Federal Court  Cour fédérale

Date: 20110505

Docket: IMM-6000-09

Citation: 2011 FC 519

Ottawa, Ontario, May 5, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

HENOK AYNALEM GHIRMATSION

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant, Mr. Henok Aynalem Ghirmatsion, is a citizen of Eritrea. In 2006, he left Eritrea, travelling first to Sudan and then, in 2007, to Egypt. In 2008, the Applicant applied for permanent residence in Canada as a refugee outside Canada. In a letter (also referred to as the rejection letter) dated September 13, 2009, a visa officer (the Officer) with the Canadian Embassy in

Cairo, Egypt refused his application. The Applicant seeks to overturn this decision. For the reasons which follow, I will allow this application for judicial review.

II. The Related Files

[2] This file is one of four judicial review applications heard together by this Court. The other three files are Court File Nos. IMM-6005-09 (Tsegeroman Zenawi KIDANE), IMM-6009-09 (Tsegay Kiflay WELDESILASSIE) and IMM-6010-09 (Selam Petros WOLDESELLASIE). These four files are representative of a group of almost 40 files, for which judicial review applications have been commenced. The remaining files have been held in abeyance pending the outcome of these four files. The common elements of the four files and, as I understand it, of the entire group of files, are as follows:

- each of the claimants is an Eritrean citizen;
- each of the Applicants claims to be a member of the Pentecostal Church;
- the applications for permanent residence were refused for each; and
- the same Officer interviewed each of the claimants and made the decision to refuse the application for permanent residence.

[3] While the individual merits of each of the applications for judicial review are raised in the separate application records, the four cases were selected as representative cases because, in the words of the Applicant, “they evince several distinct errors and patterns of decision making that are common to many or all of the other cases”.

[4] I wish to stress that this decision is addressed to this particular application by Mr. Henok Aynalem Ghirmatsion. I make no finding or order that binds the disposition of any of the remaining files. Each file presents a unique set of facts and requires separate review and determination. However, I anticipate and hope that the decisions in this and the other three cases will provide guidance to the parties on the possible disposition of the remaining cases now held in abeyance.

III. Issues

[5] The issues raised by this application are as follows:

1. Did the Officer err by failing to have regard to the Applicant’s status as a UNHCR refugee or by failing to have regard to CIC Guideline OP 5 (discussed below)?

2. Did the Officer make erroneous findings related to credibility, by failing to have regard to the evidence before her or by misunderstanding or misinterpreting the evidence?

3. Did the Officer err by failing to assess all possible grounds of persecution?

4. Did the Officer fail to observe a principle of procedural fairness by refusing to accept documentation from the Applicant?

5. Did the Officer err by failing to give adequate reasons?

6. Does the Officer's decision give rise to a reasonable apprehension of bias?

IV. The Affidavits

[6] The record before me includes a number of affidavits. As a preliminary matter, I would like to address the issues raised with respect to some of the affidavits.

[7] The Respondent's record includes an affidavit of the Officer. For the most part, the affidavit is helpful in that it explains the process of the Officer's decision-making. However, the Officer also appears to explain or supplement her reasons for the decision. In my view, this is inappropriate. In rejecting similar affidavit evidence, the Federal Court of Appeal provided the following remarks in *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness*), 2008 FCA 255, 297 DLR (4th) 651, at paragraphs 46-47:

> The judges of the Federal Court have previously stated that a tribunal or a decision-maker cannot improve upon the reasons given to the applicant by means of the affidavit filed in the judicial review proceedings. In *Simmonds v. Canada (Minister of National Revenue)*, 2006 FC 130, 289 F.T.R. 15, Justice Dawson wrote at paragraph 22 of her reasons:
>
> > I observe the transparency in decision-making is not promoted by allowing decision-makers to supplement their reasons after the fact in affidavits.

> See to the same effect *Kalra v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 941, 29 Imm. L.R. (3d) 208, at para. 15; *Yue v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 717, [2006] F.C.J. No. 914, at para. 3; *bin Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185, [2006] F.C.J. No. 1482, at para. 13. Any other approach to this issue allows tribunals to remedy a defect in their decision by filing further and better reasons in the form of an affidavit. In those circumstances, an applicant for judicial review is being asked to hit a moving target.

[8] The reasons of the Officer are those contained in the decision letter. In addition, the notes taken by the Officer in the computer assisted immigration processing system (CAIPS) may be considered to be reasons (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, at para 44). I will give no weight to any portions of the Officer's affidavit that purport to explain or augment the reasons set out in the letter or the CAIPS notes.

[9] A number of additional affidavits were included in the Applicant's Application Record, filed with the Court on February 5, 2010, and in a Supplementary Application Record, filed with the Court on August 31, 2010. The additional affidavits submitted by the Applicant are as follows:

- Janet Dench (two affidavits);
- William Griffin;
- Natalia Shchepetova (two affidavits); and
- Tewolde Yohanes

[10] These additional affidavits have been filed in each of the four files now before this Court. The Respondent objects to most of the additional affidavits.

[11] It is well established that judicial review is to be conducted on the basis of the record that was before the decision-maker when the decision was made. It is generally not permissible to introduce additional documentary evidence. As stated by Justice de Montigny in *Ochapowace First Nation (Indian Band No. 71) v Canada (Attorney General)*, 2007 FC 920, 73 Admin LR (4th) 182 at paragraphs 9-10:

> It is trite law that in a judicial review application, the only material that should be considered is the material that was before the decision maker . . .
>
> The rationale for that rule is well known. To allow additional material to be introduced at judicial review that was not before the decision maker would in effect transform the judicial review hearing into a trial de novo. The purpose of a judicial review application is not to determine whether the decision of a tribunal was correct in absolute terms but rather to determine whether its decision was correct on the basis of the record before it: *Chopra*, at para 5; *Canadian Tire Corp. v. Canadian Bicycle Manufacturers Assn.*, [2006] F.C.J. No. 204, 2006 FCA 56 at para 13.

[12] It follows that the introduction of additional evidence through affidavits is generally not permitted, unless the issues to be addressed include allegations of breach of procedural fairness or, as in this case, an allegation that there was a reasonable apprehension of bias (see, for example, *Assn of Architects (Ont.) v Assn. of Architectural Technologists (Ontario.)*, 2002 FCA 218, 19 CPR (4th) 417). In such cases, the affidavits must be confined to those issues. A party cannot, for example, under the guise of addressing a fairness issue, introduce opinions and arguments as to the reasonableness of the decision.

[13] I begin with the two affidavits of Ms. Dench. Ms. Dench is the Executive Director of the Canadian Council for Refugees (CCR). She does not hold herself out as an expert. In her first affidavit, she describes the mandate and role of the CCR and provides a detailed description of how the CCR came to be interested in the applications that have been rejected by the Officer. This descriptive part of her affidavit is not improper. However, most of her affidavit is devoted to a detailed criticism of the Officer's decisions in this and other cases. In my view, this aspect of Ms. Dench's first affidavit is not helpful to the Court. It consists almost exclusively of opinions and legal argument. These are not proper subject matters for an affidavit. To paraphrase the words of Justice Richard (as he then was) in *First Green Park Pty. Ltd. V. Canada (Attorney General)* (1996), 70 CPR (3d) 217, [1997] 2 FC 845 (FCTD) at paragraph 7:

> [A] witness such as [Ms. Dench], no matter how experienced [she] may be, cannot in this context provide information that contains speculation, make legal arguments or draw conclusions of law. Legal argument is a matter for counsel and decision making is a matter for the Court.

[14] Moreover, much of her affidavit is based on hearsay; she was not present at the interview of any of the affected applicants. Nor was she present at the interview of the Applicant by the AMERA representative. Ms. Dench's analysis and opinions may be helpful to Citizenship and Immigration Canada (CIC) in improving its training of visa officers and the process for assessing refugee claimants abroad. However, for purposes of this application for judicial review, it is neither helpful nor admissible. I will have no regard to it.

[15] Ms. Dench's second affidavit is contained within the Supplementary Application Record filed with the Court on August 31, 2010. For the most part, Ms. Dench's second affidavit also consists of further argument, opinions and legal conclusions. It appears that this further affidavit

was put forward to provide additional "facts" to demonstrate the arbitrariness of this Officer's decision-making and, perhaps, to support the allegation of a reasonable apprehension of bias. Ms. Dench provides information on other negative decisions made by this Officer and provides detailed criticisms of these decisions. These opinions are improper and of no assistance to this Court when reviewing an individual decision on judicial review.

[16] In addition, Ms. Dench cites two cases where the Officer reversed her initial rejection of applications for refugee status. Neither of these files is before me. In *Ahmed v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 957 (QL), 134 FTR 117 (FCTD), Justice Joyal was faced with a similar argument of arbitrariness based on apparently conflicting decisions of the Convention Refugee Determination Division of the Immigration and Refugee Board. Justice Joyal dismissed this argument with the following comments, at paragraphs 24, 26:

> [U]nfortunately, the other case referred to is not before me, nor am I in a position to rule whether it is right or wrong. It could very well be that in a proper test, the impugned decision is right and the other one is wrong. For that matter, both decisions could conceivably be wrong.
>
> …
>
> This Court must eschew any attempt to be drawn into an assessment of both decisions. The decision at bar is the only one of which I am seized, and in that respect, I must perform my review of it in accordance with the normal criteria ...

[17] I agree with the remarks of Justice Joyal and decline to draw any inferences or conclusions from the facts presented. The second affidavit of Ms. Dench will not be considered.

[18] The second affidavit in the Supplementary Record is that of Mr. Yohanes. Mr. Yohanes purports to respond to portions of the affidavit of the Officer. Mr. Yohanes is not an expert; rather, he is a Canadian citizen who came to Canada from Eritrea in 2003. Based on his own personal experiences and hearsay, he provides opinions that differ from the findings of the Officer in respect of: (a) sandstorms in Eritrea; (b) the ratio of prisoners to guards; and, (c) the possibility of obtaining a passport from an Eritrean Embassy in Khartoum. I give his affidavit little weight.

[19] Dr. William Griffin is the Advisory Officer of the Pentecostal Assemblies of Canada (PAOC); he has served PAOC for thirty years. His academic qualifications include a ministerial diploma at Eastern Pentecostal Bible College, Bachelor of Arts at University of Toronto, Master of Arts at University of Saskatchewan, Master of Divinity at Lutheran Theological Seminary, and Doctor of Ministry at Trinity Evangelical Divinity School. The PAOC is the umbrella organization for over 1000 Pentecostal churches in Canada. The organization has a force of 350 missionaries serving in 50 countries. On a global basis, PAOC is a member of the Pentecostal World Fellowship.

[20] On the basis of his experience within the PAOC and his academic qualifications, there can be little doubt that Dr. Griffin is qualified to provide this Court with expert opinion evidence on the Pentecostal faith and its practice around the world.

[21] Dr. Griffin was not cross-examined on his affidavit.

[22] I believe that the affidavit of Dr. Griffin is of assistance to the Court and should be admitted in this proceeding. The Pentecostal faith was a central element in this and the other three judicial

review applications. The allegation of the Applicant is that the findings made by the Officer on the subject of the Pentecostal faith were unreasonable and were based on misunderstanding, or lack of knowledge, of the Pentecostal religion as practised in Eritrea. I am not an expert in the Pentecostal (or any other) religion. Dr. Griffin provides the information needed to evaluate the reasonableness of the Officer's assessment of the Applicant's faith. I am also satisfied that the Respondent has not been prejudiced by the admission of the affidavit. The Respondent had an opportunity to cross-examine Dr. Griffin on his affidavit and, if he felt it necessary, could have sought leave of the Court to submit a responding affidavit.

[23] Ms. Natalia Shchepetova is a legal assistant in the office of counsel for the Applicant. Her second affidavit is contained in the Applicant's Record, Volume 2; this volume contains material common to all four applications. The sole purpose of the second affidavit is to put before the Court additional documentary evidence. These documents were not before the Officer. They are not relevant to this judicial review and will not be considered by this Court.

V. Background of the Applicant

[24] In this section of these reasons, I will briefly set out the background of the Applicant as he describes it. I observe that this is the Applicant's story, primarily as set out in the narrative that was part of his application; I make no findings of its truth or of the merits of his claim.

[25] The Applicant was born on November 11, 1979 in Asmara, Eritrea. He was raised as an Orthodox Christian, but converted to Pentecostalism in 1997.

[26] On October 20, 1997, the Applicant began his mandatory national military service in Sawa and was assigned to the construction unit. During this time, the Applicant studied the bible with other Pentecostal Christians who were being trained in the military. The group was caught by a superior on one occasion where their bibles were confiscated and they received a warning. From that time on the group was subjected to continuing and escalating harassment and punishment, including detention, by their superiors.

[27] In May 2002, the government in Eritrea began a concerted effort to target and shut down minority churches, including Pentecostal and "Born Again". The Applicant was instructed to sign a statement denouncing his religion and promise not to resume practising his religion; he refused. The Applicant was arrested and remained in detention for over two years, from October 2003 until July 2006.

[28] On July 7, 2006, while in prison, the Applicant was outside on a farm work detail when a sudden severe *kasmin*, or massive sandstorm, began. The Applicant and his friend took this opportunity to escape. They travelled on foot for 8 days until they reached Kessala, Sudan. They then took a bus to Khartoum. There, the Applicant was able to obtain an Eritrean passport with the assistance of his uncle who knew whom to bribe.

[29] A year and a half later, the Applicant travelled to Cairo, Egypt. The Applicant continued to worship in the Pentecostal community.

[30] In 2009, the Applicant was recognized as a Convention refugee by the United Nations High Commissioner for Refugees (UNHCR).

VI. The Interview

[31] On September 13, 2009, the Applicant was interviewed by the Officer who conducted the interview in English and Tigrinya, with the aid of an interpreter. There is no transcript of the interview. The Officer took notes on her computer during the interview and copied those notes into CAIPS on the same day.

[32] Further descriptions of what went on at the interview are contained in the affidavits of the Officer (sworn on September 5, 2010) and the Applicant (sworn on February 11, 2011). Given the time that has passed between the interview and when the affidavits were sworn, during which time memories can become dim or distorted, I am reluctant to rely on these affidavit versions for the details of the interview held in 2009.

[33] In this case (and the others heard at the same time), there is an additional source of information. After his refusal, the Applicant came to the attention of an organization known as Africa and Middle East Refugee Assistance (AMERA). AMERA describes itself as a UK-registered refugee rights organization assisting refugees who seek asylum in Egypt. As such,

> AMERA conducts interviews with persons who have received negative results from embassies in order to determine whether or not AMERA can provide assistance with regards to obtaining reviews of negative decisions.

[34] The Applicant was interviewed by a representative of AMERA on October 13, 2009, during which interview he provided further details of his interview with the Officer. The notes are attached to the Applicant's affidavit. The notes were made within a short time following the Applicant's interview with the Officer; they are more contemporaneous than the comments in the affidavits of either the Officer or the Applicant. I admit to having some difficulty assessing the reliability of these interview notes. I believe that it is likely that the notes accurately reflect the questions and answers of the AMERA interview. However, I cannot make the same conclusion about the Applicant's version of what happened at his interview with the Officer. At the time of his AMERA interview, the Applicant's application had been rejected; the rejection could have influenced his recollections. I do not know if the Applicant had been briefed before his AMERA interview or if he met with other claimants who had been rejected. In spite of my concerns, the situation faced by the Applicant cannot be ignored; he is a refugee claimant abroad, without counsel and without the various systems to protect his rights that would be found in Canada. How can this Applicant tell his story if not through the assistance of AMERA? In the circumstances, I will accept the AMERA notes with considerable reservations that may go to weight.

VII. The Decision

[35] In her rejection letter dated September 13, 2009, the reasons for rejection were set out as follows:

> After carefully assessing all factors relative to your application, I am not satisfied that you are a member of any of the classes prescribed because I am not satisfied that you have been forthcoming at your interview. I am not satisfied that you are indeed a true convert to Pentecostal faith. Your knowledge of the faith [was] not up to the level one would expect from a person who has been practicing and

> reading the bible for 12 years. You were not able to provide sufficient information about the religion to satisfy me that you are in fact a follower of the Pentecostal faith. Further, you were unable to provide to my satisfaction details of your imprisonment. In addition, the story of your escape is not plausible. I find it unreasonable that you were able to escape from prison just because there was a sandstorm. As I do not find you credible, I cannot be satisfied that you meet the country of asylum or the convention refugee definition nor that you are not inadmissible. Therefore, you do not meet the requirements of [s. 139(1)(e) of the *IRPA Regulations*].

[36] As I understand the above paragraph, the Officer made the following observations or findings concerning the Applicant:

1. he was not forthcoming;

2. he was unable to provide adequate knowledge of the Pentecostal religion;

3. he was unable to provide satisfactory details of his imprisonment; and

4. the Officer did not believe the Applicant's story of escape; she found that it was "unreasonable" that he could escape from prison because of a sandstorm.

[37] Although not expressed clearly, it is apparent that the Officer did not believe that the Applicant had been held in detention or that he was of the Pentecostal faith. Whether these two key conclusions should stand depends on the reasonableness of the underlying analysis.

[38] As noted above, under my discussion of the affidavits, I am considering the reasons as set out in the rejection letter and in the CAIPS notes. The portions of the CAIPS notes reproduced in these reasons are transcribed as closely to the original version as possible.

[39] What additional reasons for the key findings can be obtained from the CAIPS notes?

1. Not forthcoming: Nothing whatsoever is contained in the CAIPS notes to explain what the Officer meant by "not forthcoming".

2. Details of detention: The Applicant's narrative (submitted with his application) set out a lengthy description of his detention. The CAIPS notes reflect that the Officer asked a few general questions about the Applicant's detention. The only concern expressed by the Officer was about how he escaped from detention.

3. Sandstorm: The CAIPS notes reflect that the Applicant provided details of his escape:

> IN MAY, JUN. JUL, IN THAT TIME THERE ARE BIG STORMS, IT IS VERY DARK, YOU CANT SEE THE PERSON STANDING NEXT TO YOU, ME AND MY FRIEND THOUGHT OF ESCAPE, ON THAT DATE WE WERE WORKING ON THE FARM LAND, WHEN STORM CAME WE RAN TOWARD IT . . .

The CAIPS notes do not refer to any follow-up questions by the Officer on the subject of the sandstorm.

4. Pentecostal Faith: The Applicant, during his interview, referred to his religion. The exchange between the Officer and the Applicant on the subject of his religion was described in the CAIPS notes as follows:

> WHY DID YOU LEAVE ERITREA? BECAUSE OF MY BELIEF AS A PENTECOSTAL I WAS DETAINED IN 2003, UNTIL JL2006
>
> . . . WHEN DID YOU BECOME PENTECOSTAL? 1994 I WAS ORTHODOX, WHEN I WENT TO NATIONAL SERVICE IN 1997 I BECAME PENETECOSTAL, IN 1994 WAS THE FIRST TIME I LEARNED ABOUT THE BIBLE
>
> HOW DID YOU CONVERT? IN 1997 I HAD FRIENDS WHO WERE PENTECOSTAL, I BECAME CONVICED WITH WHAT THEY WERE TELLING HIM.
>
> WHAT WERE THEY TELLING YOU? THEY WERE TELLING ME ABOUT JESUS CHRIST
>
> ASKED SEVERAL QUESTIONS ABOUT PENTECOSTAL RELIGION
>
> Describe to me how do you pray? LEADER TELLS US WHAT TO DO, AND WE DO IT.
>
> What are the days that Pente followers celebrate? EASTER, CHRISTMAS, AND PENTECOST
>
> Why did you convert? NO MENTORS, AND BELIEVE IN JESUS CHRIST.

[40] In short, the CAIPS notes do not provide us with very much in the way of additional reasons for the refusal.

VIII. Statutory Framework

[41] A brief outline of the statutory scheme affecting this application may be helpful to the reader.

[42] Pursuant to s. 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), a foreign national, before coming to Canada must apply for a visa. The visa may be issued if an immigration officer is satisfied, following an examination that the foreign national is not inadmissible and meets the requirements of *IRPA*.

[43] The Applicant applied as a member of a class of persons referred to, in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPA Regulations*], as "A Convention Refugee Abroad Class". His application was made under and processed pursuant to the requirements of s. 139(1), s. 144, and s. 145 of the *IRPA Regulations*. The full text of s. 11(1) of *IRPA* and the relevant *IRPA Regulations* are set out in Appendix A to these reasons.

[44] It is also possible that persons in the situation of the Applicant may be granted permanent resident status if they are determined to be members of the "Country of Asylum Class", as set out in s. 147 of the *IRPA Regulations*.

[45] In summary form, to be eligible for resettlement in Canada under ss. 139(1), 144 and 145 of the *IRPA Regulations*, a person:

- must meet the Convention refugee definition;
- must be outside Canada; and
- must meet the requirement that there is no reasonable possibility in a foreseeable amount of time of any other durable solution such as,
    - voluntary repatriation or resettlement in their country of nationality or habitual residence; and
    - resettlement or an offer of resettlement in another country.

IX. Standard of Review

[46] The six issues raised in this case relate to: (1) an alleged failure to have regard to the evidence; (2) credibility; (3) an alleged failure to assess all possible grounds of persecution; (4) adequacy of reasons; (5) an allegation of reasonable apprehension of bias, and (6) an alleged breach of procedural fairness.

[47] First, the assessment of evidence and the weight to be given to each piece of evidence are questions of fact that are within the expertise of the Board. They are reviewed on the standard of reasonableness (*New Brunswick v Dunsmuir*, 2008 SCC 9, [2008] 1 SCR. 190 [*Dunsmuir*]). When reviewing a decision on the standard of reasonableness, the Court is concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". That is, the decision will stand unless it does not fall “within the range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, above, at para 47).

[48] Second, questions of credibility generally concern determinations of fact or mixed fact and law. A credibility finding is to be reviewed on the standard of reasonableness (*Cekim v Canada (Minister of Citizenship and Immigration)*, 2011 FC 177, [2011] FCJ No 221 (QL), at para 10).

[49] Third, failure of an officer to consider all grounds of persecution is a question of law and, thus, assessed on the standard of correctness (*Solodovnikov c Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2004 CF 1225, 41 Imm LR (3d), at para 10; *Singh v Canada* (Secretary of State)(1994), 80 FTR 132, [1994] FCJ No 931 (QL)(FCTD) at para 14; *Dunsmuir*, above, at paras 55 and 90).

[50] Fourth, with respect to the Officer’s reasons, in the recent Ontario Court of Appeal decision of *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670, [2009] WDFL

4624 [*Clifford*], at paragraph 22, Justice Goudge made it clear that the adequacy of reasons is subject to the correctness standard:

> Where an administrative tribunal has a legal obligation to give reasons for its decision as part of its duty of procedural fairness, the question on judicial review is whether that legal obligation has been complied with. The court cannot give deference to the choice of a tribunal whether to give reasons. The court must ensure that the tribunal complies with its legal obligation. It must review what the tribunal has done and decide if it has complied. In the parlance of judicial review, the standard of review used by the court is correctness.

[51] Fifth, the issue that the Applicant has raised with respect to whether a reasonable apprehension of bias is raised by the Officer's decision is reviewable on the standard of correctness (*Dunsmuir*, above, at paras 55 and 90; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 42).

[52] Finally, the issue of whether the Officer breached the duty of procedural fairness by failing to accept and review the documents submitted by the Applicant is reviewable on the standard of correctness (*Dunsmuir*, above, at paras 55 and 90).

[53] With this overview of the applicable standard of review, I turn to an analysis of the issues.

X. Failure to have regard to certain factors or evidence

A. *UNHCR Status*

[54] The Applicant has been recognized as a Convention refugee by UNHCR, as evidenced by a "blue card" issued August 31, 2009. As I understand it, the blue identity card shows that the bearer has been individually assessed and is officially acknowledged by this UN body as a refugee. The Applicant submits that the Officer erred by failing to give any consideration to the UNHCR status as a factor relevant to her determination.

[55] In carrying out her responsibilities, the Officer is guided by Citizenship and Immigration Canada (CIC) Guideline OP 5, "*Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes*" (August 13, 2009)(OP 5 or the Guidelines). OP 5 makes extensive reference to the UNHCR and the relationship between the duties of a visa officer and the UNHCR. The Guidelines set out the general context of the CIC/UNHCR relationship in section 6.53:

The office of the UNHCR is a humanitarian and non-political organization with a mandate to protect refugees and promote solutions to their problems. Solutions may include voluntary repatriation, local integration and, in a minority of cases, resettlement in a third country.	Le HCR est un organisme humanitaire et non politique dont le mandat est de protéger les réfugiés et de promouvoir des solutions à leurs problèmes. Ces solutions peuvent comprendre le rapatriement volontaire, l'intégration locale et, dans des cas exceptionnels, le réétablissement dans un tiers pays.
Local UNHCR offices identify persons in need of resettlement and refer them to visa offices.	Les bureaux locaux du HCR repèrent des personnes qui ont

The factors that the UNHCR takes into consideration when it refers a case for resettlement are described in detail in the UNHCR Resettlement Handbook, a copy of which can be found in all visa offices. The officer should be familiar with these factors. The text of the handbook is also available from the UNHCR Web site at http://www.unhcr.org/.	besoin d'un réétablissement et les recommandent aux bureaux des visas. Le Manuel de réinstallation du HCR dont tous les bureaux des visas ont un exemplaire présente, en détail, les facteurs dont le HCR tient compte lorsqu'il recommande le réétablissement de réfugiés. L'agent devrait connaître ces facteurs. On peut consulter le Manuel sur le site Web du HCR : http://www.unhcr.org.
The office of the UNHCR is an extremely important partner in Canada's resettlement program. Solid working relations between Canadian visa offices and local UNHCR offices are vital to the success of the program. Officers should ensure that their local UNHCR office understands the Canadian resettlement program and be proactive in requesting referrals of appropriate cases	Le HCR est un partenaire très important dans l'exécution du programme de rééadaptation du Canada. Des relations de travail solides entre les bureaux des visas du Canada et les bureaux locaux du HCR sont essentielles à la réussite du programme. Les agents doivent veiller à ce que leur bureau local du HCR comprenne le programme de rééadaptation du Canada et ne pas hésiter à demander qu'on leur recommande des cas pertinents.

[56] Further, OP 5, current version published on August 13, 2009, refers visa officers to the UNHCR Handbook on Procedures and *Criteria for Determining Refugee Status* and the *UNHCR Resettlement Handbook*, both published by the UNHCR, which documents provide a detailed interpretation of the Convention refugee definition (see Note to section 6.6, OP 5). In section 13.3 of OP 5, visa officers are instructed that a decision by the UNHCR with regard to an applicant's refugee status is a factor to consider when determining eligibility for refugee status in Canada.

[57] There is no reference in the CAIPS notes or the decision to the Applicant's status with the UNHCR. I recognize that UNHCR status as a refugee is not determinative; the Officer's mandate is to assess the Applicant's credibility and to determine the merits of his claim under the applicable Canadian laws. Nevertheless, OP 5 recognizes the importance and relevance of the UNHCR in the processing of applications under the Refugee Abroad Class. In my view, the Applicant's status as a UNHCR refugee was a personal and relevant consideration. In the case of *Cepeda-Gutierrez v Canada (The Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 (QL)(FCTD), at paragraph 17, Justice Evans (as he was then) was faced with the failure of a decision-maker to consider a highly personal and relevant document. He provided the following oft-quoted guidance:

> [T]he more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": Bains v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[58] The evidence of the UNHCR designation was so important to the Applicant's case that it can be inferred from the Officer's failure to mention it in her reasons that the decision was made without regard to it. This is a central element to the context of the decision. The Officer, faced with a UNHCR refugee, should have explained in her assessment why she did not concur with the decision of the UNHCR. The Officer was not under any obligation to blindly follow the UNHCR

designation; however, she was obliged to have regard to it. Unless a visa officer explains why a UNHCR designation is not being followed, we have no way of knowing whether regard was had to this highly relevant evidence.

[59] This error made by the Officer is a sufficient basis on which to overturn the decision. I wish, however, to repeat that the UNHCR determination is not determinative; the Officer must still carry out her own assessment of the evidence before her, including the evidence of the UNHCR refugee status.

B. *Failure to Assess Eligibility as set out in OP 5*

[60] As noted above, the Officer rejected the claim of the Applicant on the grounds that she did not find the Applicant to be credible. Specifically, she did not believe that (a) he was Pentecostal; and (b) he was detained. The Applicant argues that the Officer failed to carry out an assessment as to whether he met the definition of a Convention refugee. In particular, the Applicant faults the Officer for not explicitly following the steps outlined in OP 5, section 13.3.

[61] Section 13.3 of OP 5 states that visa officers should follow the five steps outlined in the table set out in that provision. In brief, the five steps are:

1. refer to definition of Convention refugee abroad class in section 6.6;

2. refer to definition of persecution in section 6.37;

3. determine if an applicant may have been persecuted and have a “well-founded fear”;

4. review other sources; and

5. assess the ability to establish by processing to section 13.9 to section 13.14.

[62] As I understand the argument, the Applicant’s most serious complaint is that the Officer failed to consider and evaluate “available resource material” (see OP 5, s. 13.3, step 3) in the context of the claim of the Applicant.

[63] OP 5 is a guideline; it must not be treated as “the law”. There is no requirement that the Officer explicitly address each of the outlined steps (see *Kamara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 785, 168 ACWS (3d) 372, at para 31). The intention of section 13.3 of OP 5 is to provide a flowchart to assist the Officer with her decision making process. It is expected, however, that the substance of the decision should demonstrate that the identified steps were generally followed in the course of a visa officer’s determinations with respect to both the Refugee Abroad Class and the Country of Asylum Class.

[64] The problem with the Applicant’s argument on this point is that it ignores the fact that the Officer’s decision was based on the finding of a lack of credibility. Stated differently, the Officer did not believe that the Applicant was Pentecostal or that he had been in detention. Moreover, the evidence before the Officer was that the Applicant left Eritrea on a valid exit visa. Thus, documentary evidence related to persecution of Pentecostals in Eritrea, to the treatment of detainees

in prison or to the treatment of those who left Eritrea illegally was not relevant. Thus, if the credibility findings are sustainable, I would conclude that there was no error by the Officer in failing to refer to each and every step outlined in section 13.3.

XI. Reasonableness of Credibility Findings

A. *Applicant's Detention*

[65] As I have described above, the determinative finding by the Officer, in this case, was that of credibility. One of the two conclusions by the Officer was that she did not believe that the Applicant had ever been in detention. This finding appears to have been based firstly on a general finding that the Applicant was unable to provide, to the Officer's satisfaction, details of his imprisonment. There is absolutely no explanation of what the Officer found to be lacking in his description of his detention or in his responses to questions on the subject. The CAIPS notes do not reflect questions about his detention that the Applicant was not able to answer. There is no justification for this general finding.

[66] The second part of the question of the Applicant's detention is the Officer's inference that the Applicant could not have escaped during a sandstorm.

[67] The Respondent argues that this finding bears the hallmark of reasonableness and logic and that it was not unreasonable, given the totality of the circumstances, to draw a negative inference or conclusion from the Applicant's testimony. Moreover, the Respondent asserts that the Officer did

not have an obligation to base her findings on “objective” evidence (*Lorena Gonzalez v Canada (Minister of Citizenship & Immigration)*(1999), 88 ACWS (3d) 1062, [1999] FCJ No 805 (QL)(FCTD)[*Lorena Gonzalez v. Canada*]). Justice Sharlow (as she was then) in *Lorena Gonzalez v. Canada*, above, stated at paragraph 26:

> Counsel for the applicant argues that the CRDD did not properly assess the applicant's conduct on the basis of the circumstances in which she found herself, but engaged in speculation as to what some other person might have done in her place, and then assumed that its speculation was the only plausible course of action. He says that the CRDD thus imposed a wholly unreasonable standard on the applicant, resulting in the same error as that identified in Giron v. Minister of Employment and Immigration (1992), 143 N.R. 238 (F.C.A.) and Cardenas v. Minister of Citizenship and Immigration (20 February 1998), IMM-1960-67, (F.C.T.D.). He correctly points out that there is no objective evidence in the record for the "ideal" asserted by the CRDD. This may be contrasted with cases in which, for example, the plausibility of a refugee claimant's story is measured against what is known about conditions in the country where the claim arose. [Emphasis added.]

[68] In the case before me, in contrast to the case before Justice Sharlow, the claimant’s story could have been measured against what was known about the conditions in the country where the claim arose. Information regarding the frequency and attributes of sandstorms in Eritrea could be found in documentary evidence. In addition, more explanation and information could have been sought from the Applicant.

[69] When asked, during cross-examination, about how she came to the conclusion regarding the sandstorm that occurred near Sawa, Eritrea, on July 7, 2006, the Officer stated that she did not have any evidence to establish that fact (Cross-Examination of AnnMarie McNeil, March 22-23, 2011, Q587). The error, as I see it, is that the Officer neglected to look at the available documentary evidence to measure the plausibility of the Applicant’s story against what was known about the

conditions in the country where the claim arose. In such a scenario, the Officer had an obligation to go to the documentary evidence to measure the credibility of the Applicant's story.

[70] It is trite law that visa officers are entitled to make findings based on inferences and plausibility. However, the Federal Court of Appeal in *Canada (Minister of Employment and Immigration) v Satiacum* (1989), 99 NR 171**, [**1989] FCJ No 505 (QL) stated at paragraph 33:

> The common law has long recognized the difference between reasonable inference and pure conjecture. Lord Macmillan put the distinction this way in Jones v. Great Western Railway Co. (1930), 47 T.L.R. 39 at 45, 144 L.T. 194 at 202 (H.L.):
>
> > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.

[71] Visa officers must be careful not to judge actions which appear implausible when judged from Canadian standards; such actions might be plausible when considered within the "claimant's milieu" (*Ye v. Canada (Minister of Employment and Immigration),* [1992] FCJ No 584 (QL), 34 ACWS (3d) 241(FCA)). In the case at hand, it appears that the Officer assessed the sandstorms based on what would be plausible in Canada, without regard to the evidence of the claimant's milieu.

[72] Although it is a difficult line to draw, I conclude that the Officer's plausibility finding in this case lies further to the conjecture end of the spectrum.

B. *Pentecostal Religion*

[73] As noted above, the Officer did not believe that the Applicant was of the Pentecostal faith. The Officer apparently based this finding on the very few questions set out in the CAIPS notes. The CAIPS notes reflect only three simple questions to which the Applicant gave equally simple responses. There were no follow-up questions and no questions about his knowledge of the Bible or doctrine of the Pentecostal faith as practised in Eritrea.

[74] From the Applicant's answers to these questions, the Officer concluded that his knowledge was not "up to the level one would expect from a person who has been practicing and reading the bible for 12 years".

[75] In general, it is reasonable to expect a claimant who has undertaken a life-changing religious conversion to have considerable knowledge of his newly-acquired faith. Based on a somewhat thorough line of questions and follow-up questions to which a claimant provides only very basic answers, it would not be unreasonable to question the sincerity of a claimant's faith. The problem with this decision is that I am unable to ascertain what questions were asked by the Officer. The CAIPS notes contain a general remark that, "ASKED SEVERAL QUESTIONS ABOUT PENTECOSTAL RELIGION". However, only two questions are identified. No follow-up questions were apparently posed. From these questions and responses, I cannot understand what was lacking.

[76] Quite simply, the findings with respect to the Applicant's faith do not hold up to a somewhat probing examination (*Canada (Director of Investigation & Research) v Southam Inc.*, [1997] 1 SCR 748, 209 NR 20). Stated in terms consistent with *Dunsmuir*, above, this part of the decision lacks justification, transparency and intelligibility.

C. *Conclusion on Credibility*

[77] Although credibility is reviewed on the standard of reasonableness, the Officer's findings in this case are not owed "blind reverence" by this Court. The Supreme Court of Canada in *Dunsmuir*, above, stated at paragraph 48:

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations ... Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, [*infra*], at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision" [Emphasis added.]

[78] Paying respectful attention to the reasons offered or which could have been offered by the Officer in this case, this Court cannot conclude that they are reasonable.

XII. Adequacy of Reasons

[79] The Applicant asserts that the reasons of the Officer are inadequate. Since this application will succeed on the basis that the decision is unreasonable, I will merely provide brief comments on this aspect of the allegation by the Applicant.

[80] In assessing the adequacy of reasons, the first question is whether there is a legal duty to give reasons. The decision of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*] established that, in certain circumstances the duty of procedural fairness will include a requirement that an administrative tribunal provide reasons for its decision. The parties apparently both acknowledge that, in the circumstances of this decision, the Officer was under an obligation to provide reasons for her decision to deny the applications for refugee status. I agree that application of the criteria set out in *Baker*, above, would lead to a conclusion that reasons are required.

[81] The second question is: what constitutes the Officer's reasons?

[82] The Officer issued a two-page rejection letter which includes some reasons for the rejection of the Applicant's application. However, the reasons are not, in this case, limited to that letter. The Respondent emphasizes that information about why an administrative decision-maker ruled in the way that it did can sometimes be found in the record of the case and the surrounding context. I agree. Reasons form part of a broader context. Information that fulfils the above purposes can come from various sources. For example, oral or written reasons of the decision maker may be amplified

or clarified by extraneous material, such as notes in the decision maker's file and other materials in the record. Even where no reasons have been given, extraneous material may suffice when it can be taken to express the basis for the decision. *Baker*, above, provides us with a good example of this, where the Supreme Court found that notes in the administrative file adequately expressed the basis for the decision. See also *Hill v Hamilton-Wentworth Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129 [*Hill*] at paragraph 101 for the role of extraneous materials in the assessment of the adequacy of reasons.

[83] In matters such as these, file notes are entered by a visa officer in CAIPS. In the case before me, the Officer recorded her notes from the interview with the Applicant almost immediately after the interview took place. These CAIPS notes are contained in the Certified Tribunal Record (CTR). I conclude that the combination of the rejection letter and the CAIPS notes of the Officer satisfy the requirement for reasons under the duty of procedural fairness; they will be taken to be the reasons for the decision. In addition, other contents of the CTR may inform the context of the decision.

[84] The Respondent has put forward an affidavit of the Officer, in which affidavit the Officer includes some statements that could be seen as explaining or adding to her reasons. For the reasons outlined above, under the discussion of the Officer’s affidavit, these explanations or additional reasons, made some 12 months after the decision, do not form part of the reasons under review.

[85] The outstanding question is whether the reasons (as contained in the CAIPS notes and rejection letter) are adequate to meet the duty of procedural fairness. In my view, they are.

[86] As stated by the Supreme Court in *Hill*, above, at paragraph 100:

> The question is whether the reasons are sufficient to allow for meaningful appellate review and whether the parties' "functional need to know" why the trial judge's decision has been made has been met. The test is a functional one: R. v. Sheppard, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 55.

[87] Although *Hill*, above, was decided in a criminal case, the same general principle is applicable to the decision before me. The Federal Court of Appeal, in *VIA Rail Canada Inc. v National Transportation Agency* (2000), 193 DLR (4th) 357, [2001] 2 FC 25 [*VIA Rail*] at paragraph 19, provided guidance in the context of an administrative decision maker:

> [R]easons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision maker erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.

[88] It is important to remember that the adequacy of reasons must be measured in the light of the particular circumstances of the case (*VIA Rail*, above, at para 21). In the case of a visa officer, it would not, in my view, be proper to hold the Officer's reasons to the same standard as would be required in a criminal matter or before a quasi-judicial decision maker (such as the National Transportation Agency). In *Baker*, above, at para 44, the Supreme Court concluded that hand-written notes of an immigration officer were sufficient to fulfill the duty to give reasons. In so concluding, Justice l'Heureux-Dubé, observed that reviewing Courts should evaluate the duty of fairness "with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured" (*Baker*, above,

at para 44). In the words of Justice Goudge in *Clifford*, above, at paragraph 30, “the fundamental question is whether the reasons show that the tribunal grappled with the substance of the matter”.

[89] On this standard, the reasons provided by the Officer are adequate. She explains what aspects of the Applicant’s testimony were not credible. At a basic level, the reasons allow the Applicant to know what determinations provided the foundation to her rejection of his application. In particular, the Officer did not believe that the Applicant had been in detention or that he was Pentecostal. Her reasons for the two findings were that she did not believe that he had escaped in a sandstorm or that he could answer basic questions about his religion. In the totality of the circumstances, I believe that the reasons were adequate.

[90] The problem of course is that the decision is unreasonable. In other words, this is not a question of the adequacy of reasons, where the Court must assess the reasons from a functional perspective to see if the basis for the decision is intelligible. Rather, as I see it, the proper question, on this judicial review, is whether the decision and the reasons can, from a substantive perspective, be upheld. As noted by Justice Goudge, in *Clifford*, above, at paragraph 32, “[t]hat is a very different task from assessing the sufficiency of the reasons in a functional sense”. For reasons given in other sections of this decision, I conclude that the decision cannot be sustained on the applicable standards of review. However, on the narrow question of whether the reasons are adequate to meet the Officer’s duty to provide reasons, I would conclude that the Officer’s reasons are adequate.

XIII. Applicant's Documents

[91] In the affidavit that was filed as part of this application, the Applicant refers to his attempt to offer further documents to the Officer during his interview:

> At my interview I asked [the Officer] to accept and review a number of documents that I had brought with me to support my case, including recommendation letters from my previous Pentecostal churches . . . as well as from my current church in Cairo … In addition, I tried to give her a magazine from my church in Cairo that had a poem of mine in it, my UNHCR blue card, my Eritrean national service ID and certificate of national service, and a number of photos. She refused to accept or even look at my documents.

[92] The Applicant submits that, in refusing to accept and consider these documents, the Officer breached the rules of procedural fairness. The documents described appear to relate to central elements of his claim – that he was a Pentecostal Christian and a UNHCR refugee and that he had served in the military.

[93] If, indeed, this happened, I would agree with the Applicant that the rules of procedural fairness were not observed – a reviewable error.

[94] The Officer, in her affidavit sworn September 5, 2010 – almost one year after the interview – makes no mention of further documents. In addition, the CAIPS notes do not contain any reference to further documents.

[95] However, it is not clear as to exactly what documents were presented to the Officer during the interview. In his application record, the Applicant includes a letter dated September 28, 2009

(about two weeks after the refusal) wherein he states that, during his interview, he "had the following documents to prove that I am a true convert to Pentecostal faith". He then lists the documents now in question. The letter is not clear, however, whether the documents were actually offered to the Officer during the interview or whether he simply had the documents with him.

[96] On October 13, 2009, the Applicant was interviewed by an AMERA representative. The notes for that interview contain statements that the Applicant "had a lot of documents with me" and that he tried to give "[the] documents" to the Officer but that "she refused to take them from me". There are no further specifics in the interview notes as to exactly what documents are being referred to.

[97] The Applicant was not cross-examined on his affidavit. However, the record as a whole on this subject indicates that there is reason to doubt some aspects of his sworn testimony.

[98] While the question is not free from doubt, I find, on a balance of probabilities, that the Applicant tried to offer further documents to the Officer and that she refused to take them. However, what is less clear is exactly what those documents were. In sum, while the Officer may have erred in refusing to accept some documents, the Applicant has failed to persuade me that the documents in question were those contained in his letter of September 28, 2009. Accordingly, I would conclude that any error was not material to the ultimate disposition of his claim.

XIV. Other Grounds of Persecution

[99] In this case, the Officer considered only one ground of persecution. Specifically, she examined whether the Applicant was at risk on grounds of religious persecution.

[100] The Applicant submits that, as reflected in his narrative, he also fears persecution on the basis of his escape from prison and his illegal exit from Eritrea. He argues that the Officer erred by not considering these additional grounds of persecution. Documentary evidence, in his view, strongly suggests that persons who escape from detention and those who return after leaving the country illegally would be subject to harsh treatment by Eritrean authorities.

[101] As disclosed in the CAIPS notes, the Officer asked the Applicant a number of questions about his escape from detention. However, it appears that no examination occurred with respect to his claimed illegal departure from Eritrea. This was confirmed by the Officer on cross-examination of her affidavit.

[102] In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 20 Imm LR (2d) 85 [*Ward*] at paragraph 89, the Supreme Court stated:

> [T]he additional ground was ultimately accepted by the appellant during oral argument. I note that the UNHCR Handbook, at p. 17, paragraph 66, states that it is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide whether the Convention definition is met; usually there will be more than one ground (idem, paragraph 67). [Emphasis added.]

[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):

> Q. When you assessed Henok's case, Mr. Ghirmatsion's case … did you have any more recent or more credible evidence in front of you that contradicted UNHCR's evidence or guidance or suggested that they were wrong about the risk to returning asylum seekers who left illegally?
>
> …

A. No, I didn't

Q. And you have agreed that nowhere in CAIPS notes or the refusal letter is there any indication that you addressed the applicant's fear of persecution, on the basis of having left the country illegally, correct?

A. That's correct.

Q. Do you have an explanation for why you didn't assess that risk?

A. No, I don't.

[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.

[107] Further, the Respondent argued that the Applicant cannot self-induce a positive claim to refugee status (*Valentin v Canada (Minister of Employment & Immigration)*, [1991] 3 FC 390, 167 NR 1 (FCA)). However, I do not accept that it is the same situation for a claimant who flees a country from one type persecution and, as a consequence, is now subject to another ground of persecution, to be in the same situation as a claimant who, under no risk, leaves a country only to self-induce a positive claim to refugee status. Leaving the country illegally is a documented risk in Eritrea (the *UNHCR Eligibility Guidelines for Assessing the International protection Needs of Asylum-Seekers from Eritrea* (April 2009)). The Supreme Court of Canada has stated that refugees

can have more than one ground of persecution and it is not the duty of the claimant, but the Officer, to identify the reasons for the persecution (*Ward*, above, at para 89).

[108] The Officer erred by failing to consider this additional ground of persecution. This error by the Officer is a sufficient basis on which to overturn the decision.

XV. Reasonable Apprehension of Bias

[109] The Applicant asserts that the decision of the Officer raises a reasonable apprehension of bias. As I understand this argument of the Applicant, the allegation is based on the cumulative record for this and the other claims that form part of this group of applications. The AMERA interviews highlight a number of common recollections and concerns that were experienced by the claimants, including the Applicant.

[110] Some of the claimants felt that the words and demeanour used by the Officer during the interview conveyed hostility towards Pentecostals. Of particular relevance, some of the claimants referred to remarks made by the Officer that she was Catholic, thereby raising a suspicion that she could be seen as biased.

[111] Moreover, the Applicant points to the large number of applications that were refused by this particular Officer.

[112] The test for apprehension of bias that has consistently been applied was articulated by Justice de Grandpré in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369, 9 NR 115 at 394 [*Committee for Justice*]. Analyzing the words of Justice de Grandpré (and the many who have followed him), the elements involved in any assessment of whether a decision maker holds a reasonable apprehension of bias are as follows:

- The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.

- The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude.

- The person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case.

- The reasonable person must be an informed person, with knowledge of all the relevant circumstances.

- A real likelihood or probability of bias must be demonstrated; a mere suspicion is not enough.

- The existence of a reasonable apprehension of bias depends entirely on the facts.

- The threshold for such a finding is high.

- The onus of demonstrating bias lies with the person who is alleging its existence.

- In the absence of evidence to the contrary, one must assume that a decision maker will act impartially (*Ayyalasomayajula v Canada (Minister of Citizenship & Immigration*), 2007 FC 248, 155 ACWS (3d) 941, at para 15).

[113] Evidence that this Officer had rejected all or most of the applications from Eritrean refugee claimants would have gone some way to support the Applicant's argument. However, that is not the evidence before me. The Officer, when questioned on her affidavit, stated that she determined approximately 600 Eritrean claims each year. Of those, her "rough estimate" was that she accepted the claims of about 400; of those 400, approximately 150 to 200 would have been of the Pentecostal faith. While the Applicant may quibble with the arithmetic, the fact remains that a substantial number of Eritrean Pentecostal claimants were accepted in the Refugee Abroad Class by this Officer. This alone is sufficient to dismiss the Applicant's argument of a reasonable apprehension of bias.

[114] It appears that the Applicant (and others in this group of claimants) felt that the attitude of the Officer was hostile and that her manner of questioning was harsh. I accept – based on the Applicant's affidavit and the AMERA interview notes – that the Officer's interview skills may have been deficient. However, this does not amount to a reasonable apprehension of bias.

XVI. Conclusion

A. *Summary of decision*

[115] Returning to the issues raised near the beginning of these reasons, I would conclude that the Officer made the following reviewable errors:

1. the Officer erred by failing to have regard to the Applicant's status as a UNHCR refugee;

2. the Officer's finding of lack of credibility lacks justification, transparency and intelligibility; it is unreasonable; and

3. the Officer erred by failing to assess the risk of persecution to the Applicant because he would be returning to Eritrea having left the country illegally.

[116] To complete this summary, my other conclusions are as follows:

1. the Officer did not err by failing to refer to or follow explicitly the steps outlined in OP 5, section 13.3;

2. although the Officer erred by refusing to accept documents offered at the interview, I am not persuaded that, in the circumstances, this failure resulted in a reviewable error;

3. the Officer's reasons (the CAIPS notes and the rejection letter) satisfy the Officer's duty to give reasons; and

4. the Applicant has not met his burden of demonstrating that the Officer's decision gives rise to a reasonable apprehension of bias.

[117] The decision will be quashed.

B. *Remedies*

[118] The Applicant seeks a number of remedies that extend beyond a re-determination of the application by a different decision maker. As stated in the "Applicants' Further Memorandum of Argument" (a submission common to all four of these judicial reviews), the Applicant seeks the following:

> The Applicants request that this Court quash the decisions of the visa officer in each of the four "lead cases", and remit the matters to a senior decision maker not based at the Cairo visa post for redetermination of eligibility within 60 days; in the event of a positive eligibility decision the applicants request further that background checks be completed within a further 30 days and visas issued within 7 days thereafter.

[119] I am prepared to quash the decisions and have the matter remitted to a different visa officer for re-determination. I am also prepared to order that the Applicant be able to submit such further material as he feels is necessary to support his claim. However, I am not prepared to issue the detailed order that the Applicant would like to see in this case.

[120] It should be up to the Respondent or his delegate to determine who can best carry out the re-determination. I believe that these reasons can offer some guidance to whomever is tasked with the re-consideration. There is no need to stipulate that the visa officer be “a senior decision maker”, primarily because I have no idea of what that would mean.

[121] I understand that the basis for the request that the new visa officer be located outside Cairo is a concern that the Officer in this case may have undue influence on the decision-making process. The new visa officer will be required by law to carry out a new, independent analysis; she or he cannot rely on the Officer’s decision or advice. I expect that the office in Cairo will ensure that procedures are established, or are already in place, to ensure independent decision making. I see no need to set that out in any order or judgment.

[122] The balance of the requested remedies relate to the imposition of time limits. I am not prepared to establish time limits for any of the next steps. However, given the uncertainty of the Applicant’s ability to remain in Egypt for any length of time and the seriousness of the risks he may face if returned to Eritrea, I expect that the re-determination and follow-up steps (if necessary) will be carried out expeditiously. In the event of lengthy delay, I would anticipate that any of my

colleagues would be sympathetic to granting an order of *mandamus* in the appropriate circumstances.

C. *Costs*

[123] The Applicant seeks costs in this and the related three files. The Applicant will have until May 27, 2011 to make further submissions on costs. The submission is to be a joint submission for all four related files and must not exceed ten pages in length. Further, the submission should identify the total amount of costs sought, either for each file or for the four files together. The Respondent will have until June 9, 2011 to reply to the Applicant's submissions on costs.

D. *Next Steps*

[124] As noted at the beginning of these Reasons, this Applicant is one of almost forty claimants in similar circumstances. In Reasons for Judgment and Judgment released at the same time as this, I have concluded that the judicial review applications for the other three files heard at the same time as this one will also be allowed. As I did early in these Reasons, I wish to stress that this decision is addressed to this particular application by Mr. Henok Aynalem Ghirmatsion. I make no finding or order that binds the disposition of any of the remaining files. Each file presents a unique set of facts and requires separate review and determination. However, I am hopeful that these Reasons will permit counsel for the Applicants and the Respondent to reach an agreement on the proper disposition of some or all of the remaining applications in the group.

[125] At the close of the hearing, the parties expressed interest in convening a conference with me to discuss the next steps. If the parties continue to believe that such a conference would be helpful, they are invited to make such a request through the Court Registry.

E. *Certified Question*

[126] Neither party proposes a question of general importance for certification. I agree that there is no question for certification.

F. *Final Remarks*

[127] In conclusion, I would like to thank the parties for their professionalism throughout the pre-hearing and hearing stages. Your clients were very well served by your advocacy. In addition, the proceedings benefited from the respect you demonstrated for your roles as Officers of the Court.

JUDGMENT

NOW THIS COURT ORDERS AND ADJUDGES that :

1. The application for judicial review is allowed, the decision of the Officer is quashed and the matter remitted to a different officer for reconsideration.

2. The Applicant will be permitted to provide any additional materials to the newly-designated visa officer that he believes are relevant to the determination of his claim.

3. The Applicant will have until May 27, 2011 to make further submissions on costs. The submission is to be a joint submission for all four related files and must not exceed ten pages in length. Further, the submission should identify the total amount of costs sought. The Respondent will have until June 9, 2011 to reply to the Applicant's submissions on costs; the reply may not exceed ten pages in length.

4. No question of general importance is certified.

"Judith A. Snider"
Judge

APPENDIX A

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

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

(a) the foreign national is outside Canada;

(b) the foreign national has submitted an application in accordance with section 150;

(c) the foreign national is seeking to come to Canada to establish permanent residence;

(d) the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely

(i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

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 :

a) l'étranger se trouve hors du Canada;

b) i a présenté une demande conformément à l'article 150;

c) il cherche à entrer au Canada pour s'y établir en permanence;

d) aucune possibilité raisonnable de solution durable n'est, à son égard, réalisable dans un délai raisonnable dans un pays autre que le Canada, à savoir :

(i) soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle,

(ii) resettlement or an offer of resettlement in another country;

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

(f) one of the following is the case, namely

(i) the sponsor's sponsorship application for the foreign national and their family members included in the application for protection has been approved under these Regulations,

(ii) in the case of a member of the Convention refugee abroad or source country class, financial assistance in the form of funds from a governmental resettlement assistance program is available in Canada for the foreign national and their family members included in the application for protection, or

(iii) the foreign national has sufficient financial resources to provide for the lodging, care and maintenance, and for the resettlement in Canada, of themself and their family members included in the application for protection;

(g) if the foreign national intends to reside in a province other than the Province of Quebec, the foreign national and their family members included in the application for protection will be able to become successfully established in Canada, taking into account the following factors:

(ii) soit la réinstallation ou une offre de réinstallation dans un autre pays;

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

f) selon le cas :

(i) la demande de parrainage du répondant à l'égard de l'étranger et des membres de sa famille visés par la demande de protection a été accueillie au titre du présent règlement,

(ii) s'agissant de l'étranger qui appartient à la catégorie des réfugiés au sens de la Convention outre-frontières ou à la catégorie de personnes de pays source, une aide financière publique est disponible au Canada, au titre d'un programme d'aide, pour la réinstallation de l'étranger et des membres de sa famille visés par la demande de protection,

(iii) il possède les ressources financières nécessaires pour subvenir à ses besoins et à ceux des membres de sa famille visés par la demande de protection, y compris leur logement et leur réinstallation au Canada;

g) dans le cas où l'étranger cherche à s'établir dans une province autre que la province de Québec, lui et les membres de sa famille visés par la demande de protection pourront réussir leur établissement au Canada, compte tenu des facteurs suivants :

(i) their resourcefulness and other similar qualities that assist in integration in a new society,

(ii) the presence of their relatives, including the relatives of a spouse or a common-law partner, or their sponsor in the expected community of resettlement,

(iii) their potential for employment in Canada, given their education, work experience and skills, and

(iv) their ability to learn to communicate in one of the official languages of Canada;

(h) if the foreign national intends to reside in the Province of Quebec, the competent authority of that Province is of the opinion that the foreign national and their family members included in the application for protection meet the selection criteria of the Province; and

(i) subject to subsection (3), the foreign national and their family members included in the application for protection are not inadmissible.

144. The Convention refugees abroad class is prescribed as a class of persons who may be issued a permanent resident visa on the basis of the requirements of this Division

(i) leur ingéniosité et autres qualités semblables pouvant les aider à s'intégrer à une nouvelle société,

(ii) la présence, dans la collectivité de réinstallation prévue, de membres de leur parenté, y compris celle de l'époux ou du conjoint de fait de l'étranger, ou de leur répondant,

(iii) leurs perspectives d'emploi au Canada vu leur niveau de scolarité, leurs antécédents professionnels et leurs compétences,

(iv) leur aptitude à apprendre à communiquer dans l'une des deux langues officielles du Canada;

h) dans le cas où l'étranger cherche à s'établir dans la province de Québec, les autorités compétentes de cette province sont d'avis que celui-ci et les membres de sa famille visés par la demande de protection satisfont aux critères de sélection de cette province;

i) sous réserve du paragraphe (3), ni lui ni les membres de sa famille visés par la demande de protection ne sont interdits de territoire.

144. La catégorie des réfugiés au sens de la Convention outre-frontières est une catégorie réglementaire de personnes qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à 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.

147. A foreign national is a member of the country of asylum class if they have been determined by an officer to be in need of resettlement because

(a) they are outside all of their countries of nationality and habitual residence; and

(b) they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.

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.

147. Appartient à la catégorie de personnes de pays d'accueil l'étranger considéré par un agent comme ayant besoin de se réinstaller en raison des circonstances suivantes :

a) il se trouve hors de tout pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

b) une guerre civile, un conflit armé ou une violation massive des droits de la personne dans chacun des pays en cause ont eu et continuent d'avoir des conséquences graves et personnelles pour lui.

FEDERAL COURT

SOLICITORS OF RECORD

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