Federal Court  Cour fédérale

Date: 20161202

Docket: IMM-2577-16

Citation: 2016 FC 1325

Toronto, Ontario, December 2, 2016

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

X.Y.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

[1] The present application concerns a life story that was under humanitarian and compassionate consideration in the decision presently under review. For the reasons that follow, I find that the decision is unreasonable.

[2] The Applicant's story is detailed and tragic. She is a 33-year-old Ethiopian woman who arrived in Canada on February 5, 2013. Ten days later, she claimed refugee protection on the

basis of actual and imputed political opinion. Approximately one month later, during her medical examination, she learned she was HIV positive.

[3] On April 24, 2013, the RPD denied her claim on the grounds of identity and credibility. She never disclosed her HIV status to her lawyer before the RPD, in part due to her fear that her lawyer's Amharic interpreter would leak the information to the Ethiopian community. She also kept her HIV status from the lawyer who prepared her merit assessment for Legal Aid, due to intense shame. Her appeal to the RAD was dismissed on November 1, 2013 for failure to perfect.

[4] On November 27, 2013, the Applicant's mother passed away leaving her with no family members in Ethiopia.

[5] When she was unable to receive legal aid, the Applicant found herself without counsel and could not perfect her application for leave and judicial review of the RAD decision. As a result, her application was dismissed on January 1, 2014.

[6] In February 2014, the Applicant disclosed her immigration issues to her HIV doctor, who pointed her in the direction of the HIV & AIDs Legal Clinic of Ontario [HALCO]. Her current counsel advised her to disclose her HIV status in her H&C and PRRA applications.

[7] On December 21, 2014, the Applicant submitted her first H&C application, based on hardship in Ethiopia due to her HIV status and her establishment in Canada. She was represented by a private bar lawyer because HALCO did not have the capacity to assist her at that time. This

first application was rejected on March 6, 2015. On May 13 and July 10, 2015, the Applicant submitted a PRRA and second H&C application, respectively. The Applicant's second H&C application was based on hardship in Ethiopia due to her HIV status, having no remaining family in Ethiopia, and her establishment in Canada. This time, she had the assistance of HALCO**.** The same Officer denied her PRRA and second H&C application on July 2, 2016. The present Application is a challenge to the H&C decision.

[8] In any event of the merits of the Applicant's detailed plea for humanitarian and compassionate relief, the Officer that heard the plea chose to reduce the weight of the Applicant's evidence on the basis of vague implausibility finding. Two critical passages of the decision speak to this point.

[9] After a brief statement of the history of the Applicant's lengthy attempt to seek relief in Canada, the very first finding in the decision under review is as follows:

> The RPD was not satisfied that the applicant had established her identity. She provided additional evidence however I have concerns with respect to the documentation she has provided to establish her identity owing to the crude presentation of the coat of arms in the stamp/seal on the birth certificate and the misspelling of the word assistant in the title Assistant Director on her secondary school certificate. I find she has not sufficiently established her identity as a citizen of Ethiopia and this weighs negatively in this assessment.
>
> (Decision, p. 2)

[10] And the very last finding in the decision under review is as follows:

> [The Applicant's] establishment in Canada was accorded little weight, and her inability to credibility establish her identity also weighed negatively into this assessment. Even with the moderate

> weight accorded to the consideration of the level of discrimination she may face, I found it insufficient to tilt this application to a positive.
>
> (Decision, p. 5)

[11] In my opinion, the first finding is an unfounded implausibility finding which constitutes an erroneous negative credibility finding. In effect, the Officer found that, without any evidence in support, it is implausible that the government in Ethiopia would issue a birth certificate with the perceived deficiencies noted, and, therefore, the document is fraudulent. As a consequence, because the Applicant tendered a fraudulent document, the Officer found that she must bear the weight of a negative credibility finding which impinges on the merits of her plea for humanitarian and compassionate relief. I find that to so decide is remarkably unfair.

[12] The law on making an implausibility finding is stated in *Vodics v Canada (Minister of Citizenship and Immigration),* 2005 FC 783 at paragraphs 10 and 11:

> With respect to making negative credibility findings in general, and implausibility findings in particular, Justice Muldoon in *Valtchev v Canada (MCI),* 2001 FCT 776 [at paragraphs 6 and 7]:
>
> > The tribunal adverts to the principle from *Maldonado v. M.E.I.*, [1980] 2 F.C 302 (C.A.) at 305, that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. But the tribunal does not apply the Maldonado principle to this applicant, and repeatedly disregards his testimony, holding that much of it appears to it to be implausible. Additionally, the tribunal often substitutes its own version of events without evidence to support its conclusions.
> >
> > A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story

> provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the acts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22]
>
> [Emphasis in the original]

> It is not difficult to understand that, to be fair to a person who swears to tell the truth, concrete reasons supported by cogent evidence must exist before the person is disbelieved. Let us be clear. To say that someone is not credible is to say that they are lying. Therefore, to be fair, a decision-maker must be able to articulate why he or she is suspicious of the sworn testimony, and, unless this can be done, suspicion cannot be applied in reaching a conclusion. The benefit of any unsupported doubt must go to the person giving the evidence.

[13] Therefore, in the present case, from evidence on the record, the Officer was required to clearly find what might reasonably be expected about the appearance of government documents from Ethiopia, and then to conclude whether the documents under consideration conform with what might be reasonably expected. In the present case this process of critical analysis was not followed. As a result, I find that the Officer’s implausibility finding is made in error of law which renders the decision under review unreasonable. The Officer’s decision must be set aside and the matter referred back for reconsideration by a different decision-maker.

[14] I wish to end these reasons with a reminder with respect to the conduct of the redetermination. Empathy leading to compassion must be alive in the mind and heart of a person who is charged with the critically important task of making a decision to relieve pain in another person's life. Remember, we all would ask for that careful and kind treatment should we be in that person's shoes.

JUDGMENT

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

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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