

Federal Court



Cour fédérale

Date: 20220606

**Docket: IMM-5885-20
IMM-6419-20**

Citation: 2022 FC 835

Ottawa, Ontario, June 6, 2022

PRESENT: Madam Justice McDonald

Docket: IMM-5885-20

BETWEEN:

ABEL YITBAREK ADGO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Docket: IMM-6419-20

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JUDGMENT AND REASONS

[1] This hearing involves judicial review applications of two decisions of the Refugee Appeal Division (RAD). The first (IMM-5885-20) concerns a decision of the RAD concluding that the Applicant was not a Convention refugee nor person in need of protection. The second (IMM-6419-20) is a decision of the RAD refusing the Applicant's request to reopen his case.

[2] The Applicant argues the RAD erred in its assessment of his risk in relation to his political activities in Canada (*sur place* claim), and erred in assessing credibility. With respect to the RAD's decision to refuse to reopen the case, the Applicant argues this constitutes a breach of procedural fairness.

[3] For the reasons that follow, both judicial review applications are dismissed as the RAD decisions are reasonable and there has not been a breach of the Applicant's right to a fair process.

I. Background and Refugee Protection Division (RPD) Decision

[4] The Applicant is a citizen of Ethiopia, belonging to the Amhara ethnic group. He states that in 2016, while he was in university, he participated in a student protest. He claims that police took him and other protestors to a military camp where he was beaten. Following this incident, his parents sent him to study in China.

[5] In 2018, the Applicant came to Canada on a study permit. He subsequently claimed refugee protection on the basis of fear of persecution in Ethiopia as a result of his ethnicity and political opinion.

[6] The RPD denied his refugee claim – the determinative issue was credibility. The RPD drew a negative inference as the Applicant had returned to Ethiopia in September 2018 and again in November 2018. The RPD rejected his explanations for returning to Ethiopia and determined that his return trips were not consistent with someone who feared for his life. The RPD also noted that the return trips to Ethiopia were not referenced in his Basis of Claim (BOC) form.

[7] The RPD also found a number of discrepancies between the Applicant's testimony and the information in his BOC, including: where he was when he learned that his parents' business was destroyed; when he applied for a visa; and details of the attack by police in 2016.

[8] Finally, the RPD noted a lack of evidence on a number of issues, including that there were no photos of the Applicant's house or his parents' business that was burned down, no medical evidence of the attack in 2016, and no media articles about these events.

[9] With respect to the *sur place* claim, the RPD noted the Applicant did not allege, and did not provide any evidence, to indicate his political activities in Canada had come to the attention of authorities in Ethiopia. Further, he testified that he was not wanted by Ethiopian authorities. The RPD concluded that the Applicant attended some political demonstrations and gatherings in

Canada for the purpose of bolstering his refugee claim, and not because he was a genuine political opponent of the current regime.

II. RAD Decision of October 19, 2020

[10] The RAD upheld the RPD finding that the Applicant's anti-government political beliefs were not genuine. The RAD also noted there was no evidence that his Ethiopian anti-government activities had continued since the rejection of his claim by the RPD.

[11] The RAD considered if the Applicant's political activities in Canada were likely to come to the attention of Ethiopian authorities, noting the documentary evidence stating that "low-profile and less vocal anti-government agitators" can be monitored. The RAD characterized the Applicant's involvement at events in Canada as "passive attendance or at best, volunteering", and held that this would not "raise his profile to a level of being someone who could be characterized even as a 'low-profile and less vocal anti-government agitator' as cited in the documentary evidence".

[12] The RAD also held the RPD did not err in assessing the Applicant's credibility. Contrary to the RPD, the RAD accepted the Applicant's explanation as to when he applied for a visa, and drew no negative inference on that issue. However, the RAD agreed with the RPD's other credibility findings and overall credibility assessment.

III. RAD Refusal to Reopen

[13] On October 19, 2020 at 4:56 p.m. – being the same date as the RAD decision outlined above – the Applicant submitted additional evidence to the RAD. However, because of the timing, the evidence was not considered by the RAD in the decision issued on the same date. The Applicant argued the failure of the RAD to consider the additional evidence constitutes a breach of natural justice, and therefore he requested that the RAD reopen his appeal.

[14] In response to the request to reopen his appeal, the RAD noted the Applicant had perfected his appeal in December 2019, and noted that there had not been any request from the RAD for new evidence, nor was there any indication from the Applicant that he would be providing new information.

[15] According to the RAD, the new evidence submitted by the Applicant on October 19, 2020 consisted of social media activity, information on participation in rallies, and updated information on the Ethiopian government, all of which was dated between January 2020 and July 2020.

[16] The RAD determined that “[t]he RAD member adjudicating the appeal would not have known about the incoming supplemental evidence application when rendering its decision on October 19, 2020, as the new evidence came at the end of the work day. The RAD member could have been *functus* at any point in the day of October 19, 2020”.

[17] The RAD found that there was no breach of natural justice and denied the request to reopen the appeal.

IV. Issues

[18] The following are the issues for determination:

- A. Did the RAD err in refusing to reopen the appeal?
- B. Did the RAD err in assessing the Applicant's *Sur Place* Claim and Credibility?

V. Standard of Review

[19] This Court has held that the reasonableness standard applies to a RAD's decision on reopening an appeal (*Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 at para 21; *Gedi v Canada (Citizenship and Immigration)*, 2022 FC 318 at para 15).

[20] The RAD decision on the merits of the Applicant's refugee claim appeal is also considered on the reasonableness standard. In reviewing a decision on a reasonableness standard, the Court asks "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99).

VI. Analysis

A. *Did the RAD Err in Refusing to Reopen the Appeal?*

[21] The Applicant argues the RAD erred by relying on the doctrine of *functus officio* in refusing to reopen his appeal as the decision should not be considered final until it is communicated to the Applicant. The Applicant states that although the decision is dated October 19, he did not receive the decision until October 30, 2020.

[22] In considering the Applicant's request to reopen his appeal, the RAD refers to Rule 49 of the *Refugee Appeal Division Rules*, SOR/2012-257, which outlines the circumstances under which an appeal can be reopened. Rule 49(6) provides that: "The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice".

[23] The RAD properly recognized that an appeal can be reopened in certain circumstances. The RAD referred to Rule 49(6) and applied the mandatory considerations outlined in the Rule. In doing so, the RAD considered the nature of the evidence tendered by the Applicant as well as the dates of the documents.

[24] The RAD determined that the dates of the new evidence submitted by the Applicant were between January 2020 to July 2020, which predated the RAD's decision. Therefore, presumably these documents could have been provided to the RAD in advance of its decision of October 2020. However, the Applicant provided no explanation as to why the documents were not

submitted before October 2020. In the absence of such an explanation, it was reasonable for the RAD to conclude that not considering the “new” evidence did not amount to a breach of natural justice.

[25] Accordingly, in my view, the fact that the date of the RAD decision and the submission of new evidence overlapped is irrelevant as the RAD properly considered the requirements of Rule 49(6) in refusing the application. Likewise, I agree with the Respondent that the RAD’s reference to *functus officio* was secondary to its determinative finding that there was no breach of natural justice.

[26] The RAD’s finding that the Applicant’s submissions did not satisfy the requirements of Rule 49(6) is reasonable.

B. *Did the RAD Err in Assessing the Applicant’s Sur Place Claim and Credibility?*

(1) *Sur Place Claim*

[27] The Applicant argues the RAD erred in finding that he was not at risk of persecution because his beliefs were not genuine, and he would not likely participate in future anti-government activities. The Applicant argues that the RAD unreasonably imported a requirement of continued political participation.

[28] However, a review of the decision demonstrates that the RAD assessed the *sur place* claim separate and apart from the finding that the Applicant's political beliefs were not genuine.

The RAD stated:

I cannot find that the RPD erred in its assessment of the credibility of his political profile, and I agree with the RPD that the evidence does not show, on a balance of probabilities, a credible or genuine anti-government profile on the part of the Appellant. Now I will turn to whether the Appellant's activities in Canada, even if not undertaken in good faith, are likely to have come to the attention of Ethiopian authorities, on a balance of probabilities (at para 18).
[Emphasis added.]

[29] The Applicant also takes issue with the RAD characterizing his political activities in Canada as "passive" and "ultra low". The Applicant states the fact that he volunteered to assist an organization, which was accepted by the RAD, shows that he was in fact an active organizer. In my view, this argument is essentially asking the Court to reweigh the evidence before the decision-maker, which is not the role of this Court in conducting a reasonableness review (*Vavilov* at para 125).

[30] The Applicant challenges the RAD's assessment of his participation in a radio interview. The Applicant argues the RAD erred in finding his participation was not likely to bring him to the attention of Ethiopian authorities, as he was only identified by his first name, when in fact he was identified by his full name. Similarly, he argues the RAD erred in failing to recognize him in a photograph, when the RAD said "I am unable to see the Appellant's likeness in these photos".

[31] With respect to the radio interview, the Applicant provided the RAD with a transcript of the interview, which only identifies him as “Abel”. However, the link to the program includes the Applicant’s full name. In my view, it was not unreasonable for the RAD to consider that the transcript – which would be the portion heard by radio listeners – only used the Applicant’s first name. It was also reasonable for the RAD to find that his participation in a radio interview was not likely to bring him to the attention of Ethiopian authorities, given – the RAD noted – it was “a weekly online radio [program] transmitted to Toronto and its surrounding areas”.

[32] The RAD considered the photos submitted and noted that it was not possible to personally identify the Applicant in the photos. Therefore, they did not support his position that his political activities in Canada would likely come to the attention of Ethiopian authorities. In this context, the RAD’s finding with respect to the photos is reasonable.

[33] In sum, the Applicant has not demonstrated any error by the RAD and, in effect, he seeks a re-weighing of the evidence on these issues, which is beyond the mandate of this Court on judicial review.

(2) Credibility

[34] The Applicant argues the RAD erred in finding the Applicant’s detentions and mistreatment were central elements of the claim, and making adverse credibility findings on peripheral issues.

[35] On these issues the RAD stated:

[...] In his Basis of Claim (BOC) form narrative, the Appellant emphasizes this experience in setting out his basis of claim: “I am applying for refugee protection in Canada because my life is at risk in Ethiopia because of my ethnic identity, political views and family profile. My family and I were subjected to unlawful arrest and harassment due to our ethnicity and perceived political opinion. I have endured physical and psychological attacks at the hands of the agents of EPRDF during my stay at Mekelle University”.

[36] As noted by the RAD, “this was the only incident underlying his claim which the Appellant alleges he personally experienced, and as such, it is reasonable to expect him to testify credibly to the details he has provided in his BOC and in testimony [...].” Accordingly, it was reasonable for the RAD to find that this was a central aspect of the claim.

[37] Overall, the RAD’s credibility findings were internally consistent and reasonable. Despite disagreeing with some of the RPD’s credibility findings, the RAD concurred that the Applicant lacked overall credibility.

[38] The RAD’s assessment of the credibility issues with the Applicant’s evidence is reasonable and entitled to deference.

VII. Conclusion

[39] The decisions of the RAD on both matters are reasonable as they are justified, transparent and intelligible. Therefore, these judicial reviews are dismissed.

[40] No serious question was posed by parties and none arises.

JUDGMENT IN IMM-5885-20 and IMM-6419-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review in IMM-5885-20 is dismissed;
2. The application for judicial review in IMM-6419-20 is dismissed; and
3. There is no question for certification.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5885-20

STYLE OF CAUSE: ABEL YITBAREK ADGO v THE MINISTER OF
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PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: MAY 12, 2022

JUDGMENT AND REASONS: MCDONALD J.

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