Federal Court  Cour fédérale

Date: 20130416

Docket: IMM-4978-12

Citation: 2013 FC 380

Ottawa, Ontario, April 16, 2013

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

TEWOLDE GEBREMEDHIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Mr. Tewolde Gebremedhin, is a citizen of Eritrea currently residing in Kenya. He has applied for permanent residence in Canada as a dependant of his wife, a Convention refugee who lives in Canada. From 1978 to May 1991, the Applicant worked for the Relief and Rehabilitation Commission (RRC), an agency of the Ethiopian Government under Mengistu Haile Mariam. A major component of the responsibilities of the RRC was the distribution of food aid to civilians in the Eritrea region of Ethiopia (now a separate country). During that time, many civilians starved or were forcibly resettled. As part of the application

process, the Applicant was questioned about his personal involvement with the RRC. There appears to be no question that the Applicant worked for the RRC and coordinated the transport of food aid in some of the areas of Eritrea most adversely affected by the famine.

[2] In a decision dated April 3, 2012, an Immigration Program Manager (the Officer) with Citizenship and Immigration Canada (CIC) determined that, due to his involvement with the RRC, there were reasonable grounds to believe that the Applicant was inadmissible to Canada, pursuant to s. 35(1)(a) and 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[3] The Applicant seeks judicial review of the decision, alleging that the Officer erred as follows:

1. The Officer breached the principles of fairness by failing to disclose a brief prepared by officials of the Canadian Border Services Agency (CBSA), which brief was relied on by the Officer;

2. The decision was unreasonable because:

    (a) the Officer erred in finding the Applicant to be complicit when he made no finding that the Applicant himself participated in crimes against humanity; and

(b) the Officer erred in finding that the Applicant was a "senior official", because the Officer failed to properly assess his role in the regime of Mengistu Haile Mariam (often referred to as the "Dergue").

[4] For the reasons that follow, I am not persuaded that the decision should be overturned. In short, there was no breach of procedural fairness and the decision was reasonable in that it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

Statutory Scheme

[5] The Applicant was found inadmissible to Canada under both s. 35(1)(a) and s. 35(1)(b) of *IRPA* because of the crimes against humanity committed by the Dergue:

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(a) 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*;	a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;
(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism,	b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme,

systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*;	à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;

[6] The Officer concluded that the Applicant was a senior member of the public service, a prescribed senior official for the purposes of s. 35(1)(b) in accordance with s. 16 of the *Immigration and Refugee Protection Regulations*, SOR/202-227 [the *Regulations*]:

16. For the purposes of paragraph 35(1)(b) of the Act, a prescribed senior official in the service of a government is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position, and includes	16. Pour l'application de l'alinéa 35(1)b) de la Loi, occupent un poste de rang supérieur au sein d'une administration les personnes qui, du fait de leurs actuelles ou anciennes fonctions, sont ou étaient en mesure d'influencer sensiblement l'exercice du pouvoir par leur gouvernement ou en tirent ou auraient pu en tirer certains avantages, notamment :
(a) heads of state or government;	a) le chef d'État ou le chef du gouvernement;
(b) members of the cabinet or governing council;	b) les membres du cabinet ou du conseil exécutif;
(c) senior advisors to persons described in paragraph (a) or (b);	c) les principaux conseillers des personnes visées aux alinéas a) et b);
(d) senior members of the public service;	d) les hauts fonctionnaires;

(e) senior members of the military and of the intelligence and internal security services;	e) les responsables des forces armées et des services de renseignement ou de sécurité intérieure;
(f) ambassadors and senior diplomatic officials; and	f) les ambassadeurs et les membres du service diplomatique de haut rang;
(g) members of the judiciary.	g) les juges.

Procedural Fairness

[7] During his assessment of the Applicant's application, the Officer referred the case to the CBSA War Crimes Unit and received an initial report. A fairness letter, dated June 8, 2011, was sent to the Applicant informing him of the Officer's concerns. The Officer requested and received a second report from CBSA after the Applicant responded to the fairness letter. The two CBSA reports were not provided to the Applicant before the Officer rendered a decision.

