Federal Court  Cour fédérale

Date: 20230224

Docket: IMM-921-22

Citation: 2023 FC 271

Ottawa, Ontario, February 24, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

HENOK MINTESNOT NEKENKIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review of a Pre-Removal Risk Assessment ("PRRA") dated November 17, 2021, which found that the Applicant would not be subject to a risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Ethiopia. The PRRA decision is somewhat unusual because it was made after a mandatory oral hearing in circumstances outlined below.

II. Facts

A. *Procedural History*

[2] The Applicant is a 32-year-old citizen of Ethiopia who entered Canada via an irregular border crossing at St. Bernard de Lacolle, Quebec in September 2019. The Applicant's PRRA application was initiated July 27, 2019. He was entitled to a PRRA, together with a mandatory oral hearing because (following a failed application for permanent resident status in the U.S.) the Applicant had applied for refugee protection in the United States. That refugee application was still pending as confirmed via Canada USA information sharing.

[3] Given this, the Applicant was denied access to the Refugee Protection Division ("RPD") because of paragraph 101(1)(c.1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ["*IRPA*"]:

> **Ineligibility**
>
> 101 (1) A claim is ineligible to be referred to the Refugee Protection Division if
>
> […]
>
> (c.1) the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws;

[4] However, in this case section 113.01 of the *IRPA* entitled the Applicant to a mandatory PRRA as an individual found ineligible to be referred to the RPD solely on the basis of paragraph 101(1)(c.1). The mandatory oral PRRA hearing was held by videoconference on October 21, 2021 with the Applicant and his representative.

B. *Summary Facts*

[5] The Applicant alleged feared of detention and torture in Ethiopia due to his sister's activism in opposing the Ethiopian regime, his Oromo ethnicity and his activism in the U.S., i.e. a *sur place* claim. The Applicant alleged his sister had been detained multiple times for her activities, and tortured on at least one occasion. He also claimed risk because his father was a senior military person in a previous government. Moreover, the Applicant alleged he was active in opposing the Ethiopian regime's treatment of the Oromo ethnic group (of which he is a part) while living in the U.S., which he alleged made him a target of Ethiopian authorities.

III. Decision Under Review

[6] The officer considered the PRRA application in two ways per sections 96 and 97 of the *IRPA*: whether the Applicant would face a serious possibility of persecution for a Convention ground, or whether he would be personally subjected to a risk to life or cruel and unusual treatment or punishment if returned to Ethiopia. On both considerations the officer refused the application.

A. *Ethnic Identity*

[7] The Officer found that there was no more than a mere possibility that the Applicant faces persecution in Ethiopia as a self-identified member of the Oromo ethnic group. Specifically, the Officer noted that the Applicant left Ethiopia when he was just 21 years old, and did not align himself to any Oromo cause until he arrived in the U.S. Moreover, the Officer found the Applicant did not provide sufficient evidence that his minimal political engagement while living in Ethiopia resulted in a public profile that would have drawn the interest of the Ethiopian authorities.

B. *Familial Connections*

(1) Applicant's Father

[8] The Officer gave positive weight to the Applicant's assertion his father was a major in the Ethiopian army and that, on a balance of probabilities, he was detained following a political transition. Ultimately, however, the Officer found very little evidence to suggest the father's past persecution by the incoming government was related to the Applicant's personal risk allegation. Moreover, the Officer notes the Applicant was not a member of any political party nor did he take part in any demonstrations while living in Ethiopia.

(2) Applicant's Sister

[9] The Officer accepted that the Applicant's sister was politically active in Ethiopia, but noted a number of inconsistencies concerning the details surrounding her activities, including her terms of detention. The Officer was provided with letters from both the Applicant's sister and the Federal Police Commission in Ethiopia. The letter from the Applicant's sister stated she was detained by police from October 16, 2016 to January 31, 2017. The police commission letter, however, stated she was detained from October 16, 2016 to January 1, 2017 – one month less.

[10] The Officer ascribed little weight to the letter from the police commission due to objective evidence of regular abuse committed by government security forces. Given this evidence, the Officer found it highly unlikely the Ethiopian authorities would have voluntarily issued a letter to the Applicant's sister confirming her arrest while also describing her detention in detail. In the Officer's view, the authorities would have exercised restraint in producing this letter especially given it includes a stern warning that the Applicant's sister risks being arrested if she does not appear at the commission for questioning. The Officer points out the Applicant himself stated at the hearing his sister had to attend the police station in person to obtain the letter. In the Officer's view, it is uncertain as to why they did not simply do so when the Applicant's sister visited the police commission to retrieve the letter. Given the totality of these considerations, the Officer assigned the letter from the police commission no probative value.

[11] As it relates to the letter written by the Applicant's sister, the Officer assigned it little weight. Ultimately, due to the superfluous nature of the letter, the Officer found the letter self-

serving in that its intention is to advance the Applicant's PRRA, rather than what it is meant to be, namely a casual letter between siblings. Also present was a notable contradiction in the testimony between the Applicant and his sister's letter as to their interactions with authorities.

C. *Political Activities Abroad*

[12] The Officer found insufficient evidence to support the Applicant's engagement with political activities in the U.S. The Officer acknowledged a letter provided by the Applicant from the San Diego Ethiopian Community Inc., which confirmed that the Applicant was a member of the organisation, but was silent on the group's political affiliations. The Officer noted in particular that the organisation's mission is to "facilitate a seamless integration of all person of Ethiopian origin into American society," with no mention of any particular political cause. Moreover, the Officer noted the Applicant's primary motivation for leaving Ethiopia, according to his own testimony, was to join his then partner in the U.S. In the Officer's view, the letter does not support any of the Applicant's political activities while in the U.S. Given this, it was found to have no probative value.

[13] The Officer noted also letters submitted by the Applicant's acquaintances were not sufficient to show that their participation in U.S.-based events resulted in an elevated political profile that would attract the attention of Ethiopian government or security officials.

D. *Medical Documentation*

[14] The Officer did give weight to a medical note provided by the Applicant for its affirmation of the injuries sustained by the Applicant's sister. However, the Officer was not persuaded the injuries described by the doctor were caused by the Ethiopian authorities as alleged. I note in passing that, unless the doctor was present, such information should not have been expected by the Officer. Specifically, the Officer took issue with the medical note's reference to the Applicant's sister being admitted to hospital on January 3, 2017 and remaining there for three days given the Applicant's sister submitted that she was detained during that time from October 16, 2016, to January 31, 2017. In the Officer's view, it was unlikely she went in for a medical examination when detained. Inconsistently in my view, given the Officer accepted the letter affirmed the sister's injuries, the Officer gave the medical letter no probative value.

IV. Issues

[15] The only issue is whether the decision is reasonable.

V. Standard of Review

[16] The parties agree, as do I, that the applicable standard of review in this case is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe

explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[17] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

VI. Analysis

A. *Risk to the Applicant via Familial Connections*

[18] The Applicant submits his family connections alone establish he would face a risk of persecution, which is more than mere possibility, if he was to return to Ethiopia. Specifically, the Applicant submits that since the panel did not make any adverse findings regarding the Applicant's sister's second detention, it must be taken to have agreed that the Applicant's sister was detained twice due to her political activism. With respect, I am unable to accept this submission. Judicial review must proceed on the record, and I am not satisfied I should assume findings on points not considered and not decided upon. This gap in the Officer's reasoning raises the issue of the tribunal failing to meaningfully grapple with the record. That is the case

here: the sister's activism is a critical part of the Applicant's case and he was owed a determination by the Officer on this point. In this respect, the decision is unreasonable.

[19] The Applicant also submits that because the Officer did not reject the possibility the Applicant's sister was confronted with evidence about the Applicant's activism in the U.S, the Court should accept this aspect of his evidence. For the same reasons as above, I am unable to do as suggested, but and with respect find this to be another matter the PRRA Officer should have specifically addressed, but did not, because this allegation goes to another material and core allegations of risk. This allegation also goes to the allegation messages and texts were monitored by Ethiopian authorities.

[20] In this connection I accept the Applicant's submissions that ambiguous statements that do not amount to an outright rejection of the claimant's evidence but only "cast a nebulous cloud over its reliability" are not sufficient as per this Court's decision in *Muniandy v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 557. I do not say every allegation needs to be specifically addressed, but material issues central to the Applicant's case should be grappled with. There is no reason why these were not.

[21] The Applicant submits that knowledge of his views by Ethiopian authorities means it is more likely than not that he would face risk in Ethiopia. That would be the case if the assumption is correct, but as noted, no determination was made in that respect, which forms part of the unreasonableness of the decision.

[22] The Applicant says, in any event, that he still faces risk in Ethiopia. On this point he submits, and I agree, the country condition evidence supports his submission that persons like him face persecution in Ethiopia due to the political opinions of family members, in addition of course to their own opinions and activities: see the report by Human Rights Watch to this effect. With respect, the resolution of this issue revolves around a proper assessment by another PRRA officer on the points noted above which has not taken place.

[23] The Applicant also submits the Officer erred in denying his claim based on his profile where the PRRA Officer did not determine what profile the Applicant was required to have to be at risk. I agree and rely on *Raveendran (Guardian of) v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 49, where Justice Beaudry states:

> [54] The conclusion of the panel that the applicants did not "fit the profile" of LTTE supporters has relatively little meaning without at least some explanation of what the "profile" is like, in the view of the panel. In addition, the evidence suggests that Sri Lankan authorities do not make a concerted attempt to "profile" who does or who does not support the LTTE. The documentary evidence shows that arrests have been made against persons who are simply suspected of supporting the LTTE in any manner. No reference in these reports is made to any profile.
>
> [Emphasis added]

B. *Applicant's Sur Place Claim*

[24] Given the errors identified already, which in my view are determinative, and because there will be a new hearing, I decline to deal with this issue. That said, as noted above, I find it problematic to rely on the medical note as affirmation of the sister's injuries but of no probative

value. Those findings are in my view inconsistent and should be reconsidered, noting as well that other documents were considered to be of no probative value.

VII. Conclusion

[25] The application for judicial review is granted because the PRRA decision is flawed by unreasonableness.

VIII. Certified Question

[26] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-921-22

THIS COURT'S JUDGMENT is that judicial review is granted, the PRRA decision is set aside, the matter is remanded for reconsideration by a differently constituted panel, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-921-22
STYLE OF CAUSE:	HENOK MINTESNOT NEKENKIE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 16, 2023
JUDGMENT AND REASONS:	BROWN J.
DATED:	FEBRUARY 24, 2023

APPEARANCES:

Daniel Tilahun Kebede	FOR THE APPLICANT
Nicholas Dodokin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Daniel Tilahun Kebede Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT