Federal Court  Cour fédérale

Date: 20180928

Docket: IMM-426-18

Citation: 2018 FC 966

Ottawa, Ontario, September 28, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

EFREM KEBEDE GEBREYESUS AND GIDAY MURUTSE KINANEMARIAM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, husband and wife, seek judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD] upholding a Refugee Protection Division [RPD] finding that they are not Convention refugees or persons in need of protection. The RAD further dismissed their submission that the conduct of the RPD demonstrated a reasonable apprehension of bias.

[2] Mr. Gebreyesus is a 66 year-old man of Eritrean origin. He has spent most of his life in Ethiopia, where he alleges he previously held Ethiopian citizenship. In 1977, he married Ms. Kinanemariam, an Ethiopian citizen. He worked in the Ethiopian government service as a teacher for 23 years.

[3] Between 1998 and 2000 Ethiopia and Eritrea were at war. Mr. Gebreyesus alleges that during the war and because of his Eritrean origin, in 1998 the Ethiopian government took away his citizenship, and in 1999 fired him from his job. He says that he was almost deported twice during this period but that both times the deportation was prevented through the intervention of his wife and friends.

[4] Mr. Gebreyesus found a new job in 2000 teaching for a Non-Governmental Organization [NGO], where he worked until he retired in 2016. He tried to claim a pension for his previous teaching job in Government service but it was denied because only Ethiopians are entitled to a pension.

[5] Mr. Gebreyesus never recovered his Ethiopian citizenship although he alleges it should have been returned following a law passed in 2006. He currently has an Ethiopian alien passport and an Ethiopian permanent residence permit.

[6] In 2016 the Applicants came to Canada to visit their son and then they made a refugee claim.

[7] The RPD heard the claims on November 28, 2016 and January 23, 2017. On November 22, 2016, six days prior to the first hearing, the RPD sent a letter to the Minister pursuant to Rule 26(1) of the *Refugee Protection Division Rules*, SOR/2012-256 [the *Rules*], to advise that there was a possibility that Article 1E of the Refugee Convention applies to Mr. Gebreyesus' claim. That provision provides that the "Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country." The letter reads as follows:

> Pursuant to Rule 26 of the Refugee Protection Division (RPD) Rules, you are hereby notified that the RPD believes that the section E of Article 1 of the United Nations Convention Relating to the Status of Refugees may apply to the refugee protection claim of the person named above. In particular, the RPD believes that, as per Article 1, the refugee claimant may have been: "[…] recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."
>
> ***Male claimant is a citizen of Eritrea but is a permanent resident of Ethiopia***.
> (emphasis in original)

[8] At the time of the hearing on November 28, 2016, no response had been received from the Minister. The RAD decision recounts what occurred during the first day of hearing that caused it to be adjourned:

> After thirty minutes of questioning, the RPD stopped the hearing and indicated that it needed to update the letter to the Minister based on information that came out in the principal Applicant's testimony, so that it could better assess whether Article 1E is an issue or not an issue.

[9] After the hearing was adjourned, irregularities were noted on some of Mr. Gebreyesus' documents and it was decided that integrity might also be an issue such that the Minister needed to be alerted under Sub Rule 27(2) of the *Rules*. That Sub Rule provides that "If the Division believes, after a hearing begins, that there is a possibility that issues relating to the integrity of the Canadian refugee protection system may arise from the claim and the Division is of the opinion that the Minister's participation may help in the full and proper hearing of the claim, the Division must adjourn the hearing and without delay notify the Minister in writing and provide any relevant information to the Minister."

[10] The second letter to the Minister, dated December 6, 2016, reads, in relevant part, as follows:

> **Rule 26 Exclusion – Section E**
>
> Pursuant to Rule 26 of the Refugee Protection Division (RPD) Rules, you are hereby notified that the RPD believes that the section E of Article 1 of the United Nations Convention Relating to the Status of Refugees may apply to the refugee protection claim of the person named above. In particular, the RPD believes that, as per Article 1, the refugee claimant may have been: "[…] recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."
>
> **Rule 27 Integrity Issues**
>
> Pursuant to Rule 27 of the *Refugee Protection Division (RPD) Rules*, you are hereby notified that the RPD believes that there is a possibility that issues relating to the integrity of the Canadian refugee protection system may apply to the claim of the person named above. In the RPD's opinion, the Minister's participation may be helpful in the full proper hearing of the claim. In particular the RPD believes that there is:
>
> - information that the claim may have been made under false identity in whole or in part

> - information that, in support of the claim, the claimant submitted documents that may be fraudulent;
> - other information that the claimant may be directly or indirectly misrepresenting the withholding material facts relating to a relevant matter.
>
> …
>
> Additional information regarding the claimant's status has come to light. The claimant has presented an alien passport from Ethiopia issued to Eritreans who are permanent residents of Ethiopia. The designation of PA in the passport number field indicates the status of the holder. The claimant has also presented an Eritrean permanent resident card and a marriage certificate. These documents have numerous spelling errors and there is some question of the validity of the marriage certificate. The claimant's picture is date stamped sometime in 2006; however the document was issued in 2002. The validity and authenticity of the claimant's documents are now in question.

[11] Prior to the second hearing on January 23, 2017, the Applicants made an application that the RPD panel members remove itself on the basis of reasonable apprehension of bias. They submitted both the inaccurate reference at the first hearing to the citizenship of Mr. Gebreyesus as Ethiopian, and the adjournment to allow the Minister to intervene, support a reasonable apprehension of bias. The basis of that submission, as described by the RPD is that "the actions suggest the panel is insisting that the Minister intervene and is aggressively pursuing the matter [and] that the wording of the letter to the Minister suggests that the panel is inclined towards a certain position in the claim."

[12] The panel member decided not to recuse herself for reasonable apprehension of bias. She explained that her reference to the Applicant's Ethiopian citizenship was for the purpose of

clarifying his nationality, given that he had traveled to Canada on an Ethiopian passport and claimed to once hold Ethiopian citizenship.

[13] She also commented on the wording of her letter, explaining the issues which had been identified with the documents which led to the identification of a potential issue of integrity. She explained that the Applicants would be provided an opportunity to provide a response to those issues at the next sitting of the hearing.

[14] The panel member also noted that the *Rules* clearly state that the RPD can adjourn the hearing to invite the Minister if it is deemed that the Minister's participation would aid in the hearing; however, there is nothing in the *Rules* to suggest that it cannot invite the Minister again if no response is received. The panel member concluded that the actions taken were within the normal parameters of a hearing and that the Applicants had not met their burden to establish a reasonable apprehension of bias.

[15] The RPD determined that Mr. Gebreyesus was excluded by Article 1E of the Refugee Convention as he had rights and obligations similar to those of Ethiopian citizens. This decision was made relying on a Directive from the Ethiopian government which enumerated the rights of permanent residents. I pause to note that which of the two Directives the Panel relied on here was initially an issue in the judicial review, but was appropriately dropped by the Applicants at the hearing of this matter.

[16] In light of the finding that Mr. Gebreyesus was a permanent resident of Ethiopia, the RPD then considered whether he had a well-founded fear of persecution in Ethiopia. It determined that while he has faced discrimination by losing employment and being detained, it was intermittent and sporadic and was not discrimination amounting to persecution. The RPD rejected the Claim.

[17] The RAD dismissed the appeal finding that there was no reasonable apprehension of bias, and it confirmed the RPD decision that the Applicants were neither Convention refugees nor persons in need of protection.

[18] The Applicants ask the Court to review the RAD's findings on reasonable apprehension of bias and the reasonableness of its decision on protection.

[19] As they did before the RAD, the Applicants submit that by writing a second letter to the Minister the RPD shows a reasonable apprehension of bias. Specifically, they submit that by writing the second letter and repeating the "allegations" that Mr. Gebreyesus is excluded, the Panel indicated the position the Minister is to adopt. They also say that the letter was "guidance" to the Minister to take a position that the documents may be forged.

[20] They submit that the RPD did not need to write the second letter as the authenticity of documents is within its jurisdiction and therefore, they say, the real reason for the letter was to request the Minister to intervene and exclude Mr. Gebreyesus under Article 1E.

[21] I agree with the Applicants that the test to be applied is that in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at page 394: "…what would an informed person, viewing the matter realistically and practically--and having thought the matter through—conclude?"

[22] In my view, the RPD acted in accordance with the *Rules* and there is nothing in its conduct to support the allegation that it had made a determination that Article 1E applied. The RPD by way of its first letter had invited the Minister to address the exclusion issue only six days before the hearing. When new evidence emerged in the hearing it was adjourned, pursuant to Rule 27, in order to update the Minister. The panel did not take any position or make any findings and it arguably had an obligation to update the Minister, especially when as here the first notice was given so close to the hearing and the Minister had not yet responded.

[23] Furthermore, when the questionable documents came to light, and the RPD concluded that the Minister's participation might be of assistance, it had a statutory obligation to advise the Minister as set out in Sub Rule 27(2) of the *Rules*.

[24] The Applicants also submit that the finding that the discrimination experienced did not amount to persecution was unreasonable. They say that discrimination can amount to persecution when it leads to consequences which are substantially prejudicial for the person concerned. Specifically, they note that *Xie v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 286 held that persecution might arise if the state interferes substantially with the applicant's ability to work and the only possibility is illegal work.

[25] I agree with the Respondent's submission that the RAD's reasons show justification, transparency and intelligibility within the decision-making process and its decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and the law.

[26] Even though Mr. Gebreyesus lost his citizenship in 1998, he has resided in Ethiopia with substantially similar rights to Ethiopian nationals. While his detentions were discriminatory, he was not charged and has not been detained since 1998 nor has he had any issues with security officials. There is no evidence of a forward-looking possibility of detainment or that deportation is currently being contemplated. The Applicants' suggestion that the conflict might escalate is speculative.

[27] Although Mr. Gebreyesus lost his job for apparently discriminatory reasons, he was able to obtain new employment and there is no evidence that he is now unable to earn a livelihood should he return. His apparent loss of a government pension may have been for discriminatory reasons; however, it cannot ground the refugee claim because as the RAD found, there is no evidence that Mr. Gebreyesus cannot continue to work or apply for a pension from the NGO. Denial of pension has not been found to be a deprivation of a fundamental human right.

[28] The Applicants lastly say that if a person is a victim of a number of discriminatory measures there will be a strong claim to a fear of prosecution. Since the cumulative effect of the instances of discrimination experienced by the Applicants amount to persecution, the RAD arrived at an unreasonable decision in stating they do not.

[29] There is most certainly jurisprudence that holds that repeated incidents of discrimination in the past can lead to a finding of persecution in the future: See for example *Horvath v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 398 and *Mete v Canada (Minister of Citizenship and Immigration)*, 2005 FC 840. However, I find that the RAD did consider the question of the impact of cumulative discrimination. It explained that all of the incidents relied on by the Applicants occurred almost 20 years ago and they were not persistent or repeated. The cases cited by the Applicants are distinguishable because of those factors.

[30] For these reasons the application will be dismissed. Neither party proposed a question for certification and in my view, there is none.

JUDGMENT IN IMM-426-18

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Daniel Kebede	FOR THE APPLICANTS
Margherita Bracco	FOR THE RESPONDENT

SOLICITORS OF RECORD:

The Law office of Daniel Tilahun Kebede Barrister, Solicitor and Notary Public Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Department of Justice Canada Ontario Regional Office Toronto, Ontario	FOR THE RESPONDENT