Federal Court  Cour fédérale

Date: 20220906

Dockets: IMM-5384-20
IMM-2894-21

Citation: 2022 FC 1174

Ottawa, Ontario, September 6, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

BISRAT ERSTU WELDESENBET

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Bisrat Erstu Weldesenbet [Applicant] seeks judicial review of two decisions related to her application for permanent residence on humanitarian and compassionate [H&C] grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The first application, IMM-5384-20, is an application for judicial review of an October 8, 2020 decision of a Senior Immigration Officer [Officer] refusing her H&C application [H&C

Decision]. The second application, IMM-2894-21, is an application for judicial review of the negative reconsideration decision of the Officer, dated March 1, 2021 [Reconsideration Decision]. On January 18, 2022, this Court consolidated the two applications and ordered that they be heard together.

[2] The applications for judicial review of the H&C Decision and the Reconsideration Decision are dismissed.

II. Background

[3] The Applicant is a Christian, Amharic speaking, and ethnically Gurage citizen of Ethiopia. She arrived in Canada in 2015 and made a refugee claim based on her membership in the Blue Party and anti-government political opinion. Her refugee claim was denied and leave for judicial review was dismissed by this Court.

[4] On January 21, 2019, the Applicant submitted an H&C application. She was represented by Charles Mwewa or Charles Lawqiq [Former Representative]. The application was based on the grounds of establishment in Canada, family ties, and the best interests of the children [BIOC], the Applicant's niece and nephew and a child in the household where she lives. The Applicant has no children of her own.

III. The Decisions

A. *H&C Decision*

[5] In dismissing the application, the Officer noted that the Applicant had been in Canada for 5 years, employed as a daycare teacher, and had a good civil record. The Officer considered letters of support from friends and community members but noted there was little evidence that the Applicant would be unable to maintain these relationships abroad. Overall, the Officer gave some positive weight to establishment. However, the Officer also held there was insufficient evidence that the Applicant had the funds to support herself in Canada.

[6] Regarding family ties, the Officer noted that the Applicant's sister, brother-in-law, niece, and nephew reside in Canada, while her spouse, parents, and three siblings reside in Ethiopia. The Officer held that the Applicant could maintain her relationship with her family members in Canada through other means.

[7] With respect to the BIOC assessment, the Officer considered the best interests of the Applicant's niece and nephew in Canada, and gave some positive weight to this factor but noted that her niece and nephew live in Ottawa, while the Applicant resides in Toronto. There was little independent or corroborative evidence to demonstrate that the Applicant is the primary caregiver of her niece and nephew. The Officer held it was in the children's best interest to remain with their primary caregiver, and that the Applicant could maintain her relationships with them through other means. The Officer also found the Applicant to be appreciated in her work at the daycare and at Sunday school but it was in the best interests of those children to remain with their primary caregivers. The Officer also considered a letter from a family member of where the Applicant lives attesting to the good relationship with a child also residing there but there was no

evidence that the Applicant was the primary caregiver. The Officer again held that the Applicant could maintain these relationships from abroad.

B. *Reconsideration Decision*

[8] On December 14, 2020, after retaining new counsel, the Applicant submitted a request for reconsideration. The request alleged that the Applicant was denied procedural fairness due to the negligent representation of her Former Representative. The Applicant's Former Representative stated he was a lawyer when he was actually a paralegal, and incorrectly advised her that she could not raise adverse country conditions in an H&C application. The Applicant also noted that a civil war had broken out in Ethiopia three weeks after the H&C Decision was rendered.

[9] The Officer reconsidered the decision in light of counsel's submissions. The Officer accepted the ongoing conflict in the Tigray region of Ethiopia, but noted that this is not in close proximity to Addis Ababa, where the Applicant is from.

[10] The Officer also considered letters of support from family members in Ethiopia outlining difficulties in obtaining employment and the actions of rebel groups in Addis Ababa. However, the Officer held that these letters of support were unsupported by the objective and corroborative evidence, and that the authors of the letters were not objective nor disinterested parties. The Officer acknowledged that the letters expressed concerns that the authors would lose their employment or have their businesses burned down, but held that these concerns were "speculative and lack[ed] objective basis." Further, although the authors indicated that there was

discrimination in employment, several of the authors also stated that they were currently employed. The Officer similarly noted that while in Ethiopia, the Applicant was continuously employed and owned a daycare. The Officer found it more likely than not that she would be able to obtain employment upon return.

[11] Finally, the Officer considered the risk of hardship arising from discrimination on the basis of the Applicant's profile as a Christian and non-Oromo. The Officer noted there were laws prohibiting discrimination and reproduced parts of the US Department of State report. These laws prohibit discrimination in respect of employment and occupations, but authorities enforce these rights unevenly.

[12] The Officer found that the overall situation in the country is improving. The Officer held that there was "little objective evidence before me to indicate that if the applicant were to require assistance from authorities, in the event that she experiences hardship related to her ethnicity [or religious beliefs], that she would be denied such aid…" Further, the Officer stated that "[w]hile I accept that there has been violence against Christians, there has also been violence and attacks against individuals with other religious backgrounds such as Muslims." The Officer noted that there was no Administrative Deferral of Removal [ADR] program in place for Ethiopia, which are created for countries experiencing widespread humanitarian crises. As a result, the Officer denied the Applicant's request for reconsideration.

IV. Issues and Standard of Review

[13] After considering the submissions of the parties, the issues are best characterized as follows:

1. Is the application for judicial review in IMM-5384-20 moot? If not, was the Applicant denied procedural fairness due to incompetent representation?
2. Should an extension of time be granted in IMM-2894-21?
3. Is the decision in IMM-2894-21 reasonable?

[14] The standard of review for issues of procedural fairness is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). The first issue will be reviewed on this standard.

[15] The second issue does not attract a standard of review.

[16] The third issue, dealing with the merits of the reconsideration decision, is reviewable on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 42-44 [*Kanthasamy*]). H&C decisions are "exceptional and highly discretionary; thus deserving of considerable deference by the Court" and resulting in a "wider scope of possible reasonable outcomes" (*Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at paras 17-18, citing *Qureshi v Canada (Citizenship and Immigration)*, 2012 FC 335 at para 30 and *Inneh v Canada (Citizenship and Immigration)*, 2009 FC 108 at para 13). A reviewing court must assess whether the decision falls within a range of reasonable outcomes, not whether it would have come to the same conclusion (*Vavilov* at paras 83, 86-87, 99, 145).

[17] Section 25 of the *IRPA* gives the Minister of Citizenship and Immigration [Minister] discretion to exempt foreign nationals from the ordinary requirements of *IRPA* where H&C considerations justify such relief (*Kanthasamy* at para 10).

V. Analysis

A. *Is the application for judicial review respecting the H&C Decision moot?*

(1) Applicant's Position

[18] The Applicant submits that administrative decisions made in the absence of procedural fairness are *void ab initio* (*Winning Combination Inc v Canada (Health)*, 2016 FC 381 at para 87 [*Winning Combination*]). A reconsideration of a decision does not rescind the breach of fairness because, in this case, the Officer did not conduct a fresh assessment of the application. Instead, the Officer erroneously assessed whether the new evidence showed a compelling change in circumstances to overturn the initial decision.

(2) Respondent's Position

[19] The Respondent argues that the Officer granted the reconsideration request because the Officer accepted that the Applicant's prior representation was ineffective. Therefore, there is no live controversy between the parties.

[20] The Respondent also pointed out that *Winning Combination* was appealed (*Canada (Health) v Winning Combination Inc*, 2017 FCA 101 [*Winning Combination FCA*]). The Federal

Court of Appeal noted that while the power to reconsider issues is not unlimited, it must be exercised according to law and principles of procedural fairness. The Court found that the reconsideration process was tainted by breaches of procedural fairness (*Winning Combination FCA* at para 86).

(3) Conclusion

[21] I do not agree with the Applicant that a reconsideration does not remedy the breach of procedural fairness.

[22] The facts and circumstances in *Winning Combination* and *Winning Combination FCA* are different from the present matter. In those cases, the Courts found that the reconsideration decision was tainted by procedural fairness breaches by the decision maker. In the present matter, it is clear that the Officer was not the party who breached the Applicant's procedural fairness rights. Rather, the Applicant's own submissions confirm that the breach of procedural fairness arose due to the negligent advice of the Former Representative.

[23] In my view, this case is somewhat analogous to *Ye v Canada (Citizenship and Immigration*), 2021 FC 1025 [*Ye*]. While *Ye* did not involve a reconsideration request, Justice Strickland held that the Refugee Protection Division's [RPD] breach of procedural fairness was remedied by the Refugee Appeal Division's [RAD] acceptance of new evidence. Justice Strickland stated "the real question in this matter is whether or not the RPD's breach of procedural fairness had a material effect. That is, in these circumstances, whether the RAD's acceptance of the Shen Letters remedied the breach" (at para 20). Justice Strickland also

referenced *Canada (AG) v McBain*, 2017 FCA 204, where the Court affirmed that procedural fairness breaches could be rectified by appeal tribunals in certain cases (at paras 9-10). When determining whether the breach has been cured, the court asks "whether the procedure as a whole satisfies the requirements of procedural fairness" (*McBain v Canada (AG)*, 2016 FC 829 at para 46, citing *Taiga Works Wilderness Equipment Ltd v British Columbia (Director of Employment Standards)*, 2010 BCCA 97 at paras 36-38).

[24] In the present matter, the Officer both accepted and engaged with the additional submissions in rendering a seven-page reconsideration decision. The two main categories of the decision relate to "Adverse country conditions" and "Risk and discrimination". It is clear from a review of the decision that the Officer responded to the Applicant's submissions, although there is no explicit statement acknowledging the issue with the Applicant's Former Representative.

[25] Ultimately, I am not convinced that the breach of procedural fairness caused by the Former Representative had a material effect because the Applicant was permitted to file new evidence on reconsideration. I find that the procedure as a whole satisfies the requirements of procedural fairness. As such, there is no longer a live controversy between the parties insofar as it concerns a breach of procedural fairness.

B. *Should an extension of time be granted regarding the Reconsideration Decision?*

(1) Applicant's Position

[26] The Applicant argues that an extension of time should be granted because (1) the Applicant had a continuing intention to pursue the application for judicial review, (2) the application has some merit (3) there is no prejudice to the Respondent as a result of the short, 6-day delay, and (4) the delay is explained by counsel's inadvertent error.

(2) Respondent's Position

[27] The Respondent does not take a position on this issue.

(3) Conclusion

[28] The Applicant correctly sets out the appropriate factors that the Court must assess (*Canada (AG) v Hennelly*, [1999] FCJ No 846 at para 3, 89 ACWS (3d) 376 (FCA) [*Hennelly*]; *Huot v Canada (Citizenship and Immigration)*, 2010 FC 973 at para 14).

[29] The Applicant filed an affidavit from a legal assistant in support of the request, stating that Mr. Blum accidentally entered the wrong deadline in his calendar, and filed the application for leave as soon as he realized the error.

[30] I have considered the absence of opposition and an absence of stated prejudice from the Respondent, the affidavit filed on behalf of the Applicant, the merits of the application, and the reasonable and forthright explanation for the delay. I am satisfied that the Applicant always intended to pursue the application for judicial review (*Romero Gomez c Canada (Citoyenneté et Immigration)*, 2021 CF 1266 at para 13). The Applicant has satisfied the *Hennelly* factors and,

accordingly, the request for an extension of time is granted. The Court will now consider the Reconsideration Decision on its merits.

C. *Is the Reconsideration Decision reasonable?*

(1) Applicant's Position

[31] The Applicant argues that the Officer applied the wrong legal test, ignored contradictory evidence, and made unreasonable inferences.

[32] First, the Applicant states it was unreasonable for the Officer to discount letters from her family and friends in Ethiopia because they were not disinterested parties (*Aisowieren v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 305 at para 15). The Applicant submits that this evidence is relevant because she is basing her application on similarly situated people.

[33] Second, the Applicant argues that the Officer erred in concluding that the Applicant was protected from discrimination due to anti-discrimination laws, given the Officer also acknowledged the laws are enforced unevenly.

[34] Third, the Applicant argues that the Officer unreasonably found that there was no objective evidence to support the Applicant's family's fears of their businesses being destroyed due to ethnic conflict. The Applicant notes that the Officer actually quoted one piece of objective evidence supporting this fear. That evidence states that a "[l]arge group of predominantly young people from the Oromo community killed members of ethnic minorities in the region and burned

down hotels, schools, business centres and residential homes belonging to ethnic Ahmaras and Gurage people…"

[35] Fourth, the Applicant argues that the Officer erred in their state protection analysis because they failed to address contradictory evidence that the Ethiopian government has failed to protect its citizens. She also submits that the Officer applied the wrong test for state protection. That is, the Officer focused on the efforts or intentions of the state, rather than the adequacy of protection at the operational level. Additionally, the Officer failed to assess state protection through an H&C lens, and unreasonably relied on a 2019 US Department of State Report, when conditions deteriorated significantly in 2020.

[36] Finally, the Applicant argues it was an error for the Officer to rely on the fact that there was no ADR in place for Ethiopia, and that there has been violence against individuals with other religious backgrounds in addition to Christians.

(2) Respondent's Position

[37] The Respondent argues that the decision is reasonable. First, the Respondent states it was not an error for the Officer to note that the Applicant's family members were not disinterested parties. The Respondent highlights that the Officer gave additional reasons for giving little weight to these letters. The Respondent cites *Alexander v Canada (Citizenship and Immigration),* 2021 FC 762 at para 65 [*Alexander*], where Justice Norris held that this line of analysis is unreasonable where it is the only reason for discounting evidence:

> Looking first at the issue of "vested interests," there can be no doubt that, as a matter of common sense and common experience, a witness's interest in the outcome of a proceeding can be a relevant factor in assessing the weight that should be given to that witness's evidence. However, this Court has found it necessary to intervene when decision makers have diminished the value of evidence for this reason alone and without meaningful consideration of other factors potentially affecting the weight of the evidence (e.g. being under oath or solemn affirmation, being consistent with other credible evidence, being corroborated in material respects, and so on).
>
> [Emphasis added.]

