

Federal Court



Cour fédérale

Date: 20240829

Docket: IMM-9218-22

Citation: 2024 FC 1350

Ottawa, Ontario, August 29, 2024

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

AYAN ABDINASIR HASSAN

Applicant

and

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

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The identity of the Applicant is in dispute. The Applicant alleges that she is Ayan Abdinasir Hassan, a citizen of Somalia. In 2018, she was found to be a Convention refugee by the Refugee Protection Division (“RPD”) based on the persecution she faced, as Ayan Abdinasir Hassan, in Somalia. In 2020, the Minister brought an application to vacate her refugee status,

asserting that she was in fact a different person who had Kenyan citizenship, not Somalian citizenship.

[2] The RPD agreed with the Minister and found the Applicant is a Kenyan citizen, and not the person she had claimed to be at her 2018 refugee hearing. The RPD granted the Minister's vacation application under section 109 of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [IRPA], finding the Applicant had obtained her refugee status through a material misrepresentation on a relevant matter. As a result, the Applicant lost her protected person status and is now no longer a Convention refugee.

[3] The Applicant challenges the RPD's vacation decision on judicial review. The Applicant takes issue with the RPD's identity findings. She argues that the RPD misconstrued and ignored relevant evidence relating to her identity. I agree with the Applicant that the RPD's assessment of the evidence was unreasonable and requires redetermination.

II. Procedural History and Background to the Vacation Application

[4] The Applicant made a claim for refugee protection approximately one month after she arrived in Canada. In her original refugee narrative she claimed to have arrived in Canada with a fraudulent Swedish passport on August 3, 2017. The Applicant had a refugee hearing on February 5, 2018. The RPD granted her claim that same day in an oral decision.

[5] Approximately three years later, in November 2020, the Minister brought an application to vacate the Applicant's refugee status. The Minister alleged that the Applicant had in fact

entered Canada as a student, using a Kenyan passport, under a different name (“R.A.A.”). The Minister claimed that the Applicant was the same person as who was depicted in R.A.A.’s student permit application and Kenyan passport. The Minister had evidence from the school that R.A.A. never attended the school they had been registered to attend.

[6] At the vacation hearing, the Applicant admitted that the photos submitted with the student permit (the medical exam photo) and in the passport were of her. She also admitted that she had entered Canada on a Kenyan passport on August 17, 2018. The Applicant maintained that she is Ayan Abdinasir Hassan, a citizen of Somalia. The Applicant testified that she was fearful of being deported and followed the smuggler’s instructions to say that she had arrived on a fraudulent Swedish passport and not the Kenyan one, which had been obtained by the smuggler.

[7] The key issue facing the RPD at the vacation hearing was whether the Applicant is who she said she was at her refugee hearing in 2018, or whether she is the person in the Kenyan passport. The RPD held a vacation hearing over the course of two days: June 17, 2022 and August 8, 2022. On September 2, 2022, the RPD granted the Minister’s vacation application and consequently under section 109(3) of IRPA, found that the Applicant’s claim was deemed to be rejected and the 2018 RPD decision was nullified.

III. Preliminary Issue: Respondent is the Minister of Public Safety and Emergency Preparedness

[8] The parties agree, as do I, that on a judicial review of an RPD decision to vacate an individual’s refugee status under section 109 of IRPA, the proper named respondent is the

Minister of Public Safety and Emergency Preparedness (see *Omar v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1334 at paras 11-14). The style of cause is amended to reflect this with immediate effect.

IV. Issue and Standard of Review

[9] The only issue on judicial review is the RPD's determination on whether there was a misrepresentation that was material – the first prong of the test under section 109 of IRPA. Key to this assessment is the RPD's evaluation of the Applicant's identity. The parties agree, as do I, that I have to review this issue on the standard of reasonableness.

[10] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) Vavilov*, 2019 SCC 65 [*Vavilov*] described a reasonable decision as “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). Administrative decision makers must ensure that their exercise of public power is “justified, intelligible and transparent, not in the abstract, but to the individuals subject to it” (*Vavilov* at para 95). In light of the serious consequences of losing one's status as a Convention refugee, the reasons provided by the RPD must reflect the profound consequences to the affected individual (*Vavilov* at para 133).

V. RPD's Treatment of Identity Evidence

[11] A vacation proceeding under section 109 of IRPA is triggered by an application by the Minister to the RPD. The vacation provisions in IRPA have two distinct stages of analysis. Only the first stage under section 109(1) is at issue on this judicial review.

[12] At the first stage, the RPD has to decide whether refugee protection “was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter” (IRPA, s 109(1)). The Minister bears the burden to demonstrate that these elements of subsection 109(1) of IRPA are satisfied (*Ede v Canada (Citizenship and Immigration)*, 2021 FC 804 at para 27). Both parties can present new evidence at this stage – the Minister in order to demonstrate that there is a material misrepresentation, and the person concerned in order to dispute it (*Canada (Public Safety and Emergency Preparedness) v Bafakih*, 2022 FCA 18 [Bafakih] at para 40).

[13] There was no dispute that there had been some misrepresentation or withholding of facts from the original panel. The Applicant conceded that she entered Canada on a different passport and different date than she had indicated in her original refugee claim. The key point of dispute was the significance – the materiality – of the misrepresentation. This question of the significance really turned on whether the Applicant is the person she claimed to be when she made her initial refugee claim, a citizen of Somalia, or R.A.A., the person on the passport and student permit application, who is a citizen of Kenya. The RPD understood the identity question

to be the key question that had to be determined. This is consistent with the approach set out by the Federal Court of Appeal in *Bafakih*.

[14] As this Court noted in *Canada (Minister of Citizenship and Immigration) v. Wahab*, 2006 FC 1554 [*Wahab*] and was recently confirmed by the Federal Court of Appeal in *Bafakih*, “the RPD must give sufficient details in its reasons as to which misrepresented or withheld fact(s) it found material and in respect of what relevant matter.” This exercise at the first stage “involves consideration of all the evidence on file, including the new evidence presented by both parties.” (*Wahab* at para 29; *Bafakih* at para 40).

[15] The evidence on file at the vacation hearing on the Applicant’s identity included: 1) the record before the 2018 RPD decision-maker; 2) the Minister’s evidence relating to the Kenyan identification documents; and 3) new government-issued Somalian identity documents and the Applicant’s testimony at the vacation hearing.

[16] At the 2018 RPD hearing, the Applicant did not have any government-issued identity documents. The panel noted that the challenges in obtaining government-issued identity documents in Somalia and the lack of reliability of such documents. The panel relied on a letter from the Midayanta Community Services confirming the steps they had taken to verify the Applicant is Somalian, the Applicant’s testimony about her time in Somalia, her clan, and family as well as the testimony of a witness who had knowledge of the Applicant in Somalia.

[17] By the time of the vacation hearing, the Applicant had gone to Kenya and obtained, in December 2020, government-issued identity documents from the Somalian embassy in Nairobi. She presented the following documents to the RPD: birth certificate, passport, and national identification card. The Applicant testified that the smuggler who assisted her with fleeing to Canada was responsible for the student permit application and the passport she used to enter Canada and that she had no other knowledge of these circumstances. She testified that she followed the smuggler's instructions and indicated in her refugee claim that she had entered Canada on a false Swedish passport, not a Kenyan one.

[18] The Minister presented a copy of the biodata page of the Kenyan passport that had the name of R.A.A. and the Applicant's photo and an immigration medical exam photo done in Nairobi prior to the Applicant's entry. The GCMS notes indicated that a person using this passport number in R.A.A.'s passport entered Canada on August 17, 2017. The Applicant testified at the vacation hearing that she was indeed the person depicted in the photos presented by the Minister.

[19] The RPD found on a balance of probabilities that the Applicant is R.A.A., a citizen of Kenya, and not Ayan Abdinahir Hassan, a citizen of Somalia. The RPD did not accept the Applicant's version of events. There are two key problems with the RPD's assessment that require the matter be redetermined.

[20] First, the RPD found that the Applicant continued to maintain that she had not entered Canada on R.A.A.'s passport. This finding is puzzling given the Applicant's testimony at the

hearing where she indicates that the name in the passport she used to enter Canada was R.A.A. and that she entered Canada on August 17, 2017. In counsel's submissions, at the close of the vacation hearing, this is the same version of events presented. There seems little doubt that the Applicant's version of events is that she admits to entering Canada on August 17, 2017 with a Kenyan passport in the name of R.A.A.

[21] There was a suggestion this confusion could possibly be a result of a typo in the RPD's decision. I do not accept this explanation because it happens at two different points of the decision and it is not a single word error. The RPD stated: "The Respondent denied that she relied on the Kenyan identity evidence provided by the Minister to enter Canada" and then later in the decision again "However, the Respondent denies that she used this passport [R.A.A.'s Kenyan passport] to enter Canada."

[22] The Minister argued that even if the RPD mistakenly believed that the Applicant had been claiming to have come on a third passport, this was irrelevant because it was still another Kenyan passport that she came on, and not the Swedish one she had claimed in her original refugee hearing. In my view, the RPD's error is relevant because part of what the RPD is assessing is the overall credibility of the Applicant's version of events presented at the vacation hearing about her entry into Canada and her use of R.A.A.'s passport. The RPD's determination is not in accordance with the evidence in the record on a key issue. On this basis alone the matter needs to be redetermined.

[23] Further, the RPD did not explain its consideration of the witness' testimony at the Applicant's original refugee hearing who testified about his knowledge of the Applicant in Somalia. There is no mention of how the RPD treated the witness testimony in the decision. The Respondent argued that the RPD's failure to address the witness testimony was not determinative because it was just another piece of evidence supporting her Somalian identity that the RPD had already rejected in favour of the Minister's evidence that the Applicant is Kenyan. I cannot agree with this approach. The witness testimony is a unique piece of evidence that was key to the 2018 determination that the Applicant is a citizen of Somalia. The RPD had to grapple with it and explain how it was considered in light of the evidence pointing to Kenyan citizenship.

[24] Given the errors identified, I have not found it necessary to evaluate the Applicant's other arguments about the RPD's assessment of the newly issued Somalian identity documents. This should not be taken as a confirmation of the reasonableness of this part of the assessment.

[25] Neither party asked that a question be certified and I agree none arises here.

JUDGMENT in IMM-9218-22

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended with immediate effect to name the Respondent as the Minister of Public Safety and Emergency Preparedness;
2. The application for judicial review is allowed;
3. The matter is sent back to be redetermined by a different decision-maker; and
4. No serious question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9218-22

STYLE OF CAUSE: AYAN ABDINASIR HASSAN v THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: SADREHASHEMI J.

DATED: AUGUST 29, 2024

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