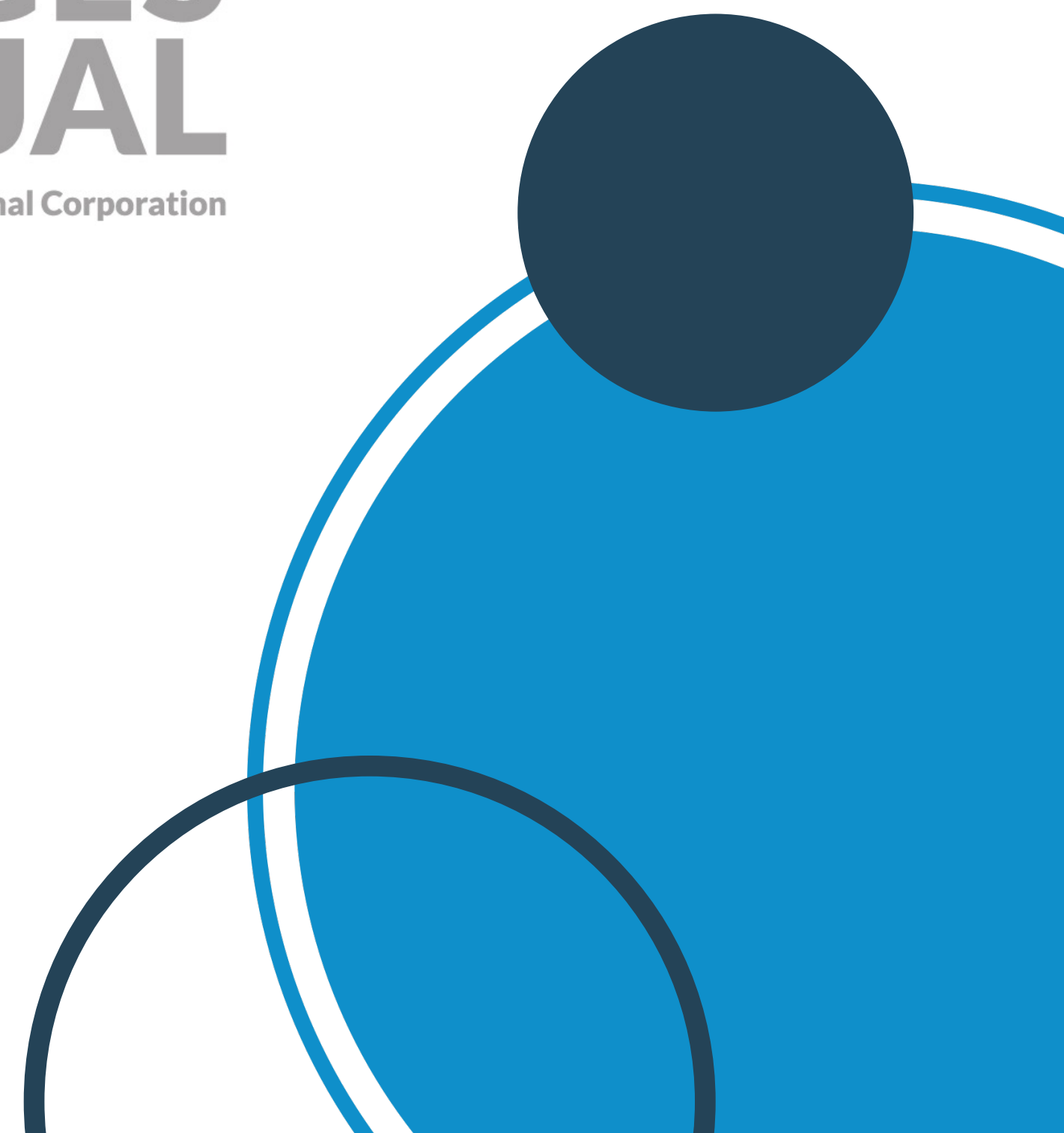




**DESLOGES
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Facial Recognition and Identity in Refugee Claims

Lessons from the Jurisprudence



PRESENTATION OUTLINE



FACIAL RECOGNITION AND IDENTITY IN REFUGEE CLAIMS

- Selection of academic articles on ethics, accuracy, and systemic bias (general use and in refugee determinations)
- Overview of jurisprudence (use of AI and ‘manual’ facial comparison to challenge identity)
- Practical lessons and ethical considerations arising from jurisprudence

Must Read: “Bots at the Gate”

International Human Rights Program, U of T Faculty of Law, Petra Molnar and Lex Gill, “Bots at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada’s Immigration and Refugee System”, online: <https://citizenlab.ca/wp-content/uploads/2018/09/IHRP-Automated-Systems-Report-Web-V2.pdf>

- Published in 2018 (developments since then)
- Not specifically about facial recognition, but sets out a human rights framework within which to assess use of AI technology in immigration and refugee determinations

