Federal Court  Cour fédérale

Date: 20101109

Docket: IMM-448-10

Citation: 2010 FC 1120

Ottawa, Ontario, November 9, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ALEMAYEHU WORKIE GELAW,
ELFINESH ADEM MEHAMED and
YEROME ALEMAYEHU WORKIE

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] For the reasons that follow, the Court grants the applicants' application to set aside the decision of an Immigration Officer in Calgary, Alberta, dated January 28, 2009, refusing their request for an exemption from the permanent resident visa requirement on humanitarian and

compassionate grounds (the "H&C Application"), in order to permit them to apply for permanent resident status from within Canada.

Background

[2] The applicants have been in Canada for a period of 13 years and 2 months as of the date of hearing.

[3] Alemayehu Workie Gelaw was born January 5, 1964, in Ethiopia. He is of Amhara ethnicity. His wife, Elfinesh Adem Mehamed, was born January 17, 1973. In 1987, Mr. Workie Gelaw began his career as a diplomat.

[4] In May 1993, Mr. Workie Gelaw was posted to the Ethiopian embassy in Rome. On February 4, 1996, while still in Italy, his wife gave birth to their daughter, Yerome Alemayehu Workie.

[5] The applicants fled to Canada, arriving on August 27, 1997. Their refugee claim was denied on April 15, 1999. Leave to judicially review that decision was denied by this Court. Mr. Workie Gelaw and his wife had a second daughter, Addis Alemayehu Workie, on March 17, 2000. Addis is a Canadian citizen.

[6] On March 20, 2000, a Post Claim Determination Officer decided that the applicants would not be subjected to a serious risk to life, extreme sanctions, or inhumane treatment if required to

leave Canada. Therefore, they did not qualify for the Post-Determination Refugee Claimants in Canada Class. Leave to judicially review that decision was denied by this Court.

[7] The applicants filed an H&C Application in April 2000; it was refused on June 25, 2002. Leave to judicially review that decision was denied by this Court.

[8] The applicants filed a second H&C Application on May 1, 2003. It is the decision rendered on that application which is challenged.

[9] Adam Alemayehu Workie, the third child of Mr. Workie Gelaw and his wife, was born October 31, 2003, and is a Canadian citizen.

[10] The applicants submitted an application for a Pre-Removal Risk Assessment (PRRA) on June 5, 2006. It was refused on June 7, 2006. Judicial review of that decision was denied by this Court.

[11] On January 28, 2009, the officer denied the applicants' second H&C Application. They did not become aware of that decision until March 2009 when they checked the status of their application online. They made two requests to obtain a copy of the decision but were not provided with one until January 13, 2010, during a meeting with Canada Border Services Agency regarding their removal from Canada.

Issues

[12] In my assessment, considering the written and oral submissions of the parties, the following are the issues requiring the Court's attention:

1. What are the standards of review for the issues in dispute?
2. Did the officer violate the duty of procedural fairness by failing to provide the applicants with a timely decision?
3. Did the officer breach the duty of procedural fairness by failing to provide an opportunity for the applicants to address any doubts the officer had?
4. Did the officer apply the wrong legal test?
5. Did the officer err by failing to consider the IP 5 Manual?
6. Is the officer's decision regarding the best interests of the children reasonable?

[13] At the hearing counsel for the applicants focused his submissions on the last issue, the best interests of the children, without, he stated, abandoning the others he had raised. In my view, that is the only issue deserving of serious attention; I shall only briefly address the other issues.

1. *Standards of Review*

[14] The applicants submit, and I agree, that Issues 2 and 3 are matters of procedural fairness reviewable on the standard of correctness: *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12. They say, and again I agree, that the remaining issues are to be reviewed on the standard of reasonableness: *Yoo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 343. I also agree with the respondent's submission that when assessing reasonableness considerable

deference should be afforded to the officer's decision and that the evidence weighed by the officer should not be re-weighed by this Court.

2. *A Timely Decision*

[15] The applicants submit that in the absence of special circumstances, a long delay in rendering a decision is unacceptable: *Singh v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1742 (T.D.). In this case, they submitted their application in 2003 but a decision was not rendered until 2009, and they were not provided with that decision until nearly a year later on January 13, 2010. They submit that this is prejudicial due to Ethiopia's state of constant turmoil and the fact that the dangers and hardships that they may face change daily. They further point out that in the period between the date of the decision and the date they received the decision a new IP 5 Manual was released that provides more detailed instructions on what should be considered when examining the best interests of children. They submit that the officer ought to have reassessed the application after the new IP 5 Manual was released.

[16] I agree with the respondent that the applicants must show a real prejudice arising from the time gap, in addition to showing that the delay is unreasonable: *Qazi v. Canada (Minster of Citizenship and Immigration)*, 2005 FC 1667. Here the record shows that the applicants have benefited from the delay, not been prejudiced by it. After their PRRA was determined in 2008, the applicants updated their H&C submissions more than once. They chose to stay in Canada notwithstanding the previous determinations that returning to Ethiopia posed no risk; that was a decision of their making, not a circumstance forced upon them. The exercise of all avenues of legal

recourse is not a circumstance beyond the control of judicial review applicants: *Serda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 356.

[17] There is insufficient evidence before the Court to find that the conditions in Ethiopia have materially changed in the period between when the decision was made and when it was given to the applicants. Similarly, the applicants have not pointed to any changes in the new IP 5 Manual that might reasonably be said to warrant a different result. The fact remains that in spite of the Manual in force, the officer's decision was ultimately governed by the same legislation and case law.

3. *An Opportunity to Address Doubts*

[18] The applicants submit that it is clear from the decision that the officer had many concerns based on an alleged lack of information provided. Most importantly, they say that the officer dismissed the applicants' argument that the children would be required to surrender their Canadian citizenships to return to Ethiopia. They complain that in spite of this the officer did not request an interview with the applicants, or ask them to provide more information, and they say that the officer should have done so. They allege that the officer did not provide them with an opportunity to disabuse the officer of these concerns and they rely on this Court's decision in *Del Cid v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 326.

[19] I am unable to agree with the applicants' submission that the officer in this case and on these facts had any duty to ask the applicants for further information.

[20] At para. 30 of *Del Cid*, relied on by the applicants, this Court stated that officers have a "duty to obtain further information concerning the best interests of the Canadian born children if the officer believed the information presented by the applicant to be insufficient to assess the best interests of the children."

[21] The question is whether this officer found insufficient evidence to assess the children's best interests. The answer is that the officer did not.

[22] The officer was mindful that he or she was to consider new evidence, and not make an entirely new assessment. Throughout the decision, the officer does refer to the applicants' lack of evidence. However, this is done to demonstrate that the evidence presented was insufficient to prove particular facts on a balance of probabilities. This is different than saying that there is insufficient evidence to make an assessment. For example, the officer notes that the applicants provided evidence that they had little contact with what family they had in Ethiopia. Therefore, the officer found that there was insufficient evidence to prove that the female children would face significant pressure from their extended family to undergo female genital mutilation. With regards to citizenship, the officer finds that, given contrary information, there was insufficient evidence to demonstrate that Addis and Adam would have to renounce their Canadian citizenship or be unable to obtain visas to enter and reside with their parents in Ethiopia. The officer had sufficient information to make an assessment, as required by *Del Cid*, and noted that there was insufficient information to support the applicants' position. Therefore, I find that there was no reason for the officer to raise these matters with the applicants.

4. *The Legal Test Applied*

[23] The applicants submit that the officer failed to consider the evidence as a whole. They say that although each submission individually may have failed to amount to unusual and undeserved or disproportionate hardship, the submissions considered together warranted a favourable decision. They submit that the officer relied on previous decisions involving these applicants when the officer should have conducted a fresh inquiry, and they point out that the threshold for establishing risk to life or cruel and unusual punishment under a PRRA application is much greater than the threshold for finding risk of undue hardship in the H&C context: *Thalang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 340.

[24] The officer's conclusion provides a summary and overall assessment of the many submissions made by the applicants and I am satisfied that the officer considered the evidence as a whole. Furthermore, the officer clearly considered unusual and underserved or disproportionate hardship, not risk, in accordance with *Thalang*.

[25] Lastly, the officer's quotation and application of *Wilson v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 488, as holding that each H&C application is not a new start, but that the officer is entitled to give weight to previous findings and should only consider new evidence in regard to the allegations in the application, was a correct interpretation of the officer's role in deciding a second H&C Application. Therefore, the officer did not err in giving weight to prior decisions and refusing to undertake a fresh inquiry.

5. *The IP 5 Manual*

[26] The applicants submit that the officer's finding that the hardship they may face in severing their ties to Canada was within their control is at odds with the IP 5 Manual. They say that the examples of circumstances within an applicant's control in the IP 5 Manual do not include the situation where an applicant remains in Canada to pursue legal remedies. They state that the officer failed to account for the considerations in the IP 5 Manual, and therefore committed a reviewable error: *Ismeal v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1366.

[27] The list of factors within an applicant's control, as provided in the IP 5 Manual, is not intended to be exhaustive. Furthermore, the only factor outside of an applicant's control that is discussed in the IP 5 Manual is where the Minister of Public Safety has instituted a temporary suspension of removals to a specific country, and the applicant establishes connections to Canada while it is in place. The officer's conclusion that the applicants' stay in Canada was within their control was reasonable and consistent with the jurisprudence of this Court.

6. *Best Interests of the Children*

[28] The applicants submit that the officer failed to be alert, alive, and sensitive in determining the best interests of the children, as described in *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165. They note that the officer failed to consider what will happen if the two younger Canadian-born children are left in Canada when the applicants return to Ethiopia. They say that the officer's conclusion that the best interest of the children was to remain in Canada

ought to have ended the analysis. Thereafter, they say, the officer could have considered factors that may outweigh it, but when considering the best interests of the children, it was not appropriate to mitigate their interests by considering their ability to cope in Ethiopia.

[29] The respondent submits that this is not a case where the officer found that the children were subject to risk but failed to afford them protection. It is submitted that the officer found no evidence of risk, the same conclusion reached by other decision-makers and upheld on judicial review.

[30] I find that the officer's analysis of the interests of the children and, in particular, of the two younger Canadian children, was superficial and marginalized their interests, and that when the decision is read as a whole, it cannot be said that the officer was alert, alive and sensitive to their interests or properly analyzed them.

[31] The officer identified the children's best interests as "(1) remaining as a family unit and (2) having access to education and healthcare."

[32] With respect to education, the officer concludes that he or she is "not satisfied based on the totality of the evidence … that the children will be restricted and/or disadvantaged in their education" in Ethiopia. With respect to healthcare, the officer concludes "there is insufficient evidence before me to establish on the balance of probabilities, that their health needs would not be met in Ethiopia."

[33] The officer concludes that the children will successfully adjust to life in Ethiopia and that any difficulties they face "fall in the unfortunate but common consequences of leaving Canada as the result of deportation." That conclusion, in my view, is unreasonable based on the mountain of information before the officer as to the conditions in Ethiopia and the risks faced there by children.

[34] The documents placed before the officer identified conditions in Ethiopia which cannot be described by any reasonable person as "difficulties" nor can they be properly described as being the "common consequences of leaving Canada." A report from Carol A. Daw, filed with the initial application, summarizes some of that evidence as follows:

> Ethiopia is poor and wracked by cycles of drought and political instability. They are [*sic*] currently referred to as a "fragile democracy". The country's Gross National Product (GNP) is $100 and their health infrastructure is only available to 50% of the population. Only 14-17% of women are considered literate, and their life expectancy is low, between age 41 and 45. One in seven women die from the complications of pregnancy and childbirth. An estimated 3 million people in Ethiopia are HIV-positive, and there are predictions that 1/3 of Ethiopian teens will die from AIDS.
> …
> Some CBC reports described the current situation in Ethiopia as worse than the great famine of 1984. The UN Secretary-General has expressed some hope for children in Ethiopia, saying that those who are receiving supplemental feeding programs are being saved from starvation. Medicare is scarce.
>
> The UN 2000 Human Development Report gives a Human Development Index (HDI) in which Canada comes first in terms of life expectancy, education and income. Ethiopia is 171st of 174, (which is Sierra Leone). The UN Human Poverty Index concentrates on measuring deprivations in 4 dimensions of human life, including longevity, knowledge, standard of living and social inclusion. Ethiopia is 83rd out of 85 "developing" countries. In the Gender related development Index, measuring the same factors as the HDI, but adjusting average achievement in accordance with the disparity

> of achievement between men and women finds Canada as #1 on the GDI, while Ethiopia is 141st out of 143 countries.
>
> According to the World Health Organization, Ethiopian girls are exposed to violence and sexual abuse, including rape and abduction. This affects girls' physical development as well as their mental and social well-being. Women in Ethiopia are 200x more likely to die of complications due to pregnancy. Their low status in society puts them at increased risk.

[35] In my view, to conclude that removing these children (two of whom are Canadian-born) to a country where they face serious risks that include early death, rape, starvation, abduction, forced marriage, and violent discrimination as being no more than the usual and ordinary consequences of deportation is perverse.

[36] The Federal Court of Appeal in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, held that a consideration of best interests of the child may be satisfied by "considering the degree of hardship to which the removal of the parent exposes the child." The officer in this case assumed that the two younger children would be travelling with their parents and older sibling to Ethiopia. Therefore it was incumbent on the officer to consider the degree of hardship the children would face in Ethiopia. In my view, that required the officer to consider the risks children face in Ethiopia. In the face of evidence of the serious and significant risks to children in Ethiopia, the officer's conclusion that the hardship they faced "in this situation is one faced by those having to leave Canada after a lengthy period of establishment" shows that the officer failed to appreciate the task he or she was required to undertake.

[37] While the interests of the children is not a determinative factor in H&C applications, the Supreme Court has indicated that the interests of the children is to be an "important factor" and is to be given "substantial weight." In this case, the only factors identified as weighing against allowing the H&C Application were that the applicants had no right to be in Canada, that they had been ordered removed, and that they had the benefit of many of the processes available under the immigration legislation. These negative factors are common to most if not all H&C applications. There was no evidence that the applicants had been anything other than law abiding, independent and productive members of Canadian society. While the weighing of the positive and negative factors is for the officer assigned to the H&C application and not this Court, one must ask how much weight was given to the children's interests, including the fact that none of them had ever been to Ethiopia, when the negative side of the balance sheet is so slight.

[38] The officer's decision is set aside.

[39] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

1. This application is allowed and the applicants' H&C application is referred back to a different officer for re-determination; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-448-10
STYLE OF CAUSE:	ALEMAYEHU WORKIE GELAW, ET AL. v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	October 20, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	November 9, 2010

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