

Federal Court



Cour fédérale

Date: 20231127

Docket: IMM-6258-22

Citation: 2023 FC 1584

Ottawa, Ontario, November 27, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

YAHYA OSMAN OSOBLE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Yahya Osman Osoble, seeks judicial review of the decision of the Refugee Protection Division (“RPD”) dated May 31, 2022, to vacate the Applicant’s Convention refugee status pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] The Applicant submits that the RPD's decision is procedurally unfair through failing to disclose the method of facial recognition used and is unreasonable based on its assessment of photographs demonstrating the Applicant to be a different individual than the one before the RPD.

[3] For the reasons that follow, I find that the RPD's decision is procedurally fair and reasonable. I therefore dismiss this application for judicial review.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 25-year-old citizen of Somalia.

[5] The Applicant entered Canada on April 8, 2017 using a false Australian passport bearing the name "Abdikadir."

[6] On February 21, 2018, the RPD granted the Applicant Convention refugee status under section 96 of the *IRPA*. While the Applicant did not provide any official identity documents from Somalia in the original RPD proceedings, the RPD found that his testimony, supporting documents, and evidence credible, and established his identity as a Somali national.

B. *Abdirahman Mohamed Mohamud*

[7] Abdirahman Mohamed Mohamud is a 26-year-old Kenyan citizen.

[8] On March 20, 2017, Mr. Mohamud applied for a study permit to attend the University of Regina at the Nairobi visa office. The photograph that is the subject of the vacation application was taken on March 15, 2017.

[9] Mr. Mohamud entered Canada on April 15, 2017, and was issued a study permit to attend the University of Regina.

[10] On April 22, 2020, the University of Regina confirmed that Mr. Mohamud had never enrolled and had not earned any credit hours towards his Bachelor of Business Administration program.

[11] On October 7, 2020, the Immigration and Refugee Board (“IRB”) informed the Applicant that the Minister of Public Safety and Emergency Preparedness (“Minister”) had applied to the RPD to vacate his status. The Minister alleged that the Applicant is actually a Kenyan citizen known as Mr. Mohamud based on the similarity between an image of Mr. Mohamud and the Applicant.

C. *Decision under Review*

[12] In a decision dated May 31, 2022, the RPD granted the Minister's application to vacate the Applicant's refugee protection status.

[13] The Minister's submissions provided a photo comparison chart of the Global Case Management System photographs of the Applicant from his refugee intake and Mr. Mohamud's study permit application. Although the Applicant says he entered Canada via the false Australian passport, the Minister alleged he entered as Mr. Mohamud via the study permit. A review of the Integrated Customs and Enforcement System showed that no Australian citizens with the name "Abdikadir" entered Toronto Pearson Airport at the relevant date.

[14] The Applicant's submissions before the RPD assumed that Immigration, Refugees and Citizenship Canada ("IRCC") had been using facial recognition technology. As such, the Applicant's submissions focused on whether the Minister should use artificial intelligence ("AI") facial recognition technology, as the software is not scientifically validated. The Applicant also maintained that he is a citizen of Somalia who is not Mr. Mohamud and that he had never used any Kenyan identity documents.

[15] On May 10, 2022, the Applicant provided an affidavit for the RPD vacation hearing that explained his understanding of the Minister's comparison of the pictures and submission that he is Mr. Mohamud. In response to this comparison, he attested to the following differences:

- His face is oval in shape and longer than Mr. Mohamud's;
 - His eyes are similar but his eyelids show less of his eyes than Mr. Mohamud's;
 - His eyebrows are thicker than Mr. Mohamud's;
 - His ears do not stick out as far as Mr. Mohamud's;
 - His nostril's do not flare out more than Mr. Mohamud's;
 - His hairline is receding where Mr. Mohamud's does not appear to have receded;
- and
- His neck is not as thick as Mr. Mohamud's.

[16] The RPD compared the two photographs and concluded that the photographs demonstrated, on a balance of probabilities, that Mr. Mohamud and the Applicant were the same person. Specifically, the RPD explained:

The photograph taken of Abdirahman Mohamed Mohamud on March 15, 2017, in Nairobi, Kenya, demonstrates clearly for the RPD that it resembles the Respondent, who appeared before the RPD at the hearing. Furthermore, the photographs in Exhibit 7 clearly emphasize the physical features and similarities in the structure of the face including the spacing between his two front teeth, which is visibly similar between both photographs.

[Citations omitted]

[17] The RPD then reviewed the Applicant's Somali documents and assigned them no probative value. The Applicant provided a Somali birth certificate and a Somali passport, which were not available at the first RPD hearing. These documents contained a different spelling of his mother's name and the omission of his father's name. The Respondent alleged that the Somali documents were obtained based on his Canadian travel documents and permanent

residence card. In addition, the RPD noted that the National Documentation Package (“NDP”) for Somalia indicated that the documents issued by the Somali government are not reliable.

[18] The RPD also reviewed the Applicant’s Kenyan documents and assigned them no weight. These documents explained that, having searched his fingerprints, the Applicant does not exist in the national database and is therefore not a Kenyan national. The RPD accepted the Minister’s submissions that the:

- (i) alleged official document contained several spelling mistakes, despite English being an official language for the Government of Kenya;
- (ii) alleged official document was devoid of any security features; and
- (iii) Kenyan biometric system was initiated in 2017, after the Kenyan passport was issued for Mr. Mohamud in October 2016, therefore reasonably indicating that the biometric repository would not have contained the Applicant’s fingerprints.

[19] The RPD therefore found that the Applicant failed to provide any credible evidence that he is a national of Somalia and no other country.

[20] Having reviewed all of this evidence, the RPD allowed the Minister’s application and vacated his refugee status based on the misrepresentation of his nationality and identity.

III. Issues and Standard of Review

[21] This judicial review application raises the issues of whether the RPD’s decision is reasonable and procedurally fair.

[22] The standard of review for the merits of the RPD's decision is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) (“*Vavilov*”). I agree.

[23] I find that the issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 (“*Canadian Pacific Railway Company*”) at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). I find that this conclusion accords with the Supreme Court of Canada's decision in *Vavilov* (at paras 16-17).

[24] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). 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 decision that is reasonable as a whole 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).

[25] 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). The emphasis on reasonableness review is the reasons of the decision-maker, read “in light of the record and with due sensitivity to the administrative regime in which they were given” but not “assessed against a standard of perfection” (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 61, citing *Vavilov* at paras 91, 103). While a decision-maker is not required to respond to every line of argument or mention every piece of evidence, a decision’s reasonableness may be called into question where the decision exhibits a “failure to meaningfully grapple with key issues or central arguments” (*Vavilov* at para 28).

[26] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

IV. Analysis

A. *Procedural Fairness*

[27] The Applicant submits that the Respondent breached procedural fairness. The Applicant argues that a failure to disclose the information used to match the Applicant’s photo with the photos of Mr. Mohamud, despite the fact that the Minister has said no facial technology software

was used in the comparison of the photographs, is unfair insofar as the use of facial recognition software is controversial.

[28] The Respondent submits that the Applicant did not raise any procedural fairness issues at the RPD hearing and that this Court should not exercise its discretion to hear this argument for the first time on judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 23-26).

[29] I agree with the Respondent. The Federal Court of Appeal has ruled that “a person who has waived a right to procedural fairness may not subsequently challenge an administrative decision on the ground that it was made in breach of the duty of fairness” (*Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116 at para 48). The Applicant did not raise any procedural fairness contentions over the admission of the photographs at the RPD hearing, nor in his written submissions before the RPD. The Applicant cannot now raise this issue before this Court.

[30] The Applicant relies upon the case of *Barre v Canada (Citizenship and Immigration)*, 2022 FC 1078 (“*Barre*”) to submit that *Barre*, released on July 20, 2022, came after the RPD’s decision and the Applicant was thus unable to rely on the principle that the Minister must explain the source of the photographic comparison. In my view, *Barre* is distinguishable from this matter. In *Barre*, the applicants did not know how the photographs were compared, as the Minister employed section 22 of the *Privacy Act*, RSC 1985, c P-21 to avoid disclosing the source of the photo comparison. Here, however, the Applicant knows the method of

comparison: the RPD clearly accepts in its decision the Minister's explanation that facial recognition software was not used. As such, I agree with the Respondent that *Barre* is distinguishable and does not assist the Applicant in this matter.

B. *Reasonableness*

[31] The Applicant maintains that the RPD's decision is unreasonable in two regards: first, the RPD erred by relying on flawed facial recognition technology in the absence of any other substantive evidence; and second, because the RPD failed to undertake a "careful and meticulous comparison" of the images and ignored documentary evidence. I disagree. The RPD conducted a reasonable assessment of the evidence, evidence this Court is precluded from reassessing (*Vavilov* at para 125).

(1) Photograph Comparisons

[32] The Applicant argues that the RPD erred by finding the Applicant was Mr. Mohamud without any additional evidence, other than comparing photos that were allegedly of low quality, black and white, grainy, and/or silhouetted. The Applicant essentially reargues the same points that were before the RPD, explaining that there are differences in the photos and that it is quite easy to mistake two individuals based on poor photographic evidence. The Applicant argues that, without corroborating evidence, the RPD decision cannot stand solely on a visual comparison.

[33] The Respondent submits that this Court's jurisprudence is clear that a tribunal is empowered to make a finding that an applicant is or is not the person appearing in the photograph of a document, without resorting to expert testimony (*Olaya Yauce v Canada (Citizenship and Immigration)*, 2018 FC 784 at para 9).

[34] I agree with the Respondent. First, although the Applicant argues the photographs are of poor quality, a review of the record indicates that the photos are visible and in colour. There is also no merit to the Applicant's submission that the Minister tampered with the evidence by brightening the images. The images are the same as the original, except brighter, and serve to enhance the image comparison. That does not amount to tampering.

[35] Furthermore, the Applicant submits that the only similarity found by the RPD was the spacing in-between the teeth and the failure to consider and list other features is unreasonable. I disagree. The RPD's decision is reasonable on this point and demonstrates a rational chain of analysis. Decision-makers are presumed to have read the evidence and do not need to address every piece of evidence and submission (*Solopova v Canada (Citizenship and Immigration)*, 2016 FC 690 at para 28). The RPD did not need to address each dissimilarity raised by the Applicant, rather, the RPD needed to conduct a fulsome analysis in light of the evidence. The reasons reflect that it did so. This Court therefore cannot interfere with the RPD's assessment. What the Applicant seeks is a reweighing of the evidence and for this Court to come to different conclusions than the RPD. That is not this Court's role (*Chen v Canada (Citizenship and Immigration)*, 2023 FC 450 at para 21, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 25, 59).

(2) Kenyan Citizen

[36] The Applicant submits that the RPD erred by concluding that he is a Kenyan citizen. The Applicant submits that the RPD erred by placing no weight on his Somali birth certificate, Somali passport, and letter from the Kenyan government that states there were no fingerprints that match his.

[37] The Respondent submits that the Applicant is simply seeking that the Court reweigh evidence, and that the Applicant fails to address the RPD's finding that the Kenyan biometrics system was only initiated in 2017, which is after the date the Applicant was issued his Kenyan passport in October 2016.

[38] I agree with the Respondent. The RPD's explanation why the Applicant's Somali documents and fingerprint letter were assigned no probative value reveals a rational chain of analysis (*Vavilov* at para 85). The Applicant's submission that the Somali government may not have relied on the Canadian documents to issue the Somali documents does not address the RPD's finding that the ease with which the Applicant obtained the documents was inconsistent with the procedure described in the NDP for Somalia. The RPD did not assign the Somali documents no probative value on the Canadian document issue alone—it was the totality of the circumstances, which the RPD explicitly stated. The RPD clearly considered the documents and viewed them as the insufficient circular evidence that it was. It is not this Court's role to reweigh this evidence (*Vavilov* at para 125).

[39] Furthermore, the Applicant relies upon *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 (“*Oranye*”) for the submission that the RPD should have accepted his letter regarding the fingerprints. In *Oranye*, this Court found that “a handful of spelling, grammar and typographical errors cannot suffice” for finding documents to be fraudulent, as the RAD had in that decision (at paras 24, 26-30). The circumstances here are distinct from *Oranye* due to the culmination of issues in the Applicant’s documents: the typographical errors, the lack of security features, and the date of the creation of the biometric system. Moreover, the RPD here did not find the documents to be fraudulent. *Oranye* is therefore of no use to the Applicant.

[40] Reasonableness review is not a “line-by-line treasure hunt for error” (*Vavilov* at para 102). The Applicant picks apart the RPD’s reasons and asks this Court to do the same, in an attempt to have the evidence reweighed. That is not this Court’s role on reasonableness review.

V. **Conclusion**

[41] This application for judicial review is dismissed. The RPD’s decision is procedurally fair and reasonable. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-6258-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question to certify.

“Shirzad A.”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6258-22

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