

Federal Court



Cour fédérale

**Date: 20211206**

**Docket: IMM-6159-20**

**Citation: 2021 FC 1355**

**Ottawa, Ontario, December 6, 2021**

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

**BETWEEN:**

**HAMZE ELMI OMAR  
SOUMIYA IDRIS ALI  
MAHER HAMZA ELMI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicants, Hamze Elmi Omar, his wife, Soumiya Idriss Ali, and their 6-year-old son, all citizens of Djibouti, seek judicial review of a decision of the Refugee Appeal Division [RAD] dated November 2, 2020, confirming the rejection of their claim for refugee protection on the grounds that their purported fear of persecution on the basis of Mr. Omar's political activism lacked credibility [RAD decision].

[2] However, the matter is more complicated than that.

[3] On August 13, 2019, the Refugee Protection Division [RPD] rejected the Applicants' claim – a claim which included the then 2-year-old daughter of Mr. Omar and Ms. Ali, with the only expressed fear of persecution being Mr. Omar's political opinion. On appeal, the RAD accepted new evidence pursuant to subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], in relation to a new ground for the minor daughter's claim, *to wit*, the risk of being subjected to female genital mutilation [FGM] at the hands of other members of the family, a practice to which 93% of the women in Djibouti have been subjected, including Ms. Ali as a young woman. The allegations relating to FGM were not mentioned in the Basis of Claim Form, the testimony before the RPD, or in the RPD decision, however, on the strength of such new evidence, the RAD ordered an oral hearing during which Ms. Ali asserted that she had not wished to raise the issue of FGM with previous counsel because she did not feel comfortable discussing such intimate matters in front of a man who was not her husband and that, in any event, her previous counsel did not find it necessary to do so as no mention of such a claim was made in the Basis of Claim Form.

[4] On February 18, 2020, the RAD accepted the claim of the minor daughter on the basis of the risk of being subjected to FGM, determining that she “would be subjected to a serious possibility of persecution should she return to her country.” The RAD also found that “it would be difficult for [Mr. Omar and Ms. Ali] to prevent [their minor daughter] from getting excised, given that this is a practice that both families adhere to, and that it could be done without their knowledge.”

[5] However, the RAD otherwise dismissed the appeals of the three remaining applicants (Mr. Omar, Ms. Ali and their young son) because they failed to point to a reviewable error on the part of the RPD as to the issues before it at the time, i.e., Mr. Omar's political activity. As regards the new claim advanced on behalf of the minor daughter, the RAD determined that Mr. Omar and Ms. Ali failed to provide any evidence that "they were afraid for their own selves due to their opposition to having their daughter excised." The RAD determined that the Applicants had failed to establish a subjectively held and objectively well-founded fear of persecution based on their opposition to FGM (as opposed to the daughter's risk of being personally subjected to FGM).

[6] Because of an administrative error, the decision of the RAD was not sent to the Applicants until after the Applicants' counsel was invited by the RAD to submit further documents or submissions in support of the appeal, despite the fact that a final decision was in fact signed but simply not sent to the parties. On the same day that the RAD decision was eventually mailed to the parties, additional documents were received by the RAD following its invitation to the Applicants' counsel, however, the initial RAD panel was now *functus* – having signed its decision – and therefore not in a position to review the new evidence. The Applicants, including the minor daughter, requested a reopening of their file on account of the administrative error, and on October 2, 2020, the RAD ordered the reopening of the appeals of the Applicants but not of the minor daughter, who had by then been granted refugee protection.

[7] Rightly or wrongly, neither the February 18, 2020 decision nor the October 2, 2020 decision of the RAD were the subject of judicial review applications.

I. Decision under review

[8] On November 2, 2020, a newly constituted RAD panel issued the RAD decision, confirming the rejection of the Applicants' claim; the determinative issue was found to be credibility. In short, the RAD made the following findings:

- (a) The RPD made no reviewable errors in relation to its credibility findings, and in fact the findings of the RPD supporting its conclusion that the Applicants lacked credibility were not even contested by the Applicants.
- (b) Any failure of the RPD to address the Applicants' *sur place* claim was not determinative of the appeal as the Applicants failed to establish the validity of such a claim.
- (c) The RPD made no reviewable error as regards the assessment of Ms. Ali's claim on the grounds of membership in a particular social group – the wife of a wanted political opponent – or in its findings in relation to any cumulative discrimination the Applicants may face as members of a minority tribe in Djibouti.
- (d) No allegations were made, nor was it established, that the Applicants have a well-founded fear or risk of harm at the hands of the agents of persecution who wish to perform FGM on the minor daughter.
- (e) As the minor daughter was no longer a party to the proceedings – having had her claim for refugee protection accepted by the previous RAD panel – the submissions, arguments and documents pertaining to FGM and to those who wish

to perform it on the minor daughter are not relevant to the claim put forward by the Applicants.

- (f) The new evidence supporting Ms. Ali's claim that she herself was also the victim of FGM was not accepted on the grounds that it was reasonably available prior to the RPD decision, and that the explanation that previous counsel did not find it necessary for her to mention raise a claim was insufficient given that no notice of allegations against previous counsel was filed. In any event, such documents were no longer relevant as the minor daughter was no longer a party to the proceedings.
- (g) The remaining new evidence was, with the exception of certain photographs, rejected by the RAD, mostly for reasons of relevancy and lack of credibility.

## II. Analysis

[9] I am granting the present application for judicial review on the basis that the RAD decision is unreasonable for having failed to consider the Applicants' claim as a family, in conjunction with the minor daughter's claim in relation to FGM. Accordingly, I need not consider the remaining issues raised by the Applicants, such as whether notice to previous counsel was necessary, whether the RAD failed to assess the Applicants' forward-looking risk in line with the Immigration and Refugee Board's *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*, and whether the RAD made unreasonable findings in relation to the Applicants' *sur place* claim and re-availment.

[10] Nor do I intend to summarize the factual foundation purportedly supporting the Applicants' claim for refugee protection on the basis of Mr. Omar's political activity as the determination of the RAD regarding the Applicants' credibility in relation to such a claim has not been raised before me.

[11] The parties agree, as do I, that the standard of review applicable to the RAD decision is that of reasonableness. The Court must "consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 15).

[12] I am persuaded that the RAD erred in not considering the claim of the Applicants in conjunction with the determination already made as regards the minor daughter. That is not to say that the RAD should have considered the minor daughter a party to the claim; that ship had already sailed with the decision of the RAD of October 2, 2020, for which judicial review was not sought. Clearly, the minor daughter was not a party to the claim before the RAD, but this should not have deterred the RAD from considering the Applicants' claim as part of a family group along with the minor daughter.

[13] I find the issue in this case similar to that in *Tomov v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1527 [*Tomov*], where Mr. Justice Mosley stated at paragraphs 10 to 12:

[10] That the family is a valid social group for the purposes of seeking refugee protection is well established: *Pour-Shariati v.*

*Canada (Minister of Employment and Immigration)* 1994 CanLII 3542 (FC), [1995] 1 F.C. 767, [1994] F.C.J. No. 1928 (F.C.T.D.) (QL); aff'd [1997] F.C.J. No. 810 (F.C.A.) (QL).

[11] Where membership in a family group is the basis for the claim, the Court of Appeal in *Pour-Shariati*, required that a personal nexus be established between the claimant and the alleged persecution on Convention grounds. It is not enough to point to the persecution suffered by family members if it is unlikely to affect the claimant directly. In this case, I am satisfied that there is a sufficient nexus between the applicant's claim and his wife's persecution. So long as they remained together, he would directly be at risk.

[12] In my view, therefore, the Board erred in requiring evidence of personal targeting outside of their relationship. It failed to consider whether he had a well founded fear of persecution by reason of his membership in his wife's family. Accordingly, I find that the decision was unreasonable and the application will be granted and the matter remitted for reconsideration by a different panel.

[14] Here, the RAD determined that the submissions, documents and evidence relating to the minor daughter's risk on the grounds of FGM were irrelevant to the claims of the remaining family members and required the Applicants to establish that they themselves would be targeted regardless of their relationship with the 2-year-old little girl. The paucity of evidence relating to any claim of a subjective fear of personal harm of the parents does not diminish the fact that there was evidence that Ms. Ali fears the consequences of not being able to protect her minor daughter from the very persecution from which the latter had already been found to require protection.

[15] Clearly there is a strong link between Mr. Omar, Ms. Ali and their young son to the little girl. Unless the RAD was expecting the little girl to remain in Canada while her parents and her

brother returned to Djibouti, the RAD decision was in effect a collateral attack on the decision of the first RAD panel which granted refugee protection to the minor daughter.

[16] Had the family not tethered their claims as a family unit and split their claims voluntarily, the situation may have been different. However, the claims of the Applicants were artificially split through a series of events triggered by an administrative error. The new evidence that was submitted as per the invitation of the RAD to the Applicants' counsel and that was rejected by the second RAD member on the basis of irrelevance was meant to be assessed by the initial RAD panel. However, the initial RAD panel had in the meantime signed off on its decision and was *functus*, thus requiring the reopening of the appeals and a newly constituted RAD panel, however, this time without the minor daughter as a party to the proceedings, which was the very reason why the second RAD panel rejected much of the new evidence relating to the issue of FGM.

[17] The Applicants' entire claim should have been assessed as part of a family group along with the minor daughter; it was not, for the sole reason that they were victims of circumstance. For the reasons already set out, and as was found by Mr. Justice Mosley in *Tomov*, I find the RAD decision unreasonable under the circumstances.

### III. Conclusion

[18] I would, therefore, grant the application for judicial review and return the matter back to a newly constituted RAD panel.



**JUDGMENT in IMM-6159-20**

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

1. The application for judicial review is granted and this matter is returned for redetermination by a different panel.
2. There is no question for certification.

“Peter G. Pamel”

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Judge

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

**DOCKET:** IMM-6159-20

**STYLE OF CAUSE:** HAMZE ELMI OMAR, SOUMIYA IDRIS ALI,  
MAHER HAMZA ELMI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** NOVEMBER 24, 2021

**JUDGMENT AND REASONS:** PAMEL J.

**DATED:** DECEMBER 6, 2021

**APPEARANCES:**

Arghavan Gerami FOR THE APPLICANTS

Taylor Andreas FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Gerami Law PC FOR THE APPLICANTS  
Ottawa, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Ottawa, Ontario