

Federal Court



Cour fédérale

Date: 20190121

Docket: IMM-3191-18

Citation: 2019 FC 84

Ottawa, Ontario, January 21, 2019

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

AHMED YAHIA ABDELHADI YAHIA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD], dated June 13, 2018 [Decision], which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under ss 96 and 97 of the Act.

II. BACKGROUND

[2] The Applicant, Ahmed Yahia Abdelhadi, is a citizen of Sudan.

[3] The Applicant claims to fear persecution at the hands of the Sudanese government due to his anti-government activism. On May 11, 2008, the Applicant was travelling in a bus which was stopped at a government checkpoint. He says that the government forces alleged that he was a member of the Justice and Equality Movement. The Applicant was arrested and detained. While detained, he was interrogated and subjected to physical abuse. He was released on June 6, 2008.

[4] The Applicant secured employment in Oman and left Sudan in 2010. He returned to Sudan on April 27, 2014 after his uncle died. Upon arrival in Sudan, he was detained and subjected to physical abuse and was released only after agreeing: to a nightly curfew; not to leave Khartoum; not to disclose information about his detention; and to share information about opposition to the government.

[5] The Applicant improperly obtained a passport and exit visa in order to leave Sudan. After returning to work in Oman, he met his parents in Egypt. The Applicant became involved in a civil disobedience campaign in November and December of 2016. The Applicant's parents were visited by Sudanese national security forces in December 2016. Shortly after, his parents told him not to return to Oman. The Applicant, who was in the United States in January 2017, crossed into Canada and filed a claim for refugee protection.

III. DECISION UNDER REVIEW

[6] The RPD determined that the Applicant is neither a Convention refugee nor a person in need of protection. The determinative issue was the Applicant's credibility.

[7] The RPD began by assessing the Applicant's claim that he was involved in a campaign of civil disobedience against the Sudanese government, via Facebook and Whatsapp while he was in Oman in November and December of 2016. The RPD considered the Applicant's social media profile and noted that only one of his social media events took place during the 2016 period of civil disobedience and that it was not publically posted. The RPD recognized that the Applicant had joined a large Facebook group called "Sudan Civil Disobedience," but noted that he had chosen not to receive notifications from the group.

[8] The RPD also considered the Applicant's claim that the government of Sudan creates fake social media profiles in order to track certain people. The RPD determined that the Applicant did not adduce sufficient evidence to demonstrate that the government of Sudan has ever paid attention to his social media profile.

[9] The RPD noted that the Applicant submitted on his refugee claim intake forms that he had never been detained or jailed in any country. Additionally, the RPD noted that the Applicant submitted that no governmental authorities had ever sought, arrested, or detained him. In a subsequent interview, the Applicant informed a Canada Border Services Agency [CBSA] officer that he was detained for a week. The RPD also considered the Applicant's travel history,

education, and the fact that he had spent 26 days in the United States. Based on these factors, the RPD stated that it would have expected the Applicant to have considered his reasons for claiming refugee protection prior to arriving at the port of entry. The RPD made a negative credibility inference based on these discrepancies and determined that, on a balance of probabilities, the Applicant had fabricated the claim that he had been detained in Sudan.

[10] The RPD went on to consider the Applicant's delay in seeking to leave Sudan. The RPD noted that the Applicant did not contact his friend about going to Oman until several months after his alleged detention by Sudanese authorities. The RPD found this delay to be unreasonable and drew a negative credibility inference from it.

[11] The RPD drew a further negative credibility inference from the Applicant's two returns to Sudan after his initial departure. The Applicant stated that he was not concerned for his safety during these two visits. The RPD did not find this reasonable after considering the claim that he had been subject to detention and physical abuse by Sudanese authorities.

[12] The RPD considered the medical report which described a number of different injuries suffered by the Applicant. The RPD noted that the medical report did not reveal the cause of the injuries. The RPD found that the report was insufficient to corroborate the Applicant's claim that he was physically assaulted while detained.

[13] The RPD also considered the Applicant's thirty-month delay in departing from Oman to the United States. The RPD found that the Applicant says he was worried about being returned to

Sudan while working in Oman, but took no steps to prevent his removal. This was inconsistent with what the RPD expected from an individual who allegedly feared being returned to his country of origin. The RPD found that the Applicant had reasonable access to a United States visa during his time in Oman. The significant delay in obtaining a visa led the RPD to draw a negative credibility inference.

[14] The RPD then examined the Applicant's ethnic background as a residual profile. The Applicant originates from the Tunjur tribe and claims that his name and physical features would reveal this to Sudanese authorities. The RPD considered reports from before 2016 that Sudanese authorities targeted individuals based on their ethnic origin and perceived opposition to the government. The RPD found that those targeted were generally politically active individuals. The RPD determined that individuals with African origins may experience employment discrimination and social harassment in Khartoum, but there is no systemic discrimination in health care access. Further, the discrimination experienced by Sudanese individuals of African descent is associated with political activity.

[15] The RPD considered the Applicant's post-secondary education and employment as an engineer. Based on these considerations, the RPD determined that there is insufficient evidence to show that he has been denied educational or employment opportunities.

[16] On the residual profile issue, the RPD concluded that there was insufficient evidence to show that the Applicant would face persecution on the basis of his ethnicity.

[17] The RPD concluded that the Applicant was not credible in relation to the central aspects of his claim. The RPD determined that he had not been detained by the Sudanese authorities. Additionally, the RPD held that he is not being sought by the Sudanese authorities and does not have a political profile that would expose him to the attention of the authorities. The RPD rejected the claim for refugee protection.

IV. ISSUES

[18] The issues to be determined in the present matter are the following:

1. What is the standard of review?
2. Was the RPD's decision reasonable?

V. STANDARD OF REVIEW

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[20] A standard of reasonableness applies to the RPD’s credibility findings (*Kulasingham v Canada (Citizenship and Immigration)*, 2012 FC 543 at para 22).

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

VI. STATUTORY PROVISIONS

[22] The following statutory provisions of the Act are relevant to this application for judicial review:

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that

Définition de réfugié

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette

fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions,

crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions

unless imposed in disregard of accepted international standards, and

légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. ARGUMENT

A. *Applicant*

[23] The Applicant says that the RPD erred in making a negative credibility inference in relation to the forms that he filled out at the Canadian port of entry. The Applicant mentioned his detention during the CBSA interview, but omitted it from his forms due to an interpretation error. It is not enough for the interpreter to have said that the interpretation was correct. This merely shows that the interpreter understands the instructions on the forms. The Applicant gave a reasonable explanation for omitting to include his detention on the form. Therefore, it was unreasonable for the RPD to make a negative credibility inference based upon this issue.

[24] The Applicant says that the RPD also unreasonably made a negative credibility inference from his delay in contacting his friend in Oman in order to leave Sudan. The Applicant called his friend soon after his detention and there is no evidence to show that he would have been able to leave more quickly than he did.

[25] The Applicant says that the RPD also unreasonably drew a negative credibility inference from his trips to Sudan. The letter written by an individual named Assad Goma describes exactly how the Applicant entered and exited Sudan on these occasions. The RPD ignored this piece of evidence and made an unreasonable credibility inference.

[26] The Applicant says that the RPD misconstrued the medical report. It was an error to disregard the medical evidence simply because it did not describe the causes of the injuries.

[27] The Applicant says that the RPD unreasonably drew a negative credibility inference from the thirty months he spent in Oman. The Applicant was not in immediate danger of being returned to Sudan from Oman during those months.

[28] The Applicant says that the RPD unreasonably assessed the degree of discrimination facing the Applicant and others of Darfuri origin in Sudan. This analysis was affected by the RPD's unreasonable negative inferences of credibility. If the RPD had properly considered the Applicant's evidence, it would have determined that the Applicant had been persecuted.

[29] The Applicant says that the RPD erred in its assessment of the Applicant's political profile. The RPD erred by failing to take into consideration the pictures which show the Applicant taking part in a political protest in Canada. It was an error to disregard these photographs because they are directly related to the Applicant's credibility. The existence of this evidence also required the RPD to conduct a *sur place* analysis which it failed to do. It was necessary for the RPD to conduct the *sur place* analysis even though the Applicant did not raise this ground with the RPD.

[30] The Applicant says that the RPD failed to properly assess the evidence before it due to its unreasonable credibility determinations. Particularly, the RPD ignored five supporting affidavits as well as letters from the Applicant's friends and family. The RPD did not indicate why these pieces of evidence were not taken into consideration. It was incumbent on the RPD to explain why it rejected this evidence. The RPD failed to do so.

B. *Respondent*

[31] The Respondent says that it was reasonable for the RPD to draw a negative credibility inference from the discrepancy between the port of entry forms and the Applicant's statements in the interview with the CBSA officer. The RPD properly considered the explanation offered by the Applicant. It was open to the RPD to reject the explanation and reasonable in the circumstances to do so. The negative credibility finding was reasonably made because the discrepancy concerned an event which was central to the Applicant's claim for refugee protection.

[32] The Respondent says that it was reasonable for the RPD to draw a negative credibility inference from the Applicant's delay in seeking to leave Sudan for Oman. The Applicant failed to explain his delay in contacting his friend.

[33] The Respondent says that the RPD reasonably rejected the Applicant's explanation for his two returns to Sudan. The Respondent also notes that a claimant's return to their country of origin can demonstrate a lack of subjective fear of persecution and can also constitute evidence against a well-founded fear of persecution. The Respondent also says that the letter written by Assad Goma does not address the RPD's concerns because he was contacted after the Applicant's returns in 2010, 2011, and April 2014.

[34] The Respondent says that the RPD's consideration of the medical documentation was reasonable. It was open to the RPD to find that the report did not sufficiently support the Applicant's claim because it did not describe the cause of the injuries.

[35] The Respondent says that it was reasonable for the RPD to draw a negative credibility inference based on the Applicant's delay in departing Oman. The RPD considered the explanation given by the Applicant. It was reasonable for the RPD to reject this explanation based on the Applicant's testimony that he feared being returned to Sudan. The Applicant's submission that he knew he was safe in Oman is contradicted by his testimony that he was being spied on in Oman and that he could be returned to Sudan.

[36] The Respondent says that the RPD's residual profile analysis was reasonable. The RPD considered the available evidence and concluded that it was insufficient to conclude that the Applicant would face discrimination which amounted to persecution if he were returned to Sudan. Further, the RPD's discrimination findings are not challenged by the Applicant.

[37] The Respondent says that the Applicant bears the onus of setting forth his claim in a clear and precise manner. The Applicant did not advance a *sur place* argument as part of his refugee claim. Accordingly, the RPD did not err by failing to undertake a *sur place* analysis.

[38] The Respondent says that the RPD was under no obligation to mention each of the affidavits filed by the Applicant. The negative credibility findings meant that the RPD was not obliged to refer to the affidavits in its decision.

VIII. ANALYSIS

[39] The Applicant has questioned just about every finding made by the RPD. I don't think it is necessary for me to address every point he raises. I am sufficiently convinced of important material errors in the Decision that render it unsafe and unreasonable and require it to be returned for reconsideration.

[40] As the Applicant points out, the RPD is silent on the five supporting affidavits and letters from family and friends relating to the Applicant's political profile and activities. This evidence speaks to the Applicant's political activities, detentions, and that the authorities are interested in discovering his whereabouts.

[41] Some of the RPD's findings are based upon insufficient evidence to support his narrative and his reasons to fear the Sudanese authorities. For example, the RPD finds that the medical report "provides insufficient evidence to corroborate that his described injuries were caused by physical abuse while in detention" (para 31). Why the RPD would expect a medical report to diagnose the cause of the Applicant's injuries is not explained, and there is no suggestion that the report's detailing of body bruises and facial injuries is not consistent with the Applicant's evidence of his mistreatment in detention. At the very least, the RPD makes the mistake of using what the report does not say to support its overall negative credibility finding, which is a reviewable error (see *Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 729 at para 11).

[42] Other findings are based upon the Applicant's failure to act soon enough when, in the RPD's opinion, he should have acted if he truly feared persecution.

[43] In dealing with the Applicant's residual profile, the RPD concludes that it was "predominantly politically active persons who were targeted by the National Intelligence and Security Services" and the "level of discrimination an individual may experience was linked to political involvement, and how long they resided in Khartoum."

[44] There are no findings that suggest the Applicant is obviously lying or that he simply cannot be believed. The findings are based upon the RPD's own views of what someone with the Applicant's high level of sophistication, post-secondary education, and his international work

history would have been likely to do in the circumstances, or what someone with the Applicant's profile would face if returned to Sudan, and a general finding of insufficient evidence.

[45] In this context, it is extremely important that the RPD examine and assess all of the evidence on point. Yet, in this case, the RPD failed to mention and take into account corroborating evidence of the Applicant's protest activities in Canada as well as the supporting affidavits and letters from family and friends which confirm his political activism and that the authorities are looking for him. The Respondent argues that given "that the RPD made negative credibility findings regarding each aspect of the Applicant's claim, there was no obligation to refer to the affidavits from the Applicant's friends and family members filed with the claim." The Respondent is wrong. The RPD does have a duty to address evidence that contradicts its general conclusions. The Court has made this clear in many cases. See, for example, *Syed v Canada (Citizenship and Immigration)*, 2005 FC 1404 at para 9; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17 (FCTD). There is no real indication from the RPD as to why it did not mention and deal with this evidence.

[46] The Respondent argues as follows on this issue:

33. Given that the RPD made negative credibility findings regarding each aspect of the Applicant's claim, there was no obligation to refer to the affidavits from the Applicant's friends and family members filed with the claim. Indeed, this Court has held:

A Member in giving reasons is not obligated to mention every document put into evidence. ... Documents that are reflective only of statements made by a claimant may not be given such probative value once a negative credibility finding has been made.

Giron v Canada (MCI), 2008 FC 1377 at para 11.

34. The Court in that decision also relied on the findings of Nadon J. (as he then was) in *Hamid*, where he noted:

Consequently, in my opinion, the applicant's assertion that the Board is bound to analyze the documentary evidence "independently from the applicant's testimony" must be examined in the context of the informal proceedings which prevail before the Board. Once a Board, as the present Board did, comes to the conclusion that an applicant is not credible, in most cases, it will necessarily follow that the Board will not give that applicant's documents much probative value, unless the applicant has been able to prove satisfactorily that the documents in question are truly genuine. In the present case, the Board was not satisfied with the applicant's proof and refused to give the documents at issue any probative value. Put another way, where the Board is of the view, like here, that the applicant is not credible, it will not be sufficient for the applicant to file a document and affirm that it is genuine and that the information contained therein is true. Some form of corroboration or independent proof will be required to "offset" the Board's negative conclusion on credibility.

Hamid v Canada (MEI) (1995), 58 ACWS (3d) 469 at para 21.

35. A review of the affidavits filed by the Applicant in this case demonstrate they were reflective of his allegations regarding his political activity and detentions, allegations which the RPD had found not to be credible. Accordingly, there was no obligation to refer to them and the RPD committed no error in this regard.

[47] As I have explained above, I do not think that the Respondent is here providing an accurate account of the jurisprudence of the Court on this issue; but this is a confirmation by the Respondent that this highly material evidence that supported the Applicant's case and contradicted the RPD's conclusions was not addressed.

[48] The RPD nowhere says that it had decided not to assess this evidence because it had concluded the Applicant cannot be believed without it, or, indeed, why the evidence is not material.

[49] This is a fundamental problem with the Decision that renders it unreasonable. It must be returned for reconsideration.

[50] Counsel agree there is no question for certification and I concur.

JUDGMENT IN IMM-3191-18

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3191-18

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DATED: JANUARY 21, 2019

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