

Federal Court



Cour fédérale

Date: 20120329

**Docket: IMM-5859-11
IMM-5861-11**

Citation: 2012 FC 371

Ottawa, Ontario, March 29, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ROZINA GEBREHIWOT TEWELDBRHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

AND BETWEEN:

MERHAWIT OKUBU TEWELDBRHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT

[1] These are reasons for judgment in two applications for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 of two decisions of an Immigration Officer finding the applicants not to be members of the Convention refugee abroad class.

[2] The applications were heard together and the facts, issues and arguments presented in both are very similar. Accordingly, the Court will provide one set of reasons for the two applications.

Unless otherwise specified, the analysis applies to both applications.

BACKGROUND:

[3] The applicant for Court file IMM-5859-11, Mrs. Rozina Gebrehiwot Teweldbrhan (“Mrs. Rozina”), and the applicant for file IMM-5861-11, Ms. Merhawit Okubu Teweldbrhan (Ms. Merhawit’), are citizens of Eritrea. They were born in Addis Ababa, Ethiopia of Eritrean parents. The applicants are cousins. In mid-1999, during the Ethiopian-Eritrean war, their respective families, save for themselves, were deported to Eritrea.

[4] Mrs. Rozina was 17 years old when her family was deported. She claims she was not deported because she was at school when the deportation took place. She took refuge in a neighbour’s house as the family house was locked down. She continued attending school and she worked at a bakery/café for the 6 following years. In the 2005 Ethiopian election, Mrs. Rozina voted for an opposition party. The government allegedly became aware of that information and arrested her. During three weeks of detention, she says she was tortured and beaten by members of the Ethiopian Security Forces. She was released on condition that she report back each week. Mrs. Rozina fled to Kenya where she stayed 2 days in Moyale and 10 days in Nairobi. She says that she left Nairobi because of the brutal treatment accorded Eritreans. She arrived in Kampala, Uganda in July 2005. Mrs. Rozina made contact with Ms. Merhawit, who was already in Kampala, upon her

arrival. She was also able to contact her family in Eritrea for the first time since the 1999 deportation.

[5] Ms. Merhawit was 14 years old when her family was deported. She managed to escape deportation as she was in a neighbour's house when the event took place. Friends of the family took care of her while she continued to attend school. She remained in Ethiopia for 6 years. Ms. Merhawit says she did not vote during the 2005 election because she feared she would be targeted because of her ethnicity. She fled to Kenya following the post-election violence. She spent two weeks in Nairobi and then moved to Kampala for the same reasons as Mrs. Rozina. Ms. Merhawit arrived in Kampala first and made contact with Mrs. Rozina when the latter arrived.

[6] In 2006, Mrs. Rozina met Mr. Hadish Teara Tesfaye, her dependent in the application before the Immigration Officer, through a mutual friend. Mr. Tesfaye was also an Eritrean national who fled Ethiopia. He was accused by the Ethiopian authorities of working with the opposition group Shaba. He was allegedly detained for five months and eventually released without documentation. He too fled to Kenya and worked there for 4 years before travelling to Kampala in 2006. He had no status in Kenya. Mrs. Rozina and Mr. Tesfaye were married on 18 May 2007. They have two children together.

[7] The applicants and Mr. Tesfaye applied for and obtained Convention refugee status in Uganda. Ms. Merhawit obtained her refugee card in 2009, and Mrs. Rozina and her husband obtained theirs in 2011. The applicants are being sponsored to come to Canada as members of the

Refugee Abroad Class by their aunt, who lives in Canada, and by the St. Patrick parish in Ottawa. They were interviewed by an Immigration Officer in Kampala on 13 April 2011.

DECISION UNDER REVIEW:

[8] The decisions for both applicants were issued on the same day. Letters dismissing their applications were sent on June 27 2011. The Officer's reasons are set out in the letters and her Computer Assisted Immigration Processing System ("CAIPS") notes. The Officer found the applicants not credible because the answers they gave during the interview were vague, contradictory and implausible. The Officer specifically found implausible the fact that their entire families had been deported except for the applicants and that they were both able to live 6 years in Ethiopia after the deportation events.

[9] The Officer did not believe Mr. Tesfaye's story of arrest, transfer and release to be credible and indicated that his credibility was also affected by the fact that he did not seek assistance from the UNHCR during his 4 years in Kenya. The Officer also found that the information provided by the UNHCR contradicted Mr. Tesfaye's testimony.

[10] The Officer stated that Mrs. Rozina was unable to indicate why she was targeted in 2005 and was unable to provide any details of her arrest. The Officer also indicated that Ms. Merhawit was unable to present any evidence of her persecution in 2005. The Officer found that the applicants had no well-founded fear of persecution and that the applicants had not been and were not seriously

and personally affected by civil war, armed conflict or massive violation of human rights in their country of origin.

[11] In the CAIPS notes, the Officer also indicated that the Officer did not believe the marriage of Mrs. Rozina and Mr. Tesfaye to be genuine. He indicated that Mrs. Rozina did not identify clearly what were the risks if she were to go back to Addis Ababa. He also speculated that Ms. Merhawit and Mrs. Rozina probably went to Kampala to seek employment and/or resettlement to Canada.

ISSUES:

[12] Several issues were raised in the applicants' written and oral submissions. They may be reduced to two determinative issues:

- a. Did the Officer err by failing to have due regard to the Ugandan Government's decision to grant refugee status to the applicants?
- b. Did the Officer err, in IMM-5859-11, in his credibility assessment by focusing on the credibility of the husband and on the genuineness of the marriage?

RELEVANT LEGISLATION:

[13] Sections 145 and 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 are relevant to these applications:

145. A foreign national is a Convention refugee abroad and	145. Est un réfugié au sens de la Convention outre-frontières et
---	---

<p>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.</p>	<p>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.</p>
<p>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</p>	<p>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 :</p>
<p>(a) they are outside all of their countries of nationality and habitual residence; and</p>	<p>a) il se trouve hors de tout pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle;</p>
<p>(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.</p>	<p>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.</p>

STANDARD OF REVIEW:

[14] The issues are questions of fact dealing with the consideration and assessment of evidence by, and the credibility findings of an Immigration Officer. The standard of review is, therefore, reasonableness: *Singh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 267 at paras 17-18; and *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53.

[15] Reasonableness is based on the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible,

acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir*, above, at para 47.

PRELIMINARY ISSUE:

[16] As a preliminary matter, the respondent objected to the introduction in evidence of three affidavits found in each of the two application records. The objections went to the form of affidavits signed by the two applicants and to the content of affidavits sworn by an articling student.

[17] The Court has reviewed the affidavits and considered the parties' arguments, and is satisfied that the applicant's affidavits are admissible and should be considered notwithstanding minor irregularities as to their form.

[18] With respect to the affidavits sworn by the articling student, the objection is that the attached documentary exhibits were not before the decision maker at the time the decisions were made. These exhibits contain information pertaining to the country conditions in the region and are of a nature commonly considered in refugee determinations. Counsel for the respondent was candid in acknowledging that his client was not prejudiced by their introduction. In any event, the content of the documents had no material effect on these applications. I saw no reason to strike them from the record.

ANALYSIS:

Did the Officer err by failing to have due regard to the Ugandan Government's decision to grant refugee status to the applicants?

[19] The applicants submit that the Officer erred in failing to have due regard to Uganda's decisions to grant them refugee status. They claim that the Officer has an obligation to consider the Republic of Uganda's assessment of their status and to explain why his was contrary.

[20] Section 13.3 of the Citizenship and Immigration Canada Guidelines OP 5 Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes (hereafter OP 5) reads as follow:

Other factors determining persecution to consider in determining eligibility for refugee status:

- a decision by the UNHCR or a signatory country with regard to an applicant's refugee status

[21] In a recent line of decisions this Court has interpreted OP 5 s. 13.3 and the principle found in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425 as obliging officers to have due regards to the decision of the UNHCR to grant refugee status: *Ghirmatsion v Canada (Minister of Citizenship and Immigration)*, 2011 FC 519 at paras 54-59; *Weldesilassie v Canada (Minister of Citizenship and Immigration)*, 2011 FC 521 at paras 30-34; and *Kidane v Canada (Minister of Citizenship and Immigration)*, 2011 FC 520 at paras 29-33.

[22] Notably, Justice Snider, at paragraphs 58 and 59 of *Ghirmatsion*, above, held that:

[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.

[23] In this case, the Officer asked questions about the current refugee status of the applicants, but stopped when it was established that they had full refugee status. Considering that the decision of the Republic of Uganda, a signatory to the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, to grant refugee status to the applicants is highly relevant to the determination of the applicants' refugee status by the Officer, his analysis should have not stopped there.

[24] Although, as indicated by *Ghirmatsion*, above, the Officer was not bound by the Uganda decisions to grant refugee status, he did have the obligation to consider those decisions and explain why he arrived at a different conclusion. Without such an explanation, the Court is left with the impression that the Officer did not consider evidence that strongly supported the applicants' cases.

[25] The respondent submits that should the Court find that there are gaps in the Officer's reasons, the Court could supplement them by reference to the records in each case: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. In

this case, such an exercise would be unhelpful as the records contain no information that could assist the court to conclude that the Officer properly considered the matter.

[26] Considering the above jurisprudence and the OP 5, I find that the Officer erred by failing to give due regard to the decisions of Uganda to grant refugee status to the applicants. As indicated by Justice Snider in *Ghirmatsion*, above, *Weldesilassie*, above, and *Kidane*, above, this error is sufficient on its own to grant the applications for judicial review.

Did the Officer err, in IMM-5859-11, in his credibility assessment by focusing on the credibility of the husband and on the genuineness of the marriage?

[27] The applicant Mrs. Rozina submits that the Officer erred by considering irrelevant factors in making his credibility findings. These irrelevant factors are the credibility of the Mr. Tesfaye's narrative and the genuineness of his marriage to the applicant.

[28] Credibility findings should not be based on insignificant or irrelevant facts and must be rationally related to the applicant's credibility: *Owusu-Ansah v Canada (Minister of Employment and Immigration)*, (1989) 8 Imm LR (2d) 106 (FCA); and *Shaheen v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 670 at paras 13-14.

[29] The CAIPS notes indicate that the Officer took a significant amount of time to determine the credibility of Mr. Tesfaye and the genuineness of his marriage to the applicant Mrs. Rozina. They also indicate that the Officer used those credibility findings to draw negative inferences with regards

to the Mrs. Rozina's credibility. These findings are immaterial to the determination of the refugee status of Mrs. Rozina. Mr. Tesfaye was not applying for refugee status and he is linked to Mrs. Rozina's application only because he is her dependent. Whether his story is credible or not bears no impact on the credibility of the applicant's narrative.

[30] Furthermore, the Officer's task was not to determine the genuineness of Mrs. Rozina and Mr. Tesfaye's marriage. Whether the Officer believed or not that their marriage was genuine is irrelevant to the determination of Mrs. Rozina's refugee status. Both findings are not rationally related to the applicant's credibility. It was unreasonable of the Officer to rely on those findings to determine that the applicant was not credible.

[31] The Court therefore finds the decisions of the Officer in both IMM-5958-11 and IMM-5861-11 to be unreasonable for lack of transparency, intelligibility and justification as the Officer did not have due regard to Uganda's decision to grant refugee status to the applicants and, in IMM-5861-11, made irrelevant and unreasonable credibility findings.

“Richard G. Mosley”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-5859-11

STYLE OF CAUSE: ROZINA GEBREHIWOT TEWELDBRHAN

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

DOCKET: IMM-5861-11

STYLE OF CAUSE: MERHAWIT OKUBU TEWELDBRAHN

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: March 26, 2012

REASONS FOR JUDGMENT: MOSLEY J.

DATED: March 29, 2012

APPEARANCES:

Warren Creates FOR THE APPLICANT

Peter Nostbakken FOR THE RESPONDENT

SOLICITORS OF RECORD:

WARREN CREATES FOR THE APPLICANT
Perley-Robertson, Hill & McDougall
Ottawa, Ontario

MYLES J. KIRVAN FOR THE RESPONDENT
Deputy Attorney General of Canada
Ottawa, Ontario