

Federal Court



Cour fédérale

Date: 20230614

Docket: IMM-7286-22

Citation: 2023 FC 843

Ottawa, Ontario, June 14, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

KARSHE MUMIN HIRSI

Applicant

and

**THE MINISTER OF SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

[1] By decision dated June 30, 2022, made under section 109 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (the “IRPA”), the Refugee Protection Division (“RPD”) vacated the applicant’s status as a Convention refugee.

[2] The RPD found that the applicant made a material misrepresentation when he entered Canada by failing to disclose his true identity.

[3] On this judicial review application, the applicant asked the Court to set aside the RPD's decision as unreasonable, applying the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 563.

[4] For the reasons that follow, I conclude that the RPD's decision must be set aside and the Minister's application to vacate returned for redetermination.

I. Events Leading to this Application

[5] The applicant claims to be a citizen of Somalia, born in Mogadishu on June 5, 1996. He alleged that he entered Canada on August 19, 2017, using a fraudulent Swedish passport that he did not see and which was kept in the possession of the woman that brought him to Canada.

[6] On September 12, 2017, the applicant initiated a refugee claim.

[7] On December 10, 2018, the RPD concluded that the applicant was a Convention refugee.

[8] On August 11, 2017, a Kenyan citizen named Zakariya Dahir Dukow entered Canada on a study permit. Mr Dukow was born in Kenya on September 14, 1997. The Canadian visa office in Nairobi issued a study permit to Mr Dukow on June 26, 2017.

[9] On October 6, 2020, the Minister of Public Safety and Emergency Preparedness Canada filed an application to the RPD under section 109 of the *IRPA* seeking to vacate the applicant's

Convention refugee status. The Minister alleged that the applicant and Mr Dukow were the same person.

[10] The RPD held a hearing on June 9, 2022. After the hearing, the Minister and the applicant (respondent before the RPD) filed written submissions.

[11] By decision dated June 30, 2022, the RPD allowed the Minister's application to vacate the applicant's refugee status, and nullified the RPD decision of December 10, 2018, that conferred Convention refugee protection upon the applicant. The RPD concluded that refugee protection had been granted based on the applicant's misrepresentation of his identity and citizenship, specifically by his failure to disclose his true identity and Kenyan citizenship.

[12] The RPD reached three important overall conclusions:

- (a) Based on photographs of the applicant and Mr Dukow, the RPD concluded that they were the same person.
- (b) The applicant entered Canada as Mr Dukow using his Kenyan passport, which was an authentic passport that was unchallenged on three occasions by immigration authorities in Kenya and on arrival in Canada.
- (c) The applicant provided no credible opposing evidence to refute the Minister's evidence. The applicant did not establish how he obtained his Somali passport after he was already in Canada. The RPD assigned no weight to his explanation of how he obtained a Somali Certificate of Identity Confirmation and no weight to other Somali documents tendered to show his identity.

II. Analysis

A. *Standard of Review*

[13] I agree with the parties that reasonableness is the applicable standard of review: *Ali v Canada (Citizenship and Immigration)*, 2023 FC 671, at para 11; *AB v Canada (Citizenship and Immigration)*, 2023 FC 29, at para 18.

[14] Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61.

[15] Not all errors or concerns about a decision will warrant the Court's intervention. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. The problem(s) cannot be merely superficial or peripheral, but must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100; *Canada Post*, at para 33.

B. *The RPD's Decision was Unreasonable*

[16] On the application to the RPD under *IRPA* section 109 to vacate the applicant's Convention refugee status, the Minister bore the burden of proof to show that the applicant had misrepresented his identity and citizenship: *Ede v Canada (Citizenship and Immigration)*, 2021 FC 804, at para 27 (citing *Nur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 636, at para 21). See also *Begum v Canada*, 2005 FC 1182, at para 8.

[17] The RPD's conclusion that the applicant and Mr Dukow were the same person was based on a comparison of their photographs. The RPD also made observations of the applicant's facial features at the RPD hearing.

[18] The RPD recognized this Court's case law establishing that it could make its own assessment of photographs, without relying on expert evidence (citing *Liu v Canada (Citizenship and Immigration)*, 2012 FC 377, at para 10; *Yauce v M.C.I.*, 2018 FC 784). The applicant did not challenge that conclusion, which reflects the current state of the law: *Ali*, at para 26; *Gedi v Canada (Citizenship and Immigration)*, 2022 FC 318, at para 19 (citing *Liu v Canada (Citizenship and Immigration)*, 2012 FC 377, at para 12).

[19] The RPD considered the facial features of the individual in photographs of Mr Dukow and found that they bore a "striking and persuasive resemblance" to the photographs of the applicant. The RPD found that "the spacing of eyes, the bridge of the nose, ears and chin [were] the same" and observed that "the shape and contour of the lips [were] similar and distinctive, as [was] the hairline in the photographs". The ears were at the "same eye level".

[20] Referring to the applicant's submissions that there were "noticeable differences between the various photographs including the presence of a scar, differences in hair length and the hairline, and differences in the ears", the RPD held that "any perceived slight differences in photographs can be attributed to differences in aspects such as lighting, camera focus and camera angles".

[21] The RPD concluded that "based on [its] examination of the photographs", the applicant was the same person as depicted in the photographs of Mr Dukow.

[22] Relying on the Court's very recent decision in *Ali*, the applicant argued that the RPD erred in its assessment of the evidence, by limiting its analysis to a visual comparison of the photographs and by ignoring other evidence in the record: *Ali*, at paras 25-30. The applicant challenged the RPD's failure to consider the scar on the applicant's forehead and compare it to the photos of Mr Dukow, arguing that the RPD failed to scrutinize the photographs thoroughly and did not provide a responsive justification for its conclusions (citing *Vavilov*, at para 133).

[23] The respondent submitted that the RPD assessed the similarities and differences between the photographs of the applicant and Mr Dukow and reached a plausible conclusion. The respondent maintained that the RPD had the benefit of seeing the applicant in person as well as comparing the photos. According to the respondent, the RPD's reasons addressed the applicant's concerns about the photos. The respondent distinguished *Ali*, arguing that the RPD's reasoning was not limited to the photographs and also included an analysis of the Kenyan and Somali passports.

[24] I agree in substantial part with the applicant's position. Applying the principles in *Vavilov* and the Court's recent case law on the use of photograph evidence to assess identity, I conclude that the RPD's decision was unreasonable.

[25] The reasons provided to an individual whose vital interests are affected must reflect the stakes: *Vavilov*, at para 133. This Court's recent decisions have also emphasized the importance of responsive reasons when the RPD assesses an individual's identity by comparing photographs: see *Ali*, at para 29; *Arafa v Canada (Citizenship and Immigration)*, 2023 FC 238, at paras 24, 26; *AB*, at paras 39-40; *Barre v Canada (Citizenship and Immigration)*, 2022 FC 1078, at paras 69, 74-75, 77, 78; *Gedi*, at paras 19, 20. This is consistent with the increased emphasis on responsive and justified reasoning in and since *Vavilov*: see *Vavilov*, at paras 2, 14, 127-128, 133; *Canada Post*, at paras 60-61, 64; and, for example, *Canada (Attorney General) v Public Service Alliance of Canada*, 2022 FCA 204, at paras 10, 12, 17, 20.

[26] The Court has also noted that while the RPD may make its own naked-eye assessment to compare photos, it can be a highly subjective and impressionistic exercise and must be approached with care: *Arafa*, at para 23; *Barre*, at para 70; *Gedi*, at para 19.

[27] The Court has also noted the risks of unconscious or implicit racial bias that a decision maker should be aware of when the individuals are of a different ethno-racial background: *Arafa*, at paras 23, 25; *Barre*, at para 70.

[28] In this case, I am persuaded that the RPD's assessment failed to provide an analysis of the photographs that was responsive to the evidence and the parties' submissions.

[29] After the RPD hearing, both parties' written submissions went to considerable lengths to emphasize the importance of a careful comparison of the photographs and to provide specific points of similarity and difference.

[30] The Minister's written submissions "implored" the RPD to "examine the individual features" in the photographs of the applicant and Mr Dukow: to compare the "eyes, eyebrows, nose, ears, lips, distance between the nose and lips, philtrum, and chin area". The Minister highlighted the scarring over the right eyebrow, as well as an indent above the scar in the photographs.

[31] The applicant's written submissions reiterated that the Minister implored the RPD to examine the individual features in the photographs, and provided the applicant's own observations about the photos. The applicant referred to the prominent scar on the applicant's forehead, arguing that it did not appear in Mr Dukow's photos. The applicant also distinguished Mr Dukow's photograph based on the applicant's "long nose and small nostrils", whereas Mr Dukow had a flatter nose with bigger nostrils. Mr Dukow had a space in his left eyebrow where there was no hair, but the applicant's eyebrows had nothing similar. The applicant contrasted the height and breadth of the individuals' ears and their hairlines.

[32] The applicant then compared the two photographs of Mr Dukow, again contrasting the scars on the forehead with the applicant's, and Mr Dukow's hair, nose, lower lip and longer neck.

[33] The applicant also noted that both men would be identified as Somalis by people who are familiar with individuals of Somali ethnicity. The applicant argued that Mr Dukow would be so identified "less readily" as his skin looked "quite light and his head's shape is square rather than the darker skinned" applicant who also had a "longer more oval face than are typical features of ethnic Somalis".

[34] The RPD's reasons found a striking resemblance between the photos, on the basis of certain points of similarity, but did not deal meaningfully and at a level of detail with several points made by the applicant to distinguish his photos from Mr Dukow's and with at least one point from the Minister. The RPD failed to deal meaningfully with the applicant's arguments relating to the scar on the applicant's forehead (including that it appeared different in separate photographs). It did not address the indent above the scar as noted by the Minister's submissions. The RPD did not address the applicant's points concerning the space in Mr Dukow's left eyebrow, the length of the applicant's nose and size of his nostrils, and how far Mr Dukow's ears stuck out from his head. The RPD also did not address the shape of the individuals' heads and their skin tone, as raised by the applicant. Responding to some of these points may also have required a consideration of the risks identified in *Arafa* and *Barre*: see *Arafa*, at paras 23, 25; *Barre*, at para 70.

[35] In short, the RPD did not seek to reconcile a number of alleged differences between the photographs as identified by the applicant and one point of alleged similarity by the respondent: *Barre*, at para 75; *Gedi*, at para 20. Further, the RPD did not instruct itself on the inherent risks of such a subjective and impressionistic exercise as comparing photographs, as described above.

[36] The applicant's photograph had a distinct and dark scar on his forehead. While the RPD found that "any slight differences" in the photographs could be attributed to lighting, camera focus and camera angles, it is hard to understand how the prominent scar in the applicant's photograph in this case could be characterized as a "slight" difference. In addition, I observe that while the RPD's assessment seemed to treat it as a neutral factor, explained away by the qualities of the photograph, the RPD did not explain how such a noticeable feature could be treated as effectively neutral. In my view, the RPD should have engaged specifically with this distinctive feature and determined whether the scars were the same, or not, or provided a more detailed understanding of how it reached its overall conclusion in the presence of the scar in one individual's photos.

[37] The RPD's reasons mentioned that the member made a "careful and thorough observation" of the applicant's facial features during the hearing. However, the RPD's in-person observations did not feature in its comparative assessment of the two individuals. Its conclusion was expressly based on its comparison of the photos. The fact that the RPD made such observations of the applicant in person, without further comment, explanation or comparison to Mr Dukow's photograph, serves to underline the need for adequate and transparent reasons to support the RPD's identity determination.

[38] I do not agree with the respondent's submission that the rest of the RPD's analysis supported its conclusion on the photograph comparison. The fact that immigration authorities in Kenya and at the Canadian border did not question Mr Dukow's Kenyan passport may support a conclusion that the passport was genuine, but it does not connect that passport to the applicant and therefore does not assist to establish whether the applicant is Mr Dukow. The RPD's conclusion that the applicant entered this country with the Kenyan passport was entirely dependant on its conclusion from the photo comparison.

[39] Reading the RPD's reasons as a whole, it appears that the RPD hearing may have resolved into a perceived choice between the proof of two proposed identities – a Kenyan identity proposed by the Minister, and a Somali identity proposed by the applicant. The RPD rejected the latter, albeit over the objections of the applicant due to the difficulty in securing Somali documents from a central government authority. Indeed, the applicant strongly disagreed with the merits of RPD's analysis of his Somali passport and other documents. However, the applicant did not directly challenge the RPD's reasoning process or identify any constraints in the law or evidence that might undermine its conclusions: *Vavilov*, at paras 125-126.

[40] The applicant did argue that the RPD should have accounted for additional evidence about his Somali identity and his presence in Somalia in 2017. However, that evidence was not before the RPD on the vacation hearing. Assuming the argument was made to the RPD at first instance, in my view, the RPD was not constrained to account expressly for the summary references to that evidence in the RPD's December 2018 reasons granting him Convention refugee status, when it made its decision under *IRPA* section 109.

[41] I note, however, that the applicant has status as a protected person in Canada. The Minister's legal burden was to demonstrate why that status should be vacated. The RPD's duty was to explain why it agreed with the Minister with adequate reasons that were responsive to the evidence and the parties' submissions. The RPD's reasons in this case were not reasonable owing to material flaws in its reasoning process, related to the absence of responsive justification for its conclusion on a central issue.

[42] These reasons make no comment on whether the applicant and Mr Dukow are the same person. That will be for the RPD to decide on redetermination.

III. Conclusion

[43] The application is allowed. The RPD's decision will be set aside and the matter returned to the RPD for redetermination by another Member.

[44] The respondent's counsel requested that the style of cause be amended to reflect the correct respondent as the Minister of Safety and Emergency Preparedness. That will be done.

JUDGMENT in IMM-7286-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The RPD's decision dated June 30, 2022, is set aside.
2. The Minister's application to vacate under section 109 of the *Immigration and Refugee Protection Act* is returned to the RPD for redetermination by another Member.
3. The style of cause is amended so that the respondent is the Minister of Safety and Emergency Preparedness.
4. No question is certified for appeal under paragraph 74(d) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7286-22

STYLE OF CAUSE: KARSHE MUMIN HIRSI v THE MINISTER OF
IMMIGRATION, REFUGEES AND CITIZENSHIP

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 17, 2023

**REASONS FOR JUDGMENT
AND JUDGMENT:** A.D. LITTLE J.

DATED: JUNE 14, 2023

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