Federal Court  Cour fédérale

Date: 20210608

Docket: IMM-6966-19

Citation: 2021 FC 566

Ottawa, Ontario, June 8, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

BINIAM TKUE GEBRESLASIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of an Immigration Officer [the Officer] of the High Commission of Canada in Nairobi, Kenya, dated September 27, 2018 [the Decision]. In the Decision, the Officer determined that the Applicant does not meet the requirements of the Convention refugee abroad class under s 145 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] or the country of asylum class

under s 147 of the Regulations, and therefore he is not entitled to a permanent resident visa to resettle in Canada.

[2] As explained in greater detail below, this application is allowed, because the reasonableness of the Decision is undermined by the Officer having impugned the Applicant's credibility based on an impermissible implausibility analysis.

II. **Background**

[3] The Applicant is a citizen of Eritrea. He crossed the border into Ethiopia illegally in 2016, allegedly to evade conscription into the Eritrean national service. The Applicant's father passed away in 2010. He claims that he dropped out of school in 2012 to support his family and that he worked as a farmer and evaded conscription. The Applicant alleges that the military came looking for him in 2016, as a result of which he fled Eritrea. He alleges fear that he will be detained and mistreated if he returns to Eritrea, because he evaded conscription.

[4] The Applicant was recognized as a Convention refugee in Ethiopia and applied for resettlement in Canada through the Private Sponsorship of Refugees Program. The Officer interviewed the Applicant on May 23, 2018, and rejected his application on September 27, 2018, in the Decision that is the subject of this application for judicial review.

[5] The Decision consists of a letter sent to the Applicant, dated September 27, 2018, and Global Case Management System [GCMS] notes, which form part of the Officer's reasons. The letter explains that, under s 139(1)(e) of the Regulations, a permanent resident visa will be issued

to a foreign national in need of refugee protection and their accompanying family members if, following examination, it is established that the foreign national is a member of the Convention refugee abroad class, the country of asylum class, or the source country class.

[6] The letter then explains that the Officer was not satisfied that the Applicant is a member of any of the prescribed classes because of contradictions and implausible information in his evidence that made the Officer doubt the credibility of his application. Specifically, the Officer found that the Applicant had not clearly articulated the time frame from when he left school to when he escaped from Eritrea. The Officer also found it implausible that he could leave school and hide for several years without being detected and taken into mandatory military service. The Officer, therefore, refused the Applicant's application to resettle in Canada.

[7] The GCMS notes attached to the Officer's letter include notes from the Applicant's interview. These notes indicate that the Officer asked the Applicant several questions about the time line surrounding when his father died, when he stopped attending school, when soldiers came looking for him, and when he crossed the border into Ethiopia. The notes from the interview indicate that the Officer put to the Applicant that there was a contradiction in his evidence, regarding the period of time from when he left school to when he left Eritrea, and suggested that his repeated testimony that he left school two years after his father died appeared rehearsed. The notes from the interview also indicate that the Officer put to the Applicant that it is implausible that he could keep hiding from the military for four years and avoid joining the national service.

[8] While the Officer's interview with the Applicant was conducted on May 23, 2018, the creation date for the GCMS entry containing the interview notes is September 27, 2018, the date of the Decision.

III. **Issues and Standard of Review**

[9] The Applicant raises the following issues for the Court's consideration:

A. Was the Officer's credibility finding reasonable?

B. Did the Officer err by failing to assess all grounds of persecution?

C. Was the Officer's failure to contemporaneously prepare notes during the interview with the Applicant a breach of procedural fairness?

[10] The parties agree that the reasonableness standard of review applies to the first two issues above, which relate to the substance of the Decision, and that the correctness standard of review applies to the procedural fairness issue.

IV. **Analysis**

[11] My decision to allow this application for judicial review turns on the first issue raised by the Applicant and specifically his argument that the Officer impugned his credibility based on an impermissible implausibility analysis. The letter communicating the Decision identifies the Officer's adverse credibility determination, based in part on a conclusion that it is implausible that the Applicant could leave school and hide from the government for several years without

being detected and taken into mandatory military or government service. Similarly, the GCMS notes indicate that the Officer found it implausible that the Applicant could leave school and hide from the government for four years without being detected and at the same time be able to support his family.

[12] In challenging this finding, the Applicant relies on the principle that implausibility findings should be made only in the clearest of cases, i.e., only 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 (see *Valtchev v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1131, 2001 FCT 776 (FCTD) [*Valtchev*] at para 9). As expressed by Justice Norris in *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908 at para 9:

> 9. It is important to remember that the ultimate question for the decision-maker is not whether the events in question occurred but whether the claimant is to be believed when he or she says that they did. 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. Individual experiences need not always follow the norm. Unlikely events can still happen. Something more is required before a claimant may be found not to be credible on the basis of implausibility alone. Importantly, this restriction on this type of fact-finding helps mitigate the risk of error if a claimant's account is rejected.

[13] Against this jurisprudential backdrop, the Applicant argues that the circumstances of the present case cannot be characterized as one of "the clearest of cases." In particular, the Applicant relies on country condition evidence in the National Documentation Package [NDP] for Eritrea, surrounding the government's practice of roundups as a forced means of conscription. The report

in the NDP on which the Applicant relies indicates that, while the available information about the frequency of these roundups varies, there was evidence that many draft evaders led a normal life and were never apprehended over a period of several years. There is also evidence that these roundups are significantly rarer in remote areas and are less common than they had been before 2010.

[14] Based on this evidence in the NDP, it cannot be said that this case represents one of the circumstances, described by *Valtchev*, in which an implausibility finding is permissible because the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant.

[15] The Respondent argues that, while the Officer characterizes the finding as one of implausibility, this is not the sort of implausibility analysis about which the principle described in *Valtchev* is concerned. *Valtchev* (at para 8) refers to Associate Chief Justice Jerome's description, in *Leung v Canada (Minister of Employment & Immigration)*, [1994] FCJ No 774, 81 FTR 303 (FCTD), of implausibility as an inherently subjective assessment that is largely dependent on an individual decision-maker's perceptions of what constitutes rational human behaviour (at para 15). I agree that such assessments are one type of implausibility analysis. However, analyses of whether events in the country of origin could have occurred in the manner alleged by a claimant (potentially against the backdrop of the objective evidence) are equally within the ambit of *Valtchev*, which expressly refers to such analyses in its explanation of the concern about implausibility findings (at para 9).

[16] The Respondent also argues that the Officer's analysis is reasonable, because it follows a rational chain of reasoning that is not undermined by the country condition evidence on which the Applicant relies. In that respect, the Respondent submits that analyzing the objective evidence is within the expertise of the Officer and emphasizes that the evidence refers only to a reduction in the frequency of roundups, not to their elimination. While I agree with these submissions, they do not undermine the merits of the Applicant's argument that the Officer arrived at the implausibility finding without any express reference to, or analysis of, the relevant country condition evidence.

[17] The Respondent also submits that the Applicant's reliance on the evidence in the NDP about the infrequency of roundups is inconsistent with his testimony before the Officer that he avoided capture by hiding. I agree with the Applicant's argument, in response to this submission, that the Decision contains no analysis to this effect. Moreover, I do not find anything inconsistent in the proposition that the Applicant was able to evade capture for four years because of a combination of infrequent roundups and efforts to hide whenever there was a risk of capture.

[18] Finally, the Respondent defends the reasonableness of the Decision on the basis that the Officer impugned the Applicant's credibility not only based on the implausibility analysis but also based on inconsistencies in the Applicant's testimony. I find this the most compelling of the Respondent's submissions, as *Valtchev* expressly states (at para 9) that "[s]omething more is required before a claimant may be found not to be credible on the basis of implausibility alone." [my emphasis].

[19] I agree that there are cases where an adverse credibility assessment based on an impermissible implausibility analysis will not undermine the reasonableness of a decision, because it appears the result would have been the same even without that analysis. However, I cannot reach that conclusion in the case at hand. While the Officer found inconsistencies in the Applicant's testimony as to the timeline between leaving school and fleeing Eritrea, the implausibility analysis was at least as central to the result as that finding. Also, the implausibility finding was not based on the issues that the Officer saw with the timeline that the Applicant described. I cannot conclude that the result would have been the same on the basis of the inconsistencies alone.

[20] I find that the implausibility analysis is a reviewable error that undermines the reasonableness of the Decision. Therefore, this application for judicial review must be allowed and the matter referred to a different officer for re-determination. Having reached this conclusion, it is unnecessary for the Court to consider the other issues raised by the Applicant in this application.

[21] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-6966-19

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, and this matter is returned to a different immigration officer for re-determination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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