Federal Court  Cour fédérale

Date: 20110627

Dockets: IMM-6000-09
IMM-6005-09
IMM-6009-09
IMM-6010-09

Citation: 2011 FC 773

Ottawa, Ontario, June 27, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

HENOK AYNALEM GHIRMATSION

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-6005-09

TSEGEROMAN ZENAWI KIDANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN

Docket: IMM-6009-09

TSEGAY KIFLAY WELDESILASSIE
(A.K.A. TSEGAY FIKLAY WELDESILASSIE)

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

AND BETWEEN

Docket: IMM-6010-09

SELAM PETROS WOLDESELLASIE

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicants in each of *Ghirmatsion v Canada (Minister of Citizenship & Immigration)*, 2011 FC 519, [2011] FCJ No 650 (QL), *Kidane v Canada (Minister of Citizenship & Immigration)*, 2011 FC 520, [2011] FCJ No 651 (QL), *Weldesilassie v Canada (Minister of Citizenship & Immigration)*, 2011 FC 521, [2011] FCJ No 652 (QL) and *Woldesellasie v Canada (Minister of Citizenship & Immigration)*, 2011 FC 522, [2011] FCJ No 653 (QL) (together referred to as the "four lead cases") were successful in their applications for judicial review. In each case, the decision

of the same Visa Officer was overturned. Pursuant to the direction of this Court, the parties provided written representations as to costs.

[2] In their submissions (made jointly in respect of the four lead cases), the Applicants seek costs on a solicitor and client basis in the amount of $166,500 plus HST. The Respondent, the Minister of Citizenship and Immigration (the Minister), submits that no costs are warranted. Having reviewed those submissions, I am persuaded that, in the exceptional circumstances of the four lead cases and in my discretion, a total award of $24,000 is justified. My reasons follow.

[3] The authority to grant costs is set out in s. 400 of the *Federal Courts Rules,* SOR/98-106 [the *Rules*] and r. 22 of the *Federal Court Immigration and Refugee Protection Rules,* SOR/93-22 [the *Refugee Rules*]. Rule 22 of the *Refugee Rules* states that no costs shall be awarded on an application for leave or for judicial review unless the Court determines that there are special reasons. For the cases at bar, special reasons exist – specifically; the context of the four lead cases, the unnecessary prolongation of the proceedings and the nature of the errors in the decisions.

[4] The first – and most significant – special reason is the context of the four lead cases. These cases were representative of more than 40 cases that were held in abeyance pending the disposition of the judicial review applications in the four lead cases. I have recently been advised that the Minister has consented to judgment in all of the remaining cases. Without the need for further litigation, all remaining cases will be sent back for reconsideration. In the unusual circumstances, the careful selection and preparation of the four lead cases obviated the need for extensive

preparation and further litigation costs for both parties in respect of the remaining files. This context supports an award of costs.

[5] The second reason relates to how these cases unfolded before the Court. The Federal Court has held that "special reasons" may be found where a party has unnecessarily or unreasonably prolonged proceedings (*Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, 275 FTR 316 at para 26) or where it could be apparent from a review of the file that the officer's reasons for decision would not withstand judicial review and should be brought to a "rapid conclusion" (*Ndererehe v Canada (Minister of Citizenship and Immigration)*, 2007 FC 880, 317 FTR 23 at para 35). Both of these factors support an award of costs in these cases.

[6] For the four lead cases and the files no longer held in abeyance, there has been a lengthy timeline, dating back to November 4, 2009, when the Applicants, through the Executive Director of the Canadian Counsel for Refugees, brought "common issues" to the attention of senior officials at Citizenship and Immigration Canada (CIC) headquarters in Ottawa. This was several weeks before the proceedings for leave and judicial review of these files had commenced. I agree with the Applicants that, if the Minister had carefully investigated these complaints, in November 2009, this litigation may not have been necessary. This is compounded by the very nature of the Applicants' claims. The four representative Applicants and all of the remaining applicants are refugees in a dangerous foreign country without the resources to finance the judicial review of their claims in Canada. This should have been a consideration for the Minister in 2009. Obviously, the Minister does not have the obligation to investigate every issue that arrives on his desk; however, when a reputable organization brings to his attention a number of similar issues, arising from the same visa

post, common sense and fairness leads me to conclude that the Minister ought to have taken the complaint more seriously. It appears that this was not done, or not done in any satisfactory manner.

[7] The Applicants insist that the Minister had numerous opportunities to resolve these cases, as the problems with the Visa Officer's decision became more apparent. In response, the Minister's counsel asserts that the actions of the Applicants' counsel called for him "to vigorously protect his client's interests" and called for "an energetic and robust defence". I strongly agree. However, it is also in the Minister's interest to resolve litigation where there is a clear indication that an application for judicial review will succeed on its merits.

[8] The fact, as asserted by the Minister, that the Applicants sought "unwarranted and improper injunctive relief" was a secondary consideration that could likely have been dealt with either through negotiation or in a much-reduced judicial review.

[9] One particular event on the path to the hearings of the four lead cases stands out. The cross-examination of the Visa Officer on her affidavits was a watershed moment, at which point the magnitude and existence of some of the errors should have been apparent to the Minister.

[10] The Applicants also refer to the Visa Officer's lack of training and "blatant" mistakes, contrary to the understanding and skills expected of the professional visa officer. In such a situation, costs may be appropriate to encourage CIC to review, and perhaps modify, the training and practices of visa officers in overseas posts (see, for example, *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1154, 225 FTR 136 at para 34). In the four lead cases, the Visa

Officer's errors were very apparent on the face of the record. As noted above, this became strikingly obvious on cross-examination of the Visa Officer where her lack of adequate training and support became evident. This is a factor that favours an award of costs.

[11] The Court has held that costs may be warranted where a party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith (*Kargbo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 469, [2011] FCJ No 577 (QL) at paras 33-35). I agree with the Minister that there has been no behaviour that reaches that level. I am satisfied that these matters should have been addressed or resolved earlier and that the Visa Officer, in all four lead cases, should have been better trained or prepared for her post. However, there is no sign of unfair, oppressive or improper behaviour on the part of the Visa Officer, the Minister or the Minister's counsel.

[12] In the unusual circumstances of the four lead cases, for the reasons described above, there are "special reasons" to award costs that go above and beyond the normal circumstances of a judicial review. Accordingly, costs are warranted.

[13] As noted above, the Applicants seek costs on a solicitor and client basis. Such costs are only justified where there is evidence of "reprehensible, scandalous or outrageous conduct" on the part of the Respondent (see *Canada (Minister of Citizenship and Immigration) v Harkat*, 2008 FCA 179, [2008] FCJ No 761 (QL) at para 13). There is no evidence of such behaviour in the case at hand.

[14] In my view, a lump sum award of $5000 per file plus a total sum of $4000 for disbursements on all four files, for a total of $24,000, is reasonable and justifiable on the facts of these cases. This amount is inclusive of HST.

[15] Lastly, I wish to address the submission by the Applicants made by letter dated May 31, 2011. With this letter, the Applicants submitted a copy of a document entitled "*The PSR QA Project: Managing Quality Counts*" and requested that the Court take this report into account in the determination of costs. The Applicants assert that this report is evidence that, if the recommendations for assessing the problems identified in the report had been implemented, the within litigation would likely never have been necessary. I will not consider this report for two reasons: (1) it is not appropriate to consider the report filed after the completion of the judicial review and after the date for submissions on costs; and, (2) the report has been presented without any context to assess whether any of the recommendations have been implemented. Therefore, this report was not taken into consideration in the determination of costs.

ORDER

THIS COURT ORDERS that:

1. Costs in the amount of $6,000, inclusive of all disbursements and HST, are awarded to the Applicant in each of Court File Nos. IMM-6000-09, IMM-6005-09, IMM-6009-09 and IMM-6010-09, for a total of $24,000.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6000-09, IMM-6005-09 IMM-6009-09, IMM-6010-09
STYLE OF CAUSE:	HENOK AYNALEM GHIRMATSION, TSEGEROMAN ZENAWI KIDANE, TSEGAY KIFLAY WELDESILASSIE (A.K.A. TSEGAY FIKLAY WELDESILASSIE), SELAM PETROS WOLDESELLASIE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

WRITTEN SUBMISSIONS ON COST PURSUANT TO REASONS FOR JUDGMENT AND JUDGMENT OF JUSTICE SNIDER DATED MAY 5, 2011

REASONS FOR ORDER AND ORDER	SNIDER J.
DATED:	JUNE 27, 2011

WRITTEN REPRESENTATIONS BY:

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