Federal Court  Cour fédérale

Date: 20210928

Docket: IMM-144-19

Citation: 2021 FC 1001

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 28, 2021

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

MEHARI BERHE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Mehari Berhe, is a citizen of Eritrea. He seeks judicial review of an immigration officer's decision (Decision) issued on October 16, 2019 denying his application for a pre-removal risk assessment (PRRA).

[2] In January 2000, the applicant was forced to perform his Eritrean national service. Once he completed his training, he was assigned to a government farm to complete his service. In 2009, the applicant and his colleagues discovered that part of the farm they were working on was actually owned by a colonel in the armed forces. Outraged by this discovery, they took part in protests and were subsequently detained in Nafka prison. During his detention, the applicant alleges that he was interrogated and beaten. With the help of a prison guard, the applicant fled to Sudan, a neighboring country, in October 2009.

[3] The applicant left Eritrea and arrived in the United States on May 8, 2010, where he lived until 2018. The applicant applied for asylum in 2010 while living in the United States, but his application was denied on February 14, 2014. On the same day, the applicant applied for and received "withholding of removal status" from U.S. authorities.

[4] The applicant attempted to enter Canada the first time in May 2017 but was sent back to the United States pursuant to paragraph 101(1)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). His claim to the Refugee Protection Division was ineligible as he presented himself at a port of entry after arriving directly from the United States, a designated country. On April 30, 2018, the applicant entered Canada irregularly. Shortly thereafter, he submitted a PRRA application.

[5] The applicant alleges that he fears a return to Eritrea, as Eritreans who are forced to return or those who avoid mandatory national service are arrested, detained and mistreated. He

claims that his family would be at risk of imprisonment and of fines for avoiding mandatory national service.

[6] After analysis, the PRRA officer (the officer) concluded that the applicant had not provided sufficient compelling evidence to support his fears and to establish that he would be at risk under sections 96 and 97 of the IRPA if returned to Eritrea. In reaching this conclusion, the officer relied on the following:

a) The applicant did not provide sufficient evidence and details explaining how escaping detention and avoiding military service affected his family and their well-being. The lack of evidence regarding his family's treatment diminishes his objective and subjective fear of return to Eritrea.

b) Although the reasons for the rejection of his asylum claim in the United States are not known, the rejection of his claim by U.S. authorities diminishes his objective and subjective fear. Moreover, in light of his obtaining "withholding of removal status," the applicant has not provided sufficient objective evidence demonstrating the existence of a threat of deportation from the United States to Eritrea. The applicant's fear of deportation as a result of Donald Trump's election was not sufficient to demonstrate the existence of a risk within the meaning of sections 96 or 97 of the IRPA.

c) Given the lack of evidence of risk of removal from the United States, the applicant's choice to come to Canada, while there is no certainty that he will be allowed to stay, indicates the absence of subjective fear.

d) The applicant has not presented sufficient objective evidence of his Eritrean nationality, enlistment, and length of national service.

e) Although conditions in Eritrea are far from ideal, the applicant has not established that his personal circumstances would put him at risk within the meaning of section 97 of the IRPA. Several members of his family continue to live in Eritrea, and have done so since his departure, and he has not provided any details or evidence explaining how the adverse conditions in the country have affected his family.

[7] The applicant seeks judicial review of the Decision. Although stated otherwise in his brief, the applicant complains of the officer's assessment of all the documentary evidence and the inadequacy of the reasons.

II. **Analysis**

[8] The parties agree that the standard of review applicable to a PRRA officer's decision, including his or her assessment of the evidence, is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*); *Damascus v Canada (Citizenship and Immigration)*), 2021 FC 547 at para 6).

[9] The officer's Decision highlights the Supreme Court's directive that the Court considers "the decision made by the decision-maker—including both the rationale for the decision and the outcome" when applying the reasonableness standard (*Vavilov* at para 83). The Court seeks to determine whether the decision is "based on an internally coherent and rational analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). It is not the role of this Court to substitute its opinion for that of the decision-maker.

[10] I agree with some of the applicant's arguments for the following reasons. My decision to allow this application for judicial review focuses on the officer's reasons. I find that his reasons call into question the dismissal of the applicant's PRRA because they "exhibit clear logical fallacies" (*Vavilov* at para 104). The reasons do not justify the Decision in an intelligible and transparent manner.

a) *Treatment of applicant's family members*

[11] The applicant alleges that the officer did not consider the totality of the documentary evidence regarding Eritrea. Specifically, he argues that the officer fragmented and omitted any reference to evidence stating that it is possible that his family did not suffer the consequences of his desertion from national service.

[12] It is well established that decision makers are not obliged to refer to every piece of evidence before them that is contrary to their findings of fact (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53, 1998 CanLII 8667 (FC) at paras 16–17). However, if the decision maker omits important evidence that contradicts his or her conclusions, the Court may intervene (*Tremblay v Canada (Citizenship and Immigration)*, 2021 FC 303 at para 37).

[13] In this case, the officer concluded that "I find the lack of evidence regarding the treatment of [the applicant's] family members due to his escape diminishes his objective and subjective fear", referring to the objective documentation submitted to him by the applicant, including the "UK Home office Country Policy and Information Note Eritrea National service and illegal exit, July 2018".

[14] In his PRRA submissions, the applicant's former counsel relied on a May 20, 2016 report from the Norwegian Country of Origin Information Centre, Landinfo Eritrea: National Service at p 23. Section 3.3 of this report states that it has not received information on fines and persecution of families for several years. The document also notes that families were met in 2013, 2015, and

2016 and no one was worried. Even more troubling is the officer's reference to a discrete sentence in section 12.4.1 of the UK Home office report. A careful reading of this entire section reveals that fines are not uniformly imposed, persecution of family members of deserters has declined in recent years, and there is no longer systematic persecution of families.

[15] I accept the respondent's argument that according to the evidence, since 2009, no fines have been imposed on the applicant's family and family has not been worried. However, the officer's reasons do not match the evidence. The officer omitted any reference to the contradictory evidence presented in paragraph 12.4.1 of the Norwegian report. He does not justify his negative findings as to the applicant's fear for the safety of his family. I therefore find that it was unreasonable for the officer to conclude that the lack of evidence regarding the treatment of the applicant's family after his flight from Eritrea diminishes his objective and subjective fear. It was incumbent upon the officer to consider all the evidence and to explain the impact of the conflicting evidence on his ultimate decision (*Acosta Ramirez v Canada (Citizenship and Immigration)*, 2007 FC 721 at para 35). Accordingly, I am of the opinion that the Decision contains sufficiently serious shortcomings (*Vavilov* at para 100) and that the officer's findings do not meet the requirements of reasonableness and intelligibility.

b) *Applicant's asylum claim rejected in the United States*

[16] According to the officer, although the reasons for the rejection of the applicant's asylum claim in the United States are unknown, the rejection diminishes his objective and subjective fear. In my view, there is no evidence to support this conclusion as the officer did not have access to the reasons for the rejection. This conclusion is speculative. The claim could have been

rejected for a number of reasons, such as a reason that would have no bearing on the applicant's objective or subjective fear of return to Eritrea.

[17] The respondent also points out that the applicant had "withholding of removal status" while living in the United States. Thus, the respondent cites *Wangden v Canada (Citizenship and Immigration)*, 2009 FCA 344 (*Wangden*), in which the Federal Court of Appeal found that "withholding of removal status" is equivalent to recognition of Convention refugee status (*Wangden* at para 7; *Kalaeb v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 345 at paras 51–55). The respondent referred to the *Wangden* case in support of his argument that the applicant had no reason to leave the United States given that he held status that protected him. However, if one accepts that refugee status and "withholding of removal status" are equivalent, the officer's presumption that the denial of the applicant's asylum claim in the United States diminishes his fear is illogical and requires explanation.

[18] The officer also found that the applicant's choice to leave the United States and come to Canada indicated a lack of subjective fear, given the insufficient evidence of risk of removal from the United States and the lack of certainty that he would be allowed to remain in Canada. I agree with the arguments of the respondent in this regard. The fear of removal from the United States to Eritrea due to the election of President Trump is not objectively well-founded in light of the rights afforded by "withholding of removal status". The applicant has not convinced me that the officer's conclusion does not reflect the hallmarks of an inherently coherent and rational analysis.

c) *Negative decision on forward-looking risk assessment*

[19] The Decision demonstrates that the officer considered the general situation in Eritrea and recognized the difficult circumstances there. The applicant insisted that Eritrea is one of the worst dictatorships in the world, a place where human rights are systematically violated. He argued that the officer underplayed the objective evidence available on Eritrea.

[20] I do not agree with the applicant. In my view, considering the arguments made by the applicant on this subject, he is in effect asking the Court to reweigh the relevant evidence, contrary to the directions of the Supreme Court (*Vavilov* at para 125).

[21] However, the applicant argued that the officer failed to assess his personal situation on a forward-looking basis when analyzing the objective documentation. Instead, the officer relied on the lack of intervention by the authorities towards his family members to conclude that there was a mere possibility that the applicant would be persecuted if he returned to Eritrea. The applicant pointed out that the officer did not take into account the fact that he had fled his country and that, in addition, he is a refugee protection claimant in the United States and Canada.

[22] On the other hand, according to the respondent, the evidence shows that the applicant's family has been living in Eritrea since his "desertion" in 2009, and that the applicant has not demonstrated the connection between him, his family, and the impact of conditions at home on his family. Further, there is doubt that the applicant was forced to perform national service in Sawa, given that he did not provide the officer with documentation typical of those who have been forced to perform national service.

[23] The applicant attempted to link the documentary evidence of country conditions to his personal situation. He stated that if he were to return to Eritrea, the risk he faces stems from having left the country and national service illegally, being a failed asylum seeker and the fact that he will be forced to return to Eritrea. These arguments are included in the submissions accompanying his PRRA application.

[24] In the Decision, the officer acknowledges the difficult conditions in Eritrea, but makes no mention of the applicant's submissions as to his personal circumstances, other than the treatment of his family since his departure. Moreover, the officer does not refer to the relevant objective documents that mention the applicant's particular circumstances. I therefore find that the officer committed a reviewable error that undermines the reasonableness of the Decision. He failed to assess the applicant's circumstances on a forward-looking basis. Instead, the officer relied on the lack of action by the Eritrean authorities with respect to the applicant's family members, who were not in the same situation as the applicant, as they neither avoided national service nor left the country.

d) *Additional arguments*

[25] The three material errors identified above are determinative in this case, but I will nevertheless briefly address some of the applicant's additional arguments.

[26] The applicant argued that the officer erred when he found that the applicant did not file sufficient evidence regarding his Eritrean citizenship and mandatory national service.

[27] The applicant did not provide the officer with a translation of his identity card. In addition, he did not produce documentation confirming his national service. I do not agree with the applicant that it was the officer's responsibility to request the translation of the document and that the officer should have convened a hearing to ask the applicant questions about it and his national service. While I agree with the applicant that the officer's findings with respect to his citizenship and national service are misplaced in the Decision, I agree with the arguments of the respondent. The officer had no duty to warn the applicant that his evidence was insufficient or to ask him to provide additional evidence (*Tesfay v Canada (Citizenship and Immigration)*, 2021 FC 593 at para 14).

[28] It is the responsibility of the applicant or the applicant's counsel to provide a translation of the evidence in a PRRA application. Failure to provide such evidence is not grounds for a hearing. In addition, the officer pointed to the fact that the applicant did not submit sufficient documentation regarding his recruitment and length of national service. According to the objective evidence in the record, conscripts who underwent military training in Sawa (the location in Eritrea where the applicant trained) were issued a yellow identification card from 1976 or 1977 until 2002 or 2003. The evidence demonstrates that it was reasonable for the officer to conclude that during the applicant's military service between 2000 and 2009, identification would have been provided to national service enlistees.

III. **Conclusion**

[29] The application is allowed.

[30] The parties have not proposed any questions for certification, and I agree that there are none.

JUDGMENT in IMM-144-19

THE COURT ORDERS as follows:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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