Federal Court  Cour fédérale

Date: 20200615

Docket: IMM-4154-19

Citation: 2020 FC 689

Ottawa, Ontario, June 15, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

LOTFI ABDULRAHMAN AHMED BAFAKIH,
SUAAD BAFAKIH,
ABDULRAHMAN LOT BAFAKIH,
AHMED BAFAKIH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of the Refugee Protection Division

[RPD] dated June 12, 2019 [Decision] wherein the RPD vacated a previous decision pursuant to s 109(1) of the *IRPA*, for misrepresentation.

II. BACKGROUND

[2] The Applicants are four citizens of Yemen. The father, Lotfi Abdulrahman Ahmed Bafakih, and the mother, Suaad Bafakih, were born in Yemen. Lotfi and Suaad married in Yemen in 1990 but they divorced in 2017. At the time of the vacation hearing, Lotfi was living in Saudi Arabia as a temporary resident, while Suaad was temporarily living in Malaysia with two of the couple's children.

[3] Lotfi and Suaad have five children, but only two of their children were included in their original refugee claim and in this vacation application. Their son, Abdulrahman, born in 1992, currently lives in the United States. The other son included in the refugee claim, Ahmed, was born in 1996 and is currently in Canada without status.

[4] The four Applicants arrived in Canada in 1998. They successfully claimed refugee protection based on allegations by Lotfi's sister Maryam Bafakih in her own claim for protection. Maryam claimed she had been harassed by a prominent Yemeni politician who attempted to force her into marriage in 1996. When Maryam did not comply, the Yemeni politician harassed the Bafakih family and imprisoned Lotfi based on false charges. On June 9, 1999, the Applicants were granted refugee status based on their claim against Yemen.

[5] Less than a year later, the Minister seized a package of documents mailed to the Applicants from the United States. This package included identity cards which indicated that Lotfi and Suaad were born in Mombasa, Kenya. For the Minister, this raised suspicion because the Applicants had not disclosed any Kenyan ties in their refugee claims.

[6] On April 27, 2000, the Minister requested Lotfi and Suaad's biometric records from the Kenyan government. On May 3, 2000, the National Registration Bureau of the Office of the President of Kenya sent a letter confirming that the fingerprints provided by the Canadian authorities matched the records of "Lutfy Abdulrahman" and "Suad Mohammed Salim," two individuals with similar names. The letter said "this confirms the suspects are registered Kenyan Nationals" and it enclosed copies of the fingerprint records. The Kenyan authorities also provided applications by the same named persons for national ID cards known as *Kitambulisho*. In their applications for ID cards, the Applicants reported themselves as living in Mombasa, Kenya. They also certified that all information was correct.

[7] In light of this new information, the Minister decided to vacate the previous decision granting the Applicants refugee status. The Minister attempted to locate the Applicants in Canada but was unable to do so. Due to the inability to locate and serve the Applicants, the Minister was unable to vacate their refugee status. This led to the Minister abandoning the vacation application in 2006.

[8] The vacation case was, in the words of the RPD, "resuscitated" over a decade later when Ahmed entered Canada in November 2017. Ahmed indicated that his father, Lotfi, was in

Saudi Arabia and his mother was in Egypt, while his brother Abdulrahman was in the United States. Ahmed provided an address in Toronto which allowed the Minister to serve Ahmed with the application to vacate dated May 11, 2018.

[9] The application to vacate alleged that the Applicants had misrepresented or withheld material facts in 1999 which "precluded the original panel from engaging in a fulsome analysis of their identities and credibility." Neither of the parents had mentioned visiting Kenya or having any Kenyan ties. Yet the biometric match, as well as the application forms provided by the Kenyan authorities, suggested Kenya could have been a country of reference for the original refugee claim.

[10] In 2019, Lotfi revealed that he had, in fact, given his and Suaad's fingerprints to his contact, Najib Abdulillah, for the purpose of acquiring Kenyan ID cards in 1994. However, he said he never received these cards and that his efforts to do so were unrelated to the Canadian decision in 1999.

III. DECISION UNDER REVIEW

[11] On June 12, 2019, the RPD granted the Minister's application.

[12] The RPD observed that there is a two-pronged test for material misrepresentation under section 109(1) of the *IRPA*. First, the RPD has to consider whether there was a material misrepresentation or withholding of material facts. Second, the RPD must consider whether there is sufficient evidence that refugee protection would nonetheless have been granted at the original

hearing. The RPD found the Minister's application met both parts of the test and granted the application to vacate the Applicants' refugee status.

[13] On the issue of misrepresentation, the RPD noted there was no dispute that the Applicants had not disclosed any connection whatsoever to Kenya in their 1999 application. The facts not disclosed included that they had tried to obtain Kenyan ID cards in 1994 and that both of Lotfi's parents were born in Kenya. The RPD considered the Applicants' explanations for these omissions, but rejected them.

[14] As to whether the omitted facts were material, there was "some evidence" that the Applicants could have obtained Kenyan citizenship through descent. The RPD noted that "the existence of potential countries of reference and attempts to obtain citizenships from potential countries of reference… goes to the very core of refugee protection," and the Applicants had withheld all information about their connections to Kenya. The RPD also held that the attempts to obtain Kenyan ID documents would have raised suspicions for the original panel and could have led to further questioning about potential Kenyan nationality or the Applicants' credibility.

[15] The RPD then addressed various pieces of evidence. After finding the Applicants were not credible due to their withholding of information, the RPD considered the argument that the documents provided by the Kenyan government lacked reliability. The RPD preferred the Yemeni documents showing that Lotfi and Suaad were born in Yemen not Kenya. However, the RPD also accepted the biometric information which showed Lotfi and Suaad had tried to obtain Kenyan ID cards and provided their fingerprints to do so. Moreover, even though their efforts to

obtain the ID cards were perhaps "illicit," the RPD found this "does not mean that he was otherwise not entitled to obtain these documents in actual, legitimate means and reasons."

[16] The RPD found that, a 2019 letter submitted by the Applicants from a Kenyan government department using a "Gmail" address, which noted that Lotfi is "probably not one of our people," lacked reliability. It stated that, even if the 2019 letter was accepted, it did not assist the Applicants given that they had withheld material information.

[17] Finally, the RPD considered the second prong of the test and whether there was sufficient evidence for the 1999 application to have been granted despite the withholding of material facts. Since Kenya had not been mentioned at all, there was no way for the panel in 1999 to evaluate Kenya as a country of reference. Seeing as the children were bound by the misrepresentations of their parents, the RPD concluded that the refugee status each of the four Applicants was vacated.

IV. ISSUES

[18] The issues raised on this judicial review application are:

1. Did the RPD rely on unreliable evidence from Kenya?
2. Did the RPD make findings of fact that were not based upon the evidence?
3. Was the RPD's finding of a material misrepresentation reasonable?

V. STANDARD OF REVIEW

[19] This application was argued following the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. However, the parties' memoranda were provided prior to these decisions. Their submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. Nevertheless, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was not necessary to ask any of the parties to make additional written submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standard of review in this case nor my conclusions.

[20] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority rejected the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[21] In this case, the Applicants made no submissions on the standard of review. The Respondent argues the decision to vacate is subject to a reasonableness review. I agree.

[22] There is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See *Mella v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1587 at para 23.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "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 para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[24] The following sections of the *IRPA* are relevant to the Decision:

Vacation of refugee protection	**Demande d'annulation**
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.	**109 (1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
Rejection of application	**Rejet de la demande**
(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.	**(2)** Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
Allowance of application	**Effet de la décision**
(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.	**(3)** La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[25] The Applicants also rely on s 42(1) of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*]:

Original documents	**Documents originaux**
42 (1) A party who has provided a copy of a document to the Division must provide the original document to the Division	**42 (1)** La partie transmet à la Section l'original de tout document dont elle lui a transmis copie :
(a) without delay, on the written request of the Division; or	**a)** sans délai, sur demande écrite de la Section;
(b) if the Division does not make a request, no later than at the beginning of the proceeding at which the document will be used.	**b)** sinon, au plus tard au début de la procédure au cours de laquelle le document sera utilisé.

VII. ARGUMENTS

A. *Applicants*

[26] The Applicants raise three fundamental issues with the Decision to vacate their refugee protection. They say the RPD: (1) relied on non-credible and untrustworthy evidence from Kenya; (2) made three factual findings that were not based on the evidence; and (3) made an unreasonable material misrepresentation finding.

(1) Credibility of the Kenyan evidence

[27] The RPD found the Kenyan documents, which were based on information provided by the Applicants to the Kenyan government, were not reliable. The Kenyan documents lacked clarity and one of the documents contained incorrect information about the Applicants' marriage. All of the documents suggested the Applicants had been born in Kenya, which was contrary to

the Applicants' assertions and contrary to their Yemeni documents. Due to these shortcomings with the Kenyan documents, the RPD preferred the Yemeni information.

[28] However, the Decision to vacate rested solely on the one Kenyan document the RPD did accept: a letter to the Canadian authorities confirming a biometric match with the fingerprints provided to the Kenyan authorities. The Applicants say this letter should also have been found unreliable. The Applicants point out that the Kenyan authorities did not provide a birth certificate, passport, or citizenship certificate for Lotfi or Suaad. Instead, there was just a letter from the Kenyan Office of the President. The Applicants argue this was not enough to prove the Applicants were Kenyan nationals, as it was not backed by credible or trustworthy evidence and the underlying information was no more than an "unidentified form containing basic biographical information and fingerprints." The fingerprint application form was "vague and illegible." The Applicants say these issues with the Kenyan documents mean that relying on the biometric match is unreasonable.

[29] Further, the Applicants say the Minister was unable to provide any original documents from Kenyan authorities or a reasonable explanation for its failure to do so. The RPD relied on the statement from the Minster that the documents "do not exist anymore." The Applicants suggest this is contrary to Rule 42(1) of the *RPD Rules* which requires parties to provide original documents to the RPD for use at a hearing. The Applicants suggest this failure to produce the original documents raises questions about the credibility of the Minister's entire case and the reliability of the Kenyan letter. The RPD should have drawn a negative credibility inference as it

often does where claimants fail to produce originals of documents without explaining their failure to do so.

[30] The Applicants also point to the grave consequences of a successful vacation application for Ahmed, who is currently residing in Canada but cannot obtain status in Canada for at least five years and, who has no alternative place to go due to a temporary suspension on removals to Yemen.

(2) Factual findings that were unsupported by evidence

[31] In their submissions, the Applicants point to three factual findings which they say were not based upon the evidentiary record before the RPD.

[32] The first disputed factual finding is the RPD's conclusion that Lotfi's parents' disclosure of their connections to Kenya on their own previous Canadian applications meant that, unlike Lotfi, his parents complied with their duty of disclosure. The Applicants note that the RPD lacked the proper record of what the grandparents disclosed on their Canadian applications for refugee status, permanent residency, or citizenship. The Applicants say any conclusion about what Lotfi's parents disclosed is purely speculative given the lack of evidence from those separate proceedings.

[33] The second fact the Applicants dispute is that Lotfi did not disclose that his parents were born in Kenya until the 2019 vacation application. The Applicants argue this was based on groundless assumptions, as the documents Lotfi previously provided to obtain his Canadian visa

were never actually provided to the RPD. The documents he later submitted on his permanent residence application – which was never processed to conclusion – were also not provided to the RPD. The Applicants say that, without knowing the contents of his visa application and his permanent residence application, it is speculative to find that this information was disclosed for the first time in 2019.

[34] The third factual finding that is disputed is that the RPD referred to the Applicants as "Kenyan citizens" in 1999 when there was no evidence that they ever actually obtained Kenyan citizenship. This argument was expanded upon in the Applicants' Reply and will be addressed below.

(3) Material misrepresentation finding was unreasonable

(a) *There was no misrepresentation*

[35] As regards the primary issue of misrepresentation, the Applicants claim that the finding that withholding their ties to Kenya was a material misrepresentation was unreasonable. The Applicants point out that Lotfi and Suaad did not hold Kenyan citizenship in 1999. They could not misrepresent something they did not legally hold. Further, the Applicants suggest they could not possibly have obtained Kenyan citizenship by descent. Given the RPD's finding that both Lotfi and Suaad were, in fact, born in Yemen, they say they could not be Kenyan citizens by birth.

[36] The RPD noted that Lotfi's parents were born in Kenya and that this was not disclosed, so the RPD found this could have been a path to citizenship. However, the RPD was "misguided" because Lotfi's paternal grandparents were born outside Kenya (before Kenya was an independent state), and so his parents would not have been able to obtain and then pass on Kenyan citizenship by descent. For Lotfi to become a legal Kenyan citizen, he would need to comply with subsection 1(1) of the *Kenya Subsidiary Legislation*, 1963, which provides that a person cannot become a citizen of Kenya if neither of his parents was born in Kenya. The Applicants point to the following evidence about the Applicants' backgrounds to support this argument:

- *Suaad was not entitled to Kenyan citizenship*: Suaad is entirely Yemeni, and there was no finding that Suaad was entitled to Kenyan citizenship – the RPD focused instead on Suaad's husband Lotfi;
- *Lotfi's mother, Asma, was not entitled to Kenyan citizenship even though she was born in Kenya*: In her affidavit, Asma said both her parents were born outside Kenya in the British colony of South Arabia which became South Yemen. The Applicants argue she had no rights to Kenyan nationality;
- *Lotfi's father, Abdulrahman, was not entitled to Kenyan citizenship even though he was born in Kenya*: The Applicants point to the affidavit of Abdulrahman (Lotfi's father, not Lotfi's son of the same name) which mentions he originated from Yemen. Abdulrahman's father (Lotfi's paternal grandfather) wanted him to "return back to Yemen" once he completed his education. The Applicants say the RPD should have inferred from this that Abdulrahman's parents were not born in Kenya. This would mean Abdulrahman could not have passed Kenyan citizenship onto any of their children including Lotfi.

[37] The Applicants argue that the RPD had a duty to consider Kenyan citizenship laws, and they say its comments that Lotfi could have obtained Kenyan citizenship by descent were unreasonable. They suggest the RPD did not perform the "highly nuanced analysis" required in the circumstances.

[38] In addition to this argument, the Applicants point out that their 1999 refugee claim was founded on the persecution of Lotfi's sister Maryam in Yemen. Maryam made her own successful claim for refugee protection and is now a Canadian citizen. The Applicants suggest that by the RPD's logic in this vacation application, Maryam would have access to Kenyan nationality through descent just like Lotfi because they are siblings. Similarly, both of Lotfi's parents, Asma and Abdulrahman, are now Canadian citizens. The Applicants say that in these family members' refugee protection proceedings, permanent residency proceedings and citizenship proceedings, the Canadian government could have canvassed the materiality of supposed "access" to Kenyan nationality. Yet no concerns were raised and Lotfi's sister and parents successfully obtained Canadian citizenship.

(b) *If there was a misrepresentation, it was not material*

[39] Alternatively, the Applicants argue that if a misrepresentation or omission was made, it was not material. They point to portions of the RPD transcript which show Lotfi procured Kenyan paperwork in 1994 but only for the purposes of escaping Yemen during the 1994 Yemeni civil war. Due to this motivation, they say the 1994 attempt to illicitly procure a Kenyan ID card was peripheral to the 1999 Canadian refugee claim.

[40] Moreover, the documents in 1994 were obtained illegally through a broker, so Lotfi could not have a lawful right to Kenyan citizenship. The Applicants argue that a well-educated individual like Lotfi would not have gone through the complicated, illicit process to obtain fraudulent Kenyan documents in 1994 if he believed he had a legal right to obtain Kenyan citizenship by legitimate means.

(c) *The two sons were minors at the time of the refugee claim*

[41] In addition to their arguments about materiality, the Applicants point to the permissive language in subsection 109(1) of the *IRPA* which states the RPD "may" vacate an individual's refugee status if it finds it was obtained as a result of misrepresenting or withholding material facts. The Applicants say this implies discretion, which the RPD should have exercised given that Ahmed was two years old at the time of the refugee claim and he had no control over the alleged misrepresentation. While there is no *mens rea* requirement for a misrepresentation, the Applicants say there still has to be a guilty "act," and since Ahmed was merely a toddler, he should not be found to have misrepresented his origins. The Applicants cite the *Convention on the Rights of the Child* which states:

> **Article 12**
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child…
>
> **Article 14**
>
> …
>
> 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

[42] The Applicants claim that the two minor Applicants, Ahmed and Abdulrahman, were incapable of forming and expressing their own views at the material time, and should not be penalized for the actions of their parents. The Applicants rely on *Kisana v Canada (Citizenship*

and Immigration), 2009 FCA 189 at para 27, a humanitarian and compassionate grounds application which noted that children should not be punished for the sins of their parents. Based on these principles and the *Convention on the Rights of the Child*, the Applicants say it was unreasonable to penalize Ahmed and Abdulrahman by vacating their refugee status due to the acts of their parents.

B. *Respondent*

(1) The findings on reliability were reasonable

[43] The Respondent says the Applicants' argument about the Kenyan and Yemeni documents is misleading. There were two types of documents provided by the Kenyan government. The first was the Kenyan government's response to the Canadian authorities' request for the Applicants' status in Kenya on May 3, 2000 (page 234 of Certified Tribunal Record). The letter confirmed a biometric match with the Applicants and confirmed they were registered Kenyan nationals. The Respondent says the RPD reasonably assessed this evidence and found the biometric match to be credible and reliable.

[44] Second, there were other Kenyan documents provided by the Applicants, including their fingerprints and their application forms to obtain the Kenyan ID cards, which the RPD noted had inconsistencies, and so the RPD preferred the contents of the Yemeni documents for the purpose of confirming the Applicants' country of birth. The Respondent says this approach was reasonable and further submits that the Applicants' birthplace is ultimately not the central issue.

The RPD's key finding was that the Applicants never disclosed any relationship with Kenya at the time their refugee claims were being processed.

[45] With regard to the Minister's failure to produce any original documents, the Respondent claims this issue is unrelated to the credibility of the biometric data obtained directly from the Kenyan government.

(2) The factual findings were reasonable

[46] The Respondent says Lotfi's parents' documentation was not before the RPD, therefore their disclosure of Kenyan ties on their own application is irrelevant to these proceedings. With respect to the factual finding that the Applicants did not reveal their ties to Kenya until 2019, the Respondent says:

> …the Applicants have failed to point to any evidence that they informed *the RPD* (or any other Canadian immigration tribunal or official) at any point prior to May 2019 that the grandparents were born in Kenya.

[47] The Respondent also submits that the Applicants' arguments rely on an erroneous view that the RPD concluded they were Kenyan citizens in 1999 when they made their Canadian refugee claim. It says the RPD did not rely on such a finding. Instead, the RPD relied upon two omissions: they were "trying to obtain documentation to be citizens of Kenya in 1994" and Lotfi's "parents were both born in Kenya."

(3) The finding of material misrepresentation was reasonable

[48] Due to the withholding of facts, the RPD was given no opportunity to assess Kenya as a potential country of reference. The Respondent points to page 7 of the Decision which states that the non-disclosure of the ties to Kenya would have:

> … at the very least raised some suspicions about his other documents from Yemen at the time and caused some more enquiries as to the facts of his claim, at the very least and I find also, that disclosure of Kenya as a country of potential nationality, whether it be from the principal respondent's own efforts in 1994 or the fact that his parents were born in Kenya, I find all of which would have cause [*sic*] much more of an enquiry into this case, perhaps even a Ministerial intervention and it simply would not have been the same type of hearing or the same type of case and there would have been analysis of whether he is able to obtain that sort of nationality and pass it on to the rest of the family and it would have been a potential country of reference.

[49] The Respondent relies on *Zheng v Canada (Minister of Citizenship and Immigration)*, 2005 FC 619 [*Zheng*] where the applicant failed to disclose his citizenship in Dominica when making his refugee claim against China. In *Zheng*, the Court found the RPD's decision to vacate was reasonable given that the withholding of this material fact prevented the RPD from assessing Dominica as a country of reference.

