

Federal Court



Cour fédérale

**Date: 20190704**

**Docket: IMM-4586-18**

**Citation: 2019 FC 890**

**Ottawa, Ontario, July 4, 2019**

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

**BETWEEN:**

**ABDIASIS ABDULLAHI LAAG**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Abdiasis Abdullahi Laag seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RAD determined that Mr. Laag is neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Laag claims to be a citizen of Somalia and no other country. The Refugee Protection Division [RPD] of the IRB refused his request for asylum on the ground that he had failed to prove his identity. This determination was upheld by the RAD.

[3] For the reasons that follow, the RAD's decision was unreasonable and procedurally unfair. The application for judicial review is allowed.

## II. Background

[4] Mr. Laag says that he was born on April 1, 1990 in Yeed, Somalia; that he is a member of the majority Ogaden clan, which is a subclan of the Auliyahan clan; and that he is a Sunni Muslim who follows the Sufi rites. He alleges that in 2015 he was attacked by five Al-Shabaab militants, who told him to stop selling cigarettes at his store and cease practising Sufism. They also demanded he join their cause. He says he was detained and tortured for five days. He escaped and went into hiding.

[5] According to Mr. Laag, on September 20, 2016 he travelled by air to Nairobi, Kenya. He then travelled by air to Brazil on September 27, 2016, and by land to the United States of America, where he arrived November 25, 2016. He sought asylum in the United States, but later abandoned his claim. His wife and parents remain in Kenya.

[6] Mr. Laag entered Canada in February 2017 between points of entry and made a refugee claim. The RPD denied his claim on February 27, 2018. Mr. Laag appealed to the RAD.

III. Decision under Review

[7] The RAD denied Mr. Laag's appeal on August 23, 2018. The RAD found Mr. Laag to lack credibility, and concluded that he had failed to establish his identity. The RAD also refused Mr. Laag's requests to adduce new evidence and convene an oral hearing.

IV. Issues

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

A. Were the RAD's rejection of the new evidence and refusal to hold an oral hearing reasonable?

B. Was the RAD's dismissal of Mr. Laag's refugee claim reasonable and procedurally fair?

V. Standard of Review

[9] The RAD's rejection of the new evidence, its refusal to hold an oral hearing and its determination that Mr. Laag could not establish his identity are all subject to review by this Court against the standard of reasonableness (*Sanmugalingam v Canada (Citizenship and Immigration)*, 2016 FC 200 at paras 35-36). Reasonableness is a deferential standard, and is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. The Court will intervene only if the decision falls outside a range of

possible, acceptable outcomes which are defensible in respect of the facts and law (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[10] Procedural fairness is a matter for the Court to determine. The standard for determining whether the decision-maker complied with the duty of procedural fairness is correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34, citing *Mission Institution v. Khela*, 2014 SCC 24 at para 79). The ultimate question is whether the applicant knew the case to meet, and had a full and fair chance to respond.

## VI. Analysis

A. *Were the RAD's rejection of the new evidence and refusal to hold an oral hearing reasonable?*

[11] The IRPA provides in ss 110(4) and (6):

### **Evidence that may be presented**

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. [...]

### **Éléments de preuve admissibles**

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet. [...]

**Hearing**

- (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)
- (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
- (b) that is central to the decision with respect to the refugee protection claim; and
- (c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

**Audience**

- (6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
- a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
- b) sont essentiels pour la prise de la décision relative à la demande d'asile;
- c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[12] Mr. Laag sought to adduce an affidavit from an individual who asserted he had known Mr. Laag for a considerable period of time and could therefore confirm his identity. Mr. Laag also proffered a letter from an optometrist who confirmed that he had undergone a corneal transplant in his left eye, and was taking medication. The RAD held that Mr. Laag could reasonably have adduced both the affidavit and the letter before the RPD.

[13] Mr. Laag explained that the affiant left Canada suddenly in October 2017 to attend to his mother in Kenya, and did not return until February 7, 2018. The affiant did not get in touch with Mr. Laag until March 2018, after the RPD had rendered its decision.

[14] The RAD noted that Mr. Laag did not inform the RPD of the affiant's existence; ask to delay the hearing until the affiant returned to Canada; or attempt to file an affidavit at any time

between February 2017, when he initiated the claim, and the RPD's decision in February 2018. The RAD appears to have assumed that Mr. Laag knew the affiant would leave Canada, would return by a particular date, and could be contacted while he was in Kenya. It is equally plausible that the affiant's sudden departure came as a surprise to Mr. Laag, he had no means of contacting the affiant in Kenya, and he did not know when or if the affiant might return to Canada.

[15] The RAD assessed Mr. Laag's explanation for his inability to adduce the affidavit before the RPD in the worst possible light, and provided no rationale for doing so. The grounds upon which the RAD rejected the affidavit, which was central to Mr. Laag's efforts to establish his identity, were therefore unreasonable. If the RAD had admitted the affidavit, then an oral hearing may have been required to resolve any credibility concerns that arose.

[16] I agree with the Respondent that the RAD's refusal to accept the optometrist's letter as new evidence was reasonable. There was evidence before the RPD that Mr. Laag had undergone a corneal transplant in his left eye. Mr. Laag says that the optometrist's letter offered new information regarding the medication prescribed to Mr. Laag, which allegedly interfered with his ability to prepare for and participate in the hearing. However, neither the medication nor its possible effects on Mr. Laag's mental acuity were mentioned in the letter. Furthermore, this information could reasonably have been presented to the RPD before it rendered its decision.

B. *Was the RAD's dismissal of Mr. Laag's refugee claim reasonable and procedurally fair?*

[17] In *Abdullahi v Canada (Citizenship and Immigration)*, 2015 FC 1164, Justice Roger Hughes said the following about the challenges faced by refugee claimants who seek to establish their identities as citizens of Somalia (at paras 9-10):

It is notorious that government documents from Somalia are virtually unobtainable (see *Elmi v Canada (MCI)*, 2008 FC 773 at para 22). The Applicant could not get documents from Somalia to prove his identity so he relied on secondary sources [...].

In this Court's view, the RPD was overly critical of the identity evidence presented by the Applicant. The RPD was seemingly intent to find fault with whatever was presented rather than to take a fair and reasonable view of the material provided.

[18] Mr. Laag offered numerous pieces of evidence to prove his identity, including:

- (a) documents submitted in support of his US asylum claim, some of which suggested that the US had provisionally accepted Mr. Laag's identity and approved his release into the care of someone named Warla, whom they accepted as his relative;
- (b) a letter from Warla;
- (c) a copy of an affidavit from his mother;
- (d) a copy of a marriage certificate;

(e) a letter from from Dejinta Beesha, a Somali community organization in Etobicoke, Ontario, confirming his identity as a Somali; and

(f) an affidavit from Ali Gamadid deposing that he knew Mr. Laag in Somalia and could identify him – Mr. Gamadid also testified in person before the RPD.

[19] The RAD rejected all of this evidence for a variety of reasons. More generally, it found Mr. Laag’s testimony to be “vague, evasive and evolving,” particularly with respect to the provenance of his marriage certificate and his mother’s affidavit, and the absence of his passport and birth certificate.

[20] While the RAD’s rejection of some of the documentary evidence may have been reasonable, its rejection of the testimony provided by Mr. Gamadid was not. Furthermore, the RAD made new adverse findings of credibility without affording Mr. Laag an adequate opportunity to respond.

[21] The RAD held that Mr. Gamidad could not reliably identify Mr. Laag, because their last encounter in Somalia was in 2009. It is unclear how the mere passage of time would render Mr. Gamidad incapable of identifying Mr. Laag, particularly since Mr. Laag was born in 1990 and was already a young adult at the time of their previous interaction in Somalia.

[22] The RPD found that Mr. Laag’s and Mr. Gamidad’s testimonies “were overall consistent and contained few discrepancies.” The RPD nevertheless observed that the information could



easily have been memorized in preparation for the hearing. The RAD took a different approach, and made the following observations regarding Mr. Gamidad's testimony:

- (a) the evidence from Mr. Gamidad was brief and vague;
- (b) Mr. Laag and Mr. Gamidad provided very little significant details about each other, and both described having no further interaction at all since 2009;
- (c) the relationship between Mr. Laag and Mr. Gamidad was tenuous at best, and essentially ended in 2009;
- (d) Mr. Gamidad was unable to specify Warla's full name – his evidence about Mr. Laag's familial relationship with Warla was also inconsistent with other evidence, i.e., whether Warla was Mr. Laag's aunt, sister or cousin; and
- (e) Mr. Gamidad had no ability to corroborate the appellant's whereabouts after 2009, roughly nine years ago.

[23] These negative credibility findings were new, and distinct from those that formed the basis for the RPD's decision. It was therefore incumbent on the RAD to apprise Mr. Laag of its potential adverse findings, and give him a reasonable opportunity to respond (*Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10). The RAD failed to do so, and the resulting decision was both unreasonable and procedurally unfair.

VII. Conclusion

[24] The application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the RAD for redetermination. Neither party proposed that a question be certified for appeal.

**JUDGMENT**

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

“Simon Fothergill”

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Judge

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

**DOCKET:** IMM-4586-18

**STYLE OF CAUSE:** ABDIASIS ABDULLAHI LAAG v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 25, 2019

**REASONS FOR JUDGMENT  
AND JUDGMENT:** FOTHERGILL J.

**DATED:** JULY 4, 2019

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