

Federal Court



Cour fédérale

Date: 20220307

Docket: IMM-2467-21

Citation: 2022 FC 291

Ottawa, Ontario, March 7, 2022

PRESENT: Madam Justice St-Louis

BETWEEN:

YAHYA KHATIB HAJI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

ORDER AND REASONS

I. Introduction

[1] The Applicant asks the Court to review the decision of the Refugee Protection Division [RPD] dated March 21, 2021, wherein the RPD allowed the Minister of Public Safety and Emergency Preparedness [the Minister]'s application to vacate a prior decision of the RPD that had granted the Applicant Convention refugee status.

[2] For the reasons exposed below, I will dismiss the application.

II. Context

[3] On December 4, 2008, the Applicant made an inland refugee claim under the identity of Yahya Khatib Haji, date of birth of September 22, 1978. The Applicant then alleged having been persecuted and harassed in Zanzibar as a member of the Civic United Front party [CUF] of which he was a member. He alleged namely that he himself, and his wife, were the victim of an attack during the campaign before the 2005 elections in Zanzibar. The Applicant also alleged having been denied the right to vote because of his involvement in the CUF and that it was very difficult, if not impossible, for CUF supporters to obtain passports or other official documents. In support of his identity and political involvement, the Applicant submitted a birth certificate and a driver's license, as well as a political membership. The Applicant also claimed that Pembans were discriminated against by the ruling party.

[4] There is no doubt that the Applicant's claim was based on the circumstances of a certain Mr. Haji and particularly, on Mr. Haji's involvement in the Civic United Front party in Zanzibar.

[5] At the time of his refugee claim, the Applicant alleged having traveled to, and entered Canada on an assumed identity as Rashid Mohammed Ali. On December 17, 2010, the Applicant's refugee claim was allowed, and in December 9, 2011, the Applicant was granted Canadian permanent resident status.

[6] At no time during or after the processing of his refugee claim and subsequent permanent residency application did the Applicant mention that he actually entered Canada as Zubeir Habib Juma, holding a genuine Tanzanian passport, which contained a Canadian and an American Visitor's Visa. Notably, the Applicant provided his fingerprints as part of both visa application processes.

[7] On November 17, 2017, the Minister applied to the RPD to vacate the refugee protection granted to the Applicant pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Minister submitted that the Applicant had misrepresented material facts regarding his identity. The Minister argued that the evidence confirmed the Applicant had made a refugee claim in Canada under a fraudulent identity and had submitted fraudulent documents to support his alias as Haji. The Minister submitted that the Applicant had misrepresented material facts regarding his identity. Some of the allegations made by the Minister are as follows:

- The Applicant's fingerprints (under the Haji identity) taken when he made his refugee claim in 2008 matched fingerprints submitted by an individual of the name Zubeir Habib Juma born on June 16, 1975, to obtain a Canadian Visitor's Visa in Tanzania in 2008;
- In his Personal Information Form [PIF] as part of his refugee claim, the Applicant indicated that he did not apply for a Canadian Visitor's Visa to come to Canada;
- The Applicant's fingerprints (under the Haji identity) matched fingerprints held by the United States Government records of an individual named Zubeir Habib Juma who was issued a United States Visitor's Visa;

- In his PIF, the Applicant indicated that he came to Toronto, Canada on November 14, 2008 by plane, using an improperly obtained passport under the name of Rashi Mohammed Ali. The evidence shows however, that he came to Montreal, Canada in 2008, under the name Juma, using a genuine Tanzania issued passport and a seaman's authorization to join a commercial vessel in Montreal.

[8] The Minister argued that by withholding or misrepresenting these material facts, the Applicant precluded the original RPD panel from engaging in a fulsome analysis of his identity and credibility. The Minister added that given the gravity of misrepresenting his identity, travel history, work history and biographical data, there can be no sufficient untainted evidence considered at the time of the first determination that could justify his refugee protection claim.

[9] The Minister outlined what the Applicant had claimed, and what the Minister's evidence revealed, in regards to the Applicants' real identity as Zubeir Habib Juma.

[10] Both the Applicant and the Minister disclosed evidence before the RPD, and on January 28, 2021, the RPD heard the parties on the vacation of the Applicant's refugee status.

[11] The Applicant testified before the RPD and affirmed that his true name and identity is Yahya Khatib Haji as he first claimed back in 2008. He admitted that he had travelled to Canada using a different false identity (Zubeir Habib Juma) than the one he had alleged in his PIF (Rashid Mohammed Ali) and that he applied for the Canadian and an American Visitor's Visas using that false Juma identity. He asserted however that the identity under which he sought and

was granted protection in Canada (Haji) is his true identity, and that the facts set out in his 2010 PIF narrative are true.

