Date: 20081114

Docket: IMM-4861-08

Citation: 2008 FC 1277

Ottawa, Ontario, November 14, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

TIGIST DAMTE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction and Background

[1] These reasons relate to an application by Tigist Damte, a citizen of Ethiopia, age 40 who seeks a stay from her removal to the United States scheduled for 9:00 a.m. on November 18, 2008. The underlying application for leave and judicial review is the November 3, 2008 decision of Enforcement Officer Martin (the Officer) not to defer her removal pending the determination of her second Pre-Removal Risk Assessment (PRRA) filed on March 28, 2008.

[2] Her first PRRA application filed in March of 2007 was refused on December 3, 2007 after her refugee claim was refused by decision of the Refugee Protection Division (RPD) dated January 12, 2006.

[3] The fear which she expresses is of the Ethiopian authorities on account of her sur place activities in opposition to the existing government in Ethiopia. After she arrived in Canada in November 2004 from the United States to which she came in 2001 from Germany where she had studied and resided from 1990 to 2001 except for a short period of time in 1998 when she returned to Ethiopia to visit her father who was ill and to complete some studies. She claims to have been detained by the Ethiopian authorities on account of her political activities in Germany as a member of an opposition party. She made a refugee claim in the United States on the basis of her sur place activities in Germany and in the United States. That claim did not succeed.

[4] In its January 12, 2006 decision, the RPD dealt with her allegation she was arrested and detained in 1998 by Ethiopian police on account of the membership in Ethiopian Peoples Revolutionary Party (EPRP). The RPD found her allegation not to be credible as to her past persecution.

[5] The RPD also analysed the applicant's sur place claim. It was not satisfied she was a member of EPRP in Germany. In terms of her activities in the United States, the panel was not persuaded she was an active member of EPRP. It commented upon a photograph of her at a demonstration in the United States concluding on the evidence before it "there is no evidence that the claimant was photographed by anyone from the Ethiopian government at this event". The panel

concluded, however, she had attended the U.S. demonstration in 2001 but was not persuaded "she would have come to the attention of the Ethiopian authorities". [Emphasis mine]

[6] The RPD then turned it mind to the applicant's activities in Canada. It concluded she was a member of the All Ethiopia Unity and Cultural Organization in Toronto but was not an active member with her political activities being minimal. Photographs at a demonstration in Toronto were submitted but the RPD said "other than photographs of people she knew the claimant has no evidence that the Ethiopian government is aware of their activities". It referred to the Gilkes Report where it was stated that any known opposition member returning from abroad to Ethiopia faced a very real possibility of being detained and interrogated but said it was not satisfied the applicant was known to the Ethiopian authorities. The panel referred to an IRB response to information request in 2004 no evidence was found "that the government in Ethiopia is videotaping the demonstrations". [Emphasis mine]

[7] It is also useful at this point to summarize the findings of the PRRA officer who rejected the applicant's first PRRA on December 3, 2007. Those findings were:

a. The risks the applicant involved in her PRRA were largely the same as those which were before the RPD.

b. Beginning on November 1, 2005, "violent anti-government protests allegedly organized by the opposition occurred in Addis Abba resulting in the arrest of opposition leaders and members of the independent media and civil society groups

for alleged participation in "unlawful activity". It observed that the security forces "also detained between 30,000 and 50,000 demonstrators without charge. Military intervention led to widespread abuses such as arbitrary detention and killings".

c. It referred to a letter of support for Ms. Damte submitted by Amnesty International (AI) and the view of that organization "of risk of return to Ethiopia for known and suspected activists as well as members and supporters of opposition groups". According to the PRRA officer, AI's letter focused on risk of return of "prominent political figures or else had significant links to such persons". The applicant, so held the PRRA officer, did not have that kind of profile.

d. He then reviewed the applicant's activities in Canada, concluding there is "insufficient evidence to support that she has done anything to come to the attention of the Ethiopian authorities or that she has undertaken activities which position her as being of particular interest to the ruling government". [Emphasis mine]

[8] It is clear to the central issue in her Canadian refugee hearing and her PRRA application was whether her political activities in the United States or in Canada would likely have come to the attention of the Ethiopian authorities. In this connection, the central aspect of her second PRRA application was the inclusion of "new evidence" which became known in June 2006 through newspaper accounts that the Ethiopian Embassy in Washington had since 2003 set up a programme to videotape Ethiopian nationals abroad as there were demonstrating against the authorities of that country. [Emphasis mine]

[9] It is conceded by counsel for the applicant this evidence of videotaping of anti-government demonstrators by Ethiopian embassy officials should have been submitted as new evidence during the first PRRA application submitted on her behalf on February 3, 2007. She said the fact that it was not filed was an oversight by previous counsel.

[10] The applicant sought leave and judicial review from her negative first PRRA decision. Her new counsel moved to stay her removal from Canada pending determination of the leave application. In the context of that stay motion, the new evidence concerning the videotaping of anti-government demonstrators was included in her stay motion. Justice Gibson, by order dated February 11, 2008, granted the stay. In his order, as one of the considerations for the grant of the stay, Justice Gibson mentioned the fact that counsel had acknowledged before him the ultimate destination if removal was carried out "will be Ethiopia and not the United States of America". Justice Gibson went on to write:

> The Court concluding that, against the established low threshold for a serious issue to be tried, a serious issue to be tried here arises, irreparable harm that is non speculative has been established given the political activities in which the Applicant has engaged while outside Ethiopia which are likely to have come to the attention of Ethiopian authorities or to come to the attention of those authorities of the Applicant is removed from Canada and that, given the foregoing, the balance of convenience favours the Applicant; [Emphasis mine]

[11] Leave was granted to the applicant to challenge the first PRRA decision. Her judicial review application was dismissed on October 8, 2008 by the Honourable Louis Tannenbaum, Deputy Judge of this Court (see *Damte v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1137).

With respect to the PRRA officer's reasons Judge Tannenbaum wrote at paragraph 12 of his reasons:

> In assessing the reasons as a whole, it appears clear to me that the PRRA Officer did not apply the wrong test. The Officer found from the documentary evidence that only prominent opposition members faced persecution and that there was no evidence that Ms. Damte fit that category. In assessing the level of risk to her based on her political activities during her time outside Ethiopia, the Officer was clearly looking to see if there was evidence to show that she would personally be known to authorities there as a sufficiently notable opposition party member to target. To prove personal risk, Ms. Damte needed to show that she would personally come to the attention of authorities. This was not an incorrect assessment, and the decision will not be vacated on this point.

[12] Counsel for the applicant on the stay motion was the same person who appeared as her counsel before Judge Tannenbaum. This Court inquired whether the new evidence was in the applicant's record before him or whether it was referred to him. I was informed in the negative in either case because of the rule that on judicial review the record before the PRRA officer is the record on judicial review. In short Judge Tannenbaum did not have the benefit of the new evidence.

II. The Decision to Refuse to Defer

[13] The officer expressed his reasons for refusing to defer in his notes to file. He first observed that the request for deferral was based on the existence of the outstanding second PRRA filed on March 28, 2008 and that deferral should be until the second PRRA was decided. He framed the issue as "deferral for the outstanding subsequent PRRA" noting there was no statutory or regulatory stay attached to a subsequent PRRA application. He outlined the following considerations:

> The new evidence in question was not included in her first PRRA claim made in March 2007. According to counsel, the evidence was available for submission in June 2006. This evidence was never submitted in error of counsel on the initial

> PRRA. The evidence was available to submit in March 2007. Failure to do so cannot result in a deferral of removal.
>
> The evidence, which was submitted as proof of irreparable for previously filed litigation (IMM-549-08) was dismissed on 08 October 2008.
>
> In stating "her PRRA application was filed seven months ago, a decision should be imminent." No evidence was provided to support this claim. A PRRA decision could take as little as 3 months or as long as 2-3 years under normal circumstances. [Emphasis mine]

[14] He expressed his conclusions as follows:

> Given the facts and timelines of the case, I believe a deferral is not warranted. There is no regulatory or statutory requirement to defer the removal of a foreign national while awaiting a decision of a subsequent PRRA.
>
> While I have been delegated the authority to authorize a deferral under the Act, I am bound by the fact that Canada Border Services Agency as part of the Department of the Solicitor General of Canada has an obligation under section 48(2) of the *Immigration and Refugee Protection Act* to carry out removal orders as soon as reasonably practicable.
>
> While I am sympathetic to the situation that Ms. Damte is faced with, after careful consideration of the facts relevant to the requested deferral, I decline to grant the request for deferral based on the reason provided. Ms. Damte is required to report for removal as was previously arranged on November 18, 2008 at 9:00a.m. to the United States.

[15] It is not disputed that in support of the stay request, the officer was provided with the second PRRA and submissions which concerned the videotaping of opposition demonstrators.

III. Analysis

[16] It is settled law that in order for an applicant to obtain a stay of his/her removal from Canada the applicant must make out conjunctively three elements: (1) serious issue to be tried; (2) irreparable harm; and (3) that the balance of convenience favours the applicant.

(a) Serious Issue

There are two exceptions to the principle that the determination of a serious question to be tried is a low hurdle, namely, that the reviewing judge must not delve deeply into the merits of the question raised but only canvass whether that question is frivolous or vexatious. One of those exceptions is when the grant of an interlocutory injunction will effectively grant the relief he/she seeks in the judicial review application which is the case here – the deferral of her removal from Canada. In such a case there is a likelihood of success raised by the serious questions is the applicable standard.

[17] Counsel for the applicant accepts that the higher threshold applies and that the applicant meets it. She argues the officer erred in the following ways:

a. First, he made a serious error of fact when he stated the new evidence was dismissed on October 8, 2008 by Judge Tannenbaum. That evidence, as already noted, was not before the judge.

b. Second, the counsel for the applicant points to the statement made by the Officer that failure to adduce the new evidence at the first PRRA application "cannot result in a deferral of removal". She argues such failure may not be fatal; it depends upon the circumstances pointing to Justice Mosley's decision in *Wong v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 783 dealing with a decision by an enforcement officer not to defer removal pending the determination of a

second PRRA when the applicant had failed to file a first PRRA after having been given an opportunity to do so.

c. Third, the officer erred when he refused to defer because the decision on the second PRRA was not imminent.

d. In terms of irreparable harm, she argued I should apply the doctrine of issue estoppel or the principle of judicial comity to Justice Gibson's finding on the stay application based on the new evidence the applicant's activities sur place would likely come to the attention of the Ethiopian authorities.

[18] Despite the argument of counsel for the respondent that the reasons when read as a whole do not disclose a question likely to succeed, I find the following serious issues:

1. The failure of the officer to consider the important new evidence simply because it had not been presented before the second PRRA when it was otherwise available. Errors of former counsel do not necessarily foreclose the consideration of such evidence. The jurisprudence is clear on this point. This erroneous view taken by the officer led him not to consider relevant evidence which had not been considered before and could materially affect the risk analysis in her situation.

2. The officer erred when he concluded the new evidence had been considered by Judge Tannenbaum. It was not. Once again, this error led the officer not to consider the new

evidence which was before him in the second PRRA which had been submitted to him in the materials provided by the applicant on its request for deferral.

(b) Irreparable harm

[19] I consider that irreparable harm has been made out because on the material before me, I find that the ultimate destination for the applicant's removal is Ethiopia, where a judge of this Court have found based on the new evidence which only he, and now I, have had an opportunity to consider.

[20] Counsel for the Minister accepted before Mr. Justice Gibson that deportation to Ethiopia was the ultimate country of removal. Counsel for the Minister now says there is no evidence that such is the case but provides no evidence why it is so when previous Minister's counsel said it was. In my view, the Minister had an obligation to explain to the Court and provide it with evidence which led to such an important change because I agree with the Minister's counsel that deportation to the United States in not proof of irreparable harm and normally there must be evidence of removal from the United States to the country of nationality.

(c) Balance of convenience

[21] In the circumstances, having made out serious issue and irreparable harm, the balance of convenience favours the applicant.

(d) Conclusion

[22] For these reasons, the application for a stay of removal is granted.

ORDER

THIS COURT ORDERS the stay of the applicant's removal to the United States scheduled for November 18, 2008 until a decision is made whether to grant leave and, if leave is granted, until the judicial review is determined.

"François Lemieux"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4861-08
STYLE OF CAUSE:	TIGIST DAMTE v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 10, 2008
REASONS FOR ORDER AND ORDER:	Lemieux J.
DATED:	November 14, 2008

APPEARANCES:

Hilary Evans Cameron	FOR THE APPLICANT
Nina Chandry	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT