Federal Court  Cour fédérale

Date: 20200123

Docket: IMM-2071-19

Citation: 2020 FC 114

Ottawa, Ontario, January 23, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

NEGASI ELIAS ZEWELDI,
AZIEB BIDEMARIAM HABTE,
YUEL NEGASI ELIAS AND
NATNAEL NEGASI ELIAS
(BY THEIR LITIGATION GUARDIAN
NEGASI ELIAS ZEWELDI)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of a Migration Officer [Officer], dated

February 7, 2019 [Decision], rejecting the Applicants' application for permanent resident visas in Canada as members of the Convention Refugee Abroad Class or as members of the Humanitarian-Protected Persons Abroad Class.

II. BACKGROUND

[2] The Applicants are citizens of Eritrea currently residing in Sudan. They submitted an application for permanent residence in Canada as refugees privately sponsored by a group of five individuals in Canada. The Applicants claim, for various reasons, that they face a risk of persecution from the Eritrean government.

[3] Mr. Zeweldi is an Eritrean Orthodox Priest. The Applicants submit that Mr. Zeweldi fled to Sudan in 2009 with the help of a smuggler after being interrogated and imprisoned for a month for delivering "agitating" sermons about injustice. Mr. Zeweldi was recognized as a refugee in Sudan and was given a United Nations High Commissioner for Refugees [UNHCR] card, which had expired at the time of the Decision. Mr. Zeweldi was joined in Sudan by Ms. Habte and their two children in 2016 who claim to have left Eritrea with the help of smugglers to escape harassment by the Eritrean authorities and to avoid their sons' upcoming mandatory military service. The Applicants also fear they will be harmed and imprisoned should they return to Eritrea for having left the country illegally.

[4] The Applicants submitted their application on August 28, 2017. In November 2017, their private sponsorship group was approved. In their application, the Applicants noted in Schedule A that Mr. Zeweldi had made at least one previous Canadian claim for refugee protection in the

past and that he travelled to Addis Ababa, Ethiopia, for three months in 2015 to apply for a Canadian visa. In Schedule 2, the Applicants noted that Mr. Zeweldi had also applied for resettlement under Canada's Refugee and Humanitarian Resettlement Program in September 2015 and that his sponsors had since changed.

[5] However, the Applicants checked "No" in Schedule A when asked if Mr. Zeweldi had "been refused refugee status, an immigrant or permanent resident visa […] or visitor or temporary resident visa, to Canada or any other country."

[6] On September 26, 2018, the Officer noted that, upon reviewing the Applicants' file, an interview would be required because Mr. Zeweldi:

> Had no problem going to Addis Ababa [to] apply for a visa in 2015. Stayed in Addis for three months. Moreover [it] seems [he] had no problem at all returning to Sudan where he says he is recognized as a refugee. Did not declare his TRV refusal of 2015.

[7] On January 23, 2019, the Officer conducted an interview with Mr. Zeweldi and Ms. Habte in Khartoum, Sudan, with the help of an English/Tigrinya interpreter. After informing the Applicants of the purpose and process of the interview and reviewing the documents brought by the Applicants, the Officer began asking questions concerning their eligibility. This line of questioning focused primarily on Mr. Zeweldi's travels to Addis Ababa to apply for a Canadian visa in 2015, as well as his ability to obtain an Eritrean passport while in Sudan in 2013.

[8] First, the Officer's notes indicate that she asked Mr. Zeweldi whether he had ever returned to Eritrea or Ethiopia. Mr. Zeweldi answered "no." When confronted by the Officer that

he did indeed go to Addis Ababa to apply for a temporary resident visa at the Canadian embassy, Mr. Zeweldi stated that he had not understood the question. He confirmed that he travelled to Addis Ababa in 2015 as he had been invited to preach in Canada by a church. The Officer's notes state that she confirmed with the interpreter that the question had been accurately translated to Mr. Zeweldi. Then, she continued to press Mr. Zeweldi on why he "lied" and why he did not declare the refusal of his 2015 visa request in his application. Mr. Zeweldi maintained that it was a misunderstanding.

[9] The Officer's notes indicate that Mr. Zeweldi answered that he had obtained a valid Eritrean passport in 2013, which expired in 2018. The Officer's notes indicate that Mr. Zeweldi stated that he obtained the passport from the Eritrean authorities in Sudan and that he did not pay someone to help him obtain it. Mr. Zeweldi indicated that he had the passport at home and would provide it to the Officer the following day.

[10] The following day, Mr. Zeweldi returned and said that he was mistaken and that the passport was no longer in his possession. The Officer's notes indicate that Mr. Zeweldi "apologize[d] for lying about the visa refusal and going to A[d]dis" to which the Officer replied that it was too late and that she no longer believed his story.

[11] On February 7, 2019, the Applicants received a letter advising them that their application for permanent residency was rejected.

