

Federal Court



Cour fédérale

Date: 20130618

Docket: IMM-11191-12

Citation: 2013 FC 675

Ottawa, Ontario, June 18, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

KIFLEMARYAM ENDEMIKAEL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review of a decision of an Immigration and Refugee Board Member [Member] finding that the Applicant was not a refugee or in need of protection [Decision].

II. BACKGROUND

[2] The Applicant was born in Eritrea and had a birth certificate to support his claim. He also used the name Seife Gemechu Aboye on a false Ethiopian passport he purchased.

[3] This judicial review does not deal substantially with the facts supporting his claim but with procedural/substantive matters at the Applicant's hearing. It is sufficient to note that he fled Eritrea, but was deported back to Ethiopia. The details of his claim and travels are set forth in the Member's decision.

[4] Eventually the Applicant fled to the U.K. where his refugee claim was rejected. He then went to Norway where his refugee claim was likewise rejected. He subsequently arrived in Canada where he again claimed refugee status.

[5] In preparing his Canadian PIF, the Applicant relied on an Ethiopian translator whom he alleges advised him not to mention his prior unsuccessful refugee claims.

[6] The refugee hearing took place over three days. Prior to the hearing the Applicant made an initial request for adjournment because his counsel was scheduled to appear at another hearing. That request was denied. However, on the first day of the hearing counsel for the Applicant renewed his request to postpone. Both counsel made submissions on the issue and the Member, according to the transcript, drafted reasons with the intention of including the reasons in the written decision.

[7] On the second day, the Applicant's counsel raised the issue that the translator on the first day of the hearing was the same person whom the Applicant alleges told him to lie on his PIF. Upon counsel learning about this translator, he requested an audit of the first day's translation and removal of the translator. There were no material issues with the translation.

[8] In response to any potential translation issues, the Member determined that he would commence the hearing *de novo* and disregard the first day's evidence. The Applicant asked that the case be adjourned and be rescheduled because there had been a breach of natural justice in regards to translation. The Member continued the hearing.

[9] On the third day, Applicant's counsel renewed the request to adjourn on the translation unsuccessfully. The Applicant also alleges bias on the part of the Member by virtue of the Member's frequent interruptions.

[10] In the Member's decision, he provides four grounds for the decision to continue; administrative efficiency, the allegation against the translator was unsubstantiated, that the Member could ignore the first day's evidence, and that the Applicant's counsel had agreed to the process initially. The Member also alluded to the need to expedite because the Applicant was in custody.

In dealing with the matter of natural justice, the Member found that there was no breach because the translation was not tainted or inaccurate. The decision to re-commence *de novo* was done out of an abundance of caution.

[11] On the merits of the refugee claim, the Member found the Applicant not to be a refugee nor a person in need of protection based significantly on the lack of identity documents. Specifically, the Member did not accept the photocopy of the birth certificate because of flaws both on the face of the document as well as the questionable source of the photocopy of the document.

[12] There are four issues raised:

- the admissibility of the Applicant's affidavit to supplement the Certified Tribunal Record;
- the alleged breach of procedural fairness regarding the adjournment request;
- the existence of reasonable apprehension of bias; and
- the reasonableness of conclusion that the copy of the birth certificate is not valid.

III. ANALYSIS

A. *Standard of Review*

[13] The issues of procedural fairness and of bias are subject to the correctness standard of review while the evidentiary issue is subject to the reasonableness standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

B. *Affidavit*

[14] In view of the disposition of this judicial review, I need not order the deletion of the Applicant's affidavit from the Court record. It is largely irrelevant and argumentative and would have been struck if it was necessary to do so.

C. *Procedural Fairness*

[15] The procedural fairness issue turns on the Applicant's argument that he had not received the reasons for not postponing the matter as requested on the first day. On this matter I see no merit in the Applicant's argument for the following reasons.

[16] The adjournment request was not just to adjourn to another day but to terminate the proceedings due to the translation issue. Firstly, the Member did provide the basis for continuing the hearing; those reasons are described in paragraph 10 above. Secondly, to the extent that the Applicant did not receive reasons for not adjourning in the reasons for decision, the Applicant never requested such reasons.

[17] On this second point, there is some confusion on the circumstances (the Respondent did not address this issue in written argument assuming quite reasonably that reasons had been given). The confusion stems from a comment by the Member that draft reasons were prepared in respect of the refusal to adjourn but in order to save time, the reasons would appear in the decision itself.

[18] No such specific reasons were included in the decision. The Applicant contends that this was a breach of procedural fairness. At no time did the Applicant request reasons even though he knew what was the result of the Member's determination. Fairness is not just formalistic; there must be substance to the claim. If the absence of reasons had worked some demonstrable unfairness, then judicial review may be warranted. However, in this instance the Applicant is asserting a bald claim, the merit of which is further diminished by the fact that the Applicant was aware that the Member had drafted reasons to include in his decision, but took no steps to secure those reasons.

[19] In *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1078, 181 ACWS (3d) 981, this Court held that in such circumstances, an applicant must request a copy of the reasons before complaining. At its very best for the Applicant, this is not a case of absence of

reasons for a decision but a misstep in not issuing the reasons. There is no breach of natural justice or procedural fairness on this issue.

D. *Bias/Reasonable Apprehension*

[20] The Applicant firstly complains that the interaction between his counsel and the Member in interrupting the closing argument discloses bias. The exchanges may have been sharp but were directed at clarifying counsel's submissions. There was nothing untoward in the Member questioning and challenging the submissions – it is frequently part of many court cases. The Member committed no act which could raise a concern by a reasonable person informed of the facts and circumstances.

[21] The second basis for the bias argument is that having heard the first day's evidence, the Member ought not to have started *de novo*. The argument is that the Member was unable, or a reasonable person would conclude that the Member was unable, to approach the evidence fairly, and that the Member was somehow tainted.

[22] This is a bare allegation and there is nothing in the record that even suggests that the Member did not ignore the first day's evidence. It is a common circumstance where a decision maker has to hear or see evidence which then must be ignored; this is particularly so with respect to admissibility issues. Absent "convincing evidence" of possible bias, as required in *Horne v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 337, 414 NR 97, the Applicant cannot succeed.

E. *Birth Certificate*

[23] There was extensive evidence surrounding identity and the copy of the birth certificate which formed the basis for the Member's conclusion that the document was unreliable. The Member's conclusion was not based simply on looking at the document.

[24] Therefore, there is no reason for the Court to interfere with the Member's finding.

IV. CONCLUSION

[25] For these reasons, the judicial review is dismissed. There is no question for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is dismissed.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-11191-12

STYLE OF CAUSE: KIFLEMARYAM ENDEMIKAEL

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: June 6, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** PHELAN J.

DATED: June 18, 2013

APPEARANCES:

Nico Breed FOR THE APPLICANT

Rick Garvin FOR THE RESPONDENT

SOLICITORS OF RECORD:

STEWART SHARMA HARSANYI FOR THE APPLICANT
Barristers & Solicitors
Calgary, Alberta

MR. WILLIAM F. PENTNEY FOR THE RESPONDENT
Deputy Attorney General of Canada
Edmonton, Alberta