Federal Court  Cour fédérale

Date: 20161012

Docket: IMM-944-16

Citation: 2016 FC 1138

Ottawa, Ontario, October 12, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

TEMESGEN ARKESO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of an immigration officer in the Canadian High Commission in Pretoria [Visa Officer], dated August 30, 2013 [Decision], which denied the Applicant's application for permanent residence as a member of the Convention refugee abroad class or as a member of the humanitarian-protected persons abroad designated class.

II. BACKGROUND

[2] The Applicant is a 38-year-old citizen of Ethiopia and has resided in South Africa since 2003, where he holds asylum-seeker status. He claims a fear of return to Ethiopia based on his membership in the Hadiya Nationality Democratic Organization, an ethnic-based political group that became part of the Southern Ethiopia Peoples' Democratic Coalition [SEPDC], a political party in Ethiopia.

[3] The Applicant says that he was arrested in July 2001 and detained by the ruling political party, the Ethiopian Peoples' Revolutionary Democratic Front [EPRDF], for 18 months after he promoted the SEPDC by distributing pamphlets on the street. During this time, he was interrogated and tortured. After his release in December 2002, he left Ethiopia with his wife and arrived in South Africa in April 2003 and subsequently had two children. His wife has obtained formal recognition of refugee status in South Africa.

[4] The Applicant and his family applied for permanent residence in Canada under the Convention refugee abroad class or the humanitarian-protected persons abroad designated class. The Applicant was interviewed at the High Commission of Canada in Pretoria, South Africa on August 27, 2013. The interview was conducted in English with the assistance of an Amharic interpreter.

III. DECISION UNDER REVIEW

[5] A decision sent from the Visa Officer to the Applicant by letter dated August 30, 2013 determined that the Applicant did not qualify for immigration to Canada in the Convention refugee abroad class or humanitarian-protected persons abroad designated class.

[6] The Visa Officer concluded that the Applicant did not meet the requirements of s 96 of the Act as he did not come under the definition of a Convention refugee. Furthermore, the Visa Officer concluded that the Applicant did not meet the requirements of the protected classes under s 139(1)(e) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Rules]. The Visa Officer was not satisfied that the Applicant was at risk of persecution due to political activism if he were to return to Ethiopia. The Visa Officer based this decision on the UK Border Agency's 2009 Operational Guidance Note [OGN] that mid or low profile activism with the opposition alliance is unlikely to result in ill treatment by EPRDF amounting to persecution due to the calming of the political situation that arose after the disputed May 2005 elections. The Visa Officer was not convinced that the Applicant was a high level activist with SEPDC and, as such, voluntary repatriation to Ethiopia was a viable option.

IV. ISSUES

[7] The Applicant submits that the following are at issue in this application:

1. Did the Visa Officer either fail to have regard to or consider perversely relevant country condition information?
2. Was the Decision made without regard to the evidence before the Visa Officer of the personal circumstances of the Applicant?

3. Was the Decision reasonable?
4. Does the Decision give rise to a reasonable apprehension of bias?

V. STANDARD OF REVIEW

[8] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[9] The first three issues raised by the Applicant ask whether the Visa Officer failed to appropriately consider the UK Border Agency's OGN documentation and took into account irrelevant facts. This is not a procedural fairness issue**.** A visa officer's assessment of an application for permanent residence involves questions of mixed fact and law and is reviewable under the standard of reasonableness: *Canada (Citizenship and Immigration) v Young*, 2016 FCA 183 at para 7; *Odunsi v Canada (Citizenship and Immigration)*, 2016 FC 208 at para 13.

[10] As a matter of procedural fairness, the bias allegations will be reviewed under the standard of correctness: *Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at para 43 [*Khosa*].

[11] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[12] The following provisions from the Act are relevant in this proceeding:

Convention refugee	**Définition de réfugié**
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,	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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of	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

each of those countries; or	pays;
(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.	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.

[13] The following provisions from the Rules are relevant in this proceeding:

General Requirements	**Exigences générales**
139 (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that	139 (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis :
…	…
(d) the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely	d) aucune possibilité raisonnable de solution durable n'est, à son égard, réalisable dans un délai raisonnable dans un pays autre que le Canada, à savoir :
(i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or	(i) soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle,
(ii) resettlement or an offer of resettlement in another country;	(ii) soit la réinstallation ou une offre de réinstallation dans un autre pays;
(e) the foreign national is a member of one of the classes prescribed by this Division;	e) il fait partie d'une catégorie établie dans la présente section;

…

Member of Convention refugees abroad class

145 A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.

Person in similar circumstances to those of a Convention refugee

146 (1) For the purposes of subsection 12(3) of the Act, a person in similar circumstances to those of a Convention refugee is a member of the country of asylum class.

Humanitarian-protected persons abroad

(2) The country of asylum class is prescribed as a humanitarian-protected persons abroad class of persons who may be issued permanent resident visas on the basis of the requirements of this Division.

…

Qualité

145 Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

Personne dans une situation semblable à celle d'un réfugié au sens de la Convention

146 (1) Pour l'application du paragraphe 12(3) de la Loi, la personne dans une situation semblable à celle d'un réfugié au sens de la Convention appartient à la catégorie de personnes de pays d'accueil.

Personnes protégées à titre humanitaire outre-frontières

(2) La catégorie de personnes de pays d'accueil est une catégorie réglementaire de personnes protégées à titre humanitaire outre-frontières qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

VII. ARGUMENTS

A. *Applicant*

[14] The Applicant submits that the Visa Officer's Decision was both unreasonable and procedurally unfair.

[15] The Visa Officer's conclusion that the Applicant does not come under the definition of a Convention refugee is wrong and troubling. In the Decision letter, the Visa Officer quotes the UK Border Agency's OGN: "the calming of the political situation in 2006/2007 means that claimants who have adduced evidence of mid or low profile activism or association within the CUD alliance of parties are unlikely to be at risk of ill treatment amounting to persecution. In such cases the grant of asylum is not likely to be appropriate." However, this quote is taken out of context; the preceding paragraph in the OGN describes the "political situation" as events that occurred in May 2005. Since the Applicant left Ethiopia in 2001, the change in circumstances arising from the May 2005 elections is not relevant to the Applicant's claim. The Applicant argues that since there is no change in circumstances, the presumption that a person who has been persecuted will continue to be persecuted should apply to his situation, which means that he is still at risk.

[16] The Visa Officer's consideration of the UK Border Agency's OGN also demonstrates reliance on outdated information. The UK Border Agency's 2012 OGN, available at the time of the Decision, revises the criteria for granting asylum: "If a claimant has a sufficient profile within one of the opposition parties, is known to the Ethiopian authorities and likely to be/remain

of adverse interest, then a grant of asylum is likely to be appropriate as internal relocation would not be a viable option." The 2012 OGN also states that low-level party members whose involvement is limited to attending meetings and paying contributions are not likely to result in monitoring by the EPRDF. However, the Applicant's activism included promoting SEPDC publicly, which led to beatings and detention. The Applicant submits that had the 2012 test been applied, he may have been recognized as a refugee.

[17] Furthermore, the Applicant notes that the three other agency reports mentioned in the Visa Officer's notes were published in 2012, yet only the UK Border Agency's 2009 OGN was quoted in the Decision. The Applicant says the usage of an outdated report suggests bias against the Applicant and that the Visa Officer was looking to find a reason to refuse the claim.

B. *Respondent*

[18] The Respondent submits that the Visa Officer's Decision was made reasonably and fairly without apprehension of bias.

[19] In response to the Applicant's submission that the UK Border Agency's 2009 OGN was out of date, the Respondent says the criteria for granting asylum status has not changed because both the 2009 and 2012 OGNs indicate that only opposition activists with a profile of some magnitude are at risk. The Visa Officer reasonably concluded that the Applicant's activism of handing out pamphlets on the street does not meet the criteria in either report.

[20] As regards the change of circumstances following the 2005 elections not being relevant to the Applicant's situation, the Respondent says that the Visa Officer did not err in finding that the country condition information reflected a change in risk to mid- or low-level activists between the time the Applicant left Ethiopia and the time the Decision was made. Additionally, since there is no presumption in Canadian jurisprudence that a person who has been persecuted will continue to be persecuted, the Applicant cannot be presumed to be at risk based solely on past treatment.

[21] The Respondent submits that the threshold to establish bias, actual or perceived, is high: *Koky v Canada (Citizenship and Immigration)*, 2015 FC 562 at para 48. The usage of an outdated country condition document does not meet the threshold of a closed mind or predisposition.

VIII. ANALYSIS

[22] While I do not accept the Applicant's arguments on irrelevancy, presumption of persecution, or bias, I do feel that this matter needs to be returned for reconsideration.

[23] On the central issue of future risk of persecution to the Applicant, the Visa Officer relied upon outdated country documentation, namely the UK Border Agency's 2009 OGN. I agree with the Applicant that the more current July 2012 OGN that was available to the Visa Officer presents a different picture of those political activists at risk in Ethiopia.

[24] The 2009 OGN draws a clear line between someone who is a "prominent activist or high profile leader with the COD alliance of parties" and "mid or low profile activism or association with the COD alliance of parties." The 2012 OGN says that the "political profile of the applicant must be carefully considered *together with up to date country information*, to determine whether the Ethiopian authorities are likely to view the applicant adversely" [emphasis added].

[25] Although the 2012 OGN says that "Low-level party members with involvement limited to attending meetings and paying contributions are not reasonably likely to result in being monitored or identified," it also asserts as follows:

> If a claimant has a sufficient profile with one of the opposition parties, is known to the Ethiopian authorities and likely to be/remain of adverse interest, then a grant of asylum is likely to be appropriate as internal location would not be a viable option.

[26] In my view, the Visa Officer does not address these factors in his Decision and relies upon the clear-line approach in the outdated 2009 OGN. The Applicant promoted SEPDC publicly and has already been detained and tortured by the authorities for his political activities, and he left Ethiopia because he faced further detention.

[27] The Applicant may not be a prominent activist or a high profile leader identified in the 2009 OGN as being at risk, but his unquestioned activities in promoting the party, sending people to vote, distributing information and pamphlets about the party, which led to an 18-month detention and beatings in the past and possible further detention, may in the future provide the "sufficient profile" and continuing interest of the authorities that the 2012 OGN says justify a grant of asylum. The Visa Officer did not consider the Applicant's situation in full and the

evidence from the perspective of the more current country information and guidance. This was unreasonable and constitutes a reviewable error.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is granted. The Decision is quashed and the matter is returned for reconsideration by a different officer;
2. The style of cause is amended to show the correct spelling of the Applicant's name as "Temesgen Arkeso"; and
3. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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