on the fraudulent passport that he used to enter Canada. The search also found no relevant entry records under the name that the Applicant claims the smuggler used when they entered Canada.

[3] On January 30, 2018, the RPD rejected the Applicant's refugee claim. The RPD found that the Applicant was not a credible witness and that he had failed to provide sufficient reliable and trustworthy evidence to establish, on a balance of probabilities: (i) his personal identity; (ii) his Somali citizenship; or (iii) the fact that he was in Somalia before coming to Canada. Based on case law from this Court, the RPD concluded that the Applicant's failure to establish his identity was fatal to his entire claim. Accordingly, it dismissed the claim without analyzing its merits.

[4] The Applicant appealed the RPD's decision to the Refugee Appeal Division [RAD] on the basis that the RPD made a number of errors, particularly with respect to his identity. The Applicant applied twice to file additional documents and provide further written submissions. He also requested an oral hearing if the RAD had any concerns regarding the credibility of the evidence.

[5] On May 21, 2019, the RAD dismissed the Applicant's appeal. It found no significant or fatal errors in the RPD's analysis of the evidence or in the RPD's findings. Like the RPD, it determined that the Applicant and his alleged identity both lacked credibility, and it concluded that he provided insufficient credible evidence to establish his identity.

[6] The Applicant seeks judicial review of this decision. He contends that the RAD placed too much weight on his resort to false documents in order to reach Canada. He also argues that the RAD erred in its assessment of the evidence and in dismissing his request for an oral hearing.

[7] Upon review of the record and the RAD's reasons, I am not persuaded that the RAD's decision is unreasonable. I am also satisfied that no oral hearing was required.

II. Analysis

A. *Standard of Review*

[8] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada held that reasonableness is the presumptive standard of review for administrative decisions (*Vavilov* at paras 10, 16-17). None of the exceptions described in *Vavilov* apply here.

[9] When the reasonableness standard applies, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100). The reviewing court must consider "the decision actually made by the decision maker, including both the decision maker's

reasoning process and the outcome" (*Vavilov* at para 83) to determine whether the decision 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). Close attention must be paid to a decision maker's written reasons and they must be read holistically and contextually (*Vavilov* at para 97). It is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102). If "the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and [if] it is justified in relation to the relevant factual and legal constraints that bear on the decision", it is not for the reviewing court to substitute the outcome it would prefer (*Vavilov* at para 99).

B. *Preliminary Matters*

[10] The first matter relates to the style of cause. The Respondent was incorrectly named in the notice of application for leave and judicial review as the "Minister of Immigration, Refugees and Citizenship". The appropriate respondent is the "Minister of Citizenship and Immigration" pursuant to subsection 4(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Therefore, the style of cause is amended.

[11] The second matter relates to the affidavit signed by the Applicant's counsel and filed on January 20, 2019. It introduces several exhibits, including affidavits from the Applicant and his alleged wife, and it contains both evidence and argument. At the beginning of the hearing, the Court raised the application of section 82 of the *Federal Courts Rules*, SOR/98-106, which provides that "[e]xcept with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit." After hearing submissions from

counsel for both parties, the Court took a brief recess to allow the Applicant's counsel to consult with her co-counsel, also present at the hearing, to determine how they wished to proceed. When the hearing resumed, the Applicant's co-counsel informed the Court that he would argue the application.

[12] The third matter relates to the admissibility of the exhibits attached to the affidavit signed by the Applicant's counsel.

[13] The Respondent argues that the affidavits of the Applicant and his alleged wife are improperly put before this Court, as they are attached as Exhibits A and B to the affidavit of the Applicant's counsel.

[14] I agree with the Respondent.

[15] As a matter of general principle, affidavits produced as attachments to the affidavits of others are to be discouraged because this manner of proceeding can have the effect of shielding an attached affidavit, which may contain actual knowledge of the events at issue, from cross-examination (*Qui v Canada (Citizenship and Immigration)*, 2019 FC 1162 at para 7; *594872 Ontario Inc v Canada*, [1992] FCJ No 253 (QL); *Parshottam v Canada (Citizenship and Immigration)*, 2008 FC 51 at para 24).

[16] The Respondent also contends that the affidavits of the Applicant and his alleged wife contain facts that could have, and in fact should have, been raised before the RAD.

[17] It is well established that a judicial review application is to be determined based on the record that was before the decision maker, barring certain well-defined exceptions (*Chin Quee v Teamsters Local #938*, 2017 FCA 62 at para 5; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20 [*Access Copyright*]). Upon review of the affidavit of the Applicant's wife and paragraphs 9 to 13 of the Applicant's affidavit, I am not persuaded that the evidence sought to be tendered falls into any of the exceptions outlined in *Access Copyright*. On the contrary, I find that the purpose of this evidence is to improve the record in order to respond to some of the concerns raised by the RAD in its decision. Consequently, paragraphs 9 to 13 from the Applicant's affidavit, as well as the affidavit from the Applicant's alleged wife, are excluded from consideration before this Court. As for the remaining paragraphs in the Applicant's affidavit, I give them little weight on the basis that the Applicant's affidavit is an exhibit to another affidavit.

[18] Similarly, the Respondent argues that Exhibits C and D should suffer the same fate as they were not presented to the RAD and do not form part of the record. Exhibit C is a copy of an email transmission in which the Applicant allegedly received a statement sworn by his wife. This statement was before the RPD and the RAD, but the email header was not. Exhibit D is a copy of the positive RPD decision relating to the Applicant's identity witness.

[19] The Applicant's counsel contends that this evidence is admissible under the procedural fairness exception because the documentation in question should have been provided to the RPD and the RAD by the Applicant's former counsel.

[20] I recognize that this Court has found that the effect of incompetent counsel in a prior hearing may raise an issue of fairness. However, in this case, I have insufficient information to decide whether there is any factual foundation to these allegations. I also agree with the Respondent that it is too easy to blame previous counsel, and there is no evidence on the record that the Applicant has followed any of the steps set out in the Procedural Protocol released by the Chief Justice on March 7, 2014, entitled *Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court*. This protocol establishes the procedure to be followed where an applicant alleges professional incompetence, negligence or other conduct against former counsel. Written notice is necessary to allow former counsel to respond to the allegations. In the absence of such notice, I give little weight to these two (2) exhibits.

[21] As for Exhibit F, it is a redacted copy of a letter from an ICES officer and a ministerial intervention in another case. The purpose of this documentation is to refute the Respondent's evidence on intervention in this case. Again, this information was not part of the record before the RAD. It is therefore inadmissible. In any event, I do not see how it supports the Applicant's case.

[22] Finally, the Applicant's counsel attaches a copy of the RPD's hearing transcript, stating that it was obtained through an access to information request filed by his previous counsel. The Respondent does not object to the inclusion of the transcript, given that an audio recording of the hearing was included on a CD within the Certified Tribunal Record.

C. *Use of False Documents*

[23] The Applicant argues that the RAD erred by drawing negative inferences from his use of false documents in order to reach Canada. He submits that this Court has long held that a refugee claimant's resort to fraudulent documents cannot serve as a firm basis upon which to impugn the credibility of the claimant or the reliability of other documents.

[24] In my view, the Applicant misstates the RAD's findings. The RAD did not base its credibility findings on the Applicant's use of false documents. In fact, the RAD explicitly acknowledged that refugee claimants may need to lie in order to escape. However, the RAD added that claimants ought to immediately correct the record when making their refugee claim. The RAD's credibility assessment was based on several other factual findings, including the finding that the Applicant withheld information about the passport he used to enter Canada. Like the RPD, the RAD found it implausible that (i) the Applicant would not know the name of the airline he travelled with to come to Canada and that (ii) he had ignored all signs of the airline's name during two (2) legs of travel.

D. *The RAD's Assessment of the Evidence*

(1) ICES Records

[25] The Applicant alleges that both the RPD and the RAD placed undue weight upon the evidence presented by the Respondent. He argues that the ICES search results are "virtually meaningless" without a family name that is both correct and accurate since "[m]any Somalia nationals have been taught to hide or delete their third name on various government applications,

because they have no faith in our government to see the merit in their claims". Also, while he saw a passport bearing the name "Abdullahi Jama", he argues that the Respondent's evidence does not constitute "actual proof" that the smuggler used that passport to gain him entry to Canada. Given this "common practice" and the fact he used a fraudulent passport to enter Canada, the Applicant submits that the ICES search results deserve little to no weight.

[26] I am not persuaded that the RAD placed undue weight on the Respondent's evidence or that the ICES results are "essentially worthless". The results contradict the Applicant's claim that he entered Canada under the false name of "Abdullahi Jama" on the alleged date of entry. The search shows that there is no record of a person entering Canada between January 1, 2017 and December 13, 2017 with a passport bearing that name. There is also no record of a person entering Canada under the alleged name of the smuggler during the relevant period. The RAD considered the Applicant's argument that he may not have recalled the correct spelling of the name as it appeared on the false passport. However, the RAD noted, with reason, that the Applicant had written this name on his Schedule 12 form, and when asked to confirm the spelling at the RPD hearing, he had replied, "[y]es, it was written that way". Given the Applicant's testimony and the fact that no one entered Canada with that name during the relevant period, it was not unreasonable for the RAD to find that the ICES results undermined the Applicant's credibility and the credibility of his alleged identity.

(2) Letters from Somalian Community Organizations

[27] The Applicant faults the RAD for rejecting opinion letters from two (2) Somalian community organizations: Midaynta Community Services [MCS] and Dejinta Beesha Multi-Service Centre [Beesha]. According to the Applicant, these letters speak to his nationality and

clan. The Applicant alleges that the MCS letter provided reliable support for his identity, and the RAD's rejection of this letter reveals that it was not aware of the factual and legal relevance of the letter. The Applicant argues that section 178 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] entitled him to introduce the MCS letter and the Beesha letter.

[28] The Applicant has failed to persuade me that the RAD's assessment of this evidence was unreasonable.

[29] Section 178 of the IRPR allows applicants to submit substitute identity documents in certain cases. Nevertheless, this right is subject to conditions. In order for a statutory declaration to serve as a substitute for an identity document, subparagraph 178(2)(*b*)(ii) of the IRPR requires that the statutory declaration "constitutes credible evidence of the applicant's identity".

[30] I agree with the Applicant that the following statement by the RAD appears to be contrary to section 178 of the IRPR:

> [69] While I would normally assign some weight to a letter from a Somali community organization in support of a refugee claimant's nationality, especially when there is other credible evidence of the refugee claimant's identity, I am unable to do so in this case considering the lack of other credible evidence going to the [Applicant's] personal identity and citizenship.

[31] However, this passage must be read in the context of the surrounding paragraphs. The RAD recognized that these organizations have experience in assessing a person's nationality, but the RAD found that the letters are deficient in many respects. In particular, the RAD noted that they fail to explain how the organizations can establish that the Applicant is who he says he is

(personal identity) or that he is in fact a citizen of Somalia or any other country (citizenship). Neither letter confirmed the Applicant's name, and they simply reiterated what the Applicant told the organizations about his alleged place of birth and clan. There was also no indication that the organizations assessed what the Applicant told them. After considering both letters, the RAD ultimately found that neither sufficiently and credibly established the Applicant's personal identity or citizenship.

(3) The Applicant's Witness

[32] The Applicant contends that it was unreasonable for the RAD to agree with the RPD's conclusion that the testimony of the Applicant's identity witness was insufficient to establish the Applicant's identity.

[33] Before the RPD, the Applicant and the witness alleged that they met in Mogadishu in January 2014 and that they knew each other for a period of one (1) week in Somalia. They also alleged that they reconnected by chance at a mosque in Canada. While the RPD acknowledged that the Applicant and the witness gave generally consistent testimony concerning how they met in Somalia and the time they spent together in Mogadishu, it found that this information could very easily have been rehearsed and memorized prior to the hearing. The RPD noted that the Applicant was able to find, in a relatively short span of time and purely by chance, a person in Canada who allegedly knew him in Somalia. It found this to be suspect, fortuitous, highly improbable, and not a coincidence.

[34] The RAD considered the Applicant's claim that the meeting at the mosque was not fortuitous. Like the RPD, the RAD found that it was an incredible coincidence that (i) the Applicant met this witness in Mogadishu on one of only two (2) times the Applicant allegedly went to Mogadishu, and that (ii) the witness met the Applicant on the witness's only visit to Mogadishu, a visit that lasted one week.

[35] Contrary to the Applicant's contention, the RAD did not rely solely on the RPD's finding. It also emphasized that the witness had provided no corroborating evidence regarding his presence in Mogadishu in 2014, and it found the testimony of the witness and the Applicant regarding their meeting in Mogadishu was extremely vague.

[36] The Applicant has failed to persuade me that the RAD's analysis and finding on this point was unreasonable.

(4) The Applicant's Knowledge of the Ashraf Clan and the Lower Shabelle Region

[37] At the hearing, the Applicant argued that it was unreasonable for the RAD to discount his knowledge of the Ashraf clan and the geography of the Lower Shabelle region of Somalia because the information was widely available and not restricted to citizens of Somalia. He claims that the RAD's reasoning places him in an untenable situation. If his knowledge is insufficient, he fails to convince the RAD of his identity. On the other hand, if his knowledge is sufficient, the fact that the information is available on the internet will be held against him.

[38] While the Applicant's argument is persuasive, and it is true that the RAD noted that the information the Applicant provided regarding Somalia's clans and geography was widely available online, I am not satisfied that an untenable situation arises in this case. The RAD found that the Applicant's testimony was vague and lacking in detail for someone who claims to have resided in Somalia for thirty (30) years. The RAD also noted that knowledge of a country's clans and geography does not establish personal identity or citizenship.

(5) The Rejection of the Applicant's New Evidence

[39] While the Applicant did not address the issue in his oral submissions, he did take issue in his further memorandum of argument with the RAD's decision to reject the two (2) letters he sought to introduce into evidence to corroborate his identity and confirm his allegations.

[40] The RAD examined the two (2) letters. It noted that the RPD had expressed significant concern at the hearing regarding (i) the Applicant's lack of identity documents and (ii) his lack of effort to obtain documents from family members and others in Somalia that could establish his identity. The RAD also noted that the Applicant was given the opportunity to provide such documents after the hearing, and he submitted three (3) documents, which the RPD accepted and assessed. The RAD further noted that the Applicant contacted the authors of these letters approximately three (3) months after the RPD rejected his claim. On this basis, the RAD found that the Applicant had failed to establish that he could not have reasonably obtained these letters before his claim was rejected and, therefore, the letters did not meet the test for new evidence under subsection 110(4) of the IRPA.

[41] This Court has repeatedly stated that documentary evidence is not new merely because of its date of creation (*Tuncdemir v Canada (Citizenship and Immigration)*, 2016 FC 993 at para 34; *Torres v Canada (Citizenship and Immigration)*, 2015 FC 888 at para 12; *Zakoyan v Canada (Citizenship and Immigration)*, 2008 FC 217 at para 21).

[42] In this case, the purpose of the Applicant's evidence was to establish his personal identity. The Applicant was aware of the concerns regarding his identity, and he was provided an opportunity to provide additional documentation to the RPD. In my view, the RAD's decision is in keeping with *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*], where the Federal Court of Appeal stated that the role of the RAD is not to provide the opportunity to complete a deficient record submitted before the RPD, but rather to correct errors of fact, law or mixed fact and law (*Singh* at para 54).

E. *The RAD's Refusal to Hold an Oral Hearing*

[43] The Applicant alleges that the RAD's decision to refuse his request for an oral hearing was capricious and unreasonable, especially since he had specifically requested one. His arguments on this issue are not clearly articulated. Nevertheless, I am satisfied that the RAD did not err in refusing the request for an oral hearing.

[44] Subsection 110(3) of the IRPA sets out the general rule that the RAD must proceed without an oral hearing. However, in accordance with subsection 110(6) of the IRPA, the RAD may convene an oral hearing where new evidence (a) raises a serious issue with respect to the credibility of the person who is the subject of the appeal; (b) is central to the decision with

respect to the refugee protection claim; and (c) if accepted, would justify allowing or rejecting the refugee protection claim. Thus, the decision to hold an oral hearing is based on the RAD's assessment of whether the criteria set out in subsection 110(6) of the IRPA have been satisfied and, if so, whether the RAD should exercise its discretion to hold an oral hearing.

[45] The RAD considered the Applicant's request for an oral hearing. However, the RAD noted that it had only admitted the first of the three (3) documents submitted: an affidavit regarding an interpretation issue in a document that was before the RPD. The RAD assessed this new document and concluded that it did not satisfy the statutory preconditions for an oral hearing because, if accepted, this document would not justify allowing the Applicant's claim. With the minimum criteria not being met, the RAD determined that it was not required to convene an oral hearing.

[46] The Applicant has failed to identify a reviewable error in the RAD's decision to dismiss his request for an oral hearing.

III. Conclusion

[47] To conclude, I am satisfied that, when read holistically and contextually, the RAD's decision meets the reasonableness standard set out in *Vavilov.* The decision is based on internally coherent reasons, and it is justified in light of the relevant facts and the law. The reasons are also transparent and intelligible. The Applicant is essentially asking this Court to reweigh the evidence to reach a different conclusion. That is not the role of this Court on judicial review (*Vavilov* at para 125).

[48] Accordingly, the application for judicial review is dismissed.

[49] No questions of general importance were proposed for certification, and I agree that none arise.

JUDGMENT in IMM-3449-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The style of cause is amended to replace the "Minister of Immigration, Refugees and Citizenship" with the "Minister of Citizenship and Immigration"; and

3. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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