Federal Court  Cour fédérale

Date: 20251023

Docket: IMM-17578-24

Citation: 2025 FC 1719

Toronto, Ontario, October 23, 2025

PRESENT: The Honourable Justice Battista

BETWEEN:

MERCY ANN WAWIRA KIMOTHO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Refugee Protection Division (RPD) found the Applicant not credible, and further found "no credible basis" for her claim pursuant to subsection 107(2) of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] However, the RPD's decision was not justified in relation to two relevant legal constraints for findings made pursuant to subsection 107(2): the requirement for no credible or trustworthy

evidence, and the requirement to address the harsh impact of the decision on the Applicant. The decision is therefore unreasonable, and the judicial review application is granted.

II. Background

[3] The Applicant is a Kenyan national who claimed to have fled Kenya because her parents arranged for her to be married to an older, wealthy man named Peterson Githaka (PG). As part of this arrangement, she was expected to undergo a "circumcision" or female genital mutilation (FGM).

[4] The Applicant stated that in January 2023 she escaped from her hometown of Kutus and went to Nairobi where she stayed with a friend, Rosemary Wambui (RW). In Nairobi, RW helped the Applicant make arrangements to secure a visa to come to Canada. She arrived in Canada on April 14, 2023, and made a claim for refugee protection shortly afterward.

[5] The RPD provided detailed reasons for rejecting the claim, referencing the principles from Guideline 4 on Gender Considerations (Immigration and Refugee Board of Canada, *Chairperson's Guideline 4: Gender Considerations in Proceedings Before the Immigration and Refugee Board* (Ottawa: Immigration and Refugee Board of Canada, 2022)). Ultimately, the RPD found "multiple reasons" to doubt the Applicant's truthfulness.

[6] The RPD also determined that there was no credible basis for the claim, based on an absence of any credible or trustworthy evidence upon which a favourable decision could be made pursuant to subsection 107(2) of the *IRPA*.

[7] The impact of this determination included the elimination of the Applicant's access to an appeal to the Refugee Appeal Division (RAD), the loss of her protection from removal pending that appeal (*IRPA*, ss 49(1)(a), 49(1)(b) and 110(2)(c)) and the loss of a stay attached to this application for judicial review (*Immigration and Refugee Protection Regulations*, SOR/2002-227, [*IRPR*] s 231(1)).

III. Issue

[8] The sole issue is whether the RPD's decision is reasonable in light of the relevant constraints described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*].

IV. Analysis

[9] The Applicant challenges nine of the decision's credibility findings, including the conclusion that there was no credible basis for the claim. Most of the RPD's credibility findings are reasonable. However, the RPD's decision was not justified with respect to two relevant constraints.

[10] Specifically, the no credible basis finding pursuant to subsection 107(2) was not justified because the RPD unreasonably rejected two witness letters proffered by the Applicant. Second, the RPD failed to explain why its decision to find no credible basis best reflected the legislature's intention given the harsh impact of the decision for the Applicant (*Vavilov*, at para 133).

A. The no credible basis finding was not justified based on the RPD's unreasonable rejection of two witness support letters

[11] Regarding the legal standard applicable to the review of credibility findings, the Respondent submits that credibility decisions are entitled to "significant deference." To the extent that this submission implies a more deferential standard than reasonableness review, I disagree.

[12] Deference is demonstrated by a court conducting judicial review through the application of the reasonableness standard of review. An adverse credibility finding, which is a form of evidentiary finding, must be reasonable. In order to determine the reasonableness of an adverse credibility finding, a reviewing court asks whether the decision maker fundamentally misapprehended or failed to account for the evidence before it (*Vavilov*, at para 126).

[13] *Vavilov* ascribes no additional deference to adverse credibility findings which is more onerous than the reasonableness review of other evidentiary findings. It is therefore misleading to add adjectives such as "significant" to the description of deference owed to such findings. This description originates from cases predating *Vavilov* and in my view, its continued use risks confusion as well as the improper elevation of the standard of review for adverse credibility findings compared to other evidentiary findings.

[14] With respect to findings of no credible basis under subsection 107(2), a decision is justified when there is no credible or trustworthy evidence on which a favourable decision could have been made (*IRPA*, s 107(2); *Rahaman v Canada (Minister of Citizenship and Immigration*), 2002 FCA 89 [*Rahaman*] at para 51). This is recognized as a high threshold (*Li v Canada (Citizenship and*

Immigration), 2018 FC 536 at para 23; *Mahdi v Canada (Citizenship and Immigration)*, 2016 FC 218 at para 10). Moreover, this Court has found that a no credible basis finding "contains a very subjective element" which is based upon "the opinion of the RPD" (*A.B. v Canada (Citizenship and Immigration)* 2020 FC 562 [*A.B.*] at para 29).

[15] In the present case, the RPD based its decision on a range of adverse credibility findings, encompassing the Applicant's testimony and supporting documentary evidence including witness statements. Applying the reasonableness standard, there is no basis for intervention in many of the RPD's findings. However, reasonable findings may still be subjective findings.

[16] For example, the RPD found that the Applicant embellished the occupation and status of Hussein Ali (HA), an alleged close familial connection to her principal persecutor PG, in order to exaggerate the level of authority and influence that could be used to pursue her. The RPD concluded that the Applicant's testimony regarding HA's profile "severely damages her personal credibility as a witness."

[17] While there is no basis to intervene in the RPD's finding that the Applicant likely perpetrated an embellishment, the impact of its findings regarding this aspect of her evidence — inflicting "severe damage" to the Applicant's personal credibility as a witness — seems disproportionate. It is easy to imagine another RPD panel taking a more restrained approach to the impact of the Applicant's evidence, and in this sense the "very subjective" nature of the RPD's no credible basis finding is illustrated (*A.B.*, at para 29).

[18] Another illustration of subjectivity is found in the treatment of the Applicant's support letters, which were all rejected for various reasons. For example, the RPD seized upon the Applicant's email instructions to a potential writer of a support letter and unreasonably concluded that the Applicant "directed or dictated" the contents of all other support letters, thereby undermining their value as evidence. This resulted in the unfounded generalization of one concern about one letter — which was not ultimately entered into evidence — to other evidence (*Vavilov*, at para 104).

[19] As described more fully below, two support letters, from Rachel Gitara ("RA") and RW, were unreasonably rejected on the basis that they recounted the Applicant's allegations "second-hand." The letters may also have been tainted by the RPD's unreasonable finding that the Applicant orchestrated the letters, but this is not entirely clear from the reasons.

[20] The RPD summarized its concerns about the letters by stating "I give evidence recounting the claimant's allegations second-hand no more weight than her own testimony … it does not render an allegation more credible for it to be repeated through the mouths of third parties."

[21] The letters from RA and RW were therefore rejected because they were not sufficient, or lacked probative value, as opposed to being mendacious. The distinction between the credibility of evidence and the sufficiency of evidence has been described by this Court (*Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 41).

i) The letter from RA was unreasonably rejected

[22] RA was the Applicant's former neighbour who provided a letter dated July 5, 2024, that was admitted into evidence. The RPD dismissed the letter because it "only recounts at length, second-hand, information that the claimant has told her."

[23] The RPD's treatment of RA's letter as largely "second-hand" is a fundamental misapprehension of the letter. The letter was not merely a recitation of the Applicant's allegations, but also contained the following information:

- RA stated that the Applicant "shared her predicament" with her about the fact her family arranged for her to marry a wealthy older man and was expected to undergo FGM, and that RA "was privy to everything she was going through";
- RA described the fact that the Applicant asked RA for advice, and asked her whether she should call the police, at which time RA advised her that calling the police would not solve the problem because it did not solve RA's similar problem with an arranged marriage;
- RA stated that in January 2023, the Applicant's parents came to RA's home looking for the Applicant and asking for help to find her, and that RA was shocked to learn that she was missing;
- RA stated that in April, 2023, she was informed by the Applicant of her move to Canada and her fears of being forced into marriage and undergoing FGM.

[24] Therefore, RA provided the RPD with information about RA's direct experiences, including RA's personal experiences with the Applicant and the Applicant's parents, and the content of conversations that RA personally had with the Applicant and the Applicant's parents. It is true that RA did not personally witness the events which the Applicant disclosed to her. But it

was unreasonable for the RPD to disregard RA's evidence that these events were disclosed to her, and that the Applicant's parents came to RA searching for the Applicant.

[25] There is an established legal distinction between evidence of statements proffered for the truth of their contents, and evidence of statements proffered to demonstrate the fact that these statements were made (*R v Abbey*, 1982 CanLII 25 (SCC), [1982] 2 SCR 24 at 41 citing *Subramaniam v Public Prosecutor*, [1956] 1 WLR 965 at 970). If the RPD believed RA's evidence, it was required to draw conclusions from it because the occurrence of these experiences and conversations supported the central allegations in the claim. Ultimately, if the letter was not unreasonably dismissed in its entirety for being "second-hand," it could have possibly been evidence on which the RPD could have made a favourable decision.

ii) The letter from RW was unreasonably rejected

[26] RW was the Applicant's former classmate who provided a letter dated June 30, 2024, which was admitted into evidence. The letter was dismissed by the RPD because much of the letter "consists of, once again, RW recounting the claimant's narrative allegations second-hand, based on the claimant 'shar[ing] with [her] all the details of her situation.'"

