

Federal Court



Cour fédérale

Date: 20191223

Docket: IMM-1487-19

Citation: 2019 FC 1657

Ottawa, Ontario, December 23, 2019

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

YOHANA KAHSSAI FSAHAYE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] An immigration officer at the High Commission of Canada in Nairobi, Kenya, refused Ms. Fсахaye's application for a permanent resident visa in Canada as a member of the Convention refugee abroad class.

[2] For the reasons that follow, that decision must be set aside.

[3] Ms. Fsahaye was born in Ethiopia but is a citizen of Eritrea and grew up there. She was conscripted by her government into an indefinite period of national service as a clerical assistant in the defence ministry in Asmara, Eritrea. She attempted to leave Eritrea in 2014, but was apprehended and imprisoned for approximately one year. About three months before her release, on March 2, 2015, she applied in person with her Eritrean passport at the American consular post in Asmara, for a visa to visit the US with her mother. Her application was denied, although her mother's was approved.

[4] After Ms. Fsahaye's release from prison, she crossed the border into Ethiopia, and using her Eritrean passport as identification, she was granted refugee status by UNHCR in January 2016. Since then, she has lived in Adiharush Refugee Camp.

[5] Ms. Fsahaye applied for permanent residence in Canada as a member of the Convention refugee abroad class. As part of that process, an immigration officer interviewed her in Addis Ababa on January 30, 2019, with the aid of an interpreter. The officer took notes on his laptop computer. On February 5, 2019, the officer made an entry in the Global Case Management System [GCMS] summarizing the questions asked and answers given. A second entry that day sets out reasons for the negative decision, and a letter was later sent by email to the Ms. Fsahaye denying her application.

[6] Credibility was the reason for denying the application. The relevant portion of the decision setting out the reasons, reads as follows:

After carefully assessing all factors relative to your application, I am not satisfied that you are a member of any of the classes

prescribed because on a balance of probabilities I find that your testimony and declarations are more likely false than true. Specifically, you declared that following your first attempt to flee the country you were caught and imprisoned in Sawa for two months during which time you became ill and obtained medical care. Following your treatment, you testified that you were then imprisoned in Adi Abeto prison from May or June 2014 until May 2015. You conceded at interview that you had applied for US visa during this time. Your biometric results show that in fact you applied for US visa in Asmara and provided your biometrics to US authorities on March 2, 2015. You were confronted with the fact that you could not have been providing biometrics to US authorities for a US visa while being detained in Adi Abeto and you indicated that you had received the day pass. I have considered this response and do not find it credible that Eritrean authorities would release a person detained in Adi Abeto on a day pass, that they would allow you to be in possession of an Eritrean passport and that you would subsequently return to a prison. Having considered the information before me, I find that your testimony and declarations are more likely false than true

[emphasis added]

[7] In her affidavit filed in support of this application, Ms. Fсахaye attests she had become ill when in Sawa prison and was sent to a military hospital. Upon completion of her medical treatment, she was transferred to Adi Abeto detention centre to finish the remainder of her sentence. She explains how he was able to leave prison on a day pass and thus attend the U.S. consular post:

Referring to my medical history, I was informed by a military officer at the detention centre that if I provide a bail, I will be able to get a day pass for March 2, and 5, 2015. Knowing this, my family members arranged my medical treatment plane [*sic*] and used the opportunity to reach out other possibilities.

While in Detention, I was given day passes in the above-noted dates using the pretext of medical reasons. However, I used the opportunities to go to the US embassy to give biometrics and conduct visa interview on March 2, 2015 and finished the medical treatment on March 5, 2015. My family members served as sureties by way of depositing their title deeds to secure me the day

passes. The prisons have had this system of letting prisoners unattended if they had surety and arrangements before them.

[emphasis added]

[8] In that affidavit, she also attests that at the interview with the officer, she explained how it was that she had an Eritrean passport. She obtained it when she was young and then renewed it when she worked for the government. She further attests that she also “explained the questions regarding the exit from detention for the visa interview and biometrics at the US embassy.” The officer’s notes disclose only that she acknowledged having an Eritrean passport and that she volunteered that she had applied to the US embassy for a visa in March 2015. The notes also indicate that she told the officer that she had been able to leave detention on a day pass. No explanation is recorded as to why or how that came to be.

[9] Ms. Fсахaye submits that she was denied procedural fairness because the officer failed to reflect accurately the answers she gave to his questions and thus the decision made is not based on the complete and accurate record. In support of that submission, she filed a supplementary affidavit in which she provides her sworn evidence as to the responses she gave to the officer when asked about the day pass and her passport.

[10] The officer’s notes on these critical issues read, in relevant part, as follows:

Q: Did you ever have a passport from Eritrea? A: Yes, I had one.
Q: Why? A: **PA is quiet* Q: Mam? Why did you obtain an Eritrean passport in Eritrea? A: I also applied to go to the USA from Eritrea also using an Eritrean passport.

...

Q: But according to your testimony today you were in prison from May 2014 until May 2015 and were not let out of Adi Abeto. **PA does not respond** Q: on your application forms and during your testimony today you told me that you were detained in prison from April 2014 until May 2015 but that you had a few weeks of medical care. However you testified that from about May/June 2014 until May 2015 you were in jail, in prison, and were not released. When I receive the results of from the USA are they going to demonstrate that you applied for a US visa during this time? A: Yes. Q; Can you explain how you were able to apply for a visa for the USA and provide your biometrics to them and attend the embassy when you were detained? **PA is silent** Q: Mam? A: I don't know. Well they gave me a day pass to go to the hospital.

...

Q: In addition, I'm concerned because it is very difficult to obtain an Eritrean passport. I have concerns because I don't find it credible that the Eritrean government would allow you to be in possession of a passport after you had been caught crossing the border illegally? A: I renewed it before and they never took it.

[11] She swore in her affidavit and again in her supplementary affidavit that she explained to the officer that she only obtained the day pass when her relatives acted as sureties and pledged the title deed to a real property as security for her return. She also attests in the first affidavit that she told the officer that she was able to get her Eritrean passport before she first attempted to flee the country, and further explains in the supplementary affidavit that it was not in her possession when she was detained and imprisoned. These pieces of contextual information are not included in the GCMS notes.

[12] Ms. Fсахaye was not cross-examined on her affidavits and the officer provided no affidavit countering her evidence. The submission that the officer breached procedural fairness in failing accurately to transcribe the content of her interview is central to her application. Ms.

Fsahaye's answers to the questions are clearly within her personal knowledge, and they are of assistance to this Court in determining her application. These affidavits are admissible.

[13] The Minister submits that the GCMS notes are reliable. The Minister further submits that the officer who made the notes is a different officer than the decision-maker. If so, that illustrates why the accuracy of the notes is imperative.

[14] I do not accept the Minister's submission that the affidavits of Ms. Fsahaye are entitled to less weight than the GCMS notes:

The Applicant does not attach any notes "contemporaneous" to the interview held on January 30, 2019. The recollection of the Applicant is not more reliable than the GCMS Notes and decision made on February 5, 2019 even if it is made in a sworn affidavit. An affidavit from the Officer would not change the historical facts of the date and content of the GCMS notes.

[15] I agree with other decisions from this Court that hold that the sworn evidence of an applicant as to statements made at an interview is to be preferred to notes made by the interviewer that are not accompanied by an affidavit: See for example, *Gharzeldin v Canada (Citizenship and Immigration)*, 2018 FC 841, and the cases cited therein.

[16] The evidence Ms. Fsahaye provides in her affidavits offers an explanation for:

- 1) why the Eritrean authorities would release her on a day pass (because it is their practice when a surety is offered);

- 2) why she was in possession of an Eritrean passport (because she obtained it as a child and renewed it when she was a government employee, and it was not in her possession when she was detained); and
- 3) why she would return to the prison (because had she not, her family, as sureties, would lose their property).

[17] An officer's decision is of such importance to an applicant and of such finality, that the recitation of the face-to-face interview must be recorded and summarized accurately. The evidence of Ms. Fsaye counters the conclusion that her narrative was more likely false than true. While it is open to an officer to conclude her account was not plausible, that conclusion could only be reached after considering the whole of the account Ms. Fsaye provided. Here, the decision-maker was silent on significant explanatory information that addresses the officer's concerns.

[18] The procedure afforded to Ms. Fsaye was not procedurally fair and the decision made because of that unfair procedure must not be allowed to stand.

[19] Neither party proposed a question for certification, nor is there one on these facts.

JUDGMENT IN IMM-1487-19

THIS COURT'S JUDGMENT is that the application is allowed, the decision is set aside, Ms. Fsaye's application for permanent residence as a member of the Convention refugee abroad class is to be determined by a different officer, if possible, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1487-19

STYLE OF CAUSE: YOHANA KAHSSAI FSAHAYE v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

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