

Federal Court



Cour fédérale

Date: 20171005

Docket: IMM-1174-17

Citation: 2017 FC 881

Toronto, Ontario, October 5, 2017

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

ALPHONSE FULU-SHUNGU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns the Applicant's request for humanitarian and compassionate (H&C) relief from a removal order requiring him to return to Burundi as a failed refugee claimant. By a decision dated February 13, 2017, the Applicant's request was rejected. The issue for determination is whether the decision is reasonable.

[2] The fact that the Applicant is HIV positive was the central feature of the Applicant's request for H&C consideration. In support of this feature, the Applicant advanced evidence to the H&C Officer (Officer) that as of 2012, of all of the HIV sufferers in Burundi, only 34% had a chance to receive anti-retroviral therapy (Certified Tribunal Record (CTR), p. 220). Prior to the delivery of the decision under review, the Officer consulted "new" information dated 2014 which is explained in the decision as follows:

With regards to treatment the majority of people in need have access to antiretroviral therapy as well as other care and support services. The government recognized that it has experienced drug shortages in the past. It is addressing the issue by implementing inventory and supply management systems in centers where the drug supply is being distributed. As for government assistance, the State also offers social and economic support to people who are affected. [Emphasis added] (Decision, CTR, p. 8)

[3] Counsel for the Applicant argues that it was unfair for the Officer to apply the new evidence without giving the Applicant an opportunity to respond. I agree with this argument and find that it is sufficient to set aside the decision. However, there is a much more significant error in the decision, which in my opinion, renders it manifestly unreasonable.

[4] In the very next paragraph to the one quoted above, the Officer states as follows:

I realize that the situation in Burundi may not be comparable to the one in Canada. However, I note that it has been making serious efforts to address the needs of people living with HIV. In light of the evidence before me, the applicant does not demonstrate that he would be unable to obtain the care his medical condition requires if he returned to his country of nationality. [Emphasis added] (Decision, CTR, p. 9)

[5] The apparent source of this opinion is the idea that the Applicant would be in the “majority” of HIV sufferers who would receive medication. There is absolutely no evidence to support this idea. To address this idea, Counsel for the Applicant requested an opportunity to refer to evidence that the Applicant could have produced to the Officer had the opportunity been provided. In my view it was very fair and appropriate that Counsel for the Respondent did not object to the request.

[6] As a result, Counsel for the Applicant produced clarifying evidence that the actual “majority” chance that the Applicant would have for treatment upon return to Burundi would only be 52% (Applicant’s Application Record, Tab D, p. 455). Regardless of this clarification, I find it stunning that in rejecting the Applicant’s request for H&C relief and stating that he will do just fine if he were to return, the Officer saw no humanitarian and compassionate reason to have the Applicant avoid the risk of something like a one in two chance of dying for failure of receiving anti-retroviral therapy in Burundi when his access to life-saving medicine is guaranteed in Canada.

[7] I find that, to say the least, the decision is devoid of rational and intelligible thought and compassion. As a result, I find that the decision is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is sent back for redetermination by a different decision-maker.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1174-17

STYLE OF CAUSE: ALPHONSE FULU-SHUNGU v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 3, 2017

JUDGMENT AND REASONS: CAMPBELL J.

DATED: OCTOBER 5, 2017

APPEARANCES:

Aisling E. Bondy

FOR THE APPLICANT

Julie Waldman

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bondy Immigration Law
Barrister and Solicitor
Toronto, Ontario

FOR THE APPLICANT

The Attorney General of Canada

FOR THE RESPONDENT