Date: 20080404

Docket: IMM-5365-06

Citation: 2008 FC 448

Ottawa, Ontario, April 4, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SULTAN MOHAMMED ALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [Act], for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) dated July 5, 2006, (Decision) wherein the Board determined that the Applicant was not a Convention refugee under section 96 of the Act, nor a person in need of protection under section 97 of the Act.

BACKGROUND

[2] The Applicant is a 58-year-old citizen of Eritrea. He belongs to the Jeberti ethnic group, originally a Tigray group in northern Ethiopia, a number of whom have resettled in Eritrea. The Applicant claims he left the region in 1975 during the war of independence from Ethiopia and went to Saudi Arabia. He alleges that at that time a number of young people, suspected by the ruling Dergue regime of being freedom fighters, left for neighbouring countries. He has not returned to what is now Eritrea since his departure thirty-one years ago.

[3] While in Saudi Arabia, the Applicant married and the couple had a daughter and son.

[4] The Applicant claims that, while living in Saudi Arabia, he was a supporter of the Eritrean People's Liberation Front (EPLF), a rebel group involved in the action for independence against the Ethiopian government. He supported the EPLF financially and helped with the recruitment of new members.

[5] In 1987, the Applicant arrived in the United States with his family. They applied for asylum against Ethiopia. The Applicant's claim was based on his political opinion as a member of the EPLF. The family's claims were refused in March 1989. Shortly afterwards, the Applicant allegedly resigned his membership in the EPLF after discovering that his two uncles and two brothers were killed in Sudan by the EPLF because they were supporters of the Eritrean Liberation Front (ELF), another armed opposition group. According to the Applicant, suspected opposition members were

brutally treated by the EPLF, and Jebertis were singled out as suspects and perceived members of the opposition. Consequently, many Jebertis, including the Applicant's relatives, fled to Ethiopia and other neighbouring countries.

[6] Eritrea gained its independence from Ethiopia in 1991. The EPLF came to power in 1993. The EPLF is the only authorized political party in Eritrea and has refused to allow democratic and national elections.

[7] On October 6, 2003, the Applicant came to Canada with his daughter and made a refugee claim. His claim was based on a fear of persecution because of his political opinions and membership in a particular social group: the Jeberti ethnic tribe in Eritrea. He also claimed protection under section 97 of the Act because of his diabetic condition, high blood pressure, heart trouble and visual impairment, which he feared would put his life at risk because he would be unable to receive necessary medical treatment in Eritrea.

[8] The Applicant's son later joined the Applicant and his daughter in Canada and also applied for refugee status. The three claims were heard together on July 7, 2006.

DECISION UNDER REVIEW

[9] In its Decision dated August 29, 2006, the Board concluded that the Applicant was not a Convention refugee or a person in need of protection, because he was not credible and did not have a well-founded fear of persecution on a Convention ground in Eritrea.

[10] The Board found the Applicant lacked credibility because of a number of omissions and inconsistencies in his evidence, including the following:

a. At the Port of Entry (POE), the Applicant omitted to mention any fear of return because of his political profile or ethnic identity, indicating instead that "the main thing is my medical condition";
b. Inconsistent with his statements at the POE, the Applicant indicated in his Personal Information Form (PIF) narrative that his fear was based on his Jeberti ethnicity, a family affiliation with the ELF, and his renunciation of the EPLF;
c. The Applicant failed to mention events in his PIF that triggered his exit from Ethiopia, including the killing of his uncle, aunt and cousin in 1975, and his being informed that military agents were looking for him;
d. The Applicant omitted to mention that he withdrew his membership in the EPLF in 1989 upon learning that the EPLF had killed two of his brothers in Sudan;
e. It was implausible that the Applicant would recollect a number of important details from his past, such as the killing of his uncles, but not remember the actual incidents that caused him to leave Ethiopia or to renounce his membership in the EPLF.

[11] When asked why he had failed to mention these details and other fears in his POE declaration, the Applicant stated that he had forgotten. The Board did not accept that his forgetfulness was due to his memory having been impaired by diabetes, pointing out that the medical evidence submitted by the Applicant did not state that memory impairment necessarily follows in all cases of diabetes. Further, the Applicant submitted no clinical evidence supporting his own condition.

[12] The Applicant's failure to provide a satisfactory explanation for the omissions, coupled with the significance of the fears and events in his claim, led the Board to draw a negative inference from the Applicant's failure to mention them. The Board concluded that the Applicant had not established a subjective fear of returning to Eritrea.

[13] With respect to the well-foundedness of the claim, the Board did not believe that the Applicant had a profile that would place him at risk if he returned to Eritrea. The Board noted as follows:

a. The Applicant testified that he had not been in contact with anyone associated with the EPLF since 1992 and had not received any information that the EPLF was looking for him or was interested in him;
b. The Applicant sought assistance from the government of Eritrea by requesting an Eritrean identification card in 1992 from the EPLF Embassy in Washington after he had withdrawn his membership in the EPLF. The cooperation of the EPLF provisional government, evidenced by their sending him an Eritrean identity card

after they knew he had withdrawn his membership and criticized the EPLF, was inconsistent with the Applicant's fear that the government was seeking to harm him;

c. There was no documentary evidence to show that a person of the Applicant's particular profile would come to the attention of the authorities in Eritrea;

d. Although there was evidence that deportees from Malta had been arrested and badly treated by the government of Eritrea in 2002, there was no evidence of any returnee from the United States or Canada being so treated;

e. There was insufficient evidence to suggest that the Jeberti people face persecution in Eritrea.

[14] The Board also determined that the Applicant could not receive protection under section 97 of the Act because inadequate medical care is not a basis of such protection.

[15] The Board refused the son's refugee application but granted the Applicant's daughter refugee status after finding that, upon returning to Eritrea, she would face compulsory conscription into the military in Eritrea and there was a serious possibility that she would be sexually abused by male members of the military.

[16] The Applicant and his son were granted leave for judicial review of the Board's Decision refusing their claims for refugee status. The son's application for judicial review, however, was discontinued.

ISSUES

[17] The Applicant does not challenge the adverse credibility findings made by the Board. The sole issue that he raises on this judicial review is as follows:

1. **Did the Board err by ignoring or misapprehending the evidence?**

ARGUMENTS

[18] The Applicant submits that the Board erred by failing to make reference to all the documentary evidence in its reasons and by ignoring evidence from Amnesty International that failed asylum claimants are at risk. The Board had evidence before it that deportees and failed asylum claimants, people who fit the Applicant's particular profile, were persecuted upon arrival in Eritrea, but the Applicant says that the Board ignored this evidence when it came to its Decision.

[19] The Applicant further argues that the Board misapprehended the evidence regarding returnees to Eritrea by failing to understand the difference between the situation of voluntary returnees from refugee camps and that of deportees returning after failed asylum claims in the West.

[20] The Respondent argues that the Applicant has failed to demonstrate that the Board committed a reviewable error. According to the Respondent, the Applicant has not established that the Board ignored evidence that proved the Applicant would personally be at risk if returned to

Eritrea. The Respondent further submits that the Applicant has failed to establish that his profile is similar to those who were detained upon their return from Malta. The evidence showed that persons who may be in danger upon returning to Eritrea are those who left Eritrea to avoid military service. The Applicant, because of his age, is not required to enter the military.

[21] The Respondent further argues that there is no blanket persecution of those who return to Eritrea after living abroad. The Respondent notes that, although the Board recognized that the human rights situation in Eritrea is very poor and some returnees are mistreated, the Board also found that there was no documentary evidence that a person with the Applicant's profile would come to the attention of the authorities; nor was there any evidence that the government of Eritrea would have any interest in the Applicant. The Respondent submits that Eritrea's poor human rights record is not sufficient to establish a specific and individualized fear in this case without proof linking the general documentary evidence to the Applicant's specific circumstances. Thus, says the Respondent, the Applicant is not entitled to international protection.

REASONS

[22] Recently, in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Supreme Court of Canada reconsidered the standard of review analysis applicable to administrative decisions and referred to two standards: reasonableness and correctness. In determining the appropriate standard of review in a given case, the Supreme Court provided the following guidance:

> […] questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness (*Dunsmuir* at para. 51).

The Court also noted that the standard of review analysis is composed of two steps:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review (*Dunsmuir* at para. 62).

[23] In light of the Supreme Court's decision in *Dunsmuir*, I conclude that the applicable standard of review in this case is reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47). I note, however, that regardless of the standard of review analysis applied in the present case, either pre-*Dunsmuir* patent unreasonableness or post-*Dunsmuir* reasonableness, my findings as set out below would be the same.

[24] It is well established that the Board need not cite in its reasons all of the documentary evidence before it. There is a presumption that all documentary evidence has been weighed and considered unless the contrary is shown (*Florea v. Canada (Minister of Citizenship and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) (QL)). Further, as part of its role and expertise, the

Board may select the evidence it prefers (*Ganiyu-Gina v. Canada (Minister of Citizenship and Immigration*), [1995] F.C.J. No. 506 at para. 2 (F.C.T.D.) (QL)). However, as stated in *Tahmoursati v. Minister of Citizenship and Immigration*, 2005 FC 1278, [2005] F.C.J. No. 1558 (F.C.T.D.) (QL) at paragraph 37:

> …the Board may make a reviewable error if it fails to mention and analyse important evidence that points away from its own conclusions and the Court infers from this silence that the Board has made erroneous findings without regard to the evidence before it. In the present case, the corroborate evidence pointed to a different conclusion from that reached by the Board and, although the Board is not required to refer to every piece of evidence that is contrary to the Board's finding, the importance of the evidence put forward by the Applicant required that it be addressed. Put in another way, the nature of the evidence required the Board to go beyond a blanket statement that all of the evidence had been considered.

[25] Further, as Justice Shore stated in *J.O. v. Canada (Minister of Citizenship and Immigration)* (2004), 41 Imm. L.R. (3d) 305, 2004 FC 1189 (F.C.T.D.) at paragraphs 26-27:

> 26 The Court deems that the Board did ignore documentary evidence before it. It is true, as the Respondent states, that there is a presumption that the Board has taken all the documentary evidence into consideration. Where, however, the documentary evidence is directly relevant to the Board's findings, but the Board does not discuss the documentary evidence, a conclusion may be drawn that the Board ignored the evidence. In the case at bar, the Board identified specific forms of discrimination and stated that there was no evidence that these forms of discrimination occurred in Nigeria. However, the documentary evidence did cite examples of specific forms of discrimination, including those identified by the Board.
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> 27 It is for the Board to determine how the documentation applies to the Applicant; however, to do so, the Board is obliged to relate how it arrives at its conclusions in demonstrating that it has considered the evidence as a whole, and not in a manner that would appear to serve a specific orientation in the circumstances,

> without having taken all diverse elements of the evidence into consideration.

[26] In the present case, the Board had the following to say about the lack of documentary evidence at page 13 of its Decision:

> [The Applicant] presented no documentary evidence that a person of his particular profile would come to the attention of the authorities. The panel concedes that Eritrea has a very poor human rights record, but there is evidence that returnees are not mistreated on their return to Eritrea, and are provided assistance from organizations such as the UNHCR in their resettlement efforts. While the panel has also considered that many deportees from Malta were arrested and badly treated by the Eritrean government in 2002, there is no such evidence of any returnee from the United States or Canada being so treated.

[27] In my opinion, the Board erred in two respects. First, there was sufficient evidence that a person of the Applicant's particular profile would come to the attention of the authorities upon returning to Eritrea. The 2004 report from Amnesty International entitled "Eritrea: 'You have no right to ask' – Government resists scrutiny on human rights" (AI Index AFR 64/003/2004) indicated that failed asylum claimants suspected of opposing the government are at risk of arbitrary detention, torture and ill-treatment, and possible extra-judicial execution. In particular, that report listed persons "known or suspected to have criticised the government or the President" and "anyone suspected of disloyalty to the government" as being at risk. It further stated that "even the act of applying for asylum abroad would be regarded as evidence of disloyalty and reason to detain and torture a person returned to Eritrea after rejection of asylum." Upon returning to Eritrea under the normal deportation procedures, the authorities would immediately be alerted to the Applicant's presence and his failed attempt to seek refuge in Canada. The documentary evidence suggests that

this, in and of itself, would be sufficient to lead to a suspicion on the part of authorities that the Applicant had been disloyal to the EPLF.

[28] Second, in support of its conclusion, the Board relied on an IRINnews report from May 2002 which stated that Eritrean refugees living in refugee camps in Sudan had returned to Eritrea with the help of the United Nations. The Board then recognized that deportees from Malta had been arrested and badly treated in 2002, but found that there was no such evidence of returnees from the United States or Canada being so treated.

[29] In my view, the Board has used the documentary evidence selectively, as there was also evidence that the United Nations suspended the voluntary repatriation of refugees in Sudan in October 2002 for security reasons. Further, although the Board recognized that failed claimants from Malta had been arrested and mistreated, there was evidence of deportees from Libya having been imprisoned and held without charge in July 2004 and reportedly freed in May 2005, as well as evidence that one person returning from the United States on an Eritrean passport had been arrested in connection with the detention of her husband, a member of the dissident "Group of 15." Lastly, as noted in the Country of Origin Information Report of April 2006, the UNHCR reported in January 2004 that "deportees from Malta to Eritrea may have faced persecution owing to an imputed political opinion, conscientious objection or other reasons" and added that "[i]t cannot be excluded that future deportees would face a similar risk." In April 2005, the UNHCR affirmed its earlier recommendation "that states refrain from all forced returns of rejected asylum seekers to Eritrea and grant them complementary forms of protection instead, until further notice." Also,

although the Board considered the voluntary repatriation of refugees in Sudan as evidence in support of its finding that there was no objective fear of persecution, the Board rejected or ignored the evidence of the detention of a person returning voluntarily from the United States stating that, unlike the deportees from Malta who were arrested and badly treated by the Eritrean government, "there was no such evidence of any returnee from the United States or Canada being so treated."

[30] Although the Board is entitled to select the evidence it prefers, the Board committed a reviewable error by failing to at least address this important and relevant information that seemingly pointed to a different conclusion than the one reached by the Board. The Board's failure to address this evidence in its analysis leads me to the conclusion that the Board ignored documentary evidence before it.

[31] There was evidence before the Board that, among Eritreans returning from abroad, those at risk included anyone known or suspected of having criticised the government or the President and anyone suspected of disloyalty to the government, and that even the act of applying for asylum abroad would be regarded as evidence of disloyalty and reason to detain and torture a person who had been denied asylum.

[32] The risks faced by the Applicant were the risks faced by voluntary asylum seekers and not the risks faced by voluntary returnees, so that the evidence cited by the Board was not relevant to the risks identified by the Applicant.

[33] Those aspects of the evidence that supported the Applicant's case and the risks that he identified were faced by failed asylum seekers should have been addressed by the Board. As Justice Evans pointed out in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 (QL), at paragraphs 15 and 17:

> 15 The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency….
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> […]
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> 17 …the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact

[34] For these reasons, I conclude that the Board, in making its Decision, based its decision on one or more erroneous findings of fact that it made without regard to the material before it. The application for judicial review is allowed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed. The decision of the Board is set aside and the matter is returned for reconsideration by a differently constituted Board.

2. There is no issue for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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