Federal Court  Cour fédérale

Date: 20180920

Docket: IMM-5149-17

Citation: 2018 FC 939

Ottawa, Ontario, September 20, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ADEN HASSAN DIRIEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Aden Hassan Dirieh (the "Applicant") is a 46-year-old citizen of Djibouti. He made a refugee claim in Canada due to being tortured for his involvement in opposition groups such as the *Union pour la Démocratie et la Justice* ("UDJ"). However, the Refugee Protection Division of the Immigration and Refugee Board of Canada ("RPD") found that he lacked credibility and dismissed the claim.

[2] On appeal to the Refugee Appeal Division ("RAD"), the Applicant sought to adduce new evidence: a letter from the Secretary General of his political party's local office, which attests to the fact that he had been politically active for six years and had faced pressure from the government. The RAD refused to admit the letter on the basis that the Applicant had failed to provide sufficient evidence as to why it was not available at the RPD hearing and dismissed the appeal.

[3] On November 30, 2017 the Applicant applied for judicial review arguing, among other things, that his evidence was unreasonably rejected. I agree and for the reasons set out below, I am of the view that this application for judicial review must be granted.

II. Facts

A. *The Applicant*

[4] The Applicant is a 46-year-old citizen of Djibouti and a member of the Samaroon ethnic group. Although a former businessman, he is of limited formal education.

[5] The Applicant says that he was a member of Djiboutian opposition political parties and movements, namely the UDJ and the *Union pour la Salute National* ("USN") coalition. During the parliamentary elections in February 2013, the Applicant served as an observer. He says that, after the elections, he was followed by military officers, and that a certain Colonel Abdillahi Djiama ("Colonel Djiama") detained him at a place called "Ficheta" for 18 days. He claims to have been tortured by Djiboutian authorities using an electrical instrument that burned his thighs

and stomach. He was not given medical treatment in detention, but sought it out at a private clinic following his release.

[6] In April 2015, the Applicant was called by a certain "Captain Mokhtar," who asked him why he supported the opposition parties and told him that he should stop. The Applicant responded by saying that it was his right to choose which party he wanted to support.

[7] In March 2016, there were demonstrations taking place in Djibouti in advance of the presidential elections. The Applicant says that he did not participate in those demonstrations. In the middle of the night, officers came to his house and detained him for four months at Gabode prison. During that time, he says that he was beaten, poorly fed, and restricted to a small dark room with a hole for a toilet. The Applicant avers that Lieutenant Mohamed Dherre ("Lieutenant Dherre") was instructed by Captain Mokhtar to force the Applicant to refrain from political activities, and that Lieutenant Dherre went so far as to physically mistreat the Applicant's mother and wife. The Applicant notes that these two military officials were from the Mamasan majority tribe, and alleges that they used their positions of authority to abuse him.

[8] When the Applicant was released, he fled Djibouti in order to seek international protection. He arrived in Canada at the border near Emerson, Manitoba, in early April 2017. He made a claim for refugee protection upon arrival at the port of entry.

B. *Refugee Protection Division*

[9] On June 6, 2017 the Applicant attended a hearing before the RPD via videoconference. By way of a decision dated June 12, 2017, the RPD dismissed the Applicant's claim. The RPD found that the Applicant was not a Convention refugee because he did not demonstrate a well-founded fear of persecution with reliable or trustworthy evidence. The RPD further found that the Applicant's life would not be at risk should he return to Djibouti, and that he would not face a risk of torture or cruel and unusual treatment or punishment upon return.

[10] The RPD found the Applicant to be credible with respect to his identity, education, and his ownership of two businesses. However, the RPD found that he lacked credibility about his political participation and opinion, primarily because he could not correctly answer questions about his political party (the UDJ) or the coalition to which it belongs (the USN), and because he could not describe what the party stood for. The RPD acknowledged that a person may be political without having full knowledge of a political party to which they belong, but suggests that the Applicant appeared to make things up and evade questions.

[11] The RPD also considered the Applicant's documentary evidence, taking issue with the fact that the Applicant's membership card from the UDJ is without security features and bears no stamps to indicate that membership dues had been paid. On this basis, the RPD afforded it "almost no probative value." As for the USN membership card, the card was a photograph from the Applicant's cell phone, and it does not bear the name of the USN President's family name,

"Houmed." The RPD concluded that the card is more than likely to be fraudulent, and thus of no probative value.

[12] The RPD also analyzed a document attesting to the fact that the Applicant had been an election observer in February 2013. The document is, again, handwritten and bears no security features, but also contains the name "Meganeb" which is crossed out and replaced with the Applicant's name. The RPD dismissed the evidence, observing that no original had been produced and that the scratched out name presented a significant reliability concern.

[13] The RPD then assessed the two pieces of medical evidence put forward by the Applicant relating to his alleged torture by the Djiboutian authorities. The first is a *Certificate Medicale* attesting to the injuries he sustained in March 2013 his treatment in April 2013. The RPD noted that the date on the medical certificate had been altered (with different colour ink), and that no original had been provided. Given the modification, the RPD afforded the document no weight and found that it called into question the Applicant's credibility concerning his allegations of torture. The second is a document from a Canadian doctor. The RPD found that this doctor "does extend her findings well beyond what is medically evidentiary" and thus determined that the doctor's conclusions are unreliable. The RPD further found that the Applicant's injuries could have been sustained in any number of ways, and thus did not substantiate the Applicant's allegations.

[14] Finally, the RPD noted that the Applicant was questioned at the port of entry and did not make mention of his arrest or detention at that time, contrary to what is presented in his basis of

claim form and his oral testimony. When this issue was raised with the Applicant, he replied that it might have been a "mistake," which the RPD observed to be the same response that he gave to other inconsistencies in his evidence. The RPD found his explanation to be unpersuasive.

C. *Refugee Appeal Division*

[15] The Applicant appealed to the RAD. By way of a decision dated November 8, 2017, the RAD confirmed the RPD's decision. On appeal, the Applicant sought to introduce new evidence in the form of a letter of support from the UDJ dated July 14, 2017. He also requested to have a hearing to consider that evidence.

[16] The RAD recalls that section 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") sets out the circumstances in which new evidence can be considered, namely that the evidence arose after rejection of the claim or was not reasonably available at the time of rejection. The RAD further recalls the "Raza principles" as modified by the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*], which directs the RAD to consider the credibility, relevance, and newness of the evidence at issue. The RAD then reviews the Applicant's submissions on the new evidence, namely that he had been unable to get a hold of the local Secretary General of the party in order to obtain the letter earlier. The RAD notes that the Applicant does not identify his attempts or the obstacles to obtaining the document, and that he had not raised these efforts during the hearing. As such, the RAD finds that there is insufficient evidence to conclude that the letter was not available prior to the hearing, and thus refuses to enter it into evidence. On that basis, the RAD also refuses the Applicant's request for an oral hearing.

[17] With respect to the credibility of the Applicant's oral testimony, the RAD agrees with the RPD's finding that the Applicant lacked knowledge of the UDJ. Similarly, the RAD confirms the RPD's conclusions with respect to the deficiencies on the USN and UDJ membership cards, as well as the attestation relating to the Applicant's observation role in the parliamentary elections.

[18] With regard to the medical certificate, the RAD notes that the document is not in the record, but that a copy was shown to the RPD during the hearing (on the Applicant's cell phone). The RAD notes that this placed the RPD at an advantage, meaning that the finding would be reviewed on a standard of reasonableness. The RAD finds the RPD's decision to afford the document no weight on the basis of an alteration to the document's date (in a different colour ink) was reasonable. The RAD further determines that, even if the medical certificate were to be given weight, there is nothing in the certificate linking the Applicant's injuries to torture, and the context of the altered date is relevant because there is an inordinate quantity of corrected or altered documents on the record.

[19] In contrast to the RPD, the RAD finds that the Canadian medical report dated June 1, 2017 is credible. The RAD finds that report is neutral, and that it does not attribute the Applicant's scars to torture, but rather an unspecified "remote injury." Nevertheless, recalling that there is no confirmation that the Applicant paid annual membership dues from 2012 onwards, the RAD concludes that there is an insufficient link between the alleged torture and the Applicant's support for the UDJ.

[20] The RAD concludes the decision by considering whether there is a residual claim for protection (aside from political affiliation). The RAD finds that the Applicant consistently linked his arrest, detention and injuries to his political activities, rather than his ethnic orientation or business activities—and that there was insufficient evidence that he was politically active. Determining that this weighs heavily against any claim under section 96, and that the circumstances would not put the Applicant at risk of more than a mere chance of persecution, the RAD dismisses the notion of a residual claim.

III. Issues

[21] In my view, the issues that arise on this application for judicial review are:

- Did the RAD err by failing to admit the new evidence?
- Did the RAD err by failing to convoke an oral hearing?
- Was the RAD decision made without regard to the evidence?

IV. Standard of Review

[22] The Federal Court of Appeal has recently stated that this Court is to review the RAD's interpretation of section 110(4) of the IRPA on a standard of reasonableness (*Singh* at para 29).

V. Analysis

A. *Did the RAD err by refusing to admit the new evidence?*

[23] The Applicant submits that sworn statements made in refugee hearings are presumed to be true (*Maldonado v Canada (Minister of Employment and Immigration)* (1979), [1980] 2 FC 302 at 305 (FCA) [*Maldonado*]). In this case, the Applicant says he provided a sworn statement that he was unable to contact the party's local Secretary General prior to the RPD hearing, so the UDJ membership certificate was properly submitted as new evidence at the RAD hearing. Although the RAD rejected this evidence for not satisfying the "new evidence" requirement of section 110(4) of the IRPA, he says that this was an error because his sworn statement carries the presumption of truthfulness and it remains unrebutted by the RAD.

[24] The Respondent submits that the RAD was not required to admit new evidence. Relying upon the Federal Court of Appeal's decision in *Singh*, the Respondent argues that the conditions for admitting new evidence under section 110(4) are "inescapable." It argues that the RAD did not assess the credibility of the Applicant's statement (i.e. that he did not have access to the document prior to the hearing), but rather was unsatisfied that this statement was sufficient to demonstrate that the new evidence was not reasonably available to him prior to the RPD hearing.

[25] In addition, the Respondent submits that the Applicant has put forth contradictory positions: he cannot argue that his efforts to obtain the letter prior to the RPD hearing were unsuccessful, while simultaneously arguing that he could not anticipate the RPD's credibility findings until after the decision was reached. In other words, it is either he tried to get the

document before the RPD hearing, or he tried to get the document after the hearing in response to the RPD's credibility findings. Both cannot be true.

[26] On the face of the RAD decision, many of the *Raza* principles (such as credibility, relevance, and materiality) do not appear to be in dispute; they are mentioned but not analyzed. Instead, the RAD focuses exclusively on the issue of newness, and specifically the notion that the Applicant did not provide sufficient evidence to prove, on a balance of probabilities, that the letter of support was not available prior to the hearing. The RAD complains that the Applicant did not outline the attempts he made to receive the document, how or why it was not available prior to the RAD hearing, and how or why he was not able to get in touch with the Secretary General of the party earlier.

[27] In my view, it was unreasonable for the RAD to dismiss the new evidence on a purported lack of details about why it could not have been provided earlier: the Applicant (under oath) provided a reason for submitting new evidence (i.e. that he could not get a hold of the party's local Secretary General before). The RAD must confine itself to the legislative requirements set out in section 110(4) and the principles stipulated in *Raza*. It cannot enumerate any number of unanswered questions about the new evidence and use that as a basis for determining that the newness criterion is unmet.

[28] I am also concerned with the RAD's assessment of the purported new evidence. First, the RAD twice refers to the letter from the Secretary General as a "report" or "reports." The document is plainly not a report. The RAD also refers to the Applicant's affidavit as a simple

"written statement." That, in my view, is somewhat of a mischaracterization of that document because it is a sworn statement and thus benefits from the presumption of truth (*Maldonado*). To be sure, an affidavit is a species of written statement, but a decision-maker should demonstrate cognizance of the distinction between a sworn document and one that is unsworn.

[29] I am further guided in my decision by the approach taken by Justice Gascon in *Olowolaiyemo v Canada (Citizenship and Immigration)*, 2015 FC 895 [*Olowolaiyemo*]. In that case, the RAD similarly rejected new evidence on the basis that the Applicant had not provided an explanation about why a document (which post-dated the RPD hearing) was not available prior to the rejection of his claim. Justice Gascon held that the RAD must specifically consider whether the new evidence was "reasonably available" and whether the document arose after the rejection of the claim by the RPD (*Olowolaiyemo* at paras 16-24). As in that case, the Applicant's new evidence in the case at bar postdates the RPD hearing and the Applicant provided sworn evidence about why the document was not previously available. Therefore, in my view, the RAD unreasonably dismissed the Applicant's request to admit new evidence, which constitutes a reviewable error.

[30] Having determined that the decision is unreasonable, I do not need to consider the other issues.

VI. Certification

[31] The Applicant proposed the following question for certification:

> Does Immigration and Refugee Act section 110(6), which sets out the conditions under which the Refugee Appeal Division may hold a hearing, apply to determinations whether documentary evidence is admissible?

[32] A question for certification must be of general importance (*Liyanagamage v Canada (Minister of Citizenship and Immigration)* (1994), 176 NR 4 at para 4 (FCA)), and dispositive of the appeal (*Canada (Minister of Citizenship and Immigration v Zazai)*, 2004 FCA 89 at para 11).

[33] I will not certify the Applicant's question because the question would not be dispositive of an appeal in this case.

VII. Conclusion

[34] This application for judicial review is granted on the grounds that the RAD unreasonably dismissed the Applicant's request to admit new evidence. The RAD's failure to properly apply section 110(4) of the IRPA is a reviewable error which must be corrected through redetermination by a differently constituted panel.

JUDGMENT in IMM-5149-17

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter referred back for redetermination by a differently constituted panel.
2. No question is certified.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5149-17
STYLE OF CAUSE:	ADEN HASSAN DIRIEH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	JULY 23, 2018
JUDGMENT AND REASONS:	AHMED J.
DATED:	SEPTEMBER 20, 2018

APPEARANCES:

David Matas	FOR THE APPLICANT
Alexander Menticoglou	FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Matas Barrister and Solicitor Winnipeg, Manitoba	FOR THE APPLICANT
Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT