

Federal Court



Cour fédérale

Date: 20240916

Docket: IMM-11217-23

Citation: 2024 FC 1450

Ottawa, Ontario, September 16, 2024

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

**YONIS DAUD ISMAIL
(a.k.a. SHIRE AHMED ALI)**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Ismail, seeks to set aside a decision dated August 16, 2023, by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), determining he is neither a Convention Refugee nor person in need of protection, and that his claim is manifestly unfounded, pursuant to sections 96, 97 and 107.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] (Decision).

[2] The Applicant asks this Court to set the Decision aside and send the matter back to the RPD for redetermination by a different panel because the Decision is unreasonable.

[3] For the reasons that follow, this application is dismissed.

II. Background

[4] The Applicant claimed to be a citizen of Somalia. He filed a claim for refugee status on July 19, 2018. He claimed he is at risk of persecution in Somalia from the terrorist group Al-Shabab due to his imputed blasphemy.

[5] The Applicant asserted that he owned a movie theatre in Mogadishu that showed Indian and American movies, as well as football matches. He testified that he and his son were attacked by Al-Shabab in the theatre in 2017 for showing purportedly blasphemous films. He testified that his son was killed, and the Applicant described sustaining head injuries that left him hospitalized for six months. The Applicant claimed that on May 1, 2018, he fled Somalia and arrived in Addis Ababa, Ethiopia. He claimed that on July 6, 2018, he then flew to Toronto from Addis Ababa, Ethiopia on a false passport that is no longer in his possession.

[6] The Applicant did not provide any identity documents confirming his claimed Somalian citizenship. He did not provide the Immigration, Refugees and Citizenship Canada officials with an original or copy of his birth certificate or any other documents to support his claimed identity, despite a request.

[7] Canada Border Services Agency investigated the Applicant's claims, which included a search of his traveller history. A review of the traveller history uncovered that a Swedish national named Shire Ahmed Ali, date of birth January 1, 1979, entered Canada through Toronto Pearson

International Airport on June 23, 2018. The records also show this same individual entered Canada on November 24, 2017. The same Swedish passport was used on both dates to enter Canada.

[8] On May 16, 2023, the Minister received information from Europol and a copy of Mr. Ali's Swedish passport photo. A side-by-side comparison of Mr. Ali's Swedish passport photo and the Applicant's refugee claimant photo indicated that Mr. Ali and the Applicant were, on a balance of probabilities, the same person. In particular, there are three distinct facial markings present in both photographs: a scar on the forehead, a distinct pox mark, and a birth mark.

[9] On August 16, 2023, the RPD rejected the Applicant's claim, finding that he was not a Convention Refugee pursuant to section 96 of the *IRPA* and is not a person in need of protection pursuant to subsection 97(1) of the *IRPA*. The RPD further determined that the Applicant's claim was manifestly unfounded pursuant to section 107.1 of the *IRPA*.

[10] The Applicant commenced an application for leave and judicial review of the Decision on September 5, 2023. This Court granted leave for judicial review on June 18, 2024.

III. Position of the Parties

[11] The Respondent acknowledged that this is a credibility case. The RPD found that, on a balance of probabilities, the Applicant is a citizen of Sweden. The Respondent noted that the Applicant did not provide a personal affidavit in support of this application that addressed the pertinent identity issues in this case.

[12] The Respondent asserted that an assessment of a refugee claim requires that the Applicant establish their identity, as failure to do so undermines the remainder of their claim.

The Respondent asserted that the RPD findings with respect to the Applicant's identity were reasonable in light of the evidence. The Respondent took the position that the identity issues are dispositive of this application.

[13] The Applicant argued that the RPD's findings about his identity are not reasonable. The Applicant argued that the RPD fundamentally misapprehended the evidence. In particular, the Applicant argued that the RPD's visual comparison of the photographic evidence and the identification via the three distinguishing marks was unreasonable and unfair; and that in light of the consequences that follow a manifestly unfounded determination, the RPD ought to have conducted the hearing in-person, rather than virtually.

[14] In addition, the Applicant submitted that the RPD made a number of credibility findings related to differences between his evidence, the evidence of his witness, and the medical report filed in support of his application that were unreasonable and unclear in its reasons.

IV. Preliminary Issues

[15] First, the Applicant noted that an error was made in the Style of Cause for this matter, the a.k.a. was listed as "DIDARUL ISLAM." It ought to have been "SHIRE AHMED ALI." The Respondent did not object to the proposed change to the Style of Cause.

[16] I agree that the Style of Cause ought to be amended, based on the information set out in the record for this Application.

[17] Second, the Respondent noted that the Applicant did not provide a personal affidavit to establish the facts relied on in support of his application for judicial review. As this Court noted in *Fatima v Canada (Citizenship and Immigration)*, 2017 FC 1086:

[5] First, no affidavit verifying the facts relied on by the applicant in support of the application for judicial review was served to the Court in accordance with subsection 10(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. The affidavit dated July 27, 2017, submitted by counsel who works at the law firm that formerly represented the applicant, is insufficient. Since the Court granted the application for leave on September 14, 2017, no motion has been filed by the applicant or her former counsel to replace the insufficient affidavit with an affidavit from the applicant. This is a fatal flaw (see, for example, *Metodieva v Canada (Minister of Employment and Immigration)* (1991), 132 NR 38, 28 ACWS (3d) 326 (FCA); *Dhillon v Canada (Citizenship and Immigration)*, 2009 FC 614 at paragraphs 4 to 10; and the case law cited in those decisions). Therefore, the Court has no alternative than to summarily dismiss this application for judicial review.

[18] This issue alone is dispositive of this application.

V. Issues and Standard of Review

[19] The issues raised in this judicial review application are:

- A. Was the identity finding by the RPD reasonable?
- B. Was the RPD's credibility finding reasonable?

[20] In view of my finding in respect of the preliminary issue above, I will only address the identity issue.

[21] The standard of review applicable to the RPD's finding that a refugee claim is manifestly unfounded is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25). The burden rests on the party challenging the decision to show it was unreasonable (*Vavilov* at para 100).

[22] Reasonableness review is a deferential standard and requires an evaluation of the administrative decision to determine if the decision is transparent, intelligible, and justified

(*Vavilov* at paras 12–15, 95). The starting point for a reasonableness review is judicial restraint and respect for the distinct role of administrative decision makers. Pursuant to the *Vavilov* framework, 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” (*Vavilov* at para 85). A review of the reasons is not a line-by-line treasure hunt for error and the reasons must be read holistically and contextually (*Vavilov* at paras 97, 102).

[23] To intervene on an application for judicial review, the Court must find an error in the decision that is central or significant, which renders the decision unreasonable (*Vavilov* at para 100).

VI. Analysis

[24] A manifestly unfounded claim is one that is “clearly fraudulent” (*Samuel v Canada (Citizenship and Immigration)*, 2023 FC 1020 at para 34). Justice Roy authored the following explanation and definition in *Warsame v Canada (Citizenship and Immigration)*, 2016 FC 596 at paragraphs 27, 30–31:

[27] Parliament chose to require that the claim be “clearly fraudulent” for particular consequences to flow. That would entail that it is the claim itself that is assessed as being fraudulent, and not the fact that the applicant would have used, for instance, fraudulent documents to get out of the country of origin or to gain access to Canada. However, once making a claim for refugee protection, the applicant would have to operate with clean hands and statements in support of the claim have to be accurate or they could be held against the claimant. In other words, the claimant would be attempting to gain refugee protection through falsehoods that may make the claim fraudulent. It is the claim that must be fraudulent.

...

[30] For a claim to be fraudulent, it would be required that a situation be represented of being of a certain character when it is not. But not any misstatement or falsehood would make a refugee claim fraudulent. It must be that the dishonest representations, the deceit, the falsehood, go to an important part of the refugee claim for the claim to be fraudulent, such that the determination of the claim would be influenced in a material way. It seems to me that a claim cannot be fraudulent if the dishonesty is not material concerning the determination of the claim.

[31] If the word “fraudulent” signals the need for a misrepresentation of the truth or a concealment of a material fact for the purpose of getting another party to act to its detriment, I would have thought that the word “clearly” would go to how firm the finding is. For instance, Black’s Law Dictionary (West Group, 7th Ed) defines “clearly erroneous standard” as “a judgment is reversible if the appellate court is left with the firm conviction that an error has been committed.” Similarly, clearly fraudulent would in my view signal the requirement that the decision maker has the firm conviction that refugee protection is sought through fraudulent means, such as falsehoods or dishonest conduct that go to the determination of whether or not refugee protection will be granted. Falsehoods that are merely marginal or are antecedent to the refugee claim would not qualify.

[Emphasis in original.]

[25] A finding that a claim is manifestly unfounded has serious consequences and requires a high threshold to be met on a balance of probabilities (*Sabunjeauklo v Canada (Citizenship and Immigration)*, 2024 FC 196 at paras 58–59, citing *Ahmad v Canada (Citizenship and Immigration)*, 2019 FC 11 at para 30; *Fatoye v Canada (Citizenship and Immigration)*, 2020 FC 456 at paras 43–52; *Tacoa Veljovic v Canada (Citizenship and Immigration)*, 2023 FC 1069 at para 66; and *Balyokwabwe v Canada (Citizenship and Immigration)*, 2020 FC 623 at para 40).

[26] In my opinion, the RPD fully met this high threshold. A review of the record highlights that the RPD fully canvassed this issue and fully turned its mind to concerns raised with respect to comparisons of photographic evidence. The reasons for the Decision state:

[60] The panel is aware of the issues created by examining photographs, such as differences in positioning, lighting, and camera. The panel is especially aware of issues created by examining photographs of persons of difference [*sic*] races and ethnicities than itself.

[61] However, the panel finds, absent significant explanation of the claimant or his counsel, that the three identification points, when viewed together, are clear and distinctive indicators that the photographs are of the same person contrary to any possible issues with trans-racial identification of more general aspects of the claimant's appearance, and finds that the odds of all three features being on two different people of the same general age and general appearance are very, very small.

[27] This Court has found that the RPD is empowered to make findings based on a comparison of photos (*Olaya Yauce v Canada (Citizenship and Immigration)*, 2018 FC 784 at para 9; *Liu v Canada (Citizenship and Immigration)*, 2012 FC 377 at para 10; see also *Kamano v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1241 at para 18; *Mebrahtu v Canada (Citizenship and Immigration)*, 2022 FC 279 at paras 39–41; *Arafa v Canada (Citizenship and Immigration)*, 2023 FC 238 [*Arafa*] at paras 22–26).

[28] The determination of identity is at the core of the RPD's expertise. Accordingly, their decisions with respect to identity are accorded with significant deference (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 48; *Ahmedin v Canada (Citizenship and Immigration)*, 2018 FC 1127 at para 35).

[29] Where "similarities are striking and undeniable" between photographs, this is a sufficient and reasonable basis for the RPD to make a determination with respect to identity (*Arafa* at para 23).

[30] In this case, the RPD showed an awareness of the concerns that arise in the context of comparing photographic evidence, including risks of unconscious or implicit racial bias, and noted that caution is required. However, the RPD also carefully undertook a manual comparison of the photographs and noted the similarities in the overall structure of the face and unique scarring and marks present in both photos. This led to the conclusion that, on balance of probabilities, the two individuals were the same person—the Applicant.

[31] The Applicant did not provide any evidence to demonstrate how the photographs differ or an explanation as to why he is not Mr. Ali, a Swedish national. The Applicant was provided numerous opportunities to be truthful with the IRB and explain the evidence concerning the Swedish passport.

[32] In my opinion, the RPD's Decision on the issue of identification is reasonable and takes into account the evidentiary record. The reasons are intelligible, justified, and reasonable.

[33] Finally, I will point out that the RPD noted that the Applicant submitted a report that indicated he suffered from PTSD. The report suggested several accommodations that could be made to assist the Applicant at the hearing, including short and simple questions, the use of a translator, and frequent breaks during the hearing. The RPD accepted the diagnosis of PTSD and made reasonable accommodations for the Applicant. Counsel for the Applicant acknowledged that the accommodations were made for his client and confirmed that they did not request the hearing be conducted in-person. In addition, counsel for the Applicant did not raise concerns with the quality of the video for the virtual hearing. In my opinion, the RPD appropriately considered the report and made reasonable and proper accommodations for the Applicant at the hearing.

VII. Conclusion

[34] I will note that claims similar to the Applicant's risk losing public confidence in our immigration and refugee system that strives to protect individuals trying to escape situations similar to those that were fraudulently appropriated by the Applicant in his basis of claim narrative.

[35] Considering the totality of the evidence in this application, I find that the RPD decision is reasonable and aligns with the evidence before them.

[36] This application for judicial review is dismissed.

[37] The parties did not pose any questions for certification, and I agree that there are none.

JUDGMENT in IMM-11217-23

THIS COURT’S JUDGMENT is that:

1. The style of cause for this matter is amended with immediate effect.
2. The application for judicial review is dismissed.
3. No question is certified.

“Julie Blackhawk”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-11217-23

STYLE OF CAUSE: YONIS DAUD ISMAIL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 4, 2024

JUDGMENT AND REASONS: BLACKHAWK J.

DATED: SEPTEMBER 16, 2024

APPEARANCES:

Hart A. Kaminker FOR THE APPLICANT

Kareena Wilding FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kaminker and Associates FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario