

Federal Court



Cour fédérale

Date: 20171220

Docket: IMM-2164-17

Citation: 2017 FC 1172

Ottawa, Ontario, December 20, 2017

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

TSINAT TESFAY YHDEGO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Before the Court is an application for judicial review of the decision of a visa officer of Citizenship and Immigration Canada (the Visa Officer), dated November 18, 2016, which denied the applicant's application for a permanent resident visa as a member of the Convention refugee abroad class or the humanitarian-protected persons abroad designated class. The Visa Officer was concerned that the applicant had not answered truthfully all questions put to him for the

purpose of examining his application, as required by s. 16(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] For the reasons that follow, I have determined that this application should be dismissed.

II. Facts

[3] The applicant, Tsinat Tesfay Yhdego, is a citizen of Eritrea. He asserts a fear of the Eritrean government following his desertion from the Eritrean military. The applicant claims he was a guard at a military prison beginning in January 2007. He also claims he was imprisoned and tortured there from July 2008 to December 2009 for failing to shoot suspected illegal border crossers who ran away from him after being detained. This event, the detention of suspected illegal border crossers and the applicant's subsequent imprisonment for not shooting those who fled, is referred to herein as the Key Event.

[4] The applicant fled to Sudan following his release from prison. He also claims continuing fears of arrest and other hardships associated with living as a Christian refugee in Sudan. These fears include the possibility of deportation back to Eritrea.

[5] The applicant obtained his status with the United Nations High Commission for Refugees in Sudan on May 17, 2010. On February 5, 2016, the applicant submitted his application for permanent residence in Canada, appending a narrative of the events (including the Key Event) that led to his flight from Eritrea (the Narrative). The applicant's former employment with the Eritrean military caused the Visa Officer to be concerned about the applicant on security

grounds, and prompted an interview with the applicant. The applicant was interviewed on July 19, 2016, in Khartoum, with the assistance of an interpreter (the Interview).

[6] The Visa Officer later noted that the applicant had not mentioned the Key Event during the Interview. Presumably because the applicant had not been asked to explain that omission during the Interview, a procedural fairness letter was sent to the applicant on September 26, 2016 (the PFL), in which he was invited to do so. The wording of this invitation is important, and so the relevant portion of the PFL is reproduced here:

You wrote the following in the narrative on file: "...In 14th July 2008 when a group of 20 men were out for gathering fire wood, we saw three young people passing by. Our chief ordered us to stop [them] and as we later knew were, making their way to Sudan as a teenage girl confessed when interrogated. The chief nominated me to take them to our base garrison and two of them, the boys, started to run away blindly while I fired warning shots into the air the only way to stop them was by shooting at them but I still refrained from doing so and I remained with only the girl and handled her to the main officer after narrating to him all what had happened. When the squad head came back I was summoned to the main officer. They suspected me of assisting the individuals to flee. They continued putting baseless allegations against me and said I was trying to hinder them in their endeavour to stop illegal border crossing. The main chief of my unit said 'you had the gun in your hand why didn't you shoot them'. Thus I was taken responsible for the escape of the boys and as a charge of I was jailed from 15th of July 2008 to 10th of December 2009 at the prison centre of my respective place..."

During your interview in Khartoum on July 19th 2016, you failed to mention this incident even though the Visa Officer asked several questions that would have been relevant occasions to do so. For example, the Visa Officer asked you:

- what were your duties as a guard?
- did you see prisoners being detained while you were guarding?
- did you ever see anyone trying to escape?

- were you part of the team controlling to make sure no one escaped?
- what happened to that made you escape?
- when you were guarding did you have an order to shoot anyone you say [*sic*] escaping?

Your answers to all of these questions do not reflect the facts presented in the written narrative. This is a significant discrepancy that is highly relevant to your admissibility assessment.

I would like to provide you with the opportunity to explain the discrepancy.

