

Federal Court



Cour fédérale

Date: 20180123

Docket: IMM-2723-17

Citation: 2018 FC 58

Toronto, Ontario, January 23, 2018

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

ZELALEM FISIHA WOLDEMARYAME

Applicant

and

**IMMIGRATION, REFUGEES AND
CITIZENSHIP CANADA**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] In July 2016, the Applicant claimed refugee protection against return to Ethiopia based on his political identity as a member of the Coalition for Unity and Democracy (CUD) in Ethiopia. By a decision dated October 17, 2016, the Refugee Protection Division (RPD) rejected the Applicant's claim for protection on the basis of a central finding that the Applicant failed to

prove his identity. On appeal, by a decision dated May 25, 2017, the Refugee Appeal Division (RAD) upheld the RPD's decision. The present Application challenges the RAD's decision.

II. The RPD's Decision-Making on Identity

[2] The challenge presented to the Applicant by RPD was to meet the requirement of Rule 11 of the *Refugee Protection Rules*, SOR/2012-256 and s. 106 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the *IRPA*]:

11 The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.

11 Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour se procurer de tels documents.

106 The Refugee Protection Division must take into account, with respect to the credibility of a claimant,, whether the claimant possesses acceptable documentation establishing identity and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain documentation.

106 La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

[3] In deciding that the Applicant failed to meet the identity evidentiary burden, the RPD made a clear statement of the condition precedent ramification of making such a finding:

The claimant bears the onus of proving their identity. In this case, the necessary credible evidence to reach a positive conclusion regarding the claimant's claim as to his personal and national

identity was not provided, and the burden was not met. As cited in *Ipala*, without a proven identity, the panel cannot find a serious possibility of persecution or risk to the person [*Ipala v Canada (Minister of Citizenship and Immigration)*, 2005 FC 472].

[Emphasis added]

(RPD Decision, para. 9)

[4] Besides the Applicant's own testimony before the RPD, the only ostensible identity document the Applicant produced was a copy of a purported birth certificate. The following passages from the RPD's decision describe how the copy of the birth certificate was handled with some suspicion:

The panel finds there is nothing to connect this birth certificate to the claimant appearing before the panel, other than a photo of the claimant which may or may not be affixed to the actual birth certificate. Moreover, the panel notes that the stamps on the document are illegible, in particular on the bottom right, where it appears that two stamps were printed over one another. In short there are no security features on the document, and the issuance procedures suggest little if any effort was made to ensure that the claimant presented the birth certificate before the panel today is, in fact, the person to whom it was issued in 2011.

[Emphasis added]

(RPD Decision, para. 12)

[5] In the course of reaching its decision, the RPD questioned the Applicant on his failure to produce additional identity documentation from Ethiopia. In response, the Applicant maintained that the state of emergency that existed in the country made it impossible for him to do so. In the result, the RPD made a far reaching global negative credibility finding on, not only the issue of identity, but also on the substance of the Applicant's claim:

The panel finds that the claimant has not provided sufficient credible or trustworthy documentary evidence in support of this personal identity. The panel also finds that the claimant's evidence, as it relates to his personal identity, nationality and identity as a member of the CUD is neither trustworthy nor credible [...].

[Emphasis added]

(RPD Decision, para. 5)

III. The RAD's Decision-Making

[6] The RAD took no serious issue with the RPD's decision-making with respect to the Applicant's identity. The focus of the RAD's decision was on the admissibility of new evidence on the identity issue: seven pieces of documentary evidence were advanced by the Applicant for consideration pursuant to s. 110(4) of the *IRPA*:

110(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

110(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[7] The standard of review is reasonableness for factual findings reached upon applying evidence to the issues outlined in the provision. In *Singh v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 96, Justice de Montigny explained at paragraph 29:

For all of these reasons, I therefore conclude that the judge correctly identified the standard of review to be applied to the application for judicial review that was before her. In other words, the RAD's interpretation of subsection 110(4) of the *IRPA* was subject to review on the reasonableness standard, in accordance

with the presumption that an administrative body's interpretation of its home statute is owed deference by a reviewing court.

[8] The RAD admitted five news articles published between October 16, 2016 and November 12, 2016 describing the nature of the state of emergency in Ethiopia at that time, and a copy of an email from the Ethiopian Consulate dated November 21, 2016 advising of its ability to verify the legality of birth certificates issued in Ethiopia. However, the RAD did not admit the seventh document being the Applicant's purported Ethiopian National ID Card.

A. *The RAD's Findings Concerning the National ID Card*

[9] The Applicant provided the following explanation for the introduction of the National ID Card:

On November 25, 2016, I received my original national ID card from Ethiopia. When I had asked my sister in Ethiopia to send me this document earlier, she was unable to find it at our house. She was only able to find my school document.

However, after searching and asking around, my sister learned that my national ID card was with my neighbours in Gonder. When my mother passed away, my sister was working in a remote area of Ethiopia, outside Gonder and was not around. Since her children were not around when she passed away, my mother's neighbours helped clear out her house and kept my national ID with them for safekeeping.

As such, it took a few weeks for my sister to trace the national ID card and to send it to me. Based on this new information, my counsel sent a formal request for reconsideration to Legal Aid on November 28, 2016, the day my RAD appeal was due.

[Emphasis added]

(Applicant's Statutory Declaration dated December 6, 2016, Certified Tribunal Record, pp. 98 – 99, paras. 42 – 44)

[10] The RAD's approach to deciding on the admission of the National ID Card is available in the following paragraphs from the decision under review:

[24] The RAD has reviewed the copy of the Appellant's National ID (Kebele) card [footnote omitted], which he submits was sent to him from his sister in Ethiopia. The RAD has considered the Appellant's submission that his sister was unable to find the card in a timely manner in order to submit it as post-hearing evidence, yet the RAD has not been provided with information confirming when the request was made to his sister to search for the document, or when the document was received from Ethiopia.

[25] The RAD notes that the audio recording of the hearing confirms that both the RPD and counsel for the Appellant, on separate occasions, clearly ask the Appellant whether it is possible to obtain additional identity documents from family members or institutions in Ethiopia. The Appellant adamantly states on multiple occasions he is unable to contact anyone or obtain any documents from Ethiopia because of conditions surrounding the state of emergency imposed in Ethiopia.

[26] The RAD notes that the Appellant's testimony about the state of emergency in Ethiopia evolved significantly over the course of the hearing. He initially testified that social media had been "shut down" as part of the state of emergency and it was difficult to get information from Ethiopia. During questioning by the RPD about obtaining additional identity documents he testified that government offices are not open to issue documents and the post office is not open to mail items. During questioning by his counsel he was asked if his sister could obtain identity or school documents from his family home and perhaps send them to him by courier. His testimony further evolved to indicate that roads were closed and there was a general strike so this was not possible. His counsel further asked if it would be possible to have his sister email copies of documents to him and he said this was not possible because the internet was also shut down.

[27] As much as the RAD has admitted new evidence that describes the conditions experienced in the state of emergency in Ethiopia, The [*sic*] RAD finds these documents do not provide evidence to support the Appellant's allegations that many facilities and government services are totally inaccessible. The RAD finds it reasonable to expect that the Appellant would be able to support his statements about the current state of emergency in Ethiopia with documentary evidence. The RAD further finds the Appellant's testimony in this issue was designed to deflect and avoid further

exploration in respect of obtaining documents to support his identity. The RAD finds the Appellant's testimony in respect of obtaining any documents from Ethiopia was evasive and lacking in credibility.

[28] The RAD has further assessed the Appellant's new evidence about the state of emergency in Ethiopia elsewhere in this appeal. The RAD finds upon review of the evidence that it does not support the Appellant's allegations that the state of emergency or unrest in Ethiopia has prevented him from obtaining documents from government offices, schools or family members, as well as accessing mail, email or courier services to send documents to Canada. The RAD finds it reasonable to believe that had the Appellant taken the initiative to contact his sister in Ethiopia prior to his hearing before the RPD, that he would have been able to obtain this and perhaps other documents to assist him in a timely manner.

[29] The RAD finds the Appellant's allegation that the state of emergency prevented him from obtaining the National ID card at an earlier date is not supported by credible testimony or evidence in the record and this is unsatisfactory. The RAD finds that the Appellant's explanation does not contain sufficient detail or persuasive evidence to explain why he was unable to present this evidence before the RPD.

[30] The RAD finds that the National Identity card does not meet the statutory requirements of section 110(4) and it will not be admitted as new evidence in this appeal.

[Emphasis added]

[11] My findings with respect to the RAD's approach are as follows.

[12] In paragraph 24, the RAD made a critical reviewable error in failing to address the Applicant's evidence that he received the National ID Card on November 25, 2016.

[13] In paragraphs 25 to 28, the RAD conducted an evidentiary evaluation by comparing the Applicant's testimony before the RPD and the admitted new evidence of in-country conditions in

Ethiopia. To resolve the difference observed, the RAD immediately resorted to an unfounded implausibility finding and unfounded speculation.

[14] In paragraph 27, the RAD effectively found that it was implausible that the Applicant testified to the truth before the RPD because he failed to produce documentary evidence to support his testimony. In this respect, the RAD failed to acknowledge that the Applicant's new evidence was tendered to provide verifiable independent evidence of the emergency situation in Ethiopia.

[15] As to the Applicant's motivation in providing the new evidence, in paragraph 27 the RAD resorted to sheer speculation that the Applicant's state of emergency evidence was "designed to deflect and avoid further exploration". I find that the unfounded speculation placed the Applicant in a very harmful negative light which directly affected the outcome on the appeal.

[16] In paragraph 28 the RAD continued to address the discrepancy in the evidence, but adds to the conjecture about the difference by speculating that if the Applicant had tried harder to obtain evidence through his sister, the evidence would have been provided. I find that the RAD's propensity of making findings with no evidentiary basis constitutes reviewable error as described in s. 18.1(4)(d) of the *Federal Court's Act*:

18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

[...]

d) based its decision or order on an erroneous finding of fact

18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

[...]

d) a rendu une décision ou une ordonnance fondée sur une

that it made in a perverse or capricious manner or without regard for the material before it;

conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

[17] In paragraph 29, the RAD made a further erroneous finding: the Applicant did not make the “allegation” that the state of emergency prevented him from obtaining the National ID card. The only evidence on the record about how the National ID Card arose is that quoted in paragraph 9 of these reasons. In addition, the finding that the Applicant failed to explain why he was unable to present the National ID Card before the RPD neglects the evidence that the RAD did not acknowledge: the Applicant only received the National ID Card on November 25, 2016, being more than a month after the rejection of the Applicant’s claim.

[18] Finally in paragraph 30, on the basis of the error laden fact-finding described above, the RAD rejected the Applicant’s key documentary identity evidence.

IV. Conclusion

[19] For the reasons provided, I find the decision under review is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back for redetermination by a differently constituted panel.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2723-17

STYLE OF CAUSE: ZELELEM FISIHA WOLDEMARYAME v
IMMIGRATION, REFUGEES AND CITIZENSHIP
CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATES OF HEARING: NOVEMBER 30, 2017 AND JANUARY 11, 2018

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