

Federal Court



Cour fédérale

Date: 20230511

Docket: IMM-6747-21

Citation: 2023 FC 671

Ottawa, Ontario, May 11, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

KASIM OSMAN ALI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Kasim Osman Ali [Applicant] seeks judicial review of the Refugee Protection Division's [RPD] September 17, 2021 decision [Decision] vacating the Applicant's status as a Convention refugee pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and Rule 64 of the *Refugee Protection Division Rules*, SOR/2012-256 [RPD Rules]. The

RPD found that the Applicant made a material misrepresentation by failing to disclose his true identity.

[2] The application for judicial review is allowed.

II. Background Facts

[3] The Applicant claims that he is Kasim Osman Ali, a citizen of Somalia born on February 12, 1999. He claims that he entered Canada on April 8, 2017 using a fraudulent Norwegian passport. On June 2, 2017, the Applicant initiated a refugee claim.

[4] On August 31, 2017, the RPD found the Applicant to be a Convention refugee pursuant to section 96 of *IRPA*. While the Applicant did not provide any official identity documents from Somalia at the time of his refugee proceeding, the RPD found that the Applicant's identity as a Somali national was established by his testimony and supporting documents.

[5] On November 18, 2020, the Minister of Public Safety and Emergency Preparedness [Minister] applied to vacate the Applicant's Convention refugee status on the basis that he misrepresented or withheld his identity before the RPD. The Minister advanced evidence of an individual named Hasim Mohamed Egal Dahir, born on November 6, 1997 in Nairobi, Kenya, who arrived in Canada on April 17, 2017. Mr. Dahir was issued a study permit to attend the International College of Manitoba, but failed to commence the program. The Minister was of the view that Mr. Dahir and the Applicant were the same individual based on a visual comparison of several photographs.

III. The Decision

[6] The RPD granted the Minister's application to vacate the Applicant's status as a Convention refugee pursuant to section 109 of *IRPA* and Rule 64 of the *RPD Rules*. The RPD found that the decision to confer Convention refugee status on the Applicant was obtained as a result of misrepresenting or withholding material facts to the matter, and that there was a causal connection between the misrepresenting or withholding and the favourable result.

[7] The main issue before the RPD concerned the Applicant's request for the Minister to disclose the investigative techniques employed in their analysis of the photo comparisons between the Applicant and Mr. Dahir. The Applicant objected to the photographs and alluded to the Minister having used Clearview AI, a company providing facial recognition software, or another facial recognition software application to compare the photographs. The Minister submitted that the Applicant's assertions were mere speculation, and that subsection 22(1)(b) of the *Privacy Act*, RSC 1985, c P-21 [*Privacy Act*] "allows law enforcement agencies to protect the details of their investigations." The RPD found that Clearview AI ceased providing services in Canada on July 6, 2020 and "would certainly not be used by a law enforcement agency such as the [Canadian Border Services Agency]." The RPD reiterated the Minister's *Privacy Act* submissions, concluding that it was not persuaded by the Applicant's request for disclosure.

[8] Turning to the Applicant's identity, the RPD found that the photographs of the Applicant and Mr. Dahir, on a balance of probabilities, were the same person. The RPD noted that it carefully reviewed the photographic evidence, including a 2011 passport photo of Mr. Dahir. The

RPD accepted that similarities in physical features among people of similar ethnic heritage may exist; however, there was striking physical similarities between the photographs. Namely, the RPD found that the structure of the overall face, including unique scarring around the Applicant's left eye, were the same. The RPD was not persuaded by the Applicant's testimony that he and Mr. Dahir were two different individuals based on its assessment of the photographic evidence.

[9] Based on the totality of the evidence, including the passport and medical examination in Nairobi, the RPD found that the Applicant is a Kenyan citizen. Accordingly, the Applicant misrepresented material facts, his correct name, date and place of birth, and country of nationality from the RPD panel of first instance. In doing so, the Applicant foreclosed an inquiry into his true identity, a material element of his claim. The RPD also found a causal connection between the misrepresentation or withholding and the favourable result, as failing to advance a refugee claim against all of one's countries of nationality is fatal to the refugee claim. The RPD concluded that the material facts that the Applicant misrepresented or withheld were so fundamental as to call into question the credibility of his entire account for fearing persecution, such that there was no remaining evidence to justify refugee protection.

IV. Issues

[10] The sole issue for determination is whether the Decision was reasonable.

V. Standard of Review

[11] The standard of review for the merits of the Decision is reasonableness. This case does not engage one of the exceptions set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Therefore, the presumption of reasonableness is not rebutted (at paras 16-17).

[12] A reasonableness review is a robust form of review that requires the Court to consider both the outcome of the decision and the underlying rationale to assess whether the decision, as a whole, bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at paras 13, 15, 99). A decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). This may include instances where the decision-maker has failed to account for evidence before it (*Vavilov* at para 126). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within a range of acceptable outcomes, the decision will be reasonable (*Vavilov* at para 85-86). The onus is on the Applicant to demonstrate the unreasonableness of the decision (*Vavilov* at para 100).

VI. Preliminary Issue

[13] A preliminary issue relates to the Respondent's submission of an affidavit affirmed by Mr. Goncalves, counsel for the Minister before the RPD. The Applicant submits that the general rule against the admission of new evidence on judicial review precludes the admissibility of Mr.

Goncalves' affidavit because it goes to the merits of the matter (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20 [*Access Copyright*]).

[14] The Respondent submits that the Court should exercise its discretion to admit the affidavit in light of the non-exhaustive list of exceptions to this rule (*Access Copyright* at para 20). The Respondent explains that the affidavit assists the Court in understanding the record before the RPD, definitively answers the issue of whether the Minister relied on facial recognition technology, and does not introduce new evidence.

[15] In my view, the affidavit of Mr. Goncalves is inadmissible on this application.

[16] Generally, the evidentiary record before a reviewing court is restricted to the record before the decision-maker. However, there are exceptions to this general rule (*Patel v Canada (Citizenship and Immigration)*, 2021 FC 483, citing *Access Copyright*):

[20] ... (i) an affidavit that provides general background in circumstances where that information might assist the court in understanding the issues relevant to the judicial review; (ii) an affidavit that is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary records of the administrative decision-maker, to enable the court to fulfill its role of reviewing the decision for procedural unfairness; and (iii) an affidavit that highlights the complete absence of evidence before the decision-maker when it made a particular finding. There may be additional exceptions, as the list is not closed.

[Citations omitted.]

[17] In the present matter, none of the exceptions apply. The substance of Mr. Goncalves' affidavit goes to the merits of the matter, specifically regarding the investigative techniques employed in the Minister's assessment of the photographic evidence, and could have been submitted before the RPD (*Perez v Hull*, 2019 FCA 238 at para 17). Mr. Goncalves did not advance these investigative techniques before the RPD. Rather, as noted above, the Minister invoked section 22 of the *Privacy Act* to protect the details of its investigation.

[18] For these reasons, I have not considered Mr. Goncalves' affidavit in the determination of this matter.

VII. Analysis

[19] While the parties also advanced submissions concerning the RPD's treatment of the Minister's refusal to disclose its investigative techniques, this application is granted on the RPD's unreasonable assessment of the evidence.

A. *Applicant's Position*

[20] The RPD unreasonably found that there were striking similarities between the photographs of the Applicant and Mr. Dahir. The RPD failed to consider the Minister's burden to provide "clear, convincing and cogent" evidence that the Applicant, on a balance of probabilities, made a material representation (*FH v McDougall*, 2008 SCC 53). Mere resemblances between the faces of two different people in photographs is insufficient to meet this standard, particularly given that the RPD acknowledged possible resemblances between those of the same ethnic group.

[21] The RPD also failed to refer to the Minister's circumstantial evidence of Mr. Dahir's and the Applicant's entry into Canada (*Cf AB v Canada (Citizenship and Immigration)*, 2023 FC 29 at paras 38-39 [AB]; *Arafa v Canada (Citizenship and Immigration)*, 2023 FC 238 at paras 22-28 [*Arafa*]).

B. *Respondent's Position*

[22] The RPD reasonably found that the Applicant and Mr. Dahir are, on a balance of probabilities, the same person. The Applicant asks the Court to reweigh the evidence, which is not the function of judicial review.

[23] The determination of identity is at the core of the RPD's expertise that warrants significant deference (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 48; *Ahmedin v Canada (Citizenship and Immigration)*, 2018 FC 1127 at para 35). Striking physical similarities between photographs is a sufficient basis upon which to reach conclusions as to identity (*Arafa* at para 22). Here, the RPD carefully conducted a manual comparison of the photographs, noting striking similarities in the overall structure of the face, nose, mouth, eyes, eyebrows, and ears, including unique scarring. The Applicant has not provided any submissions as to how the two sets of photographs differ, nor any explanation as to why he could not be Mr. Dahir. Moreover, the Applicant did not obtain a visa to enter Canada or provide official identity documents from Somalia when he initiated his refugee claim, and the Applicant and Mr. Dahir arrived in Canada around the same time in April 2017, after which Mr. Dahir never attended any classes at the International College of Manitoba. These factors inferentially support the RPD's conclusions on identity.

[24] Further, *AB* and *Afara* are not distinguishable from the present matter. The RPD clearly noted the Minister's circumstantial evidence relating to Mr. Dahir, as outlined above, though it was not required to do so to make a determination regarding the Applicant's identity. The RPD's Decision also does not run afoul to any of the principles outlined in *AB* (at paras 38-40) and *Afara* (at paras 24-26).

C. *Conclusion*

[25] In my view, the RPD erred in its assessment of the evidence.

[26] The RPD reasonably concluded, citing this Court's jurisprudence, that it was empowered to make findings based on a comparison of photos (*Liu v Canada (Citizenship and Immigration)*, 2012 FC 377 at para 10).

[27] The RPD accepted that similarities in some physical features among people of similar ethnic heritage may exist. In this context, the RPD then found "striking physical similarities" between the two sets of photographs (*Arafa* at para 23). For instance, the RPD found that "the structure of the overall face, including nose, mouth, eyes, eyebrows, and ears", including unique scarring on the outside corner of the eye, were the same in the photographs. The RPD also noted that, while the Applicant asserted there were dissimilarities in facial features, he did not identify any specific distinctions (at paras 32-33; *AB* at para 39).

[28] However, the RPD limited its analysis to a visual comparison of the photographs (*Geddi v Canada (Citizenship and Immigration)*, 2022 FC 318 at para 21; *Cf Arafa* at para 26; *AB* at

para 41). It did not go further by engaging with the Applicant's and Mr. Dahir's personal information or circumstances surrounding their arrivals in Canada. Rather, after reiterating the Applicant's testimony on these considerations, the RPD concluded that it was not persuaded by his evidence due to its photographic assessment (at para 34). For the RPD, the similarities between the photographs was determinative to whether the two individuals were the same person. In limiting its assessment in this manner, the RPD failed to engage with the evidence and reconcile the differences between the Applicant's declared date of arrival, being April 8, 2017, at the Toronto Pearson International Airport, and the date of arrival of Mr. Dahir, being April 17, 2017, at the Edmonton International Airport (*Arafa* at para 10). Similarly, while the RPD referenced the Minister's submissions regarding Mr. Dahir's medical assessment conducted in Kenya, the RPD simply refers to this in passing without any assessment.

[29] In my view, the Respondent's submissions attempt to supplement the RPD's reasons. I disagree that these considerations can be inferred from the record (*Vavilov* at para 98). The Respondent has also provided no authority in support of their assertion that the RPD need not address evidence in order to make a determination regarding the Applicant's identity. This statement runs contrary to this Court's jurisprudence. As noted by Justice Go, the consequences of the RPD's findings are significant, and should not be made without adequate reasons (*Barre v Canada (Citizenship and Immigration)*, 2022 FC 1078 at para 78; *Vavilov* at para 133).

[30] The RPD's lack of analysis in this regard renders the Decision unreasonable.

VIII. Conclusion

[31] For the above reasons, the application for judicial review is allowed. The Decision was unreasonable.

[32] Prior to the hearing, the Applicant sought a remedy of the Court compelling the RPD to disclose its investigative methods respecting the photographic evidence. At the hearing, counsel for the Applicant resiled from this request in the event the Court allowed the application for judicial review. This was, in part, a result of the information contained in the affidavit of Mr. Goncalves. Accordingly, the Applicant's requested remedy will not be considered.

[33] The parties do not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-6747-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted to a different member of the RPD for re-determination.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6747-21

STYLE OF CAUSE: KASIM OSMAN ALI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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