Federal Court  Cour fédérale

Date: 20170323

Docket: IMM-1960-16

Citation: 2017 FC 306

St. John's, Newfoundland and Labrador, March 23, 2017

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

GIZACHEW TEGEGN ABEGAZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Gizachew Tegegn Abegaz (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Appeal Division, dismissing his appeal from a negative decision of the Refugee Protection Division, denying his claim for protection as a Convention refugee or a person in need of protection, pursuant to section 96 and subsection 97(1), respectively, of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[2] The Applicant is a citizen of Ethiopia. He sought protection in Canada on the basis of his Amhara ethnicity, his political views and his desertion from the military. The Immigration and Refugee Board, Refugee Protection Division (the "RPD") dismissed his claim on the grounds that the Applicant was not credible and failed to provide evidence of a subjective fear. The RPD also found that the Applicant had reavailed himself of protection in Ethiopia, when he returned in 2014.

[3] The Applicant's appeal to the RAD was also dismissed, on the grounds that he was not credible and that the RPD did not err in either its process or conclusions.

[4] In this application for judicial review, the Applicant argues that his right to procedural fairness was breached because there were serious errors in the translation of his evidence before the RPD and the lawyer who represented him before the RAD did not appreciate the errors of translation because he did not speak Amharic, the Applicant's language.

[5] The Applicant also submits that his subjective fear of returning to Ethiopia did not arise until he received a phone call in April, 2015. In these circumstances, the findings of the RPD about reavailment and delay in making his claim do not apply.

[6] Finally, the Applicant argues that the RAD erred in finding a lack of subjective fear when there was objective evidence about the persecution of people with his profile, that is a deserter from the military.

[7] The Minister of Citizenship and Immigration (the "Respondent") submits that the arguments about breach of procedural fairness relate to the decision of the RPD, not to the decision of the RAD, the decision which is the subject of this application for judicial review.

[8] The Respondent argues, in the alternative, that the standard of interpretation was proper and the Applicant waived his objections to the interpretation when he did not raise it before the RPD or before the RAD. In any event, the Respondent submits that the interpretation was sufficient to allow the Applicant to understand the proceedings and to present his case.

[9] The Respondent also submits that the RAD did not ignore the significance of the phone call and its finding of reavailment was reasonable.

[10] Finally**,** the Respondent argues that the lack of evidence of subjective fear was a sufficient basis to reject the Applicant's claim.

[11] The alleged breach of procedural fairness is reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339. The RAD's findings of reavailment and lack of subjective fear are reviewable on the standard of reasonableness; see the decisions in *Canada (Minister of Citizenship and Immigration) v. Nilam*, 2015 FC 1154 and *Arslan v. Canada (Minister of Citizenship and Immigration)* (2011), 16 Imm. L.R. (4th) 271 (F.C.).

[12] According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47, the standard of "reasonableness" requires that a decision be justifiable, transparent and intelligible, and falls within a range of acceptable outcomes.

[13] I agree with the submissions of the Respondent on the issue of alleged inadequate interpretation.

[14] This problem, if there was a problem, should have been raised at the first available opportunity, that is before the RPD. I refer to the decision in *Mohammadian v. Canada (Minister of Citizenship & Immigration)* (2001), 271 N.R. 91 (F.C.A.). It was not. Neither was it raised before the RAD.

[15] The most important aspect of interpretation is that a person seeking protection in a hearing before the RPD understands what is happening. In *Dhaliwal v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 157 at paragraph 67, the Court reviewed the issue of interpretation and concluded that the necessary element was "linguistic understanding between the parties".

[16] Considering the submissions of the parties, I am not persuaded that any breach of procedural fairness arose from the manner in which the interpreter discharged her mandate. It is not necessary for me to address the issue of waiver.

[17] The RPD found that the Applicant had reavailed himself when he returned to Ethiopia in 2014. He returned to Ethiopia in between jobs working at sea in 2014 and 2015. The record is unclear whether he visited Ethiopia in the course of his employment or only in between his two employment contracts.

[18] The RAD found that the RPD had not erred in using the term "reavailment". Specifically, it found that the RPD had used the term to refer to the Applicant's voluntary return to Ethiopia in the context of credibility findings. The Applicant argued before the RAD that the term is only relevant during cessation proceedings. The RAD noted that the term is used by the UNHCR in a general sense and is not limited only to situations where a person has already been recognized as a refugee.

[19] I see no error by the RAD in its consideration of the issue of reavailment. I do not agree with the Applicant that the term is only relevant in cessation proceedings; see the decision in *Kostrzewa v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1449 at paragraph 26.

[20] Finally, considering the issue of subjective fear, the RAD agreed with the finding of the RPD that the Applicant's evidence about being a target of the government was too vague and that the Applicant had failed to establish this essential element of his claim.

[21] Upon reviewing the Certified Tribunal Record and considering the oral and written submissions of the parties, I am not persuaded that the Board committed a reviewable error and **that** the decision meets the standard of reasonableness referred to above.

[22] In the result, this application for judicial review is dismissed.

[23] The Applicant proposed the following question for certification:

> In a matter where inadequacy of interpretation services is not raised as an issue at the Refugee Appeal Division level, is the Applicant precluded from raising it as an issue in an Application for Judicial Review.

[24] The Respondent submits that this question has already been answered in the jurisprudence.

[25] I agree with the position of the Respondent and no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and I decline to certify the question proposed by the Applicant.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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