Reference Materials: Use of AI Facial Recognition in Refugee Determinations (Ethics and Accuracy)

- Christian, Gideon. “AI Facial Recognition Technology in the Canadian Immigration System”. CILA online: <https://cila.co/ai-facial-recognition-technology-in-the-canadian-immigration-system/>
- Kinchin, Niamh. “Technology, Displaced? The Risks and Potential of Artificial Intelligence for Fair, Effective, and Efficient Refugee Status Determination”. Law In Context online: <https://search.informit.org/doi/pdf/10.3316/informit.553020919379694>
- Kinchin, Niamh and Mougouei, Davoud, “What Can Artificial Intelligence Do for Refugee Status Determination?”. International Journal of Refugee Law online: <https://km4s.ca/wp-content/uploads/What-Can-Artificial-Intelligence-Do-for-Refugee-Status-Determination-A-Proposal-for-Removing-Subjective-Fear-2022.pdf>.

Reference Materials: General Discourse on Ethics, Accuracy, and Systemic Bias

General Ethics

- <https://ccla.org/privacy/facial-recognition-explained-how-is-frt-used-in-canada/>

Systemic Bias in AI Facial Recognition

- <https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=9130131>
- <https://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf>
- <https://arxiv.org/pdf/1908.06165>
- <https://par.nsf.gov/servlets/purl/10358566>
- https://www.researchgate.net/profile/Aythami-Morales/publication/329118364_Measuring_the_Gender_and_Ethnicity_Bias_in_Deep_Models_for_Face_Recognition/links/5bf684dc299bf1124fe54af6/Measuring-the-Gender-and-Ethnicity-Bias-in-Deep-Models-for-Face-Recogniti

Accuracy of Facial Recognition Technology

- https://ualresearchonline.arts.ac.uk/id/eprint/17389/1/Face_Mis_ID_AIES_2021_Use_this_version.pdf
- <https://link.springer.com/content/pdf/10.1007/s43681-022-00146-8.pdf>

Barre v Canada (MCI),
2022 FC 1078 (CanLII),
<<https://canlii.ca/t/jr6r8>>

Holding

[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.

<<https://canlii.ca/t/jr6r8#par11>>

Barre v Canada (MCI),
2022 FC 1078 (CanLII),
<<https://canlii.ca/t/jr6r8>>

Evidence of use of AI

[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.

<https://canlii.ca/t/jr6r8#par24>

Barre v Canada (MCI),
2022 FC 1078 (CanLII),
<<https://canlii.ca/t/jr6r8>>

Unreasonable use of *Privacy Act* to exempt disclosure

- Jurisprudence on use of *Privacy Act* (paras 34-39) – see especially para 35:

“when a government agency is seeking an exemption from disclosure under s 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”

- Irony that Minister disclosed *only* personal information while claiming exemption to *protect* personal information

Barre v Canada (MCI),
2022 FC 1078 (CanLII),
<<https://canlii.ca/t/jr6r8>>

Three reasons RPD decision was unreasonable (para 44-46)

- RPD did not clarify the nature of the personal information the Minister was seeking to protect
- RPD accepted Minister's request under s. 22 of *Privacy Act* without considering evidence or arguments as to its applicability
- RPD concluded without evidence that CBSA had not used Clearview AI just because they had ceased using it in 2020
- Additionally (*note for practitioners*) RPD should have considered reviewing the evidence the Minister sought to protect prior to ruling on its disclosure (para 50-53)

Barre v Canada (MCI),
2022 FC 1078 (CanLII),
<<https://canlii.ca/t/jr6r8>>

Failure to provide justification for the RPD's comparison of the photos

[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.

Developments and Jurisprudence post- *Barre*

Change in approach by CBSA?

- CBSA appears to have started using human analysts to prepare “manual” comparison report
- Question about whether initial matches are generated by AI and human experts merely confirm these – possibility of confirmation bias? (analogy to *Chinook* AI processing tool in visa decisions?)

Common theme in post-*Barre* cases

- Where there is no evidence of AI use or CBSA attests no AI was used, then *Barre* is distinguishable
- RPD has the jurisdiction to assess comparison reports and render its own decisions

Judicial Discussion of *Barre* Decision

Osman v Canada (MCI), 2023 FC 1644
(CanLII), at para 22,
<<https://canlii.ca/t/k1k1c#par22>>

[22] In my view, the Applicants' argument misconstrues the RPD's finding. Rather than finding it did not need to challenge CBSA's claim, the RPD pointed out that "it is a serious allegation that CBSA is using facial recognition technology based on speculation not fact." The Applicants in this case, unlike those in *Barre*, did not submit any evidence about CBSA's use of Clearview AI – a public denial by CBSA of such use is not proof of its use. Further, I note that the RPD member did ask counsel for the Minister how they obtained the photographs, to which counsel for the Minister responded they were GCMS [Global Case Management System] photos and the photos obtained from the Swedish authorities.

Judicial Discussion of *Barre* Decision

Osohle v. Canada (MCI), 2023 FC 1584
(CanLII), at para 30,
<<https://canlii.ca/t/k1f28#par30>>

- The RPD is empowered to make a finding as to identity based on appearance without requiring expert testimony

Ali v Canada (MPSEP), 2024 FC 466
(CanLII), < <https://canlii.ca/t/k3njs>>

- The RPD can assess identity without expert evidence
- *Barre* distinguished because in this case the Minister disclosed how the photographs were compared

Judicial Discussion of *Barre* Decision

Mah v Canada (MCI), 2023 FC 1229
(CanLII), at para 18,
<<https://canlii.ca/t/k0537#par18>>

- Applicants cannot raise the issue of disclosure for the first time on judicial review
- “The RPD cannot be faulted for failing to address an issue that was never raised before it”

Jurisprudence on Photo Comparisons to Challenge Identity

- RPD must provide responsive reasons in view of the interests and stakes involved in identity findings [*Hirsi v Canada (MPSEP)*, 2023 FC 843 (CanLII), at para 25, <<https://canlii.ca/t/jxpn4#par25>>]
- “Naked-eye assessments” can be a “highly subjective and impressionistic exercise and must be approached with care” [*Hirsi*, para 26]
- RPD must be cognizant of risk of “unconscious or implicit racial bias that a decision maker should be aware of when the individuals are of a different ethno-racial background” [*Hirsi*, para 27]
- RPD cannot ignore differences in its assessment [*Hirsi*, para 34-35]

Jurisprudence on Photo Comparisons to Challenge Identity

- Panel member in *Hirsi* used nearly identical phraseology in another decision [*Omar v Canada (MPSEP)*, 2023 FC 1334 (CanLII), at para 22, <[https://canlii.ca/t/k0l5b - par22](https://canlii.ca/t/k0l5b-par22)>]

[25] The almost identical articulation by the RPD in these two cases underscores the very general nature of its photographic comparison analysis and the lack of personalization, thereby undermining the reasonableness of the analysis. A generic approach to photographic comparison is inconsistent with the need to exercise caution given the highly subjective nature of comparing facial features, especially among people of similar ethnic heritage: Hirsi at para [27](#); Arafa at paras [23, 25](#); Barre at para [70](#); Gedi at para [19](#).

Jurisprudence on Photo Comparisons to Challenge Identity

- Limitations of observation and comparison during virtual hearing [*Omar*, para 26-28]

[26] In terms of the RPD's observation of the Applicant during the hearing, I note that the hearing was virtual, rather than in-person. While the RPD acknowledged the limitations of "lighting, camera focus, camera angles and the photographer" when comparing photographs, the panel did not recognize any inherent limitations of observing an individual's facial features during a virtual hearing. Such limitations may include the quality of the camera, the quality of the video-feed and/or wifi connection, and the lighting. The RPD should have considered the potential impact of these factors on making identity findings based on a virtual hearing.

[27] Indeed, a review of the transcripts reveals that the Applicant's internet connection was poor and that he "froze" at least three times during the brief virtual hearing. Yet, the RPD panel did not acknowledge or consider the impact, if any, of these technological challenges on the panel's ability to properly observe the Applicant's facial features. In my view, this calls into question the RPD's statement that it carefully and thoroughly observed the Applicant's facial features during the hearing.

Jurisprudence on Photo Comparisons to Challenge Identity

- Limitations of observation and comparison during virtual hearing [*Omar*, para 26-28]

[28] Moreover, the RPD failed to articulate how its observation of the Applicant's facial features during the hearing factored into its comparison of the photographs of the Applicant and Mr. Abdallah. Justice Little's critical analysis of the same approach taken by the RPD in Hirsi is equally applicable in this case:

[37] The RPD's reasons mentioned that the member made a "careful and thorough observation" of the applicant's facial features during the hearing. However, the RPD's in-person observations did not feature in its comparative assessment of the two individuals. Its conclusion was expressly based on its comparison of the photos. The fact that the RPD made such observations of the applicant in person, without further comment, explanation or comparison to Mr Dukow's photograph, serves to underline the need for adequate and transparent reasons to support the RPD's identity determination. [Emphasis added]

Practice Tips & Ethical Considerations

Consider Independent Evidence

- Use flexible rules of evidence as opportunity for advocacy (qualified “expert” not required)
- Consider seeking an expert (e.g. academic expert interested in addressing systemic issues)
- Cost can be a barrier – but don’t rule it out before investigating potential options
- Disclose relevant research articles

Always Request Disclosure

- IRB has jurisdiction to consider and adjudicate applications for further disclosure
- Even if rejected, application preserves argument for Federal Court judicial review
- If human expert, consider requesting a summons for cross-examination (drawing on case law re: difficulties in comparison)
- Consider requesting in-person sitting to mitigate issues with comparison on video call

QUESTIONS?

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