Federal Court Cour fédérale

Date: 20240524

Docket: IMM-860-23

Citation: 2024 FC 795

Ottawa, Ontario, May 24, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

BRHANE NGUSSE WELDAY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Brhane Ngusse Welday [Applicant] is an Eritrean national who previously held refugee status in Sudan. The Applicant seeks a judicial review of a January 2, 2023 decision [Decision] of the Immigration Appeal Division [IAD] refusing the Applicant's appeal and upholding a decision made by the Immigration Division [ID] to issue an exclusion order against the Applicant for inadmissibility due to misrepresentation.

[2] The application for judicial review is allowed. The IAD made an unreasonable plausibility finding.

II. Background

[3] In 2007, the Applicant applied to come to Canada as a sponsored refugee [2007 Application] spelling his name as Berhane Nguse Welday, using a date of birth of October 10, 1962, and disclosing that he had been involved with both the Eritrean Liberation Front [ELF] and the Eritrean People's Liberation Front [EPLF]. In 2008, a visa officer interviewed the Applicant to discuss his background and involvement with the ELF and EPLF. In 2009, an officer refused the 2007 Application because the officer found that the Applicant was inadmissible to Canada under section 34 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] due to his involvement with the ELF. This decision is not before the Court.

[4] In 2012, with help from an individual at a café in Sudan, the Applicant applied for permanent residency as a sponsored spouse [2012 Application], spelling his name as Brhane Ngusse Welday and using a date of birth of October 10, 1961. The Applicant did not disclose participation with the ELF and the EPLF and he did not disclose his prior refusal. The 2012 Application was approved and the Applicant has been in Canada as a permanent resident since 2015, along with his daughter, who was listed as a dependant and who has since become a Canadian citizen.

[5] In June 2021, a Canada Border Services Agency [CBSA] officer interviewed the Applicant to discuss the 2007 Application and 2012 Application, as the CBSA had launched an

investigation into whether the 2007 Application and 2012 Application were submitted by the same individual. In the interview, the Applicant maintained that he never intended to withhold information from his application or misrepresent information to Canadian authorities. He explained that the individual assisting him with his 2007 Application used his date of birth from his United Nations High Commissioner for Refugees identification card issued in Sudan (October 10, 1962), as it was the relevant document for a refugee sponsorship application and the Applicant had been unable to get the date corrected on the document. There are also variances in how the Applicant's name is translated to English. By the time the Applicant made the 2012 Application, he had been able to obtain an Eritrean passport in Sudan, which contained the same name and birthdate that he used in his 2012 Application. The Applicant could not read the form and he only replied to direct questions that the individual assisting him asked.

[6] The CBSA issued a section 44 report against the Applicant, which was referred to the ID. The ID determined that the Applicant did make a misrepresentation within the meaning of paragraph 40(1)(a) of *IRPA* and that the Applicant's subjective belief that he was not making a misrepresentation did not remove his responsibility to provide truthful answers on all applications. The Applicant was issued a removal order.

[7] The Applicant appealed the ID's decision to the IAD requesting humanitarian and compassionate [H&C] relief from the removal order so that he can retain his permanent residence status in Canada. The validity of the misrepresentation was not a subject of the appeal.

III. Decision

[8] The IAD refused the Applicant's appeal on the basis that the H&C considerations could not overcome the seriousness of the misrepresentation. The IAD's determination was based on a finding that the evidence led to a reasonable inference that the errors in the 2012 Application were not inadvertent or inconsequential but were made to minimize the likelihood that the 2007 Application and its refusal would be reviewed by immigration authorities.

IV. Issues and Standard of Review

[9] The sole issue is whether the Decision was reasonable. This assessment involves a consideration of the following:

1. Were the IAD's credibility or plausibility findings reasonable?
2. Did the IAD reasonably apply the H&C considerations to the Applicant's circumstances?

[10] I agree with the parties that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). This case does not engage any of the exceptions set out by the Supreme Court of Canada in *Vavilov*; therefore, the presumption of reasonableness is not rebutted (at paras 16-17).

V. Analysis on Reasonableness

A. *Were the IAD's credibility or plausibility findings reasonable?*

(1) Applicant's Position

[11] The IAD unreasonably found that the Applicant was a guarded participant without reference to what evidence established this finding, despite the Applicant ultimately acknowledging matters related to his past in Eritrea and the 2007 Application. The only evidence consisted of a CBSA officer's statutory declaration describing their characterization of the Applicant's interactions in the 2021 interview. The IAD identified that the credibility finding was based on the Applicant's "reluctance to acknowledge information which might harm his case". This led to the following unreasonable inference that the Applicant took a similar approach when completing his 2012 Application form:

> …The preponderance of probabilities which a practical and informed person would readily recognize as reasonable are that, after having his first application refused in 2009, Mr. Welday caused different information to be included in his second application form to avoid the same undesirable outcome.

[12] Implausibility findings must be limited to the clearest of cases where there is clear evidence, a clear rationalization to support the inference, and references to relevant evidence which could potentially refute such conclusions (*Ansar v Canada (Citizenship and Immigration)*, 2011 FC 1152 at para 17). Case law has cautioned against speculative reasoning (*Martinez Giron v Canada (Citizenship and Immigration)*, 2013 FC 7 at paras 28-30, citing *Imafidon v Canada (Citizenship and Immigration)*, 2011 FC 970 and *Aguilar Zacarias v Canada (Citizenship and Immigration),* 2012 FC 1155). Here, the IAD's plausibility finding is speculative and not supported by evidence.

[13] The evidence establishes that the Applicant did not know the reason the 2007 Application was refused. The 2008 interview only stated that it was "possible" that the Applicant's military service could make him inadmissible to Canada, but the officer needed to research it. The

Applicant’s forced conscription did not form part of the concerns raised at the end of the 2008 interview. The Applicant responded to a procedural fairness letter in 2008, denying membership and stating that he was forced to participate. The Respondent has not provided notes relating to the content of the 2009 refusal letter.

[14] The IAD unreasonably relied on the CBSA officer’s negative characterization of the Applicant. The procedural fairness letter also lacked sufficient detail about what the misrepresentation was, so the Applicant’s counsel had to prompt CBSA for further details. In response, the CBSA officer alleged that the Applicant had failed to disclose prior applications, which was misleading as it indicated that there were multiple refusals. The Respondent also mischaracterizes the 2021 interview with the CBSA officer by stating that the Applicant did not acknowledge matters relating to his past involvement with ELF and EPLF in his 2007 Application until the CBSA officer disclosed the 2008 interview notes, despite the Applicant acknowledging the existence of a prior application before the disclosure of the 2008 interview notes.

[15] The Applicant also disputes that the misrepresentation was extremely serious. Section 40 of *IRPA*, concerning misrepresentation, formed the basis of the section 44 report, rather than section 34 security grounds for inadmissibility, even though the latter is a more serious ground for inadmissibility. The IAD unreasonably failed to engage with arguments as to why the Respondent would fail to include this ground of inadmissibility in the section 44 report if the misrepresentation was being considered as “extremely serious”.

(2) Respondent's Position

[16] The IAD has a distinct advantage in assessing credibility, so the Court should exercise deference (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 42). The IAD found that on a balance of probabilities, the Applicant caused different information to be included in his 2012 Application to avoid the same undesirable outcome as his 2007 Application.

[17] The IAD did not speculate or make a plausibility finding when it identified the Applicant's reluctance to acknowledge information during his first 2021 interview with the CBSA officer or that might harm his H&C application. The following evidence was before the IAD: the 2008 Global Case Management System notes advising the Applicant that his involvement with ELF was a concern; the contents of the procedural fairness letter identifying that the Applicant was considered inadmissible due to his membership in ELF; the Applicant knew his 2007 Application was refused; the Applicant's failure to disclose his involvement in ELF or EPLF and his prior refusal in his 2012 Application and at the initial interview with CBSA in 2021; and the Applicant's reluctance to acknowledge information that might harm his H&C factors.

[18] The IAD also reasonably relied on the CBSA officer's statutory declaration, which described that the Applicant's answers were devoid of details relating to his involvement with the ELF and EPLF and came across as a "sanitized version of events purposefully omitting" these facts. The CBSA officer noted that the Applicant did not provide concise answers to simple pointed questions. The Applicant was also not speaking candidly, as he only acknowledged

matters relating to his involvement with ELF and EPLF and his 2007 Application after the CBSA officer disclosed the 2008 interview notes.

[19] Furthermore, it was reasonable for the IAD to conclude that the misrepresentation was serious after identifying concerns with the Applicant's credibility and that the misrepresentation directly affected the success of his 2012 Application. The Applicant made multiple misrepresentations that obscured his identity and foreclosed the avenue of investigation as to the Applicant's admissibility to Canada under section 34. The Respondent's strategic decisions concerning the section 44 report and arguments at the IAD are irrelevant.

(3) Conclusion

[20] The IAD's plausibility assessment lacks justification and intelligibility and is therefore unreasonable. This unreasonable implausibility finding impacted the IAD's credibility assessment. I pause to note, however, that the Decision involved an assessment of H&C considerations, as the Applicant had not challenged the validity of the misrepresentation before the IAD.

[21] The IAD is entitled to determine the credibility and plausibility of the evidence before it so long as it does so reasonably based on the record (*Sanichara v Canada (Minister of Citizenship and Immigration),* 2005 FC 1015 at para 20).

[22] The IAD acknowledged the Applicant's explanation that, given his inability to read and write in English, the person who assisted the Applicant with the 2012 Application did not tell

him about the contents of it. Nevertheless, the IAD speculated that the Applicant had willfully omitted or misrepresented information in the 2012 Application. The IAD made the inference that the Applicant knew that his involvement with the ELF was the reason his 2007 Application was rejected, without citing the evidence. The IAD did not sufficiently explain, with evidence, why it was drawing an inference that the Applicant knew the 2007 Application was rejected due to his involvement with the ELF. The IAD did not have an evidentiary basis to make the inference it did about the Applicant's knowledge. This is sufficient to grant the application for judicial review.

[23] After unreasonably speculating that the Applicant knew why the 2007 Application was refused, the IAD compounded its error by attempting to discern the Applicant's intention at the time he completed the 2012 Application in order to determine the seriousness of the misrepresentation. The IAD considered the Applicant's 2021 initial interview where the CBSA officer's declaration stated that the Applicant provided a "sanitized" version of his involvement with the ELF and EPLF. In the Applicant's second interview, he was forthright in acknowledging his involvement with the ELF and EPLF. This led the IAD to the finding that the Applicant was a guarded participant based on the preponderance of evidence. In trying to discern the Applicant's intention, the IAD did not sufficiently engage with this conflicting evidence nor did it explain what the preponderance of evidence consisted of.

[24] The IAD then noted that the Applicant demonstrated a reluctance to share information that might be inconsistent with his H&C arguments during the IAD hearing. In support of this proposition, the IAD noted that the Applicant testified that he could not imagine living apart

from his daughter yet the Applicant also testified that he moved to Edmonton while his daughter remained in Calgary and they did not have specific concrete plans to live in the same city again. The IAD also noted that the Applicant did not live with his daughter until his marriage ended after approximately four years. These findings were used to undermine his credibility. The IAD determined that the Applicant's reluctance to acknowledge information that might harm his case led to a reasonable inference that he took a similar approach when completing his 2012 Application. However, it is unclear how this evidence concerning the circumstances involving his daughter directly relates to the finding about the Applicant not sharing information or otherwise not being forthright at the time of completing the 2012 Application. The reasoning is unintelligible and unjustified.

[25] Similarly, the IAD did not engage with the conflicting evidence to the inference about the Applicant's approach to filling out the 2012 Application. The IAD briefly acknowledged his limited English literacy, limited elementary education, and reliance on a third party to complete the form as mitigating factors to his culpability before finding that "the evidence does not support a conclusion that the [Applicant] was as blameless as his counsel submitted." However, the IAD failed to account for in its reasons how these conflicting facts may impact its inference (*Vavilov* at para 126). The IAD also did not provide justification on how this inference applies to both the Applicant's omission of information about his involvement with ELF and EPLF, as well as the concern about the Applicant's name and date of birth.

[26] The IAD identified that "direct or indirect misrepresentations carry the same legal consequences." However, the above unreasonable inferences significantly informed the IAD's

view that the misrepresentation was “extremely serious”. The IAD then weighed this plausibility determination against the H&C factors, leading to the conclusion that the H&C factors were insufficient to overcome the seriousness of the misrepresentation. The IAD’s reasons lack justifiability and intelligibility.

[27] The above findings are sufficient to dispose of this matter without considering the second issue.

VI. Proposed Question for Certification

[28] During the judicial review hearing before the Court, the Applicant proposed the following question for certification:

> In the context of a humanitarian and compassionate analysis, how should a decision-maker evaluate the hardship stemming from personal risk that an Applicant would face upon removal in order to determine its weight, when such risk has been accepted?

[29] The Applicant only raised the proposed question for certification at the outset of the hearing, thereby not complying with the Court’s *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* dated June 29, 2023 [Guidelines]. Under the Guidelines, the party intending to propose a certified question should notify opposing counsel at least five days prior to the hearing. As a result, the Court may refuse to consider the merits of the proposed question as it prejudices the Respondent and the Court, as well as does not serve the interests of justice (*Medina Rodriguez v Canada (Citizenship and Immigration)*, 2024 FC 401 at para 44).

[30] In any event, at the conclusion of the hearing, I directed the parties to provide written submissions after the hearing on the proposed question for certification. After considering the submissions of counsel, I decline to certify the proposed question because it does not meet the requisite criteria of contemplating issues of broad significance or general importance and being dispositive of the appeal (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9). I agree with the Respondent's submission that this is an inappropriate question for certification as it effectively is asking the Court to interfere with the IAD's discretion in weighing factors for its H&C assessment. It is not a question of general importance that transcends the interests of the parties. Given that I am remitting the matter for reconsideration due to the IAD's plausibility or credibility inferences, the proposed question will not be dispositive of an appeal.

VII. Conclusion

[31] For the reasons above, the application for judicial review is allowed.

JUDGMENT in IMM-860-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted for re-determination.
2. The proposed question is not certified.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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