Federal Court  Cour fédérale

Date: 20240325

Docket: IMM-4320-23

Citation: 2024 FC 466

Ottawa, Ontario, March 25, 2024

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

MUKTAR HASHI ALI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board, dated March 10, 2023 [Decision], allowing the Minister's application to vacate the Applicant's *Convention* refugee protection pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The RPD Panel determined the Applicant misrepresented his identity on his refugee claim, such that the decision on his refugee status was nullified.

II. Standard of review

[3] On judicial review, decisions like this are generally reviewed against the standard of reasonableness. This Court does not decide if it is right or wrong. However, issues of procedural fairness are reviewed on a standard of correctness. I am placing this discussion up front to save repetition and because I make preliminary determinations early on in these Reasons.

A. *Reasonableness review*

[4] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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 that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will

> always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[5] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up" and is in line with legal and factual constraints:

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
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> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
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> [Emphasis added]

[6] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

[7] The Federal Court of Appeal recently reiterated in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*] that the role of this Court is not to reweigh and reassess the evidence unless there is a fundamental error:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

B. *Procedural fairness review*

[8] As noted above, questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at paragraph 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at paragraph 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: Sound v Fitness Industry Council of Canada, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal's decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[9] I also understand from the Supreme Court of Canada's teaching in *Vavilov* at paragraph 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions <u>other than a review related to a breach of natural justice and/or the duty of procedural fairness</u>), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the

> rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
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> [Emphasis added]

[10] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[11] While generally a breach of procedural fairness will result in the decision being set aside, that is not the case if the error is inconsequential and the result otherwise legally inevitable: see Federal Court of Appeal in *Canada (Attorney General) v McBain*, 2017 FCA 204 [*McBain*], per Justice Boivin at paragraphs 9-10:

> [9] Breaches of procedural fairness will ordinarily render a decision invalid, and the usual remedy is to order a new hearing (*Cardinal v. Director of Kent Institution*,1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 (QL)).
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> [10] Exceptions to this rule exist where the outcome is legally inevitable (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202 at pp. 227-228; 1994 CarswellNfld 211 at paras. 51-54) [*Mobil Oil*] or where the breach of procedural fairness has been cured in the appellate proceeding (*Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97, [2010] B.C.J. No. 316 (QL) at para. 38 [*Taiga Works*]).

III. Facts

[12] The Applicant claimed he left Somalia from Mogadishu, and says he arrived in Canada in 2018. The Applicant attended Immigration, Refugees and Citizenship Canada on July 24, 2018 and initiated a claim for refugee protection naming Somalia as his country of citizenship.

[13] There are no Global Case Management System [GCMS] records showing when or how the Applicant entered Canada.

[14] The Applicant alleges his nationality is Somali and that his name is Muktar Hashi Ali, born October 2, 1998.

[15] The Applicant had a hearing before the RPD on May 21, 2019, and his claim for refugee protection was accepted the same day. The RPD determined the Applicant had sufficiently established his identity on a balance of probabilities.

[16] A year and a half later, on November 4, 2020, the Minister brought an application to vacate his refugee status pursuant to section 109 of *IRPA*, asserting the Applicant misrepresented his identity. The Minister alleges the Applicant is in fact a citizen of Kenya named Abdullahi Hassan Abdi [Abdi]. Abdi also entered Canada in 2018, but on a Kenyan passport with a lawfully obtained Canadian study permit.

[17] Based on material in Abdi's application in the GCMS, and manual comparisons (not using facial recognition software), the Respondent determined Abdi's photographs matched those of the Applicant. Abdi had applied for a study permit on March 29, 2018 at the Canadian visa office in Nairobi, Kenya, and claimed to be a Kenyan national. Upon comparing the photographs, the Respondent formed the opinion, based on a balance of probabilities, that Abdi and the Applicant are the same person.

[18] The Respondent took the position before the RPD that Abdi had been issued a Kenyan passport on June 29, 2017, valid until June 29, 2027. The Respondent submitted the picture on Abdi's biodata page of his passport matches that of the Applicant and that Abdi and the Applicant are one and the same. Abdi's study permit obtained on his Kenyan passport was to study at the University of Regina. GCMS records show Abdi entered Canada on May 31, 2018, at Pearson International Airport in Toronto.

A. *First disclosure request/preliminary motion before RPD*

[19] The Applicant here (Respondent on the Minister's vacation application) brought a preliminary motion before the RPD regarding the disclosure of investigatory techniques used to identify the comparison photographs. The RPD heard the motion virtually March 16, 2022. The Applicant argued facial recognition technology was used to identify comparison photographs, and without disclosure and a full understanding of the investigative techniques, there was a breach of procedural fairness. On this disclosure motion, Applicant also submitted "visually comparing these photos (without any fingerprint evidence) would be akin to engaging in implicit racial bias and discrimination."

[20] In written submissions dated March 25, 2022, the Minister stated at paragraph 2 [page 99 of the CTR], “to be clear, no type of facial recognition technology, software, or artificial intelligence was used at any time in this case.” The Minister submitted on this basis that the Applicant knew the case to meet and was provided with all relevant evidence, and as noted below, I agree.

[21] The RPD refused the disclosure motion in a decision dated May 5, 2022. The RPD relied on representations by the Minister that no facial recognition technology was used, and therefore and in my view reasonably concluded that all relevant disclosure on the case was provided. The RPD found his request for disclosure was answered. The RPD determined there was no independent right of the Applicant to know the Minister’s method of investigation and it does not affect the RPD Panel’s assessment of the evidence.

[22] The RPD did not decide the fingerprint issue, or any issue concerning biometrics, which issues were not put before it. While the Minister did make a *Privacy Act*, RSC 1985, c P-21 [*Privacy Act*] submission in this disclosure motion, the RPD made such no finding.

[23] The RPD in my view reasonably and correctly concluded its role is to independently assess whether the photographs are similar enough to support the Minister’s application:

> [17] Even if such technology were used, and they did not, it does not affect the panel’s ability to examine the pictures and determine if they are similar. Ultimately it is the member who will decide if these pictures are similar enough support the’s application.

B. *Second disclosure request during the vacation hearing*

[24] The Applicant made a second disclosure request following the Court's decision in *Barre v Canada (Citizenship and Immigration)*, 2022 FC 1078 [*Barre*] per Go J.

[25] For administrative reasons, the Application to vacate proper was fixed for a *de novo* hearing to be reheard by a newly formed and different Panel of the RPD.

[26] The new RPD panel once again accepted the Minister's advice that facial recognition software was not used, determined the method of gathering evidence was not relevant, and that the issue of identity would be decided by the RPD's own independent assessment. The RPD made no decision on a *Privacy Act* issue, nor on the Minister's claim of common-law investigatory privilege regarding disclosures that would compromise future investigations.

[27] Notably, the RPD's Decision makes no reference to fingerprint comparisons or biometrics.

[28] Nor is there any direct reference to fingerprint comparisons or biometrics in the Applicant's Memorandum of Fact and Law filed on this judicial review, nor in the Applicant's affidavit filed in support (except references in exhibits where these issues had been raised but not decided in the earlier disclosure motion).

C. *Vacation hearing*

[29] On September 12, 2022, the Applicant attended a hearing before the RPD and provided oral testimony on his name, date of birth, and Somalian citizenship. The Applicant also provided documents in supporting of the challenge to his identity, including an affidavit from the Applicant's mother, father, and a photo of his mother's Somali passport and Somali National ID.

[30] On March 10, 2023, the RPD allowed the Minister's application and nullified the Applicant's refugee protection decision. There is no appeal to the RAD of a vacation decision, thus this matter comes to this Court by leave granted by a judge of this Court.

IV. Decision under review

[31] The RPD concluded the Minister met their onus for granting of the application to vacate pursuant to section 109 of *IRPA*. The RPD concluded the Applicant misrepresented and withheld material facts relating to relevant matters before the RPD panel of first instance, namely his identity, citizenship, and personal history, and that a positive decision was obtained from the RPD as a result of material misrepresentations.

[32] The RPD outlined the statutory requirements under section 109 of *IRPA*, reasonably and correctly stating constraining law that the Panel must consider two key issues (at paragraph 15):

> (a) whether the decision granting refugee protection was obtained as a result of a direct or indirect misrepresentation, or a withholding of material facts relating to a relevant matter; and

> (b) whether at the time of first determination there was sufficient evidence to justify refugee protection notwithstanding the misrepresentation.

[33] Then, the RPD at paragraph 16 reviews and thereafter reasonably and correctly applies constraining law set out in *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181, per Justice Harrington:

> [16] In *Gunasingam*, the Federal Court held that "[a] decision must be made with respect to subsection 109(1) before consideration is given to subsection 109(2)." There are three elements to subsection 109(1):
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> > a) there must be a misrepresentation or withholding of material facts;
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> > b) those facts must relate to a relevant matter; and
> >
> > c) there must be a causal connection between the misrepresenting or withholding on the one hand and the favorable result on the other.

[34] Turning to the concern raised by Applicant's counsel on the preliminary motion, the RPD noted it continued to rely on the RPD decision of May 5, 2022, dismissing the request for further disclosure. Notably the RPD made no finding on a *Privacy Act* issue. Nor did the RPD deal with or make any decision regarding fingerprints or biometrics: neither was not raised.

[35] With respect to the issue of how photographic comparisons were made, the focus of the Applicant's submissions to both RPD panels, and contrary to the repeated submissions of the Applicant, in my respectful view there was no breach of procedural fairness. Specifically, at paragraph 22 of the Decision the RPD noted and accepted the Minister's answer to the request

for production, which was that the Minister clearly and unequivocally stated no facial recognition technology of any kind was used in this matter:

> [22] In the Panel's view, Counsel's concerns relating to the use of facial recognition software by the Minister have been satisfactorily answered. The Minister has clearly and unequivocally stated that no technology of any such kind was used in this matter. Moreover, the period leading up to the vacation proceeding and the proceeding itself allowed the Respondent and Counsel to respond to the information contained in the Minister's application to vacate, whether it be by way of disclosure, testimony at the hearing, or submissions. Each party has had an equal opportunity to establish its position.
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> [Emphasis added]

[36] In this connection, the RPD reasonably determines it is the RPD's role to independently determine the outcome of the application, and that in this context reasonably determined the method of gathering evidence in not relevant to that assessment at paragraph 23:

> 1. The Federal Court has found, on numerous occasions, that the panel is qualified to assess evidence without the benefit of expert opinion evidence (see *Liu v MCI*, 2012 FC 377 at para 10). This means that the method of gathering evidence is not relevant to the case; whether or not facial recognition technology was used to identify a photograph that bears a resemblance to the Respondent, once the Minister submits the two photographs into evidence, the outcome is the same. The panel must undertake an independent assessment, taking all of the evidence into account.
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> 2. The panel must clearly justify how it reached its conclusion, as it would in assessing any other piece of evidence (see *Gedi v MCI*, 2022 FC 318 at paras 19-21).

[37] The RPD also found as fact there was credible and trustworthy evidence to establish the Applicant's true identity as Abdi, and that the Applicant had not provided satisfactory evidence to the contrary.

[38] Turning to the photographic comparisons, the RPD conducted its own independent determination of the issues before it including the photographs included in the Minister's submissions. At paragraph 30 of the Decision, the RPD describes a photo comparison chart:

> [30] The Minister submitted a photo comparison chart of photographs of Abdullahi Hassan ABDI that were collected at the time of his application for a study permit and entry into Canada with the photograph of the Respondent [Applicant] taken at the time he made his inland application, 18 When presented with the Minister's photographic evidence, the Respondent [Applicant] identified himself in each of these photographs. Four of these photographs were taken by an Etobicoke IRCC employee on June 29, 2018, July 24, 2018, August 6, 2018, and November 21, 2019. The other photograph was taken by IRCC Panel physicians conducting immigration medical examinations on January 25, 2018, of Abdullahi Hassan ABDI. The Minister also provided a photo from Abdullahi Hassan ABDI's Kenyan passport (#B216199) issued on June 29, 2017.

[39] At paragraphs 32 and 33 of the Decision, the RPD finds:

> [32] The Panel notes that when considering photographs, no two photographs of the same person are identical, taking into account differences in lighting, camera focus, camera angles and the photographer. The Panel considered the facial features of the two individuals in the photographs. The Panel compared the eyebrows, their length, distance from the eye, the width between the eyes themselves, the shape of the eyes and the shape of the fold of the eyes. The Panel further compared, the nose, the nostrils, the shape therein, the width of the nose and the length, the distance of the bottom of the nose to the top of the lip and the shape of the lips. The Panel compared the jawline and the shape of the face overall.
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> [33] Specifically, in the Panel's review of the photos, it notes the following striking similarities. First, when reviewing the photos, the first distinct feature recorded by the Panel are the eyes of the Respondent and Abdullahi Hassan ABDI. The similarities in the eyes of each photo can be seen in the size and shape of the eyes and the shape of their eyebrows. The eyes appear to be very similar in size and shape, with a round or oval shape and the eyes are framed by the same type of brows, with a distinct arch. Second, during the Panel's comparison of the photos, it recorded visible similarities in the Respondent's and Abdullahi Hassan ABDI's

> ears. They are of a medium size and protrude out significantly from the sides of their head. The shape of the ears is also very similar, as they both have a curved outer edge and a slightly pointed top. The photos depict similar ears in terms of their size, shape, and protrusion from the sides of the head. Third, the photos show a strong similarity in the size of the Respondent and Abdullahi Hassan ABDI's forehead and shape of their hairline. Both photos show a broad forehead with a distinct hairline, well above the eyebrows. Additionally, the hairline is slightly curved in both photos, with a slight dip in the center of the forehead. The similarity between the two photos is striking, suggesting that the person's hairline and forehead have remained consistent over time. Lastly, a scar above the right eyebrow is featured in all photographs. The scar is a distinguishing feature of the person depicted, and is present in all images, providing a consistent point of comparison between the photos.

[40] As noted, the Applicant testified before the RPD. The RPD notes the Applicant maintains he is not Abdi, but the RPD determines the Applicant's evidence was weak because the photographs "show a consistent pattern of distinct facial features, including unequivocal similarities in eye shape, ear shape, forehead, hairline and scarring." The Panel found on the evidence on a balance of probabilities that Abdi and the Applicant are one and the same.

[41] The RPD then turned its analysis to whether the evidence presented by the Applicant was sufficient to answer allegations of misrepresentation. The Applicant tendered:

> i. Affidavit of the Respondent's [Applicant's] father, Hashi Ali Abdi;
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> ii. Somali Passports for the Respondent [Applicant] and his mother, Shukri Ahmed Sahal;
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> iii. Mother's statutory declaration and letter of guarantor; and
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> iv. Letter of support from the District Commissioner of Beled Hawo District

[42] The RPD held the letter of support from the District Commissioner did not go to the Applicant's identity and actual place of birth, and assigned it little weight. Notably this letter (although from the same counsel) was misfiled in this matter by RPD staff – it should not have been before the RPD because it dealt with another claimant, an error not caught by the Panel member who nonetheless assessed it as if it was properly in the Applicant's file. I gather there are several hundred RPD Panel members who deal with tens of thousands of applications annually. In the Court's view the fact the letter was there and considered by the RPD were administrative errors. The RPD's mistake does not constitute a pattern of lack of proper care as the Applicant alleged. In this connection, I note the Applicant had two paragraphs in his Memorandum that had nothing to do with this case. Mistakes happen. With respect, I am unable to see how the presence of this letter made any difference in the result which in my view was legally inevitable per *McBain*, noted above.

[43] The Panel then reviewed the passport of the Applicant's mother and her National ID card, her statutory declaration, and the Applicant's Somali passport. The Applicant said he got his Somali passport by asking an "MP" to get one for him and did so by letter without his personal attendance. The Panel notes the process described by the Applicant, which in my view shows a profound "lack of scrutiny" regarding issuance of Somali passports. The RPD reasonably found this situation negatively affected the validity of the two passports in issue (the Applicant's and that of his mother).

[44] In this connection, the RPD also reasonably relied on objective evidence in the National Documentation Package [NDP], at paragraph 50:

[50] Specifically, the panel relies on the following items in the NDP RIR SOM200235.E31 published by the IRB on August 28, 2020, relates that,

> • According to a senior advisor of the Somali National Identity Program and member of the Somali Constitution Review Commission, “Somalia is an "ID Dark Zone," a region that has no formal "legal, secure, reliable, inclusive, and verifiable identification system.”
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> • The US Department of State indicates that there is "no recognized competent civil authority to issue civil documents."
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> • According to a World Bank document “ID registries in Somalia are "disconnected" and lead to Somalis relying on a "patchwork of non-interoperable systems and documents."
>
> • Sources indicate that a national identity card is issued to those applying for a Somali passport ... The national identity card is issued at the same time as the passport and that there is no separate application requirement or procedure; applicants indicate on their passport application forms whether they wish to receive the passport only, a national identity card only or both documents.
>
> • A feasibility report on a national identification system for Somalia by the World Bank et al. indicates that while the card states that it can act as proof of citizenship, there is no legislation or "wide acceptance" of the card to act as such.
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> • According to the Country Reports on Terrorism 2018 by the US Bureau of Counterterrorism, Somali identity documents are not recognized by "[m]ost" countries.
>
> • Australia's Department of Foreign Affairs and Trade (DFAT) indicates that the "majority of countries" do not recognize the Somali passport.

