Federal Court  Cour fédérale

Date: 20250204

Docket: IMM-12536-23

Citation: 2025 FC 228

Ottawa, Ontario, February 4, 2025

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

FITHI TECLEBRHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Fithi Teclebrhan [Applicant] seeks judicial review of a September 8, 2023 decision [Decision] of the Refugee Appeal Division [RAD], which upheld a decision of the Refugee Protection Division [RPD]. The RPD determined the Applicant is neither a Convention refugee nor a person in need of protection. The RAD agreed with the RPD. The determinative issue for the RAD was the Applicant's failure to credibly establish his identity as an Eritrean national.

[2] This application for judicial review is dismissed.

II. Facts

[3] The Applicant alleges that he was born on September 20, 1983, in Asmara, Eritrea, and is therefore a citizen of Eritrea. In his basis of claim [BOC] narrative, the Applicant claims mistreatment and detention at the hands of the Eritrean military in grade 12 at the military training centre in Sawa, Eritrea. Upon his release, the Applicant's family assisted him to leave Eritrea.

[4] In June 2004, the Applicant travelled to Ethiopia and remained there for three months. The Applicant then entered Kenya on a 2-year temporary permit. Upon expiry, the Applicant applied for a renewal and was refused. He continued to live in Kenya without legal status. While in Kenya, the Applicant converted to Christianity and was baptized. The Applicant met his current partner in 2012 and they now have a daughter.

[5] In June 2015, with assistance from his brother and aunt, the Applicant travelled to the United States. The Applicant made an asylum claim and was refused. The Applicant then entered Canada in May 2019 and was detained. The Applicant filed a refugee claim and the Canada Border Services Agency [CBSA] released him with conditions on June 17, 2019.

[6] The RPD released its decision on May 11, 2023, finding the Applicant is neither a Convention refugee nor a person in need of protection. The determinative issue was the Applicant's credibility in relation to his identity. The RPD cited inconsistencies in the evidence,

in the testimony of his brother and father who were witnesses at the hearing, and the lack of supporting identification documents, other than a baptismal certificate. The RPD noted that the Applicant failed to provide acceptable identity documents. With no reasonable explanation provided, the credibility concerns were serious enough to rebut the presumption of truthfulness. The RPD found that it had no way of determining the Applicant's actual identity, his proper date of birth, or whether he is Ethiopian or Eritrean. The Applicant appealed this decision to the RAD.

III. Decision

[7] The Applicant argued the RPD: was overly zealous in assessing contradictions between his oral testimony and statements made to the CBSA; erred in its analysis of objective evidence on Eritrean documents; and failed to appropriately weigh witness testimonies. The Applicant argued this evidence, together with new evidence, a DNA test of the Applicant's father who lives in the Unites States, established his identity.

[8] Although it disagreed with some of the RPD's findings, the RAD ultimately agreed the Applicant was not credible in his testimony and had not established his identity through other means. The RAD refused to admit the DNA test.

[9] The DNA report dated June 8, 2023, signed by the Laboratory Director of DNA Diagnostics Centre in Ohio, identifies the Applicant's positive biological connection to his father. However, the RAD found this report did not meet the requirements for admitting new evidence under section 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[*IRPA*]; nor the criteria of credibility, newness, and relevance as established by *Raza* v *Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] and *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 [*Singh*]. The RAD did not hold an oral hearing.

[10] The RAD found the Applicant's explanation for why he could not reasonably have submitted the DNA evidence earlier was insufficient. During the RPD's hearing, the Applicant stated he could provide a DNA test, to which the RPD replied, "okay". However, the DNA evidence submission post-dated the RPD's decision. The RAD further found that even if the new evidence met the requirements of *IRPA* section 110(4), it did not meet the *Raza* criteria of relevance and credibility. The DNA report did not establish: the DNA sample emanates from the Applicant himself, rather than a sibling; where the sample was collected; how the persons who provided the DNA samples identified themselves; nor how the DNA samples were collected or transmitted to the laboratory in the United States.

[11] The RAD found inconsistencies in the Applicant's testimony counted against his credibility, specifically the varying explanations given as to why the Applicant was unable to produce the documents he allegedly used on his travels between Eritrea and Kenya. Additional inconsistencies between the Applicant's testimony and evidence included: whether he had refugee status in Kenya; lack of immediate forthrightness with Canadian authorities about his prior attempt to immigrate to the United States; use of what the RAD found to be an Ethiopian passport in his United States immigration attempt; and contradictory explanations about the location of this document. Accordingly, the RAD found the presumption of truthfulness was rebutted.

[12] Lastly, the RAD found the witness testimony and corroborative evidence did not establish the Applicant's nationality. The witness' sworn testimony and corroborative evidence did not state the Applicant is Eritrean rather than Ethiopian. The objective evidence given showed in 1996 Eritrean Ethiopians were actively able to choose either Ethiopian or Eritrean nationality. The Applicant suggested his Eriterean nationality is evidenced in his attendance at the Sawa National Military training center. However, the objective evidence did not establish that Ethiopian nationals completing grade 12 in Eritrea were exempt from mandatory attendance at the Sawa National Military training centre.

[13] The RAD found the totality of evidence left it in the same position as the RPD, with no ability to determine whether the Applicant was Eritrean or Ethiopian. The Applicant failed to establish his identity on a balance of probabilities. Since identity establishment is a threshold issue, the RAD found the RPD correctly determined the Applicant's refugee claim must fail.

IV. Issues and Standard of Review

[14] This matter raises the following issues:

1. Was the RAD's refusal to admit new evidence reasonable?
2. Did the RAD's refusal to admit new evidence breach the Applicant's procedural fairness rights?
3. Were the RAD's findings on the admitted evidence reasonable?

[15] The parties agree the merits of the Decision are reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

[*Vavilov*]). I agree. This case does not engage one of the exceptions set out by the Supreme Court of Canada in *Vavilov*. Therefore, the presumption of reasonableness is not rebutted (*Vavilov* at paras 16-17).

[16] The Respondent makes no submission on the standard of review for procedural fairness. The Applicant submits the standard of review is correctness (*Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at para 46). I agree. Procedural fairness issues are reviewed on a standard akin to correctness (*Canadian Pacific Railway v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]). In assessing procedural fairness allegations, this Court will determine whether the process followed was fair having regard to all the circumstances (*Canadian Pacific* at para 54).

V. Analysis

A. *Was the RAD's refusal to admit new evidence reasonable?*

(1) Applicant's Position

[17] The RAD unreasonably assessed whether the DNA test met the admissibility requirements under *IRPA* subsection 110(4).

[18] The RAD read too much into the RPD's answer of "okay" by unreasonably inferring the Applicant should have provided the DNA test prior to the Decision's release.

[19] The RAD's analysis of *Raza* factors was unreasonable. The RAD unreasonably speculates the DNA test must have been performed in the United States. The affidavit of Mr. McIntosh, counsel at McIntosh Law & Technology, provides screenshots of the DNA Diagnostics Centre website, confirming the process for DNA testing. Additionally, the company's letterhead includes the logos showing testing locations in both Winnipeg, Manitoba and Fairfield, Ohio. The Applicant's father must have been able to travel to Canada, since the Applicant's refugee proceedings would have been abandoned if he had travelled to the United States.

[20] The RAD's finding on the probative value of the DNA report suffers similar flaws. The RAD failed to note a Winnipeg-based company was involved in the DNA testing. The information about the companies and their process as described on the website was not before the RAD, however it constitutes generally recognized facts (*IRPA*, s 171(b)). The RAD's questions about sample collection or transmission to the laboratory in the United States is immaterial.

[21] The RAD's reasoning violates the presumption of regularity typically applied to public actions; the panel will tend to accept notations by immigration authorities absent compelling or convincing evidence (*Ahmad v Canada (Public Safety and Emergency Preparedness)*, 2017 CanLII 54681 (CA IRB) at para 27). Some private law cases also apply this presumption. Since the DNA Diagnostics Centre has no interest in the outcome of the DNA results beyond accuracy, the DNA certificate information may be presumed accurate in accordance with the presumption

of regularity. Absent compelling or convincing evidence of error, the RAD should have accepted the DNA certificate as accurate.

(2) Respondent's Position

[22] The RAD has no authority to admit new evidence where *IRPA* section 110(4) requirements are not met. Where no evidence is accepted, the RAD is prohibited from an oral hearing pursuant to *IRPA* section 110(6).

[23] An appeal to the RAD is not a second chance to answer the weaknesses identified by the RPD via new evidence submissions (*Singh* at para 54; *Anyira v Canada (Citizenship and Immigration)*, 2021 FC 882 at para 23; *Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260 at para 15 [*Abdullahi*]). If evidence should be submitted prior to a decision, it is reasonable to expect a claimant to seek adjournment or file post-hearing evidence (*Olori v Canada (Citizenship and Immigration)*, 2021 FC 1308 at para 27). Similarly, the Court has rejected arguments that *IRPA* section 110(4) should be interpreted to allow new evidence admissions on appeal to the RAD when an applicant is surprised their evidence before the RPD was insufficient to establish identity (*Ozomba v Canada (Citizenship and Immigration)*, 2016 FC 1418 at paras 15-18).

[24] The RAD is justified in refusing to admit evidence where an applicant fails to provide an adequate explanation of why they could not have presented their evidence to the RPD prior to its decision (*Nteta-Tshamala v Canada (Citizenship and Immigration)*, 2019 FC 1191 at para 26).

The RAD's focus under this criterion correctly examined the reason why the DNA evidence could not have been presented prior to the RPD's decision.

[25] The *Refugee Protection Division Rules*, SPR/2012-256 and *IRPA* both instruct that claimants must provide acceptable documentation establishing their identity. It is the Applicant's onus to sufficiently establish his identity. The RPD has no obligation to inform the Applicant what evidence is required to discharge that onus. The Applicant was aware the RPD had identity concerns, demonstrated by his offer to provide a DNA test, yet he made no efforts to actually provide the RPD with that evidence. The Applicant neither sought adjournment nor submitted post-hearing evidence prior to the RPD's decision.

[26] Furthermore, the RAD's *Raza* factors assessment was reasonable. The RAD was not required to consider the DNA Diagnostics Centre website as the Applicant did not provide evidence from that website. The RAD was not required to conduct its own investigation to find evidence supporting the Applicant's case. Furthermore, the RAD was not required to take judicial notice of the website, as website material is generally not acceptable for judicial notice (*Canada (Attorney General) v Misquadis*, 2003 FCA 370 at para 16; *R v Balen*, 2012 ONSC 2209 at para 61).

[27] The presumption of regularity attaches to public action taken, such as performance of statutory duty, an administrative proceeding, or sworn official documents. The Applicant's position, attaching the presumption of regularity to a private company's DNA test result, is not supported by any authority.

(3) Conclusion

[28] The RAD's refusal to admit new evidence, and its analysis of *IRPA* section 110(4) and the *Raza* factors in doing so, is reasonable.

[29] The RAD reasonably found the new evidence inadmissible. The Applicant did not sufficiently explain why he could not have presented the DNA evidence prior to the RPD decision. It is trite law that refugee claimants bear the burden of proof and must put their best foot forward before the RPD. It is also trite law that an appeal to the RAD is not an opportunity to improve a deficient record in response to weaknesses identified by the RPD (*Abdullahi* at para 14). The Applicant's explanation, that the RPD did not fully clarify if it wished for the Applicant to provide a DNA test, does not render the RAD's Decision unreasonable. The RAD correctly identified the Applicant's offer to provide a DNA test to the RPD, his failure to do so, and his inability to explain why.

[30] I agree with the Respondent that the Applicant's arguments on the *Raza* factors are irrelevant. The DNA evidence was inadmissible for failure to meet the *IRPA* section 110(4) requirements. Nevertheless, I find the RAD's assessment of the *Raza* factors is reasonable. The Applicant failed to provide sufficient evidence regarding the source and reliability of the DNA test.

[31] Furthermore, I agree with the Respondent, there is no authority supporting the Applicant's argument that the presumption of regularity should apply to a private DNA testing company's result.

B. *Did the RAD's refusal to admit new evidence breach the Applicant's procedural fairness rights?*

(1) Applicant's Position

[32] In assessing the *Raza* factors, the RAD posed questions not previously asked of the Applicant, thereby breaching the Applicant's right to procedural fairness. The RAD asked: how and where the DNA samples were collected; from whom (the Applicant or his brother); and how their identities were verified. The RAD could have posed these questions in writing. The Applicant addresses these questions in his affidavit on judicial review.

(2) Respondent's Position

[33] There is no merit to the Applicant's procedural fairness position. The Court in *Hossain v Canada (Citizenship and Immigration)*, 2023 FC 1255 [*Hossain*], at paragraph 43, states:

> [43] This Court has determined that it is not procedurally unfair for the RAD to refuse to admit new evidence based on its lack of credibility without holding an oral hearing, or without providing notice of its concerns about the new evidence [citations omitted].

[34] The Applicant was represented by experienced immigration counsel who understood the Applicant's obligation to establish his identity and put his "best foot forward" to demonstrate his evidence is admissible (*Zerihaymanot v Canada (Citizenship and Immigration)*, 2022 FC 610 at para 20).

(3) Conclusion

[35] The RAD did not breach the Applicant's procedural fairness rights.

[36] In the event the RAD was incorrect in finding the new evidence inadmissible under *IRPA* section 110(4), it alternatively assessed its admissibility under the *Raza* factors of relevance and credibility. The RAD posed its questions in the context of assessing these *Raza* factors. Procedural fairness does not require the RAD to provide written notice of its evidence credibility concerns (*Hossain* at para 43). It was the Applicant's onus to provide sufficient evidence on the admissibility of the DNA test results to the RAD. The Applicant cannot, on judicial review, submit answers to the RAD's evidence assessment questions.

C. *Were the RAD's findings on the admitted evidence reasonable?*

(1) Applicant's Position

[37] The RAD's consideration of objective evidence was unreasonable. The objective evidence showed that in 1996 Eritreans and Ethiopians could choose their nationality. At the time of the 1996 Ethiopian-Eritrea agreement the Applicant was 12 years old. It is unreasonable to suggest a child at that age could choose his own nationality. The document cited by the RAD showed the agreement was short-lived. In 1999, the Ethiopian government passed legislation prohibiting voters registered in the 1993 Eritrean referendum to claim Ethiopian citizenship. The evidence shows both parents were living in Eritrea when the Applicant was born and remained until the Applicant fled Eritrea seeking refugee protection. There was no evidence his parents ever lived in Ethiopia or were Ethiopian by descent.

[38] Furthermore, the RAD applied the incorrect standard of proof for determinations of fact. The standard of proof is a balance of probabilities (*Adjei v Canada (Minister of Employment and*

Immigration), 1989 CanLII 9466 (FCA)). The standard imposed on the Applicant required him to establish his case beyond any possible doubt. The RAD raised unanswered questions and addressed speculative possibilities with no evidentiary basis. However, the RAD made no concrete findings on the reasonable probability of its speculations. Instead, the RAD speculated the Applicant's brother may have provided the DNA that was tested, or that the Applicant may be Ethiopian. This reasoning goes against the Court's guidance in *Dirieh v Canada (Citizenship and Immigration)*, 2018 FC 939 [*Dirieh*] at para 27.

[39] In *Dirieh*, the Court makes a general point that in factual determinations the decision-maker should consider the evidence before it, not the evidence that is absent, unless the relevant party is asked about the absent evidence. Similarly, the RAD cannot enumerate any number of unanswered questions as a basis for determining the claim is not established. The jurisprudence suggests when new issues arise on appeal, the duty of fairness requires they be put to the appellant before a decision is rendered (*Shoyebo v Canada (Citizenship and Immigration)*, 2022 FC 1264 at para 27; *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at paras 9-10).

(2) Respondent's Position

[40] The Applicant has not challenged any of the RAD's credibility findings. It is trite law that unchallenged RAD credibility findings must be presumed as true (*Khan v Canada (Citizenship and Immigration)*, 2021 FC 1233 at para 5).

[41] It is settled law that refugee claimants are deemed to be aware of publicly available documents describing general country conditions, including the National Documentation Package [NDP]. The RAD does not have a duty to disclose information contained in the NDP. It was reasonable for the RAD to observe the NDP showing Eritrean-Ethiopians were actively able to choose either Ethiopian or Eritrean nationality in 1996. The RAD's concern was with the testimony of the Applicant's parents and supporting evidence, none of which established the Applicant as Ethiopian or Eritrean. It was the Applicant's onus to establish his identity as a national of Eritrea. None of his witnesses spoke directly to that issue.

[42] There is no merit to the Applicant's position that the RAD imposed an unreasonably high standard of proof. The RAD expressly applied the balance of probabilities standards to determine if the Applicant established his identity.

[43] *Dirieh* is distinguishable from this matter. The applicant in *Dirieh* provided a sworn affidavit explaining why they could not have submitted the new evidence earlier. The Applicant in this case has provided no such evidence. It was the Applicant's burden to show why he could not reasonably have been expected to submit the new evidence to the RPD prior to its decision.

[44] Furthermore, the RAD did not base its Decision on speculative possibilities arising from unanswered questions. The RAD identified gaps in the evidence and explained why those gaps left it unable to conclude the Applicant had discharged his burden of proof for new evidence admission. The RAD identified an absence of evidence concerning: "how and where the DNA samples were collected"; "how the identity of the persons who supplied the samples was

ascertained"; "how [the Applicant] established his identity to the laboratory"; and where the sample was collected. These considerations derive from the *Raza* test, which requires an assessment of the credibility and relevance of the new evidence.

(3) Conclusion

[45] The RAD reasonably assessed the newly admitted evidence.

[46] I agree with the Respondent, the Applicant's submissions do not address the RAD finding an insufficiency of evidence concerning his nationality. The Applicant misconstrues the RAD's issue with the objective evidence of the 1996 Ethiopian-Eritrea agreement. The RAD found the Applicant's testimony, corroborative evidence, and witness evidence did not establish the Applicant's nationality. The RAD then assessed the 1996 Ethiopian-Eritrea agreement evidence in light of the insufficient nationality evidence provided by the Applicant. The RAD found the Applicant had also not provided sufficient evidence establishing his Eritrean nationality in the context of the 1996 agreement.

[47] I find no indication in the record suggesting the RAD applied a higher standard of proof on the intermediate issues than required.

[48] I agree with the Respondent, this situation is distinguishable from *Dirieh*. The Applicant did not provide evidence under oath for the circumstances surrounding the new evidence submission. The Applicant argues the RAD based its findings on a number of unanswered questions, contrary to the Court's guidance in *Dirieh*. This is inaccurate. Rather, the RAD

assessed the *Raza* criteria of credibility and reliability, as required, by considering the source and context in which the circumstances came into existence, and whether it could prove or disprove a fact relevant to the refugee claim.

VI. Conclusions

[49] For the reasons above, this application for judicial review is dismissed.

[50] The Applicant has proposed three questions for certification:

> 1. Does the presumption of regularity apply only to public actions, or can the presumption also apply to private actions, where the private actor is acting as a professional or expert and is disinterested in the result?
>
> 2. Is reversible legal error committed when the standard of proof used for intermediate findings is incorrect or unreasonable and the standard of proof for the ultimate disposition is both reasonable and/or correct?
>
> 3. Does judicial comity apply to the principle set out in the case of *Dirieh v Canada (Citizenship and Immigration),* 2018 FC 939 - that new evidence can not be refused admittance at the Refugee Appeal Division of the Immigration and Refugee Board on the basis of unanswered questions posed by the Division but not presented to the appellant - for all grounds of admissibility of new evidence under *Immigration and Refugee Protection Act* section 110(4)?

[51] In the test for certification, the question must: "(i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance" (*Mudrak v. Canada (Minister of Citizenship and Immigration)* 2016 FCA 178 at para 16, citing *Zhang v Canada (Citizenship and Immigration),* 2013 FCA 168 at para 9).

[52] The first question is not dispositive of the appeal. The RAD reasonably refused to admit the new evidence under *IRPA* section 110(4) and had no discretion to admit it due to this finding.

[53] The second question is not a question of broad significance or general importance. It would be a reversible error if the decision-maker applied the incorrect standard of proof when assessing the reasonableness of a decision under *Vavilov*.

[54] The third question does not transcend the interests of the parties to this matter.

JUDGMENT in IMM-12536-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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