

Federal Court



Cour fédérale

Date: 20190208

Docket: IMM-547-18

Citation: 2019 FC 167

Ottawa, Ontario, February 8, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

FIREW HAILE KIDANE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Firew Haile Kidane, seeks judicial review of a decision (Decision) of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada. The RPD concluded that the Applicant was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The application for judicial review is brought pursuant to subsection 72(1) of the IRPA.

[2] For the reasons that follow, the application will be allowed.

I. Background

[3] The Applicant's personal identity and his national identity as an Ethiopian citizen of Amhara ethnicity are not in issue. The determinative issue before the RPD was the Applicant's credibility.

[4] The Applicant sought refugee protection in Canada because he feared persecution by the Ethiopian government primarily due to his activities as a Pentecostal gospel preacher and his opposition to the ruling government in Ethiopia. The Applicant studied theology at the Ethiopian Full Gospel bible college in Addis Ababa, Ethiopia and travelled widely to preach as a missionary evangelist.

[5] The Applicant alleges that he was stopped while driving to visit friends by three Ethiopian state security agents on or about February 20, 2016. The agents demanded that he drive to a police station in Addis Ababa. The Applicant asked the agents to produce a warrant and, in response, one of the agents beat and insulted the Applicant and said "you will come with us". At the police station, the Applicant was accused of associating with opposition members of the Ethiopian diaspora and of representing their views in Ethiopia. He was also accused of criticizing the government under the guise of preaching the gospel. The Applicant denied the allegations and was held at the police station until February 29, 2016, during which time he claims he was badly beaten with a rubber stick on his head and legs.

[6] The Applicant fled Ethiopia to the United States with his fiancée on March 28, 2016. However, the relationship ended and the Applicant came to Canada on November 3, 2016 as he has relatives living in Canada. He made a refugee claim under the Safe Third Country Agreement.

[7] Since leaving Ethiopia, the Applicant has participated in two protest rallies, one in the United States and one in Canada, and in a fundraising event in Canada in support of a television program critical of the Ethiopian government. He alleges that he would be persecuted by the Ethiopian government as a result of these activities should he return to Ethiopia.

[8] The Applicant filed a Basis of Claim form and an amended Basis of Claim. For ease of reference in this judgment, I will refer to the two forms collectively as the Applicant's BOC.

[9] The hearing before the RPD took place over three days (July 28, 2017; August 23, 2017; September 20, 2017). The second day of the hearing was abandoned due to inadequate translation services. Of note is the fact that the interpreter that day had also provided translation services on the first day of the hearing.

II. Decision under Review

[10] The Decision is dated December 12, 2017. The RPD refused the Applicant's refugee claim principally because the Applicant was not credible. The panel found that there were material inconsistencies between his testimony before the RPD and the allegations set out in his BOC.

[11] The RPD noted that the Applicant's fear of persecution by the state security forces of the ruling government in Ethiopia was based on his Amhara ethnicity, his religion as a Pentecostal gospel preacher and his real and perceived opposition to the government. The Applicant also feared persecution in Ethiopia due to his participation in protest rallies and other political events in Canada and the United States.

[12] The RPD panel drew four negative inferences regarding the basis of the Applicant's claim and his credibility, as follows:

1. At the hearing, in response to questioning by the panel, the Applicant testified that he had been charged in Ethiopia with communicating with foreign elements and speaking against the government when preaching. The Applicant stated that he appeared in court on February 28, 2016, on which date the judge released him from detention but stated that he would have to answer the charges against him. The RPD drew the Applicant's attention to the fact that he had not mentioned either that he had been charged or had appeared in court in his BOC. The panel rejected the Applicant's explanation as unreasonable and stated:

[16] In the panel's view, the claimant's testimony that he was formally charged and appeared in court, and was ordered released by the court, goes to the heart of his claim that he was detained by the authorities and maltreated for allegedly having aligned himself with the opposition diaspora while abroad and preaching anti-government rhetoric in church at home. The panel expects that the claimant would have included these details in his BOC, and draws a negative inference about his alleged arrest and detention from their absence. The panel finds, on a balance of probabilities, that the claimant was never formally charged, did not appear in court on 28 February 2016 in answer to charges against him, and was not ordered released from detention by the court on that day.

