

Federal Court



Cour fédérale

Date: 20231005

Docket: IMM-8033-22

Citation: 2023 FC 1334

Ottawa, Ontario October 5, 2023

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

SHUAIB IDLE OMAR

Applicant

and

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

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicant seeks judicial review of a decision by the Refugee Protection Division [RPD] vacating his refugee status pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD determined that the Applicant had

misrepresented his citizenship and identity and that he was not Shuaib Idle Omar, a citizen of Somalia, but was rather a Kenyan citizen named Daudi Mohamed Abdallah [Mr. Abdallah].

[2] I am allowing the application because the RPD erred in vacating the Applicant's refugee status on the sole basis of photographic comparisons of the Applicant and Mr. Abdallah, and failed to consider and assess evidence supporting the Applicant's Somali identity and citizenship.

II. **Background**

[3] The Applicant claims that he is a citizen of Somalia, born in Afgoye, Somalia on April 12, 1996. He states that he entered Canada on July 8, 2016 using a fraudulent passport under the name of Hussein Farah. The Applicant successfully claimed refugee protection in 2016 based on a well-founded fear of persecution by Al-Shabaab.

[4] In October 2020, the Minister of Public Safety and Emergency Preparedness [Minister] brought an application under section 109 of the *IRPA* seeking to vacate the Applicant's refugee status on the ground that the Applicant misrepresented his identity, citizenship, and personal history in claiming refugee protection. The Minister alleged that his true identity was Mr. Abdallah, a Kenyan citizen who applied for a study permit to attend the International College of Manitoba and entered Canada on April 23, 2016, weeks before the Applicant alleged to have arrived on July 8, 2016.

[5] The Minister further argued that by withholding or misrepresenting these material facts, the Applicant prevented the original RPD panel from engaging in an informed and accurate

analysis of his identity and credibility, and from assessing whether his fear was well-founded in the correct country of reference (i.e., Kenya).

[6] The RPD granted the Minister's application and vacated the Applicant's refugee status, finding on a balance of probabilities that refugee protection was granted based on the Applicant's misrepresentation of his identity and Somali citizenship. The panel held there was "credible and trustworthy evidence" to establish that the Applicant's true identity was Mr. Abdallah.

III. **Issues and Standard of Review**

[7] The parties raise two preliminary issues. First, the Respondent seeks an order amending the style of cause to name the Minister of Public Safety and Emergency Preparedness as the Respondent, instead of the Minister of Citizenship and Immigration. Second, the Applicant challenges the admissibility of the Affidavit of Brandon Goncalves, filed by the Respondent. I deal with these two issues in my analysis below.

[8] The determinative issue on the merits of this application for judicial review is whether the RPD erred in vacating the Applicant's refugee status. I agree with the parties that the applicable standard of review is reasonableness: *Otabor v Canada (Citizenship and Immigration)*, 2020 FC 830 at paras 17-19; *Bafakih v Canada (Citizenship and Immigration)*, 2020 FC 689 at paras 19-23; *Abdulrahim v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 463 at paras 11-12.

[9] Reasonableness is a robust form of review that considers whether an administrative decision is transparent, intelligible, and justified: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 12-13, 15, 99 [*Vavilov*]. A reasonable 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. A decision-maker's reasons are not to be assessed against a standard of perfection, but rather should be read holistically and contextually in order to understand the basis on which a decision was made: *Vavilov* at paras 91, 97.

[10] The Applicant also raises an issue about proper disclosure, arguing that he made a request for disclosure before the RPD concerning the Minister's investigative techniques. He asserts that the panel breached procedural fairness in failing to deal with this request. In the alternative, the Applicant argues that there is a positive obligation on the Minister to proactively disclose the investigative techniques used. The Applicant submits that the Minister's failure to proactively disclose "should have resulted in the RPD finding that the photo comparison evidence was inadmissible": Applicant's Further Memorandum of Argument at para 89. Given my determination that the RPD's decision vacating the Applicant's refugee status is unreasonable, I need not address these arguments.

IV. Analysis

A. *Preliminary issues*

- (1) The proper respondent is the Minister of Public Safety and Emergency Preparedness

[11] For the reasons that follow, my view is that the proper respondent on judicial review of a RPD decision to vacate refugee status under section 109 of the *IRPA* is the Minister of Public Safety and Emergency Preparedness.

[12] While the Minister of Citizenship and Immigration is primarily responsible for the administration of the *IRPA*, the Minister of Public Safety and Emergency Preparedness has administrative responsibility over certain specified areas: *IRPA*, ss 4(1), 4(2). Notwithstanding this division of responsibilities, the Governor in Council may make an order specifying which Minister is responsible for the purposes of a particular *IRPA* provision or may designate them as having joint responsibility: *IRPA*, s 4(3). As set out in the *Ministerial Responsibilities Under the Immigration and Refugee Protection Act Order*, SI/2015-52 [*Order*], the Minister of Public Safety and Emergency Preparedness is designated as the responsible Minister for the purposes of subsection 109(1) of the *IRPA*: *Order*, s 2.

[13] Naming the Minister of Public Safety and Emergency Preparedness as the Respondent in this matter is consistent with Rule 303(1)(a) of the *Federal Courts Rules*, SOR/98-106. An applicant is required to name as a respondent every person “directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought”. As the

Minister responsible for making an application to the RPD for the vacation of refugee status under section 109(1) of the *IRPA*, the Minister of Public Safety and Emergency Preparedness is “directly affected” by the relief sought in this application, namely remitting the vacation proceeding for consideration by a different RPD panel member.

[14] In a recent case involving a judicial review of both a cessation decision under section 108 of the *IRPA* and a vacation decision under section 109, the Minister of Public Safety and Emergency Preparedness was added as a respondent, in addition to the already-named Minister of Citizenship and Immigration. Justice Fuhrer reasoned that given the former Minister’s responsibility for section 109 of the *IRPA*, he was a proper respondent: *Wu v Canada*, 2023 FC 1071 at para 11. In this case, the only decision at issue is the vacation of the Applicant’s refugee status under section 109. As such, both Ministers are not appropriately named as joint respondents.

(2) The affidavit is not admissible

[15] The Applicant challenges the admissibility of the Affidavit of Brandon Goncalves, the Hearings Officer representing the Minister before the RPD [Goncalves Affidavit], which details the investigative techniques used in this case. I agree with the Applicant that the affidavit introduces new evidence that goes to the merits of the case, and does not meet any of the exceptions to the general rule that evidence not before the decision-maker is inadmissible on judicial review: *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20(b).

[16] Notably, in another case, Justice Favel also refused to admit an affidavit by the same Hearings Officer attempting to adduce post-hearing evidence about investigative techniques: *Ali v Canada (Citizenship and Immigration)*, 2023 FC 671 at paras 13-18 [*Ali*]. In fairness, the Respondent conceded that the Goncalves Affidavit is not admissible to address the reasonableness of the RPD's decision. The Goncalves Affidavit is therefore struck from the record and was not considered by the Court in rendering this decision.

B. *The RPD's Decision is unreasonable*

[17] The RPD's decision vacating the Applicant's refugee status is unreasonable for two main reasons. First, the panel's reasoning that the Applicant and Mr. Abdallah are the same person is inadequate and lacks justification. Second, the panel erred in failing to consider and assess the Applicant's evidence supporting his Somali identity and citizenship.

(1) The RPD's reasoning is inadequate

[18] The RPD concluded that the Applicant and Mr. Abdallah are "one and the same person" based on the panel's "careful and thorough observation of the Respondent's facial features during the hearing", as well as a comparison of the photographs of the Applicant and Mr. Abdallah.

(a) *Photographic comparisons*

[19] While the RPD is entitled to compare photographs for identity purposes and need not rely on expert evidence, caution must be exercised: *Hirsi v Canada (Minister of Public Safety and*

Emergency Preparedness), 2023 FC 843 at para 26 [*Hirsi*]; *Arafa v Canada (Citizenship and Immigration)*, 2023 FC 238 at para 23 [*Arafa*]; *Barre v Canada (Citizenship and Immigration)*, 2022 FC 1078 at para 70 [*Barre*]; *Gedi v Canada (Citizenship and Immigration)*, 2022 FC 318 at para 19 [*Gedi*]. This Court has emphasized that decision-makers must be particularly alert to the risks of unconscious or implicit racial bias when relying on subjective impressions about similarities in facial features: *Hirsi* at para 27; *Arafa* at paras 23, 25; *Barre* at para 70.

[20] Significantly, the RPD's observations of the similarities between the photographs of the Applicant and Mr. Abdallah are expressed in a single paragraph, despite this being the determinative factor in allowing the Minister's vacation application:

[24] The panel notes that when considering photographs, no two photographs of the same person are identical, taking into account differences in lighting, camera focus, camera angles and the photographer. The panel considered the facial features of the two individuals in the many photographs and find that they bear a striking and persuasive resemblance to the photographs of the Respondent. For example, the spacing of eyes, the bridge of the nose, ears and chin are the same. The panel also observed that the shape and contour of the lips are similar and distinctive, as is the hairline in the photographs and notes that the distinctive ears are at the same level. Notably, there is a distinctive scar or birthmark under the Respondent's left eye which is visible in the photographs and was visible during the hearing. Based on examination of the photographs, the panel finds on a balance of probabilities that the Respondent is the same person depicted in the photographs of Abdallah.

[21] I do not accept the Respondent's characterization that the RPD noted "specific and distinctive details of the Applicant's appearance": Respondent's Further Memorandum of Argument at para 59. To the contrary, I find the RPD's observations, as set out in the passage

above, are general and superficial in nature. Simply referring to an individual's facial features as "distinctive" without further descriptors is insufficient.

[22] When a decision involves the potential for significant impact or harm, the decision-maker's reasons must adequately "reflect the stakes": *Vavilov* at para 133; *Ali* at para 29; *Barre* at para 78. Here, the RPD's reasons do not reflect the high stakes of vacating the Applicant's refugee status. It was incumbent on the RPD to support its conclusion that the Applicant and Mr. Abdallah were the same person through justified, transparent, and intelligible reasons. The inadequacy of the RPD's reasons supporting its identity determination is even more stark considering it approached the remaining evidence from the standpoint of having already decided the Applicant's true identity is Mr. Abdallah, as discussed in detail below.

[23] Finally, while not dispositive, I am troubled by the identical phraseology used by the same RPD panel member in this case and in *Hirsi* when comparing facial features. In *Hirsi*, the RPD also vacated the applicant's refugee status as it found, based on a comparison of photographs, that Mr. Hirsi was a Kenyan citizen, not a Somali citizen as claimed.

[24] The RPD in *Hirsi* used the very same language that it used here to describe the similarities of the two individuals' facial features and conclude that they were the same person. In particular, the RPD's reasoning in this case, as set out in paragraph 20 above, mirrors the underlined portions of the following passage from this Court's decision in *Hirsi*:

[19] The RPD considered the facial features of the individual in photographs of Mr Dukow and found that they bore a "striking and persuasive resemblance" to the photographs of the applicant. The RPD found that "the spacing of eyes, the bridge of the nose, ears

and chin [were] the same” and observed that “the shape and contour of the lips [were] similar and distinctive, as [was] the hairline in the photographs”. The ears were at the “same eye level”. [Emphasis added]

[25] The almost identical articulation by the RPD in these two cases underscores the very general nature of its photographic comparison analysis and the lack of personalization, thereby undermining the reasonableness of the analysis. A generic approach to photographic comparison is inconsistent with the need to exercise caution given the highly subjective nature of comparing facial features, especially among people of similar ethnic heritage: *Hirsi* at para 27; *Arafa* at paras 23, 25; *Barre* at para 70; *Gedi* at para 19.

(b) *The RPD’s observation of the Applicant during the hearing*

[26] In terms of the RPD’s observation of the Applicant during the hearing, I note that the hearing was virtual, rather than in-person. While the RPD acknowledged the limitations of “lighting, camera focus, camera angles and the photographer” when comparing photographs, the panel did not recognize any inherent limitations of observing an individual’s facial features during a virtual hearing. Such limitations may include the quality of the camera, the quality of the video-feed and/or wifi connection, and the lighting. The RPD should have considered the potential impact of these factors on making identity findings based on a virtual hearing.

[27] Indeed, a review of the transcripts reveals that the Applicant’s internet connection was poor and that he “froze” at least three times during the brief virtual hearing. Yet, the RPD panel did not acknowledge or consider the impact, if any, of these technological challenges on the panel’s ability to properly observe the Applicant’s facial features. In my view, this calls into

question the RPD's statement that it carefully and thoroughly observed the Applicant's facial features during the hearing.

[28] Moreover, the RPD failed to articulate how its observation of the Applicant's facial features during the hearing factored into its comparison of the photographs of the Applicant and Mr. Abdallah. Justice Little's critical analysis of the same approach taken by the RPD in *Hirsi* is equally applicable in this case:

[37] The RPD's reasons mentioned that the member made a "careful and thorough observation" of the applicant's facial features during the hearing. However, the RPD's in-person observations did not feature in its comparative assessment of the two individuals. Its conclusion was expressly based on its comparison of the photos. The fact that the RPD made such observations of the applicant in person, without further comment, explanation or comparison to Mr Dukow's photograph, serves to underline the need for adequate and transparent reasons to support the RPD's identity determination. [Emphasis added]

(2) The RPD erred in failing to consider the Applicant's supporting documentation

[29] In support of his identity and Somali citizenship, the Applicant submitted new evidence:

(i) a Somali passport issued in Nairobi, Kenya on February 23, 2022; and (ii) a Somali birth certificate issued in Nairobi on February 22, 2023. The Applicant also submitted an affidavit from a guarantor, a Somali citizen who stated that that he knew the Applicant and his family as Somali citizens. According to the Applicant, a guarantor was required to establish his Somali identity in order to obtain his passport and birth certificate.

[30] The RPD erred in failing to consider and assess these supporting documents, and basing its identity finding exclusively on the similarities it found between the photographs of the Applicant and Mr. Abdallah.

- (a) *The RPD failed to assess the authenticity of the foreign-issued identity documents*

[31] The RPD failed to address and apply the presumption of authenticity to the Somali passport and birth certificate. Documents purporting to be issued by a foreign authority are presumed to be genuine, unless there is a valid reason to doubt their authenticity: *Farah v Canada (Minister of Citizenship and Immigration)*, 2023 FC 760 at para 20 [*Farah*]; *Liu v Canada (Minister of Citizenship and Immigration)*, 2020 FC 576 at para 85 [*Liu*]; *Jele v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 24 at para 40 [*Jele*]; *Chen v Canada (Citizenship and Immigration)*, 2015 FC 1133 at para 10 [*Chen*].

[32] This Court has repeatedly held that the prevalence of fraudulent versions of certain types of official documents is not a valid reason, in and of itself, to conclude that a particular document is not genuine: *Liu* at para 88; *Chen* at paras 10-14; *Lin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 157 at paras 53-54; *Cheema v Canada (Minister of Citizenship and Immigration)*, 2004 FC 224 at para 7. Rather, there must be evidence demonstrating that the particular document at issue is not authentic, such as irregularities on the face of the document itself: *Jele* at para 45. In *Liu*, Justice Norris sets out examples of valid reasons that would suffice to rebut the presumption of authenticity: *Liu* at para 87.

[33] Furthermore, the circumstances in which foreign documents are obtained are relevant to their authenticity: *Shakil Ali v Canada (Citizenship and Immigration)*, 2023 FC 156 at para 8; *Bagire v Canada (Citizenship and Immigration)*, 2013 FC 816 at paras 24-26; *Sunday v Canada (Citizenship and Immigration)*, 2021 FC 266 at para 16.

[34] Contrary to the established jurisprudence, the RPD failed to consider whether there were valid reasons to doubt the authenticity of the passport and the birth certificate, relying instead on general statements in the National Documentation Package [NDP] about “widespread fraud”. The RPD also failed to consider the circumstances in which the documents were acquired, despite the Applicant having provided detailed evidence about the process of obtaining these documents.

[35] In addition, the RPD misapprehended the NDP evidence about Somali passports, finding that they are generally not accepted as legitimate “identity” documents. In *Farah*, Justice Zinn reviewed the same country condition evidence relied upon by the RPD in this case, and found that “the passages cited refer to passports being unacceptable as “travel documents” not as identity documents”: *Farah* at para 23.

- (3) The RPD failed to consider the reliability and credibility of the guarantor’s affidavit

[36] The RPD further erred in failing to consider the reliability and/or credibility of the guarantor’s affidavit. It discounted the affidavit, and by extension, the Applicant’s Somali passport and birth certificate because the Applicant had a “history of misrepresentation before

the Board”. I agree with the Applicant that this amounts to circular reasoning. The panel clearly made up its mind that the Applicant had lied about being Somali and then relied on this finding to discount the affidavit. In this vein, the RPD’s reasons do not exhibit the requisite attributes of transparency, justification, and intelligibility.

[37] I do not accept the Respondent’s arguments that the RPD reasonably afforded no weight to the affidavit because it is unsworn, only contains four substantive paragraphs, and provides little supporting detail: Respondent’s Further Memorandum of Argument at paras 64-65. The RPD did not assess the credibility, reliability, and probative value of the guarantor’s affidavit and the Respondent cannot now offer after-the-fact explanations to supplement the RPD’s reasons: *Vavilov* at para 97; *Ali* at para 29; *Montero v Canada (Citizenship and Immigration)*, 2021 FC 776 at para 30.

V. **Conclusion**

[38] Based on the foregoing, the RPD’s decision to vacate the Applicant’s refugee status under section 109 of the *IRPA* is unreasonable and cannot stand. The application is allowed, the RPD’s decision is set aside, and the matter is returned to the RPD for determination by another member.

[39] No question of general importance was proposed by the parties for certification and I find that none arises.

JUDGMENT in IMM-8033-22

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division dated July 26, 2022 is set aside and the matter is remitted for determination by a differently constituted panel.
3. The style of cause is amended so that the Minister of Public Safety and Emergency Preparedness is the respondent.
4. No question is certified for appeal.

“Anne M. Turley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8033-22

STYLE OF CAUSE: SHUAIB IDLE OMAR v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

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APPEARANCES:

Lina Anani FOR THE APPLICANT

Christopher Ezrin FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor FOR THE APPLICANT
Toronto, Ontario
Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario