

Federal Court



Cour fédérale

Date: 20200114

Docket: IMM-3589-18

Citation: 2020 FC 39

Ottawa, Ontario, January 14, 2020

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

X.Y.

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of Ethiopia, who claimed refugee status in Canada. Her original claim was based on her fear of persecution by Ethiopian authorities because of her participation in an anti-government protest in 2016. The Refugee Protection Division (RPD) denied her claim. She appealed to the Refugee Appeal Division (RAD).

[2] During her RAD appeal, the Applicant's refugee claim included her fear of persecution based on her political involvement, but she also claimed to fear persecution based on her HIV status and the lack of appropriate medical care because she is HIV-positive and has breast

cancer. The RAD dismissed her appeal on July 9, 2018. The Applicant seeks judicial review of that decision.

[3] At the hearing of the judicial review application, the Applicant sought an order to protect her anonymity, asking that the decision, and all other publicly available information in the Court records, be redacted to protect her identity. The Respondent opposed this request, and argued that the Applicant had not met the test for a confidentiality order.

[4] I am satisfied that, having regard to the relevant principles set out in the governing jurisprudence, such a limited order is appropriate in this case. As will become clear below, the Applicant did not disclose her HIV status at the RPD hearing because she feared that she would face stigma within her community if this fact were to become known, and there is evidence of widespread discrimination on the basis of HIV status in Ethiopia. Such a limited order has been granted in other, similar cases: see, for example, *AB v Canada (Citizenship and Immigration)*, 2017 FC 629; *AB v Canada (Citizenship and Immigration)*, 2019 FC 165; *AB v Canada (Citizenship and Immigration)*, 2018 FC 237.

[5] The style of cause in this matter is amended so that the Applicant will be identified only by the initials X.Y.

I. Context

[6] The Applicant is a citizen of Ethiopia of Oromo ethnicity. She worked for the Ethiopian Ministry of Foreign Affairs (the Ministry) during the 1990s and early 2000s, where she claims she faced discrimination due to her ethnicity. While deployed overseas, the Applicant made

comments at her workplace that were critical of the government's treatment of people of Oromo descent in Ethiopia, and she alleges that this caused her dismissal by the Ministry.

[7] She returned to Ethiopia, and claims that two Ethiopian police officers raped her in 2002. She believes that this assault resulted in her becoming infected with HIV. Since that time, she has experienced frequent discrimination in Ethiopia because she has HIV.

[8] The Applicant states that in October 2016 she closed a kiosk she owned and operated to participate in a strike against the Ethiopian government, sometimes referred to as the Oromo uprising. Since then the authorities have been searching for her because she was perceived to be an opponent of the government. The Applicant claims she went into hiding at her sister's house, before fleeing to the United States on April 22, 2017. From there she arrived in Canada in August 2017 and submitted a refugee claim.

[9] The RPD dismissed the Applicant's claim on the basis of credibility. It found her testimony to be lacking in detail and confused regarding certain key elements of her allegations, including the timing of her interactions with the police, as well as the circumstances of her departure from Ethiopia. Overall, the RPD did not find her allegations to be supported by the evidence, and it dismissed her refugee claim. It should be noted that the Applicant did not directly raise her claim based on her HIV status before the RPD because she feared that she would face stigma from her community if this were disclosed.

[10] The Applicant appealed this decision to the RAD, and sought to introduce new evidence about: (i) her HIV status and a psychological evaluation report about her capacity to testify at the

RPD hearing, (ii) the extent of discrimination against persons with HIV in Ethiopia, and (iii) updated country condition documents on the overall situation in the country.

[11] The RAD accepted the first two categories of documents as new evidence. The RAD accepted the Applicant's explanation as to why she did not disclose her HIV status (although it noted that she did testify before the RPD that she had acquired a virus for which she was receiving retroviral therapy), and it also accepted that the Applicant had not disclosed to the RPD that her father had passed away only a few days before the RPD hearing, and that this had affected her capacity to testify. The RAD therefore accepted the evidence relating to the Applicant's personal situation as well as the documents regarding stigma and discrimination in Ethiopia related to HIV.

