Date: 20230203

Docket: IMM-8018-21

Citation: 2023 FC 162

Ottawa, Ontario, February 3, 2023

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

NADIA SAED ABDULLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I.   **Overview**

[1]   This matter turns on a question of identity. Is the Applicant who she says she is or another person who came to Canada on a student visa at about the same time? The Refugee Appeal Division [RAD] was not satisfied as to the Applicant's identity and, on appeal by the Respondent Minister, set aside a decision of the Refugee Protection Division [RPD] which had

determined that she was a Convention refugee pursuant to section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicant seeks judicial review of the RAD decision.

[2]   The case raises issues about facial recognition technology and the obligation, if any, on the tribunal to require disclosure of the methods employed to find the photographic evidence used to impugn the Applicant's identity claim. Ultimately, however, I conclude that this is not the case to resolve those questions.

[3]   For the reasons that follow, the application is dismissed.

II.   **Context**

A.   *Applicant's claim*

[4]   The Applicant alleges that she is Nadia Saed Abdulle, a citizen of Somalia of the minority Sheikhal clan, born in Mogadishu in December 1999.

[5]   She alleges that in May 2018, while she was selling tea with her sister in the market, two unknown men approached them. One of the men said that he wanted to marry her but she rejected him. He then accused her of seducing and enticing men.

[6]   Shortly thereafter, in June 2018, the Applicant says she was walking home with her sister and her sister's husband when a car stopped beside them. She recognized the men from the

market. They threatened the Applicant and shot her brother-in-law. The Applicant and her sister fled in different directions.

[7]   The Applicant went to hide at a family friend's house. Her sister missing, the Applicant and her family fled to Mogadishu. The next day, her sister's body was found. The Applicant and her family decided to leave the country.

[8]   The Applicant alleged that she left Mogadishu on June 20, 2018 using a Swedish passport with the name "Huda" (or a variant spelling of that name) and travelled via Istanbul, arriving in Toronto on June 21, 2018. She claimed she was accompanied by a smuggler named Sadiyo who posed as her mother. The rest of her family left for Kenya.

B.   *RPD Decision*

[9]   The PRD found that the Applicant was a Convention refugee pursuant to section 96 of *IRPA* on the grounds of her membership of a particular social group as a woman who has been targeted for forced marriage by Al-Shabaab. The RPD found that the Applicant would face a serious possibility of persecution in the future if she were to return to Somalia.

[10]   The RPD noted that it is not unusual for Somalis to not have any primary identity documents because of the lack of a functioning government since 1991, and as such, did not draw a negative inference from the Applicant's lack of documents.

[11]   The RPD found that the Applicant established her personal and national identity on the balance of probabilities based on her testimony, the testimony of a supporting witness and affidavits from her mother and maternal uncle.

[12]   The RPD also found the Applicant to be a credible witness who provided detailed and spontaneous answers to the questions asked; the Applicant did not attempt to embellish her claim and there were no significant inconsistencies or omissions in her testimony. She testified in a Somali language fluently and provided various details about life in Somalia consistent with objective country evidence in the NDP.

[13]   The RPD found that the Applicant established she is from the Sheikhal clan and a Sufi because she provided a number of details about the practises and beliefs as well as religious traditions.

[14]   Given the detail of the Applicant's testimony about her daily life in Somalia and her work in the market with her sister, the RPD found that the Applicant had established the truth of what she alleged.

[15]   The RPD gave weight to the testimony of a witness who claimed she knew the Applicant in Somalia while noting that this testimony would not be determinative of her identity on its own. The RPD also gave weight to the affidavits provided and a letter from the Midaynta Community Services finding that they were all consistent with the Applicant's testimony.

[16]   The RPD therefore found that the Applicant had established on the balance of probabilities that she was presented with an unwanted marriage proposal, threatened with forced marriage, that her brother-in-law was killed as alleged and that she faces a serious possibility of persecution in Somalia.