[38] With respect to the alleged failure to consider contradictory evidence, the Respondent argues the Applicant is not reviewing the reasons holistically, and decision makers are presumed to have considered all the evidence.

[39] Further, the Respondent argues the Officer was assessing state protection at the operational level. For example, the Officer considered that members of senior leadership were prosecuted for human rights abuses, charges were brought against former officials of the National Intelligence and Security Service, and political movements were decriminalized following Abiy's assumption of Office**.**

[40] The Respondent asserts it was not an error to note that violence affected both Christians and other religions, or that there is no ADR in Ethiopia. The Respondent describes these statements as "parenthetical" in the overall analysis.

(3) Conclusion

[41] I find the Officer's decision to be reasonable. When the Reconsideration Decision is read as a whole, I find that the Officer reasonably considered whether the Applicant would likely be affected by adverse country conditions if returned to Ethiopia (*Kanthasamy* at para 56). The Officer's analysis "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Vavilov* at para 86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[42] The Officer reasonably engaged with the mixed country condition evidence. The Officer considered the evidence in light of the Applicant's ethnicity as well as the ethnic and religious conflict in Ethiopia. First, the Officer noted that much of the country condition evidence related to the Tigray region, while the Applicant and her family are from Addis Ababa.

[43] Next, the Officer considered the statements contained in the letters from the Applicant's family and friends, as well as the situation that occurred after the killing of a popular Oromo musician. The Applicant's argument that the Officer discounted the evidence of interest persons solely on that basis is without merit. I agree with the Respondent's reference to *Alexander*, where Justice Norris held that it is unreasonable to discount evidence solely on the basis that it comes from interested persons. That is not the case here. The Officer noted the country condition evidence showed some positive legal developments to combat discrimination and found that some of the statements in the letters were speculative while other statements confirmed that, other than one friend, the Applicant's sister, uncle and another friend were all employed. The Officer then linked the country conditions with the Applicant's confirmation that she has worked not only in Canada, but also in Ethiopia and Switzerland, to find that it was more likely than not

that the Applicant could obtain employment on her return. After considering the letters and the country condition evidence, the Officer determined that some of the hardship associated with her return could be mitigated. This is not an error.

[44] The Officer then considered the matter of hardship in light of the evidence of ethnic and religious violence in many parts of Ethiopia, including instances occurring in Addis Ababa. The Officer noted the positive legal developments and security measures being taken, as referenced in the 2019 United States Department of State report, which also highlighted the imperfect situation with other examples of violence. The Officer concluded that there was little objective evidence to conclude that the Applicant would be denied assistance from the police in the event she experiences hardship on account of her ethnicity and religious beliefs. In my view, the Officer did not view the state's efforts solely as "taking steps" to improve. Rather, the Officer's analysis illustrates that they considered the strength of the evidence as to whether the Applicant would likely be affected by adverse country conditions (*Browne v Canada (Citizenship and Immigration)*, 2022 FC 514 at para 48; *Arsu v Canada (Citizenship and Immigration)*, 2020 FC 617 at para 16; *Trach v Canada (Citizenship and Immigration)*, 2019 FC 747 at para 21).

[45] The Officer then connected these conclusions to the H&C Decision. The Officer noted that, despite the Applicant's positive establishment in Canada, establishment alone is not a determinative factor. Instead, a global assessment of all factors must be weighed and considered. The Officer found that there was no "compelling change in circumstances" that would alter the H&C Decision. I do not view the use of these words as importing a new standard or a new test. It is simply a reflection of the Officer's conclusion that the new country condition evidence, which

was not submitted by the Former Representative, did not demonstrate that she would face hardship on her return.

[46] Overall, in light of the record, I find that it was open for the Officer to conclude that the degree of hardship and instability that a return to Ethiopia would entail did not warrant H&C relief.

[47] Lastly, I agree with the Respondent that the Officer's statements that violence affected both Christians and other religions, or that there is no ADR in Ethiopia, are not errors sufficient to render the Decision unreasonable. I agree with the Respondent's characterization of these statements as being "parenthetical" in the overall analysis.

VI. Conclusion

[48] The applications for judicial review in IMM-5384-20 and IMM-2894-21 are dismissed.

[49] The parties have not proposed a certified question, and in my view, none arises on the facts.

JUDGMENT in IMM-5384-20 and IMM-2894-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review in IMM-5384-20 is dismissed for mootness.

2. The application for judicial review in IMM-2894-21 is dismissed.

3. There is no question of general importance for certification.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5384-20
STYLE OF CAUSE:	BISRAT ERSTU WELDDESENBET v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-2894-21
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