Federal Court  Cour fédérale

**Date: 20160107**

**Docket: IMM-862-15**

**Citation: 2016 FC 12**

**Ottawa, Ontario, January 7, 2016**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**TIRUEDEL ZENEBE DESALEGN**

**Respondent**

## JUDGMENT AND REASONS

## I. Introduction

[1] The Minister of Citizenship and Immigration [the Minister] has brought an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board. The RAD set aside the determination of the Refugee Protection Division [RPD] that Tiruedel Zenebe Desalegn is not a Convention refugee under s 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], nor a person in need of protection as defined

by s 97 of the IRPA. The RAD substituted its own determination that Ms. Desalegn is a Convention refugee. The Minister brings this application pursuant to ss 72(1) and 72(2) of the IRPA.

[2] For the reasons that follow, I have concluded that the RAD admitted new evidence in a manner that did not comply with s 110(4) of the IRPA, and improperly relied upon that evidence and other documents found in the record to conclude that Ms. Desalegn has a well-founded fear of persecution in Ethiopia. The application for judicial review is therefore allowed.

## II. Background

[3] Ms. Desalegn is a citizen of Ethiopia. Her claim for refugee protection was based on the following allegations.

[4] Ms. Desalegn is a popular musician in Ethiopia. Her parents are also musicians and known political dissidents. Ms. Desalegn's parents were arrested and detained in 2005 due to their membership in the opposition group Unity for Justice and Democracy [UDJ], which Ms. Desalegn joined briefly in 2008. Following their release, Ms. Desalegn's mother fled Ethiopia with Ms. Desalegn's uncle, a well-known member of the Ethiopian opposition party Ginbot 7. They were both granted asylum in the United States of America. Ms. Desalegn's father remained in Ethiopia.

[5] In May 2010, the police arrested and detained Ms. Desalegn and her former partner due to their support of the UDJ.

[6] On April 5, 2013, the police arrested and detained Ms. Desalegn after her song "One Day" aired on the radio in Ethiopia. The government perceived her song to be critical of the current regime. Ms. Desalegn was released after her brother paid a bribe.

[7] On June 3, 2013, Ms. Desalegn obtained a Temporary Resident Visa for Canada. Ms. Desalegn managed to leave Ethiopia with the help of a senior official at the Addis Ababa airport. She arrived in Toronto and immediately made a claim for refugee protection.

[8] In a decision dated July 15, 2014, the RPD determined that Ms. Desalegn was neither a Convention Refugee nor a person in need of protection. The determinative issue was Ms. Desalegn's credibility. The RPD also found a lack of objective corroborative evidence to support her claim.

[9] Ms. Desalegn appealed the RPD's decision to the RAD. She challenged the RPD's decision on two grounds: (i) the RPD erred in its assessment of her credibility because it undertook a microscopic analysis of the evidence; and (ii) the RPD ignored or dismissed corroborative evidence that supported her claim. Ms. Desalegn submitted several new pieces of evidence pursuant to s 110(4) of the IRPA.

[10] In a decision dated January 28, 2015, the RAD admitted the new evidence and granted Ms. Desalegn's appeal. The RAD found that the RPD had wrongly rejected three documents that the RAD considered to be highly probative. The RAD substituted its own determination that Ms. Desalegn is at risk in Ethiopia due to her political opinion and her popularity as a musician.

## III. Issues

[11] This application for judicial review raises the following issues:

A. Was the RAD's admission of the new evidence reasonable?

B. Was the RAD's determination that Ms. Desalegn is a Convention refugee reasonable?

## IV. Analysis

### A. *Was the RAD's admission of the new evidence reasonable?*

[12] Questions regarding the admission of new evidence before the RAD are reviewable by this Court against the standard of reasonableness (*Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 at paras 36-42 [*Singh*]; *Khachatourian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 182 at para 37).

[13] In support of her appeal, Ms. Desalegn submitted several new pieces of evidence pursuant to s 110(4) of the IRPA to address the RPD's credibility concerns and to demonstrate that she had actively participated in opposition politics since leaving Ethiopia. The evidence included: (i) an affidavit setting out her personal history and her efforts to obtain additional evidence following the RPD's decision; (ii) a letter from the Ethiopian Association of Greater Toronto dated September 9, 2014, confirming that Ms. Desalegn had performed several songs at fundraising events throughout 2013 and 2014; (iii) a letter from the Ethiopian Satellite

Television Service [ESAT] dated September 24, 2014, thanking Ms. Desalegn for singing her song "One Day" at a fundraiser in Toronto in October 2013; (iv) photographs of Ms. Desalegn meeting with the chairman of Ginbot 7 following the fundraiser in Toronto; (v) a statutory declaration from her mother, Ms. Belayneh, amending her initial account of Ms. Desalegn's arrest in Ethiopia; (vi) a report by Amnesty International dated July 10, 2014, stating that Ethiopians in contact with members of Ginbot 7 and the ESAT are at risk of imprisonment because the Ethiopian government views these groups as terrorist organizations; and (vii) a journal article titled "Refugee Status Determination and the Limits of Memory" by Hilary Evans Cameron.

[14] The RAD's decision makes it difficult for this Court to assess whether it correctly applied the test for determining whether the proposed evidence was admissible. Subsection 110(4) of the IRPA provides as follows:

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| **110 (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 presented, at the time of the rejection. | **110 (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 les circonstances, au moment du rejet. |

[15] Ms. Desalegn says that the RAD's admission of the new evidence was consistent with the Court's approach in *Singh*, in which Justice Gagné held that the test for admitting new evidence in the context of a pre-removal risk assessment [PRRA] found in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] differs from the criteria for admitting new evidence in

the context of an appeal before the RAD. Justice Gagné reasoned that Parliament intended the RAD to conduct a full, fact-based appeal, and "when the RPD confronts a claimant on the weakness of his evidentiary record, the RAD should, in subsequent review of the decision, have some leeway in order to allow the claimant to respond to the deficiencies raised" (at para 55). This decision is currently before the Federal Court of Appeal, and the question of whether the *Raza* criteria apply to s 110(4) of the IRPA is therefore unsettled.

[16] The RAD admitted all of the new evidence with the following explanation: "I have taken into account s 110(4) requirements and the *Raza* factors – applied not strictly – and find that all documents mentioned above, with the exception of the article by Hilary Evans Cameron, meet the statutory requirements as well as the *Raza* factors: as they are new, were not reasonably available and are material and relevant." The RAD then denied Ms. Desalegn's request for an oral hearing.

[17] The flexible approach contemplated in *Singh* concerns the RAD's treatment of evidence only once it has met the statutory requirements of s 110(4) of the IRPA (*Fida v Canada (Minister of Citizenship and Immigration)*, 2015 FC 784 at paras 6-8). As Justice Strickland noted in *Deri v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1041, the RAD has no discretion to refuse to apply the three explicit conditions for the admissibility of new evidence prescribed by s 110(4). The RAD must therefore determine: (i) whether the evidence arose after the rejection of the claim; (ii) whether it was reasonably available; and (iii) whether the applicant could reasonably have been expected, in the circumstances, to present the evidence before the RPD.

[18] In this case, the RAD provided little in the way of reasons for admitting the new evidence. Instead, the RAD stated: "I accept the justification for each of the documents provided by the Appellant in the memorandum and the Appellant's record." Assuming that this amounts to an incorporation by reference of the arguments presented by Ms. Desalegn, these are insufficient to meet the statutory requirements of s 110(4).

[19] According to the memorandum of argument that Ms. Desalegn submitted to the RAD:

> … [s]ome of the information contained with the new letters and Ms. Belayneh's affidavit may have originated prior to or during the course of the RPD hearing. However, in the Appellant's case, the above evidence was not reasonably available before or during her RPD hearing because it specifically responds to information and findings contained in the RPD decision. …
>
> The new personal evidence directly responds to the RPD's central credibility findings and as such is relevant in addressing issues identified in the RPD decision. The Appellant provided substantial personal supporting documentation to corroborate her claim before the RPD. She could not have anticipated that the RPD would utterly ignore or unreasonably dismiss all of her corroborative documentation. Accordingly, she was not aware until receipt of the RPD decision that the 'new' evidence on appeal would be required to address the RPD Member's erroneous factual findings.

[20] In the alternative, Ms. Desalegn suggested that even if the evidence did not meet the *Raza* criteria, the RAD should nevertheless accept it pursuant to *Elezi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 240 at para 45. In that case, this Court held that PRRA officers have the discretion to consider evidence that has probative value, even if it is "technically inadmissible".

