Federal Court  Cour fédérale

Date: 20171030

Docket: IMM-4815-16

Citation: 2017 FC 966

Ottawa, Ontario, October 30, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ASMEHLASH SELAMSSA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a 53-year-old citizen of Eritrea who, as a young man, served in the Ethiopian military under the Derg regime, a military junta which ruled Ethiopia (including what is now Eritrea) from 1974 to 1991. In 2009, the Applicant's brother and the Calgary Catholic Immigration Society sponsored his application for permanent residence status under the Convention Refugee Abroad class and Humanitarian-Protected Persons Abroad class. Ultimately, on June 15, 2016, the Applicant was interviewed in connection with his permanent

residence application in Kampala, Uganda, by an Immigration Officer from the High Commission of Canada in Dar es Salaam, Tanzania. In a letter dated June 29, 2016, the Officer refused the Applicant's application because the Officer found he was not a member of any of the prescribed refugee classes. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision.

I. The Officer's Decision

[2] In her letter of June 29, 2016, the Officer noted that the Applicant had been interviewed with the assistance of an interpreter fluent in English and in Tigrinya, and also that he had not indicated any difficulty in understanding the translator or in having the translator understand him. After quoting the definition of a Convention refugee in section 96 of the *IRPA*, the Officer referenced section 98 which excludes from this definition persons who have: (i) taken up residence in a country outside the country of their nationality and have been recognized as having the rights and obligations which are attached to the possession of nationality of that country; (ii) committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee; or (iii) been guilty of acts contrary to the purposes and principles of the United Nations.

[3] The Officer also referenced sections 145 and 147, as well as paragraph 139(1)(e), of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as amended, and concluded her letter by informing the Applicant that:

> After carefully assessing all factors relative to your application, I am not satisfied that you are a member of any of the classes prescribed. Based on the discrepancies between the written information on file and the information you provided at the interview, I am not satisfied you are credible, particularly in regard to your involvement with the Derg regime. I gave you many opportunities to answer my concerns during the interview and you failed to answer them. I am therefore not satisfied that you meet the definition of a Convention refugee and that you are not excluded as per A98. I further considered the country of asylum classes, but found that you do not meet the requirements of this class either. In addition, I am not satisfied that you are not inadmissible to Canada. Therefore, you do not meet the requirements of this paragraph.

[4] The Global Case Management System [GCMS] notes form part of the Officer's decision (see e.g.: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 43-44, [1999] SCJ No 39). The Officer noted in the GCMS notes that the Applicant had provided contradictory information about his military service, in particular that: on the Background Declaration in the Applicant's written application, he stated that he had served in the military from February 1971 to June 1983, that he was a distinguished soldier from April 1977 to March 1978 at Asmara Phorto-35, and that he was in active combat in Dekemehary, Quahay, Mimine, and Mereb; but on an updated Background Declaration provided at the interview, he stated that he had served as a private in the military from April 1982 to March 1983 in Asmaraforto brigade 22, shalega 31, and was in active combat at Malmine in March 1983. Also, during the interview, the Applicant stated that he had served in the military for only three months, protecting villagers' cattle from bandits, and was shot at night by unknown assailants.

[5] When the Officer inquired about these discrepancies at the interview, the Applicant told the Officer he could not have begun his service in 1971 since he would have been too young.

Although the Officer acknowledged this, she noted that the Applicant had provided no valid documents from Eritrea proving his date of birth. The Applicant further claimed that, due to his lack of education, he was unaware of the nature of the Derg. The Officer did not find this credible given the mass executions carried out throughout Ethiopia (including Eritrea) during the "Red Terror" campaign in the 1970s. The Officer also did not find credible that Eritrean authorities would have detained the Applicant in 1996, five years after the fall of the regime, if he had only served in the military for three months. Based on documentary evidence and reports about the Derg militia, the Officer did not find it credible that the Applicant's only duties would have been protecting cattle. Finally, the Officer did not find the Applicant's explanation regarding the night he was shot while guarding cattle credible, particularly when he had declared in his application that he was involved in active combat.

[6] The Officer ultimately concluded in the GCMS notes that:

> Based on information on file and info provided at interview, I am not satisfied that PA worked only 3 months for the Derg regime and I am not satisfied that his description of his limited involvement with the regime is credible. Based on the information available on file, I am satisfied that PA was detained by the Eritreans in 1996 and the Ethiopians in 2013. Based on the information available on file, I am also satisfied that PA was a member of the Derg regime and that he was detained for his past involvement. However, I am not satisfied that Pa has answered my question[*sic*] honestly during the interview and there are too many discrepancies on file to assess the level of his involvement and participation with the Derg regime…. Based on the discrepancies between written information on file and information provided at interview, I am not satisfied that PA is credible.

II. Issues

A. *Amendment of Style of Cause*

[7] At the outset of the hearing of this matter, it was determined that the Respondent had been incorrectly named as the Minister of Immigration, Refugees and Citizenship Canada. According to the federal Registry of Applied Titles, the applied title for the Department of Citizenship and Immigration is Immigration, Refugees and Citizenship Canada. The correct Respondent to this application for judicial review is the Minister of Citizenship and Immigration by virtue of subsection 4(1) of the *IRPA*. Accordingly, the style of cause will be amended, with immediate effect, to name the Minister of Citizenship and Immigration as the Respondent in lieu of the Minister of Immigration, Refugees and Citizenship Canada.

B. *The Officer's Affidavit*

[8] The Respondent has filed an affidavit which identifies the documentation before the Officer (G. Garant) at the time of the interview and when she prepared the refusal letter. This affidavit also identifies four immigration forms in the Applicant's Record, attached as exhibits A and C to the Applicant's affidavit, which were not before Ms. Garant when she interviewed the Applicant and issued her decision letter. According to the Respondent, it is well-established that evidence not before an administrative decision-maker is not admissible on judicial review except in certain limited circumstances relating to general background information, information attesting to the absence of evidence on a certain matter or issue, or information relating to natural justice. The Respondent submits that none of these exceptions apply in this case and these

exhibits should therefore be struck from the Applicant's Record or, in the alternative, given no weight. On this issue, I agree with the Respondent. Accordingly, the Court has assigned no weight to the documentation in the Applicant's Record which was not before the Officer when she interviewed the Applicant and when she prepared the refusal letter.

C. *Standard of Review*

[9] It is well-established that the decision of an officer as to whether an applicant is a member of the Convention refugee abroad class or the country of asylum class is a question of mixed fact and law reviewable on the reasonableness standard (see, e.g.: *Gebrewldi v Canada (Citizenship & Immigration)*, 2017 FC 621 at para 14; *Bakhtiari v Canada (Citizenship and Immigration)*, 2013 FC 1229 at para 22, 235 A.C.W.S. (3d) 1067; *Qarizada v Canada (Citizenship and Immigration)*, 2008 FC 1310 at para 15, [2008] FCJ No 1666; *Saifee v Canada (Citizenship and Immigration)*, 2010 FC 589 at para 25, [2010] FCJ No 693.

[10] Under the reasonableness standard, the Court is tasked with reviewing a decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

[11] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). Whether an administrative decision was fair is generally reviewable by a court. However, the analytical framework is not so much one of correctness or reasonableness but, instead, one of fairness. As noted by Jones & deVillars (*Principles of Administrative Law*, 6th ed. (Toronto: Carswell, 2014) at 266):

> The fairness of a proceeding is not measured by the standards of "correctness" or "reasonableness". It is measured by whether the proceedings have met the level of fairness required by law. Confusion has arisen because when the court considers whether a proceeding has been procedurally fair, the court…decides whether the proceedings were correctly held. There is no deference to the tribunal's way of proceeding. It was either fair or not.

[12] Under the correctness standard of review, a reviewing court shows no deference to the decision maker's reasoning process and the court will substitute its own view and provide the correct answer if it disagrees with the decision maker's determination (see: *Dunsmuir* at para 50). Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). When applying a correctness standard of review, it is not only a question of whether the decision under review is correct, but also a question of whether the process followed in making the decision was fair (see: *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14, 238 ACWS (3d) 199; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 471 FTR 71).

[13] The quality of the interpretation at an immigration hearing or interview is a question of procedural fairness and, hence, subject to a correctness standard of review (see, e.g.: *Singh v Canada (Citizenship and Immigration)*, 2007 FC 267 at para 16, 155 ACWS (3d) 922; *Saravia v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1296 at para 3, 142 ACWS (3d) 1023); *Siddiqui v Canada (Citizenship and Immigration)*, 2015 FC 1028 at para 38, 258 ACWS (3d) 388; *Licao v Canada (Citizenship and Immigration)*, 2014 FC 89 at para 18, 237 ACWS (3d) 739).

D. *The Applicant's Interview*

[14] The Applicant's affidavit dated December 30, 2016, filed as part of his Application Record, states in relevant part that:

> I was called for an interview on June 15, 2016 in Kampala, Uganda. There was a Tigrinya interpreter at the interview. …
>
> I never understood the interpreter properly and there was some misunderstanding. For example I remember the interpreter asked me "what do you eat?", I answered him our traditional food Injera. However later after some explanation, I realized that he was asking me what I was doing for a living.

[15] Additionally, the jurat in the Applicant's affidavit states that:

> As Asmelash Selamssa does not understand the English language, this affidavit was, in my belief, interpreted to him/her, by ANTENEH MENGESHA who first swore that he/she well understands the English and AMHARIC languages and that he/she would well and truly interpret the contents of this affidavit and that he/she would well and truly interpret the oath about to be administered.

[16] Ms. Garant states in her affidavit the following:

> As a matter of general protocol and procedure, I make sure that a person being interviewed - whether this is in person or over the telephone - understands the interpreter. … If there are difficulties with the interpretation, this is noted in the interview notes and the interview does not proceed any further with that interpreter. If nothing is noted, it is because neither the person being interviewed, nor the interpreter, expressed any difficulties with the interpretation. During the interview on June 15, 2016, the Applicant did not say that he did not understand the interpreter properly or that there was some misunderstanding.

[17] The GCMS notes entered on June 22, 2016, state that Ms. Garant "verified that applicant and interpreter understand each other." The notes pertaining to the Applicant's interview make no mention of the misunderstanding between the Applicant and the translator about Injera.

[18] In addition, the certified tribunal record contains an undated letter from the Applicant's brother, Michael, which was forwarded to the High Commission in Dar es Salaam on or about October 14, 2016. This letter raises questions about the integrity of the interpretation at the interview, stating in relevant part that:

> The interpreter told him he got the Canada permanent residence visa which is not true and my brother is telling me now that his interpreter work [*sic*] for the Eritrean government YGDF undercover also so I do not believe he interpreted to you exactly what my brother he told him to clarify for you. The interpreter is [*sic*] not Give [*sic*] the trues [*sic*] information to the immigration officer.
>
> Even the Eritrea and Ethiopian calendar 1983 it's in European calendar (1991). We have different calendars. So the interpreter he mixed up. I don't think he explain the correct information. So we can prove the interpreter knowingly gave false information to the officer.

[19] The Officer's letter to the Applicant refusing his application did not contain the GCMS notes pertaining to the interview. These notes were first disclosed to the Applicant as part of Ms. Garant's affidavit filed with the Respondent's Memorandum of Argument on February 20, 2017. The certified tribunal record received by the Court on April 4, 2017, contains additional GCMS notes pertaining to the Applicant's application; it does not contain any handwritten notes concerning the precise questions and answers at the Applicant's interview. Even if the Applicant did not, according to Ms. Garant, indicate any difficulty in understanding the translator or in having the translator understand him at the interview, concerns about the translation at the interview were raised well before the Applicant's receipt and review of the GCMS notes relating to the interview.

[20] I cannot be sure whether the interview in this case was procedurally fair to the Applicant or whether the Applicant was properly or adequately understood by the translator and the Officer. In this case, the competency or adequacy of the translation at the interview is open to question in view of the Applicant's affidavit, sworn to in the English and Amharic languages. The fact that this affidavit is not in the English and the Tigrinya languages raises questions as to whether the Applicant and the translator adequately understood each other at the interview and as to whether the Applicant is more fluent in Amharic than Tigrinya. In the absence of any transcript or audio recording of the interview, it is not possible to determine whether the interpretation at the interview was adequate, precise or competent, or whether any inadequacies or errors in the translation related to trifling or immaterial matters. Moreover, in view of the letter from the Applicant's brother, there is also some question as to whether the translator was impartial. The Officer's decision to deny the Applicant's application for permanent residence is

tainted by what may well have been faulty translation at the interview. This application for judicial review will therefore be allowed.

III. Conclusion

[21] For the reasons stated above, the Applicant's application for judicial review is allowed.

[22] Neither party raised a serious question of general importance; so, no such question is certified.

JUDGMENT in IMM-4815-16

THIS COURT'S JUDGMENT is that: the style of cause is hereby amended, with immediate effect, to name the Minister of Citizenship and Immigration as the Respondent in lieu of the Minister of Immigration, Refugees and Citizenship Canada; the application for judicial review is granted; the decision of the immigration officer dated June 29, 2016, is set aside; the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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