Federal Court  Cour fédérale

Date: 20220223

Docket: IMM-4759-19

Citation: 2022 FC 246

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 23, 2022

PRESENT: Mr. Justice Pamel

BETWEEN:

AZERA TEKESTE KIFLOM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background and underlying decision

[1] This is an application for judicial review of a decision rendered by an immigration officer on December 11, 2019, confirming the refusal of a pre-removal risk assessment [PRRA].

[2] The applicant, Azera Tekeste Kiflom, is a 52-year-old citizen of Eritrea. In Eritrea, most men and women are required to perform a term of national service that, in practice, could go on indefinitely and be akin to slavery. In 1995, when he was 25, Mr. Kiflom was arrested by the Eritrean authorities for having deserted from national service. After spending a month at the military training camp in Sawa, Mr. Kiflom was transported to a government company and forced to work there as a mechanic to fulfil his national service obligation. In 1997, the authorities released him from national service for health reasons; however, he was again arrested two years later and brought back to the same government company to perform forced labour.

[3] On May 7, 2013, during a meeting of the government company's employees, Mr. Kiflom stated that he was not happy that he had not been released from his national service obligation. The next day, the authorities arrested Mr. Kiflom at his home, beat him and accused him of being an enemy of the state. He was brought to the Adi Abeito prison, where he spent two years before fleeing in May 2015 with the assistance of a security guard. He crossed the Eritrea border into Ethiopia, where he spent two months before going to Kenya. In Kenya, he worked as a trucker until January 2017, when he returned to the ancestral home in Eritrea to mourn his mother. During his time in Kenya, Mr. Kiflom states that he signed a [TRANSLATION] "regret form," paid the diaspora tax corresponding to 2% of his salary [diaspora tax] and obtained an Eritrean passport. While he was at the ancestral home, he discovered that the authorities had been to the house looking for him. Nevertheless, he remained in the ancestral home and submitted an application for a visa to travel to the United States, which he received in June 2017. Over the subsequent months, he planned his escape with the assistance of a friend who had ties with senior immigration authorities who could facilitate his departure in exchange for a certain

amount of money. Mr. Kiflom left Eritrea for the United States by air on August 29, 2017. He arrived in Canada for the first time on September 7, 2017, and claimed refugee protection, but his claim was determined to be ineligible by reason of the Canada-USA Safe Third Country Agreement and under paragraph 101(1)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Mr. Kiflom was therefore sent back to the United States, where he was incarcerated until January 3, 2018. He crossed the Canadian border a second time on January 18, 2018.

[4] Faced with a removal order, Mr. Kiflom filed a PRRA application under subsection 112(1) of the IRPA. He noted that he feared being persecuted by the Eritrean authorities because of his political opinion, his desertion and his unauthorized departure from the country. In support of his application, Mr. Kiflom submitted a copy of a letter addressed to Mr. Kiflom's wife, with two translations, which states that her business licence was being suspended because her husband was not present or because no proof of payment of the diaspora tax had been submitted. Mr. Kiflom also submitted a copy of two summonses from the Eritrean police dated December 12, 2017, and February 28, 2018, issued against Mr. Kiflom and his wife, respectively.

[5] The officer first rejected Mr. Kiflom's PRRA application on June 19, 2019. She found that Mr. Kiflom had not submitted sufficient evidence to demonstrate that he was a person in need of protection or that he faced a risk of persecution pursuant to sections 96 and 97 of the IRPA. The officer did not give any probative value to the summonses because Mr. Kiflom was unable to provide the originals, the summonses had several formatting errors, and they did not

indicate the reason for the summons or the consequences if Mr. Kiflom or his wife did not go to the police station. The officer also did not give any probative value to the suspension letter since Mr. Kiflom only provided a copy of it and its content was not supported by other documents. Additionally, the officer noted that the letter did not show that Mr. Kiflom's life would be threatened or that he would be at risk of cruel and unusual treatment at the hands of the Eritrean authorities even if he paid the diaspora tax.

[6] In her analysis of the documentary evidence, the officer considered, in particular, a report from the Danish immigration services published in December 2014 [Danish Report] from which she noted the following:

> 5.2.1. Are National Service evaders or deserters seen as traitors and political opponents by the government?
>
> A Western embassy (A) in Eritrea stated that "ordinary people who evade the National Service or desert from the service are not being prosecuted and imprisoned and they are not at risk of disappearances. That kind of treatment is reserved for people who have had some kind of oppositional activities i.e. political prisoners".
>
> …
>
> A UN agency and Western embassies (A) and (D) in Eritrea concurred and emphasised that the Eritrean government does not consider evaders and deserters as traitors or political opponents to the government.
>
> A Western embassy based in Khartoum (met in Asmara) referred to a public statement made by the Head of the Political Office of the PFDJ, that those who have left Eritrea to avoid National Service are considered economic refugees and not political opponents.

[7] Relying on several international reports, the officer noted that the Eritrean authorities had become more relaxed and understanding with regard to citizens who had left the country. The officer concluded that Mr. Kiflom had not presented sufficient evidence to show that he would be considered a criminal by the Eritrean authorities or that they would be interested in him because he had claimed refugee protection abroad. Lastly, the officer concluded that mandatory national service was not a risk within the meaning of sections 96 and 97 of the IRPA; in particular, she was not convinced that mandatory national service constituted a personalized risk for Mr. Kiflom should he return to Eritrea, because all citizens of Eritrea are subject to this measure:

> [TRANSLATION]
> I find that mandatory conscription is not a risk under section 96 or 97 of the IRPA unless the applicant can provide sufficiently objective evidence that mandatory conscription constitutes persecution or a forward-looking personal risk.
>
> …
>
> Through my research, I have reached the conclusion that military service is a condition that applies to all Eritrean citizens, and I find that the information I have does not objectively show that military service represents a forward-looking risk for the applicant, contrary to his claims.

[8] On August 1, 2019, Mr. Kiflom filed an application for leave and for judicial review of the officer's first decision dated June 19, 2019; however, on September 26, 2019, Mr. Kiflom submitted additional documents in support of his PRRA application. The articles in the additional documents criticize and discredit one of the reports—the Danish report—on which the officer relied to conclude that the Eritrean authorities were more relaxed and understanding with regard to citizens who had left the country without their authorization. The officer therefore reconsidered her June 19, 2019, decision and in a December 11, 2019, decision, she again

rejected Mr. Kiflom's PRRA application. Although the officer agreed to set aside the Danish report in her analysis and reconsider her decision, she noted that other reports also provided the same information:

> [TRANSLATION]
> Although I set this document aside and did not consider it in the analysis, I note that other reports that followed, in particular, the United States State Department's *Country Report* and the United Kingdom Home Office reports from 2018, 2016 and 2015, indicate that Eritreans, including those who have illegally left the country and claimed refugee protection in other countries, return to stay in Eritrea, especially in the summer, to visit their families, etc. Moreover, the evidence indicates that people who have left Eritrea, even to evade conscription, can return to Eritrea as long as they sign a "regret letter" and pay any outstanding diaspora tax (of 2%) at an Eritrean embassy.

[9] Moreover, the officer confirmed the rejection of Mr. Kiflom's PRRA application because he still had not provided sufficient evidence of a personal risk should he return to Eritrea:

> [TRANSLATION]
> Moreover, I note that the applicant has still not provided any evidence to show that the Eritrean authorities arrested and beat him and threw him in prison. He did not show that he could not return to Eritrea if he signed the "regret letter" and paid the outstanding diaspora tax (of 2%).

[10] The officer concluded that Mr. Kiflom had not provided sufficient evidence to show there was a personal and objectively identifiable risk pursuant to sections 96 and 97 of the IRPA. It is the December 11, 2019, decision that is the subject of the present application for judicial review.

II. Issues and standard of review

[11] Mr. Kiflom submits that the officer's decision is based on extrinsic evidence that should have been disclosed to him; that he should have had the right to a hearing since the officer drew conclusions about the credibility of the documentary evidence; and that the officer's decision is not reasonable because she relied on reports with sources that are not credible, erred by giving little probative value to the documentary evidence he submitted, and erred by concluding that Mr. Kiflom would not be at risk should he return to Eritrea because mandatory national service is a law of general application. The questions Mr. Kiflom submitted in this application for judicial review are as follows:

1. Did the officer breach the principles of procedural fairness by relying on extrinsic evidence?

2. Was a hearing required because the evidence raised an important issue regarding Mr. Kiflom's credibility?

3. Was the officer's decision reasonable?

[12] The first question, whether the officer erred by considering extrinsic documentary evidence, is a question of procedural fairness, and the Court must ask "whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). Moreover, there is no debate about whether reasonableness is the applicable standard for an officer's decision on a PRRA application (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]; *Mombeki v Canada (Citizenship and Immigration)*, 2020 FC 931 at para 8).

The role of the Court is therefore to review the officer's decision and determine whether it is based on an "internally coherent and rational chain of analysis" and whether the decision as a whole is transparent, intelligible and justified (*Vavilov* at paras 85–86).

[13] Mr. Kiflom submits that the issue of whether the officer should have conducted an interview with him is a question of procedural fairness. There is a divergence in the case law as to the applicable standard for an officer's decision to conduct an interview in a PRRA application (*Jystina v Canada (Citizenship and Immigration)*, 2020 FC 912 at paras 18–20). For me, I find that the decision to hold a hearing pursuant to paragraph 113(b) of the IRPA and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] depends on the interpretation the officer makes of their enabling statute and that the Court must show deference (*Vavilov* at para 25; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 16; *Hare v Canada (Citizenship and Immigration)*, 2020 FC 763 at paras 11–12).

III. Analysis

A. *A hearing was required*

[14] I do not need to consider questions 1 and 3 because I conclude that the officer made disguised credibility findings and did not hold a hearing pursuant to paragraph 113(b) of the IRPA and section 167 of the Regulations.

[15] According to paragraph 113(b) a hearing "may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required". Section 167 of the Regulations sets out the factors required for a hearing to be held for a PRRA application:

Hearing — prescribed factors	**Facteurs pour la tenue d'une audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[16] The factors listed in section 167 of the Regulations are cumulative (*Abdellah v Canada (Citizenship and Immigration)*, 2007 FC 786 at para 22; *Bhallu v Canada (Solicitor General)*, 2004 FC 1324 at para 4). In other words, "[t]he right to a hearing in the context of PRRA proceedings exists when credibility is the key element on which the officer bases his or her decision and without which the decision would have no basis" (*Sylla v Canada (Minister of*

Citizenship and Immigration), 2004 FC 475 at para 6; *Garces Canga v Canada (Citizenship and Immigration)*, 2020 FC 749 at para 28).

[17] In this case, I find that the officer drew disguised credibility findings regarding the summonses that Mr. Kiflom submitted in evidence. As stated by Justice Grammond in *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paragraph 16 [*Magonza*], "credibility is the answer to the following question: 'is this a trustworthy source of information?'" As for the probative value, it "has to do with the capacity of the evidence to establish the fact of which it is offered in proof" (*Magonza* at para 21, citing *R v MT*, 2012 ONCA 511 at para 43). Once an officer begins to note irregularities in a document, he or she is questioning the reliability of the document and is therefore making credibility findings.

[18] The officer analyzed the summonses and concluded that she could not give them any probative value. However, the officer did not mention how the information in these documents does not establish the fact Mr. Kiflom was trying to prove; she instead focused on the assessment of errors of form:

> [TRANSLATION]
> I note that these two summonses are not dated and, in the header, the only indications that appear are: State of Eritrea, Debub Regional Police and Adi Keyh Police Station. They do not indicate the reasons the applicant or his wife must appear, or the consequences should they not appear.
>
> I note that in one summons, there is an error in the name of the applicant's wife and that the name of the city is spelled differently than on the birth and marriage certificates. I also note that the seal is not clear and is illegible.
>
> Additionally, I note that the applicant submitted copies of the documents without providing the reasons for not submitting the originals.

> For the above-noted reasons, I conclude that these documents have no probative value and do not establish the validity of the risks alleged by the applicant.

[19] In this case, the officer states she did not give any probative value to the summonses, noting several errors of form (Mr. Kiflom's wife's name, the city and the seal) and indicating things she considered to be omissions regarding what she expected to be included in a summons (no date, incomplete information in the header and lack of information about the reasons for the summons and consequences of not appearing). The fact the officer noted that Mr. Kiflom did not submit the original summonses reinforces the conclusion that the officer was questioning the credibility of the documents before her.

[20] The summonses are key elements in Mr. Kiflom's PRRA application because they aim to show that the Eritrean authorities were still looking for him in 2017 even after he had signed a "regret form" and paid the diaspora tax in 2015. The credibility findings for these documents justify holding a hearing pursuant to section 167 of the Regulations.

IV. Conclusion

[21] Since I find that the officer made disguised credibility findings without holding a hearing, the decision is unreasonable. As a result, I will allow the application for judicial review and return the matter for reconsideration by another officer.

JUDGMENT in IMM-4759-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.

2. The matter is returned for reconsideration by another officer.

3. No question is certified.

"Peter G. Pamel"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Déborah Andrades-Gingras	FOR THE APPLICANT
Zoé Richard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Coline Bellefleur, Lawyer Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT