Federal Court  Cour fédérale

Date: 20230119

Docket: IMM-394-22

Citation: 2023 FC 93

Ottawa, Ontario, January 19, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

TEKLE KIDANE ZIGTA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Tekle Kidane Zigta, seeks judicial review of a decision of a visa officer (the "Officer") of Immigration, Refugees and Citizenship Canada dated November 24, 2021, finding the Applicant inadmissible to Canada on security grounds under subsection 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"), for having been a member of an organization that there are reasonable grounds to believe engages, has engaged, or will

engage in terrorism and subversion by force of any government. The Officer found the Applicant inadmissible under subsection 34(1)(f) in relation to two security grounds: subversion by force of any government under subsection 34(1)(b) and terrorism under subsection 34(1)(c).

[2] The Applicant applied for a permanent residence ("PR") visa through the Convention Refugee Abroad Class or Country of Asylum Class (Humanitarian-Protected Persons Abroad) program. On the basis of an interview with the Applicant, the Officer refused the Applicant's application on the grounds that his past membership in the Eritrean People Liberation Front ("EPLF") qualified him as inadmissible pursuant to subsection 34(1)(f).

[3] The Applicant submits that the Officer erroneously disregarded key evidence in the Applicant's case pointing to his forced conscription into the EPLF and made factual findings that are unsupported by the evidentiary record.

[4] For the reasons that follow, I find that the Officer's decision is unreasonable. This application for judicial review is therefore granted.

II. Facts

A. *The Applicant*

[5] The Applicant is a 49-year-old citizen of Eritrea. The Applicant claims that in 1990, at the age of 17, armed EPLF soldiers came to his home and forced him to join the EPLF, to fight

for Eritrean independence in the war against the then-regime. As he was a minor, the Applicant claims that he had no choice but to join the EPLF.

[6] The EPLF and Ethiopian Peoples' Revolutionary Democratic Front ("EPRDF") eventually defeated the Eritrean regime, forming a transactional government that conducted a referendum, resulting in the formal independence of Eritrea in May 1993.

[7] The Applicant claims that in May 1998, he was summoned to join the Eritrean army under mandatory conscription. He served in the military in different roles until June 2008. Some of this time was spent working in building construction. According to the Applicant's Schedule 2 form, the Applicant was subjected to poor working conditions amounting to "a form [of] slavery," forced to work "through the use of violence and intimidation," and made to work "with minimal food, rest and health care."

[8] In June 2008, the Applicant and his team organized a strike to oppose these working conditions. They were arrested and detained at Hadoshdos Prison Center in Nakfa, Eritrea. The Applicant claims that he was subject to torture and inhuman treatment at the hands of prison security while detained there. He claims that prison authorities told him that his involvement in the strike was treasonous and politically motivated, and threatened that he would be subject to indefinite detention.

[9] In August 2008, the Applicant escaped from Hadoshdos Prison Center and fled to Ethiopia. The Applicant claims that following his escape, his wife was arrested for one month

and forced to pay $50,000 Nakfa. The Applicant resided in a refugee camp near the Eritrean border until April 2010.

[10] The Applicant claims that due to the lack of security in Ethiopia, he fled to Sudan in April 2010, where he stayed for four days. He claims that the situation in Sudan was also dangerous and the Sudanese government was kidnapping and deporting Eritreans back to Eritrea, commonly in exchange for ransom. The Applicant fled to Israel and made a refugee claim. He has since been residing in Israel under a conditional release visa, which is renewable monthly.

[11] In September 2018, the Applicant submitted an application for a PR visa in Canada as a member of the Convention Refugee Abroad Class or Country of Asylum Class (Humanitarian-Protected Persons Abroad) program, sponsored by a group of five citizens and permanent residents of Canada.

[12] On November 4, 2021, the Applicant was interviewed by the Officer at the visa office in Tel Aviv. The Officer refused the Applicant's application in a letter dated November 24, 2021.

B. *Decision Under Review*

[13] The Officer's decision is largely contained in their Global Case Management System ("GCMS") notes, which form part of the reasons for the decision.

[14] The Officer began by referencing the Encyclopaedia Britannica entry for the EPLF and concluding from this source that the EPLF was engaging in the subversion by force of the

Ethiopian government, which culminated in the overthrow of the government in 1991. The Officer relied on *Hagos v Canada (Citizenship and Immigration)*, 2011 FC 1214 ("*Hagos*"), to state that the EPLF was also an organization engaged in terrorism pursuant to subsection 34(1)(c) of *IRPA*, as per the definition of terrorism outlined by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, and by the *Criminal Code*, R.S.C., 1985, c. C-46.

[15] The Officer then found that the Applicant was a member of the EPLF from 1990 to 1993, as noted in his application and confirmed in his interview. The Officer stated that the Applicant appears to have served in the EPLF during this time "for nationalism reasons" for the following reasons: (1) he expressed happiness regarding the Eritrean independent movement in 1990 and contribution to the goals of the EPLF in "fighting the enemy" (the then-Ethiopian regime); (2) there is no evidence of a direct threat of death or bodily harm against the Applicant to support his claim that he was forced to join the EPLF in 1990; and (3) there is no evidence that the Applicant attempted to leave the EPLF during the years he was a soldier, and he remained a soldier for more than two years after the EPLF formed a provisional government in May 1991.

[16] The Officer noted the Applicant's claim that during his time with the EPLF, he delivered bread with his division. The Officer found, however, that there are reasonable grounds to believe that the Applicant also participated in combat operations during this time, as he later joined the same division as a combat team commander in 1998. The Officer found that this would have been unlikely had the Applicant not had prior experience with combat operation.

[17] The Officer noted that when asked about his membership and support for the EPLF, the Applicant stated that he was not a member, he was young, and he was forced to join. When asked why he did not leave the EPLF, he stated, "We were against the enemy (Ethiopian regime) there was no reason to leave" and that if he had left, he did not have anywhere to go. The Officer found that the Applicant's responses to these questions did not address the concerns that the Applicant joined the EPLF for nationalist reasons, without duress as a factor, and that his involvement in the EPLF qualifies as membership.

[18] On this basis, the Officer determined that the Applicant is inadmissible to Canada on security grounds under subsection 34(1)(f) of *IRPA*, for having been a member of an organization that there are reasonable grounds to believe has engaged in terrorism and subversion by force of the government.

III. Issue and Standard of Review

[19] The application for judicial review raises the sole issue of whether the Officer's inadmissibility finding is reasonable.

[20] The standard of review is not disputed. The parties agree that the applicable standard of review in admissibility decisions made under subsection 34(1)(f) of *IRPA* is reasonableness. I agree. As stated by Justice Norris in *Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080, the applicability of a reasonableness review to these decisions is "well-established in the jurisprudence" (at para 19).

[21] Reasonableness is a deferential, but robust, standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 12-13) ("*Vavilov*"). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[22] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. Analysis

[23] The Applicant submits that the Officer's decision disregarded the central evidence in his application, specifically the Applicant's consistent statement that he was conscripted as a minor, by force and duress. The Applicant submits that the Officer failed to properly assess the specific nature and circumstances of his involvement with the EPLF, including whether his involvement

was voluntary (*Kanendra v Canada (Minister of Citizenship and Immigration)*, 2005 FC 923 at para 24; *Sinnaiah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1576 at para 6; *Krishnamoorthy v Canada (Citizenship and Immigration)*, 2011 FC 1342 ("*Krishnamoorthy*") at para 23). The Applicant submits that he made it clear that his involvement with the EPLF as a child soldier was the result of coercion by armed EPLF officers arriving at his home and demanding his conscription, which he claims is evident from both the interview transcript and the objective documentary evidence regarding child soldiers in Eritrea between 1962 and 1991.

[24] The Applicant submits that the Officer's decision was made without regard to his clear responses in the interview, the jurisprudence establishing the necessary factors to consider when assessing membership, and the available documentary evidence regarding Eritrea. The Applicant contends that, contrary to the Officer's reasons, there is nothing in the Applicant's responses indicating his willingness or voluntariness to join the EPLF, and no evidence to substantiate the Officer's speculative claim that the Applicant joined the EPLF as a result of his "Eritrean nationalism". The Applicant also notes that the Officer, when recounting the Applicant's responses, wrongly stated that the EPLF had goals of "fighting the enemy," which the Applicant never said in the interview. The Applicant submits that his excitement at the prospect of Eritrean independence is an unreasonable basis upon which to conclude that he voluntarily joined the EPLF.

[25] The Applicant further submits that as a 17-year-old at the time of his forced conscription, he was a child soldier as defined by the *United Nations Convention on the Rights of the Child* ("UNCRC"). The Applicant submits that the *Optional Protocol to the Convention on the Rights*

of the Child on the Involvement of Children in Armed Conflict, to which Canada is a signatory, prohibits the recruitment or conscription of children under 18 years old by government or non-government forces. Noting that section 34 of *IRPA* is silent on the status of minors whose activities fall under certain inadmissibility grounds, the Federal Court of Appeal in *Poshteh v Canada (Citizenship and Immigration)*, 2005 FCA 85 ("*Poshteh*"), found that an individual's status as a minor is a relevant consideration in considering whether they are a member of a terrorist organization under section 34 of *IRPA*. The Applicant submits that the Officer disregarded his age as a factor in the assessment and the line of reasoning is therefore unreasonable.

[26] Lastly, the Applicant submits that the Officer erred in making implausibility findings regarding the nature of his involvement in the EPLF. The Officer disputed that the armed officers who arrived at the Applicant's home posed a threat or coerced the Applicant, stating that "while it is likely that the militia soldiers had weapon, it is not given that they used the weapons to threaten the applicant to join the EPLF [sic]," because the Applicant did not confirm that the soldiers threatened him. The Officer also found that there were reasonable grounds to believe that the Applicant had participated in combat operations during his time in the EPLF because when he later joined the same division, he did so as a commander of combat operations. The Applicant relies on this Court's decisions in *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 ("*Valtchev*") and *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908 ("*Zaiter*") to submit that the Officer's implausibility findings regarding the circumstances of the Applicant's involvement in the EPLF renders the decision unreasonable.

[27] The Respondent maintains that the Officer's inadmissibility decision is reasonable. The Respondent submits that the Federal Court of Appeal in *Poshteh* established that membership in an organization should be given a broad interpretation and the Applicant's admission that he was a soldier in the EPLF from 1990 to 1993 is therefore sufficient to qualify as a member for the purposes of subsection 34(1)(f) of *IRPA*. The Respondent notes that despite the Applicant's submission that he was conscripted into the EPLF against his will, he stated in his interview that he was happy with the Eritrean independence movement at the time and did not leave the EPLF because they were against the enemy (the Ethiopian regime). The Respondent submits that the Officer reasonably found that the Applicant did not join the EPLF under coercion or duress.

[28] The Respondent submits that there is no merit to the Applicant's allegation that the Officer failed to consider his status as a child soldier. The Respondent notes that the Applicant remained a soldier after he turned 18 years old, and did not make efforts to leave. The Respondent relies on this Court's decision in *Ismail v Canada (Citizenship and Immigration)*, 2016 FC 1294, for the proposition that an individual's status as a minor is not a blanket exemption from inadmissibility under subsection 34(1)(f) of *IRPA*.

[29] The Respondent further submits that the Officer reasonably found that the Applicant participated in combat operations while he was a soldier with the EPLF. The Respondent submits that this finding is not speculative because the Officer reasonably relied on the Applicant's statement that he carried a weapon, that he rejoined the same division as a commander of the combat team in 1998, and "rationality and common sense" to determine that it

would be unlikely for him to return as a commander of a combat team if he had not previously participated in combat operations.

[30] In my view, the Officer erred in failing to meaningfully consider the totality of the circumstances surrounding the Applicant's involvement in the EPLF, and made unreasonable implausibility findings regarding the Applicant's circumstances. For these reasons, I find that the Officer's decision is unreasonable.

[31] The Officer's reasoning regarding the Applicant's apparent willingness to join the EPLF exhibits a lack of internal rationality that renders the decision unreasonable (*Vavilov* at paras 101, 104). On numerous occasions in his interview, the Applicant stated that he was forced to join the EPLF at the hands of armed EPLF officers who came to his home. The Applicant stated that he "was forced", he joined "against [his] will", the EPLF soldiers "had weapons", and there was "no option to refuse" joining. This is a clear and consistent narrative, with no clear basis to doubt its credibility. The sole bases upon which the Officer found that the Applicant willingly joined the EPLF for nationalist reasons, is that he "expressed happiness regarding the independence movement in 1990 and contribution to the EPLF's goals of 'fighting the enemy'"; there is no evidence that he was coerced or threatened by the armed soldiers, and; there is no evidence that he attempted to leave the EPLF. In my view, each of these reasons lack rationality.

[32] I find it to be an irrational and unreasonable line of reasoning that the Applicant's enthusiasm for the prospect of an independent Eritrea reflects his willingness and voluntariness to join the EPLF. The two are mutually exclusive and the connection between these findings is

unsupported by the Applicant's responses or the evidentiary record. Without a clear assessment of the circumstances of the Applicant's conscription into the EPLF, it is unreasonable to assume that exhibiting support for Eritrean independence is sufficient to show that that the Applicant joined the EPLF willingly and in pursuit of a nationalist purpose. This is an "absurd premise" (*Vavilov* at para 104).

[33] I further find that the Officer's conclusions regarding the Applicant's lack of evidence that he was coerced or threatened to join the EPLF and his failure to leave the EPLF after joining in 1990 do not accord with central evidence regarding the Applicant's involvement in the EPLF and, therefore, the decision does not align with the evidentiary record and legal constraints. Although membership in an organization is to be given a broad interpretation, the assessment of membership requires consideration of certain central factors, such as "involvement, length of time, [and] degree of commitment" in the organization (*Krishnamoorthy* at para 23; *Poshteh* at para 37; *Perez Villegas v Canada (Citizenship and Immigration)*, 2011 FC 105 at para 44). A factor to consider when assessing an individual's membership is whether there was coercion or duress involved in their conscription, particularly in the circumstances of a minor, such as in the Applicant's case (*Poshteh* at para 52). As summarized in *Jalloh v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 317 at paragraphs 36 to 38:

> [36] In my view, it is preferable to consider the evidence of membership along with the evidence of coercion in determining whether there are reasonable grounds to believe the person genuinely was a member of the group. One way of looking at this issue is to regard evidence of duress as defeating the *mens rea* of membership (*Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 339). Accordingly, evidence relating to duress must be considered along with the evidence relating to

> membership in deciding whether the person really was a member of the group or, rather, was motivated by self-preservation.
>
> [37] In sum, a person cannot be considered to be a member of a group when his or her involvement with it is based on duress. At a minimum, a member is someone who intentionally carries out acts in furtherance of the group's goals. A person who performs acts consistent with those goals while under duress cannot be said to be a genuine member.
>
> [38] Therefore, the finding of membership should rest on indicia that the person's intentions were consonant with the group's objects, not survival. The evidence should be considered as a whole to determine whether the person was truly a member or whether his or her acts carried out in the group's name were coerced. It must be remembered, of course, that the issue to be decided under s 34(1)(f) is whether there are reasonable grounds to believe that the person was a member, not whether the evidence establishes such a connection on a balance of probabilities, or whether duress has been made out on any particular standard of proof. This, too, suggests that all of the relevant evidence should be considered together.
>
> [Emphasis added]

[34] The Officer's GCMS notes exhibit a lack of consideration for the Applicant's repeated statements that he was forcibly conscripted or that he was a minor when armed EPLF officers came to his home. Additionally, the Officer's conclusion that the Applicant was not threatened or coerced because he did not confirm a direct threat uttered to him by the soldiers reveals an irrational line of reasoning. The relevant excerpt from the transcript of the interview is as follows:

> How did you join the EPLF?
>
> I was forced
>
> How old were you?
>
> Almost 18

> How were you forced? Were you threatened?
>
> They came to my village in the night and took me by force
>
> How? Can you explain what “by force means”?
>
> Against my will
>
> How did they take you against your will? For example, did they threaten you?
>
> They just came and told me to go with them so I went with them. They had weapons.
>
> Do you know others who were forced to join EPLF?
>
> Many other young people
>
> Did anyone refuse?
>
> I don’t know
>
> What would happen if you refused?
>
> I don’t know, there is no option to refuse

[35] Assessing the responses cumulatively, the Applicant claims that when he was 17 years old, multiple armed EPLF soldiers came to his home. The Applicant’s statements that the soldiers came to his home in the night, the soldiers had weapons, they told the Applicant to go with them, and the Applicant’s understanding that there was no option to refuse the soldiers’ demand, all lead to the conclusion that the Applicant felt threatened to join, at risk of being harmed. In light of these statements, and the jurisprudence establishing that an assessment of membership should involve a consideration for the circumstances of an individual’s participation, the Officer’s conclusion that the Applicant joined the EPLF willingly because he did not confirm that the soldiers directly threatened him or did not explicitly explain what would have happened to him if he refused to join is an irrational and unsupported conclusion. In my

view, it is unreasonable for the Officer to find that several armed soldiers demanding that a 17-year-old join the EPLF is merely an "indirect threat", particularly in light of the Applicant's belief that "there was no option to refuse" and that he "did not have anywhere to go if [he] left."

[36] Lastly, I agree with the Applicant that the Officer's implausibility findings regarding the circumstances of the Applicant's involvement in the EPLF are unreasonable. In *Valtchev*, this Court established that implausibility findings can only be made in the clearest cases, such as "if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant" (at para 7). Particularly relevant to the Applicant's case is the Court's statement in *Valtchev* that a decision-maker "must be careful when rendering a decision based on a lack of plausibility" because "actions which appear implausible when judged from Canadian standard might be plausible when considered from within the claimant's milieu" (at para 7). Justice Norris applied this principle in *Zaiter*, stating, "adverse credibility determinations based on implausibility should not be made simply on the basis that is it unlikely that things happened as the claimant contends" (at para 9).

[37] I find that this reasoning applies to the Officer's implausibility findings in the case at hand, particularly that the Applicant participated in combat operations during his time in the EPLF because it is unlikely that he later joined the same division as a commander of combat operations without this prior experience. This is an irrational chain of analysis to conclude that the Applicant participated in combat operations as part of the EPLF (*Vavilov* at para 96). This

reasoning is unsupported by the evidence and contains a logical gap in reasoning that renders the finding unreasonable (*Vavilov* at para 96).

[38] Viewing the Applicant's situation from a culturally sensitive and global lens, it is not implausible that a young man would be enthusiastic about the prospect of his nation's independence and, simultaneously, would be forcibly conscripted into the EPLF by armed soldiers. Both truths can exist at once and "individual experiences need not always follow the norm" (*Zaiter* at para 9). It is also not implausible that a young man would be forcibly conscripted into the EPLF as a minor, and fail to leave once an adult out of fear of harm and the lack of anywhere else to go. I find this fear and desperation to be evident from the Applicant's interview transcript, and there is no reasonable or credible basis upon which to doubt the Applicant's consistent narrative.

[39] For these reasons, I find that the Officer's decision lacks the requisite degree of justification, transparency and intelligibility (*Vavilov* at para 99) and unreasonably found that the Applicant is inadmissible to Canada on security grounds under subsection 34(1)(f) of *IRPA*.

V. Conclusion

[40] This application for judicial review is granted. The Officer's decision unreasonably failed to consider the circumstances of the Applicant's participation in the EPLF, and made unreasonable implausibility findings about his involvement in the EPLF. These errors are sufficient to warrant this Court's intervention and render the decision unreasonable. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-394-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The decision under review is set aside and the matter remitted back for redetermination by a different decision maker.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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