

Federal Court



Cour fédérale

Date: 20230217

Docket: IMM-7755-21

Citation: 2023 FC 238

Ottawa, Ontario, February 17, 2023

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**ABUBEKER ARAFA
(A.K.A. MENSUR NURU MUSSA)
RIMA MOHAMMEDBERHAN
(A.K.A. ROMANA MAHAMUD AHMED)
AMIN ABUBEKER
(A.K.A. AMIR MUSSA)
SABRINA ABUBEKER
(A.K.A. FATMA AMIRA SABRIN MUSSA)**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants state they are citizens of Eritrea who fear persecution in that country due to their political opinion and their Jeberti ethnicity. The Refugee Protection Division [RPD] rejected their claims, finding the Applicants had failed to establish their identities.

[2] The Applicants appealed the RPD's finding to the Refugee Appeal Division [RAD]. The RAD has considered the appeal on four separate occasions, this Court having granted applications for judicial review following the first three RAD decisions.

[3] The RAD's fourth, and most recent decision, was rendered on September 20, 2021, after an oral hearing, where the Minister intervened. The RAD again found that the Applicants had failed to establish their identities and concluded, relying on evidence introduced by the Minister, that it was more probable than not that the Applicants are citizens of Sweden. The RAD confirmed the RPD's conclusion that the Applicants were neither Convention refugees nor persons in need of protection.

[4] The Applicants seek judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] arguing the RAD committed numerous errors in its consideration and assessment of the evidence. The Respondent argues that the RAD's finding that the Applicants had failed to establish their identity was reasonable.

[5] For the reasons that follow, I am not persuaded that the Applicants have demonstrated any error warranting the Court's intervention. The Application is dismissed.

II. Background

[6] The Principal Applicant, Mr. Abubeker Arafa (alleged to also be Mensur Nuru Mussa) reports he was accused of being part of the Jeberti opposition in Eritrea and was arrested and tortured in December 2014 after he criticized a decision to not release him from mandatory national service although he had served for 15 years. He states he was released from detention in July 2015 and that he, his spouse Rima Mohammedberhan (alleged to also be Romana Mahamud Ahmed) and their children then fled to neighbouring Sudan in December 2015. In Sudan, they obtained false passports and travelled to Canada.

[7] In finding the Applicants had not credibly established their identities, the RPD:

- A. noted that the documentary evidence indicated national identity documents were important to everyday life in Eritrea and, on this basis, did not accept the adult Applicants' explanation for not possessing national identity documents;
- B. gave no weight to birth certificates the Applicants provided, noting that the Applicants' evidence as to how the birth certificates were obtained shortly before they departed Eritrea was inconsistent with the national documentary evidence. The RPD also took issue with the Principal Applicant's inability explain why the birth certificates had been left in Eritrea and were later sent to Canada by his brother in Sudan;

- C. did not believe, based on the Principal Applicant's reported financial circumstances, that the Applicants had the \$45,000 they reportedly paid to obtain false passports and also concluded it was not credible that the Applicants had no knowledge of the names in which the false passports were issued or their purported country of issue;
- D. acknowledged there was some evidence that the Principal Applicant's spouse had attended school in Eritrea but found this was insufficient to overcome the RPD's concerns and establish identity.

[8] The first RAD panel refused to admit new evidence from the Applicants and confirmed the RPD findings. On judicial review, the matter was returned to the RAD for redetermination following judgment on consent (Court Docket Number IMM-4895-16). The second RAD panel accepted some of the Applicants' new evidence and rejected other evidence before again confirming the RPD's determination. The Applicants' judicial review application of the second decision was successful on the basis that the RAD's refusal to admit some of the new evidence was unreasonable (*Arafa v Canada (Citizenship and Immigration)*, 2019 FC 6). A third RAD panel again upheld the RPD decision, but on consent, that decision was returned for reasons of fairness because the RAD had refused to hold a hearing before concluding certain elements of new evidence were fraudulent (Court Docket Number IMM-5551-19).

[9] In considering the appeal for the fourth time, the RAD solicited submissions on an updated national documentation package and requested original copies of certain documents. The Minister intervened on the appeal, placing fresh evidence before the RAD and alleging the

Applicants were in fact Swedish citizens. Finding that the Minister's new evidence raised serious credibility issues central to the appeal, the RAD conducted an oral hearing. The oral hearing was convened to address whether the Applicants were Swedish nationals and to consider the authenticity of certain identity documents submitted as new evidence by the Applicants.

III. Decision under review

[10] Relying on the Minister's evidence, which included customs enforcement records, Europol photos, and a comparison of photos of the Applicants and photos from their alleged authentic Swedish passports, the RAD concluded that the Applicants had used genuine Swedish passports to enter Canada in February 2016. It based this conclusion on:

- A. the similarity between the Applicants' declared date of arrival and the date of arrival of the Swedish family as reflected in customs enforcement records (February 26 and February 23 respectively);
- B. the resemblance between the Applicants and the Swedish family;
- C. the matching scar near the left eye of both the Principal Applicant's spouse and the adult Swedish woman; and
- D. similarities in the birth dates of the Applicants and the Swedish individuals.

[11] Before the RAD, the Applicants conceded that the Swedish family members were likely of Eritrean origin and that this explained the physical similarities, including the similar facial markings, which, it was submitted, are common in Eritrea. However, the Applicants argued they

were not the individuals identified by the Swedish passports and challenged the Minister's failure to provide a biometric match or expert evidence evaluating the similar facial features.

[12] The RAD acknowledged the dangers of relying on implicit racial biases when a finding is based on a decision maker's subjective comparison of facial features, but it found the overall similarities to be striking.

[13] The RAD noted that the Applicants did not provide explanations for patterns between their declared dates of birth and the birth dates of the Swedish family members, holding this to be a significant factor. Nor did the RAD accept that the Applicants had relied on a smuggler to enter Canada after noting their evolving evidence related to their journey to Canada in response to the Minister's disclosure.

[14] The evidence also evolved in other respects. For example, one of the minor Applicants testified before the RPD that his birthday was on May 20, and that he was 8 years old. This birthday was not the birth date reported but was consistent with the date on the corresponding Swedish passport, which had not been discovered at the time of the RPD hearing. The Principal Applicant explained the discrepancy to the RPD by stating that the minor Applicant was mixing up his birthday with that of an Eritrean girl in Canada, but later advised the RAD that his son was confused after being forced to memorize the birthday on the Swedish passport.

[15] Having rejected that the Applicants had relied on a smuggler to enter Canada as reported, the RAD also rejected the argument that the similarities between photos of the Applicants and

the Swedish family could be explained by the smuggler's efforts to match the passports with the Applicants. The RAD additionally found Eritrean documents the Applicants relied upon to be fraudulent for other reasons.

[16] Addressing the Applicants' argument that the Minister failed to produce evidence of a biometric match between them and the Swedish family, the RAD noted the Minister's evidence indicated European member states are required to destroy fingerprint records of asylum seekers once they become citizens.

[17] The RAD did accept some of the Applicants' evidence, including documentation regarding the Principal Applicant's late mother, photographs, a marriage certificate and a school transcript indicating the Principal Applicant's spouse had spent some time attending school in Eritrea. The RAD acknowledged this evidence was probative and supportive of the Applicants' claim to the non-Swedish identities but concluded the evidence was not sufficient to establish their identities.

IV. Issues and Standard of Review

[18] The Applicants argue the RAD erred by failing to undertake an independent assessment of the similarities between the Applicants and the Swedish family, by unreasonably assessing the evidence relating to the Applicants' arrival to Canada and by unreasonably considering the Eritrean identity documents. In effect, the Applicants have raised a single issue – was the RAD's decision reasonable?

[19] The parties agree that the standard of review is reasonableness. In conducting a reasonableness review, a reviewing court asks “whether the decision 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” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]). A reasonable decision is one that is internally coherent, and displays a rational chain of analysis (*Vavilov* at para 85).

[20] The party challenging a decision has the burden of demonstrating the decision is unreasonable. Alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision, or reflective of a minor misstep in the reasoning process. Instead, the court must be satisfied any shortcomings or flaws relied upon by the party challenging the decision are sufficiently central or significant so as to render the decision unreasonable (*Vavilov* at para 100).

V. Analysis

[21] The Applicants argue the RAD’s decision is unreasonable because the RAD failed to independently assess the Minister’s evidence. The Applicants submit that, instead, the RAD simply relied on the Minister’s intervention record to conclude the Applicants were the Swedish passport holders. The Applicants also cite the absence of any biometric evidence, the RAD’s failure to attribute sufficient weight to a 4 cm height difference between the Principal Applicant’s spouse and the corresponding Swedish woman, and the RAD’s reliance on its

subjective impressions in comparing photographs. The Applicants further argue that the birth date pattern the RAD relies upon is simply not borne out.

[22] Contrary to the Applicants' submissions, the RAD did engage with the evidence and addressed the Applicants' submissions in undertaking a comparison of photos. The RAD reasonably concluded, citing this Court's jurisprudence, that it was empowered to make findings based on a comparison of photos (*Olaya Yauce v Canada (Citizenship and Immigration)*, 2018 FC 784 at para 9; *Liu v Canada (Citizenship and Immigration)*, 2012 FC 377 at para 10; see also *Kamano v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1241 at para 18; *Mebrahtu v Canada (Citizenship and Immigration)*, 2022 FC 279 at paras 39–41).

[23] In undertaking the comparison analysis, the RAD instructed itself on the risk of unconscious or implicit racial biases, noting that caution is required when relying on subjective impressions about similarities in facial features. The RAD acknowledged that certain similarities such as head shape and nose size are not reliable indicators on their own. It was in this context that the RAD then concluded the "similarities are striking and undeniable." The RAD states the "two sets of individuals are virtually identical."

[24] In certain circumstances, the RAD's failure to explain its comparison of two sets of photos may be unreasonable. In *Barre v Canada (Citizenship and Immigration)*, 2022 FC 1078 at paragraphs 74-75, the Court found the RPD's failure to justify the conclusion that there were "great similarities" between two sets of photos, coupled with its failure to address identified dissimilarities, rendered the decision unreasonable. In *Gedi v Canada (Citizenship and*

Immigration), 2022 FC 318 at paragraph 20, the Court found it unreasonable that the RAD relied exclusively on its own direct examination of photographs without addressing an affidavit describing differences in addition to other contradictory evidence.

[25] In this case, however, the RAD was clearly alert to the risks of unconscious or implicit racial bias. The RAD also noted that the Applicants did not dispute the similarities in appearance, family composition, age and background. They instead sought to explain those similarities based on the alleged smuggler's intention to procure documents that would match the Applicants.

[26] Additionally, the RAD did not limit its analysis to a visual comparison of the photographs on the Swedish passports. The RAD also considered the pattern or formula between the Applicants' dates of birth and those reported in the Swedish passports, their inconsistent account of their experience with the alleged smuggler as well as the evolving nature of their narrative as it related to their travel to Canada. It was in this context, and in the absence of dissimilarities identified by the Applicants – other than the 4 cm height difference that was considered by the RAD – that the RAD concluded the photos were “virtually identical.” In the circumstances, a detailed recital of specific similarities was not, in my view, required.

[27] Turning to the birth date pattern, the Applicants argue the RAD overlooked how the pattern was not reflected in the Principal Applicant's year of birth. However, the Applicants do not dispute the RAD's broader finding of a “curious pattern.” Decision makers will not be held to a standard of perfection and judicial review is not a treasure hunt for error. The RAD's failure

to acknowledge an inconsistency in an otherwise established pattern does not undermine the reasonableness of the RAD's decision in this instance.

[28] The Applicants' arguments relating to the absence of biometric data and the RAD's treatment of the common facial markings and height difference do not identify any reviewable error. Instead, these arguments take issue with the RAD's interpretation of the evidence and the weight given to it. It is well established that it is not the role of a court on judicial review to reweigh evidence.

[29] The Applicants also take issue with the RAD's conclusion that the birth certificates and a driver's licence in the Principal Applicant's name were fraudulent. Again, these arguments reflect nothing more than a disagreement with the RAD's interpretation and weighing of the evidence. The RAD detailed its concerns with the reported procedures for the issuance of the birth certificates in light of the documentary evidence. The RAD also identified the inconsistencies evident on the face of the driver's licence and considered the explanations provided. The RAD's concerns went beyond the mere availability of fraudulent documentation in Eritrea, and were sufficient to rebut the well-established presumption that government-issued documents are valid (*Adesida v Canada (Citizenship and Immigration)*, 2016 FC 256 at para 19). Having engaged with the evidence and having detailed the reasons it was not satisfied with the explanations provided by the Applicants, it was reasonably open to the RAD to conclude, as it did, that the documents were fraudulent.

[30] The RAD also acknowledged and addressed evidence demonstrating their connection to Eritrea that supported the Applicants' claim but found this evidence was insufficient to overcome the credibility findings arising from the Applicants' evolving narrative and reliance on fraudulent documents. Again, I find no reviewable error arising from this conclusion or the supporting analysis.

VI. Conclusion

[31] The Applicants have not demonstrated that the RAD's decision is unreasonable. The Application is dismissed. No question of general importance was proposed by the parties for certification and none arises.

JUDGMENT in IMM-7755-21

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.
2. No question is certified.

"Patrick Gleeson
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7755-21

STYLE OF CAUSE: ABUBEKER ARAFA (A.K.A. MENSUR NURU MUSSA), RIMA MOHAMMEDBERHAN (A.K.A. ROMANA MAHAMUD AHMED), AMIN ABUBEKER (A.K.A. AMIR MUSSA), SABRINA ABUBEKER (A.K.A. FATMA AMIRA SABRIN MUSSA) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: DECEMBER 15, 2022

JUDGMENT AND REASONS: GLEESON J.

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