

Federal Court



Cour fédérale

**Date: 20240326**

**Docket: IMM-8591-21**

**Citation: 2024 FC 472**

**Toronto, Ontario, March 26, 2024**

**PRESENT: The Honourable Madam Justice Turley**

**BETWEEN:**

**MAHDI BANIN HUSSEIN**

**Applicant**

**and**

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

**Respondent**

**JUDGMENT AND REASONS FOR JUDGMENT**

**(Delivered orally from the Bench in Toronto, Ontario on March 25, 2024)**

[1] This judicial review application arises out of a decision by the Refugee Protection Division [RPD] dated October 29, 2021, vacating the Applicant's refugee status pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD determined that the Applicant had misrepresented his true identity when he sought refugee protection. As a result, the

Applicant's refugee claim was deemed rejected and the RPD decision of May 5, 2017 was nullified.

[2] I am allowing the application. I agree with the Applicant that the RPD erred in refusing to admit the Applicant's new evidence related to his Somali identity to rebut the Respondent's allegation that he had misrepresented his true identity. In allowing the application, I wholly adopt the reasons of my colleague Justice Norris in *Bhuchung v Canada (Citizenship and Immigration)*, 2023 FC 1009 [*Bhuchung*]. Indeed, the Respondent repeats the very same legal arguments in this judicial review that this Court rejected in *Bhuchung*. I do not agree with the Respondent that this case is distinguishable on any ground.

[3] As a preliminary matter, I will address the issue of the proper respondent. As raised with the parties, on judicial review of a RPD decision to vacate an individual's refugee status under section 109 of the *IRPA*, the proper named respondent is the Minister of Public Safety and Emergency Preparedness, not the Minister of Citizenship and Immigration. The former Minister is designated as the responsible Minister for the purposes of subsection 109(1) of the *IRPA*, as set out in section 2 of the Governor in Council's *Ministerial Responsibilities Under the Immigration and Refugee Protection Act Order*, SI/2015-52. I dealt with this issue in further detail in *Omar v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1334 at paras 11-14.

[4] In the vacation proceeding before the RPD, the Respondent alleged that the Applicant had concealed his true identity from the original RPD panel, and that he is in fact a Kenyan national named Mahad Ali Hussein Sheikh who was born on July 15, 1994 in Nairobi, Kenya.

[5] The Applicant conceded that, contrary to what he had told the RPD at his original refugee hearing, he had entered Canada using a Kenyan passport in the name of Mahad Ali Hussein Sheikh. However, the Applicant insisted that this was a fraudulent identity and that he is Mahdi Banin Hussein, a Somali citizen. In support, the Applicant tendered numerous documents that were not before the original RPD panel including: a Somali passport, a Somali identity card, a certificate of identity confirmation issued by the Mogadishu authorities, an email from the Somali Ambassador to Canada attesting that the Somali passport is genuine, and two affidavits from individuals who alleged that they had knowledge of the Applicant's Somali identity: Refugee Protection Division Reasons and Decision dated September 23, 2021 at para 17 [RPD Decision].

[6] The Respondent objected to the admissibility of these documents, asserting that a vacation hearing is not a fresh hearing and that the Applicant was precluded from submitting this evidence as it was not before the original RPD panel: RPD Decision at para 28.

[7] I do not accept the Respondent's argument that the RPD did enter these documents into evidence but simply preferred the Minister's evidence: Respondent's Further Memorandum of Argument at para 37. Rather, the RPD specifically determined that the Applicant "cannot rely on new evidence of his purported identity to rebut his misrepresentation made before the original RPD panel": RPD Decision at para 29.

[8] Subsection 109(1) of the *IRPA* states that the RPD may vacate an individual's refugee status if it finds that it was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. Subsection 109(2) provides that the RPD

may reject the Minister's vacation application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

[9] In refusing to admit the Applicant's new evidence of his Somali identity, the RPD erred in applying the principles that govern the evidence an individual may rely upon in responding to a vacation application. As such, the RPD fell into the same error as in *Bhuchung*. After thoroughly canvassing the relevant legislative and jurisprudential background, Justice Norris concluded that "while new evidence is not permitted under subsection 109(2) to uphold the original determination, it is permitted under subsection 109(1) to show that there was no misrepresentation": *Bhuchung* at para 48. On this basis, Justice Norris held that the RPD's refusal was unreasonable: *Bhuchung* at para 49.

[10] As in *Bhuchung*, the RPD precluded the Applicant from relying on the new evidence related to his identity in order to rebut the Respondent's allegation that he had misrepresented his personal and national identity before the original RPD panel. Yet, that is precisely the type of evidence that the RPD should admit to determine whether the Respondent established the alleged misrepresentation under subsection 109(1): *Hassan v Canada (Citizenship and Immigration)*, 2023 FC 1422 at paras 30-31; *Bhuchung* at paras 50-51.

[11] As the Applicant points out, had the RPD admitted the Applicant's evidence related to his Somali citizenship, "it could have found that the Applicant truly is the person he claims to be, rather than the Kenyan citizen the Minister alleges he is": Applicant's Further Memorandum of Law and Argument at para 36. While it is ultimately up to the RPD to assess and weigh the

evidence and determine whether it is sufficient to rebut the Respondent's allegations, it was incumbent on the RPD to consider the evidence: *Bhuchung* at para 51.

[12] There is no merit to the Respondent's argument that this case is distinguishable from *Bhuchung* because the RPD determined that the Kenyan identity was genuine: Respondent's Further Memorandum of Argument at para 35. Indeed, in *Bhuchung*, the RPD also found that the passport used by the applicant to enter Canada was genuine. Justice Norris referred to this finding in the following passage:

[31] The RPD then finds, on a balance of probabilities, that the Nepalese passport confirms the applicant's identity as Nanang Chhokle Sherpa (alias Nawang Chhokle Sherpa). The RPD was satisfied that this is a genuine passport because it had "withstood government scrutiny" when the applicant used it to travel between Nepal and India, when he used it to apply for a US visa in 2006, and when he used it to enter Canada.

[Emphasis added]

[13] Finally, the Respondent's reliance on the Court's decision in *Kingsley Ndi v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 656 [*Kingsley Ndi*] is misplaced: Respondent's Further Memorandum of Argument at para 36. In that case, the only issue was whether there was sufficient remaining evidence, despite the misrepresentation, to justify refugee protection under subsection 109(2) of the *IRPA*: *Kingsley Ndi* at para 34. The Court concluded that, for the purposes of subsection 109(2), the RPD properly determined that a revised version of events submitted by the applicant could not be considered as it was not before the original decision-maker: *Kingsley Ndi* at para 35. In contrast, in this case, the new evidence was tendered by the Applicant to respond to the Respondent's allegations under subsection 109(1) of the *IRPA*.

[14] For these reasons, the application for judicial review is allowed. The RPD's decision dated October 29, 2021 is set aside and the matter is remitted to a differently constituted panel.

[15] No question of general importance was proposed by the parties for certification, and I find that none arises in this case.

**JUDGMENT in IMM-8591-21**

**THIS COURT’S JUDGMENT is that:**

1. The style of cause is amended so that the Minister of Public Safety and Emergency Preparedness is the Respondent.
2. The application for judicial review is allowed.
3. The decision of the Refugee Protection Division dated October 29, 2021 is set aside and the matter is remitted for determination by a differently constituted panel.
4. No question is certified for appeal.

“Anne M. Turley”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-8591-21

**STYLE OF CAUSE:** MAHDI BANIN HUSSEIN v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 25, 2024

**JUDGMENT AND REASONS  
FOR JUDGMENT:** TURLEY J.

**DATED:** MARCH 26, 2024

**APPEARANCES:**

Adam Bercovitch Sadinsky FOR THE APPLICANT

James Todd FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Silcof, Shacter FOR THE APPLICANT  
Barristers and Solicitors  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario