

Date: 20080526

Docket: IMM-4048-07

Citation: 2008 FC 667

Ottawa, Ontario, May 26, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

AYALNEW BERHANU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and background

[1] Ayalnew Berhanu, a citizen of Ethiopia of Amhara ethnicity, claims to have a well-founded fear of persecution by the Ethiopian government based on his political opinion as a member and supporter of All Amhara People's Organization (AAPO) an opposition party which was formed in 1991 and also because of his ethnicity. He claims that on January 23, 1992, security forces of the Ethiopian People Revolutionary Democratic Front (EPRDF) stormed into his office and searched it at gunpoint. He was warned not to continue his activities with the AAPO. On March 10, 1992, his office and home were searched and papers taken away. He claims he went into hiding. He left for

the United States on March 29, 1992 on a student visa in order to enrol into a college but never did. He applied for asylum in the United States which was denied. While in that country, he claims to have participated in activities for the Coalition for Unity and Democracy (the CUD), a successor to AAPO. These activities, he says, have brought him to the attention of the Ethiopian authorities.

[2] He remained in the United States illegally until early 2006 when he came to Canada to seek the protection of this country. In Canada, he continued to publicly oppose the Ethiopian regime. He was denied asylum by the September 17, 2007 decision of the Refugee Protection Division (the tribunal), a decision which he challenges in this judicial review application.

The tribunal's decision

[3] Credibility was not a factor in the tribunal's decision. It found his testimony he was of Amhara ethnicity to be credible; it also said "Overall, the claimant testified in a credible manner". The tribunal ruled, however, he did not have a well-founded fear of persecution because of his political activities in Ethiopia, in the United States and in Canada nor did he have a well-founded fear because he was an Amhara.

[4] The focus of the tribunal's decision was on the nature and extent of the applicant's political activities. The tribunal first concluded his activities in 1991 and 1992 in Ethiopia "would not raise his profile amongst government or security officials should he return there."

[5] On this point the tribunal wrote:

The claimant testified that his activities in Ethiopia were modest (attending speeches/lectures, talking about the need for change with colleagues, modest recruiting on behalf of the AAPO) and occurred during the early years of the EPRDF government, as well as formative years of the AAPO party. The claimant confirmed that he was never physically harmed, arrested or charged for any of his political activities in Ethiopia. The claimant's allegations of being threatened by Kebele officials and by security forces at work were not supported by any evidence provided by the claimant. As such, the panel finds that there is not a serious possibility that the claimant would be subject to persecution for his past political involvement while in Ethiopia. This conclusion was supported by the findings of the U.S. Immigration Judge (dated March 18, 1996), which concluded that the claimant's allegations of harassment while in Ethiopia were found to be unrelated to the claimant's own particular political opinion. The panel therefore concludes that the claimant does not have a well-founded fear of persecution based on his opposition activities in Ethiopia before his departure. [Emphasis mine.]

[6] In the tribunal's view "the claim turned on whether or not the applicant has provided sufficient credible or trustworthy evidence that his opposition activities during his 14 years in the United States and now in Canada would result in a serious possibility of persecution should he return to Ethiopia."

[7] In respect of his activities in the United States, the tribunal found he had provided credible evidence on his political activities such as:

- Attending several demonstrations in 1997, 2002, 2003 and 2005;
- "Embassy meetings";
- Fundraising activities.

[8] In Toronto, the tribunal found he attended CUD meetings and participated in an anti-government demonstration in June 2006.

[9] The basis of his fear of return, according to the tribunal was “his belief that the Ethiopian government has spies who document the activities of opposition supporters around the world.” The tribunal said to support his belief, the applicant relied upon an article from Addisvoice.com dated June 27, 2006 which “claims that an Ethiopian Embassy representative [in Washington]” asked his superiors in Addis Ababa for \$20,000 to compile a name list and photos of Ethiopians who attended a protest vigil outside the White House and in a letter that official wrote on December 9, 2005 work had already started on photo prints from the video they had recorded.

[10] The tribunal gave this article little weight giving the following reason:

... since it was impossible for the panel to assess whether or not the allegations were genuine as they were based on a leaked letter and were not verified. The Addis Voice appeared to be an opposition website as in its masthead it claims to be: “A pro-democracy voice for Ethiopia” and it keeps track of how long opposition CUD leaders and journalists have been jailed by the second. As such, the panel found that Addis Voice was not an independent source of information, and the panel did not assign significant weight to the contents of a leaked document which had not been authenticated. Furthermore, neither the claimant nor his counsel provided any evidence that the Ethiopian Embassy in Washington’s request for funds to document opposition members in the United States had been received or acted upon by the Ethiopian government. The article further weakens the claimant’s claim of potential persecution as virtually all of his alleged opposition activities pre-date the December 9, 2005 embassy official request for resources to make the list. During his testimony the claimant did not provide evidence that his name was taken or identity confirmed by embassy officials at the meeting in Crystal City in 2000, at the 2005 demonstration outside the Ethiopian embassy, or any other opposition activity. In addition, the claimant did not provide evidence that he was approached and warned by embassy officials and local EPRDF supporters for his actions in the United States.

The claimant’s subjective fear of being persecuted for his opposition activities outside Ethiopia is not supported in the documentary evidence in R/A-1, or additional evidence presented by counsel. The panel did not find any reference to Ethiopian embassies or the government documenting opposition supporters outside Ethiopia, nor could the panel find any accounts of opposition supporters living abroad being persecuted upon their return to Ethiopia. As such, the panel finds that

the claimant has not established that Ethiopian government officials have engaged in spying and the drafting of lists of opposition supporters in the United States or around the world, and therefore the claimant cannot establish a well-founded fear of persecution in Ethiopia.

[11] The tribunal accepted the applicant was a party member but not one who had played a leadership role in an opposition party in or outside Ethiopia since his activities focused on supporting and promoting the party through:

- Small scale fundraising (selling T-shirts);
- Modest promotional activities (discussions with colleagues, distributing 20-30 leaflets to Ethiopian restaurants in Toronto);
- Helping to arrange people to show up at demonstrations;
- Attending lectures, meetings and demonstrations.

[12] The tribunal found these activities confirm the “applicant’s status as an opposition supporter but would not raise his profile as that of an opposition leader, organizer or militant” holding “that the documentary evidence indicated CUD leaders and organizers were being persecuted for organizing before and after the 2005 election and that documentary evidence did not “indicate” that CUD supporters have routinely been persecuted since mass arrests associated with the June 2005 election protests and the November 2005 CUD support rallies.”

[13] The tribunal then analyzed his allegation based on his Amhara ethnicity finding he had not established his claim because:

- He had not demonstrated past persecution on this ground;
- He had not provided any documentary evidence that would support his claim of potential persecution on this ground;
- The 2005 U.K. Home Office Report still indicates the Amharas are a politically and culturally dominant ethnic group of between 14 and 22 million people;
- Amharas are represented in the government by the Amhara National Democratic Movement which won 134 seats in the 2000 elections and is affiliated to the ruling EPRDF.

The applicant's case

[14] Counsel for the applicant argued the tribunal's decision should be set aside on account of the following errors:

- 1) The tribunal misread the documentary evidence when it concluded such evidence drew a difference between a high profile member and mere members or supporters in terms of being threatened by the Ethiopian security service.
- 2) The tribunal erred in its consideration of the Addis Voice article which the applicant placed into evidence. Counsel asserted there was no discussion about that article during the hearing, the applicant was not asked any questions about it then and therefore the tribunal had no evidentiary foundation for discrediting the article the way it did; furthermore, the documentary evidence substantiated the article in terms of the Ethiopian Government practice of paying informers.

- 3) The tribunal erred in its finding the authorities at Addis Ababa airport would not be interested in him upon his return. The tribunal failed to consider or comment upon his evidence that after he went into hiding, the police came to his house three times looking for him. It also failed to consider his claim that he illegally left the country which would heighten the interest of the Ethiopian authorities in him.

Analysis

a) Standard of review

[15] Counsel for the applicant's attack on the tribunal's decision focuses on the errors of fact which the tribunal made in considering or assessing the evidence before it. In my view, this engages the provisions of section 18.1(4)(d) of the *Federal Courts Act* which provides this Court may grant relief where a tribunal reached its decision based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it, a breach of which in the post *Dunsmuir* era is judged against the standard of review of reasonableness although it is clear if this section is breached, the decision cannot be but unreasonable.

b) Discussion and conclusion

[16] Findings of fact command the highest degree of deference from the Court. The Court in not to reweigh the evidence on judicial review. I cite the Supreme Court of Canada decision in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, at paragraph 85:

85 We must remember that the standard of review on the factual findings of an administrative tribunal is an extremely deferent one: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, *per* La Forest J., at pp. 849 and 852. Courts must not revisit the facts or weigh the evidence. Only where the evidence viewed reasonably is incapable of supporting the tribunal's findings will a fact finding be patently unreasonable. An example is the allegation in this case, viz. that there is no evidence at all for a significant element of the tribunal's decision: see *Toronto Board of Education, supra*, at para. 48, *per* Cory J.; *Lester, supra*, at p. 669, *per* McLachlin J. Such a determination may well be made without an in-depth examination of the record: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, *per* Gonthier J., at p. 1370.

[17] I also cite that Court's decision in *Boulis v. Minister of Manpower and Immigration*, [1974] S.C.R. 875 for the principle the reasons of a tribunal "must not be read microscopically; it is enough if they show a grasp of the issues that are raised and of the evidence addressed to them, without detailed reference. The record is available as a check on the Board's conclusions."

[18] For the reasons that follow, I am of the view this judicial review application must succeed because fundamentally the tribunal misread the evidence both in terms of the applicant's testimony as well as the documentary evidence. In coming to this conclusion, I examined all of the evidence contained in the applicant's application record, the documentary evidence in terms of country reports on Ethiopia, as well as the transcript of the applicant's testimony which, as noted, was deemed by the tribunal to be credible. Cumulatively, the errors described below warrant this Court's intervention on the basis the decision is based on findings of fact in breach of section 18.1(4)(d) of the *Federal Courts Act* and may thus be characterized as unreasonable in *Dunsmuir v. New Brunswick*, 2008 SCC 9. Underlying my conclusion is the recognition in all of the documentary evidence that the regime in power in Ethiopia, since 1991, is a repressive regime whose human rights record is very poor and, despite the advances of democracy in that country, uses coercive means to cling to power including the detention of political opponents.

[19] First, the documentary evidence does not draw a sharp line, as the tribunal did, to the effect only opposition leaders, organizers or militants are persecuted by the regime in power in Ethiopia. The documentary evidence is replete with indicators showing Ethiopia's security forces detain members, supporters and demonstrators (see applicant's record, pages 125, 128, 143, 149, 155, 161, 166, 170, 180, 192, 200). The tribunal specifically recognized the applicant was a member of the CUD in the United States and had been a member of the fledgling AAPO in Ethiopia and was threatened by Ethiopia's security forces on that account.

[20] Second, the tribunal appeared to minimize the applicant's role as a CUD member in the United States. It failed to mention his involvement in recruiting members to oppose the regime and to influence Congress through demonstrations. It did not mention the applicant's corroborative evidence from CUD members in the U.S. to this effect.

[21] Third, the tribunal failed to take account of the applicant's testimony that while in hiding, the security forces came three times to his house before he fled.

[22] Fourth, the tribunal failed to recognize the impact of the applicant's testimony he would be politically active in Ethiopia if returned.

[23] Fifth, the tribunal's assessment of the Addis Voice article introduced into evidence by the applicant was unreasonable on a number of grounds: (1) it was not weighed against the applicant's oral testimony that during demonstrations in front of the Ethiopian Embassy in Washington, many photos were taken of the demonstrators by unknown individuals and the documentary evidence

which showed that the Ethiopian regime paid informers (applicant's record, page 162; certified tribunal record, page 426); (2) it was unreasonable for the tribunal to corroborate that the Ethiopian Embassy had actually received the \$20,000 sought from Addis Ababa; and (3) no questions were put to the applicant exactly who was behind Addis Voice and why this evidence should be discounted.

[24] Sixth, the tribunal erred in deriving comfort from the fact the applicant's claim in the United States failed. That claim filed in 1993, was not advanced on the basis of the applicant's political opinion but rather on account of his ethnicity.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed, the tribunal's decision is quashed and the applicant's refugee claim is remitted for reconsideration by a differently composed tribunal. No certified question was proposed.

“François Lemieux”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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