[27] The treatment of RW's letter as "second-hand" is a fundamental misapprehension of RW's evidence. Like RA's letter, this letter was not a mere recitation of the Applicant's allegations but also contained the following information, which was not "second-hand":

- RW stated that while at university with the Applicant, she observed that the Applicant's family was religious and conservative;

- RW described the fact that the Applicant came to RW's home in January 2023 to request shelter because she was running away from home;
- RW stated that the Applicant shared all the details of her situation with RW, and described information directly provided by the Applicant to RW about the arranged marriage and the Applicant's fears of genital mutilation;
- RW stated that she assisted the Applicant to apply for a visa to Canada.

[28] Like RA, RW provided the RPD with information about RW's direct experiences with the Applicant, including conversations which RW shared with the Applicant. It is true that RW, like RA, did not personally witness the events which the Applicant described to her. But it was unreasonable for the RPD to disregard RW's evidence that the Applicant came to her for shelter, and the fact that the Applicant recounted to RW the events giving rise to her fears. These experiences and conversations supported the central allegations in the claim. If RW's letter was not unreasonably dismissed in its entirety for being a "second-hand" account, it could have possibly been evidence on which the RPD could have made a favourable decision.

iii) Conclusion on the presence of credible evidence

[29] As described above, the rejection of the letters from RW and RA was not reasonable. It will be the task of a newly constituted panel on redetermination to reach a conclusion on the evidentiary value of the letters.

[30] The Respondent suggests that the legal sufficiency of the letters from RA and RW could not have led to a favourable decision. This is not relevant for a court on judicial review. The test

for a reviewing court is whether the RPD's dismissal of the evidence was reasonable. Once a court determines that evidence was unreasonably rejected, confidence in the no credible basis finding is lost, and the matter should be remitted for redetermination by a new panel. It is not necessary or appropriate for a reviewing court to also determine whether the unreasonably rejected evidence would be sufficient to make a positive determination in the claim. That evidentiary assessment belongs to the administrative decision maker.

B. The RPD's decision was unreasonable due to its failure to explain why the no credible basis finding best reflected legislative intention

[31] The second constraint on the RPD's decision was the requirement for the RPD to consider the impact on the Applicant of the finding of no credible basis under section 107(2) of the *IRPA*. The Supreme Court of Canada has described this constraint both as a corollary to the power exercised by administrative decision makers and as a safeguard against concerns regarding arbitrariness (*Vavilov*, at paras 133-135).

i) The "individual impact" constraint

[32] The Supreme Court has identified several constraints that assist in the determination of a decision's reasonableness (*Vavilov*, at paras 105-142). These constraints can operate individually or in combination to undermine or support a decision's reasonableness (*Vavilov*, at para 194). One constraint is the impact of a decision on the affected individual (*Vavilov*, at paras 133-135; *Lapaix v Canada (Citizenship and Immigration)*, 2025 FC 111 at para 34).

[33] The consideration of an administrative decision's impact on an individual has a lengthy pedigree in Canadian jurisprudence. It originated in procedural fairness jurisprudence which emphasized a contextual approach to procedural rights. The Supreme Court then identified "the importance of the decision to the individuals affected" as a factor in determining the extent of fairness protections (Lorne Sossin, "The Impact of Vavilov: Reasonableness and Vulnerability" (2021) 100:1 SCLR 265 [Sossin] at 267-268, citing *Baker v Canada (Minister of Citizenship and Immigration*), 1999 CanLII 699 (SCC), [1999] 2 SCR 817, at para 25).

[34] *Vavilov* marked the transition of this consideration from procedural fairness review to substantive reasonableness review (Sossin, at 272-277):

> It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.
>
> Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the Immigration and Refugee Protection Act, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration*), 2002 SCC 3, [2002] 1 S.C.R. 84.
>
> (*Vavilov*, at paras 133-134)

[35] The SCC provided guidance on when the individual impact constraint is triggered: it arises from a decision's harsh consequences on an individual, which includes, at a minimum, circumstances that threaten an individual's life, liberty, dignity or security of the person. The SCC also provided guidance on the requirements of the constraint: "the decision maker must explain why its decision best reflects the legislature's intention." Therefore, a decision's respect for this constraint, as described in *Vavilov*, involves the following:

- The decision maker's duty of explanation is not discretionary: an explanation "must" be given;
- The decision must reasonably identify the consequences of the decision on the affected individual;
- The decision must reasonably identify the legislative intention leading to the consequences;
- The decision maker is obligated not simply to explain why the decision is consistent with legislative intention, but why the decision best reflects legislative intention. This means that if there is an option that is respectful of other constraints but carries less harsh consequences, a decision maker should explain why that option was not pursued. Applied to determinations pursuant to subsection 107(2), decision makers are required to explain why, in the particular circumstances of the claim and in view of the consequences, it best reflects legislative intention to make a finding of no credible basis rather than simply refuse the claim on the basis of adverse credibility findings.

ii) The harsh consequences of section 107(2)

[36] The harsh consequences of section 107(2) include the following:

- The loss of an appeal to the Refugee Appeal Division on the merits of the decision denying the refugee claim (*IRPA*, s 110(2)(c));
- The loss of a statutory suspension in a claimant's removal from Canada during the appeal period (*IRPA*, ss 49(1)(b) and 49(1)(c))

and the loss of a statutory stay associated with an application for leave for judicial review (*IRPR,* s 231(1));

- The potential loss of an effective remedy on judicial review, if a claimant is removed prior to the disposition of judicial review proceedings;
- The loss of access to a work permit due to the enforceability of the claimant's removal order (*IRPR,* s 206(1)(b); *IRPA,* s 49(2)(c)).

[37] In short, a no credible basis finding exposes claimants to immediate removal with no effective challenge to the RPD's decision despite the "subjective" nature of the finding that is based on "the opinion of the RPD" (*A.B.,* at para 29*)*. The finding truncates claimants' post-determination rights in order to expedite removal (*Rahaman,* at paras 15, 21). In addition, if claimants are allowed to remain in Canada while pursuing judicial review, the loss of a work permit means they are left without a legal means of financially supporting themselves.

[38] The deprivation of an appeal on the merits represents an exceptional, harsh consequence under the *IRPA*. It places claimants subject to a no credible basis finding in circumstances similar to designated foreign nationals, claimants who travelled through safe third countries and claimants whose claims have been vacated or have ceased (*IRPA,* s 110(2)). Similarly, the risk of removal prior to the completion of judicial review proceedings places claimants subject to a no credible basis finding in circumstances similar to designated foreign nationals, claimants inadmissible for serious criminality, and those issued a report on inadmissibility on their entry to Canada (*IRPR,* ss 231(2) and 231(3)).

[39] In addition, the deprivation of an appeal on the merits represents a departure from international legal standards designed to protect against *refoulement* (*Rahaman,* at paras 39-40;

United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P4/ENG/REV.3 [UNHCR Handbook] at 42-43).

[40] The principle of *non-refoulement* is the "cornerstone of the international refugee protection regime" (*Mason*, at para 108) and the *IRPA*'s interpretation and application must comply with this obligation (*Mason*, at para 104). The Federal Court of Appeal recognized "a problem" with the consequences of a no credible basis finding where, as in the present case, a claim is not also found to be manifestly unfounded (*Rahaman*, at para 44). Evidence that these consequences depart from internationally recommended standards includes the following:

> - The United Nations High Commissioner for Refugees has long established that unsuccessful asylum claimants should have access to formal appeals from decisions made on their claims. This was the recommendation of the Executive Committee for the High Commissioner's Programme (United Nations High Commissioner for Refugees, *Report on the 28th Session of the Executive Committee of the High Commissioner's Programme, Geneva, 4–12 October 1977*, UN Doc A/AC.96/549 (19 October 1977) at para 53(6)(e)(vi)) and this recommendation is reiterated in the UNHCR Handbook (UNCHR Handbook, at 43);
>
> - Prior to the operational implementation of the RAD, UNHCR directly wrote to the acting Canadian Minister of Citizenship and Refugees in 2002 urging that Canada implement an appeal process on its merits for refugee determinations (Letter from Judith Kumin (UNHCR Representative in Canada) to Minister Elinor Caplan, 7 January 2000). UNHCR described an appeal process as "an important part of a set of substantive and procedural guarantees designed to ensure international protection for persons in need of it.";
>
> - Regionally, Canada is subject to the jurisdiction of the Inter-American Commission on Human Rights (IACHR) which generates visit reports and thematic reports as an organ of the

Organization of American States (*Charter of the Organization of American States*, 30 April 1948, 119 UNTS 3, Can TS 1990 No 23 (entered into force 13 December 1951)). In its 2000 report on the Canadian refugee determination system, prior to the operational implementation of the RAD, the IACHR found that Canada lacked a merit-based appeal process, and that Canadian judicial review and administrative processes did not have sufficient authority to reassess critical findings of fact for error. The IACHR stated "given that even the best decision-makers may err in passing judgment, and given the potential risk to life which may result from such an error, an appeal on their merits of a negative determination constitutes a necessary element of international protection" for which judicial review with limited leave provisions is not sufficient (Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev. (28 February 2000) at paras 104-9).

- The United Nations Committee Against Torture (CAT) has also emphasized the need for an appeal mechanism for people facing deportation to ensure that states do not violate the principle of *non-refoulement* (United Nations Committee Against Torture, *General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22* (4 September 2018), UN Doc CAT/C/GC/4 at para 18(e)) in accordance with Article 3 of the *Convention Against Torture (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Can TS 1987 No 36 (entered into force 26 June 1987, accession by Canada 24 June 1987)).

- The CAT expressed the specific view that Canada should provide a review on the merits, rather than just a review of reasonableness, when a decision results in the expulsion of an individual to a place where they may face a risk of torture (United Nations Committee Against Torture, Committee Against Torture Concludes Thirty-Fourth Session, Press Release HR/4844 (20 May 2005)).

[41] For these reasons, the consequences of a no credible basis finding depart from the usual rights intended by Parliament and international law designed to safeguard against *refoulement*. The finding results in "harsh consequences" for the purpose of the individual impact constraint

described by the Supreme Court in *Vavilov*. To the extent that a no credible basis finding elevates the risk of *refoulement*, it threatens an individual's life, liberty, security of the person and dignity. To the extent that it deprives a refused claimant of the right to a work permit, it threatens a claimant's livelihood.

iii) The RPD's disregard of the "individual impact" constraint

[42] The gravity of the consequences described above places a heavy burden on decision makers not to deviate from the legal constraint concerning individual impact when considering a no credible basis finding (*Mason*, at para 66). Yet there is no mention at all in the RPD decision of the harsh impact of its no credible basis finding on the Applicant.

[43] The RPD could have rejected the claim solely based on the adverse credibility findings it made, most of which were reasonable. But the RPD chose to impose much harsher consequences, leaving the Applicant and other readers to wonder why. This is a failure of responsive justification.

[44] Given these consequences and, in addition, given the "very subjective" nature of no credible basis findings (*A.B.*, at para 29), there was an obligation on the RPD to explain how its decision best reflected legislative intent behind subsection 107(2). Its failure to do so is unreasonable.

[45] The Respondent argues that the individual impact constraint from *Vavilov* is not applicable to the RPD's decision because the RPD has no equitable jurisdiction, and it cannot avoid a no credible basis finding "simply because it feels bad for the person." The Respondent appears to

interpret the SCC's citation of jurisprudence related to IAD jurisdiction as restricting the individual impact constraint to the presence of equitable jurisdiction (*Vavilov*, at para 134).

[46] However, it is clear from the SCC's description and application of the individual impact constraint that it was not intended to be restricted in the manner the Respondent suggests. This is demonstrated in *Vavilov*, where the SCC applied the individual impact constraint to find the decision unreasonable notwithstanding the absence of equitable jurisdiction for the decision maker (*Vavilov*, at paras 172, 192-193).

[47] The requirement of decision makers to explain why a decision's harsh consequences best reflects legislative intent therefore applies to all administrative decisions from which harsh consequences flow. This constraint ensures "the accountability of executive action under administrative law in a constitutional democracy" (Sossin, at 272).

V. Conclusion

[48] A finding of no credible basis under subsection 107(2) of the *IRPA* carries at least two relevant legal constraints: first, the "high threshold" of reasonably finding all relevant evidence proffered by a claimant not to be credible or trustworthy, and second, an explanation of why the harsh consequences attached to the decision "best reflects the legislature's intention" (*Vavilov*, at para 133). The RPD's decision failed to abide by both constraints and is therefore unreasonable.

JUDGMENT in IMM-17578-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, the decision rendered on the Applicant's refugee claim is quashed, and the matter is remitted to a differently constituted panel for reconsideration.

2. The newly constituted panel is directed to assess all evidence unfettered by the previous panel's findings.

3. There is no question for certification and no order regarding costs.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Adam Wawrzkiewicz	FOR THE APPLICANT
Sarah Merredew	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis and Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT