Federal Court  Cour fédérale

Date: 20110503

Docket: IMM-3355-10

Citation: 2011 FC 510

Ottawa, Ontario, May 3, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

THOMAS TEKLE BERHANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *Act*) by Thomas Tekle Berhane (the applicant). The Board found that it could not establish the applicant's identity, and that the applicant was therefore neither a Convention refugee nor a person in need of protection under ss 96 and 97 of the *Act*.

II. Facts

[2] The applicant is allegedly a citizen of Eritrea, from the town of Asmara, born on July 22, 1977, and of Pentecostal faith.

[3] The applicant's father, who previously worked as a teacher, was allegedly imprisoned from 1991-1995 for collaborating with the former government of Eritrea.

[4] The applicant alleges that in 1995, when first asked to fulfill the required military service, his mother obtained an exemption for him due to his being an only child. The applicant continued to avoid military service due to his faith, and claims that his boss and family helped him to hide.

[5] In February 2005, the applicant was allegedly taken to the 6th Police Station in Asmara and detained for 65 days for having avoided compulsory military service. He claims to have been released and instructed to report to the police station the following month to enlist. He then went into hiding.

[6] The applicant alleges that on February 10, 2007, he was attending a private prayer meeting, but the police interrupted and all attendees were taken to the 5th Police Station in Asmara. The applicant was allegedly detained for one month, during which time he suffered abuse and beatings. While being transferred to a prison at Sawa, he allegedly managed to escape. He spent one night at

his parents' home, and then remained in hiding in Eritrea for another two and a half months before leaving the country.

[7] The applicant arrived in Kessela, Sudan, on April 21, 2007, and then went to Nairobi, Kenya, on May 1, 2007. He arrived in Canada on May 14, 2007, and claimed refugee status on May 18, 2007. He alleges not to have had any news of his parents since arriving in Canada.

[8] The applicant arrived in Canada with an English translation of his birth certificate. He claims to have had Eritreans from Toronto, who were travelling back to their native country, organize to obtain the original Tigrignian copy of his birth certificate through his aunt in Asmara. She obtained it from his parents' home.

[9] The applicant had an expedited interview with a Refugee Protection Officer (RPO)on September 2, 2009. The decision was to refer him for a full hearing before the Board. His full hearing took place on April 21, 2010. The decision was issued on May 21, 2010, and received by the applicant on May 28, 2010.

III. The decision under review

[10] In a lengthy decision, the Board found that it was unable to determine the applicant's identity as a national of Eritrea, and was therefore unable to determine whether the applicant was a Convention refugee or a person in need of protection.

[11] The Board noted that the applicant allegedly used a non-genuine passport, under the name of Elias Solomon, to travel from Kenya to Canada, but remitted the false documents to the smuggler who accompanied him to Toronto. The Port of Entry (POE) notes stated that the applicant had an English-translated copy of his birth certificate when he arrived, and at the hearing, the applicant presented a copy of the original birth certificate in the Tigrigna language. The Board noted the rule from *Rasheed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 587 at para 19 [*Rasheed*], to the effect that foreign documents purporting to be issued by competent foreign public officials should be accepted as evidence of their content unless there is a valid reason to doubt them. In assessing the authenticity of the birth certificates, the Board was guided by *Sertkaya v Canada (Minister of Citizenship and Immigration)*, 2004 FC 734 [*Sertkaya*], which held that it is open to the Board to consider the authenticity of documentary evidence and the ability of the claimant to obtain and use fraudulent documents.

[12] With respect to credibility, the Board found that the cumulative effect of the applicant's testimony left the panel with insufficient credible and trustworthy evidence.

[13] The Board questioned the birth certificate, the only identity document, and found the applicant's explanation as to the production of an English translation of the certificate unreasonable. The Board noted that the applicant's Personal Information Form (PIF) stated that he spent another two and a half months in Eritrea after the night at his parents' home when his father packed his bag and documents; the Board found it unlikely that the applicant never checked the contents of the bag and the documents. The Board noted that the applicant's father was educated, and would likely have known which documents would be useful. The applicant had also alleged that he used to carry the

Tigrigna birth certificate with him as identification, for lack of a national identity card, but had no explanation for why he didn't have it with him when he left.

[14] The Board found several issues with respect to the applicant's testimony, as it related to his imprisonment, the duration of his stay in hiding, the copy of a diploma from a computer course and how it was obtained and his aunt's involvement in obtaining his original birth certificate.

[15] The Board found objective evidence that fraudulent Eritrean documents can easily be purchased in Khartoum. The Board cited *Uddin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 451 [*Uddin*], for the proposition that the applicant's lack of credibility combined with the Immigration and Refugee Board's [IRB] knowledge that it is easy to produce forged documents which can lead the Board to give no probative value to the applicant's documents.

[16] The Board disbelieved the applicant's story of being arrested during a prayer meeting and found it unlikely that the applicant was able to subsequently escape from soldiers armed with Kalashnikovs, noting that religious prisoners are dealt with very harshly and the Eritrean government is one of the worst persecutors of Christians in the world. The Board cited the following dicta from *Faryna v Chorny*, [1952] 2 DLR 354 (BCCA) at 357:

> In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[17] The Board also took exception to the applicant's lack of explanation regarding the fact that his parents were left unharmed despite his avoiding serving in the military.

[18] The Board disbelieved the applicant's statement that his father had saved $4000 for the applicant to use to come to Canada, noting that the father had allegedly been in prison from 1991-1995, and only worked as a private tutor afterwards, due to illness. The Board found that the applicant had no reasonable explanation for these funds.

[19] The Board accepted the letter from Rehoboth Evangelical Church in Toronto to the effect that the applicant had worshipped there since 2007, and noted that the applicant correctly answered questions on the Pentecostal faith.

[20] The Board concluded that the cumulative effect of the credibility issues meant that there was no sufficient credible and trustworthy evidence on which to base a determination that the applicant was a Convention refugee. The Board cited *Sheikh v Canada (Minister of Employment and Immigration*, [1990] 3 FC 238 (FCA) at 244:

> […] even without disbelieving every word [a claimant] has uttered, a first-level panel may reasonably find him so lacking in credibility that it concludes that there is no credible evidence relevant to his claim.
>
> […] In other words, a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony.

The Board here found that the applicant was so lacking in credibility regarding the central issues that there was a general lack of credibility regarding all relevant testimony, especially regarding how he obtained the original birth certificate, upon which subject he was evasive and contradictory.

[21] The Board then recalled that the applicant bears the onus of proving his identity. In this case, the necessary credible evidence to reach a positive conclusion regarding the applicant's claim that he was a citizen of Eritrea was not satisfied. The Board cited *Ipala v Canada (Minister of Citizenship and Immigration)*, 2005 FC 472, for the proposition that without a proven identity, the Board cannot find a serious possibility of persecution or a risk to the person.

IV. Relevant legislation

The relevant portions of the *Act* are as follows:

Convention refugee	Définition de « réfugié »
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the	*b*) soit, si elle n'a pas de nationalité et se trouve hors

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless

(iii) la menace ou le risque ne résulte pas de sanctions légitimes —

imposed in disregard of accepted international standards, and	sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection	Personne à protéger
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
Credibility	Crédibilité
106. The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.	106. La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

V. Issues and standard of review

[22] The applicant raises the following issues:

1. Did the Board err in its assessment of the applicant's identity?
2. Were the Board's credibility findings unsupported by the evidence?

[23] The applicable standard of review for reviewing the Board's assessment of identity documents, because the Board had first-hand access to the documents and the applicant's testimony, is reasonableness, as determined by Justice Tremblay-Lamer in *Zheng v Canada (Minister of Citizenship and Immigration)*, 2008 FC 877.

[24] In *Kaur v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1120 at para 9, Justice Lemieux noted that the standard of review applicable to a trier of facts in credibility findings is one of reasonableness, as these are questions of fact.

VI. Analysis

a) Did the Board err in its assessment of the applicant's identity?

[25] The applicant's central argument is that the Board misinterpreted the *Sertkaya* case in holding that it could diminish the ruling of *Rasheed*, namely that documents issued by a foreign government are presumed to be valid unless there are good reasons to doubt their validity. The applicant notes that in *Sertkaya*, the document in question was a letter "allegedly written by the applicant's Turkish employer, confirming an instance of abuse by the police", and thus was an employment letter and not a government-issued foreign identity document. The applicant contends

that the Board in essence relied on *Sertkaya* to overturn *Rasheed*. The applicant cites several cases holding that challenging foreign official documents without any evidence with respect to what such a document should look like or contain constitutes a reviewable error (*Tsymbayuk v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1306 at paras 26-28; *Nika v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 656 at paras 12-13; *Ramalingam v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 10 at para 6; *Halili v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 999 at para 5; and *Cheema v Canada (Minister of Citizenship and Immigration)*, 2004 FC 224 at paras 8-9). The applicant argues that if the Board disbelieved the authenticity of the birth certificate, it should have pointed to some evidence as to what an Eritrean birth certificate should look like, or mentioned what elements present on the certificate led the Board to doubt its authenticity.

[26] The applicant contends that it was unreasonable of the Board to disbelieve the applicant's story of obtaining the birth certificate by finding that it was "impossible for the claimant to have an envelope mailed from Eritrea that contained one of the documents when he testified that one had been faxed and the other carried personally". The applicant points to two moments in the transcript where he testified that he had the envelope at home (Applicant's Record (AR), pp 216-217), and also points to his testimony that his aunt first faxed his computer certificate and later sent it by mail when he told her it was important (AR, p 221). The applicant submits that the Board not only erred in its analysis, but breached procedural fairness by not asking the applicant to submit the envelope, after the hearing, further to his testimony that he could do so. The applicant attached a copy of the envelope to his affidavit for this review. At the hearing, the Court ordered that the copy of the envelope be struck from the record since it was not part of the proceedings before the Board.

[27] The applicant submits that the respondent's repetition of the Board's conclusions regarding the story of the birth certificate does not address the issues raised by the applicant's submissions, especially the cases cited by the applicant to the effect that a Board must point to something on the face of the document that raises a suspicion about its authenticity.

The applicant notes that the Board had the original and the English-translated birth certificates in its possession, and that neither is alleged to contain any erroneous information or to have been tampered with in any way. No evidence was adduced by the Board to show that they might have been falsely obtained in Khartoum.

[28] The respondent argues that the Board was justified in finding that the applicant's story was enough to undermine the credibility of the identity documents, citing the following excerpt from *Jacques v Canada (Minister of Citizenship and Immigration)*, 2010 FC 423 at para 16 [*Jacques*]:

> As I read these cases, they stand for the simple proposition that in deciding whether a document is genuine, the Board must rely on some evidence. In some cases, the evidence will come from other documentary evidence or testimony at the hearing. In others, the necessary evidence will be on the face of the document itself. In either case, the essential question will be whether the Board's conclusion was reasonable in light of whatever evidence was before it.[…]

The respondent then repeats all of the credibility issues that the Board found with the applicant's story regarding the birth certificates and the computer course diploma.

[29] The respondent disputes the applicant's explanation of his testimony regarding the diploma being both faxed and posted to him, noting that the applicant did not mention that he was faxed his diploma until after it was pointed out to him that it appeared to be a faxed copy.

[30] The respondent argues that the Board's interpretation of *Sertkaya* was correct, and that *Sertkaya* supports the long-standing jurisprudence relating to the Board's authority to consider the authenticity of documents. The respondent cites *Julien v Canada (Minister of Citizenship and Immigration)*, 2010 FC 351 at para 37, for the ruling, that it is the task of the trier of fact to weigh the documentary and testimonial evidence and conclude whether the evidence is sufficient to establish, on a balance of probabilities, the applicant's identity.

[31] The respondent submits that the onus was on the applicant to substantiate his case, and that had he wished to rely on the evidence of the envelope, he should have provided it to the Board before the hearing; there was no duty on the Board to allow him to submit it later.

[32] I am in agreement with the applicant that *Sertkaya* cannot be read to overturn the rule from *Rasheed* that foreign government-issued documents are presumed to be valid, absent some evidence to the contrary. In *Sertkaya*, the document at issue was not even mentioned in the context of the applicant's identity, only in the context of his possible membership in a political party, and was, as the applicant notes, a letter from an employer rather than a government-issued document. It would be incorrect, in my view, to say that the Board can allow the applicant's credibility to affect its view of the authenticity of the documents, absent some other evidence as to their authenticity, as laid out in *Jacques*.

[33] However, a close reading of the decision in this case leads me to the conclusion that the Board did not, in fact, make any adverse determination on the authenticity of the documents. The applicant is correct that, at no point, did the Board point to anything in the identity documents that appeared faulty or incorrect, as in the cases cited within *Jacques*. At paragraph 12 of the decision, the Board cites the *Uddin* case, which held that an applicant's lack of credibility combined with the Board's knowledge of the ease with which forged documents can be obtained can lead the Board to give no probative value to the claimant's documents. In my view, this is what the Board did in this case. It made no actual finding as to the authenticity of the identity documents, but rather found that the credibility issues surrounding the applicant's story of obtaining these documents led it to give them no weight. This distinguishes it from *Jacques*, as per paragraph 17 of that case, which reads:

> 17 In this case, while I accept the general propositions of law put forward by the Minister, I agree with Mr. Jacques that the Board's conclusion here was unreasonable. The Board did not make any adverse credibility finding against Mr. Jacques. Accordingly, it based its rejection of Mr. Jacques' claim, and of his oral testimony, solely on the imperfections in the appearance of the letter and a concern about its source. The Board did not explain how these concerns should detract from Mr. Jacques' personal credibility.

[34] A similar finding was made in *Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at para 23, where Justice de Montigny distinguished cases like *Cheema* and *Halili* (cited in *Jacques*), in which the authenticity of documents was questioned due to credibility, from cases like the present one where these documents were merely given no probative value, with no explicit finding made as to their authenticity.

[35] I accept that the Board erred in finding that it was impossible that the computer certificate could have been both faxed and sent to him, in light of the applicant's statement at the hearing (AR, p 221), that his aunt had first faxed it and later mailed it when he told her it was important. The presence of the envelope before the Board may have assisted the Board in coming to a different conclusion on this fact. However, in my view, this does not undermine the Board's numerous other credibility findings surrounding the identity documents, and I find that it was reasonable of the Board to conclude as it did that no probative value could be given to the identity documents.

c) Were the credibility findings unsupported by the evidence*?*

[36] Justice Lemieux in *Kaur v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1120 at para 9, stated that it is "settled law that credibility findings made by the Refugee Protection Division are findings of fact where the reviewing court can intervene only if it finds the tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it" as set out in subsection 18.1(4)(*d*) of the *Federal Courts Act*".

[37] The applicant attacks several credibility findings in turn, and submits that they were made without regard to the evidence, thereby tainting the Board's overall conclusion, considering the Board's acknowledgement that it was the sum of the credibility findings that contributed to its decision, rather than the strength of each individual finding.

[38] The applicant contests the Board's finding regarding the exemption from military service obtained in 1995. The applicant notes that he testified that his mother obtained an exemption for him because he was an only child (AR, p 226-7), and argues that there is nothing unreasonable about the explanation that he gave. This explanation also appears in his PIF narrative. The applicant contends that it was unreasonable of the Board to use a 2007 newspaper article regarding the existing exemptions for national service to analyze an event that occurred in 1995, when the exemptions may have been very different.

[39] The applicant contests the Board's finding that the applicant's boss was unlikely to have protected him given the consequences, and argues that according to this logic, no Pentecostal would ever help another member of their faith; this is a finding which the applicant submits is perverse and discloses a lack of understanding of faith, altruism and civil disobedience.

[40] Regarding the Board disbelieving that the applicant was detained for 65 days due to his testimony regarding the conditions, the applicant notes that the documentary evidence relied upon by the Board described prison conditions, while the applicant was detained at the local police station in Asmara, not in prison.

[41] The applicant contests the Board's conclusion that the applicant was not truthful regarding the prayer meeting at which he was arrested, due to the Board's questioning of the meeting's having no security. The applicant points to his testimony where he admitted that in hindsight this seemed risky, but that the thoughts of the group were mainly concentrated on praying (AR, pp 234-5).

[42] The applicant submits that the Board's findings that he could not have escaped from the prisoner convoy as described, that his father could not have saved $4000 over the course of being a teacher for many years, that the applicant could not have saved the same amount doing construction work, and that it is improbable that his parents were not persecuted, are all microscopic examinations of the evidence for which the applicant gave reasonable explanations. The applicant also submits that the Board never asked him how long his father had worked prior to his imprisonment and what savings he would have accumulated from a lifetime of teaching, nor gave any evidence as to why this sum was unreasonable.

[43] Finally, the applicant argues that the Board erred in finding that the Pentecostal faith began in 1967 in Ethiopia, arguing that the documentary evidence shows that Protestantism was introduced to Ethiopia through missionaries in the 19th century.

[44] The respondent simply repeats the Board's conclusions on these issues.

[45] I am mindful of the fact that it is not up to the Court to re-decide each issue when the Board had the benefit of seeing and hearing the applicant's testimony. As the Federal Court of Appeal held in *Singh v Canada (Minister of Employment and Immigration)* (1994), 169 NR 107 at para 3:

> Because of its advantage of seeing and hearing the witnesses at an oral hearing, the findings on credibility made by such a Tribunal should not be lightly impeached by an appellate court.

There are several credibility findings that cannot stand in light of the evidence; however, in my view, these do not undermine the other credibility findings so as to negate the entire decision.

[46] I agree with the applicant that the Board's conclusion regarding the exemption for military service in 1995 was unreasonable. The applicant mentioned in both his testimony and his PIF narrative that his mother obtained an exemption because he was an only child and helped to support the family. The Board itself noted documentary evidence saying that when other children are in the military, exemptions are currently granted for one child to stay home and support the family. Though it does not necessarily follow that exemptions were granted for only children, I agree with the applicant that it was unreasonable of the Board to reject this explanation of an event in 1995 using a list of exemptions published in 2007. There is no indication that these same exemptions were in place in 1995. The Board itself noted that conscription intensified after 2000.

[47] I also agree with the applicant that the Board incorrectly relied on evidence detailing the conditions in Eritrean prisons to reject the applicant's testimony regarding his time in detention, when he had clearly alleged that he was being detained in a police station, not a prison. There is no evidence that these two institutions would have identical conditions.

[48] These are the issues on which I find that the Board erred and made conclusions without regard to the evidence before it. I note that on the issue of the date of the rise of the Pentecostal faith in Eritrea, the applicant states that there is documentary evidence to support his view, and cites p. 297 and 298 of the AR to affirm that the Board erred. A close reading indicated that the Mennonite Mission came after World War II, as a relief mission, but started to evangelize soon after. The

Board's finding that his father born in 1945 and mother in 1951 could not have been born in the faith is plausible. On the other credibility findings attacked by the applicant, while the Court perhaps would not have reached the same conclusions as the Board (especially regarding the view that the applicant's boss would not have helped him), it does not appear that the findings are in fact unreasonable, or outside of the range of "possible, acceptable outcomes" as set out in *Dunsmuir v New Brunswick,* 2008 SCC 9 [2008] 1 SCR 190.

[49] The Court also notes that the Board made other credibility findings that the applicant did not mention, and explicitly stated that the applicant's credibility was assessed in a more holistic manner, with no individual finding, forming the basis of the conclusion. I therefore find that it was reasonable for the Board to conclude as it did that the applicant's story was lacking in credibility to the point that no finding could be made as to the veracity of any portion of it.

[50] For theses reasons the application for judicial review is dismissed. No questions for certification were proposed by the parties and none arise from this matter.

JUDGMENT

THIS COURT ORDERS AND ADJUGES that the application for judicial review is dismissed.

No question is certified.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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