Federal Court Cour fédérale

Date: 20150617

Docket: IMM-6212-14

Citation: 2015 FC 759

Ottawa, Ontario, June 17, 2015

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ELSA HAGOS AWET
THOMAS ANTONIOS ENDRIAS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review brought by Elsa Hagos Awet and Thomas Antonios Endrias from a decision of the Refugee Appeal Division [RAD] denying their appeal from an earlier unsuccessful refugee determination by the Refugee Protection Division [RPD].

[2] The Applicants claim to be citizens of Eritrea. Their application for protection was denied by the RPD on the ground that they had failed to prove their identities with credible or trustworthy evidence. That decision was upheld by the RAD.

[3] In the hearing before the RPD the Applicants produced identity documents in the form of birth certificates and drivers' licences. Their birth certificates were rejected because of the absence of security features and poor quality. The drivers' licenses were rejected mainly because they contained English spelling errors and alterations. Based on the Applicants' knowledge of Eritrea, the RPD concluded the Applicants had probably lived there but it was not satisfied of their purported Eritrean citizenship.

[4] Before the RAD the Applicants attempted to supplement their identity documentation with originals of their Ethiopian birth certificates and, for Ms. Awet, an original baptismal certificate. These documents were appended to a brief affidavit indicating that they were acquired after the RPD decision. That affidavit indicated that the documents were carried out of Eritrea by a person at the request of Mr. Endrias' parents.

[5] The principal ground of appeal before the Court concerns the standard of review applied by the RAD to the RPD's decision. On the face of the RAD's decision it is quite clear that it adopted the deferential standard of reasonableness. This is evidenced by the following passages:

> [40] The appropriate standard of review in this appeal is one of reasonableness. Reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the RPD's decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

> [41] Given the analysis above, the RAD therefore has afforded a considerable level of deference to RPD findings on questions of fact in this claim and considered whether the findings meet the reasonableness test.
>
> [42] For theses reasons, the RAD concludes that, in considering this appeal, it must show deference to the factual and credibility findings of the RPD. The notion of deference to administrative tribunal decision-making requires a respectful attention to the reasons offered or which could be offered in support of the decision made. Even if the reasons given do not seem wholly adequate to support the decision, the RAD must first seek to supplement them before it substitutes its own decision.
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> …
>
> The RPD's finding that the Appellants have not established their identity falls within a range of possible, acceptable outcomes that is defensible in respect of the facts and law. As such, this appeal cannot succeed.

[6] Counsel for the Minister points out that the RAD did its own assessment of some of the identity evidence and appears to have drawn its own conclusions about its reliability. In particular the RAD, like the RPD, expressed doubt about the likelihood that government agencies would issue documents with basic English spelling errors. The RAD also found the Applicants' explanations for failing to produce their National Identity Cards "illogical". In both instances the RAD found the corresponding findings by the RPD to be reasonable.

[7] It is also of some concern that the RAD found the newly tendered identity documents not credible on the basis of "the RPD credibility findings from the previous documents which were filed at the hearing". This suggests the RAD did not independently consider the reliability of these documents and simply applied the deferential standard.

[8] It is thus not entirely clear from the RAD's decision how it treated the RPD findings. In the face of the RAD's unequivocal assertions of deference it would be unsafe to assume that it fully carried out the kind of independent review of the evidence that is required: see *Huruglica v Canada,* 2014 FC 799, [2014] FCJ No 845, per Justice Phelan; *Spasoja v Canada,* 2014 FC 913, 249 ACWS (3d) 829, per Justice Roy; *Alyafi v Canada,* 2014 FC 952, [2014] FCJ No 989, per Justice Martineau; *Njeukam v Canada,* 2014 FC 859, 247 ACWS (3d) 429, per Justice Locke; *Bahta v Canada,* 2014 FC 1245, 248 ACWS (3d) 419, per Justice Simpson; *Pemaj v Canada,* IMM-1988-14, per Justice Kane and my own decision in *Sow v Canada,* 2015 FC 295, 252 ACWS (3d) 316. For this reason the matter must be redetermined on the merits in accordance with the standard of review discussed in the above decisions.

[9] I would add that at least one of the RPD's findings concerning the tendered new documents is difficult to comprehend. At para 31 of the RAD decision, these documents were rejected on the following basis:

> In contrast the new evidence submitted by the Appellants to the RAD, what they purport to be original birth certificates and a baptismal certificate [sic]. There is no evidence before the RAD to establish a link between the Appellants and the documents that they have submitted as being theirs. As such the RAD does [sic] find these documents persuasive and, as a result, does not accept these documents as proof of their identity.

This statement is wrong. The new documents were appended to an affidavit establishing a link to the Applicants, and they also contained personal identifiers consistent with the Applicants' original identity documents.

[10] I accept the point made by the Minister's counsel that the new documents were rejected independently because they ought to have been available before the RPD. In making that finding, the RAD applied the principles of admissibility from *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 289 D.L.R. (4th) 675. While I agree that applying the basic factors in *Raza* can be helpful, this Court has since observed that a more generous approach to the acceptance of new evidence may be appropriate in the context of a RAD appeal than in a PRRA: see *Singh v Canada (Minister of Employment and Immigration),* 2014 FC 1022 at paras 3-42, 246 ACWS (3d) 433.

[11] For the foregoing reasons this application is allowed. The matter will be remitted to a different panel of the RAD for reconsideration on the merits.

[12] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed with the matter remitted to a different panel of the RAD for redetermination on the merits.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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