Federal Court  Cour fédérale

Date: 20240916

Docket: IMM-3442-24

Citation: 2024 FC 1454

Ottawa, Ontario, September 16, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

ABDISATAAR DAHIR YUSUF

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS (CANADA BORDER SERVICES AGENCY)

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant claims to be an 18-year-old citizen of Somalia. He wants to seek refugee protection in Canada. However, on February 6, 2024, a delegate of the Minister of Public Safety and Emergency Preparedness determined that he had previously made a claim for refugee protection in the United States, making his claim for protection in Canada ineligible to be

referred to the Refugee Protection Division (RPD) under paragraph 101(1)(c.1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[2] The applicant has applied for leave and for judicial review of this decision.

[3] The respondent agrees with the applicant that the decision under review is unreasonable. The respondent has also agreed to have the matter reconsidered by a different decision maker. The respondent offered to settle the application for judicial review on this basis but the applicant refused, essentially for two reasons. First, he takes a broader view of why the Minister's delegate's decision is unreasonable than the respondent does. And second, he believes he can obtain a more favourable outcome from the Court than the respondent is prepared to agree to.

[4] The respondent has now moved for an order allowing the application for judicial review and remitting the matter for redetermination by a different decision maker. The applicant opposes the motion.

[5] For the reasons that follow, the respondent's motion will be granted, the application for judicial review will be allowed, and the matter will be remitted for redetermination by a different decision maker. As I will explain, in my view, no useful purpose would be served by continuing with the litigation of this matter.

II. PRELIMINARY ISSUES

[6] Two preliminary issues should be addressed at the outset.

[7] First, the application for judicial review was commenced late and the applicant has requested an extension of time under paragraph 72(2(c) of the *IRPA*. The respondent does not oppose this request. The extension of time will be granted.

[8] Second, in the originating Notice of Application, the applicant requested an anonymity order pursuant to Rule 8.1 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. This provision authorizes the Court to make an order that "all documents that are prepared by the Court and that may be made available to the public be amended and redacted to the extent necessary to make the party's identity anonymous."

[9] The applicant based his request on "the exceptional tragic personal and dangerous facts and circumstances that [he] has endured and continues to face." This is the full extent of the representations made in support of the request. The respondent has not filed a Form IR-5 signalling its opposition to the request. This may be because the applicant did not file his own Form IR-5 in the first place, as required by Rule 8.1(1). In any event, after taking the public interest in open and accessible court proceedings into account, as required by Rule 8.1(5), I am not satisfied that the applicant's identity should be anonymized.

[10] An anonymity order is generally considered a minor restriction on the open court principle but it still must be justified by the circumstances of the case in which it is sought (*Adeleye v Canada (Citizenship and Immigration)*, 2020 FC 681 at para 17; *Mamut v Canada (Citizenship and Immigration)*, 2024 FC 243 at para 11). To be warranted, a discretionary restriction on court openness must be necessary to prevent a serious risk to an important public

interest that would otherwise arise and, as a matter of proportionality, its benefits must outweigh its negative effects (*Sherman Estate v Donovan*, 2021 SCC 25 at para 38). Given the very limited submissions made in support of the request, and considering all the circumstances of this case, I find that the applicant has not established that court openness in the sense that his name would appear in the style of cause in documents prepared by the Court poses any risk at all to an important public interest. Accordingly, the request for an anonymity order must be dismissed on this basis alone.

III. BACKGROUND

[11] The applicant states that he was born in Somalia in December 2005. According to the applicant, he fled that country alone in April 2022, when he was 16 years of age. With the assistance of an agent, he made his way to Brazil. From Brazil, he travelled overland to the United States/Mexico border. He entered the United States at San Diego, California, in June 2022. The applicant states that, after entering the United States, on two separate occasions he was held in immigration detention for several months, first in California, then in Illinois.

[12] The applicant eventually made his way to the Canada/United States border near Emerson, Manitoba. He entered Canada irregularly on August 8, 2023. He then submitted an inland claim for refugee protection in Winnipeg on October 30, 2023. According to the applicant, his goal since he left Somalia was to obtain refugee protection in Canada.

[13] The applicant was interviewed by a Canada Border Services Agency (CBSA) officer on September 26, 2023, and again on October 30, 2023. On both occasions, he was accompanied

by a legal guardian, a representative from Manitoba Child and Family Services. During the first interview, the applicant confirmed that he had never claimed refugee protection in another country. During the second interview, however, the CBSA officer told the applicant that Canada had received information from the United States that he had applied for refugee protection there, prior to coming to Canada. The applicant responded: "I told the lawyer I don't want to apply. I don't know if he applied for me." (Earlier in the interview, the applicant had stated that, while in detention in the United States, he had been assisted by "a lawyer for the youth.")

[14] It bears underscoring that the applicant maintains that, for the entire time he was in the United States, he was an unaccompanied minor.

[15] On February 6, 2024, a Hearings Advisor and Immigration Officer, acting as the Minister's delegate, found that the applicant's claim was ineligible to be referred to the RPD under paragraph 101(1)(c.1) of the *IRPA*. In the decision, the officer stated that it "has been confirmed that the person concerned made a claim for asylum/refugee protection in the United States of America." This confirmation appears to be in the form of a signed I-589 application. This is a US Citizenship and Immigration Services form that is used to apply for asylum in the United States. A copy of the application is not in the record. However, the application was before the Minister's delegate, who states the following in the decision:

> I note that below the claimant's signature on the I-589 Application there is a redacted signature in the section labeled "Declaration of Person Preparing Form, if Other Than Applicant, Spouse, Parent, or Child" indicating that there was a third party involved in completing and submitting this application, however the nature of this person's relationship to the claimant (e.g. legal guardian, designated representative, counsel, etc.) is unclear.

[16] The respondent concedes that the decision is unreasonable because the Minister's delegate did not engage in any way with the applicant's statements in the September 26 and October 30, 2023, interviews that he had not made a refugee claim in the United States, that he had informed his lawyer that he did not want to make a claim in the United States, and that if such a claim had been made, this was without his knowledge or consent. On this basis, the respondent is prepared to consent to an order allowing the application for judicial review, setting aside the decision of the Minister's delegate, remitting the matter to a different Minister's delegate for redetermination, and confirming that the applicant will be given an opportunity to provide further submissions and evidence in connection with that redetermination.

[17] As noted above, the applicant opposes resolution of the application for judicial review in this way because he wishes to litigate an additional issue and because he believes he could obtain a more favourable outcome than the respondent has agreed to.

IV. ANALYSIS

[18] In supplementary written submissions on this motion, the respondent submits that proceeding with the application for judicial review would be "an unnecessary waste of limited judicial resources" because, given the respondent's agreement that the matter must be redetermined, the application is now moot. While I do not agree that the application is entirely moot, I do agree that the litigation of this matter in the usual manner would be a waste of limited judicial resources, not to mention the resources of the parties.

[19] Given that the decision at issue is one made on behalf of the respondent Minister, the respondent's agreement that the matter should be redetermined would usually be the end of the matter. Indeed, under the Court's settlement project in immigration and refugee protection matters, when the decision is that of a Minister (as opposed to the Immigration and Refugee Board), if the parties are able to settle the matter, the Court's further involvement is not required. An applicant will simply discontinue the application for judicial review pursuant to the terms of settlement. See the Court's *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (last amended October 31, 2023), paragraph 41. This was how the respondent first proposed dealing with the present application. The applicant did not agree.

[20] The respondent now moves for an order allowing the application on the basis of its consent. While the applicant opposes this motion, the parties do agree on this much: the Minister's delegate's decision is unreasonable, it should be set aside, the matter should be remitted for redetermination, and, if the matter is to be redetermined, the applicant should have an opportunity to provide further evidence and submissions to the new decision maker. This agreement renders all of these issues moot: there is no longer a live controversy over them that the Court must resolve (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353-54).

[21] These are not the only issues raised in the underlying application for judicial review, however. The applicant raises other matters that are not the subject of agreement between the parties. Nevertheless, I am satisfied that it would not be a sound use of limited judicial resources to allow the application to proceed to a hearing and disposition in the usual manner. This is because the additional issue the applicant wishes to pursue concerning the reasonableness of the

decision is also moot. Furthermore, it is plain and obvious that the preconditions for the additional relief the applicant is seeking are absent.

[22] First, as already noted, while the applicant and the respondent agree that the decision under review is unreasonable, the applicant takes a broader view than the respondent of why this is the case. According to the applicant, the determination that he had made a claim for refugee protection in the United States that rendered his Canadian claim ineligible to be referred to the RPD is unreasonable because it did not deal reasonably with his legal status as a minor at the time of his application for protection in the United States. As I will explain, while the respondent has not conceded this point, this issue has been rendered moot by the respondent's agreement that the matter must be redetermined.

[23] According to the applicant, the decision is unreasonable in this respect because the Minister's delegate failed to follow the guidance set out in *Garces v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 798. That case also concerned the application of paragraph 101(1)(c.1) of the *IRPA* where an unaccompanied minor had made a claim for refugee protection in the United States (in that case, two sisters). As in the present case, in *Garces*, the Minister's delegate concluded that the claims for refugee protection in Canada were ineligible to be referred to the RPD because claims for protection had previously been made in the United States. Justice Grammond found that the decision was unreasonable because the Minister's delegate never turned their mind to the issue of the children's legal capacity to make a claim for refugee protection in the United States, despite the legal constraints bearing on the delegate's decision-making power that demonstrated the importance of this issue and the need to

resolve it. The decision was also unreasonable because the Minister's delegate failed to consider relevant evidence, instead focusing on a single document – the I-589 forms signed by the applicants. Justice Grammond concluded that the matter had to be redetermined: see *Garces,* at paras 31-32.

[24] In the present case, the Minister's delegate considered the Court's decision in *Garces.* Despite this, she found that the proof of a prior claim in the United States was determinative. The Minister's delegate wrote: "The wording of *IRPA* 101(1)(c.1) is direct and clear – if a claimant made a claim in the United States of America which has been confirmed through an info-sharing agreement, then they are ineligible to make a claim in Canada regardless of age or other personal factors." The Minister's delegate did not examine in any way the applicant's legal capacity to make a refugee claim in the United States, assuming he had even done so. The applicant submits that the Minister's delegate fell into the very same errors the Court identified in *Garces*.

[25] I agree with the applicant that the application of paragraph 101(1)(c.1) of the *IRPA* in cases where the prior claim for protection was made by an unaccompanied minor is an important issue. I would also be prepared to say that the applicant makes a strong case that the Minister's delegate's decision is unreasonable in this respect as well. However, it is not necessary to resolve this issue because the matter must be redetermined in any event. Since the matter must be redetermined, the issue of whether the Minister's delegate's decision is unreasonable in light of *Garces* is moot. Even if there is a controversy between the parties over this question, its resolution will not affect the rights of the parties. The applicant is entitled to a new decision

from the Minister's delegate regardless of the answer to this question. The issue of his legal capacity to make a claim for protection in the United States will be squarely before the decision maker; the respondent has not suggested that the next decision maker will be constrained in any way by the earlier determination. As well, concerns over judicial economy weigh decisively against the Court addressing this question despite its mootness (*Borowski*, at 360-61). As the Federal Court of Appeal has emphasized, "mootness in judicial reviews has assumed new prominence in light of the recent encouragement given to reviewing courts to avoid needless hearings" (*Public Service Alliance of Canada v Canada (Attorney General)*, 2021 FCA 90 at para 6). In any event, the decision in *Garces* speaks for itself. Even if, in the applicant's case, the Court were to address the question of how paragraph 101(1)(c.1) applies to an earlier claim for protection by an unaccompanied minor, it is unlikely it would say anything more about the legal constraints on the decision maker in this regard than what has already been said in *Garces.*

[26] The applicant also opposes a summary determination of his application for judicial review because he believes he can obtain a more favourable remedy than the respondent is prepared to agree to. According to the applicant, this Court could (and, indeed, should) remove paragraph 101(1)(c.1) of the *IRPA* as a potential impediment to his claim for protection being referred to the RPD once and for all. It could do so by declaring that the claim is not ineligible under paragraph 101(1)(c.1) of the *IRPA*, or by referring the matter back to the Minister's delegate with a direction to find that the applicant's claim is not ineligible under this paragraph.

[27] One way or another, the applicant is effectively seeking what is sometimes referred to as a directed verdict, a term the applicant himself uses. While doubt has been cast on the propriety of this terminology (see *Garshowitz v Canada (Attorney General)*, 2017 FCA 251 at para 8; *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at para 74), the underlying idea is clear and well established in the jurisprudence: even under a reasonableness standard of review, in certain exceptional circumstances, it will be in the interests of justice for a reviewing court to limit the options open to the administrative decision maker responsible for determining the question at issue. In effect, the reviewing court substitutes its opinion on the matter for that of the administrative decision maker. In the present case, the applicant has framed his request for a remedy in different ways but, in essence, he is asking this Court to substitute its opinion on the application of paragraph 101(1)(c.1) of the *IRPA* for that of the Minister's delegate and to determine this issue in his favour.

[28] The Supreme Court of Canada held in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65, that, "while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended" (at para 142). Thus, declining to remit a matter to the decision maker "may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose" (*ibid.*). One way this can become evident to the reviewing court is when it finds that the relevant legal constraints point overwhelmingly to only one reasonable conclusion: see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 120-21; and *Canada*

(Public Safety and Emergency Preparedness) v Weldemariam, 2024 FCA 69 at paras 120-27. The same principle guides the exercise of the court's discretion under paragraph 18.1(3)(b) of the *Federal Courts Act*, RSC 1985, c F-7, to refer a matter for redetermination "in accordance with such directions as [the court] considers to be appropriate." Where those directions dictate a particular outcome, this is appropriate only if that outcome is, on the facts and the law, the only lawful or reasonable conclusion: see *Tennant*, at paras 72-73 and the authorities cited therein. Such a remedy will rarely be appropriate, however, when material factual issues remain unresolved (*Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14; *Canada (Attorney General) v Allard*, 2018 FCA 85 at para 45). This is because, if material facts remain in dispute, it is unlikely that it will be evident to the reviewing court that there is only one reasonable outcome. This constraint is also grounded in the fact that primary responsibility for making the necessary factual determinations has been given to the administrative decision maker, not the reviewing court (*Vavilov*, at para 125).

[29] The applicant submits that it is a foregone conclusion that his claim is not ineligible to be referred to the RPD under paragraph 101(1)(c.1) of the *IRPA*. According to the applicant, the facts are "undisputed" and the law is "crystal clear." In short, the "stage is set" for the reviewing court to determine this issue in his favour. Thus, according to the applicant, the application for judicial review should be allowed to run its course because the Court is bound to declare that his claim is not ineligible under paragraph 101(1)(c.1) of the *IRPA*. Alternatively, if the matter is to be returned to a new decision maker, the applicant submits that it should be with reasons that "explain the law and its correct application, and how the law should be applied given the presence of certain facts and findings (those relating to [his] personal and unique exceptional

circumstances) to provide a just and fair determination to [the applicant]." Necessarily, according to the applicant, these reasons would tell the Minister's delegate how to decide the issue – namely, in a way that is favourable to him.

[30] I am unable to agree that, on the current record, there is even a possibility that the Court would grant such a remedy, either in the form of a declaratory judgment (assuming for the sake of argument that it would have jurisdiction to do so) or in the form of directions to the Minister's delegate.

[31] Contrary to the applicant's submissions, there are many unresolved factual issues. The circumstances under which the I-589 application came to be signed are far from clear. In fact, it is not even clear whether the applicant signed the application. As noted above, the application is not before the Court. The applicant denies signing the application yet the Minister's delegate's decision appears to suggest that his signature is on the document (see paragraph 15, above). It is not this Court's role to resolve this factual issue. If the respondent has not challenged the applicant's evidence that he did not sign the form and, if one was signed, this was done without his knowledge or consent, that is only because this is not the appropriate forum in which to do so.

[32] It was incumbent on the Minister's delegate to consider all the evidence and make the necessary findings of fact. The decision under review is fatally flawed because the Minister's delegate failed to do so in respect of a material issue: Did the applicant (or someone with legal authority to do so on his behalf) sign the I-589? This is why the matter must be redetermined.

As well, there are significant gaps in the evidence, including whether a third party signed the I-589, who that person was, and the nature of their relationship to the applicant (again, see paragraph 15, above). The gaps in the evidence can only be filled, if at all, when the matter is redetermined. It will be for the new decision maker to make the necessary findings of fact on the evidence presented.

[33] Furthermore, in submitting that the law is "crystal clear," the applicant asserts that *Garces* established as a matter of law that, since the applicant was a minor when the I-589 form was signed, the form "is not valid and carries no legal force or affect [*sic*] or consequence." With respect, this a complete misunderstanding of what the Court held in *Garces.*

[34] In sum, the applicant misunderstands the role of the Court on judicial review. To go back to first principles, judicial review on a reasonableness standard, which is the applicable standard here, "finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers" (*Vavilov*, at para 13). The purpose of reasonableness review is "to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (*Vavilov*, at para 82). In general, the role of a reviewing court is to *review*; it is not to decide the underlying issues for itself (*Vavilov*, at para 83). There is a narrow exception to this general rule governing judicial review on a reasonableness standard but it is plain and obvious that it is not engaged here. The record falls far short of establishing that there is only one reasonable answer to the question of whether the applicant's claim for protection is ineligible to be referred to the RPD under

paragraph 101(1)(c.1) of the *IRPA*. It would be a waste of scarce judicial resources to allow this matter to run its course only for the Court to reach exactly the same conclusion after a full hearing, something I consider to be inevitable.

[35] To be clear, I reject the applicant's suggestion that, in bringing this motion, the respondent is employing litigation tactics in an effort to avoid an adverse determination by the Court concerning the application of paragraph 101(1)(c.1) in his case. The respondent has acted responsibly and appropriately in conceding that this matter must be redetermined by another Minister's delegate and seeking an early resolution of this application for judicial review.

[36] Finally, the applicant also appears to be asking the Court to dictate the procedure the new decision maker should follow, although his submissions on what is required are not entirely clear. Once again, the applicant misunderstands the role of the Court on judicial review. The respondent has agreed that the applicant should have an opportunity to present further evidence and submissions to the new decision maker. I agree that this is appropriate. Beyond this, at this stage, it is not this Court's role to dictate in advance the procedure the administrative decision maker should follow in the applicant's particular case. The applicant has not challenged the procedure followed by the Minister's delegate in rendering the February 6, 2024, decision; he focused entirely on the reasonableness of that decision. If there is another adverse decision and the applicant is of the view that it was not made fairly, he can challenge it in a new application for judicial review. The reviewing court would then determine whether the requirements of procedural fairness were met.

V. CONCLUSION

[37] For these reasons, the respondent's motion for an order allowing the application for judicial review will be granted. The Court's Judgment is set out below.

[38] Neither party has proposed any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. In my view, no question arises.

JUDGMENT IN IMM-3442-24

THIS COURT'S JUDGMENT is that

1. The request for an extension of time to commence the application for judicial review is granted.
2. The request for an anonymity order is refused.
3. The respondent's motion for an order allowing the application for judicial review is granted.
4. The application for judicial review is allowed, the decision of the Minister's delegate dated February 6, 2024, finding under paragraph 101(1)(c.1) of the *Immigration and Refugee Protection Act* that the applicant's claim for refugee protection is ineligible to be referred to the Refugee Protection Division is set aside, and the matter is remitted for redetermination by a different decision maker.
5. The applicant shall be given a reasonable opportunity to provide further evidence and submissions to the new decision maker.
6. No question of general importance is stated.
7. The whole without costs.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3442-24
STYLE OF CAUSE:	ABDISATAAR DAHIR YUSUF V MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS (CANADA BORDER SERVICES AGENCY)

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	NORRIS J.
DATED:	SEPTEMBER 16, 2024

WRITTEN REPRESENTATIONS BY:

David Bruni	FOR THE APPLICANT
Brendan Friesen	FOR THE RESPONDENT

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