

Federal Court



Cour fédérale

**Date: 20200821**

**Docket: IMM-6302-19**

**Citation: 2020 FC 847**

**Ottawa, Ontario, August 21, 2020**

**PRESENT: Mr. Justice Sébastien Grammond**

**BETWEEN:**

**MOHAMED AHMED ALI ELAMIN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Mr. Elamin seeks judicial review of the dismissal of his claim for asylum. I am allowing his application, as the decision-makers made negative credibility findings that cannot be supported by the evidence. As I am unable to say whether the outcome would have been the same without these findings, I am sending the matter back for redetermination.

I. Background

[2] Mr. Elamin is a citizen of Sudan. In support of his claim for asylum, he alleges the following facts. In 2008 and 2009, when he was studying computer science at university, he participated in student demonstrations against the Sudanese regime. As a result, he was twice arrested and beaten.

[3] After graduating, Mr. Elamin was hired by the Sudanese civil registry, an organization that issues identity documents and passports. At some point in time, this organization was incorporated into the Ministry of the Interior and was considered a branch of the police. On a number of occasions, Mr. Elamin developed a disagreement with his superiors, who allegedly asked him to perform illegal tasks. He also refused a posting in Darfur, because he thought he would then be forced to participate in military missions. As a result, he was disciplined and lost his salary for a certain period of time.

[4] Nevertheless, Mr. Elamin was able to retain his employment with the civil registry. In 2015 or 2016, allegedly after paying a bribe to the official in charge, he was selected for a six-month posting at the Sudanese embassy in Washington. At the end of that posting, Mr. Elamin did not return to Sudan. Instead, he remained in the United States and quickly made his way to Canada, where he claimed asylum.

[5] At his hearing before the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB], Mr. Elamin filed a document that purports to be a judgment of a police

court in Sudan, condemning him to six months in jail for being absent from work and for failing to return to Sudan at the end of his posting. He testified that he obtained a picture of that document from a friend who himself obtained it from an employee of the civil registry in Sudan. He added that it would be highly imprudent to seek to obtain a certified copy. He also stated that after his defection, police officers searched his house and questioned members of his family as to his whereabouts.

[6] The RPD dismissed Mr. Elamin's claim, essentially for lack of credibility. The RPD first concluded that Mr. Elamin's story was implausible, because background checks would have been performed when he was hired by the civil registry and would have revealed any information kept by the police about him. The RPD also found that Mr. Elamin sought to mislead it, by indicating that he was a computer technician, while official documents described him as a technical police sergeant or policeman. With respect to the disciplinary sanctions imposed on Mr. Elamin in 2015, the RPD found that they did not amount to persecution and were rather the result of laws of general application. Moreover, Mr. Elamin had failed to include a significant part of his story in his Basis of Claim [BOC] form and waited until a few days before the hearing to provide an additional statement. Because Mr. Elamin did not claim asylum in the United States and waited until the end of this posting to claim asylum in Canada, the RPD concluded that his behaviour was inconsistent with that of someone fearing persecution. The RPD also reviewed the document that purports to be a jail sentence, but gave no weight to it, mainly because Mr. Elamin failed to obtain a certified copy.

[7] The Refugee Appeal Division [RAD] of the IRB dismissed Mr. Elamin's appeal against the decision of the RPD. The RAD focused on three specific issues, likely because they were the main grounds of appeal raised in Mr. Elamin's written argument. First, the RAD confirmed the RPD's finding that Mr. Elamin's failure to claim asylum in the United States negated his subjective fear. Second, the RAD found that Mr. Elamin's credibility was seriously affected by the contradiction between his testimony and the official documents with respect to his occupation. Third, the RAD agreed with the RPD that there were valid reasons for doubting the authenticity of the jail sentence.

[8] Mr. Elamin now seeks judicial review of the decision of the RAD.

## II. Analysis

[9] Mr. Elamin's application for judicial review challenges credibility findings. It has been said time and again that factual findings, in particular credibility findings, are the preserve of the initial decision-maker. While this was initially justified by the decision-maker's ability to observe the demeanour of the witnesses on the stand, institutional reasons are now invoked to prevent appeal and judicial review from becoming a replay of the initial hearing: *Housen v Nikolaisen*, 2002 SCC 33 at paragraphs 15-18, [2002] 2 SCR 235. With respect to judicial review, the Supreme Court of Canada recently stated, in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 125 [Vavilov], that "the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings." The Federal Courts have applied these principles in a long line of cases, including *Aguebor v Canada (Minister of Employment and Immigration)* (1993),

160 NR 315; *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319; *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*].