C.   *Decision under review*

[17]   The Minister appealed the RPD decision because an individual, who resembled the Applicant had been identified in the IRCC's Global Case Management System (GCMS). I will identify her by the initials "KA". The Minister requested an oral hearing pursuant to subsection 110(6) of *IRPA*. The RAD found that the evidence raised a serious issue with respect to the credibility of the Applicant and was central to the decision with respect to the claim.

[18]   KA, born in 1997 with Kenyan citizenship, submitted and was approved for a student permit in May 2018. A person using that permit entered Canada at Pearson Airport on June 19, 2018, two days before the Applicant submitted her claim. Based on a visual comparison between the photographs of the two, the Minister argued that both individuals are in fact the Applicant.

[19]   The determinative issue on the appeal was identity. The RAD found that the Applicant had failed to establish her personal identity and her Somali identity.

[20]   The RAD noted the Applicant had not presented any primary identity document to establish her identity at the RPD hearing, which the RAD had accepted was not unusual with Somali claimants given the lack of a functioning government in the country since 1991.

[21]   At the RAD hearing, the Applicant admitted that she and her supporting witness had not told the truth in their testimony before the RPD and admitted that they did not know each other in Somalia. The RAD noted that the Midaynta Community Services letter also relied on this false testimony by the witness. The RAD noted that neither of the affidavits of the Applicant's mother and maternal uncle were accompanied by evidence of their identity although the mother's affidavit was accompanied by another from a Kenyan notary who stated that another individual, with a Somali passport, vouched for the mother's identity.

[22]   The RPD had found that the maternal uncle's affidavit was not determinative especially as a copy. At the appeal, the Minister noted an inconsistency in the uncle's affidavit, which referenced the Applicant's brother when she had not listed any brothers in her refugee intake documents.

[23]   Prior to the RAD hearing, the Applicant submitted into evidence the Somali passport of a paternal uncle and the Norwegian passport of her maternal aunt as evidence of her identity on the basis that their middle and surnames were the same as the Applicant's parents in line with Somali tradition. The RAD found that neither document established the Applicant's personal or national identity especially in the absence of any evidence to corroborate the alleged relationships.

[24]   The RAD found that the new documents submitted by the Applicant were not sufficient to establish her identity in light of the misrepresentations to the RPD and the new evidence

presented by the Minister. That evidence included the photographs submitted as part of the student permit application of KA and image on the bio page of her Kenya passport.

[25]   On the appeal, the Applicant argued that the comparison between her photographs and those of the other individual must have been facilitated by facial recognition software because "it is hard to imagine how they could be manually sifting through photographs attached to the over more than one million applications that are received each year without using this highly controversial technology". She submitted evidence that the Clearview AI software was being investigated by the Office of the Privacy Commissioner for potential contravention of the *Privacy Act* RSC, 1985, c P-21.

[26]   The Applicant was represented throughout by counsel, though not her present counsel. No request was made of the RAD to direct the production by the Minister of evidence pertaining to the methods employed to sift through the records of persons contemporaneously granted visas to enter Canada to find the photographs used to impugn the identity of the Applicant.

[27]   The Respondent denied that Clearview AI software had been employed. In their submissions on appeal, the Respondent wrote that "traditional investigation techniques" were used to identify and compare the two accounts in the GCMS system. The RAD accepted this explanation and found that there was no evidence that Clearview AI software was used to compare the photographs. What those "traditional investigation techniques" may have been was not explored.

[28]   The RAD was satisfied that photographs submitted as part of the student permit application of KA are photographs of the Applicant because they show the same distinguishing marks. The Kenyan passport of KA was found to be presumptive evidence of the Applicant's identity.

[29]   The RAD found that the Applicant's evidence that she arrived on June 21, 2018, in Toronto is not credible because the Minister found no evidence of anyone using the name Huda (or a variation of that spelling) and a Swedish passport arriving that day. KA was confirmed to have arrived in Toronto on June 19, 2018. The RAD concluded that this evidence supported a finding that the Kenyan passport is presumptive evidence of the Applicant's identity. The evidence provided by the Applicant of her Somali identity was found to be insufficient to rebut that presumption. The onus was on the Applicant to produce acceptable documentation establishing her identity. In the absence of such evidence, the RAD concluded she had failed to do so and was neither a Convention refugee nor a person in need of protection.

III.   **Issues**

[30]   The standard of review in a decision to vacate is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*].

[31]   The sole issue raised on this application for judicial review is whether the RAD's decision to vacate the Applicant's refugee status was reasonable.

IV.   **Analysis**

[32]   As a preliminary matter, the Court raised what appeared to have been an error with respect to a reference in the translation before the RPD of the maternal uncle's affidavit to a "brother" of the Applicant. The Applicant had not listed any brothers in her intake documents. The Respondent cited this as an inconsistency in its submissions on appeal. However, the matter had been clarified by the interpreter at the RPD hearing who was asked by the panel to translate the document. As a result, the RPD panel member noted for the record that the letter referred to the Applicant's parents and sister and not to a brother. The RAD overlooked this correction in mentioning the Respondent's submission. While troubling, this error does not appear to have been material to the determinative of the appeal.

[33]   The Applicant has raised two major concerns with the RAD decision. The first is that the Minister breached her right to procedural fairness by failing to require disclosure of information pertaining to the investigative techniques used to find the photo match. The second is that the RAD erred in relying on the photographs in the absence of any other substantive evidence to determine that the Applicant had not establish her identity.

[34]   The Applicant argues that if the Minister is going to rely on photographic comparisons to vacate her status in Canada, the Respondent should have provided clear and transparent information regarding the technology employed. The Applicant does not claim that it was Clearview AI specifically but contends that some type of facial recognition technology was used, as it is not possible for officials to sift through thousands of immigration applications to find two

images that match. Additionally, she submits, such technology is not accurate and the rate of false matches is higher for people of colour and women.

[35]   While the weaknesses of facial recognition software are common knowledge, the Applicant's argument is undermined by the fact that she did not seek a direction for disclosure from the RAD on the methods or processes used but proceeded to make her appeal argument based on the assumption, without an evidentiary foundation, that such software had been employed. This was merely speculation, particularly in the face of the Respondent's uncontroverted assertion that an exhaustive search had been conducted using "traditional investigation techniques". Whatever those techniques were, no inference can be drawn that they included facial recognition software in the absence of supporting evidence.

[36]   In the circumstances, there is no basis on which the Court could find that the Applicant had been denied procedural fairness by the RAD. That leaves the question of whether the decision was otherwise reasonable.

[37]   The RAD determined that the Applicant and KA are the same person based on the photographic evidence submitted by the Respondent. The Applicant acknowledges that there are similarities between the subjects of the photos, which are colour and black and white, but contends that there are evident differences in the facial features. She notes that Somali women have similar features such as big eyes, long and thin noses, fuller lips; they wear hijabs and have darker skin. The similarities are, therefore, unreliable and risk false positive identifications that rely on unconscious or implicit racial bias. Given the lack of any other corroboration such as

fingerprints, the Applicant argues, the decision cannot stand based solely on a visual comparison of unclear photographs.

[38]   The Respondent submits the RAD was entitled to find that the Applicant had not established her identity as a citizen of Somalia and to decide that she was a citizen of Kenya based on the side-by-side comparison of the photos. The Respondent claims that the Applicant merely wishes the RAD had placed less weight on the Respondent's evidence.

[39]   On judicial review, it is not the role of this Court to reweigh evidence: *Vavilov* at para 125. That means that in this instance, the Court should not substitute its own opinion of the evidence based on a comparison of the photographs.

[40]   This matter is similar to the cases before the Court in *Barre v Canada (Citizenship and Immigration),* 2022 FC 1078 [*Barre*] and *Gedi v Canada (Citizenship and Immigration),* 2022 FC 318 [*Gedi*]. In these cases, the Minister also alleged that the Applicants were not Somali nationals but Kenyan citizens with study permits to enter Canada based on photo comparisons.

[41]   In *Barre,* the question of whether the respondent had used facial recognition software was squarely at issue in a proceeding to vacate the applicants' refugee status. Justice Go described the controversy as follows at para 7:

> The Minister's evidence included photo comparisons between the
> Applicants and two Kenyan citizens who arrived in Canada on
> study permits shortly before the Applicants' refugee claims were
> made. The Applicants objected to these photographs and sought to
> introduce evidence about Clearview AI, a company providing
> facial recognition software, claiming that the Canada Border

> Services Agency [CBSA] used Clearview AI to generate the photo comparisons. The Minister objected to the Applicants' evidence concerning Clearview AI, arguing that there is no indication it was used in the investigation. The Minister further argued that section 22(2) of the *Privacy Act*, RSC, 1985, c P-21 [referred herein as the *Privacy Act* or the *Act*] "allows law enforcement agencies to protect the details of this investigation" and that "the Minister is not privy to provide an affidavit stating to [sic] how they are obtaining the evidence as it is protected." The RPD agreed with the Minister, finding that Clearview AI ceased providing services in Canada on July 6, 2020 and "[a]n App that is banned to operate in Canada would certainly not be used by a law enforcement agency such as the CBSA."

[42]   Justice Go found that the RPD erred in admitting the Minister's evidence about the photos while rejecting the applicants request to compel the Minister to disclose the source of the comparisons. Among other reasons, Justice Go concluded that the reliance on the *Privacy Act* was misplaced as the RPD had failed to clarify the nature of the personal information the Minister was seeking to protect and accepted the assertion, without evidence or argument, that the *Privacy Act* allowed CBSA to protect the details of its investigation.

[43]   If the photo comparisons were made by an analyst, rather than by facial recognition software, Justice Go held, at paragraph 57 of *Barre,* than it would still have been incumbent on the RPD to seek that information before deciding to accept the evidence.

[44]   As noted above, in the present matter the Applicant did not seek disclosure of the investigative methods employed by the Minister but proceeded on the assumption that facial recognition software had been used.

[45]   *Gedi* turned on the failure of the RAD to consider all of the evidence respecting the

applicant's identity. The potential use of software to find another individual with similar features

was not at issue. Rather, the applicant contended that the RAD had erred in not engaging the

services of an expert in facial recognition before concluding that the photographs examined were

of the same individual. I wrote at paras 20-22:

> [20] The Applicant provided an affidavit describing the differences
> between himself and the Kenyan national and explaining how
> family names within communities in both countries were often
> similar. The RAD gave that evidence no weight and preferred to
> rely upon its own direct examination of the photographs. This
> would have been acceptable had the RAD explained its chain of
> analysis and how it arrived at that conclusion, but it failed to do so.
> It did not explain what distinguishing features led it to find that the
> photographs were of the same person. While it was open to the
> RAD to conclude that there was a strong resemblance, the Member
> had to justify that conclusion beyond saying that she had extensive
> experience in conducting such assessments.
>
> [21] There was other evidence before the RAD to establish the
> Applicant's identity including supporting evidence from an aunt,
> an uncle and a community organization. But the RAD's focus
> appeared to be exclusively on the similarity of the photographs.
>
> [22] It was reasonable for the RAD to reopen its decision because
> the Minister had been denied an opportunity to present its evidence
> relating to the Applicant's identity before the decision overturning
> the RPD's findings was rendered. The RAD then relied on the
> Minister's evidence to the exclusion of the other evidence
> supporting the Applicant's claim to be a Somali national. It was
> not enough for the RAD to simply state its conclusion based upon
> its own appraisal of the photographs without explaining why it did
> not accept the Applicant's evidence pointing to the differences.
>
> [Emphasis added]

[46]   This case differs from *Gedi* in that here, the RAD specifically referenced the Minister's

exhibit of side by side photographs showing circles around what are described as "distinguishing

marks" (marks on the brow, nose and upper lip and a scar on the chin of the subjects) and relied

on those marks in arriving at the conclusion that the photographs are of the same person. The RAD considered the Applicant's contention that differences in the photographs outweighed the similarities and an affidavit from a member of counsel's office to similar effect. However, the RAD found the distinguishing marks on the faces of the subjects to be more convincing.

[47]   The Applicant's evidence had been that she left Mogadishu on June 20, 2018 using a Swedish passport with the name "Huda" and arrived at Pearson airport on June 21, 2018. In reply to the Minister's evidence that no one using a Swedish passport with that name arrived at the airport on that date, the Applicant filed evidence that the name she was using could have been spelled "Houda", "Whoda", "Whouda" or another spelling. The Minister responded with a second statutory declaration that none of those names had been found in the Integrated Customs Enforcement System database for arrivals at Pearson on June 21, 2018.

[48]   Having decided that the photographs depicted the same person, the RAD concluded that because someone of the name "Huda", or any of the variants suggested by the Applicant, had not been found to have arrived on June 21, 2018 but KA arrived alone on June 19, 2018, this was further evidence that they are the same person. In my view, this is circular reasoning as there is nothing other than the photographs to establish that the two arrivals are the same. However, it was open to the RAD to find that the Applicant's claim to have arrived on June 21, 2018 was not credible and that she had not established her identity on all of the evidence including her misrepresentations. This was the determinative finding.

[49]   In the result, I am unable to conclude that the RAD erred in its determination that the

Applicant had not established her identity and must dismiss this application.

V.   **Certified Questions**

[50]   The Applicant submits that this is an exceptional case which raises two certifiable

questions:

> 1. Whether IRCC or CBSA should be permitted to rely on
> photographic evidence to impugn an applicant's identity in the
> absence of any other biometric evidence (e.g. fingerprints) about
> the applicant's identity.
>
> 2. Whether IRCC or CBSA should be permitted to rely on
> photographic evidence to impugn an applicant's identity without
> disclosing to the applicant the methods or processes, including any
> software, used to identify and match photos of the applicant or
> photos alleged to be of the applicant.

[51]   The Applicant submits that the questions meet the requirements for certification. She

argues that the issue of facial recognition technology or facial matching technology has

widespread repercussions and has been disproportionally affecting members of the Somali

community. Moreover, use of the technology has broader significance given its impact on

racialized and marginalized communities.

[52]   The Respondent opposes certification of a question on the ground that they would not be

dispositive of an appeal in as much as the RAD's determination on identity was based on the

entirety of the evidence in the record and whether, on the whole, it demonstrated that the

Applicant was, more likely than not, a citizen of Somalia, or not. However, in an effort to make

the Applicant's proposed questions more amenable to certification, the Respondent proposes the following alternatives:

> 1. May the RAD reasonably rely on photographic comparison evidence, together with other evidence, to make findings of fact concerning a refugee claimant's national and personal identity or is this evidence generally unreliable or unreliable in the absence of fingerprint comparison evidence?
>
> 2. May the RAD reasonably rely on photographic comparison evidence, together with other evidence, to reject the refugee claimant's evidence concerning his or her personal and national identity or is this evidence generally unreliable, or unreliable in the absence of fingerprint comparison evidence?

[53]   While I accept that the Applicant's concerns are important, I agree with the Respondent that this is not the case in which to resolve them. The proposed questions would not be dispositive of an appeal because the issues of the reliability of photographic comparison evidence and the methods by which it was obtained, were not directly raised by the Applicant before the RAD and would be presented on appeal in an evidentiary vacuum. The RAD's assessment and weighing of the evidence in this particular case, which ultimately turned on the inability of the Applicant to establish her claimed identity, would not serve as the basis for appellate review of a serious question of general importance. That question will have to wait for another day and another case.

JUDGMENT in IMM-8018-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No questions are certified.

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"Richard G. Mosley"

Judge

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DOCKET: IMM-8018-21

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