Federal Court Courfédérale

Date: 20111021

Docket: IMM-1855-11

Citation: 2011 FC 1212

Ottawa, Ontario, October 21, 2011

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

TIGIST DAMTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] For seven years the Applicant has unsuccessfully maintained her claim for protection as an opponent of the government of Ethiopia. The last step in this effort is the negative humanitarian and compassionate (H&C) decision presently under review which was rendered on February 17, 2011 pursuant to s. 25 of the *Immigration and Refugee Protection Act*, SC 2001 c 27. The essence of the Applicant's argument is that the decision is unreasonable because of fundamental evidentiary errors. For the reasons that follow, I have no hesitation in agreeing with this argument.

[2] The Applicant is a 42-year-old Amhara Ethiopian who was trained as a graphic artist in Germany in 1990. In the mid-1990's, after earning her diploma, she returned to Ethiopia where she was arrested by the authorities as a member of the Ethiopian People's Revolutionary Party (EPRP) which is in opposition to the Ethiopian government, was tortured and held in custody for nine days. The Applicant returned to Germany, completed her graduate studies, and then moved to the United States where her family had relocated. She was denied asylum in the US and came to Canada in 2004; immediately upon arrival she made a claim for refugee protection.

[3] The history of the Applicant's claim discloses a diligent effort to have her claim understood and accepted.

[4] The Applicant's protection claim is based on two subjective and objective fear elements: fear of returning to Ethiopia based on her perceived political opinion; and, fear of the high degree of gender discrimination in Ethiopia. In 2006, on the basis of a global negative credibility finding, the Refugee Protection Division of the Immigration and Refugee Board (RPD) denied her claim, and leave to seek judicial review was denied. In 2007, a first Pre-Removal Risk Assessment (PRRA) was negatively decided and judicial review of this decision was also denied. In 2009, a second PRRA was negatively decided, as was a first application for H&C relief. Upon judicial review of this first H&C decision, leave was granted, and following a hearing the decision was set aside and the matter was returned for redetermination on a finding that the decision-maker failed to consider a key element of the Applicant's hardship argument being the acute gender discrimination that she would suffer if she is required to return to Ethiopia. In February 2011, the Applicant's second request for H&C relief was denied. This is the decision presently under review.

[5] An important feature of the Applicant's life situation is that, upon being scheduled for removal from Canada following the rejection of her second PRRA application, first H&C application, and the dismissal of a stay motion, she was given sanctuary by the Newtonbrook United Church. She has remained in the Church, without leaving the building, since August 13, 2009. Key evidentiary support with respect to the redetermination of the Applicant's second H&C application are letters of support and explanation from the Church and two reports from a psychiatrist who assessed the Applicant's current mental health condition.

[6] The negative H&C decision presently under review was decided according to the Respondent's Guideline test as follows:

> A positive H&C decision is an exceptional response to a particular set of circumstances. The hardship of having to apply for a permanent resident visa from outside of Canada would pose, in most cases, an unusual and undeserved hardship that was not anticipated by the Act of Regulations. The hardship in most cases is the result of circumstances beyond a person's control. Or, that the hardship would have a disproportionate impact on the applicant due to their personal circumstances.
>
> (Reasons for Decision, Application Record, p.7; IP 5 Operational Manual - Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds)

The Officer who rendered the decision determined that the Applicant would not face an unusual and undeserved or disproportionate hardship in returning to Ethiopia.

I. Evidentiary Errors

[7] In my opinion, the decision is unreasonable on the basis of six evidentiary reviewable errors.

A. ***Speculating on the impact of removal on the Applicant's marriage***

[8] In 2005, the Applicant met Mr. Henok Wodaj, a Canadian citizen, when she was involved with the Ethiopian Evangelical Church and they were married at the Newtonbrook United Church in June of 2010. He visited her often. Recently the Applicant's husband has accepted work in Charlotte, North Carolina. The Church Administrator, Carol Crump, wrote the following in support of the relationship:

> Everything that I have observed in the relationship between Tigist and Henok points to a match of love, not of convenience. He is a devoted fiancé. He has visited frequently, spending as much time as possible with her while in sanctuary. He always seems happy here. I noticed him one time bringing in a huge bouquet of red roses! When he brought her some new clothes, he knew exactly what would please her.
>
> [...]
>
> There is absolutely no doubt in my mind that Tigist and Henok are in love and I hope that they will have every opportunity to enjoy the happy marriage that they deserve.
>
> (Application Record, p. 317)

[9] The Applicant, her husband, the Church administrator, and as described below, the psychiatrist who evaluated the Applicant's mental health, provided considerable evidence indicating the emotional difficulty that both the Applicant and her husband were encountering as a result of their separation and the strain of sanctuary.

[10] The Applicant's husband expresses the following hope for keeping the marriage intact if the Applicant is required to return to Ethiopia:

> I lived in Toronto until March 16, 2010 when I was hired by a company called SCI. This company placed me at IBM in Charlotte, North Carolina, USA, where I currently work as a systems analyst.

> My contract is for 1 year. If I am able to renew my contract, I am interested in seeing if it is possible to transfer to a position in Canada with the same company.
>
> […]
>
> I intend to sponsor my wife. I am also considering bringing my wife with me to US if I am not able to transfer to a position in Canada. I am currently working in the US on a TN visa. If I am able to acquire an H1B visa, I may be able to sponsor my wife and have her come live with me in Charlotte until the end of my contract.
>
> (Affidavit of June 2010, Applicant's Appendix, Volume 5, p. 894)

With respect to the practical future viability of the marriage, the Officer cites a number of concerns but also states a conclusion about the future:

> Henok writes that it is his hope that the applicant can live with him in the US but if that does not work out then he will look into transferring to IBM Canada. To date submissions are silent as to possible avenues available to them in this regard.
>
> [...]
>
> The applicant's husband has not indicated what possible steps are available to them or what steps he has taken to seek out sponsorship information. In his most recent letter (undated but submitted in December 2010) he writes that he is having difficulty both emotionally and financially coming to visit his wife in Canada but he hopes to see her at Christmas.
>
> Details of the applicant's current living arrangements informs that she continues to live in the basement of the church. She is provided with an area for sleeping, accommodation for personal hygiene and access to food. The applicant submits that she has not left the church since October 2009 for fear of being discovered. She writes of the restrictive nature of her living arrangements and states that her emotional state has deteriorated since the wedding. She has not had visits from her parents or sisters although her husband has visited twice.
>
> [...]

> The applicant's family are residents of the United States. Her husband has a US visa and is living and working in the US. He states that he would like her to live with him in the US. He has not indicated what steps that he has taken to ensure their future together in that country. He has not indicated how granting the applicant status in Canada would assist him in getting her status to live in the US, assist him financially or alleviate his burden of travel. Submissions from the applicant are silent as to the possibility or willingness of her spouse to sponsor her from Ethiopia either to live in Canada or the US. The applicant has not indicated that US policies require her to be a Canadian resident in order for them to be together in the US. Permanent residency in Canada does not necessarily guarantee entry to the US. International law supports the belief that countries have the right to control their own borders and immigration laws. While the applicant's husband submits that it was difficult to move to the US and be separated from his wife, it was nonetheless, within his control.
>
> [...]
>
> <u>It is reasonable to believe (in the absence of evidence to the contrary) that she would continue to receive the emotional support of her husband and family in a long distance relationship. It is also reasonable to believe that any steps or queries into having the applicant join her husband in the US would continue. Evidence does not support that it would not</u>.
>
> [...]
>
> I acknowledge that a spousal separation is difficult however the hardship of being separated from her husband is based on a decision to marry someone who continues to reside outside of Canada.
>
> [Emphasis added]
>
> (Reasons for Decision, Application Record, pp. 10 – 19)

[11] Thus, while identifying the obstacles that must be navigated to sustain the marriage if the Applicant returns to Ethiopia, nevertheless, the Officer concludes that it is reasonable to believe that a positive immigration outcome will continue to be pursued, and, in the meantime, the marriage can be sustained. In my opinion there is no evidence to support this conclusion; the belief is conjecture.

It is also possible to speculate that there is no way that the Applicant and her husband will ever be reunited given the fact that this hope is completely dependent on success in navigating the complexities and vagaries of the US or Canadian immigration systems in anything approaching a reasonable time, and, as a result, the marriage will be at an end.

B. *Mischaracterizing the psychiatric evidence*

[12] The Applicant provided the Officer with two reports prepared by Psychiatrist Dr. James Deutsch who assessed her mental health. The first was as a result of a meeting with the Applicant in early June of 2010, and the second from a 45-minute telephone assessment approximately six months later.

[13] In the first report Dr. Deutsch concluded that:

> Despite the trying circumstances of her life, Ms Damte presented as generous, giving, desiring to be productive and to contribute to society in Canada, and to be able to have the basic things in her life. Her attempt to maintain a semblance of normality, however, is punctuated with frequent episodes of extreme anxiety consisting of bodily experiences and reminders of the threats and the torture that she experienced in Ethiopia. Her family is in North America. There is no remaining family in Ethiopia. They were all able to escape and find safety.
>
> Ms Damte presents with symptoms that are quite commonly seen in individuals who have experienced physical and psychological trauma, dislocation, and prolonged and acute uncertainty and inability to plan their future. These symptoms do not in themselves imply an underlying psychiatric disorder, but are frequently understood to be a human reaction to defined acute and chronic stress. I would however recommend she be able to see a medical practitioner to rule out the possibility of any physical condition whose symptoms might overlap.
>
> Were it be required that she return to Ethiopia, it would involve not only risk to life and limb, but an unbearable separation from all that

> matters to her. The psychological pain and trauma would be devastating to Ms Damte.
>
> (Application Record, p. 321)

Following his second discussion with the Applicant, Dr. Deutsch provided the following update observations:

> Ms Damte's condition has deteriorated under her current conditions of not knowing what life will bring, and of having no control or plan.
>
> […]
>
> Similar to well-described cases of prisoners of war, she is faced daily with extreme uncertainty, not only for her physical and psychological safety and continuity, but now as well she is faced with loss of a primary relationship [with her husband] and of the possibility of a meaningful future, which she clearly desires, as does any human being. She dares not hope. The symptoms she describes, though significantly worse than during her original assessment in June 2010, continue to represent a coping response to a situation of chronic uncertainty and traumatic past, and do not appear to represent an underlying mental disorder. I support the availability of medical monitoring and care as required, given the potential overlap between her symptoms and those of certain medical disorders. The availability of emotional support and companionship is essential.
>
> The urgency of her situation is greater now. It is hoped that a decision can be expedited, in order to prevent further worsening of her suffering.
>
> (Application Record, p. 410)

[14] With respect to the quality of Dr. Deutsch's evaluation, the Officer expressed the following opinion:

> He writes that return to Ethiopia would be <u>difficult</u> for the applicant;
>
> […]
>
> I find the value of the reports to be low. The analysis of the report conflates the applicant's anxiety regarding the possible return to

> Ethiopia with the anxiety resulting from the applicant's self-imposed confinement. Nonetheless, no course of treatment or medication has been recommended.
>
> [Emphasis added]
>
> (Reasons for Decision, Application Record, pp. 10 – 11)

[15] The Applicant submits that the Officer mischaracterized Dr. Deutsch's findings. Dr. Deutsch determined that the Applicant would suffer "devastating" psychological pain and trauma if returned to Ethiopia whereas, in the decision, the Officer concludes that the situation that would be "difficult" for the Applicant. I agree that this is a mischaracterization and constitutes a reviewable error. In my opinion the Officer's representation of the psychiatric assessment is so underwhelming that it constitutes a failure to properly consider the evidence (see: *De Sousa v MCI,* [2008] FCJ No 1506, at paragraph 22 for a similar finding).

[16] The Respondent argues that, absent a psychiatric diagnosis, a psychiatric opinion is not clinical and that to remain within the confines of clinical observation and psychiatric expertise, the psychiatrist must use only "clinical terms" or "objective standards." In my opinion, this argument misses the point of the evaluation. Dr. Deutsch was not asked to make a clinical psychiatric diagnosis but to report on the Applicant's mental condition from talking to her and observing her. I reject the notion that such an assessment can only be validated for evidentiary purposes by making a clinical finding.

C. *Questioning the Psychiatrist's expertise and methodology*

[17] The Officer's understanding of the purpose of Dr. Deutsch's involvement is expressed in the following passage from the decision:

> He writes that return to Ethiopia would be difficult for the applicant; however, I note that he has not indicated on what objective evidence he bases his belief. Dr. Deutsch has not indicated that he has expertise on Ethiopia or a personal knowledge of the applicant's circumstances in that country.
>
> […]
>
> Information as to how the interview was conducted has not been provided. Nor is it clear that the assessment is based on evidence beyond the applicant's statements.
>
> (Reasons for Decision, Application Record, pp. 10 – 11)

[18] I find that the Officer is mistaken as to the purpose of Dr. Deutsch's involvement. It is clear that Dr. Deutsch's evaluations were tendered, not for proof of the facts recounted by the Applicant with respect to objective fear of return to Ethiopia, but to supply evidence of her current state of mind, and its fragility in the circumstances of her proposed return to Ethiopia. I find there is absolutely no basis to question Dr. Deutsch's methodology applied in reaching the opinions offered or, indeed, the content of the opinions as quoted above. Because the mistake played a part in little weight being accorded to Dr. Deutsch's evaluation, I find that it constitutes a reviewable error.

D. *Disregarding evidence supporting a rational basis for the Applicant's fear of return*

[19] In considering the evidence relating to the Applicant's political activism, the Officer made the following assessment:

> The panel also found that there was no evidence that photographs of various events were taken or used by the Ethiopian government.

> […]
>
> While not bound by the finding of the RPD, I note that the letters relating to her political activism provided in this application are similar. They support that the applicant has membership in several Canadian Ethiopian organizations; however, membership in and of itself does not necessarily mean that the applicant is perceived to be actively involved in the organization, its programs or its ideology. Letters in support of her political profile are vague and lacking in personal details. In terms of references to Ethiopian country conditions I prefer the documentary evidence found through research of objective country reports. The statements regarding a risk to the applicant if returned to Ethiopia are generalized, speculative and not supported by objective evidence.
>
> (Reasons for Decision, Application Record, p. 12)

[20] With respect to the reality of the risk she would suffer upon her return to Ethiopia, the Applicant tendered evidence to prove a wide spread suspicion that the Ethiopian authorities routinely videotape anti-government demonstrations abroad (Applicant's Application Record, pp. 94 - 136). I agree with the argument that, regardless of a determination of its reliability, the evidence was required to be considered to properly evaluate the subjective fear that the evidence has caused the Applicant. I find that the Officer's failure to engage this requirement constitutes a reviewable error.

E. *Concluding on health care in Ethiopia by independent research without notice*

[21] With respect to the issue of the Applicant's mental health and her care upon return to Ethiopia, the Officer considered documentary evidence found through independent research. Specifically, the Officer consulted the World Health Organization Report on Mental Health System

in Ethiopia, 2006 (Applicant's Application Record, p. 411) to make the following accurate factual finding:

> The country has 53 psychiatric outpatient facilities, 6 inpatient facilities and one mental hospital. There is only one residential facility in the country for the chronically mentally ill and several other residential facilities, which have mentally ill clients among their beneficiaries.
>
> (Reasons for Decision, Application Record, p. 17)

Based on this finding, the Officer expressed the opinion that "medical care (including mental health issues) although limited, is reasonably available to [the Applicant] in Ethiopia" (Reasons for Decision, Application Record, p. 19).

[22] The Applicant makes two arguments with respect to this opinion: it is a breach of natural justice for the Officer to rely on extrinsic evidence without providing notice and an opportunity for response, and the opinion is unsupported by the evidence. While I do not accept the natural justice argument because the evidence consulted was publicly available prior to the Applicant filing her submissions, I agree that the opinion constitutes a perverse finding. The evidence is that in Ethiopia there are 0.003 psychiatrists for every 100,000 people, which is the equivalent of 22 psychiatrists for 80 million people. In my opinion, under no circumstances can this be found to be "reasonably available" care.

F. *Failing to accurately determine the reality of the Applicant's life upon return to Ethiopia, and to decide with respect to that reality*

[23] The first decision with respect to the Applicant's request for H&C relief was set aside because of the decision-maker's failure to consider an important aspect of the Application:

undisputed deep gender discrimination in Ethiopia. The issue that the Officer in the present Application was called on to address is the proven results generated by that discrimination: poverty, violence, powerlessness, and hopelessness experienced by women.

[24] I find that, while the discrimination is identified, its depth and effect established by the evidence are not fairly and accurately portrayed or applied in the decision under review. In my opinion, the following statement respecting small gains does nothing to address the evidence of the entrenched reality of women's suffering in Ethiopia:

> In Amhara, Addis Ababa and Oromia, Pathfinder has trained and provided resources to women's associations that enable members to earn an independent income and develop business skills. Through these programs, more than 2,400 women have undertaken training in small-scale business management. Participants have learned vegetable and horticultural production and marketing, animal husbandry, pottery making, restaurants and tea shop management and garbage collection and recycling. Women form their own savings and credit groups supporting one another as they develop business skills and repay their loans. Six hundred participants received loans of money generated through a revolving fund in the Oromia region while another group of commercial sex workers started small business outside the sex trade, as did 500 who collect firewood … It doesn't take long for a young girl to see her future in a whole new light when presented with the possibility that, instead of marrying an older man she has never met, she can finish high school and perhaps even continue to university. She can earn her own money, and – finally – choose her own husband.
>
> (Reasons for Decision, Application Record, p. 14)

[25] The Officer's consideration of the evidence of discrimination and the overall framing of the decision on this issue warrants comment. In the decision, the Officer states:

> A review of the documentary evidence informs that country conditions in Ethiopia are <u>less than ideal</u>. There are areas of concern with the treatment of women in the country. Nonetheless, applicant

> is not named in the documents nor does the information support that she is similarly situated. The evidence does not inform that she would expect to return to a rural part of the country nor is she uneducated. She has not indicated (nor has the evidence indicated) that female genital mutilation (FGM) is of concern for a person of her age nor has she indicated that spousal violence is an issue. It is not enough that the applicant show the existence of discrimination in Ethiopia, she must show how that discrimination subjects her personally to a hardship that is unusual and undeserved or disproportionate.
>
> […]
>
> While finding employment in her specific field <u>may be difficult</u> in Ethiopia, I am not satisfied that it is an unusual and undeserved or disproportionate hardship. It is reasonable to believe (in the absence of evidence to the contrary) that she would continue to receive the emotional support of her husband and family in a long distance relationship. It is also reasonable to believe that any steps or queries into having the applicant join her husband in the US would continue. Evidence does not support that it would not.
>
> Difficulties may arise for the applicant in Ethiopia based on her prolonged absence from that country; her reluctance to secure employment outside her particular field of study and her lack of family and friends in Ethiopia. However, her own history informs that she has faced similar difficulties in the past and been adaptable. She left home and went to study in Czechoslovakia and Germany at a young age, without her family, friends or employment. She left Germany and moved to the US where she found employment. She then, left her family and friends and re-located to Canada where she submitted that she had no family or friends.
>
> [Emphasis added]
>
> (Reasons for Decision, Application Record, p. 18)

[26] In my opinion, these statements disregard the reality presented in the evidence, and thus constitute a reviewable error. The euphemistic findings that country conditions in Ethiopia are "<u>less than ideal</u>" and employment "<u>may be difficult</u>" cloud the truth: the Applicant will return to Ethiopia as a dysfunctional woman who will face tremendous culturally imbedded gender discrimination

with no viable coping strategy. In addition, the Officer's reliance upon the Applicant's previous history of adaptability certainly disregards the medical evidence and the Applicant's present poor mental health.

III. Conclusion

[27] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at paragraph 47 establishes the test for a reasonable decision:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

I find that the decision under review is unreasonable because evidentiary error renders it indefensible on the facts.

IV. Final Observations

[28] While they do not form part of the reasons for setting aside the decision under review, I have two final observations to make about key features of the present Application.

A. *Questioning the Church's intentions in providing sanctuary to the Applicant*

[29] In support of her Application, the Applicant provided two letters, one from the Church Administrator, and one from the Reverend of Newtonbrook United Church, as evidence that the Applicant is a person in need of humanitarian and compassionate relief.

[30] In his letter, Reverend Allan Baker states:

> Newtonbrook United Church has a long history of worship and responsiveness to social needs in the immediate community and beyond. When affordable housing on Yonge Street was demolished to make room for high-rise, high-priced condominiums, we offered up our congregational parking lot to provide 53 units of affordable housing.
>
> […]
>
> More recently, over the past 10 years, we have responded to the needs of the hungry and homeless initially through the "Out of the Cold" program, but now expanded to year-round caring for those less fortunate than ourselves.
>
> […]
>
> Against this background, we were made aware of the plight facing Ms. Tigist Damte a person whose application for refugee status in Canada has thus far been denied. As we studied her situation in more detail, we felt that she should be given a fair and reasonable opportunity to have her case reconsidered. We continue to view this as a justice issue. But what could we do to help in a meaningful way?
>
> This is a new venture for us as a congregation. What kind of commitment would we be making.... and for how long? We soon discovered that our fears were primarily fears of the unknown..., and unfounded. As we have come to know, respect and love Tigist, we are appreciating her warmth and personality and the many gifts she has brought to the life and work of Newtonbrook United Church over the past several months. We have been providing living accommodation to Tigist since November 2009. Within the confines of our church building, she has become involved with many aspects of our congregational life and work. She attends Sunday morning Worship regularly. She is an active volunteer at our Wednesday

> Drop Inn, serving meals to our guests. As jobs are rotated, she helps out in many aspects and quietly but effectively steps in where she sees things need to be done — a good team player. She is making strong friendships with several members of the congregation, including myself and my wife.
>
> […]
>
> Tigist Damte is a woman who, in my experience, is able to form healthy relationships; share her skills for the benefit of others, provide care for people who are marginalized, and contribute in many meaningful ways to our community. Her presence has certainly enriched our congregation and she is a blessing to those who know her.
>
> (Application Record, pp. 315 – 316)

[31] The Officer acknowledged that the church community does not view its involvement lightly, and that the Applicant is the first to whom they have offered sanctuary. However, the Officer questioned the Church's intentions:

> They became involved because they believe this to be an issue of justice. Details as to how they became involved with the applicant or her circumstances have not been provided. A guide for Lutheran/Anglican ministries in offering sanctuary has been submitted but procedures used by the United Church (the Newtonbrook United Church in particular) have not been submitted.
>
> […]
>
> The evidence from the Newtonbrook United Church congregation does not inform how they came to determine that the applicant was a person in need of sanctuary […] The evidence does not inform whether their decision was based on information other than the applicant's statements. Documentation is silent as to whether the justice issue raised by the church is based on the applicant's personal circumstances or part of a broader mandate for the church. The justice issue has not been specifically identified by the church congregation.
>
> (Reasons for Decision, Application Record, p. 9)

[32] It appears that the Officer's central concern for precision in the expression of the Church's motivation for providing sanctuary to the Applicant acted as a barrier to seeing the obvious: sanctuary was provided out of humanitarian and compassionate concern for her well being. By missing this point, the Officer was not impressed with the Church's thoughtful perspective of the facts of the Applicant's situation. There is no question that the Officer did not have to accept the Church's perspective as compelling in reaching the decision under review, but neither is there any basis for questioning the Church's care and concern for the Applicant.

