Cour fédérale  Federal Court

**Date : 20211021**

**Docket : IMM-6236-20**

**Citation : 2021 FC 1059**

**Ottawa, Ontario, October 21, 2021**

**PRESENT: The Honourable Madam Justice Rochester**

**BETWEEN :**

**TESFAI WOLDU WOLDEMICHAEL**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant, Tesfai Woldu Woldemichael seeks judicial review of a decision of the Refugee Appeal Division [RAD] dated November 9, 2020 [the Decision] overturning a decision of the Refugee Protection Division's [RPD] decision dated April 11, 2019. The RAD found that the Applicant's identity had not been established and thus determined the Applicant is neither a Convention refugee nor a person in need of protection as defined in sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant states that he is a citizen of Eritrea. The RPD found that the Applicant's identity and citizenship were established on the basis of his testimony and a photocopy of an Eritrean identity card. The Minister appealed the RPD decision to the RAD. Both the RPD and the RAD considered that the central issues before them were the identity of the Applicant as an Eritrean national and his credibility. The RAD allowed the appeal finding, on a balance of probabilities, there was insufficient evidence to establish the Respondent's national identity.

[3] The Applicant seeks judicial review of the Decision on the basis that (i) the RAD did not have jurisdiction to undertake an analysis of the Applicant's identity under s. 106 of the IPRA and substitute its findings for those of the RPD, and (ii) in any event, the RAD's decision on the question of identity was unreasonable.

[4] For the reasons that follow, this application for judicial review is allowed, and the Applicant's appeal is remitted to the RAD for redetermination.

## I. Background

[5] The Applicant states that he is a citizen of Eritrea, born in 1985, and that he fled Eritrea out of fear of persecution resulting from military desertion. He states he left Eritrea in 2006, fled to Sudan where he spent seven months in a refugee camp, before finding his way to Israel in 2007. He left Israel for Mexico in 2016, and crossed over the border into the United States, where he was detained. His claim for asylum was denied and the United States authorities released him from detention on July 5, 2017. On August 15, 2017, the Applicant entered Canada illegally at the Quebec border and claimed refugee status.

[6] The Applicant claims he fears being imprisoned in Eritrea, and faces a risk to life, and a risk of torture or cruel and unusual punishment at the hands of the Eritrean state.

[7] In a decision dated April 5, 2019, the RPD found that the claimant had established his identity on the basis of his testimony and a photocopy of an Eritrean identity card. The RPD noted that it was uncertain whether the Eritrean identity card contained all the features described in the national documentation package, due to the fact that the photocopy was so poor. The RPD noted that there was easy access to fraudulent identity documents in Eritrea, and found that the Eritrean driver's licence that the Applicant had submitted was a fraudulently obtained document.

[8] The RPD mentioned various additional documentation, notably documents obtained from Israel, copies of his mother's identity documents, an affidavit from the Applicant, and witness letters. The RPD did not analyze the additional documentation in its reasons. The RPD did however state that it found "that is had insufficient credible evidence to find that the claimant has another identity than the identity he says he has as an Eritrean citizen". Finally, the RPD found that there were numerous issues with the Applicant's credibility. It disbelieved a number of the Applicant's allegations, but acknowledged that much of the Applicant's evidence in terms of the living conditions in Israel were credible. The RPD concluded that the Applicant had established his identity and had a well-founded fear of persecution as a failed asylum seeker returning to Eritrea.

[9] The Minister appealed the RPD decision to the RAD. Neither party requested an oral hearing nor submitted new evidence. The Minister submitted that the Applicant had provided

insufficient evidence to establish his identity, while the Applicant argued that the RPD came to the right conclusion.

[10] The RAD allowed the appeal, finding that the Applicant is not a Convention refugee nor a person in need of protection because he had not established his identity on a balance of probabilities. The RAD attributed little weight to the photocopy of the Eritrean identity card, and found that the copy of the card, together with the Applicant's testimony was insufficient to establish his identity. The RAD also found that the Applicant did not make reasonable efforts to obtain the original of the card that was held by authorities in the United States or take any steps to obtain a new one. The RAD agreed with the RPD that the Eritrean driver's licence was fraudulent.

[11] The RAD determined that the fact that the Applicant had submitted a fraudulent document for the purposes of identity (i) impacted on his overall credibility and (ii) supported the RAD's conclusion that he had not established his identity. The RAD gave little weight to the additional documents submitted, notably documents from Israel, his mother's identity documents, a report card from Eritrea, and witness letters, finding that (i) they do not establish that the Applicant is a citizen of Eritrea, and (ii) in any event they did not outweigh the concerns the RAD had with the official government documents submitted by the Applicant.

[12] Finally, the RAD highlighted the RDP's statement that there was insufficient evidence to find that the Applicant had another identity that was not Eritrean. In commenting on the statement, the RAD underscored that it was the Applicant's burden to establish his identity, and

even if the Applicant does not have evidence pointing to an identity other than Eritrean, it was still possible to conclude that the Applicant's Eritrean identity had not been established.

## II. Issues and Standard of Review

[13] The issues on this judicial review application are as follows:

> A. Does s. 106 of the IRPA preclude the RAD from overturning the RPD on the question of the Applicant's identity?
>
> B. Was it reasonable for the RAD to conclude that the Applicant had not established his identity?

[14] The first issue, one of jurisdiction, is reviewable on the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 17 [*Vavilov*]).

[15] The second issue is reviewable according to the framework for reasonableness as set out in *Vavilov*. For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100). *Vavilov* further instructs that the reviewing court should not approach the underlying decision with the intention of conducting a "line-by-line treasure hunt for error" (at para 102), but rather concern itself with whether "the decision as a whole is transparent, intelligible and justified" (at para 15). A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[16] The reviewing court must refrain from supplementing its own reasons to justify the outcome of a decision when the reasons contain a "fundamental gap or reveal that the decision is based on an unreasonable chain for analysis" (*Vavilov* at para 96). This Court may therefore not "disregard the flawed basis for a decision and substitute its own justification for the outcome" (*Vavilov* at para 96). The Supreme Court states that a decision maker "must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them" (*Vavilov* at para 126).

## III. Analysis

### A. *Does s. 106 of the IRPA preclude the RAD from overturning the RPD on the question of the Applicant's identity?*

[17] The Applicant proposes an interpretation of s. 106 of the IRPA that, to my knowledge, has yet to be considered by this Court. The Applicant invites this Court to interpret s. 106 of the IRPA as precluding the RAD from overturning the RPD on the question of identity on the basis that the language of s. 106 requires this determination to be made by the RPD, not the RAD.

[18] Section 106 of the IRPA states:

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| **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 | **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. |

> have taken reasonable steps to obtain the documentation.

[19] The Applicant focuses on the fact that the language of s. 106 of the IRPA expressly refers to the RPD. The Applicant contrasts this with other sections of the IRPA, notably ss. 104 and 105, which refer to the RPD and the RAD. The Applicant submits that the intent of the Legislature was therefore to render the question of identity within the exclusive purview of the RPD. At the hearing, the Applicant conceded that this argument had not been raised before the RAD.

[20] The Respondent submits that questions of identity fall within the RAD's jurisdiction, which the RAD properly exercised in this case. The Respondent relies on the Federal Court of Appeal's decisions in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] and *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*].

[21] I find the Applicant's interpretation of s. 106 of the IRPA as restricting the RAD's jurisdiction difficult to reconcile with the following four factors. First, the legislative history of the RAD:

> The whole purpose [of the RAD] is to ensure that the correct decision is made ... Our expectation is that … the ability of the RAD to fix mistakes will give greater assurance to the Federal Court in the decision making at the IRB. In that way, we will see fewer cases actually given review at the Federal Court. (Standing Senate Committee on Social Affairs, Science and Technology, 37th Parliament, 1st Session, Issue 29 (October 4, 2001) in JBA, Part II, Vol. 1, Tab 11; emphasis added) (*Huruglica* at para 87)

[22] Second, the Federal Court of Appeal's reasoning in *Huruglica*:

> [78] At this stage of my analysis, I find that the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into an application of the correctness standard of review. If there is an error, the RAD can still confirm the decision of the RPD on another basis. It can also set it aside, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD: paragraph 111(2)(b) of the IRPA."

[23] This is echoed in *Singh* where the Federal Court of Appeal states that the "role of the RAD is not to provide the opportunity to complete a deficient record submitted before the RPD, but to allow for errors of fact, errors in law or mixed errors of fact and law to be corrected" (*Singh* at para 54).

[24] The third factor is the language of s. 106 of the IRPA itself. The section provides that the RPD must take certain factors into account with respect to the credibility of a claimant without identification. Requiring that these factors be taken into account is a far cry from precluding the RAD from determining whether a claimant has established his or her identity.

