

Federal Court



Cour fédérale

Date: 20220308

**Docket: IMM-6025-20
IMM-2202-21**

Citation: 2022 FC 318

Ottawa, Ontario, March 8, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ISSA MUKHTAR GEDI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] These are applications for judicial review of two decisions of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada (IRB). The first decision was dated September 30, 2020 and accepted the respondent Minister's request to reopen a decision

previously made by the RAD that had initially granted the Applicant, Convention refugee status. The second decision, for which review is sought in Court file IMM-2202-21, is that dated December 21, 2020 in which the RAD dismissed the appeal and confirmed the Refugee Protection Division's (RPD) decision that the Applicant was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[2] The two matters were heard by the Court sequentially on the same date. As the facts relate to both matters, one set of reasons will be issued and placed on each file. For the reasons that follow, the application for judicial review in Court file IMM-6025-20 will be dismissed and the application in Court file IMM-2202-21 will be granted.

II. **Background**

[3] The Applicant claims to be a citizen of Somalia, born in 1999 and a Sunni Muslim member of the minority Tumaal clan. He says that in 2018, members of Al-Shabaab sought to recruit his brother and he to join their cause and fight Ethiopian forces. Their father was killed when he resisted. The Applicant and his brother then fled to Mogadishu. A maternal uncle paid a smuggler to provide a false German passport. The Applicant most resembled the photo on the passport, so he was chosen to use it.

[4] The Applicant left Mogadishu on July 21, 2018, arrived in Toronto on July 22, 2018, and claimed protection. In a decision rendered on September 4, 2019, the RPD rejected his claim on

the ground that he had not established his personal and national identity on a balance of probabilities.

[5] The RPD found numerous inconsistencies in the Applicant's evidence and vague and evasive testimony undermined the Applicant's identity and allegations, and thus, were considered sufficient to rebut the presumption of truth.

[6] The Applicant appealed the RPD's decision to the RAD. He did not seek to tender new evidence or to be heard. His appeal was allowed and the RAD found him to be a Convention refugee on June 11, 2020. This decision was based on the RAD's determination that the RPD's findings rested on peripheral elements to the claim and could not be used to discredit the Applicant. The RAD found the Applicant to be credible and to fit the profile of persons potentially at risk from Al-Shabaab. As such, the RAD found that he has a nexus to a Convention ground as someone likely to be perceived by Al-Shabaab to be supportive of its opponents and because of imputed political opinion. The RAD concluded that he was likely to be killed by Al-Shabaab if he returned to Somalia.

[7] Before the RAD's decision was rendered, a Hearings Officer with the Canadian Border Services Agency (CBSA) had prepared a Notice of Intervention and disclosure package to be served and filed. Before that could happen, the IRB mail services and Registry office were closed due to COVID-19. Before the IRB reopened its mail operation on June 22, 2020, and the Registry on June 29, 2020, the RAD had rendered its positive decision.

[8] The Officer was made aware of the RAD's decision on July 3, 2020. The next day, the Officer submitted to the RAD and to the Applicant's counsel an application to reopen the proceeding pursuant to Rule 49 of the *Refugee Appeal Division Rules, SOR/2012-257 (RAD Rules)*. The Officer submitted that there was a breach of the Minister's right to natural justice, as it was impossible for the Minister to provide the April 2020 Notice of Intervention before the RAD made its decision, due to the IRB's operational closure. The Applicant did not respond.

[9] The RAD requested the Minister to provide its Notice of Intervention, and the Minister did so on August 17, 2020. The Applicant opposed the Minister's in a response on September 28, 2020.

[10] Having considered the Minister's application, and the Applicant's response, the RAD concluded that there had been a breach of the Minister's right to natural justice and reopened the appeal pursuant to Rule 52 of the *RAD Rules*. The Minister was permitted to intervene and to present evidence to support their contention that the Applicant was not Somali national Issa Mukhtar Gedi, but a Kenyan national named Mohamud Mohamed Abdullahi – who had previously applied for and been issued a Canadian study permit. This evidence was largely based on similarities in photographs of the two individuals and in family names. Unfortunately, no fingerprints were associated with the Kenyan national's application.

[11] In ruling on the application to reopen, the RAD addressed the Applicant's objections as follows:

[19] The Respondent's extensive submissions on the nature of the **Minister's evidence is not relevant in this context**. The issue

before me is whether there was a breach of natural justice when the RAD rendered a decision when **there was a pending application**. In my view, I find that there was.

[20] The evidence from the Minister should be considered by the RAD. **The rendering of a decision by the RAD before the intervention could be served, and during the pandemic period where normal operations had ceased, precluded the RAD from considering this evidence. This constitutes a breach of natural justice.** I disagree with the Respondent's submission that there was no breach. As a result, I find that the application is allowed, and the appeal is to be reopened and considered by another RAD member.

[Emphasis added]

[12] On December 21, 2020, the RAD dismissed the appeal, and found the Applicant not to be a Convention refugee, as he had not established on a balance of probabilities that he is Issa Mukhtar Gedi.

III. Issues and Standard of Review

[13] As a preliminary matter, the Applicant required an extension of time to file his application for judicial review of the RAD decision dismissing his appeal. The respondent did not oppose this, and I am satisfied that the factors for granting the request are met as set out in *Grewal v Canada (Ministry of Employment and Immigration)*, [1985] 2 F.C. 263 (FCA).

[14] Having considered the submissions of the parties, the issues in my view are:

- a) Was the RAD's decision to reopen the appeal unreasonable?
- b) Was the RAD's decision on the reopened appeal to confirm the RPD's decision unreasonable?

[15] The applicable standard of review for these issues is reasonableness. In particular, the standard of review in regard to reopening the appeal is addressed in *Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103, and *Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 at paras 19-21. As determined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions. While there are circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arises in the present case.

[16] To determine whether the decision is reasonable, the reviewing court must ask “whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99). The party challenging the decision bears the burden of showing that it is unreasonable (*Vavilov* at para 100).

IV. Analysis

A. *The RAD's decision to reopen the appeal is reasonable*

[17] The *RAD Rules* do not provide a specific time limit in which to submit an intervention request other than it must be made before the RAD decides an appeal (Rule 4(1)). The Minister is specifically empowered to intervene. In the unusual circumstances of this case, it was the pandemic which prevented the intervention before the decision was rendered.

[18] The RAD is not bound by technical rules of evidence (*IRPA* s 171(a.4)). Since the Minister was prepared to provide the Notice of Intervention in April 2020 and the decision was not rendered until two months later, it was reasonable for the RAD to conclude that the Minister would have intervened before the decision was rendered and so, the Rule would have been respected. The RAD's reference to the evidence submitted by the Minister does not, in my view, lead inevitably to a conclusion that the RAD relied on its content as the reason to reopen the appeal. The RAD, in making that decision, did not assess the evidence nor did it comment on the resemblance between the two individuals in the photographs. In the circumstances, it was open to the RAD to conclude that the Minister had been denied natural justice in the first RAD decision.

B. The RAD decision confirming the RPD decision is unreasonable

[19] The difficulty with the second RAD decision which confirmed the RPD's findings is that it appears to have been based upon a subjective appraisal of photographs of the Applicant and the Kenyan national. The RAD is qualified to assess the evidence put before the Member without the benefit of expert opinion evidence: *Liu v Canada (Citizenship and Immigration)*, 2012 FC 377 at para 10. But in this instance, the RAD failed to justify how it reached the conclusion that the photographs were of the same individual.

[20] The Applicant provided an affidavit describing the differences between himself and the Kenyan national and explaining how family names within communities in both countries were often similar. The RAD gave that evidence no weight and preferred to rely upon its own direct examination of the photographs. This would have been acceptable had the RAD explained its chain of analysis and how it arrived at that conclusion, but it failed to do so. It did not explain

what distinguishing features led it to find that the photographs were of the same person. While it was open to the RAD to conclude that there was a strong resemblance, the Member had to justify that conclusion beyond saying that she had extensive experience in conducting such assessments.

[21] There was other evidence before the RAD to establish the Applicant's identity including supporting evidence from an aunt, an uncle and a community organization. But the RAD's focus appeared to be exclusively on the similarity of the photographs.

V. Conclusion

[22] It was reasonable for the RAD to reopen its decision because the Minister had been denied an opportunity to present its evidence relating to the Applicant's identity before the decision overturning the RPD's findings was rendered. The RAD then relied on the Minister's evidence to the exclusion of the other evidence supporting the Applicant's claim to be a Somali national. It was not enough for the RAD to simply state its conclusion based upon its own appraisal of the photographs without explaining why it did not accept the Applicant's evidence pointing to the differences.

[23] The decision was not transparent, intelligible or justified. For that reason, it must be overturned and returned to the RAD for reconsideration by a differently constituted panel.

[24] No serious questions of general importance were proposed, and none will be certified.

JUDGMENT IN IMM-6025-20 and IMM-2202-21

THIS COURT'S JUDGMENT is that:

- 1) The application in Court file IMM-6025-20 is dismissed;
- 2) The application in Court file IMM-2202-21 is granted and the matter will be remitted to the RAD for redetermination by a different Member,
- 3) A copy of this Judgment and Reasons will be placed on Court files IMM-6025-20 and IMM-2202-21, and
- 4) No questions are certified in either file.

"Richard G. Mosley"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6025-20
IMM-2202-21

STYLE OF CAUSE: ISSA MUKHTAR GEDI V THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARD VIA VIDEOCONFERENCE OTTAWA -
TORONTO

DATE OF HEARING: JANUARY 19, 2022

JUDGMENT AND REASONS: MOSLEY J.

DATED: MARCH 8, 2022

APPEARANCES:

Lina Anani FOR THE APPLICANT

Brad Gotkin FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister & Solicitor FOR THE APPLICANT
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario