

Federal Court



Cour fédérale

**Date: 20230825**

**Docket: IMM-2966-22**

**Citation: 2023 FC 1154**

**Ottawa, Ontario, August 25, 2023**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**WANDWASEN FANTA BELAY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**Overview**

[1] This is an application for judicial review of a Refugee Appeal Division [RAD] decision, dated, March 15, 2022. The RAD confirmed the Refugee Protection Division's [RPD] finding that the Applicant is excluded from refugee protection pursuant to Article 1E of the *Convention Relating to the Status of Refugees* [the *Refugee Convention*] because he had substantially the same rights as a German national.

## **Background**

[2] The Applicant is a citizen of Ethiopia. He fears the Ethiopian government because of his anti-government activities, his Amharic ethnicity, and his perceived political opinion as the child of a senior figure in the Ethiopian armed forces.

[3] The Applicant fled to Germany in 1994 after his father was killed. He was granted temporary status there on humanitarian grounds, but that status expired sometime after he left Germany.

[4] The Applicant moved to the United States in 2005. He sought refugee protection there but his claim was refused in 2009. The Applicant also unsuccessfully tried to obtain residence there through a spousal sponsorship.

[5] In February 2018, the Applicant came to Canada and initiated a claim for refugee protection.

[6] The Applicant's claim was first denied by the RPD under Article 1E of the *Refugee Convention* on July 17, 2019. That decision was returned to the RPD by the RAD on September 29, 2020, for redetermination due to serious errors with the decision.

[7] The Applicant's redetermination was considered on March 15, 2022. The RPD decision was confirmed and the appeal was rejected under Article 1E of the *Refugee Convention*.

[8] The Applicant appealed the redetermination decision to the RAD. The RAD's decision on the appeal of the redetermination is the subject of this judicial review.

### **Decision under Review**

[9] The RAD confirmed the decision of the RPD. The RAD began by acknowledging its role was to look at all the evidence and decide if the RPD made the correct decision.

[10] At the outset, the RAD noted it had reviewed both RPD decisions and the oral testimony, and that it agreed with the Applicant that the second RPD decision was "seriously deficient" in that it appeared to be copy and pasted verbatim from the first RPD decision. The similarities were so extensive that it was unclear to the RAD whether the Applicant's testimony was actually assessed, amounting to, in the RAD's words, "a substantive breach of the Appellant's right to a de novo hearing."

[11] The RAD determined it could remedy the breach based on the complete record before it, including the documentary evidence and oral testimony given in the second hearing.

[12] On the issue of Article 1E, the RAD found the Applicant was granted subsidiary humanitarian protection and temporary resident status in Germany, and he therefore enjoyed a right substantially similar to that of a national of Germany.

[13] The RAD noted that the Applicant lived in Germany with protection granted for humanitarian reasons, for ten years, between 1995 and 2005. His travel document was issued in 2000 and states the holder is allowed to return to Germany by August 29, 2002. The Applicant also stated in his testimony that this travel document was renewed, at least once.

[14] The RAD concluded that the Applicant lost his status through his own refusal to take the steps necessary to retain his permanent residency status in Germany. It then determined that the Applicant is excluded from refugee protection under Article 1E of the *Refugee Convention*.

[15] In other words, the RAD determined the Applicant allowed his status to lapse. Therefore, he could not be allowed to benefit from his failure to renew his status.

[16] The RAD reasonably concluded the Applicant had not met his burden to prove he did not have or could not have a permanent residence in Germany.

### **Issues and Standard of Review**

[17] The Applicant submits the Decision is both procedurally unfair and unreasonable.

[18] The Applicant asserts that the RAD breached the Applicant's rights to procedural fairness by not granting him an oral hearing after it determined the RPD had seriously breached the Applicant's right to a *de novo* hearing.

[19] The Applicant further submits the RAD erred in finding he is excluded from refugee protection pursuant to Article 1E.

[20] This application for judicial review turns on the issue of procedural fairness, which I find is determinative of the overall application.

[21] When reviewing the procedural fairness of a decision, the Court determines whether the procedure used by the decision-maker was fair, having regard to all of the circumstances including the nature of the substantive rights involved and the consequences for the individual affected. While technically no standard of review applies, the Court's review exercise has been held to be akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at paras 54-55; *Hussey v Bell Mobility Inc*, 2022 FCA 95, at para 24; *Gordillo v Canada (Attorney General)*, 2022 FCA 23, at para 63; *Ali v Canada (Citizenship and Immigration)*, 2022 FC 1207, at para 8; *Kambasaya v Canada (Citizenship and Immigration)*, 2022 FC 31, at para 19.

[22] Given my finding, set out below, that there was a breach of procedural fairness, it is neither necessary nor appropriate to consider whether the RAD's decision is reasonable.

A. *Procedural fairness*

[23] The RAD's assessment of the significant problems with the RPD's decision is found at paragraphs 16-17 of the Decision where the RAD stated:

In my review of both RPD Decisions and the oral testimony, I agree with Appellant's Counsel that the second RPD Decision is seriously deficient. To a large extent, it appears that the second RPD Decision is "[copied] and pasted" from the first RPD Decision. As Appellant's Counsel submits, paragraphs 4-21 of the second RPD Decision have the same wording as paragraphs 3-23 and paragraphs 26-30 of the earlier RPD Decision. Additionally, the references to Exhibits in the second RPD Decision follows the numbering of the original RPD Record as reflected in the first RPD Decision. The second RPD Panel does not refer anywhere to the oral testimony that the Appellant gave during the hearing that took place before the second RAD, thus making it unclear whether that testimony was assessed. **I agree with Appellant's Counsel that, considering all the evidence, this amounts to a substantive breach of the Appellant's right to a *de novo* hearing.**

I find, however, that the RAD can remedy this breach, because I have before me a record of all prior proceedings for this claim, all the documentary evidence that has been provided, and the oral testimony given in the second hearing, not only in the form of transcripts, but also in terms of the audio of the hearing, to which I have listened. I confirm that at one point, after the RPD had given instructions to turn off microphones, I did hear persons conversing in a foreign language, but this is not a language that I am unable to understand. I can, therefore, independently reassess this evidence.

[my emphasis]

[24] In my view, the issues the Applicant and the RAD identified with the RPD decision are so severe that they amount to an unquestionable breach of the Applicant's right to a *de novo* hearing. The RAD's conclusion that it could remedy such a breach without hearing from the Applicant, or at minimum, putting the Applicant on notice, was a further breach of procedural fairness as I explain below.

[25] That the RPD decision appeared to be almost entirely copied and pasted from the first RPD decision, calls into question the entire RPD record placed before the RAD.

[26] Overall, I find the RAD could not remedy the RPD's breach by reviewing the deficient record particularly without notice to the Applicant or providing him with an opportunity to make further submissions. The Applicant's right to procedural fairness was clearly breached.

[27] It is helpful here to consider the nature of the role of the RAD which the Federal Court of Appeal set out in some detail in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] at paragraphs 78 and 79:

[78] At this stage of my analysis, I find that the role of the RAD is to intervene when the RPD is wrong in law, in fact, or in fact and law. This translates into an application of the correctness standard of review. If there is an error, the RAD can still confirm the decision of the RPD on another basis. It can also set it aside, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD: paragraph 111(2)(b) of the *IRPA*.

[79] **I also conclude that an appeal before the RAD is not a true *de novo* proceeding.** Recognizing that there may be different views and definitions, **I need to clarify what I mean by "true *de novo* proceeding". It is a proceeding where the second decision-maker starts anew: the record below is not before the appeal body and the original decision is ignored in all respects. When the appeal is a true *de novo* proceeding, standard of review is not an issue. This is clearly not what is contemplated where the RAD proceeds without a hearing.**

[my emphasis]

[28] The Applicant's submission on this point is two-fold. First, once it was determined that the RPD had seriously breached the Applicant's right to a *de novo* hearing, it ought to have either remitted the matter back or, granted the Applicant an oral hearing. Second, the Applicant argues that, at the very least, the RAD was required to notify the Applicant of the breach and provide him with an opportunity to respond and make further submissions.

[29] The Respondent's position echoes the reasoning of the RAD in attempting to justify its approach to remedy the severe breach of procedural fairness by the RPD. They contend the Applicant "implicitly agreed" that the RAD could follow this procedure as the Applicant specifically asked that the matter not be referred back for a third RPD hearing.

[30] This is not an entirely accurate characterization of the Applicant's submissions to the RAD. The Applicant requested that the RAD substitute its own decision finding him to be a *Refugee Convention* refugee, or alternatively, that the matter be remitted to a differently constituted panel.

[31] There is considerable jurisprudence about the broad correction powers of the RAD: see *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223, [2020] 2 FCR 299, at paras 41 and 44; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157, at para 78; *Alvarenga Torres v Canada (Citizenship and Immigration)*, 2021 FC 549, at paras 37-38; *Karim v Canada (Citizenship and Immigration)*, 2020 FC 566, at para 21.

[32] In *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223, [2020] 2 FCR 299, at paragraph 44, the Federal Court of Appeal described the powers of the RAD this way:

[44] RPD decisions are reviewed by the RAD for correctness (*Huruglica*, at paragraph 103). The RAD may confirm the RPD determination, set it aside and substitute its own decision, including a grant of refugee protection, or refer the matter back to the RPD with directions (IRPA, subsection 111(1)). The RAD does not have the power to order removal and makes no orders to that effect. Removal is an administrative action, taken by departmental officers when a claim has been rejected. The Federal Court, on the other hand, can stay or set aside removal orders.



[33] The Respondent also submits that the Applicant's arguments concerning the RAD's finding that he is excluded from refugee protection is simply a disagreement with the RAD's weighing of the evidence and factual findings. They note the Applicant has been unable to demonstrate the RAD's findings are unreasonable. However, reasonableness is not in issue given the procedural unfairness finding is determinative.

### **Conclusion**

[34] For the reasons identified above, this application is allowed and the matter is to be returned for redetermination by another panel of the RAD.

**JUDGMENT in IMM-2966-23**

**THIS COURT'S JUDGMENT is that:**

1. The Applicant's application is allowed and this matter is to be returned for redetermination by a different panel of the RAD.
2. There is no question for certification.

"E. Susan Elliott"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2966-22

**STYLE OF CAUSE:** WANDWASEN FANTA BELAY v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 22, 2023

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** AUGUST 25, 2023

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