

Date: 20080404

Docket: IMM-2674-07

Citation: 2008 FC 441

BETWEEN:

MIHERET TEKU JEGO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing on the 6th of March, 2008, at Toronto, of an application for judicial review of a decision of the Refugee Protection Division (the “RPD”) of the Immigration and Refugee Board wherein the RPD determined the Applicant not to be a Convention refugee or a person in need of like protection to that of a Convention refugee in Canada. The decision of the RPD is dated the 7th of June, 2007.

BACKGROUND

[2] The Applicant is a citizen of Ethiopia, of Gedeo tribal ethnicity. She is in her early twenties. In 1999, when the Applicant was a high school student, she joined the Gedeo Student Association,

described in the reasons for the decision under review as a group of students “concerned about advancing the rights of Gedeo people in Ethiopia.” The Gedeo Student Association was supported by the Gedeo People’s Democratic Organization.

[3] In 2000, the Applicant was elected as the assistant leader of the Gedeo Student Association. Later in the same year, when the head of the Association was arrested, jailed, and, upon release, expelled from school for a year, the Applicant assumed the leadership role.

[4] The Applicant graduated from high school at the end of 2001. She went to Awassa in Ethiopia where she commenced a college programme in January of 2002. The Applicant continued her activity with the Gedeo Student Association. In August of 2002, the Applicant’s home was searched by police but no “incriminating” materials were found. The Applicant graduated from college in August of 2003.

[5] The Applicant found employment in November of 2003 at the Dilla Municipality in Ethiopia, as an auditor. She continued in her role with the Gedeo Student Association.

[6] In 2004, the Applicant participated in an anti-government protest in the Dilla area. Government security forces fired on the participants and five hundred (500) people were killed. One day after the demonstration, the Applicant was arrested. She was detained for approximately one (1) month during which time she was “interrogated and tortured”. When, following her release, she attempted to return to work, she found she was “black listed” from continuing with her

government employment. She was unable to find employment in the private sector. Her parents, both schoolteachers, were demoted.

[7] The Applicant applied for entry to a business management programme at George Brown College in Canada and was accepted. She arrived in Canada to commence the programme on the 2nd of December, 2004. She filed her claim for Convention refugee or like status on the 7th of November, 2005, after she was advised that conditions in Ethiopia had worsened for her if she chose to return.

THE HEARING BEFORE THE RPD, POST HEARING SUBMISSIONS ON BEHALF OF THE APPLICANT AND THE DECISION UNDER REVIEW

[8] The hearing before the RPD was conducted with the aid of an Ethiopian/English interpreter. The Applicant testified in Ethiopian. She was represented by counsel who examined the Applicant first. The Presiding Member had no "...problem with respect to [the Applicant's] identity." No issues were raised during the hearing with regard to the quality of the interpretation.

[9] At the close of the hearing, which was not long, counsel for the Applicant requested permission to provide written submissions "...given the fact that there is a large volume of material that I haven't reviewed for the 2006 package, and there is some question of whether or not things are referred to in the documentation package." Permission was granted.

[10] In written submissions on behalf of the Applicant, dated the 12th of April, 2007, counsel writes at the first page of the submissions:

We hereby further request that, in light of the obvious interpretation problems experienced in the hearing, that if any adverse credibility findings are to be drawn from the testimony given on that date [the date of hearing], that the Board first **audit the recording of the hearing for accuracy of interpretation.** We submit that this is essential as accurate interpretation is a vital component of natural justice. The problems with the interpretation are discussed further, below.¹

[emphasis in original]

Seven (7) further paragraphs of the written submissions under the heading “Credibility” are devoted to that issue and, in particular, to barriers to clear testimony. Counsel writes:

5. It is submitted that the panel should be particularly careful in ascribing too much weight to any inconsistencies in the testimony in this case, in light of the obvious barriers to effective communication at the hearing that the claimant faced.

Counsel noted the Applicant’s young age at the date of hearing, twenty-two (22) years old, the claimant’s psychological trauma and the “evident problems with the **interpretation related to dates.**” Once again, I note that this was the first expression of concern on behalf of the Applicant with regard to the quality of interpretation at the Applicant’s hearing.

[11] In its reasons in support of the decision under review, the RPD devoted slightly more than a page to the “Preliminary Issue” of what it described as “...discrepancies in the evidence from that found in the written documentation.” Accuracy of interpretation was included within that general expression of concern. For ease of reference, the paragraphs from the RPD’s reasons under the heading of “Preliminary Issue” are reproduced as an annex to these reasons.

[12] Following the discussion of the “Preliminary Issue”, the RPD turned to its analysis. In the second brief paragraph under that heading, the RPD wrote:

After careful consideration of all of the evidence and representations, the panel determines that the claimant [here the Applicant] has not established an objective or subjective basis for her fear of persecution or serious harm, because of a lack of

¹ Tribunal Record, p. 50.

credibility in pivotal areas of her testimony and the lack of credible written evidence.

Just prior to the heading “Conclusion” in its reasons, the RPD wrote:

Based on the lack of documentary and credible *viva voce* evidence, the Panel finds, based on a balance of probabilities, that the claimant has not established a well-founded fear of persecution by reason of her actual or perceived political opinion and/or ethnicity. Therefore, the Panel concludes that the claimant is not a Convention refugee.

Since the Panel finds the claimant’s evidence not to be credible and her fear of persecution not well-founded, the Panel finds that, more likely than not, the claimant will not face serious harm should she return to Ethiopia. Therefore, the Panel concludes that the claimant is not a person in need of protection pursuant to section 97(1)(a) and (b) of the *IRPA*, as there is no risk to her life, or of cruel and unusual treatment or punishment, or a danger, believed on substantial grounds to exist, of torture, upon returning to Ethiopia.

THE ISSUES

[13] In the Memorandum of Argument filed on behalf of the Applicant, only one (1) issue is identified and that in the following terms:

The Applicant submits that the issue is: Did the Refugee Division err in determining that the Applicant was not a Convention refugee or a person in need of protection?

[14] At hearing, counsel for the Applicant urged that the denial of an audit of the interpretation at the hearing constituted a reviewable error and a breach of natural justice and that the determination that the Applicant had not established an objective or subjective basis for her alleged fear of persecution or serious harm, because of a lack of credibility in pivotal areas of her testimony and a lack of credible written evidence, constituted a further reviewable error.

ANALYSIS

a) Standard of Review

[15] This application for judicial review was heard the day before the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*² was delivered. I will therefore not rely on that authority for determination on the issue of standard of review although, in the circumstances of this particular case, I am satisfied that it is of little, if any, impact.

[16] The issue of refusal to order an audit of the interpretation provided at the Applicant's hearing before the RPD is, I am satisfied, an issue of procedural fairness. As such, I am satisfied that the decision of the RPD in this regard must be reviewed against a standard of "correctness".

[17] The remaining issue, that being whether or not the Applicant established an objective or subjective basis for her fear of persecution or serious harm because of a lack of credibility in pivotal areas of her testimony and a lack of credible documentary evidence, is an issue to be examined against a standard of "patent unreasonableness" or, put another way, against the standard provided in paragraph 18.1(4)(d) of the *Federal Courts Act*³ since it turns entirely on a review of the RPD's weighing of the evidence before it, a role at the heartland of its expertise.

b) The determination not to order an audit of the interpretation services provided at the hearing before the RPD

[18] In *Mohammadian v. Canada (Minister of Citizenship and Immigration)*⁴, Justice Pelletier, then of the predecessor to this Court, wrote at paragraph [29]:

In this case, I find that the question of the quality of the interpretation should have been raised before the CRDD because it was obvious to the applicant that there were problems between him and the interpreter. His affidavit refers to the difficulty he had understanding the interpreter and says that at times he did not understand

² 2008 SCC 9, March 7, 2008.

³ R.S.C. 1985, c. F-7.

⁴ [2000] 3 F.C. 371; appeal dismissed: 2001 FCA 191.

what was being said. This is sufficient to require him to speak out at the time. His failure to do so then is fatal to his claim now. The applicant's assertion that he did not know he could object to the interpreter is not credible given that the first hearing was adjourned because he and the interpreter could not communicate. Clearly, the CRDD had shown it was alive to the issue of interpretation. As a result, I do not have to engage in an analysis as to whether all of the elements of *Tran* have been met since, even if they have, the applicant's failure to make a timely complaint in circumstances where it was reasonable to expect him to do so means that relief is not available to him.

Precisely the same might be said here. Problems of interpretation could have been reasonably addressed at the time of the hearing before the RPD, and there was an obligation to do so then and not later, in judicial review proceedings such as this. The Applicant was represented before the RPD by counsel, though not the counsel who appeared on her behalf on this judicial review. The Applicant could have expressed her concerns regarding interpretation to her counsel and the matter could have been addressed then and there. It was not. Nor was it raised by counsel as an issue at the close of the hearing when time to provide written submissions was requested and granted. The matter was only raised in written submissions and then only with respect to a limited aspect of the interpretation. That was simply too little, too late. I am satisfied that the RPD made no reviewable error, against a standard of review of "correctness", in rejecting the Applicant's request for an audit of the interpretation at her hearing before the RPD.

c) The credibility determination as to pivotal areas of the Applicant's testimony and a lack of credible documentary evidence

[19] This Court may only interfere in the weighing of the evidence before a tribunal such as the RPD if the tribunal based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material that was before it. Put another way, it is not for this Court, on judicial review, to substitute its weighing of the evidence that was before the tribunal for that of the tribunal itself. The law in this regard has been long settled. In

*Aguebor v. Ministre de l'Emploi et de l'Immigration*⁵, Justice Décary, for the Court, wrote (in translation):

There is no longer any doubt that the Refugee Division [the predecessor to the RPD], which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. ...

[20] Precisely the same might be said here with regard to the RPD's weighing of the totality of the evidence before it. I am satisfied that, while I might have reached a different conclusion, that is not the issue. I simply cannot conclude that the RPD's weighing of the totality of the evidence before it was perverse or capricious or arrived at without regard to the totality of the evidence that was before it.

CONCLUSION AND CERTIFICATION OF A QUESTION

[21] For the foregoing reasons, this application for judicial review will be dismissed. Counsel for the Applicant will have seven (7) days from the day on which these reasons are distributed to counsel by the Court to serve and file submissions on certification of a question. Upon service and filing of any such submissions, counsel for the Respondent will have seven (7) days to serve and file responding submissions. Only thereafter will an Order issue dismissing this application for judicial review.

“Frederick E. Gibson”

JUDGE

Ottawa, Ontario.
April 4, 2008

ANNEX

⁵ (1993), 160 N.R. 315 (F.C.A.).

Preliminary Issue

During the course of the oral testimony, there were several discrepancies in the evidence from that found in the written documentation. The claimant's explanations for these differences were either that she "had problems remembering" or that "the problem is in the interpretation into English." At the hearing, neither the claimant, nor her lawyer indicated that there was a problem with the services provided by the interpreter.

In written submissions provided on April 11, 2007, it was requested that an audit of the hearing for accuracy of interpretation should be performed in the event that adverse credibility findings were drawn from the claimant's evidence. Specifically, it was submitted that the claimant's testimony had been compromised by "evident problems with the interpretation related to dates."

The Panel notes, as is discussed in-depth below, that the claimant's oral evidence was at odds with regard to names of associations and other relevant facts in addition to the dates. During the course of her testimony, she was specifically asked if you could read English and she stated "yes," she was able to do so. Plus, she studied at George Brown College in a course presented in English. Her school documents in Ethiopia are written in English and it is noted that, at a minimum, she studied English from 1990 until 1993 and that her grades in this course were higher than that of most other subjects.

When the claimant completed her application for refugee protection at Citizenship and Immigration Canada (CIC) on November 29, 2005, she indicated that she did not require an interpreter. Nor was the content of the Personal Information Form interpreted to her; although, she swore an affirmation at the hearing declaring that the information found in this document was truthful.

In addition, the Panel is only aware of one significant discrepancy in the translation of the dates during the course of the hearing and it was subsequently clarified.

For all of the above reasons, the Panel finds that an audit of the hearing is not required. The claimant has a working knowledge of English and has been able to study at the College level in this language. The interpreter at the hearing is qualified to perform translation services. In addition, noting that she may have provided an incorrect date based on the Ethiopian calendar, the interpreter was given the opportunity to correct the error, which was done. It is also noted that the correction made in was in support of the claimant's claim.

Thus, the Panel finds that it is not necessary to request an audit of the interpretation at the hearing related to dates or any other subject matter. Rather, the Panel is satisfied that the claimant's discrepancies surrounding dates and other facts at the hearing are credibility issues and have been provided the appropriate degree of evidentiary weight in accordance with this determination.

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: MIHERET TEKU JEGO and THE MINISTER OF
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