Federal Court Cour fédérale

Date: 20200313

Docket: IMM-3098-19

Citation: 2020 FC 375

Ottawa, Ontario, March 13, 2020

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SAMUEL WELDAY HAILE
SAMRAWIT WELDAY HAILE
(BY HER LITIGATION GUARDIAN
SELMAWIT EMAN GHIDE)

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Samuel Welday Haile and his sister Ms. Samrawit Welday Haile, by her litigation guardian Ms. Selmawit Eman Ghide (collectively, the “Applicants”) seek judicial review of two decisions made by an Immigration Officer (the “Officer”) at the High Commission of Canada in Nairobi, Kenya.

[2] Mr. Samuel Welday Haile (the "Male Applicant") seeks judicial review, in cause number IMM-3098-19, of the decision refusing his application for permanent residence in Canada as a member of the Convention refugee abroad class or the Humanitarian-Protected Persons abroad class, as described in sections 145 and 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations") and section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), respectively.

[3] Ms. Samrawit Welday Haile (the "Female Applicant") seeks judicial review, in cause number IMM-3097-19, of the decision also refusing her application for permanent residence in Canada as a member of the Convention refugee abroad class or the Humanitarian-Protected Persons abroad class.

[4] By Order dated December 3, 2019, Prothonotary Aalto ordered that these two applications for judicial review be consolidated, pursuant to the *Federal Courts Rules*, SOR/98-106 and that cause number IMM-3098-19 be designated the lead file.

[5] The Applicants are citizens of Eritrea. They are siblings. By letter dated May 27, 2016, the United Nations High Commissioner for Refugees ("UNHCR") verified that they were recognized as refugees by the Ethiopian government. On July 25, 2017, they applied for permanent residence in Canada.

[6] In a decision dated March 20, 2019, the Officer refused the Male Applicant’s application on the grounds that his evidence was not credible and in any event, there was insufficient evidence of risk to him if returned to Eritrea.

[7] In a decision dated March 20, 2019, the Officer refused the Female Applicant’s application, on the grounds that there was insufficient evidence she faced fear or a risk of harm in Eritrea.

[8] The Applicants now argue that the decisions are unreasonable because the Officer did not consider their status as refugees in Ethiopia or their forward looking risk in Eritrea.

[9] The Male Applicant submits that the Officer’s credibility finding was unreasonable.

[10] The Female Applicant also argues that the Officer unreasonably considered her best interests as a child because she had not raised this issue.

[11] The Applicants further submit that the Officer breached their procedural fairness rights because he relied on specialized knowledge regarding the status of the border between Eritrea and Ethiopia without providing them with an opportunity to respond. They also argue that his failure to input his notes at the time of the interview gave rise to a breach of procedural fairness.

[12] The Minister of Citizenship and Immigration (the “Respondent”) submits that the decisions were reasonable and that there was no breach of procedural fairness in either case.

[13] The Respondent also raises a preliminary objection to certain paragraphs of the Male Applicant's affidavit filed in support of his application for judicial review and the affidavit of Ms. Eman Ghide, filed in support of the Female Applicant's application for judicial review. The Respondent submits these paragraphs constitute evidence that was not before the Officer.

[14] In its recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada revisited the standard of review of administrative decisions. It said that, presumptively, such decisions are reviewable on the standard of reasonableness, with two exceptions: where legislative intent or the rule of law requires otherwise. Neither exception applies in this case.

[15] The Supreme Court of Canada confirmed the content of the standard of reasonableness, as set out in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[16] According to the decision in *Dunsmuir*, *supra*, the standard of reasonableness requires that a decision be justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[17] *Vavilov*, *supra* has not changed the approach to be taken on questions of procedural fairness, including a breach of natural justice, which are reviewable on a standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[18] Upon consideration of the contents of the Certified Tribunal Record (the "CTR") and of the arguments of the parties, both written and oral, I am not persuaded that any breach of procedural fairness resulted from the Officer's consideration of his knowledge about the reopening of the border between Eritrea and Ethiopia.

[19] Likewise, I see no breach of procedural fairness arising from the fact the Officer entered his notes in the Global Case Management System after the interview.

[20] The negative credibility finding made in respect of the Male Applicant is based upon discrepancies in his evidence about his detention by Eritrean authorities.

[21] I refer to the decision in *Joseph v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 548 where the Court observed that not every negative credibility finding would be fatal to a claim.

[22] In my opinion, the same observation applies here.

[23] The Male Applicant did not deny that he gave conflicting evidence about his detention in Eritrea. He offered an explanation, which the Officer did not accept. However, in the context of the application for protection made by the Male Applicant, this negative credibility finding, although reasonable, is not determinative of this application for judicial review.

[24] In my opinion, upon considering the material in the CTR, the Officer did not reasonably consider the status of the Male Applicant as a UNHCR refugee in Ethiopia. The Officer gave that fact a cursory reference and failed to address risk on a forward-looking basis. This treatment of a relevant fact renders his decision unreasonable, when considered against the test in *Dunsmuir*, *supra*.

[25] I refer to the decisions in *Ghirmatsion v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 519 and *Teweldbrhan v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 371, where the Court noted that although status as a UNHCR refugee is not determinative, it is an important factor that an officer is obliged to consider. An officer is not bound by UNHCR status, but must provide an explanation for why a different conclusion was reached.

[26] I also refer to the decision in *Canagasuriam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1488 (F.C.T.D.) where the Court said the following at paragraph 11:

> In *Ghorvei v. Canada (Minister of Citizenship & Immigration)*[1], Associate Chief Justice Jerome wrote at page 153:
>
> > The "danger" report did not contain any references to either the applicant's desertion to the enemy, Iraq, his political activism in Iran, or the fact that he was found to be a refugee by the U.N.H.C.R. The Minister erred in not considering these factors which are clearly relevant to this type of determination.
>
> While the facts of this matter are distinctly different from those that were before the Associate Chief Justice, I am satisfied that the same could be said here by analogy. The visa officer erred in not

> considering the fact that the applicant was recognized as a refugee under the Mandate of the UNHCR. His analysis does not acknowledge this fact and makes no effort to distinguish that recognition. In failing to distinguish the recognition, I am satisfied that the visa officer erred in law. Further, it is trite law that the concept of "well-founded fear of persecution" is forward looking. While past evidence of persecution is not necessarily determinative of a well-founded fear of persecution if the individual in question is required to return to the country against which he or she alleges fear, it is a factor to be considered. …

[27] In the present case, the Officer's decision does not show a reasonable consideration of forward-looking risk in respect of the Female Applicant nor of her status as a person recognized as a UNHCR refugee.

[28] It is not necessary to address the other argument raised by the Female Applicant.

[29] In the result, the applications for judicial review will be allowed, the decisions set aside and the matters remitted to a different officer for redetermination.

[30] There is no question for certification arising.

JUDGMENT in IMM-3098-19

THIS COURT'S JUDGMENT is that the applications for judicial review are allowed, the decisions set aside and the matters remitted to a different officer for redetermination.

This judgment shall be filed in cause number IMM-3098-19 and placed on the file in cause number IMM-3097-19.

There is no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3098-19
STYLE OF CAUSE:	SAMUEL WELDAY HAILE, SAMRAWIT WELDAY HAILE (BY HER LITIGATION GUARDIAN SELMAWIT EMAN GHIDE) v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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