Federal Court Cour fédérale

Date: 20230912

Docket: IMM-6971-22

Citation: 2023 FC 1229

Ottawa, Ontario, September 12, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

IBRAHIM SEERAR MAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

[1] This is the application for judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada to vacate, pursuant to s 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, [*IRPA*] the Applicant's refugee status.

Background

[2] The Applicant, utilizing a valid Kenyan passport he obtained on May 22, 2017 in the name of Abdighaffar Abdinasir Omar, applied for a study permit to come to Canada. The study permit was issued on May 17, 2018. He travelled to Canada in June 2018 using that passport.

[3] In July 2018, the Applicant, identifying himself as Ibrahim Seerar Mah, made a claim for refugee protection, which was accepted by the RPD without need of a hearing. The Basis of Claim [BOC] submitted by Ibrahim Seerar Mah stated that he was a citizen of Somalia. He claimed that on May 14, 2018, he and six other Somali youths were herding animals when members of al-Shabaab approached them. The men shot and killed two of the youths when they tried to run away and abducted and beat the others. The Applicant claimed that he escaped the next morning. His family hired a smuggler, and the Applicant left Somalia with the smuggler on June 15, 2018.

[4] On October 5, 2020, the Minister of Public Safety and Emergency Preparedness [Minister] brought an application, pursuant to s 109(1) of the *IRPA* and Rule 64 of the *Refugee Protection Division Rules* [*RPD Rules*] seeking to vacate the RPD's decision allowing the Applicant's claim for refugee protection.

Decision Under Review

[5] The RPD set out the Minister's allegations and supporting evidence, as well as the Applicant's submissions. It noted than in its analysis under s 109 of the *IRPA*, the RPD was to

consider two key issues: whether there was a direct or indirect misrepresentation or withholding of material facts relating to a relevant matter, and, if so, whether at the time of first determination, there was sufficient evidence to justify protection notwithstanding the misrepresentation.

[6] The RPD also noted that during the hearing, the Applicant acknowledged that his Kenyan passport was legally valid. However, he submitted that it was obtained through an agent. The RPD found that the Applicant had used his Kenyan passport to travel to Canada and that his citizenship is presumptively Kenyan. The Applicant did not rebut that presumption with any credible evidence. The RPD accepted that the Applicant is of Somali ethnicity, but found that he had failed to provide any credible evidence that he is a national of Somalia and no other country. Further, the test under s 109(1) is not whether the disclosure of certain facts would have caused more inquiry, but whether the refugee decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter, and whether there is a causal connection between the misrepresentation or withholding of information and the favourable result (citing *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 [*Gunasingam*] at para 7). In other words, the question was whether there was a causal connection between the Applicant's positive refugee decision and his failure to disclose information about his Kenyan activities.

[7] The RPD referred to the Statutory Declaration filed by the Applicant in response to the application to vacate. This acknowledged the Applicant's acquisition and use of a Kenyan passport for travel, the obtaining of a Canadian student visa, and entry into Canada under the

identity of Abdighaffar Abdinasir Omar – none of which the Applicant disclosed in his refugee claim made under the name Ibrahim Seerar Mah. The RPD found that the Applicant provided no credible evidence to refute the Minister's evidence, which the RPD found persuasive of the Applicant's material misrepresentation of his nationality and identity.

[8] Further, the Applicant presented no credible evidence to refute the Minister's evidence that the Respondent was in Kenya, and not in Somalia, during the relevant time as presented in his BOC form. The RPD noted that, at the hearing, the Applicant acknowledged that he withheld information about his sojourn in Kenya. The RPD found that the Applicant's misrepresentation to the RPD was material, and there was a causal connection between the withholding of a material fact – his Kenyan nationality – and the favourable refugee decision as a Convention refugee from Somalia.

Issues and Standard of Review

[9] I note here that the Applicant was represented by counsel who prepared and submitted his application for leave and judicial review. On August 15, 2023, counsel sought an order to be removed as counsel of record. This request was made on the basis that the Applicant received notice of the judicial review but has not responded to communications from counsel since at least June 14, 2023, and is believed to have left Canada. The Order was granted on August 17, 2023, and came into effect on August 29, 2023, when former counsel filed proof of service of the Order at the last known address and email address of the Applicant. The Applicant did not attend, and was not represented by counsel at the judicial review hearing, and the hearing proceeded on the basis of the written submissions of his former counsel.

[10] In the written submissions, the Applicant does not take issue with any of the RPD's findings of fact. Rather, he submits the issues are:

i. Whether the RPD breached the duty of procedural fairness by failing to order Canadian Border Services Agency [CBSA] to disclose information pertaining to their investigative methodology; and

ii. Whether the RPD erred in failing to admit, post-hearing, a Somali passport obtained by the Applicant.

[11] The parties submit and I agree that reasonableness is the standard of review applicable to the merits of the RPD's decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25). This is the standard applicable to the issue of the failure to admit the passport.

[12] The Applicant's written submissions appear to suggest that the reasonableness standard also applies to the procedural fairness issue. However, issues of procedural fairness are to be reviewed on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79 and in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*], the Federal Court of Appeal held that the required reviewing exercise is best – albeit imperfectly – reflected in the correctness standard. The Court is to determine whether the proceedings were fair in all of the circumstances (*CPR* at paras 54-56; see also *Watson v Canadian Union of Public Employees*, 2023 FCA 48 at para 17).

Statutory Provisions

[13] The following section of the *IRPA* is relevant to the RPD's decision:

> **Applications to Vacate**
> **Vacation of refugee protection**
>
> **109 (1)** The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.
>
> **Rejection of application**
>
> **(2)** The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.
>
> **Allowance of application**
>
> **(3)** If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

No Breach of Procedural Fairness

[14] The Applicant submits that CBSA did not disclose their methodology for how they matched the Applicant's photograph with the Kenyan photos and that "it seems relevant and fair to necessitate such disclosure."

[15] The Applicant notes that the Minister's written submissions to the RPD included that:

> 12. A Kenyan citizen named Abdighaffar Abdinasir OMAR, born on 10 November 1997 in Garissa, Kenya, was approved for a study permit on 17 May 2018 by the Nairobi visa office.
>
> …..

> 16. OMAR's photograph was collected upon his entry to Canada. Photographs from these records compared to the photographs collected from Ibrahim Seerar MAH during his refugee intake reveal that on a balance of probabilities the photographs are of the same individual.

[16] The Applicant submits that it is unlikely that two sets of similar images could be manually located unless CBSA is using facial recognition technology. Relying on *Barre v Canada (Citizenship and Immigration)*, 2022 FC 1078 [*Barre*], the Applicant submits that CBSA "did not respect disclosure requirements" as they did not share their methodology for matching the photographs.

[17] There is no merit to this submission.

[18] First, as the Respondent points out, there is nothing in the record before me to indicate that the Applicant made any request of the RPD to make such a disclosure order. Rather, this issue arises for the first time on judicial review. The RPD cannot be faulted for failing to address an issue that was never raised before it (see *Oluwo v Canada (Citizenship and Immigration)*, 2020 FC 760 at para 43; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-23).

[19] *Barre* is also distinguishable on its facts. In *Barre*, the Minister's vacation application 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 CBSA used Clearview AI

to generate the photo comparisons. The Minister objected to the applicants' evidence concerning Clearview AI, arguing that there was no indication it was used in the investigation. The Minister further argued that section 22(2) of the *Privacy Act* allows law enforcement agencies to protect the details of their investigation. The RPD vacated the applicants' refugee status based in part on the photo comparisons.

[20] On judicial review, the applicants in *Barre* argued that the RPD should not have admitted photographic evidence of the Kenyan students. Justice Go found that the RPD erred by allowing the photo comparisons without requiring the Minister to disclose the methodology used in procuring the evidence. Thus, unlike *Barre*, where admissibility was raised by the applicant in response to the vacation application, and a reviewable error was identified by the Court with respect to that issue on judicial review, the issue before me does not appear to have been similarly raised by the Applicant before the RPD. Accordingly, the RPD did not err in failing to address the issue.

[21] Second, the Applicant in this matter does not appear to dispute that he is the same person in both sets of photographs. Before the RPD, he acknowledged that he obtained his Kenyan passport bearing the name Abdighaffar Abdinasir Omar and used it to obtain a student visa and to travel to Canada, but claimed it was obtained through improper means by his smuggler. As the Respondent submits, even if the disclosure had been requested, it is unclear how further information about how the photographs were obtained by CBSA might have changed the situation as the Applicant did not deny that he was the same person in the photographs. Put

otherwise, unlike *Barre*, the Applicant is not suggesting that there is a possibility that he was improperly identified by the comparison of the photographs.

[22] In these circumstances, the Applicant has not established that the RPD breached procedural fairness.

Somali Passport – No Error in Failing to Admit

[23] The Applicant submits that, through his counsel, he informed the RPD at the vacation hearing that he would be obtaining his Somali passport shortly. He claims that he received the passport on July 4, 2022 and that his counsel submitted it to the RPD on July 5, 2022 by way of an application made pursuant to *RPD Rules* 43 and 50. On July 6, 2022, the RPD responded, indicating that it was returning the document because the decision of the RPD was made before the RPD received the document. The Applicant submits that this was incorrect, as the date of the RPD decision is July 6, 2022. Further, the RPD was put on notice that the post-hearing disclosure would be submitted. He submits that the application should have been granted, and the Somali passport considered, and that the RPD erred in failing to do so, rendering its decision unreasonable.

The Respondent submits that the RPD was not required to admit the Somali passport as post-hearing evidence for the purposes of the vacation hearing. Pursuant to s 109(1) of the *IRPA*, the issue was not whether the Applicant had obtained some sort of status in Somalia, but whether he had withheld evidence from the RPD in his initial refugee claim noting that in its decision the

RPD cited *Bafakih v Canada (Citizenship and Immigration),* 2020 FC 689 at para 12 in this regard.

Analysis

[24] As the RPD found, pursuant to s 109 of the IRPA it was required to determine if the Applicant's refugee status was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. And if so, whether other sufficient evidence was considered at the time of the first determination to justify refugee protection.

[25] *RPD Rule* 43(1) does permit a party who wants to provide a document as evidence "after a hearing but before a decision takes effect" to do so if they make an application in accordance with Rule 50. However, *RPD Rule* 68(1)(b) states that a written decision made by a single RPD member on an application to vacate or to cease refugee protection takes effect when the member signs and dates the reasons for the decision.

[26] Here, the Applicant submitted the Somali passport to the RPD on July 5, 2022. The RPD reasons are dated June 29, 2022 on both the covering and signature page. In view of *RPD Rule* 68(1)(b), June 29, 2022 is the date that the decision came into effect. Accordingly, the RPD did not err in refusing to admit the Somali passport. It was submitted after its decision had come into effect.

[27] Even if the Somali passport had been accepted, this would not have changed the RPD's misrepresentation finding, a finding that is not disputed by the Applicant. And, as the Somali

passport was not submitted and was not considered by the RPD when the refugee claim was determined, it also does not comprise "other sufficient evidence" that could have justified refugee protection. The Applicant does not submit that the evidence that was before the RPD when his refugee claim was determined would be sufficient to justify refugee protection pursuant to s 109(2) of the *IRPA*.

[28] I would also observe that at the vacation hearing, the RPD found that the Applicant had not provided credible evidence to refute the Minister's evidence that the Applicant was in Kenya, and not Somalia, during the relevant period identified in his BOC and found that the Applicant was not a credible witness. The Applicant did not challenge this finding in his judicial review application. Although the RPD did not explicitly address this in the context of s 109(2) of the *IRPA*, the RPD implicitly found that other evidence considered in the refugee claim hearing would not be sufficient to overcome this credibility finding on a central aspect of the Applicant's claim (see *Hailu v Canada (Citizenship and Immigration)*, 2021 FC 15, at paras 24-25; *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 24).

Conclusion

[29] For the reasons above, the application must be dismissed.

JUDGMENT IN IMM-6971-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6971-22
STYLE OF CAUSE:	IBRAHIM SEERAR MAH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 6, 2023
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	SEPTEMBER 12, 2023

APPEARANCES:

No Appearance	FOR THE APPLICANT
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