[7] The applicant's response to the PFL (the Response Letter) referred to the Key Event and expanded on his answers to the questions listed in the PFL. However, the applicant failed to explain why he did not mention the Key Event during the Interview.

III. Impugned Decision

[8] The Visa Officer rejected the application principally due to the applicant's failure to provide the missing explanation. The Visa Officer also noted several discrepancies between the Narrative, the Interview and the Response Letter. The reasons for the Visa Officer's decision are found in a letter that was sent to the applicant, as well as in Global Case Management System (GCMS) notes.

[9] The cited discrepancies are discussed below.

[10] Ultimately, the Visa Officer was of the view that the discrepancies undermined the applicant's credibility, which in turn hindered the Visa Officer's admissibility analysis. The following extract from the GCMS notes shows the Visa Officer's reasoning:

Based on careful consideration of all of these facts and the discrepancies in the information presented by PA, I am not satisfied that he is credible. Credible information about his experience during this period is critical for the completion of a proper assessment of whether or not PA is admissible to Canada, specifically whether or not he might be described in A35(1)(a) for having participated in actions against prisoners which could constitute a crime against humanity. Given the large body of evidence in the form of human rights reports about the violent treatment of prisoners in Eritrea during the period while PA was a prison guard, clear and credible facts about PAs activities in national service are central to this assessment. They are also central to the determination of whether or not, based on his experience, he would face persecution in Eritrea. In the absence of credible information that is directly relevant, am not satisfied that PA meets requirements for immigration to Canada. Refused.

IV. Issues

[11] The applicant raises two categories of issues. First, the applicant argues that the PFL was not sufficiently clear in asking for an explanation as to why the applicant did not mention the Key Event during the Interview. The applicant argues that, without having put the applicant on notice of the Visa Officer's concern, it was unfair to make any decision on this basis.

[12] The second category of issues raised by the applicant concerns the various discrepancies noted by the Visa Officer in the GCMS notes. The applicant argues that the differences cited are minor and it was unreasonable to characterize them as discrepancies or to draw any negative conclusions from them.

V. Analysis

A. *Standard of review*

[13] The parties do not appear to disagree on the subject of the applicable standard of review. Procedural fairness is reviewed on a standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. The various inconsistencies found by the Visa Officer, and the conclusions drawn therefrom, are findings of fact and mixed fact and law which are reviewed on a standard of reasonableness: *Rocha v Canada (Citizenship and Immigration)*, 2015 FC 1070 at para 19.

B. *Procedural Fairness*

[14] In my view, it was reasonable for the Visa Officer to be concerned about the applicant's failure to mention the Key Event during the Interview. The Key Event (the escape of the detainees and the applicant's consequent imprisonment) was the principal trigger mentioned in the Narrative for his flight from Eritrea.

[15] The PFL was important because the applicant had not been asked during the interview to explain his omission. Fairness required that he be given a chance to provide an explanation. This was particularly so in view of the Visa Officer's opinion, as subsequently reflected in the GCMS notes, that this was "a major discrepancy" which was the "primary concern".

[16] The applicant argues that the PFL failed to ask the specific question that was the main concern: “Why didn’t you mention the Key Event during the Interview?” The applicant argues that, instead, the Visa Officer simply pointed out the omission and then listed a number of questions in response to which the Key Event might have been mentioned. He argues that the request thereafter to explain the discrepancy is not sufficiently clear to give the applicant notice of the Visa Officer’s primary concern. That request is reproduced here for convenience:

Your answers to all of these questions do not reflect the facts presented in the written narrative. This is a significant discrepancy that is highly relevant to your admissibility assessment.

I would like to provide you with the opportunity to explain the discrepancy.

[17] I accept that the PFL could have been clearer in communicating the Visa Officer’s primary concern. I hold this view because the request for an explanation is in relation to “the discrepancy”, which is defined in the PFL’s preceding paragraph, and can only really be understood by reference to the extract from the applicant’s narrative which is quoted several paragraphs earlier in the PFL. An explicit question of the kind provided in the previous paragraph would have been clearer.

