Federal Court  Cour fédérale

Date: 20200205

Docket: IMM-4062-19

Citation: 2020 FC 205

Ottawa, Ontario, February 5, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SELEMAWIT ABRAHAM KIFLOM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by a Migration Officer ("Officer") of Immigration, Refugees and Citizenship Canada finding that the Applicant was not a member of the Convention refugee abroad or the humanitarian-protected persons abroad class as defined, respectively, in ss 145 and 146 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("IRP Regs").

[2] For the following reasons, this application is dismissed.

Background

[3] The Applicant, Selemawit Abraham Kiflom, is a citizen of Eritrea. She claims that, after she complained that she was being forced to perform indefinite National Service, she was mistreated. She then fled from Eritrea to Sudan, where she remains. The Applicant applied for permanent residence as a Convention refugee abroad and as a humanitarian-protected person abroad. Her application was sponsored by the Canadian International Immigrant and Refugee Support Association and co-sponsored by her brother, Mulu-berhan Kiflom. Her application was denied on March 29, 2019.

Decision under review

[4] In a letter dated March 29, 2019, the Officer stated that they had completed an assessment of the Applicant's application for a permanent resident visa as member of the Convention refugee abroad class or the humanitarian-protected persons abroad class and had determined that the Applicant did not meet the requirements for immigration to Canada. The Officer referenced s 16(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), which requires that a person who makes an application must answer truthfully all questions put to them for the purpose of the examination, and stated that concerns had arisen from the responses the Applicant gave at an interview conducted on April 18, 2018 in Khartoum, Sudan. Specifically, the Applicant provided multiple contradictory dates for when she was a student, when she completed her National Service, and when she left Eritrea. Further, the

Applicant acknowledged that she knowingly provided incorrect information at the interview so that her testimony would match the information provided in the written declarations in her application forms. The Officer found, based on a balance of probabilities, that the Applicant's declarations were more likely false than true and that her declarations were not credible. The Officer was not satisfied as to when the Applicant left Eritrea or that she left due to a well-founded fear of persecution there. Nor was the Officer satisfied as to when or if she did her National Service, or whether it was the reason she left Eritrea.

[5] The Officer concluded that the Applicant did not meet the requirements of s 139(1)(e) of the IRP Regs because the Applicant was not a member of the Convention refugee abroad class or the country of asylum class (*i.e.* a humanitarian-protected person abroad).

[6] Further reasons for the Officer's decision are found in the Global Case Management System notes ("GCMS Notes"). The entries in the GCMS Notes record that the Officer raised with the Applicant the differences in the dates provided in her application forms and in her testimony. The Officer also noted the Applicant's explanations for this. The Officer recorded that the Applicant signed her application forms, declaring the information they contained to be correct, while knowing that it was not. She then perpetuated the incorrect information at the interview. The Officer considered the new dates that the Applicant provided when the incorrect dates came to light, but expressed concern that the Applicant only provided this information after the inconsistences were brought to her attention. The Officer found that the false information the Applicant provided at the interview and in her application forms raised questions as to the entirety of her account of events. The Officer was not satisfied that the Applicant had been

truthful pursuant to s 16(1) of IRPA. The Officer reiterated that they were not satisfied as to when the Applicant left Eritrea or why she did so. Nor as to when and where she performed her National Service in Eritrea and what position she held in that service. Further, that her National Service was the basis for her declared fear. As a result, her application was refused.

[7] The Applicant subsequently requested a reconsideration of the Officer's decision. She explained that she made mistakes regarding the dates because "it was the worst time of her life, so she forgot them". The Officer noted that this explanation was inconsistent with the one the Applicant gave at her interview, being that she had provided the correct dates to a man who assisted her but who then filled out the forms with incorrect dates. The Officer denied the request for reconsideration.

Issues

[8] The Applicant lists seven issues, which she submits require determination on judicial review. However, in my view, there is one preliminary issue, which may be determinative, and one overarching issue on the merits. These are as follows:

i. Preliminary Issue: Should the Applicant be granted an extension of time to bring the within application?

ii. If so, was the Officer's decision reasonable?

Standard of review

[9] Subsequent to the parties filing their written submissions, the Supreme of Canada issued its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

("*Vavilov*"). Accordingly, at the hearing of this application for judicial review, I inquired if the parties wished to make any additional submissions arising from *Vavilov* and concerning the standard of review applicable in this matter.

[10] Counsel submitted, and I agree, that reasonableness continues to be the appropriate standard of review when assessing the merits of an immigration officer's decision. In *Vavilov*, the Supreme Court of Canada held that there is a presumption that administrative decisions will be reviewed on the reasonableness standard. That presumption can only be rebutted in two circumstances. The first is where the legislature explicitly prescribes the applicable standard of review or where it has provided a statutory appeal mechanism from an administrative decision to a court. The second is where the rule of law requires that the standard of correctness be applied (*Vavilov* at para 17). Neither situation arises here and, therefore, the standard of review is reasonableness.

[11] Reviewing a decision for reasonableness means reviewing for intelligibility, transparency, and justification and for whether the decision "is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

Preliminary Issue: Should the Applicant be granted an extension of time to bring the within application?

[12] The time period, or delay, within which an applicant must bring an application for judicial review of a negative immigration decision is found in s 72 of IRPA:

> 72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken

> or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.
>
> (2) The following provisions govern an application under subsection (1):
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> (a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;
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> (b) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;
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> (c) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;
>
> (d) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and
>
> (e) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

[13] This matter arose outside Canada and therefore, pursuant to s 72(2)(b), the Applicant was required to file her application for leave and judicial review within 60 days after the day on which she was notified of the Officer's negative decision The decision is dated March 29, 2019 and the Applicant makes no submission to suggest that she became aware of it other than on that date. However, she did not file her application for leave and judicial review until June 28, 2019, one month after the filing deadline. In her application for leave and judicial review, the Applicant requested an extension of time pursuant to s 72(2)(c) of the IRPA, listing the four factors, discussed below, that are to be taken into consideration by the Court when considering such a request.

[14] Leave was granted by Associate Chief Justice Gagné on October 30, 2019. However, Justice Gagné did not address the extension of time request.

Applicant's Position

[15] In her initial memorandum of fact and law, the Applicant did not substantively address the request for an extension of time. She stated only that she at all times wished to challenge the Officer's decision, that the Respondent would not be prejudiced by granting the extension of time, and that there is merit to her application. Further, that the delay was explained by two affidavits, one from Gentiana Morina, a student working in the office of the Applicant's counsel ("Morina Affidavit") and the other from the Applicant's brother, Mulu-berhan Kiflom ("Kiflom Affidavit", together the "Affidavits"), and that the delay is short.

[16] In her Reply, the Applicant responded to the Respondent's substantive submissions concerning the extension of time. She submits that the Respondent would not be prejudiced by the extension of time because the Respondent always had an obligation to respond to the application, regardless of whether there was an extension of time element. The submission states that the Applicant could not provide an affidavit to show her continuing intention to challenge the underlying decision because she is abroad and she does read either English or French. Further, that the logistics of arranging for an affidavit would be difficult and, therefore, the best evidence of her continuing intention comes from her brother. The Applicant suggests that the Respondent could cross-examine Mulu-berhan Kiflom on his affidavit to resolve any questions about the delay in filing her application.

[17] The Reply also includes submissions purporting to explain the reasons given in the Affidavits for the late filing of the application. Specifically, that when Mulu-berhan Kiflom sent instructions to Applicant's counsel advising that the Applicant wished to proceed with her application for leave and judicial review, there was no way to know that Mulu-berhan Kiflom was connected to the Applicant. Finally, the Applicant submits that the criteria used to assess whether an extension of time will be granted do not have to be met separately. Rather, they are to assist the Court in coming to an overall determination of how justice would best be served between the parties. The Applicant submits that it would be unjust not to grant her extension of time if her application was meritorious. To this point, she submits that even if the other factors are adverse, this would not outweigh a meritorious leave application.

Respondent's Position

[18] The Respondent identifies the factors that the Applicant must demonstrate in order to obtain an extension of time and addresses each of them. The Respondent acknowledges that the factors need not all be resolved in the Applicant's favour, rather, that the Court must be satisfied that it is in the interests of justice to grant an extension of time.

[19] Regarding the Applicant's continuing intention to pursue the application for judicial review, the Respondent submits that evidence of continuing intention must come from the Applicant herself and that she has failed to do so (*Virdi v Canada (Minister of National Revenue)*, 2006 FCA 38 at para 3 ("*Virdi*")). Further, that the Kiflom Affidavit is not sufficient because although it says that the Applicant has a continuing intention, the affidavit does not state whether the affiant discussed this with the Applicant or how he knows this. Similarly, the Morina

Affidavit does not state whether she or the Applicant's counsel have spoken or corresponded with the Applicant concerning her alleged intention to proceed. The Respondent accepts that sometimes first-hand evidence is not possible, but submits that in this matter there is no evidence to support the position that the Applicant was unreachable or unavailable to swear her own affidavit or to support her counsel's assertion that the logistics of arranging an affidavit rendered this option unreasonable. The Respondent notes that both a cellphone number and an email address are found in the Applicant's immigration application. The Respondent also rejects the Applicant's argument that deficiencies in her evidence could be cured by cross-examination by the Respondent on the Kiflom Affidavit and points out that the burden is on an applicant to justify an extension of time (*Tilahun v Canada (Citizenship and Immigration)*, 2019 FC 815 at para 9 ("*Tilahun*")).

[20] Regarding the explanation for the delay, the Respondent submits that a party seeking an extension of time must justify the entire period of the delay (*Canada (Minister of Citizenship and Immigration) v Singh*, 140 FTR 102, [1997] FCJ No 1726 at para 22 (FCTD) (QL/Lexis) ("*Singh*")). Further, that only unanticipated or unexpected events will justify an extension of time (*Nwammadu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 107 at para 10 ("*Nwammadu*"); *Chin v Canada (Minister of Employment and Immigration)*, 69 FTR 77, [1993] FCJ No 1033 at para 8 (FCTD) (QL/Lexis) ("*Chin*")).

[21] The Respondent submits that the reason for the delay given in the Morina and Kiflom Affidavits is inadequate. The reasons given by counsel for the Applicant in the Applicant's Reply are also inadequate because neither the failure of counsel to clarify the received

instructions to proceed, or the Applicant simply waiting for counsel to proceed, are reasonable explanations for failing to abide by the statutory time limits (*Chen v Canada (Citizenship and Immigration)*, 2007 FC 621 at para 6; *Flores Cabrera v Canada (Citizenship and Immigration)*, 2011 FC 1251 at para 9).

[22] The Respondent submits that this Court has previously and recently admonished the Applicant's counsel for failing to provide a proper explanation for a delay in filing an application for leave and judicial review (*Idu v Canada (Citizenship and Immigration)* (17 May 2018), IMM-658-18 (FC) ("*Idu*"); *Ibrahim v Canada (Citizenship and Immigration)* (7 September 2018), IMM-2507-18 (FC) ("*Ibrahim*"); *Tilahun* at paras 2-4, 10, 13). Given these repeated warnings, the only acceptable outcome in the interest of justice is to refuse to grant the extension of time. The Respondent submits that it is prejudiced by the delay due to its obligation to respond to the request for an extension of time (*Mante v Canada (Citizenship and Immigration)*, 2019 FC 215 at para 9; (22 February 2019), IMM-1131-18 (FC)("*Mante*")). Further, responding to an extension of time request, particularly a deficient one, requires additional time and effort that the Respondent would not have incurred but for the Applicant's delay.

[23] Finally, the Respondent submits that this application has no merit because the Officer's decision was reasonable. Serious inconsistencies in the Applicant's evidence undermined her entire claim. The Applicant's failure to provide a coherent and consistent timeline for her narrative is a reasonable basis for the Officer's conclusion.

Analysis

[24] In this matter the leave judge elected not to address the extension of time request and, therefore, it is to be dealt with at the judicial review (*Deng Estate v Canada (Citizenship and Immigration)*, 2009 FCA 59 at para 16).

[25] Section 72 of the IRPA prescribes a delay within which applications for judicial review must be filed and s 72(2)(c) of the IRPA states that a Judge of this Court may, "for special reasons", allow an extension of time for the filing and serving of such applications. The filing of applications on time is a mandatory requirement and extensions for bringing a late application for judicial review are not granted simply as a matter of routine. They must be justified by the applicant.

[26] In *Pham v Canada (Citizenship and Immigration)*, 2018 FC 1251 ("*Pham*"), Justice Harrington summarized the principles concerning the granting of a request for an extension of time:

> [27] There is a wealth of jurisprudence dealing with extensions of time under *IRPA*, or under the *Federal Courts Act* and *Rules*. The underlying premise is that justice should be done. The Federal Court of Appeal has held, time and time again, that an extension of time is discretionary and should take into account the following four criteria:
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> > a. Did the moving party have a continuing intention to pursue the judicial review application?
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> > b. Is there some potential merit to the application?
> >
> > c. Does the moving party have a reasonable explanation for the delay?

> d. Is there prejudice to the other party arising from the delay?
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> It is not necessary that all four criteria be satisfied *(Canada (Attorney General) v Hennelly*, [1999] F.C.J. No. 846; *Canada (Attorney General) v Larkman*, 2012 FCA 204 and just recently *Thompson v Attorney General of Canada et al*, 2018 FCA 212).

[27] The Federal Court of Appeal in *Canada (Attorney General) v Larkman*, 2012 FCA 204 ("*Larkman*") listed the above factors and also discussed their interrelationship:

> [62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice: *Grewal*, *supra* at pages 277-278. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal*, at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195, 89 Admin LR (4th) 1.

[28] Against this backdrop, I will now consider the factors and the circumstances of this matter.

i. Continuing intention

[29] In *Virdi*, Justice Décary for the Federal Court of Appeal wrote:

> [2] As the moving party, the appellant bore the burden of establishing the elements necessary for an extension of time. Generally speaking, this must be done by affidavit evidence sworn by the moving party himself that can be subject to cross-examination.

> [3] In the case at bar, the appellant did not see fit to swear his own affidavit. Instead, he asks the Court to find that he had a reasonable explanation for his delay, a continuing intention to seek judicial review and an arguable case solely on the basis of an affidavit sworn by his lawyer's secretary. This failure to provide his own evidence to the Court was, in this case, fatal to his motion.
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> (emphasis original)

[30] In *Conteh v Canada (Citizenship and Immigration)* (2 July 2019), IMM-181-19, Associate Chief Justice Gagné relied on *Virdi* when, on reconsideration, she refused to grant an extension of time to permit an applicant to late file his application record and thereby perfect his application of leave and judicial review. There, the only evidence filed was an affidavit from a law student working for the applicant's counsel. Justice Gagné held that evidence of an applicant's continuing intention to pursue their case must come from the applicant themselves, rather than their counsel or their counsel's assistant, and that the failure to do so is fatal to an applicant's request for an extension of time (*Virdi* at para 3). The motion was denied on that basis.

[31] Thus, it is a concern that the Applicant herself has not filed any evidence of her continuing intention to judicially review the underlying decision.

[32] What has been filed are the Morina and Kiflom Affidavits. These say very little. The Morina Affidavit indicates that Ms. Morina is a student working in the office of Mr. David Mattas and states: "We received instructions to proceed to this file from Mulu-berhan Kiflom on April 17th. However, the instructions came initially only under the name Mulu-berhan and we did not connect the name with the case of this applicant". Further, that it was only when a follow

up request on the progress of the file was received from Mulu-berhan Kiflom on June 27th that the two were connected, and the leave application was filed the next day. Neither of these communications from Mr. Kiflom are provided as exhibits, redacted to remove any information subject to solicitor-client privilege, or otherwise.

[33] Unlike the Morina Affidavit, the Kiflom Affidavit does address the Applicant's continuing intention, but only to say that the Applicant has a continuing intention and always intended to file the application for leave and judicial review. The Kiflom Affidavit does not depose how the affiant knows that the Applicant has a continuing intention or how that intention manifested itself. It does state, "I gave instructions to David Matas on April continue [*sic*] with this application. I gave instructions to David Matas on April 17th under the name Mulu-berhan to commence this application." Copies of the instructions are not attached as exhibits.

[34] The Respondent acknowledges that a personal affidavit from an applicant may not be possible in all circumstances. I agree and add that this may be particularly difficult in a situation involving a refugee who is applying from outside of Canada and who may be living in a refugee camp or is otherwise constrained in their ability to provide an affidavit. Given that the interests of justice are a paramount consideration when deciding to grant an extension of time (*Larkman* at para 62), in my view, the personal circumstances of an applicant are relevant to whether a personal affidavit is necessary to demonstrate a continuing intention to proceed.

[35] In this matter, counsel for the Applicant submits that logistical constraints prevented the acquiring of a personal affidavit from the Applicant. These included that the she cannot read

English or French, she is living in a country where she is a foreigner and the preparation of an affidavit would require an interpreter and notarization. However, these are submissions of counsel only. And, as to the Applicant's ability to communicate in English, counsel's submission does not appear to be supported by the record before me. The GCMS Notes indicate that the Applicant was provided with an interpreter, however, that she also spoke in English during her interview, and the Officer stated that the Applicant is literate and fluent in English. The Applicant also requested English correspondence on her Generic Application Form for Canada and indicated on that form that she is able to communicate in English. The email from the Applicant to the Officer requesting reconsideration of the negative underlying decision is also written in English. More significantly, none of counsel's submissions on this point are supported by affidavit evidence.

[36] The absence of a personal affidavit together with the failure of the Kiflom Affidavit to explain the basis for his statement that the Applicant has a continuing intention to pursue judicial review, or, explain why she was not able to provide a personal affidavit, mitigate against a finding that the Applicant demonstrated her continuing intention to pursue her application for leave and judicial review. This is tempered, however, by the Affidavits that indicate the Applicant's brother did communicate to the Applicant's counsel a request to proceed.

ii. Reasonable Explanation

[37] In *Chin*, Justice Reed stated that when considering an application for an extension of time she looked for "some reason for the delay which is beyond the control of counsel or the applicant, for example, illness or some other unexpected or unanticipated event" (*Chin* at para 8;

also see *Singh* at para 16). More recently, in *Nwammadu*, this Court held, "[o]nly an unanticipated event that is beyond the control of the applicant can justify an extension of time" (at para 10). Here, the event that lead to the late filing was counsel's failure to recognize and respond to instructions, which counsel attributed to a miscommunication. Failures of counsel have previously been found not to be an unanticipated event that can justify an extension of time. For example, in *Ismael v Canada (Citizenship and Immigration)*, 2018 FC 1191, Justice Kane was considering whether Rule 399 of the *Federal Courts Rules*, SOR/98-106 permits the Court to set aside an order based on counsel's submission that she had not adequately represented the applicant. In the course of that analysis, Justice Kane referred to *Chin*:

> 49 In *Chin v Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1033 (QL), 69 FTR 77 [*Chin*], counsel for the applicant missed the deadline to file the Application Record, the application was dismissed, and counsel brought a motion to set aside the order dismissing the application and to extend the time to file the Application Record. The Court found that the explanation of counsel, that she had conflicting demands, was not sufficient reason to set aside the Order, noting at para 10:
>
> > 10 I know that courts are often reluctant to disadvantage individuals because their counsel miss deadlines. At the same time, in matters of this nature, counsel is acting in the shoes of her client. Counsel and client for such purposes are one. It is too easy a justification for non-compliance with the rules for counsel to say the delay was not in any way caused by my client and if an extension is not granted my client will be prejudiced. I come back again to the question of fairness. It is unfair for some counsel to be proceeding on the basis that barring unforeseen events the time limits must be met and for others to be assuming that all they need do is plead overwork, or some other controllable event, and they will be granted at least one extension of time. In the absence of an explicit rule providing for the latter I proceed on the basis that the former is what is required.

> 50 The rationale provided by the Court in *Chin* is equally applicable in the present circumstances.

[38] I would also note that the Respondent has provided the May 17, 2018 Order of Madam Prothonotary Ring, issued in *Idu*, concerning a delay in filing an application record. As in this matter, an affidavit of Ms. Morina was filed addressing the delay. This affidavit stated that the record was not filed because of "operational limitations in our office, the influx of work because of the influx of refugees to Manitoba and to our office and the need to process all work in a sequential and orderly manner". Prothonotary Ring found that the applicants had demonstrated a continuing intention to pursue the application, that for the purposes of the motion she was prepared to assume that there was some merit to the applicant's case, and that the prejudice to the respondent was not established by evidence and was minor. The main issue was whether there was a reasonable explanation for the delay of over 5 weeks. Prothonotary Ring found that the evidence tendered by the applicants, Ms. Morina's affidavit, was wholly unsatisfactory, was not supported by a proper evidentiary foundation, and did not explain how the increase in refugee claimants affects counsel commitments. However, despite serious deficiencies in the applicants' motion, upon balancing the factors for granting extensions of time, and considering that the overriding principle that justice must be done, she granted the request for an extension of time. This was based on her view that the applicants should not be deprived of their rights on account of an error of counsel where it is possible to rectify the consequences of such an error without injustice to the opposing party. Prothonotary Ring then stated:

> [15] However, I wish to impress upon counsel for the Applicants that the Court will not accept these wholly inadequate explanations for delay in the future. Applications for leave in immigration matters are intended to proceed expeditiously. An applicant who fails to comply with the timelines set out in the *Federal Courts Citizenship, Immigration and Refugee Protection*

> *Rules* must provide a good reason to deviate from these strict deadlines, including a proper explanation for the delay based on proper affidavit evidence that sets out all of the facts to be relied upon by the applicant.

[39] The Respondent additionally points out that my Order in *Ibrahim*, dated September 7, 2018, also made it very clear that offering no explanation for a delay, which was the circumstance before me, is as unacceptable as offering an explanation based on counsel's workload, as was the circumstance in *Idu*. The Respondent also notes that in *Tilahun*, Justice Roy issued an Order dated June 14, 2019 that referenced *Idu* and my Order in *Ibrahim*. Justice Roy was very clear about what he characterized as the cavalier approach of counsel for the applicant in the matter before him with respect to requests for extensions of time and the shortcomings of the request before him. He agreed that extensions of time are exceptional and that there should be good reasons for the delay (*Tilahun* at paras 9-10 citing *Ibrahim*).

[40] A commonality of *Idu, Ibrahim, Tilahun* and this matter is that counsel for the applicants was the same in each case. As a result, counsel for the Applicant would have been well aware of the risks associated with late filing and the need to establish that there was a reasonable explanation for the late filing based on affidavit evidence that set out all of the facts to be relied upon by an applicant.

[41] Here, the Morina Affidavit offers an explanation, being that Mr. Matas' office received instructions on April 17th to proceed but that the instructions came under the name of Mulu-berhan, and the office did not connect the name with the Applicant's case. Further, that this connection was not made until a follow up request by Mr. Kilflom for a status report June 27th.

[42] The Respondent submits that the Morina Affidavit raises many questions, such as why counsel did not request that Mr. Kiflom provide a copy of the decision being challenged after receiving the first email or why counsel took no steps to verify the Applicant's identity. Counsel for the Applicant provides response arguments – rather than in affidavit evidence – stating that there was nothing in the email from Mulu-berhan that could link him to the Applicant, and nothing in the refusal letter which could link Mulu-berhan to the Applicant.

[43] Frankly, the submissions of the Applicant's counsel are not persuasive. Assuming, as counsel for the Applicant suggested, that the instructions were received by email, it is troubling that instructions to proceed were sent to counsel but were simply ignored for two months, until the sender followed up, because counsel did not make a connection to an existing client by looking at the name of the sender of the email. This is particularly so as counsel for the Applicant is a senior member of the immigration bar and would be well aware of the strict timeline for filing applications for leave and judicial review of negative immigration decisions. Moreover, as seen from the above, this Court has reminded him that when requests for extensions of time are necessary, they must be properly supported. Further, the Affidavits do not indicate whether or not the Applicant was identified in the email. Further, and most concerning, if the instructions were received by email it would be simply a matter of hitting "reply" and asking for clarification as to the name of the applicant who wished to proceed with an application for leave and judicial review. No explanation was offered for why this was not done. I do not find this to be a reasonable explanation for the delay.

[44] Nor do I agree with the submission of the Applicant's counsel, made at the hearing before me, that the Affidavits answered all questions and that there was nothing else to say. I also do not agree that if the Respondent had questions that were not answered by the Affidavits, it should have cross-examined the affiants. This ignores that the burden was on the Applicant to establish the elements necessary to be granted an extension of time (*Virdi* at para 2), and that such applications are to be dealt with in a summary way (IRPA, s 72(2)(d)). By filing Affidavits that raise more questions than they answer, the Applicant does not meet her burden.

[45] The Respondent also points out that the Applicant's application for permanent residence included her email address and mobile phone number. I add that she seems to have used her email account to send her reconsideration request to the Officer. However, there is no evidence that she took steps to ensure the filing of her application for leave and judicial review by her counsel within the statutory delay or to explain why she did not do so. Only an unanticipated event that is beyond the control of the applicant or counsel can justify an extension of time. Here, the Applicant could not have anticipated that her counsel would not act on the instructions provided to him. To this extent, this was an event beyond her control. However, there is also no evidence that having received no response to the instructions, the Applicant took any steps to follow up to ensure that the application had been filed within the required 60 days.

[46] This factor weighs against the Applicant. However, her counsel's failure to follow up on instructions to proceed factors into whether, overall, the interests of justice are met.

iii Prejudice to the Respondent due to the delay

[47] Relying on *40 Park Lane Circle v Aiello*, 2019 ONCA 451 ("*Park Circle*"), the Applicant submits that the relevant prejudice is the prejudice resulting from the delay, not prejudice arising from having to contest the application for an extension of time. However, *Park Circle* does not really say this. Rather, the Ontario Court of Appeal stated, "[i]n any case where a party to litigation seeks an indulgence from the court, a primary considerations must be whether any prejudice would result from the granting of the indulgence". In that case, what was relevant was not the prejudice that would be caused by the progress of the subject appeal, but the prejudice resulting from the one day delay in filing the notice of appeal (*Park Circle* at para 6).

[48] In my view, in answering the question of whether there is prejudice to the other party arising from the delay, it cannot be ignored that, but for the late filing, the Respondent would not have had to make submissions responding to the request for an extension of time. And, where the request is not well supported, this requires additional response time and effort.

[49] In that regard, I note that *Mante* concerned a Rule 399 motion seeking to set aside an order dismissing an application for leave and judicial review, and also addressed whether to grant an extension of time to permit the application record to be filed. When applying the factors for extensions of time, Justice Kane found that the respondent was prejudiced by the lack of finality in an order and by being called upon to respond to the motion.

[50] In my view, when an applicant is represented by counsel and the Respondent must still expend additional time and resources to respond to this this type of poorly supported request, this is a form of prejudice, albeit minor.

[51] This factor weighs against the Applicant, but not heavily.

iv. Potential merit

[52] Two of the Applicant's assertions can be dismissed summarily.

[53] The first of these is the submission that the Officer made a "prior decision" and then improperly and without justification made a second and different decision. This is without merit. The GCMS Notes indicate that the paper assessment of the Applicant's permanent resident application raised no concerns. She was then randomly selected for an interview. It was at this interview that the discrepancies in the dates arose and, based on those discrepancies, the Officer denied her application. This is reflected in the March 29, 2019 decision letter. Contrary to the Applicant's submissions, the Officer did not reverse or re-open a prior decision. The initial GCMS entry did not constitute a decision. The decision was not made until after the interview, at which time the Applicant was given formal notice of it by way of the decision letter.

[54] The second submission that is of no potential merit is the Applicant's argument that the Officer unreasonably responded to her request for reconsideration. Putting aside the fact that the Notice of Application refers only to a decision dated April 1, 2019 (presumably meaning March 29, 2019) and does not reference the reconsideration decision which was sent to the Applicant by

email on April 25, 2019, the Officer found that the Applicant's request for reconsideration further undermined her credibility. This was because in her reconsideration request she provided a different explanation for the inconsistent dates identified during her interview than the reason she gave for this inconsistency at the interview. It was reasonable for the Officer not to reconsider the decision as credibility was and remained a determinative concern (see, for example, *Hussein v Canada (Citizenship and Immigration)*, 2018 FC 44 at paras 55-58). In any event, the Applicant merely stated that she had found an old school paper that made her realise that she made a mistake in her dates. That her dates were inconsistent had already been established and had been explained, differently, three times. Nor did she submit any documents, but merely stated that she had found "educational documents" that would establish why she left Eritrea. There is no explanation as to how school documents could explain this, and, in any event, the basis of her claim was that she left Eritrea because she was being mistreated after complaining about indeterminate and unpaid National Service.

[55] This leaves the Applicant's submission that the Officer made the decision without identifying the contradictions upon which the Officer relied, that the Officer overstated the contradictions and based the refusal decision on considerations or contradictions that were peripheral to her claim. Further, that the Officer erred by failing to consider her entire claim, and in particular, that she left the Eritrea illegally.

[56] It is well established that insignificant and peripheral issues and/or inconsistencies should not form the basis of a negative credibility finding (*Salamat v Canada (Immigration Appeal Board)*, 8 Imm LR (2d) 58, [1989] FCJ No 213 (FCA) (QL/Lexis); *Attakora v Canada (Minister*

of Employment and Immigration), 99 NR 168, [1989] FCJ No 444 (FCA) (QL/Lexis); *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 23). However, I am not persuaded that the inconsistencies identified by the Officer are peripheral or insignificant.

[57] In its submissions, the Respondent summarized the timelines that the Applicant submitted in her documentary submissions and in her interview. In sum, they are as follows:

> - National Service: in her Schedule A form the Applicant declared that her National Service was from July 2013 to June 2016. In her narrative, she gave different dates, being July 2013 to December 2015. During her interview, she stated she completed her National Service in June 2012 and then that she continued in the National Service until the last days of 2015, but later stated that her National Service was from June 2012 to June 2013 until she graduated and then from June 2013 until May 2016.
>
> - School: in her Schedule A form the Applicant declared that she was in college from September 2009 to June 2010 and then from September 2012 to June 2013. In her narrative, she stated she joined college in 2009, withdrew, and continued her studies in June 2013. During her interview she stated she said that she was in college from July 2008 to July 2009, that she withdrew in 2009, and went back from January 2010 to June 2012.
>
> - Fleeing Eritrea: in her Schedule A form the Applicant declared that she was residing in Tesseney, Eritrea from June 2013 to June 2016, but in in another place on the form stated that this was from July 2013 to June 2016. She also declared that she resided in Shegarab, Sudan from January 2016 to October 2016. She indicated that from October 2016 she was residing on Khartoum, Sudan. In her narrative, she stated she fled to Sudan in December 2015. During her interview she stated she came to Sudan in December 2015. When questioned about her confusing Schedule A, she stated that she went to Kassala, Sudan in December 2015 and she went to Khartoum in January 2016. When the Officer raised the conflicting dates, she said she came to Sudan in May 2016.

[58] The record demonstrates why the Officer was concerned about “multiple contradictory dates” for when the Applicant was a student, when she was in National Service, and when she left Eritrea. And, contrary to the Applicant’s submission, the Officer does not exaggerate the inconsistencies in the dates provided by the Applicant. The Officer merely states that the contradictions exist. Although the Applicant asserts that “we are left to guess” at the contradictions the Officer was referring to in the decision, in fact, these are clearly identifiable in the record.

[59] Nor are the contradictions in dates peripheral to the Applicant’s claim. Her claim is factually simple: she asserts that she was mistreated after she complained about being held indeterminately and without pay in the National Service, and that her fear of this mistreatment was why she fled illegally to Sudan. The Officer found that she provided contradictory dates about when she was in school, when she was performing her National Service, and when she fled to Sudan. The dates at issue pertain to the very events that are central to the Applicant’s claim – her National Service and her decision to flee Eritrea. Based on her contradictory information, the Officer was not satisfied as to when the Applicant performed her National Service, and when and why she left Eritrea. Thus, while the Applicant submits that the date that she fled Eritrea had nothing to do with the basis of her claim, this ignores that her evidence giving the inconsistent dates undermined the credibility of her story as a whole.

[60] The Officer’s conclusion that the Applicant had not been truthful, as required by s 16(1) of the IRPA, was justified as seen from the GCMS Notes. Based on this, the Officer reasonably

found that the false information given by the Applicant brought into question the whole of her story.

[61] However, the Applicant also submits that the Officer did not consider whether the Applicant's claim that she left Eritrea illegally was credible and, relying on *Ghirmatsion v Canada (Citizenship and Immigration), 2011 FC 519 ("Ghirmatsion")*, submits that the Officer failed to consider this as another ground of persecution.

[62] The Applicant's immigration application form and her narrative speak to her flight from Eritrea because of mistreatment she suffered having complained about unpaid and unending National Service. In her form, when answering the question of whether she will be able to return to her home country, she indicates that she left the country illegally and will be persecuted and potentially imprisoned if she returns. The initial GCMS entry, which found that here were no concerns with her application, summarized the Applicant's situation and stated, based on the information she presented in her application and in light of the officer's knowledge of current country conditions in Eritrea, that the officer was satisfied that the Applicant had established a well-founded fear of persecution in Eritrea "on account of desertion". The interview was conducted after this entry.

[63] In *Ghirmatsion*, the applicant claimed that he was imprisoned in Eritrea based on religious grounds but escaped and fled to Sudan. On judicial review, he submitted that the officer had only examined whether he was at risk on grounds of religious persecution but that his

narrative reflected that he also feared persecution on the basis of his escape from prison and his illegal exit from Eritrea. Justice Snider stated:

> [103] The Respondent argues that the Officer testified that she did not find the Applicant to be credible; therefore, she was under no obligation to consider all of the relevant bases for persecution. This would be a sound response if (a) the credibility findings are reasonable; and (b) if the credibility findings clearly foreclosed all other grounds of persecution.
>
> [104] I acknowledge that, in general, a negative credibility finding (if reasonable and made with regard to the evidence) will mean that the decision maker does not have to look further into the claim. For example, if a visa officer concludes that a claimant was never imprisoned, it follows that a claim based on a fear of being returned to detention is not sustainable. However, if the claimant puts forward facts that raise an additional ground of persecution, that part of the claim still needs to be assessed, unless the visa officer clearly finds that part of the claim to also lack credibility.
>
> [105] Leaving aside my earlier finding that the credibility findings are not reasonable, I turn to the reasons and findings made by the Officer. In this case, the Officer did not believe that the Applicant had ever been detained. However, it appears that the Officer never turned her mind to whether the Applicant had left Eritrea illegally, notwithstanding the Applicant's description of his departure or the documentary evidence regarding the risk to those who departed Eritrea illegally. This is supported by the cross-examination of the Officer (Cross-Examination of AnnMarie McNeil, March 22-23, 2011, Q603-609)…
>
> [106] It would have been open to the Officer to consider this additional ground of persecution and reject it; however, this is not what the Officer did. She had no explanation for why she did not assess this risk. The Respondent asks this Court to accept that the Officer was under no obligation to consider these additional risks because she did not find the Applicant's story to be credible. However, that was not the reason why the Officer did not consider these additional grounds of persecution. She had no explanation. This is a reviewable error that, on its own, would warrant overturning the Officer's decision.

[64] Here, the Applicant's departure from Eritrea is clearly linked to her desertion from the National Service, as demonstrated by her narrative. She claims she would be at risk upon return because she deserted. However, the Officer was not satisfied as to when or if she completed her National Service or whether that was in fact the reason she left Eritrea, which was the basis that she claimed a well founded-fear of persecution. Without credibility as to those events, the credibility of her whole claim may be reasonably undermined as a legitimate credibility finding may foreclose an applicant's claim (*Ghirmatsion* at para 104; *Yasik v Canada (Citizenship and Immigration)*, 2014 FC 760 at para 55.)

[65] In her application for judicial review, the Applicant argues that her illegal exit from Eritrea is a separate ground of persecution that was not considered by the Officer. Her counsel submitted at the hearing of this matter that the country conditions document for Eritrea support that illegal exit is a discrete basis for persecution.

[66] The problem with the submission is that the Applicant's claim tied her exit to the National Service and, based on her inconsistent evidence, the Officer found her story overall to lack credibility. Thus, how and why she left Eritrea has not been established, including whether she left legally or illegally. Further, when appearing before me, counsel for the Applicant submitted that the country conditions support that any exit from Eritrea is illegal, but no country conditions documentation was referenced in the Applicant's written submissions nor were any provided when appearing before me to support that position. This is unlike *Ghirmatsion* where supporting documentary evidence was submitted.

[67] In these circumstances, I am not persuaded that the Officer erred, nor that the Applicant's case has potential merit.

[68] I have carefully considered the potential merit factor because, in my view, in this case it is ultimately determinative of the request for an extension of time.

[69] Viewed in whole and weighing all of the factors to be considered when determining whether an extension of time should be granted, and keeping in mind the overriding consideration of the interests of justice, the extension is denied. This is determinative.

[70] However, even if the extension of time had been granted, the application for judicial review would have been dismissed. My analysis above as to the potential merit of the application for judicial review also demonstrates that the application would not succeed on its merits. Further, that the decision was intelligible, transparent and justified in relation to its relevant factual and legal constraints.

JUDGMENT in IMM-4062-19

THIS COURT'S JUDGMENT is that:

1. The extension of time is denied; and

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4062-19
STYLE OF CAUSE:	SELEMAWIT ABRAHAM KIFLOM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	WINNIPEG, MANITOBA
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APPEARANCES:

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