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2022 FC 1078

Asha Ali Barre and Alia Musa Hosh (*Applicants*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: BARRE V. CANADA (CITIZENSHIP AND IMMIGRATION)

Federal Court, Go J.—By videoconference, May 5; Toronto, July 20, 2022.

Citizenship and Immigration — Status in Canada — Convention Refugees and Persons in Need of Protection — Application for judicial review of joint decision of Refugee Protection Division (RPD) vacating both of applicants' refugee statuses under Immigration and Refugee Protection Act (IRPA), s. 109, Refugee Protection Division Rules, r. 64 — Applicants claim to be born in Somalia — Determined to be refugees by RPD — Minister of Public Safety and Emergency Preparedness (Minister) later applied to vacate Convention refugee status conferred on both applicants on basis of misrepresentation, withholding of material facts — Minister's evidence included photo comparisons between applicants, Kenyan citizens who arrived on study permits shortly before applicants' refugee claims made — Minister objected to applicants' evidence concerning facial recognition software by Clearview AI, arguing no indication software used in investigation — Further arguing Privacy Act, s. 22(2) allowing law enforcement agencies to protect details of investigation — RPD vacated applicants' refugee status based in part on photo comparisons — Established that applicants, Kenyan students same persons — Applicants argued, inter alia, that decision unreasonable — Also argued that RPD should not have admitted photographic evidence because this evidence likely came from questionable facial recognition software — Whether RPD erred by admitting Minister's photo comparisons as evidence — Whether RPD's findings that applicants were Kenyan students reasonable — RPD erred by allowing photo comparisons without requiring Minister to disclose methodology used in procuring evidence on basis of Privacy Act — Privacy Act, s. 22(2) appearing to contain several elements not applicable to present case — Curious that Minister cited Privacy Act, which protects personal information, as basis for not disclosing source of photo comparison when only information that Minister disclosed was personal to two Kenyan students alleged to be the applicants — Decision in Canadian Association of Elizabeth Fry Societies v. Canada (Public Safety) (Elizabeth Fry Societies) confirming that when government agency seeking exemption from disclosure under Privacy Act, s. 22(1)(b), Court will not infer injurious harm on theoretical basis from mere presence of an investigation without evidence of nexus between requested disclosure, reasonable expectation of probable harm — Principles outlined in that case regarding Privacy Act equally applicable to case at hand — Privacy Act not overriding principle of procedural fairness — RPD erred by accepting Minister's reliance on s. 22(2) — RPD did not clarify nature of personal information that Minister was seeking to protect — Did not seek any evidence or arguments on how any aspect of s. 22 applied — Concluded without evidence that Canada Border Services Agency did

not rely on Clearview AI solely because company ceased offering its facial recognition services in Canada, made no inquiry as to when photo comparisons created — Allowed Minister to rely on Privacy Act to shield itself from disclosure requirement — Failed to engage in necessary consideration of balancing alleged protection of privacy rights with applicants' procedural fairness right to disclosure — While RPD's error in admitting photo comparisons determinative of issue, its assessment of evidence addressed — RPD's findings that applicants were Kenyan students unreasonable — RPD unreasonably ignored discrepancies between Global Case Management System notes, allegations made by Minister — In conclusion, decision to vacate applicants' refugee status unreasonable as it lacked an internally coherent, rational chain of analysis that was justified in relation to facts, law — Matter returned for redetermination — Application allowed.

This was an application for judicial review of a joint decision of the Refugee Protection Division (RPD) vacating both of the applicants' refugee statuses under section 109 of the *Immigration and Refugee Protection Act* (IRPA) and rule 64 of the *Refugee Protection Division Rules*.

The applicants claim that they were born in Somalia. They both based their refugee claims on fear of sectarian and gender-based violence from militant Islamist groups in that country. The RPD determined Ms. Barre to be a Convention Refugee in May 2017, and in the case of Ms. Hosh, in July 2018. Neither applicant had identity documents from Somalia at the time of their refugee proceedings. The RPD established the applicants' identities through witness testimony and other evidence. In 2020, the Minister of Public Safety and Emergency Preparedness (Minister) applied to vacate the Convention refugee status conferred on both applicants on the basis that they had misrepresented and withheld material facts relating to relevant matters before the RPD. The Minister's evidence included photo comparisons between the applicants and two Kenyan citizens who arrived in Canada on study permits shortly before the applicants' refugee claims were made. The applicants objected to these photographs and sought to introduce evidence about Clearview AI, a company providing facial recognition software. The Minister objected to the applicants' evidence concerning Clearview AI, arguing that there was no indication it was used in the investigation. The Minister further argued that subsection 22(2) of the *Privacy Act* "allows law enforcement agencies to protect the details of this investigation". The RPD vacated the applicants' refugee status based in part on the photo comparisons, finding "great similarities" between the photos in either case, to establish that each of the applicants and alleged Kenyan student are one and the same person. The RPD thus found that the applicants had withheld or misrepresented material facts. It concluded that the material facts misrepresented were so fundamental as to call into question the credibility of the applicants' entire accounts for fearing persecution, such that there could not be any remaining evidence to justify refugee protection. The applicants argued, *inter alia*, that the decision was unreasonable and that the RPD breached procedural fairness. They also argued that the RPD should not have admitted photographic evidence of the Kenyan students because this evidence likely came from questionable facial recognition software.

The determinative issues in this case were whether the RPD erred by admitting the Minister's photo comparisons as evidence, and whether the RPD's findings that the applicants were Kenyan students were reasonable.

Held, the application should be allowed.

The RPD erred by allowing the photo comparisons without requiring the Minister to disclose the methodology used in procuring the evidence on the basis of the *Privacy Act*. The RPD referenced subsection 22(2) of the *Privacy Act*, which appears to contain several elements that are not applicable to the present case. There was no information about who decided not to make the disclosure. The provision refers to "any personal information requested under subsection 12(1)". Here there was no such request, but rather a procedural fairness argument in the course of a vacation proceeding. There is no record of the RCMP's involvement or any agreement not to disclose information. It was curious that the Minister cited the *Privacy Act*, which protects personal information, as the basis for not disclosing the source of the photo comparison when the only information that the Minister had disclosed was personal to the two Kenyan students who were alleged to be the applicants. The decision in *Canadian Association of Elizabeth Fry Societies v.*

Canada (Public Safety) (*Elizabeth Fry Societies*) confirms that when a government agency is seeking an exemption from disclosure under paragraph 22(1)(b), the Court "will not infer injurious harm on a theoretical basis from the mere presence of an investigation, whether past or present, without evidence of a nexus between the requested disclosure and a reasonable expectation of probable harm". While *Elizabeth Fry Societies* dealt with an application by an individual to seek disclosure of her own personal records, and while it dealt with paragraph 22(1)(b) which may or may not apply here, the principles outlined in that case regarding the *Privacy Act* were equally applicable to the case at hand. The *Privacy Act* does not override the principle of procedural fairness. The RPD erred by accepting the Minister's reliance on subsection 22(2) of the *Privacy Act*. First, the RPD did not clarify the nature of the personal information that the Minister was seeking to protect, before concluding that the information in question was subject to the *Privacy Act*. Second, the RPD accepted, without seeking any evidence or arguments on how any aspect of section 22 of the *Privacy Act* applied, the Minister's assertion that the *Privacy Act* allows the Canada Border Services Agency (CBSA) to protect the details of its investigation. Third, the RPD concluded, again without any evidence, that the CBSA did not rely on Clearview AI solely because the company ceased offering its facial recognition services in Canada as of July 6, 2020, and made no inquiry as to when the photo comparisons were created in this case. The respondent conceded that the RPD should not have relied on subsection 22(2) of the *Privacy Act*. The RPD allowed the Minister to rely on the *Privacy Act* to shield itself from the disclosure requirement, without first considering the possibility of reviewing the information, which had been withheld from the applicants. It gave a cursory nod to the respondent's *Privacy Act* argument and failed to engage in the necessary consideration of balancing the alleged protection of privacy rights with the applicants' procedural fairness right to disclosure. The RPD's swift acceptance of the Minister's exemption request, in the absence of a cogent explanation for why the information is protected from disclosure, appears to be a departure from its general practice. At the very least, the applicants deserved to know why and how the RPD so readily reached an opposite conclusion in this case.

While the RPD's error in allowing to admit the photo comparisons was determinative of the issue, its assessment of the evidence was addressed in order to provide further guidance to the RPD upon reconsideration of the matter. The RPD's findings that the applicants were Kenyan students was unreasonable. Its decision did not address any of the arguments raised by the applicants with respect to the inadequacies of the Global Case Management System (GCMS) notes that the Minister relied on to support their application to vacate. The RPD unreasonably ignored the discrepancies between the GCMS notes and the allegations made by the Minister. In so doing, the RPD erred by ignoring evidence that contradicted its own findings. The decision also failed to provide adequate reasons for the RPD's conclusion that the two applicants and the two Kenyan students were the same persons based on the photo comparisons. In conclusion, the decision to vacate the applicants' refugee status was unreasonable as it lacked an internally coherent and rational chain of analysis that was justified in relation to the facts and law. The matter was returned for redetermination by a differently constituted panel of the RPD.

STATUTES AND REGULATIONS CITED

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 109.

Refugee Protection Division Rules, SOR/2012-256, r. 64.

Privacy Act, R.S.C., 1985, c. P-21, ss. 12(1), 22, 37, 41, 73.

Canada Evidence Act, R.S.C., 1985, c. C-5, s. 37.

Communications Security Establishment Act, S.C. 2019, c. 13, s. 76.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 7, 11, 15.

Federal Courts Act, R.S.C., 1985, c. F-7, s. 57.

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653; *Canadian Association of Elizabeth Fry Societies v. Canada (Public Safety*), 2010 FC 470, [2011] 3 F.C.R. 309.

CONSIDERED:

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66; *H v. R.*, [1986] 2 F.C. 71 (T.D.); *Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon*, 2005 FC 1000, [2006] 3 F.C.R. 493; *Mebrahtu v. Canada (Citizenship and Immigration),* 2022 FC 279; *Kamano v. Canada (Public Safety and Emergency Preparedness),* 2021 FC 1241.

REFERRED TO:

Lavigne v. Canada (Office of the Commissioner of Official Languages), 2002 SCC 53, [2002] 2 S.C.R. 773; *Forsch v. Canada (Canadian Food Inspection Agency)*, 2004 FC 513, [2005] 2 F.C.R. D-15; *Professional Institute of the Public Service of Canada v. Canada (Customs and Revenue Agency)*, 2004 FC 507; *R. v. Tse*, 2008 BCSC 1793; *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51.

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Buolamwini, Joy and Timnit Gebru. "Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification" (2018), *Proceedings of Machine Learning Research*, 81:1–15, online: <gendershades.org>.

Canada. Office of the Privacy Commissioner of Canada. "Joint investigation of Clearview AI, Inc. by the Office of the Privacy Commissioner of Canada, the Commission d'accès à l'information du Québec, the Information and Privacy Commissioner for British Columbia, and the Information Privacy Commissioner of Alberta", February 2, 2021, online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2021/pipeda-2021-001/>.

APPLICATION for judicial review of a joint decision (2021 CanLII 152060) of the Refugee Protection Division of the Immigration and Refugee Board vacating both of the applicants' refugee statuses under section 109 of the *Immigration and Refugee Protection Act* and rule 64 of the *Refugee Protection Division Rules*. Application allowed.

APPEARANCES

Quinn Campbell Keenan for applicants.

Rachel Hepburn Craig for respondent.

SOLICITORS OF RECORD

Quinn Campbell Keenan and *Chapnick & Associates*, Toronto, for applicants.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

GO J:

I. Overview

[1] The applicants, Ms. Asha Ali Barre and Ms. Alia Musa Hosh, bring this application for judicial review against a joint decision of the Refugee Protection Division (RPD) [*X (Re)*, 2021 CanLII 152060 (I.R.B.)] vacating both of their refugee statuses under section 109 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and rule 64 of the *Refugee Protection Division Rules*, SOR/2012-256. The RPD found that the applicants were not citizens of Somalia as they had alleged in their successful refugee claims, but rather citizens of Kenya who had entered Canada on study permits under different names (the Decision).

[2] The applicants both claim that they were born in Somalia as daughters of farmers from Buulo Mareer, members of minority clans, and practitioners of Sunni-Sufi Islam. They both based their refugee claims on fear of sectarian and gender-based violence from Al-Shabaab and other militant Islamist groups in Somalia.

[3] The RPD determined Ms. Barre to be a Convention Refugee in May 2017, and in the case of Ms. Hosh, in July 2018. Neither Ms. Barre nor Ms. Hosh had identity documents from Somalia at the time of their refugee proceedings.

[4] In Ms. Barre's case, the RPD found that her identity was established, as her testimony was consistent with the objective country conditions documents regarding Sufism, the Madhiban clan, and the tradition of Higsiin. The RPD also accepted the evidence of an identity witness, a Canadian citizen from Somalia who had met Ms. Barre in Somalia, and a letter from the Somali Multi Service Centre which had conducted a verification assessment of Ms. Barre's knowledge of and connection to Somalia.

[5] As for Ms. Hosh, the RPD found her identity was established in part through the evidence of Ms. Barre, as the two women testified consistently regarding their time spent together in Somalia as classmates, as well as their knowledge of each other's families and homes in Somalia. Additionally, the RPD relied on a questionnaire from the Loin Foundation which verified Ms. Hosh's identity, and noted Ms. Hosh's ability to speak about the Tunni clan and converse with the interpreter fluently in Somali. Notably, the RPD dismissed the concerns of the Minister of Citizenship and Immigration (MCI) about Ms. Hosh's identity, finding credible her explanation that she did not know the exact spelling of the name her smuggler used and that the MCI's search of how she entered Canada was based on a very specific spelling of her pseudonym.

[6] On October 6 and 7, 2020, the Minister of Public Safety and Emergency Preparedness (Minister) applied to vacate the Convention refugee status conferred on

both applicants on the basis that they had misrepresented and withheld material facts relating to relevant matters before the RPD.

[7] The Minister's evidence included photo comparisons between the applicants and two Kenyan citizens who arrived in Canada on study permits shortly before the applicants' refugee claims were made. The applicants objected to these photographs and sought to introduce evidence about Clearview AI, a company providing facial recognition software, claiming that the Canada Border Services Agency (CBSA) used Clearview AI to generate the photo comparisons. The Minister objected to the applicants' evidence concerning Clearview AI, arguing that there is no indication it was used in the investigation. The Minister further argued that subsection 22(2) of the *Privacy Act*, R.S.C., 1985, c. P-21 (referred herein as the *Privacy Act* or the Act) "allows law enforcement agencies to protect the details of this investigation" and that "the Minister is not privy to provide an affidavit stating to [*sic*] how they are obtaining the evidence as it is protected." The RPD agreed with the Minister, finding that Clearview AI ceased providing services in Canada on July 6, 2020 and "[a]n App that is banned to operate in Canada would certainly not be used by a law enforcement agency such as the CBSA."

[8] The RPD vacated the applicants' refugee status based in part on the photo comparisons, finding "great similarities" between the photos in either case, to establish that each of the applicants and alleged Kenyan student are one and the same person. The RPD also based its decision on the Global Case Management System (GCMS) notes with respect to the Kenyan students, which according to the RPD, suggested that they did not attend classes at their intended educational institutions. The RPD further accepted affidavits submitted by CBSA indicating that searches of the Integrated Customs Enforcement System (ICES) did not confirm the applicants' alleged entry to Canada under their respective aliases.

[9] The RPD thus found that the applicants had withheld or misrepresented material facts, i.e. their Kenyan citizenship and their entry into Canada utilizing an alternate identity. In the RPD's view, this misrepresentation was relevant to their claim, as they did not advance a claim against all their countries of nationality and as identity is fundamental in a refugee claim. The RPD further found that there was a causal connection between the misrepresenting or withholding on the one hand, and the favourable result on the other, as failing to advance a claim against all of one's countries of nationality would be fatal to the claim. The RPD concluded that the material facts misrepresented were so fundamental as to call into question the credibility of the applicants' entire accounts for fearing persecution, such that there could not be any remaining evidence to justify refugee protection.

[10] The applicants argue that the Decision is unreasonable and the RPD breached procedural fairness. They argue that the RPD should not have admitted photographic evidence of the Kenyan students because this evidence likely came from questionable facial recognition software such as Clearview AI.

[11] I find the Decision unreasonable as the RPD erred in relying on the *Privacy Act* to admit the photo comparisons and to exempt the Minister from disclosing how the photo comparisons were made. I also find the Decision unreasonable because the RPD ignored evidence that ran contrary to its conclusion, and provided inadequate reasons

for its findings with respect to the facial similarities between the applicants and the Kenyan students.

II. Confidentiality Order

[12] At the hearing, I raised a concern with the parties about the public disclosure of information about the two Kenyan students who may or may not be the applicants, irrespective of my decision. Even if I were to confirm the Decision as reasonable, there is still a possibility that the Kenyan students are not the applicants as alleged by the Minister. I thus advised the parties of my intention to issue a confidentiality order to protect the privacy of the two students, regardless of the outcome of this matter. The parties did not oppose.

[13] As such, I order that the information in the Court file relating to the two Kenyan students not be released to the public. Specifically, I order that the existing record, which contains unredacted details about the Kenyan students, be designated as confidential. Additionally, for the sake of public access to Court records, I order that all the documents filed by the parties and the Tribunal be refiled in redacted public versions with all identifying information removed: the applicant and respondent will each refile their memorandum of argument and the RPD will refile the certified tribunal record. These redacted documents shall be filed within one month of the release of this decision, and the Court will make them available to the public.

[14] I further order the parties and the RPD not to publish or disclose any information relating to the two Kenyan students to the public.

III. Issues and Standard of Review

[15] The applicants submit that the issues are:

(1) What is the standard of review?

(2) Was the Minister's evidence on the application to vacate conclusive that the applicants are inadmissible for misrepresentation of material facts?

(3) Were the Minister's photo evidence and comparison charts admissible evidence?

(4) Did the applicants suffer a breach of procedural fairness and/or natural justice?

(5) Was the RPD Decision reasonable?

(6) Is there a question for certification?

[16] The respondent submits that the issues are:

(1) Was the decision to vacate the applicants' refugee status reasonable?

(2) Have the applicants shown that the photo evidence should not have been admitted?

(3) Was there a breach of procedural fairness?

[17] In my view, the determinative issues in this case are:

a) whether the RPD erred by admitting the Minister's photo comparisons as evidence; and

b) whether the RPD's findings that the applicants were Kenyan students were reasonable.

[18] The applicants submit that the standard of review for the merits is patent unreasonableness, and that the standard of review for the procedural fairness issue is correctness. The respondent has not made submissions on the standard of review.

[19] As confirmed by the jurisprudence, the merits of the decision are reviewable on the reasonableness standard per *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*).

[20] 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 paragraph 85. The onus is on the applicant to demonstrate that the RPD decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "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 paragraph 100.

IV. Analysis

A. *Relevant Legislation*

[21] Section 109 of IRPA reads as follows:

Vacation of refugee protection

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

(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.

[22] In finding that the Minister did not need to disclose investigation methods, the RPD relied on subsection 22(2) of the *Privacy Act*. However, as I elaborate below, it appears that the RPD may have intended to rely on subsection 22(1). In full, section 22 reads as follows:

Law enforcement and investigation

22 (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)

(a) that was obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

(i) the detection, prevention or suppression of crime,

(ii) the enforcement of any law of Canada or a province, or

(iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*,

if the information came into existence less than twenty years prior to the request;

(b) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,

(ii) that would reveal the identity of a confidential source of information, or

(iii) that was obtained or prepared in the course of an investigation; or

(c) the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

Policing services for provinces or municipalities

(2) The head of a government institution shall refuse to disclose any personal information requested under subsection 12(1) that was obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or municipality pursuant to an arrangement made under section 20 of the *Royal Canadian Mounted Police Act*, where the Government of Canada has, on the request of the province or municipality, agreed not to disclose such information.

Definition of *investigation*

(3) For the purposes of paragraph (1)(b), ***investigation*** means an investigation that

(a) pertains to the administration or enforcement of an Act of Parliament;

(b) is authorized by or pursuant to an Act of Parliament; or

(c) is within a class of investigations specified in the regulations.

B. *Did the RPD err by admitting the Minister's photo comparisons as evidence?*

[23] The applicants dispute the RPD's admission of the charts comparing their photos to those of the two Kenyan students.

[24] In the applicants' view, their allegations that Clearview AI was used in generating the photo comparisons were entirely justified by a report of the International Human Rights Program and the University of Toronto Faculty of Law and the Citizen Lab (Petra

Molnar and Lex Gill, *Bots at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada's Immigration and Refugee System*, 2018, online: <https://citizenlab.ca/wp-content/uploads/2018/09/IHRP-Automated-Systems-Report-Web-V2.pdf>). They submit that this report provides "credible assessments" showing that several million immigration applications are processed annually, and that CBSA and the Royal Canadian Mounted Police (RCMP) share information.

[25] The applicants submit that the Minister has offered no other explanation for how their photos came to be compared to those of the two Kenyan students. They submit that facial recognition software is an unreliable pseudoscience, which has consistently struggled to obtain accurate results, particularly with regard to Black women and other women of colour. They cite Joy Buolamwini and Timnit Gebru, "Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification", *Proceedings of Machine Learning Research*, Vol. 81:1–15, 2018, online: <gendershades.org>, a study on facial analysis algorithms which found that darker-skinned females are the most misclassified group with error rates of up to 34.7 percent, as compared to the error rate for lighter-skinned males at 0.8 percent. The applicants submit that the photos cannot establish with any degree of certainty that they are the alleged Kenyan students.

[26] The applicants further argue that because claimants are not allowed to submit additional evidence at vacation proceedings, the Minister should not have been allowed to submit these photographs.

[27] All of the above-noted arguments were also made to the RPD, but were rejected at paragraph 12 of the Decision:

> The panel has carefully considered the submissions of both parties. On July 6, 2020, Clearview AI has advised Canadian privacy protection authorities that, in response to their joint investigation, it will cease offering its facial recognition services in Canada. This step includes the indefinite suspension of Clearview AI's contract with the RCMP, which was its last remaining client in Canada. An App that is banned to operate in Canada would certainly not be used by a law enforcement agency such as the CBSA. Minister's Counsel, an officer of the Court, as the Respondent's Counsel is, is not privy to providing an affidavit stating the methodology used in procuring the evidence presented to the parties at the hearing. I concur with the Minister's counsel that to use it would be violating the *Privacy Act* as mentioned by counsel. Respondent's counsel's motion [to exclude the photo comparison charts] is denied. [Emphasis added.]

[28] Before this Court, the applicants further argue that although the Minister urged—and the RPD accepted—that subsection 22(2) of the *Privacy Act* allows the Minister to withhold evidence related to investigative methods, the Minister nonetheless submitted declarations from two CBSA officers attesting to having completed ICES searches. This, in the applicants' view, violated the very principles of law that the Minister relied on to withhold their investigative methods.

[29] The respondent argues that it was not incumbent on the Minister to disclose how the photographs in question were obtained. As submitted by the Minister and accepted by the RPD, it would have been a violation of the *Privacy Act* to disclose details of the investigation, including how evidence was obtained.

[30] At the hearing, I expressed my concerns to the parties regarding the RPD's reliance on the *Privacy Act*, including the strong possibility that the RPD cited a wrong

section of the Act in support of its findings. I further queried the specific “personal information” that the Minister was seeking to protect, especially given that the only information that the Minister has chosen to disclose thus far, was personal information relating to the two Kenyan students. I asked for and received parties’ submissions with respect to my concerns.

[31] Having considered the parties’ submissions, particularly the submissions made by the respondent, it is my conclusion that the RPD erred by allowing the photo comparisons without requiring the Minister to disclose the methodology used in procuring the evidence on the basis of the *Privacy Act*.

[32] As noted above, the RPD referenced subsection (2) of section 22 of the *Privacy Act*, which appears to contain several elements that are not applicable to the present case. First, the decision maker under that provision is “[t]he head of a government institution” or their delegate as per section 73, whereas in this case there was no information about who decided not to make the disclosure. Second, the provision refers to “any personal information requested under subsection 12(1)”, which grants individuals the right of access to their personal information. Here there was no such request under subsection 12(1), but rather a procedural fairness argument in the course of a vacation proceeding. Third, subsection 22(2) refers to information “obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or municipality pursuant to an arrangement made under section 20 of the *Royal Canadian Mounted Police Act*, where the Government of Canada has, on the request of the province or municipality, agreed not to disclose such information.” Here there is no record of the RCMP’s involvement or any agreement not to disclose information.

[33] As I put to the parties, it is possible that the RPD intended to refer to subsection 22(1) of the *Privacy Act*, specifically subparagraph 22(1)(a)(ii), which relates to information “obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to…(ii) the enforcement of any law of Canada or a province”. Another possibility is paragraph 22(1)(b) of the Act that permits the government to refuse the disclosure of personal information on the basis that it “could reasonably be expected to be injurious to the enforcement of any law of Canada” or “the conduct of lawful investigations.” However, these provisions still involve a “head of a government institution” or delegate as decision maker and are likewise triggered by an application under subsection 12(1).

[34] As I have noted above, I find it curious that the Minister cited the *Privacy Act*, which protects personal information, as the basis for not disclosing the source of the photo comparison when the only information that the Minister has disclosed was personal to the two Kenyan students who are alleged to be the applicants. My question remains, notwithstanding the broad definition given by the Supreme Court of Canada (SCC) to “personal information” in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paragraphs 68–69, and later confirmed in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at paragraph 23, where the SCC highlighted the Act’s definition of “personal information” to include “information about an identifiable individual that is recorded in any form”.

[35] In addition, as this Court has confirmed in *Canadian Association of Elizabeth Fry Societies v. Canada (Public Safety)*, 2010 FC 470, [2011] 3 F.C.R. 309 (*Elizabeth Fry Societies*), when a government agency is seeking an exemption from disclosure under paragraph 22(1)(b), the Court "will not infer injurious harm on a theoretical basis from the mere presence of an investigation, whether past or present, without evidence of a nexus between the requested disclosure and a reasonable expectation of probable harm": *Elizabeth Fry Societies*, at paragraph 74.

[36] In that case, Justice Kelen, then of this Court, was asked to review an application brought by the Elizabeth Fry Societies to challenge a refusal by the Correctional Services Canada (CSC) to disclose the personal records of a young inmate, Ashley Smith, who committed suicide in her cell. Prior to her death, Ms. Smith requested access to her personal records under the *Privacy Act* and gave consent to the Elizabeth Fry Societies to assist her. CSC refused to disclose the records, citing in part paragraph 22(1)(b) of the Act on the basis that there was, at one point, a criminal investigation into four CSC officers about Ms. Smith's suicide.

[37] Justice Kelen began his analysis by examining the purpose of the Act and stated as follows [*Elizabeth Fry Societies*, at paragraphs 48–49]:

> Privacy is a fundamental right in a free and democratic society. The *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] protects a person's privacy from unreasonable search and seizure by government authorities. Government cannot interfere with the privacy of an individual unless there are reasonable grounds to believe that that person has committed an offence, and it is necessary for the government to enter the private domain of that person. As well as this privacy right of an individual, the *Privacy Act* sets out two quasi-constitutional rights of privacy for an individual:
>
> > a. it protects personal information held by government institutions from disclosure to any third parties. This protects the individual's privacy; and,
> >
> > b. it provides individuals with a right to access their personal information which any government institution holds about them. This ensures that an individual knows what information the government has about them. It is in this context that Ashley Smith consented and authorized the Correctional Services of Canada to disclose to the Canadian Association of Elizabeth Fry Societies enumerated personal information about Ashley Smith.
>
> The purpose of the *Privacy Act* was set out by the Supreme Court of Canada in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2. S.C.R. 773, *per* Justice Gonthier at paragraphs 24–25:
>
> > The *Privacy Act* is also fundamental in the Canadian legal system. It has two major objectives. Its aims are, first, to protect personal information held by government institutions, and second, to provide individuals with a right of access to personal information about themselves (s. 2).
> >
> > …
>
> The *Privacy Act* is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society.

[38] Justice Kelen went on to note, at paragraphs 50–51, that "any exceptions to the right of access must be interpreted narrowly with a view to the purpose of the Act" and

that privacy “is a fundamental right in our democracy and exemptions from that right are to be strictly construed against the government institution. There is a reverse onus on the government to show that the personal information sought by an individual is not subject to disclosure under the *Privacy Act*.”

[39] Relying on the Supreme Court of Canada’s decision in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at paragraphs 60–61, Justice Kelen [at paragraph 71] reiterated that paragraph 22(1)(b) is not “an absolute exemption clause”, and an agency’s refusal to disclose under paragraph 22(1)(b) “must be based on concrete reasons that meet the requirements imposed by that paragraph. Parliament has provided that there must be a reasonable expectation of injury in order to refuse to disclose information under that provision. In addition, s. 47 of the *Privacy Act* provides that the burden of establishing that the discretion was properly exercised is on the government institution. If the government institution is unable to show that its refusal was based on reasonable grounds, the Federal Court may then vary that decision and authorize access to the personal information” (Emphasis in original.)

[40] It was on that basis that Justice Kelen found [at paragraph 75]: “the evidentiary deficiencies in [the CSC’s] case are sufficient to dismiss paragraph 22(1)(*b*) as a valid exemption and to order the full disclosure of the requested documents.”

[41] While *Elizabeth Fry Societies* dealt with an application by an individual to seek disclosure of her own personal records, and while it dealt with [paragraph] 22(1)(b) which may or may not apply here, the principles outlined in that case regarding the Act are equally applicable, in my view, to the case at hand.

[42] I also note that, in *H v. R.*, [1986] 2 F.C. 71 (T.D.), Justice Reed, then of this Court, granted an order to prohibit the National Parole Board from considering information which it failed to disclose to an applicant seeking day parole. In granting the order, Justice Reed noted [at page 78] that while the enactment of the *Privacy Act* “established a right, that had not existed before”, the Act does not operate “so as to limit access to information to which an individual might be entitled as a result of other legal rules or principles… as in this case, to have the case one has to meet disclosed pursuant to the rules of natural justice.” That the *Privacy Act* does not override the principle of procedural fairness was again confirmed by this Court in *Forsch v. Canada (Canadian Food Inspection Agency)*, 2004 FC 513, [2005] 2 F.C.R. D-15, at paragraphs 50–65, and *Professional Institute of the Public Service of Canada v. Canada (Customs and Revenue Agency)*, 2004 FC 507, at paragraph 105.

[43] In admitting the Minister’s evidence about the photo comparisons, while rejecting the applicants’ request to compel the Minister to disclose the source of the photo comparisons, I find the RPD erred by accepting the Minister’s reliance on subsection 22(2) of the *Privacy Act* for three reasons based on the case law cited above.

[44] First, the RPD did not clarify the nature of the personal information that the Minister was seeking to protect, before concluding that the information in question was subject to the Act.

[45] Second, the RPD accepted, without seeking any evidence or arguments on how any aspect of section 22 of the *Privacy Act* applies, the Minister's assertion that the Act allows CBSA to protect the details of its investigation.

[46] Third, the RPD concluded, again without any evidence, that the CBSA did not rely on Clearview AI solely because the company ceased offering its facial recognition services in Canada as of July 6, 2020, and made no inquiry as to when the photo comparisons were created in this case. As the applicant points out, while the RPD relied upon the fact that the RCMP was the last remaining customer of Clearview AI and stopped using it in 2020, this does not necessarily mean CBSA was not using the software when the photographs were collected in 2016 and 2017. The applicants argue that vacation on the basis of such evidence was a violation of their rights, citing Clearview AI's scraping of internet images, "mass surveillance", and privacy rights. They also point to a report entitled "Joint investigation of Clearview AI, Inc. by the Office of the Privacy Commissioner of Canada, the Commission d'accès à l'information du Québec, the Information and Privacy Commissioner for British Columbia, and the Information Privacy Commissioner of Alberta", released February 2, 2021, online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2021/pipeda-2021-001/>, which determined that Clearview AI "collected, used and disclosed the personal information of individuals in Canada for inappropriate purposes, which cannot be rendered appropriate via consent." The RPD's finding that the Minister did not use Clearview AI was not supported by evidence, and it failed to consider the applicant's submissions highlighting the danger of relying on facial recognition software.

[47] The respondent conceded at the hearing that the RPD should not have relied on subsection 22(2) of the *Privacy Act*. However, the respondent submitted that the RPD was applying the principle under subsection 22(1), supported by the common law, which also recognizes a public interest privilege in the methods of investigation (citing in their written submission, *R. v. Tse*, 2008 BCSC 1793, which relies on *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51). Regardless of who made the decision not to disclose, the respondent argued that the obtaining of the photographs and comparison was a matter of an investigation done by CBSA, and was thus subject to privilege, protected by common law, the *Privacy Act*, as well as by the *Canada Evidence Act*, R.S.C., 1985, c. C-5 (CEA), on an application under section 37 [of the CEA].

[48] Further, according to the respondent, the fact that the results of any investigation were disclosed does not detract from the privilege asserted, and given that the photos were disclosed, the applicants were aware of the case they had to meet and had the opportunity to make submissions on the photographic evidence.

[49] I reject the respondent's arguments. I note, first of all, that the RPD did not refer to common law investigative privilege or the CEA to support its conclusion. The respondent's arguments, while well articulated, cannot be used to bolster the decision maker's lack of reasoning and analysis.

[50] I further note that parties seeking an exemption from disclosure of evidence are often required to disclose that information to the Court, whether the exemption was made under the common law or section 37 of the CEA. Additionally, section 41 of the *Privacy Act* itself allows review by the Federal Court if a request for personal information

under subsection 12(1) was refused and a complaint has been made to the Privacy Commissioner.

[51] In this case, the RPD allowed the Minister to rely on the *Privacy Act* to shield itself from the disclosure requirement, without first considering the possibility of reviewing the information which has been withheld from the applicants.

[52] The RPD may have taken the position that it does not have the right to examine the information as the power to determine the validity of the exemption appears to be reserved for the Court in light of subsection 12(1) and section 41 of the *Privacy Act*. However, that rationale was not made apparent in the Decision.

[53] I note, further, that in *Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon*, 2005 FC 1000, [2006] 3 F.C.R. 493 (*Kahlon*), this Court seemed to suggest that the RPD can and should inspect documents that may be subject to the *Privacy Act* before allowing the respondent—in that case the Minister of Public Safety and Emergency Preparedness—to examine only those documents that are found to be relevant to the application to vacate. The Court in *Kahlon* noted at paragraph 36 that the *Privacy Act* has "quasi-constitutional status", and that personal information "which has no apparent relevance to the issues underlying the application to vacate, ought not to be readily disclosed." However, the Court nevertheless found the RPD erred by taking an "all-or-nothing approach" by failing to consider alternatives to full disclosure "in order to strike a balance between the need for disclosure and the right to privacy": *Kahlon*, at paragraph 37.

[54] Similarly, in this case, the RPD gave a cursory nod to the respondent's *Privacy Act* argument and failed to engage in the necessary consideration of balancing the alleged protection of privacy rights with the applicants' procedural fairness right to disclosure.

[55] The RPD's swift acceptance of the Minister's exemption request, in the absence of a cogent explanation for why the information is protected from disclosure, appears to be a departure from its general practice. In the normal course of determining a claim, the RPD would likely not admit documentary evidence from a claimant without any information about its source. At the very least, the applicants deserve to know why and how the RPD so readily reached an opposite conclusion in this case.

[56] Further, the information that the Minister sought to exempt from disclosure could be relevant to the determination of the ultimate issue before the RPD. If the photo comparisons were, as the applicants suggest, generated through an artificial intelligence software, be it by Clearview AI or some other outfit, it may call into question the reliability of the Kenyan students' photos as representing the applicants, two women of colour who are more likely to be misidentified by facial recognition software than their white cohorts as noted by the studies submitted by the applicants.

[57] If, on the other hand, the photo comparisons were made by an analyst of the CBSA, it would still have been incumbent upon the RPD to seek that information before deciding to admit the evidence, just as it accepted the sworn affidavit of a CBSA agent regarding the result of her ICES searches.

[58] My conclusion is further supported by the jurisprudence to date of this Court dealing with the reliance on photo comparisons as proof of identity of applicants. In *Mebrahtu v. Canada (Citizenship and Immigration),* 2022 FC 279, the Minister submitted a photograph of the applicant taken in May 2018 at a primary inspection kiosk at Pearson Airport under a different identity, alongside the photograph taken of the applicant for her refugee claim. The Minister also noted the lack of a fingerprint match when the applicant made her refugee claim. In *Kamano v. Canada (Public Safety and Emergency Preparedness),* 2021 FC 1241, it was a senior analyst at the CBSA who conducted a facial comparison between three different photos of the applicant from the applicant's immigration file and the photo attached to the temporary resident visa application form in the name of another person. In both cases, the Minister provided sufficient information to the RPD as to how the photo comparison was made, which in turn allowed this Court to assess the reasonableness of the RPD's findings.

[59] Here, the RPD reached a conclusion about the reliability of the photo comparisons based on the Minister's say-so with no further details about the "how." It then took the Minister's word that they must protect the details of their investigation under the *Privacy Act* without having to demonstrate whether the requirements for non-disclosure, as set out in the Act, were met. The RPD's conclusion, which was void of transparency, intelligibility, and justification, must be set aside.

C. *Was the RPD's decision finding the applicants were Kenyan students unreasonable?*

[60] While the RPD's error in allowing admitting the photo comparisons is determinative of the issue, I want to address the RPD's assessment of the evidence, in order to provide further guidance to the RPD upon reconsideration of the matter.

[61] The applicants argue that the two Kenyan students are presumably still living in Manitoba on validly granted study permits. According to the applicants, the documents upon which their study permits were based (i.e. identity documents, medical examinations, school transcripts, and letters attesting to work experience) are presumptively valid and no reason exists to doubt their authenticity. In the applicants' view, the Minister is suggesting that they fabricated their specific narratives of persecution in order to gain refugee status in Canada, despite having valid study permits and entering Canada legally. The applicants ask: if it were their intent to assume false identities, would they willingly create new connections between themselves and the RPD?

[62] The applicants argue that it was reckless to treat the GCMS notes for the Kenyan students as evidence that they never attended classes at their institution. The GCMS notes do not establish, in the applicants' view, that the two students abandoned their studies or the province of Manitoba, only that there was a brief period of unresponsiveness. With respect to the student who is alleged to be Ms. Hosh, the applicants argue that the GCMS notes in question were incomplete and outdated as the most recent entry is from 2016. They also include an email from the student stating that she is deferring her studies from September 2016 to January 2017.

[63] As to the GCMS notes concerning the student supposed to be Ms. Barre, they indicate three standard compliance reviews were completed after one incident of non-compliance. These notes have entries as recent as 2020.

[64] The applicants further submit that there are sufficient differences between the photos, that there are difficulties in comparison when one person is wearing a hijab, and that ethnic Somalis in both Kenya and Somalia can share similar features.

[65] The respondent argues that the Decision was reasonable in light of the evidence, including: the physical resemblance based on comparison of photos, the lack of evidence to corroborate the applicants' entry to Canada, and the fact that the Kenyan students have not attended school in Canada pursuant to their study permits.

[66] The respondent has not specifically responded to the applicants' arguments on the limitations of the GCMS notes, other than suggesting the notes only formed part of the basis for the Decision.

[67] I find the Decision unreasonable for two main reasons.

[68] First, the Decision did not address any of the arguments raised by the applicants with respect to the inadequacies of the GCMS notes that the Minister relied on to support their application to vacate. These include, in the case of the student alleged to be Ms. Hosh, an email from the student stating that she was deferring her studies from September 2016 to January 2017, and in the case of Ms. Barre, the completion of three standard compliance reviews, with entries as recent as 2020. Such evidence appeared to counter the Minister's assertion that the students simply abandoned their studies and never attended their classes. In failing to address such evidence, the RPD unreasonably ignored the discrepancies between the GCMS notes and the allegations made by the Minister, who carried the burden of proving misrepresentations on the part of the applicants. In so doing, the RPD erred by ignoring evidence that contradicted its own findings.

[69] I also find the Decision unreasonable because it failed to provide adequate reasons for the RPD's conclusion that the two applicants and the two Kenyan students were the same persons based on the photo comparisons.

[70] At the hearing, I asked the respondent for submissions on how the Court may apply the reasonableness standard in assessing the RPD's findings on photo comparisons. I raised this question in light of my query that there may not exist a "range of reasonable outcomes" in this case: the applicants are either the Kenyan students as alleged or they are not. My query further stems from what I consider to be the highly subjective nature of conducting photo comparisons, particularly involving people of different ethno-racial background.

[71] The respondent helpfully submitted that this Court does not need to be convinced that it would render the same conclusion. Instead, it should consider whether a person with an open mind may reasonably find that they are the same person. If, on the other hand, the Court looks at the photos and concludes that it is plainly absurd to conclude that the photos depict the same person, then it would be open to the Court to find the Decision unreasonable.

[72] I also note the SCC's guidance in *Vavilov*, at paragraph 83, that the Court should not "attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker" and that "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did." Instead, *Vavilov*

asks the reviewing court to “consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.”

[73] In light of the instructions from *Vavilov*, I begin my analysis by examining the reasons given by the RPD with respect to its photo comparisons.

[74] With respect to Ms. Hosh, the Decision briefly stated [at paragraph 56]:

> I have carefully reviewed the photographs of the respondent and that of [the Kenyan student alleged to be Ms. Hosh] and find that in addition to the similarities in features common to her ethnic heritage, there are great similarities between the two pictures establishing that Alia Musa Hosh and [the Kenyan student] are one and the same person.

[75] I find the RPD failed to provide the requisite justification for concluding there are “great similarities” between the two sets of pictures, “in addition to the similarities in features common to [Ms. Hosh’s] ethnic heritage.” The RPD did not explain what these similarities were, or how those similarities fell outside of those supposedly common to Ms. Hosh’s ethnic heritage. I find the RPD’s lack of adequate reasons to be particularly disconcerting, as I note that while there are similarities between the photos of Ms. Hosh and that of the Kenyan student she is alleged to be, there are also some marked dissimilarities as described in Ms. Hosh’s submissions to the RPD. The RPD did not explain how it came to reconcile the similarities and the dissimilarities between the two sets of photos before concluding they depicted one and the same person.

[76] As to Ms. Barre, the RPD provided a bit more explanation and noted as follows [at paragraph 40]:

> Some of the salient features such [as] the ears and hair are covered in one picture and hence I was unable to compare those features. I have carefully read the respondent Barre’s affidavit detailing the differences in the photographs and stating that the similarities are because of the ethnic Somalian lineage. While I agree that there are similar features due to their ethnic heritage there are other features which are also similar. I find the structure of the nose[,] mouth and the eyes are the same in both pictures.

[77] Here, I find the RPD failed to provide adequate reasons for concluding that Ms. Barre and the alleged Kenyan student were one and the same person, after acknowledging that it was unable to compare such “salient features” as ears and hair. The RPD also failed to explain what similar features are due to the two women’s ethnic heritage and what are not. Taken together, these errors mean the RPD’s reasoning fell short of meeting the requisite justification, transparency and intelligibility expected within the decision making process: *Vavilov*, at paragraph 86.

[78] The consequences of the RPD’s findings are significant to both applicants. These findings should not be made without adequate reasons. As the SCC noted in *Vavilov*, at paragraph 133:

> …. Where the impact of a decision on an individual’s rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature’s intention. This includes decisions with consequences that threaten an individual’s life, liberty, dignity or livelihood.

[79] Given that the photo comparisons played a key role in the RPD's findings that each of the applicants and alleged Kenyan students are one and the same, I therefore conclude that Decision to vacate the applicants' refugee status was unreasonable as it lacks an internally coherent and rational chain of analysis that is justified in relation to the facts and law: *Vavilov*, at paragraph 85.

V. Remedy

[80] The applicants request a declaration that they are in fact Ms. Barre and Ms. Hosh, citizens of Somalia, and not citizens of Kenya. They further request that this Court reinstate the initial RPD decisions finding them to be Convention Refugees.

[81] The applicants have not provided arguments on why this would be one of the "limited scenarios" for the Court substitute its own decision rather than remitting the matter to the decision maker: *Vavilov*, at paragraphs 139–142. I also find no basis to grant such an extraordinary remedy in this case.

VI. Certified Question

[82] The applicants argue that their cases "indicate that one or more pieces of recent legislation may not accord with principles of the Charter/constitution." They cite the *Communications Security Establishment Act*, S.C. 2019, c. 13, section 76, arguing that there is cause to believe that the Minister, CBSA and other government bodies have violated sections 7, 11, and 15 of the *Charter of Rights and Freedoms* (Charter) in a manner that is not saved by section 1. They ask the Court to "provide some much-needed clarity on this subject."

[83] The respondent opposes any proposed certified question, noting the applicants had ample time to submit proposed questions yet failed to do so. The respondent also denies that there was any breach of the applicants' Charter rights in this case.

[84] The applicants never provided specific arguments on what these Charter violations would be, nor have they sent a Notice of Constitutional Question as required under section 57 of the *Federal Courts Act,* R.S.C., 1985, c. F-7. In any event, I conclude it is not an appropriate case for any certified question as I have decided to grant the application on non-Charter grounds.

VII. Conclusion

[85] The application for judicial review is allowed and the matter is returned for redetermination by a differently constituted panel of the RPD.

[86] There is no question to certify.

JUDGMENT in IMM-4222-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a differently constituted panel of the RPD.

3. There are no questions to certify.
4. The documents on record filed prior to this judgment are designated as confidential.
5. The applicant, respondent, and Refugee Protection Division, respectively, are ordered to provide redacted public versions of the applicant's memorandum, respondent's memorandum, and the certified tribunal record, with any identifying information about the Kenyan students removed, within one month of this judgment.