

Federal Court



Cour fédérale

Date: 20140729

Docket: IMM-505-14

Citation: 2014 FC 759

Ottawa, Ontario, July 29, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

ALRADIA WEDAH ELBAKER

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act* [IRPA] following a decision of a member of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [Board] to deny a claim for refugee protection.

[2] The applicant, Alradia Wedah Elbaker, is a citizen of Sudan whose family was caught between warring parties in the Darfur region of that country. She was denied protection under both sections 96 and 97 of the *IRPA*.

[3] For the purposes of this decision, I need only address the denial under section 96, which applies when a claimant has “a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion.” For the reasons set out below, I have concluded that this application should be granted and the RPD’s decision set aside.

II. Facts

[4] Ms. Elbaker is from El Daein, in the Darfur region of Sudan, and lived in Maali (about 30 km from the city). She had a farm with her husband and children, seven boys and one girl. After civil war began in 2003, Ms. Elbaker and her family were caught between government and rebel forces due to the specific location of the farm. Each of the sides in the conflict imposed taxes on local people, and each side considered those people to be traitors for giving support to the other side.

[5] On February 14, 2010, government forces surrounded Ms. Elbaker’s farm and began shooting at their house. The forces entered the house and beat Ms. Elbaker’s husband and accused him of being a traitor. When one of Ms. Elbaker’s sons intervened, both the husband and the son were taken to an unknown location. They have not been seen since. The house was burned down, the livestock were taken and Ms. Elbaker’s children were scattered. To this day,

Ms. Elbaker has no news from her children and does not know where they live, or even if they remain alive.

[6] In an attempt to find her missing husband and son, Ms. Elbaker later went to the offices of the government forces who took her husband and son. She was not well-received. She was called a traitor, mistreated, and threatened.

[7] Ms. Elbaker left Maali to rejoin her brother in El Daein. He organized for her to come to Canada on a false Dutch passport where she submitted a refugee claim.

III. Analysis of the RPD's decision

[8] In assessing the section 96 aspect of Ms. Elbaker's refugee claim, the RPD acknowledged at paragraph 11 of its decision that:

It may very well be that the members of the government forces who attacked the claimant's farm and apprehended her husband and son may have believed at the time that the claimant's family had helped the rebels.

[9] However, later in the same paragraph 11, the RPD states: "The panel finds that insufficient evidence has been provided to support [Ms. Elbaker's] allegation that she and her family were personally targeted because of their political opinion or perceived political opinion."

A similar statement is made later in the decision at paragraph 14:

The panel ... does not find any evidence that the claimant and her family were personally targeted or that the government forces or even the rebel forces have any particular interest in her. The panel also finds that there is insufficient evidence to support her claims of persecution and is not persuaded that her fears are well-founded.

[10] These statements concerning the lack of evidence that Ms. Elbaker and her family were personally targeted are difficult to reconcile with the earlier acknowledgement of the attack on her farm on February 14, 2010, which is clearly a personal targeting.

[11] I have attempted in several ways to reconcile the apparent inconsistency, but without success.

[12] I have considered whether the RPD was of the view that section 96 did not apply because the persecution to which Ms. Elbaker and her family were subjected applied generally and was not particular to her family. The RPD's decision does discuss, still in paragraph 11, the fact that the family was simply in the wrong place and that many other families were similarly targeted. There is further discussion of the generalized nature of the risk to Ms. Elbaker at paragraph 17. However, while the generalized nature of a risk may be relevant to section 97 of the *IRPA*, it is not a proper consideration for section 96. Ms. Elbaker and her family were personally targeted, and the fact that others were also targeted does not change that.

[13] I have also considered whether the RPD was not satisfied that the persecution that Ms. Elbaker and her family faced had a nexus to one of the grounds enumerated in section 96: race, religion, nationality, membership in a particular social group or political opinion. But it seems clear that the attack on Ms. Elbaker and her family, and her later mistreatment at the offices of the government forces, were due to a perception that she and her family had supported the rebel forces. This would seem to constitute a perception of a political opinion, even if Ms. Elbaker and her family were not politically active (*Canada (Attorney General) v. Ward*, [1993] 2

SCR 689 at p 746-747). In my view, a nexus appears to have been established, even though none was explicitly stated in the RPD's decision.

[14] The final possibility that I considered in an attempt to reconcile (i) the RPD's acknowledgement of the attack on Ms. Elbaker and her family; and (ii) its insistence that insufficient evidence exists to show personal targeting, is as follows: perhaps the RPD meant to conclude that, though Ms. Elbaker was personally targeted at her farm on February 14, 2010, she ceased to be a target after that. In support of this hypothesis is the phrase "at the time" in the above-quoted passage from paragraph 11 of the decision: "government forces ... may have believed at the time that the claimant's family had helped the rebels."

[15] The main problem with this hypothesis is that the RPD decision does not state a conclusion that the risk no longer exists. In fact, the RPD states at paragraph 17 that Ms. Elbaker would face a risk to life if she were to return. Moreover, there does not appear to be any clear evidence to support a conclusion that the risk no longer exists. For one thing, Ms. Elbaker's experience going to the office of the government forces appears to be sufficient to show that the attack on her farm, the taking of her husband and son, and the burning down of her house did not end the risk she faced.

[16] The RPD's decision notes that Ms. Elbaker has not experienced any further difficulties at the hands of either government or rebel forces, and that there is no evidence that they have any interest in the claimant. Those are facts, but they are not evidence that the targeting to which Ms. Elbaker and her family were subjected has ended. But the uncontradicted evidence is that the

government forces have continued to threaten Ms. Elbaker. I have seen no evidence to indicate that this state of things has changed or that the government forces no longer believe that Ms. Elbaker supports the rebels.

[17] I am also mindful that the burden for a refugee claimant to satisfy s.96 is relatively low. A claimant must prove on the balance of probabilities that there is more than a mere possibility – or a reasonable chance – that the claimant will face persecution if returned to his or her country of origin: *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 at 683, 57 DLR (4th) 153 (FCA) and *Lopez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1156 (para 20).

[18] The foregoing analysis concerns issues of mixed fact and law and the parties are agreed that the standard of review of the RPD's decision is reasonableness.

[19] I have been unable to reconcile the RPD's critical conclusion of insufficient evidence that Ms. Elbaker has been personally targeted with its acknowledgement of Ms. Elbaker's personal experiences. For these reasons, I find this conclusion by the RPD to be unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted.

The RPD's decision is set aside and the matter is referred back to the Board for a new determination by a differently constituted panel. There is no serious question of general importance to certify.

"George R. Locke"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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