Federal Court  Cour fédérale

Date: 20180320

Docket: IMM-3190-17

Citation: 2018 FC 314

Ottawa, Ontario, March 20, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

HANNA SISAY TEKA
NADI TASESSE
NATI TADESSE

Applicants

and

IMMIGRATION, REFUGEE AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicants are citizens of Ethiopia who seek review of the June 26, 2017 decision of the Refugee Appeal Division [RAD] concluding that they are not refugees or persons in need of protection under ss. 96 or 97 of the *Immigration and Refugee Protection Act* [IRPA]. The RAD decision overturned a previous decision of the Refugee Protection Division [RPD] granting the

Applicants refugee status. The decisive issue for the RAD was the authenticity of the Applicants' birth certificates.

[2] For the reasons that follow, this judicial review is denied.

I. Background

[3] The Principal Applicant [PA] and her two children are citizens of Ethiopia. The PA claimed refugee status on the basis that she was abducted, imprisoned and beaten as she was suspected of being a supporter of the Oromo Liberation Front [OLF] political movement. After her release she left Ethiopia with her children and claimed refugee status in Canada.

[4] Her father was a member of the OLF and active in Ethiopian politics. He was allegedly imprisoned and tortured. The PA also alleges that her husband was imprisoned because of his suspected OLF involvement.

[5] The Applicants' refugee claim was allowed by the RPD.

[6] The Minister appealed the RPD decision to the RAD and the RAD overturned the RPD finding.

II. RAD Decision

[7] On June 26, 2017 the RAD allowed the Minister's appeal and set aside the decision of the RPD. The determinative issue for the RAD was the authenticity of the Applicants' birth certificates.

[8] The RAD considered all of the evidence relied upon by the Applicants including the birth certificates, a psychotherapist report, and letters from Oromo organizations.

[9] On the birth certificates, the RAD noted that the RPD considered and rejected the Minister's document analysis report [Document Analysis Report] concerning the birth certificates. Although the Document Analysis Report indicated that there were serious concerns about the birth certificates' "authenticity and how they were obtained," the RPD rejected the report because it was not based on a sample document and because Ethiopian birth certificates do not have security features.

[10] The RAD noted that at the RPD hearing the Minister sought to enter into evidence a second document analysis report [Second Document Analysis Report], but the RPD refused to receive this document into evidence because it had not been disclosed within the RPD's 10 day disclosure rule.

[11] The RAD considered the parties' arguments, and concluded that the Second Document Analysis Report was probative and therefore received it into evidence. The RAD noted that the

Second Document Analysis Report contradicted the Applicants' testimony that their birth certificates were sent from Ethiopia in March 2016. This report indicated that the birth certificates were actually printed at a Staples store in Toronto in July 2016. The RAD noted that the analysis was conducted based on a security feature embedded in the actual printer "which allows an examiner to determine that a document was printed in a publicly accessible commercial printer such as the one in the Staples store."

[12] While the Applicants argued that the printers could have been used by the Ethiopian government, the RAD noted that this was a speculative argument and did not explain the inconsistency as to the date of printing. The RAD concluded that the birth certificates were fraudulent, and the identities of the Applicants were not established.

[13] The RAD also considered the report offered by a psychotherapist stating that the PA exhibited symptoms consistent with post-traumatic stress disorder, generalized anxiety disorder, and major depressive disorder. However, the RAD concluded that the report did not conclusively attribute the PA's symptoms to the circumstances of her refugee claim.

[14] The RAD also considered letters from Oromo organizations, particularly from the Oromo Canadian Community Association [OCCA] but determined that these letters could not establish the Applicants' identity and were in the nature of letters of support.

[15] The RAD concluded that the RPD's findings regarding identity were not correct, and therefore allowed the Minister's appeal.

III. Issues

[16] The following issues arise on this judicial review:

A. Were the Applicants treated fairly by the RAD?

B. Is the RAD's assessment of the evidence reasonable?

C. Should costs be awarded against the Applicants' counsel?

D. Post hearing submissions

IV. Standard of Review

[17] The standard of review on the RAD's decision not to convoke an oral hearing under s.110(6) of the IRPA involves the application of the law to the facts, and is therefore reviewed on the reasonableness standard (*Ajaj v Canada (Citizenship and Immigration)*, 2016 FC 674 at paras 16-17).

[18] The issue of fairness and being given an "opportunity to respond" in the common law context is a matter of procedural fairness which is typically considered on the correctness standard (*Zhang v Canada (Citizenship and Immigration)*, 2018 FC 203 at para 12).

[19] The standard of review for the RAD's assessment of the evidence on the facts is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35).

V. Analysis

A. *Were the Applicants treated fairly by the RAD?*

[20] The Applicants claim that they were treated unfairly by the RAD as they were deprived of the opportunity to respond to the Second Document Analysis Report which they argue is "new" evidence. They further argue that receipt of this new evidence by the RAD triggered s. 110(6) of the IRPA and therefore an oral hearing should have been convoked.

[21] The Respondent strenuously disagrees with these submissions and states that the Applicants had two opportunities in their written submissions to the RAD to address this evidence. Further the Respondent argues that the issue of the authenticity of the birth certificates was not a new issue as this was also a central issue before the RPD. In the circumstances, the Respondent argues that there is no breach of procedural fairness for the RAD not to hold an oral hearing as the Applicants were aware of the evidence but did not provide "full and detailed submissions" as required by the *Refugee Appeal Division Rules* [*Rules*], as to why an oral hearing was necessary.

[22] According to s.110(3) of the IRPA, Parliament intended the RAD to be a paper-based tribunal. However, the RAD can convoke an oral hearing if certain criteria, set out in s.110(6) of the IRPA, are met. Section 110(6) provides:

Hearing	**Audience**
(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence	**(6)** La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au

referred to in subsection (3)	paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	**a)** soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	**b)** sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	**c)** à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[23] The *Rules* put the onus on the Applicants to inform the RAD why they are requesting an oral hearing and to provide "full and detailed submissions" supporting this request (*Refugee Appeal Division Rules*, s.10(3)(e)(iii)). In *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 55, the Court noted that the RAD's role and rules of evidence "must be respected."

[24] Therefore, if there is "new" evidence going to credibility and that is central to the decision, the RAD has authority to convoke an oral hearing (*Adera v Canada (Citizenship and Immigration)*, 2016 FC 871 at para 57). Even if the criteria in s.110(6) are met, the RAD still has discretion to decline to hold an oral hearing (*Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at para 35).

[25] The determinative question is whether the Second Analyst Report raises a "new issue." New issues and evidence related to those issues are legally and factually distinct from the grounds of appeal raised by the parties and cannot reasonably be said to arise from the issues raised by the parties: *R. v Mian*, 2014 SCC 54 at para 30 [*Mian*]; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 71. In this case, the Second Analyst Report formed the grounds of appeal raised by the Respondent in its record before the RAD. The Respondent argued in its memorandum that the RPD erred in refusing to admit this Report as it was "relevant and probative evidence." In its submissions to the RAD, the Respondent outlined the contents of the Second Analyst Report and also offered the Addendum to the Report which corroborated the conclusions in the report.

[26] In light of this, and considering that this Report was in issue before the RPD, it cannot be said that the Second Analyst Report constitutes a "new issue." The fact that the RPD did not receive this Report into evidence does not make it a new issue. In fact, the failure of the RPD to take this report into evidence was one of the Respondent's grounds of appeal to the RAD.

[27] Furthermore, although the Addendum to the Second Analyst Report was not before the RPD, it does not qualify as "new" evidence as it is simply an addendum to the main report and serves only to corroborate the conclusions of the Report. It is not legally or factually distinct, as noted in *Mian*.

[28] For those reasons, the RAD was not required to hold an oral hearing pursuant to s. 110(6) because there was no "new" issue before the RAD. The RAD cannot be faulted for proceeding

on a paper-based record, as it is designed to do under s.110(3), if the Applicants did not fully plead exceptional circumstances to justify an oral hearing.

[29] To the extent that the Applicants raise procedural fairness issues in the common law context, I also conclude that the common law duty of procedural fairness was not violated in this case. The Applicants had two opportunities to make their case in response to the Respondent's evidence before the RAD. This is not a case where the RAD raised new credibility issues on its own accord, and did not provide an opportunity for the Applicants to respond, as in *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at paras 9-10. Here, the RAD addressed the arguments on appeal based on the RPD record. This was a reasonable and correct way to proceed.

B. *Is the RAD's assessment of the evidence reasonable?*

[30] The Applicants argue that the RAD conducted a superficial analysis of the Second Analyst Report in respect of the birth certificates and did not question the report's methodology.

[31] However, this argument is not supported by the RAD's reasons. The RAD expressly considered the methodology behind the Second Analyst Report and Addendum. In the record, the Minister also offered a technical description of the report.

[32] The reasons and record must be read together (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15). In this case, reading the reasons and record holistically, the RAD clearly considered the veracity of the

Second Analyst Report, noting the Applicants' arguments in response, but ultimately preferring the conclusions outlined in the report. This was reasonable.

[33] On the Oromo letters, the Applicants argue that the RAD discounted the OCCA letter because it did not offer specific details about the contents of statements and interviews. The Applicants submit that the RAD did not explain why this detail should have appeared in the letter.

[34] Here however the RAD discounted the OCCA letter as evidence because it was not sufficient to prove the material issue, which was identity. The RAD assessed the evidence for what it said, but simply concluded it was not probative. The RAD is entitled to do so.

[35] The RAD is owed deference in the assessment of evidence, and its weighing of the evidence should not be reconsidered and substituted on judicial review (*J.M. v Canada (Citizenship and Immigration),* 2015 FC 598 at para 48). A "high degree of deference" is owed to the RAD's factual findings and assessment of the evidence (*Koky v Canada (Citizenship and Immigration)*, 2017 FC 1035 at para 11).

[36] Therefore, the RAD's assessment of the evidence is reasonable.

C. *Should costs be awarded against the Applicants' counsel?*

[37] The Respondent requests an award of costs against legal counsel for the Applicants because of statements contained in the PA's affidavit which they allege are misleading. The

Respondent also takes issue with the conduct of the Applicants' legal counsel in failing to include key documents in the Application for Leave and Judicial review Record filed on behalf of the Applicants.

[38] The particular paragraph from the PA's Affidavit states as follows:

> Our refugee claim was accepted, but upon appeal, the Refugee Appeal Division cancelled our refugee status based on documents disclosed by the Minister. However, I have never been given a chance to respond to the allegations that my birth certificate is fraudulent. I had hoped that the RAD or RPD would allow me to respond to these allegations by the Minister but they have just rejected my claim without providing me the chance to respond. I do not believe this to be fair and request an opportunity to be heard.

[39] As noted above, this is not an accurate statement. The Applicants had two opportunities to respond to the RAD.

[40] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* provides that no costs are awarded in immigration proceedings unless the Court finds there are "special reasons" for so doing.

[41] What constitutes special reasons were described by the Federal Court of Appeal in *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 [*Ndungu*]. While the Court in *Ndungu* noted that the circumstances it outlined were not exhaustive, the "special reasons" exception in Rule 22 is a "high bar" (*Brown v Canada (Citizenship and Immigration)*, 2011 FC 585 at para 43). In *Ndungu*, at para 7, the Court noted that, when it comes to the behaviour of an Applicant:

> ‘Special reasons’ justifying an award of costs against an applicant may be found where the applicant has unreasonably opposed the Minister’s motion to allow the application for judicial review, thereby prolonging the proceedings (citations omitted).

[42] Given the high bar for costs under Rule 22, this case is unlike the circumstance described in *Ndungu*. Here, while the paragraph of the Applicant’s affidavit is not accurate, this appears to have arisen more from sloppy drafting rather than an intention to mislead the Court. Likewise I do not find that the failure of Applicant’s legal counsel to file a full record on the leave application was intentional.

[43] I therefore decline to award costs.

D. *Post hearing submissions*

[44] Following the hearing the Applicants submitted further submissions on a recent decision on procedural fairness. The Respondent objects to the Court considering these submissions on the grounds that there is no provision in the *Federal Courts Rules* on judicial review to allow the filing of such submissions.

[45] I agree with the Respondent. In any event, the case sought to be relied upon by the Applicants is simply a restatement of the law on procedural fairness and is of no assistance to the Applicants here as I have concluded there was no breach of procedural fairness.

JUDGMENT in IMM-3190-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is certified; and

3. No costs are awarded.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3190-17
STYLE OF CAUSE:	HANNA SISAY TEKA, NADI TASESSE, NATI TADESSE v IMMIGRATION, REFUGEE AND CITIZENSHIP CANADA
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APPEARANCES:

Max Berger	FOR THE APPLICANTS
Brad Bechard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Max Berger Professional Law Corporation Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT