

Federal Court



Cour fédérale

Date: 20130228

Docket: IMM-6115-12

Citation: 2013 FC 206

Ottawa, Ontario, February 28, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

FATIHA ALI AMIN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by an immigration officer (the officer) of the High Commission of Canada in Nairobi, Kenya dated April 11, 2012, wherein the applicant's permanent residence application was refused. The officer's decision was based on the finding that the applicant and her spouse and daughters did not meet the requirements to be members of the Convention refugee abroad class or members of the humanitarian protected persons abroad designated class.

[2] The applicant requests that the officer's decision be set aside and the application be referred for redetermination by a different immigration officer.

Background

[3] The applicant and her family are originally from Ethiopia. The applicant was married once before her current marriage. Her former spouse is the father of her two daughters. The applicant married her current spouse in 2010.

[4] The applicant states that she fled Ethiopia because of her ex-husband's political involvement. The ex-husband was allegedly wanted by police due to his Oromo ethnicity and his support for the Oromo Liberation Front (OLF). The applicant claims that in 1999, she was detained by police for one month because they could not find her (former) husband and that during that time, she was physically and sexually abused. Once released, the applicant was required to sign in with the police daily for two weeks, following which she and her children fled Ethiopia for Djibouti on foot.

[5] The applicant's current husband states that in a 2004 election, he voted in support of the OKKO (the Oromo Congress Party). However, the victory was denied by the Ethiopian government and a group of students including the applicant's spouse, were detained. They were held for 15 days and then released with a warning. He left for Djibouti following his release.

[6] The applicant applied from Djibouti to be admitted to Canada as a Convention refugee along with her current husband and her daughters. The applicant and her husband were interviewed on March 21, 2012, at which time the applicant gave contradictory evidence about her ex-husband. The applicant first stated that he was detained in 1999 in Ethiopia, disappeared after his release and that she did not know if he was dead or alive. The applicant then stated that he reappeared in Djibouti and that they divorced in 2005 because he was abusive and taking khat. When asked by the officer about this discrepancy, the applicant gave no response and then when asked if she would be able to get his consent for their two daughters to travel to Canada, she answered that he had disappeared from Djibouti after their divorce.

[7] The applicant also submitted an Attestation from ONARS (the Office National D'Assistance Aux Réfugiés et Sinistrés) issued in 2003 and her husband's 2004 ONARS Attestation Provisoire which verified their refugee status. The officer expressed concern about the authenticity of the Attestations and asked if he could verify the documents with ONARS. The applicant and her spouse agreed and on March 28, 2012, the officer made an entry into the CAIPS notes stating "Verification conducted: ONARS confirmed that the Attestations of PA and spouse were not genuine." The officer's decision to deny the application was rendered the same day and the decision was communicated to the applicant by letter on April 11, 2012.

Officer's Decision

[8] In the April 11, 2012 letter, the officer stated that the applicant had provided vague and limited information about her ex-husband's political involvement, which was her alleged reason for

fearing persecution in Ethiopia. He further noted that the Attestations filed in support of the application were not genuine. As a result, he was not satisfied that the applicant's evidence was credible. The officer stated that the applicant had been given an opportunity to respond to his concerns and that he had considered the response, but that his decision remained unchanged. He therefore concluded that the applicant and her family did not have a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group or political opinion.

[9] In the March 28, 2012 CAIPS notes, the officer stated that the applicant gave vague answers about her ex-husband's involvement with the OLF and that she "could not say why she though [*sic*] he [her ex-husband] was an OLF member except from his ethnicity". The officer further noted the contradictory evidence that the applicant gave about her ex-husband, as well as the evidence that he had abused her. He concluded that because she was remarried and is no longer in contact with her ex-husband, she did not appear to be a "woman at risk."

[10] The officer went on to note his concerns with the authenticity of the ONARS Attestations that had been submitted, and the fact that his "concerns were confirmed by the issuing authority of [those] kinds of documents."

[11] With regard to the applicant's contradictory evidence about her ex-husband, the officer explained that it was possible that the applicant had meant that she did not know if her ex-husband was alive after he disappeared for the second time in Djibouti and gave her the benefit of the doubt for those inconsistencies.

[12] Nonetheless, the officer's other concerns remained and he concluded that given the vagueness of her answers regarding the reason that she feared persecution and the fraudulent documents submitted in support of the applicant's status in Djibouti and the time of her arrival there, there were strong credibility concerns about the central elements of the claim. The officer was thus not satisfied that the applicant's fear of persecution due to alleged political opinions was well-founded.

[13] The applicant's daughters' claims were the same as their mother's and thus failed for the same reasons. The applicant's spouse's claim was also not found to be credible and based on the information that he provided about his detention in Ethiopia and in light of the conditions there, the officer was not satisfied that the spouse's fear of persecution due to alleged political opinions was well-founded.

Issues

[14] The applicant submits the following points at issue:

1. What is the appropriate standard of review?
2. Did the officer act unreasonably in failing to consider the Gender Guidelines when assessing the applicant's credibility?
3. Was the duty of fairness breached by non-disclosure of extrinsic evidence and the absence of an opportunity to respond?

Applicant's Written Submissions

[15] The applicant submits that the officer failed to consider or apply the Gender Guidelines and in particular, the Guideline that women from cultures where men do not share the details of their activities with their female relatives may not be able to explain the experiences of their male relatives. The officer acted unreasonably in not having regard to the Gender Guidelines and the cultural context in which the applicant found herself. As a result, the credibility finding made by the officer, based in part on the lack of the applicant's knowledge of her ex-husband's political activities, was perverse.

[16] The applicant further submits that, according to the CAIPS notes, somewhere between the March 21, 2012 interview and the March 28, 2012 post-interview observations recorded in the CAIPS notes, the officer received a communication from ONARS about the applicant. However, that communication was never provided to the applicant, nor was she given an opportunity to respond.

[17] The officer gave no consideration to the question of where and how the applicant got the Attestations; if the applicant got the documents from ONARS, then she cannot be faulted for them not being properly issued. Furthermore, the officer stated that the applicant was given the opportunity to respond to his concerns, but that did not happen, as the applicant learned that ONARS had confirmed the officer's concerns when she received a copy of the certified tribunal record. Finally, there is only reference to the communication with ONARS in the CAIPS notes, but the applicant still does not know what the nature of that communication was. The applicant submits

that in light of the fact that in both the refusal letter and the Immigration Manual, the respondent allows for an applicant's opportunity to respond, there is a legitimate expectation that this procedure would be followed.

[18] The applicant submits that, provided she was found credible, there are compelling reasons arising out of past persecution; her sexual assault during detention in particular, that should allow her to be found a Convention refugee.

Respondent's Written Submissions

[19] The respondent submits that the applicant is asking the Court for a reassessment of the evidence, which is not the proper function of the Court in a judicial review.

[20] The respondent submits that none of the applicant's claims were based on a fear of persecution because of her gender; rather they were based on her ex-husband's alleged association with a political group. Therefore, there was no requirement to apply the Guidelines. The applicant was asked about the nature of her ex-husband's political involvement, which was the alleged reason that she left Ethiopia and stated that she knew he supported the OLF because he was Oromo. The respondent also notes that the applicant was asked during the interview whether any of her family members had been involved as a member or supporter of a political party or religious group and she responded in the negative. The officer's assessment of the applicant's credibility was therefore reasonable.

[21] With regard to the alleged breach of procedural fairness, the respondent submits that the officer expressed concerns about the Attestations at the outset of the interview and that he asked if he could have the documents verified with ONARS. There is no indication in the CAIPS notes that the applicant or her spouse gave any response to the officer's concerns and there was no ambiguity in the CAIPS notes as to what the officer was concerned about. Contrary to the applicant's submissions, she and her spouse were aware during the interview process that the validity of the Attestations was in question. The officer gave them ample opportunity to provide an explanation and participate in a meaningful manner in determining their claims by making them aware of this concern at the beginning of the interview. There has therefore been no breach of procedural fairness.

Applicant's Reply

[22] The applicant submits that the Gender Guidelines have four components, the first two dealing with substantive grounds of prosecution, the second two dealing with evidence and procedure. The respondent is effectively taking the position that the Guidelines dealing with evidence and procedure can reasonably be ignored and that the only part of the Guidelines that must be considered is the substantive grounds or persecution. However, the applicant argues, there is nothing in the jurisprudence to justify this division and the respondent's proposition is artificial.

[23] The applicant accepts that the Guidelines do not need to be mentioned if they are followed in substance, but where, as here, there is a departure from the Guidelines, there is a legal duty to explain why they are not being followed. The applicant notes *Sy v Canada (Minister of Citizenship and Immigration)*, 2005 FC 379, [2005] FCJ No 462, which she states stands for the proposition

that the necessity of taking into account cultural considerations when assessing the credibility of a female applicant is not limited to gender-based claims.

[24] The applicant submits that the duty of disclosure of extrinsic evidence with an opportunity to respond is not limited to extrinsic evidence about which no notice has been given that it would be sought. The mere fact that the applicant was told that her documents would be verified does not tell her what the result of the verification would be. It is impossible for the applicant to respond to the results of the verification simply because she knew there was verification and the ability for her to respond to a third party document she had to actually see the document or at least have a meaningful summary of its contents. The mere fact of knowing that such a document will come into existence is not sufficient to give the applicant a meaningful opportunity to respond.

Analysis and Decision

[25] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190).

[26] This Court has reviewed the failure to consider the Gender Guidelines on a reasonableness standard (see *MDGD v Canada (Minister of Citizenship and Immigration)*, 2011 FC 855 at paragraph 12, [2011] FCJ No 1050; and *Cornejo v Canada (Minister of Citizenship and*

Immigration), 2010 FC 261, at paragraphs 16 to 18, [2010] FCJ No 295). In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraphs 59 and 61).

[27] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Khosa* above, at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[28] I wish to now deal with Issue 3.

[29] **Issue 3**

Was the duty of fairness breached by non-disclosure of extrinsic evidence and the absence of an opportunity to respond?

The case law from this Court teaches that generally, where an officer has extrinsic information of which the applicant is unaware, the applicant should be given the opportunity to disabuse the officer of any concerns arising from that evidence (see *Huang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 145 at paragraph 7, [2012] FCJ No 203; and *Gu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 522 at paragraphs 23 to 25, [2010] FCJ No

624). Extrinsic evidence which was not put to an applicant and was found to have violated an applicant's right to procedural fairness has included fraudulent client contracts (see *Chen v Canada (Minister of Citizenship and Immigration)*, 2007 FC 41, [2007] FCJ No 65), evidence that was supplied by a senior manager at an applicant's former place of employment (see *Kniazeva v Canada (Minister of Citizenship and Immigration)*, 2006 FC 268, [2006] FCJ No 336) and a negative business proposal assessment that had been provided by the Province of Ontario (see *Muliadi v Canada (Minister of Employment and Immigration)*, [1986] 2 FC 205 (CA)). These were all cases in which the extrinsic evidence considered was central to the officers' decisions and the applicants were not given the chance to address it. Conversely, in *Pan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 838, [2010] FCJ No 1037, the officer's reliance on evidence that a particular accounting firm had produced the applicant's financial statements was not found to breach procedural fairness because the officer did not rely on it in his final decision.

[30] In the current case, the applicant and her spouse were given notice during the interview of the concerns that the officer had about the authenticity of the ONARS Attestations. Specifically, in the March 21, 2012 CAIPS notes, the officer recorded that he "expressed concerns regarding the documents and asked PA and spouse if [he] could have the documents verified with ONARS and they said yes" and later on that he "had expressed [his] concerns about the authenticity of the documents submitted at the beginning of the interview."

[31] Later, in the CAIPS notes recorded on March 28, 2012 the officer stated "verification conducted: ONARS confirmed that the Attestations of PA and spouse were not genuine" and that he "expressed concerns about the document and [his] concerns were confirmed by the issuing authority

of these kinds of documents.” The alleged inauthenticity of the Attestations then formed part of the officer’s reasons for denying the applicant’s claim.

[32] The respondent argues that the officer made the applicant and her spouse aware of his concerns at the outset of the interview on March 21, 2012, giving them ample opportunity to provide an explanation and participate in a meaningful manner in determining their claim. While this is true, it is also not the point. The real issue is the fact that the officer then allegedly received evidence from ONARS that was used in part to deny the applicant’s claim, which the applicant has not had an opportunity to respond to. Indeed, it is unclear from the record what kind of communication the officer had from ONARS and how ONARS was able to confirm that the Attestations were not valid. The entries in the CAIPS notes which make it impossible to discern what case the applicant had to make (particularly given that she was not even made aware of this new evidence) and for this Court to fully assess the reasonableness of the decision. Pursuant to the jurisprudence noted above, the officer breached procedural fairness and the decision should be returned for redetermination by a different officer.

[33] Because of my finding on Issue 3, I need not deal with Issue 2.

[34] The applicant submitted the following two proposed questions of general important for my consideration for certification:

1. Is the legal duty to consider the Gender Guidelines in appropriate cases limited, in vas office applications for membership in the Convention refugee abroad class or a member of the humanitarian protected persons abroad designated class, to cases where the application is based on fear of persecution because of gender?

2. In a visa office application for membership in the Convention refugee abroad class or a member of the humanitarian protected persons abroad designated class, when the visa office considers extrinsic evidence, is the duty of fairness respected by disclosure of the intent to seek extrinsic evidence and the potential source without disclosure of the extrinsic evidence obtained with an opportunity to respond?

[35] The respondent did not wish to submit a proposed question but opposed the certification of the questions proposed by the applicant.

[36] I am not prepared to certify either question as they do not contemplate issues of broad significance or general application (see *Canada (Minister of Citizenship and Immigration) v Liyanagamage* (1994) 176 NR 4 (FCA), 91994] FCJ No 1637 at paragraph 4).

[37] The judicial review is allowed.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions***Immigration and Refugee Protection Act, SC 2001, c 27***

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 commenced by making an application for leave to the Court.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Immigration and Refugee Protection Regulations, SOR/2002-227

139. (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that

...

(e) the foreign national is a member of one of the classes prescribed by this Division;

139. (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis :

...

e) il fait partie d'une catégorie établie dans la présente section;

145. A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.

145. Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6115-12

STYLE OF CAUSE: FATIHA ALI AMIN
- and -
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: February 21, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: February 28, 2013

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