

Federal Court



Cour fédérale

Date: 20161125

Docket: IMM-2400-16

Citation: 2016 FC 1311

Ottawa, Ontario, November 25, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

TIRUEDEL DESALEGN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Tiruedel Desalegn, is a citizen of Ethiopia. She is also a musician who has composed songs used both for entertainment and to send political messages, in particular the song “One Day”, associated with protesting the current regime in Ethiopia. In June 2013, Ms. Desalegn sought refugee protection in Canada claiming to fear political persecution because of her past membership and public support of the opposition parties in Ethiopia. The Refugee Protection Division [RPD] rejected her claim in a decision dated July 15, 2014, finding

that she lacked credibility and had not produced sufficient objective corroborative evidence to substantiate her claim.

[2] Ms. Desalegn subsequently appealed the RPD's negative decision to the Refugee Appeal Division [RAD] and in support of her appeal, sought to introduce additional evidence pursuant to subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. Two (2) grounds were raised in the appeal: first, that the RPD erred in its assessment of her credibility by adopting a microscopic and overzealous approach of the evidence; and second, that the RPD failed to consider relevant and credible evidence capable of corroborating Ms. Desalegn's risk profile.

[3] In a decision dated January 28, 2015, the RAD admitted the new evidence, substituted its own determination (to the RPD's) that Ms. Desalegn is at risk in Ethiopia due to her political opinion and subsequently granted her appeal. The Respondent, the Minister of Citizenship and Immigration [Minister] filed an application for leave and judicial review of the RAD's decision. On January 7, 2016, this Court granted the Minister's application for judicial review, finding that the RAD had erred in admitting Ms. Desalegn's proposed new evidence and that the RAD had unreasonably substituted its own determination of Ms. Desalegn's credibility without affording any deference to the RPD's credibility findings. The matter was remitted back to the RAD for redetermination by a differently constituted panel. Ms. Desalegn provided further submissions and evidence for the redetermination before the RAD. In a decision dated May 18, 2016, the RAD refused to admit all of the new evidence with the exception of updated country conditions

documents, and rejected Ms. Desalegn's appeal, thereby confirming the decision of the RPD. She now seeks judicial review of this second RAD decision.

[4] Ms. Desalegn raises the following four (4) issues upon judicial review:

- a) The RAD's assessment of her new evidence is not reasonable;
- b) The RAD failed to consider her *sur place* ground of risk;
- c) The RAD's assessment of the RPD's credibility findings is unreasonable; and
- d) The RAD ignored, misconstrued, and unreasonably discounted credible, relevant and material documentary evidence that was before the RPD.

[5] In my view, the dispositive issue in this application for judicial review is the RAD's failure to consider and address Ms. Desalegn's *sur place* ground of risk.

[6] In further submissions filed before the RAD on redetermination, Ms. Desalegn raised the argument that she faces a *sur place* risk as a result of her ongoing recent support of the opposition movement since her arrival in Canada. In support of her argument that she faces risk upon a return to Ethiopia, she relied on a July 2014 report from Amnesty International (see Certified Tribunal Record, p 247 [CTR]), confirming that alleged contact with the Ginbot 7 party or the opposition Ethiopian media service, the Ethiopian Satellite Television [ESAT], is used by the authorities as a reason to imprison on false allegations of terrorism. She argued that the new evidence she wished to adduce before the RAD and which post-dated the RPD's decision, was sufficient to ground a *sur place* claim (see CTR, pp 663-664, paras 15 and 17).

[7] The evidentiary basis upon which her *sur place* allegations were grounded included, among other things, photographs of her meeting privately in Toronto with the Chairman of the Ginbot 7 party (CTR, p 239), a letter from another senior member of the Ginbot 7 leadership committee confirming that she has been an active participant in protest demonstrations and public meetings organized in Toronto against the current regime in Ethiopia (CTR, pp 685-686), letters from the ESAT confirming that she had performed her protest song at a Toronto fundraiser (CTR, p 236) and expressing gratitude for her ongoing support of the organization (CTR, p 681).

[8] The RAD does not address or consider Ms. Desalegn's submissions regarding the *sur place* claim. Its decision is entirely silent on the issue.

[9] The Minister submits that the RAD did not fail to assess the *sur place* claim, arguing rather that the rejection of Ms. Desalegn's new evidence was dispositive of the *sur place* issue. Since the RAD did not admit the proposed new evidence, there was an insufficient evidentiary basis to consider the issue and accordingly, the RAD was under no obligation to consider her *sur place* risk. The Minister further argues that the RAD's findings at paragraphs 59 and 60 of its decision supported the conclusion that the RAD had considered the *sur place* claim. The RAD found that the evidence disclosed at the hearings before the RPD failed to convince that Ms. Desalegn had the political profile to make her a person of interest to the Ethiopian government authorities should she return there. It also found that there was a lack of objective evidence to corroborate her claim of arrest and future risk.

[10] I disagree with the Minister's interpretation of the RAD's decision. Given that the issue of the *sur place* claim was explicitly raised in Ms. Desalegn's further submissions for the redetermination by the RAD and that the new evidence she wished to adduce supported her continuing political involvement and opposition to the Ethiopian regime since her arrival in Canada, the RAD should have expressly considered the claim. Given its failure to do so, it is impossible to infer from the record and the decision whether the *sur place* claim was considered. As such, regardless of the standard of review, the decision cannot stand.

[11] While this error is sufficient to dispose of the application, I also have additional concerns with the decision, one of which is the RAD's failure to analyse and consider an affidavit from Ms. Desalegn's uncle which was adduced as new evidence. Ms. Desalegn's uncle is a highly regarded musician and prominent Ethiopian opposition activist in the USA. His affidavit confirms that Ms. Desalegn is currently politically active. In discussing the admissibility of the new evidence, the RAD does not mention or address the affidavit.

[12] Although a tribunal is presumed to have considered all of the evidence before it, it is noteworthy that the RAD explicitly lists and addresses ten (10) of the items submitted, but the eleventh (11th) new document is absent from the enumeration and analysis. This is significant given that one of the errors identified by Ms. Desalegn the first time before the RAD was the RPD's failure to address an earlier affidavit from the same uncle.

[13] Similarly, in *Teklewariat v Canada (Citizenship and Immigration)*, 2016 FC 1026 [*Teklewariat*], the Pre-Removal Risk Assessment Officer thoroughly reviewed eleven (11) sets

of documents but ignored one key document substantiating the applicant's allegation of risk and contradicting the RPD's credibility finding. Madam Justice Tremblay-Lamer found the absence of any mention of that one document suspicious and granted the application for judicial review. She indicated that the document would perhaps not have been sufficient to overcome the negative findings on credibility, however "[t]he record is not sufficient to allow the Court to extrapolate what the Officer's reasoning would have been [...] and the fact that only this document was excluded from his analysis points to an error on his part, rather than to a conscious choice on which piece of evidence to analyze in his reasons" (*Teklewariat* at para 19).

[14] For these reasons, the application for judicial review shall be allowed and the matter remitted to a differently constituted panel of the RAD for redetermination.

[15] The parties did not propose any certified question in the present proceedings.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is remitted back for redetermination by a differently constituted panel of the Refugee Appeal Division;
2. No question is certified for appeal.

"Sylvie E. Roussel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2400-16

STYLE OF CAUSE: TIRUEDEL DESALEGN v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 23, 2016

JUDGMENT AND REASONS: ROUSSEL J.

DATED: NOVEMBER 25, 2016

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