2. The RPD questioned the Applicant about his date of release from detention. The panel referred to a document submitted by the Applicant entitled "Evidence of imprisonment time", dated February 29, 2016 and signed by an official of the Addis Ababa police commission. The Applicant testified that he asked for the letter on February 28, 2016, the date of his release from jail. The panel drew the Applicant's attention to the fact that this testimony contradicted his declaration in his BOC that he was kept at the police station until February 29, 2016. When further questioned, the Applicant stated that he was

released on February 29, 2016 and had made a mistake in referring to February 28, 2016. The panel rejected the Applicant's explanation and drew a further negative credibility inference.

3. In his BOC, the Applicant stated that he had been badly beaten with a rubber stick on his head and legs during his detention. At the hearing, the RPD repeatedly asked the Applicant about his treatment while in detention. He described the treatment as including abuse, attacks and the withholding of food delivered by family members and friends. When asked to describe the abuse and attacks suffered, he stated that the police would insult and abuse the detainees. The panel reminded the Applicant that, in his BOC, he had described being hit on the head and legs while in detention. The RPD did not accept the Applicant's explanation that he had had a very bad experience in jail which included physical violence. The Applicant did not mention being beaten by a rubber stick on the head and legs and the RPD drew a further negative credibility inference based on this omission.
4. Finally, the RPD asked the Applicant if he had any further involvement with the Ethiopian authorities following his release from detention. He testified that he did experience further problems, consisting of telephone calls from the authorities warning him to cease his activities and a subsequent meeting with the authorities during which they again warned him not to have any connection with people abroad. The panel drew the Applicant's attention to the fact that there was no mention in his BOC of interactions with the Ethiopian authorities following his detention. In response, he stated that he had had little time to submit his BOC after arriving in Canada and that his lawyer was too busy for the Applicant to keep adding details to his narrative. The RPD rejected the Applicant's explanation as unreasonable. The RPD stated that the Applicant's testimony that he was contacted and threatened by the Ethiopian authorities following his release from detention was material to his claim. The panel concluded that the Applicant had had no contact with Ethiopian authorities following his release from detention and drew a fourth negative credibility inference.

[13] The RPD concluded this section of its analysis of the Applicant's claim stating that he had not established that he had been "arrested and detained by government authorities for suspected involvement with the opposition diaspora or for preaching against the government during his sermons, and that he is not being sought on that basis in Ethiopia".

[14] The RPD considered a number of documents submitted by the Applicant including letters from a friend of his and from his brother-in-law, and a recommendation from the Gate of Hope Church, Burnaby, British Columbia. The panel concluded that the documentary evidence did not overcome its credibility concerns.

[15] The RPD then reviewed the Applicant's *sur place* claim based on his participation in protest rallies and other political activities in the United States and Canada. Specifically, the Applicant stated that he had attended a protest rally in Washington, D.C., on September 19, 2016, and a protest rally in Toronto, Ontario on September 20, 2017. He had also attended a fundraiser for an independent television program in Canada that was critical of the Ethiopian government. The panel considered whether the Applicant's participation in these events had or would come to the attention of the Ethiopian authorities and whether, as a result, the Applicant would face a serious possibility of persecution upon any return to Ethiopia.

[16] The panel concluded that the Applicant had failed to demonstrate that his attendance at these events made him a target of the Ethiopian authorities. The Applicant had received no indication that he had been identified by the Ethiopian government due to his activities and the panel found the Applicant's concern in this regard speculative. Further, based on its negative credibility findings, the RPD noted that the Applicant was not someone who was known to the Ethiopian government. The panel rejected the Applicant's *sur place* claim to refugee protection based on his activities in the United States and Canada.

[17] Finally, the RPD found that the Applicant's Amhara ethnicity was insufficient to create a residual risk profile. Based on the documentary evidence before the panel, the risk to persons of Amhara ethnicity in Ethiopia was limited to those who were politically involved.

III. Issues

[18] The Applicant has raised two issues in this application:

1. Was the Applicant's right to procedural fairness breached because he was not provided with adequate translation services during his hearing before the RPD?
2. Was the Decision reasonable?

IV. Standard of Review

[19] The issue of procedural fairness raised by the Applicant will be reviewed for correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56). The review focuses on the procedures followed in arriving at a decision and not on the substance or merits of the case in question. I must assess whether the Applicant's right to a fair process was violated due to inaccurate translation at the RPD hearing (*Mah v Canada (Citizenship and Immigration)*, 2013 FC 853 at para 9 (*Mah*)).

[20] The standard of review for questions of credibility and assessment of the Applicant's *sur place* evidence by the RPD is reasonableness (*Wang v Canada (Citizenship and Immigration)*, 2017 FC 19 at para 12; *Li v Canada (Citizenship and Immigration)*, 2011 FC 941 at paras 14-15; *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 22 (*Rahal*)).

The review of a tribunal's credibility findings against a standard of reasonableness requires me to give significant deference to the findings of the tribunal, recognizing that "the role of this Court is a very limited one because the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence" (*Rahal* at para 42).

V. Analysis

1. *Was the Applicant's right to procedural fairness breached because he was not provided with adequate translation services during his hearing before the RPD?*

[21] The Applicant submits that he was denied procedural fairness due to inadequate interpretation services at his RPD hearing. He states that the inaccurate translation of his testimony significantly affected the panel's assessment of his credibility, an assessment that was fatal to his refugee claim. The Applicant notes that the interpreter from the first day of his hearing was found, on the second day, to be providing inadequate translation services. As a result, the second hearing day was cancelled and the testimony from that day disregarded. The Applicant argues that this alone is a signal that the interpretation services provided to him on the first day of the hearing were questionable. The Applicant also makes detailed submissions regarding three alleged errors made by the translator that first day, each of which he relates to significant adverse credibility findings made by the RPD. The Respondent disagrees with the Applicant's assessment of the impugned translation services and with the impact of the translation of the Applicant's testimony on the RPD's credibility assessment.

[22] I will address the specific arguments of the parties later in this analysis. First, I will set out the established standards against which the adequacy of translation services at an RPD hearing must be assessed.

[23] The right of applicants to competent and accurate translation during their RPD hearing is protected by section 14 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11 (Charter)*. In *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at paragraph 4 (*Mohammadian*), the Federal Court of Appeal held that the interpretation provided to applicants must be “continuous, precise, competent, impartial and contemporaneous”. The Court of Appeal also held that it is not necessary for applicants to show they have suffered actual prejudice as a result of a breach of the required standard of interpretation for the Court to interfere with the RPD’s decision. However, the right to adequate translation is not the right to perfect translation. The issue is whether the translation resulted in a failure of “linguistic understanding” (*Mohammadian* at paras 6, 16). While an applicant is not required to prove actual prejudice due to an error of translation, the error must be material to the RPD’s findings (*Batres v Canada (Citizenship and Immigration)*, 2013 FC 981 at para 12).

[24] In support of his arguments regarding the inadequacy of the translation provided at the RPD hearing, the Applicant relies on an affidavit submitted by Mr. Liyu Solomon Kidane (no relation to the Applicant), an articling student in his lawyer’s office. I have not been provided with the credentials of Mr. Kidane to assess the translation other than the fact that he is a native Amharic speaker and pursued his legal education in Ethiopia and Canada. He is not a certified

interpreter and translator, a professional designation that requires significant linguistic training (for contrast, see *Mah* at para 5). With every respect to Mr. Kidane, I must factor his lack of formal interpretation training into my consideration of his commentary and alternate translation of the Applicant's testimony at the hearing.

[25] The Applicant first argues that the translator erred in translating the Amharic word "*kise*" as a formal charge, leading in part to the panel's first negative credibility inference based on the Applicant's failure to state in his BOC that he had been formally charged when detained by the Ethiopian authorities. The Applicant argues that the word *kise* has many meanings, including that of an allegation, and that the interpretation of the word depends on the context in which it is used.

[26] I have reviewed the transcript (Transcript) from the first day of the RPD hearing and the context in which the alleged mis-translation occurred. The relevant exchange between the panel and the Applicant as reflected in the Transcript and Mr. Kidane's proposed alternate translation of the exchange is as follows:

MEMBER: Were you ever formally charged with a crime?

CLAIMANT: Yes, they charged me.

[KIDANE: Yes, they accused me.]

MEMBER: What did they charge you with?

CLAIMANT: I was charged with communicating with foreign elements opposed to the government and during my preaching also I said some things that were not favourable to the government.

[KIDANE: For my preaching that incite protest against the government and sending information to foreign based opposition about the government.]

[27] If, as the Applicant contends and as Mr. Kidane states, the word *kise* must be viewed in context to determine its accurate translation, I see no error in the translation provided to the panel given the context of the questioning. The Applicant's use of the word *kise* in response to the member's direct question as to whether he had been charged would have been translated contextually as "charged".

[28] Second, the Applicant submits that the interpreter erred in translating the RPD's questions regarding his mistreatment during his detention in Ethiopia. The submission focuses on the RPD's negative inference from the Applicant's omission to testify to any details of his mistreatment in contrast to the specific information contained in his BOC. The panel repeatedly asked the Applicant to describe his treatment while in detention. Mr. Kidane states that the term "treatment" was interpreted as a more general inquiry as to the "conditions" experienced in detention. Mr. Kidane also states that the panel's questions regarding the nature of the attacks against the Applicant were translated as "beatings" or that he was "beaten" (and not attacked).

[29] It is clear from the Transcript that the panel questioned the Applicant at length regarding his treatment in detention, making a number of attempts to elicit details from him. The Applicant replied in each instance that he had been abused, insulted and ridiculed. Mr. Kidane points out places in the testimony where the Applicant referred to the beating of prisoners which was interpreted as abuse. However, the panel followed up in each instance asking for details of the abuse. The panel returned to this issue, summarized the Applicant's testimony and asked pointedly why he had failed to reference the details of his treatment as set forth in the BOC. The Applicant's response again provided no details, either in his response as translated at the hearing

or in the alternate translation proposed by Mr. Kidane. Whether the panel's questions were interpreted as using the word "attack(s)" or "beating(s)" caused no confusion and does not explain the Applicant's unresponsive testimony.

[30] Finally, the Applicant refers to the adverse credibility finding drawn by the RPD based on his apparent inconsistent testimony regarding the date of his release from detention. There is no doubt that there was confusion during the hearing as to whether the Applicant's date of release was February 28 or February 29, 2016. The translation of the Applicant's initial response to the panel's question regarding his date of release is ambiguous. The questioning then goes back and forth in various attempts to correct and explain the date. In my opinion, this line of questioning by the panel and the conclusions it drew from the Applicant's responses do not give rise to an issue of translation. They are better cast as issues affecting the reasonableness of the Decision.

[31] In summary, having reviewed the submissions of the Applicant and the Respondent, the commentary and alternate translation of excerpts from the Transcript offered by Mr. Kidane on behalf of the Applicant, and the Transcript itself, I am satisfied that the translation services provided to the Applicant did not result in any linguistic misunderstanding between the Applicant and the RPD panel. I find that the Applicant has not established real and significant errors in the translation such that his right to adequate translation during the RPD hearing was breached.

2. *Was the Decision Reasonable?*

[32] The Applicant submits that the RPD's adverse credibility findings were based on the inadequate translation of his testimony from the first day of the hearing and on non-material omissions from his testimony. As such, they were unreasonable findings. The Applicant also submits that the RPD failed to consider his evidence as a whole. Rather, the panel parsed through the evidence in search of support for its adverse findings. Finally, the Applicant argues that the RPD erred in its assessment of his *sur place* claim as the panel failed to support its findings that the Applicant's activities had not come to the attention of the Ethiopian authorities and that the Ethiopian government targeted only well-known political figures.

[33] The Respondent submits that the RPD made no material errors in its assessment of the Applicant's testimony and evidence. In addition, the Respondent argues that the Applicant has raised no serious issue with the RPD's *sur place* findings as the Applicant has mischaracterized the panel's conclusions.

[34] As the translation services provided to the Applicant during his RPD hearing were adequate, the reasonableness of the Decision must be assessed on the findings set forth by the RPD and not on any implicit flaw based on improper translation of the underlying evidence.

[35] For the reasons set forth in this section, I find that the Decision was not reasonable. I am mindful of the role of the RPD as the decision-maker best placed to make credibility findings and the need to accord real deference to its findings. However, certain of the panel's findings either

do not reflect the evidence in the record or are not adequately supported by reasons in the Decision.

[36] The RPD made four critical adverse credibility findings, leading to its conclusion that the Applicant had not established the allegations raised in his BOC. The panel pointed to inconsistencies and omissions in the Applicant's evidence that went to the heart of his claim. The RPD's core conclusion was as follows:

[34] Based on the evidence, the panel accepts that the claimant is a missionary evangelist and that he has preached the gospel in Ethiopia and abroad. However, in light of the noted credibility concerns, the panel finds, on a balance of probabilities, that the claimant was not arrested and detained by government authorities for suspected involvement with the opposition diaspora or for preaching against the government during his sermons, and that he is not being sought on that basis in Ethiopia.

[37] I will address each of the RPD's four negative credibility findings against this conclusion.

[38] The RPD first questioned whether the Applicant had been formally charged and taken before an Ethiopian court as a result of his detention by the authorities on February 20, 2016. The panel stated that the Applicant's testimony was generally consistent with his BOC with respect to being pulled over by the police and ordered to the police station, but there was no mention in the BOC that the Applicant had been formally charged and had appeared in court prior to his release. The RPD found that the Applicant's testimony at the hearing that he was charged by the Ethiopian authorities, appeared in court and was released from detention by the presiding judge was not credible in light of the omission of these details from the BOC. The panel stated that this testimony went to the heart of the Applicant's claim that he was detained

and mistreated for having aligned himself with the opposition diaspora and for preaching anti-government rhetoric in Ethiopia. As such, the RPD would have expected these details to be included in the BOC. The panel stated:

The panel finds, on a balance of probabilities, that the claimant was never formally charged, did not appear in court on 28 February 2016 in answer to charges against him, and was not ordered released from detention by the court on that day.

[39] In reaching this conclusion, the RPD failed to address the document entitled “Evidence of imprisonment time” (Arrest Certificate) issued by the Addis Ababa police commission. The Arrest Certificate states:

Mr. Firew Haile Kidane was arrested in our division for investigation with the charge of association with the oppositions from February 20, 2016 to February 29, 2016. He was released on February 29, 2016.

[40] The Respondent correctly points out that the RPD did not wholly disregard the Arrest Certificate in the Decision as it relied on the document for purposes of its second credibility finding (discussed below). However, this submission does not explain why the panel failed to address the content of the Arrest Certificate which, on its face, contradicted two of its central findings: (1) that the Applicant was arrested by the Ethiopian authorities, a key element of its first negative credibility inference; and (2) that he was detained by government authorities, a key element of its core conclusion.

