Federal Court  Cour fédérale

Date: 20220711

Docket: IMM-4399-20

Citation: 2022 FC 1012

Ottawa, Ontario, July 11, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

BATHA HAILE DEHAB
(A.K.A. DEHAB BATHA HAILE)
(A.K.A. BATHA DEHAB HAILE)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Appeal Division (the RAD) dated August 26, 2020, dismissing her appeal of a decision by the Refugee Protection Division (the RPD) to deny her claim for refugee protection (the Decision).

[2] The Applicant is an 80 year-old citizen of Eritrea who claimed refugee protection based on the persecution she faced at home as the mother of a Pentecostal Christian.

[3] For the reasons that follow I am granting this application as the reasons provided by the RAD failed to meet the requirements of being internally consistent and rational concerning the Applicant's possibility of persecution in Eritrea as a failed refugee claimant.

II. **Background facts**

[4] The Pentecostal Christian faith has been outlawed in Eritrea since 2002. The Applicant alleges that on Christmas day, 2016, she and her daughter were arrested and detained for three days by the Eritrean authorities because the Applicant allowed her daughter to host secret Bible study programs and prayer group in her home.

[5] The Applicant was released on bail on December 28, 2016 after the husband of a relative acted as her Surety. One of the release conditions, to which she agreed, was that the Applicant stop any Pentecostal Christian gatherings in her home.

[6] In April 2017, the Applicant obtained an Eritrean passport and an exit visa through bribery. She visited her two daughters in Canada on January 28, 2018.

[7] The Applicant alleges she had planned to return to Eritrea until she learned that the Surety and her daughter were arrested in Eritrea on July 1, 2018. The Applicant was told that she was also being sought by the authorities for the violation of her release conditions by allowing her daughter to hold Pentecostal Christian meetings in her home. As such, the Applicant fears

she will be arrested if she returns to Eritrea. Additionally, the Applicant now fears she will be arrested, detained and tortured as a failed refugee claimant returning to Eritrea.

[8] For these reasons, the Applicant claimed refugee protection on July 27, 2018. Her claim was rejected on February 21, 2019.

III. **The Decision**

[9] The RAD found the determinative issues were credibility and whether the Applicant would face a serious possibility of persecution due to her residual profile as a failed refugee claimant. The RAD found the RPD did not err in finding the Applicant was not credible nor wanted by the Eritrean authorities.

[10] The RAD also determined the RPD did not err in finding that the Applicant would not face a serious possibility of persecution due to her residual profile of being a failed refugee claimant.

[11] Due to inconsistencies, evasiveness and contradictions in the Applicant's testimony when compared to her narrative, the RAD found she was not credible concerning her contact with the Surety while she was in Canada and how she obtained her passport and exist visa.

[12] The Applicant argued before the RAD that the RPD had erred by failing to take into account her residual profile as a failed refugee claimant.

[13] After reviewing the relevant country condition documents, the RAD determined that the main motivation for persecution of returning refugees related to those who had evaded the draft, deserted, or left the country illegally.

[14] The RAD noted the Applicant had not proven she left Eritrea illegally. Combining that with the Canadian policy not to disclose who has and has not made refugee claims in Canada, the RAD found that the possibility of persecution of the Applicant was reduced.

[15] The RAD concluded the RPD did not err in finding there was not a serious possibility of persecution for the Appellant due to her residual profile as a failed refugee claimant if she were to be returned to Eritrea.

IV. **Issue and Standard of Review**

[16] While a number of issues were raised by the Applicant, I find the determinative issue is the RAD's treatment of the risk to the Applicant as a returning failed refugee claimant.

[17] Reasonableness is the presumptive standard of review, subject to certain exceptions that do not arise here: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*].

[18] The focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and at least as a general rule, to refrain from deciding the issue themselves: *Vavilov* at para 83.

[19] Overall, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

V. **Analysis**

[20] The Applicant submitted to the RAD that due to her long overstay, the Eritrean authorities would automatically know that she was a failed refugee claimant.

[21] The RAD reviewed National Documentation Package (NDP) ERI105801.E for Eritrea dated June 29, 2018. The RAD noted it indicates that "while there is evidence of persecution of returnees, the main motivation appears to be those who evaded (*sic*) draft, deserted, or left the country illegally."

[22] The quote above is misleading.

[23] The full paragraph from which the RAD seems to draw this observation, states:

> For voluntary returnees from abroad who previously had evaded (*sic*) draft, deserted or left the country illegally, it seems that the draconian laws are not applied at the moment, provided they have regularised their relations to the Eritrean authorities prior to their return. According to a new, unpublished directive, such returnees are exempt from punishment. It is understood that the majority of the individuals who have returned according to this directive effectively have not been persecuted. (My emphasis)

[24] It is clear from the first sentence that the information pertains to *voluntary* returnees who *evaded, deserted or left the country illegally,* and not failed refugee claimants. I find nothing in

the paragraph above supports the RAD's comments of the 'main motivation' for Eritrea's persecution of returnees nor how this information is at all relevant in assessing the Applicant's claim that she will face persecution as a failed refugee claimant forced to return to Eritrea.

[25] I find these errors by the RAD show it misunderstands the residual profile of the Applicant. Although she lives abroad in Canada, she will not be a voluntary returnee if she is deported from Canada to Eritrea.

[26] Two paragraphs after the misleading excerpt, the RAD cites the following from the same NDP:

> …the UK Home Office fact finding mission to Eritrea cites Eritrean immigration officials as explaining that they are not concerned with the reason an individual left, rather, '[a]ll we are looking at is how long they have been away; more than 3 years or not' (UK Feb. 2016, para. 11.10.2). According to the immigration officials, if an Eritrean has been away for less than three years, they need to complete the national service (UK Feb. 2016, para. 11.10.2).

[27] Based on the above, the RAD extrapolated that the Applicant will not face any form of persecution because she was away for less than 3 years. It is clear that the Response to Information Request makes no such assertions. This reasoning lacks rationality and intelligibility.

[28] In making both of these errors, the RAD narrowly focussed on section 2 of the NPD "Treatment of Returnees" which concerns <u>voluntary</u> returnees but failed to consider information in the sections that directly address the Applicant's residual profile: "2.1 Returnees Who Claims Refugee Status or Were Seeking Asylum" and "2.2 People Forcibly Returned".

[29] This is a significant oversight as section 2.2 explicitly states that the information that follows applies to “recent returns of failed asylum seekers, specifically enforced returns rather than voluntary”, which is precisely the situation the Applicant will face upon the enforcement of a Deportation Order.

[30] The Applicant’s submissions to the RAD had been that the only rational inference Eritrean authorities could draw if she returned to Eritrea would be that she had claimed asylum in Canada and they would see from her visa and passport that she had overstayed by a lengthy period.

[31] The Applicant also submitted that “it is a well-known fact that Eritreans leave the country, and make asylum claims throughout the world” therefore “it would simply be assumed that she made an asylum claim in Canada.”

[32] The Applicant’s submissions to the RAD specifically excerpted portions from NDP ERI105801.E, item 14.2 stating that:

> In Eritrea, people are arrested and detained without any formal charges. Therefore, most people can only speculate about the reasons for arrest and detention, the following reasons are cited frequently: . . . (k) failed asylum seekers and refugees who are returned to Eritrea. Similarly, a 2017 report by Freedom House states that “Eritrean refugees and asylum seekers repatriated from other countries are detained.”
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> . . . . . .
>
> The 2015 report by the UN Human Rights Council states that “with few exceptions, those who have been forced to return . . . have been arrested, detained and subjected to ill-treatment and torture.”

[33] The RAD is presumed to have considered all the evidence but as it did not address these directly contradictory submissions, which speak to the fundamental issue of risk to the Applicant if she is returned to Eritrea. I can only conclude that their omission means that the RAD did not have regard to the material before it: *Sivapathasuntharam v Canada (Citizenship and Immigration)*, 2012 FC 486, at para 24, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration*) [1998] FCJ 1425, at para 17.

[34] I am not satisfied that the reasoning "adds up". The reasons, when read in conjunction with the record, do not make it possible to understand the RAD's reasoning on a critical point: *Vavilov* at paras 103 and 104.

[35] As a result, for all the foregoing reasons, I find the Decision is unreasonable.

[36] The Decision must be set aside for redetermination by another member of the RAD.

[37] There is no serious question of general importance for certification.

JUDGMENT in IMM-4399-20

THIS COURT'S JUDGMENT is that:

1. The application is granted and the Decision is set aside. This matter is remitted for redetermination by another member of the RAD.
2. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4399-20
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