[8] The Applicant submits that failure to disclose the CBSA reports breached procedural fairness, since the general fairness letter did not provide sufficient detail to allow the Applicant to meaningfully respond to the allegations of complicity against him. According to the Applicant, the fairness letter did not raise issues related to the method of joining, whether the Applicant could have left the organization earlier and the scope of his knowledge, matters that were likely part of the CBSA memo. The Applicant relies on *Pusat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 428 at paras 30-32, 388 FTR 49 [*Pusat*] in which the Officer's failed to disclose a CBSA report which contained detailed allegations about the membership of the applicant in a terrorist organization.

[9] I accept that failure to disclose a report that is relied on by an immigration officer raises the question of whether or not the applicant had the opportunity to meaningfully participate in the decision-making process (*Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 at para 22, [2001] 3 FC 3). However, this does not mean that a failure to provide the document itself automatically results in a breach of procedural fairness. Each case turns on its facts. The relevant question is not whether the document was provided but whether the information was disclosed to the Applicant.

[10] To determine whether the Applicant was given sufficient information about the allegations against him to meaningfully participate, I observe that the most critical information in the CBSA brief was disclosed in the fairness letter:

- The Applicant held a senior position in the Ethiopian government while working at the RRC. He was Head/Director of Transport in Asmara from 1980-1984. He also served in Massawa (1984-1990) and Seraya (1990-1991). The Applicant reported to the RRC Commissioner for Eritrea, who reported to the top RRC Commissioner in Addis Ababa.

- Through his actions in the RRC, the Applicant was complicit in two crimes against humanity committed by the Ethiopian government, contrary to article 7(1)

of the *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544, UN Doc A/CONF 183/9 [the *Rome Statute*]:

- Deportation or forcible transfer of population; and

- Extermination by deliberately starving civilians while tremendous amounts of food aid were ready to be distributed and instead ignored;

- Open sources document these acts committed by the Ethiopian government against civilians, particularly during the 1983-1985 famine. The RRC diverted money and food aid to government forces and militias. They used transportation systems for forcible resettlement and weapons transport rather than distribution of food and relief supplies.

- The Applicant was responsible for moving food aid from the Massawa Port to all seven districts of Eritrea and the Tigray region. These were some of the areas that were hardest hit by the famine.

[11] The Applicant asserts that information related to the Applicant's method of joining and lack of dissociation from the RRC should have been provided. I disagree.

[12] The Applicant overlooks the fact that this information was discussed with him in his interview, when the Officer questioned the Applicant about his employment with the RRC. The

Officer specifically asked the Applicant to explain how he started working at the RRC and required him to provide the details of his entire tenure with that organization. At the end of the interview, the Officer told the Applicant that the reason for this line of questioning related to inadmissibility. Therefore, Applicant should have known that this information was relevant to the allegations against him.

[13] The Applicant also argues that the contents of the CBSA report relating to his knowledge should have been disclosed. However, a review of the CBSA report demonstrates that the pertinent allegations were directly reproduced in the fairness letter. Based on these allegations, relating to the Applicant's position in the RRC and the atrocities committed by organization, the Officer concluded it was not credible that the Applicant did not know about these atrocities or could have ignored them. Further, the fairness letter states that the Applicant was complicit in crimes against humanity, implying some level of knowledge or imputed knowledge.

[14] The Applicant refers to the allegation in the fairness letter that 90% of international aid (food and money) was diverted to government and militias and submits that he should have been provided with the documentary source for the 90% figure. This does not raise an issue of procedural fairness. All of the documents were publicly available to everyone, including the Applicant, a fact specifically noted in the fairness letter. In addition, the Applicant addressed this quantification with documentary evidence from Human Rights Watch in his responding submissions.

[15] In sum, the information relevant to the allegations of inadmissibility that was contained in the CBSA brief was provided in the detailed fairness letter sent to the Applicant or was discussed with the Applicant at his interview.

[16] The case of *Pusat*, relied upon by the Applicant, is distinguishable; that case dealt with a situation where no fairness letter was provided (*Pusat*, above at paras 16, 32). Essentially, what the applicants in *Pusat* wanted was provided in this case.

[17] On the facts of this case, I conclude that there was no breach of procedural fairness.

Reasonableness of Decision

A. *Section 35(1)(a)*

[18] Section 35(1)(a) of *IRPA* applies to individuals who have personally committed crimes against humanity or are complicit in such offences (*Ezokola v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 224 at paras 52-60, 69-70, [2011] 3 FCR 417 [*Ezokola*]). Crimes against humanity require a criminal act, committed in the context of a systemic attack against civilians or an identified group, as well as a guilty mind (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paras 128-130, [2005] 2 SCR 100 [*Mugesera*]).

[19] To establish inadmissibility under this section, the standard of proof is "reasonable grounds to believe", as noted in s. 33 of *IRPA*. This standard requires more than "mere suspicion" but less than proof on a balance of probabilities (*Mugesera*, above at paras 114-115).

[20] Complicity under s. 35(1)(a) must be established through personal and knowing participation when the relevant organization is not a limited brutal purpose organization (*Ezokola*, above at paras 52-57).

[21] Nonetheless, active and direct participation – in the sense of aiding and abetting the commission of atrocities – is not required. If a senior official remains in his or her position, defends the interests of the government for whom he or she works and is aware of the relevant atrocities, this is sufficient to demonstrate complicity (*Ezokola*, above at para 72; *Nsika v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1026 at para 18, [2012] FCJ No 1112 [*Nsika*]).

[22] The Federal Court of Appeal articulated six factors relevant to participation in *Bahamin v Canada (Minister of Employment and Immigration)* (1994), 171 NR 79, [1994] FCJ No 961 [*Bahamin*]: the nature of the organization; method of recruitment; position/rank in the organization; knowledge of atrocities; length of time in the organization; and opportunity to leave the organization. The *Bahamin* factors continue to be recognized by the Federal Court and remain good law (*Nsika*, above at paras 23, 25).

[23] In the context of this application for judicial review, some factual matters are not in dispute. Causing starvation and forced expulsion may constitute crimes against humanity (*Rome Statute*, art 7(1), 7(2); *Hagos v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1214 at paras 68-70, 75-80, 5 Imm LR (4th) 130). The Government of Ethiopia under Mengistu Haile Mariam from 1974 to 1991 is designated under s. 35(1)(b) of *IRPA* as a regime that has engaged in terrorism, systematic or gross human rights violations, genocide, war crimes or crimes against humanity. While the Applicant contests the level of 90% diversion of international aid, he does not deny that thousands of Eritreans were starved or forced to re-settle during the time that the Applicant was employed by the RRC as Director of Transport and as a District Officer in the most adversely affected areas.

[24] Given these undisputed facts, the issue before the Officer was whether the Applicant was complicit in those crimes against humanity.

[25] The Applicant asserts that the Officer's complicity finding is unreasonable because the issue of active participation was not considered in the context of an organization that did some legitimate aid work and also committed atrocities. I do not agree. Active participation is not necessary for a finding of complicity. Further, the Officer's reasonable analysis of the *Bahamin* factors, used to evaluate participation, demonstrates a sufficient basis for a finding of complicity.

[26] It is evident from the Officer's notes that all six *Bahamin* factors were considered. The Officer reasonably evaluated the Applicant's participation using the *Bahamin* factors.

[27] The Officer considered that the Applicant joined the RRC voluntarily and he worked for the RRC and its successor organizations for 20 years. The Applicant dissociated from the organization voluntarily and there is no evidence that he attempted to leave earlier.

[28] The Officer also concluded that the Applicant's position was important – he held positions of "head of transport (as director)" and "district officer", akin to a "senior director", and he placed himself high on the RRC organizational hierarchy. The Officer preferred the Applicant's evidence at the interview over his evidence after receiving the fairness letter, since the Applicant did not have a motive to minimize his duties at the interview. This weighing of the evidence and the conclusion that the Applicant had a "high ranking position in the top half of the RRC" was reasonable.

[29] The Applicant's job duties relating to transportation, especially of food, suggested that the Applicant did participate in, or at least condone, war crimes relating to the distribution of food aid. The Applicant was responsible for "port coordination during famine", he "represented [districts] for food distribution" and he "coordinat(ed) cargo transport from Eritrea and northern Ethiopia – Tigray – areas hardest hit by famine". Further, documentary evidence established that the RRC "received over 90 per cent of the money and food" sent as emergency relief. Even if the 90% level of diversion is factually inaccurate, the point remains that very serious levels of re-distribution of food aid did take place while the Applicant was working in a position with significant supervisory responsibilities.

[30] The Officer considered the Applicant's argument that the RRC did some genuine aid work. However, in the analysis of the Applicant's knowledge, the Officer concluded that given the Applicant's duties and position – coordinating food aid in areas hardest hit by the famine – there was no way he could not have been aware of the atrocities committed. This finding is also reasonable and based on the evidence before the Officer.

[31] The Applicant's important role in food distribution and cargo transport in areas most affected by the famine, his voluntary association with the RRC for 20 years, his likely awareness of the crimes committed and his failure to dissociate earlier, all support indirect participation and a finding of complicity on a standard of reasonable grounds to believe. The Officer's conclusion with respect to the Applicant's complicity under s. 35(1)(a) falls within a range of possible, acceptable outcomes.

B. *Section 35(1)(b)*

[32] In addition to finding that the Applicant was inadmissible under s. 35(1)(a) of *IRPA*, the Officer also concluded that the Applicant's senior position within the RRC resulted in a finding of inadmissibility pursuant to s. 35(1)(b).

[33] Section 35(1)(b) states that individuals who are prescribed senior officials in governments that engage in or have engaged in systematic or gross human rights violations are inadmissible to Canada. Prescribed senior officials are listed in s. 16 of the *Regulations*, as noted

above. To establish inadmissibility under this section, the standard of proof is also "reasonable grounds to believe" (*Mugesera*, above at paras 114-115).

[34] Section 35(1)(b) of the *IRPA* requires the decision-maker to analyze whether the applicant's position in the organization was senior on an appropriate evidentiary basis (*Hamidi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 333 at paras 24-26, 289 FTR 110).

[35] ENF 18, the CIC Policy Document relating to war crimes and crimes against humanity, states that a finding under s. 35(1)(b) based on senior membership in the public service requires the designation of the regime, proof of the position held and proof that this position is senior (Affidavit of Salima Sajan at 12). ENF 18 also explains how an officer may determine whether a position is senior:

> If it can be demonstrated that the position is in the top half of the organization, the position can be considered senior. This can be further established by evidence of the responsibilities attached to the position and the type of work actually done or the types of decisions made (if not by the applicant then by holders of similar positions).

[36] As noted above, the Government of Ethiopia under Mengistu Haile Mariam from 1974 to 1991 is designated under s. 35(1)(b) of *IRPA* as a regime that has engaged in terrorism, systematic or gross human rights violations, genocide, war crimes or crimes against humanity. The question is whether the Applicant's position in the RRC is senior enough to allow the inference that he was part of that regime.

[37] Contrary to the Applicant's submissions, the Officer considered the appropriate issue in finding that the Applicant was a senior member of the public service, and not just a senior member of the RRC. The relevant issue is whether the Officer's conclusion that the Applicant was a senior member of the public service was reasonable.

[38] As reflected in the decision and the Officer's notes, the Officer considered that the Applicant described his positions as a "director" and "senior director" at the interview. Both positions were separated by only one person from the top individual in the RRC. The Officer considered the Applicant's submissions in response to the procedural fairness letter that his position was not senior and that there was a misunderstanding about the nature of his job titles. The Officer concluded that this was an attempt by the Applicant to minimize his duties, since this evidence was inconsistent with that given at the interview and in his application.

[39] In my view, the Officer's findings are reasonable.

[40] Firstly, the documentary evidence demonstrates that the RRC was an important organization in the Ethiopian government. A report released by Human Rights Watch states that the RRC was a "powerful government department" with a mandate "to prevent and ameliorate future famines, and to coordinate international assistance". The same report states that "the RRC and voluntary agencies working along side it… received over 90 per cent of the money and food" sent as emergency relief. This suggests that the RRC played a significant role in the government and in the crimes against humanity referred to by the Officer relating to the diversion of food aid.

[41] Secondly, the Applicant's evidence at his interview is consistent with a senior position not only in the RRC, but also in the Ethiopian government:

- The Applicant was Head/Director of Transport in Asmara, a position that he held from 1980 to 1984, during which time he reported to the RRC representative for Eritrea, who in turn reported to the commissioner's office in Addis.

- The Applicant was responsible for moving food aid from Massawa port to all seven districts in Eritrea.

- In 1984, the Applicant became the District Officer in Massawa, where his position involved the administration of food distribution and coordination of cargo transport to Eritrea and Tigray in Northern Ethiopia, areas hardest hit by the famine.

- The Applicant explained that the position in Massawa was like a senior director position.

[42] The chart drawn at the interview places the Applicant's position only two levels below the Commissioner of the RRC, who was the top of that organization. Given the RRC's key role, it was not unreasonable to find that the Applicant was a senior member of the public service.

[43] Lastly, it was reasonable for the Officer to doubt the Applicant's evidence in response to the fairness letter, and to prefer his earlier evidence. The Applicant's motive to minimize his role in the RRC and the Ethiopian government and the differences between the Applicant's descriptions of his positions were relevant factors that the Officer was entitled to weigh.

[44] In response to the fairness letter, the Applicant made lengthy submissions. With respect to his position within the RRC, he submitted a letter from the Ministry of Agriculture and Rural Development (the Ministry Letter). In the Applicant's opinion, this letter, which appears to contradict the Officer's finding that the Applicant held a senior position in the public service, was ignored. In my view, the Ministry Letter was addressed and, in many ways, is consistent with the Officer's findings.

[45] I observe first that the Officer acknowledged in the notes that he reviewed "the file in its entirety", including "all docs submitted in response to PF letter". The Ministry Letter is specifically noted as a document that was received from the Applicant in response to the procedural fairness letter.

[46] Further, the Officer acknowledged the contrary evidence in the Ministry Letter with respect to the Applicant's position with the RRC and complicity. The Officer stated that the Applicant, in response to the fairness letter, took the position that he "only ever held minor, regional and district level civil servant positions". This acknowledges the contrary evidence in the Ministry Letter that the Applicant held "minor district level positions" providing "purely a professional service". The Officer also stated the Applicant relied on the fact that he kept his

position after those who served under the Dergue were punished for their crimes. This acknowledges the contrary evidence in the Ministry Letter that the "[o]thers who had nothing to do with rights violations, including those who served as civil servants with the Dergue were allowed to continue their normal lives under the new Government. Accordingly, Tewolde was assigned as Representative of DPPC".

[47] Having reviewed the record and the submissions of the Applicant, I am satisfied that the Officer's s. 35(1)(b) finding that the Applicant was a senior member of the public service falls within a range of possible, acceptable outcomes.

Conclusion

[48] In sum, the decision reached by the Officer that there were reasonable grounds to believe that the Applicant was a member of an inadmissible class of persons described in s. 35(1)(a) and 35(1)(b) of *IRPA* was reasonable.

[49] Neither party proposes a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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