

Federal Court



Cour fédérale

Date: 20230426

Docket: IMM-4397-22

Citation: 2023 FC 607

Toronto, Ontario, April 26, 2023

PRESENT: Mr. Justice Diner

BETWEEN:

**SHAABAN MOHAMAD HASSAN
MOHAMED MOUSTAFA**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This Application seeks the judicial review of a decision by the Refugee Appeal Division [RAD] dated April 13, 2022 [Decision], confirming a decision by the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Judicial Review is granted for the following reasons.

I. Background

[2] The Applicant claims he was born in Egypt on November 9, 1971, into a traditional and religious family. He alleges he grew to doubt the fundamentalist Islamic teachings under which he was raised and as a result, became the target of the Muslim Brotherhood.

[3] The Applicant fled Egypt for the US in 1999. He initially opted not to apply for refugee protection and instead stayed in the US as a visitor, but eventually initiated a refugee claim in March 2009, which was rejected in June 2016.

[4] The Applicant came to Canada in August 2018 and made a claim for refugee protection. Upon entry, an officer from the Canada Border Services Agency [CBSA] seized four identity documents from the Applicant: (i) a US Social Security Card bearing the name “Shaaban H Mohamed”; (ii) an Employment Authorization Card from US Citizenship and Immigration Services also with the name “Shaaban H Mohamed” indicating he was born in Egypt on November 9, 1971; (iii) a Michigan driver’s licence in the name of “Shaaban Mohamde-Hassan Moustafa” born on November 9, 1971; and (iv) a purported copy of an old Egyptian passport, which was illegible and primarily in Arabic.

[5] The RPD heard the Applicant’s claim on September 1, 2021, and issued its decision on October 1, 2021, rejecting the claim on the basis that his identity was not established. The RPD did not assess his objective risk.

[6] The RPD concluded that none of the Applicant's identity evidence could support his claim of being Shaaban Mohamad Hassan Mohamed Moustafa, an Egyptian citizen, because none of the documents he submitted contained his full name or established his country of citizenship. The RPD noted that the Applicant was not able to provide an Egyptian passport, because it was stolen while the Applicant was in the US and the Egyptian consulate refused to replace it, because the Applicant could not provide a military service record. However, the RPD was not satisfied with the Applicant's explanation since he had not provided any documentation to confirm that he made an application for a replacement passport.

[7] After the hearing, the Applicant disclosed a copy of a birth certificate in the name of "Shaaban", citizenship "Egyptian". The RPD attributed low probative weight to the birth certificate because it was provided late, and was not satisfied that it established on a balance of probabilities the Applicant's identity or that he was a citizen of Egypt and no other country.

[8] The RPD noted that the Applicant claimed that the documentation from his US asylum application was stolen at the same time as his passport. However, the RPD was not satisfied with his efforts to obtain replacement copies, finding that the Applicant had not established that these documents were unavailable or that he made reasonable efforts to obtain them and drew an adverse credibility inference. The Applicant appealed the RPD decision to the RAD.

II. Decision Under Review

[9] On April 13, 2022, the RAD issued the Decision dismissing the Applicant's appeal. The RAD refused to admit the Applicant's new evidence submitted on appeal – additional documents

to establish his identity – because it failed to meet the criteria of subsection 110(4) of the IRPA. The RAD noted that it was clear at the hearing before the RPD that identity was the main issue, rejecting the explanation that he could not have been reasonably expected to provide documents, which may have helped to establish identity earlier, especially since he was represented by counsel.

[10] The RAD found that the RPD did not err in its analysis of the Applicant's US identity documents. It noted that while the Applicant asserted that many countries truncate long Arabic names, he did not provide any evidentiary basis for this assertion nor did he explain why the names stated on the documents were inconsistent. In any event, the RAD emphasized that the onus lies with the Applicant to establish his identity and it was not satisfied that the US documents or other supporting identity documents discharged that onus.

[11] The RAD further found that the RPD did not err in drawing a negative credibility finding due to the Applicant's failure to make reasonable efforts to obtain his US asylum documentation, noting that he did not produce those documents on appeal either, and absent US asylum documents, there was no evidence that he had established his identity in the US let alone any US asylum claim. Although the RAD did not draw a negative credibility finding based on the Applicant's failure to provide evidence of his attempts to obtain a replacement passport, it found that this did not assist the Applicant in establishing his identity.

[12] The RAD found that the RPD had not erred with respect to its analysis of the Applicant's birth certificate, since (i) he failed to provide a satisfactory explanation of his delay in providing

it; and (ii) the birth certificate did not establish that the Applicant is a current citizen of Egypt since Egyptian law does not allow for dual citizenship except where expressly authorized. The findings in relation to the birth certificate as well as the totality of the identity evidence were unreasonable.

III. Analysis

[13] The RAD's Decision is reviewable under the standard of reasonableness, as set out by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The RAD's Decision failed to meet this standard due to the following shortcomings.

A. *The RAD unreasonably assessed the Applicant's birth certificate.*

[14] The RAD gave the birth certificate minimal weight due to (i) credibility concerns raised by the timing of when it was produced (i.e., after the 2021 RPD hearing, when it had been issued in 2017 while the Applicant was residing in the US); and (ii) its limitations in establishing that the Applicant is currently a citizen of Egypt. The RAD agreed with the RPD that the birth certificate only established that the Applicant was a citizen of Egypt at birth, but did not establish that he is still a citizen since Egypt does not allow for dual citizenship. The RAD determined that these two concerns diminished the probative value of the document and thus made it insufficient to establish the Applicant's identity.

[15] First, with regard to the credibility concerns raised by the timing of the production of the birth certificate, I agree with the Applicant that the RAD should not have assigned it minimal

weight absent a finding of inauthenticity. Rather, the RAD noted, “it is trite law that late submission of documents can affect the weight attributed to them where no adequate explanation is provided for their late submission”, citing no authority. In doing so, the RAD made a masked authenticity finding, which this Court has found to be an error of law (*Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27 [*Oranye*]). The RAD unreasonably insinuated, without explicitly stating, that the birth certificate was not genuine because it was submitted late, and as a result assigned it little weight. As held by Justice Ahmed in *Oranye*, “[f]act finders must have the courage to find facts. They cannot mask authenticity findings by simply deeming evidence to be of “little probative value”” (para 27).

[16] I note that the RAD rejected the RPD’s finding that the Applicant provided no explanation for how he obtained the birth certificate: “[w]hile the RPD found that he did not explain how he obtained the birth certificate that was issued in September 2017, when he would have been in the USA, the RAD notes that he did in fact testify that his family members obtained it for him.” However, the RAD nonetheless unreasonably failed to make any adverse authenticity findings about the birth certificate before assigning it little weight (*Ogbebor v Canada (Citizenship and Immigration)*, 2022 FC 670 at para 21; *Mabirizi v Canada (Citizenship and Immigration)*, 2021 FC 1354 at para 18).

[17] Furthermore, the RAD problematically reasoned that while the birth certificate could establish that he was an Egyptian citizen at birth since his parents are Egyptian, it did not establish that he is now a citizen of Egypt since Egyptian law does not allow for dual citizenship except where expressly authorized. The problem with this finding was that there was no evidence

before either tribunal to suggest the Applicant had obtained the citizenship of any other country, thus it was unreasonable to require him to prove that he had not lost his citizenship, or, put differently, that he was not a citizen of another country (*Denis v Canada (Citizenship and Immigration)*, 2018 FC 1182 at para 53). Indeed, the 2017 birth certificate confirmed that, as recently as 2017, the Applicant was an Egyptian citizen, as were both his parents, which renders him a citizen by birth under Egyptian law as confirmed by the National Documentation Package Item 3.2 “*Law No. 26 of 1975 Concerning Egyptian Nationality*”. This document was referenced by the RAD (paragraph 24 of its Decision).

[18] Neither the RAD nor the RPD rebutted the presumption of genuineness conferred to the birth certificate as a document issued by a foreign government (*Ramalingam v Canada (Citizenship and Immigration)*, [1998] FCJ No 10 (QL) at para 5). Without doing so, the birth certificate was highly probative in establishing the Applicant’s identity. It was unreasonable for the RAD to require a standard of proof beyond that of a balance of probabilities, as there was no evidence to suggest the Applicant had ever obtained citizenship elsewhere.

B. *The RAD’s consideration of the evidence in its totality.*

[19] The Applicant submits the RAD adopted a piecemeal approach in its assessment of the Applicant’s identity evidence by assessing each document in isolation from one another and providing reasons why each document individually was insufficient to establish his identity. The Applicant argues that when considered in conjunction, all the identity evidence submitted to the RPD sufficiently established his identity on a balance of probabilities.

[20] The Respondent counters that the RAD's finding of inconsistency in the names found in the Applicant's various documents demonstrates that the tribunal did consider the identity evidence in its totality. I cannot agree. The RAD did not consider the identity evidence as a whole. Rather, it expected each one of the documents submitted by the Applicant to contain his full name, his date of birth, and his current country of citizenship, and gave little weight when a document did not have all of these elements. For instance, the RAD did not consider how:

- the Small Claims Petition corroborated the Applicant's claim that his Egyptian passport and other documentation from his US asylum application were stolen;
- his Michigan Driver's license corroborated his date of birth;
- his US Employment Authorization Card corroborated that his country of origin was Egypt.

These should have been analyzed in conjunction with the birth certificate.

[21] As held by Justice Manson in *Warsame v Canada (Citizenship and Immigration)*, 2019 FC 118 at paragraph 18, "[n]o piece of evidence should be dismissed simply because it is a single piece of the totality of the evidence provided. It is not appropriate to consider such evidence in isolation; rather one must consider the whole of the evidence purposively and contextually." Here, the RAD failed to do so. Rather, it dismissed each document individually on the basis that the Applicant's name did not appear in full, and that the truncated versions were inconsistent. After all, the Applicant's name, as is evident in the style of cause, consists of five names.

[22] Considering all the particular circumstances at hand, namely that the Applicant is a claimant who: has been out of his country of citizenship for 20 years; had most of his identity documents stolen while in the US; and has been unable to replace them because he cannot

provide his military service record (all of which the RAD accepted as credible), that the RAD failed to provide justifiable reasons for his failure to prove identity. It has an obligation to justify its outcome, particularly when the stakes are elevated (*Vavilov* at para 133). The fact that the tribunal simply would have preferred different identity documents such as US asylum paperwork or an Egyptian passport, does not make the Decision reasonable.

[23] In sum, I find that the RAD's assessment of the birth certificate and its failure to consider the identity evidence as a whole are sufficiently central issues to render the Decision unreasonable (*Vavilov* at para 100).

IV. Conclusion

[24] The Application for Judicial Review is allowed for the reasons explained above. No question of general importance arises.

JUDGMENT in file IMM-4397-22

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed.
2. No questions for certification arise.
3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4397-22

STYLE OF CAUSE: SHAABAN MOHAMAD HASSAN MOHAMED
MOUSTAFA v THE MINISTER OF CITIZENSHIP
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**REASONS FOR JUDGMENT
AND JUDGMENT:** DINER J.

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