[41] In my view, the RPD was required to consider the Arrest Certificate in the Decision. The document was a relevant and material part of the Applicant’s evidence. The panel made no finding disputing the authenticity of the Arrest Certificate. In fact, the panel relied on the

document to contradict the Applicant's testimony regarding his date of release. The RPD's failure to engage with the substance of the Arrest Certificate is by itself a reviewable error as it undermines the RPD's credibility analysis and its core conclusion (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17). The Arrest Certificate may not have been sufficient to alter the RPD's conclusion but, without any analysis of the document, the panel's first negative credibility finding and core conclusion were not intelligible.

[42] The Applicant also argues that the RPD ignored an amendment to his BOC made on July 28, 2017. The amendment removed the words "and court" from the Applicant's statement that "they kept me in the station until February 29, 2016 without any access to a lawyer [and court]". The Applicant argues that the removal of these two words implied that he had been brought to court. The Respondent argues that such an implication is not sufficient to render the RPD's adverse credibility finding unreasonable. While I agree with the Respondent that the amendment alone is not a sufficient indication of reversible error, when read with the statement in the next following paragraph of the BOC that the Applicant was released on bail, the amendment suggests involvement by a court in his release process.

[43] I return to the RPD's core finding that the Applicant did not establish that he had been arrested and detained by the Ethiopian authorities for opposition activity. I find that the RPD's failure to substantively address the Arrest Certificate together with its lack of focus on the actual wording of the Applicant's BOC rendered its core conclusion unreasonable.

[44] In addition, the RPD's treatment of the apparent contradiction in the Applicant's release date (February 29 and not February 28, 2016) was unduly harsh and strayed firmly into the microscopic. The Applicant's misstatement of the date during his testimony appears to have been an honest mistake. His testimony is confirmed by the Arrest Certificate which refers to the Applicant's release on February 29, 2016. The Transcript from the hearing denotes initial confusion as to the date but the confusion was quickly resolved and there is little question that the date of release was February 29, 2016. The RPD's reliance on this mistake to support its second adverse credibility finding was unreasonable.

[45] The RPD's findings regarding the inconsistencies in the Applicant's evidence regarding his treatment while in detention were thorough and reasonable. The omission of any detail in his testimony of the beatings he recounted in his BOC called into question an important element of his narrative. The panel questioned the Applicant repeatedly on this issue and made no reviewable error in drawing its adverse credibility inference.

[46] I make the same finding regarding the Applicant's evidence of further involvement with the Ethiopian authorities following his release from detention. The panel made no error in concluding that this aspect of the Applicant's evidence was material to his claim that he would face further arrest and torture were he to return to Ethiopia. The Applicant's explanation for his omission from his BOC of this aspect of his claim was not persuasive and the RPD's finding that the Applicant had no contact with Ethiopian authorities following his release was reasonable.

[47] Having considered the RPD's adverse credibility findings as a whole against its core conclusion that the Applicant had not established that he had been arrested and detained by the Ethiopian authorities, I find the RPD's Decision unreasonable. There is evidence in the record that the Applicant was arrested and detained in Ethiopia. The panel either substantively ignored this evidence in the case of the Arrest Certificate or provided little analysis in the case of the content of the Applicant's BOC. The uncertainty surrounding the alleged mistreatment of the Applicant while in detention and the absence of post-release contact with the Ethiopian authorities do not overcome the panel's errors.

[48] The Applicant also submits that the RPD's analysis of his *sur place* claim was unreasonable. As the panel's credibility findings influenced its assessment of the *sur place* claim, I will not address the Applicant's submissions in this regard. A reassessment of the Applicant's *sur place* arguments will necessarily be made on redetermination of his refugee claim.

VI. Conclusion

[49] The application will be allowed as the Decision was unreasonable.

[50] No question for certification was proposed by the parties and none arises in this application.

JUDGMENT in IMM-547-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division (RPD) is set aside and the matter remitted for redetermination by a different panel of the RPD.
2. No question of general importance is certified.

“Elizabeth Walker”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-547-18

STYLE OF CAUSE: FIREW HAILE KIDANE v THE MINISTER OF
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