Date: 20091117

Docket: IMM-2116-09

Citation: 2009 FC 1167

BETWEEN:

LEMLEM YIREFU BEGASHAW

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

HENEGHAN J.

Introduction

[1] Ms. Lemlem Yirefu Begashaw (the "Applicant") seeks judicial review of the decision made by Pre-Removal Risk Assessment Officer M. Campbell (the "Officer") on March 23, 2009, refusing the Applicant's application to be found a person in need of protection pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

Background

[2] The Applicant, a citizen of Ethiopia, came to Canada in 2004, following a period of residence in the United States of America. In 1995, she had won a diversity visa lottery that granted

her entry to the United States and had been given a "green card". She returned to Ethiopia in 1998 because she was ill and homesick. During her stay in Ethiopia, the Applicant was diagnosed with a depressive disorder.

[3] The Applicant returned to the United States in October 2000. In February 2002, she lost her status in the United States but she remained there until she entered Canada in January 2004. She claimed refugee protection immediately.

[4] The hearing of the Applicant's claim was held on October 20, 2004. Her claim was rejected in a decision dated October 27, 2004, on the grounds that the Board did not believe the Applicant's family were members of the All Amhara People's Organization ("AAPO") in Ethiopia nor were family members persecuted for their political activities. The Board also found that the Applicant's return to Ethiopia in 1998 and receipt of exit visas on two occasions from the Ethiopian Government showed that she did not have a subjective fear of returning to Ethiopia. The Applicant sought leave for judicial review of the Board's decision but leave was denied on January 11, 2005.

[5] In filing her application for a Pre-Removal Risk Assessment, the Applicant again alleged that her family were politically active with the AAPO, that both her mother and a brother were imprisoned, and that another brother died from political persecution. She also alleged that she had herself been persecuted for allegedly providing financial assistance to the AAPO.

[6] The Applicant also submitted evidence about her health, in particular her mental health at the time she appeared before the Board for the hearing of her refugee claim. The medical evidence included a report from Dr. Lo, a psychiatrist who assessed the Applicant in 2006; a letter from Dr. Chisvin, a psychiatrist who began treating the Applicant in October 2004; and a statement from Ms. Khadija Abdi, a mental health worker with a community centre in Toronto. The thrust of this medical evidence was that the Applicant had been suffering from untreated mental illness at the time of her refugee hearing and that she had subsequently recovered memories of imprisonment and of rape while imprisoned in Ethiopia, facts that were not presented during her refugee hearing nor in her Personal Information Form ("PIF").

[7] The written submissions that were filed by the Applicant's Counsel in support of the PRRA application characterized the medical reports and the statement from Ms. Abdi as "new evidence" that would "plausibly" support the Applicant's delayed memory recovery of having been imprisoned and sexually assaulted in Ethiopia.

[8] The PRRA Officer determined the Applicant would not be at risk of persecution for her political activities if returned to Ethiopia. The Officer also found that the Applicant had not presented objective evidence to show that she had the profile of a person at risk in Ethiopia.

[9] The Officer further gave little weight to the evidence regarding the Applicant's mental health, noting that the Applicant was the source of the information upon which the psychiatrists and the mental health worker based their opinions.

[10] The Applicant raises several issues in this application for judicial review, as follows:

1. Did the Officer err by failing to conduct an oral hearing?
2. Did the Officer err in her treatment of the medical evidence?
3. Did the Officer err in her consideration of the exemption in subsection 108(4) of the Act?

Discussion and Disposition

[11] The first matter to be addressed is the applicable standard of review, having regard to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. Questions of law and of procedural fairness are reviewable on the standard of correctness and questions of fact, mixed fact and law and of the exercise of discretion are reviewable on the standard of reasonableness.

[12] The Applicant submits that the Officer made credibility findings in rejecting her PRRA application. Relying on subsection 113(b) of the Act and of section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"), she argues that she was entitled to an oral hearing when her credibility was engaged.

[13] The Minister of Citizenship and Immigration (the "Respondent") takes the position that the Applicant had no right to an oral hearing because the Officer based the decision upon the insufficiency of the evidence, not the credibility of the Applicant.

[14] Subsection 113(b) of the Act and section 167 of the Regulations provide as follows:

113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit:
…	…
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
…	…
167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following: (a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act; (b) whether the evidence is central to the decision with respect to the application for protection; and (c) whether the evidence, if accepted, would justify allowing the application for protection.	167. Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise : a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur; b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection; c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[15] The language of subsection 113(b) makes it clear, in my opinion, that the availability of an oral hearing in the PRRA context lies solely in the discretion of the Respondent, having regard to the "prescribed factors" that are identified in section 167 of the Regulations. The fact that those prescribed factors exist in a given case does not lead to the inevitable conclusion that an oral hearing must be held. In this regard, I respectfully depart from the approach taken in the decision of *Tekie v. Canada (Minister of Citizenship and Immigration)*, 50 Imm. L.R. (3d) 306 (F.C.).

[16] I am mindful that the principle of judicial comity must be taken into account when a judge of the Court purports to depart from a prior decision of the Court. In this regard, I refer to the decision in *Almrei v. Canada (Citizenship and Immigration)* (2007), 316 F.T.R. 49 at paras. 61 and 62 where Justice Lemieux said the following about judicial comity:

> (3) The principle of judicial comity
>
> 61 The principle of judicial comity is well-recognized by the judiciary in Canada. Applied to decisions rendered by judges of the Federal Court, the principle is to the effect that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law. I cite the following cases:
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> - Haghighi v. Canada (Minister of Public Safety and Emergency Preparedness), [2006] F.C.J. No. 470, 2006 FC 372;
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> - Benitez v. Canada (Minister of Citizenship and Immigration) [2006] F.C.j. No. 631, 2006 FC 461;
>
> - Pfizer Canada Inc. v. Canada (Minister of Health), [2007] F.C.J. No. 596, 2007 FC 446;
>
> - Aventis Pharma Inc. v. Apotex Inc., [2005] F.C.J. No. 1559, 2005 FC 1283;

> - Singh v. Canada (Minister Citizenship and Immigration) [1999] F.C.J. No. 1008;
>
> - Ahani v. Canada(Minister Citizenship and Immigration), [1999] F.C.J. No. 1005;
>
> - Eli Lilly & Co.v. Novopharm Ltd. (1996), 67 C.P.R. (3d) 377;
>
> - Bell v. Cessma Aircraft Co. (1983) 149 D.L.R. (3d) 509 (B.C.C.A.)
>
> - Glaxco Group Ltd. et al. v. Minister of National Health and Welfare et al. 64 C.P.R. (3d) 65;
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> -Steamship Lines Ltd. v.M.N.R., [1966] Ex. CR 972.
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> 62 There are a number of exceptions to the principle of judicial comity as expressed above they are:
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> 1. The existence of a different factual matrix or evidentiary basis between the two cases;
> 2. Where the issue to be decided is different;
> 3. Where the previous condition failed to consider legislation or binding authorities that would have produced a different result, i.e., was manifestly wrong; and
> 4. The decision it followed would create an injustice.

[17] In my opinion, the third exception identified by the Court in *Almrei* applies here.

[18] In *Tekie*, Justice Phelan focused on the language of section 167 of the Regulations and not the language of subsection 113(b) of the Act in concluding that an oral hearing was required. As well, it appears that in *Almrei*, an oral hearing had been requested. That is not the situation here.

[19] The language of subsection 113(b), with the words “may” and “of the opinion” suggests to me the availability of a hearing will always be a matter of discretion, not a matter of right. The Applicant was not deprived of a right nor did she suffer from a breach of procedural fairness when she did not have an oral hearing before the Officer. I note that Counsel who filed the PRRA submissions did not request an oral hearing.

[20] However, the manner in which the Officer purported to reject the Applicant’s application on the basis of insufficiency of evidence is problematic. I agree with the Applicant’s submission that the Officer in fact made the decision on credibility grounds but failed to disclose and identify those grounds. In short, the Officer did not believe the evidence presented by the Applicant but she did not express that disbelief. The Officer purported to reject the PRRA application on one ground, that of insufficient evidence, but in reality, she rejected the application on the basis of credibility concerns.

[21] Surely this is improper and in my opinion, a breach of the obligation to provide adequate reasons for the decision. “Adequate reasons” means the “real” reasons for a decision. In this regard, I refer to the decision in *Hilo v. Canada (Minister of Employment and Immigration)*, 15 Imm. L.R. (2d) 199 (F.C.A.) where the Federal Court of Appeal said the credibility findings must be expressed in “clear and unmistakable terms”. The problem here is that the Officer in fact cloaked the credibility concerns in the language of sufficiency of evidence. That does not meet the legal requirements.

[22] Further, the Officer was dismissive of the medical evidence that was presented, assigning it little weight because the source of the Applicant's medical history was the Applicant herself.

[23] In my opinion, this was an unreasonable conclusion by the Officer. The two psychiatrists addressed the issue of the Applicant's mental health. It was entirely reasonable and appropriate for them to rely on the factual history provided by the Applicant, insofar as that history provided a framework for the medical doctors to provide their opinion as to the existence of mental health illness and their views as to appropriate care.

[24] The Officer erred in her treatment of the medical evidence.

[25] It is not necessary for me to address the Applicant's arguments relative to subsection 108(4) of the Act.

[26] The application for judicial review is allowed, the decision of the PRRA Officer is set aside and the matter is remitted to another officer for determination.

[27] Counsel may submit a proposed question for certification by Monday, November 23, 2009. Judgment will issue thereafter.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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