

Federal Court



Cour fédérale

Date: 20231016

Docket: IMM-6771-22

Citation: 2023 FC 1372

Ottawa, Ontario, October 16, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

**HELEN KELETA SARIAM
NATHAN BERHANE MUSSIEL**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of the decision of the Refugee Protection Division (“RPD”) dated June 22, 2022, finding that the Applicant’s refugee status is vacated pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] The Applicants submit that the RPD based its decision to grant the application by the Minister of Public Safety and Emergency Preparedness (the “Minister”) to vacate the Applicants’ refugee status on irrelevant factors, and failed to properly consider all cumulative factors of the test for vacation of refugee status under section 109 of *IRPA*.

[3] For the reasons that follow, I find that the RPD’s decision is reasonable. This application for judicial review is therefore dismissed.

II. Facts

A. *The Applicants*

[4] In their 2017 claim for refugee protection, the Applicants represented themselves as Helen Keleta Sariam (the “Principal Applicant”) and her son, Nathan Berhane Mussiel (the “Minor Applicant”), as being 36 and seven years old, respectively. They claimed to be citizens of Eritrea and no other country.

[5] The Applicants arrived in Canada on January 7, 2017, and made a claim for refugee protection on February 1, 2017. They claimed to have fled persecution in Eritrea and to have travelled through Sudan and Egypt to arrive in Canada to make a refugee claim. The Applicants’ claim centered on the Principal Applicant’s alleged imprisonment following her participation in secret prayer services at her church and the subsequent persecution in Adi Abieto prison, where she was allegedly detained from July 8, 2016 to July 25, 2016. She claimed that while in prison,

she was beaten, raped, and denied food and drink. The Principal Applicant claimed that her imprisonment resulted in her and her son fleeing Eritrea for their safety.

[6] In support of the application for refugee protection, the Principal Applicant submitted Eritrean birth certificates for herself and the Minor Applicant, identified herself and her son as being Eritrean, did not identify any other country of citizenship, stated that they did not have a passport or nationality identity document for any other country, stated that they resided in Eritrea continuously from at least February 2002 to September 2016, and did not disclose any efforts to seek refugee protection against Sweden or any history of residence in Sweden.

[7] In an oral decision rendered on May 9, 2017, the RPD granted the Applicants' claim for refugee protection. The RPD accepted the Applicants' identities as citizens of Eritrea based on the Principal Applicant's documentation and testimony. The RPD accepted their fear of persecution to be well founded throughout Eritrea.

[8] In February 2019, Swedish authorities, via Interpol, informed the Canada Border Services Agency ("CBSA") that the photographs of the Applicants matched the photographs of Swedish nationals Semhar Mehari Haile (the Principal Applicant) and Nathan Berhane Mussiel (the Minor Applicant). In further correspondence received on April 17, 2019, Swedish authorities informed CBSA that the Applicants are Swedish nationals, that the Principal Applicant applied for Swedish passports for herself and her son in 2016, and that the Minor Applicant was born in Stockholm. The Applicants' Swedish passports were used to enter Canada at Pearson International Airport in Toronto on December 31, 2016.

[9] On February 10, 2021, the Minister made an application to vacate the Applicants' refugee status pursuant to section 109 of *IRPA*, on the basis that the Applicants misrepresented and withheld material facts about their identities, citizenship, and personal history, and that there can be no other sufficient evidence to justify granting refugee protection.

B. *Decision under Review*

[10] In a decision dated June 22, 2022, the RPD granted the Minister's application to vacate the Applicants' refugee status.

[11] The RPD first considered the three elements to be met under subsection 109(1) of *IRPA*, as set out in *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 ("*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.

[12] The RPD noted that it must first render a decision with respect to subsection 109(1) of *IRPA* before moving to subsection 109(2), which authorizes the RPD to reject an application to vacate status where there is "other sufficient evidence" considered at the time of the first determination to justify refugee protection. The Minister bears the onus to establish the test for vacation of status.

[13] The RPD reviewed the Applicants' oral testimony and post-hearing submissions to determine that all three elements of the subsection 109(1) test are met, and no such "sufficient evidence" exists to justify refugee protection under subsection 109(2).

[14] On the first consideration of whether there was a misrepresentation or withholding of material facts, the RPD found credible and trustworthy evidence that the Principal Applicant misrepresented about her true identity, which is of central importance to the Applicants' claim for refugee protection. The RPD found that the Principal Applicant's testimony regarding her actions taken in coming to Canada was vague and contradictory. The Principal Applicant testified that she did not remember the aliases she used to enter Canada, that she only remembered these names when she received the Minister's application to vacate status, and that she only followed the advice of the smuggler who allegedly assisted her in coming to Canada. The RPD found that this is not a reasonable explanation for the Principal Applicant's lack of truthfulness about the names and aliases she used. The RPD also noted the Principal Applicant's confirmation that she misrepresented the date on which she and her son first entered Canada.

[15] In response to the Minister's allegation that the Principal Applicant also misrepresented about her route into Canada, the Principal Applicant testified that she acted on the advice of the smuggler and trusted him, as she feared for her life. The RPD found that whether or not the Principal Applicant felt pressure from the smuggler to misrepresent or withhold information, material facts central to her refugee claim were still misrepresented or withheld.

[16] The RPD noted the Minister's submission that the Principal Applicant failed to provide full and complete information in her refugee claim regarding the details in the documents she used to enter Canada in December 2016, which constitutes another misrepresentation. The RPD acknowledged that while the Principal Applicant's level of education and the stress associated with claiming refugee protection explain why she failed to provide this material information, a finding under subsection 109(1) does not include consideration of an individual's intention, motives, or negligence. Rather, the relevant consideration is whether the protected person misrepresented or withheld material facts, citing *Canada (Minister of Citizenship and Immigration) v Pearce*, 2006 FC 492 ("*Pearce*").

[17] The RPD found that a thorough observation of the Applicants' facial features during the hearing and a comparison of the photographs provided by the Minister demonstrates that the Principal Applicant and Semhar Mehari Haile are the same person, and that the Minor Applicant and Nathan Berhane Mussiel are the same person. The RPD found that it has the authority to make such findings and need not rely on an expert, citing *Liu v Canada (Citizenship and Immigration)*, 2012 FC 377 ("*Liu*") at paragraph 10, and *Olaya Yauce v Canada (Citizenship and Immigration)*, 2018 FC 784 ("*Yauce*") at paragraph 9. Flowing from this finding is the RPD's finding that the Principal Applicant consequently misrepresented the Minor Applicant's true date of birth, which is August 13, 2015, as listed on his Swedish passport.

[18] The RPD found that the Applicants did not provide credible opposing evidence to refute the Minister's evidence of their misrepresentations, which it found persuasive. The RPD

consequently assigned minimal weight to the Applicants' testimony and evidence regarding their identities as presented during their original refugee claim.

[19] Regarding the remaining elements under subsection 109(1) of *IRPA*, the RPD found that the Applicants' fabrication and misrepresentations regarding their identities, citizenship, and profiles as citizens of Eritrea undermine the entirety of their refugee claim and the credibility of their stated need for protection. The RPD therefore found that the Applicant's material misrepresentations are central and causally connected to the RPD's initial decision to grant their claim for refugee protection.

III. Issue and Standard of Review

[20] The application raises the sole issue of whether the RPD's decision is reasonable.

[21] The standard of review is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) (“*Vavilov*”). I agree.

[22] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record

before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[23] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100).

IV. Analysis

[24] The Applicants submit that the RPD erred in relying on irrelevant factors to arrive at the decision to vacate their refugee status, and failed to properly consider whether there is sufficient other evidence to justify granting refugee protection. I disagree with the Applicants on both points and find that the RPD’s decision to grant the Minister’s application is reasonable.

[25] The Applicants reference the decision by the Federal Court of Appeal (“FCA”) in *Canada (Citizenship and Immigration) v Camayo*, 2022 FCA 50 (“*Camayo*”) to submit that although the guidance in *Camayo* is in the context of an application for cessation of refugee status, the same principles apply to an application to vacate status under section 109 of *IRPA*, including the requirement to consider the severity of the consequences of a vacation decision and the personal circumstances of the claimant.

[26] The Applicants submit that their identities as alleged in their initial refugee claim are established, on a balance of probabilities, by a majority of the documentary evidence provided, including birth certificates, a birth registration form, and supporting letters attesting to their Eritrean citizenship. The Applicants note that the Minister does not raise an issue with the veracity of these documents.

[27] The Applicants further submit that the RPD failed to consider the Minister's failure to provide evidence to demonstrate that they are Swedish nationals beyond the information from Interpol and their photographs. The Applicants note that the Minister provided post-hearing submissions that conduct a detailed comparative analysis of the facial features depicted in the Applicants' photographs in their refugee claim and those provided by Interpol in Sweden. The Applicants submit that the Minister is not an expert of physiognomy and in light of the serious consequences of a finding to vacate refugee status, this analysis should not have been undertaken without an expert. The Applicants contend that the Minister ought to have provided further evidence of their Sweden nationality, such as fingerprints provided when they allegedly applied for their Swedish passports or the Swedish birth certificate of the Minor Applicant.

[28] The Applicants further submit that the RPD erroneously characterized all of the Principal Applicant's errors or omissions as being relevant or central to the refugee claim. The Applicants note, for instance, that the discrepancy in the date on which the Applicants entered Canada is immaterial to the merits of the refugee claim.

[29] Lastly, the Applicants submit that the RPD failed to adequately consider the final element of subsection 109(1), which asks whether there is a causal connection between the misrepresenting or withholding and the favourable result in the refugee claim. However, the Applicants' submissions on this point are vague and unclear.

[30] The Respondent maintains that the RPD's decision to vacate the Applicants' refugee status is reasonable in light of the evidence and the relevant considerations. At the outset, the Respondent submits that the Applicants' reliance on *Camayo* is misplaced and cannot be imported into the different context of an application to vacate status.

[31] The Respondent submits that the RPD reasonably granted little weight to the Applicants' birth certificates, birth registration form, and other supporting documents pointing to their Eritrean nationality. The RPD reasonably found that the Applicants have no credible evidence to refute the Minister's evidence, which was persuasive of the Principal Applicant's numerous misrepresentations regarding her identity and history. The Respondent submits that the Applicants' submission on this point amounts to a disagreement with the weight attributed to these documents, which is not a valid ground for judicial review.

[32] The Respondent further submits that the RPD reasonably found that the Principal Applicant intentionally misrepresented or withheld information to the original RPD panel concerning the Applicants' aliases when coming to Canada and their travel using Swedish passports. The Respondent submits that the RPD provides an intelligible and transparent analysis of the evidence to support this finding and explains why and how the misrepresented or

withheld facts are material and relevant to the Applicants' refugee claim. The Respondent submits that the Applicants once again disagree with the weight granted to the evidence and wrongly impugn the RPD for finding that the Principal Applicant's intention or negligence is irrelevant, which aligns with this Court's jurisprudence. In response to the Applicants' specific contention that the Minister ought to have provided the fingerprints that are typically required for Swedish passport applications as further evidence of their Swedish nationality, the Respondent's counsel noted in oral submissions that once Swedish passports are granted, any fingerprints are deleted from the records and the Applicants' submission on this point is therefore meritless.

[33] Regarding the RPD's assessment of the Applicants' photographs, the Respondent submits that the RPD reasonably found that the photographs of the Applicants in the initial refugee claim match those provided by Swedish authorities. The Respondent submits that the RPD is empowered to find that an individual is, or is not, the person in a photograph in a piece of identity documentation, as evidenced by the authorities cited in the decision, and it does not have to resort to expert testimony prior to making such a finding. The Respondent submits the visual inspection of the photographs is in line with this Court's recent jurisprudence, citing *AB v Canada (Citizenship and Immigration)*, 2023 FC 29, and that this facial recognition was accompanied by an assessment of the record as a whole.

[34] The Respondent submits that the RPD reasonably found that there remained no sufficient evidence upon which to reject the Minister's application, and the Applicants' submission that the RPD could have also rejected the Minister's application is without merit.

[35] I agree with the Respondent. In my view, the Applicants have not raised a reviewable error in the RPD's decision to vacate their refugee status.

[36] At the outset, I do not find that the jurisprudence under the specific context of an application for cessation of refugee status can be applied to the entirely separate context of an application to vacate status, which involves different legal and factual considerations. I therefore do not find that the principles enumerated in *Camayo* are applicable to the case at hand.

[37] The RPD's decision demonstrates a thorough assessment of the evidence in light of the statutory criteria under section 109 of *IRPA*. The reasons are responsive to the relevant factual and legal constraints bearing upon the decision (*Vavilov* at para 99). Contrary to the Applicants' submissions, which appear largely to take issue with the degree of weight granted to certain pieces of evidence, reweighing or reassessing the evidence as it appeared before the decision-maker is not this Court's role on reasonableness review (*Vavilov* at para 125).

[38] On the first consideration under subsection 109(1), as outlined in *Gunasingam*, the RPD reasonably found that the Principal Applicant misrepresented or withheld information regarding the following aspects of her and her son's identity and personal history:

1. The Principal Applicant used an alias for her and her son when entering Canada, but did not provide these names to the original RPD panel in her refugee claim;

2. The Principal Applicant did not admit that she used these aliases to enter Canada and that they actually entered Canada in December 2016 until after the Minister brought the application to vacate the Applicants' refugee status;
3. In their intake forms and before the original RPD panel, the Principal Applicant stated that she and her son entered Canada on January 7, 2017, but testified at the vacation proceeding that they entered Canada on December 31, 2016;
4. The Principal Applicant misrepresented and/or withheld the fact that they travelled to Canada on Swedish passports from the original RPD panel and that they are Swedish nationals;
5. The Principal Applicant therefore also misrepresented her son's true date of birth, which is listed on his Swedish passport as being August 13, 2015, rather than August 12, 2015, as alleged, and;
6. The Principal Applicant testified that when entering Canada in December 2016, she memorized the information on the Swedish passports the Applicants used to enter Canada, but the Applicants' Schedule 12 form does not contain any information about passports issued by another country and used to enter Canada.

[39] The RPD clearly justified this information as being the basis for the finding that the Principal Applicant deliberately misrepresented or withheld information about her identity and personal history. The RPD's finding that the Principal Applicant's reliance on a smuggler does

not displace the finding that she misrepresented certain central facts about her identity is in accordance with the jurisprudence. As stated in *Pearce*, “whether the [Applicants] had the intellectual capacity to understand or the intention to misrepresent the facts or withhold material facts is not relevant” and, rather, “it is the behaviour of the [Applicants] - in withholding material facts - that is relevant to the determination of the vacation application” (at paras 38-39).

[40] The RPD also gave reasonably little weight to the Applicants’ identity documentation, which does not serve as credible opposing evidence to refute the Minister’s evidence that the Principal Applicant misrepresented or withheld material facts central to her claim. I agree with the Respondent that the Applicants merely disagree with the weight assigned to this evidence, which does not provide a valid basis for judicial review (*Vavilov* at para 125).

[41] Regarding the consideration of whether this information is relevant and material to the claim, the RPD reasonably found that the matter of the Applicants’ identity is highly relevant to the credibility of her claim as it was assessed by the original RPD panel. The RPD also reasonably found that these significant misrepresentations and withholding of information are causally connected to the outcome of the Applicants’ refugee claim, particularly given that the RPD’s entire analysis of the Applicants’ refugee claim was contingent on their asserted identity, citizenship, and profile as citizens of Eritrea.

[42] Lastly, I do not agree with the Applicants that the RPD erred by failing to rely on an expert witness to assess the Applicants’ photographs. The RPD has the authority to make such

assessments and need not rely on an expert witness in order to exercise this authority (*Liu* at para 10; *Yauce* at para 9).

[43] For these reasons, I find that the Applicants have not raised a reviewable error in the RPD's decision to grant the Minister's application to vacate their refugee status.

V. Conclusion

[44] This application for judicial review is dismissed. The RPD's decision is reasonable in light of the factual and legal constraints bearing upon it (*Vavilov* at para 99). No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-6771-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question to certify.

“Shirzad A.”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6771-22

STYLE OF CAUSE: HELEN KELETA SARIAM AND NATHAN
BERHANE MUSSIEL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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