[12] The RAD did not accept the more general country condition documents. It found that this evidence did not indicate a change in country conditions, but rather demonstrated ongoing unrest in the country, including the targeting of perceived opponents of the government and limits on basic rights and freedoms. The evidence before the RPD was that Ethiopia had been under a 10-month state of emergency beginning in October 2016, and the further evidence the Applicant wanted to file before the RAD simply pointed to a continuation of that state of affairs.

[13] The RAD refused to convene an oral hearing, because it found the determinative issues to be the Applicant's credibility and her objective risk upon return, neither of which could be resolved with a hearing.

[14] The Applicant claimed that the RPD denied her a fair hearing by relying on an inadequate and unreliable translation, which caused the RPD to make unfounded credibility findings, and by focusing on her allegation relating to rape, without considering her state of mind at the hearing.

[15] The RAD rejected the argument based on the inadequacy of the translation, finding that while there were some issues with the quality of the translation, they were generally minor and there were substantial periods during the hearing where there appeared to be no problems with the translation. Despite the difficulties with the translation, the RAD found that the Applicant was able to relay her story.

[16] The RAD then considered the Applicant's submissions regarding the RPD's credibility findings relating to the events associated with her return to Ethiopia, including the rape allegation. The RPD had drawn negative credibility conclusions about her inability to identify the times when she went to the police, but the Applicant argued that the errors in translation had contributed to the confusion and that the negative credibility findings were therefore incorrect.

[17] The RAD found that the RPD's analysis was microscopic and unjustified. Based on the new evidence which provided context for the Applicant's inability to recall a specific date and time regarding traumatic events that took place approximately 15 years prior to her testimony, the RAD accepted the Applicant's allegations of rape and that she became infected with HIV as a result. It found the Applicant to be credible regarding these allegations, on a balance of probabilities.

[18] The RAD did not accept that the RPD had become overly focused on the rape allegations or that it failed to consider the Applicant's state of mind during the hearing. It found that the hearing had proceeded in a manner that was respectful to the Applicant. Since the RPD had not been informed of the death of the Applicant's father shortly before its hearing, or provided with any expert evidence regarding her capacity to testify or to recall events, it could not be faulted for failing to consider the impact of these things.

[19] Turning to the core of the Applicant's refugee claim that she was wanted by Ethiopian authorities, the RAD upheld the RPD's determination that she was lacking in credibility because she had been able to obtain a passport and visa. Furthermore, the Applicant had not obtained any corroborating evidence to support her claim and she had been able to leave Ethiopia through the airport using her own passport. The RAD concluded that there was insufficient evidence to support her claim that the authorities were looking for her.

[20] The RAD's analysis of this aspect of the Applicant's claim largely replicates that of the RPD. It noted that her testimony that she had gone into hiding after she was told by an Oromo police officer and a neighbour that the security forces were looking for her was contradicted by her actions in applying for and obtaining an Ethiopian passport as well as a United States visa. The RAD concluded that her engagement with government agencies ran counter to her testimony that she was in hiding.

[21] The RAD weighed the Applicant's testimony against her ability to procure a passport and visa, the absence of any corroboration of her claim, and the lack of any arrest warrant or summons. It concluded that there was insufficient evidence to support her allegation that she was

wanted by Ethiopian authorities. The RAD also noted that the objective documentary evidence suggested that low-level opponents of the government (as opposed to higher-ranking leaders) were at a greater risk of detention. This also ran counter to her narrative about her departure from the country.

[22] For all of these reasons, the RAD concluded that the Applicant was lacking in credibility with respect to the events of 2016 and her allegations that the security authorities in Ethiopia were looking for her.

[23] The RAD also rejected the Applicant's claims based on her HIV status. It noted her evidence that she had been diagnosed while in Ethiopia and that she had received treatment by a doctor at a hospital there. While the objective country evidence referred to social stigma and discrimination against people with HIV or AIDS, the RAD noted that the Applicant's personal experience was not consistent with this. She had been receiving regular treatment, support and monitoring since her diagnosis. The RAD concluded that the evidence did not support a conclusion that the cumulative effect of discrimination amounted to persecution. Furthermore, the Applicant's experience showed that she had been able to live, work, and get treatment in Ethiopia.

[24] For all of these reasons, the RAD dismissed the Applicant's appeal, and confirmed the RPD's determination that the Applicant was not a Convention refugee nor a person in need of protection.

II. Issues and Standard of Review

[25] The only issue in this case is whether the RAD decision is reasonable. This includes the questions raised by the Applicant about the RAD's treatment of the interpretation problems, its assessment of her claims about the events after October 2016, whether she has a residual profile that warrants protection, and about her fear of persecution because of her HIV status.

[26] Prior jurisprudence has confirmed that the standard of reasonableness applies to the RAD's credibility findings as well as any matters of mixed fact and law: see *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35; *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at para 25. This also applies to the RAD's consideration of whether the RPD hearing was procedurally fair: *Gebremedhin v Canada (Citizenship and Immigration)*, 2017 FC 497 at para 11

[27] When this case was argued, the leading authority on reasonableness review was *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], and its progeny. I have reviewed the recent decisions of the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Bell Canada v Canada (Attorney General)*, 2019 SCC 66, and *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*]. In view of paragraph 144 of *Vavilov*, I see no reason on the facts of this case to request additional submissions from the parties on either the appropriate standard or the application of that standard. As stated in *Canada Post* at paragraph 26, under both frameworks the result in this case would be the same.

[28] When reviewing a decision on the standard of reasonableness, *Dunsmuir* stated that the analysis was to focus on “the existence of justification, transparency and intelligibility within the decision-making process” and whether the decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law” (*Dunsmuir* at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[29] Under the *Vavilov* framework, “where reasons are provided but they fail to provide a transparent and intelligible justification... the decision will be unreasonable” (at para 136). However, *Vavilov* also confirms that “it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies” (at para 86, emphasis in original). Key elements in this analysis include whether the reasoning is rational and logical, and whether the decision is justified in relation to the relevant constellation of law and facts (*Vavilov*, paras 102 and 105).

III. Analysis

[30] The Applicant argues that the RAD made four errors: (i) it failed to address whether the translation errors at the RPD hearing affected its negative credibility findings; (ii) it made unreasonable findings regarding the post-October 2016 events; (iii) it failed to examine the Applicant’s residual profile as an Oromo woman who had been critical of the government; and (iv) its findings about her HIV status are unreasonable because they were made without regard to the objective documentation.

[31] These will be addressed in turn.

A. *Translation errors*

[32] The Federal Court of Appeal in *Mohammadian v Canada (Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 FC 85 [*Mohammadian*], found that “interpretation provided to applicants before the Refugee Division must be continuous, precise, competent, impartial and contemporaneous” (at para 4). The standard of interpretation is high, but does not need to be perfect; the key is whether there was linguistic understanding: *R v Tran*, [1994] 2 SCR 951. Put another way, the question is whether the individual was allowed to tell their story and to be understood: *Batres v Canada (Citizenship and Immigration)*, 2013 FC 981 at paras 10-13 [*Batres*].

[33] However, if there are errors in translation which are demonstrated to be material to the RPD’s credibility findings, the decision may be overturned: *Batres* at para 12; *Huang v Canada (Citizenship and Immigration)*, 2003 FCT 326 at para 16. The errors must be serious, and they must have affected the individual’s ability to answer questions. A key question is whether the errors were material to the tribunal’s findings: *Gebremedhin* at para 14. If a breach of this standard is demonstrated, it is not necessary to show actual prejudice: *Mohammadian* at para 4; *Batres* at para 13.

[34] The Applicant submits that the RAD did not engage with the essence of her argument on this point. She had claimed that the translation errors were material and affected the RPD’s credibility findings. The Applicant points to portions of the transcript, which show that the translator made mistakes both in relaying the RPD’s questions to the Applicant, and in translating her answers to key questions. The problems related, in particular, to the timing of her

visit to the police station after her return to Ethiopia in 2002. The RPD made specific findings that the Applicant's narrative lacked credibility because she was unable to recall specific dates or to answer its questions about these events.

[35] In addition, the Applicant points to portions of the transcript that show occasions when the translator went beyond the role of interpreting questions and answers, and tried to explain the underlying basis for a question or answer.

[36] I am in agreement with the Applicant that the RAD's analysis of this issue is lacking, in that it does not address the key question from the jurisprudence: whether the translation errors affected the RPD's credibility findings in a material way. The difficulty for the Applicant on this point, however, is that the RAD rejected the RPD's findings on other grounds, and it ultimately concluded that the Applicant's claims were credible on a balance of probabilities.

[37] The Applicant points to translation errors regarding her interactions with the police and her answers to questions on this issue. She also argues that the credibility findings regarding her treatment overseas, and upon her return to Ethiopia in 2002, reflected translation errors. The RPD did find her to be lacking in credibility in part based on her answers to these questions. However, the RAD found the RPD's analysis to be microscopic and unreasonable, and it reversed the findings on these specific points. It noted that these findings are not determinative, since the Applicant's refugee claim rests on the events that occurred after October 2016.

[38] There is no evidence about any other translation errors relating to any other findings by the RPD. On the evidence before the Court, it is difficult to see how any error in addressing the

translation issue affected the outcome in a way that is prejudicial to the Applicant. In light of this, I cannot accept that the inadequacies of the RAD's analysis of the translation issue are sufficient to render the decision unreasonable.

B. *The RAD's findings about the post-October 2016 events*

[39] The RAD found that the Applicant's narrative about the events that followed her involvement in the one-day strike in support of the Oromo uprising in October 2016 was not credible for three reasons: (i) she obtained a passport and visa while she was being sought by the authorities; (ii) the lack of corroborative evidence that she was in hiding undermined her credibility; and (iii) the Applicant was able to leave Ethiopia using her own passport, while the authorities were supposedly searching for her.

[40] The RAD noted that the Applicant had said she went into hiding from October 2016 until she left Ethiopia in April 2017 because she was told by an Oromo police officer, as well as a neighbour, that she was wanted by the security forces. During this period the Applicant obtained an Ethiopian passport as well as a United States visa, both issued in February 2017.

[41] The RAD noted that the RPD had examined the objective documentary evidence about the issuance of passports in Ethiopia, which indicates that both fingerprints and photographs are taken, and that it had found that her explanation for engaging with authorities and risking discovery by security agencies was not credible. The RAD concluded that the Applicant's testimony about being wanted by security forces ran counter to her actions in applying for and obtaining a passport and visa in person. Her engagement with government agencies during a period in which she said she was in hiding undermined her credibility.

[42] The RAD also found the Applicant's credibility was impugned by the lack of corroborating evidence from the police officer or neighbor who told her she was wanted by the authorities, or from her sister with whom she had been in hiding for a period of six months. It also reviewed the documentary evidence regarding the ability of opposition members to leave Ethiopia. On the basis of all of this, the RAD concluded that there was insufficient evidence to support the Applicant's claim that she was wanted by the authorities.

[43] The Applicant contends that the RAD's conclusions are not supported by the evidence and amount to implausibility findings. She argues that the RAD has found contradictions where none exist. The Respondent submits that the RAD's findings on these matters are supported in the evidence, and it is not the role of the Court to re-weigh the evidence.

[44] I agree with the Applicant that the RAD's findings on her engagement with the authorities and her exit from Ethiopia amount to plausibility findings, because there is no true contradiction in the evidence. For example, the fact that Ethiopian passport authorities take fingerprints and photographs does not directly contradict the Applicant's story that she obtained a passport while she was in hiding. Rather, it raises a question as to why she would run the risk if she was truly wanted by security authorities.

[45] The Applicant cites *Tegene v Canada (Citizenship and Immigration)*, 2018 FC 787 [*Tegene*], where Justice George Locke set aside a decision of the RPD because its treatment of supposed inconsistencies in the testimony of the applicant was unreasonable. Specifically, Locke J. made the following findings:

- the RPD failed to consider the applicant's explanation for not seeking corroborative evidence from family members who were still in Ethiopia; she had testified that she did not want to put them in danger by asking them to comment on political issues because Ethiopian authorities were known to intercept such communications;
- the RPD misinterpreted her evidence about being in hiding, because she had never said she was in hiding all of the time. It was not inconsistent for her to have sought the assistance of a traditional healer, or to have left her home on occasion; she had stated that she left home regularly, and therefore the RAD erred in finding this to impugn her credibility; and
- the RPD found it implausible that the applicant had exited Ethiopia using her own passport, if she was actually being sought by the authorities; this finding was not justified by the evidence.

[46] I agree with the Applicant that the *Tegene* decision is relevant and persuasive in relation to the specific findings made by the RAD in this case. Although there is evidence that Ethiopian passport authorities take fingerprints and photographs, there does not appear to be any evidence to demonstrate that this information is regularly or systematically shared with security forces. Furthermore, the RAD does not refer to the abundant evidence in the record regarding the difficulty that the passport authorities have in administering their system, and the gaps in information sharing which have been documented.

[47] In addition, the RAD does not explain why it discounts the Applicant's evidence about why she did not seek out corroborative evidence from anyone in Ethiopia. Her explanation – that

seeking such statement would put them at risk – is consistent with the objective documentary evidence, and with the finding in *Tegene*.

[48] Similarly, the RAD's finding that the Applicant could not have left Ethiopia through the airport if she was actually wanted by the authorities is not supported by the evidence. The evidence does indicate that this may have posed a risk to the Applicant, but I agree with the statement of Locke J. in *Tegene* at paragraph 18, that the evidence "goes no further than noting a "risk". It is inherent in a risk that the eventuality in question may not arise."

[49] For these reasons, I find that the reasoning of the RAD on these questions is unreasonable. It does not reflect the binding jurisprudence that counsels against making implausibility findings except in the clearest of cases (*Valtchev v Canada (Citizenship and Immigration)*, 2001 FCT 776 at para 7), and in particular that credibility findings must be based on reasonably drawn inferences rather than conjecture or speculation (*Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757 at para 62). While it cannot be disputed that the role of the Court in reviewing a credibility finding is limited, for the reasons set out in *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319, it is equally true that the Court has a supervisory role to ensure that the reasoning and analysis of the evidence is both justifiable and justified (see *Vavilov*, at para 86).

[50] The findings of the RAD in relation to the Applicant's credibility are not explained in light of her testimony and the more general documentary evidence. The RAD has reached a number of conclusions by drawing inferences about what is reasonable or plausible, without

explaining why it reached these findings based on the evidence in the record. This is not reasonable.

C. *The failure to consider the Applicant's residual profile*

[51] The Applicant contends that the RAD had an obligation to consider her residual profile as a dissenting Oromo who had expressed views in support of the Oromo minority and had criticized the government in her previous position in the embassy overseas. Once the RAD made credibility findings that were different from those made by the RPD, it had an obligation to consider the legal implications of these findings.

[52] The Respondent submits that the RAD is limited to a consideration of the grounds of appeal that are argued before it. Here, the Applicant's focus was on the events that had occurred upon her return to Ethiopia in 2002, and then the events that followed her closing of her shop in October 2016. The RAD cannot be faulted for failing to analyze a ground of appeal that was not fully argued before it.

[53] The Applicant's written submissions to the RAD mention the issue of her residual profile, noting that, "given the deteriorating human rights situation in Ethiopia, particularly the recent round of crackdown [*sic*] on the Oromo community, the [Applicant] has a residual profile of a person who could be targeted by the government due to her imputed political opinion and Oromo ethnicity." The Applicant submits that the RAD's failure to analyze this ground renders the decision unreasonable.

[54] I do not find that this aspect of the RAD's decision unreasonable. The Applicant points to the RAD's findings that differ from those of the RPD, but the difficulty for the Applicant is that these findings do not relate to her residual profile. It is not disputed that the Applicant is Oromo, and the RAD clearly considers the evidence she has brought forward about both her experience of persecution in Ethiopia, and her fears of returning. In the end, however, the RAD concludes that the evidence is simply insufficient to support her claims. At paragraph 39, the RAD concludes: "While the evidence does refer to the ongoing human rights situation in Ethiopia, I find that the [Applicant] does not have a profile such that she would face a serious possibility of persecution if she were to return."

[55] Although the analysis is not detailed, the decision does indicate that the RAD considered the Applicant's residual profile, but it was not persuaded that she was wanted by any agent of the Ethiopian government. There was no basis for it to find that her residual profile warranted refugee protection.

D. *Findings based on HIV status*

[56] The Applicant argues that the RAD's analysis of the new evidence regarding her HIV status is unreasonable because it ignored her evidence that she had experienced social stigma and discrimination while in Ethiopia. The RAD's conclusion that her own experience did not support a finding that she might face persecution in Ethiopia was made with reference only to some of the evidence, while ignoring other, directly contradictory, material in the record.

[57] The RAD noted the Applicant's evidence that she had been diagnosed and received medical treatment on an ongoing basis while in Ethiopia. It referred to the objective country

condition evidence about social stigma and discrimination, but found that this evidence did not support a conclusion that the cumulative effect of the discrimination rose to the level of persecution. Moreover, the RAD concluded that “the testimony of the [Applicant], her own personal experience, directly contradicts this evidence. The [Applicant] has been receiving regular treatment, support, and monitoring since her diagnosis in 2011” (at para 37).

[58] The Applicant submits that this is an unreasonable finding, because it does not refer to the Applicant’s sworn affidavit before the RAD, which stated that she had experienced discrimination and stigma, and feared that she would experience violence because of her HIV status if she returned to Ethiopia. The Applicant stated that “I was told I was not allowed to share food or utensils [or] hug others as I would transmit the virus to others. I became very anxious around people. I chose to isolate myself.” This was not referred to by the RAD.

[59] I find that the RAD’s conclusion on this issue is unreasonable, given its failure to make any reference to the evidence of the Applicant on this particular point. The fact that she received medical care while in Ethiopia is relevant but not determinative. The RAD’s conclusion that the Applicant “was able to live, work, and get treatment and mental health support in Ethiopia” (at para 38) is contradicted by her evidence. The Applicant’s evidence is also consistent with the abundant country condition documentation about the treatment of people with HIV or AIDS in Ethiopia (see *XY v Canada (Citizenship and Immigration)*, 2018 FC 213). The RAD’s failure to mention this aspect of the Applicant’s evidence, combined with its specific finding quoted above that she was able to live and work in Ethiopia, makes it impossible to know whether the Applicant’s evidence was discounted or ignored. This is not reasonable.

IV. Conclusion

[60] For all of these reasons, I find the RAD decision to be unreasonable. I am therefore granting the application for judicial review. The decision is overturned and the matter is returned to the RAD for reconsideration by a different panel.

[61] There is no question of general importance for certification in this case.

JUDGMENT in IMM-3589-18

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended, with immediate effect, so that the name of the Applicant is replaced with the initials X.Y.
2. The Application for judicial review is allowed.
3. The decision of the Refugee Appeal Division is overturned. The matter is referred back to the Refugee Appeal Division for reconsideration by a different panel.
4. There is no question of general importance for certification.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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