

Federal Court



Cour fédérale

Date: 20170712

Docket: IMM-4911-16

Citation: 2017 FC 677

Toronto, Ontario, July 12, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ABDULAZIZ EBRAHIM YESUF

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, by way of this judicial review, challenges a decision dated November 1, 2016 [Decision] of the Refugee Protection Division of the Immigration and Refugee Board [RPD, Board]. In the Decision, the RPD rejected his claim for protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act, IRPA]. The Applicant feared persecution based on national service, and as an ethnic Jeberti. He also asserted

a *sur place* claim, in that he feared persecution by the Eritrean state for having fled the country illegally and claimed refugee protection.

[2] I am granting the judicial review and sending the matter back for redetermination based on the Board's findings with respect to identity, as well as the *sur place* findings.

[3] The Applicant claims that he was born in Eritrea on June 6, 1989, fled to Ethiopia where he lived from 2008 to 2015, and then travelled to Canada on an improperly obtained Ethiopian passport. He presented several identity documents with his claim including his Eritrean identity card [ID Card], a birth certificate [BC], a health card/vaccination record, school records, and his mother's ID card.

[4] In rejecting the claim, the RPD focused on his ID Card and BC. The Applicant alleged that his ID Card had been issued to his parents in Eritrea in 2009 and forwarded to him in Ethiopia. The RPD asserted specialized knowledge of Eritrean documents, and found that the Card lacked "essential elements". Specifically, the Card did not have "PGE" printed on it (meaning Provisional Government of Eritrea). The RPD concluded that the ID Card was fraudulent.

[5] The Board further found that the Applicant was not the person named in the BC, noting that it did not contain a photo and had been issued without proof of identity when he was an adult living in Ethiopia. Moreover, the Board noted that dates on the health card conflicted with his claimed date of birth, and the names on the school records were different from his name.

[6] Finally, the Board found some of the Applicant's answers to be unconvincing, and inconsistent with the documentation.

[7] In light of the above concerns, the Board chose not to address the mother's ID Card, stating that if genuine, it could not establish his identity given other credibility and fraudulent document concerns.

[8] The RPD concluded that the Applicant was not a citizen of Eritrea, submitted false documents, and had thus failed to establish identity. In the alternative, the RPD rejected the claim on credibility grounds, finding that the claim was clearly fraudulent, and therefore manifestly unfounded pursuant to section 107.1 of IRPA.

II. Issues and Analysis

[9] The Applicant argues that the RPD's identity, credibility, and manifestly unfounded findings are all unreasonable because:

- A. the identity analysis ignored contradictory information from the National Documentation Package for Eritrea [NDP], and failed to analyse other key identity documents;
- B. the credibility analysis was tainted by the identity analysis and failed to consider the Applicant's section 97 risk; and
- C. the manifestly unfounded finding was made without regard to the evidence.

[10] The parties agree, as I do, that the reasonableness standard of review applies. As mentioned above, I agree with the Applicant on the first and second issues, and as a result do not need to address the third.

A. *Identity*

[11] The Applicant submits that the RPD erred by failing to analyse the identity documents with an understanding of the Eritrean context, and without recourse to key documents in the NDP, and relies on the recent Eritrean identity case in *Hadesh v Canada (Citizenship and Immigration)*, 2016 FC 747 [*Hadesh*].

[12] The Applicant submits that Eritrean identity documents can have variations. For instance, the Applicant points out that according to the NDP, official sources have referred to the State of Eritrea rather than the Provisional Government since 1997, so “PGE” may not be present on Eritrean documents issued after 1997. Furthermore, and contrary to the RPD findings, the Applicant points out that birth certificates are routinely issued upon application by a head of household; and children of an Eritrean mother are Eritrean (as noted at pages 470, 480 and 478 of the Certified Tribunal Record).

[13] I agree with the Respondent on two of its overarching contentions in response: first, that the Applicant’s failure to establish identity, if reasonable, is conclusive (see *Elmi v Canada (Citizenship and Immigration)*, 2008 FC 773 at para 4); and second, that the Board was under no obligation to mention all of the evidence before it. However, I cannot agree with the Respondent in this instance that the conclusions in the area of identity were reasonable.

[14] First, I find that the Board failed to address contradictory evidence both with respect to the ID Card, and how the Applicant's mother could have obtained his birth certificate. This evidence in the NDP appears to contradict central parts of its identity analysis.

[15] The need to be rigorous in addressing contradictory evidence, in the face of negative identity findings of the kind made in this Decision – namely those based on perceived irregularities of state-issued documentation from a country such as Eritrea – must be particularly attentive to contradictory evidence, in addition to home country conditions, and a claimant's particular circumstances. As stated by Justice Southcott at para 17 of *Hadesh*:

I am conscious that the RPD is not required to refer to every piece of evidence it has considered. However, the more important the evidence that is not mentioned and analyzed, the more willing a court may be to infer that a finding was made without regard to that evidence (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35 at paras 16-17). My conclusion is that the failure either to refer to the information available from the NDP as described above, or to conduct an analysis of the identity documentation ... renders the decision unreasonable.

[16] The Court cannot speculate as to whether or not the NDP documents in question would have changed the outcome of the identity analysis, and for that reason, the matter requires consideration: *Haramicheal v Canada (Citizenship and Immigration)*, 2016 FC 1197 [*Haramicheal*] at para 17.

[17] The second problem with the Board's identity finding is that it failed to address the Applicant's mother's ID Card because of the concerns raised with respect the identity

documentation and credibility findings relating to her son (the Applicant). Here, the RPD wrote at paragraph 24:

Assuming the identity of the mother is established as Eritrean, the national identity card of the mother does not erase the fraudulent nature of the claimant's own national identity card, nor does it compensate for the credibility issues which arose in the testimony of the claimant, nor does it assist the panel in establishing the identity of the claimant who was before it. The mother's identity card was of no assistance in identifying the claimant, and the panel attributed no weight to the document.

[Emphasis added]

[18] In a similar set of facts, in *Mohmadi v Canada (Citizenship and Immigration)*, 2012 FC 884 at para 16 [*Mohmadi*], the RPD relied on its concerns about the applicant's identity card and his contradictory testimony to impugn the authenticity of his passport. Justice Mandamin wrote at para 16:

In my view, the RPD made a key finding that was unreasonable. The RPD noted several problems with the Applicant's taskira including discrepancies and contradictions within the Applicant's testimony. Had this been all the RPD relied on, I may have concluded that the RPD's findings were reasonable. However, the RPD relied on this conclusion to find a different document, the Applicant's passport, of little weight.

[Emphasis added]

[19] *Mohmadi* held that the RPD cannot limit its analysis of a central identity document just because another has been found inauthentic. Thus, similar to *Mohmadi*, I find that the RPD erred by failing to consider the Mother's ID Card, particularly in light of the evidence in the record that a child born to an Eritrean mother, is Eritrean.

[20] Similarly, as noted by Justice de Montigny of this Court (as he then was) in *Kabongo v Canada (Citizenship and Immigration)*, 2013 FC 1086 at para 21:

The Board could not come to a reasonable assessment of the Applicant's identity by only focusing on those documents where authenticity appears doubtful and ignoring those documents which appear to be trustworthy. All the documents filed and the explanations provided by the Applicant must be considered before coming to a conclusion.

[21] Finally, I would point to *Ghebremichael v Canada (Citizenship and Immigration)*, 2012 FC 873 [*Ghebremichael*] which also involved an individual who claimed he was Eritrean, and whose claim was rejected on the basis of identity. There too, the RPD held that the Applicant lacked genuine documentation, but failed to adjudicate all of it. On judicial review, Justice Mosley found at paragraph 17:

As in *Lin*, it was unquestionably open to the Board to find that the applicant's identity had not been established particularly in light of its reasonable finding that the birth certificate was false. Nonetheless, it had an obligation to consider all of the evidence before it and it is not apparent from the record that it did. In light of the cursory examination of the identity question disclosed by the transcript, this is not a case in which I am prepared to assume that the Board considered all of the evidence that it does not specifically refer to. Nor am I prepared to supplement the Board's reasons by my own review of the record.

B. *Section 97 Risk*

[22] As a secondary argument, the Applicant argues that the RPD's analysis was coloured by its identity finding, such that the RPD erred by failing to consider risk under section 97 of the Act, as a failed refugee claimant (the '*sur place*' claim).

[23] The Respondent counters that the Applicant failed to establish how this risk applies to him, since the credibility analysis was reasonable and identity was not established. Thus there was no need to consider section 97 risk.

[24] Here the RPD held as an alternative finding, that even if its identity analysis was unreasonable, the claim must fail on credibility grounds (and failed to consider the section 97 risk). This approach is flawed. If the Applicant had established his identity, but his claim failed on credibility grounds, his risk of torture under section 97 upon return as a failed refugee claimant should still have been assessed.

[25] Justice Strickland summarized the case law on *sur place* refugee claims in *Sanaei v Canada (Citizenship and Immigration)*, 2014 FC 402 at para 51 [*Sanaei*], citing with approval this Court's earlier decision in *Hannoon v Canada (Minister of Citizenship and Immigration)*, 2012 FC 448 at para 42 [*Hannoon*]:

[...] It is established jurisprudence that even if an applicant does not explicitly raise a *sur place* claim, it must still be examined if it perceptibly emerges from the evidential record that activities likely to cause negative consequences on return took place in Canada (see *Mohajery* above, at paragraph 31; and *Mbokoso c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, [1999] F.C.J. No. Page: 19 1806 (Fed. T.D. at paragraph 10). Where there is trustworthy evidence that supports the claim, this analysis must be conducted whether or not the decision maker deems the applicant credible (see *Mohajery* above, at paragraph 32).

[26] *Sanaei* thus confirms that the RPD must consider a *sur place* claim, regardless of credibility concerns where the identity is not at issue (and here, that was the basis of the alternative finding of the Board). This is why I also find it was unreasonable for the RPD to have

declined to consider the Applicant's risk upon return to Eritrea as a failed asylum seeker in Canada, within the context of its "alternate position".

C. *Manifestly unfounded finding*

[27] The Applicant argues that the manifestly unfounded finding has no foundation in the evidence, given the problematic elements of the identity and credibility findings. In light of my findings on the first two issues, there is no need to rule on this third issue.

III. Conclusion

[28] For the reasons explained above, the judicial review is granted.

JUDGMENT in IMM-4911-16

THIS COURT'S JUDGMENT is that

1. This judicial review is granted and the matter is referred back to the Refugee Protection Division for reconsideration by a different officer.
2. No questions for certification were raised.
3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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