[50] Furthermore, the Respondent says the arguments about whether the Applicants would, in fact, have obtained Kenyan citizenship are not relevant since the RPD reasonably found:

> It is not for me to analyze now in May of 2019, the law of citizenship for Kenya as it was back then in 1999 and it is not for me, as the RPD in 2019, to ask… [the parties]… to hunt for documents from various family members to determine if they lost their citizenship to Kenya and if so, how the respondents could have been able to re-obtain their citizenship to Kenya, as of 1999. All of this should have happened in 1999 properly with proper disclosure.

[51] On the materiality argument, the Respondent reiterates that the Applicants made no mention of Kenya during their refugee claim proceedings. Hence, the RPD was precluded from considering Kenya in any way, and the RPD is entitled to deference in finding that this was a material omission in the circumstances.

[52] In response to the Applicants' argument that the RPD should not punish Ahmed because he was a minor at the time of the misrepresentation and has nowhere else to live other than Canada, the Respondent says the Applicants have not provided any evidence that Ahmed cannot live with his immediate family members in Saudi Arabia, Malaysia, Egypt, or the United States. Misrepresentation does not require malice or an intention to deceive as innocent misrepresentations are captured by s 109 of the *IRPA*. The Respondent says the RPD reasonably exercised its discretion and found Ahmed to be bound by his parents' failure to mention any ties to Kenya.

C. *Applicants' Reply*

[53] The Applicants' Reply reiterates that the Minister erroneously found the Applicants were "Kenyan nationals" in 1999 when this was not the case. The Applicants say they did not lawfully hold Kenyan citizenship and they had obtained the underlying paperwork illegitimately, so they could not have been Kenyan nationals.

[54] The Applicants dispute two assertions made by the Respondent. First, the Respondent suggests that the Applicants presented themselves in Kenya in 1994 to apply for Kenyan ID cards and were Kenyan residents at the time, but nothing in the record supports this claim that

they ever physically entered Kenya. Second, the Respondent says the RPD made no finding of Kenyan citizenship, yet at line 45 of page 2 of the Decision, the RPD refers to the Applicants as "duly registered Kenyan nationals" in 1999. The Applicants say the use of the word "ties" to Kenya distorts the facts of this case, namely, that the Applicants did not legally hold Kenyan citizenship and never had legal access to Kenyan citizenship.

[55] The Applicants say that the Yemen border war in 1994 is what caused Lotfi to procure Kenyan documentation and that this is peripheral to the merits of the Canadian refugee claim, which was made over four years later. The Applicants also point out that, unlike the current forms, the 1998 version of the Personal Information Form [PIF] "made no inquiries as to an applicant's parentage beyond a declaration of the parent's citizenship."

[56] The Applicants distinguish *Zheng* because in that case the applicant actually held citizenship in Dominica, yet this was not disclosed during his Canadian refugee proceedings. In their case, the Applicants say they were not "citizens" of a second country, as the Kenyan ID cards were procured in a fraudulent manner and any eventual citizenship that could have followed from this process was illegitimate.

[57] As regards the reliability of the Kenyan letter, the Applicants say the documents from Kenyan authorities that lacked credibility were provided by the Minister. These documents contained inaccurate material, and so the RPD accepted the Yemeni documents instead. The Applicants say these credibility concerns, and the Minister's failure to provide "any" original

documents, make the Decision unreasonable. They do not contest the biometric match based on the fingerprints.

[58] With respect to Lotfi's parents' own applications, the Applicants reiterate that there was no evidence of what they did or did not disclose. They emphasize that Lotfi's parents' Kenyan birthplace alone does not entitle them to Kenyan nationality.

[59] Finally, regarding the transcript where Applicants' counsel confirms they left Kenya in 1994, the Applicants advance two positions. First, they say it is unreasonable to rely on a statement made by counsel in closing submissions as evidence. Second, they suggest that counsel made a mistake in summarizing the facts, and point to the full quotation in the closing submissions at page 36 of the Application Record:

> Their efforts to leave Kenya around 1994 had no *unintelligible* or bearing on the problems that ultimately caused the family to flee and ultimately come to Canada to make a refugee claim. They dealt with the general civil unrest in the country at the time as a result of the civil war between the north and the south. In the aftermath of the Gulf war, Yemeni citizens had difficulty working in Gulf countries… [emphasis added]

[60] The context shows that Applicants' counsel meant they were leaving *Yemen* in 1994 and never left Kenya because they never, in fact, lived in Kenya. They say they never mentioned living in Kenya in their refugee claims precisely because, they never lived in Kenya. This passage was not relied upon by the RPD but, instead, was included in the Respondent's argument, so the misstatement in the closing submissions should not influence this judicial review.

D. *Respondent's Further Memorandum*

[61] The Respondent's Further Memorandum generally follows its initial arguments: the Applicants withheld material facts which prevented the RPD from properly assessing Kenya as a potential country of reference. At para 12, the Respondent lists key findings underpinning the Decision:

> (i) the Applicants did not disclose any connection to Kenya in 1999;
>
> (ii) the Applicants did not dispute that they did not disclose any connection to Kenya;
>
> (iii) they did not disclose until 2019 that the Principal Applicant's parents were both born in Kenya;
>
> (iv) they did not disclose that they had applied for Kenyan status in 1994;
>
> (v) it is possible that the Principal Applicant could have obtained Kenyan citizenship by descent;
>
> (vi) Kenya could have been assessed as a potential country of reference in 1999;
>
> (vii) the existence of potential countries of reference and attempts to obtain status in such countries go to the core of the determination of refugee protection;
>
> (viii) the Applicants' failure to disclose their ties to Kenya was either a material misrepresentation or the withholding of material facts.

[62] The Respondent submits that the Decision did not turn on whether the Applicants, in fact, held Kenyan citizenship, but rather whether they withheld information related to *potential* Kenyan citizenship. The Respondent also cites cases where this Court has confirmed an applicant need not intend to misrepresent the facts for the RPD to vacate refugee status.

[63] Finally, the Respondent says any alleged errors by the RPD that do not go to the issue of misrepresentation are inconsequential. The RPD was unable to probe the issues of the Applicants' credibility, including the possibility that other documents before the 1999 panel were obtained in a fraudulent manner, and the RPD was unable to assess Kenya as a country of reference at all.

[64] In light of this withholding of information, the Respondent says the Decision to vacate was reasonable.

VIII. ANALYSIS

[65] The misrepresentation finding at the heart of this Decision reads as follows:

> I find that the first prong of the Section 109 test is met and there is a misrepresentation by withholding or concealing material information, more specifically, as the words are in the *Act*.
>
> I find that you directly or indirectly misrepresented or withheld material facts relating to a relevant matter. One may say that, he indirectly misrepresented that in fact by 1999 he probably had - was registered as a Kenyan national so that's really indirect misrepresentation or withholding but I find that he directly withheld the fact that his parents were born in Kenya and all that goes to the relevant, important matters of ID, nationality and country of reference.
>
> So, I find that the first prong is met.
>
> In my view, Kenya was a potential country of reference for the principal respondent in 1999 and I find also, it would have been a potential country of reference for the rest of the respondents as members of his family and as descendants of him, as well and, of course, being married to him, all of which would have been important to deal with as potential countries of reference and perhaps even exclusion under Article 1E for the wife, perhaps.

> Again, we don't have the full information as to the law at that time but I find all that should have been in 1999, not in 2019.

[66] The "you" here appears to be the "principal respondent," who is Mr. Lotfi Abdulrahman Ahmed Bafakih, who the RPD refers to as "Lotfi."

[67] So the direct or indirect misrepresentations relied upon are:

(a) "by 1999 he probably has – was registered as a Kenyan national…."

(b) "the fact that his parents were born in Kenya…."

[68] The RPD holds that, by withholding these facts, the Applicants prevented the RPD from considering Kenya as a "potential country of reference" in the Applicants' 1999 refugee claims that resulted in their obtaining refugee status in Canada. In 1999, the Applicants were found to be Convention refugees as citizens of Yemen.

[69] So, potentially at least, the Applicants could have been refused refugee status in Canada because they had a right to go to Kenya. There is, however, no evidence to suggest that the Applicants had any right to go to Kenya. The evidence only suggests, at best, that Kenya was a possible country of reference that could have been explored as part of their refugee claim and/or that the Applicants might not have been credible at that time.

[70] The RPD steadfastly refuses to consider whether there is any legal basis for considering Kenya as a country of "potential nationality" for the Applicants. The concern appears to be that the failure of the Applicants to disclose their connections with Kenya meant that the RPD, in

considering their 1999 refugee claim, was precluded from considering Kenya as a possible country of reference:

> I find that I reject all these explanations as unreasonable because I would observe that the existence of potential countries of reference and attempts to obtain citizenships from potential countries of reference where the principal respondent has an actual descent by parentage, that I find goes to the very core of refugee protection, which, as is well-known, is only surrogate protection and that every refugee claimant is required to exhaust all of their avenues against each and every country of reference and disclosure is also required for potential country of reference to allow a refugee status determination <inaudible> tribunal like the RPD to determine that in fact, Yemen, is the only country of reference for these people.
>
> The fact that other people in the Middle East the way Lotfi explained to me in Africa engaged in corrupt attempts to obtain Kenyan citizenship as is found in Exhibit II, does not excuse the respondents from failing to disclose these attempts to gain Kenyan citizenships, especially when they have a personal connection to that country by way of the personal respondent's both parents being born there.
>
> The fact, as is stated in the grandparents' affidavits that they appear to have had no interest in obtaining Kenyan citizenship makes no difference to the duty of the respondents to disclose these facts.
>
> Now the fact that the grandparents disclosed these facts in their own applications and Canada appears to have accepted their applications and did not prevent them from getting refugee, permanent residence or citizenship, I find, does not help the claimants because these complied with their duty of disclosure. They disclosed their potential country of reference which would have allowed. at the time, the disclosure for Canada, the authorities, to analyze the situation at the time and to make a determination.
>
> …
>
> There may have been at the time all sorts of reasons as to the inconsistencies, such as. a different birth certificate for the grandfather, listing the adults as single as opposed to married but the problem is that all of these concerns should be have been brought out and analyzed in 1999. not now in 2019 and the Minister should have been given a chance and the Board should

> have been given a chance to review these issues and to determine what the practices were at the time in Kenya. For example, is the creation of birth certificates, the creation of birthplaces in Kenya, even though perhaps not factually correct, whether they had an legitimate purpose or not.
>
> …
>
> The 1999 panel, K. Wamar(sp), who was the presiding Member and James Waters, who rendered a decision on June 9, 1999, pursuant to Exhibit l, the first page, were all unaware of all these facts and at the very least, the principal respondent's ability to obtain with fair ease, improperly obtained Kenyan documents, should have at the very least raised some suspicions about his other documents from Yemen at the time and caused some more enquiries as to the facts of his claim, at the very least and I find also, that disclosure of Kenya as a country of potential nationality, whether it be from the principal respondent's own efforts in 1994 or the fact that his parents were born in Kenya, I find all of which would have cause much more of an enquiry into this case, perhaps even a Ministerial intervention and it simply would not have been the same type of hearing or the same type of case and there would have been analysis of whether he is able to obtain that son of nationality and pass it on to the rest of the family and it would have been a potential country of reference.

[71] So the RPD does not find that Kenya was, or was not, a country of reference; it finds that Kenya was a "potential country of reference" that the Applicants should have disclosed, and their failure to do so precluded a line of inquiry that, potentially, could have led to the refusal of their refugee claim.

[72] It seems to me that this approach by the RPD is fundamentally flawed and is based upon a logical fallacy. Section 109 of the *IRPA* reads as follows:

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.	**109 (1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(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.	**(2)** Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
…	…
[Emphasis added.]	[Je souligne.]

[73] If any connection which the Applicants had with Kenya in 1999 was not capable of yielding Kenyan nationality, then, in my view, there was no misrepresentation or withholding of material facts relating to a relevant matter. If the 1999 panel was precluded from pursuing a line of inquiry, this does not mean that, in accordance with s 109(1), the 1999 decision was obtained "as a result of," in this case, "withholding material facts relating to a relevant matter." If Kenya was not, in fact, a possible alternative refuge for the Applicants, then no material fact was withheld that could have, either directly or indirectly, resulted in the decision to award them refugee status at that time. This is not a decision under s 40 of the *IRPA* where the words "induces or could induce an error" appear. In my view, under s 109(1) the Minister must show that the "decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter." Parliament would not have used such

different wording in these two misrepresentation provisions if it had intended them to be applied in the same way. In my view, the Respondent's position is, essentially, that the failure to disclose a possible Kenyan connection "could have" led to the Applicants obtaining refugee protection where it was not available, or that it doesn't matter whether the Applicants would have obtained refugee protection or not because the failure to disclose prevented a possible line of inquiry. But this is not, in my view, what s 109(1) says. It says "was obtained" not "could have been obtained."

[74] In my view, then, s 109 required the Minister to demonstrate that the Applicants' failure to mention any possible connections to Kenya in 1999 led to a decision that was a direct or indirect result of withholding that information.

[75] All that the RPD says in this case is that the Applicants' failure to mention Kenya could "potentially" have resulted from a withholding of "potentially" material facts. But, in my view, s 109 required the RPD to find that the 1999 decision "was obtained" because material facts were withheld. The test under s 109 is not, as the RPD finds, that the disclosure of certain facts "would have cause [*sic*] much more of an inquiry into this case…."

[76] Even if the test proposed by the Minister is used – that the "RPD panel could have assessed Kenya as a possible country of reference," – the Minister has provided no evidence that the Applicants have any right to Kenyan citizenship, or that the RPD could have assessed Kenya as a possible country of reference.

[77] There is no evidence on the record before me that the Applicants misrepresented anything. Given the PIF and other forms that the Applicants were required to complete in the 1990s, there was nothing to alert them to the fact that they should have indicated that grandparents were born in Kenya or that their own attempts to obtain Kenyan ID cards were anything more than an attempt to secure jobs outside of Yemen because of the difficult situation in that country. The Minister has also failed to provide the transcript from the refugee hearing so there is no indication of whether Kenya was raised or whether there were any credibility concerns with the Applicants. No documents have been produced to show that the Applicants have a right to Kenyan citizenship. It is clear that Lotfi and Suaad were born in Yemen. There is no evidence to suggest that the fact of Lotfi's parents having been born in Kenya provides any right to Kenyan nationality or residence for any of the Applicants.

[78] The Respondent does not appear to disagree with any of this and points out that:

(a) The Applicants made no mention of Kenya in their PIFs or at any other stage of their refugee determination process;

(b) The Applicants did not disclose that Lotfi's parents were born in Kenya; and

(c) The Applicants did not disclose that they themselves sought Kenyan status prior to coming to Canada.

[79] The Respondent does not argue that the evidence suggests that the Applicants had any right to Kenyan citizenship. Nor do the Applicants deny that they failed to make any references

to Kenya in their applications for refugee protection or at any point during their initial refugee determination process in 1998-1999.

[80] The Respondent simply takes the position that, because Lotfi's parents were born in Kenya and the Applicants had sought status in Kenya back in 1994, these undisclosed facts could reasonably have led the RPD in 1999 to assess Kenya as a potential country of reference. This means that the refugee hearing could have been conducted in a different manner and credibility issues could have been explained. There is, however, no indication as to how any further inquiry about Kenya could have led to any conclusion that the Applicants had rights to nationality or residence there. In other words, there is no proof that the Applicants' failure to mention Kenya was in any way material to their successful refugee claims. Without establishing materiality, the Respondent simply falls back on the assertion that the failure to mention Kenya prevented a possible line of inquiry by the RPD when it heard their refugee claim. It was only material to a possible line of inquiry which, on the evidence before me, would have led nowhere. There is no evidence it was material to the actual granting of refugee status.

[81] The evidence before me suggests that the Applicants made no mention of Kenya because they knew they couldn't go there and they had no reason to believe that the RPD might want to explore Kenya as a possible country of reference.

[82] Under s 109, I do not think it is sufficient for the Minister to establish material facts that could have led to further inquiries as to whether Kenya was a possible country of reference.

[83] In my view, under s 109(1) of the *IRPA*, refugee protection can only be vacated if the RPD finds "that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter." It appears that, the Member conflates s 109 (1) with s 40(1)(a) of the *IRPA*. However, the wording of these two provisions is distinctly different and, as the facts of this case demonstrate, for good reason.

[84] Before me, the Respondent has not demonstrated how the failure of the Applicants to mention their Kenyan connections was the omission of a "relevant matter" by which the refugee decision "was obtained." The Respondent can only say that the failure to mention the Kenyan connections prevented a line of inquiry into whether Kenya was a possible country of reference. We now know that it was not. The Respondent did not, before the RPD, and has not before the Court, established an omission that, in accordance with s 109(1), resulted in the decision to grant the Applicants refugee status.

[85] It seems to me that to interpret s 109(1) in the way the Respondent suggests and in the way adopted by the RPD in the present Decision, would mean that a genuine refugee could lose refugee status simply by failing to mention a fact that "could have" opened up a possible line of inquiry, even if protection was not obtained as a result of that omission.

[86] As the Respondent asserts, the evidence only suggests a possible line of inquiry that could have been explored by the RPD when it decided to award refugee status as to whether Kenya could be considered a possible country of reference.

[87] In my opinion, it would be unreasonable and unconscionable if the Minister could simply move to vacate refugee status on the basis of an innocent, and not unreasonable, omission that the Minster has not demonstrated was material to the granting of refugee status, but which has merely prevented a possible line of inquiry that the Minister has not demonstrated could have led to the refusal of refugee status.

IX. CERTIFICATION

[88] The Applicants propose the following question for certification:

> Does a finding under section l09(1) of the *IRPA* [that a grant of Convention Refugee protection be vacated] require that the direct or indirect misrepresenting/withholding of a material fact(s) have led to a different result at the initial refugee protection proceedings before the RPD?

[89] The Respondent's position on this question is as follows:

> The Respondent submits that a question related to the proper interpretation of section 109(1) would meet the test for certification as set out in the jurisprudence of the Federal Court of Appeal (*Lunyamila v. Canada (MPSEP)*, 2018 FCA 22).
>
> However, the Respondent is of the position that an interpretation of section 109(1) which requires the RPD to find that a misrepresentation or withholding definitely led to the granting of refugee protection would be either an impossible or impractical task in most cases and could not have been the intention of Parliament. Requiring the RPD vacation panel to determine what questions might have been asked and what the answers would have been would be an exercise in speculation and conjecture and would require the vacation panel to engage in what would essentially be a second refugee hearing.
>
> However, if this Court is of the view that a question on this issue should be certified, the Respondent proposes the following question:

> "Is the RPD required to find, before vacating a decision allowing refugee protection under section 109(1), that any misrepresentation or withholding of material facts definitely led to a different conclusion by the original RPD panel, or is it sufficient for the RPD to find that a different conclusion might have been reached by the original panel?"

[90] In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, the Federal Court of the Appeal set out the following criteria for the certification of a question:

(a) It must be dispositive of the appeal;

(b) It must transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance;

(c) It must have been raised and dealt with by the court below; and

(d) It must arise from the case, not from the judge's reasons.

[91] In my view, these criteria are all satisfied in the present case.

[92] In essence, the parties have addressed the same issue and have asked the same question which I think is best formulated as follows:

> Before vacating a decision granting refugee protection under s 109(1) of the *IRPA*, is the Respondent required to demonstrate, and is the RPD required to find, a misrepresentation or withholding of a material fact that would have led to a different conclusion by the original RPD panel, or is it sufficient for the RPD to find a misrepresentation or withholding of a material fact that could have led to a possible line of inquiry that may, or may not, have resulted in a denial of refugee protection by the original RPD panel?

JUDGMENT IN IMM-4154-19

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.

2. There following question is certified:

> Before vacating a decision granting refugee protection under s 109(1) of the *IRPA*, is the Respondent required to demonstrate, and is the RPD required to find, a misrepresentation or withholding of a material fact that would have led to a different conclusion by the original RPD panel, or is it sufficient for the RPD to find a misrepresentation or withholding of a material fact that could have led to a possible line of inquiry that may, or may not, have resulted in a denial of refugee protection by the original RPD panel?

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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