Federal Court  Cour fédérale

Date: 20190429

Docket: IMM-4822-17

Citation: 2019 FC 538

Ottawa, Ontario, April 29, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

MEDHANIE TEKLE HAILE,
MERKEB REZENE, NAOD MEDHANIE,
MELAT MEDHANIE

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicants – Mr. Medhanie Tekle Haile, Ms. Merkeb Rezene, and the two minor Applicants – seek judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD], which upheld the decision of the Refugee

Protection Division [RPD] that the Applicants are not Convention refugees or persons in need of protection.

[2] For the reasons set out below, this Application is allowed as the RAD erred in finding the RPD decision was procedurally fair.

[3] The Applicants state that they are citizens of Eritrea. They were arrested and detained in July 2013 for refusing to join the country's ruling party. Mr. Haile says he was held for over a year and subjected to torture. Ms. Rezene states that she was held for two-and-a-half months, during which time she was interrogated, tortured and sexually assaulted.

[4] After Mr. Haile's release, the family fled to Sudan in October 2015. With the help of a smuggler who provided them with fake European passports, Ms. Rezene and her children travelled to Canada and made a claim for refugee protection in January 2016.

[5] Mr. Haile joined the family in Canada in August 2016. He filed a refugee claim on September 9, 2016.

II. **The RPD Decision**

A. *Overview and Background*

[6] The claims of Mr. Haile, Ms. Rezene and their children were joined and heard by the RPD on December 9, 2016 and January 27, 2017.

[7] In support of their claim, the Applicants submitted the following documents to the RPD:

1. Birth certificates for all four family members;
2. A marriage certificate;

3. An Eritrean “Grade III” driver’s licence for Mr. Haile;
4. A Family Residential Card;
5. A zone administration summons dated May 7, 2014;
6. The children’s immunization records;
7. Copies of Eritrean ID cards for their immediate family members;
8. A letter from a former roommate of Mr. Haile, confirming that they had lived together in Khartoum, Sudan, from October 23, 2015, to August 26, 2017; and
9. A letter of support from the Regent Park Community Health Centre in Toronto.

[8] At the RPD hearing, the Applicants were questioned extensively about the documents that they presented to establish their identities and about their travel to Canada.

[9] On January 27, 2017, at the end of the second day of hearing, counsel for the Applicants requested an additional three weeks to contact the Eritrean Consulate [Consulate] in an effort to verify the authenticity of the Applicants’ birth certificates and Mr. Haile’s driver’s licence. The RPD granted counsel a one-week adjournment, until February 3, 2017, to provide submissions on the documents and to address the two Responses to Information Requests [RIRs] in the National Documentation Package [NDP] that refer to the identity documents.

[10] The RPD stated in its decision that it specifically directed counsel not to approach the Consulate for two reasons. Identifying the Applicants to the Consulate may have put them at risk and the documents in question were specifically referred to in the NDP and examples were provided.

[11] Counsel nonetheless contacted the Consulate by email immediately after the hearing and attached copies of the driver’s licence of Mr. Haile and a birth certificate. He inquired as to whether the Consulate could comment on the authenticity of the driver’s licence on which he had

circled two spelling mistakes. He also asked the Consulate whether certain information that appeared at the very bottom of the birth certificate was to be expected if it had been issued from the Public Registration Office.

[12] On February 2, 2017, counsel wrote to the RPD to request additional time for his submissions as he had not yet received a response from the Consulate. Although the response is not in the record, it is common ground between the parties that he was given until "close of business" on February 8 2017.

[13] At 4:13 pm on February 8, counsel sent a fax to the RPD requesting additional time to obtain a response from the Consulate. He included as an attachment the emails he had exchanged with the Consulate which indicated that a response was forthcoming. Counsel also provided a "preliminary response" to the RPD's question regarding the information in the NDP. The RPD received the fax at 4:15 pm.

[14] The RPD refused to consider counsel's faxed submissions on the basis that they were late.

B. *The RPD Decision*

[15] On February 14, 2017, the RPD rejected the Applicants' claim for refugee protection.

[16] The RPD found the determinative issue was the failure of the Applicants to establish their national and personal identity on a balance of probabilities. Documents which had been submitted to corroborate their identities were lacking in credibility and, when questioned about details concerning the said documents, the Applicants had failed to explain the discrepancies reasonably.

[17] The RPD said it had allowed until the close of business February 8, 2017 for any submissions to be made. It indicated that no submissions were received by 4:00 pm; and, in particular, no submissions were made with respect to the documentary evidence in the NDP that was discussed in the hearing.

III. **The Decision under Review**

[18] On October 17, 2017, the RAD dismissed the appeal and confirmed the RPD decision.

[19] On appeal to the RAD, the Applicants submitted that the RPD had breached their right to procedural fairness by refusing to accept the written submissions of February 8, 2017.

[20] The Applicants' also took issue with: (1) the negative credibility findings of the RPD concerning their account of travelling to Canada; (2) the analysis of their identity documents; and (3) the failure to consider that they had testified in Tigrinya.

[21] The RAD reviewed the discussion between the RPD and counsel at the end of the RPD hearing, noted that the February 2, 2017 fax request for an extension of time until February 8, 2017 was granted; that the subsequent fax on February 8th provided some submissions with respect to the birth certificates and driver's license and indicated that counsel was still waiting for a response from the Consulate.

[22] The RAD identified the marriage certificate and the driver's license as two key identity documents with which it had serious concerns. After setting out a lengthy portion of the transcript containing testimony about the wedding and the names of official participants in the marriage, the RAD found that the Applicants' testimony was inconsistent and lacked credibility. It gave no weight to the marriage certificate.

[23] The RAD agreed with the RPD that the explanation and testimony about Mr. Haile's driver's license was inconsistent with the documentary evidence. It suggested that he may never have had a driver's licence.

[24] Ultimately, the RAD determined it had serious concerns with the marriage certificate and the driver's licence; and given the prevalence of fraudulent documents of Eritreans fleeing the country, there was insufficient trustworthy evidence to support their identities.

[25] The Applicants had submitted new evidence to the RAD in the form of an affidavit sworn by counsel who had appeared at the RPD hearing. Counsel attested to his understanding that the business hours of the RPD ran until at least 4:30 pm. He attached as an exhibit the written submissions provided to the RPD on February 8, 2017 together with a fax transmission sheet showing the time the fax was sent.

[26] Also attached to the affidavit was counsel's February 8, 2017 follow-up email request seeking an update as to when he would receive an answer about the documents. That email contained the February 6, 2017 email from the Consulate that no answer had yet been received but they would be in touch as soon as the information became available.

[27] The RAD accepted the affidavit as new evidence but ultimately found that the RPD had not breached its duty of procedural fairness when it refused to accept post-hearing submissions from the Applicants' counsel.

[28] The RAD also confirmed the finding of the RPD that the Applicants had failed to establish their identities as citizens of Eritrea, and generally lacked credibility.

IV. **Issues**

[29] Two issues arose in this Application:

1. Whether the RAD erred when it found that the RPD's refusal to accept post-hearing submissions did not amount to a breach of procedural fairness.
2. Whether the RAD's credibility analysis of the identity documents was reasonable.

V. **The Standard of Review**

[30] The parties agree that the RAD's decision with respect to the post-hearing submissions of the Applicants involves the application of principles of procedural fairness and natural justice: *Cox v Canada (Citizenship and Immigration)*, 2012 FC 1220 at para 18. I agree.

[31] Mr. Justice Rennie recently reviewed and confirmed the core principles of procedural fairness in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*]. He concluded that whether there has been procedural fairness does not require a standard of review analysis but "a court must be satisfied that the right to procedural fairness has been met." In that respect, the ultimate question is whether the Applicants knew the case to be met and had a full and fair chance to respond: *CPR* at paras 49-50, 56.

[32] Procedural fairness review involves asking whether a fair and just process was followed having regard to all the circumstances, including the nature of the substantive rights involved and the consequences for an individual: *CPR* at 53 - 54; *Mission Institution v Khela*, 2014 SCC 24 at para 79.

[33] No deference is to be shown to the decision maker's reasoning process when applying the correctness standard. The reviewing court undertakes its own analysis: *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 50.

VI. **Did the RAD err in Finding the RPD Decision was Procedurally Fair?**

A. *Arguments of the Parties*

[34] The Applicants submit that the RAD erred when it found that the RPD did not breach procedural fairness. They note that tendering post-hearing submissions in refugee claims is important as their section7 *Charter* rights (*The Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11) are involved. The Applicants say the result is that the duty of fairness owed to them by the RPD and the RAD is at the high end of the scale: *Kozak v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 at para 53.

[35] The Applicants note that their request at the end of the RPD hearing to provide post-hearing submissions was made as a direct response to comments made during the hearing by the RPD concerning the identities of the Applicants. The Applicants submit that it was procedurally unfair when their post-hearing submissions which addressed the determinative issue as found by the RPD - the identity documents - were rejected out of hand and not even considered. They allege that when the RAD upheld the incorrect finding of the RPD, it was equally in error.

[36] To support their argument, the Applicants rely on a number of cases of both this Court and the Federal Court of Appeal.

[37] One that is particularly on point is *Caceres v Canada (Minister of Citizenship and Immigration)*, 2004 FC 843 [*Caceres*] in which Mr. Justice Rouleau considered whether it was procedurally unfair for a panel of the RPD to fail to consider, and to ignore, written submissions filed on the due date but after a 5:00 pm deadline set by the Board. In allowing the judicial review application, Mr. Justice Rouleau said at paragraph 23:

> . . . To disregard the written submissions on the sole basis of the delay of their delivery is absurd. It would amount to the setting aside of a cardinal principle of natural justice, that of *audi alteram partem*, based on a mere technicality. Such flagrant breach of natural justice is in itself sufficient to warrant this Court's intervention.

[38] In addition to *Caceres*, jurisprudence was put forward by the Applicants confirming that there is a duty on the RPD to receive evidence submitted by the parties at any time after the hearing but before the decision is rendered. The basis for finding such duty is that until that time the RPD is not *functus officio*. See for example *Avci v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 359 at paragraph 5 and *Nagulesan v Canada (Minister of Citizenship and Immigration)* 2004 FC 1382 at paragraph 17 [*Nagulesan*].

[39] Under the present *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*] the written decision of a single member panel takes effect (i.e. is rendered) when it is signed and dated. In this case, the RPD signed and dated the decision on February 14, 2017 which was six days after the post-hearing submissions were faxed to the RPD.

[40] To support their position that there was no error committed because a deadline was set by the RPD and missed by the Applicants, the Respondent relies on *Ahanin v Canada (Citizenship and Immigration)*, 2012 FC 180 at paragraph 80 [*Ahanin*]. There, Mr. Justice Russell said that "[a]n applicant has the right to make submissions until a decision is made, but where a reasonable deadline is set for post-hearing submissions an applicant cannot, in my view, disregard the deadline for no apparent reason and then make submissions at the time and in a way that suits his or her own convenience."

[41] In reply to the Respondent's positon, the Applicants rely on an earlier discussion in *Ahanin,* at paragraph 73, where Mr. Justice Russell identified the "lacuna in the rules" and noted that the RPD had a well-established practice of accepting post-hearing submissions. He went on to mention paragraph 22 of Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, saying that "procedural fairness includes an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker" and stated that the principle must extend to materials submitted in the course of a refugee hearing, including counsel's submissions.

[42] The Respondent properly pointed out that in *Ahanin*, Mr. Justice Russell identified that there is a lacuna in the *RPD Rules*. Former Rule 37, now Rule 43 of the *RPD Rules*, addresses how to submit a document as evidence after the hearing; no rule says submissions can or cannot be made after the hearing: *Ahanin*, at para 73.

[43] The Respondent also submitted that if there is no specific rule covering the situation, then the Court should look at whether there was a full and fair hearing.

[44] I agree. As there is no specific rule in the *RPD Rules* that applies to post-hearing submissions the common law principles of procedural fairness govern this situation.

B. *Analysis*

[45] The somewhat peculiar issue in this case is that each of the RPD and counsel for the Applicants failed at the hearing and at any time thereafter prior to the decision by the RPD, to clarify what the term "close of business" meant.

[46] As a result, it falls to the Court to determine whether the refusal by the RPD, as upheld by the RAD, to consider the submissions of the Applicants made shortly after 4:13 pm on February 8, 2017 was procedurally fair given the deadline for submissions set by the RPD was 4:00 pm.

[47] The question for the RAD was whether the RPD acted fairly in coming to the decision to deny refugee protection to the Applicants.

[48] The question before this court is whether the RAD determined correctly that the RPD acted fairly. If the RPD provided the Applicants with a fair and full opportunity to be heard, then the RAD's decision is correct. If the RPD did not provide such a full and fair opportunity, then the RAD's decision is incorrect.

[49] In undertaking such analysis I am cognizant of this statement by the Supreme Court of Canada at paragraph 79 of *Dunsmuir*, internal citations omitted:

> Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case."

[50] The Respondent has urged me to apply paragraph 80 of *Ahanin* that where a reasonable deadline has been set for post-hearing submissions an applicant cannot disregard the deadline for no apparent reason.

[51] I decline to do so. Having thoroughly reviewed the facts and reasons in *Ahanin*, I am satisfied that it is distinguishable from the case at bar given significant differences in the underlying facts.

[52] Mr. Justice Russell found in *Ahanin* that the actions of counsel for the applicant were unacceptable. He observed that "the RPD followed a prudent and courteous approach to this matter and the Applicant did not" and "the RPD did everything it could to accommodate the Applicant but he alleges procedural unfairness in the face of his own lack of diligence, prudence and courtesy": *Ahanin,* at paras 59 and 64.

[53] The most important and critical distinction though is that in *Ahanin* the submitted materials did not reach the RPD before it made the decision. In the case at bar, the RPD received the submissions six days before it made the decision.

[54] The Applicants urge me to apply Mr. Justice Rouleau's decision in *Caceres*. I will do so as I find it is squarely on all fours with this case.

[55] In *Caceres,* the Board was to receive submissions by 5:00 pm on April 17, 2003. Mr. Justice Rouleau found at paragraph 16 that "the Board did receive them during the evening of the 17th but failed to consider them and even chose to ignore them in its reasons." Mr. Justice Rouleau found that the Board, having authorized counsel to file the written submissions, should at least have considered them "even though they were somewhat tardy": *Caceres*, at para 20.

[56] By ignoring the written submissions of the applicant, Mr. Justice Rouleau concluded that the Board had violated the principles of natural justice going so far as to say that it was absurd to disregard written submissions on the sole basis of the delay of their delivery: *Caceres*, at para 23.

[57] I see no significant difference between the facts of this case and the facts in Caceres.

[58] Both cases involve common law principles of procedural fairness. The applicants in each case were seeking refugee protection. The decision maker that committed the breach of procedural fairness in each case was the RPD, albeit 14 years apart in time.

[59] In each case, the breach was also the same. The Board gave permission for written submissions at a particular time: 5:00 pm in *Caceres* and 4:00 pm in the case at bar. The submissions were received by the Board after the stated deadline. It is not clear in *Caceres* what time the submissions were sent to the Board other than the comment that while they were to be filed by 5:00 pm the Board received them "during the evening": *Caceres*, at para 16. From that comment, it would appear that the time of delivery of the faxed submissions in *Caceres* was more than 15 minutes late.

[60] As found in *Caceres,* I find it is procedurally unfair in this case to set aside the principle of *audi alteram partem* on the basis of a short delay in the delivery of the written submissions. Considering the consequences to persons seeking refuge protection, such a rigid approach is not fair.

[61] The RAD's decision was based on essentially the same evidence as was before the RPD, including the time at which the fax was sent. In confirming that the RPD was not in breach of procedural fairness, the RAD applied and upheld the RPD deadline of 4:00 pm.

[62] I have determined that the hearing before the RPD was procedurally unfair. It follows that I find the RAD was not correct in determining that the RPD hearing was procedurally fair. Given this finding, it is not necessary to consider the RAD's credibility analysis.

C. *Conclusion*

[63] On review of the underlying record and considering the jurisprudence, together with the facts, I am satisfied that the failure of the RPD to consider the submissions of the Applicants, which were received prior to it being *functus,* constituted a breach of procedural fairness.

[64] I have found there was a breach of procedural fairness by the RPD and I also find that the RAD erred in finding there was no such breach by the RPD.

[65] That is not quite the end of it however. I must now consider whether the breach should be overlooked.

VII. **The Breach of Procedural Fairness Cannot be Overlooked**

[66] A breach of procedural fairness can only be overlooked if there is no doubt that it had no material effect on the decision: *Iqbal v Canada (Minister of Citizenship & Immigration),* 2005 FC 1388 at para 18 [*Iqbal*]; *Nagulesan,* at para 17.

[67] The determinative issue, as stated by the RPD, was a failure by the Applicants to establish their national and personal identities on a balance of probabilities. The RPD found the marriage certificate, driver's licence and birth certificates presented by the Applicants all lacked credibility, as too did various other documents they presented.

[68] The RAD identified the two key identity documents to be the marriage certificate and the driver's licence.

[69] The rejected submissions responded directly to the two specific RIR's upon which the RPD had requested submissions and upon which it had relied in its decision. Counsel provided a

brief analysis of the relevant portion of each RIR. With respect to the driver's licence, counsel pointed out that there was a contradiction in the RIR between two opinions, one of which was consistent with the position put forward by Mr. Haile. Regarding the birth certificates, counsel identified that the RIR disclosed an inconsistency in the Eritrean birth certificate templates that he suggested meant it was entirely plausible that the birth certificates were authentic.

[70] It is not necessary to determine whether those submissions would have resulted in a different outcome for the Applicants. That is not the test set out in *Iqbal* and *Nagulesan*.

[71] I have reviewed the two RIRs and the submissions. I am not able to say that there is no doubt that failing to consider the submissions had no material effect on the decision. Therefore, the breach of procedural fairness cannot be overlooked.

[72] The result of the foregoing is that the decision of the RAD is set aside as it is not correct. The matter will be returned for reconsideration by a different panel in accordance with these reasons.

VIII. **What it Means to be an Officer of the Court**

[73] I wish to comment upon a particular statement made by the RAD. Hopefully it was made unintentionally and without malice. For that reason, and in the event that my comments may be helpful if a similar situation arises in future before an administrative tribunal, I offer the following observations.

[74] Addressing the new affidavit evidence, the RAD noted that "there is no published time as to the Board's business hours" and "it has been accepted practice that 4:00 PM, the time the front desk at the Board closes, is the end of the business day." The RAD stated that experienced

lawyers, such as Applicants' counsel, who had appeared before the RPD for many years, are aware of this practice.

[75] That finding by the RAD conflicted with the sworn affidavit evidence it had received from counsel which stated:

> The precise time of the close of business was never specified by the Member. My understanding is that business hours at the Board run until at least 4:30 p.m. my written submission was faxed to the board at 4:13 p.m. on February 8, 2017. (. . .) for a duration of 1 minute and 36 seconds.

[76] The RAD did not accept counsel's evidence largely as result of its view of an email sent by counsel to the Consulate.

[77] Unfortunately, in the course of explaining why it did not accept counsel's affidavit evidence the RAD said:

> Clearly, [counsel] was well aware of this practice and to indicate in his declaration that his "understanding is that business hours at the Board run at least 4:30 PM" [sic] is disingenuous.

[78] To call counsel's sworn statement "disingenuous" is a very serious allegation. The Oxford English Dictionary defines disingenuous as "lacking in candour or frankness, insincere, morally fraudulent." Synonyms for disingenuous include "dishonest", "insincere", "untruthful", "deceitful", "hypocritical", "misleading", "duplicitous" and "devious."

[79] The label "disingenuous" is particularly egregious when it is used to describe counsel as they are an officer of the court.

[80] As an officer of the court, all counsel are under a number of ethical obligations which are essential for the effective operation of the judicial system and the administration of justice. Chief

amongst those is the requirement that counsel act with integrity and honesty. Counsel is not to mislead the court or a tribunal.

[81] As an officer of the court, counsel would be aware that they owe the same obligation of honesty to the RAD or the RPD as they do to this Court.

[82] In Ontario, Rule 5.1-2(e) of the *Rules of Professional Conduct* of the Law Society of Ontario is very clear as to a lawyer's duty to a court or tribunal:

> 5.1-2 When acting as an advocate, a lawyer shall not
>
> . . .
>
> (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,

[83] Any counsel who failed to honour their ethical obligations as an officer of the court or breached the *Rules of Professional Conduct* would chance a disciplinary offence and, quite possibly, career suicide. It would not be done cavalierly.

[84] Lawyers cherish their personal credibility. That judges and other decision makers can rely upon that credibility is essential to the administration of justice. It is important that decision makers, including judges, not accidentally tarnish the reputation of counsel by using an unfortunate choice of words.

JUDGMENT in IMM-4822-17

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the decision of the RAD is set aside to be re-determined by a different panel in accordance with these reasons.
2. There is no question for certification on these facts.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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