

Federal Court



Cour fédérale

Date: 20170512

Docket: IMM-4245-16

Citation: 2017 FC 497

Ottawa, Ontario, May 12, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

SENTAYEHU GETACHEW GEBREMEDHIN

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Sentayehu Getachew Gebremedhin [the Applicant] claimed refugee status in Canada on the grounds of her political opinions expressed in both Ethiopia and here in Canada. The Applicant had her refugee claim dismissed first by the Refugee Protection Division [RPD], on May 2, 2016, and then by the Refugee Appeal Division [RAD], dated September 22, 2016. For the reasons that follow, I would dismiss this application for judicial review of the RAD decision.

II. Background

[2] The Applicant is a citizen of the Democratic Republic of Ethiopia. She was a competitive runner in Ethiopia. She arrived in Canada on November 12, 2015, and claimed refugee status on November 30, 2015. She fears persecution in Ethiopia because of her Amharic ethnicity, her refusal to support or join the ruling party, and her support for the Semayawi Party [the Blue Party].

[3] In 2004, the Applicant's father was arrested and imprisoned. It is alleged he was incarcerated due to his political activities. Shortly after his release he passed away.

[4] On April 22, 2015, the Applicant was returning home from a running competition in Germany. As she and her husband walked home from the airport they were stopped by police. One officer struck the Applicant and her husband was arrested. The following day he was released on bail after she provided the police with details of her travels to Germany.

[5] The Applicant then obtained a Canadian visa on the pretense of running a marathon here. The RPD accepted that she faced discrimination in her athletic career but went on to conclude that this did not amount to persecution. It found that she embellished her political activity in Ethiopia. It found that she had participated in political activities here in Canada but that these were at best low level and would not come to the attention of Ethiopian authorities.

[6] The RPD found that the Applicant's story after her departure from Ethiopia was inconsistent and that the incident causing her to flee was not credible. She appealed the RPD's negative determination to the RAD.

[7] The RAD admitted two new pieces of evidence that were not available before the RPD. The first piece of evidence was regarding twelve translation errors during the RPD hearing. The second piece of evidence was regarding a walk and lecture by Mr. Obang Metho, an Ethiopian human rights activist, dated May 7, 2016, in which the Applicant said she had participated in since the RPD hearing.

[8] Upon reviewing the RPD record and accepting the new evidence, the RAD affirmed the RPD decision. It reviewed each translation error in turn, concluding that they did not substantively impact the RPD's determination. It found that on a balance of probabilities the Applicant was not credible and that her allegations lacked veracity. It further found that her sur place claim in Canada failed as she had failed to demonstrate that her political involvement in Canada would have been brought to the attention of Ethiopian authorities. As a result, the RAD confirmed the RPD decision and dismissed the appeal.

III. Issues

[9] The Applicant raises the following issues on judicial review:

- A. Did the RAD err in law by applying the wrong test in determining that the Applicant's right to procedural fairness was not breached by reason of inadequate interpreting at her hearing?

B. Did the RAD err in law in finding that the Applicant was not a refugee sur place?

IV. Standard of Review

[10] The decision in its entirety should be reviewed on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*]). The Federal Court of Appeal found that the RAD is to carry out its own analysis of the record and intervene when the RPD is wrong in law, in fact, or in fact and law (*Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*]).

[11] The RAD reviews issues of procedural fairness before the RPD on a correctness standard. The Respondent accurately points out that that the Federal Court conducts judicial review of this correctness analysis on a reasonableness standard (*Zhang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1031 at paras 27-38).

V. Analysis

A. *Translation Errors*

[12] The Applicant argues that the RAD should have found a breach of procedural fairness given the many translation errors before the RPD. She submits that the RAD asked itself the wrong question when it determined that the interpretation errors did not “significantly influence the RPD’s overall credibility findings”. As a result, the Applicant submits that it was an error for the RAD to conclude that the interpreter’s errors did not overcome the overall or totality of

adverse credibility findings. The Applicant argued that the fact that the errors influenced some of the RPD's credibility findings in some way is sufficient to find a breach of procedural fairness.

[13] Interpreters do not need to be perfect. They must be continuous, precise, competent, impartial and contemporaneous (*Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at paras 4-6 and 16; *Batres v Canada (Minister of Citizenship and Immigration)*, 2013 FC 981 at paras 10-11 [*Batres*]).

[14] Furthermore, many decisions of this Court have held that errors of interpretation must be material to the RPD's credibility findings and do not need to demonstrate actual prejudice in the decision (*Batres*, above, at paras 12-13). Although the Applicant does not need to demonstrate actual prejudice, she must demonstrate that the translation errors were serious, non-trivial, that they affected her ability to answer questions, and that they were material to the tribunal's findings. Anything lower would demand perfection (*Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1028 at paras 71-72 [*Siddiqui*]; *Bidgoli v Canada (Minister of Citizenship and Immigration)*, 2015 FC 235 [*Bidgoli*]).

[15] The Respondent argues that more than two hours of translation resulted in only twelve errors, which were not significant and did not influence the RPD's decision.

[16] In both *Siddiqui* and *Bidgoli*, the Courts were reviewing RPD decisions and not RAD decisions. In this case the RAD addressed in detail whether the translation errors could overcome the credibility findings of the RPD and found the errors were not significant or did not influence

the RPD decision. In doing this the RAD did not have to specifically decide whether the error needed to be material or any of the other standards used such as serious and non-trivial. The RAD assessed whether the few errors identified allowed the Applicant to tell her story and if the errors as a whole influenced the overall credibility findings.

[17] The RAD considered each error in turn. They listened to the hearing recording to ensure they had the context in which the particular translation error was made. The RAD found that although minor errors were made, those errors would not overcome the totality of adverse credibility findings made by the RPD. The adverse findings were unaffected by any error of translation. The RAD therefore made no mistake in finding that the translation errors at the RPD hearing did not amount to a breach of procedural fairness.

[18] The RAD was very thorough when making the determination that the RPD did not breach procedural fairness. The effect of the translation errors on the whole of the RPD's findings when assessed against the whole decision did not make the hearing procedurally unfair. In addition the RAD's own assessment with the correct translations was reasonable. The translation errors were not at the heart of the inconsistencies and points of concern the RPD had regarding the Applicant's credibility.

[19] I find the RAD was reasonable in its assessment of the translation errors.

B. *Sur Place*

[20] The Applicant goes on to argue that the RAD erred in their assessment of her *sur place* claim in Canada. The RAD should not have based its decision on her “profile” which was agreed by the parties to be a low profile. She argues that the documentary evidence does not support that you must be a high profile person to come to the attention of Ethiopians officials. Furthermore, she argued that there was no documentary evidence to support that any particular profile was needed to attract persecution.

[21] This same argument was put before the RAD and is contained in the decision at paragraph 51:

The Appellant submits that the RPD’s findings regarding her *sur place* claim are wrong because they are not supported by the independent documentary evidence ... that the National documentation Package (NPD) indicates that expatriates of Ethiopia, with or without a high profile, can be victims of government surveillance and mistreatment.

[22] In answering this question the RAD found that the Applicant had participated in various political activities in Canada but that her knowledge of opposition activities were limited and she was at best a low level supporter who had not and will not come to the attention of Ethiopian authorities. At paragraph 54 of the RAD decision, it references a Response to Information request that indicates any person who is actively involved in Ethiopian politics or political objectives or is anti-government is subject to scrutiny and could be detained. As well, the RAD looked at the new evidence that there was an event sponsored by Unity for Human Rights and Democracy on May 7, 2016, that included a 2 km walk and lecture by human rights activist

Obang Metho. The Applicant could not be identified in the photos she provided. She did not explain whether she participated in both the run and the lecture. The RAD found she did not have a high profile in Canada with an opposition party and that her political activities and knowledge were limited. For that reason, the RAD found at paragraph 56 that “the Appellant has not or will not come to the attention of the Ethiopian authorities nor would she if she were to return to Ethiopia.”

[23] The correct test for a sur place claim was outlined by Justice Tremblay-Lamer in *Ngongo v Canada (Citizenship and Immigration)*, [1999] FCJ No 1627 [*Ngongo*]. In *Ngongo, above*, at paragraph 23, Justice Tremblay-Lamer discusses sur place claims:

... The only relevant question is whether activities abroad might give rise to a negative reaction on the part of the authorities and thus a reasonable chance of persecution in the event of return.

[24] In the RPD decision at paragraphs 20 to 22, The Applicant’s activities in Canada were weighed against the documentary evidence. The RPD concluded that:

[w]hile there is some evidence that indicates opponents are monitored, the Panel finds that given the level of involvement of the claimant (limited) and political knowledge of the claimant (limited) it is unlikely that her activities will come to the attention of the Ethiopian authorities if she were to return. Furthermore, her evidence that her husband remains in the family home and has not been questioned on her activities suggests that no one is aware of her political involvement in Canada.

[25] The RPD concludes using some of the same language in summary as the RAD which is “she is not a high profile opponent” and finds there is “...no credible evidence before the Panel to suggest her activities have come to the attention of the Ethiopian officials.”

[26] I find the RAD's assessment to be reasonable and answers at paragraphs 50-56 the question set out in *Ngongo*. The RAD also assessed the new evidence submitted by the Applicant finding that the totality of the evidence did not support her claim. The possibility of the Applicant having a sur place claim was thoroughly canvassed and though "high level" or "low level" profile was not used in the documentary evidence it is clear that the RAD and the RPD determined that her activities in Canada were such that she would not come to the attention of Ethiopian officials. The record when read as a whole shows that the use of those terms in conclusion was supported by evidence applied to the facts in the analysis of the claim and does not make the decision unreasonable.

[27] The Applicant also argued that the RAD erred by imposing too high of a burden on her. She argued that the RAD required she prove that her political activities would have come to the attention of Ethiopian authorities on a balance of probabilities. However, only a serious possibility of persecution must be proven to establish a refugee claim under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. Her argument is that the RAD therefore subjected her to a more onerous burden of proof than required and the decision should therefore be sent back for redetermination.

[28] The legal threshold for a sur place claim should not be confused with the standard of proof. In order to show a well-founded fear of persecution under section 96 of the Act, an applicant must establish that there is a "reasonable chance" or "serious possibility" of persecution (*Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (FCA) at paras 5-8; *Sebastio v Canada (Minister of Citizenship and Immigration)*, 2016 FC 803 at paras

13-14 [*Sebastio*]). The standard of proof for facts on which a claimant relies is a balance of probabilities. However, once proven, the legal threshold to demonstrate persecution is only a “serious possibility”.

[29] The RAD assessed whether the Applicant’s activities in Canada would come to the attention of the Ethiopian authorities. This is a factual determination which the RAD made on a balance of probabilities. This is not the same as replacing the legal threshold of “serious possibility” of persecution (*Sebastio*, above, at paras 14-15). Once the RAD made its factual determinations on a balance of probabilities, it then looked at the totality of evidence and determined that the Applicant did not face a serious possibility of persecution. When the decision is assessed as a whole, the RAD did not impose a higher legal threshold than was required. The RAD found there was no basis for a sur place claim.

[30] Reasonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision making process and also the decision must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir*, above; *Khosa*, above).

[31] I find that the RAD did not error in this assessment as the determination was reasonable and as a result, the judicial review application is dismissed.

[32] No question for certification was presented and none arose.

JUDGMENT in IMM-4245-16

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;
2. No question is certified.

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4245-16

STYLE OF CAUSE: GEBREMEDHIN V MIRC

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 9, 2017

JUDGMENT AND REASONS: MCVEIGH J.

DATED: MAY 12, 2017

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