

Federal Court



Cour fédérale

Date: 20230524

Docket: IMM-2582-22

Citation: 2023 FC 722

Ottawa, Ontario, May 24, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

DAUD AHMED OSMAN

Applicant

and

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

Respondent

JUDGMENT AND REASONS

[1] Mr. Osman is seeking judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board vacating his refugee status pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. I am allowing his application. The RPD reasonably found that Mr. Osman failed to disclose that he had used an alternate identity to gain entry to Canada and that this misrepresentation had a causal connection with the outcome of the matter. However, the RPD's finding that there was no other evidence

that could justify granting refugee status is unreasonable, because it overlooks the testimony of an independent witness at the original RPD hearing.

I. Background

[2] Mr. Osman claimed refugee status in February 2017. He asserted that he was a citizen of Somalia, that he never used an alternate identity (except “Cisman” instead of “Osman”), that he did not have official identity documents and that he entered Canada in January 2017 with the help of a smuggler. The RPD granted him refugee status in July 2017.

[3] It was later discovered that Mr. Nuh, a citizen of Kenya, obtained a study permit from the Nairobi visa office, entered Canada in December 2016 with a Kenyan passport, and never attended classes. A comparison of the photographs of Mr. Osman and Mr. Nuh led the Canada Border Services Agency [CBSA] to believe that they are the same person.

[4] The Minister initiated vacation proceedings pursuant to section 109 of the Act, alleging that Mr. Osman was in reality a Kenyan national and that he misrepresented his identity. At the hearing, Mr. Osman admitted that he used the alternate identity of Mr. Nuh to enter Canada, but insisted that he was a citizen of Somalia, not Kenya. He explained that when he made his refugee claim, he remained silent about the Nuh identity because these were the instructions given by the smuggler and he was afraid of being deported if he did not follow them.

[5] A new panel of the RPD allowed the Minister’s vacation application, but for somewhat narrower reasons than those urged by the Minister. The RPD applied the three-part test

established in *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 at paragraph 7 [*Gunasingam*]. It found that Mr. Osman made a misrepresentation, in that he failed to disclose his use of the Nuh identity. Further, it found that this misrepresentation related to a relevant matter, namely, identity, and that there was a causal connection between the misrepresentation and the outcome of the claim. It also considered whether, pursuant to subsection 109(2), there was other sufficient evidence at the time of the first determination to justify refugee protection. It found that the evidence was lacking, because Mr. Osman’s misrepresentation seriously affected his credibility and nothing rebutted the presumption of nationality arising from holding a Kenyan passport.

II. Analysis

[6] Mr. Osman now argues that the RPD’s vacation decision is unreasonable. He challenges both aspects of the decision—the finding, pursuant to subsection 109(1) of the Act, that the decision that granted him refugee status “was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter”; and the finding, pursuant to subsection 109(2), that there was no “other sufficient evidence ... to justify refugee protection.” I will address each issue in turn.

A. *Misrepresentation – Subsection 109(1)*

[7] Both parties agree that the test to be applied under subsection 109(1) was laid out by this Court in *Gunasingam* at paragraph 7: “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 result on the other.”

[8] Even though the RPD organized its reasons according to this three-part framework, Mr. Osman asserts that the RPD’s finding is unreasonable.

[9] At the hearing of this application, it became clear that Mr. Osman expected the RPD to reach a firm conclusion as to his nationality and that, in his view, the only conclusion open on the evidence was that he is a Somali, not a Kenyan citizen.

[10] In my view, given the manner in which the RPD decided the matter, it was not required to reach a firm conclusion as to Mr. Osman’s citizenship. This is because the RPD did not base its decision on a finding that Mr. Osman misrepresented his citizenship, but rather that he failed to disclose his use of the Nuh identity to gain entry to Canada. There is no serious issue that this finding is reasonable, because Mr. Osman admitted that he failed to disclose the use of the Nuh identity when he made his refugee claim. As the RPD based its decision on this specific misrepresentation, it did not have to reach any firm conclusion about Mr. Osman’s real citizenship.

[11] While he does not seriously challenge the RPD’s finding regarding the first two prongs of the *Gunasingam* test, Mr. Osman targets the conclusion regarding the third prong, namely that there is a causal connection between the misrepresentation and the outcome of the refugee hearing. But once again, this appears to be another manner of arguing that the RPD should have

reached a firm conclusion about his citizenship. If I understand correctly, he argues that the failure to disclose the use of a Kenyan passport would not have affected the granting of refugee status, because there was overwhelming evidence of his Somali citizenship, both at the refugee hearing and the vacation hearing.

[12] The RPD, however, did not need to follow Mr. Osman along this road. It was reasonable for the RPD to hold that had the initial panel known about the use of the Kenyan passport, the issue of Mr. Osman's identity would have presented itself in a starkly different manner. In particular, the RPD noted that the fact that Mr. Osman lied under oath would have significantly affected his credibility. Moreover, the use of a Kenyan passport would have given rise to a rebuttable presumption that the holder is a Kenyan national. This is enough to establish a causal connection. In other vacation cases, this Court did not require the RPD to reach a firm conclusion as to the outcome of the claim: see, for example, *Sajid v Canada (Citizenship and Immigration)*, 2016 FC 981 at paragraph 14; *Fadhili v Canada (Citizenship and Immigration)*, 2022 FC 1121 at paragraph 12. If that were the test, the vacation hearing would effectively be turned into a hearing *de novo* of the refugee claim. Yet, the vacation process is not meant to give untruthful applicants "a second bite at the cherry," to use Justice Evans's colourful language in *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153 at paragraph 15, [2002] 4 FC 501.

[13] Mr. Osman also faults the RPD for reaching this conclusion without considering the evidence he brought at the vacation hearing. I disagree. The evidence in question pertained to his

asserted Somali citizenship. It does not negate the misrepresentation found by the RPD, nor does it break the causal connection between the misrepresentation and the outcome.

B. *Remaining Evidence – Subsection 109(2)*

[14] The matter, however, does not end there. Mr. Osman also challenges the RPD's finding that there was no remaining evidence at the initial hearing that was unaffected by his misrepresentation and that could justify the granting of refugee status.

[15] The RPD justified its conclusion by the principle in *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 (CA) at 244, according to which "a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony." According to the RPD, the fact that Mr. Osman lied under oath affected his credibility to the point that his testimony is tainted in its entirety. There would be no remaining evidence rebutting the presumption of nationality arising from the use of a Kenyan passport. Therefore, the remaining evidence could not justify refugee status, because it is premised on Mr. Osman's Somali citizenship.

[16] In my view, the RPD failed to account for the evidence provided at the initial hearing. Mr. Osman brought a witness, Ms. Ishmael, who attended school with him in Somalia. The initial RPD panel found that Ms. Ishmael's evidence corroborated Mr. Osman's story, in particular his identity and allegations of persecution. Thus, the remaining evidence was not premised on Mr. Osman's Somali citizenship; it contributed to establish that citizenship.

[17] In the vacation decision, the RPD does not mention Ms. Ishmael's evidence. It would appear that the RPD believed that the only remaining evidence at the initial hearing consisted of country condition evidence.

[18] Moreover, the principle in *Sheikh* cannot extend to Ms. Ishmael's testimony, as it is independent of Mr. Osman's evidence. While a negative credibility finding can extend to all the evidence offered by an applicant, it does not affect other witnesses who corroborate the applicant's evidence: *Babar v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 216; *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at paragraph 20; *Li v Canada (Citizenship and Immigration)*, 2019 FC 307 at paragraph 18; *Tofa v Canada (Citizenship and Immigration)*, 2023 FC 315. If it were otherwise, this would amount to a form of circular reasoning. In addition, the corroborating witness did not simply repeat the part of the testimony that gave rise to a negative credibility finding. Ms. Ishmael did not say anything about how Mr. Osman entered Canada.

[19] Therefore, the RPD reached its conclusion regarding subsection 109(2) without proper regard to the evidence. This renders its decision unreasonable.

[20] The Minister sought to sustain the RPD's subsection 109(2) finding by emphasizing that the power to deny an application for vacation is discretionary; in other words, the RPD may, but is not required to, decline to vacate the applicant's refugee status if there is sufficient remaining evidence. However, this is not what the RPD did in this case. Its decision is based exclusively on its finding that there was no other sufficient evidence. It did not purport to exercise a discretion

not to apply subsection 109(2). It is not for the Court, on judicial review, to sustain a decision on a ground that was not invoked by the decision-maker. I leave open the question of whether the RPD has a discretion to vacate refugee status even though it finds that there is other sufficient evidence.

III. Disposition

[21] For these reasons, the application for judicial review will be allowed in part. The matter will be remitted to a different panel of the RPD for a redetermination of the subsection 109(2) issue only.

JUDGMENT in IMM-2582-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed in part.
2. The portion of the decision of the Refugee Protection Division dealing with subsection 109(2) of the *Immigration and Refugee Protection Act* is quashed and the matter is remitted to the Refugee Protection Division for a redetermination of this issue only.
3. No question is certified.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2582-22

STYLE OF CAUSE: DAUD AHMED OSMAN v THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MAY 17, 2023

JUDGMENT AND REASONS: GRAMMOND J.

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