III. DECISION UNDER REVIEW

[12] The Officer rejected the Applicants' application for permanent residency because she was not satisfied that they met the requirements of the *IRPA* and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]. In particular, the Officer found that Mr. Zeweldi did not meet the definition of a Convention refugee because he was not credible. The Officer based this credibility finding on Mr. Zeweldi's denial of his visit to Ethiopia in 2015 and his procurement of an Eritrean passport in 2013, as well as his own confession that he had lied.

[13] The Officer noted that Mr. Zeweldi denied any subsequent travel following his arrival in Sudan in 2009 but then later admitted, once confronted, that he had travelled to Ethiopia in 2015 to submit an application for a Canadian temporary resident visa. The Officer noted that it is improbable that Mr. Zeweldi misunderstood the question as it was asked and repeated to him at least three times.

[14] The Officer noted that it was also unlikely that the Eritrean authorities would have issued Mr. Zeweldi with a passport if he had left the country illegally while being sought by security forces. The Officer concluded that Mr. Zeweldi was likely in possession of a valid travel document that allowed him to travel freely to neighbouring countries.

[15] Given these credibility concerns, the Officer found that she could not assess whether the Applicants were inadmissible or whether they met the applicable legal requirements as per s 11(1) of the *IRPA*.

[16] The Officer noted that, as a result of these credibility issues, she was not sure what to believe of the Applicants' story, but for the fact that Mr. Zeweldi is Christian and cannot preach in Eritrea. Moreover, in addition to the concerns listed above, the Officer noted that Mr. Zeweldi had first applied for permanent residency in 2012. However, the application was cancelled as the financial requirements were not met or information was not provided by his sponsors. The Officer also noted that Mr. Zeweldi had applied again in 2016, but his application was refused as his sponsors did not demonstrate, on a balance of probabilities, that they met the financial requirements.

IV. ISSUES

[17] The issues raised in the present application are the following:

1. Did the Officer breach the Applicants' right to procedural fairness?
2. Did the Officer err in her credibility assessment?
3. Did the Officer err by failing to assess the Applicants' claim of persecution?

V. STANDARD OF REVIEW

[18] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under

reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was not necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standards of review in this case nor my conclusions.

[19] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[20] The Applicants submitted that the standard of review applicable to the issue of procedural fairness was correctness, while the standard of review applicable to the Officer's assessment of the Applicants' credibility and claim of persecution was reasonableness. The Respondent submitted that the issues in this case should be reviewed according to the standard of reasonableness as there is no procedural fairness issue at play in this case.

[21] Some courts have held that the standard of review for an allegation of procedural unfairness is "correctness" (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]). The Supreme Court of Canada's decision in *Vavilov* does not address the standard of review applicable to issues of procedural fairness (*Vavilov*, at para 23). However, a more doctrinally sound approach is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated that the issue of procedural fairness:

> requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation (*Moreau-Bérubé*, para 74).

[22] As for the standard of review applicable to the Officer's credibility findings as well as this Court's review of the Officer's assessment of the Applicants' persecution claim, there is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See *Alkhairat v Canada (Citizenship and Immigration)*, 2017 FC 285 at para 8 concerning the review of the Officer's credibility finding, and *Sadeq Samandar v Canada (Citizenship and Immigration)*, 2019 FC 1117 at para 14 [*Sadeq Samandar*] concerning the review of the Officer's assessment of the persecution claim.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "bears the hallmarks of reasonableness — justification, transparency

and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Khosa*, above, at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[24] The following provisions of the *IRPA* are relevant to this application for judicial review:

Application before entering Canada	**Visa et documents**
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.	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.

Sponsorship of foreign nationals

13 (1) A Canadian citizen or permanent resident, or a group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province or an unincorporated organization or association under federal or provincial law — or any combination of them — may sponsor a foreign national, subject to the regulations.

Parrainage de l’étranger

13 (1) Tout citoyen canadien, résident permanent ou groupe de citoyens canadiens ou de résidents permanents ou toute personne morale ou association de régime fédéral ou provincial — ou tout groupe de telles de ces personnes ou associations — peut, sous réserve des règlements, parrainer un étranger.

Convention refugee

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

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

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

Définition de réfugié

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

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

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

[25] The following provisions of the *Regulations* are relevant to this application for judicial review:

General requirements	**Exigences générales**
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	139 (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis :
…	…
(e) the foreign national is a member of one of the classes prescribed by this Division;	e) il fait partie d'une catégorie établie dans la présente section;
Convention refugees abroad class	**Catégorie**
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.	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.
Member of Convention refugees abroad class	**Qualité**
145 A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.	145 Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

Person in similar circumstances to those of a Convention refugee

146 (1) For the purposes of subsection 12(3) of the Act, a person in similar circumstances to those of a Convention refugee is a member of the country of asylum class.

Personne dans une situation semblable à celle d'un réfugié au sens de la Convention

146 (1) Pour l'application du paragraphe 12(3) de la Loi, la personne dans une situation semblable à celle d'un réfugié au sens de la Convention appartient à la catégorie de personnes de pays d'accueil.

Humanitarian-protected persons abroad

146 (2) The country of asylum class is prescribed as a humanitarian-protected persons abroad class of persons who may be issued permanent resident visas on the basis of the requirements of this Division.

Personnes protégées à titre humanitaire outre-frontières

146 (2) La catégorie de personnes de pays d'accueil est une catégorie réglementaire de personnes protégées à titre humanitaire outre-frontières qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

Member of country of asylum class

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

Catégorie de personnes de pays d'accueil

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

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

(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.

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.

VII. ARGUMENTS

A. *Applicants*

[26] The Applicants argue that the Officer: (1) breached their right to procedural fairness by failing to advise them of her specific concerns and by providing inadequate reasons for her Decision; (2) based her credibility findings on a misconstrued understanding of the evidence; and (3) ignored the Applicants' claim of persecution and the country conditions in Eritrea. For these reasons, the Applicants ask this Court to allow this application for judicial review, quash the Decision, remit the application back to a different decision-maker, and award costs to the Applicants given the important errors in this case.

(1) Procedural Fairness

[27] The Applicants argue that the Officer breached their right to procedural fairness by failing to put her specific concerns to the Applicants and by failing to provide adequate reasons capable of demonstrating how the Officer reached her Decision.

[28] First, the Applicants submit that the Officer failed to advise the Applicants as to why she believed Mr. Zeweldi's travel to Ethiopia or possession of valid travel documents negatively affected their claim. The Applicants submit that the Officer breached their right to procedural fairness by failing to indicate what was deficient in the Applicants' application and by not providing an adequate opportunity to respond to these perceived deficiencies.

[29] Second, the Applicants state that the Officer's reasons breached their right to procedural fairness as they do not provide an adequate explanation as to how the Officer reached her Decision. The Applicants argue that the Officer's reasons provide no valid grounds for refusing the application. Instead, the reasons consist of a summary of the facts and a statement of a conclusion without any analysis (see *Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565 at paras 20-22).

(2) Credibility Assessment

[30] The Applicants submit that the Officer unreasonably assessed their credibility by misapprehending the information in their application and by taking a "belligerent" approach to the interview process.

[31] First, the Applicants argue that the Officer misapprehended the evidence submitted in their application, as she found that the Applicants had misrepresented information which they clearly disclosed in their application. In fact, the Applicants submit that they explicitly noted that Mr. Zeweldi travelled to Addis Ababa in September for three months, that he applied for a Canadian visa while in Addis Ababa, and that he had previously submitted a Canadian refugee protection claim. The Applicants note that this directly contradicts the Officer's notes and supports the finding that Mr. Zeweldi simply misunderstood the question translated to him by the interpreter. It is unreasonable to conclude that Mr. Zeweldi would have attempted to lie about information he had disclosed in his application. The Applicants argue that this error is determinative as this Court found in *Toth v Canada (Minister of Citizenship & Immigration)*, 2002 FCT 1133 that:

> [25] It is well settled that if a panel makes a finding of fact having misconstrued or ignored relevant evidence before it and relies on those findings when making an adverse determination as to credibility, the decision is unreasonable and warrants intervention […]

[32] Second, the Applicants argue that the Officer "belligerently" interrogated Mr. Zeweldi about the peripheral issue as to whether he travelled to Ethiopia. Not only do the Applicants submit that this is irrelevant to their underlying refugee claim based on their fear of the Eritrean government, they also say that the Officer's hostile accusatory approach led her to unreasonably assess the Applicants' credibility.

(3) Claim of Persecution

[33] The Applicants argue that the Officer unreasonably assessed their claim of persecution by: (1) ignoring the fact that Mr. Zeweldi had already been found to be a Convention refugee in the past; (2) failing to consider all relevant persecution grounds in light of the country conditions; (3) failing to consider the individual claims of each family member; and (4) failing to consider the Country of Asylum Class claim.

[34] First, the Applicants argue that the Officer failed to properly consider the fact that Mr. Zeweldi had been formally recognized as a refugee by the Sudanese authorities. Though the Applicants admit that this fact was acknowledged briefly by the Officer, they argue that it was not given any consideration. They argue that this error is sufficient to overturn the Decision (see *Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at para 6 [*Ghirmatsion*]).

[35] Second, the Applicants submit that there is little discussion by the Officer of the Applicants' circumstances in Eritrea despite the ample documentary evidence citing numerous ongoing human rights concerns in that country. The Applicants submit that the Officer was obligated to consider all of the claimed grounds (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1 at para 80) as well as show sufficient knowledge of the country conditions (*Saifee v Canada (Citizenship and Immigration)*, 2010 FC 589 at paras 30-32 [*Saifee*]). The Applicants note that the Officer's failure to analyze the totality of the grounds in their claim, in light of the ongoing country conditions, constitutes a reviewable error as per this Court's decision in *Ghirmatsion*, at para 69.

[36] Third, the Applicants claim that the Officer erred in failing to fully consider the persecution claims of Ms. Habte and their two sons and by choosing, instead, to focus almost exclusively on Mr. Zeweldi.

[37] Fourth, the Applicants argue that the Officer failed to consider their Country of Asylum Class claim. The Applicants note that the Officer did not include any analysis in her notes nor in her Decision regarding whether the Applicants qualify as members of the Country of Asylum Class despite the available evidence concerning the situation in Eritrea. Therefore, the Applicants argue that this renders the Decision unreasonable (see *Ghirmatsion*, at para 63 and *Saifee*, at paras 38-40).

B. *Respondent*

[38] The Respondent argues that the Officer: (1) did not breach the Applicants' right to procedural fairness as she put her concerns directly to the Applicants during the interview and provided adequate reasons for her Decision; (2) reasonably assessed the Applicants' credibility given the numerous inconsistencies and implausibilities in Mr. Zeweldi's answers; and (3) was not required to consider the Applicants' persecution claim as her credibility finding was determinative. For these reasons, the Respondent submits that this judicial review should be dismissed and that, in any case, no special costs are warranted given the lack of delays or misconduct in this case.

(1) Procedural Fairness

[39] The Respondent argues that there was no breach of procedural fairness in this case as the Officer's concerns were directly put to the Applicants during the interview and the Officer's reasons clearly outline why the application was refused and what factors led to the conclusion reached.

[40] First, the Respondent submits that the Applicants were clearly advised of the Officer's credibility concerns as she directly put those concerns to the Applicants during the interview and canvassed responses concerning Mr. Zeweldi's trip to Ethiopia, his 2015 visa application, and how he obtained his passport. There was no need for the Officer to offer the Applicants an additional opportunity to respond to these concerns. Moreover, the Respondent notes that the

Applicants were given the opportunity to provide Mr. Zeweldi's passport the following day in order to disabuse the Officer of her concerns.

[41] Second, the Respondent notes that the Officer's reasons were adequate as the refusal letter along with her notes indicate that she considered the demeanour of the Applicants during the interview, as well as their answers and the evidence provided. The Respondent submits that, after considering all of these elements, the reasons go on to clearly outline why the application was refused and what factors led to the conclusions reached. Nothing more was required.

(2) Credibility Assessment

[42] The Respondent says that the Officer's assessment of the Applicants' credibility was reasonable as the issue in this case was not whether Mr. Zeweldi's story was inconsistent with the evidence submitted but, rather, his lack of forthcomingness, evasiveness, and the implausibility of his answers. Given Mr. Zeweldi's answers and behaviour during the interview, the Respondent submits that it was open for the Officer to find that he lacked credibility.

[43] The Applicants' inconsistencies during the interview are not simply cured by the fact that they included certain information in their application. This lack of forthcomingness and evasiveness during the interview is sufficient to ground the Officer's negative credibility finding. Indeed, the Respondent notes that Mr. Zeweldi even apologized the following day for having lied and the Applicants indicated in their application that Mr. Zeweldi had not "been refused refugee status, an immigrant or permanent resident visa […] or visitor or temporary resident visa, to Canada or any other country."

[44] Moreover, the Respondent argues that the Officer did not show undue eagerness in finding contradictions, but rather attempted to obtain a response to her questions in order to alleviate her growing credibility concerns.

(3) Claim of Persecution

[45] The Respondent argues that the Officer was not required to move forward with an assessment of the Applicants' claim of persecution since her credibility finding was determinative and the Officer did not ignore Mr. Zeweldi's UNHRC status.

[46] First, the Respondent points out that the Applicants fail to recognize that credibility findings can be determinative. This Court has found that an officer has no obligation to assess the remainder of an application after concluding that an applicant just cannot be believed (see *Sadeq Samandar* at paras 22-24). In this case, the Respondent notes that the Officer was unable to establish whether the Applicants were not inadmissible pursuant to s 11(1) of the *IRPA* due to this lack of credibility. As such, the Officer could not proceed with the application (*Ramalingam v Canada (Citizenship and Immigration)*, 2011 FC 278 at paras 36-37).

[47] Second, the Respondent acknowledges that this Court has found that a failure to reference the UNHCR status of an applicant is an error in certain cases. However, the Respondent notes that the Officer explicitly recognized that Mr. Zeweldi had an expired UNHCR card. In this case, the Officer simply found that the Applicants had failed to credibly establish the facts upon which their application was based.

VIII. ANALYSIS

A. *Evidentiary Matters*

[48] Mr. Zeweldi's affidavit filed with this application contains some information and explanations that were not before the Officer. The Applicants cannot supplement the record in this way.

[49] Relying upon the guidance provided by Justice Stratas in *Bernard v Canada (Revenue Agency)*, [2015] FCJ 1396, the Applicants acknowledge the general rule that they cannot now enter evidence that was not before the Officer, but argue that they qualify for all 3 exceptions set out in that case, namely:

a) Background information and summaries aimed at assisting the Court to understand the record before it;

b) Information that is useful because the Decision is unreasonable in that it rests upon a key finding of fact unsupported by any evidence at all; and

c) Evidence relevant to an issue of natural justice or procedural fairness.

[50] The Applicants asserts as follows:

> 14. One of the essential issues in this matter is whether Negasi was lying - as the officer concluded - or whether there was a misunderstanding. We submit that the evidence outlined in Negasi's affidavit meets all three of the exceptions noted by the Court in *Bernard*. It provides a helpful explanation for the Court to understand the record before it, explains why the officer's

> conclusions were unreasonable, and provides evidence related to the issue of procedural fairness.
>
> 15. We also submit that in cases like this, the Applicant's affidavit provides an opportunity to address issues raised in the GCMS Notes which are written by the visa officer from his/her perspective. The only way to address what is a subjective rendering of the interview and the issues articulated by the visa officer is by way of an affidavit from the Applicant. There is no independent account of the proceedings to assess what actually was said or discussed. Negasi's affidavit is the first opportunity to provide a response to the officer's written account (i.e. notes) of the interview.
>
> 16. The Applicants also submit that the underlying issues related to the affidavit evidence raise a further serious issue that warrants consideration, and is another reason why leave should be granted.

[51] The Applicants' clearly do not understand the narrow scope of the exceptions. The Court needs no assistance in understanding the record before it, and the Decision – which consists of both the Refusal Letter and the Global Case Management System [GCMS] notes – is clear, complete and speaks for itself. The Court has a precise record of the procedure followed at the interview with the Officer as well as what was said by both sides, and why the Officer found Mr. Zeweldi to be generally lacking in credibility to such an extent that there was no point in proceeding any further with the application. The Applicants do not explain how the Decision is incomplete or inaccurate with regards to what transpired at the meeting. The notes were made by the Officer contemporaneously at the meeting and the Officer has no reason to lie.

[52] For example, as regards the apology Mr. Zeweldi gave the Officer for lying on the previous day, the Applicants now argue:

> He may have offered "an apology for lying" upon his return to the visa office (as noted by the Respondent: Resp. Memo, para. 19), but in fact it was simply a plausible explanation. He had not been

> intentionally lying, because he had genuinely believed that his passport was at home.

[53] In his affidavit for this application, Mr. Zeweldi says what happened when he returned without the passport he had claimed was at home:

> When I went back to see the visa officer the next day after our interview, I told her that I could not find it. If I knew that it was lost, I would have told the officer at the interview.

[54] So, even on his own evidence, all he told the Officer was that he couldn't find the passport. The Officer's notes, however, record precisely what he said:

> … Notes added the next day: PA came to see me without the passport. He says he was mistaken thinking it was at home that he no longer has it and does not know where it is. I mention that twice yesterday he told me the passport was at home? He responds by saying he wants to apologize for lying about the visa refusal and going to Adis. I tell him that it is too late now. I don't believe his story. He is not credible. I don't know what to believe of his story besides the fact he is a Christian and says he cannot preach in Eritrea. Besides, PA had two other sponsorships in the past. One was in 2012 for PA only. Private sponsorship. Financial requirements not met or information not provided by sponsors so file cancelled. Second sponsorship submitted in 2016 by same group of 5 refused as they did not, on a balance of probability, meet financial requirements as all of them were involved in several G5 and SAH sponsorships. Now all members of group of 5 seem to be new acquaintances. All except one are Ethiopians. PA did not declare these two sponsorships in the past. Even though applications never took off, files were created by ROCO and applicant must have known he was being sponsored. Refused. Not credible…

[55] So clearly, when Mr. Zeweldi says in his affidavit "If I knew that it was lost, I would have told the [O]fficer at the interview" he is not recounting any explanation he provided to the Officer. He is simply attempting to persuade the Court to give him the benefit of the doubt. But

this is not the role of the Court. Reasonableness and procedural fairness are assessed on the basis of evidence and explanations that were before the Officer when she made the Decision, not explanations offered to the Court long after the interview took place and for which there is no reliable contemporaneous record.

[56] Tellingly though, in the same affidavit, Mr. Zeweldi says he had no reason to lie and that, as a priest, he would not lie because "It is against my moral and religious principles." However, Mr. Zeweldi does not question the Officer's evidence that he apologized to her for lying. So the only evidence before me is that he apologized for lying. It makes no sense that a man who does not lie for moral and religious reasons would apologize for lying.

[57] In this application, I have disregarded Mr. Zeweldi's affidavit in so far as it attempts to introduce evidence and explanations that were not before the Officer. I have also disregarded Mr. Zeweldi's attempts to introduce argument in his affidavit.

B. *The Issue*

[58] The Applicants say that "One of the essential issues in this matter is whether Negasi was lying – as the officer concluded – as whether there was a misunderstanding."

[59] This is, in fact, the primary issue before me. However, notwithstanding that the Applicants say it is an "essential issue," they also say that the "Officer's credibility finding is arguably a red herring" because it was based upon "irrelevant and peripheral considerations":

> Secondly, we submit in reply that the officer's assessment regarding travel to Ethiopia was in fact focused on irrelevant and peripheral considerations. Whether he had traveled to Ethiopia was irrelevant to his underlying refugee claim against Eritrea.

[60] The Applicants appear to be saying that Mr. Zeweldi's overall credibility (*i.e.* whether he can be believed or not) is irrelevant to their refugee claims. They do not explain how an officer can assess a refugee claim when Mr. Zeweldi cannot be believed. Overall credibility is, in fact, a pre-requisite for any refugee claim and if the officer reasonably concludes that a claimant cannot be believed, then there is no basis for the claim.

[61] In the present case, Mr. Zeweldi not only lied during the interview without explanation, he also apologized the next day for having lied at the interview, and as the GCMS notes show there were other inconsistencies with prior sponsorships.

[62] In his submissions for the present application, Mr. Zeweldi says that the Decision was unreasonable because the Officer ignored the information he had included in the visa application documents, as well as what he told the Officer at the interview.

[63] As regards to the interview, Mr. Zeweldi's affidavit says:

> During the interview, I mentioned that there was some misunderstanding about the officer's question about going to Ethiopia. This is indicated in the officer's notes. I thought the question was whether I had recently come from Ethiopia. That is why I said "No". I believe it must have been some issue with the interpreter, because I had indicated in our application forms that I had gone to Ethiopia in 2015 (Schedule A). I was not trying to hide this information. In fact I had included it in our application. I would not lie about this information, because the visa office would know I had gone to Addis to apply for a visa. I could not lie about

> this when I actually went to the Canadian Embassy in Addis. All this information was available to the immigration officer.

[64] Even if this evidence were accepted as part of the present application, it does not explain crucial factors.

[65] The Officer did not refuse the application at or after the interview. In fact, the notes make it clear that the Officer was willing to give Mr. Zeweldi the benefit of the doubt. She says that "I am not really sure that this makes sense" and she asks Mr. Zeweldi to provide his original passport. Mr. Zeweldi told her that this would not be a problem. So, had Mr. Zeweldi provided the passport, the stamps of entries and exits might well have clarified the situation.

[66] Mr. Zeweldi told the Officer that there would be no problem in providing the passport, but when he returned the next day, he said two conclusive things that forced the Officer to make a decision about his credibility:

a) After telling the Officer on the previous day that the passport was at home he said that he no longer had the passport and did not know where it was;

b) When he is reminded by the Officer that he had told her the passport was at home, he did not explain why he had said it was, or why he thought it was, when it wasn't. He responded by saying that he wanted to apologize for lying about the visa refusal and going to Addis Ababa.

[67] It is only at this point – not at the interview on the previous day – that the Officer finds she cannot believe his story because he is not a credible person.

[68] Mr. Zeweldi now also argues that:

a) He had indicated in his visa application that he had gone to Addis Ababa for 3 months in late 2014;

b) He had also indicated in his forms that he had previously applied for a visa which had been refused;

c) He had also noted that he had previously applied for refugee sponsorship.

[69] Pointing this out to the Court now, does not assist the Applicants. It does not explain why Mr. Zeweldi told the Officer that he had lied. If there was no reason to lie because the documents told another story, then there was no need to tell the Officer that he had lied. Even with the documentation, the Officer – with no explanation as to why he had lied – had little choice but to find he was not credible. The issue is not whether Mr. Zeweldi went to Ethiopia or not, or whether he had made a previous visa application, and a refugee sponsorship. The issue is “How could the Officer depend upon anything the Applicant said, or said he had done, when he confessed he lied and provided no explanation to the Officer as to why he lied?” The Applicants have not addressed this issue in their submissions.

[70] That Mr. Zeweldi lied directly to the Officer, as recorded in the GCMS notes, cannot be diluted by the fact that he did mention his previous applications in Schedule "A" of his application (but not his full immigration history) and also listed his travel outside of Sudan.

[71] The GCMS notes are clear that the Officer was willing to give Mr. Zeweldi the benefit of the doubt at the end of the interview:

> … I am not really sure that this makes sense. Lots of people cross the border without smugglers. I ask applicant if he is willing to submit his original passport. He can come and show me tomorrow. I do not mention that to him but I would like to see where it was issued, if he has stamps of entries and exits. **PA responds that it is not a problem, passport is at home and he will bring it tomorrow**. I think that if he has no entry stamps in Ethiopia and Eritrea but the one in 2015, it might be in his favor…
>
> [Emphasis added.]

[72] What tips the balance is the following:

> … Notes added the next day: PA came to see me without the passport. He says he was mistaken thinking it was at home that he no longer has it and does not know where it is. I mention that twice yesterday he told me the passport was at home? He responds by saying he wants to apologize for lying about the visa refusal and going to Adis. I tell him that it is too late now. I don't believe his story. He is not credible. I don't know what to believe of his story besides the fact he is a Christian and says he cannot preach in Eritrea…

[73] So, on the evidence before me, Mr. Zeweldi lied. He confessed he had lied and apologized. He offered no explanation for lying, or for why he cannot produce the passport he said would be no problem and the Officer concludes that she just cannot believe his story: "He is not credible." The issue for the Court is whether this was a reasonable conclusion.

[74] The Officer's conclusion that Mr. Zeweldi was not credible was based upon her first-hand impressions of his responses to questions asked during the interview. The Court was not there to witness this and so must show considerable deference to the Officer's Decision (see *Kabran v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 115 at para 42).

[75] There may be all kinds of reasons and explanations for what the Applicant did at the interview, but he placed none of them before the Officer, and he cannot place them before me now and ask the Court to make the decision. Given that Mr. Zeweldi himself told the Officer that he had lied and offered no explanation for having done so, I cannot say that the Officer's conclusions on his credibility were unreasonable. This is indeed a strange case, and it is by no means clear to me what caused Mr. Zeweldi to act and speak as he did. However, the issue is what he said and did before the Officer and whether her conclusions based upon that evidence were reasonable. Based upon the record before the Officer, I cannot say they were not.

[76] The Officer's approach was also in accord with the CIC Policy Manual OP5, s 3.2. Mr. Zeweldi was given the benefit of the doubt and the Officer looked for ways to explain the discrepancies. There is nothing microscopic about Mr. Zeweldi's confession that he had lied and his failure to explain why. And the lack of counsel does not explain why Mr. Zeweldi lied. He did not say he had made a mistake. He said he had lied.

[77] The Applicants have not addressed this central aspect of the Decision. Instead, they ask the Court to consider a range of oblique or peripheral matters that do not impact the reasonableness of the Officer's conclusion on their general credibility.

[78] The Applicants say that the Officer ignored the fact that Mr. Zeweldi had been declared a Convention refugee, she failed to consider all relevant grounds and the individual claims of each family member, ignored the evidence of persecution in Eritrea, and failed to consider both the Convention Refugee Class and the Country of Asylum Class.

[79] The Officer shows that she is fully aware of Mr. Zeweldi's refugee status: "wife does not have UNHCR card but PA does but no longer valid. Expired in 2013." Notwithstanding that Mr. Zeweldi had UNHCR status, this does not relieve the Officer of her obligation to assess the Applicants' claims in accordance with Canadian jurisprudence and it does not resolve the credibility issues that are the basis of this Decision. As Justice Gagné pointed out in *Gebrewldi v Canada (Citizenship and Immigration)*, 2017 FC 621 at para 28:

> As for the applicants' UNHCR status, this Court has noted that UNHCR status is not determinative and, rather, that the officer is under a duty to conduct his or her own assessment of an applicant's eligibility for refugee status in accordance with Canadian law (*B231 v Canada (Citizenship and Immigration)*, 2013 FC 1218 at para 58; *Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at para 57; *Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 at para 27). The Operation Manual OP 5 "Resettlement from overseas" [Guidelines] states that visa officers should consider an applicant's UNHCR designation when considering their application for refugee status in Canada (*Pushparasa*, above at para 26; *Ghirmatsio*n, above at para 56). However, the "Guidelines are not law and they do not constitute a fixed or rigid code" (*Pushparasa*, above at para 27). Therefore, an applicant's UNHCR status is not determinative of an application for refugee status in Canada.

[80] What the Applicants are suggesting now is that, although Mr. Zeweldi told the Officer he had lied, without explanation, so that she reasonably found that he lacked credibility and she

could not believe his story, she was still obliged to assess their status and application for a permanent resident visa.

[81] The Applicants point to the CIC Manual OP5 Guidelines as a guide to what is reasonable and those Guidelines make it clear that there are four stages to determining eligibility, the first of which is "credibility." If an applicant is not credible, the officer cannot proceed to determine the future stages which are, first of all, "durable solution," eligibility, and then whether the applicant has the ability to establish himself or herself.

[82] As Justice Brown pointed out in *Sadeq Samandar* at paras 22-24:

> 22 The negative credibility finding calls into question the veracity of the totality of the Principal Applicant's answers. Therefore, there was no requirement to analyze the Applicants' assertions regarding their risk as Shia Hazara. This very point was dealt with by Justice Scott in *Ramalingam*, at paras 36 and 37:
>
> > [36] I find myself, on the whole, convinced by the Respondent's interpretation of section 11(1), as being more logical with regard to the language of the provision. After reading *Manigat*, I agree with the Respondent that there is no indication that the Court intended to limit its application to the narrow grounds described by the Applicant.
> >
> > [37] Based on the recent case of *Kumarasekaram, I find that the Applicant is incorrect in arguing tha*t there is no jurisprudence in support of rejecting an application on the basis of section 11(1). I am persuaded that an Officer can reject an application without a specific finding of inadmissibility, on the grounds that the failure of the Applicant to provide a complete picture of his background, that Officer cannot actually determine that the Applicant is "not inadmissible".
>
> 23 I agree with what my colleague Justice Southcott found in *Noori*, at para 22:

> [22] The Applicants are correct that the Officer did not analyse these assertions or assess whether they were supported by the country condition evidence. However, as analyzed above, the Officer was unable to be satisfied that the Principal Applicant was not inadmissible to Canada, because of concerns about the veracity of his testimony. As the Applicants have not been successful in challenging the reasonableness of that finding, it precludes the Applicants being eligible for Convention refugee status, and I cannot conclude that the Decision is unreasonable based on the Officer not having analysed the claimed risk of persecution due to the Applicants' ethnicity and religious beliefs.
>
> 24 Here, the Officer was unable to make a determination on inadmissibility. I am unable to accept the Applicants' submission that the Officer was required to go further and analyse the claimed risk of persecution due to the Applicants' ethnicity, religious beliefs and country conditions. The essence of the Applicants' claim is to read out of the decision-making process the visa officer's legislated duty under subsection 11(1) of *IRPA* to decide if he or she is "satisfied that the foreign national is not inadmissible." The Officer cannot be faulted for carrying out that analysis.

[83] And all of the Applicants in this case were depending upon the evidence of Mr. Zeweldi. There was no indication that they wished to be, or could have been, assessed separately given the basis for the application. In her claim form, Mr. Zeweldi's wife asserts that she and the children fled because her husband had left the country illegally in 2009 and the authorities threatened and mistreated her because they wanted him to come back. If Mr. Zeweldi cannot be believed, then the other Applicants lose the principal basis of any claim they might have.

[84] And there is no basis to the Applicants' assertions that the Officer breached procedural fairness and that the reasons are inadequate. The GCMS notes reveal how the Officer's concerns

were put to Mr. Zeweldi, that he was given the benefit of the doubt and an opportunity to redeem himself, and he did not avail himself of this opportunity but merely said he had lied without explanation.

[85] Nor do I see any evidence that the Officer was belligerent or inappropriately confrontational with Mr. Zeweldi. She puts her credibility concern to him firmly and looks for a clear explanation which he never gives, even after being given a break after the interview to retrieve his passport.

[86] The Applicants say that the contradictions in evidence over whether Mr. Zeweldi went to Ethiopia are irrelevant to the refugee claim and should not be the basis for an adverse credibility finding. Mr. Zeweldi's ability to travel outside Ethiopia is not irrelevant to the refugee claim and there are other factors that supported the adverse credibility finding such as why he had left Eritrea illegally and why he was able to obtain an Eritrea passport in 2013. Nor did he declare his visa refusal to go to Canada and provided no explanations. The GCMS notes reveal the following exchange at the interview:

> You misrepresented the fact that you were refused a visa and you lied to me about going to Addis. What am I supposed to believe; PA does not answer. I explain that his credibility is at play.

[87] My conclusion is that it is difficult to determine why Mr. Zeweldi did what he did in this case. The GCMS notes make it clear that the Officer took appropriate precautions to ensure that there were no problems with translation and that Mr. Zeweldi fully understood what he was being asked. Questions were repeated and there is nothing to explain why Mr. Zeweldi would apologize for lying if he had not done so. Notwithstanding the lack of a full explanation for his

actions, it cannot be said that the Officer acted in a procedurally unfair way or came to an unreasonable conclusion on general credibility that is the basis of the Decision. There may be an explanation for Mr. Zeweldi's behaviour but he did not provide it to the Officer.

[88] The Applicants ask for costs in this application but there are no special reasons why the Court should consider costs. The Respondent has proceeded reasonably and there were ample grounds upon which to defend the Decision. I see no special factors in this case that would justify an award of costs.

[89] Counsel agree there is no question for certification and I concur.

JUDGMENT IN IMM-2071-19

THIS COURT'S JUDGMENT is that

1. The application is dismissed;

2. There is no question for certification;

3. No order is made as to costs.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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