

Date: 20080221

Docket: IMM-2967-07

Citation: 2008 FC 228

Ottawa, Ontario, February 21, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

HENOK ABRAHA AMARE

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated July 3, 2007 concluding that the applicant was not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

FACTS

[2] The applicant, a 29-year-old Ethiopian citizen, arrived in Canada on April 5, 2006 claiming refugee protection because of his political beliefs. Specifically, the applicant fears arrest, detention,

and torture on account of his opposition to the Ethiopian government and membership in the Coalition for Unity and Democracy (CUD), an Ethiopian opposition coalition.

[3] On June 8, 2005, the applicant allegedly took part in a CUD demonstration protesting the results of the 2005 Ethiopian election. Based on his participation in this demonstration, the applicant states that he was arrested and detained by authorities from June 10, 2005 until July 24, 2005, a period of over six weeks. While detained, the applicant maintains that he was interrogated about his support for the CUD, as well as his criticism of the government's agricultural policy. The applicant further states that during this time he was "beaten, flogged, slapped, and hit with a baton and rifle."

[4] Upon his release, the applicant learned he had been granted a scholarship to study in Belgium. Accordingly, he arranged for a passport and Belgium visa and left Ethiopia on September 28, 2005. While in Belgium, the applicant states that he continued to participate in CUD politics, attending demonstrations and a meeting at the Ethiopian embassy in November 2005. The applicant maintains that at one such demonstration he criticized the Ethiopian government, which angered the Ethiopian ambassador and was well-documented by Ethiopian officials.

[5] While in Belgium, the applicant obtained visitor visas to both Canada and the United States. On April 5, 2006, the applicant arrived in Canada and advanced his claim for refugee protection.

Decision under review

[6] The applicant's refugee claim was heard before the Board on March 7, 2007. On July 3, 2007, the Board found that the applicant was not a Convention refugee on the basis that he lacked a well-founded fear of persecution. While the Board accepted the applicant's identity and his membership in the CUD, it drew a number of negative inferences on the basis of inconsistencies and implausibilities in the applicant's testimony. These negative findings included:

1. the applicant did not attend the demonstration on June 8, 2005 that was the alleged cause of his arrest and detention;
2. the applicant was not arrested or detained because of his involvement in the June 8, 2005 demonstration;
3. the applicant's failure to claim asylum on three occasions prior to arriving in Canada demonstrated a lack of subjective fear of persecution; and
4. the applicant did not attend a meeting at the Ethiopian embassy in Belgium, and therefore did not anger the Ethiopian ambassador marking him for further persecution should he return to Ethiopia.

The applicant does not challenge any of the foregoing findings in this application for judicial review.

[7] In its decision, the Board also found no basis on which a claim could be sustained under section 97 of the IRPA and, accordingly, concluded that the applicant was not a person in need of protection. As the Board held at pages 1-2 of its decision:

... The panel finds that the claimant is not a person in need of protection in that his removal to Ethiopia would not subject him

personally to a risk to his life, or to a risk of cruel and unusual treatment or punishment, and that there are no substantial grounds to believe that his removal will subject him personally to a danger of torture. ...

It is this finding that the applicant seeks to have judicially reviewed.

ISSUE

[8] The applicant raises one issue: whether the Board erred in failing to perform a separate analysis of the applicant's risk of persecution under section 97 of the IRPA.

STANDARD OF REVIEW

[9] The applicant argues that the above issue involves a pure question of law and is reviewable on a standard of correctness. However, the jurisprudence states that the failure to separately consider an individual's objective risk under section 97 can be either a reviewable error or an irrelevant error, and that such a determination must be made on the facts of each independent case: see *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, [2003] F.C.J. No. 1540 (QL) and *Kandiah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, [2005] F.C.J. No. 275 (QL).

[10] Accordingly, I accept the following finding of Mr. Justice Blanchard in *Nyathi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1119, [2003] F.C.J. No. 1409 (QL) at paragraph 10 that the adequacy of the Board's section 97 analysis should be reviewed on the standard of reasonableness *simpliciter*:

¶ 10 ... The second issue is whether the Board erred in its assessment of whether the applicant is a person in need of protection under the Act. I am of the view that this raises a question of mixed fact and law for which the standard of review is reasonableness *simpliciter*....

ANALYSIS

Issue: Did the Board err in failing to perform a separate analysis under section 97 of the IRPA?

[11] Under subsection 97(1) of the IRPA, the Board must assess whether a refugee claimant is in need of protection for reasons of potential death, torture, or cruel and unusual treatment or punishment. The section states:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[12] An analysis under section 97 is different from the Board's determination of whether a refugee claimant is a Convention refugee under section 96 of the IRPA. Under section 96, the claimant must establish the existence of a well-founded fear of persecution tied to a Convention ground. However, under section 97 a claimant must show whether, on the balance of probabilities, their removal from Canada would subject them personally to the dangers and risks stipulated in paragraphs 97(1)(a) and (b) of the IRPA. This is a wholly objective analysis, and must be evaluated in light of all relevant considerations and with a view to the country's human rights record: see *Kandiah*, above, at paragraph 18 per Martineau J.

[13] Further, the jurisprudence is clear that a negative credibility determination in respect of a refugee claim under section 96 is not necessarily dispositive of the consideration of subsection 97(1): see *Bouaouni*, above; *Nyathi*, above; *Kandiah*, above; and *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1008, 256 F.T.R. 154. For example, Mr. Justice Martineau held in *Kandiah* at paragraph 18 that:

¶ 18 ... There may well be instances where a refugee claimant, whose identity is not disputed, is found to not to have a valid basis

for his alleged subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative subjective fear determination, which may be determinative of a refugee claim under section 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. ...

[14] In the case at bar, the Board concluded the applicant was not a person in need of protection under section 97 of the IRPA. After concluding that the applicant's lack of credibility and failure to claim asylum before arriving in Canada undermined his well-founded fear of persecution, the Board stated at page 7 of its decision:

For these reasons, the panel finds that the claimant has not established that he will face a serious possibility of persecution upon his return to Ethiopia, nor has he established that, on a balance of probabilities, he would suffer a risk to life, or of cruel and unusual treatment or punishment, or a danger, believed on substantial grounds to exist, of torture, should he return to Ethiopia.

[15] However, the Board found at page 2 of its decision that the applicant established his membership in the CUD as an ordinary member participating in rallies and meetings. The applicant argues that, having accepted his membership in the CUD, the Board was required to examine whether that membership might expose him to any of the risks enumerated in paragraphs 97(1)(a) and (b) of the IRPA. The applicant points to documentary evidence that, in his opinion, clearly establishes that ordinary members and suspected members of the CUD are subjected to detention and torture at the hands of the Ethiopian government.

[16] The documentary evidence before the Court in this application crosses the threshold where the Board is not required to provide further analysis on the specific elements of section 97. The documentary evidence establishes that ordinary and suspected members of the CUD have been subjected to arbitrary arrest, detention, and abuse at the hands of the Ethiopian government: see the 2005 U.S. Department of State Country Reports on Human Rights Practices – Ethiopia at page 71 of the Applicant's Application Record and the letter from Amnesty International dated February 6, 2007 at page 297 of the Certified Tribunal Record. Further, the documentary evidence speaks of the possibilities of persecution for ordinary members and sympathizers of the CUD, without regard to levels of activity or leadership within the party.

[17] I find the Board's conclusion about the section 97 risk to the applicant insufficient. The Board failed to deal with the documentary evidence and assess the applicant's risk. This conclusion is unsupported by any reasoning or rationale.

CONCLUSION

[18] The findings of the Board with respect to section 96 of the IRPA should not be disturbed. The Court will allow the applicant's application and order that the matter be referred back for redetermination only in respect of the Board's analysis under section 97.

[19] Both parties and the Court agree that this case does not raise a question that should be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed; and
2. The Board's decision is set aside, and the refugee claim is referred back to a differently constituted panel of the Board for redetermination solely with respect to whether the applicant is a person in need of protection under section 97 of IRPA.

“Michael A. Kelen”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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