

Federal Court



Cour fédérale

Date: 20240710

Docket: IMM-2746-23

Citation: 2024 FC 1085

Toronto, Ontario, July 10, 2024

PRESENT: The Honourable Justice Battista

BETWEEN:

ABDIQANI IBRAHIM ALI

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Protection Division (RPD) to vacate the Applicant's status as a Convention refugee. The RPD vacated the Applicant's status on the basis of photographs that led the RPD to believe that he had misrepresented his identity, including his citizenship. For the reasons that follow, I find that the RPD breached the principles of procedural fairness, and ignored and dismissed relevant evidence. As such, the application is granted.

II. Preliminary matters

A. *First preliminary matter: renaming the Respondent*

[2] Since the issuance of the *Ministerial Responsibilities Under the Immigration and Refugee Protection Act Order* (SI/2015-52), the Minister of Public Safety and Emergency Preparedness has had responsibility for vacation proceedings under s. 109(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Respondent proposes, and I agree, that the correct Respondent in this matter is the Minister of Public Security and Emergency Preparedness. I therefore order that the style of cause in this matter be amended to reflect the correct Respondent.

B. *Second preliminary matter: confidentiality*

[3] I have concerns similar to those expressed by Madam Justice Avvy Go in *Barre v Canada (Citizenship and Immigration)*, 2022 FC 1078 [*Barre*] about the public disclosure of information about the Kenyan student identified in the record who is alleged to be the Applicant. At the hearing of this matter, I received the consent of the parties to issue a confidentiality order to protect the privacy of the student, regardless of the outcome of this matter.

[4] As such, I order that the information in this Court file relating to the Kenyan student not be released to the public. Specifically, I order that the existing record, which contains un-redacted details about the Kenyan student, be designated as confidential. For the sake of public access to Court records, I also order that all the documents filed by the parties and the Tribunal be re-filed in redacted public versions with all identifying information removed: the Applicant and Respondent will each re-file their memoranda of argument and the RPD will re-file the Certified Tribunal Record. These redacted documents shall be filed within one month of the release of this decision, and the Court will make them available to the public.

[5] I further order the parties and the RPD not to publish or disclose any information relating to the personal identity of Kenyan student alleged to be the Applicant to the public.

III. Background

[6] On May 2, 2017, a panel of the Refugee Protection Division found the Applicant to be a Convention refugee pursuant to s. 96 of IRPA. The panel's decision was made after an oral hearing, including the consideration of sworn and unsworn oral and documentary evidence from a variety of sources confirming the Applicant's identity. The RPD panel found him credible and provided a positive decision accepting his claim on the day of his hearing.

[7] The Applicant had claimed refugee protection against Somalia on March 8, 2017. His claim was based on the danger to his life from Al Shabaab. He and his family were targeted by Al Shabaab because of their adherence to the Sufi faith. Specifically, Al Shabaab killed his father and brother, and attempted to recruit the Applicant for their militia.

[8] The Applicant eventually became a permanent resident of Canada. However, on November 4, 2020, the Applicant received an application to vacate his refugee status by the Minister's counsel for Canada Border Services Agency (CBSA). The application to vacate was based on the Minister's belief that the Applicant is actually a Kenyan citizen, two years older, who allegedly entered Canada on a student visa on December 14, 2016.

[9] The application to vacate was considered by a panel of the RPD over three sittings, held on March 4, 2022, April 4, 2022, and May 16, 2022. The RPD allowed the application to vacate on February 3, 2023. Ultimately, the decision to vacate was based on the RPD member's perceived similarities between the Applicant and the Kenyan student alleged to be the Applicant after a visual

comparison of photographs. The impact of the decision was to nullify the Applicant's refugee status, putting him at risk of losing his permanent resident status and being rendered inadmissible to Canada for five years for misrepresentation based on the combined impact of ss. 40(1)(c), 40(2)(a), 46(1)(d), and 109(3) of IRPA.

IV. Issues and Standard of Review

[10] This application for judicial review raises two issues:

- A. Did the RPD breach procedural fairness in limiting the Applicant's ability to test the evidence brought against him?
- B. Was the RPD decision reasonable?

[11] In my view, issues of procedural fairness are not amenable to a standard of review analysis. Instead, the question is whether the decision making process was fair in all the circumstances, applying the factors set out by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. As stated by the Federal Court of Appeal in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69:

[55] Attempting to shoehorn the question of procedural fairness into a standard of review analysis is also, at the end of the day, an unprofitable exercise. Procedural review and substantive review serve different objectives in administrative law...

[56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond...

[12] By contrast, the RPD's substantive decision is reviewable on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*].

A reasonable decision is one that displays justification, transparency, and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at para 15.

V. Analysis

A. *Issue one: Procedural fairness*

[13] The Applicant states that the RPD breached the duty of procedural fairness by denying his requests to determine the methodology used to obtain and analyze the comparison photographs, and thereby to test the reliability of the Minister's evidence.

[14] From the beginning of the vacation proceedings, the consistent primary concern raised by the Applicant was how CBSA was able to find photos of a Kenyan national and match them with his photos. Counsel for the Applicant first sought disclosure of the techniques used to locate and compare the photographs at the outset of the vacation proceedings, and again after the release of this Court's decision in *Barre*.

[15] In response, Minister's counsel denied that facial recognition software was used, and stated that the similar photographs were detected and analyzed through a "manual process." Minister's counsel later submitted what purported to be a digitally signed affidavit from Nicole Noble, a CBSA investigator, indicating that a confidential manual investigative technique was used and the photographs were taken from the Global Case Management System, London Regional Medical Office, and/or Primary Inspection Kiosks. Minister's counsel provided no further disclosure regarding the source and methodology used to obtain and compare the photographs.

[16] The RPD denied the requests from the Applicant for further information regarding the methodology used to obtain and compare the photographs. The panel found it sufficient that

counsel for the Minister provided an assurance that no facial recognition software had been used. The panel appeared to interpret the Applicant's concerns as being related to the capacity of the panel to render a reliable decision. In doing so, it entirely avoided the issue of procedural fairness owed to the Applicant.

[17] The RPD stated at paragraph 12 of its decision:

Furthermore, it is the duty of the panel to determine the outcome of the application and not the Minister or Counsel for the Respondent. Therefore, the method of gathering evidence is not relevant to the case.

[Emphasis added.]

[18] The panel then referred to its authority to render decisions in the absence of expert evidence and stated "...once the Minister submits the two photographs into evidence, the outcome is the same. The panel must undertake an independent assessment, taking all the evidence into account."

[19] Minister's counsel offered justifications for shielding the evidence from examination, but the RPD did not rely upon those justifications. For the RPD, the mere existence of the photographs and reassurance that facial technology was not used was sufficient for its decision.

[20] The duty of procedural fairness in refugee vacation proceedings can be determined by applying the factors identified by the Supreme Court of Canada in *Baker*. Acknowledging that the content of the duty of procedural fairness is contextual, the Court set out a number of factors to determine the level of participatory rights required in a particular statutory, institutional, and social context. The Court identified the following factors:

- *the nature of the decision being made and the process followed in making it*: essentially, the closer the nature of the decision and the process is to a judicial model, the higher the procedural protections;
- *the nature of the statutory scheme and the “terms of the statute pursuant to which the body operates”*: the role of the decision being made in the context of the statute, and avenues for recourse are relevant considerations within this factor;
- *the importance of the decision to the individual or individuals affected*: “The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated” (para 25);
- *the legitimate expectations of the person challenging the decision*: if a person has been legitimately led to believe that a certain process or result will ensue, greater procedural protections will be applied; and,
- *the choices of procedure made by the agency itself*: appropriate deference should be given to the expertise as well as institutional constraints of an agency.

[21] Applying these factors to refugee vacation proceedings, I find that they dictate a high level of procedural protection.

[22] The refugee vacation process is closer to a judicial—rather than a purely administrative—process. An oral hearing is provided, with a right to counsel, before a quasi-judicial decision maker. The proceedings are adversarial in nature.

[23] Within the statutory scheme, refugee vacation proceedings have the potential to not simply revoke protected person status, but to also revoke permanent residence and make a person

inadmissible to Canada for five years based on s. 40(1)(c) of IRPA. The vacation decision-maker is situated at the same decision-making hierarchy level as the decision-maker who originally granted refugee status; no higher legal authority is required. No appeal is available; an application for judicial review in this Court is the only means of challenging a vacation decision, and leave is required to bring that application. The person concerned loses refugee status immediately upon an affirmative vacation decision, regardless of whether a Federal Court challenge to the decision is filed: IRPA, s. 109(3). As stated above, this loss of status brings with it the potential for loss of permanent residence based on s. 46(1)(d) of IRPA, and removal. In my view, it is difficult to find a process under IRPA with a greater imbalance between severe consequences and limited recourse. This imbalance requires high procedural protections, in my opinion.

[24] The importance of refugee vacation proceedings to individuals affected by vacation decisions also dictates high procedural fairness standards. Vacation of refugee status removes protection previously granted by Canada to those fearing persecution in their countries of origin. In *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paragraph 25, quoting *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraph 118, the Supreme Court found that, “the greater the effect a decision has on the life of an individual, the more robust will be the procedural protections required to fulfill the duty of fairness and the requirements of fundamental justice under section 7 of the Charter.”

[25] Regarding legitimate expectations, an argument can be made that the granting of refugee protection after an oral hearing before an RPD panel, and the granting of Canadian permanent residence which flows from that status, leads to legitimate expectations that protected person status would not be revoked by another RPD panel without a high level of procedural safeguards. However, given varying perspectives on the scope of the legitimate expectations doctrine in

Canadian administrative law, I make no conclusions on this *Baker* factor in determining the content of procedural fairness in refugee vacation proceedings.

[26] Concerning the final *Baker* factor, I find that the RPD's choice of procedures is constrained by the nature of rights at stake and the adversarial model. This tilts toward a higher level of procedural protection.

[27] Overall, considering the contextual factors identified in *Baker* for determining the content of procedural fairness, I find that refugee vacation proceedings require a high level of procedural fairness. This includes a full opportunity for refugees to challenge the evidence supporting the request to vacate status, which in turn entails the provision of information to refugees regarding the source and methodology used to obtain the evidence being used against them.

[28] Applying these procedural standards to the present case, I find that the RPD breached the Applicant's right to procedural fairness. The RPD breached procedural fairness when it denied his request for further information about the source and methodology used by the Minister in obtaining and comparing the photographs, thereby blocking the Applicant's attempts to test the reliability of the evidence being used against him. The RPD also breached procedural fairness by accepting without further examination statements by counsel for the Minister that no facial recognition technology was used and the photographs were discovered and compared manually.

[29] Counsel for the Minister in these proceedings was counsel for an adversary, not a witness or an *amicus curiae*, a "friend of the court." She provided unsworn evidence about the origin of the photographs, which I assume was hearsay given no indication in the record of her personal involvement in obtaining the evidence.

[30] I realize that the rules of evidence in RPD proceedings are relaxed, and the RPD may consider any evidence that it considers to be trustworthy and credible in the circumstances: IRPA, s. 170(g),(h).

[31] However, the relaxation of evidentiary rules by the RPD cannot be uniform in all matters; they must respond to the requirements of procedural fairness, and reflect the nature of the particular proceedings, issues involved, and interests at stake. In this case, given the adversarial context, the highly contested and controversial nature of the evidence in question, and potential for severe consequences resulting from the proceedings, the rules of procedural fairness required more than unsworn, general statements by counsel to an adversary in the proceedings regarding the provenance of evidence.

[32] Counsel for the Minister eventually produced what purported to be a digitally signed affidavit by a CBSA investigator which confirmed her own statements regarding the origin of the photographs. This document was not without its problems but at least it was intended to be sworn evidence directly from a party rather than from counsel for a party. In any case, the RPD denied the Applicant's requests to test the evidence against him without referring to anything other than general, unsworn statements from counsel for the Minister. By doing so, the RPD deprived the Applicant of the opportunity to challenge the evidence being used against him in a manner commensurate with the risks he faced.

[33] The RPD was wrong when it stated that "the method of gathering evidence is not relevant to the case." In fact, an assessment of the probative value of evidence first requires a determination of the reliability of that evidence: David M. Paciocco et al, *The Law of Evidence*, 8th ed (Toronto: Irwin Law Inc., 2020) at p 274-275. Determining the reliability of the evidence being used against

him was exactly what the Applicant was trying to achieve. This could involve questions about the process used to obtain the evidence, the reliability or propriety of that process, the risk of human or other error, and potentially other considerations. The Applicant was entitled to more than an assurance that facial recognition technology was not employed, given the high level of procedural protections required in vacation proceedings. Disclosure had to be meaningful, and include information that is only to the advantage of the Applicant: *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 at para 142. As pointed out by Justice Sebastien Grammond, full disclosure benefits the justice system as a whole because it facilitates the search for truth, allowing access to information and the testing of assertions: *Mawut v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1155 at para 29.

[34] The Respondent relies on two factually similar cases involving vacation of refugee status through the comparison of photos: *Osohle v Canada (Citizenship and Immigration)*, 2023 FC 1584 [*Osohle*] and *Ali v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 466 [*Ali*]. I find both cases to be distinguishable.

[35] *Osohle* is not helpful to the Respondent because the Court determined that there had been a waiver of procedural fairness rights: para 29

[36] *Ali* is distinguishable because the Court found that the Applicant had received what it requested, namely, an assurance that facial recognition technology was not used, and therefore no breach of procedural fairness occurred. *Ali* did not directly address the requirement for full disclosure or the standards of procedural fairness applicable to refugee vacation proceedings.

[37] Ultimately, it was unfair for the RPD to consider the photographic evidence probative enough for revoking the Applicant's statuses and at the same time allow that evidence to be shielded from examination for reliability.

B. *Issue two: Reasonableness of the decision*

[38] The RPD ignored and unreasonably dismissed the following relevant evidence before it: evidence tendered in the Applicant's refugee determination hearing, evidence of dissimilarities in the photographs of the Kenyan student, and evidence from the Kenyan government that he is not a citizen of Kenya.

(1) Evidence tendered in the Applicant's refugee determination proceeding

[39] The Applicant tendered the following identity evidence before the RPD vacation panel that was found sufficiently credible by the RPD refugee determination panel to justify Convention refugee status:

- A letter from Dejinta Beesha which stated that the Applicant belongs to the Ashraf clan and that he is a national of Somalia, originally from the town of Bu'ale. This was determined through an interview and written examination (Certified Tribunal Record (CTR) at p 91).
- An identity letter from Nurto Iftin Ali, who confirmed that the Applicant is her relative and that he was born in Bu'ale in 1997. The letter also corroborated that Bu'ale is currently in the control of Al Shabaab (CTR at p 89).
- A sworn affidavit from the Applicant's mother, Halima Abdi Rage, which explained why the Applicant fled Somalia and why she subsequently fled the country as well. The affidavit specifically confirmed the Applicant's identity as a national of Somalia (CTR at p 93).

- A sworn affidavit from the Applicant's cousin, Rashid Mohammad, who was a witness at the refugee determination hearing. Mr. Mohammed testified at Mr. Ali's hearing regarding his identity, his nationality (Somalia) and his clan membership (CTR at p 86).

[40] The credibility of this evidence cannot co-exist with the validity of the RPD vacation panel's decision. Yet, the RPD failed to specifically refer to or assess any of this evidence. The reasonableness of a decision is jeopardized when a decision-maker fundamentally fails to account for evidence before it: *Vavilov* at para 12. The RPD's failure to address this evidence renders the decision unreasonable.

(2) Evidence of dissimilarities

[41] The Applicant provided a sworn affidavit to the RPD which included a description of the differences between the photographs of him and the Kenyan student. He pointed out a scar above the right eyebrow of the Kenyan student which he does not have. He pointed out the differences in the placement and shape of the Kenyan student's ears compared to his ears. He described the differences between the shapes of their eyes and the shapes of their faces. The RPD did not refer at all to this evidence, which renders its decision unreasonable: *Gedi v Canada (Citizenship and Immigration)*, 2022 FC 318 at para 20.

(3) Evidence from the Kenyan government

[42] In an attempt to prove a negative, specifically that he is not a Kenyan citizen, the Applicant traveled to Kenya in January 2022, and obtained a letter from the Ministry of Foreign Affairs and International Trade indicating that based on the Applicant's biometrics, there was no trace that he is a Kenyan citizen either by birth or any other way. The letter is authored by a Kenyan Foreign

Service Officer named Nigel Mwaura, but is signed by Assistant Director Joseph Vungo. The RPD acknowledged objective evidence confirming that Joseph Vungo works in the position indicated in the letter at the Kenyan Ministry of Foreign Affairs.

[43] However, the RPD dismissed this evidence based on the fact that it was signed by someone other than the author of the letter, in contrast to evidence from the Applicant that authorized signatories in an organization can often sign for one another. The RPD also acknowledged that Kenyan data banks could be searched for personal information, but it required specific proof that the Ministry of Foreign Affairs could conduct such a search. Finally, the RPD expressed concerns about the fact that the Applicant had not kept documentary proof of his approach to the Kenyan authorities, such as kiosk tickets.

[44] In stark contrast to its treatment of the Minister's photographic evidence, the RPD adopted an overly stringent and therefore unreasonable analysis of the letter to impugn its origins and reliability.

VI. Conclusion

[45] In summary, the RPD relied on little more than its visual acuity to override the decision of another RPD panel granting refugee status, which in turn revoked the Applicant's refugee status and exposed him to loss of permanent residence, inadmissibility, and removal under IRPA. In the process, it breached the Applicant's right to procedural fairness by truncating his ability to test the evidence against him. The decision is unreasonable and unfair and will be set aside.

JUDGMENT in IMM-2746-23

THIS COURT’S JUDGMENT is that:

1. The style of cause is hereby amended as follows:

BETWEEN:

ABDIQANI IBRAHIM ALI

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

2. The application for judicial review is granted.
3. The matter is returned for redetermination by a differently constituted panel of the RPD in accordance with these reasons.
4. There are no questions to certify.
5. The documents on record filed prior to this judgment are designated as confidential.
6. The Applicant, Respondent, and Refugee Protection Division, respectively, are ordered to provide redacted public versions of the Applicant’s Memorandum, Respondent’s Memorandum, and the Certified Tribunal Record, with any

identifying information about the Kenyan student alleged to be the Applicant removed, within one month of this judgement.

“Michael Battista”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2746-23

STYLE OF CAUSE: ABDIQANI IBRAHIM ALI v THE MINISTER
OF PUBLIC SAFETY AND EMERGENCY
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