

Federal Court



Cour fédérale

Date: 20240122

Docket: IMM-7128-22

Citation: 2024 FC 104

Ottawa, Ontario, January 22, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Tekle Kefle GHIRME

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Tekle Kefle Ghirme, is a citizen of Eritrea who was conscripted forcefully to work in the Eritrean military. He worked from 2002 until 2013, when he was imprisoned for two years following his expression of disagreement with a “shoot-to-kill” policy regarding border patrols. The Applicant fled Eritrea in 2015, while being treated in hospital for injuries

received in prison. He claims protection in Canada based on fear of persecution by the Eritrean state.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] found that the Applicant was excluded from refugee protection pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], incorporating by reference Article 1F(a) of the Refugee Convention (as defined in section 2 of the IRPA). Specifically, the RPD found that there are serious reasons for considering that the Applicant was complicit in the commission of crimes against humanity, and that his contribution was voluntarily made, significant and knowing. See Annex “A” for relevant provisions, including subsection 4(3) of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, which defines “crimes against humanity.”

[3] The Refugee Appeal Division [RAD] of the IRB dismissed the Applicant’s appeal [Decision], upholding the RPD’s determination of inadmissibility with regard to section 98 of the IRPA and Article 1F(a) of the Refugee Convention. The Applicant seeks to have the Decision set aside.

[4] There is no dispute that the presumptive reasonableness standard of review applies, and further, there are no circumstances here, in my view, that displace the applicable review standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 10, 17, 25.

[5] A decision may be unreasonable, that is lacking justification, transparency and intelligibility, if the decision maker misapprehended the evidence before it. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, above at paras 99-100, 125-126.

[6] The more granular issue raised by the Applicant, reframed with the review standard and role of the reviewing Court in mind, is whether the RAD reasonably found that the Applicant was complicit in the acts of the Eritrean army, in the sense that he voluntarily made a significant and knowing contribution to the military's crimes against humanity.

[7] I find that the Applicant has met his onus of demonstrating that the Decision is unreasonable for lack of intelligibility.

II. Applicable Legal Principles

[8] To deter findings of complicity or guilt by association, the Supreme Court introduced a contribution-based approach to complicity in international crimes: *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] at para 9.

[9] Exclusion from refugee protection under Article 1F(a) of the Refugee Convention essentially is warranted only where there are "serious reasons for considering" that a claimant has made a voluntary, knowing and significant contribution to the crimes or criminal purpose of the impugned organization: *Ezokola*, above at para 8.

[10] The standard of proof applicable to determining whether there are “serious reasons for considering” is lower than a balance of probabilities but above a mere suspicion: *Ezokola*, above at paras 101-102. Passive membership in or mere association with an impugned organization is not enough to rise to the level of complicity, but rather, there must be a link between the individual and the criminal purpose of the group: *Ezokola*, above at paras 8, 68, 77.

[11] The Supreme Court developed a list of non-exhaustive factors to “serve as a guide” in assessing a claimant’s contribution (*Ezokola*, above at para 91):

- a) the size and nature of the organization;
- b) the part of the organization with which the claimant was most directly concerned;
- c) the claimant’s duties and activities in the organization;
- d) the claimant’s position and rank in the organization;
- e) the length of time in the organization, particularly after acquiring knowledge of the group’s crime or criminal purpose; and
- f) the method by which the claimant was recruited and the opportunity to leave.

III. Analysis

[12] In short, I find that the RAD unreasonably found that the Applicant was complicit in the acts of the Eritrean army.

[13] The Applicant admits that his contribution may have been knowing at some point, but contends that the RAD unreasonably focused on the voluntariness aspect of the test and failed to address whether all three elements were present, i.e. the contribution was voluntary, significant and knowing.

[14] The Respondent argues that the RAD indeed considered all three elements, including “significant contribution,” and it only needed to find that the Applicant’s conduct was more than infinitesimally significant, with reference to *Ezokola* at para 57, citing *Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-514, Judgment on the Prosecutor’s Appeal against the Decision on the Confirmation of Charges, 30 May 2012 (ICC, Appeals Chamber) at para 277. I am not persuaded, however, that the RAD framed the test in this manner.

[15] Instead, the RAD concluded that the Applicant’s conduct was “more than guilt by association and more than passive acquiescence” because he was in the army for a significant period of time and his duties (of detaining individuals at the border who were attempting to leave the country illegally and sending them to prison) had a direct link to human rights abuses (torture and mistreatment in prison), therefore constituting a significant contribution. This reasoning identifies the factors of the Applicant’s time in service and the linkage between the Applicant’s duties and the human rights abuses without, unreasonably, any analysis about why, in the RAD panel’s view, these factors support the “significant contribution” conclusion, or as the Respondent argues, represent something more than an infinitesimally significant contribution. I add that the Decision makes no mention of the bottom threshold identified in *Ezokola* at para 57.

[16] The RAD’s determination that the Applicant is excluded was influenced by Eritrea’s shoot-to-kill policy, notwithstanding the findings that the Applicant did not shoot anyone pursuant to the policy and that the enforcement of the policy had lessened by the time the Applicant’s duties changed from menial jobs, during his first eight years in the army, to

detention of individuals at the border. In particular, I find that the following determinations lack coherence and, hence, intelligibility.

[17] In particular, the RAD acknowledged that the Applicant's first eight years in the army were irrelevant because he worked menial jobs such as construction, and there was no link between those jobs and the criminal purpose of torture and mistreatment. The RAD inferred, however, that the Applicant must have known about the shoot-to-kill policy because he was in the army in 2004 when the policy was adopted, even though the RAD had found this period of time to be irrelevant because of the menial jobs the Applicant held then.

[18] Further, the RAD illogically determined, in connection with the issue of duress in the context of voluntariness, that, although the Applicant likely would languish in prison if he had been caught trying to leave Eritrea, remaining would mean that he likely would have to participate in the shoot-to-kill policy. The RAD had accepted, however, that he had not participated in the policy from the time his border duties commenced, which was at a time when the enforcement of the policy was lessening.

[19] Similarly, the RAD unintelligibly concluded that the punishment for refusing to participate in the policy would not be the same or worse for the Applicant than the death he was inflicting on civilians. This conclusion is contradicted by the evidence that the Applicant detained people at the border and sent them to prison but did not enforce the shoot-to-kill policy, and the RAD's acknowledgement that the Applicant likely would languish in prison if he had

been caught trying to leave Eritrea. In other words, the Applicant would face the very same fate as those he detained if he tried to escape and was caught.

[20] As a final example, I find that the RAD also unintelligibly discounted duress on the basis of the length of time the Applicant spent in the army, while acknowledging the Applicant's forcible recruitment and the documentary evidence that supported the Applicant's contention that if he tried to leave the army and was caught, he would face imprisonment.

[21] Notwithstanding the RAD's recognition that something "more than guilt by association" is required, the RAD's illogical and unintelligible reasoning here nonetheless is reminiscent of "complicity by association" against which the Supreme Court of Canada firmly cautions in *Ezokola*, thus warranting the Court's intervention.

IV. Conclusion

[22] For the above reasons, the Applicant's judicial review application is granted. The Decision is set aside, and the matter will be remitted to a different RAD panel for redetermination.

[23] Neither party proposed question for certification, and I find that none arises in the circumstances.

JUDGMENT in IMM-7128-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The June 30, 2022 decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada is set aside, and the matter will be remitted to a different RAD panel for redetermination.
3. There is no question for certification.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

Immigration and Refugee Protection Act, SC 2001, c 27.
Loi sur l’immigration et la protection des réfugiés, LC 2001, ch 27.

<p>Definitions</p> <p>2 (1) The definitions in this subsection apply in this Act.</p> <p>...</p> <p>Refugee Convention means the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951, and the Protocol to that Convention, signed at New York on January 31, 1967. Sections E and F of Article 1 of the Refugee Convention are set out in the schedule. (<i>Convention sur les réfugiés</i>)</p> <p>...</p>	<p>Définitions</p> <p>2 (1) Les définitions qui suivent s’appliquent à la présente loi.</p> <p>...</p> <p>Convention sur les réfugiés La Convention des Nations Unies relative au statut des réfugiés, signée à Genève le 28 juillet 1951, dont les sections E et F de l’article premier sont reproduites en annexe et le protocole afférent signé à New York le 31 janvier 1967. (<i>Refugee Convention</i>)</p> <p>...</p>
<p>Exclusion — Refugee Convention</p> <p>98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.</p>	<p>Exclusion par application de la Convention sur les réfugiés</p> <p>98 La personne visée aux sections E ou F de l’article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.</p>
<p>SCHEDULE</p> <p>(Subsection 2(1))</p> <p>Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees</p> <p>E This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.</p> <p>F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:</p>	<p>ANNEXE</p> <p>(paragraphe 2(1))</p> <p>Sections E et F de l’article premier de la Convention des Nations Unies relative au statut des réfugiés</p> <p>E Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.</p> <p>F Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :</p>

<p>(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;</p> <p>(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;</p> <p>(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.</p>	<p>a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;</p> <p>b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;</p> <p>c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.</p>
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Crimes Against Humanity and War Crimes Act, SC 2000, c 24.
Loi sur les crimes contre l'humanité et les crimes de guerre, LC 2000, ch 24.

<p>Definitions</p> <p>4 (3) The definitions in this subsection apply in this section.</p> <p><i>crime against humanity</i> means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. (<i>crime contre l'humanité</i>)</p> <p>...</p>	<p>Définitions</p> <p>4 (3) Les définitions qui suivent s'appliquent au présent article.</p> <p><i>crime contre l'humanité</i> Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu. (<i>crime against humanity</i>)</p> <p>...</p>
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FEDERAL COURT
SOLICITORS OF RECORD

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