[18] Nevertheless, I am not convinced that the applicant was not given fair notice that the Visa Officer wanted an explanation as to why he failed to mention the central event of his Narrative when he was interviewed. For one thing, it was clearly an important omission, especially given some of the questions that were asked during the Interview (see discussion below). In addition, a careful reading of the PFL shows a clear reference to the omission, followed by a characterization thereof as “a significant discrepancy”, followed by a request for an explanation

for “the discrepancy”. In the circumstances of this case, it is my view that the Visa Officer’s concern and wish for an explanation were fairly put to the applicant, and the mere fact that the request in the PFL could have been written more clearly is not sufficient to establish otherwise.

[19] My view is not altered by the fact that the applicant clearly has difficulty with the English language. The applicant’s difficulty in understanding the Visa Officer’s primary concern appears to be more in relation to the applicant’s diligence in reading the PFL than any translation issues.

[20] I am also mindful that, even now, the Court has not been provided with a convincing explanation as to why the applicant failed to mention the Key Event during the Interview.

[21] Once the Visa Officer had fairly put the concern to the applicant and requested an explanation, there was no need to repeat that request in a second procedural fairness letter, even in the absence of the requested explanation in the applicant’s Response Letter.

C. *Cited Discrepancies*

[22] As indicated above, the applicant responded to the PFL by expanding on his answers to the six questions listed therein. The Visa Officer found discrepancies in the applicant’s statements in relation to each of those six questions. Each of these is discussed separately under the respective headings below. I begin each section with a reproduction of the relevant portion of the Visa Officer’s GCMS notes. For ease of reading, I have reformatted these notes, though without altering the wording. I have not attempted to make any corrections to spelling, grammar or syntax. It should be noted that the references to the applicant’s statements and answers in the

GCMS notes are not always verbatim. However, in my view, they are a fair indication, for the purposes of this analysis, of what the applicant said.

(1) Question: What were your duties as a guard?

[23] Text from GCMS notes:

Narrative: On 1 January 2007 I was deployed to the army unit 6th brigade at Mitr Military detention and rehabilitation and reformation centre to work there as a sentinel for the prisoners.

Answer at interview: I was in the gate and our job was to control the staff members of the prison that they don't help the prisoners to escape and we check who goes in and out because the gate is 100 meters from the prison.

Answer in response to PFL: duties were to patrol at the gate, of the entire prison compound and controlling in and out let of the prison. Main duties was being in the gate to register for every on or item or any one of my colleagues and different police members and office staffs, works and soon and to surrender my all the documents' I had received from the guard who was before me to the next in queue.

Discrepancies between the answers: PA [principal applicant] has provided contradictory information about whether he was responsible for monitoring the prison and prisoners or simply located at the gate with no direct contact with prisoners. While in the narrative he referred to being a sentinel for prisoners, and in the response to PFL he declared he was responsible for the entire prison compound, at interview he stated that "We were located a bit far from [the prisoners] and they have their own staff. We can see them from far but I have never been close to the prison because it is surrounded by a wire gate."

[24] In my view, it was not unreasonable for the Visa Officer to find an inconsistency between the suggestion in the applicant's Narrative that he had contact with prisoners, and the suggestion during the Interview that he did not.

[25] Moreover, the applicant's statement during the Interview that he had never been close to the prison is particularly difficult to reconcile with his statement in the Narrative that he spent about 17 months there as a prisoner. Though the Visa Officer did not focus on this particular inconsistency, it is an important additional consideration related to the applicant's failure to mention during the Interview the Key Event, or the imprisonment and torture that followed it.

(2) Question: Did you see prisoners being detained while you were guarding?

[26] Text from GCMS notes:

Narrative: as cited in the PFL, describes an event when PA was directly involved with detaining fleeing prisoners.

A: We were located a bit far from them and they have their own staff. We can see them from far but I have never been close to the prison because it is surrounded by a wire gate.

Answer in response to PFL: "as I was there it was a must issue to see for the prisoners to observe them while they are going out and inside of the gate where I was assigned for patrolling the gate."

PA has provided contradictory information about whether or not prisoners used the gate he was guarding. In the narrative, he describes observing prisoners go out for firewood gathering activities and in response to the PFL he stated that prisoners did use the gate he guarded but at interview he stated that he was controlling the staff of the prison and those providing food and water to the prison.

[27] The applicant argues that the Narrative suggests that the young people discussed in the context of the Key Event who were detained and who then fled were not prisoners but simply passers-by who were detained as suspected illegal border crossers. The applicant also argues that there is no inconsistency between his statement that he observed prisoners and the suggestion

that he was not responsible for guarding them. The applicant argues that it was therefore unreasonable for the Visa Officer to perceive any discrepancy here.

[28] It may be technically correct that the suspected illegal border crossers were detainees and not prisoners. However, I am not convinced that it was unreasonable for the Visa Officer to perceive a discrepancy here. In his Narrative, the applicant described his involvement in the collection of firewood by a group of 20 men (presumably prisoners) and his assignment to take charge of detainees. His proximity to prisoners and detainees as described in the Narrative in the context of the Key Event stands in stark contrast to the impression given during the Interview that he had little contact with prisoners.

[29] Again, his statement in response to this question during the Interview that he had seen prisoners from far but had never been close to the prison is difficult to reconcile with his claim that he was a prisoner there himself over a period of 17 months.

(3) Question: Did you ever see anyone trying to escape?

[30] Text from GCMS notes:

Narrative: describes a specific event when he was directly involved with prisoners trying to escape.

A: The place is not a place where you can try to escape. It is a dead area with high temperature. No one can escape from there and there is a serious controlling.

Answer in response to PFL: Yes, Sure...

While PA declared in the narrative and in response to the PFL that he did see prisoners escape on at least one very memorable

occasion, he made no reference to that central event at his interview. This is a significant discrepancy.

[31] Again, it is possible that the detainees who fled from the applicant's custody were not technically prisoners at the time. But again, I am not convinced that the Visa Officer's characterization of them as prisoners amounts to a reviewable error. In attempting to reconcile the information in his Narrative and the answers he gave during the Interview, the applicant did not explain that he did not consider the escapees described in the Narrative as prisoners. Rather, he appears to focus on stating that it was an unusual occurrence for him to have charge of detainees.

[32] In my view, it was reasonable for the Visa Officer to perceive a discrepancy here. Certainly, when asked during the Interview whether he had ever seen anyone trying to escape, his failure to mention the Key Event was conspicuous and demanded an explanation.

(4) Question: Were you part of the team controlling to make sure no one escaped?

[33] Text from GCMS notes:

Narrative: describes an event when he was part of a team controlling to make sure no one escaped.

A: I was not in charge of that thing. I was in charge of the staff, who comes in and who comes out. There is a gate, we check in the water truck when we come in and out.

Answer in response to PFL: No.

Again, significant discrepancy in answers to this question.

[34] This is yet another instance in which the applicant's answers during the Interview seem to ignore the Key Event, and conspicuously so. The fact that the applicant's omissions concern events in which he was in charge of prisoners/detainees gives reason to the Visa Officer's concern. Based on the whole of the reasons, including the passage quoted in paragraph [10] above, the Visa Officer seems to have been concerned that, during the Interview, the applicant may have sought to minimize the appearance that he had involvement with prisoners.

[35] I see no error here.

(5) Question: What happened that made you escape?

[36] Text from GCMS notes:

Narrative: after being accused of failing to shoot at the escaping prisoners, PA was imprisoned for 18 months. After this experience, days after he was discharged from jail he fled.

A: I grew up with my grandmother and when I was first posted to the military it was not by my own will it was because I was over age and they said I can't proceed with my education and I didn't like that. And I had stayed 3 years in military and this was not what I wanted. There is always stress and the people you deal with don't have the same mentality as I so I decided to leave the country.

Answer in response to PFL: fled after being tortured and imprisoned and deprived of education.

Major discrepancy in the answers in that at interview PA did not mention imprisonment as a reason for deciding to leave Eritrea.

[37] The applicant argues that a person may have more than one reason for fleeing his home country, and that the Visa Officer's perception of a discrepancy here was unreasonable.

[38] While I accept that a person may have more than one reason for fleeing, it was reasonable for the Visa Officer to be concerned about the failure to mention the Key Event during the Interview, especially since it was the principal reason that was mentioned in the Narrative. It was also reasonable for the Visa Officer not to be satisfied with the applicant's Response Letter, which did not attempt to explain why the Key Event was not mentioned.

[39] In view of the applicant's silence about the Key Event during the Interview, it would have been reasonable for the Visa Officer to form the impression that the applicant did not have that event in his mind at that time, and to question how that could be. I myself have formed that impression and have that question.

[40] If the applicant did have the Key Event in his mind during the Interview, he seems to have gone to some length to avoid mentioning it. I note a passage from the GCMS notes of the Interview where the applicant was asked how long he acted as a guard at the prison. His answer is indicated as "1 year and five months Jan 2007 to December 2009." This indicates two different periods. The "1 year and five months" correctly reflects the time from the applicant's arrival at the prison until his imprisonment. However, the "Jan 2007 to December 2009" covers the whole period that he was at the prison, either as a guard or as a prisoner. This is another instance that makes it difficult to understand how the applicant could have failed to mention the Key Event during the Interview.

- (6) Question: When you were guarding did you have an order to shoot anyone you saw escaping?

[41] Text from GCMS notes:

Narrative: PA fired warning shots into the air as the only way to stop escaping prisoners and was later blamed for not shooting them.

A: Because we were in the gate and we did not have that kind of order?

Answer in response to PFL: no, but he was accused of not shooting youths on the day of the escape.

PA has provided slightly different answers to all these questions on three occasions. Overall, my greatest concern is that the incident which is most central to his refugee story as presented in the narrative submitted with the original application was not mentioned at all at interview. In response to my PFL, PA did confirm that the event described in the narrative did occur, but he did not explain why he failed to mention it at interview.

[42] The applicant argues that he never indicated that he had received any orders to shoot prisoners. He acknowledges that he was imprisoned for failing to shoot escapees, but he does not acknowledge having received orders to do so. The applicant also notes that the Visa Officer acknowledged that the differences between the applicant's various statements on this point are slight. The applicant argues that it would be more suspicious if the applicant did not have slight differences in his answers to the same question asked three times.

[43] First, the Visa Officer's acknowledgement that the differences in the applicant's statement are slight suggests that less weight was given to these differences. The Visa Officer's

initial concerns with regard to orders to shoot are not indicated in the GCMS notes as a discrepancy.

[44] More importantly, this is another instance in which the applicant's failure to mention the Key Event during the Interview is conspicuous, and the Visa Officer's concern that this failure was not explained is reasonable. It is difficult to understand how the applicant, having been asked during the Interview about orders to shoot anyone, could have failed to mention the central event of his Narrative which involved his receiving severe punishment and torture for having failed to shoot people.

(7) Conclusion regarding Perceived Discrepancies

[45] In my view, all of the concerns expressed by the Visa Officer in the GCMS notes are reasonable. I see no reviewable error in the conclusions reached with regard to discrepancies in the applicant's various statements and answers.

VI. Conclusions

[46] This application should be dismissed.

[47] The parties are agreed that there is no serious question of general importance to be certified in this case.

JUDGMENT in IMM-2164-17

THIS COURT'S JUDGMENT is that:

1. The present application for judicial review is dismissed.
2. No serious question of general importance is certified.

“George R. Locke”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2164-17

STYLE OF CAUSE: TSINAT TESFAY YHDEGO v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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