[21] In my view, the RAD was required to examine each proposed piece of new evidence and decide whether the information could have reasonably been adduced during the proceedings before the RPD. Evidence that merely responds to the RPD's concerns regarding credibility, or that corrects information or mistakes in affidavits that were previously submitted, does not meet the *Raza* criteria.

[22] Ms. Desalegn notes that Justice Hughes said the following in *Abdullahi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1164 at para 11 [*Abdullahi*]: "Nonetheless, the Applicant, who justifiably was surprised that the evidence he presented to the RPD was not sufficient, endeavoured to provide further evidence to the RAD. I find that the further evidence falls under the category of evidence that could not reasonably be expected as set out in section 110(4) of IRPA."

[23] *Abdullahi* must be understood within its unique factual context. In that case, the RPD instructed the claimant to provide an affidavit or letter from his roommate to establish his identity. The claimant provided a letter. The RPD then faulted him for not providing an affidavit. Justice Hughes found this to be unreasonable because the claimant had been presented with both options. *Abdullahi* cannot be taken as authority for the proposition that an appellant before the RAD may present new evidence every time he or she is surprised by the RPD's decision, particularly in this case where the hearing before the RPD took place over a number of days and there was a hiatus of several months before the RPD rendered its decision.

[24] I therefore conclude that the RAD's reasons for admitting the new evidence are neither transparent nor intelligible. Reasons are adequate if they permit a reviewing court to understand why the tribunal made its decision, and to determine whether the conclusions fall within the range of acceptable outcomes in light of the evidence before the tribunal (*Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 16-18). The RAD relied extensively on the newly-admitted evidence in support of its decision to grant Ms. Desalegn's appeal. Its failure to provide an adequate justification for admitting the new evidence is sufficient to dispose of the application for judicial review. I will nevertheless comment briefly on the second ground for judicial review advanced on behalf of the Minister.

B. *Was the RAD's determination that Ms. Desalegn is a Convention refugee reasonable?*

[25] The RAD's decision to substitute its own determination for that of the RPD is subject to review by this Court against the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1208 at para 25).

[26] The determinative issue before the RPD was Ms. Desalegn's credibility. The RPD rejected Ms. Desalegn's claim because of numerous inconsistencies and contradictions in her testimony, the information she provided in her Basis of Claim form, and the information contained in the forms she submitted to the Minister in support of her application for a Temporary Resident Visa.

[27] The RAD opted for a wholly different approach. It did not examine the RPD's credibility findings, nor did it address the grounds that Ms. Desalegn advanced in support of her appeal.

Instead, the RAD referred to the new evidence it had admitted and some other information in the record that it held had not been properly considered by the RPD. The RAD then listed a number of factual findings that it described as "uncontended", *i.e.*, uncontentious or uncontroversial.

[28] However, many of the findings were very much in contention, and some had been explicitly rejected by the RPD. The RAD did not address the RPD's rejection of Ms. Desalegn's claim to be a political dissident because she knew very little about the political parties to which she allegedly belonged. Nor did the RAD address the RPD's finding that there was a lack of objective evidence to corroborate her claim that she had been arrested. Instead, the RAD simply found that Ms. Desalegn had been arrested and continued to be "of interest to the authorities." Again, the RAD's reasons are neither transparent nor intelligible.

[29] The RAD owes deference to the RPD's assessments of credibility that are based on witnesses' testimony (*Ngandu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 423 at para 31, citing *R v NS (N)*, 2012 SCC 72 at para 25). This is an area where the RPD enjoys a particular advantage (*Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 at paras 54-55; *Yetna v Canada (Minister of Citizenship and Immigration)*, 2014 FC 858 at para 17). It was unreasonable for the RAD to substitute its own determination of Ms. Desalegn's credibility without affording deference to the RPD's credibility findings or explaining why it considered those findings to be wrong.

## V. Conclusion

[30] The application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RAD for re-determination. No question is certified for appeal.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RAD for re-determination;

2. No question is certified for appeal.

"Simon Fothergill"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-862-15 |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION v TIRUEDEL ZENEBE DESALEGN |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 24, 2015 |
| **JUDGMENT AND REASONS:** | FOTHERGILL J. |
| **DATED:** | JANUARY 7, 2016 |

**APPEARANCES:**

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| A. Leela Jaakkimainen | FOR THE APPLICANT |
| Ben Liston | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE APPLICANT |
| REFUGEE LAW OFFICE<br>Barristers and Solicitors<br>Toronto, Ontario | FOR THE RESPONDENT |