Federal Court Cour fédérale

Date: 20200917

Docket: IMM-2415-19

Citation: 2020 FC 908

Ottawa, Ontario, September 17, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ESAK YAKOB ABREHAM, YORDANOS KIFLE FISHATSION, MILYON ESAK YAKOB (BY HIS LITIGATION GUARDIAN ESAK YAKOB ABREHAM)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a decision of a visa officer [the Officer] at the High Commission of Canada in Nairobi, Kenya, dated February 11, 2019 [the Decision]. In the Decision, the Officer refused their application for permanent residence as members of the

Convention refugee abroad class or country of asylum class, pursuant to the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], made under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons explained in greater detail below, this application is dismissed. I have considered the Applicants' arguments and find the Decision to be reasonable and to have been reached in a procedurally fair manner.

II. **Background**

[3] The Applicants are Esak Yakob Abreham [the Principal Applicant], his spouse and their son, all citizens of Eritrea. They are currently living in a refugee camp in Ethiopia.

[4] The Applicants fled Eritrea in 2015. According to the Principal Applicant's Basis of Claim form [BOC], he was conscripted to Eritrea's National Service and served for 18 years. His BOC also asserts he was accused of mobilizing fellow members of the National Service and incarcerated, but he was released from prison in September 2015, after nine months of incarceration. The BOC asserts the National Service threatened him with indefinite detention if he attempted to mobilize National Service members.

[5] The United Nations High Commissioner for Refugees [UNHCR] has recognized the Applicants as refugees. The Principal Applicant has family members living in Canada and, in 2017, the Applicants applied for permanent residence in Canada through a sponsorship program.

On December 15, 2018, the Principal Applicant and his spouse were interviewed by the Officer in Ethiopia.

III. **Decision under Review**

[6] In the Decision under review, dated February 11, 2019, the Officer cites the requirements of the Convention refugee abroad class and the country of asylum class, pursuant to sections 145 and 147 of the Regulations, respectively, as well as paragraph 139(1)(c) of the Regulations, which governs issuance of permanent resident visas to members of those classes. The Officer then states the following:

> 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 of the discrepancies noted between your written narrative and your oral testimony at interview. For instance, circumstances under which you were released from prison were different on the application and on what you told me at interview. Though your application stated that you were released, at interview you stated that you escaped from prison. Details on why you were arrested are also different. I put these concerns to you but your response did not alleviate them. Therefore, you do not meet the requirements of [paragraph 139(1)(c)].

[7] The Officer's Global Case Management System [GCMS] notes also refer to these concerns and state that they led the Officer to doubt the credibility of the application. The Officer notes having put these concerns to the Principal Applicant but that his responses were not sufficient to alleviate the concerns.

[8] The Decision also refers to s 11(1) of the Act and its requirement for a visa officer to issue a visa to a foreign national if the officer is satisfied that the foreign national is not

inadmissible and meets the requirements of the Act including the Regulations. The Decision states that the Officer was not satisfied the Applicants met the requirements of the Act and Regulations, for the reasons explained earlier in the Decision, and refuses their application for permanent resident visas.

IV. **Issues and Standard of Review**

[9] The Applicants' submissions raise the following issues:

A. Were the Officer's credibility concerns unreasonable?

B. Was the Decision unreasonable, because the Officer failed to properly assess the Applicants' claim of persecution?

C. Did the Officer breach procedural fairness, by failing to provide an adequate opportunity to respond to the Officer's concerns?

D. Did the Officer unreasonably or incorrectly rely on section 11 of the Act?

[10] As suggested by the articulation of the first two issues, they are reviewable on the standard of reasonableness. The procedural fairness issue is governed by the correctness standard or, otherwise expressed, attracts no standard of review but rather an assessment of whether the duty of fairness has been adhered to (see, e.g., *Al Fares v Canada (Citizenship and Immigration),* 2020 FC 373 at para 23).

[11] As suggested by articulation of the last issue identified above, involving s 11(1) of the Act, the Applicants have not taken a position on the standard of review applicable to that issue. The Respondent argues that reasonableness applies, because the issue involves the interpretation and application of the Officer's governing legislation. I am inclined to agree with that position but need not decide the point. As will be explained later in these Reasons, nothing turns on the s 11(1) issue.

V. **Analysis**

A. *Were the Officer's credibility concerns unreasonable?*

[12] In challenging the Officer's adverse credibility findings, the Applicants submit first that these findings turned on discrepancies in the evidence that related to irrelevant, minor or peripheral details. As noted by Justice Harrington in *Gorqaj v Canada (Minister of Citizenship and Immigration)*, 2012 FC 920 at para 6, a decision-maker must not concentrate its analysis on a few minor or secondary inconsistencies to the point where it is "splitting hairs."

[13] The Officer's credibility concerns turned on three areas of inconsistency between the Applicants' written application and their oral evidence:

A. The reason for the Principal Applicant's detention by Eritrean authorities—his application stated that he had been accused of mobilizing fellow National Service participants, while the Applicants testified that he was arrested for overstaying during a period of leave from the military;

B. Whether the Principal Applicant was released from prison or escaped—his application stated that he was released, but he testified that he escaped;

C. Whether the Principal Applicant was sick and hospitalized during the sequence of events through which he left prison—he testified that he escaped from prison to the hospital and then from the hospital to home, while his application was silent on these details.

[14] The Applicants submit that these discrepancies were minor and irrelevant and that, in focusing upon them, the Officer lost sight of the essence of the claim, i.e. that the Principal Applicant had spent 18 years in enforced, indefinite National Service and had been detained for eight months. I cannot agree with this characterization of the Officer's analysis. The Applicants were seeking protection based on the Principal Applicant being subjected to mandatory military service and his consequent detention. As the Respondent submits, the reason for his detention in the context of that service, whether he escaped from the military or was released, and (if he escaped) how the escape was effected are directly relevant to the Principal Applicant's basis for seeking protection.

[15] Moreover, when the Officer confronted the Principal Applicant with these discrepancies, he provided little in the way of explanation. In relation to being sick and hospitalized, he offered only that it might have been a technical mistake by the translator. In relation to the reason he had been detained, he stated, "I think it was the reason and I might have forgotten." I find nothing unreasonable in the Officer's adverse credibility conclusions based on that evidence.

[16] The Applicants also argue that the Officer erred in failing to assess their evidence against the backdrop of the country conditions in Eritrea, which include indefinite military service, forced conscription, and arbitrary detention for those who desert or oppose the regime. They rely on Justice Mainville's decision in *Saifee v Canada (Minister of Citizenship and Immigration)*, 2010 FC 589 at para 30, that if it can be shown that a visa officer made a decision without knowledge of country conditions, this could be a valid reason to overturn the decision in judicial review.

[17] In my view, no such inference can be drawn in the case at hand. *Ghirmatsion v Canada (Minister of Citizenship and Immigration)*, 2011 FC 519 [*Ghirmatsion*] illustrates the circumstances in which an officer may be obliged to consider country condition evidence to assess the objective basis for a claim. In that case, Justice Snider concluded that a visa officer neglected to look at the available documentary evidence to measure the plausibility of the applicant's story against what was known about the conditions in the country where the claim arose (at para 69). Such circumstances are distinguishable from the present case, in which the Officer's adverse credibility findings turned not on the plausibility of the Applicants' allegations in the context of the circumstances in Eritrea, but rather upon inconsistencies in their narrative.

[18] In summary, I find no basis to disturb the Officer's credibility findings.

B. *Was the Decision unreasonable, because the Officer failed to properly assess the Applicants' claim of persecution?*

[19] As an initial point in advancing this argument, the Applicants note that they had been recognized as refugees by the UNHCR. The Applicants submit that the Officer was obliged to take this fact into account and to provide reasons for reaching a contrary conclusion.

[20] Both parties have referred the Court to jurisprudence addressing the significance of a prior UNHCR determination when Canadian authorities are assessing a claim for refugee protection as a member of the Convention refugee class. The Applicants rely on Justice Snider's explanation at paragraphs 57 to 59 of *Ghirmatsion*:

> [57] There is no reference in the CAIPS notes or the decision to the Applicant's status with the UNHCR. I recognize that UNHCR status as a refugee is not determinative; the Officer's mandate is to assess the Applicant's credibility and to determine the merits of his claim under the applicable Canadian laws. Nevertheless, OP 5 recognizes the importance and relevance of the UNHCR in the processing of applications under the Refugee Abroad Class. In my view, the Applicant's status as a UNHCR refugee was a personal and relevant consideration. In the case of *Cepeda-Gutierrez v Canada (The Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 (QL)(FCTD), at paragraph 17, Justice Evans (as he was then) was faced with the failure of a decision-maker to consider a highly personal and relevant document. He provided the following oft-quoted guidance:
>
>> [T]he more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": Bains v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from

> any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.
>
> [58] The evidence of the UNHCR designation was so important to the Applicant's case that it can be inferred from the Officer's failure to mention it in her reasons that the decision was made without regard to it. This is a central element to the context of the decision. The Officer, faced with a UNHCR refugee, should have explained in her assessment why she did not concur with the decision of the UNHCR. The Officer was not under any obligation to blindly follow the UNHCR designation; however, she was obliged to have regard to it. Unless a visa officer explains why a UNHCR designation is not being followed, we have no way of knowing whether regard was had to this highly relevant evidence.
>
> [59] This error made by the Officer is a sufficient basis on which to overturn the decision. I wish, however, to repeat that the UNHCR determination is not determinative; the Officer must still carry out her own assessment of the evidence before her, including the evidence of the UNHCR refugee status.

[21] The Respondent relies on the more recent decision by Justice Gagné in *Gebrewldi v Canada (Minister of Citizenship and Immigration)*, 2017 FC 621 [*Gebrewldi*] at paragraphs 28 to 35:

> [28] As for the applicants' UNHCR status, this Court has noted that UNHCR status is not determinative and, rather, that the officer is under a duty to conduct his or her own assessment of an applicant's eligibility for refugee status in accordance with Canadian law (*B231 v Canada (Citizenship and Immigration)*, 2013 FC 1218 at para 58; *Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at para 57; *Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 at para 27). The Operation Manual OP 5 "Resettlement from overseas" [Guidelines] states that visa officers should consider an applicant's UNHCR designation when considering their application for refugee status in Canada (*Pushparasa*, above at para 26; *Ghirmatsion*, above at para 56). However, the "Guidelines are not law and they do not constitute a fixed or rigid

code" (*Pushparasa*, above at para 27). Therefore, an applicant's UNHCR status is not determinative of an application for refugee status in Canada.

[29] It is important to note that this Court has repeatedly stated that when examining an officer's decision, the analysis is not limited to the decision letter. Rather, the Global Case Management System [GCMS] notes also form part of the officer's reasons (*Pushparasa*, above at para 15; *Khowaja v Canada (Citizenship and Immigration)*, 2013 FC 823 at para 3; *Kotanyan v Canada (Citizenship and Immigration)*, 2014 FC 507 at para 26).

[30] This Court has stated that, where an officer fails to reference an applicant's UNHCR status in both the notes and the decision, he has committed a reviewable error. Such an error is a sufficient basis on which to overturn the decision (*Ghirmatsion*, above at paras 57-59). However, this Court's decision in *Pushparasa* indicates that if, upon reading the decision and reasons as a whole, it is clear that an officer is "aware" of an applicant's refugee designation, this will be sufficient to meet the standard imposed (*Pushparasa*, above at paras 27-29). In *Pushparasa*, Justice Yvan Roy stated the following:

> The CAIPS notes are clear that the officer was aware of the UNHCR designation at the applicant's interview. A photocopy of the valid card appears at page 55 of the Certified Tribunal Record [CTR]. The record also shows email communication between an official and the UNHCR as to whether the applicant had also submitted an application to the United States (CTR at page 28). Questions were asked of the applicant during his interview with Canadian officials about the status of the discussions with the United States immigration authorities (*Pushparasa*, above at para 28).

[31] Justice Roy went on to say that the officer nevertheless found that the applicant did not meet the requirements of the IRPA and Regulations on the merits of his application, a finding which is determinative. Justice Roy concluded that the officer's decision was reasonable.

[32] In the present case, there is evidence in the Certified Tribunal Record that the officer was aware of the applicants' UNHCR status. Photocopies of the refugee identification cards from the Republic of Sudan, for both the Principal Applicant and her spouse, appear in the record. The record also shows that, in the

> GCMS notes, the officer recognises and refers to the refugee status of the applicants in the Republic of Sudan.
>
> [33] Although the officer does not explicitly reference the applicants' UNHCR status in the decision letter, the decision as a whole, which includes the notes and the record, contain indicia of his awareness. According to the jurisprudence, what is required is a thorough assessment of an applicant's eligibility under Canadian law. That was done here.
>
> [34] The officer's decision, read as a whole, establishes that she recognised the applicants' refugee status and that a comprehensive assessment of the application on its merits, in accordance with Canadian law, was conducted.
>
> [35] Neither the UNHCR status of the applicants, nor the general country condition documents, can be a substitute for personal evidence. In light of the serious credibility concerns outlined by the officer, going to the foundation and the root of the applicants' claim, I am of the opinion that the decision falls within the range of possible, acceptable outcomes. Therefore, the officer's decision is reasonable and I see no reason to interfere with it.

[22] Applying the principles identified in this jurisprudence, I find no basis to interfere with the Officer's decision. The Officer's GCMS notes refer to the Applicants' UNHCR status. Consistent with the analysis in *Gebrewldi*, it is clear that the Officer was aware of that status. The Applicants argue that the Officer was additionally required to explain why that status was not being followed (see *Ghirmatsion* at para 58). However, I consider the Officer's credibility analysis to represent that explanation.

[23] The Applicants also submit that the Officer erred in failing to consider all grounds of persecution that could apply based on the conditions in Eritrea, as well as the country of asylum class applicable under the Act. However, I agree with the Respondent that a claim for Convention refugee status cannot succeed solely based on the unfavourable human rights

conditions in the country of origin. Claimants must establish a link between themselves and persecution in that country (see, e.g., *Krishnapillai v Canada (Minister of Citizenship and Immigration)*, 2007 FC 563 at para 14). Having found the Applicants' evidence surrounding their personal circumstances not credible, it was reasonable for the Officer not to be satisfied that they met the requirements of the Convention refugee abroad class.

[24] Turning to the country of asylum class, the Applicants argue that the Officer failed to consider their eligibility for this class. They argue that the GCMS notes demonstrate that the Officer considered only the Convention refugee abroad class, as the notes conclude with the statement, "Given documents and information before me, I am not satisfied that [Principal Applicant] meets definition of a refugee."

[25] The difficulty with this argument is that it ignores the content of the Officer's February 11, 2019 letter conveying the Decision. This letter references the requirements of both the Convention refugee abroad class under s 145 of the Regulations and the country of asylum class under s 147 of the Regulations. It then states that, based on the discrepancies between the written narrative and oral testimony, the Officer was not satisfied that the Principal Applicant was a member of "any of the classes prescribed." The letter evidences that the Officer rejected the Applicants' claim under both the Convention refugee abroad class and the country of asylum class, because of the credibility concerns that were the basis for the Decision. Again, I find no reviewable error in the Officer's analysis.

C. *Did the Officer breach procedural fairness by failing to provide an adequate opportunity to respond to the Officer's concerns?*

[26] As I understand the Applicants' submissions, they recognize that, in the course of the interview, the Officer provided an opportunity to respond to the credibility concerns that the Officer developed during the interview. However, the Applicants submit that the opportunity afforded to them was not sufficient. They raise, for instance, the possibility that a procedural fairness letter, setting out the concerns in writing, may have been appropriate.

[27] I find little merit to this argument. The GCMS notes record the Officer raising with the Principal Applicant the particular inconsistencies that ultimately gave rise to the negative credibility findings and seeking explanations. The Applicants have offered no jurisprudential support for the position that the principles of procedural fairness obliged the Officer to set out in writing the credibility concerns that arose during the interview. I find the opportunity afforded by the Officer during the interview to meet the applicable procedural fairness requirements.

D. *Did the Officer unreasonably or incorrectly rely on section 11 of the Act?*

[28] The Applicants submit that the Officer invoked s 11 of the Act improperly. I understand, based on the parties' written submissions and oral argument, that the Applicants raised this issue involving s 11 of the Act in response to arguments originally asserted by the Respondent. The relevant subsection 11(1) reads as follows:

Application before entering Canada	**Visa et documents**
11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11(1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[29] In its Memorandum of Argument, the Respondent asserted that an officer is entitled to reject an application under s 11(1) where there is insufficient evidence to determine if the applicant is inadmissible. The Respondent referred the Court to jurisprudence such as *Sadeq Samandar v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1117 at para 23, for the principle that concerns about the veracity of an applicant's testimony can leave an officer unsatisfied that the applicant is not inadmissible.

[30] In response to this line of argument, the Applicants submit that the jurisprudence relied upon by the Respondent involved matters where admissibility concerns were "bubbling near the surface." The Applicants argue that the Officer cannot rely on "phantom admissibility concerns" to invoke s 11. In other words, s 11 can be invoked where there are apparent inadmissibility concerns that cannot be properly assessed because of credibility problems. The Applicants argue there were no such inadmissibility concerns in the present case.

[31] Little more need be said about this issue, which, in my view, was raised based on a misinterpretation of the Decision. Subsection 11(1) requires an officer considering a visa application to issue a visa if the officer is satisfied that the foreign national is not inadmissible AND meets the requirements of the Act. As I read the Decision in the case at hand, the Officer rejected the Applicants' application not because of inadmissibility concerns but rather because the Officer was not satisfied that the requirements of the Act (and the Regulations made thereunder) were met. That is, the Applicants did not satisfy the Officer that they met the requirements of the Convention refugee abroad class or the country of asylum class. The Decision did not turn on admissibility concerns.

[32] As such, the Applicants' argument surrounding s 11 does not raise a basis to find the Decision unreasonable.

VI. **Conclusion**

[33] As I have found no reviewable error in the Decision, this application for judicial review must be dismissed. Neither party has proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-2415-19

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2415-19
STYLE OF CAUSE:	ESAK YAKOB ABREHAM, YORDANOS KIFLE FISHATSION, MILYON ESAK YAKOB (BY HIS LITIGATION GUARDIAN ESAK YAKOB ABREHAM V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE VIA TORONTO
DATE OF HEARING:	AUGUST 19, 2020
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	SEPTEMBER 17, 2020

APPEARANCES:

Timothy Wichert	FOR THE APPLICANTS
Nadine Silverman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Legal Aid Ontario Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT