Federal Court  Cour fédérale

Date: 20190806

Docket: IMM-567-19

Citation: 2019 FC 1016

Ottawa, Ontario, August 6, 2019

PRESENT: Mr. Justice Annis

BETWEEN:

HANA ENDESHAW WONDIMU
HADAS TSEHAYE GIRMAY
TEOBISTA AYELE WODAJO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This application for judicial review, filed pursuant to section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, seeks to set aside a decision dated January 4, 2019 [the Decision] of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, that

upheld a decision of the Refugee Protection Division [RPD] dated September 27, 2017 denying the Applicants' claim for refugee protection.

[2] For the reasons that follow, the application is dismissed.

II. Facts

[3] Hana Endeshaw Wondimu [the "Principal Applicant"], Hadas Tsehaye Girmay [the "Second Applicant"], and Teobista Ayele Wodajo [the "Minor Applicant"] are citizens of Nigeria, who allege that they are citizens of Ethiopia.

[4] The Principal Applicant was an employee of Ethiopian Airlines from December 2010 until her departure to Canada working as a flight crew attendant. Her husband is also employed by Ethiopian Airlines as a driver.

[5] In 2014 and 2015, the immediate superior of the Principal Applicant raised the matter of the Principal Applicant joining the Tigray People's Liberation Front [TPLF] party to inform on her work colleagues, which she declined.

[6] In June 2016, the Principal Applicant applied for a tourist visa to visit Canada, which was approved on December 20, 2016.

[7] In January 2017, the Principal Applicant disclosed the ethnicity of her parents in a work form that she was required to complete, noting that her mother is ethnically Tigray. A work

meeting, with a government representative also in attendance, was held for the ethnically Tigray staff on February 14, 2017.

[8] A further meeting followed on March 22, 2017 with Emergency Command Post personnel in attendance where she was again asked to join the TPLF and to report suspicious activity on the part of crew. Similar meetings followed on April 8, 2017, but allegedly of more threatening tone, that included an ultimatum that she provides her decision to cooperate within 15 days.

[9] On April 25, 2017 her husband provided a declaration signed to his wife to carry out any legal processes on his behalf for their daughter in any government offices in Canada and the United States.

[10] On April 26, 2017 the Principal Applicant renewed her Canadian tourist visa, which included the Second Applicant.

[11] On April 28, 2017 security officers belonging to the Emergency Command Post allegedly apprehended her at the condo apartment where she lived with her husband and detained her in a location where she was allegedly insulted, touched sexually, abused and threatened, including threats that her mother would similarly be detained.

[12] On April 30, 2017 the Principal Applicant was released because she agreed to cooperate.

[13] Because she was sick from the treatment allegedly suffered while she was detained, her employer placed her on sick leave until May 20, 2017. However, on May 15, 2017 the three Applicants left Ethiopia and entered Canada the next day on their tourist visa, eventually claiming refugee status on June 22, 2017.

[14] The Court notes that no aspect of the foregoing narrative has been corroborated with documentary or objective evidence, apart from a mostly illegible medical form dated May 1, 2017 appearing to indicate that the Principal Applicant had suffered some form of trauma and was to take time off work.

III. Issues

[15] This application for judicial review raises the following issues:

1. Did the RAD err in excusing a procedural failure of the RPD in concluding that any alleged prejudice would have been eliminated by the Applicants filing further evidence on appeal?

2. Did the RAD err in confirming the RPD's finding that the Principal Applicant was not credible?

3. Did the RAD err in ignoring evidence alleged to contradict its decision?

IV. Standard of review

[16] Issues 1 and 3 are process-finding facts. They are reviewed on a standard of correctness (*Kallab v Canada (Citizenship and Immigration)*, 2019 FC 706 at para 32 [*Kallab*]; *Judicial Review of Administrative Action in Canada*, D. J. M. Brown & The Honourable J. M. Evans, 14:3520).

[17] The second issue regarding the review of credibility findings is an assessment finding of fact. They are subject to the reasonableness standard of review, but accorded the highest deference. The Court is not entitled to reweigh the evidence. The factual findings can be set aside only when the error is in the clearest of cases. A factual finding based upon the assessment of evidence is sufficient if there is some evidence to support it. This standard similarly applies to the inference drawing step of an inferential finding of fact, which must not entail a reasonability analysis (see *Njeri v Canada (Citizenship and Immigration)*, 2009 FC 291 para 11; *Kallab* at paras 40-41; *Jean Pierre v Canada (Immigration and Refugee Board)*, 2018 FCA 97 at paras 51-53; *Housen v Nikolaisen*, 2002 SCC 33).

[18] Credibility conclusions are most often based on the accumulation of a number of findings. Accordingly, the factual finding errors must not only be plain to see, but also of an overriding nature in order to set aside a general credibility finding.

V. Analysis

A. *Procedural error*

[19] The Applicants' principal submission is that the RAD erred in overriding a procedural error it attributed to a factual finding of the RPD, on the basis that it could have been mitigated by the Applicants having addressed the issue by filing new evidence and additional submissions in the appeal to the RAD.

[20] The RPD's alleged error was said to be in drawing an adverse inferential credibility finding from an inconsistency in the Principal Applicant's testimony, without providing her with an opportunity to respond.

[21] The Principal Applicant testified that she was told by her husband that Ethiopian security authorities had approached him and stated that they did not believe him when he said that she had gone to Canada. The RPD concluded that it was improbable that security forces would come to that conclusion because information on her trip would be available to them. The Principal Applicant submits that she should have been given an opportunity to respond to this improbability finding.

[22] The Court rejects this submission for two reasons. First, I respectfully disagree with the conclusion of the RAD that the RPD member erred by failing to raise his concerns with the Principal Applicant about her statement and providing her with an opportunity to respond.

[23] In advancing this submission, the Applicants rely upon the Court's decision in *Buwu v Canada (Citizenship and Immigration)*, 2013 FC 850 [*Buwu*]. There, the RPD had found the applicant not to be credible for not knowing the names of students about whom she provided

testimony. The Court stated that "the failure to answer a question that was never asked is not a rational ground for finding an applicant not credible", which obviously is a correct principle.

[24] However, in *Buwu*, the evidence as described with respect to knowledge of the students, could not support an inferred conclusion that the applicant should have known their names. This evidence is found at paragraph 17 as follows:

> [17] The Applicant points out that other international students were peripheral to her claim, and that she never claimed to have spent any time with them. The Applicant elaborated on this issue in her oral testimony as follows:
>
> > Applicant: And there were some students at the school who were foreign I remember who came just a bit after I came. They were gay and it showed, it was really evident in the way they dressed, the way they spoke, and they were often rejected and they had verbal comments from students. They did not even stay long at the university, and from that point I started to feel really unwelcome …

[25] Accordingly, there was no foundational evidence upon which an improbability inference could be drawn that the applicant ought to have known the students' names. The RPD's error was that the inference was purely speculative having no foundation in its underlying facts. Moreover, it is not clear how the applicant could have added to what was already on the record: she only had a fleeting contact with the students that did not provide an opportunity to learn their names. The RPD's error in *Buwu* is with the drawing of the inference unsupported by foundational evidence, not any failure to provide an opportunity to ask questions.

[26] With respect to the rule requiring witnesses to be informed of inconsistencies in their testimony during the hearing and provided an opportunity to respond, in my view this depends upon the context. If a situation arises where the RPD member recognizes after the hearing that there may be some scope for the claimant to explain an inconsistent response, either a direction to the claimant should be issued requesting a response be provided, or the factual conclusion should be abandoned. However, in some instances, it can reasonably be assumed that there is no reply that could affect the improbability finding. Reformulating somewhat the statement in *Buwu*, the rule might be that there is no need to seek a response to an inconsistent answer to a question if no exculpatory explanation appears probable. The RPD's improbability conclusion is an example where no exculpatory response appears probable.

[27] The Principal Applicant's statement found to be improbable is that her husband told the security officers that she had gone to Canada and that they did not believe him. There is nothing more to add to her testimony as a statement of fact that the RPD member found to be inferentially improbable.

[28] The foundational facts supporting the RPD member's improbability inference are twofold. First, it is well-known that airlines maintain manifests of all passengers who fly on their airplanes, along with their travel itinerary. Second, it is also recognized that government security forces can access this information for any number of reasons. The Principal Applicant has no information to add or detract from that already available to the RPD member that forms the basis of his improbability finding. Accordingly, there is no plain error in concluding that it was improbable that security forces would indicate a lack of truthfulness concerning the statement of

the husband. They would simply access the information available from the airlines to determine whether it was correct or not.

[29] Furthermore, I am also in agreement with the RAD that in any event, any response that might have been made to the inconsistency finding should have been brought forward with new evidence introduced before the RAD. Even without an appeal process, it is incumbent on the party alleging procedural unfairness to furnish evidence of prejudice from the error where the complaint is about not being able to provide a response to an adverse finding.

[30] More to the point, in situations of procedural unfairness, the RAD's process provides scope to repair problems with the RPD decision. This is precisely one of the reasons that an appeal procedure was added to the refugee determination process which allowed the Applicants to provide new evidence and to advance additional submissions. The fact that the Applicants did not have recourse to filing additional evidence is because there was none that could have undermined the improbability finding based upon the well-recognized foundational facts involving airline practices.

B. *Alleged unreasonable negative credibility findings*

[31] As noted above, it is not sufficient to demonstrate an error in a factual finding that is plain to see involving credibility findings. The error must be such that it overrides the credibility finding which may be composed of other negative findings. I raise this point only because an example of non-overriding factual error is described in the reasons of the RAD in this matter. At paragraph 31, the panel member indicates that even if the issue of the "address inconsistency"

referred to below was resolved, the other negative credibility findings would still create an overall finding that the Principal Applicant was not credible. I agree with this conclusion.

(1) Inconsistencies relating to the residential address of the Principal Applicant

[32] The RAD relied upon the findings of the RPD with respect to the numerous inconsistencies surrounding the Principal Applicant's testimony of where she was residing when apprehended. While it did not start off as a key issue, the inconsistencies mounted to the point whereby the Principal Applicant left an impression that she was not credible. She first testified that she lived at the address on her identity card for 14 years, being that also of her mother. It was only when asked whether she resided with anyone else during that period that she changed her account providing another address of the condominium located near her parents' address, where she said she lived with her husband and child.

[33] The Principal Applicant explained that she had been unable to obtain an identity document for the condominium address and therefore continued to use it. She indicated as well that it was a rental accommodation and could not be changed for at least two years, but in this case, she acknowledged having lived there for 3 ½ years. She further explained that her employer, Ethiopian Airlines and the security forces, were not aware that she did not reside at the address on her identity card, which equally seemed improbable to the RPD member. When asked how they knew where she lived in order for the security officers to apprehend her, she indicated that during her detention she was advised that she had been followed – a somewhat conveniently improbable answer. The series of incorrect and improbable answers do not inspire confidence in the testimony of the Principal Applicant. The RAD indicated that it shared the RPD's concerns

about this inconsistency. I find that its conclusions in this regard cannot be set aside as an error of fact assessment made in the clearest of cases, or otherwise unreasonable in the circumstances.

(2) The lenient discipline applied to the husband for his complicity in his spouse's departure

[34] The RAD noted that the RPD also found that the Principal Applicant was not credible based on her response explaining why her husband had only been disciplined by his involvement in her departure with a verbal warning. The RAD concluded that this was a more serious credibility issue than concerns about the confusion of where she was arrested.

[35] The RAD found that the husband's discipline was particularly lenient given that he was ethnically Oromo, whose members are suspected of being in opposition to the TPLF. Her answer that there was no proof of him having committed a wrongdoing does not stand to reason, inasmuch as he was complicit in assisting an alleged traitor who would have been detained and abused from leaving the country. The security forces had also threatened her mother if she did not comply with their demands to cooperate. There is no reason why similar action would not have been taken against her husband, whose involvement included consenting to the Principal Applicant leaving Ethiopia with the child two days before she was detained. A verbal warning is a lenient form of discipline given the seriousness of the issue to be judged by the Principal Applicant's treatment by security officials. Moreover, disciplinary measures are normally recorded such that written corroboration of the discipline should have been provided, or an explanation why it was not available: see Rule 11, *Refugee Protection Division Rules* (SOR/2012-256).

[36] The improbability of the husband's treatment being proportionally so mild in comparison with the severity of that meted out to his spouse, including threats to other family members, cannot be said to be clearly speculative. Indeed the evidence smacks of improbability.

C. *Other Submissions of the Applicants*

[37] I conclude that other submissions of the Applicants not central to the hearing do not present any ground for finding the RAD's decision to be unreasonable. The issue with respect to the inadmissibility of the new evidence is not seriously challenged. The documents could reasonably have been expected to be presented ahead of the RPD's decision or provided in a post-hearing disclosure. Otherwise, they do not postdate the RPD's rejection in terms of their content.

[38] With respect to the alleged corroborative evidence some of which was not referred to by the RPD and the RAD, the Board is presumed to have considered it. Moreover, none of the documents supplement the Applicants submissions to any significant extent (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62).

[39] The letters from the Principal Applicant's father, her husband and an unidentified person purporting to corroborate the Principal Applicant's detention and release and that she continued to be a person of interest to the authorities have little probative value that would affect the adverse credibility findings of the RPD and RAD. They are unsworn, out-of-court statements of family members who are presumed to be biased in favour of the Principal and Second

Applicants, in addition to their potential self-interest as sponsored family members for eventual resettlement in Canada. Similarly, the unsworn five-line statement of the unidentified individual who “knows the family for over 10 years” is of minimal probative value. It supposedly confirms the Principal Applicant’s detention without indicating how the information was obtained or other details provided. It also blatantly advocates on behalf of the Principal Applicant by stating that “I humbly ask the Canadian government to give her asylum”.

[40] The doctors’ form-note of May 1, 2017, most of which as indicated is undecipherable, cannot be said to corroborate injuries sustained in the alleged detainment. Traumatic, being the only perceptible diagnosis if relating to stress, is a self-reported form of mental condition contingent upon the reliability of the information provided, in this case from the Principal Applicant. Similarly, no weight can be attributed to the purported summons dated some month and a half after the Applicants’ departure. It inconsistently describes a failure by the Principal Applicant to refrain from unknown activities, while bearing the incorrect address where the she resided. The letter terminating the Principal Applicant’s employment at Ethiopian Airlines, confirms only that she moved to Canada, which is not in dispute,

VI. Conclusion

[41] For the foregoing reasons, the application is dismissed. No question is certified for appeal.

JUDGMENT in IMM-567-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no questions are certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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