

Federal Court



Cour fédérale

Date: 20240425

Docket: IMM-704-23

Citation: 2024 FC 630

Toronto, Ontario, April 25, 2024

PRESENT: Madam Justice Go

BETWEEN:

MOHAMUD DINI WARSAME

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Mohamud Dini Warsame [Applicant] claims to be a citizen of Somalia who fears persecution at the hands of Al-Shabaab. The Applicant seeks a judicial review of a Refugee Appeal Division [RAD] decision dated December 22, 2022 dismissing his refugee claim on the ground of identity [Decision].

[2] The Applicant arrived in Canada on a Ugandan passport on November 19, 2019. At his refugee claim hearing before the Refugee Protection Division [RPD], the Applicant identified as a member of the Sheikhal clan in Somalia. To corroborate his identity, the Applicant provided an affidavit from an individual claiming to be his paternal aunt [aunt's affidavit]. The RPD dismissed the Applicant's refugee claim on the basis of identity and credibility, finding among other things, that the aunt's affidavit did not establish his identity. While disagreeing with some elements of the RPD's findings, the RAD went on further to find that the aunt's affidavit was fraudulent and on that basis drew a negative inference against the Applicant's credibility.

[3] I find the RAD breached procedural fairness by raising a new issue without providing the Applicant an opportunity to respond. I thus grant the application.

II. Analysis

[4] Before the RPD, the Applicant provided the aunt's affidavit that confirmed the Applicant's identity as "Maxamuud Diini Warsame," his birthplace, the killing of his father by Al-Shabaab, the Applicant's and his mother's escape to Kenya, and the Applicant residing in Canada.

[5] In rejecting the Applicant's claim on July 11, 2022 on grounds of the Applicant's identity and credibility, the RPD made several findings. Specifically, with respect to the aunt's affidavit, the RPD noted the different spelling of the Applicant's name and that the affidavit was unsigned. The RPD concluded the document did not establish Applicant's identity.

[6] On appeal, the Applicant challenged the RPD's findings on the aunt's affidavit. The RAD agreed with the Applicant's submissions in two respects. First, the RAD accepted that the English spelling is a phonetic rendering of the Somali name provided in the aunt's affidavit and that the error, if any, would be a typographical error. Second, the RAD found that the affidavit appeared to be signed under the stamp imprinted upon it.

[7] The Applicant also dealt with the RPD's reasons for dismissing the aunt's affidavit because it said the Applicant did not provide proof of how he found his aunt, and submitted that this issue is peripheral and should not have attracted negative findings. The RAD rejected the Applicant's submissions, finding that the Applicant did not submit any new evidence on appeal and did not provide any explanation for not doing so.

[8] The RAD then concluded that the aunt's affidavit is likely fraudulent. The RAD decided to give it no weight and drew a negative inference against the Applicant's credibility.

[9] Before the Court, the Applicant argues the RAD breached the duty of procedural fairness, as it made fresh and significant findings that the Applicant should have been notified of and provided the opportunity to respond.

[10] The Applicant raises several arguments in support of his position. I do not find all of the Applicant's arguments persuasive. However, I agree with the Applicant on their key point, namely the RAD should have notified the Applicant of its intent to raise a new issue about its finding of a fraudulent document.

[11] As Justice Grammond explained in *Savit v Canada (Citizenship and Immigration)*, 2023

FC 194:

[11] With respect to procedural fairness, “the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond”: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 at paragraph 56. This principle must be applied taking into account two characteristics of the RAD. First, the RAD must carry out its own analysis of the record: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157 at paragraphs 58, 59, 103. In doing so, it may consider new issues or rely on reasoning different from that of the RPD. Second, the RAD usually decides matters without holding an oral hearing. It therefore cannot take this opportunity to ask the appellant to respond to new grounds it intends to raise.

[12] Because of these particularities, this Court has held that procedural fairness requires that the RAD give notice to the parties if it intends to raise issues that were not decided by the RPD. Therefore, “[t]he RAD cannot give further reasons based on its own review of the record, if the refugee claimant had not had the chance to address them”: *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at paragraph 22 [*Kwakwa*].

[13] In order to implement this principle, this Court relies on *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689 [*Mian*], even though it deals with an appeal in the criminal context. In that case, the Supreme Court of Canada defined the concept of a new issue as follows, at paragraph 30:

An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties . . . and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.

[12] Similarly, Justice Ahmed in *Ali v Canada (Citizenship and Immigration)*, 2022 FC 442 [Ali], relying on *Daodu v Canada (Citizenship and Immigration)*, 2021 FC 316 at paras 15-24, stated a new issue arises if it falls outside the scope of the grounds an applicant raises on appeal: *Ali* at para 28.

[13] In *Ali*, the RAD made additional credibility findings regarding an affidavit from the applicant's uncle confirming the applicant's identity. In finding that the RAD's conclusions amounted to a new issue, Justice Ahmed observed the RAD erred because its credibility concerns were "factually distinct" from the concerns the RPD before it raised and that the RPD did not make credibility findings on the uncle's affidavit: *Ali* at para 29.

[14] In addition, I note in *Kibiku v Canada (Citizenship and Immigration)*, 2023 FC 1310 [Kibiku], the Court found the RAD breached the duty of procedural fairness by finding the applicant's document to be fraudulent, while the RPD's determinative issue before related to inconsistencies surrounding the applicant's claim: *Kibiku* at paras 13-15. Likewise, in *Yu v Canada (Citizenship and Immigration)*, 2023 FC 602 at para 20, the Court found the RAD erred by impugning the applicant's credibility based on a document's authenticity without putting it to the applicant first to allow the applicant to respond.

[15] I come to the same conclusion in this case, as the RAD's finding that the aunt's affidavit was fraudulent was a new and distinct finding. While the RPD did raise doubt about the veracity of the aunt's affidavit, it did not find the document to be fraudulent.

[16] Not only that, the RAD relied on its finding of the provision of a fraudulent affidavit to rebut the presumption of truthfulness. In so doing, I agree with the Applicant that the RAD's finding that the affidavit was fraudulent was a broad extension of its negative credibility finding. As such, these findings raised new credibility issues that were not made by the RPD and were not addressed in the Applicant's appeal.

[17] At the hearing, the Respondent submitted that when read in context, the RAD was referring to the issue of identity when finding that the aunt's affidavit did not support the Applicant's alleged identity. The Respondent argued the fact the RPD found the document not credible or reliable, allowed the Applicant to explain how he obtained the aunt's affidavit. This, in turn, enabled the RAD to find that the Applicant did not put forth a reasonable explanation for why he did not provide any evidence of the source of the aunt's affidavit, before it concluded the aunt's affidavit was fraudulent.

[18] I reject the Respondent's submission. A finding that the aunt's affidavit did not establish the Applicant's identity, as the RPD did, is distinct from the RAD's finding that the document is fraudulent. Additionally, the RAD overturned some of the RPD's findings on the aunt's affidavit, yet it went further than the RPD in its negative assessment. Under these circumstances, I agree with the Applicant that he could not have anticipated the fraudulent finding as a live issue for the RAD. As such, in accordance with the principles of procedural fairness, the RAD was required to notify the Applicant of the new issue and offer him an opportunity to respond.

III. Conclusion

[19] The application for judicial review is allowed.

[20] There is no question to certify.

JUDGMENT in IMM-704-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.
3. There is no question to certify.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-704-23

STYLE OF CAUSE: MOHAMUD DINI WARSAME v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

DATE OF HEARING: APRIL 15, 2024

JUDGMENT AND REASONS: GO J.

DATED: APRIL 25, 2024

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