Federal Court  Cour fédérale

Date: 20190103

Docket: IMM-840-18

Citation: 2019 FC 6

Ottawa, Ontario, January 3, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

ABUBEKER ARAFA
RIMA MOHAMMEDBERHAN
AMIN ABUBEKER
SABRINA ABUBEKER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, a family of four, seek judicial review of a redetermination decision (Decision) of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada. The RAD confirmed the decision of the Refugee Protection Division (RPD) that the Applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27

(IRPA). The RAD found that the Applicants had failed to establish their identities as nationals of Eritrea. This application for judicial review is brought pursuant to subsection 72(1) of the IRPA.

[2] The Applicants submitted to the RAD eighteen documents as further evidence of their national identities. The RAD assessed the admissibility of the Applicants' new evidence pursuant to subsection 110(4) of the IRPA and admitted five of the eighteen documents. I find that the RAD's exclusion of a number of the documents submitted by the Applicants was unreasonable. Therefore, this application for judicial review will be allowed.

I. Background

[3] As stated above, the Applicants are a family of four: Mr Abubeker Arafa (Principal Applicant), Ms Rima Mohammedberhan, his wife, and Amin and Sabrina Abubeker, their children. The Applicants claim to be citizens of Eritrea. The Applicants also state that they are ethnic Jebertis, an oppressed minority in Eritrea.

[4] The Principal Applicant states that he was arrested, detained and tortured by the Eritrean authorities from December 2014 to July 2015. The reason for the detention and abuse was his perceived membership in the Al-Nahda party, a political party created by ethnic Jebertis in opposition to the government.

[5] In December 2015, the Applicants fled Eritrea to Canada via Sudan with the assistance of a smuggler. They arrived in Canada on February 26, 2016 and filed a refugee claim on April 7, 2016.

[6] The Principal Applicant fears persecution at the hands of the Eritrean authorities because of his perceived political opinion. Ms Mohammedberhan fears that she will be harassed, abused and raped by government officials if returned to Eritrea. The Applicants also fear retribution from the Eritrean authorities as refugees who fled the country illegally.

[7] The Applicants' procedural history in Canada is as follows:

Date	Procedural History	Additional Description
June 8, 2016	The Applicants' refugee determination hearing. The RPD rejects the Applicants' claims.	The RPD found the Applicants lacked credibility and failed to establish their identities.
June 23, 2016	Written decision of the RPD.	
July 11, 2016	The Applicants file an appeal to the RAD.	
November 1, 2016	First decision of the RAD.	The RAD dismissed the appeal and confirmed the RPD's credibility and identity findings.
November 23, 2016	The Applicants file an Application for Leave and Judicial Review of the RAD's first decision.	
February 13, 2017	Consent judgment of the Federal Court.	The Federal Court returned the matter to the RAD for reconsideration.
January 30, 2018	Redetermination decision of the RAD.	The RAD dismissed the appeal on the basis the Applicants had not established their identities as Eritrean nationals.
February 21, 2018	The Applicants file an Application for Leave and Judicial Review of the RAD redetermination decision.	
June 15, 2018	The Federal Court grants leave for judicial review of the RAD redetermination decision.	

II. Decision of the RPD

[8] The RPD refused the Applicants' refugee claims by way of a decision dated June 23, 2016. The panel found that the Applicants had not established their identities either by documentary evidence or through their testimony at the RPD hearing.

[9] The determinative issues before the RPD were identity and credibility as it related to the Applicants' identities. The panel noted that the onus was on the Applicants to produce acceptable documentation establishing their identities (section 106 of the IRPA and Rule 11 of the *Refugee Protection Division Rules*, SOR/2012-256). The only identity documents provided by the Applicants to the RPD were their birth certificates. The four birth certificates were issued on October 14, 2015. The Principal Applicant testified that they did not leave Eritrea with the birth certificates but had them sent subsequently by his brother from Sudan. The brother had obtained the certificates from the Principal Applicant's mother in Eritrea. The RPD stated that it was reasonable to expect that the Applicants would have fled Eritrea with their birth certificates given the importance of identity documentation in Eritrea. The RPD also reviewed the process by which the Applicants obtained the birth certificates. The Principal Applicant testified that they had not been required to submit any proof of identity to obtain the certificates. The RPD found that the process described by the Applicants was not consistent with the objective country evidence which indicated that proof of identity was required.

[10] The RPD found the testimony of the Principal Applicant and Ms Mohammedberhan regarding their identities not credible. The panel noted inconsistencies between the Principal Applicant's Basis of Claim (BOC) form and his testimony, and stated that the Principal

Applicant's testimony regarding his national identity (ID) card was not credible. The RPD found Ms Mohammedberhan's testimony as to her national identity vague.

[11] The Applicants submitted two letters from the Association of Eritrean Jeberti Canada (Association) which confirmed that the adult Applicants were Eritreans from the minority ethnic group of Jeberti. The panel placed little weight on the letters as they were very brief and did not indicate how the Association confirmed the Applicants' identities.

[12] Finally, the RPD placed some weight on a student transcript produced by Ms Mohammedberhan on the morning of the hearing but stated that it was not sufficient to establish her identity.

[13] The RPD questioned the absence of any other identity documents. The panel did not accept the Applicants' explanations as to why they had no other documentation when they had essentially lived all of their lives in Eritrea. Finally, the RPD did not accept the Principal Applicant's testimony regarding the Applicants' journey to Canada or his evidence regarding the treatment of his family in Eritrea, finding significant embellishments in his testimony, inconsistencies with his BOC and a lack of corroborative evidence regarding his obtaining of the funds necessary to travel to Canada.

III. The First RAD Decision

[14] The first RAD decision was set aside on consent of the parties by Order of Justice Southcott of this Court dated February 13, 2017. The Applicants' case was remitted for redetermination by a different RAD panel.

IV. RAD Decision under Review

[15] The Decision under review is the January 30, 2018 reconsideration decision by the RAD. The RAD dismissed the Applicants' appeal and confirmed the RPD's decision that the Applicants were neither Convention refugees nor persons in need of protection.

[16] The RAD first addressed the admissibility of eighteen documents submitted by the Applicants as new evidence. The panel considered the proposed new evidence against the requirements of subsection 110(4) of the IRPA and admitted five of the eighteen documents. I will review the RAD's exclusion of the Applicant's new evidence in detail in the analysis section of this judgment.

[17] The Applicants raised four arguments in their appeal to the RAD:

1. The RPD made improper and manifestly unjust credibility findings against Ms Mohammedberhan who was experiencing labour pains during the RPD hearing;
2. The evidence before the RPD was sufficient to establish the Applicants' identity;
3. The new evidence before the RAD, together with the evidence in the RPD record, sufficiently established the Applicants' identity as Eritrean nationals; and,
4. Whether the RAD was required to hold an oral hearing pursuant to subsection 110(6) of the IRPA?

[18] The RAD found that the RPD committed no breach of procedural fairness and did not err in its credibility findings with respect to Ms Mohammedberhan. The panel reviewed the conduct of the RPD hearing and found that the RPD properly considered Ms Mohammedberhan's discomfort during the hearing. The RPD panel offered to take breaks and asked a number of times if Ms Mohammedberhan was fine to proceed with the hearing. The RAD also agreed with the RPD's assessment of Ms Mohammedberhan's testimony. The RAD emphasized that Ms Mohammedberhan was not vague in all of her testimony. Rather, her testimony became vague when she was asked for details regarding her national ID card. Her lack of clarity concerning her ID card, the length of time she had resided in Eritrea without an ID card and when she had lost the card, undermined her credibility. The RAD did not accept that Ms Mohammedberhan's condition explained her vague testimony.

[19] The RAD rejected the Applicants' argument that the documentation they had submitted to the RPD was sufficient to establish their identities. The RAD also found that the RPD did not err in its credibility findings. The panel reviewed both the identity evidence that was before the RPD and the new evidence it had admitted. The RAD made detailed credibility findings and, like the RPD, drew a number of negative inferences from the Principal Applicant's narrative and testimony and the inconsistencies with his BOC. The RAD focused considerable attention on the Applicants' birth certificates. The panel assessed in detail: the issue of fraudulent documents in Eritrea and Sudan; the Applicants' failure to bring the birth certificates with them from Eritrea; the objective country evidence regarding the obtaining of birth certificates in Eritrea; the provenance of the birth certificates and the Applicants' narrative of how the certificates were

forwarded to them; and, issues on the face of the birth certificates. In conclusion, the RAD ascribed little weight to the birth certificates in establishing the Applicants as Eritrean citizens.

[20] The RAD gave little weight to the letters from the Association. The panel stated:

> I am unable to give much weight to the letter because I do not know whether this information was self-reported by the Appellants, or how the organization arrived at their determination, or the methods used by the organization to conclude that the Appellants are Jeberti or Eritrean citizens.

[21] The RAD then reviewed a number of inconsistencies between the information contained in the Principal Applicant's BOC and his testimony. The panel drew negative inferences regarding the Principal Applicant's credibility due to these inconsistencies, finding that his testimony was not a mere elaboration of the information in the BOC. The RAD also assessed: the RPD's treatment of the national ID card of the Principal Applicant's mother, the Applicants' failure to provide their marriage certificate, and the Principal Applicant's failure to mention his national ID card in his BOC; the RPD's findings regarding the Applicant's testimony explaining their journey to Canada; and, the fact that the Applicants gave evidence in Tigrinya, the most widely spoken language in Eritrea.

[22] The RAD considered all of the evidence and concluded that the Applicants had not "provided sufficient and reliable documents and credible evidence to establish their identities as Eritrean citizens as required by section 106 of the IRPA and Rule 11 of the *Refugee Protection Division Rules*". Finally, the RAD refused the Applicants' request for an oral hearing, finding that the criteria set forth in subsection 110(6) of the IRPA had not been satisfied.

V. Issues

[23] The determinative issue before me is the RAD's treatment of the additional information submitted by the Applicants. The Applicants argue that the RAD improperly excluded the documents based on a restrictive application of subsection 110(4) of the IRPA.

[24] The Applicants also raise the following issues in this application:

1. Did the RAD make unreasonable findings regarding Ms Mohammedberhan's labour pain at the RPD hearing and its impact on her ability to testify?
2. Did the RAD breach Ms Mohammedberhan's right to procedural fairness in failing to consider her individual refugee claim?
3. Did the RAD err in its consideration of the evidence before it and erroneously attack the Applicants' credibility?
4. Did the RAD err in failing to convene an oral hearing pursuant to subsection 110(6) of the IRPA?

[25] For the reasons that follow, I find that the RAD improperly excluded a number of the documents submitted by the Applicants. On reconsideration, the RAD will assess the RPD's findings in light of the new evidence. The new RAD panel will make its own determination regarding the Applicants' identities, evidence and credibility, and will either confirm the RPD's decision or substitute its own determination (paragraphs 111(1)(a) and (b) of the IRPA) or refer the matter back to the RPD (paragraph 111(1)(c) and subsection 111(2) of the IRPA). Depending on its conclusions regarding identity, the panel will assess the substance of the Applicants' claims for refugee protection, including whether Ms Mohammedberhan has asserted a claim separate from that of the Principal Applicant. Further, the issue of an oral hearing will be

addressed by the RAD on reconsideration. As a result, I make no findings in this judgment regarding the issues set forth in paragraphs 2, 3 and 4 above.

[26] I will address one aspect of the Applicants' arguments regarding the RAD's treatment of Ms Mohammedberhan. In their Further Memorandum, the Applicants state that the RAD sidelined Ms Mohammedberhan's independent claim because the RAD did not see her "as a claimant of equal worth and value as her husband" or "as relevant or worthy of consideration on her own". I see no basis for these allegations. The RAD did not consider whether Ms Mohammedberhan had asserted an independent claim as she had not established her identity. Similarly, the RAD did not assess the substance of the Principal Applicant's claim of persecution and abuse because he had not established his identity. The Applicants acknowledge earlier in the Further Memorandum that their risks have not yet been assessed. The RAD methodically assessed the Applicants' arguments and evidence regarding Ms Mohammedberhan's condition at the RPD hearing and the impact it may have had on her testimony. The RAD's statement in paragraph 92 of the Decision that her claim was based on that of her husband reflects the statement of the RPD to the same effect and Ms Mohammedberhan's own statement during the RPD hearing that she was not advancing an independent claim.

VI. Standard of review

[27] The RAD's interpretation of subsection 110(4) of the IRPA is subject to review by this Court for reasonableness in accordance with the presumption that an administrative body's interpretation of its home statute is owed deference by a reviewing court (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 (*Singh*)). Consequently, the Decision will

only be set aside if it lacks justification, transparency, or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the Applicants' case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[28] In their Further Memorandum, the Applicants characterize the issue of whether the RAD made unreasonable findings regarding Ms Mohammedberhan's labour pain at the RPD hearing as an issue of procedural fairness. In oral argument, counsel for the Applicants stated that the issue is not one of procedural fairness before the RPD; rather, it is an issue of the RAD's assessment of Ms Mohammedberhan's testimony and credibility. I agree with counsel's latter characterization of the issue. I will also review the RAD's consideration of evidence and credibility on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Huruglica*), 2016 FCA 93 at para 35; *Gebremichael v Canada (Minister of Citizenship and Immigration*), 2016 FC 646 at para 8).

VII. Analysis

1. *Admissibility of Applicants' New Evidence – Subsection 110(4) of the IRPA*

[29] The central issue in this judicial review is the admissibility of new evidence tendered by the Applicants and, largely, refused admission by the RAD in reliance on subsection 110(4) of the IRPA. The RAD admitted three documents relevant to Ms Mohammedberhan's condition during the RPD hearing and two affidavits submitted by the Applicants. The following documents were ruled inadmissible by the RAD:

1. Affidavit of the Principal Applicant dated January 6, 2017;

2. Documents sent by the Principal Applicant's mother on July 15, 2016 from Eritrea as follows (July 2016 Documents):

    (a) Copy of the Principal Applicant's Eritrean national ID card;

    (b) Copy of the Principal Applicant's driver's licence;

    (c) Copy of the Eritrean ID card of the Principal Applicant's mother;

    (d) Copy of the birth certificate of the Principal Applicant's mother;

    (e) Copy of the Eritrean passport of the Principal Applicant's mother;

    (f) Copy of the Applicants' marriage certificate;

    (g) Photographs of the Principal Applicant in Eritrea and Google Maps and Landmark Research corresponding to photographs;

    (h) Envelope sent by the Principal Applicant's mother containing the foregoing documents ((a)-(g)), dated July 15, 2016.

3. Documents found in Eritrea by a friend of the Principal Applicant during the summer of 2017 as follows (Summer 2017 Documents):

    (a) Property deed to the house of the Principal Applicant's mother;

    (b) School record (2014-15) of the minor Applicant.

4. Affidavits of the Principal Applicant's relatives, Saud Jemal Ibrahim and Jamal Sirag Abdullah (November 2017 Affidavits).

[30] Subsection 110(4) of the IRPA provides as follows:

Evidence that may be presented	**Éléments de preuve admissibles**
(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have	(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans

presented, at the time of the rejection.	les circonstances, au moment du rejet.

[31] The Applicants submit that the RAD engaged in an overzealous and microscopic analysis of their new evidence against the requirements of subsection 110(4). They state that, within the three-month period between the filing of their claims (March 14, 2016) and the RPD hearing date (June 8, 2016), they could obtain only some of their documents from Eritrea. Other documents, specifically the documents sent by the Principal Applicant's mother in June 2016, arrived just 22 days after the date of the RPD's decision.

[32] The Applicants make a number of arguments in support of the admission of their new evidence. First, they argue that the RAD should have taken into consideration the fact that the Applicants fled Eritrea at great risk, leaving behind all of their possessions and documents. The compressed timeline for processing their claims meant that their hearing date at the RPD was less than three months after the filing of their claims. Nevertheless, they were able to obtain their birth certificates from Eritrea during that period. The Applicants had to rely on the Principal Applicant's elderly and ill mother to find and send additional documents. She did so after only a brief delay (June 2016 Documents). The Applicants also explained the late arrival of the Summer 2017 Documents. The Applicants did not know of the existence of these documents at the time of the RPD hearing. They were found following a request to a friend of the Principal Applicant to look for further documents. The friend travelled to the home of the Principal Applicant's mother in the summer of 2017 and found the documents. With respect to the November 2017 Documents, the Applicants argue that they relied on their counsel at the time of the RPD

proceedings who did not inform them that affidavit evidence could be filed to corroborate their identities.

[33] The Applicants also submit that the sheer weight and content of their new evidence justifies the admission of the documents pursuant to subsection 110(4). They rely on the decision of this Court in *Acikgoz v Canada (Citizenship and Immigration)*, 2018 FC 149 at paragraph 25 (*Acikgoz*), for the proposition that the "newness" of evidence for purposes of a subsection 110(4) analysis can be considered on the basis that the new evidence contradicts a finding of fact by the RPD. The Applicants argue that their evidence was new as the documents contradicted the RPD's identity findings or were unknown and unavailable to the Applicants prior to the RPD hearing. They state that the RAD had flexibility in the application of subsection 110(4) and that the RAD should have admitted their new evidence considering the rights at stake in the Applicants' refugee claims.

[34] In order to properly assess the Applicants' arguments, it is first necessary to set out the parameters of a subsection 110(4) analysis by the RAD. This issue has been addressed numerous times by this Court and by the Federal Court of Appeal.

[35] Subsection 110(4) of the IRPA is a departure from the general principle set forth in subsection 110(3) that the RAD proceeds without a hearing on the basis of the RPD's record. The three conditions that must be met for evidence to be admissible pursuant to subsection 110(4) are:

1. The evidence arose after the rejection of the claim by the RPD;

2. The evidence was not reasonably available; or

3. The evidence was reasonably available but the applicant could not reasonably have been expected in the circumstances to present the evidence at the time of the rejection.

[36] The Federal Court of Appeal considered the scope of subsection 110(4) in 2016 in *Singh*. Justice de Montigny reviewed the three conditions of admissibility set out in the subsection and stated (*Singh* at paras 35 and 36):

> [35] These conditions appear to me to be inescapable and would leave no room for discretion on the part of the RAD. In the first place, the very wording of subsection 110(4) specifies that the person who is the subject of the appeal "may present only" (« ne peut présenter ») evidence that falls into one of these three categories, thereby excluding any other evidence. Second, one should not lose sight of the fact that this provision departs from the general principle according to which the RAD proceeds without a hearing, on the basis of the RPD's record (s. 110(3)) and must for that reason be narrowly interpreted. Indeed, the judge seems to agree with this approach, insofar as she states that the respondent "was required to establish that he could not have reasonably been expected to provide the newly submitted documents at his RPD hearing" (para. 47). If she ultimately sides with him, it is because his request to file this new evidence fell squarely, in her view, within the scope of subsection 110(4), "and it met its explicit criteria" (para. 62).
>
> [36] The respondent and intervener relied on *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, [2008] 1 F.C.R. 365 [*Elezi*] and, to a lesser extent, on *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 101, [2009] F.C.J No. 101, to argue that the RAD may take into account the probative value and credibility of evidence in order to counteract the requirements of subsection 110(4). With respect, I am unable to agree with this interpretation.

[37] Justice de Montigny then considered the application of the factors identified in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 (*Raza*), to the interpretation of subsection 110(4). In *Raza*, the Federal Court of Appeal addressed the admissibility of evidence in the

context of a Pre-removal Risk Assessment (PRRA) and paragraph 113(a) of the IRPA, and stated (*Raza* at paras 13 and 14):

> [13] As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:
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> 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
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> 2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
>
> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?
>
> If not, the evidence need not be considered.
>
> 4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

> 5. Express statutory conditions:
>
> > (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.
> >
> > (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).
>
> [14] The first four questions, relating to credibility, relevance, newness and materiality, are necessarily implied from the purpose of paragraph 113(*a*) within the statutory scheme of the IRPA relating to refugee claims and pre removal risk assessments. The remaining questions are asked expressly by paragraph 113(*a*).

[38] Justice de Montigny found that the *Raza* criteria are relevant to a subsection 110(4) analysis while emphasizing the legislative framework of the RAD and Parliament's clear intention to narrowly circumscribe the introduction of new evidence before the RAD. He stated that credibility and relevance are basic conditions to the admissibility of any evidence. Justice de Montigny then noted that the newness criteria is largely redundant in the context of the express requirements of subsection 110(4) and that the issue of materiality may require adaptation in light of the differences between a PRRA determination and the mandate of the RAD in the review of an RPD decision. He also stated that the short timeframes within which refugee claimants must submit their evidence do not supercede the legislative intent to limit the introduction of new evidence to the conditions of subsection 110(4) (*Raza* at paras 54 and 63).

[39] Turning to the case before me, there are four groups of documents at issue: the Principal Applicant's affidavit dated January 6, 2017; the June 2016 Documents; the Summer 2017 Documents; and, the November 2017 Affidavits. I find that the June 2016 Documents were improperly excluded by the RAD. I also find that the Principal Applicant's affidavit, the Summer 2017 Documents and the November 2017 Affidavits were not new evidence within the scope of subsection 110(4) of the IRPA and that the RAD did not err in excluding them from consideration.

[40] While available or in existence at the date of the RPD hearing, the June 2016 Documents are documents that the Applicants could not reasonably have been expected to present to the RPD. The Principal Applicant's mother was elderly and infirm. The RAD stated that she had sent the birth certificates in a timely manner and, therefore, did not accept the Applicants' arguments centering on the mother's difficulties in assembling the additional documents and forwarding them to the Applicants in Canada. However, the birth certificates are obvious identity documents. The mother would have recognized them and may have assumed they sufficiently identified the Applicants. The fact that she required further prompting and time to find and send the remainder of the documents is reasonable given her circumstances in Eritrea. The Applicants' argument that they did not know what documents the mother had initially sent until they received the birth certificates, necessitating the additional prompt, is persuasive. The delay in sending the documents was minimal and reflects an ongoing attempt to furnish identity documents. The RAD's commentary regarding the potential assistance of the Principal Applicant's sister, who lived with his mother, is speculative. There is no evidence in the record as to her ability to assist the mother.

[41] I find that the explanation provided by the Applicants together with the short time frame within which the June 2016 Documents were sent fall within the circumstances contemplated by Justice de Montigny in referring to the limited ability of the RAD to apply the conditions of subsection 110(4) with some flexibility (*Singh* at para 64). In other words, in the circumstances of the Applicants and the Principal Applicant's mother, it was not reasonable to expect the Applicants to have presented the documents to the RPD.

[42] In concluding that the June 26 documents are admissible, I place no reliance on the Applicants' argument that the sheer volume and content of the evidence contained in the documents was sufficient or material to their admission. Justice de Montigny in *Singh* and Justice Strickland of this Court in *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 (*Figueroa*), have clearly stated that the probative value and credibility of new evidence sought to be placed before the RAD in reliance on subsection 110(4) are not relevant to the analysis of the mandatory conditions of the subsection. The proposed evidence must meet the mandatory criteria. Justice Strickland stated (*Figueroa* at para 45):

> [45] The Federal Court of Appeal in *Singh FCA* also addressed a submission based on *Sanchez*, as well as *Elezi v Canada (Citizenship and Immigration)*, 2007 FC 240, that the RAD may take into account the probative value and credibility of evidence in order to counteract the requirements of s 110(4). The Federal Court of Appeal explicitly rejected that interpretation (at paras 36 and 63). Further, I do not accept that the Federal Court of Appeal's statement in paragraph 64 – that the RAD always has freedom to apply the conditions of s 110(4) with more or less flexibility – in any way detracts from its prior finding in paragraph 35 that the explicit statutory requirements of s 110(4) leave no room for discretion.

[43] In my opinion, the passage cited by the Applicants from *Acikgoz* indicating that the RAD should take into account whether the evidence was new "in the sense that it contradicted a finding of fact by the RPD, including a credibility finding" must be read in the context of both *Singh* and *Figueroa*. The fact that new evidence may contradict a finding by the RPD is not sufficient to bring the evidence within the parameters of subsection 110(4).

[44] With respect to the remaining evidence at issue, I agree with the RAD and find that the Principal Applicant's January 2017 affidavit is not admissible. The affidavit was submitted as one of four documents to address the credibility findings made by the RPD against Ms Mohammedberhan. The other documents were an affidavit from Ms Mohammedberhan, a letter from Nurse Practitioner Shackleton of Access Alliance dated September 21, 2017 and a Statement of Live Birth dated June 9, 2016. The RAD admitted the latter three documents but excluded the affidavit of the Principal Applicant on the basis that it did not refer to the issue of Ms Mohammedberhan's condition and pain during the RPD hearing. As a result, the RAD reasonably concluded that the affidavit was not relevant to the issues in the appeal.

[45] The Applicants argue that they had no knowledge of the existence of the Summer 2017 Documents and could not have provided them to the RPD. It was only in the summer of 2017 that the Principal Applicant requested the assistance of a friend travelling to Eritrea to look for further documents. I do not accept the Applicants' arguments and find that the Summer 2017 Documents do not fall within the ambit of subsection 110(4). The RAD's analysis and conclusions in excluding the documents were reasonable.

[46] The delay in providing the Summer 2017 Documents was substantial. The documents were located at the home of the Principal Applicant's mother. I accept that she did not find them in June 2016 but this oversight is not sufficient to bring the documents within subsection 110(4). The onus was on the Applicants to provide all documentation on a timely basis. To admit further documents after a substantial delay on the basis that a better search of the mother's house was performed would permit the Applicants to complete a deficient record and would defeat the purpose of the subsection (*Singh* at para 54). The RAD reasonably observed that the fact the Applicants only requested the assistance of a friend to look for further documents in 2017 does not absolve them from the requirement to have obtained these documents in a timely manner.

[47] Finally, the Applicants argue that the November 2017 Affidavits from two of the Principal Applicant's relatives should have been admitted by the RAD as the Applicants had not been advised by their former counsel that affidavits from relatives could be presented as corroborative evidence of their identities. The RAD was not persuaded by the Applicants' arguments, noting that the Applicants had not argued on appeal that they did not have adequate representation before the RPD. The panel reviewed the record and the audio recording of the RPD hearing. The RAD did not accept the Principal Applicant's evidence that he was advised by former counsel that the birth certificates would be sufficient. In fact, the Principal Applicant testified before the RPD that he had been advised to obtain additional documents from Eritrea. This testimony was consistent with the Principal Applicant's request to his mother in 2016 to obtain further documentation. The RAD expressed concern regarding the Principal Applicant's statement at the RPD hearing that the Applicants did not have any family or friends in Canada.

This testimony is inconsistent with the content of the affidavits which state that the two affiants met with the Applicants shortly after they arrived in Canada in 2016.

[48] I find that the RAD's consideration of the November 2017 Affidavits and its decision to exclude the affidavits pursuant to subsection 110(4) was reasonable. It is clear from the two affidavits that the Principal Applicant reached out to each of the affiants in 2016. The Applicants have provided no explanation as to why the affidavits were not obtained until late 2017. The RAD fully considered the Applicants' arguments regarding their reliance on prior inadequate counsel. The Applicants knew in early 2016 that they required additional documents. They obtained documents in June 2016. Their argument that they did not know that affidavit evidence could be helpful in establishing their identities is not persuasive. Such an argument would permit the ongoing presentation of evidence well beyond the parameters of subsection 110(4) based on the specific nature of the evidence.

[49] The Applicants bore the onus of providing all of their evidence on a timely basis. They have presented compelling arguments as to why the June 2016 Documents should be admitted for consideration by the RAD pursuant to subsection 110(4) of the IRPA. However, the January 2017 affidavit of the Principal Applicant, the Summer 2017 Documents and the November 2017 Affidavits are not admissible as they represent efforts to supplement the record and do not fall within the restrictive criteria of the subsection.

2. *Did the RAD make unreasonable findings regarding Ms Mohammedberhan's labour pain at the RPD hearing and its impact on her ability to testify?*

[50] The Applicants submit that the RAD erred in failing to adequately consider Ms Mohammedberhan's condition during the RPD hearing. They argue that the RAD dealt with Ms Mohammedberhan's labour pain and its impact on her ability to testify in a perverse and capricious manner. Ms Mohammedberhan states that she was in immense pain during the RPD hearing and that the medical evidence before the RAD established that her pain during early labour could have impacted her ability to focus and answer questions. I do not find the Applicants' arguments persuasive. The RAD did not err in its consideration of Ms Mohammedberhan's condition during the RPD hearing and its impact on her testimony.

[51] The RAD reviewed the transcript of the RPD hearing and found that the RPD member was alert and sympathetic to Ms Mohammedberhan's condition. The RAD also noted that Ms Mohammedberhan was questioned for a very short period of time. The RPD was very aware of Ms Mohammedberhan's condition. The panel asked a number of times if she needed to take a break and whether she was fine to continue. Ms Mohammedberhan responded on each occasion that she was okay though she was "feeling some pressure". The transcript from the RPD hearing sets out the following exchanges:

> RPD: Thank-you. Are you OK?
>
> Ms. Mohammedberhan: I, I'm feeling some pressure.
>
> Principal Applicant: She was due today.
>
> RPD: Oh…
>
> Principal Applicant: Or tomorrow but she said she was fine to, to spend the day here. She said she wasn't having any symptoms.

RPD: Okay, if, are you sure you're okay to proceed?

Ms. Mohammedberhan: I am okay.

[52] There is no indication that Ms Mohammedberhan was in extreme pain during the hearing contrary to her statement in her affidavit dated January 6, 2017. It was open to the RAD to prefer the evidence from the hearing itself in this regard.

[53] The RAD considered the impact on her testimony of the fact that Ms Mohammedberhan was experiencing early labour during the RPD hearing. The Applicants state that the RAD ignored the medical evidence that corroborated the reason for Ms Mohammedberhan's vague testimony but this statement is not reflected in the Decision. The RAD reviewed the medical evidence submitted by the Applicants. The panel found that the evidence did not explain Ms Mohammedberhan's vague testimony specific to her Eritrean national ID card. The RAD noted that the letter from the nurse practitioner at Access Alliance stated that the "pain of uterine contraction of early labour certainly could have impacted [Ms Mohammedberhan's] ability to testify and answer questions during her refugee testimony". The letter did not explain why Ms Mohammedberhan's testimony was vague only with respect to one aspect of her testimony. In addition, I note that the letter spoke in general terms only and did not establish or corroborate that Ms Mohammedberhan was experiencing significant pain during the hearing. I find that the RAD's weighing of the evidence as against Ms Mohammedberhan's testimony was reasonable. The panel's findings were neither perverse nor capricious.

VIII. Conclusion

[54] The application is allowed.

[55] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-840-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Board is set aside and the matter is again remitted for redetermination by a different panel.
3. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-840-18
STYLE OF CAUSE:	ABUBEKER ARAFA, RIMA MOHAMMEDBERHAN, AMIN ABUBEKER, SABRINA ABUBEKER v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 13, 2018
JUDGMENT AND REASONS:	WALKER J.
DATED:	JANUARY 3, 2019

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