Federal Court  Cour fédérale

**Date: 20230411**

**Docket: IMM-2949-21**

**Citation: 2023 FC 503**

**Ottawa, Ontario, April 11, 2023**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**MOHAMED ABDIWAHAAB FARAH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] The applicant claims to be Mohamed Abdiwahaab Farah, a citizen of Somalia who was born on December 20, 1997. After spending just over two years in Sweden, where he unsuccessfully sought refugee protection, the applicant entered Canada on December 31, 2017, and claimed refugee protection here. The Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") rejected the claim because the applicant had

failed to establish his personal identity and his identity as a Somali national. The applicant appealed this decision to the Refugee Appeal Division ("RAD") of the IRB but did not perfect the appeal. The RAD dismissed the appeal on January 10, 2020.

[2] On May 28, 2020, the applicant submitted an application for permanent residence in Canada on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). In support of the application, the applicant cited the hardship he would face in Somalia, the best interests of his child (a daughter who was born in Canada in October 2019), and his establishment in Canada.

[3] In a decision dated April 16, 2021, a Senior Immigration Officer with Immigration, Refugees and Citizenship Canada ("IRCC") refused the application. The officer found that the applicant had not presented sufficient H&C considerations to warrant an exemption from the usual requirement that permanent residence must be applied for from outside Canada. Among other things, relying in part on the decision of the RPD, the officer was not satisfied that the applicant had established his Somali nationality. Consequently, the officer was also not satisfied that the applicant would suffer hardship in Somalia.

[4] The applicant now applies for judicial review of this decision under subsection 72(1) of the *IRPA*. He argues that the officer's conclusion that he failed to establish his Somali nationality is unreasonable. As I explain in the reasons that follow, I agree with the applicant that the officer's approach to the RPD's decision is unreasonable. However, I am not persuaded that this calls into question the reasonableness of the officer's conclusion that the applicant had

not established his Somali nationality. Nor am I persuaded that this central finding is unreasonable in any other way. This application will, therefore, be dismissed.

## II. BACKGROUND

### A. *The Applicant's Narrative*

[5] The applicant claims to have been born in Kismayo, Somalia. He also claims to belong to the Ashraf clan, a minority clan that is subject to persecution in Somalia, including by members of the Marehan clan, a sub-clan of the majority Darod clan.

[6] According to the applicant, in 2006, Marehan clan members confiscated his father's farm land in Kismayo. Approximately a year later, while Al-Shabaab was controlling the area, the family was able to re-claim the property. However, in January 2015, members of the Marehan clan again tried to confiscate the property. The applicant's uncle was killed in the course of the dispute after he killed two members of the Marehan clan.

[7] The applicant claims to have been in Somalia at the time of these events. Believing that the conflict could not be settled by legal means, and fearing that he would be targeted for a revenge killing because he is the eldest of his father's children, the applicant decided to flee. The applicant also feared that he would be forcibly recruited by Al-Shabaab, which continued to be active in the area. He left Somalia for Kenya the very same day his uncle was killed. The applicant eventually made his way to Sweden, where he has extended family.

B. *The Claim for Protection in Sweden*

[8] Relying on the narrative set out above, on July 15, 2015, the applicant submitted an application for refugee protection in Sweden. He did so under the name Mohamed Abdullahi Gasshe with a date of birth of December 20, 1999. This made him 15 years of age when he submitted his claim for protection. The applicant did not present any documentary evidence to establish his age or personal identity.

[9] In a written decision dated October 2, 2017, the Swedish Migration Agency rejected the application for protection.

[10] The agency made four preliminary findings that are important for present purposes. First, it was not satisfied that the applicant had "made probable" his age or that he was even a minor when he sought protection. This finding was largely based on the results of a medical age assessment. That assessment determined (within a certain margin of error) that it was more likely than not that the applicant was over 18 years of age. The agency therefore treated the applicant's claim as that of an adult rather than a minor (which affected the manner in which the claim was assessed). It is apparent from the agency's reasons that the applicant had continued to maintain that the date of birth he originally provided (December 20, 1999) was correct notwithstanding the results of the medical age assessment or the agency's concerns about his truthfulness in this regard.

[11] Second, the applicant had limited knowledge of the clan to which he claimed to belong and he did not have a plausible explanation for why he did not know as much as he would reasonably be expected to know about his alleged clan. The agency therefore concluded that the applicant had not "made it probable" that he belonged to the Ashraf clan.

[12] Third, given the knowledge of Kismayo the applicant had demonstrated, the agency was satisfied that he had "made it likely" that Kismayo was his latest residence in Somalia. Accordingly, the agency assessed his case against the conditions prevailing in that city.

[13] Finally, since "there has been no indication" that the applicant is a citizen of any country other than Somalia, the applicant had "made probable" that he is a Somali citizen. The agency therefore treated Somalia as the country of reference. The decision does not otherwise explain the grounds for this determination or the evidence (if any) the agency relied on in making it.

[14] After making these preliminary findings, the agency rejected the claim for protection on its merits. It concluded that the applicant had failed to provide reliable evidence that he belonged to a clan that, as he alleged, was in a conflict over land with the Marehan clan that could not be resolved by legal means. Additionally, the applicant had not "made it likely" that he is at risk of being killed as a result of any such conflict with the Marehan clan. The agency therefore concluded: "For this reason the Agency finds that you have not made it likely that you risk being killed by the Marehan clan because of a blood feud at a return to Kismayo." For reasons that are not germane to the present application, the agency also found that there were no other grounds to grant the applicant status in Sweden.

[15] Having rejected his application for asylum, the Swedish Migration Agency directed the applicant to depart the country no later than four weeks after the decision became final.

C. *The Claim for Protection in Canada*

[16] The applicant departed Sweden for Canada on December 31, 2017, arriving at Pierre Elliott Trudeau International Airport in Montreal the same day. The applicant claims that, because he did not have any other travel document, he used his cousin's passport, which was in the name of Abdulkadir Gaashe. (The country that issued the passport is not stated anywhere in the record on this application.) According to the applicant, he destroyed the passport while *en route* to Canada. He made a claim for refugee protection on arrival in Canada.

[17] The applicant signed his original Basis of Claim ("BOC") form on February 6, 2018. In that form, he identified himself as Mohamed Abdullahi Gaashe with a date of birth of December 20, 1999. This is the same name and date of birth the applicant had used when he sought protection in Sweden.

[18] On April 20, 2018, the applicant signed a substantially amended BOC narrative. He now identified himself as Mohamed Abdiwahab Farah with a date of birth of December 20, 1997.

[19] The applicant explained in his amended narrative that, on the advice of the smuggler who had helped him get to Sweden, he gave Swedish authorities the incorrect date of birth of December 20, 1999, so that his claim would be processed as that of a minor. The applicant also explained that he had used the name Mohamed Abdullahi Gaashe in his application for asylum in

Sweden because that was the name his cousin had used for him in filling out paperwork when the applicant had had to be hospitalized there.

[20] To corroborate his claims that he is a Somali national and that he had now provided his correct name and date of birth, the applicant provided the RPD with what he claimed was his birth certificate. The name, date and place of birth on the document were the same as those the applicant was now maintaining were correct.

[21] The applicant's amended narrative set out essentially the same account as he had relied on in seeking protection in Sweden. As well, as did his original BOC, the amended narrative added that on October 14, 2017 (that is, shortly after the negative Swedish asylum decision) the applicant had learned that his mother, his brother, and his five sisters were all killed in an Al-Shabaab bombing in Mogadishu. The applicant stated in his original narrative that, as a result, he has no family in Somalia. In his amended narrative, however, he corrected this to state that he has no remaining family in Somalia except for his father. (The circumstances of the applicant's father are discussed further below.)

[22] At the hearing before the RPD, the applicant called Madina Omar Isse as a witness. Both the applicant and Ms. Isse testified that she is his mother's cousin. The two first met on February 7, 2018, after the applicant was in Canada, when Ms. Isse helped secure the applicant's release from immigration detention. The applicant lived in Toronto with her and her family until January 2019. Although the applicant called Ms. Isse as a witness to help establish his identity, she had no first-hand knowledge of who he is. Before meeting the applicant, she had only heard

about him from family members in Sweden. It was information they had provided that led her to believe that the applicant is who is said he was.

[23] It appears from the RPD's decision that, prior to the hearing, the Minister had provided the results of a biometric search conducted by US authorities. That information suggested that the applicant had once been included on a US refugee sponsorship application. In the application, the person said to be the applicant was identified as Mohamed Gashe Mohamed, a citizen of Ethiopia, with a date of birth of January 1, 1992. While these documents were evidently before the RPD, they are not part of the record on the present application. The RPD does not say when the visa application was made; however, in submissions in support of the H&C application, counsel for the applicant (who also appeared for him at the RPD) states that it was in 2008.

[24] At the RPD hearing, the applicant confirmed that he is the individual referred to in the US visa application. He testified that he had become separated from his family when they were fleeing Kismayo and a friend of his mother's had taken him with her to Ethiopia. He was about nine or 10 years old at the time. When this woman later applied for a US visa along with other members of her family, she included the applicant on the application. The applicant surmised that she had given his nationality as Ethiopian, despite the fact that he is Somali, because others on the application were Ethiopian. It is unclear from the record on this application how or when the applicant eventually found himself back in Somalia.

D. *The Decision of the RPD*

[25] The RPD member concluded that the applicant had not met his burden of establishing, on a balance of probabilities, his personal identity and his nationality as a Somali citizen. The member therefore found that the applicant is neither a Convention refugee nor a person in need of protection.

[26] In determining that the applicant had not established his identity, the RPD member made the following key findings concerning the evidence before her:

- The Somali birth certificate provided by the applicant is fraudulent. This finding was based on, among other things, obvious defects on the face of the document and the improbability that an official Somali document would be written partly in English, as the birth certificate was.

- The applicant's explanation for why his nationality was listed as Ethiopian in the US sponsorship application when the applicant denies that this is the case is not credible.

- While the Swedish Migration Agency had accepted that the applicant's nationality is Somali, it does not explain the basis for this conclusion apart from stating that there was no indication that the applicant had any other nationality. In the present case, on the other hand, there is an indication (in the US sponsorship documents) that the applicant is Ethiopian. In any event, the Swedish determination is not binding on the RPD.

- The applicant had admitted to using four different names. He maintained that, one way or another, they were all his family names. In particular, he had used the name "Gaashe"

in Sweden because it is a family nickname. The applicant's explanation for his use of all the different names is not credible.

- Ms. Isse's evidence has no probative value because she had no first-hand knowledge of who the applicant is.

[27] Since the failure to establish identity was determinative of the claim for protection, the RPD did not address the credibility of the applicant's account of the alleged blood feud with members of the Marehan clan over his father's property.

[28] As noted above, the applicant appealed the RPD's decision to the RAD but he failed to perfect the appeal and it was dismissed accordingly.

E. *The H&C Application*

[29] The applicant submitted his application for permanent residence on H&C grounds on May 28, 2020. He identified himself in the application as Mohamed Abdiwahaab Farah and stated that he was born in Kismayo, Somalia on December 20, 1997. (In the record on this application, the applicant's second name is sometimes spelled Abdiwahab. Nothing appears to turn on this.) The applicant did not provide an affidavit or any other form of personal statement in support of the H&C application. His counsel provided extensive written submissions and supporting documentary evidence to IRCC on January 16, 2021.

[30] The H&C application was based primarily on the hardship the applicant would face in Somalia. The applicant also relied on the best interests of his daughter and his establishment in Canada.

(1) Hardship in Somalia

[31] Broadly speaking, the applicant relied on two forms of hardship he would suffer in Somalia. One was the risks he would face due to the dispute with members of the Marehan clan over his father's land. The other arose from conditions in Somalia, including social instability, inter-clan conflicts, economic hardship, and widespread violence.

[32] Both of these forms of hardship were premised on the applicant being a citizen of Somalia. Counsel for the applicant therefore urged the H&C officer to find that the applicant had established his Somali nationality on a balance of probabilities.

[33] Counsel noted that, given the absence of a stable civil administration in Somalia since 1991, it is difficult for individuals from there to obtain official identification documents. The applicant therefore sought to establish his Somali nationality with the following documents: (a) his birth certificate (this is the same document the applicant had provided to the RPD); (b) an identity document for Mohamed Abdullai Gaashe issued by the Swedish Migration Agency bearing the applicant's photograph and indicating his Somali nationality; (c) a copy of the decision of the Swedish Migration Agency finding that the applicant is a Somali citizen; (d) a letter dated October 11, 2019, from the Loyan Foundation; (e) a letter dated January 6, 2020,

from the Somali-Canadian Association of Etobicoke; and (f) a document identified in counsel's submissions as "Fathers [*sic*] ID document from Somalia."

[34] The letter from the Loyan Foundation states that a representative of the organization had conducted a community verification assessment, which is written in the Somali language script, as well as an oral interview with the applicant in the Somali language. Both exams "are based on information about Somalia including its geography, history, heritage, sociopolitical and the current political situation, the individual's clan lineage and culture." The letter states that, based on an assessment of the applicant's exam results by a "professional Somali settlement counselor," the organization can confirm that the applicant is a national of Somalia and that he belongs to the "Asharaf" clan.

[35] The letter from the Somali-Canadian Association of Etobicoke, which is signed by the Executive Director of the organization and a legal support worker, states that they had met with and interviewed the applicant to verify that he is of Somali origin. The letter states that the applicant "displayed an ability to speak the Somali language, and demonstrated exceptional knowledge of his clan, the geographical area of Somalia and the district of the city in which he lived." The letter also states that the applicant had brought with him two individuals of Somali origin to confirm his identity. One was Madina Omar Isse, who "is his Aunt and knows him; she testifies that the individual we were interviewing is Mohamed Abdiwahaab Farah." (This is the same person who testified at the RPD hearing.) The other was Abdisalan Farah Gas, who "states that he [*sic*] known Mohamed in the last two years." Both of these individuals also signed the letter. The letter states that these two individuals had indicated a willingness to "attest under

oath that they know Mohamed" so they were referred "to the local legal system to get affidavits." No such affidavits were provided with the H&C application.

[36] The document said to be an identification document for the applicant's father is not in English and no translation was provided. There is no information concerning what this document is, when the applicant obtained it, or how. Apart from being listed along with the other "identity documents" that were being provided, counsel's submissions do not address the provenance, authenticity, or relevance of this document in any way.

[37] I pause here to note that the Schedule A Background/Declaration form the applicant signed in May 2020 in connection with his H&C application states that his father is deceased. No date of death is provided. On the other hand, the Additional Family Information form the applicant also completed in connection with his H&C application gives his father's date of death as October 13, 2017 (that is, the day before the rest of his family was killed in Mogadishu). There is no explanation in the record for why, as noted above, the applicant stated in his amended BOC narrative (which he signed on April 20, 2018) that his father was still alive.

[38] Turning to the Swedish Migration Agency documents, counsel for the applicant argued that, given the evidence that Somalis often use family nicknames on official documents, and given the applicant's testimony before the RPD that "Gaashe" is his family's nickname, the fact that the applicant had used the name Mohamed Abdullahi Gaashe in his refugee claim in Sweden reasonably suggests that his true name is Mohamed Abdiwahab Farah. Counsel for the applicant

also relied on the determination by the Swedish Migration Agency that the applicant is a national of Somalia in support of the contention that the applicant is, in fact, Somali.

[39] A copy of the RPD's decision was also provided with the H&C application. Counsel for the applicant acknowledged that the RPD had rejected the applicant's refugee claim because he had not established his identity. Counsel submitted, however, that the RPD's decision was flawed and that the panel had made errors of law and fact.

[40] More particularly, counsel challenged the RPD's conclusion that the applicant had not established his Somali nationality on the following grounds:

a) The RPD "came to an unfair assessment of his identity and credibility without having considered the totality of the evidence." The RPD had erred by refusing to accept a letter from the applicant's cousin in Sweden, which had been disclosed late, and post-hearing disclosure regarding the recent killing of a Somali-Canadian journalist in Kismayo.

b) The RPD breached procedural fairness by concluding that the birth certificate is fraudulent without first giving the applicant an opportunity to address the member's concerns about the authenticity of the document. Had the member done so, the applicant would have explained that the document is an English translation of an original Somali document that he had once had but that he had now misplaced. Contrary to what the RPD erroneously believed, the document was not the original birth certificate, nor was it issued in English by Somali authorities. Furthermore, the spelling errors in the document "could have likely been explained because it is merely a translation from the Somali language," according to counsel.

c) The applicant's explanation for how he came to be included on the US visa application and why his nationality was listed as Ethiopian was credible and should have been accepted by the RPD. He was only 10 years old at the time and it would have been the adults around him, not the applicant, who were responsible for completing the paperwork. As well, the applicant could not provide many details about the entire incident "because he was simply too young and was likely traumatized due to the separation from his family."

d) The RPD erred in its assessment of the evidence of the applicant's identity witness, Madina Omar Isse. She had testified with respect to the applicant's correct name, date of birth and nationality. She had provided "spontaneous testimony" that was "largely consistent" with the applicant's. In spite of this, on the basis of a "microscopic" analysis that "focused on peripheral issues," the RPD found that she was not credible. As well, the RPD erred in finding that Ms. Isse failed to provide any documents establishing that she is from Mogadishu when in fact she had provided her Canadian passport, which states her place of birth as Mogadishu.

[41] Regarding the particular hardship the applicant faced in Somalia as a result of the dispute over his father's land and at the hands of Al-Shabaab, counsel simply reiterated the same narrative as the applicant had relied on in his Swedish and Canadian claims for refugee protection. The original and amended basis of claim forms were submitted with the H&C application.

[42] Finally, counsel also provided voluminous documentary evidence concerning general country conditions in Somalia. There is no need to summarize it here.

(2) Best Interests of the Applicant's Daughter

[43] Counsel for the applicant submitted that the applicant is the father of a daughter who was born in Calgary, Alberta in October 2019. According to counsel, the applicant's relationship with his daughter's mother ended before the child was born and the mother had refused to include the applicant's name on the child's birth certificate (which was provided). The applicant lives in Toronto and his daughter lives in Calgary. According to counsel, the applicant sees his daughter over social media and video chats and this is how he has kept in contact with her. Counsel did not say how frequently this occurs. Nor did counsel say whether the applicant and his daughter had ever met in person or whether he provides any financial support for her or her mother. Nevertheless, counsel submitted that it would be in the applicant's daughter's best interests for the applicant to remain in Canada and not have to return to Somalia so that "he can be part of [her] life."

(3) Establishment in Canada

[44] Counsel submitted that the applicant's establishment in Canada would be lost if he had to return to Somalia, compounding the hardship of having to live under the adverse conditions in that country.

[45] Counsel submitted that the applicant "is presently working and earning an income." He "has been paying his taxes and has been contributing to the Canadian economy." Counsel also submitted that the applicant is not in receipt of social assistance. Several pay stubs, banking records, and the applicant's T-4 for 2019 were provided. However, the most recent pay stub was for the period from February 9 to 15, 2020, and the most recent banking record was for the month of January 2020. In his Schedule A Background/Declaration form, which he completed in May 2020, the applicant stated that he had been unemployed since April 2020 due to a workplace injury and the COVID-19 pandemic. Despite the fact that the submissions in support of the H&C application were not provided until January 2021 and the decision was not rendered until April 2021, no more up to date information about the applicant's personal circumstances was provided.

[46] Counsel also submitted that the applicant "has been involved in the Somali community in Toronto as is evidenced in the letters which he provided as part of this application." This would appear to be a reference to the letters from the Loyan Foundation and the Somali-Canadian Association of Etobicoke, described above.

## III. DECISION UNDER REVIEW

[47] The officer concluded that the applicant had not presented sufficient H&C considerations "to warrant an exemption from the immigrant visa requirement." In reaching this conclusion, the officer made the following key findings concerning alleged hardship in Somalia:

- The applicant's account of the dispute with members of the Marehan clan over his father's land describes "essentially the same events articulated at his refugee hearing."

The officer states: “While I am not bound by the findings, the Refugee Protection Division (RPD) is a decision making body who are experts in the determination of refugee claims. I note that the RPD refused the applicant’s claim as a result of identity and credibility issues. I therefore give considerable weight to the findings of the Board.”

- Counsel had submitted that the RPD’s decision was flawed and the panel made errors of fact and law. The officer states: “I find that counsel’s critique with respect to the findings of the Board does not lie within the purview of the H&C application. Rather, it lies in the jurisdiction of the Federal Court.”

- For the reasons given by the RPD for finding the birth certificate to be fraudulent (which are quoted at length), the officer gives the birth certificate no weight.

- The officer gives the letter from the Somali-Canadian Association of Etobicoke no weight because the statement in the letter that Ms. Isse is the applicant’s aunt contradicts the evidence at the RPD that she is the applicant’s mother’s cousin. As well, as noted by the RPD, she has no first-hand knowledge of who the applicant is.

- The letter from the Loyan Foundation “does not establish how they concluded the applicant’s identity by conducting exams and by having an oral interview with a Settlement Counsellor.”

- Based on “the totality of all of these documents” (i.e. the birth certificate, the letter from the Somali-Canadian Association of Etobicoke, and the letter from the Loyan Foundation), the officer “do[es] not find they establish the applicant’s identity.”

- There are sources for obtaining official Somali identity documents and the applicant has not made any effort to obtain government identification from Somali authorities despite having had ample opportunity to do so.

- On the basis of these findings, the officer concludes that the applicant has not met the onus on him to demonstrate on a balance of probabilities his identity as a Somali national. Consequently, the officer was not satisfied that the applicant is a national of Somalia. This factor "weighs heavily" in the assessment of the application. (The officer does not comment on whether the applicant had provided his correct name.)

- The applicant had provided "a plethora" of documentation relating to country conditions in Somalia but, since he had not established his connection to that country, the documents were assigned little weight.

[48] The officer also concluded that the applicant's length of time and establishment in Canada weighed only minimally in his favour. The applicant had attained "some degree of integration into Canadian society" since he arrived on December 31, 2017. While he has been employed from time to time, it is "unclear how the applicant is supporting himself at the present time." The applicant had demonstrated that he is capable of relocating and adapting to life in a new country. The officer was not satisfied that the applicant would be unable to return to Somalia (his country of birth) and achieve similar results, despite the challenges he might face given conditions there. As well, the applicant has extended family in Somalia who can assist him with re-integration there. The officer states: "I acknowledge that there will be some difficulties having to re-adapt, however, I am not satisfied that his establishment is so significant

in Canada. Other than the fact that the applicant worked and is currently studying English, I have little information about his financial situation, his assets, friendships and integration into the community. I give minimal weight to his establishment in Canada."

[49] Finally, the officer was not satisfied that there was sufficient evidence that the applicant's daughter's best interests "will be negatively impacted" if the applicant were required to leave Canada and return to Somalia. While counsel submitted that the applicant would be unable to support his daughter and her mother emotionally or financially if he were to return to Somalia, there was insufficient evidence that he is doing so now. Similarly, the applicant sees his daughter over social media and video chats and he could continue to communicate with her in the same way from Somalia. Given the "limited evidence" regarding the child's best interests, the officer concluded that this factor is "not determinative."

[50] After carrying out a cumulative assessment of the evidence submitted and the factors advanced by the applicant, the officer concluded that relief from the requirement that the applicant apply for permanent residence from abroad was not warranted.

## IV. STANDARD OF REVIEW

[51] It is well-established that the merits of an H&C decision should be reviewed on a reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44). That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[52] 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). For a decision to be reasonable, a reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Vavilov* at para 102, internal quotation marks and citation omitted). On the other hand, "where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable" (*Vavilov* at para 136).

[53] When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125). As well, it follows from the discretionary nature of decisions under subsection 25(1) of the *IRPA* that generally the administrative decision maker's determinations will be accorded a considerable degree of deference by a reviewing court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4). At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review (*Vavilov* at para 13).

[54] The onus is on the applicant to demonstrate that the officer's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are

sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

## V. ANALYSIS

### A. *Preliminary Issue – Is the Applicant's Affidavit Admissible?*

[55] In support of this application for judicial review, the applicant provided an affidavit sworn on June 30, 2021. The respondent urges the Court to disregard the affidavit as it impermissibly supplements the record. The respondent also submits that many of the statements in the affidavit are argumentative and stray improperly into submissions on the merits of the application.

[56] I agree with the respondent in both respects.

[57] There is no need to itemize all the ways in which the affidavit is argumentative. There are many. The affidavit should have been limited to facts within the personal knowledge of the applicant: see Rule 81(1) of the *Federal Courts Rules*, SOR/98-106.

[58] To the extent that the affidavit states facts, the applicant adds at least three things that supplement the record that was before the administrative decision maker. First, the applicant states that for him to obtain any official Somali identification documents at this stage, it would be necessary to meet consular officials face to face at the Somali embassy in Washington, DC, which he has been unable to do. Second, as a matter of cultural custom, he refers to Ms. Isse (an

older woman to whom he is related) as “aunt”. Third, the community verification assessment performed by the Loyan Foundation was “quite rigorous.” The applicant does not elaborate on what he means by this.

[59] None of this information was before the H&C officer. It is all responsive to adverse findings made by the officer.

[60] New evidence is generally not admissible on judicial review (*Sharma v Canada (Attorney General)*, 2018 FCA 48 at paras 7-9). None of the recognized exceptions to this general rule (see *Sharma* at para 8) apply to the new evidence provided by the applicant. While the list of exceptions is not closed (*Perez v Hull*, 2019 FCA 238 at para 16), the applicant has not attempted to justify the admission of this new evidence on any other basis.

[61] Accordingly, I will disregard not only those parts of the applicant’s affidavit that are argumentative but also those parts that add new information that was not before the officer.

B. *Is the H&C Decision Unreasonable?*

(1) Introduction

[62] It is axiomatic that a person seeking status in Canada must establish their identity – in simple terms, who they are and where they are from. Personal identity “remains the cornerstone of Canada’s immigration system. Identity establishes the uniqueness of an individual. It is what sets a person apart and differentiates him or her from all others” (*Terganus v Canada*

*(Citizenship and Immigration)*, 2020 FC 903 at para 23). This information is necessary for Canadian authorities to make accurate admissibility determinations. A person's identity can also be an essential element of the basis on which they seek status in Canada. For the applicant, this was the case in both his claim for refugee protection and his H&C application.

[63] Identity is at the "very core of every refugee claim" (*Hassan v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 459 at para 27). It is "a preliminary and fundamental issue" (*Terganus* at para 22). Unless the claimant's personal identity is established, there can "be no sound basis for testing or verifying the claims of persecution or, indeed for determining the Applicant's true nationality" (*Jin v Canada (Minister of Citizenship and Immigration)*, 2006 FC 126 at para 26; *Liu v Canada (Citizenship and Immigration)*, 2007 FC 831 at para 18; *Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 at para 61). Thus, any person claiming refugee protection must establish their identity on a balance of probabilities (*Teweldebrhan v Canada (Citizenship and Immigration)*, 2015 FC 418 at para 8). At a minimum, this encompasses their personal identity and their nationality (or lack of nationality, as the case may be). Should they fail to establish these things, this will be fatal to their claim for protection (*Terganus* at para 22). As we have seen, the applicant's refugee claim was rejected because he failed to establish his personal and national identity.

[64] Identity was also a core issue in the applicant's H&C application. His submissions concerning the hardship he would face if he had to leave Canada were all premised on his being a national of Somalia.

[65] As is well-known, the discretion to make an exception provided for by subsection 25(1) of the *IRPA* provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19). Whether relief is warranted in a given case will depend on the specific circumstances of that case (*Kanthasamy* at para 25). Consequently, the onus is on an applicant to present sufficient evidence to warrant the exercise of such discretion in his or her case (*Kisana v Canada (Citizenship and Immigration),* 2009 FCA 189 at para 45; *Owusu v Canada (Minister of Citizenship and Immigration),* 2004 FCA 38 at para 5).

[66] In the applicant's case, conditions in Somalia were relevant to his H&C application only if he could establish his identity as a national of that country (there being no other reason to think that he would be required to go there if he had to leave Canada).

(2) The Officer's Reliance on the RPD's Decision

[67] The officer found that the applicant had not established his identity as a national of Somalia. In doing so, the officer relied, in part, on the RPD's finding that the applicant had not established his Somali nationality. While noting that the RPD's findings concerning the applicant's identity and credibility are not binding, the officer nevertheless gave them "considerable weight" in view of the expertise of that body in the determination of refugee claims. The applicant contends that the officer's reliance on the RPD's findings is unreasonable. As I have already stated, while I agree that the way in which the officer approached the RPD's decision is unreasonable, I do not agree that this calls into question the overall reasonableness of the officer's assessment of the evidence of the applicant's national identity or the ultimate conclusion that the applicant had not established his Somali nationality.

[68] I begin by observing that the officer is correct that the RPD's findings on the applicant's identity and credibility are not binding on the officer. However, it is important to be clear about what, exactly, this means.

[69] In reaching its ultimate conclusion that the applicant is not a Convention refugee or a person in need of protection, the RPD made subsidiary determinations on questions of fact or mixed fact and law – including whether the applicant had established his Somali nationality on a balance of probabilities. While a similar question arises in the applicant's H&C application, it is not the same question. The question the RPD answered was whether, *in that proceeding*, the applicant had established his Somali nationality on a balance of probabilities. The question before the H&C officer was whether, *on the record before the officer*, the applicant had established his Somali nationality on a balance of probabilities.

[70] The two questions should not be conflated. That being said, in the present case, the questions are not unrelated. In his H&C application, the applicant relied on some of the same evidence concerning his identity as he had relied on before the RPD. Thus, it was not unreasonable for the officer to consider the RPD's assessment of that same evidence as it related to the question of the applicant's identity.

[71] As the officer also understood, the RPD's findings were not binding in the sense that it was open to the officer to reach a different conclusion, even with respect to the same evidence as was considered by the RPD. Indeed, to be clear, the officer was obliged to conduct their own

assessment of all the evidence (including evidence that had also been considered by the RPD). The H&C officer did this.

[72] When conducting that assessment, it was not unreasonable for the officer to consider that the expertise of the RPD is a relevant factor when determining how much weight to give to its findings concerning the applicant's identity and the evidence the applicant had provided to establish this (which, to repeat, overlapped with the identity evidence the applicant provided on his H&C application). However, with respect to both the evidence that was before the RPD and the ultimate question of whether the applicant had established his identity as a Somali national, the officer had to be open to being persuaded to reach a different conclusion. Such persuasion can be – but need not be – based on evidence that was not considered by the RPD. It can also involve simply trying to persuade the officer that the RPD made an erroneous finding of fact by drawing unreasonable, untenable or illogical inferences from the evidence that it considered.

[73] It is in this regard, in my view, that the officer fell into error in stating that the arguments made by the applicant's counsel against the RPD's findings were not within the officer's "purview" but, rather, could only be considered by the Federal Court.

[74] In fairness to the officer, the arguments of counsel (set out in paragraph 40, above) were cast very much like submissions on an application for judicial review. Moreover, many of the issues counsel raised (such as whether the RPD breached procedural fairness or erred in refusing to admit evidence) were entirely irrelevant to the issues the officer had to determine. Nevertheless, despite the unhelpful way in which the submissions were framed, the officer

should have recognized that the applicant was raising at least some potentially valid reasons why the officer should give limited if any weight to the RPD's finding concerning the applicant's identity and its assessment of the evidence bearing on that question. It was unreasonable for the officer to dismiss the applicant's submissions in their entirety as not being within the officer's purview.

[75] I am not persuaded, however, that this calls into question the overall reasonableness of the officer's conclusion that the applicant had not established his Somali nationality. Properly considered, none of the applicant's challenges to the RPD's decision reasonably could have altered the officer's conclusion that the RPD's findings concerning the applicant's identity were deserving of "considerable weight." Furthermore, as I will discuss below, the officer's assessment of the additional identity evidence the applicant provided in his H&C application as well as the cumulative effect of all of the identity evidence are also reasonable.

(3) The Identity Evidence Before the RPD

[76] Looking first at the birth certificate, and ignoring the irrelevant issue of whether the RPD breached the requirements of procedural fairness, counsel did raise a potentially relevant consideration. This was that the officer should not, as the RPD did, conclude from the fact that the birth certificate is partly in English that it is fraudulent. According to counsel's submission, the document is partly in English because it is not the applicant's original birth certificate; rather, it is an English translation of the original (which is now lost).

[77] While this is a potentially valid reason for reaching a different conclusion regarding the value of the birth certificate as evidence of the applicant's nationality, the necessary factual foundation for this argument is entirely absent. On its face, the document bears stamps and signatures that suggest that it is an original document issued by Somali authorities. There is nothing suggesting that it is actually a translation of another document. As well, there is no declaration from the translator confirming the accuracy of the translation. Crucially, the applicant did not provide any evidence to support his counsel's assertions, including when or why he obtained the translation. On a central and contentious matter such as this, the submissions of counsel alone (which are all that support this argument) would not give the officer a reasonable basis to conclude that the fact that the document is partly in English is not a valid reason to find that it is fraudulent. Thus, while the officer erred in failing to consider this argument, this does not affect the reasonableness of the officer's adoption of the RPD's findings concerning the birth certificate (including that it is likely fraudulent).

[78] In this connection, I would note that the applicant is correct that the officer does not expressly adopt the RPD's findings concerning the birth certificate. Nevertheless, I do not agree that this calls the transparency and intelligibility of this determination into question. This part of the decision cannot be read otherwise than that the officer was adopting as their own the RPD's analysis of the birth certificate in its entirety. That analysis, I would also add, is entirely reasonable.

[79] Second, while the letter from the Somali-Canadian Association of Etobicoke was not before the RPD, its contents do overlap with the evidence considered by the RPD. The officer

gave the letter no weight because it relied, in part, on information from Ms. Isse (information that was also before the RPD). The officer made this determination for two reasons. One was that Ms. Isse is identified in the letter as the applicant's aunt but she had identified herself at the RPD hearing as the applicant's mother's cousin. The officer found this to be a material discrepancy that cast doubt on the reliability of the contents of the letter.

[80] Despite presumably knowing about this discrepancy in the information he was providing in support of his H&C application, the applicant made no attempt to address it by way of evidence or submissions. While he now attempts to do so on judicial review (by stating in his affidavit that, being an older lady who is related to him as his mother's cousin, he also refers to her as "aunt", so really there is no discrepancy), as I have already explained, this evidence comes too late. On the record before the officer, the officer's assessment of the discrepancy is not unreasonable.

[81] The other reason the officer gave the letter no weight was that, in any event, Ms. Isse has no first-hand knowledge of the applicant's identity. The RPD had reached the same conclusion about her evidence. In the H&C submissions, the applicant attempted to get around the RPD's assessment of this evidence but the submissions simply miss the point. The applicant's counsel described Ms. Isse's testimony before the RPD as credible. Counsel also criticized the RPD's findings concerning her testimony as "microscopic" and inconsistent with the evidence. However, even if true, none of this matters. The RPD found that the fundamental problem with Ms. Isse's evidence was that she had no first-hand knowledge of the applicant's identity. In the absence of any evidence suggesting otherwise (and there was none), it was not unreasonable for

the H&C officer to reach the same conclusion as the RPD about Ms. Isse's identification of the applicant: it had no probative value because she had no first-hand knowledge of who he is.

[82] Third, counsel argued that the RPD erred in refusing to admit late disclosure (a letter from the applicant's cousin in Sweden) and post-hearing disclosure (a news report concerning the death of a Somali-Canadian journalist in Kismayo). Once again, whether the RPD erred or not is irrelevant to the issues the H&C officer had to determine. The RPD's refusal to accept this evidence did not in any way preclude the officer from considering it if it were to be provided in support of the H&C application. In fact, the applicant did provide the news report about the death of the journalist. While that report may be relevant to conditions in Somalia, it has nothing to do with the issue of the applicant's identity. On the other hand, one might have thought that the letter from the applicant's cousin in Sweden could potentially be relevant to the issue of the applicant's identity; however, it was not provided with the H&C application. In the absence of that evidence, there was nothing the officer could make of it, whether or not the RPD erred in refusing to admit it. As a result, the officer's failure to consider the argument that the RPD had erred in rejecting relevant evidence could not possibly affect the reasonableness of the officer's ultimate finding concerning the applicant's identity.

[83] Finally, counsel for the applicant urged the officer to come to a different conclusion than the RPD regarding the credibility of the applicant's account of how his nationality came to be listed as Ethiopian in the US visa application. The problem with this argument, however, is that this account was never put directly before the officer. Although it is summarized in the RPD's decision, the applicant's actual testimony in that proceeding is not provided. Counsel purports to

summarize this evidence in submissions, and provides additional reasons why it should be found credible, but, once again, the submissions of counsel are no substitute for actual evidence on such a central and contested issue.

[84] In the complete absence of evidence from the applicant himself, there is no reasonable basis for the officer to have found that, contrary to the view of the RPD, the applicant's explanation for how he came to be included on the US visa application and identified as a national of Ethiopia is credible. In any event, this issue is largely if not entirely theoretical. Unlike the RPD, the officer did not expressly rely on the fact that the applicant had once been identified as a national of Ethiopia in concluding that he had not established that he is a national of Somalia.

[85] There is one additional item relating to the applicant's identity that was before both the RPD and the officer – the decision of the Swedish Migration Agency. The applicant relied on this document as corroboration of his identity but the officer does not address it anywhere in the decision under review. Given the importance of the issue of identity, it would have been better if the officer had addressed this evidence explicitly. However, the failure to do so does not undermine the reasonableness of the officer's conclusion that the applicant had not established his national identity.

[86] The RPD discussed the information from Sweden in its decision and found that it had no probative value on the issue of the applicant's identity. In the context of the officer's reasonable conclusion that the RPD's findings concerning the applicant's identity were entitled to

substantial weight, the officer must have agreed with the RPD that the Swedish agency's determination that the applicant is a national of Somalia was neither binding nor probative – findings which, I would suggest, are also entirely reasonable. The officer's failure to state this expressly does not undermine the transparency or intelligibility of the officer's ultimate conclusion that the applicant had not provided sufficient evidence to establish his national identity.

[87] In sum, it was unreasonable for the officer to categorically refuse to consider the applicant's critique of the RPD's identity finding. However, in the absence of the necessary supporting evidence, the applicant's arguments would not reasonably be capable of persuading the officer to give less than considerable weight to the RPD's findings (as the officer did). As the respondent submits, on the record the applicant put before the officer, it was simply impossible for the officer to evaluate the applicant's critique of the RPD's decision.

[88] Before leaving the subject of the officer's reliance on the RPD's decision, there is one other matter to address.

[89] As set out above, the officer states: "I note that the RPD refused the applicant's claim as a result of identity and credibility issues. I therefore give considerable weight to the findings of the Board." The officer's reliance on the RPD's "findings" on "credibility issues" is potentially problematic for two reasons. One is that the RPD's credibility findings were limited to the applicant's evidence concerning his personal and national identity; the RPD did not address the credibility of the applicant's account of the alleged blood feud with members of the Marehan

clan over his father's property. However, the officer appears not to have understood this, observing at one point that "the applicant has provided minimal objective evidence in his H&C application pertaining to his alleged past experiences with the Marehan clan or sufficient objective evidence to overcome the RPD's findings." The RPD made no findings in this regard. Nevertheless, given that the officer's reasonable determination that the applicant failed to establish his national identity is determinative, this error is inconsequential.

[90] The other way in which the officer's reliance on the RPD's credibility findings is potentially problematic is that those findings were made with respect to the applicant's testimony *in that proceeding*. Depending on what new or additional evidence was before an H&C officer, the findings of an earlier decision maker about the credibility of the evidence considered by that decision maker may have little or no probative value for the issues to be determined by the subsequent decision maker. However, this question does not arise in the present case because, apart from the new documentary evidence relating to his identity, the applicant relied on the same evidence as he presented at the RPD. The applicant did not establish any valid reasons to doubt the soundness of the RPD's adverse findings concerning the credibility of his testimony concerning his identity. In the absence of any new evidence from the applicant himself, it was entirely reasonable for the H&C officer to give those findings considerable weight.

(4) The New Identity Evidence

[91] I turn now to the new identity evidence the applicant provided in his H&C application. This consisted of the balance of the letter from the Somali-Canadian Association of Etobicoke,

the letter from the Loyan Foundation, and something that was said to be the applicant's father's identification document.

[92] I agree with the applicant that the officer should have said more about the letter from the Somali-Canadian Association of Etobicoke before giving it no weight. This is because, in addition to the information from Ms. Isse (which was problematic for the reasons I have already addressed), the letter's conclusion that the applicant is "an individual of Somali descent" was also based on information from a second individual, Abdisalan Farah Gas, as well as the applicant's ability to speak the Somali language and his demonstration of "exceptional knowledge of his clan, the geographical area of Somalia and the district of the city in which he lived."

[93] Nevertheless, in the context of the decision as a whole, one can understand why the officer gave these parts of the letter no weight as well. With respect to Mr. Gas, the letter simply states that he has known the applicant "in the last two years." In the absence of any information suggesting otherwise, he appears to have no first-hand knowledge of the applicant's Somali nationality. Consequently, his "confirmation" of the applicant's identity, like Ms. Isse's, would have no probative value. As for the applicant's ability to speak the Somali language and his knowledge of certain matters relating to Somalia, the officer's valid concern about the value of the Loyan Foundation's confirmation of the applicant's Somali nationality (the letter "does not establish how they concluded the applicant's identity by conducting exams and by having an oral interview") applies equally to the opinion of the Somali-Canadian Association of Etobicoke.

[94] The officer does not specifically mention the document purported to be the applicant's father's identification. Once again, given the importance of the issue of the applicant's identity, it would have been better if the officer had addressed this document in the decision. Nevertheless, I do not agree with the applicant that the failure to do so renders the adverse identity finding unreasonable. The document was not in English. There was no information as to what it was or where it came from. It was not mentioned anywhere in counsel's extensive written submissions. Contrary to the applicant's submission on review, the document does not "speak for itself." In short, there was no basis on which the officer could reasonably have given it any probative value with respect to the question of the applicant's identity.

(5) Overall Assessment of the Identity Evidence

[95] The officer gave the RPD's findings concerning the applicant's identity and the identity evidence provided in his application for refugee protection considerable weight. As well, independently of the RPD's findings, the officer assessed the additional evidence submitted by the applicant to establish his identity as a Somali national (some items expressly, others implicitly). As is required, the officer assessed all of the identity evidence cumulatively (see *Warsame v Canada (Citizenship and Immigration)*, 2019 FC 118 at para 18). I would not necessarily agree that it was reasonable for the officer to give the community verification assessments no probative value (see my discussion of this type of evidence in *Yusuf Adan v Canada (Citizenship and Immigration)*, 2022 FC 1383 at para 60 as well as the authorities cited therein). However, the officer's overall conclusion that, cumulatively, the evidence presented by the applicant was insufficient to establish his Somali identity on a balance of probabilities is reasonable. There is no basis for me to interfere with that determination.

(6) Other H&C Factors

[96] The applicant does not directly challenge the reasonableness of the officer's weighing of the best interests of his daughter and his establishment in Canada. He submits, however, that the decision as a whole is unintelligible because, despite the adverse finding concerning the applicant's alleged Somali nationality, in addressing these other factors, the officer appears to accept that, if the applicant is required to leave Canada, he would return to Somalia.

[97] I do not agree that there is any incoherence or inconsistency in the decision as a whole. It is true that, having concluded that the applicant failed to establish his Somali nationality, there was no need for the officer to go on to consider other factors that were premised on this being his nationality. The officer could have rejected the application on this basis alone. Instead, evidently attempting to respond to all the submissions that had been advanced in support of the H&C application, the officer assessed the other factors cited by the applicant and weighed them all together in reaching the final decision. In doing so, the officer assumed for the sake of argument that the applicant is a Somali national. While the decision could have been clearer about the fact that this analysis was being done in the alternative to the primary finding that the applicant had failed to establish his Somali nationality, once this is understood, there is nothing unintelligible in the officer's approach.

## VI. CONCLUSION

[98] For these reasons, the application for judicial review will be dismissed.

[99] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

**JUDGMENT IN IMM-2949-21**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2949-21 |
| **STYLE OF CAUSE:** | MOHAMED ABDIWAHAAB FARAH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | SEPTEMBER 20, 2022 |
| **JUDGMENT AND REASONS:** | NORRIS J. |
| **DATED:** | APRIL 11, 2023 |

**APPEARANCES:**

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|---|---|
| Tina Hlimi | FOR THE APPLICANT |
| Charles J. Jubenville | FOR THE RESPONDENT |

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