Federal Court  Cour fédérale

Date: 20160713

Docket: IMM-4623-15

Citation: 2016 FC 781

St. John's, Newfoundland and Labrador, July 13, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

KIBROM KEBEDOM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Kibrom Kebedom ("the Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the "RPD"), denying his claim for protection, pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[2] The Applicant claims to be a citizen of Eritrea. He alleges to be at risk of persecution as a consequence of mandatory conscription into the National Service. He was ordered to report for National Service in July 2014 and fled instead. He also alleges to be at risk of persecution as a refugee claimant.

[3] The RPD found that the Applicant's claim had no credible basis. His identity was the determinative issue before the RPD. The RPD rejected the claim on the basis that his identity documents were insufficient, on a balance of probabilities, to establish his identity as a citizen of Eritrea.

[4] In support of his identity, the Applicant submitted a birth certificate, a school report card and copies of his parent's identity cards. The RPD assigned these documents no weight.

[5] After the hearing held on September 17, 2015, the Applicant, by letter dated September 20, 2015, requested the opportunity to submit post-hearing evidence and asked the matter remain under reserve for five days.

[6] The RPD refused the Applicant's request to file further evidence. It found that he had not provided any information as to what documents he sought to adduce, their relevance or why the documents could not be filed earlier.

[7] The Applicant raised four issues in this application for judicial review:

A. Did the RPD breach procedural fairness by refusing to allow the Applicant to submit post-hearing evidence;

B. Was the RPD's assessment of the Applicant's evidence unreasonable;

C. Were the RPD's plausibility findings unreasonable;

D. Did the RPD commit a reviewable error by finding that the claim had no credible basis.

[8] As a preliminary matter, the Minister of Citizenship and Immigration (the "Respondent") objects to the inclusion in the Applicant's Application Record of the post-hearing evidence that was not accepted by the RPD.

[9] The Respondent submits that an application for judicial review should be conducted on the basis of the record before the decision maker. He argues that the evidence does not fall within the narrow exceptions to that general rule, relying upon the decision in *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, [2003] 1 F.C.R. 331.

[10] The Respondent argues that the RPD is under no duty to accept the evidence and properly exercised its discretion in denying the request to provide evidence after the close of the hearing; see the decision in *Farkas v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 542 at paragraph 12.

[11] The first issue to be addressed is the applicable standard of review.

[12] The refusal to accept new evidence after the close of a hearing involves discretion. In this case, the Applicant frames this refusal as an issue of procedural fairness. An alleged breach of procedural fairness is reviewable on the standard of correctness; see the decision in *Behary v. Canada (Citizenship and Immigration)*, 2015 FC 794.

[13] The Board's credibility and identity findings are reviewable on the standard of reasonableness; see the decision in *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.).

[14] Reasonableness is concerned with the justification, transparency and intelligibility of the decision-making process, and requires that the decision fall within a range of possible, acceptable outcomes; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[15] The Respondent's objection to the Applicant's inclusion of the post-hearing evidence in his Application Record will be addressed next.

[16] The Applicant submits that the post-hearing evidence was adduced to establish a breach of procedural fairness, which is a recognized exception to the general rule that judicial review should be conducted on the basis of the evidence before the decision maker.

[17] I agree that material extraneous to the material before the decision maker can be introduced in an application for judicial review in support of an argument about a breach of

procedural fairness; see the decision in *Ontario Assn. of Architects, supra* at paragraph 30. I reject the Respondent's arguments on this issue.

[18] However, as set out below, I am not persuaded that any breach of procedural fairness occurred. I will ignore the proposed post-hearing evidence that is included in the Application Record, for the purpose of deciding this application.

[19] The third issue is whether the RPD breached the duty of procedural fairness by not allowing the Applicant to provide post-hearing evidence.

[20] Rule 43(3) of the *Refugee Protection Division Rules*, SOR/2012-256 sets out factors to be considered when a party makes an application to provide a document as evidence after a hearing as follows:

(3) In deciding the application, the Division must consider any relevant factors, including	(3) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :
(a) the document's relevance and probative value;	a) la pertinence et la valeur probante du document;
(b) any new evidence the document brings to the proceedings; and	b) toute nouvelle preuve que le document apporte aux procédures;
(c) whether the party, with reasonable effort, could have provided the document as required by rule 34	c) la possibilité qu'aurait eue la partie, en faisant des efforts raisonnables, de transmettre le document aux termes de la règle 34.

[21] I agree with the Respondent that the RPD is under no legal duty to accept post-hearing evidence.

[22] Discretionary decisions are subject to judicial intervention if made for improper reasons or with reference to irrelevant considerations; see the decision in *Maple Lodge Farms v. Government of Canada,* [1982] 2 S.C.R. 2.

[23] I am not persuaded that the RPD erred in the exercise of its discretion to refuse the post-hearing evidence. The letter from Applicant's Counsel dated September 29, 2015 does not indicate what evidence he sought to file or why that evidence could not have been filed in accordance with Rule 34. The Applicant had not met the criteria set out in Rule 43(3).

[24] The next issue to be addressed is the reasonableness of the RPD's assessment of the Applicant's evidence.

[25] The RPD gave the Applicant's birth certificate no weight, despite finding that it "does not contain any flaws on its face." It found that, in light of the availability of fraudulent documents and its finding that the Applicant was not credible, the birth certificate was neither credible nor trustworthy.

[26] In my opinion, the fact that fraudulent identity documents are available in Eritrea and in the Eritrean expatriate community in Canada is not a sufficient basis to reject the Applicant's

birth certificate; see the decision in *Chen v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1133.

[27] The availability of fraudulent documents in a country does not, *per se*, mean that the Applicant was not credible.

[28] It follows that the RPD's assessment of the birth certificate was unreasonable, in light of the standard of reasonableness referred to above.

[29] The remaining issue is the no credible basis finding.

[30] A finding of no credible basis may only be made where there is no trustworthy or credible evidence that could support recognition of the claim; see the decision in *Rahaman v. Canada (Minister of Citizenship and Immigration) (C.A.)*, [2002] 3 F.C.R. 537 at paragraph 28. Since I have found that the RPD's assessment of the Applicant's birth certificate was unreasonable, I conclude that the finding of no credible basis is also unreasonable.

[31] In my opinion, the RPD's no credible basis finding is also flawed since the Applicant's knowledge of Tigrinya, the most widely spoken language in Eritrea, is credible evidence that could support the recognition of his refugee claim; see the decision in *Tran v. Canada (Citizenship and Immigration)*, 2013 FC 1080 at paragraph 8.

[32] In the result, this application for judicial review is allowed and the matter is remitted to a differently constituted panel of the RPD for redetermination. There is no question for certification proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is remitted to a differently constituted panel of the RPD for redetermination.

There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4623-15
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