[25] Finally, I am guided by the comments of my colleague Justice Lafrenière on questions of identity generally and the RAD's expertise: "Questions of identity of a claimant are within the RAD's expertise and the Court should give it significant deference. The Court will only interfere if the decision under review lacks justification, transparency or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the case and in law." (*Kagere v Canada (Citizenship and Immigration)*, 2019 FC 910 at para 11).

[26] I therefore find that s. 106 of the IRPA does not preclude the RAD from overturning the RPD's finding on the question of the Applicant's identity. The RAD has jurisdiction to consider the question of a claimant's identity, and to intervene when the RPD is wrong in law, in fact or in fact and law.

B. *Was it reasonable for the RAD to conclude that the Applicant had not established his identity?*

(1) Eritrean and Israeli Documentation

[27] As stated by my colleagues Justices Fothergill, Ahmed and McHaffie, credibility determinations are part of the fact-finding process, and are afforded significant deference upon review (*Fageir v Canada (Citizenship and Immigration)*, 2021 FC 966 at para 29; *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at para 35; *Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 6). Credibility determinations lie within "the heartland of the discretion of triers of fact […] and cannot be overturned unless they are perverse, capricious or made without regard to the evidence" (*Fageir v Canada (Citizenship and Immigration)*, 2021 FC 966 at para 29; *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at para 35; *Edmond v Canada (Citizenship and Immigration)*, 2017 FC 644 at para 22 citing *Gong v Canada (Citizenship and Immigration)*, 2017 FC 165 at para 9).

[28] Moreover, as stated by my colleague Justice Lafreniere, establishing one's identity "is a core preliminary and fundamental issue, and failure to establish identity is fatal to a claim for refugee protection. Section 106 of the [IRPA] and s. 11 of the Refugee Protection Division Rules expressly require that a refugee claimant must first establish his/her identity on a balance of

probabilities." (*Weldeab v Canada (Citizenship and Immigration)*, 2021 FC 161 at para 23). Consequently, it is the Applicant that bears the burden of establishing his identity on a balance of probabilities.

[29] I find that the RAD, based on the evidentiary record before it, had sufficient reason to conclude that the Applicant had not established his national identity based on the Eritrean and Israeli documentation.

[30] I find the RAD did not err in its determination that the fraudulent Eritrean driver's licence and the photocopy of the national identity card did not establish the Applicant's identity. Its decision was justified in relation to the facts and the applicable law. The RAD raised concerns that quality of the photocopy provided by the Applicant made it impossible to deduce the color of the card or the embedded security features. In addition to the concerns raised before the RAD, counsel for the Respondent drew the Court's attention to the photocopy in the record of the translation and certification by the Tigrinya to English translator of the Applicant's identity card. The certification states that the translator saw the original card of the identified person, but in fact the certification refers to a name other than that of the Applicant.

[31] The Applicant submits that the RAD ought to have had the identity documents analyzed by an expert. This Court has concluded that it is clear that the RAD does not have an obligation to have documents reviewed by experts before concluding that they are fraudulent (*Jacques v Canada (Minister of Citizenship and Immigration)*, 2010 FC 423 at para 14; *Olanrewaju v Canada (Citizenship and Immigration)*, 2020 FC 569 at para 20). There must be, however, some

evidence before the RAD upon which to base a finding that the document is not genuine, unless the problem is apparent on the document's face (*Jacques v Canada (Minister of Citizenship and Immigration)*, 2010 FC 423 at para 14; *Olanrewaju v Canada (Citizenship and Immigration)*, 2020 FC 569 at paras 20 and 22). Based on the record, there are issues that were apparent on the faces of the documents. I do not find that the RAD erred by not sending the abovementioned documents to an expert.

[32] The RAD's conclusion that the Israeli documentation and the international driver's licence do not establish the Applicant's national identity is not unreasonable. Moreover, the Applicant has not established that the RAD erred in attributing little weight to the baptismal certificate and the school report card given the issues with the Applicant's credibility. The RAD states that the report card from Eritrea is not an official government document. Upon a review of the record, I note that the school report card is exclusively in English and contains no Tigrinya, unlike the other Eritrean documentation.

[33] As to the baptismal certificate, the RAD gave it no weight. The Applicant objects to the fact that the RAD took issue with the use of a baptismal name on the certificate, namely "Tesfamichael", and the fact that this name was not used elsewhere. While I do not consider the existence of a baptismal name on the certificate to be inherently problematic, I find that, based on the record before it, it was not unreasonable for the RAD to give the baptismal certificate no weight. The Applicant testified that a friend arranged for the baptismal certificate in 2017, because the Applicant required documentation for his application in the United States. At one point in his testimony, the Applicant stated that he contacted his friend in Eritrea who sent the

document while at another point in his testimony he stated that he asked his friend in the United States who obtained the document for him. The certificate is dated 2017, and refers to a baptism date in 1985. The Applicant testified as follows: “The church, since you belong to the church where you are, it's in your locality, they know who we are and when you ask them, they just issue the certificate.” While the Applicant’s name and baptismal name are clearly legible in the photocopy, the signature church administrator and the seal of the church are not.

[34] After finding that the overall credibility of the Applicant had been impacted, the RAD listed a number of documents that it found did not assist in establishing the Applicant’s identity as a citizen of Eritea. Included in those documents were the identity cards for the Applicant’s mother. The baptismal certificate lists the Applicant’s mother as “Brha”, as does one of the translations of an older identity card exclusively in Tigrinya. The Applicant identified his mother as “Braha” in his Basis of Claim. Copies of a more modern identity card and passport identity identify her as “Birha”. The Applicant and his mother do not have any names in common.

[35] The Applicant objected to the fact that the RAD referred to “the identity card” for his mother, when in fact copies of three identity cards were submitted. I find this misstatement does not render the Decision unreasonable. The Applicant submits that any person born to a father or mother of Eritrean origin is an Eritrean national by birth. From a review of the record, I note that this issue was not raised before either the RPD or the RAD, and therefore I will not consider it.

[36] The Applicant submits that the RAD erred by not evaluating the authenticity or the probative value of the three identity cards. While the wording of the RAD’s finding is not as

clear as it could be, I find that the Applicant has not demonstrated that the RAD's conclusion on the mother's documentation was unreasonable in light of the evidentiary record before it.

(2) Support Letters

[37] Four letters of support were submitted by the Applicant, two of which were notarized and all of which were accompanied by photos of Provincial (Canada) or State (United States) government-issued identification cards. Two of the support letters, each of which were set out in the form of affidavits, detailed how the individuals had grown up with the Applicant in the same small village. A third support letter, from an Alberta resident, attests to being the cousin of the Applicant and a willingness to act as a guarantor for the Applicant's application and provide financial support. While the fourth support letter only attests to knowing the Applicant since his time in Israel. The RAD addressed the letters of support as follows:

> …the support letters do not outweigh the concerns I have with the official government documents that the Appellant has submitted. I give little weight to these documents in establishing his identity given the concerns identified above.

[38] The Applicant submits that the RAD erred in the manner in which it dealt with the support letters. The Applicant objects to the RAD attributing little weight to the support letters when there was no question or discussion as to the authenticity of these letters. The Applicant further submits that sworn testimony about identity is not affected by irregular identity documents. The Respondent submits that there is a presumption that all documentary evidence was considered by the RAD, and the failure to mention the support letters, which were of secondary importance, does not render the RAD's decision unreasonable.

[39] I find the RAD's decision unreasonably dealt with the support letters. These letters, which in two cases were notarized, were provided by four individuals along with colour copies of their North American identity cards. The four letters contain both facts and opinions by third parties. While the RAD did not unreasonably deal with the Eritrean and Israeli documentation given the record before it and its findings on the overall credibility of the Applicant, it is unclear how the adverse credibility findings impact the support letters. There must be an element of transparency.

## IV. Conclusion

[40] I find the RAD's treatment of the support letters was unreasonable. The application for judicial review is therefore allowed and the Applicants' appeal is remitted to a differently constituted panel of the RAD for redetermination.

[41] Neither party proposes a question to certify, and in my view, no such question arises in this case.

**JUGDMENT in IMM-6236-20**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is granted;
2. The RAD's decision shall be set aside and this matter shall be referred back to a differently constituted panel of the RAD for redetermination;
3. There is no question for certification arising.

"Vanessa Rochester"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET :** | IMM-6236-20 |
| **STYLE OF CAUSE :** | TESFAI WOLDU WOLDEMICHAEL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL (QUÉBEC) BY VIDÉOCONFÉRENCE |
| **DATE OF HEARING :** | SEPTEMBER 22, 2021 |
| **JUDGMENT AND REASONS :** | ROCHESTER J. |
| **DATED :** | OCTOBER 21, 2021 |

**APPEARANCES :**

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| Me Stéphanie Valois | FOR THE APPLICANT |
| Me Lynne Lazaroff | FOR THE RESPONDENT |

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