Federal Court  Cour fédérale

Date: 20231206

Docket: IMM-9360-22

Citation: 2023 FC 1644

Toronto, Ontario, December 6, 2023

PRESENT: Madam Justice Go

BETWEEN:

MOHAMED JAMA OSMAN
SAFA ABDIAZIZ JAMA
SIHAM MOHAMED JAMA
SAMIR MOHAMED JAMA

Applicants

and

MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Mohamed Jama Osman [Principal Applicant or PA], his wife, Ms. Safa Abdiaziz Jama [Associate Applicant or AA] and their minor children, Siham Mohamed Jama and Samir Mohamed Jama [together, the Applicants] seek a judicial review of the Refugee Protection

Division [RPD] decision dated August 29, 2022 to vacate the Applicants' statuses as Convention refugees [Decision].

[2] The Decision was based on an application brought by the Minister of Public Safety and Emergency Preparedness [Minister], pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and Rule 64 of the *Refugee Protection Division Rules*, SOR/2012-256. The Minister claimed the Applicants concealed their real identities as Swedish citizens at their original refugee hearing, and as a result, prevented the original RPD panel from engaging in an informed and accurate analysis of their identity, credibility, and allegation of well-founded fear of persecution.

[3] Before this Court, the Applicants challenge the Decision as unreasonable. For the reasons set out below, I find the Decision reasonable and I dismiss this application for judicial review.

II. Background

A. *Factual Context*

[4] The Applicants allege they arrived in Canada on October 9, 2015 on false passports and with the assistance of smugglers. When the Applicants initiated their refugee claims less than two weeks later, they declared they were citizens of Somalia, and no other country. The PA declared his name as Mohamed Jama Osman, born March 10, 1989; the AA declared her name as Safa Abdiaziz Jama, born December 10, 1990; and they declared their children's names as

Siham Mohamed Jama, born August 15, 2011 and Samir Mohamed Jama, born September 20, 2013.

[5] The Applicants alleged in their claim that they feared persecution at the hands of Al-Shabaab, because the PA was selling alcohol in his shop in Mogadishu. The Applicants were granted protection on January 12, 2017.

[6] Upon inquiry made through Europol to the Swedish National Unit, the Minister obtained new evidence indicating that a family of four Swedish citizens - two adults and two children - entered Canada on October 6, 2015, using the names Mursal Sallad Warsane born January 10, 1988, Dahabo Hassan Warsame born March 10, 1984, Ziham Salad Warsane born August 12, 2014, and Zamir Sallad Warsane born September 15, 2013. The Swedish National Unit also provided the Minister with their photos, but not their fingerprints.

[7] The Minister alleged that the Applicants were these four Swedish citizens who must have lived in Sweden at least since August 2010. The Minister argued that had the Applicants' alleged Swedish citizenship been known to the original RPD panel, the outcome of their refugee claims would have been different.

[8] Before the RPD, the Applicant disputed the Minister's photographic evidence and argued that facial recognition technology misidentifies people of colour compared to white people. For this argument, the Applicants relied on two articles, including one from the Toronto Star reporting on allegations against the federal government's use of facial recognition technology in

its confirmation of the identities of refugees [Toronto Star article]. The Toronto Star article also reports on the growing number of Somali refugees whose identities have been questioned by Canada Border Services Agency [CBSA] through photo matching with Kenyan travellers into Canada. In that same article, CBSA denied any use of facial recognition technology.

B. *Decision under Review*

[9] The RPD accepted the Minister's application to vacate the Applicants' Convention refugee statuses. It found the Applicants misrepresented and withheld material facts relating to a relevant matter before the original RPD panel; namely, their identities, citizenship, and personal history. The RPD determined there was a causal connection between these material misrepresentations and the decision to grant the Applicants protection. The RPD also determined that the Applicants failed to provide sufficient objective evidence to rebut the Minister's allegations and rather continued to rely on the identity evidence with which they presented the original RPD. The RPD noted that if the original RPD panel knew of the Swedish citizenship, the Applicants would have been required to make their claims against Sweden and prove they could no longer live there.

III. Issues and Standard of Review

[10] The Applicants raise several issues challenging the reasonableness of the Decision which I summarize as follows:

a. Was it reasonable for the RPD to accept a quote from CBSA in the Toronto Star article that it does not use facial recognition software?

b. Did the RPD err in its finding of similarity between the Applicants and the Swedish nationals in regards to the Applicants' date of entry, the minor Applicants' birthdates, and the minor Applicants' names?

c. Did the RPD err in determining that the Applicants lived in Sweden for at least five years and that the minor Applicants were born in Sweden and had never been to Somalia?

[11] The Respondent submits that the standard of review of the Decision is reasonableness, noting that it is a highly deferential standard of proof*: Canada v Vavilov (Minister of Citizenship and Immigration)*, 2019 SCC 65 [*Vavilov*]. I agree.

[12] 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).

[13] 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

[14] Under section 109 of the *IRPA* (see Appendix A), the Minister may make an application to vacate positive decisions of refugee protection in circumstances where a status refugee was afforded protection by "directly or indirectly misrepresenting or withholding material facts relating to a relevant matter." If the RPD allows the Minister's application to vacate, the claim is deemed to be rejected and the conferral of refugee protection is nullified.

[15] In assessing an application to vacate, the RPD must first find that the decision granting refugee protection was obtained as a result of a direct or indirect misrepresentation or withholding of material facts relating to a relevant matter. Second, if the RPD makes such a finding, it must consider whether there remains sufficient evidence examined at the time of the original determination to justify refugee protection and, if so, the RPD may reject the application to vacate, notwithstanding the misrepresentation: *Abdi v Canada (Citizenship and Immigration)*, 2015 FC 643 at para 36.

[16] A misrepresentation or withholding must be with respect to a material fact related to a relevant matter. That is, the misrepresentation must be such that it impacted the original refugee protection decision: *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 at para 7.

a. *The RPD did not err in accepting the CBSA's statement in the Toronto Star article*

[17] The RPD determined that, on a balance of probabilities, the photos of the Applicants and the Swedish nationals were of the same person. The RPD rejected the Applicants' argument of the "doppelganger" phenomena and the shortcomings of facial recognition software; noting that in the Toronto Star article, CBSA denied the use of facial recognition software in its immigration enforcement programs. The RPD also recognized that while fingerprint evidence would have proven the Applicants' identity beyond a reasonable doubt, this was not the evidentiary standard required under a section 109 assessment.

[18] Before this Court, the Applicants argue the RPD erred by failing to challenge the truthfulness of CBSA's quote that it does not rely on Clearview AI, a company that provides facial recognition software. The Applicants submit it is "highly likely" CBSA used Clearview AI when it matched the photos.

[19] In their written submission, the Applicants rely heavily on my decision in *Barre v Canada (Citizenship and Immigration)*, 2022 FC 1078 [*Barre*]. At the hearing, they made no submissions on the application of *Barre*. In any event, the Applicant's reliance on *Barre* is misplaced. *Barre* is distinguishable both in terms of the facts and the reasons for my decision in that case.

[20] The applicants in *Barre* introduced evidence that CBSA used Clearview AI to generate the photo comparisons. The respondent disputed these claims, and argued that subsection 22(2)

of the *Privacy Act*, RSC, 1985, c P-21, allows CBSA to protect the details of its investigation. I determined the RPD erred in its reliance on the *Privacy Act* to admit the photo comparisons without requiring disclosure from the Minister, who asserted investigative privilege for its refusal to disclose such information: *Barre* at paras 7, 11. I also found that the RPD ignored contradictory evidence and provided inadequate reasons for its finding on facial similarities: *Barre* at para 11. None of these circumstances apply to the case at hand.

[21] The Applicants further argue that like in *Barre*, the RPD determined it did not need to challenge CBSA's claim that it does not use Clearview AI. This, the Applicants argue, was unreasonable as the RPD came to its conclusion without support from, and in fact by ignoring, the evidence.

[22] In my view, the Applicants' argument misconstrues the RPD's finding. Rather than finding it did not need to challenge CBSA's claim, the RPD pointed out that "it is a serious allegation that CBSA is using facial recognition technology based on speculation not fact." The Applicants in this case, unlike those in *Barre*, did not submit any evidence about CBSA's use of Clearview AI – a public denial by CBSA of such use is not proof of its use. Further, I note that the RPD member did ask counsel for the Minister how they obtained the photographs, to which counsel for the Minister responded they were GCMS [Global Case Management System] photos and the photos obtained from the Swedish authorities.

[23] In the absence of evidence to the contrary, I find that the RPD reasonably concluded that it "has no reason to challenge or doubt the truthfulness of the statement made by the CBSA to the Toronto Star."

[24] More to the point, the RPD noted that the Minister did in fact provide insight into how it came to its finding and how it procured the evidence – through communicating with the Swedish National Unit, "rather than random street photographs or images scraped from the internet." The RPD's finding was consistent with the evidence before it.

b. *The RPD's findings of similarity between the Applicants and the Swedish nationals were reasonable*

[25] The Applicants challenge the RPD's finding with respect to its photo comparisons, as well as comparisons based on the names of the minor Applicants, and the minor Applicants' dates of birth.

[26] The RPD observed the photos of the Applicants and the Swedish nationals were of the same persons. The Applicants submit the photos in question are of entirely different people, pointing to various facial features to argue that it was unreasonable of the RPD to find them to be the same persons.

[27] The Applicants further cite *Hirsi v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 843 [*Hirsi*] and *Arafa v Canada (Citizenship and Immigration)*, 2023 FC 238 [*Arafa*] to support their claims. They argue that in *Hirsi*, the Court held that a photo comparison should be

conducted with care and must reflect the stakes involved when one's vital interests are at risk (*Hirsi* at paras 25-27). Also in *Arafa*, the Applicants argue, the Court found it unreasonable of the RPD to fail to address dissimilarities in a photo comparison (*Arafa* at para 24). The Applicants submit that both the decisions in *Hirsi* and *Arafa* caution against hasty, superficial, and racially laced photo comparisons, and they emphasize the process is highly subjective and ill-defined, and must therefore be approached with care.

[28] While I agree that such subjective appraisals as photo comparisons must be exercised with caution and an alertness "to the risks of unconscious or implicit racial bias": *Omar v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1334 [*Omar*] at para 19, the jurisprudence does not suggest that photo comparisons can never be used as a factor for assessment.

[29] Further, this Court has confirmed that the RPD has the authority to make photo comparison assessments without relying on an expert witness: *Sariam v Canada (Minister of Citizenship and Immigration)* 2023 FC 1372 at para 42, citing *Liu v Canada (Citizenship and Immigration)*, 2012 FC 377 at para 10, and *Olaya Yauce v Canada (Citizenship and Immigration)*, 2018 FC 784 at para 9.

[30] In *Arafa*, a case cited by the Applicants, the Court ultimately upheld the panel's decision to vacate the applicants' refugee status, based in part on its findings that the two sets of individuals were identical in their appearances.

[31] At the hearing, the Applicants emphasized the presence of make-up in the photo of the female adult Swedish national while the AA had no make-up in her photo, and argued the lack of mention by the RPD of such a difference was unreasonable. I disagree. Whether or not make-up was used does not affect the RPD's analysis of facial features – spacing of the eyes, the bridge of the nose and the chin – that the RPD found to be the same. Further, the RPD did take into account that the "niqab" (which should have read hijab) frames the face of the AA and the Swedish national in slightly different positions, as well as the difference in the light.

[32] While not raised by the parties, I note Justice Turley's disapproval of similar descriptions about facial features by another RPD member of a photo comparison as "general and superficial in nature": *Omar* at para 21. In *Omar*, however, the photo comparison was the determinative factor for the RPD decision, unlike the case at hand. As well, the RPD in this case did go beyond general descriptions in its reasons.

[33] Ultimately, the RPD noted some, if not all, of the differences that the Applicants referenced, before concluding that there is a "persuasive resemblance between the subjects in these photos." The RPD provided detailed reasons for its conclusion. While the Applicants may disagree with the RPD's conclusion, they fail to identify any reviewable error with the reasoning.

[34] With respect to the Applicants' date of arrival in Canada, and the minor Applicants' birthdates and names, the RPD agreed with the Minister's submission that it is more than a "mere coincidence" that the Applicants' date of arrival as well as the minor Applicants'

birthdates were only a few days apart. It also agreed that the minor Applicants had the same phonetic names as the Swedish nationals.

[35] The Applicants do not address the issue of their date of arrival being three days apart from that of the Swedish nationals. The Applicants submit that individuals with similar birthdates "is not a remarkable coincidence at all." They point to the "Birthday Paradox" to argue that it is very possible for two people to have birthdays on, or around, the same date and that given the many people who enter Canada daily through the Toronto Pearson International Airport, it is, in fact, a mere coincidence that the minor Applicants have similar birthdates. As for similarities in the minor Applicants' names, the Applicants also argue this is a coincidence and draw an analogy to similarities in other names.

[36] The Respondent argues these similarities are not mere coincidences, rather, an attempt to misrepresent the minor Applicants' true identities.

[37] Irrespective of whether these similarities were mere coincidences, the issue before me is whether the RPD's conclusion that they were not is reasonable. In finding that they were not coincidences, the RPD relied in part on the Court's decision in *Kallab v Canada (Citizenship and Immigration)*, 2019 FC 706 which noted in part at para 188:

> The Oxford English Dictionary online defines the term "coincidence" as a "remarkable concurrence of events or circumstances without apparent causal connection". If the witness's significant personal interest combines with the alleged random events and cannot [be] objectively corroborated, the evidence tends to damage credibility, simply because it is remarkable that the events occurred together. Indeed, coincidence can similarly assist by providing probative value to a fact when not associated with self-

interest: *Briand v. Canada (Attorney General)*, 2018 FC 279 at para 61.

[38] The RPD noted the Applicants' submission about coincidences but concluded, on a balance of probabilities, that these "coincidences" demonstrate the Applicants are in fact Swedish citizens. The RPD also found, on a balance of probabilities, that the Applicants did not enter Canada on the date declared in their immigration documents, noting that the Applicants provided no evidence about their entrance on October 9, 2015. This finding was reasonable. The Applicants' arguments amount to a disagreement with the RPD's conclusion, without making out any reviewable errors, nor can I find any.

c. *The RPD's determination of the Applicants' citizenship and residency in Sweden was reasonable*

[39] The RPD found that on a balance of probabilities, the Applicants had to have lived in Sweden continuously for at least five years and that the minor Applicants were born in Sweden and had never been to Somalia.

[40] The Applicants challenge this finding, arguing that the RPD offered no proof that the children were born in Sweden and that this information is not found in the messages exchanged between the Minister and Europol. The Applicants point out that the Swedish National Unit had listed the Swedish citizens as having "emigrated" and that there is no mention of the minor Applicants' country of birth. The Applicants also submit that the Minister did not provide confirmation that the adult Swedish citizens were married or the minor Swedish citizens were their children, such as a marital status certificate or birth certificates. The Applicants submit that

without this objective evidence, it is unfair and unreasonable of the RPD to disregard the Applicants' claim that they are not from Sweden and determine that the children are born in Sweden.

[41] The Applicants also point out that the information from Europol shows that Mursal Sallad Warsane is registered as married to a Deeqo Ismail Hassan, yet there is no mention of this person in the Decision.

[42] I find these submissions lack merits.

[43] To start, to whom Mursal Sallad Warsane is married has no bearing on the case. The Europol information shows Dahabo Hassan Warsame, and not Deepo Ismail Hassan, as the mother of the two children, with Mursal Sallad Warsane listed as their father. The lack of a birth certificate for the two Swedish children whom the adult Applicants claim are not theirs, does not undermine the reasonableness of the RPD's conclusion about the minor Applicants' identity and country of birth.

[44] I agree with the Respondent that while the Applicants would have received their permanent resident status in Canada before 2021, they could still have waited until 2021 to register their emigration with the Swedish authorities; the two events are not mutually exclusive.

[45] The RPD's determination about the Applicants' nationality and residency in Sweden followed its findings based on its photo comparisons and other similarities between the

Applicants and the four Swedish nationals. The RPD further noted the lack of evidence about the Applicants' entry into Canada on October 9, 2015. Taken together, the RPD found, on a balance of probabilities, that the Applicants entered Canada on October 6, 2015 on their Swedish passports.

[46] Further, the RPD noted that in order to qualify for Swedish citizenship, as stated in the *Act on Swedish Citizenship*, a person must live in Sweden for at least five years without interruption prior to procuring a Swedish passport. The RPD observed that the Applicants' alleged Swedish passports were issued in August and September 2015, and thereby accepted the Minister's contention that they have resided in Sweden from at least August 2010 onward. From there, the RPD concluded it is more likely than not the minor Applicants were born in Sweden and have never been to Somalia, as the family would have had to meet the residency requirement in order to obtain citizenship.

[47] The RPD's reasoning meets the hallmarks of intelligibility, transparency and justification in light of the evidence before it.

d. *Final Observations*

[48] As the Applicants rightly point out, the Decision has a serious impact on their lives, as it led to the vacation of their refugee statuses, and hence their statuses in Canada.

[49] The Respondent argued at the hearing that since the Swedish Government has acknowledged the Applicants' citizenship, they could therefore return to Sweden. I see no such

assurance in the record before me. While the Swedish authorities have shared the Europol information with CBSA about the four Swedish nationals whom the Minister alleges to be the Applicants, nothing in the Europol information asserts that the Applicants are indeed the Swedish nationals in question.

[50] But as the case law has long established, the Minister needs only to convince the RPD, on the balance of probabilities - and not beyond a reasonable doubt - that the person whose status he is challenging misrepresented or withheld some facts in their original claim: *Nur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 636 at para 21. Thus, even though I find the Decision reasonable, it does not mean that the Minister has proven that the Applicants are the alleged Swedish nationals beyond a reasonable doubt.

[51] Thus, as it now stands, the Applicants may end up in a precarious situation where they face an uncertain future.

[52] However, given the RPD's reasoning demonstrates an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para 85, I see no basis to interfere with the RPD's conclusion.

V. Conclusion

[53] The application for judicial review is dismissed.

[54] There is no question for certification.

JUDGMENT in IMM-9360-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

APPENDIX A

***Immigration and Refugee Protection Act* (S.C. 2001, c. 27)**
***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**

Application to Vacate	**Annulation par la Section de la protection des réfugiés**
Vacation of Refugee Protection	**Demande d'annulation**
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.	**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.
Rejection of application	**Rejet de la demande**
(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.	**(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.
Allowance of application	**Effet de la décision**
(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.	**(3)** La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

FEDERAL COURT

SOLICITORS OF RECORD

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