[12] Before the RPD, the Applicant also affirmed that the passport he claimed to have entered Canada with in 2008 was not genuine, and that he stated this inaccurate information in his PIF on the direction of a smuggler. He further stated that he did not disclose the circumstances of his travels because the smuggler instructed him not to do provide this information to the Canadian authorities.

[13] A witness also testified before the RPD for the Applicant, asserting that he was an acquaintance of the Applicant in Zanzibar where he knew him under the identity of Haji.

[14] On March 21, 2021, the RPD vacated the Applicant's refugee status, decision under review in these proceedings.

III. Impugned Decision

[15] In its decision, the RPD panel examining the vacation procedure outlined the Minister's allegations, reviewed the testimony at the hearing and made its determination. The RPD outlined section 109 of the Act and cited *Canada (Public Safety and Emergency Preparedness v Gunasingam*, 2008 FC 181 [*Gunasingam*] for the principle that a decision must be made with respect to subsection 109(1) before consideration can be given to subsection 109(2). The RPD noted the elements of subsection 109(1) as (a) there must be a misrepresentation or withholding of material facts; (b) those facts must relate to a relevant matter; and (c) there must be a causal

connection between the misrepresenting or withholding on the one hand and the favourable results on the other.

[16] The RPD proceeded to examine (1) the misrepresentation or withholding of material facts; (2) if facts relate to a relevant matter; and (3) if sufficient remaining evidence evinced the causal connection.

[17] The RPD found that:

- The Applicant admitted that information in his PIF was untrue, and on a balance of probabilities, at the time of the Applicant's first-instance refugee determination hearing, he withheld information concerning a possible additional or alternative personal identity, namely Zubeir Habib Juma, and evidence relating to the circumstances under which he came to Canada;
- The misrepresentation or omission related to a relevant matter, specifically the issue of a claimant's identity. There is evidence that each of the Applicant's two identities, the one disclosed and the one hidden, may be the truthful one. A claimant's identity is a fundamental and a preliminary issue in refugee determination matters (section 106 of the Act) and on balance of probabilities, the misrepresentation or withheld evidence before the RPD in this application was material in the case of the first-instance decision;
- The Applicant had provided two authentic identity documents under his Haji identity, i.e., a birth certificate and a driver's license, in order to support his refugee claim, and a witness testified as to that identity at the hearing on the vacation. On the other hand, the Minister provided a Tanzanian passport that appeared to have been genuinely issued by

the Tanzania government, containing two Visitor's Visas issued by foreign governments with the Applicant's actual fingerprints, which he admittedly provided. The RPD gave greater weight to the Juma passport, i.e., the one the Applicant never mentioned, and the Visitor's Visas contained in it. Ultimately, based on the evidence and testimony, the RPD found on a balance of probabilities, the true identity of the Applicant to be that of Zubeir Habib Juma and not that of Yahya Khatib Haji as alleged at the first RPD proceeding; and

- Considering that the first RPD panel was unaware of the Applicant's possible additional or alternative identity, there is no sufficient evidence remaining to justify refugee protection.

[18] The RPD thus allowed the Minister's application under section 109 of the Act, and vacated the Applicant's refugee status.

IV. Issue before the Court

[19] I agree with the parties that the RPD decision must be reviewed under the standard of reasonableness. The Court must thus determine if the Applicant has shown the RPD decision to be unreasonable.

[20] In *Canada (Public Safety and Emergency Preparedness) v Bafakih*, 2022 FCA 18 at paragraph 27 [*Bafakih*], the Federal Court of Appeal recently outlined again that “[o]n a reasonableness review, the focus of the inquiry ‘must be on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome’

(*Vavilov* at para 83). Ultimately, the reviewing court must be satisfied that the administrative decision is ‘based on an internally coherent and rational chain of analysis and □...□ is justified in relation to the facts and law that constrain the decision maker’ (*Vavilov* at para 85)”.

[21] The Federal Court of Appeal also reminded us, that, “[a]s reaffirmed in *Vavilov*, a reviewing court applying the standard of reasonableness must refrain from deciding itself the issues that were before the administrative decision maker. In other words, it does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the ‘range’ of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the ‘correct’ solution to the problem.’ (*Vavilov* at para 83)” (*Bafakih* at para 52).

[22] The Applicant submits that the decision of the RPD is unreasonable as (1) the initial decision granting refugee protection was not obtained as a result of direct or indirect misrepresentation that was material to the outcome of the initial refugee determination; and (2) there remained sufficient evidence, considered at the time of the initial determination, to justify refugee protection per subsection 109(2) of the Act.

[23] In particular, the Applicant submits that the Minister did not establish, on the balance of probabilities, a causal link between the misrepresented and withheld material facts and the decision granting the Applicant status as a Convention refugee. The Applicants adds that the RPD decision does not evince a “rational chain of analysis” showing that the decision of the first instance panel resulted from the Applicant’s misrepresentations. The Applicant confirms

however that the RPD correctly stated the test of section 109, but submits that its findings in applying it are unreasonable. The Applicant submits that his irregular travel and entry into Canada prior to making his refugee claim was on the record before the first instance RPD, albeit in a disguised and potentially misleading form. The Applicant thus adds, essentially that the first instance panel was faced with functionally identical issues, that being personal identity pursuant to section 106 of the Act.

[24] Second, the Applicant submits that the RPD's application of subsection 109(2) cannot stand because there was sufficient remaining evidence untainted by the admitted representation, and considered at the time of the initial decision. The Applicant submits that the discretion granted to the RPD to decline to address the merits of a claim where the claimant has failed to establish identity do not extend to a section 109 vacation hearing.

[25] The Minister responds that the RPD's decision to vacate the Applicant's refugee status is reasonable.

V. Decision

[26] The Applicant has not shown the RPD decision to be unreasonable given the record and the law.

[27] In a vacation proceeding under section 109 of the Act, the RPD is charged with making a determination as to whether the finding that an individual was a Convention refugee was

obtained by way of misrepresentation. The RPD does not have the mandate to determine whether the person continues to meet the definition of a Convention refugee.

[28] Section 109 of the Act provides as follows:

<p>Vacation of refugee protection</p> <p>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.</p>	<p>Demande d'annulation</p> <p>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.</p>
<p>Rejection of application</p> <p>(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.</p>	<p>Rejet de la demande</p> <p>(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.</p>
<p>Allowance of application</p> <p>(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.</p>	<p>Effet de la décision</p> <p>(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.</p>

[29] Upon plain reading of this provision, the RPD's mandate is to reconsider and vacate its earlier decision to allow a person's claim for refugee protection on the ground that the decision was obtained directly or indirectly by misrepresentation, or withholding of any material fact. The

RPD may reject the vacation application if other sufficient evidence was considered at the time of the first determination to justify refugee protection..

[30] The appropriate test requires that (i) there be a misrepresentation or withholding of material facts; (ii) those facts relate to a relevant matter; and (iii) there be a causal connection between the misrepresenting or withholding on the one hand and the favourable result on the other (*Gunasingam* at para 7; *Canada (Minister of Citizenship and Immigration) v Wahab*, 2006 FC 1554).

[31] The parties agree that the RPD identified the proper test.

[32] I agree with the Minister that the central fact of the RPD decision is not about irregular entry, but is about identity, and that the first RPD panel was denied the opportunity to consider and weigh all the circumstances of the Applicant's true identity in arriving at a decision on the merits of his claim for refugee protection.

[33] It is clear, as detailed earlier, that the RPD examined how the misrepresentation and omission favourably impacted the first RPD decision. While the identity is a fundamental and preliminary issue, the RPD, in the first instance, was not confronted with the two seemingly authentic identities. It was confronted with a seemingly authentic identity, supported by two identity documents (and one membership card) and a declaration relating to the use of a false identity to enter Canada.

[34] As the Minister indicates, the RPD did concentrate a part of its reasons on the sufficient remaining evidence. It acknowledged that the Applicant maintained that the Haji identity is his genuine identity. It also considered the identity documents that the Applicant had provided to the initial RPD panel to establish this Haji identity as well as the testimony provided by the identity witness he put forward at the vacation hearing.

[35] The RPD weighed the evidence, and gave more weight to the genuine Tanzanian government passport that contained two foreign Visitor's Visas issued with the Applicant's very own fingerprints, which he had admittedly provided. On a reasonableness review, it is not the role of the court to reweigh the evidence and the RPD's finding is no doubt part of the possible issues that were open to it.

[36] I do not agree with the Applicant that the RPD, having decided on the identity, failed to examine if there remained sufficient evidence. The RPD simply found that there remained no sufficient evidence as the claim had been examined per the circumstances that were particular to a Mr. Haji. I will thus not consider the question that the Applicant raised for certification.

[37] I agree with the Minister: at the end of the day, the Applicant cannot avoid the consequences of his failure to disclose relevant information pertaining to his identity to the first RPD panel.

[38] Since the RPD's finding on the Applicant's true identity cannot be disturbed, its conclusion that there remains no sufficient evidence to support a refugee claim is also reasonable.

[39] The Applicant has not met his burden to demonstrate a reviewable error on the part of the RPD. I will thus dismiss the application for judicial review.

ORDER in IMM-2467-21

THIS COURT ORDERS that:

1. The Application for judicial review is dismissed;
2. No costs are awarded;
3. No question is certified.

"Martine St-Louis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2467-21

STYLE OF CAUSE: YAHYA KHATIB HAJI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC BY WAY OF
VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 24, 2022

ORDER AND REASONS: ST-LOUIS J.

DATED: MARCH 7, 2022

APPEARANCES:

Me Michael Brodzky FOR THE APPLICANT

Me Laoura Christodoulides FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Brodzky FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario