Federal Court Cour fédérale

Date: 20220727

Docket: IMM-6457-21

Citation: 2022 FC 1121

Ottawa, Ontario, July 27, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

IDDI YUNUS FADHILI
NAJAT OMAR SORAN

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Iddi Yunus Fadhili and Najat Omar Soran, seek judicial review of the decision of the Refugee Protection Division ("RPD") of the Immigration and Refugee Board, dated August 5, 2021, to vacate the Applicants' refugee status pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicants submit that the RPD erred in its assessment of their misrepresentation and that there was a reasonable apprehension of bias.

[3] For the reasons that follow, I find the RPD's decision is reasonable, and that there was no reasonable apprehension of bias. Accordingly, this application for judicial review is dismissed.

II. **Facts**

A. *The Applicants*

[4] The Applicants state they are citizens of Somalia. The Principal Applicant, Iddi Yunnus Fadhili, is 41 years old, and the Associate Applicant, Najat Omar Soran, is 40 years old. The Applicants claim to have separately fled Somalia with their families in 1991.

[5] In November 2015, the Applicants sought refugee protection from within Canada. The RPD heard their claim in 2017. Before the RPD panel of first instance, the Applicants claimed that they met and married in Kenya, where they remained without status or identity documents until they came to Canada with the help of an agent in September 2015. The Applicants' basis of claim ("BOC") narrative states that they met the agent in July 2015. The record, however, indicates that the Applicants arrived at Pearson Airport in Toronto on May 22, 2015.

[6] In a decision dated August 9, 2017, the RPD found that the Applicants were credible based on their experiences in Somalia and Kenya, and their identities as Somali members of the

Bajuni clan, a vulnerable minority. The RPD found that the Applicants had a well-founded fear of persecution in Somalia.

[7] The Respondent states that after the Applicants were granted refugee protection, it came to the Canada Border Service Agency's attention that the Applicants obtained refugee status by using false identities. In September 2020, the Minister of Public Safety and Emergency Preparedness ("Minister") brought an application to vacate the Applicants' refugee protection status based on misrepresentation and the withholding of facts at their initial RPD hearing.

B. *Decision Under Review*

[8] In a decision dated August 5, 2021, the RPD granted the Minister's application to vacate the Applicants' refugee protection status pursuant to section 109 of the *IRPA*.

[9] The Minister's submissions addressed how the Applicants had misrepresented material facts relating to relevant matters pursuant to subsection 109 of the *IRPA*. The Minister submitted that the Applicants made misrepresentations based on the identities they used to travel to Canada, the date of their arrival in Canada, their date of departure from Kenya, and their use of an agent to come to Canada, including him accompanying them to Canada and the dates they allegedly interacted with the said agent. More likely than not, the Applicants are in fact Kenyan nationals, Iddi Yunus and Najaa Omar Said, and not citizens of Somalia as they claim. The Minister argued that the Applicants also misrepresented or withheld their residence history, names and residence of family members, and their status in the UAE. The original refugee claim was a fiction, including the Applicants' identities and their persecution narrative. For a refugee

claim to succeed there must be a risk established in all countries of nationality. Since the Applicants failed to make a claim against Kenya, their country of nationality, the Minister submitted that their refugee claim must fail.

[10] Before the RPD, the Applicants claimed that as undocumented Somalis, they obtained fraudulent Kenyan passports in the late 1990s, which they used and renewed over the years prior to coming to Canada. They stated that they continued to use these documents because they had nothing else to show their identity and feared being deported back to Somalia from Kenya. The Applicants claim that they engaged an agent to falsify the information in their temporary resident visa (“TRV”) applications out of necessity, in order to conceal the fact that they used false Kenyan passports to maintain their identities in Kenya.

[11] In examining the Minister’s application to vacate the Applicants’ refugee status, the RPD first considered the three elements under subsection 109(1) of the *IRPA,* as set out in *Canada (Public Safety and Emergency Preparedness) v Gunasingam,* 2008 FC 181 at paragraph 7:

> a) there must be a misrepresentation or withholding of material facts;
>
> b) those facts must relate to a relevant matter; and
>
> c) there must be a causal connection between the misrepresenting or withholding on the one hand and the favourable result on the other.

[12] The RPD reviewed the Applicants’ testimony and submissions and determined that all three elements of the subsection 109(1) test are met. The RPD made the following findings:

- The Applicants misrepresented themselves and withheld facts about their Kenyan identities and residence history. They did not disclose their use of aliases and that they had resided in Dubai, UAE from 2006 to 2015. They misrepresented the circumstances that brought them to Canada, the names under which they entered Canada, and the date of their arrival: they arrived using TRVs in May 2015 and not with the assistance of an agent in September 2015.

- The misleading and withheld facts speak directly to the Applicants' identities and the basis of their claim. By withholding these facts, the Applicants prevented the panel of first instance to delve into their identities and the substance of their claim. If identity, and thereby nationality, cannot be established, then no determination can be made on the merits of the claim.

- There was a causal connection between the misrepresentation and withholding of information and the favourable result. The panel of first instance took the Applicants' claim and narrative at face value, and decided the matter based on their sworn testimonies that they were Somali nationals and that their story of persecution was credible. Had the panel of first instance been aware of the information in the Applicants' TRV, it would have raised significant doubt as to their identity and the credibility of their claim, and might not have led to the favourable result achieved.

[13] Under subsection 109(2) of the *IRPA,* the RPD examined whether there was other sufficient evidence considered at first instance to justify refugee protection. The panel of first instance found the Applicants to be credible. However, the RPD found that the new evidence, combined with the Applicants' admissions of misrepresentation, leaves their credibility "in tatters" and the presumption of truthfulness of their sworn testimony has been rebutted. The Applicants had the opportunity to correct the record, but they did not do so. The RPD noted that subsection 109(1) does not warrant consideration of the Applicants' motives, intentions, negligence or *mens rea,* or whether the Applicants had the capacity to understand or intended to misrepresent or withhold material facts (*Canada (Minister of Citizenship and Immigration) v Pearce*, 2006 FC 492 at para 36). The RPD thus did not delve further into the explanation for their actions or their attempt "to shift the blame for their deception onto the agent."

[14] The RPD found the new evidence supports a conclusion that the Applicants are citizens of Kenya. They both carry Kenyan passports, which they have had for three decades, have renewed on several occasions, and have used to travel to other countries, most notably UAE. There is no evidence to support their claim that these passports were obtained fraudulently. Possession of a national passport is presumptive evidence of citizenship and the Applicants failed to present persuasive evidence to rebut the presumption that they are Kenyan nationals.

III. **Issues and Standard of Review**

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

A. *Whether the RPD's decision to vacate the Applicants' refugee status is reasonable.*

B. *Whether there is a reasonable apprehension of bias.*

[16] The Applicants make no submissions on the standard of review. The Respondent submits that the reasonableness standard applies to the first issue. I agree that the appropriate standard of review of the RPD's decision is reasonableness (*Ede v Canada (Citizenship and Immigration)*, 2021 FC 804 at para 7; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 10, 16-17). The issue of a reasonable apprehension of bias concerns a matter of procedural fairness and is traditionally reviewed on the correctness standard (*Malit v Canada (Citizenship and Immigration),* 2018 FC 16 at para 11).

[17] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). 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 reasonable decision 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).

[18] 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).

[19] 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 paras 21-28 (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. **Analysis**

[20] Section 109 of the *IRPA* sets out the framework under which the RPD may, on application by the Minister, vacate a positive refugee protection decision:

Applications to Vacate	**Annulation par la Section de la protection des réfugiés**
Vacation of refugee protection	**Demande d'annulation**
109 (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding	**109 (1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

material facts relating to a relevant matter.	
Rejection of application	**Rejet de la demande**
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
Allowance of application	**Effet de la décision**
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[21] Pursuant to section 109 of the *IRPA,* the RPD has the discretion to vacate a positive refugee determination if it finds that 1) the decision was obtained through the refugee claimant directly or indirectly misrepresenting or withholding materials facts relevant to their claim, and 2) leaving the misrepresentation aside, the remaining evidence before the panel that decided the refugee claim was insufficient to justify refugee protection (*Canada (Public Safety and Emergency Preparedness) v Bafakih*, 2022 FCA 18).

A. *Reasonableness of RPD's Decision*

[22] First, the Applicants submit that the RPD erred in finding that subsection 109(1) "[…] does not warrant consideration of the [Applicants'] motives, intention, negligence or *mens rea*." The Applicants argue that the jurisprudence of this Court that upholds this finding contradicts the jurisprudence regarding the effect of agent instructions on claimants entering Canada. Before the

RPD, the Applicants did not dispute that they withheld relevant, material facts, but explained that they did so under the strict instructions of their agent. The Applicants submit that the objective evidence clearly indicates that their risk profile is real, as undocumented Somalis in Kenya live in fear of harassment and deportation, with no rights to basic services. There is also evidence that many in their position use agents to fraudulently obtain Kenyan documents in order to live peacefully and leave Kenya safely.

[23] The Applicants argue that the Federal Court of Appeal has found that a refugee claimant's fraudulent travel documentation is irrelevant to the central matters of a refugee claim and of limited value in determining general credibility (*Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 (FCA)). The Applicants note that this Court has frequently applied this logic, especially when a refugee claimant no longer has possession of the fraudulent travel documents due to their agent's instructions (see: *Ameir v Canada (Minister of Citizenship and Immigration),* 2005 FC 876 at para 16; *Zhao v Canada (Citizenship and Immigration),* 2015 FC 471 at paras 6, 12-13). As noted in *Rasheed v Canada (Minister of Citizenship and Immigration),* 2004 FC 587 at paragraph 18:

> Where a claimant travels on false documents, destroys travel documents or lies about them upon arrival following an agent's instructions, it has been held to be peripheral and of very limited value as a determination of general credibility. First, it is not uncommon for those who are fleeing from persecution not to have regular travel documents and, as a result of their fears and vulnerability, simply to act in accordance with the instructions of the agent who organized their escape. Second, whether a person has told the truth about his or her travel documents has little direct bearing on whether the person is indeed a refugee [Citations omitted.]

[24] The Applicants maintain that it is unreasonable to, on the one hand, allow the RPD deference with respect to credibility findings, while at the same time preventing refugee claimants from explaining their behaviour and motivation. The Applicants state that they did not keep the fraudulent travel documents because their agent confiscated them upon clearing the airport after they arrived in Canada. They simply followed their agent's instructions. It is also unreasonable to expect the Applicants to submit evidence to corroborate their Somali identities or demonstrate that their Kenyan passports were obtained fraudulently as this is very difficult to prove. The Applicants submit that it is an error to base a credibility finding on the absence of corroborative evidence alone, and much depends on the type of evidence at issue (*Ndjavera v Canada (Citizenship and Immigration),* 2013 FC 452 at paras 6-7).

[25] Second, the Applicants submit that pursuant to subsection 109(2) of the *IRPA*, there is sufficient evidence to otherwise justify refugee protection in their case. The Applicants rely on *Canada (Citizenship and Immigration) v Davidthamby Chery*, 2008 FC 1001 ("*Davidthamby Chery*"), in which this Court upheld the RPD's decision to reject a vacation application because there were numerous elements of the claimant's story that remained intact. Despite the claimant's misrepresentations, the evidence still established that the claimant in *Davidthamby Chery* was a Tamil from Northern Sri Lanka who had been targeted on several occasions. In their case, the Applicants note that the RPD did not dispute that they are Bajunis from Somalia, but only that their Bajunis ethnicity does not prove they did not acquire Kenyan citizenship after relocating to Kenya. Many Somalis have remained in Kenya undocumented or used fraudulent documents to protect themselves. The Applicants also rely on *Mansoor v Canada (Citizenship and Immigration),* 2007 FC 420 ("*Mansoor*") to maintain that there were material elements of

their claim that could support the panel of first instance's finding (at para 29), including the testimony of a witness and letters of support that attest to their Somali ethnicity and nationality.

[26] The Respondent maintains that the RPD's application of section 109 of the *IRPA* was reasonable. Regarding the analysis under subsection 109(1), the Respondent argues that the RPD specifically acknowledged the Applicants' claim that they had obtained fraudulent Kenyan passports in the late 1990s and used them "out of necessity" in order to conceal their Somali identity. The RPD also addressed the Applicants' claim that they had relied on the instructions of their agent, who advised them to fabricate information in their claim forms. The RPD noted that section 133 of the *IRPA* protects refugee claimants from traveling on fraudulently obtained documents, if they are found to be genuine refugees. However, in this case, the Applicants failed to take the opportunity to correct the record, and continued to affirm that the information contained in their claim forms was true, complete and correct. It was reasonable of the RPD to find that a vacation decision does not involve consideration of motives, intention, negligence or *mens rea.*

[27] Furthermore, the Respondent argues that the scenario advanced by the Applicants is not corroborated by the facts on record. For instance, the Applicants state they sought the assistance of an agent to leave Kenya. The Principal Applicant's affidavit states that they sought the assistance of the agent in "late 2014", yet the record indicates that the Applicants were living in the UAE at that time. Also, instead of being issued their passports in September 2015 with the agent's help, as was alleged before the RPD panel of first instance, the passports were renewed

by the Applicants themselves in November 2010 (for the Principal Applicant) and February 2011 (for the Associate Applicant).

[28] Secondly, the Respondent submits that the Applicants' assertion that there is sufficient evidence to justify their refugee protection misrepresents the RPD's findings. The RPD did not accept that the Applicants are Bajunis from Somalia. In fact, it found that the evidence supports the conclusion that they are citizens of Kenya. This evidence included the Applicants' Kenyan passports, which they have carried for three decades, as well as their marriage certificate and the Associate Applicant's birth certificate, both of which indicate their Kenyan citizenship. The Applicants failed to provide persuasive evidence at the vacation hearing to establish their identity as Somalis and to rebut the presumption that they are Kenyan nationals. It was thus reasonable of the RPD to conclude that there was no basis on which their refugee claim could be granted, particularly since the evidence identifying them as Kenyan citizens and undermining their credibility was not put before the panel of first instance.

[29] I agree with the Respondent's submissions with respect to the analysis under subsection 109(1) of the *IRPA*. I find that it was reasonable of the RPD to conclude that the motivation for the misrepresentation or withholding of material facts was not relevant to the determination under subsection 109(1) of the *IRPA*. This is in keeping with my colleague Justice Favel's decision in *Abdulrahim v Canada (Public Safety and Emergency Preparedness),* 2020 FC 463, which affirms that subsection 109(1) of the *IRPA* reveals no *mens rea* element (at para 21, citing: *Canada (Minister of Citizenship and Immigration) v Wahab*, 2006 FC 1554 at para 29). Further, as noted by the RPD, the Applicants had the opportunity to correct the record and failed to do so.

[30] Contrary to the Applicants' submissions, I also do not find that the RPD erred by failing to account for the agent's role in the misrepresentations. The Applicants cite to jurisprudence from this Court that deals with refugee claimants who relied on agents to obtain false documentation and followed their instructions to destroy those false documents. Indeed, vulnerable refugees often find themselves without travel documentation and are forced to rely on agents to exit life-threatening circumstances. The Applicants' situation is not comparable. The record indicates that the Applicants used their own Kenyan passports, which they had held for three decades, to obtain Canadian TRVs from the UAE and to travel to Canada from Dubai, where they had been living for nine years. They also travelled extensively on these passports, which contain visa stamps from Oman, Sri Lanka, Thailand, Malaysia and the UAE. While the Applicants claim to have come to Canada in September 2015 accompanied by the agent, the record indicates that they landed in at Pearson Airport in Toronto on May 22, 2015. The Applicants appear to not even have travelled to Canada with the agent. Instead, the record shows that they entered Canada on May 22, 2015 with an individual named Faiza Omar Said, who is listed on the Associate Applicant's TRV application as her sister.

[31] As rightly noted by the Respondent's counsel during the hearing, the Applicants submissions are riddled with inconsistencies. For example, despite claiming before the panel of first instance that they had been living in Kenya since the 1990s, the record indicates that the Associate Applicant held a residence permit in the UAE from 2013-2016. The Principal Applicant's TRV application also indicates that he worked in the UAE from June 2006 to January 2017. Additionally, while the Principal Applicant's BOC states his parents are deceased, his TRV application indicates that his parents are living and employed in Mombasa,

Kenya. The Applicants' persistent dishonesty, inconsistent evidence and extensive misrepresentation speak volumes.

[32] I am also not convinced by the Applicant's submissions regarding the RPD's analysis under subsection 109(2) of the *IRPA*. While I accept that the Applicants could very well be members of the Bajuni minority clan from Somalia who fled Somalia in the 1990s, I do not find that the RPD erred in determining that the evidence "supports a conclusion that the [Applicants] are citizens of Kenya." As noted by the RPD, "many people who speak a distinct language and claim ethnicity to a specific geographically based social group located in one country, can relocate, and become nationals of another country." The evidence before the RPD indicates that the Applicants carried Kenyan passports for three decades, which they renewed on multiple occasions and used to travel extensively. There is also no evidence that these passports were obtained fraudulently. A passport is *prima facie* evidence of citizenship and the burden is on a claimant to rebut this presumption (*Abrha v Canada (Citizenship and Immigration),* 2020 FC 226 at para 17, citing *Adar v Canada (Citizenship and Immigration),* 1997 CanLII 16800 (FC). In my view, it was reasonable of the RPD to find that the Applicants failed to rebut the *prima facie* presumption that they are Kenyan citizens. Unlike in *Davidthamby Chery* and *Mansoor*, where there was sufficient evidence to otherwise justify the refugee claim, the Applicants in this case have not made out the central aspects of their claim: that they are citizens of Somalia, and not citizens of Kenya.

[33] Overall, I find that the RPD followed the process set out under section 109 of the *IRPA* and rendered a decision that is based on an internally coherent and rational chain of analysis that is justified in relation to the evidence (*Vavilov* at para 85).

B. *Reasonable Apprehension of Bias*

[34] The Applicants take issue with the RPD's finding that they dealt a "self-inflicted and fatal wound to their credibility" and the RPD's comment during the hearing that the Applicants "seemed to want to blame everything on their agent." The Applicants characterize this as the RPD "wagging his privileged, Western finger at the Applicants," and argue that the RPD member's un-judicious tone and manner demonstrate that this was not a fair hearing.

[35] The Respondent submits that the RPD's remarks do not meet the high threshold for a finding of real or perceived bias. If the Applicants felt the RPD panel was exhibiting bias during the hearing, it was incumbent on them to make a timely objection at the first opportunity. There is no evidence that they raised such an objection during the hearing and a failure to do so is a waiver of the issue (*Korki v Canada,* 2011 FCA 287 at para 9; *Thelusma v Canada (Citizenship and Immigration)*, 2018 FC 612 at para 31).

[36] The test of a reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would [they] think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly." (*Kankanagme v Canada (Minister of*

Citizenship and Immigration), 2004 FC 1451 at para 16, citing *Committee for Justice and Liberty v Canada (National Energy Board),* [1978] 1 SCR 369 at p. 394).

[37] While the RPD's decision admonishes the Applicants for their misrepresentation, I do not find that it rises to the level of unfairness or bias. The RPD's comments are in response to the fact that the Applicants maintained a dishonest story about their identity documents, their residence in Dubai, their use of aliases, and how they travelled to Canada. An allegation of bias is a serious accusation that challenges the integrity of the decision-maker. I do not find that the Applicants' allegations of bias are supported by material evidence demonstrating conduct that derogates from the standard (*Arrachch v Canada (Minister of Citizenship and Immigration),* 2006 FC 999 at para 20, citing *Arthur v Canada (Attorney General),* 2001 FCA 223).

V. **Conclusion**

[38] For the reasons above, I find that the RPD's decision is reasonable and that there was no apprehension of bias. I therefore dismiss this application for judicial review. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-6457-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6457-21
STYLE OF CAUSE:	IDDI YUNUS FADHILI AND NAJAT OMAR SORAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 31, 2022
JUDGMENT AND REASONS:	AHMED J.
DATED:	JULY 27, 2022

APPEARANCES:

Deryck Ramcharitar	FOR THE APPLICANTS
David Cranton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ramcharitar Law Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT