Federal Court Cour fédérale

Date: 20160215

Docket: IMM-3419-15

Citation: 2016 FC 195

Toronto, Ontario, February 15, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

KAMIL AYTAC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of the Refugee Appeal Division [RAD] dated June 26, 2015, in which the RAD confirmed the decision of the Refugee Protection Division [RPD] determining that the Applicant is not a Convention refugee pursuant to section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] nor a person in need of protection pursuant to section 97 of IRPA.

[2] For the reasons that follow, this application is allowed.

I. Background

[3] The Applicant is a citizen of Turkey. He alleges that he is of Kurdish ethnicity, that he is of the Alevi faith, and that he was active in pro-Kurdish parties, as a result of which he alleges he was mistreated and detained by the Turkish police.

[4] Specifically, the Applicant submitted evidence to the RPD that he is a member of the Kurdish Peace and Democracy Party [BDP] and was an active supporter of the various predecessor parties to the BDP. He alleges that he made the decision to flee Turkey in May 2012 after a crackdown on BDP members, which put him at serious risk of long-term imprisonment and torture. With the assistance of a smuggler, he came to Canada on October 27, 2013.

[5] The Minister intervened in his claim on the basis of serious concerns about the Applicant's identity.

[6] On February 26, 2015, the RPD rejected the Applicant's refugee claim, concluding that he had not established his personal or national identity. The RAD dismissed the appeal from the RPD on June 15, 2015.

II. RPD Decision

[7] The RPD denied the Applicant's application to submit additional post-hearing identity documents and therefore did not consider that evidence in making its decision. The RPD noted that the post-hearing documents were relevant but gave them little probative value, as they had not been subject to a forensic examination and no reasonable explanation was provided as to why they were not produced earlier.

[8] The RPD also had concerns about the Applicant's other identity documents. These concerns included, with respect to a photocopy of his Turkish passport, inconsistencies in the Applicant's testimony as to the validity period and the circumstances of destruction of the passport and as to the location at which he applied for a British visa. The RPD also noted that the Applicant arrived in Canada using false documents issued in the name of Taner Yilmaz. The photograph used in the false documents was the same as the photograph in the Applicant's own identity card and driver's licence.

[9] The RPD placed little weight upon the Applicant's identity card, based on a forensic report casting doubt on its reliability. It also placed little weight upon a document from a political organization in Turkey, as the photograph was the same one used on the fraudulent documents and the Applicant's personal information was handwritten, and upon a document from a cultural organization, based on a stamp on the document not overlapping the photograph.

III. RAD Decision

A. *Post hearing evidence*

[10] The RAD acknowledged that the RPD did not make specific mention of Refugee Protection Division Rule 43, which provides for factors to be considered in deciding whether to admit post-hearing evidence. However, the RAD concluded that the RPD's decision did consider the factors set out in Rule 43. The RAD found that the RPD considered the application, found the documents to be relevant but lacking in probative value, and found that the Applicant had not provided a reasonable explanation for their late submission.

[11] The RAD then considered the RPD's decision to assign little probative value to the post-hearing documents. The post-hearing documents included a card from the Turkish military with hand-written personal information, a land registry document, an insurance certificate, a birth certificate for Gulay Aytac, a family registration document, a social insurance record card, an "international marriage certificate", a military discharge certificate, and some union receipts. The Applicant argued before the RAD that the RPD erred in rejecting these documents based on its concerns about whether his other identity documents had been legitimately obtained.

[12] The RAD concluded that, even if the Applicant did not have prior credibility difficulties, many of these documents would warrant little probative value. Some documents did not contain photographs or biometric information and the ones that did contain a photograph were hand-written with few security features. When considered in the context of his credibility difficulties, the documents were found to have little probative value.

[13] The RAD noted that, as the documents deserved little weight, it was not necessary to consider whether the Applicant provided a reasonable explanation for their late submission. Nevertheless, it found lacking the explanation that the Applicant did not realize that further evidence of identity would be required until the hearing was concluded. The forensic report specifically indicated that the documents do not constitute credible evidence of identity and, despite this, the Applicant did not seek new documents until after the conclusion of the hearing. The RAD therefore found that the RPD did not err in denying the Applicant's application for submission of post-hearing documents.

(1) Identity Finding

[14] The RAD found that the RPD had considered the large number of documents submitted and referred to the RPD's reasons for concern and resulting conclusion that the evidence did not establish the Applicant's identity. The RAD stated that it had considered the evidence and reached the same conclusion. The RAD did however agree with the Applicant's position that it was an error for the RPD to consider the Applicant's use of false documents to enter Canada as part of its assessment of his identity. Nevertheless, the RAD found that the RPD's identity finding stood despite this error.

(2) Admissibility of Evidence Submitted on Appeal

[15] The RAD referred to Section 110(4) of IRPA, which provides that an appellant may present only evidence that arose after rejection of his claim or that was not reasonably available, or that he could not reasonably have expected in the circumstances to have presented at the time

of the rejection. Following consideration of applicable case law, the RAD stated it would undertake an analysis of any proposed new evidence, not only for its timeliness, which is largely the focus of section 110(4), but also for its evidentiary value.

[16] Noting the jurisprudence surrounding the factors identified in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 for the consideration of new evidence by a Pre-Removal Risk Assessment [PRRA] officer, the RAD stated that it would look to the factors in *Raza* but would not be strictly bound by them and, in applying any *Raza* factor, would distinguish its own role from that of a PRRA officer. It concluded that it is appropriate, even if new evidence meets the test in section 110(4), for the RAD to consider whether new evidence is relevant, credible, trustworthy and material. On materiality, the RAD adopted an approach that focuses on whether the evidence is material enough to affect the outcome of the RAD appeal.

[17] The Applicant's proposed new evidence before the RAD included the post-hearing documents that had been submitted to and rejected by the RPD and a "Refusal of Entry Clearance", apparently issued by immigration authorities in the United Kingdom, as well as a Visa Application Submission Receipt.

[18] With respect to the the post-hearing documents, the RAD noted that they did not arise after the rejection of the claim and that the Applicant could reasonably have been expected to provide those documents to the RPD in accordance with the RPD Rules. Therefore, they did not meet the requirements of Section 110(4). The RAD also concluded that, even if they were to be

accepted, these documents were not capable of overcoming its serious concerns with respect to the Applicant's identity.

[19] The RAD similarly noted that the UK documents were dated in 2013 and therefore did not arise after the rejection of the Applicant's refugee claim. Considering the Applicant's testimony before the RPD, the RAD found that he could reasonably have been expected to present these documents to the RPD. Even if the UK visa refusal met the test in section 110(4), the RAD would not accept it, as it was not relevant or material. It did not provide any indication whether the validity of the Applicant's passport was assessed by the UK authorities.

[20] The RAD ruled that the Applicant's proposed new evidence was not admissible in the appeal and held that, having reviewed the RPD's decision and the evidence, it reached the same conclusion as the RPD that the Applicant had not established his personal and national identity.

IV. Issues and Standard of Review

[21] Based on the Applicant's oral argument at the hearing, he is submitting the following issues for the Court's consideration:

A. The RAD's decision represents a breach of procedural fairness in upholding the RPD's decision to exclude the post-hearing identity evidence;

B. The RAD's decision is unreasonable in failing to admit post-hearing evidence under s. 110 of IRPA;

C. The RAD's decision is unreasonable because it did not conduct an independent assessment of the totality of the Applicant's evidence on the central issue of the appeal; and

D. The RAD's decision is unreasonable because it relied on the findings of the RPD without regard for how an acknowledged error in the RPD's approach to the evidence impacted those findings.

[22] Neither party takes issue with the standard of review applied by the RAD with respect to its review of the RPD's decision. The RAD articulates a requirement to conduct an independent assessment of the evidence in support of the Applicant's claim.

[23] However, the parties' positions do diverge in one respect on the standard of review to be applied by the Court in considering the RAD's decision. The Applicant submits that the standard of review is one of reasonableness, except for the issue whether the RAD should have found the RPD to have erred in excluding the post-hearing evidence. The Applicant argues that this is an issue of procedural fairness that should be reviewed on a standard of correctness. The Respondent submits that the standard of reasonableness applies to all issues in this application.

[24] I adopt the Applicant's position on the standard of review, relying on *Cox v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1220, as authority for the issue whether post-hearing evidence is allowed by the RPD being reviewed on a standard of correctness. However, as explained below, in this case I would reach the same conclusion on the issue to which this standard applies, even if I were to apply the standard of reasonableness.

V. Submissions of the Parties

A. *The Applicant's Position*

[25] The Applicant's argument, that the RAD erred in sustaining the RPD's decision not to admit the post-hearing document, focuses upon the assessment of the documents' probative value, as required by RPD Rule 43. He argues that the RAD looked at this evidence through the prism of the adverse credibility determinations that had been made with respect to the principal identity documents submitted to and considered by the RPD. The Applicant's position is that it is an error to assess an identity document based on credibility concerns unrelated to the document (see *Elhassan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1247).

[26] With respect to the RAD's decision not to admit the post-hearing evidence under s. 110 of IRPA, the Applicant argues that evidence can be before the RAD in only two ways, either as part of the record of the proceedings of the RPD under s.110(3) or as new evidence admissible under s.110 (4). He points out that post hearing evidence that was submitted to the RPD will never be admissible as new evidence under s. 110(4), because, it will never be the case that it "arose after the rejection of the claim" or was not "reasonably available" before the rejection as required by s. 100(4). Rather, post hearing evidence refused by the RPD under Rule 43 of the RPD Rules must form part of the "record of the proceedings of the RPD" under s. 110(3) of IRPA.

[27] The Applicant also notes that appellants are instructed by the RAD Rules (s.3(3)(c)) that the record before the RAD is to contain "any documents that the Refugee Protection Division

refused to accept as evidence, during or after the hearing, if the appellant wants to rely on the documents in the appeal". Unlike the case of "new evidence" where s.3(3)(g) of the RAD Rules instructs an appellant to make submission on how that evidence meets the test under s.110(4) of the IRPA, there is no such direction on the admissibility before the RAD of documents refused admission by the RPD. The Applicant argues this is an indication that such evidence is properly before the RAD without the need for further justification.

[28] The Applicant submits that there is also no reason to exclude evidence again at the RAD stage for non-compliance with the RPD Rules, as there is no prejudice to the RAD in weighing this evidence, where both the RAD and the Minister would have a full opportunity to test the evidence should they see fit. Finally, the Applicant argues that the refusal to consider this evidence is a bar on a refugee claimant's ability to present their case in a context where section 7 *Charter* rights are engaged and where the objectives of IRPA are to facilitate refugee protection.

[29] In relation to the identity documents that were in evidence before both the RPD and the RAD, the Applicant argues that the RAD did not conduct an independent assessment. It owes no deference to the RPD on the genuineness or weight of documents. The authenticity of the documents must be assessed in their own right and cannot be discarded solely based on credibility concerns related to testimony or a claimant's other documents (*Ren v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1402 [*Ren*]). The Board must engage in some assessment of each piece of evidence that goes to identity (*Teweldebrhan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 418 [*Teweldebrhan*]).

[30] The Applicant submits that the RAD's assessment is completely silent on a number of documents that the Applicant submitted to prove his identity. There is no indication in the RAD's decision that this evidence of identity was assessed, why this evidence of identity was given no weight, or why this evidence in combination with other evidence of identity was not enough to establish identity on a balance of probabilities.

[31] Finally, the Applicant submits that the RAD erred, in upholding the RPD's finding that the evidence as a whole did not establish the Applicant's identity, in light of the RAD's own recognition that the RPD had considered an erroneous factor (reliance on the use of fraudulent identity papers to enter Canada) in its assessment of the whole of his evidence. The RAD did not consider how the RPD's conclusion was impacted by this error.

B. *Respondent's Position*

[32] On the subject of the post-hearing evidence and the application of RPD Rule 43, the Respondent submits that the RAD made no error in agreeing with the RPD that the evidence had little probative value.

[33] In response to the Applicant's argument under s. 110 of IRPA, the Respondent notes that this Court recently found that the RAD has no discretion to admit new evidence that does not meet the requirements under s.110 (4) (*Deri v MCI* , 2015 FC 1042 at pars 51 and 55).

[34] The Respondent also argues that evidence found inadmissible and therefore not considered by the RPD is, by definition, new evidence before the RAD. An appellant must put

this evidence into its record so that the RAD may then assess whether it qualifies for admission under s.110 (4) as new evidence. The fact that there is a specific statutory restriction on the type of new evidence that is permissible on appeal makes clear that the RAD is not a complete *de novo* appeal that allows an appellant to provide better evidence where the evidence provided to the RPD is found lacking.

[35] In response to the *Charter* argument, the Respondent submits that the limitation in s.110(4) on admittance of new evidence before the RAD does not preclude a refugee claimant from providing required evidence and therefore raises no inconsistency with the principles of fundamental justice.

[36] The Respondent also notes that the RAD went beyond what was required in its s.110(4) analysis and assessed the documents, finding they were not probative.

[37] On the subject of the identity documents that were in evidence, the Respondent argues that the RAD clearly considered the documents on its own and came to the same conclusion as the RPD. Specifically, it found contradictions between testimony and evidence, inconsistent testimony regarding photos on identity documents, problems with the Turkish identity card issued in Canada, and a problem with the document from the political organization in Turkey.

[38] Further, the Respondent submits that it is trite law that the RAD need not mention each piece of evidence and is presumed to have considered the evidence. In this case, there were already significant problems with more probative identity documents. When primary documents

are not credible, it is not necessary to give weight to other documents that cannot on their own confirm identity (*Diarra v Canada (Minister of Citizenship and Immigration)*, 2014 FC 123 [*Diarra*]).

[39] The Respondent also argues that the fact the RAD disagreed with one, non-determinative finding, but agreed with the rest of the findings and the overall decision, shows a clear independent analysis.

VI. Analysis

[40] My decision to allow this application for judicial review turns on the requirement for the RAD to assess the totality of the evidence in support of the Applicant's identity. The Applicant cites a number of authorities for this principle (e.g. *Lin v Canada (Minister of Citizenship and Immigration)*, 2006 FC 84 at paras 9-14; and *Kabongo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1086 at paras 19-22) but refers in particular to the recent decision in *Teweldebrhan*, where Chief Justice Crampton held as follows at paragraphs 13-21:

> [13] In reaching its conclusion that Mr. Teweldebrhan had failed to establish his identity on a balance of probabilities, the RPD did not refer to the letters from the two Eritrean political organisations or the letter from Mr. Teweldebrhan's wife.
>
> [14] The presumption that foreign identity documents are valid (*Rasheed v Canada (Minister of* Citizenship *and Immigration)*, 2004 FC 587 at paras 19-20; *Bouyaya*, above at para 11) falls away when there is a valid reason for doubting their authenticity (*Elhassan*, above at para 21).
>
> [15] In my view, a valid reason for doubting the authenticity of an applicant's foreign identity documents is that other identity documents provided by the applicant have been established to be fraudulent or otherwise inauthentic. Another such valid reason is where the RPD has a reasonable basis for rejecting the credibility

of explanations offered by an applicant with respect to one or more of his or her identity documents.

[16] Stated differently, where the RPD is satisfied one or more of an applicant's identity documents have been fraudulently obtained or are otherwise inauthentic, the presumption that the applicant's remaining identity documents are valid can no longer be maintained. This is because the foundation for that presumption has been eroded.

[17] In this case, there were at least two factors that, independently, provided such a valid reason for doubting the authenticity of Mr. Teweldebrhan's identity documents. These were: (i) the fact that he testified that he had travelled on illegally obtained visas and on a passport that he obtained through an "agent" in Sudan, and (ii) the two Certificates of Baptism that he provided to the RPD were inconsistent and he was unable to offer a reasonable explanation for that inconsistency. Had the RPD questioned Mr. Teweldebrhan about the inconsistencies it had identified in respect of the identification numbers on the money transfer and bus ticket invoice, and had it not been satisfied with his responses, that would have provided a third, independent, reason for setting aside the presumption.

[18] *Elhassan*, above, is distinguishable on this point, as the RPD based its determination to give little weight to a birth certificate on credibility findings that were found to be unreasonable (*Elhassan*, above at paras 23-24).

[19] Notwithstanding that the RPD was entitled to set aside the presumption of validity of Mr. Teweldebrhan's identity documents, it was still required to at least consider and assess the authenticity and probative value of each of those documents, as well as the affidavits and the letters that he submitted in support of his application (*Jiang v Canada(Minister of Citizenship and Immigration*), 2007 FC 1292 at paras 6-7; *Lin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 157 at para 55). The RPD's failure to do so rendered unreasonable its determination that Mr. Teweldebrhan had not established his identity on a balance of probabilities.

[20] Had the RPD actually assessed the copies of the identity documents, the affidavits and the letters that Mr. Teweldebrhan submitted, it would have been reasonably open to it to find that their collective probative value did not establish Mr. Teweldebrhan's identity on a balance of probabilities (*Lawal v*

> *Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at para 23).
>
> [21] Instead, the RPD appeared to dismiss outright the copies of the identity documents as well as the two affidavits, and it did not mention the letters at all. This was unreasonable.

[41] In the case at hand, the Applicant identifies seven documents or categories of documents, introduced by the Applicant in support of his identity in his RPD hearing that are not referred to in the RAD's decision. He argues that failure to conduct an independent assessment of the authenticity and probative value of each of these documents represents a reviewable error as explained in *Teweldebrhan*. The Respondent does not distinguish *Teweldebrhan* but argues that the documents to which the Applicant refers are tertiary documents that could not have changed the RAD's decision. The Respondent encourages the Court to prefer the decision in *Diarra*, in which Justice Shore stated the following at paragraph 30:

> [30] The Court does note that the RPD did not expressly mention the Applicant's mother's death certificate in its reasons; however, the failure to mention this document, a tertiary document, does not, in and of itself, make the RPD's decision unreasonable. It is clear from the jurisprudence that the RPD does not need to address every single piece of evidence; particularly where it has found that the applicant's underlying claim lacks credibility (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 14-17). It is evident in this case that the RPD considered its probative value prior to rendering its decision (Hearing transcript, CTR at pp 410-412).

[42] I find that these authorities can be reconciled, in that Justice Shore concluded based on his review of the record in *Diarra* that the RPD had actually considered the probative value of the tertiary identity document that was the subject of the applicant's argument. Based on these authorities, I would consider it to be a reviewable error on the part of the RAD to have reached

its decision without considering the identity documents to which the Applicant refers unless, as argued by the Respondent, those documents could not have changed the RAD's decision.

[43] Before turning to that question, I will address the RAD's review of the RPD's decision to reject the post-hearing evidence, as that review also raises concerns about considering the totality of the identity evidence. I agree with the Applicant that the RAD's reasons raise the issue that it concluded that evidence to have little probative value in part based upon credibility difficulties with other evidence, contrary to the principles expressed by Justice Boswell at paragraphs 24 to 27 of *Ren*. I acknowledge, as argued by the Respondent, that the RAD also referred to having concerns about the probative value of the post-hearing documents, even if the Applicant did not have other credibility difficulties. However, the RAD makes this statement about "many", not all, of these documents, and its subsequent analysis of the documents' probative value omits the social insurance record card, the military discharge certificate, and the family registration document that the RAD had referred to as being included in the post-hearing documents.

[44] Therefore, it appears from the decision that, as with the documents that were submitted at the hearing before RPD, the RAD's analysis of the probative value of the post-hearing documents considers some, but not all, of those documents. The RAD proceeds to conclude that the Applicant did not provide a reasonable explanation for the late submission of these documents to the RPD, and I find no error in that conclusion. The RAD also correctly identifies that the factors that were to be considered by the RPD under Rule 43, in considering whether to admit the post-hearing evidence, included both the availability of a reasonable explanation for late submission and the documents' probative value. However, in the absence of an analysis by

the RAD of the probative value of all these documents, other than in reliance on credibility difficulties associated with other documents, that factor has not been properly considered. As such, my conclusion is that the RAD erred, in a manner both incorrect and unreasonable, in its review of the RPD's decision not to permit submission of the post-hearing evidence.

[45] I therefore return to the question whether the identity documents that have not received independent assessment by the RAD could have changed the RAD's decision. The identity documents that were before the RPD at the hearing, but on which the RAD was silent, are described by the Applicant as follows:

A. A letter from the Toronto Kurdish Community & Information Centre confirming his personal identity based on his knowledge of Kurmanji Kurdish and interviews with friends and relatives who know him in Canada;

B. Kurdish Political Party Circulars noting party member assignments and a list of party member election duties including Mr. Aytac's name;

C. Kurdish Political Party Letter addressed to Mr. Aytac on party letterhead congratulating the Applicant on his youth chairmanship;

D. Kayseri Haci Veli Membership ID with his photograph and official stamps;

E. Alevi Cem House Membership receipts in his name;

F. School Certificate for Applicant's son Ekin Ali Aytac; and

G. Pictures of the Applicant at the Alevi Cultural Centre in Turkey.

[46] I agree with the Respondent's characterization of these documents as tertiary, particularly compared to those identity documents that were expressly considered by the RAD in reaching its decision. However, some of these documents (emanating from political parties) appear similar in character to those that were the subject of the decision in *Teweldebrhan*, and one bears the Applicant's photograph, such that it is not possible to conclude that they are without some potential probative value. As noted above, the post-hearing documents that the RAD did not assess for probative value include the Applicant's social insurance record card, military discharge certificate, and family registration document. I also note that the social insurance record card bears a photograph.

[47] Consistent with the analysis in *Teweldebrhan*, the RAD could well have found after assessing all these documents, in combination with its other findings, that their collective probative value did not establish the Applicant's identity. However, my conclusion is that it is not possible to know whether assessment of the combination of these documents could have changed the RAD's decision. Therefore, my finding us that such an assessment was required. This application for judicial review must be allowed and the matter referred back to the RAD for re-determination.

[48] Having reached this conclusion, it is unnecessary for me to consider the Applicant's arguments related to s. 110 of IRPA. The Applicant raised a potential question of general importance for certification in connection with that issue. However, as I have made no decision on that issue, no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and this matter is referred back to the Refugee Appeal Division for re-determination by a different panel member. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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