

Federal Court



Cour fédérale

Date: 20241101

Docket: IMM-15521-23

Citation: 2024 FC 1743

Ottawa, Ontario, November 1, 2024

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

YAHYA HASSAN KARSHE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Citizenship and Immigration [Minister] seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RAD confirmed the determination by the Refugee Protection Division [RPD] of the IRB that Yahya Hassan Karshe is a Convention refugee.

[2] Mr. Karshe did not participate in this application for judicial review, despite acknowledging receipt of this Court's order granting the Minister leave to commence the application and setting dates for the completion of steps preceding the hearing. He did not submit affidavits or file a memorandum of fact and law. On October 18, 2024, a Registry Officer contacted Mr. Karshe by e-mail and asked him to confirm whether he would attend the hearing scheduled for October 21, 2024. The following day, Mr. Karshe replied: "I am sorry but I will not be able to attend the hearing".

[3] Mr. Karshe alleged before the RPD and RAD that he is a citizen of Somalia who has a well-founded fear of persecution by Al Shabaab, a religiously-motivated terrorist organization in Somalia. He says he was targeted by Al Shabaab because he worked for a non-governmental organization distributing food and medicine to displaced persons.

[4] According to Mr. Karshe, he arrived in Canada with the help of a smuggler who posed as his wife. He left Mogadishu on September 15, 2018, changed planes in Istanbul, and landed in Toronto on September 16, 2018. He says the smuggler allowed him to use her husband's Finnish passport, and Canadian border officers did not question him on arrival. He claimed not to recall many details of his trip, but he believed the name on the passport was "Jama". He stated that his parents, wife, and children all fled Somalia for Kenya, and now reside in Nairobi.

[5] The Minister intervened at the hearing before the RPD, and took the position that Mr. Karshe is in fact a Kenyan national identified in the record as "KSM". KSM was close in age to Mr. Karshe, and had entered Canada on September 20, 2018. The Minister presented

photographs of KSM and Mr. Karshe to demonstrate their close resemblance, as well as a statutory declaration of an officer with the Canada Border Services Agency confirming that a search of the Integrated Customs Enforcement System [ICES] disclosed that no citizen of Finland with the given name or surname Jama entered Canada at Pearson International Airport on September 16, 2018.

[6] The RPD acknowledged that the photographs presented by the Minister demonstrated a similarity in appearance between the two men. It nevertheless accepted Mr. Karshe's identity and credibility, and found him to be a Convention refugee. The RPD did not discuss the ICES search results.

[7] On appeal to the RAD, the Minister adduced further evidence that Mr. Karshe is KSM. The RAD nevertheless confirmed the RPD's determination that Mr. Karshe is a Convention refugee. The RAD found that the five similarities between Mr. Karshe and KSM identified by the Minister were all coincidences.

[8] For the reasons that follow, the RAD unreasonably rejected the Minister's evidence of Mr. Karshe's identity, and failed to consider the cumulative effect of the evidence presented. The application for judicial review is allowed.

II. Background

[9] The RPD accepted Mr. Karshe's explanation that he could not present a Somali passport to prove his identity due to prevailing country conditions in Somalia. The RPD found that a Somali driver's licence in Mr. Karshe's name was not a credible document. Mr. Karshe admitted that a Kenyan driver's licence in his name was fraudulent. He had asked his father to procure the document so he could work as a taxi driver in Toronto.

[10] Mr. Karshe put forward a witness who testified that he knew Mr. Karshe's father and met Mr. Karshe as a young child in Somalia. The RPD found the witness to be credible, and accepted Mr. Karshe's testimony about his life in Somalia. The RPD gave some weight to a letter from a Somali settlement agency confirming Mr. Karshe's claim about his identity, and photographs of Mr. Karshe with his family and friends that he said were taken in Somalia.

[11] The RPD considered the photographs of KSM submitted by the Minister. The RPD concluded that the similarities in the appearances of Mr. Karshe and KSM were not so striking as to establish, on a balance of probabilities, that Mr. Karshe and KSM were the same person.

[12] On appeal to the RAD, the Minister submitted new evidence, including:

- (a) an array of eight photographs comparing KSM and Mr. Karshe; and

- (b) excerpts from notes in the Global Case Management System pertaining to KSM's visa application in 2014, showing that KSM and Mr. Karshe married women with similar names (Afiya Anwar Abeyd/Abeid and Afye Anwar Anwar) on the same date (February 2, 2012), and arrived in Canada within four days of each other.

[13] The RAD largely affirmed the factual findings of the RPD. With respect to the photo array submitted by the Minister, the RAD found as follows (at paras 94, 98):

The Minister submits that the Respondent and KSM share certain distinct features, in particular, a similarly shaped nose with moles and a cupid's bow of the upper lip with the right side slightly higher than the left. I have compared the photographs, including those submitted to the RAD. I acknowledge that I have the power to make a finding that a person is or is not the person who appears in a photograph. However, I do not find the photographic evidence before me or the similarities in facial features on which the Minister relies persuasive, for the following reasons.

[...] with respect to the similarities identified by the Minister, I do not find the shape of the nose to be a particularly distinctive feature. The same is true of the upper lip. To find the similarities probative, I would need to find that that they are distinctive in the sense that few people share them. I am not satisfied that such is the case. As for the mole, I do not find that the photographs are sufficiently clear for me to discern a mole that is consistent and similar in the photographs.

[14] With respect to the Minister's contention that it was implausible for KSM and Mr. Karshe to have married women with similar names on the same date, the RAD said the following (at para 101):

[...] That the Respondent and KSM would share the same date of marriage is a coincidence. However, there is no evidence that the choice of date is unusual or one that is unlikely to be a day chosen by many people as their wedding date. That the Respondent and

KSM would have married, on that day, women whose third names differ but whose first names are spelled in a similar way and whose second names are identical would seem to add to the coincidental nature of the facts. However, I find that the country condition evidence on naming practices in Somali society makes the similarity in the names of their spouses not particularly significant.

[15] With respect to the results of the ICES search, the RAD acknowledged that this raised some doubts about Mr. Karshe's testimony, but noted his uncertain recollection about the name that appeared in the Finnish passport he claimed to have used to enter Canada.

III. Issue

[16] The sole issue raised by this application for judicial review is whether the RAD's decision was reasonable.

IV. Analysis

[17] The RAD's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only where "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[18] The criteria of "justification, intelligibility and transparency" are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls

within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[19] The RAD held that similarities in the photo array would be probative only if they were “distinctive in the sense that few people share them”. However, the Minister did not argue that KSM’s features and those of Mr. Karshe were shared by few other people. The Minister asserted only that the facial appearances of KSM and Mr. Karshe were very similar.

[20] As Justice Mandy Ayles explained in *Hassan v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1550 [*Hassan*] (at para 33):

Where identity is at issue, it is critical that the decision-maker meaningfully engage with the parties’ submissions on the similarities and differences between sets of photos, weigh those similarities and differences, reconcile any differences and clearly identify and explain how particular facial features (distinctive or otherwise) in the photographs led them to their conclusion on identity [...] [emphasis added].

[21] *Hassan* reinforces the requirement that decision makers provide reasons that are responsive to the parties’ submissions (*Vavilov* at paras 127-128). Here, the RAD unreasonably found that the similar features in the photographs of KSM and Mr. Karshe would be probative only if they were distinctive. Its analysis of the photographic evidence was not responsive to the parties’ submissions and inconsistent with this Court’s jurisprudence.

[22] The Minister identified five considerations that tended to indicate KSM and Mr. Karshe were the same person, and Mr. Karshe had failed to establish his true identity:

- (a) KSM and Mr. Karshe were of similar age;
- (b) KSM and Mr. Karshe had a similar facial appearance;
- (c) KSM and Mr Karshe were married on the same date;
- (d) the names of KSM's and Mr. Karshe's wives were very similar; and
- (e) KSM and Mr. Karshe entered Canada at the same point of entry within four days of each other.

[23] A tribunal's decision may be unreasonable if it erroneously considers key pieces of evidence in isolation and fails to consider the cumulative effect of circumstantial evidence of identity (*Adan v Canada (Citizenship and Immigration)*, 2022 FC 1383 at para 59). The RAD found that none of the similarities identified by the Minister was sufficient to impugn Mr. Karshe's identity. However, the RAD assessed the similarities between KSM and Mr. Karshe in a piecemeal fashion. The RAD's failure to consider the Minister's evidence cumulatively renders its decision unreasonable.

V. Conclusion

[24] The application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the RAD for redetermination. Neither party proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the RAD for redetermination.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-15521-23

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
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PLACE OF HEARING: TORONTO, ONTARIO

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No Appearance FOR THE RESPONDENT

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