[10] Nevertheless, credibility determinations are not immune from review. In *Vavilov*, at paragraph 126, the Supreme Court stated that “The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it.” Moreover, the decision-maker must explain its credibility findings in “clear and unmistakable terms.” *Hilo v Canada (Minister of Employment and Immigration)* (1991), 130 NR 236 at paragraph 6. If the reasons are inadequate, they may well “fail to reveal a rational chain of analysis or [...] reveal that the decision was based on an irrational chain of analysis,” which renders the decision unreasonable: *Vavilov*, at paragraph 103.

[11] Thus, I must analyze the challenge to the RAD’s credibility determinations with great circumspection. Nevertheless, I have concluded that the findings made in this case cannot stand. This is one of the few cases in which this Court must strike down a decision because of unreasonable credibility findings.

[12] The difficulty in this case is that Mr. Elamin put forward two separate risks in support of his claim for asylum – the discovery of his participation in protests when he was in university and punishment for his defection from the diplomatic mission in the United States. Most of his BOC narrative related to the first issue, and, unsurprisingly, the RPD’s decision is mainly devoted to it. Nevertheless, the second risk must also be analyzed independently of the first.

[13] Thus, I will begin my analysis with the RAD's finding that the authenticity of the document establishing Mr. Elamin's jail sentence was doubtful. This document was central to Mr. Elamin's allegation of risk flowing from his defection. This will lead me to discuss Mr. Elamin's overall credibility, as it was a factor that the RAD considered in assessing the authenticity of the jail sentence. Lastly, I will address the Minister's argument that even if the jail sentence were authentic, Mr. Elamin's defection cannot ground a claim for asylum.

A. *The Jail Sentence*

[14] The RAD's reasons for disregarding the jail sentence are found at paragraphs 33-34 of its decision:

In my opinion, there were valid reasons for doubting the authenticity of this document. As I explained above, not only was no original copy of this document produced before the RPD, the appellant also failed to make any effort to get an affidavit from the friend who allegedly obtained the document in question on his behalf. In its decision, the RPD explained why the very content of this document led it to give the document no probative value, notably the fact that neither the names of witnesses nor the nature of their testimony had been indicated.

What is certain is that, according to case law, a decision maker may draw a conclusion concerning the weight to give to a document after assessing the document's credibility or probative value, or both. It is open to the RPD not to give evidentiary weight to assessments or reports based on underlying evidence found not to be credible. Finally, evidence is not assessed in isolation from the overall claim for refugee protection. Where an applicant's personal testimony is not credible, it is reasonable for the RPD to have credibility concerns with the supporting documentary evidence, and the RPD may opt to accord it minimal weight. Based on my own analysis, the RPD did not err in not according probative value to this document.

[footnotes omitted]

[15] It appears that the main reason for doubting the authenticity of this document is Mr. Elamin's failure to obtain a certified copy and an affidavit from the friend who forwarded the document to him. As the RAD rightly notes, pursuant to rule 11 of the *Refugee Protection Division Rules*, SOR/2012-256, asylum claimants bear the onus of substantiating their claims with documentary evidence, where this is reasonably possible. As Canadian authorities are not always able to assess the authenticity of a document, especially where only a copy is provided, the manner in which an asylum seeker obtains a key document is highly relevant and evidence may be needed in this regard.

[16] The burden to provide documentary evidence, however, cannot exceed what can reasonably be expected of the applicant. In this case, one must not lose sight of the fact that we are dealing with Sudan. Even a cursory review of the National Documentation Package [NDP] maintained by the IRB's Research Directorate reveals that Sudan is plagued by serious problems with respect to arbitrary behaviour of the police and security forces, corruption and lack of an independent judiciary, to name but a few.

[17] At the RPD hearing, the panel member asked Mr. Elamin how he obtained the document establishing the jail sentence and why did he not have an original. Mr. Elamin answered that a friend took a picture of the document and sent it to him. He added that, even for someone working in the administration, it was very difficult and dangerous to have access to that document. The RPD concluded that Mr. Elamin should have made efforts to obtain a certified copy of the document.

[18] In this regard, the RAD acknowledged, at paragraph 30 of its decision that “it is understandable that it may have been risky to attempt to obtain a certified copy of the document.” It seems to me that in doing so, the RAD recognized that anyone overtly trying to obtain a certified copy would be perceived by the Sudanese authorities as an accomplice of Mr. Elamin and would expose him or herself to a significant risk.

[19] Nevertheless, the RAD went on to add that Mr. Elamin should have obtained an affidavit from the friend who provided him with a picture of the document and that the failure to do so affected its authenticity. With great respect to the RAD, I fail to understand the difference between seeking a certified copy and obtaining an affidavit from the friend. In both cases, the person acting on Mr. Elamin’s behalf cannot reveal his or her identity and must act covertly. It is thus unreasonable to expect Mr. Elamin’s friend to sign an affidavit in which he would essentially confess to stealing the document from the Sudanese authorities. Moreover, while the RPD member questioned Mr. Elamin about the reason for the lack of a certified copy, he did not ask him to justify the lack of an affidavit from his friend. The RPD, indeed, did not mention the lack of an affidavit as a reason to doubt the authenticity of the document. It would be unfair, in my view, to raise this issue at a subsequent step without affording Mr. Elamin an opportunity to explain why he did not obtain such an affidavit. In any event, as I mentioned above, the explanation is obvious.

[20] In the excerpt quoted above, the RAD also relied on the content of the document as an additional reason to doubt its authenticity. What the RPD said in this regard is found in the description it provides of the document, which includes the following sentence: “Allegedly,



some witnesses had testified, but no names or the content of their testimony were stated.” It is far from clear, however, that the RPD considered this a negative factor affecting the document’s authenticity. Rather, the RPD focused entirely on the lack of an original. The absence of the witnesses’ names on the document is not a defect that casts a doubt on its authenticity.

Documents should normally be assessed on what they say, not what they fail to say: see, for example, *Yahia v Canada (Citizenship and Immigration)*, 2020 FC 84 at paragraph 41. There is simply no evidence as to the usual form of documents of that nature in Sudan. The document is only one page long. One would be surprised to find all the details of the case in it, especially as the case must have proceeded by default, in Mr. Elamin’s absence. Moreover, the RPD’s statement about the absence of any description of the content of the testimony is puzzling, as the document itself mentions that the witnesses confirmed Mr. Elamin’s absence starting on May 2, 2017. Thus, in adopting the RPD’s remarks regarding the content of the document as a reason to doubt its authenticity, the RAD’s decision does not evince an internally coherent reasoning nor an engagement with the evidence, which would have established the decision’s reasonableness: *Vavilov*, at paragraphs 102–104, 126.

#### B. *Overall Credibility*

[21] These errors, however, may well be immaterial if Mr. Elamin’s overall credibility is negatively affected for other reasons. In *Lawani*, at paragraph 24, my colleague Justice Denis Gascon summarized the law as follows:

[...] a lack of credibility concerning central elements of a refugee protection claim can extend and trickle down to other elements of the claim [...] and be generalized to all of the documentary evidence presented to corroborate a version of the facts.

[22] This is what the RAD did in this case. At paragraph 34 of its reasons, quoted above, it invoked Mr. Elamin's lack of credibility as an additional ground to doubt the authenticity of the jail sentence. That would be unimpeachable, provided that the overall credibility determination is itself reasonable. I have, however, serious doubts in this regard.

[23] There are several reasons why the RPD concluded that Mr. Elamin was not credible, including the implausibility of his overall story, his failure to include significant portions of his story in his BOC form, his attempt to mislead the panel by portraying himself as a computer technician, when the official documents described him as a "policeman," and his failure to claim asylum at the earliest opportunity in the United States. The RAD reviewed only two of them: Mr. Elamin's title as a "policeman" and the delay in claiming asylum. In my view, the RAD's treatment of the "policeman" issue is unreasonable, for the following reasons.

[24] At the RPD hearing, Mr. Elamin was asked about the discrepancy between his BOC form, in which he described himself as a computer technician, and his passport and other official documents, where he is described as a "policeman" or a "technical police sergeant." The panel member asked him directly, "Were you a policeman?" to which Mr. Elamin responded, "a computer technician, but with a police appointment." A long exchange followed, during which the panel member tried repeatedly to have Mr. Elamin acknowledge that he was a policeman. At the end of the hearing, Mr. Elamin was asked by his counsel to clarify the meaning of "policeman." He replied that in Sudan, the term would only be used to describe a person carrying weapons. The RPD found that Mr. Elamin contradicted himself and tried to mislead the panel.

[25] After its own review of the evidence, the RAD agreed with the RPD, finding that there was indeed a “serious contradiction” between Mr. Elamin’s testimony and the official documents.

[26] With respect, I fail to understand how this finding can be reconciled with the evidence. Mr. Elamin provided a cogent explanation for not describing himself as a policeman, although he was employed by the police. It is not inherently implausible that, in Sudan, the issuance of identity certificates is entrusted to a branch of the police. Thus, there is no contradiction between Mr. Elamin’s membership in the police as an organization and the fact that he does not perform duties commonly associated with those of a policeman. From my review of the transcript, it appears that the RPD member very quickly formed the opinion that there was an insuperable contradiction. Moreover, the hearing was marred with translation problems, which may have made it more difficult for the panel to grasp the explanation Mr. Elamin was trying to convey.

[27] The RPD mentioned other reasons for doubting Mr. Elamin’s overall credibility. From my review of the decision, I am unable to say whether they are sufficient to justify a negative credibility finding. I can only say that the “policeman” issue appears to have played a significant role in the RPD’s reasoning. Given the view the RAD took of the matter, it did not assess the sufficiency of the other grounds. As a result, I must send the matter back for redetermination.

C. *Laws of General Application*

[28] The Minister, however, argues that even if the RPD and RAD made those errors, Mr. Elamin's claim for asylum would nevertheless be bound to fail, because the imprisonment that he fears results from his breach of a law of general application of his home country.

[29] In putting forward such an argument, the Minister is asking the Court to sustain the RAD's decision for reasons other than those given by the RAD. In *Vavilov*, at paragraph 96, the Supreme Court of Canada held that "it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome." It is only where "a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose" that an application for judicial review of a decision based on flawed reasoning may be dismissed: *Vavilov*, at paragraph 142. In my view, this case falls under the general rule, not the exception.

[30] It is true that sanctions for non-compliance with laws of general application are usually not considered to amount to persecution. Asylum claims have been denied where the applicant refused to perform mandatory military service or breached his country's laws regarding authorized absences from the country: *Valentin v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 390 (CA); *Ates v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 322. This principle was applied to the case of an employee of the Cuban embassy who exposed himself to a jail sentence for abandoning his mission: *González Salcedo v Canada (Citizenship and Immigration)*, 2014 FC 822.

[31] There is an exception to this principle where the manner in which a prison sentence is applied would in itself constitute persecution. Thus, applicants were held to have a well-founded fear of persecution where country condition evidence revealed widespread abuse and mistreatment of prisoners: *Basbaydar v Canada (Citizenship and Immigration)*, 2014 FC 158 at paragraphs 33-35; *Canada (Citizenship and Immigration) v Akgul*, 2015 FC 834 at paragraph 12.

[32] In this case, neither the RPD nor the RAD made findings regarding conditions of detention in Sudan. A cursory review of the relevant sections of the NDP for Sudan raises significant concerns in this regard. As a result, I cannot say that Mr. Elamin's claim would inevitably be dismissed.

[33] Thus, I decline to sustain the RAD's decision on the basis of reasons not given by the RAD. The extent of the risk related to Mr. Elamin's potential incarceration in Sudan will have to be assessed upon redetermination of his claim.

### III. Disposition

[34] The RAD based its decision on unreasonable credibility findings. As I am unable to say whether it would have reached the same outcome without these findings, I must quash the decision and send the matter back for redetermination.

**JUDGMENT in IMM-6302-19**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is granted and the matter is sent back to the Refugee Appeal Division for redetermination.
2. No question is certified.

"Sébastien Grammond"

Judge

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

**DOCKET:** IMM-6302-19

**STYLE OF CAUSE:** MOHAMED AHMED ALI ELAMIN v THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE BETWEEN  
MONTRÉAL, QUEBEC AND OTTAWA, ONTARIO

**DATE OF HEARING:** AUGUST 4, 2020

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**DATED:** AUGUST 21, 2020

**APPEARANCES:**

Stéphanie Valois FOR THE APPLICANT

Suzon Létourneau FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Stéphanie Valois FOR THE APPLICANT  
Montréal, Quebec

Attorney General of Canada FOR THE RESPONDENT  
Ottawa, Ontario