B. *Credibly determining humanitarian and compassionate relief*

[33] The Respondent's Guideline test for granting H&C relief has been accepted by Justice L'Heureux-Dubé as a reasonable start point of analysis in *Baker v Canada (MCI)*, [1999] 2 SCR 817 at paragraphs 72 and 74:

> The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. […] The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.
>
> […]
>
> While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach.
>
> [Emphasis added]

The Guideline test applied as quoted in paragraph 6 of these reasons bears repeating:

> A positive H&C decision is an exceptional response to a particular set of circumstances. The hardship of having to apply for a permanent resident visa from outside of Canada would pose, in most cases, an unusual and undeserved hardship that was not anticipated by the Act of Regulations. The hardship in most cases is the result of circumstances beyond a person's control. Or, that the hardship would have a disproportionate impact on the applicant due to their personal circumstances.
>
> [Emphasis added]

Thus, the Guideline test requires a subjective as well as an objective evaluation of hardship: unusual hardship might only require an objective analysis, whereas undeserved and disproportionate impact hardship requires both an objective as well as a subjective analysis. A subjective analysis requires that the facts be viewed from an applicant's perspective. In particular, a disproportionate impact analysis must reflect an understanding of the reality of life a person would face, in body and mind, if forced to leave Canada. In my opinion, to be credible in determining these essential features, a decision-maker must apparently, and actually, apply compassion.

[34] Applying compassion requires an empathetic approach. This approach is achieved by a decision-maker stepping into the shoes of an applicant and asking the question: how would I feel if I were her or him? In coming to the answer, the decision-maker's heart, as well as analytical mind, must be engaged.

[35] With respect to undeserved hardship, it is apparent that an operating feature of the negative decision rendered in the present Application is a finding of <u>deserved</u> hardship:

> Her manner of remaining in Canada was a choice that she made.
>
> (Reasons for Decision, Application Record, p.11)
>
> Difficulties may arise for the applicant in Ethiopia based on her prolonged absence from that country; <u>her reluctance</u> to secure employment outside her particular field of study and her lack of family and friends in Ethiopia.
>
> […]
>
> She then, left her family and friends and re-located to Canada where she submitted she had no family or friends.
>
> […]
>
> […] she decided to remain in Canada after that time was arguably within her control. That she has taken the unusual step of seeking sanctuary is also arguably within her control.
>
> […]
>
> I acknowledge that a spousal separation is difficult however the hardship of being separated from her husband is based on a decision to marry someone who continues to reside outside of Canada.
>
> [Emphasis added]
>
> (Reasons for Decision, Application Record, pp. 18 - 19)

In reaching these conclusions, negative to the Applicant's request for relief, there is no evidence that an attempt was made to consider each decision the Applicant made from her perspective. For example, sanctuary was granted to the Applicant by the Church on the basis that it was "just" for her to have the opportunity to remain in Canada until her H&C request was completed. The question is: can the Applicant's willingness to accept the offer of sanctuary be accepted as reasonable given her

fear of returning to Ethiopia? A compassionate evaluation might result in the answer being "yes". This all-important question was not addressed.

[36] With respect to disproportionate impact hardship, a decision-maker must ask the question: how would I feel if I were this person when the door to the plane opens upon arrival in the country from which I fled? In the present case, the question becomes: on arrival in Ethiopia what would it feel like to be an impoverished middle-aged mentally unstable woman racked with immobilizing fear returning to a punishing political, social, and economic place which has virtually no mental health care, with no birth family or marriage support, no job, no prospect of obtaining meaningful work, no place to live; and, indeed, no future. Heartfelt compassion might require her to not take the first step. There is no evidence in the decision presently under review that a credible disproportionate impact analysis was undertaken.

ORDER

For the reasons provided, the decision is set aside and the matter is referred back to a different H&C officer for redetermination.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	October 21, 2011

APPEARANCES:

Hilary Evans Cameron	FOR THE APPLICANT
Nina Chandy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT