Federal Court  Cour fédérale

Date: 20191023

Docket: IMM-4892-18

Citation: 2019 FC 1325

Ottawa, Ontario, October 23, 2019

PRESENT: Madam Justice Walker

BETWEEN:

YONAS BOKRETSION KIDANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Yonas Bokretsion Kidane, the Applicant, seeks judicial review of a negative Pre-Removal Risk Assessment (PRRA) decision of a Senior Immigration Officer (Officer) of Immigration, Refugees and Citizenship Canada. The Officer determined that Mr. Kidane's evidence regarding his personal history was not credible and that he had not satisfactorily established his identity as a national of Eritrea. The application for judicial review is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 (IRPA).

[2] Mr. Kidane argues that the conduct of the Officer gives rise to a reasonable apprehension of bias that negated her ability to assess his PRRA application with an open mind. He focusses his argument on the Officer's alleged hostility towards his counsel. I have considered Mr. Kidane's evidence in support of his argument against the accepted test and evidentiary threshold for establishing reasonable apprehension of bias. I have concluded that the evidence does not support Mr. Kidane's argument. For the reasons that follow, the application will be dismissed.

[3] With the consent of the parties, the style of cause in this matter is hereby amended to reflect "The Minister of Citizenship and Immigration" as the Respondent. The Minister of Citizenship and Immigration is the proper respondent in this application as he is the Minister responsible for the administration of the IRPA in respect of the decision for which judicial review is sought (see subsection 4(1) of the IRPA and paragraph 5(2)(b) of the *Federal Courts Citizenship, Immigration and Refugee Protection* Rules, SOR/93-22).

I. Background

[4] Mr. Kidane states that he is a citizen of Eritrea and served in the military from 2011 to 2015. He fled Eritrea and travelled to Sudan in March 2015 after escaping from military detention. Mr. Kidane fears returning to Eritrea due to his escape and illegal exit from the country.

[5] Mr. Kidane left Sudan in February 2017. He travelled through a number of countries, eventually reaching the United States where he applied for but was denied refugee status.

[6] Mr. Kidane first arrived in Canada on October 9, 2017 and made a claim for refugee protection. He was found ineligible pursuant to paragraph 101(1)(e) of the IRPA as he came to Canada directly from the United States. Mr. Kidane returned to the United States but re-entered Canada on December 18, 2017. Although he was once again found ineligible to claim refugee protection, he was eligible for a PRRA. Mr. Kidane submitted his PRRA application on January 23, 2018.

[7] The Officer held an oral hearing via teleconference on August 13, 2018. Mr. Kidane was accompanied at the hearing by his counsel and social support worker. An interpreter was also present and assisted Mr. Kidane during the hearing.

II. Decision under review

[8] The Decision is dated August 22, 2018. The Officer concluded that Mr. Kidane lacked credibility, stating that he presented "several important contradictions, omissions and implausibilities with regards to important events and occurrences in his personal history". The Officer also concluded, having examined Mr. Kidane's identity documents and considered his oral testimony, that Mr. Kidane had not satisfactorily established his identity as a national of Eritrea. As a result, the Officer was unable to determine if the country conditions for Eritrea placed him at risk within the meaning of sections 96 and 97 of the IRPA.

[9] The Officer made nine distinct adverse credibility findings based on Mr. Kidane's testimony at the August 13 hearing. The negative findings centred on Mr. Kidane's lack of knowledge of Eritrea, his hometown of Keren and the Eritrean military, inconsistencies in his oral and written evidence regarding his treatment by the military upon arrest and during detention, his escape from detention, and his subsequent flight to and residency in Sudan.

[10] The Officer then briefly addressed Mr. Kidane's subjective fear. The Officer found that the fact he remained in Sudan for two years and travelled through many countries before reaching the United States without claiming refugee protection undermined Mr. Kidane's subjective fear for his life in Eritrea.

[11] Finally, the Officer reviewed in detail Mr. Kidane's documentary evidence of identity: his baptism certificate, three personal letters and a letter of support from the *Hidmona – Eritrean-Canadian Human Rights Group*. The Officer found that the baptism certificate was likely not genuine and that Mr. Kidane's explanation for having no other primary identity documents was not persuasive. The Officer also gave little weight to the four letters in establishing identity due, in general terms, to a lack of content in the letters themselves and a lack of information regarding the relationships between the writer of each of the letters and Mr. Kidane.

III. Preliminary issue – Admissibility of portions of Mr. Kidane's affidavit

[12] The Respondent argues that Mr. Kidane has attempted to introduce new evidence in this application through significant portions of his affidavit of November 2018. The Respondent states that the affidavit contains numerous explanations and information regarding his oral testimony at the hearing that Mr. Kidane is now offering after the fact.

[13] It is well established that the evidentiary record on an application for judicial review is restricted to the record before the decision-maker. There are recognized exceptions to the general rule, including the admission of an affidavit that: provides general background information; addresses procedural fairness issues; or, highlights the complete absence of evidence before the

administrative decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20.

[14] At the hearing of this application on October 15, 2019, Mr. Kidane's counsel agreed that those parts of the affidavit that contain new evidence are not properly before the Court. I have reviewed Mr. Kidane's affidavit and the specific objections raised by the Respondent. In large part, I agree with the Respondent and have not considered Mr. Kidane's new evidence, specifically all of paragraphs 24-25, 29, 31-33, 35-38, 40-41, 45-52, 54- 55, and 57. In addition, I have not considered parts of other paragraphs in the affidavit that contain new information and/or statements clarifying Mr. Kidane's responses to the Officer. I have considered the remainder of the affidavit which provides some general background information.

IV. Issues

[15] Mr. Kidane raises the following issues in this application:

1. Did the Officer's conduct give rise to a reasonable apprehension of bias against Mr. Kidane?

2. Did the Officer err in concluding that Mr. Kidane was not credible?

[16] In oral argument before me, Mr. Kidane's counsel emphasized that the primary issue in this application is the allegation of reasonable apprehension of bias.

V. Standard of Review

[17] The issue of reasonable apprehension of bias on the part of the Officer raises a question of procedural fairness and is reviewable for correctness (*Lakatos v Canada (Citizenship and*

Immigration), 2018 FC 1061 at para 12; *Alcina Rodriguez v Canada (Citizenship and Immigration)*, 2018 FC 995 at para 31 (*Alcina Rodriguez*)).

[18] The second issue raised by Mr. Kidane goes to the substance of the Decision and I will review that issue for reasonableness (*Yang v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 496 at para 14; *Korkmaz v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1124 at para 9; *Raza v Canada (Citizenship and Immigration)*, 2006 FC 1385 at para 10; *Aladenika v Canada (Citizenship and Immigration)*, 2018 FC 528 at para 11). Considerable deference is owed to factual determinations and credibility assessments made by a PRRA officer. The Court will only interfere if the decision lacks justification, transparency or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Analysis

1. *Did the Officer's conduct give rise to a reasonable apprehension of bias against Mr. Kidane?*

[19] Mr. Kidane's application to this Court rests on his allegation of reasonable apprehension of bias. He submits that the Officer's conduct prior to the August 13 hearing and her animosity towards his counsel affected her treatment of Mr. Kidane's evidence during the hearing and, eventually, her refusal of his PRRA application.

[20] Mr. Kidane's argument is two-fold. First, he states that the focus of his concern is the Officer's pre-hearing conduct. Mr. Kidane alleges that the Officer displayed bias in her correspondence with his former counsel, Mr. Segal, when attempting to schedule the oral hearing. Second, Mr. Kidane argues that the Officer's observation in the Decision that he

changed his testimony after a break during which he had opportunity to consult with Mr. Segal demonstrates either actual bias or a reasonable apprehension of bias.

[21] The right to be heard by an impartial decision-maker is a critical element of an individual's broader right to procedural fairness. The test for reasonable apprehension of bias reflects the importance of the requirement that the decision-maker must not only be impartial but must also be perceived to be impartial (*Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 SCR 369 at page 394; cited in *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 46):

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[22] The threshold for finding bias or a reasonable apprehension of bias is high as decision-makers are presumed to be impartial (*Sagkeeng First Nation v Canada (Attorney General)*, 2015 FC 1113 at para 105). The evidentiary burden has been described as follows (*Alcina Rodriguez* at para 35):

> [35] An allegation of bias must be supported by convincing evidence and cannot be made lightly. The burden of proof is on [the applicant], and the threshold to be met is high (*Fouda v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1176 at para 23). In essence, he must demonstrate that the decision-maker was closed-minded and not open to persuasion.

[23] In this light, I have carefully considered Mr. Kidane's submissions, the affidavit and exhibits produced by Mr. Segal, and the Decision itself. I find that Mr. Kidane has not satisfied

his considerable evidentiary burden. The evidence does not establish that the Officer was closed-minded in her consideration of his PRRA application. An informed and reasonable person, considering the Officer's conduct and the Decision, would not conclude that the Officer would decide Mr. Kidane's application unfairly.

[24] I turn first to the Officer's pre-hearing conduct. Mr. Kidane's submissions in this regard are based on the information contained in Mr. Segal's affidavit and the Officer's correspondence with Mr. Segal. A summary of the relevant dates and correspondence is as follows:

1. An initial hearing date of July 9, 2018 was scheduled by the Officer. Notice of the hearing was provided to Mr. Kidane's first counsel on June 25, 2018.

2. On June 26, 2018, Mr. Kidane's new counsel, Mr. Segal, submitted a signed Use of Representative form and cover letter to Immigration, Refugees and Citizenship Canada (IRCC). Mr. Segal requested clarification of a hearing scheduled for July 9 or 10. The Officer did not receive Mr. Segal's letter.

3. As Mr. Kidane did not present himself for the July 9 hearing, the Officer scheduled a second hearing for July 25, 2018. A "Notice for Hearing-Second" was sent to Mr. Kidane on July 9, 2018.

4. On July 13, 2018, Mr. Segal responded to the second Notice of Hearing by way of letter. He indicated that he was unavailable on July 25, 2018 and requested new dates as soon as possible.

5. Having received no response, Mr. Segal's assistant, Ms. Law, phoned the Officer on July 23, 2018. On Mr. Segal's behalf, she submitted a letter to the Officer the same day enclosing the Use of Representative form, indicating Mr. Segal was not available on July 25, 2018, and again requesting new dates for a hearing.

6. In an email response dated July 25, 2018, the Officer acknowledged the rescheduling request and noted that she had attempted to contact Mr. Segal on July 24, 2018. The Officer then stated:

> In my message to you I advised you that the oral hearing scheduled for today was in fact the second one for this applicant. I also advised you that you would not be required to make legal arguments on behalf of your client during this process. Consequently, I asked whether it would be feasible to send an associate, an assistant or an articling student to take notes during the hearing. Unfortunately, I did not hear

> from you and, as a result, the hearing had to be cancelled. Regrettably, though you made a request to cancel the hearing due to your unavailability, you appear to have failed to notify your client. As a result, Mr. Kidane presented himself at the IRCC Winnipeg office today, only to find out that his hearing had been cancelled per your request.
>
> I would like to proceed and schedule another hearing as soon as possible. This shall be **the third and final opportunity** for the applicant to attend his hearing. I am cc'ing the applicant as well, per his request. I am currently looking at August 13 or August 14, 2018. Please advise which date works better for your client as soon as possible.
> ...
>
> (Emphasis in original)

7. An oral hearing was held by videoconference on August 13, 2018. Mr. Kidane's counsel and social support worker, as well as an interpreter, were present.

[25] In my view, the Officer's pre-hearing conduct gives rise to no reasonable apprehension of bias against Mr. Kidane. The Officer's July 25, 2018 email is a measured response to the situation. There is no suggestion of hostility in the email. Despite the delays in the process, the Officer offered two alternative dates for the rescheduled hearing and asked Mr. Segal which date would work best for Mr. Kidane. The email reflects some frustration with the process but is a typical response to the difficulties both the Officer and Mr. Segal experienced in scheduling Mr. Kidane's hearing.

[26] Mr. Segal contends that the Officer showed a disregard for the hearing process by attempting to contact him when she knew he would be away and by her question as to whether an associate, assistant or articling student could take his place on July 25, 2018. Mr. Segal also contests the Officer's assumption that he failed to inform Mr. Kidane of the cancelled July 25 hearing.

[27] I do not find these arguments persuasive. First, Mr. Segal's correspondence with the Officer noted only that he would be unavailable on July 25, it did not state that he would be away on holiday. Further, the fact that the Officer reached out to Mr. Segal on July 24, 2018 despite being informed on July 23 by Ms. Law that Mr. Segal was away rather than unavailable, is not remarkable. Lawyers regularly check their voicemail and email while on vacation. Second, the Officer's question regarding an available replacement for Mr. Segal must be read in context. The Officer informed Mr. Segal that there would be no opportunity at the hearing for him to make legal submissions. The purpose of the hearing was to obtain information from Mr. Kidane. While I understand that Mr. Segal would want to ensure Mr. Kidane had his counsel available to him during the hearing, the Officer's question in light of the purpose of the hearing is not evidence of her disregard for its importance, nor is it evidence of bias. It is not uncommon for counsel to arrange for their colleagues to cover absences from the office. Finally, the Officer's observation that Mr. Kidane had not been informed of Mr. Segal's request that the hearing be cancelled was a reasonable inference from Mr. Kidane's attendance at the IRCC office on July 25, 2018.

[28] Mr. Kidane's second submission regarding the Officer's alleged bias is based on a statement in her credibility assessment in the Decision. In describing Mr. Kidane's conflicting testimony with respect to whether he suffered physical abuse during his detention by the Eritrean military, the Officer stated:

> Following the break, during which the applicant had a chance to speak directly with his counsel, the applicant changed his testimony.

[29] Mr. Kidane states that there is no evidence that he spoke to Mr. Segal on this subject during the break. He also states that the Officer should have put any concern she had in this

regard to him at the hearing. Mr. Kidane argues that the Officer's insinuation of coaching on the part of Mr. Segal is evidence of her ongoing hostility.

[30] The record does not disclose whether the Officer put to Mr. Kidane concerns regarding any coaching by Mr. Segal. What the record does show is that she directly questioned Mr. Kidane's contradictory evidence and gave him the opportunity to correct the contradictions.

[31] The Respondent emphasizes that Mr. Kidane has not refuted the obvious contradictions in his testimony regarding his allegations of physical abuse by the military during his detention. The Respondent argues that any finding of reasonable apprehension of bias must take into account the evidence before a decision-maker and the conclusions drawn by the decision-maker from that evidence. The question is then whether the Officer's conclusions regarding Mr. Kidane's evidence would lead a reasonable person to conclude that she did not evaluate his evidence with an open mind.

[32] The Officer's description of Mr. Kidane's evidence in the Decision is instructive. Mr. Kidane was asked to provide details regarding his detention. He was also directly asked whether he was physically assaulted and responded:

> Me no, no physical contact or beating because of my health. But there was psychological torture. There were two dead bodies, they brought them to us, they said these tried to escape and they tortured us psychologically. There were others who were beaten, but for me physically I was not. But there was psychological torture.

[33] Following the break, when asked about the first time he experienced physical harm at the hands of the military, Mr. Kidane stated:

> From the day I was in detention it was a daily occurrence. I cannot specifically say when it started. From the very day they put me in detention. The first beating was the very day they took me from the place I work.

[34] The Officer pointed out to Mr. Kidane that, prior to the break, he had specifically stated he had not been physically assaulted during detention. At that point, Mr. Kidane responded that he did not understand the question and stated that inadequate translation led to his confusion between physical assault and physical or body damage. The Officer concluded that Mr. Kidane's reliance on a translation issue did not explain the serious contradictions in his testimony. I agree. Mr. Kidane was able to distinguish between psychological and physical torture in his testimony. His answers were emphatic and the contradictions were not resolved by his reliance on imperfect translation.

[35] The Officer's assessment of Mr. Kidane's inconsistent testimony was detailed and her conclusions reasonable. They do not reflect either a closed mind or a refusal to consider the evidence. The same is true of the Officer's other credibility findings and her consideration of Mr. Kidane's documentary evidence.

[36] In the absence of any evidence that Mr. Kidane was coached or encouraged to change his testimony by Mr. Segal, the Officer should have limited her analysis to the inconsistent testimony. However, this statement, in the course of a decision that is measured and comprehensive, does not meet the evidentiary bar for establishing a reasonable apprehension of bias.

[37] I have also considered Mr. Kidane's arguments cumulatively to assess whether they would cause an informed person, reviewing the Officer's conduct and the Decision as a whole, and having thought the matter through, to conclude that the Officer would not decide fairly. As stated above, I find the Officer's correspondence with Mr. Segal contains no suggestion of bias. There is no basis for Mr. Kidane's argument that the Officer's pre-hearing conduct established a tone which carried through to her assessment of Mr. Kidane's testimony and her negative suggestion regarding Mr. Segal's conduct. Mr. Kidane's evidence does not objectively support a finding of either actual bias or a reasonable apprehension of bias.

2. *Did the Officer err in concluding that the Applicant was not credible?*

[38] Mr. Kidane made no oral submissions regarding the reasonableness of the Officer's negative credibility assessments. I will consider briefly his written submissions in the interests of a full disposition of this application.

[39] I note first that one element of Mr. Kidane's submissions contesting the Officer's credibility findings is that he had issues with the interpreter at the hearing, namely that the interpreter failed to put his statements into context and that the interpreter erred in the translation of some words and sentences.

[40] Mr. Kidane was required to raise any concerns with the adequacy of the interpretation provided to him at his first opportunity, failing which he waives the right to argue that deficiencies in translation constitute a breach of procedural fairness (*Jovinda v Canada (Citizenship and Immigration)*, 2016 FC 1297 at para 28). In his affidavit, Mr. Kidane indicates that he had issues with the interpreter from the beginning of the hearing but he failed to raise any issues with the Officer other than his confusion regarding the precise meaning of the Officer's

question regarding physical abuse during his detention in Eritrea (discussed above). Therefore, I will not consider Mr. Kidane's translation submissions as a procedural fairness issue in this application. In addition, the translation complaints now raised by Mr. Kidane regarding the interpreter do not impact the substance or reasonableness of the Officer's findings.

[41] The Officer's assessment of Mr. Kidane's credibility was detailed. As stated above, she made nine distinct adverse credibility findings. The Officer described the factual basis for each of her findings and drew clear conclusions from the evidence. She addressed all material aspects of Mr. Kidane's narrative. The Officer also made one implausibility finding which was supported by the documentary evidence on which she relied.

[42] I find that the Officer made no reviewable error in her assessment of Mr. Kidane's credibility. Her reasons were transparent and fully justified on the evidence before her, including Mr. Kidane's oral testimony. The Officer's conclusion that Mr. Kidane was not credible was reasonable and her ultimate refusal of his PRRA application was a reasonable and possible outcome for his case.

VII. Conclusion

[43] The application is dismissed.

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

JUDGMENT IN IMM-4892-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The style of cause in this matter is amended to name "The Minister of Citizenship and Immigration" as the Respondent.

3. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4892-18
STYLE OF CAUSE:	YONAS BOKRETSION KIDANE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	OCTOBER 15, 2019
JUDGMENT AND REASONS:	WALKER J.
DATED:	OCTOBER 23, 2019

APPEARANCES:

Amado Claros	FOR THE APPLICANT
Alexander Menticoglou	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Amado Claros Law Office Barrister and Solicitor Winnipeg, Manitoba	FOR THE APPLICANT
Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT