Federal Court  Cour fédérale

**Date: 20190612**

**Docket: IMM-2065-18**

**Citation: 2019 FC 805**

**Ottawa, Ontario, June 12, 2019**

**PRESENT: Mr. Justice Ahmed**

**BETWEEN:**

**TEKLE KEFLE GHIRME**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] In July 2017, the Applicant Tekle Kefle Ghirme, a citizen of Eritrea, filed a refugee claim. After interviewing the Applicant, an Enforcement Officer (the "Officer") with the Canada Border Services Agency ("CBSA") prepared a report under section 44(1) of the *Immigration and Refugee and Protection Act*, SC 2001 c 27 ("IRPA") finding that the Applicant is inadmissible to Canada under s. 35(1)(a) of the IRPA. Section 35(1)(a) of the IRPA establishes that a foreign

national is inadmissible to Canada on grounds of violating human or international rights for committing an offence in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24.

[2] On April 17, 2018, an Inland Enforcement Supervisor acting as the Minister's Delegate determined that the section 44(1) report was well-founded, and referred it to the Immigration Division ("ID") for an admissibility hearing under section 44(2) of the IRPA.

[3] On May 4, 2018, the Applicant filed for judicial review of the s. 44(2) decision by the Minister's Delegate. I will set the decision aside for the reasons that follow.

## II. **Background**

[4] The Applicant, Tekle Kefle Ghirme, is a 34 year old citizen of Eritrea. In December 2016, he sought asylum in the U.S.A. In April 2017, an American judge rejected his asylum claim, but granted him "withholding of removal." The Applicant was unsure about how long he would be protected from removal in the U.S.A., so he came to Canada and made a refugee claim related to his military service in Eritrea.

[5] The CBSA interviewed the Applicant three times: on July 6, 2017 (at a Port of Entry related to his refugee claim), on August 9, 2017 (with the CBSA War Crimes Unit in Montreal), and on February 7, 2018 (to discuss the CBSA's concerns regarding his inadmissibility).

[6] According to the Applicant, in 2002 he turned 18 years of age and was conscripted into the Eritrean military. He served until February 2015 in various roles including a Radio Operator and Standard Solider. His duties included construction, working in agriculture, and one month

each year as a checkpoint border guard. As a border guard, the Applicant stopped people from leaving Eritrea at checkpoints and also through the mountains.

[7] The Applicant gave conflicting evidence about whether or not he had a weapon while serving at checkpoints. At one interview he alleged that he was armed with a Kalashnikov, but at another interview he alleged that he was only armed with a baton. His evidence is also that he turned over people that were captured to the military police for detainment in a Tessenei prison. He says he never fired a Kalashnikov, but that other border guards would fire into the air.

[8] The Applicant says that at a meeting in 2012, he verbally opposed the military's shoot to kill policy. The Applicant also says he spoke out because he "was worried about what might happen if the families of loved one would hear of trouble at the border because of this aggressive policy toward anybody trying to get out of the country. [He] thought as well that aggrieved relatives might seek to take revenge."

[9] In 2013 the Applicant was sent to prison, accused of being responsible for a superior's death in a mine blast. The Applicant's belief, however, is that he was imprisoned for speaking out against the shoot to kill policy. At some point, the Applicant escaped. He believes that if he is returned to Eritrea he will be regarded as a traitor, and worries about the family he left behind.

A. *The section 44(1) Report*

[10] On April 9, 2018, the Officer wrote a section 44(1) report concluding that the Applicant is inadmissible under section 35(1)(a) of the IRPA. The Officer found reasonable grounds to believe that the Applicant has violated "human or international rights for committing an act

outside Canada that constitutes an offence referred to in Sections 4 to 7 of the Crimes Against Humanity and War Crimes Act." On April 17, 2019 the Minister's Delegate referred the Report under section 44(2) of the IRPA to the Immigration Division for an admissibility hearing.

[11] The Officer's Case Review Notes dated April 9, 2018 begin by setting out Eritrea's policy of conscripting its citizens into military service. The notes also describe Eritrea's shoot to kill policy which has been in place since 2004 and used to prevent people from leaving the country. The Officer then reviewed the Applicant's immigration documents, noting his lengthy service in the Eritrean military and the various roles he served in, as well as the information gathered from the Applicant's three CBSA interviews.

[12] The Officer noted the Applicant's submission that he spoke out against the shoot to kill policy in 2012. However, the Officer noted that the Applicant knew about the policy for approximately 8 years before speaking out, and determined that his reason for speaking out had more to do with his concern over reprisal from relatives rather than the actual policy of shooting people who tried to leave the country. This led the Officer to conclude that the Applicant was likely detained due to his involvement in the mine blast, rather than speaking out in 2012. The Officer also noted that although the Applicant believes the Eritrean government engaged in extrajudicial killings, "he continued worked [sic] for the military for approximately 11 years while this policy was in place (2004 to 2015)."

[13] The Officer also considered that the Applicant says he detained people who attempted to cross the border, and turned them over to the military police. In turn, the military police would detain these people in Tessenei prisons. The Officer reviewed the objective evidence describing

the deplorable conditions in these prisons, including reports of people dying from being tortured, executed, as well as reports of underground cells.

[14] Based on the Applicant's information, the Officer concluded that he was "complicit in crimes committed by the Eritrean Government." Although the Applicant had stated that his military colleagues shot into the air, but had never done so himself, the Officer made a negative credibility finding. The Officer's basis for its finding was that the Applicant had never faced punitive measures during a lengthy military career for failing to perform his duties.

[15] Taking into account the factors for complicity from *Ezokola v Canada (Citizenship and Immigration*), 2013 SCC 40 [*Ezokola*], the Officer concluded that there are numerous reasons to believe that the Applicant "has made a voluntary, significant and knowing contribution to the Eritrean Governments criminal purposes. Moreover, [the Applicant] is complicit in offences which are considered to be crimes against humanity according to the Rome Statute of the International Criminal Court." In a decision dated April 19, 2018, the Minister's Delegate (an Inland Enforcement Supervisor) found that this 44(1) report was well founded. The Minister's Delegate accordingly referred the Applicant for an admissibility hearing at the ID under section 44(2) of the IRPA.

## III. **Issue and Standard of Review**

[16] The standard of review of the Minister Delegate's decision to refer the s. 44(1) report to an admissibility hearing is reasonableness (*Kidd v Canada (Public Safety and Emergency Preparedness),* 2016 FC 1044 at para 17). The issue in this case is therefore whether the

Minister's Delegate reasonably exercised discretion by referring the s. 44(1) report which was of the opinion that the Applicant is inadmissible under s. 35(1)(a) of the IRPA.

## IV. **Preliminary Issue**

[17] The Respondent raised a preliminary issue, arguing that this judicial review should not be heard as there is an adequate alternative remedy (*Canada (National Revenue) v JP Morgan Asset Management)*, 2013 FCA 250 at para 84). According to the Respondent, an ID hearing is an adequate alternative remedy because it is a *de novo* decision and the Applicant will have the advantage of presenting new evidence. The Respondent submits that in *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 [*Tran*]), which also dealt with section 44(2) of the IRPA, the Supreme Court of Canada recognized an adequate alternative remedy:

> [22] Second, while courts have the discretion to hear an application for judicial review prior to the completion of the administrative process and the exhaustion of appeal mechanisms, they should exercise restraint before doing so (*Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission*), 2012 SCC 10, [2012] 1 S.C.R. 364, at paras. 35-36; D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 3:4100). In this case, the parties have not asked this Court to revisit the decisions of the courts below to hear the application, and I am of the view that this Court should respect those decisions.

[18] The Respondent also provided this Court with *Sidhu v Canada (Citizenship and Immigration)*, 2002 FCT 260, and argued that a hearing before the ID and appeal to the IAD were adequate alternative remedies. In *Sidhu,* the Court found that the appeal remedy in that case was superior to the judicial review's remedy (*Sidhu* at para 33).

[19] I disagree. First, *Sidhu* involved the prior *Immigration Act* which lacked an equivalent to section 72(2)(a) of the IRPA. By legislating section 72(2)(a) of the IRPA, Parliament removed this Court's discretion to hear matters where any right of appeal that may be provided by the IRPA is not exhausted. The statutory bar in this provision prevails over section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 (*Somodi v Canada (Citizenship and Immigration)*, 2009 FCA 288 at para 24 [*Somodi*]). As with *Tran*, the Applicant in this matter has no right to appeal due to section 64(1) of the IRPA.

[20] Second, *Tran* is distinguishable from the matter before this Court because the SCC decided the case on the issue of statutory interpretation. An ID hearing is the adequate forum to hear an issue of statutory interpretation about whether a conditional sentence is a "term of imprisonment" under 36(1)(a) of the IRPA as occurred in *Tran.* However, it is not an adequate alternative remedy to the judicial review of the exercise of the discretionary power to refer a well-founded report to the ID as occurred in this case. In the case at hand, the issue involves the exercise of the Minister Delegate's discretion. Specifically, when legislating section 44(2) of the IRPA, Parliament gave the Minister's Delegate the discretion to refrain from referring a well-founded 44(1) report to the ID (*Tran* at para 6). A review of the exercise of this special discretionary power is outside the scope of the ID's powers in the context of an inadmissibility hearing.

[21] The appropriateness of seeking judicial review of a delegate's decision to refer the applicant to an admissibility hearing was addressed by Justice Gagné in *Haqi v Canada (Citizenship and Immigration)*, 2014 FC 1167 at para 29:

> [29] In my view, the applicant's failure to seek judicial review of the officer's Section 44 Report or the Minister's decision to refer the applicant to an admissibility hearing is fatal to the applicant, as the Board did not have jurisdiction to review the legality of either. In her short order rendered in Collins, above, Justice Hansen observed that she could not find a legislative, regulatory or jurisprudential support for the proposition that the Board has the jurisdiction to assess the validity or legality of a section 44 report and that the legality of the section 44 report or the Minister's decision to refer it to a hearing could not be attacked indirectly by way of an application for judicial review of the Board's decision, just like the applicant is attempting to do in the present file […]

## V. **Analysis**

[22] *Ezokola* involved a Refugee Protection Division decision and considered the nature of complicity in crimes against humanity. In *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at paras 18-21, the Federal Court of Appeal explained that the factors considered by the SCC in *Ezokola* are relevant in a s. 35(1)(a) analysis. This is so because s. 35(1)(a) of the IRPA parallels Article 1F(a) of the *Refugee Convention*. In *Ezokola*, the Supreme Court of Canada explained why voluntariness is an important factor:

> [29] For the reasons that follow, we conclude that an individual will be excluded from refugee protection under art. 1F(a) for complicity in international crimes if there are serious reasons for considering that he or she voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime. The evidentiary burden falls on the Minister as the party seeking the applicant's exclusion: *Ramirez*, at p. 314.
>
> …
>
> [36] The foregoing demonstrates the need for a carefully crafted test for complicity — one that promotes the broad humanitarian goals of the *Refugee Convention* but also protects the integrity of international refugee protection by ensuring that the authors of crimes against peace, war crimes, and crimes against humanity do not exploit the system to their own advantage. As we will explain,

> these two aims are properly balanced by a contribution-based test for complicity — one that requires a voluntary, knowing, and significant contribution to the crime or criminal purpose of a group.

[23] In this case, the Applicant submits that the Officer failed to consider the *Ezokola* voluntariness factor. Thus, the Applicant submits the resulting decision of the Minister's Delegate is unreasonable, as it relied on an incomplete report. The Applicant also submits the evidence before the Officer indicated that his participation in the Eritrean military was involuntary. For example, he submits that the evidence stated that military service is mandatory, that he had no choice over the kind of work he did, that he was forced to work against his will because if he failed to execute his duties he would have faced physical abuse, mistreatment, detention or death, and he had to escape the country illegally.

[24] The Respondent argues that the s. 44 report is not the appropriate stage to conduct an in-depth *Ezokola* review. Rather, the Respondent submits that at this stage, the Minister's Delegate determines that the Applicant "may" be inadmissible—the full review on the merits will occur at the ID and a tribunal does not have to comment and consider each issue raised by the parties (*Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3). The Respondent also argues that the decision is in accordance with the Supreme Court of Canada's explanation that "[t]o assess the voluntariness of a contribution, decision makers should, for example, consider the method of recruitment by the organization and any opportunity to leave the organization" (*Ezokola* at para 86).

[25] I agree with the Applicant that s. 35(1)(a) parallels Article 1F(a) as explained by the Federal Court of Appeal at para 19 in *Kanagendren* . Accordingly, the *Ezokola* factors apply in

this matter. The Officer recognized that the *Ezokola* factors applied to the s. 44 report because five of the six *Ezokola* factors were addressed. However, the Officer failed to consider one factor —the voluntariness factor —in the reasons. This is problematic because the evidentiary burden of establishing compliancy is on the Minister (*Ezokola* at para 29). Moreover, the Applicant's evidence was that his military service was mandatory, that he was unable to choose the type of work he did, that he hoped to return to civilian life, and that he was forced to work against his will. As the s. 44(1) report lacks any consideration of voluntariness and of the Applicant's evidence about his ability to leave the Eritrean military, then the Minister could not properly exercise discretion under s. 44(2).

[26] In this case, the only mention of voluntariness is the Officer's cursory statement as follows: "[w]hile taking into account the factors in the test for complicity as outlined in *Ezokola v. Canada (Minister of Citizenship and Immigration),* it is the belief of the writer that there are serious reasons for considering that Mr. Ghirme has made a voluntary, significant, and knowing contribution to the Eritrean Governments [*sic*] criminal purpose." Furthermore, as the Applicant pointed out in his Further Memorandum at paragraph 33, the Minister's own evidence supports the Applicant's allegations:

> According to open source information, Eritrea conscripts all men and unmarried women into 'national service', and …most conscripts serve for much of their working lives.
>
> In practice, however, the service, on the basis of the statutory provision for expansion in crisis situations, has been effectively permanent for many since the border war with Ethiopia.
>
> Eritrean conscripts are also used in non-military capacities as well. Eritreans drafted into this service are assigned unpaid law enforcement and other civilian duties, including agricultural work, construction and labor, security, guarding detention centres, military communication roles and border guard duties.

[27] In sum, the Supreme Court of Canada has explained six factors to assess when addressing a claimant's complicity. These factors are considered at the ID hearing involving whether a claimant is inadmissible under 35(1)(a) of the IRPA (*Parra v Canada (Citizenship and Immigration)*, 2016 FC 364 at paras 1, 31). But these six factors must also be addressed in the s. 44(1) report so that the Minister's Delegate can properly exercise discretion under s. 44(2) of the IRPA when deciding whether to refer someone to an ID hearing. Since that did not happen in this case, the Minister's Delegate's finding that the s. 44(1) report was well founded is unreasonable. Accordingly, I will set aside the decision.

## VI. **Certified Question**

[28] Counsel for both parties was asked if there were questions requiring certification, they each stated that there were no questions arising for certification and I concur.

## VII. **Conclusion**

[29] This application for judicial review is allowed.

**JUDGMENT in IMM-2065-18**

**THIS COURT'S JUDGMENT is that:**

1. The decision is set aside and the matter is referred back for redetermination by a different Minister's Delegate.
2. There is no question to certify.

"Shirzad A."

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2065-18 |
| **STYLE OF CAUSE:** | TEKLE KEFLE GHIRME v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
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| **DATED:** | JUNE 12, 2019 |

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