Federal Court  Cour fédérale

Date: 20240108

Docket: IMM-13592-22

Citation: 2024 FC 25

Toronto, Ontario, January 8, 2024

PRESENT: Madam Justice Go

BETWEEN:

ASRAT LABA ABDISA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Asrat Laba Abdisa [Applicant] is a citizen of Ethiopia who applied to resettle in Canada through the designated classes of a Convention refugee abroad class and Humanitarian-protected persons abroad [resettlement application] under sections 145-147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[2] The Applicant alleges that on August 1, 2019, while he was working as a pharmacist at a government-run hospital [Hospital], he and his colleagues treated numerous protestors who were wounded during the Ethiopian Government's crackdown on peaceful demonstrations. Government forces harassed the hospital staff, including the Applicant, for attending to the injured. The Applicant was arrested and detained for over three weeks.

[3] Three days after his release, the Applicant fled to Kenya where he was recognized as a Convention refugee by the Kenyan government and the United Nations High Commission for Refugees [UNHCR].

[4] On December 15, 2022, a migration officer of the High Commission of Canada in Nairobi, Kenya [Officer] rejected the Applicant's resettlement application, finding the Applicant did not have a well-founded fear of persecution [Decision]. The Applicant seeks a judicial review of this Decision. I find the Decision unreasonable and I grant the application.

II. Issues and Standard of Review

[5] The Applicant raises two arguments:

A. The Decision was unreasonable because

   i. The Officer's determination of lack of well-founded fear is oblivious of the Applicant's persecution for his imputed political opinion, detention and country conditions in Ethiopia; and

   ii. The Applicant's past persecution is enough to show his well-founded fear.

B. The Officer erred by failing to have regard to the Applicant's status as a UNHCR refugee.

[6] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[7] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker:" *Vavilov* at para 85. The onus is on the Applicant to demonstrate that the decision is unreasonable: *Vavilov* at para 100. To set aside a decision on this basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency:" *Vavilov* at para 100.

III. Analysis

[8] The Applicant based his resettlement application on the allegation that he fears Ethiopian authorities because of his imputed political opinion. To qualify under the Convention refugees abroad class, the Applicant must meet the Convention refugee definition in section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. That is, the Applicant must demonstrate he has a well-founded fear of persecution related to a nexus ground.

[9] Citizenship and Immigration Canada, as it was formerly known, published a guide entitled OP 5 – Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes [OP 5 Guideline], to assist

officers assess permanent residence visa applications under the Convention refugees abroad and Humanitarian-protected persons abroad classes.

A. Was the Decision unreasonable?

[10] The Officer noted that the Applicant has had no political involvement, or participation in any demonstrations, worked for the Government, and was following his supervisor's orders by providing pharmacy services to the wounded on the day in question. As such, the Officer concluded that the Applicant did not have a well-founded fear of persecution.

[11] The Applicant argues the Officer's conclusion on his well-founded fear of persecution was unreasonable and that the undisputed facts of past persecution – the detention, beatings, and condition to report – demonstrate his well-founded fear of persecution.

[12] The parties agree that the test for persecution does not require proving persecution is more likely than not to occur, rather the test is whether, on a balance of probabilities, there was a "reasonable chance," "reasonable possibility," "serious possibility," or "good grounds," for persecution: *Adjei v Canada (Minister of Employment and Immigration)*, 1989 CanLII 9466 (FCA), [1989] 2 FC 680.

[13] However, while the Applicant argues his past persecution is sufficient to prove well-founded fear of persecution, citing *Fernandopulle v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91 [*Fernandopulle*], the Respondent contends the Applicant's

arguments merely amount to disagreements and do not demonstrate that the Decision was unreasonable.

[14] I do not find all of the Applicant's arguments persuasive. Contrary to the Applicant's assertion, the Federal Court of Appeal in *Fernandopulle* held that proof of past persecution does not create a legal presumption, rather, such evidence *may* support a finding of fact that the claimant has a well-founded fear of persecution: *Fernandopulle* at para 18. A claimant must still demonstrate a well-founded fear of future persecution: *Fernandopulle* at para 21.

[15] The Applicant also bases his argument of well-founded fear on the presence of subjective fear, noting that a lack of subjective fear should only be made in circumstances where the refugee claimant has been found not to be credible. I find the issue of subjective fear is not determinative of the case. Subject to a caveat that I will address below, I am of the view that the Officer did not reject the Applicant's application due to credibility concerns or a lack of subjective fear. Further, as the Respondent points out, in addition to having subjective fear, the fear must also be assessed objectively and in light of country conditions and the Applicant's evidence: *Kwiatkowsky v Minister of Employment and Immigration*, 1982 CanLII 221 (SCC), [1982] 2 SCR 856 at 862.

[16] Where I disagree with the Respondent, is their assertion that the Applicant has failed to establish that the fear he claimed to have is reasonable and that his claimed risk has a valid basis.

[17] As *Fernandopulle* and the cases that follow confirm, proof of past persecution may be a relevant consideration. *Sathasivam v Canada (Citizenship and Immigration),* 2023 FC 638 at para 43 explained as follows: "One basis for such a risk analysis is events in the past, from which a future risk could be inferred."

[18] Similarly, OP 5 Guideline at 57 explains:

> The phrase "by reason of a well-founded fear of persecution" is key to the definition of the Convention refugee abroad class. Applicants must provide reasons to enable the officer to decide if they:
>
> - were persecuted; or
> - have a well-founded fear of persecution.

[19] The OP 5 Guideline continues at 57 to provide a list of factors that may indicate an applicant has faced persecution. This includes, among others, any history of incidents indicating persecution of the applicant.

[20] In his resettlement application, the Applicant gave details about the events leading up to his arrest, as well as his experiences during the three-week detention. In Schedule A, the Applicant noted that in early January 2019, he was employed by the Hospital as a pharmacist, in charge of dispensing drugs. The Applicant went on to describe the event that took place on August 1, 2019, and his subsequent arrest and detention. The Applicant gave a similar account in a separate document entitled "The Reasons Why I Fled My Home Country" where he described being subject "to severe beatings, physical threats, intimidation, and denied to have access to my family and to acquire legal representation." The Applicant further stated he was "exposed to constant interrogation by use of excessive force met to obtain confession under duress," and

"remained in the unlawful detention without trial and justice" until he was released on August 25, 2019 on the condition to report to Federal police after every two days for further investigations.

[21] According to the Global Case Management System [GCMS] Notes taken by the Officer of their interview with the Applicant, the Officer asked the latter about his identity and personal information, how he arrived in Kenya, his relationship with the sponsor of his resettlement application, and his employment in Kenya.

[22] The Officer also asked questions regarding the incident on August 1, 2019. In response, the Applicant briefly described what happened at the Hospital, and relayed his three-week detention before release with conditions to report to the police every two days. The Officer then went on to ask questions about the Applicant's own participation in political activities.

[23] Despite the arrest and detention being a central element of the Applicant's allegations of persecution, the Officer did not appear to have asked a single question about the Applicant's ordeal while in detention. Moreover, the Officer devoted just one short sentence in their analysis concerning the Applicant's allegations of past persecution when the Officer noted:

> EVEN WERE THE ONE INCIDENT AND SUBSEQUENT CLAIMED DETENTION TRUE, I CANNOT CONCLUDE THAT THIS AMOUNTS TO PERSECUTION OR A CONTINUING VIOLATION OF HUMAN RIGHTS. CASE REFUSED.

[24] Putting aside the Officer's choice of the word "were," which may signal a negative credibility finding, the Officer's analysis of the Applicant's allegations of past persecution was

sorely lacking, as it left the Court with no insight into which aspect of the Applicant's allegations were considered, or why these allegations did not amount to persecution.

[25] Thus, while I disagree with the Applicant that his past persecution is sufficient to support a well-founded fear, I find the Decision unreasonable as the Officer failed to explain how or why the evidence of the arrest, detention, beatings, and interrogations did not amount to persecution or support a well-founded fear. I also note that the Officer did not analyze whether or not the ongoing requirement to report to the police would put the Applicant at future risk, in light of his allegations of past persecution. The Officer's lack of analysis on the evidence and the Applicant's central allegations of persecution rendered the Decision unreasonable.

B. Did the Officer err by failing to consider the Applicant's UNHCR status?

[26] The Applicant argues the Officer erred by omitting his Convention refugee status and only mentioning it as his identity verification document. The Applicant points to the OP 5 Guideline which directs officers to consider an applicant's UNHCR refugee status, rendering the Officer's failure to do so a reviewable error. This error, the Applicant argues, combined with the Officer's omission of Ethiopia's deteriorating country conditions, makes the Decision unreasonable.

[27] The Respondent argues it was sufficient of the Officer to only acknowledge the Applicant's refugee status and explain why he was not satisfied that the Applicant had a well-founded fear of persecution. The Respondent argues that in *Fisehaye v Canada (Citizenship and Immigration)*, 2022 FC 1358 [*Fisehaye*], Justice McVeigh found that the requirement of an

officer to explain why they diverge from the UNHCR on the applicant's refugee determination is satisfied where the officer acknowledges the applicant has been recognized as a refugee and then assesses the evidence of risk.

[28] I reject the Respondent's arguments for the following reasons.

[29] First, I find *Fisehaye* distinguishable on the facts. In *Fisehaye*, the applicant's allegation of persecution was tied to her ex-husband, with whom the applicant was estranged, and on that basis, the officer in that case found a lack of sufficient evidence to support a well-founded fear. It was in that context that Justice McVeigh did not find the officer's treatment as being unreasonable given that after acknowledging that the UNHCR recognized the Applicant as a refugee, the officer proceeded to assess the Applicant's evidence of forward looking risk: *Fisehaye* at para 55.

[30] Second, as the case law confirms, the fact that an applicant has been granted refugee status by the UNHCR or by a state which is a signatory to the Refugee Convention is a relevant factor that an officer should consider: *Teweldbrhan v Canada (Citizenship and Immigration)*, 2012 FC 371 at paras 20-23, *Amanuel v Canada*, 2021 FC 662 [*Amanuel*] at para 54, *Teckle v Canada (Citizenship and Immigration)*, 2022 FC 845 at para 39, and *Ghbremariam v Canada (Citizenship and Immigration)*, 2023 FC 1305 at paras 15-16.

[31] As explained by Justice Little in *Amanuel*, while an applicant's UNHCR status is not determinative, in assessing the merits of an applicant's claim, the officer must have regard to the

UNHCR's determination. If the officer does not concur with it, the officer should explain why. The Court may conclude that the Officer's decision was reasonable if the decision and reasons make clear that (i) the officer was aware of the applicant's UNHCR status as a refugee; (ii) the officer conducted a thorough assessment of the applicant's application on the merits of Canadian law; and (iii) in doing so, the officer explained why the UNHCR's status was not followed: *Amanuel* at para 54.

[32] In this case, the Officer noted the Applicant's UNHCR status under "document verification," along with the Applicant's other identity information. As part of the verification process, the Officer asked detailed questions about the Applicant's family status, his health conditions, and his relationship with his sponsor. The Officer did not ask any question about the Applicant's UNHCR designation, or the basis of that designation. No other mention was made of the Applicant's UNHCR status again in the rest of the GCMS Notes, let alone any explanation as to why the Officer did not concur with the UNHCR's determination.

[33] In the context of this case, in addition to failing to analyze the Applicant's central allegations of persecution, I also find the Officer erred by failing to engage with the UNHCR's designation of the Applicant as a Convention refugee and provide an explanation as to why they did not concur with the designation. As such, the Officer committed the type of reviewable errors that would warrant the Court's intervention: *Amanuel* at para 54.

IV. Conclusion

[34] The application for judicial review is granted.

[35] There is no question for certification.

JUDGMENT in IMM-13592-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter sent back for redetermination by a different officer.
2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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