

Federal Court



Cour fédérale

**Date: 20231003**

**Docket: IMM-2147-22**

**Citation: 2023 FC 1322**

**Ottawa, Ontario, October 3, 2023**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**SALMAN HERSI ABDI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. OVERVIEW**

[1] The applicant claims to be Salman Hersi Abdi, a citizen of Somalia. He sought refugee protection in Canada on the basis of his fear of Al-Shabaab. 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 identity.

[2] The applicant appealed this determination to the Refugee Appeal Division (RAD) of the IRB.

[3] In a decision dated February 21, 2022, the RAD agreed with the RPD that the applicant had not established his identity. The RAD therefore dismissed the appeal and confirmed the RPD's determination that the applicant is neither a Convention refugee nor a person in need of protection.

[4] The applicant now applies under subsection 72(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)* for judicial review of the RAD's decision. He submits that the decision was made in breach of the requirements of procedural fairness and that it is unreasonable.

[5] For the reasons that follow, I am not persuaded that the decision was made unfairly or that it is unreasonable. This application for judicial review will, therefore, be dismissed.

## II. BACKGROUND

### A. *The applicant's narrative*

[6] The applicant claims that he is Salman Hersi Abdi, a national of Somalia who was born in Mogadishu on May 26, 1997. He states that he lived in Mogadishu until 2009 when, because of the ongoing civil war in Somalia, he and his family fled to Kenya. The applicant lived at first in the Dadaab refugee camp and then moved to Nairobi to live with a cousin and attend school.

[7] While living in Kenya, the applicant experienced discrimination by certain anti-Somali groups and the police (both of whom were hostile to Somali refugees due to Al-Shabaab's activities), as well as physical violence. In June 2014, he was stabbed in the thigh in Nairobi during an anti-Somali demonstration.

[8] As a result of these difficulties in Kenya, the applicant returned to Mogadishu on November 19, 2015. After returning, he shared his critical opinions about Al-Shabaab with some friends. The next day, the applicant received a telephone call from an unknown person threatening to kill him if he continued to criticize Al-Shabaab.

[9] Fearing for his life, the applicant returned to Kenya on November 25, 2015. He remained there for about a year. When he learned that Kenya was planning to return Somali refugees to Somalia, the applicant decided it was not safe to stay there any longer. Using what he says is an altered Kenyan passport, the applicant fled to the United States on November 17, 2016. After remaining in the United States for a few months, on February 20, 2017, the applicant entered Canada irregularly and sought refugee protection.

[10] The applicant's claim was first heard by the RPD on May 8, 2017. In a decision dated May 18, 2017, the RPD rejected the claim on grounds of credibility, identity, and the availability of an internal flight alternative. This Court allowed the applicant's application for judicial review and remitted the matter to the RPD for reconsideration: see *Abdi v Canada (Citizenship and Immigration)*, 2018 FC 93.

B. *Evidence of the applicant's identity*

[11] After the matter was returned to the RPD, the Minister filed a Notice of Intent to Intervene. In the intervention, the Minister provided information received from the United States that, in July 2016, the applicant had applied for a US visa using a Kenyan passport in the name of Abdikadir Ali Mohamed (born in Kenya on June 1, 1991). The purpose of the visa was to attend a student debating competition at Yale University in November 2016.

[12] At the re-hearing before the RPD, the applicant acknowledged that he had used this passport to apply for a US visa as well as for an earlier trip to Thailand. He also acknowledged that this was the passport he used to enter the United States in November 2016. He maintained, however, that he had obtained it fraudulently. The applicant believed the passport was genuine but his photograph had been substituted for the original. He also claimed that he had deliberately destroyed the passport before he entered Canada because he feared he would be deported if he were found to be travelling on a fraudulent document.

[13] To corroborate his testimony that he is not Abdikadir Ali Mohamed (a citizen of Kenya) but, rather, Salman Hersi Abdi (a citizen of Somalia), the applicant relied on the following evidence:

- a) An identity document issued by the United Nations High Commissioner for Refugees (UNHCR) in Nairobi, Kenya dated June 8, 2010. The document bears the applicant's photo and gives his nationality as Somalian. The applicant maintained the document is his even though it is in the name of Sadam Hirsi Abdi. He attributed this to a mistake by

the UNHCR caseworker who prepared the document. The applicant also acknowledged that the document gives the date of birth as January 1, 1992, which is not his date of birth. The applicant explained that he had lied about his age to the UNHCR caseworker to make himself appear older than he was. The document states that its validity expired on June 7, 2012. The applicant acknowledged that he had allowed it to lapse.

- b) A letter dated April 6, 2017, from the Mary Happy School in Nairobi stating that Salman Hersi Abdi had attended the school from 2010 until 2015.
- c) An affidavit sworn on April 25, 2017, by Nimo Mohamed Abdule, the applicant's cousin in Nairobi.
- d) An affidavit sworn on April 28, 2017, by Mohamed Mohamoud Omar, the applicant's maternal uncle, as well as Mr. Omar's testimony before the RPD in 2017, when the RPD first considered the applicant's claim. (Mr. Omar was not available to testify again when the matter was redetermined.)
- e) A letter dated April 3, 2017, from Dejinta Beesha (Somali Multi-Service Centre) confirming on the basis of a community verification assessment questionnaire and interview that the applicant is a citizen of Somalia.
- f) A letter dated April 3, 2019, from the Loyan Foundation confirming on the basis of a community verification assessment and interview that the applicant is a national of Somalia.
- g) An affidavit sworn on April 4, 2019, by Yahya Abdirahman Duhulow, an acquaintance of the applicant's in Toronto.

C. *The RPD decision*

[14] The re-hearing before the RPD took place over three dates: July 19, 2019; April 22, 2021; and May 26, 2021.

[15] The RPD rejected the applicant's claim in a written decision dated August 25, 2021. The RPD was not satisfied that the applicant had established his identity on a balance of probabilities. Since identity is the starting point for any inquiry into a claim for refugee protection, the applicant's failure to establish this was fatal to his claim.

[16] The RPD began by noting that the applicant had not produced any primary identity documents to establish that he is Salman Hersi Abdi, a citizen of Somalia born May 26, 1997. The member then instructed himself that, since there are no primary identity documents, he must "consider the claimant's explanation for why there are no documents, the efforts he made to obtain primary identity documents and any secondary sources of evidence, such as witness testimony."

[17] In summary, the RPD found as follows with respect to the secondary sources of evidence of the applicant's identity:

- The letter from the Mary Happy School is entitled to no weight because it does not indicate the nationality or citizenship of the pupil referred to.
- The UNHCR document does not have the correct spelling of the name or the correct date of birth of the person the applicant claims to be. The applicant claims to have been aware

of the spelling mistakes, yet he took no steps to correct them. As well, on his own account, he wilfully misrepresented his age to the UNHCR. As a result, the document is entitled to no weight in establishing the applicant's alleged identity as Salman Hersi Abdi or his nationality as a citizen of Somalia.

- The RPD accepted that Mr. Omar (the applicant's maternal uncle) had met the applicant in Kenya in 2016 but his evidence did not confirm the applicant's identity, Somali nationality, or whether he holds Kenyan nationality. The RPD gave his affidavit and previous testimony limited weight.
- In his affidavit, Mr. Duhulow (the applicant's acquaintance in Toronto) states that the applicant was born and raised in Somalia and identifies the applicant's clan but he does not explain how he knows these things – for example, whether they are matters of first-hand knowledge or is he merely repeating things the applicant told him. Mr. Duhulow does not say anything about whether the applicant has any status in Kenya. Since Mr. Duhulow was not available to testify, these questions could not be put to him. The RPD therefore gave his affidavit little weight.
- Mr. Abdule (the cousin with whom the applicant claimed to have lived in Nairobi) was not available to testify. His affidavit was not accompanied by any identity documents. The document was replete with obvious spelling mistakes. The RPD found:  
“Considering that this is supposed to be an accurate document with legal effect, these several errors cause me to doubt its authenticity and accordingly, I give it no weight.”

[18] Turning to the Kenyan passport the applicant had used, the RPD noted that possession of a national passport creates a *prima facie* presumption that the holder is a national of the issuing country unless the passport itself states otherwise. The RPD found that the applicant had not rebutted this presumption with persuasive evidence.

[19] In any event, the RPD found that, even if it were to accept that the identity on the passport (Abdikadir Ali Mohamed) is false, there was still an absence of credible and reliable evidence that the applicant is who he claims to be (Salman Hersi Abdi, a national of Somalia). The RPD stated: “The claimant is severely hampered in this regard by the defects in his UNHCR document which he let lapse and which he knowingly took no pains to correct, and which was false when made as to his date of birth. The claimant cannot rely on false documents to establish his identity.”

[20] Having determined that the applicant had not met his onus to establish his identity on a balance of probabilities, the RPD rejected the claim.

### III. DECISION UNDER REVIEW

[21] The RAD provided lengthy and detailed reasons dismissing the applicant’s appeal. In summary, the RAD found as follows:

- The RPD correctly held that the Kenyan passport was presumptively valid, that possession of this document gave rise to a presumption that the applicant is a national of Kenya, and the applicant had failed to rebut these presumptions with credible evidence.



- The RAD agreed with the applicant that the RPD erred in failing to address his account of how he obtained the Kenyan passport. Conducting its own assessment, the RAD found that the account is not credible because the applicant had withheld material information about when he obtained and used the Kenyan passport, because the account had evolved over time, and because it contained material inconsistencies for which there was no credible explanation.
- The RPD correctly found that the UNHCR document was of little value in establishing the applicant's identity, as both the name and the date of birth were inconsistent with the applicant's declared identity. The RAD rejected the applicant's explanations for the errors in the document.
- The RAD agreed with the RPD that the other evidence the applicant relied on is insufficient to establish his declared identity "due to the lack of credibility and probative value of much of the evidence." The RAD analyzed all this evidence in detail. This included the community verification assessment letters, which the RPD had not addressed in its reasons. The RAD concluded that these letters were "compatible with the Appellant's declared identity" but, to the extent that they speak "only generally to matters that are not necessarily specific to Somali nationals or the Appellant's personal identity," they "could also be compatible with the alternate identities that have arisen in this claim." In other words, the letters may be probative of the applicant's Somali ethnicity but they had little value as evidence of his personal or national identity. Likewise, the RAD found that a land ownership document (which the RPD also did not address) did not assist in determining the applicant's true name or his date of birth.

[22] On the basis of its own assessment of the evidence, the RAD agreed with the RPD that the applicant had not established his declared identity. The RAD states: “Even after considering the evidence cumulatively, the Appellant’s declared identity has not been established on a balance of probabilities.” Since identity is a threshold issue, the applicant cannot be recognized as a Convention refugee or a person in need of protection. The RAD therefore dismissed the appeal and confirmed the RPD’s determination.

#### IV. STANDARD OF REVIEW

[23] The applicant challenges both the fairness of the procedure by which the RAD dealt with his appeal as well as the decision on the merits of the appeal. There is no dispute about how the Court should approach these issues on judicial review.

[24] First, to determine whether the procedure followed by the RAD met the requirements of procedural fairness, the reviewing court must conduct its own analysis of the process the decision maker followed and determine for itself whether that process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 to 28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Perez v Hull*, 2019 FCA 238 at para 18; and *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para. 14. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56 and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35. The ultimate question “is whether the applicant knew the case to meet and had a full and fair chance to respond”

(*Canadian Pacific Railway Co* at para 56). No deference is owed to the RAD in this regard (*Canada (Attorney General) v Ennis*, 2021 FCA 95 at para 45). The burden is on the applicant to demonstrate that the requirements of procedural fairness were not met.

[25] Second, the RAD's decision on the merits of the appeal is reviewed on a reasonableness standard. When applying this standard, the reviewing court must begin its inquiry "by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 84, internal quotation marks and citation omitted). 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.*).

[26] 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).

[27] 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). Nevertheless, the test of reasonableness and its requirements of justification, intelligibility and transparency apply to an administrative decision maker's assessment of the evidence and to the inferences the decision maker draws from that evidence (*Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 46). Consequently, adverse findings of fact and adverse inferences with respect to credibility must find their justification in the evidence before the decision maker and their expression in the decision maker's reasons (*ibid.*).

[28] The onus is on the applicant to demonstrate that the RAD'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. *Did the RAD breach the requirements of procedural fairness?*

[29] The applicant submits that the RAD breached the requirements of procedural fairness in two related respects: first, by raising a new issue concerning the credibility of the applicant's account of how he obtained the Kenyan passport; and second, by relying on transcripts of the hearings on July 19, 2019, and April 22, 2021, in making adverse findings about the credibility of this account when the applicant did not have those transcripts.

[30] As I will explain, I do not agree that the requirements of procedural fairness were breached in either respect.

[31] Looking first at the RAD's adverse findings about the credibility of the applicant's account of how he obtained the Kenyan passport, it is true that the RPD did not address this issue. Indeed, the RPD's failure to address the applicant's "testimony and explanations in both hearings as to how he obtained the Kenyan passport" was one of the grounds of appeal the applicant raised before the RAD. According to the applicant, the RPD had "failed to consider relevant evidence" (*Appellant's Memorandum of Argument, paragraph 17*). The applicant also argued that the RPD had misconstrued his evidence, which was not that the passport was "fake" but only that the photograph had been altered on an otherwise genuine passport (*Appellant's Memorandum of Argument, paragraph 44*), that it had "fail[ed] to engage" with his account of how he obtained the passport (*Appellant's Memorandum of Argument, paragraph 50*), and that country condition evidence demonstrating the ease with which false identity documents can be obtained in Kenya "support[ed] the claimant's detailed testimony about corruption and how he was able to obtain his false Kenyan documents" (*Appellant's Memorandum of Argument, paragraph 70*). More generally, counsel submitted that the applicant had "testified at his hearings in a straightforward, credible, and trustworthy manner" and that his "many hours of testimony was consistent with his narrative and supporting documentation, and did not contain any evasions, exaggerations or embellishments" (*Appellant's Memorandum of Argument, paragraph 76*).

[32] At paragraph 21 of the decision, the RAD explained as follows why it was satisfied it could address the credibility of the applicant's account on appeal, even though the RPD had not done so:

The Appellant submits that he gave detailed and credible testimony about how he obtained the Kenyan passport, but that the RPD failed to engage with his testimony and ignored documentary evidence that supported his story. He argues that the RPD was required to determine the credibility of his story as to how he obtained the passport. I agree with the Appellant. In this case, it is possible for the RAD to reach its own conclusions on the credibility of the Appellant's testimony. The Appellant has raised this issue himself in his appeal. There was extensive testimony given on the matter, which forms part of the evidentiary record. The Appellant has full knowledge of the credibility concerns that were raised during the proceedings at the RPD. In this situation, given the RAD's role to independently assess the evidence and bring finality to the refugee claim, the RAD may assess the credibility of the Appellant's testimony about his Kenyan passport, being corollary to the arguments made in the appeal.

[33] There is no basis to interfere with this determination, which is well-supported by the jurisprudence – including *Nuriddinova v Canada (Citizenship and Immigration)*, 2019 FC 1093, at paras 38-39 and 47-48, and *Qiu v Canada (Citizenship and Immigration)*, 2021 FC 166 at paras 27-28, both of which the RAD cites. As Justice Walker held in *Nuriddinova*, “While the RAD cannot raise a new issue without notice to the parties, it is entitled to make independent findings of credibility against an appellant where credibility was at issue before the RPD, the RPD's findings are contested on appeal and the RAD's additional findings arise from the evidentiary record” (at para 47). This is exactly the case here.

[34] There is also no merit to the applicant's complaint about the RAD's reliance on transcripts of the July 19, 2019, and April 22, 2021, hearings.

[35] When he filed his Appellant's Record on October 18, 2021, the applicant had requested that these transcripts "be made available" to him because he "does not have the means to have them prepared." He also requested the opportunity to file additional written submissions following receipt of the transcripts. The RAD does not address the request for the transcripts in its decision (or at any earlier time); however, as is apparent from the Certified Tribunal Record, transcripts of the hearings are included in the record provided to the RAD by the RPD.

[36] The RPD provided the applicant and his counsel with a CD recording of the hearing on August 27, 2021. Rule 3(3)(b) of the *Refugee Appeal Division Rules*, SOR/2012-257, states that an appellant must include in their record "all or part of the transcript of the Refugee Protection Division hearing if the appellant wants to rely on the transcript." The applicant has not provided any authority supporting his submission that the RAD is obliged to assist an appellant in meeting this requirement. Nor, in any event, has the applicant established that he was prejudiced by the RAD's reliance on transcripts he did not have. The evidence in question was the applicant's own and he had been provided with a recording of that testimony. On judicial review, the applicant has not identified any arguments he would have made to the RAD but was unable to do so because he did not have a transcript. In these circumstances, I am satisfied that the requirements of procedural fairness were met.

[37] This ground for review must be rejected.

B. *Is the decision unreasonable?*

[38] The applicant submits that the RAD's ultimate conclusion that he failed to establish his identity is unreasonable. I do not agree.

[39] The RAD provided detailed reasons that are responsive to the applicant's arguments on appeal. On the present application, the applicant essentially attempts to re-argue his appeal and effectively invites me to substitute my views of the evidence for those of the RAD. As stated above, this is not the Court's role on judicial review under the reasonableness standard.

[40] The applicant has not pointed to any grounds of appeal or material evidence the RAD overlooked, nor has he shown that the RAD analysis suffers from fundamental flaws that undermine the reasonableness of its conclusions. In transparent and intelligible reasons, the RAD explained why it concluded that the applicant had failed to rebut the presumption that the Kenyan passport he admittedly used is valid or, following from this, the presumption that he is in fact a national of Kenya. Critically, the RAD's adverse findings concerning the applicant's credibility are fully explained and are justified in light of the record. The RAD also examined each of the items of evidence on which the applicant relied to establish his asserted identity and explained why that evidence lacked credibility or probative value (or both). Contrary to the applicant's submissions on review, the RAD also considered all this evidence cumulatively, as it was required to do (see paragraph 22, above). The applicant has provided no reason to think that this is not the case.



[41] In short, the applicant has not established any basis on which to interfere with the RAD's conclusions. This ground for review must also be rejected.

VI. CONCLUSION

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

[43] 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-2147-22**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed.
2. No question of general importance is stated.

“John Norris”

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Judge

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

**DOCKET:** IMM-2147-22

**STYLE OF CAUSE:** SALMAN HERSI ABDI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 2, 2023

**JUDGMENT AND REASONS:** NORRIS J.

**DATED:** OCTOBER 3, 2023

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