

Federal Court



Cour fédérale

Date: 20200408

Docket: IMM-791-18

Citation: 2020 FC 499

Ottawa, Ontario, April 8, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ESEY HAILEMICAEL TESFAGABER

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“*IRPA*”), of the decision of a Visa Officer [Officer] at the Canadian High Commission in Nairobi, Kenya dated January 30, 2018 [Decision] finding that the Applicant [Esey] does not meet the definition of a family member, and there were insufficient humanitarian and compassionate factors to overcome that fact. As a result, Esey did

not meet the requirements to obtain a permanent resident visa as a family member of his uncle, Yonas Zemicael [Yonas].

[2] For the reasons that follow, this application is granted.

II. **Background Facts**

[3] Esey is a citizen of Eritrea whose biological parents were detained by the Eritrean police approximately 15 years ago and were never heard from again. They are presumed to be dead.

[4] After his parents disappeared, Esey was taken in by Yonas who is the brother of Esey's mother. Yonas and his wife, Zufan, raised Esey as part of their own family. Yonas also took in Esey's cousin, Diamond whose parents were also taken by the Eritrean police. In addition to Esey and Diamond, Yonas and his wife have two biological children both of whom are younger than Esey and Diamond.

[5] Yonas fled Eritrea to Canada in November 2010 and claimed refugee protection. Zufan stayed in Eritrea with the four minor children. On August 15, 2011, the RPD found Yonas to be a convention refugee.

[6] Yonas applied for permanent residence, the processing of which began on May 14, 2012. He included his wife and all four minor children in the application. On July 25, 2012, Yonas was granted permanent resident status in Canada on the basis of family reunification. The assessment of the family members was not completed at that time.

[7] In October 2016, Zufan and her two biological children received permanent residency. At that time, the visa officials decided to disassociate Esey and Diamond from the original applications because neither of them had been legally adopted by Zufan. The GCMS notes indicate that new files with updated forms and information were created for each of them to enable H&C review of their cases as *de facto* dependents.

[8] On April 19, 2016, Yonas had advised the authorities in writing that Diamond, whom he described as his adopted son, had disappeared. His wife and close family members were unable to obtain any information from Eritrean officials. Diamond's whereabouts were unknown.

III. H&C evidence and submissions on behalf of Esey

[9] The GCMS notes indicate that before Esey and Diamond were disassociated from the original application, a procedural fairness letter was sent on May 23, 2014 to counsel for Yonas in which an officer expressed concerns about the legality of any adoption of Esey and Diamond.

[10] On August 21, 2014, Yonas replied by requesting the permanent residence application be considered on H&C grounds as *de facto* family members. He filed evidence and made submissions to support this request.

[11] The submissions from Yonas explained that Esey and Diamond:

- were the children of his missing sisters;
- had no other family in Eritrea;
- view Yonas and Zufan as their father and mother having grown up with them;

- wished to stay together with the other children;
- if left in Eritrea, they would be alone with no means to support themselves, nowhere to go and nowhere to stay which would cause them great hardship;

[12] At that time, Esey and Diamond were teenagers who were still in school. The submissions added that it would be traumatic and a tremendous emotional hardship if they were to be separated from the rest of the family. They were also in danger of being conscripted into the military, which was mandatory between the ages of 18 and 40. Military service was described in the 2013 U. S. Department of State report (US DOS) for Eritrea as being “prolonged indefinitely” with no promotions or salary increases coupled with the inability to legally leave the country. Military service involved labour on behalf of the government, which the US DOS described as being “often harsh and sometimes involved physical abuse.”

[13] The US DOS also reported that, in addition to forced conscription, the government of Eritrea, a dictatorship, restricted civil liberties such as freedom of speech, press, assembly, association, and religion. A litany of abuses was outlined ranging from killings and torture to politically motivated disappearances and executive interference in the judiciary. There was corruption, a lack of due process and excessive pretrial detention as well as infringement of privacy rights.

[14] Yonas confirmed in his statement that he had taken custody of his nephews when their parents were arrested and he was unable to get information about their whereabouts. He said that when the children first came to his house everybody thought it would be temporary, but over time it became clear that it was not. The children were devastated and psychologically traumatized but he tried to tell them everything would be okay and they did not have to worry

because they are part of the family. He provided examples of activities he did with his nephews such as gardening and having a dog. He said that he tried to make them focus on school by rewarding them for anything which enforced their school results. Esey became first in his class and the other children began to compete with them for better results and attention.

[15] Yonas also said that he and his father, the grandfather of Esey and Diamond, discussed the future of the children and agreed it would be best for them to continue to live with Yonas and his family. He went to the civil court and registered them as his dependents

[16] Two brothers of Yonas – Dessale and Samiel – have Canadian citizenship. They live in Toronto. They each wrote strong, family-oriented letters of support for the H&C application.

[17] Dessale explained that traditionally the elder brother or sister takes responsibility for a family member if the parents cannot take care of their children. He said that Yonas had done a good job of raising Esey and Diamond who were very successful in school. He indicated that Yonas was a hard-working and loving father who was determined to continue to fulfill his responsibility.

[18] Dessale also indicated that, together with Samiel, he had set up an emergency family trust fund of \$24,000 to fund education and living arrangements for two years for the children. Dessale was willing to help them in all aspects of their life. He expressed his concern that it would be a nightmare if they were left alone and separated from the family.

[19] In his letter, Samiel indicated he was the youngest member the family. He had built a career and bought a business in Toronto the success of which he attributed to his sister and brothers always supporting him. He indicated it was now his turn to help his brother's family. He too spoke of Esey and Diamond as being family of Yonas; they had lived together for more than a decade. He described Yonas as their "father, role model and friend". He also observed that if the children lost Yonas and his wife, it would be a "horrendous experience" as they were already scarred from the loss of their biological parents. As did Dessale, Samiel said he would help them with housing, schooling and making them good Canadian residents.

[20] Other documentary evidence submitted with the H&C application included the translation of a confirmation of guardianship granted by Yonas on July 16, 2010 to Zufan. On December 7, 2011, an Order was issued by the State of Eritrea in which Yonas confirmed that he was the father and guardian of the four minor children all of whom were named in the order, with their birthdates shown as well. The part of the Order titled Decision indicated that Yonas was travelling outside of the country and, in his absence, he granted to his wife, Zufan, legal guardianship of the four minor children.

[21] The evidence included a certified translation of a Resident Card issued on October 18, 2006 for the Zoba Maakel area. The card contains a family number, an identity number and the date of birth for Yonas. It states that he is the head of family, provides the street address, the issue date and lists all the family members. The registration numbers, identity numbers and dates of birth for Yonas, Zufan and each of the four children are entered on the card. The original card contains an octagonal seal. It contains the same dates and other numbers as on the translation.

[22] The children's passports were required to continue to process the application. Yonas advised the officials that his wife had tried to obtain passports for the four children but eventually was advised that Eritrea had suspended issuing passports and exit visas for citizens between the ages of 5 and 40 so she could not obtain them.

[23] Zufan also could not obtain a police certificate for Esey because certificates would not be provided to anyone not legally allowed to obtain a passport or exit visa. The police refused to provide a letter of explanation.

IV. **Decision under review**

[24] By letter dated January 30, 2018, the Officer denied the H&C application for permanent residence for Esey. The reason given in the letter was that the Officer was not satisfied that Esey was a family member of Yonas.

[25] The Officer found that Esey did not meet the definition of a family member set out in subsection 1(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. That determination was based on the Officer's finding that since Yonas had not legally adopted him, Esey was not a "dependent child" under the provisions of section 2 of the IRPR.

[26] Additional reasons for the Decision are found in the Global Case Management System [GCMS] notes in the underlying record. Notes are to be considered by a reviewing Court: *Song v Canada (Citizenship and Immigration)*, 2019 FC 72 at para 18.

[27] The GCMS notes made on January 30, 2018 begin by instructing that a refusal letter be sent with a copy to Yonas, who is referred to as “HoF” - meaning head of family - in Canada.

What follows are more detailed comments providing reasons for the refusal letter, all of which were in uppercase letters:

OFFICER REVIEW-PI HAS BEEN REFERRED TO AS AN ADOPTED SON - HOWEVER, NO LEGAL STEPS HAVE BEEN TAKEN TO ADOPT PI -THERE IS NO LEGAL DOC THAT CONFERS THE ROLE OF GUARDIAN ON HoF/SPR - THUS, HE DOES NOT MEET THE DEFINITION OF A DEPENDENT CHILD - THERE IS A REQUEST FOR H&C - THERE ARE A NUMBER OF STATEMENTS CONCERNING THE PI'S SITUATION IN ERITREA AND WHAT HIS BEST INTERESTS ARE - THE DIFFICULTY IS THAT THEY ARE JUST THAT, STATEMENTS - NO DOCUMENTARY PROOF HAS BEEN PROVIDED - WHILE HE'S AN ADULT NOW, AT LOCK - IN HE WAS A MINOR - GIVEN THE LACK OF EVIDENCE, IT IS DIFFICULT TO DETERMINE HIS BEST INTEREST - THERE IS NO OBJECTIVE EVIDENCE OF HIS CURRENT LIVING SITUATION - THERE IS NO OBJECTIVE EVIDENCE OF A CONNECTION TO THE HoF/SPR - I AGREE THAT THE CONDITIONS IN ERITREA ARE BAD FOR EVERYONE WHO LIVES THERE - BUT THERE IS NO OBJECTIVE EVIDENCE OF HOW IT AFFECTS THE PI IN PARTICULAR - FOR THE ABOVE REASONS, I AM NOT SATISFIED THAT THE H&C CONSIDERATIONS ARE SUCH THAT THEY OVERCOME THE FACT THAT PI IS NOT A DEPENDENT - CASE REFUSED.

V. **Issue and Standard of Review**

[28] The Applicant submits there are several issues. In my view, all of the issues speak to whether the Decision is reasonable.

[29] Questions such as whether the Officer neglected evidence, erred in the assessment of the best interests of the child, failed to apply the H&C test, or even whether the Officer's reasons are inadequate all go to whether the decision is reasonable.

[30] This application was argued before the Supreme Court of Canada released the decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] in which it restated how a reviewing court is to conduct a reasonableness review.

[31] There is now a clear statement that when the merits of an administrative decision are judicially reviewed, the applicable standard of review is presumed to be reasonableness, subject to certain exceptions, none of which apply on these facts: *Vavilov* at paras 23 and 33.

[32] This application was argued on the basis that the standard of review is reasonableness. Although the principles set out in *Vavilov* now apply to this application, I find that it is not necessary to receive further submissions from the parties as the result would be the same under the pre-*Vavilov* framework established in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] and its progeny.

VI. Legislation

[33] The legislative provisions relied upon by the Officer set out the definition of who is a family member and who is a dependent child. Those definitions are found in subsection 1(3) and section 2 of the *IRPR*:

Interpretation**Definitions**

1 (1) The definitions in this subsection apply in the Act and in these Regulations.

[. . .]

Definition of family member

(3) For the purposes of the Act, other than section 12 and paragraph 38(2)(d), and for the purposes of these Regulations, other than paragraph 7.1(3)(a) and sections 159.1 and 159.5, family member in respect of a person means

(a) the spouse or common-law partner of the person;

(b) a dependent child of the person or of the person's spouse or common-law partner; and

(c) a dependent child of a dependent child referred to in paragraph (b).

Interpretation

2 The definitions in this section apply in these Regulations.

[. . .]

dependent child, in respect of a parent, means a child who

(a) has one of the following relationships with the parent, namely,

(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or

(ii) is the adopted child of the

Définitions et interprétation**Définitions**

1 (1) Les définitions qui suivent s'appliquent à la Loi et au présent règlement

[. . .]

Définition de membre de la famille

(3) Pour l'application de la Loi — exception faite de l'article 12 et de l'alinéa 38(2)d — et du présent règlement — exception faite de l'alinéa 7.1(3)a et des articles 159.1 et 159.5 —, membre de la famille, à l'égard d'une personne, s'entend de :

a) son époux ou conjoint de fait;

b) tout enfant qui est à sa charge ou à la charge de son époux ou conjoint de fait;

c) l'enfant à charge d'un enfant à charge visé à l'alinéa b).

Définitions

2 Les définitions qui suivent s'appliquent au présent règlement.

[. . .]

enfant à charge L'enfant qui :

a) d'une part, par rapport à l'un de ses parents :

(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,

(ii) soit en est l'enfant adoptif;

b) d'autre part, remplit l'une

parent; and

(b) is in one of the following situations of dependency, namely,

(i) is less than 22 years of age and is not a spouse or common-law partner, or

(ii) is 22 years of age or older and has depended substantially on the financial support of the parent since before attaining the age of 22 years and is unable to be financially self-supporting due to a physical or mental condition. (*enfant à charge*)

des conditions suivantes :

(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,

(ii) il est âgé de vingt-deux ans ou plus et n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents depuis le moment où il a atteint l'âge de vingt-deux ans, et ne peut subvenir à ses besoins du fait de son état physique ou mental. (*dependent child*)

VII. Analysis

[34] *Vavilov* has not changed the focus of previous jurisprudence such as *Dunsmuir*. The well-known administrative law requirement that a tribunal's reasons should demonstrate that a decision is transparent, intelligible and justified remains alive and well: *Vavilov* at para 15.

A. *Not a Family Member*

[35] In the original application seeking permanent residence for his entire family, Yonas stated that he had not legally adopted Esey or Diamond. In light of that fact, the Officer reasonably found that Esey does not fall within the definition of a family member.

B. *Guardianship*

[36] In a closely related finding, the Officer next stated that there is “no legal document that confers the role of guardian on HoF/SPR”. However, the Certified Tribunal Record (CTR) contains a copy of the Eritrean Court Order confirming that Yonas, as legal guardian granted his wife, Zufan, legal guardianship while he was travelling outside of Eritrea.

[37] The certified translation of what appears to be a court Order is a legal document. It includes a statement that Yonas is the father and guardian of all the minor children. While it was open to the Officer to critique or take issue with the Order, it was not reasonable to say there was no legal document that “confers” guardianship on Yonas without addressing the Order which, on the face of it, confirms an already existing state of guardianship.

[38] There is an entry in the GCMS notes made by AK05029 on August 27, 2014. It notes that the travel visa application by Yonas declared the two nephews but did not say at that time that they were adopted. Immediately below that reference is a note by AN05036 made on May 23, 2014 in connection with a review of the Nairobi General Application. It is an interesting notation:

2 guardianship documents from The State of Eritrea 3rd Court Central Zone submitted for [Diamond and Esey]. English translations submitted of the guardianship documentation. Guardianship doc dated 05/08/2004 for Diamond [balance omitted as not relevant to Esey]. Guardianship doc dated 05/010/2005 for Esey states that his parents were living in Asmara until August 2001 but have no means of contacting them for the past 4 years & he has been living with the HOF & now needs a legal guardian & HOF nominated to be the legal guardian. As per copies of birth certs for Diamond & Esey on file, appears that their mothers

Nazriet Fessehazion & Senait Fessehazion are the sisters of the HOF (they appear on old photos on file together with the children & PA).

[39] The entry goes on to conclude that it appears from the guardianship documents and information on the file that the parents are still alive; the children have not been adopted and are not the biological children of the HoF. It was for that reason that Diamond & Esey were found not to be dependents and were removed from the application.

[40] Unfortunately, the documentation referred to above is not in the CTR. Only the GCMS note is before the Court. Neither of the two guardianship documents are in the CTR, nor are the copies of the birth certificates or the photos showing the two children, their mothers and Yonas together.

[41] On the face of it, the conclusion in this note that the parents must be alive is puzzling. Once the parents left Asmara in August 2001, it states that there was no means of contacting them. The guardianship order for Esey was made in 2005. It would appear that officer AK05029 concluded that as Yonas was nominated to be the legal guardian, the parents must have made the nomination. That does not necessarily follow in law; nor is it clear from the note whether that was the officer's reasoning.

[42] At the very least, the notation contradicts two important findings by the Officer who made the Decision.

[43] One such finding was that “there is no objective evidence of a connection to the HoF/SPR”. The birth certificates and photos of the mothers with Yonas and the children are objective evidence to the contrary.

[44] The second finding was that “there is no legal doc that confers the role of guardian on HoF/SPR”. It appears that there were two such legal documents, one for each child. In addition, there was the recital in the Eritrean Court Order where Yonas appointed Zufan to be the guardian of the children in his absence.

[45] The Officer erred when they failed to acknowledge and reconcile the evidence in the GCMS notes that contradicted the reasons given for the Decision.

VIII. **Conclusion**

[46] Once the Officer determined that Yonas was not a legal guardian, that led to the conclusion that Esey did not meet the definition of a dependent child.

[47] It is not necessary to delve deeply into the other issues raised by the Applicants. The Officer noted that there was a “request for H&C” but did not acknowledge or address the evidence submitted in support of the numerous H & C factors put forward as grounds to grant the application. The Officer did not accept the letters that were submitted as evidence. They were dismissed as being “statements” with no documentary proof. There is also no analysis of the best interests of Esey who was locked in as a minor.

[48] Given the lack of analysis of the evidence, the case really turns on the finding that Yonas was not a legal guardian. As discussed, that finding is on extremely shaky ground. The failure of the Officer to reconcile the conflicting statements in the GCMS notes on this critical fact renders the Decision unintelligible and unreasonable. When that is coupled with the fact that the documents are not before the Court for review it is not possible to determine whether the Officer would have arrived at a different conclusion on the H&C grounds had they accessed the documents referred to in the GCMS notes and taken them into consideration.

[49] For all the foregoing reasons, the application is granted and the Decision is set aside to be returned for redetermination. Neither party raised a serious question for certification.

JUDGMENT in IMM-791-18

THIS COURT’S JUDGMENT is that:

1. The application is granted.
2. The Decision is set aside and returned for redetermination by a different visa officer.
3. There is no serious question of general importance for certification.
4. No costs.

“E. Susan Elliott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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