Federal Court  Cour fédérale

Date: 20220607

Docket: IMM-4271-21

Citation: 2022 FC 845

Toronto, Ontario, June 7, 2022

PRESENT: Madam Justice Go

BETWEEN:

KIDANE BERAKI TEKLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Kidane Beraki Tekle, is a citizen of Eritrea currently residing in Ethiopia. He was granted refugee status by the United Nations High Commissioner for Refugees [UNHCR] in July 2016 while living in Sudan.

[2] In 2006, when the Applicant was about 18 years old, he was recruited by the Eritrean government to serve mandatory and indefinite national military service. A year later, he requested leaves to visit his family, but his requests were ignored. In October 2007, he escaped from the military and hid in his hometown. A few months later, the Applicant was caught by the military who had support from the local government authorities.

[3] In February 2008, the military put him in jail, without any trial, at the notorious Adi-Arde Prison Center, where he was constantly exposed to corporal punishment and torture by military personnel and commanders, including being made to walk on bare feet on broken glass.

[4] After finishing his prison time in June 2008, the Applicant was sent to Bisha State Mining to continue his involuntary national service. Cowed with fear of being detained and punished again, he quietly stayed in the national service until March 2016. During this time, he served as a night-guard for the mine. He was disciplined – including physical punishments – for minor mishaps. Eventually he was sent to work at the Eritrean-Ethiopian border.

[5] In March 2016, one of the superior officers in the military asked the Applicant to be a member of the ruling party, the Peoples Front for Democracy and Justice [PFDJ], and to sign an oath swearing total allegiance to PFDJ. When the Applicant refused to do so, his superior told him he would be detained.

[6] The Applicant decided to leave Eritrea. On about March 28, 2016, he crossed the Eritrean-Ethiopian border, before fleeing to Sudan on foot. He remained in Sudan until 2019,

when the political situation deteriorated and his life was threatened. He moved back to Ethiopia and has been living there since.

[7] The Applicant applied to resettle in Canada through the Convention Refugee Abroad Class or the Country of Asylum Class, under s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, as well as ss. 145 and 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The Applicant fears the Eritrean government, which conscripted him into the military. In a letter dated June 7, 2021, an Officer at the High Commission of Canada in Nairobi rejected the application on the grounds that the Applicant's testimony was inconsistent, contradictory, and implausible [the Decision].

[8] The Applicant argues that he was denied procedural fairness because of inadequate interpretation at his interview with the Officer. He also challenges the Officer's credibility findings, as well as arguing that the Officer failed to address his refugee status granted by the UNHCR and failed to address all grounds of persecution.

[9] I find the Applicant has been denied procedural fairness due to inadequate interpretation. I also find the Decision unreasonable because the Officer failed to address his UNHCR refugee status.

II. Applicant's Affidavit on Judicial Review

[10] As stated in an affidavit filed on judicial review, the Applicant realized that the interpretation service provided at the interview was problematic after reviewing the Decision

with his counsel. He suspected that either his answers were not accurately translated, or the Officer's questions were not accurately translated to him. The Applicant noticed that there were conversations between the interpreter and the Officer which were not translated to him. He states that he had no way to know the interpretation problems at the time other than being aware that there was a difference in dialect, as he is a Tigrigna speaker from Eritrea whereas the interpreter was a Tigrigna speaker from Ethiopia.

[11] The Respondent never cross-examined the Applicant on his affidavit, nor provided any affidavit from the Officer or the interpreter to contest the Applicant's allegations with respect to the interpretation issues.

III. Issues and Standard of Review

[12] The Applicant raises the following issues:

(1) Was his right to procedural fairness breached due to the inadequate interpreting provided at the interview?
(2) Was the Officer's credibility finding reasonable?
(3) Did the Officer err by failing to have regard to the Applicant's status as a UNHCR refugee or by failing to have regard to Guidelines OP 5?
(4) Did the Officer err by failing to assess all possible grounds of persecution?

[13] Both parties agree that the procedural fairness issue is reviewable on a standard of correctness (or alternatively, no standard), and that the reasonableness standard applies to the other issues, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[14] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov*, at para 85. The onus is on the Applicant to demonstrate that the Decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov*, at para 100.

IV. Analysis

A. *Was the Applicant's right to procedural fairness breached due to the inadequate interpretation service provided at the interview?*

[15] The Applicant argues that he was denied procedural fairness because of the inadequate interpretation service provided at his interview, particularly with regard to his duties in the military. The Applicant submits that the interpreter changed the meaning of certain words and engaged in conversations with the Officer without interpreting them to him.

[16] Before examining whether the alleged inadequacy of interpretation resulted in a breach of procedural fairness, I must first address the Respondent's submission that the Applicant waived his right to raise issues with the interpretation by failing to raise such concerns during his interview with the Officer. The Respondent makes several arguments in this respect, namely:

a) The Officer specifically noted the Applicant was interviewed with the assistance of an interpreter who speaks both English and Tigrigna, and the Applicant did not indicate there was any difficulty in understanding the interpreter or in having the interpreter understand him;

b) In his affidavit, the Applicant alleges several instances when he became aware that there were potential issues with the interpreter, but he failed to

raise any concerns nor did he indicate to the Officer that there were dialectal differences that could create a problem. Since the Applicant failed to raise any interpretation issues or concerns at the first instance, he cannot do so now on judicial review: *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 [*Mohammadian*] at paras 12 and 19;

c) Even if the alleged interpretation errors did occur, the Applicant had an opportunity to raise these errors when the Officer put the discrepancies of his responses to him yet failed to do so;

d) The Applicant confirmed in his application forms that he has Grade 8 education and can understand English, which is the language of instruction in Eritrea; and

e) There was no indication that the Applicant had to rely on an interpreter to complete his application forms, which indicated that he is able to understand English.

[17] I am not persuaded by the Respondent's argument.

[18] As decisions from this Court confirm, the sworn evidence of the Applicant to is to be preferred to notes made by the Officer that are not accompanied by an affidavit: *Fsahaye v Canada (Citizenship and Immigration)*, 2019 FC 1657 at para 15.

[19] In a recent decision, *Divya v Canada (Minister of Citizenship and Immigration)*, 2022 FC 620 [*Divya*], Justice Diner commented as follows:

> [18] As an aside, I note that in the absence of a transcript or recording of the interview, it can be difficult for the Court to decipher which version of the facts is correct (see *Zeon v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1338 at paras

> 13-14). As interviews are often only conducted between an officer and the applicant, unlike in days past where it was more common to have legal counsel present at interviews, it is unfortunate that the practice is not – particularly in this day and age – to keep any recording, but rather to rely entirely on GCMS notes. This is particularly true in situations where findings of misrepresentation are concerned, given the severe consequences that result. The Court must have regard to sworn testimony of the Applicant when the fairness of the interview process has been contested, particularly where there has been no cross-examination on the Applicant's evidence.
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> [19] GCMS notes have been the subject of significant commentary. The Court of Appeal has recognized that they are generally admissible as falling within the business records exception to the hearsay rule, although exceptions may apply where the GCMS notes record interviews conducted during an investigation (see *Cabral v. Canada (Citizenship and Immigration)*, 2018 FCA 4 at paras 24 and 28 respectively). In such a case, the notes may not be admissible to prove the truth of their contents (*Cabral* at para 28). Indeed, this Court has held:
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> > CAIPs notes should be admitted as part of the record, that is, as the reasons for the decision under review. However, the underlying facts on which they rely must be independently proven. In the absence of a visa officer's affidavit attesting to the truth of what he or she recorded as having been said at the interview, the notes have no status as evidence of such.
> >
> > (*Chou v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14890 at para 13, aff'd 2001 FCA 299).

[20] As the Applicant's affidavit was never challenged by the Respondent, and the Respondent never filed an affidavit from the Officer and/or the interpreter in question to counter the Applicant's allegations, I prefer the Applicant's account of what took place at the interview over the GCMS notes which, for obvious reasons, only recorded the English translation of the Applicant's responses.

[21] I find that *Mohammadian* can be distinguished on facts as the applicant in that case was represented by counsel when he raised no objection to the quality of the interpretation, and he raised no objection during the ensuing period when his counsel was preparing written representations on the merits of the claim: *Mohammadian*, para 8. Here, based on the Applicant's affidavit, this judicial review application is the first opportunity he has had to raise the issue, as he only became aware of misinterpretation while discussing the Decision with his legal counsel.

[22] Further, I agree with counsel for the Applicant that there is no evidence that his client – who was unrepresented at the interview – was aware of his right to raise concerns about the interpretation, let alone having the confidence to raise concerns with the person who has the power to determine his fate.

[23] While the Applicant indicated in his application forms that he could understand English, he also indicated that he had received assistance to complete the forms. I am not convinced that having a Grade 8 education means the Applicant would have the requisite level of fluency in the English language to gauge the accuracy of the interpretation. Indeed, if the Applicant were fluent in English, he probably would not have sought interpretation services in the first place.

[24] The Decision has a significant impact on the Applicant. The outcome of the application determines if the Applicant will be resettled in Canada as a Convention Refugee. In view of all the circumstances of the case, I conclude that the Applicant never waived his right to raise the issues of interpretation by not raising his concerns at the interview with the Officer.

[25] I also find that the Applicant's procedural fairness right has been violated as a result of the inadequate interpretation at the interview.

[26] The principles for analyzing the quality of interpretation, as set out by the Federal Court of Appeal in *Mohammadian* and summarized in *Licao v Canada (Citizenship and Immigration)*, 2014 FC 89 at para 26, are as follows:

> a. The interpretation must be precise, continuous, competent, impartial and contemporaneous.
> b. No proof of actual prejudice is required as a condition of obtaining relief.
> c. The right is to adequate translation not perfect translation. The fundamental value is linguistic understanding.
> d. Waiver of the right results if an objection to the quality of the translation is not raised by a claimant at the first opportunity in those cases where it is reasonable to expect that a complaint be made.
> e. It is a question of fact in each case whether it is reasonable to expect that a complaint be made about the inadequacy of interpretation.
> f. If the interpreter is having difficulty speaking an applicant's language and being understood by him is a matter which should be raised at the earliest opportunity.
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> [Emphasis in original]

[27] The Applicant points to *Batres v Canada (Citizenship and Immigration)*, 2013 FC 981, at para 12, where the Court said that errors in translation must be material to the Immigration and Refugee Board's credibility findings. In that case, a reviewing interpreter provided an affidavit indicating that, for example, the interpreter had mistranslated "police" as "people", which the Court found to be a breach of procedural fairness.

[28] Here, the Officer denied the application on credibility grounds. As explained in a letter dated June 7, 2021, the Officer was not satisfied that the Applicant was a member of the prescribed classes because of "the inconsistencies, contradictions and implausibility noted" in the application and what the Applicant recounted at the interview. Specifically, the Officer noted in the Decision:

> It is improbable that PA would have worked at the border region for many years and not see anyone arrested and not see people tortured. PA contradicted himself when he said that he used to be a prison guard and saw people tortured and later said that they were taken to another place for torture. It is not credible that PA's military unit would arrest people and PA would not participate for the time he was in the military. PA was not forthcoming with information but only opened up after further probing. For instance, he initially stated that he was doing farming but omitted the guarding bit until further probing. There are inconsistencies in the narrative including the reason for flight and the flight path. Given the implausibility, inconstancies and contradictions noted, I am not satisfied with the credibility of this application. As such, I am not satisfied that Pa meets definition of a refugee. I put these concerns to the applicant, but the responses were not sufficient to alleviate them.

[29] In his Affidavit, the Applicant outlines some of the key errors caused by the inadequate interpretation:

- In response to the Officer's finding that "[i]t is improbable that you would work at the border region for many years and not see anyone arrested and not see people tortured", the Applicant explains he never said he saw people being tortured when he was on national service. The Applicant saw torture when he himself was arrested and tortured and he heard about the torture of other prisoners from other detainees and colleagues.
- In response to the Officer's finding that "You contradicted yourself when you stated that you used to be a prison guard and saw people tortured and later said that they were taken to another place for torture and you did not see", the Applicant submits that he never said he guarded prisoners, but

rather testified that he served as a border guard only for a brief period and that he heard about the border crossers and their fate from other colleagues.

- The Applicant also submits that when he testified about the death of his father, the interpreter had difficulty understanding the Applicant and instead talked with the Officer without interpreting to the Applicant.

[30] The Applicant argues that these were material errors and that, but for the interpretation errors, the Officer could not have concluded that the Applicant was providing contradictory answers.

[31] I agree that these errors were material. The Officer's adverse credibility findings and findings of implausibility were tied to what the Officer understood to be the Applicant's responses to questions about his military service as a border guard, the duration of his service, and whether or not he witnessed any torture as a guard – almost all of the Applicant's responses to these questions were tainted by the errors in interpretation.

[32] Other than relying on the Applicant's Grade 8 education and his purported ability to understand English, and reiterating that the onus on the Applicant to provide complete background to the Officer as per *Kabran v Canada (Minister of Citizenship and Immigration)*, 2018 FC 115 at paras 38 and 42, the Respondent makes no submission to counter the Applicant's argument about the materiality of the errors.

[33] It is a given that the Applicant bears the onus of demonstrating his eligibility to enter Canada. In this case, however, the Applicant's efforts to discharge his onus were unfairly thwarted by inadequate interpretation, which amounted to a breach of procedural fairness.

[34] As a final note, I share Justice Diner's observation in *Divya*, at para 20, that recordings or transcripts "would go a long way to resolving the issue of conflicting versions of visa officer interviews." This comment aptly applies to resolving disputes over the quality of interpretation service at these interviews as well.

B. *Did the Officer err by failing to have regard to the Applicant's status as a UNHCR refugee or by failing to have regard to Guidelines OP 5?*

[35] The Applicant submitted proof of registration as a refugee and his refugee identity card confirming his refugee status in Ethiopia. In the Applicant's view, the Officer failed to give due consideration to his recognition by the Ethiopian government as a Convention refugee, as the Officer merely stated that his proof of registration by the government of Ethiopia and by the UNHCR was brought during the interview, but gave no indication that his refugee status was considered.

[36] The Applicant points out that the Citizenship and Immigration Canada *Guidelines OP 5 Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes* [OP 5] listed consideration of UNHCR refugee status as one factor in determining refugee claims from outside of Canada.

[37] The Applicant cites jurisprudence establishing that while an officer is not bound by a decision of the UNHCR to grant refugee status, the officer must at least consider such a decision (*Teweldbrhan v Canada (Citizenship and Immigration)*, 2012 FC 371 at paras 21-23).

[38] Recently, in *Amanuel v Canada (Citizenship and Immigration)*, 2021 FC 662 [*Amanuel*], Justice Little summarized the principles applicable to an officer's consideration of an applicant's UNHCR designation:

> [54] The following principles emerge from these decisions:
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> A. An applicant's UNHCR status as a refugee is important but not determinative;
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> B. An officer must determine the merits of the applicant's claim under Canadian law in accordance with the evidence in the record. In doing so, the officer may assess credibility;
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> C. In making this determination, the officer must have regard to the UNHCR's determination. If the officer does not concur with it, the officer should explain why;
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> D. It is a reviewable error if an officer does not mention an applicant's UNHCR status in the officer's decision and/or in the GCMS notes; and
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> E. If the Court reviews the officer's decision and reasons and finds it is clear that (i) the officer was aware of the applicant's UNHCR status as a refugee; (ii) the officer conducted a thorough assessment of the applicant's application on the merits under Canadian law; and (iii) in doing so, the officer explained why the UNHCR's status was not followed, the Court may conclude that the officer's decision was reasonable. The officer's assessment of credibility may contain the required explanation for why the UNHCR's status was not followed.
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> [55] In this case, as in *Abreham* and *Gebrewldi*, the officer must be presumed to have been aware of the applicant's UNHCR status as a refugee, given the officer's use of the UNHCR proof of registration to verify the applicant's identity at the June 24, 2019 interview. The question is whether the officer sufficiently

> considered the applicant's application on the merits under Canadian law (including possibly by conducting a credibility analysis) and in doing so, sufficiently explained why the applicant's UNHCR status was not being followed: *Abreham*, at para 22; *Ghirmatsion* at para 58.

[39] Applying the above-noted principles, I find that the Officer made a reviewable error by failing to engage with the Applicant's refugee status in their analysis. While the Officer may have been aware of the Applicant's UNHCR status as a refugee, the Officer did not explain why the UNHCR's status was not followed, nor did the Officer refer to the Applicant's UNHCR status when assessing the Applicant's credibility: *Amanuel* at para 56.

[40] The Respondent submits that the Applicant's UNHCR refugee status is irrelevant to the Officer's considerations at "stage one" and does not relieve the Applicant of his duty to provide credible evidence that he met the statutory requirements. By "stage one", the Respondent is presumably referring to OP 5 in place at the time of the Decision, setting out four considerations: "Assessing credibility", "Ensuring the applicant does not have a durable solution", "Eligibility criteria for Convention refugee abroad class", "Determining whether the applicant has the ability to establish himself or herself." The Respondent notes that "UNHCR status is not determinative and, rather, that the officer is under a duty to conduct his or her own assessment of an applicant's eligibility for refugee status in accordance with Canadian law": *Gebrewldi v Canada (Citizenship and Immigration)*, 2017 FC 621 [*Gebrewldi*] at para 28.

[41] *Gebrewldi*, in my view, can be distinguished on facts as the applicant in that case did not contest the credibility findings of the officer, and the Court found that UNHCR status could not be a substitute for personal evidence in light of the serious credibility concerns: *Gebrewldi*, at

paras 11, 35. As well, I do not read *Gebrewldi* to suggest that officers need not have regard for the UNHCR status when determining credibility, it simply confirms that the UNHCR status is not determinative of the issue: *Gebrewldi*, at para 28.

[42] In the Respondent's view, the Applicant's overall lack of credibility meant that the Officer could not be satisfied that he met the requirements of either class under Canadian law and was not inadmissible (citing *Ameni v Canada (Citizenship and Immigration),* 2016 FC 164 [*Ameni*] at para 13: "Failure to establish the facts on which an application is based may also lead to rejection of a claim based on a determination that there has been misrepresentation or lack of credibility or otherwise."

[43] As I find that the Officer's credibility findings were tainted by the inadequate interpretation, *Ameni* is thus not applicable.

C. *Other Issues Raised by the Applicant*

[44] Because of my finding on the procedural fairness and UNHCR status issues, I will not consider the issues of whether the Officer made unreasonable findings of credibility, or whether the Officer failed to assess all possible grounds of persecution. Those questions should be left to a new officer to determine.

[45] Given the Applicant alleges that his responses were not adequately interpreted, it would make sense for the visa office to arrange another interview with the Applicant, this time with an

interpreter who speaks the Applicant's dialect and can adequately interpret the Applicant's responses into English.

V. Conclusion

[46] The application for judicial review is allowed and the matter is returned for redetermination by a different officer.

[47] There is no question to certify.

JUDGMENT in IMM-4271-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different officer.

3. There are no questions to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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