

Federal Court



Cour fédérale

Date: 20220829

Docket: IMM-763-20

Citation: 2022 FC 1240

Ottawa, Ontario, August 29, 2022

PRESENT: Mr. Justice James W. O'Reilly

BETWEEN:

DEMEKECH MEKONN TESEMA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 2016, Ms Demekech Mekonn Tesema arrived in Canada from Ethiopia on a student visa. The following year, she learned that police in Ethiopia wanted to question her about her involvement in a youth protest a decade or so earlier. She claimed refugee protection in Canada because she fears persecution in Ethiopia as an active member of the Blue (Semayawi) Party and as an ethnic Oromo.

[2] A panel of the Refugee Protection Division rejected Ms Tesema's claim due to a lack of credible evidence. Ms Tesema appealed the RPD's decision to the Refugee Appeal Division. The RAD also found that Ms Tesema's evidence lacked credibility. In addition, the RAD noted that Ms Tesema had not put forward any additional arguments supporting her appeal, even though she had been represented by counsel.

[3] Ms Tesema submits that she was treated unfairly before the RAD as a result of the incompetence of her counsel. She points to a number of arguments that could have been presented to the RAD on her appeal, but were not. Ms Tesema also maintains that a mistranslation of a document she presented as part of her claim – a police summons – resulted in an adverse credibility finding that was unjustified. Finally, Ms Tesema argues that the RAD erred by failing to consider proof of her membership in the Blue Party that, similarly, had not been properly assessed by the RPD. Ms Tesema asks me to quash the RAD's decision and order another panel to reconsider her appeal.

[4] I agree with Ms Tesema that she did not have a fair chance to present her appeal to the RAD because her lawyer failed to put forward substantive arguments on her behalf. I will allow her application for judicial review on that basis; I need not address the other arguments she advanced.

[5] The sole issue is whether Ms Tesema was denied procedural fairness before the RAD.

II. Was Ms Tesema Denied Procedural Fairness due to Incompetence of Counsel?

[6] Lack of competent representation before a tribunal can amount to a breach of procedural fairness if a three-part test has been satisfied (*Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99 at para 22). First, former counsel must receive notice that the applicant has raised the issue, and be provided an opportunity to respond. Second, the applicant must show that former counsel's conduct amounted to incompetence. Third, the applicant must establish that the incompetence resulted in a miscarriage of justice.

[7] Ms Tesema has met the first branch of the test. She advised her former counsel that she intended to raise the issue of incompetency on this application for judicial review, and received a written response. In keeping with the Court's Practice Guidelines, former counsel was also sent a copy of the Order granting Ms Tesema leave to pursue her application for judicial review, albeit on short notice (*Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (June 24, 2022), para 54). At that point, former counsel confirmed that he would rely on his previous response.

[8] In a refugee case, the second and third branches of the test are difficult to apply. For the second branch, the Court must review the RPD decision, consider what issues the applicant could have raised on an appeal to the RAD, take into account former counsel's explanation for not raising those arguments, and then evaluate the applicant's arguments to determine whether former counsel's failure to raise them showed incompetence. For the third branch, the Court must review the RAD's decision to assess whether the outcome would have been different if the missing submissions had been made.

[9] Here, on the second branch of the test, Ms Tesema points to a number of submissions that could have been made on her behalf to the RAD, but were not. In fact, no submissions were made to the RAD. Former counsel advised Ms Tesema in advance of her appeal that she did not have “strong grounds” to succeed. In the Appellant’s Record filed before the RAD, in the section asking the appellant to provide “full and detailed submissions regarding each error” made by the RPD, the sole entry is “None”.

[10] Ms Tesema submits that the following submissions are among those that could and should have been raised before the RAD:

- The RPD failed to properly consider Ms Tesema’s proof of membership in the Blue Party;
- The RPD doubted the authenticity of a police summons because it did not contain the address where Ms Tesema was meant to report. However, documentary evidence on the contents of summonses in Ethiopia suggests that the address is not necessarily provided (National Documentation Package: Ethiopia, April 30, 2018 [NDP], Item 10.2).
- The RPD doubted Ms Tesema’s claim of subjective fear of persecution because she originally came to Canada as a student and delayed seeking refugee protection here. However, Ms Tesema learned that she was wanted by police only after she arrived in Canada.

- Ms Tesema's basis of claim form stated that she had been involved in a demonstration in 2007. However, in her oral testimony, she said that it occurred in 2005. Before the RPD, she explained that her basis of claim form contained an error committed by the person who helped her fill it out. The RPD rejected that explanation because Ms Tesema could have caught the error and corrected it. However, documentary evidence before the RPD corroborated Ms Tesema's oral testimony about the date of the demonstration.

[11] On the question of the authenticity of the summons, Ms Tesema's former counsel explained that he had considered the information in the NDP for Ethiopia regarding the contents of police summonses (Item 10.2), but also considered another section of the NDP about police reports (Item 10.5). The latter refers to the prevalence of fraudulent or modified *police reports* in Ethiopia that can be obtained by corruption and is not a relevant consideration.

[12] On the question of the year in which the demonstration took place, former counsel explained that Ms Tesema had not informed him of the alleged typographical error in her basis of claim form. Further, given that the RPD had rejected that explanation for the discrepancy, former counsel asserted there was no point raising it on appeal.

[13] Overall, former counsel conceded that another lawyer or independent assessor could view Ms Tesema's case differently, but noted that theoretical arguments that could have been made on her behalf were unsupported by the facts.

[14] Does a failure to raise these arguments (and potentially others) show incompetence on the part of counsel?

[15] Having considered the arguments that could have been made on Ms Tesema's behalf and former counsel's explanations for not raising them, I am satisfied that competent counsel would have presented at least some arguments to the RAD, including the following four, pointing out potential weaknesses in the RPD decision.

[16] First, the RPD did mention Ms Tesema's membership card showing that she belonged to the Blue Party. However, the RPD did not consider whether membership in the Blue Party and involvement in associated political activities could have exposed Ms Tesema to persecution in Ethiopia.

[17] Second, regarding the authenticity of the police summons, contrary to the RPD's finding, the NDP for Ethiopia does not state that the address of a police station is a mandatory piece of information on a summons, and it confirms that fraudulent summonses are rare or non-existent. The section of the NDP on which former counsel relied does not refer to police summonses, just police reports.

[18] Third, the RPD appeared to conclude that Ms Tessema's acquisition of a student visa and her delay in applying for refugee protection were inconsistent with a genuine fear of political persecution in Ethiopia. However, the RPD did not directly address Ms Tessema's claim that her fear arose mainly after she arrived in Canada and learned that police in Ethiopia wanted her for

questioning. Since the RPD doubted the authenticity of the police summons, it likewise discounted the possibility that Ms Tessema's fear was genuinely based on it.

[19] Fourth, the RPD did not consider the fact that Ms Tessema's testimony about the year of the demonstration for which she was wanted in Ethiopia was corroborated by objective documentary evidence. That evidence supported her assertion that there was an inadvertent error in her basis of claim form, likely attributable to the person who helped her fill it out. Former counsel was apparently unaware of documentary evidence corroborating Ms Tessema's testimony.

[20] In my view, competent counsel would have put forward some, or all, of the foregoing arguments, and perhaps others. Accordingly, I find that the failure to present any of them amounted to incompetence.

[21] In respect of the third branch of the test, I find that the outcome of Ms Tessema's appeal to the RAD would likely have been different if the foregoing submissions had been made. That is not to say that the RAD would have accepted all of the arguments that Ms Tessema might have put forward, but it would likely have been persuaded by one or more them – enough for Ms Tessema to succeed on her appeal.

[22] Accordingly, I find that the conduct of former counsel resulted in a miscarriage of justice. Since Ms Tessema has satisfied the three-part test that applies here, I must allow her application for judicial review.

III. Conclusion and Disposition

[23] Ms Tesema's former counsel failed to provide her competent representation in her appeal to the RAD, which resulted in a miscarriage of justice. Therefore, I will allow her application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT IN IMM-763-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted.
2. The matter is returned to a different panel of the RAD for reconsideration.
3. No question of general importance is stated.

"James W. O'Reilly"

Judge

ANNEX

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries;

Or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Définition de réfugié

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-763-20

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JUDGMENT AND REASONS O'REILLY J

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