[45] The RPD, in my view, reasonably concluded it should place little or no weight on the Somali passports of the Applicant and his mother.

[46] The RPD reviewed the affidavit from the Applicant's father, and placed little evidentiary weight on it. Notably the RPD discounted his evidence because he was the father, contrary to constraining law set out in *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24. In my view in the circumstances while an unreasonable finding by itself, in the RPD's overall assessment of identity, viewed holistically and not as a treasure hunt for error, the error regarding the father's affidavit does not affect the result on judicial review.

[47] The RPD also determined on a balance of probabilities that the Applicant did not enter Canada as he stated on January 19, 2018. Notably the Applicant as an alleged citizen of Somalia, had no corroborating evidence to support his travel to Canada in that or any year. To the contrary, the RPD reasonably accepted the Minister's evidence, on a balance of probabilities in all the circumstances that the Applicant arrived on May 31, 2018 on his Kenyan passport as Abdi. Having a Kenyan passport also presumptively determined the Applicant to be a citizen of Kenya and not Somalia as claimed.

[48] The RPD therefore allowed the Minister's application to vacate the Applicant's refugee protection pursuant to subsection 109(3) of *IRPA* and Rule 64 of the *Refugee Protection Division Rules* (SOR/2012-256).

V. Issues

[49] The Applicant raises the following issues:

1. Whether the CBSA should be permitted to rely on photographic evidence to impugn an Applicant's identity without disclosing to the Applicant the methods or processes, including any software, used to identify and match photos of the Applicant or photos alleged to be of the Applicant?

2. Whether the Panel misconstrued the Applicant's evidence?

3. Whether the Panel erred in failing to conduct an analysis of the differences in the photos provided by the Minister?

[50] The Respondent submits there was no breach of procedural fairness, and the Decision is reasonable.

[51] Respectfully, the issue on judicial review is whether the RPD's Decision is reasonable and procedurally fair.

VI. Relevant Provisions

[52] Section 109 of *IRPA* states:

> Vacation of refugee protection
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> **109 (1)** The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.
>
> Rejection of application

> **(2)** The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.
>
> Allowance of application
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> **(3)** If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

VII. Submissions of the parties and analysis

A. *Photograph comparison and investigative techniques reasonable*

[53] The Applicant submits the two applications made for disclosure of the Minister's investigative techniques were erroneously and unreasonably denied. With respect, there is no merit in this submission. The Applicant asked for disclosure because he suspected facial recognition was used, as appears to have been the case in 2015 and 2016 according to newspaper articles from that time.

[54] In response, the Minister disclosed that facial recognition software was not used and went further to state that the identification of the Applicant as Abdi was based on manual comparisons of their photographs. As noted above the Applicant's request for disclosure was asked and answered. I understand the Applicant is still not satisfied and argues the Minister is withholding material information. With respect, the Court was offered no evidence nor any air of reality to support his argument. There are no reviewable errors in the RPD's assessment and conclusions in relation to the Minister's non-use of facial recognition software.

[55] The Applicant also submits the RPD erred by allowing the Minister to rely on the *Privacy Act*. However, as noted above that issue was not decided by either panel of the RPD. There is simply no merit in this submission.

[56] The Applicant submits the issue arising from the RPD's Decision, and the decision in *Barre* is the blanket acceptance by the RPD that the Minister did not use facial recognition technology, without an alternative explanation. This argument is untenable because the Minister provided an alternative explanation, namely manual comparison, which factual assertion was reasonably accepted by the RPD.

[57] Furthermore, the Applicant submits the RPD did not consider the legal ramifications of facial recognition technology and its pitfalls and consequences when utilized against people of colour, particularly black men, where there is a higher level of false positive matches. This argument has no merit because facial recognition has no application in this case.

[58] While the issue is hypothetical, I agree the method used to identify photos for comparisons such as took place here would not in any event be determinative. I say this because determining whether individuals in photographs are the same is a factual matter for independent determination by the RPD based on the facts of each particular case. That is what occurred here. The photos were identified based on a manual human comparison of photographs, and again by human comparison of photographs and other information by the RPD member.

[59] This sort of fact finding is properly assigned to the RPD, as held by Justice Roussel (as she then was) in *Olaya Yauce v Canada (Citizenship and Immigration)*, 2018 FC 784 at paragraph 9:

> [9] The Applicant's argument is without merit. This Court has held that the RPD is empowered to make a finding that an applicant is – or is not – the person appearing in the photograph of an identity document and is not required to resort to expert testimony before making such a finding (*Liu v Canada (Citizenship and Immigration)*, 2012 FC 377 at paras 9-10; *Hernandez Santos v Canada (Citizenship and Immigration)*, 2007 FC 1119 at paras 21-22; *Kazadi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 292 at paras 11-12).

[60] The Applicant relies on the Federal Court of Appeal in *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 [*Brown*]. With respect, *Brown* outlines the duty of disclosure, which and with respect was reasonably satisfied in this case as noted above.

[61] I also agree that the Applicant's repeated and unfounded assertions that the Minister's Counsel is misrepresenting the Minister's response to the requested disclosure is an unwarranted and frankly unworthy attack on Minister's Counsel, and in part for that reason I will not strike Ms. Sullivan's affidavit from the record.

[62] The Respondent submits *Barre* is distinguishable, and relies on *Osoble v Canada (Citizenship and Immigration)*, 2023 FC 1584, where Justice Ahmed at paragraph 30 found the Applicant was made aware of the method of comparison, as here, which displaced the relevance of *Barre.* I fully adopt and apply Justice Ahmed's reasoning:

> [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.
>
> [Emphasis added]

[63] There was no breach of procedural fairness.

B. *RPD Panel did not misconstrue the Applicant's evidence*

[64] The Applicant submits the RPD provides an incorrect factual summary of the Applicant's claim at paragraph 6 of the Decision, and I've underlined the sentences the Applicant contests:

> [6] In his narrative, the Respondent alleged that his father was threatened by the Al Shabaab to stop teaching Sufism and was ordered to pay taxes to them every three months. The Respondent further stated that in mid-May 2016, the Al Shabaab killed his uncle at their home for allegedly being a spy. The Respondent alleged that the Al Shabaab took him and told him if he didn't join them, they would kill him. He alleged that he was then tortured by three men in an effort to get information about his family and friends. The Respondent stated that he was able to escape, whereafter he hid at his father's home before fleeing to Mogadishu. He states that his family found an agent who posed as his mother to assist in his travels to Canada. The Respondent stated that he fled to Nairobi on June 18, 2018, using a Swedish passport in the name Muhumed. He travelled on Turkish Airlines from Mogadishu to Istanbul then to Canada arriving in Canada on June 19, 2018. He declared a fear of return to Somalia due to the Al Shabaab.
>
> [Emphasis added]

[65] The Applicant states he fled from his hometown of Qooani, and went to Mogadishu, staying with his father's friend. Second, the Applicant states he left Somalia directly from Mogadishu, and never transited through Kenya.

[66] With respect, these are minor inconsistencies, and even if the RPD may have misstated portions of the original narrative, the Applicant failed to demonstrate how the minor errors render the Decision unreasonable. This is a classic treasure hunt for error: it does not displace the overall conclusion the Applicant's refugee status must be vacated given his fundamental and overriding misrepresentations as to his identity, nationality and narrative.

[67] The Applicant submits the RPD erred in rejecting the Applicant's mother's Somali passport, absent providing a reason for it to have been obtained in a fraudulent or illegitimate manner. The Applicant submits despite the objective evidence in the NDP stating Somali passports are not recognized for travel, the RPD erred in not accepting it as a form of identification.

[68] There is no reviewable error in this regard. The RPD had not only overwhelming evidence of the unreliability of Somali passports but confirmation from the Applicant himself as to the profound "lack of scrutiny" with which his was obtained. Here and with respect the Applicant is asking the Court on judicial review to reassess and reweigh the evidence in the face of detailed reasons. I decline the invitation as per *Doyle*, cited above.

C. *RPD Panel conducted an analysis of the photographic evidence*

[69] The Applicant submits Justice Mosley's decision *Gedi v Canada (Citizenship and Immigration)*, 2022 FC 318 [*Gedi*], is factually similar. In *Gedi* the Applicant provided an affidavit describing the differences between himself and the Kenyan national during the vacation hearing. The Applicant submits the RPD panel's summary of the similarities between the photograph comparisons does not address the differences between the photos, or the content of the Applicant's affidavit, and that is a significant error. The Applicant submits at paragraphs 9 and 12 of his affidavit:

> 9. The only similarities between Abdullahi and I are 1) we are both ethnically Somali 2) We are both Muslim and 3) we are both black.
>
> 12. Abdullahi Hassan Abdi has a longer, pointy nose. In addition to this, our hairlines differ, along with the shape of our eyebrows and the shape of our jawlines.

[70] There is no merit in this submission, for two reasons. First, the Applicant invites the Court to reweigh and reassess the evidence, which forms no part of the Court's role on judicial review. In any event, the RPD provided detailed reasons for its determination the photographs of Abdi and the Applicant are of the same person. Its reasons included specific references to the very matters now complained of namely the Applicant's nose, hairline, eyebrows and jawline (see RPD's reasons at paragraphs 32 and 33, reproduced above).

VIII. Conclusion

[71] Given the foregoing, this application for judicial review will be dismissed.

IX. Style of Cause

[72] The style of cause is amended effective immediately such that the Minister of Public Safety and Emergency Preparedness is the sole Respondent.

X. Certified Question

[73] The Applicant's counsel raised questions for certification at the end of the hearing concerning fingerprints an biometrics which (as noted) were not raised on judicial review nor on the merits before either panel of the RPD. Counsel did so without notice and contrary to the Court's Amended Consolidated General Practice Guidelines of December 20, 2023, available at www.fct-cf.gc.ca/Content/assets/pdf/base/2023-12-20_Amended_Consolidated_General_Practice_Guidelines.pdf.

[74] Notwithstanding, I agreed to receive post-hearing written submissions on a short timeline. The Applicant proposed the following two questions:

1. Whether IRCC or CBSA should be permitted to rely on photographic evidence to impugn an applicant's identity in the absence of any other biometric evidence (e.g. fingerprints) about the applicant's identity?

2. Whether IRCC or CBSA should be permitted to rely on photographic evidence to impugn an applicant's identity without disclosing to the applicant the methods or processes, including any software, used to identify and match photos of the applicant or photos alleged to be of the applicant.

[75] These are the same as counsel unsuccessfully raised in *Abdulle v Canada (Citizenship and Immigration)*, 2023 FC 162 before Justice Mosley.

[76] The Applicant submits the RPD should only be allowed to proceed with examination of photographs once proper disclosure is made regarding investigative techniques. In this case, the Applicant submits the circumstance is exceptional because the Kenyan national did not have his fingerprints taken, so the only evidence relied upon by the Minister was the photographic evidence. The Applicant submits the two questions meet the requirements of the Federal Court of Appeal in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168. The Applicant's position is the issue of facial recognition technology has widespread repercussions and disproportionate effects on members of the Somali community.

[77] The Respondent's position is neither question should be certified because: 1) they do not arise in the litigation, 2) they are irrelevant and do not pertain to matters of broad significance or general importance, 3) they do not relate to matters raised before the RPD, and 4) neither question lends itself to an answer of general application or transcend the interests of the parties.

[78] I am not persuaded to certify either question.

[79] The first will not be certified because neither the issue of fingerprints nor biometrics was raised in the Applicant's Memorandum or in his affidavit. I am not making any decision on the point. Moreover, neither the fingerprints nor biometrics issue was dealt with by either the first or second RPD except in the context of the motion for disclosure, in respect of which no decision was made or called for.

[80] The second question will not be certified because the RPD accepted the Minister's evidence and found as a fact, as it was reasonably entitled to do, that no such software was used in this case and that in fact manual comparison was the method used to identify and match the photographs in issue.

JUDGMENT in IMM-4320-23

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4320-23
STYLE OF CAUSE:	MUKTAR HASHI ALI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 13, 2024
JUDGMENT AND REASONS:	BROWN J.
DATED:	MARCH 25, 2024

APPEARANCES:

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