

Federal Court



Cour fédérale

Date: 20170815

Docket: IMM-414-17

Citation: 2017 FC 769

Ottawa, Ontario, August 15, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MESRAK KASSIE NEBRET

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION CANADA**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a Refugee Appeal Division [RAD] decision, dated January 4, 2017 and accompanying a Notice of Decision dated January 11, 2017, confirming the Refugee Protection Division [RPD] decision determining that the Applicant is not a Convention refugee pursuant to s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] nor a person in need of protection pursuant to s. 97 of IRPA.

[2] As explained in greater detail below, this application is dismissed, because the Applicant has not satisfied me that she was denied procedural fairness in connection with the hearing leading to the impugned decision or that the decision is unreasonable.

II. Background

[3] The Applicant, Mesrak Kassie Nebret, is an Ethiopian citizen of Amhara ethnic background. She came to Canada in April 2011 and made a refugee claim at the end of 2013 based on her political activities both in Ethiopia and following her arrival in Canada.

[4] Ms. Nebret states that, before leaving Ethiopia, she was engaged to be married to Samuel Debesai, an opposition activist who was detained at the time she made her application for refugee protection. She also states that her father was a party member of the previous regime and governor of the Debat district, who was also detained by the current regime, tortured, and died shortly after his release in 1993.

[5] Ms. Nebret claims that she was politically active while in Ethiopia, as a member of the Coalition for Democracy, Justice and Unity party and the Unity for Democracy and Justice Party. She asserts in her Basis of Claims [BOC] form that she was detained twice, in May and August of 2010, was mistreated in prison both times, and was released with a warning to refrain from engaging in politics. Ms. Nebret asserts fear she will be imprisoned and tortured if she returns to Ethiopia. She also says that she has continued her political activities in Canada, participating since 2012 in the activities of a Toronto-based non-governmental organization named Unity for Democracy and Human Rights, of which she became a member in 2013.

[6] The Minister of Citizenship and Immigration intervened in the claim before the RPD, filing documentary disclosure and written submissions. Ms. Nebret's claim was heard before the RPD on May 10, 2016. As the Amharic interpreter was unable to stay for the entire scheduled sitting, the matter was adjourned and continued on June 21, 2016, with the assistance of another interpreter. The RPD rejected Ms. Nebret's claim on July 15, 2016 on the basis of credibility concerns. The RPD did not believe that Ms. Nebret had been politically active in Ethiopia, that she had been detained and imprisoned as alleged, or that she ever came to the attention of the alleged agents of persecution. The RPD also had credibility concerns about the evidence of Ms. Nebret's political activities in Canada and found that she had not established with credible evidence that such activities would be known to Ethiopian authorities. She appealed the RPD's decision to the RAD and now seeks judicial review of the RAD's dismissal of her appeal.

III. Issues and Standard of Review

[7] The Applicant raises the following issues for the Court's consideration:

- A. Whether inadequate interpretation services provided at the RPD hearing infringed the Applicant's right to procedural fairness;
- B. Whether the RPD's use of English in the hearing infringed the Applicant's right to procedural fairness;
- C. Whether the RAD erred in the assessment of the Applicant's credibility;
- D. Whether the decision to deny the Applicant's *sur place* claim was reasonable.

[8] The Applicant argues, and I concur, that the issues related to procedural fairness are reviewable on a standard of correctness (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12) and that the RAD's findings with respect to the Applicant's credibility and *sur place* claim are reviewable on the standard of reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9).

IV. Analysis

A. *Whether inadequate interpretation services provided at the RPD hearing infringed the Applicant's right to procedural fairness*

[9] Ms. Nebret argues that the interpretation at the hearing before the RPD was inadequate, in that the interpreter changed the meaning of words, conveyed thoughts different from that which were meant by the participants, omitted words, and added content that was not said during the hearing. She submits that, as a result of these errors, she was prevented from properly presenting her claim and the RPD was prevented from properly understanding it. In support of this argument, Ms. Nebret has filed a translation prepared by a legally trained employee of her counsel's office, who is fluent in the Amahric and the English languages and has experience in providing interpretation services. This document sets out excerpts from the RPD hearing, translating into English certain statements made in Amahric by both Ms. Nebret and the interpreter.

[10] Ms. Nebret correctly submits that the right to an interpreter in a refugee proceeding is enshrined in s. 14 of the *Canadian Charter of Rights and Freedoms*, that the interpretation must

be precise, continuous, competent, impartial and contemporaneous, and that no proof of actual prejudice is required as a condition of obtaining relief in the case of inadequate translation (see *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 [Mohammadian]; *Licao v Canada (Minister of Citizenship and Immigration)*, 2014 FC 89 [Licao], at para 26).

[11] However, Ms. Nebret also acknowledges that interpretation services are not expected to be perfect and that not every interpretation error constitutes a breach of procedural fairness. She refers to the decision of this Court in *Batres v Canada (Minister of Citizenship and Immigration)*, 2013 FC 981, which addressed an argument that erroneous translation led the RPD to make adverse credibility findings. Justice McVeigh observed at paragraph 12 that, where there are errors in translation, the errors must be material to the credibility findings in order to grant relief. Ms. Nebret submits that translation errors made during her RPD hearing prevented her from being able to tell her story and are material to the RPD's credibility findings.

[12] These arguments were raised before the RAD, which reviewed the translated excerpts from the RPD hearing. The RAD agreed that there were interpretation errors but concluded that they were not errors of significance and did not prevent Ms. Nebret from understanding the proceeding or telling her story. I agree with the RAD's conclusion that there were errors in the interpretation. However, as noted by the Respondent, the Applicant has not provided a side by side translation of the entire hearing. Therefore, like the RAD, the Court can only work with the translated excerpts that are available and must assess from those excerpts whether the errors are material and reveal that they prevented her from communicating her case to the RPD.

[13] At the hearing of this application, Ms. Nebret's counsel focused upon three particular areas of the hearing transcript excerpts which demonstrate deficiencies in the interpretation. One of these areas relates to whether Ms. Nebret's understanding of the English language was sufficient that she could testify in English or whether she should use the services of an Amharic interpreter. This area will be addressed below in my analysis of the second issue raised by the Applicant, i.e. whether the RPD's use of English in the hearing infringed her right to procedural fairness.

[14] The other areas focused upon by Ms. Nebret's counsel involved her testimony surrounding the prison in which she alleges she was detained in Ethiopia and her testimony about her treatment while detained. In connection with her treatment while detained, the RPD asked how she was treated in prison, which the interpreter translated as an inquiry as to how she was arrested. I agree with Ms. Nebret that this demonstrates a translation error. However, it does not appear to have prevented her from telling her story, as she has also included excerpts in which she described physical abuse by her captors. Ms. Nebret also points out interpretation errors in this evidence, in that she testified she was mistreated, which the interpreter translated as being pushed and tortured. When the RPD asked what she meant by tortured, she referred to being pushed around and punched. The interpreter translated this as "just they kicked us with their hands". The RPD asked if she had been beaten, and she confirmed that she was. Again, while I agree that there was a lack of precision in some of this interpretation, the translated excerpts provided by Ms. Nebret do not demonstrate that this prevented her from communicating the mistreatment to which she says she was subjected in prison or otherwise from communicating her claim.

[15] Turning to Ms. Nebret's testimony surrounding the prison, she refers to an exchange in which the RPD asked about "central prison", translated by the interpreter as "Meakelawi prison", and Ms. Nebret responded by referring to "Meakelawi", which the interpreter translated as "central prison". The RAD's decision refers to objective evidence that "Meakelawi" means "central" in Amharic, and I do not understand Ms. Nebret to be arguing otherwise. It is therefore not clear to me that this exchange demonstrates an error in translation. Ms. Nebret also refers to several translated transcript excerpts which demonstrate the RPD asking her to explain why she did not discuss in her narrative the area or name of the prison where she was taken when arrested. I agree that these inquiries were not translated properly.

[16] However, it is not possible to characterize translation errors in the two areas highlighted by Ms. Nebret as material to the rejection of her claim. While the RPD made adverse credibility findings related to her failure to mention in her BOC the name of the prison at which she was detained and omission of the details of her mistreatment, the RAD agreed with her submission on appeal that these were minor omissions and that the RPD had erred by making these particular credibility findings. The RAD considered these errors to relate to two relatively minor credibility conclusions, which did not change the RAD's overall determination that Ms. Nebret had not established with credible or trustworthy evidence that she was politically active, that she was detained, that she was or is sought by the authorities for any reason, or that she was or is perceived as a political dissident.

[17] In the interests of completeness, I note that the Applicant's Memorandum of Facts and Law recites other translated transcript excerpts as examples of alleged interpretation errors. I

have reviewed these excerpts in the Memorandum of Facts and Law and have not identified any errors that I would consider to be material to the credibility findings upon which the rejection of Ms. Nebret's claim for protection was based.

[18] I am therefore satisfied that the RAD correctly concluded that the translation errors did not result in a denial of procedural fairness.

B. *Whether the RPD's use of English in the hearing infringed the Applicant's right to procedural fairness*

[19] Ms. Nebret notes that on the first day of the hearing, May 10, 2016, the RPD concluded that Ms. Nebret required the services of an interpreter and therefore adjourned the hearing. She argues that, when the hearing reconvened on June 21, 2016, the RPD insisted that the hearing proceed, at least in part, in English. Ms. Nebret takes the position that this represents the RPD revisiting its previous decision, to proceed using the services of an interpreter, without any support for such decision other than her having demonstrated a working proficiency in the English language and stating in her BOC that she speaks English.

[20] In connection with this issue, Ms. Nebret refers to translated transcript excerpts which demonstrate the RPD querying her capacity with the English language. On the first day of the hearing, the RPD expressed the view that Ms. Nebret needed the services of an interpreter and, although Ms. Nebret wanted to speak in English, the RPD did not consider this to be a good idea. On the second day, when the hearing reconvened with the benefit of an interpreter, the RPD asked Ms. Nebret whether she was listening to the RPD's English questions or solely to the

Amharic translations. The RPD conveyed that she had the option of testifying in English, and she responded that she would try.

[21] Ms. Nebret argues, and I agree, that these communications by the RPD were not interpreted well. However, the translated transcript also demonstrates the RPD asking counsel to advise whether he would prefer that Ms. Nebret speak in English, to which counsel responds that he would ask her to speak in Amharic, as a result of which the RPD states that they will stay with the interpretation. A subsequent excerpt from the transcript demonstrates the RPD noting that Ms. Nebret was answering English questions without listening to the Amharic interpretation. The RPD again queried whether she was comfortable speaking in English, she responded that she preferred the assistance of the interpreter, and the RPD reminded her that the interpreter would speak in Amharic for her. While this exchange was again imperfectly translated, the translated excerpt nevertheless demonstrates that it was Ms. Nebret who was departing from reliance on the translator and that the RPD was aware of this and raised the point with her. It also demonstrates that she understood the point that the RPD was raising, expressing her preference for using the interpreter, and that the RPD reached and conveyed the same conclusion as on the first day of the hearing, that Ms. Nebret should use the available Amharic translation services.

[22] This issue was raised before the RAD, which noted that it was the RPD which recommended on the first day of the hearing that Ms. Nebret use the services of the interpreter and adjourned the hearing after the interpreter became unavailable. The RAD observed that, at the second sitting, the RPD offered that that Ms. Nebret could testify in English and she agreed, but that the RPD then consulted counsel on this issue, following which the RPD decided that

Ms. Nebret should use the services of the interpreter and asked Ms. Nebret to avoid listening to the questions in English. I find that the RAD has correctly interpreted the transcript excerpts relevant to this issue, and I agree with the RAD that Ms. Nebret has not established, as she alleges, that the RPD insisted that she speak English.

[23] Ms. Nebret also refers to a paragraph in the RAD's decision, which noted that counsel questioned Ms. Nebret, and she answered, without the services of an interpreter. The RAD observed that this exchange went quickly and fluidly, with no indication that Ms. Nebret was struggling to understand or reply. As argued by the Respondent, Ms. Nebret has not referred to the Court to the portion of the hearing to which this paragraph refers. There is accordingly no basis for the Court to conclude that the conduct of this portion of the hearing in English, which appears to have been prompted by counsel rather than by the RPD, impeded Ms. Nebret's ability to present her claim or otherwise denied her procedural fairness. The RAD found that, if Ms. Nebret had concerns about testifying in English, she or her counsel should have raised these concerns at the earliest opportunity. The RAD also found that the record demonstrates that it was Ms. Nebret who was eager to speak in English and that it was the RPD who preferred the use of the interpreter.

[24] I agree with the RAD's interpretation of the record and its application of the relevant legal principle, that waiver of the right to adequate translation results if an objection to the quality of the translation is not raised by the claimant at the first opportunity in those cases where it is reasonable to expect that a complaint be made (see *Mohammadian*; *Licao*, at para 26).

[25] Finally, I note the RAD's conclusion that the RPD did not err by referring to the fact that Ms. Nebret obtained a work visa which required a working knowledge of English. I find no error in this observation by the RPD, which the RPD stated as support for Ms. Nebret's own testimony that she is fluent in English. Similarly, the RAD noted that Ms. Nebret listed English and Amharic in her BOC as the two languages she speaks. Even without the benefit of this information as to Ms. Nebret's capacity in English, I find no error by the RAD in its analysis of this issue and its conclusion that Ms. Nebret was not denied procedural fairness. The RAD's analysis is not dependent upon this information as to her linguistic capacity. However, this information does further support the correctness of the conclusion.

C. *Whether the RAD erred in the assessment of the Applicant's credibility*

[26] Ms. Nebret submits that the RAD erred in confirming the RPD's findings on credibility. She notes that, in relation to her father, the RPD observed that Ms. Nebret did not allege in her BOC form that her father's background was raised during her detentions and that, in her oral testimony, she made no allegation of her father's background being known to the alleged agents of persecution. Rather, she said she was questioned about why she was carrying on political activities in her area. However, Ms. Nebret submits that the RPD did not ask her if her father's political profile was raised during her detentions and that it was therefore an error for the RPD to impugn her credibility on the basis of questions that were never asked (see *Buwu v Canada (Citizenship and Immigration)*, 2013 FC 850, at para 18). She further argues that, in the absence of such questions, the RPD's finding that her father's profile played no role in her detention is simply speculation and cannot support a negative credibility finding.

[27] This argument was raised before the RAD, which analysed the RPD's reasoning as being that there was a lack of evidence to support a key allegation, that Ms. Nebret was sought and harmed by the authorities in part because her late father was known to be a political opponent of the regime. Ms. Nebret's own evidence did not include reference to her father's profile being raised during her detentions. The RAD considered this to be a valid observation by the RPD based on the record, and the RAD made the same observation.

[28] Conscious of the deferential standard applicable to the Court's consideration of this aspect of the RAD's decision, I am unable to conclude the RAD's analysis to be unreasonable. The RAD considered Ms. Nebret's argument and adopted an interpretation of the RPD's decision which is within the range of possible, acceptable outcomes.

[29] Ms. Nebret also submits that the RPD erred in making an adverse credibility finding based on the omission of her second detention in one of the three application forms she submitted in support of her claim for protection. She notes that the date of the detention was consistent in the other two forms and was confirmed by her in oral testimony. She argues that the omission was a minor inconsistency which does not support an adverse credibility finding and that the RAD erred in confirming that this finding was reasonable.

[30] The RAD's decision demonstrates that it considered this argument but concluded that, because the alleged detentions and mistreatment go to the very heart of the refugee claim, Ms. Nebret's unexplained omission of a key fact did damage her credibility. The RAD reached

the same conclusion as the RPD. I find the RAD's analysis to be reasonable, and there is no basis for the Court to interfere.

[31] In relation to the country condition evidence, Ms. Nebret submits that the RAD failed to analyze the changed conditions in Ethiopia and how they could impact her upon return. She submits that the likelihood of her persecution has increased in light of the new situation, and that the RAD ought to have considered the experiences of similarly situated persons in her country (see *Chaudri v Canada (Minister of Employment and Immigration)*, (1986), 69 NR 114 (FCA)).

[32] The RAD admitted into evidence, under section 110(4) of IRPA, documentary evidence of events relating to a state of emergency in Ethiopia in October 2016. However, the RAD explained that this evidence did not assist Ms. Nebret, as she had not established with credible evidence that she was or is sought by the authorities, or was or is perceived as a political opponent of the government. Again, I find the RAD's analysis reasonable. While Ms. Nebret refers to the new evidence as describing the deepening of human rights violations in Ethiopia, including the detention and mistreatment of protesters, the RAD reasonably concluded that this evidence was not probative of Ms. Nebret's risk, given her failure to establish and that she is personally likely to be of interest to the authorities.

[33] Finally, Ms. Nebret notes that the RPD concluded that the fact she was issued a genuine passport, within a few days of her alleged release from detention, indicated on a balance of probabilities that she was not detained as she alleged. She argues that this represented an implausibility finding and that the RAD erred in confirming this finding. She referred the Court

to two documents from the National Documentation Package [NDP], which she submits were not referenced in, and contradict, the finding.

[34] The RAD referred to objective evidence indicating that the authorities harass and detain members and supporters of opposition parties that the government regularly arrests political opponents and subjects them to intimidation, abuse and torture, and that dissidents are kept under surveillance. The RAD noted that the Ethiopian government has prevented political opponents from travelling abroad and that Ms. Nebret alleged that after her detentions she was warned that the authorities would monitor her and that she was told to report to the authorities each week. The RAD concluded, after reviewing the objective evidence and Ms. Nebret's own evidence, that it was implausible that she was able to obtain both a passport and a police clearance certificate without difficulty almost immediately after her release.

[35] Ms. Nebret refers the Court to two Responses to Information Requests from the NDP. She notes that one refers to it being very easy to obtain a passport in Ethiopia and that the other explains the manner in which a person's passport can be seized for outstanding criminal charges. The latter document states that such seizure is not automatic. Rather, if the public prosecutor has reason to believe that a person will leave the country that office will petition the court that the passport be withheld. This document also states that, if bail is granted by a court, and the court decides to restrict the right of the person to travel outside Ethiopia, it simply gives such restriction order to the immigration authorities with no need to seize travel documents.

[36] In my view, these Responses to Information Requests do not contradict the RAD's analysis in a way which would support a finding that the decision is unreasonable. The fact that passports are generally easily obtained does not address whether such ease applies in the case of political opponents of the government. The second document referenced by Ms. Nebret addresses seizure of a passport that has already been issued, and other means of prohibition against travel, in the case of someone who has been prosecuted for a criminal offense. It does not address the availability of a new passport to political opponents of the government, which was the subject of the RAD's analysis.

[37] In conclusion on this issue, none of the arguments raised by Ms. Nebret, related to the RAD's analysis of her credibility, represent a basis to find its decision unreasonable.

D. *Whether the decision to deny the Applicant's sur place claim was reasonable*

[38] In connection with her *sur place* claim, Ms. Nebret submits that that the RAD erred by imposing a higher standard of proof than is required by law. She argues that the RAD expected her to prove that the Ethiopian government was aware of her activities, but that the applicable standard of proof for a *sur place* claim is a likelihood or balance of probabilities, i.e. whether the claimant's activities are likely to come to the attention of the authorities in his or her country (see *Win v Canada (Minister of Citizenship and Immigration)*, 2008 FC 398).

[39] I accept Ms. Nebret's statement of the applicable standard of proof but otherwise find no merit to this argument. The RAD held that she must establish that she faces a serious possibility of persecution in her country of origin and that there were credibility problems with her evidence

about her political activity in Canada. The RAD concluded that there was no credible evidence that her activities in Canada had come to the attention of Ethiopian authorities or that there is more than a mere possibility that she will be persecuted because of perceived political activities. I do not read the decision as articulating or applying a standard of proof at odds with the applicable jurisprudence. Rather, the RAD found there was no credible evidence to assist her in meeting that standard.

[40] Ms. Nebret also submits that the RAD's finding that she has not established that her activities came to the attention of the Ethiopian authorities was wrong, given the evidence she provided of her political activities in Canada and the monitoring activities of the Ethiopian government with respect to diaspora Ethiopians. She states that the documentary evidence clearly shows that the government monitors the activities of its opponents in the diaspora and that it is clear that her activities were conducted openly and vocally and will be viewed negatively by the Ethiopian government.

[41] Again, I find no merit to this submission. Ms. Nebret is asking the Court to reweigh the evidence that was before the RAD, which is not the role of the Court on judicial review.

Moreover, as noted by the Respondent, the RAD admitted into evidence on appeal printouts of pages from Ms. Nebret's Facebook account demonstrating that, between the filing of her notice of appeal and the perfection of the appeal, she posted several political items on Facebook. The RAD concluded that this did not corroborate her claim that she had been politically active in Canada for some time. Rather, it undermined her credibility, because it created the impression that, for purposes of the appeal, she quickly and briefly created evidence found lacking by the

RPD. The RAD found in any event that there was no indication that these few, brief social media postings had or will come to the attention of the Ethiopian authorities. I can find no fault with the reasonableness of this analysis.

V. Conclusion

[42] Having found that the Applicant's submissions have demonstrated no reviewable error, this application for judicial review must be dismissed. The parties raised no question for certification for appeal, and none is stated..

JUDGMENT in IMM-414-17

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-414-17

STYLE OF CAUSE: MESRAK KASSIE NEBRET V THE MINISTER OF
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PLACE OF HEARING: TORONTO, ONTARIO

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DATED: AUGUST 15, 2017

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