

Federal Court



Cour fédérale

**Date: 20220128**

**Docket: IMM-5443-20**

**Citation: 2022 FC 100**

**Ottawa, Ontario, January 28, 2022**

**PRESENT: The Honourable Madam Justice Aylen**

**BETWEEN:**

**BERHAN TAKELE ABRAHA,  
NATNAEL KINDEYA HAGOS, HABEL KINDEYA HAGOS,  
TOMAS KINDEYA HAGOS, BETHESDA KINDEY HAGOS, and  
MIRACLE KINDEYA HAGOS**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicants seek judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, dated October 7, 2020, in which the RAD confirmed the decision of the Refugee Protection Division [RPD] that Berhan Takele Abraha [the Principal

Applicant] was not a *Convention* refugee or a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*.

[2] The Applicants assert that the RAD's decision is unreasonable for three reasons: (a) first, the RAD erred in its assessment of risk pursuant to section 97 of the *IRPA*.; (b) second, the RAD erred in relying on three new credibility findings that were not canvassed at the oral hearing before the RPD, thereby rendering a breach of natural justice; and (c) third, the RAD's conclusion regarding the Principal Applicant's children was unreasonable. While the Applicants originally asserted an error in relation to the RAD's evaluation of the Principal Applicant's risk of persecution under section 96 of the *IRPA*, the Applicants abandoned this ground of review at the hearing.

[3] At the hearing, the Respondent objected to the Applicants' oral submissions regarding the alleged error made by the RAD in its assessment of risk pursuant to section 97, asserting that the Applicants were advancing arguments not raised in their further memorandum of fact and law. The Applicants pointed the Court to certain excerpts from their further memorandum of fact and law to attempt to demonstrate that their oral submissions were not new. I agree with the Respondent that the Applicants improperly reframed their section 97 submissions at the hearing. However, I find that this application turns on the RAD's breach of procedural fairness, such that I need not consider the Applicants' reframed section 97 submissions.

[4] For the reasons that follow, this application for judicial review will be allowed.

## **II. Background**

[5] The Principal Applicant is a citizen of Ethiopia. The Co-Applicants are the Principal Applicant's children. In her Basis of Claim form, the Principal Applicant claimed that the Applicants faced persecution and risk to life because of the Principal Applicant's political expression and support of a political opposition party (the Arena Party or Arena Tigray Party) and their identity as ethnic Tigrayans, a targeted minority group within Ethiopia.

[6] The Principal Applicant submitted that she was arrested upon her return from a trip to Dubai on May 31, 2018 and detained for five days. She states that she was accused of belonging to the Tigray People's Liberation Front [TPLF]. While detained, she states that she was subject to physical and psychological abuse at the hands of the Ethiopian police. She states that she was severely beaten and sustained injuries.

[7] On June 5, 2018, the Principal Applicant was released on bail with conditions, such that she was required to regularly report to the police station and if she were to leave the region, she was required to first obtain a permit from the police.

[8] The Principle Applicant states that upon her release she received medical treatment for her injuries.

[9] The Applicants applied for and obtained Canadian visas and left Ethiopia on July 25, 2018, making a refugee claim upon arrival in Canada.

[10] In its decision dated October 15, 2019, the RPD determined that the Applicants were neither *Convention* refugees nor persons in need of protection. The Applicants appealed to the RAD.

### **III. Decision at Issue**

[11] On October 7, 2020, the RAD dismissed the appeal and confirmed the decision of the RPD that the Applicants are neither *Convention* refugees nor persons in need of protection. The RAD held that the determinative issue was credibility.

### **IV. Issue and Standard of Review**

[12] While a number of issues were raised on this appeal, I find that the determinative issue is whether the RAD's decision was procedurally fair.

[13] Procedural fairness is a matter for the Court to determine. The standard for determining whether a decision-maker complied with the duty of procedural fairness is correctness [see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54]. A Court assessing a procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances [see *Canadian Pacific Railway Company v Canada (Attorney General)*, *supra* at para 54]. The ultimate question is whether the Applicants knew the case to meet and had a full and fair chance to respond [see *Laag v Canada (Minister of Citizenship and Immigration)*, 2019 FC 890 at para 10].

**V. Analysis**

[14] The Applicants submit that the RAD erred in basing its credibility finding on an issue that the RPD did not put to the Applicants to explain at the hearing, which error amounted to a breach of the Applicants' procedural fairness rights. Specifically, the Applicants asserts that the RAD raised three new credibility issues involving the witness letters, the police reappearance notice and the Principal Applicant's medical certificate, none of which were raised by the RPD.

[15] In considering this submission, it is critical to start by examining the credibility findings made by the RPD and then by the RAD. The RPD found that the Principal Applicant was the victim of a random police incident that resulted in her detention for five days. The RPD did not believe the Principal Applicant's assertion that she was detained on suspicions of being a member of her asserted ethnic and political groups. The RPD's decision focused on a letter written by the Principal Applicant to the mayor of Addis Ababa and the Principal Applicant's assertion that this letter was of concern to the police when she was arrested. The RPD rejected the Principal Applicant's assertion, noting their concern that the letter was not mentioned in the Principal Applicant's narrative. Moreover, the RPD also noted the absence of objective evidence of government persecution of Tigrayans as an ethnic group or of members of the TPLF.

[16] The RAD agreed with the RPD's findings regarding the absence of objective evidence of government persecution of Tigrayans as an ethnic group or of members of the TPLF, which the RAD found was an important reason to doubt that the Principal Applicant had been held in captivity for five days based on her ethnicity and political association. The RAD also agreed with

the RPD's finding that the omission of the Principal Applicant's letter to the mayor of Addis Ababa negatively affected her credibility.

[17] However, the RAD went on to find additional elements that negatively affected her credibility.

[18] The Applicants relied on two witness letters provided by Brhane Hailu Tesema and Etsegenet Hagos Gebretsadik, which the Applicants asserted corroborated many elements of the evidence contained in the Principal Applicant's narrative and testimony. While these letters were before the RPD, they were only mentioned by the RPD in one paragraph of its decision in relation to the Principal Applicant's argument that the disappearance of her husband supported a possible risk of forward-looking persecution and did not factor into the RPD's consideration of the Principal Applicant's narrative regarding the motive for her arrest, nor their credibility assessment. Moreover, the Principal Applicant was not questioned about the details of the witness letters at the RPD hearing.

[19] The RAD found that the letters provided by the witnesses contradicted the Principal Applicant on the essential subject of the grounds for her arrest. Specifically, the RAD held:

However, Mr. Tesema states that the PA was a strong opponent of the TPLF. He also declares that the PA was arrested because she was a member of the "Union of Tigrians for Democracy and Sovereignty party". In her letter, Estegenet Hagos Gebretsadik states that the PA was "sentenced (sic) to five days in prison". She also declares that the PA "was arrested because she joined the Tigrians for Democracy and sovereignty party". These statements are in direct contradiction of the PA's narrative where she explains that she was arrested by the police because she was suspected of being a member of the TPLF.

[20] As a result of these contradictions, the RAD stated that it gave no weight to the letters on the central matter of the Principal Applicant's political persecution as an imputed member of the TPLF and found that these contradictions further undermined the Principal Applicant's credibility.

[21] The RAD also went on to consider the reappearance notice issued by the Addis Ababa Police Commission dated August 16, 2018, which the Applicants relied upon to establish that the Principal Applicant was persecuted. This document was not referred to in the RPD's decision. The RAD found the reappearance notice to be "a puzzling document", as the Police Commission (rather than the tribunal) was summoning the Principal Applicant "to hear [her] response" to an unspecified "criminal charge". The RAD stated that due to the vagueness of the document, the RAD had concerns about its authenticity. Even if it were to consider the document to be authentic, the RAD stated that it could not conclude that the unspecified criminal charge was related to the Principal Applicant's political opinions.

[22] Finally, the RAD went on to consider the medical certificate produced by the Principal Applicant for the medical treatment that she received after being released from police detention. This document was not referred to in the RPD's decision. The RAD found that the medical certificate did not attest to the cause of the Principal Applicant's injuries nor did it prove that her injuries were the result of political persecution. With regards to the allegations of persecution, the RAD gave no weight to the medical certificate.

[23] While I agree with the Respondent that, in making their submissions to the RAD, the Applicants pointed to the RPD's failure to properly consider the documents at issue as important

corroborative evidence and took issue with the RPD's credibility determinations, I disagree with the Respondent's assertion that the circumstances of this case did not warrant the Applicants being given an opportunity to address the RAD's concerns regarding these documents and their impact on the Principal Applicant's credibility.

[24] The credibility findings made by the RAD were material to its decision and were new and distinct from those that formed the basis of the RPD's decision. Moreover, the RAD's comments regarding the three documents (which went to a critical element of the Applicants' claim) were not addressed by the RPD. In such circumstances, I find that it was incumbent upon the RAD to raise its concerns with the Applicants and give the Applicants an opportunity to respond prior to releasing its decision [see *Kwakwa v Canada (Minister of Citizenship and Immigration)*, 2016 FC 600 at para 26; *He v Canada (Citizenship and Immigration)*, 2019 FC 1316 at para 79; *Laag, supra* at para 23; *Palliyaralalage v Canada (Minister of Citizenship and Immigration)*, 2019 FC 596 at para 9; *Mohamed v Canada (Citizenship and Immigration)*, 2020 FC 1145 at para 72]. Having failed to do so, I find that the RAD committed a breach of procedural fairness.

## **VI. Conclusion**

[25] The application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RAD for redetermination.

[26] Neither party proposed a question for certification and I agree that none arises.

**JUDGMENT in IMM-5443-20**

**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 Refugee Appeal Division for redetermination.
2. The parties proposed no question for certification and none arises.

“Mandy Ayles”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5443-20

**STYLE OF CAUSE:** BERHAN TAKELE ABRAHA,NATNAEL KINDEYA HAGOS, HABEL KINDEYA HAGOS, TOMAS KINDEYA HAGOS, BETHESDA KINDEY HAGOS, and MIRACLE KINDEYA HAGOS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HEARD BY VIDEOCONFERENCE

**DATE OF HEARING:** JANUARY 25, 2022

**JUDGMENT AND REASONS:** AYLEN J.

**DATED:** JANUARY 28, 2022

**APPEARANCES:**

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