Federal Court  Cour fédérale

Date: 20230411

Docket: IMM-630-22

Citation: 2023 FC 516

Ottawa, Ontario, April 11, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ISAACK SHIEK MAGOYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Isaack Shiek Magoya, seeks judicial review of a decision of the Refugee Appeal Division ("RAD") dated December 9, 2021, upholding the finding 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*"). The RAD found insufficient evidence that the Applicant would face a prospective risk of persecution or a risk to his life in Somalia.

[2] The Applicant submits that the RAD ignored key evidence regarding the risk facing the Applicant in Somalia, and erred in conducting an unduly singular analysis of each element of the Applicant's risk profile, rather than a cumulative assessment of the risk as required.

[3] For the reasons that follow, I find the RAD's decision is reasonable. This application for judicial review is dismissed.

II. Facts

A. *The Applicant*

[4] The Applicant is a 52-year-old citizen of Somalia. He has been married four times and he married his current wife in 2014.

[5] The Applicant claims that on February 12, 1991, members of the United Somali Congress ("USC") attacked his family home. The USC stole all valuables from the home, killed his two brothers and uncle, and raped his mother, sister, and wife during the attack. The Applicant claims he was beaten until he was unconscious, leaving lasting scars.

[6] In June 1991, the Applicant and his remaining family members relocated to Kenya. The Applicant began working in Nairobi. He claims that while in Nairobi, he was beaten, harassed,

and arrested by the Kenyan police because he is not Kenyan. The Applicant asserts that he was a victim of widespread exploitation by the Kenyan police against Somali refugees.

[7] The Applicant arranged for travel from Kenya to the United States ("US") through a smuggler. He left Nairobi on October 14, 1999 and arrived in Mexico City on October 15, 1999. The Applicant arrived at the San Ysidro Border Crossing on October 25, 1999, where he applied for refugee status in the US but was refused.

[8] The Applicant claims that the refusal of his refugee claim negatively affected his mental health, resulted in his homelessness, and triggered heavy drinking. The Applicant claims that these circumstances contributed, in part, to his criminal activity in the US, which includes charges for neglect or endangerment of a child, driving under the influence, driving while suspended, driving without a license, inflicting a corporal injury on a spouse, assault, and domestic assault. The Applicant was also convicted for the offence of battery in the US in 2003.

[9] The Applicant arrived in Canada in July 2017. He sought refugee protection in Canada on the basis that if he returned to Somalia after several decades in North America and as a member of the minority Bantu tribe, he would be vulnerable to persecution at the hands of Al-Shabaab.

B. *RPD Decision*

[10] In a decision dated September 27, 2017, the RPD found that the Applicant was excluded from refugee protection pursuant to Article 1F(b) of the *United Nations Convention Relating to*

the Status of Refugees, 189 U.N.T.S. 150 (the "*Refugee Convention*"), for having committed a serious non-political crime outside of Canada.

[11] Conviction is not required for a finding under Article 1F(b), and the central test is to determine whether a crime committed is "serious" in the context of Article 1F(b), as outlined by the Federal Court of Appeal in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 ("*Jayasekara*") and affirmed by the Supreme Court of Canada in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 ("*Febles*"). The test involves evaluation of the following factors to determine seriousness: elements of the crime, the mode of prosecution, the penalty prescribed, the facts, the mitigating and aggravating circumstances underlying the conviction, and sentencing range (*Jayasekara* at para 44; *Febles* at paras 33, 62).

[12] The RPD noted that during his port of entry ("POE") interview, the Canada Border Services Agency ("CBSA") officer questioned the Applicant about his criminal history in the US, including various criminal charges and a conviction resulting in a sentence to a term of imprisonment for battery. The RPD found that the Applicant's testimony was vague and inconsistent. When asked about his charge for battery in 2003, the Applicant vaguely responded that his wife called the police, that he had been drunk, that he did not remember, and that he denied assaulting his wife. The RPD found that the offence of battery likely equates to the Canadian offence of assault under section 265 of the *Criminal Code*, R.S.C., 1985, c. C-46, but that a presumption could not be made about the seriousness of the offence.

[13] The RPD found that the Applicant was neither forthright in his testimony regarding the circumstances resulting in the battery charge in 2003, nor about the disposition of this charge. The Applicant testified that he was drunk and that he told his wife not to speak with him when he was drunk. He did not provide further details about what transpired between him and his wife. The RPD noted that the Applicant initially said that he was not imprisoned in the US, but later amended this statement when asked about the information in his immigration forms stating that he had been in prison for three months in 2003 for battery. The RPD drew a negative inference from the Applicant's lack of candour and accountability.

[14] The RPD noted the Applicant's evidence that he had been ordered to take an anger management course, but that he did not attend as he could not afford it, after which he went to prison. The RPD stated that the Applicant seemed reluctant to say why he was released from prison and found that the Applicant's credibility was further impugned by his lack of candour.

[15] The RPD identified several aggravating circumstances underlying the Applicant's conviction. The RPD noted that the paramount consideration in this case is the Applicant's pattern of intimate partner violence and that the Applicant justified his violent behaviours by explaining he was intoxicated or triggered by his wife's actions. The RPD also noted that the Applicant's apparent alcoholism is also an aggravating factor and that the Applicant continually referenced his alcohol consumption as a means to reduce the culpability of his actions. The RPD noted the Applicant's evidence that he had quit drinking in 2009 and this mitigated the seriousness of the crime, but found that the relevant factor involves mitigating factors underlying the circumstances of the conviction, not in the years following the conviction.

[16] The RPD ultimately found that on an assessment of the *Jayasekara* factors to the Applicants' case, the Applicant committed a serious crime within the meaning of Article 1F(b) of the *Refugee Convention* and was therefore excluded from refugee protection.

C. *Initial RAD Decision*

[17] In a decision dated September 27, 2018, the RAD dismissed the Applicant's appeal and confirmed the RPD's decision.

[18] The RAD first noted that on appeal, the Applicant failed to provide a memorandum including full and detailed submissions regarding alleged errors in the RPD's decision. The RAD stated that it is not its role to speculate and undertake a microscopic search for errors in the RPD's decision, nor to provide the Applicant with a second chance to present his claim. The RAD also dismissed the Applicant's request for an oral hearing because he did not proffer any new evidence in support of his appeal.

[19] The RAD reiterated the relevant tests for a finding under Article 1F(b) of the *Refugee Convention,* as outlined in *Jayasekara* and *Febles*. The RAD acknowledged the Applicant's extensive criminal history in the US and lack of remorse or accountability for his patterns of abuse against his domestic partners. The RAD found that on an independent review of the evidentiary record and the Applicant's criminal history, the RPD did not err in its finding that the Applicant had committed a serious crime within the meaning of Article 1F(b), thereby excluding him from refugee protection.

[20] The Applicant applied for judicial review of the RAD's decision. In a decision dated October 29, 2019, this Court granted judicial review of the RAD's decision because the RAD failed to conduct a proper assessment of the seriousness of the offence committed by the Applicant, as required by the decisions in *Jayasekara* and *Febles*. The matter was remitted back for redetermination by a differently constituted panel.

D. *Decision Under Review*

[21] In a redetermination decision dated December 9, 2021, the RAD dismissed the Applicant's appeal and found that the Applicant is neither a Convention refugee nor a person in need of protection as per sections 96 and 97(1) of *IRPA*. On redetermination, the RAD found that the Applicant is not excluded from protection under Article 1F(b), but proffered insufficient evidence to establish a serious possibility of persecution or risk if returned to Somalia.

(1) Article 1F(b)

[22] The RAD found that the RPD failed to consider the elements of the Applicant's crime and the mode of prosecution, which are both factors outlined in *Jayasekara*. The RAD noted that the RPD referenced evidence that the Applicant was imprisoned for three months and ordered to take anger management classes, but drew no inference regarding the penalty and failed to consider the factor of sentencing range. The RAD found that this failure could be attributed to the lack of evidence to draw inferences about possible sentencing, due to which the RAD also found it was unable to make findings on this issue.

[23] The RAD agreed that the Applicant's pattern of intimate partner violence and alcohol use are aggravating factors, but found insufficient evidence about the particular circumstances underlying the Applicant's domestic violence to identify it as a serious crime within the meaning of Article 1F(b). The RAD therefore concluded that the Applicant is not excluded from refugee protection under Article 1F(b).

(2) Persecution & Risk

[24] The RAD stated that it conducted an independent assessment of the Applicant's alleged fear of persecution in Somalia. The RAD noted that the Applicant did not explain how the attack on his home in 1991 constitutes persistent harassment and failed to submit evidence demonstrating that he had been harassed since leaving Somalia in 1991. The RAD accepted that the nature of this attack was extreme, but found that the Applicant did not explain how this resulted in a constant state of fear for thirty years after leaving Somalia.

[25] The RAD considered the Applicant's documentary evidence and the Applicant's testimony that he is at risk of persecution because he is from an area in Somalia that is controlled by Al-Shabaab. The RAD found that the Applicant's subjective fear is speculative, unsupported by evidence of actual threats of harm, and largely based on perceived country conditions. On review of the objective evidence of conditions in Somalia involving Al-Shabaab and the Bantu clan, the RAD accepted, in part, that Al-Shabaab conducted, targeted and violent attacks against civilians during the 1991 civil war in Somalia, and members of the minority Bantu clan were and continue to be vulnerable to violence and discrimination. The RAD further noted that while the clan system has led to some social and political exclusion for members of the Bantu clan, this has

shifted over time, some Bantu groups have strengthened, and their experience cannot be generalized. The RAD referenced the most recent National Documentation Package ("NDP"), which states that the situation of minorities have improved in Somali society. It found insufficient objective evidence to conclude that treatment of Bantu clan members rises to the level of persecution or that the Applicant would face such persecution upon return to Somalia.

[26] The RAD noted the Applicant's submission that his westernization will make him stand out in Somalia, given his many years living in North America, and he may be harmed as a result. The RAD found that there is no evidence on the record to support this assumption.

[27] The RAD further found that the Applicant provided insufficient evidence to suggest that the dangers he might face in Somalia are greater than a general risk faced by Somali people in the country. The RAD concluded that the Applicant had failed to establish that he faced a risk as set out in section 97 of *IRPA*. For these reasons, the RAD dismissed the Applicant's appeal and found that the Applicant is neither a Convention refugee nor a person need of protection.

III. Issue and Standard of Review

[28] This application for judicial review raises the following issues:

A. *Whether the RAD's decision is reasonable.*

B. *Whether there was a breach of procedural fairness.*

[29] The standard of review is not disputed. The parties agree that the applicable standard of review is reasonableness. The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35)). I find that this conclusion accords with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paragraphs 16-17.

[30] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). 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 decision that is reasonable as a whole 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).

[31] 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).

[32] 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* at para 54).

IV. Analysis

[33] The Applicant submits that the RAD disregarded key evidence pertaining to the risk facing the Applicant upon his return to Somalia as a "westernized individual" and as a member of the minority Bantu clan, and conducted an unduly narrow assessment of risk based on extricated elements of the Applicant's profile, rendering the decision unreasonable as a whole. The Applicant also submits that the RAD breached procedural fairness by failing to provide the Applicant with notice that it would be newly considering the substantive matters, as the RPD focused exclusively on the Applicant's exclusion under Article 1F(b).

[34] In my view, the RAD's decision is reasonable. Given that the Applicant's procedural fairness argument hinges on his submission that the RAD disregarded contradictory evidence, and I do not find that the RAD's decision is unreasonable on this basis, I will not be addressing the procedural fairness issue.

[35] The Applicant submits that the RAD's conclusion that the Applicant would not face persecution in Somalia on account of his "westernized" profile fails to accord with the evidentiary record, which it claims to run counter to this finding. The Applicant notes that the RAD characterizes his concern about being targeted for this aspect of his profile as an unsupported assumption or belief, despite the documentary evidence stating that those who return to Somalia from abroad and are "westernized" are perceived as a person of interest by Al-Shabaab. The Applicant cites the NDP evidence, which states that Somalis who have spent considerable time in western countries may be at risk of violence from Al-Shabaab for holding western views and failing to ascribe to dominant Somali beliefs.

[36] The Applicant notes that the NDP evidence further states that those from the minority Bantu clan are at a higher risk of violence given their general exclusion from mainstream Somali society, which directly counters the RAD's conclusion that the Applicant's membership in the Bantu clan does not pose a risk of persecution. The Applicant submits that the RAD's conclusion that the situation for the members of the Bantu clan has improved in recent years is an erroneous overstatement of the evidence, which simply states that the situation of minorities has generally improved in Somali society, not that minorities are not subject to mistreatment amounting to persecution. The Applicant further submits that recent NDP evidence runs contrary to the RAD's conclusion regarding the Bantu clan, according to a 2017 Australian report and a 2015 United Nations High Commissioner for Refugees report.

[37] The Applicant submits that the RAD conducted an erroneously singular analysis of the Applicant's claim that he would suffer persecution upon return to Somalia, extricating individual

elements of his profile rather than a cumulative assessment of all aspects of his profile. The Applicant relies on this Court's decision in *Vilvarajah v Canada (Citizenship and Immigration)*, 2018 FC 349, and *Rodriguez Ramos v Canada (Citizenship and Immigration)*, 2022 FC 41, for the proposition that risk factors should not be considered in silos and the assessment should instead be of the cumulative risk caused by the applicant's profile as a whole.

[38] The Respondent maintains that the RAD's decision is reasonable and accords with the evidentiary record. The Respondent submits that the RAD reasonably found insufficient evidence to establish that the attack on the Applicant's home in Somalia in 1991 constituted a series of incidents or harassment amounting to persecution, as asserted. The Respondent contends that the RAD's conclusion that there is no objective basis for the Applicant's alleged fear of persecution at the hands of Al-Shabaab is in accordance with the evidentiary record, which contains no evidence to show that the Applicant or someone in his family received threats from Al-Shabaab in the 30 years since he left Somalia.

[39] The Respondent submits that the RAD's findings on this issue are also supported and justified by references to the NDP evidence, based on which the RAD reasonably concluded that the Bantu political and social experience in Somalia can no longer be generalized and the situation for minority groups such as the Bantu clan has improved. The Respondent further submits that the Applicant's submissions on the issue of persecution and risk constitute a disagreement with the RAD's weighing of the evidence and therefore amount to a request that this Court reweigh the evidence before the decision-maker, which is not this Court's role on reasonableness review.

[40] The Respondent submits that the RAD's reasons exhibit a global and cumulative assessment of the Applicant's profile, contrary to the Applicant's submission. The Respondent submits that the RAD canvassed and analysed each aspect of the Applicant's claim and the fact that the RAD did not explicitly state that it considered the intersectionality of these factors is an insufficient ground to render the decision unreasonable.

[41] I agree with the Respondent. In conducting an independent assessment of the Applicant's circumstances and evidence, the RAD reasonably found that the Applicant proffered insufficient evidence to establish that he would face persecution or a risk to his life upon return to Somalia. The record contains minimal evidence to establish that the attack on his family's home in 1991 constitutes an ongoing threat to the Applicant's life after 30 years of living abroad. It is open to the RAD to find that the Applicant's assertion that he faces a particular risk of persecution is unsupported by evidence and is therefore speculative.

[42] The RAD's decision importantly noted the Applicant's testimony that the "[Al-Shabaab] might just kill me just because I have lived away from the country… and they might think I have some agenda coming back, and that just might be enough for them to kill me" [emphasis added]. It also noted that in the Applicant's POE interview, he admitted that he was never threatened by anyone in Somalia. It is reasonable for the RAD to find that these statements alone, uncorroborated by evidence demonstrating that the Applicant has ever been sought after or targeted by Al-Shabaab or anyone else, are insufficient to rise to the level of persecution. I agree with the Respondent that a bulk of the Applicant's submissions on the RAD's assessment of

persecution and risk amount to a request that this Court reweigh and reassess the evidentiary record, but that is not this Court's role on reasonableness review (*Vavilov* at para 125).

[43] I do not find that the RAD's reasons exhibit a selective analysis of the objective evidence regarding Al-Shabaab or the situation facing the minority Bantu clan. To the contrary, the RAD conducted a balanced assessment of the NDP evidence, granting due weight to the evidence that pointed both in favour of and against the Applicant's claim. For instance, the RAD acknowledged that Al-Shabaab have committed violence against civilians and members of the Bantu clan have been vulnerable to this violence as a minority group in Somalia. However, the RAD transparently and intelligibly references the evidence that demonstrates the improving situation for members of the Bantu clan and grants negative weight to the lack of evidence proffered by the Applicant to indicate otherwise. The RAD is not required to reference every contradictory piece of evidence in the NDP, as the Applicant's submissions seem to suggest (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53 at para 16). The RAD's decision is duly justified on the basis of the objective evidence and the minimal evidence submitted by the Applicant (*Vavilov* at para 105).

V. Conclusion

[44] This application for judicial review is dismissed. The RAD's decision is reasonable in light of the Applicant's evidence. No question for certification was raised, and I agree that none arise.

JUDGMENT in IMM-630-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-630-22
STYLE OF CAUSE:	ISAACK SHIEK MAGOYA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 30, 2023
JUDGMENT AND REASONS:	AHMED J.
DATED:	APRIL 11, 2023

APPEARANCES:

Steven Blakey	FOR THE APPLICANT
Monmi Goswami	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT