

Federal Court



Cour fédérale

Date: 20190212

**Dockets: IMM-616-18
IMM-612-18**

Citation: 2019 FC 176

Ottawa, Ontario, February 12, 2019

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

ASMANUR ADEM ABDURAHMAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of two Canada Border Services Agency (CBSA) decisions. The first decision is a finding that her refugee claim is not eligible to be heard by the Refugee Protection Division (RPD) as she did not meet the exemption of the “Safe Third Country Agreement” (STCA) between Canada and the United States (US) as implemented by

Regulations to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The second CBSA decision was a refusal to consider her claim because of the first refusal.

[2] For the reasons that follow, the judicial reviews are granted as the CBSA Officer erred in his decision of December 30, 2016 (IMM 616-18) when he required documentary proof of a family relationship. Accordingly, the CBSA decision of January 11, 2018 (IMM 612-18), which is founded upon the December 2016 decision, must also be reconsidered.

Background and Decisions Under Review

[3] The Applicant is originally from Eritrea and was living in Saudi Arabia when she obtained a student visa for the US. She holds a passport from Ethiopia. When she arrived in the US, she travelled to the Canadian border at the St-Bernard de-Lacolle, Port of Entry in Québec and on December 28, 2016, made a claim for refugee protection.

[4] The Applicant was interviewed by a CBSA Officer and her eligibility to make a claim at the land border under an exception to the STCA was raised. She claimed to have two uncles and an aunt in Canada. She did not have a birth certificate.

[5] The CBSA Officer contacted her uncle, Mohammed Hadago, on December 29, 2016 who confirmed that he was her uncle. The CBSA Officer informed the uncle that he needed to provide documents to establish their relationship by the next day or the Applicant would be sent back to the US.

[6] In the decision dated December 30, 2016, the CBSA Officer determined that the Applicant was ineligible to make a claim and could not be referred to the RPD pursuant to paragraph 101(1)(e) of the *IRPA*. The Officer determined that the Applicant was ineligible for the STCA exception due to lack of documentary evidence and she was sent back to the US.

[7] The decision states that, the “Subject’s claim seems to be ineligible taking into account all documents presented at the time of assessment.”

[8] The second decision under review is that of a different CBSA officer on January 11, 2018. The Applicant states that, after her ineligibility arising from the December 2016 decision, she was told that she could not return to Canada until one year had elapsed. On January 9, 2018, she returned to the Canadian border and crossed on foot outside an official Port of Entry.

[9] In the January 2018 decision, the CBSA officer concluded that the Applicant was ineligible to make a refugee claim in Canada on the sole ground that a prior claim had also been found to be ineligible. As such, the claim was denied on the basis of paragraph 101(1)(c) of the *IRPA*.

Issue

[10] The dispositive issue for both judicial review applications is if the CBSA Officer, in reaching his decision on December 30, 2016, fettered his discretion.

Analysis

Standard of Review

[11] The standard of review when there is an allegation that an administrative decision-maker has fettered their discretion, is unsettled. In *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, Justice Stratas described how, traditionally, fettering of discretion constituted an automatic ground for setting aside an administrative decision; but now, an allegation that a decision-maker has fettered their discretion may be subsumed into the reasonableness analysis (at paras 21-24).

[12] I adopt the approach taken in *Barco v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 421, where Justice Boswell concluded regardless of the standard of review to be applied, if an officer did indeed fetter their discretion then it would constitute a reviewable error under either standard and would require that the decision be set aside (at para 20).

Did the CBSA officer fetter his discretion?

[13] The Applicant argues that the CBSA Officer fettered his discretion by requiring the Applicant to prove her family relationship through documentary evidence. The Applicant notes that there is no such requirement in the language of the SCTA or the *IRPA*. Further, the Applicant states that her circumstances, namely arriving at the border without documentary

evidence, are contemplated by the STCA and the Minister's Guidelines, neither of which require documentary evidence to prove a family relationship.

[14] In any event, she argues that she provided evidence of her family in Canada and her uncle confirmed his relationship with the Applicant to the CBSA Officer. The Applicant argues that it was an error for the CBSA Officer to insist that she provide documents to confirm that she has relatives in Canada, within one day of her arrival at the border.

[15] The STCA states as follows regarding proof of family relationship at Principle 2 in the Statement of Principles:

Procedures will acknowledge that the burden of proof is on the applicant to satisfy the decision-maker that a family relationship exists and that the relative in question has the required status. Credible testimony may be sufficient to satisfy a decision-maker in the absence of documentary evidence or computer records. It may be appropriate in these circumstances to request that the applicant and the relative provide sworn statements attesting to their family relationship.

[16] Furthermore, the Minister's Operational Instructions and Guidelines regarding proof of family relationship pursuant to the STCA state as follows:

When a claimant identifies a family member in Canada, the officer must be satisfied that the relationship is one that qualifies the claimant for an exception. The standard of proof is "balance of probabilities". The claimant is responsible to provide information to establish the relationship and status of the family member. However, in some cases written documentation, such as birth, marriage certificates etc. may not be available. In such cases, credible testimony may be sufficient provided the officer is satisfied with respect to the claimed relationship. If the testimony is not sufficient, attempt to confirm family relationships and that the relative has the necessary status in Canada. This may be done by:

- * contacting the claimed relative;
- * review of documents provided by the claimant
- * FOSS checks
- * review of files held by other CBSA offices
- * review of IRB records
- * checking city directories, telephone books, internet sites, etc.
- * statutory declarations (may be useful but are not required).

Any contradictions or inconsistencies that result in doubt about the claimed relationship should be documented in detail.

[17] The *IRPA* does not outline a requirement for documentary evidence, such as birth or marriage certificates, to establish the relationship to a family member for the purpose of meeting the *STCA* exemption.

[18] The Applicant argues that her statements and her uncle's statements were sufficient proof of a family relationship within the meaning of the *STCA*. She says that she made an unambiguous claim to have family members in Canada, an aunt and an uncle, both of whom are her father's half-siblings. The Applicant also provided contact information for her aunt and a cousin to verify her familial relationships.

[19] The CBSA contacted one of her uncles but did not contact the other claimed relatives.

For documentary evidence, the Officer's notes state that he had the following documents:

- Subject's birth certificate (which she did not have in her possession);
- Subject's father's bio passport page;
- Subject's mother's bio passport page;

- Mr. Mohammed Hadago's landing document from 1985.

[20] Therefore, the evidence before the Officer was the Applicant's statement, her uncle's statement, as well as the documents listed. The Officer does not make any credibility findings and does not state that he did not believe the Applicant or her uncle. The Officer appears to have based his finding on the mistaken understanding that documentary evidence was necessary to support a claim to an exemption under the STCA.

[21] While I agree with the Respondent that it was the Applicant's onus to establish that she is eligible to make a refugee claim as an exception to the STCA (*Wangden v Canada (MCI)*, 2008 FC 1230 at paragraph 28, aff'd 2009 FCA 344), the Officer appears to have added criteria to that onus which are not contained in the provisions of *IRPA* or the STCA. There is no requirement that evidence only be in the form of vital records, since oral testimony is specifically referenced. If the Officer had doubts regarding the credibility of the Applicant or her uncle's statements, then they should have been noted.

[22] Accordingly, the CBSA Officer erred by requiring the Applicant prove her family relationship through documentary evidence. Therefore the decision of December 30, 2016 cannot stand.

[23] Further, as the CBSA decision of January 11, 2018 is based upon the ineligibility finding of December 30, 2016, the January 2018 also cannot stand.

[24] Therefore I am allowing the judicial reviews in both Court File IMM-616-18 and Court File IMM-612-18.

JUDGMENT IN IMM-612-18 AND 616-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review in IMM-616-18 is granted and the decision of CBSA Officer is set aside and the matter is remitted for redetermination by a different officer;
2. The application for judicial review in IMM 612-18 is granted and the decision of CBSA Officer is set aside and the matter is remitted for redetermination by a different officer; and
3. No question of general importance is proposed by the parties and none arises.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-616-18
IMM-612-18
STYLE OF CAUSE: ASMANUR ADEM ABDURAHMAN v MCI
PLACE OF HEARING: TORONTO, ONTARIO
DATE OF HEARING: DECEMBER 20, 2018
JUDGMENT AND REASONS: MCDONALD J.
DATED: FEBRUARY 12, 2019

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