

Federal Court



Cour fédérale

Date: 20181003

Docket: IMM-3957-17

Citation: 2018 FC 988

Ottawa, Ontario, October 3, 2018

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

AMANUEL KIDANE TESFAGABER

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Amanuel Tesfagaber claimed to be a citizen of Eritrea, who came to Canada fleeing religious persecution and avoiding military service. He requested refugee protection. The Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) denied his claim on the basis that Mr. Tesfagaber had not established his identity. This is an application for judicial review of that decision.

[2] For the reasons that follow, I am dismissing this application.

I. Decision Under Review

[3] The Applicant arrived in Canada on July 6, 2012, and his refugee claim was heard in June 2017. The Applicant was represented by counsel in preparing for his hearing, but counsel withdrew 10 days prior to it, on the basis that he had been unable to contact the Applicant.

[4] The transcript shows that the Applicant agreed to proceed with the hearing without counsel. A number of documents had been filed by his counsel prior to the hearing in accordance with the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*], including a copy of the Applicant's birth certificate as well as country conditions documents. At the hearing, the Applicant indicated that he wanted to file another document, his driver's licence. This document had not been translated or produced in a timely manner as required by the *RPD Rules*. As this document is key to the decision under review, I will say more about it below.

[5] The *RPD Member* found the key issues to be identity, and credibility as it relates to identity, under s. 106 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and rule 11 of the *RPD Rules*. The Member concluded that the birth certificate tendered by the Applicant was not genuine, finding that it was simply a typed document that lacked security features, had no photograph, and that the date on it did not correspond to the dates testified to by the Applicant. For example, the date of issue on the document was 2001, some 11 years earlier than indicated by the Applicant in his testimony, and the certificate indicated that his birth had been recorded in 2009, eight years after the document itself was issued. The Member noted that this was "nonsensical in the context of your testimony."

[6] The Member also found a number of inconsistencies and gaps in the Applicant's testimony, including a statement in his refugee claim that he had resided in the same residence for 10 years, whereas his oral testimony was that he had only lived there for one or two years. In addition, the Member found the Applicant's evidence about how he had avoided compulsory military service was lacking in credibility.

[7] In regard to the driver's licence, the Applicant produced it and indicated he wanted to put it into evidence on the day of the hearing, although he did not have a translation. When asked why he had not produced it earlier, he stated that he did not realize it was important. The Member decided to accept the document as evidence and the translator who was assisting the Applicant at the hearing prepared a handwritten translation of the pertinent parts of the document.

[8] The transcript of the hearing shows that when the Member accepted the driver's licence, the hearing was adjourned so that an on-line document checker could be consulted. A copy of screen shots of various pages from the document checker was obtained, and provided to the Applicant. When the hearing resumed the Member confirmed with the translator that the document checker had been explained to the Applicant.

[9] The Member found that the driver's licence was not genuine, based on a comparison of the document tendered by the Applicant and the on-line document checker that the Member consulted, as well as the Applicant's lack of response to questions about the licence. . The Member asked the Applicant about several discrepancies between the driver's licence he had produced and the information requirements provided by the document checker. The Applicant

was not able to explain these differences, and simply re-affirmed that this was a genuine driver's licence from Eritrea.

[10] The Member concluded: "So, when I look at everything cumulatively I am unable to render a positive decision and I find that you have not met your burden which is to establish your identity, either by documents or by way of your testimony."

II. Issues and Standard of Review

[11] Two issues arise in this case:

- A. Was there a denial of procedural fairness?
- B. If not, is the decision reasonable?

[12] The standard of review in regard to procedural fairness is correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69. The standard of review in relation to the merits of the decision and the Member's findings on credibility and the validity of the documents is reasonableness: *Dai v Canada (Citizenship and Immigration)*, 2015 FC 723 at para 6 [*Dai*].

III. Analysis

A. *Was there a denial of procedural fairness?*

[13] The Applicant does not challenge the rulings of the RPD in relation to the birth certificate, nor the credibility findings in relation to his testimony. The Applicant's main argument is that once the decision was made to accept the driver's licence into evidence, despite

it not having been provided 10 days in advance of the hearing as required by the *RPD Rules*, the Member had a duty to ensure that there was procedural fairness in relation to how that evidence was dealt with. He contends that the RPD denied him procedural fairness because it did not provide a translated version of the document checker, or to allow him time to review it and to prepare adequately to address the questions that arose from it.

[14] As noted earlier, the Member decided to accept the late-tendered driver's licence as evidence, then adjourned the hearing to consult the document checker. A copy of screen shots from the document checker for a grade 2 driver's licence from Eritrea (which was the type of licence that the Applicant stated he possessed) was provided to the Applicant. When the hearing re-convened, the Member asked whether the interpreter "had a chance to review it and explain to the claimant", to which the interpreter stated "yes".

[15] The Member then proceeded to put a series of questions to the Applicant, based on comparisons between the licence he had tendered into evidence and the requirements for a valid Eritrean class 2 driver's licences as described by the document checker. These questions related to a significant number of discrepancies, including: (i) whether the pages ought to have been numbered; (ii) the lack of a security feature when exposed to a UV light; (iii) the fact that the licence indicated it had been renewed for two years, when both the Applicant's testimony and the document checker indicated that licences in Eritrea are renewed for only one year; and finally, (iv) that the front of the licence had five numbers, while the driver's licence number in the body of the document had six numbers, and the two did not match. The Applicant did not have answers to any of these questions.

[16] The Applicant argues that he was not in a position to raise questions as to the validity of the document checker nor to question any of the details as to what it actually says about requirements for valid driver's licences in Eritrea. He was never provided with a translated version of the document, nor was he given an opportunity to review it or to rebut any of the concerns being raised by the Member. In the circumstances, in view of the fact that he was representing himself and had neither the capacity nor opportunity to present his case, the Member's actions denied him procedural fairness.

[17] The requirements of procedural fairness depend on the nature of the process, including the type of hearing, the nature of the interests affected by the outcome, and the statutory framework (*Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817).

[18] Applicants before the RPD are entitled to represent themselves, and in such cases the RPD is not to act as an applicant's counsel; the ultimate responsibility of the member is to ensure that the hearing proceeds in a manner which is fair: *Thompson v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 808 at para 12. This can impose a more onerous obligation on the RPD member than where an applicant is represented, and it requires the RPD to provide a degree of flexibility to an applicant: *Nemeth v Canada (Citizenship and Immigration)*, 2003 FCT 590 at para 13; *Kohazi v Canada (Citizenship and Immigration)*, 2015 FC 705 at para 12.

[19] The Applicant refers to several cases of this Court which have found a denial of procedural fairness where documents were not disclosed, or opportunities to respond to concerns about documents were not provided to refugee claimants: *Quiroz Mendez v Canada (Citizenship*

and Immigration), 2011 FC 1150; *Ke v Canada (Citizenship and Immigration)*, 2012 FC 862. I find that these cases are distinguishable on their facts.

[20] Here, the Applicant produced a driver's licence on the day of the hearing. It was not translated. He had decided to proceed with the hearing despite not being represented by counsel. The Member decided to accept the Applicant's request to allow him to file this as evidence. The Member then ensured that the translator supporting the Applicant during the hearing prepared a translation of the document into English since this had not been done in advance. The Member consulted a document checker that provides information about documentation for Eritrea and other countries, including driver's licences. Upon reconvening, the Member confirmed with the translator that he had explained the document checker to the Applicant. All of these steps are fully consistent with the Member's obligation to ensure that the hearing was fair.

[21] The Member then asked the Applicant a series of questions about the differences between the driver's licence he had produced, and the requirements set out in the document checker. The Applicant was unable to answer any of the questions; he simply re-stated that he believed that it was a valid driver's licence. It should be noted that the questions about the driver's licence were mainly about features that are evident on the face of the document; the only issue of a more technical nature related to the security feature about exposure to a UV light. The Applicant was unable to provide any meaningful response to any of the questions raised by the Member.

[22] The Applicant claimed in his affidavit, filed in this proceeding, that he had misunderstood the explanation and had thought that the document checker and questions were all about an Eritrean passport. That is difficult to believe for two reasons: first, the Applicant had

testified that he had never received a passport; second, the Applicant answered some of the questions about the driver's licence and stated that he thought it was genuine. It is difficult to see from the transcript any basic confusion as to what he was being questioned about. There is no indication in the transcript of any issues of translation, and the Applicant did not state that he was having difficulty following the proceedings or understanding the questions on this or anything else raised during the hearing.

[23] The Applicant also points out that there is no evidence that the document checker is accurate or up-to-date, and argues it was unfair to proceed without allowing the Applicant time to verify these things in order to answer the Member's questions. This is the core of the argument on procedural fairness.

[24] The Applicant argues that once the decision was made to accept the driver's licence into evidence, the Member had to take steps to ensure that the hearing was fair. This should have involved an adjournment to provide a translated version of the document checker, and to allow the Applicant to verify its accuracy, so as to be able to answer the concerns raised by the Member.

[25] In the circumstances of this case, I do not find a breach of procedural fairness. Here, the driver's licence was produced by the Applicant on the day of the hearing. The Member adjourned the hearing and sought to verify whether it was valid, using the document checker. A copy of the relevant pages from the document checker was provided to the Applicant, via the translator. Upon resumption of the hearing, the Member asked and was assured by the translator that the document checker had been explained to the Applicant. Although no translation was

provided, this in and of itself does not constitute a breach of procedural fairness in these circumstances. What is key here is that the Applicant had an opportunity to understand the document.

[26] In addition, the Member asked the Applicant a series of questions about the differences between the driver's licence and the information provided by the document checker. The transcript of the hearing does not indicate any confusion on the part of the Applicant. He simply has no answer to the questions. Some of the questions relate to information from the document checker, others relate to the testimony of the Applicant. For example, both the document checker and the Applicant's testimony indicated that Eritrean driver's licences had to be renewed each year, whereas the driver's licence produced at the hearing appeared to indicate it was valid for two years. The Applicant had no explanation for this.

[27] The Applicant was not taken by surprise that his identity would be a key question at the hearing – that is evident from s. 106 of *IRPA*, the *RPD Rules*, and case-law. It would have been part of his counsel's preparation for the hearing, as evidenced by the birth certificate that had been filed before the hearing. The Applicant had been assisted by counsel in preparing for the hearing, and it is reasonable to expect that the Applicant would have been made aware that he needed to establish his identity as a citizen of Eritrea.

[28] Jurisprudence makes clear that an applicant has a high onus to produce acceptable documents establishing identity: *Su v Canada (Citizenship and Immigration)*, 2012 FC 743 at para 4; *Malambu v Canada (Citizenship and Immigration)*, 2015 FC 763 at para 41; and *Dai*, para 20. Case-law also affirms that assessing identity is at the core of the expertise of the RPD.

[29] Here, the Member asked the Applicant specific questions about the various documents he produced for the hearing, including the driver's licence. The Applicant was provided with an opportunity to answer those questions. The Member did not find the answers to be sufficient to quell the doubts about the validity of the documents, or to answer inconsistencies in the Applicant's narrative. The onus lies on the Applicant to produce sufficient reliable evidence to establish his identity. Considering all of the circumstances of this case, I do not find a breach of the requirements of procedural fairness.

[30] In view of the arguments presented, I will deal briefly with the second issue.

B. *Is the decision reasonable?*

[31] There is a high onus on an applicant to produce acceptable documentation establishing their identity. Assessing the identity issue is at the core of the RPD's expertise, and a court on judicial review should exercise caution before intervening to reverse such a finding: *Getaneh v Canada (Citizenship and Immigration)*, 2012 FC 1279; *Lhamo v Canada (Citizenship and Immigration)*, 2016 FC 873.

[32] Here the Member found the Applicant had produced a fraudulent birth certificate, and also found that he had not made reasonable efforts to obtain other documentation to establish his identity. For the reasons outlined above, the Member concluded that the late-produced driver's licence was also not valid. In addition, the Member concluded that the Applicant's testimony lacked credibility in relation to key details. All of these conclusions are amply supported in the record.

[33] Considering all of the evidence, the Member dismissed the claim because the Applicant had not established his identity. I find no basis to overturn that decision.

[34] No question of general importance was proposed for certification by the parties, and none arises in this case.

[35] For these reasons, I am dismissing this application for judicial review.

JUDGMENT in IMM-3957-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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