

Federal Court



Cour fédérale

Date: 20240528

Docket: IMM-5663-23

Citation: 2024 FC 808

Toronto, Ontario, May, 28, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MIHRETAB SIUM TEMELSO

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 the Refugee Appeal Division [RAD] dated April 18, 2023 [Decision], in which the RAD confirmed the decision of the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection. The Decision turned on the RAD's finding that the Applicant is excluded under Article 1(F)(b) of the Convention, on the basis that there were serious reasons for

considering that he committed a serious non-political crime, trafficking in persons, outside the country of refuge.

[2] A explained below, this application is allowed, because the Decision is unreasonable in that it does not intelligibly explain how the RAD arrived at the material finding that the Applicant was charged with human trafficking in Uganda.

II. Background

[3] The Applicant is a citizen of Eritrea. He also has a Ugandan passport, and while he has lived in Eritrea, Ethiopia, South Sudan and Uganda before coming to Canada, his most recent country of residence was Uganda. The Applicant asserts fear of harm from the Eritrean government, as well as fear that agents of the Eritrean state and persons cooperating with them will harm or kill him.

[4] Around 1997, the Appellant was imprisoned in Eritrea for a month after refusing to join the National Service, act as its spokesperson, or pay additional funds. He was released and escaped to Ethiopia before relocating to Uganda. He began operating businesses in Uganda and South Sudan and became known as a successful businessman. In 2010, Eritrean government officials met with the Appellant and encouraged him to invest in business in Eritrea, promising political improvements. The Appellant alleges he invested approximately US\$16 million in businesses and infrastructure in Eritrea. However, he criticized the then-President of Eritrea during a meeting in Uganda in 2011. After the meeting, he met with the President privately and expressed further concerns about the rule of law and human rights in Eritrea. Two years later, a presidential advisor expressed upset at his actions from 2011 and told the Applicant to leave

Eritrea. The Applicant alleges he secretly returned to Eritrea in 2015, despite his fears, because of the significant money he had invested there.

[5] In February 2015, the Applicant was detained in an Eritrean prison. He alleges that he escaped with the assistance of a doctor and a guard, and he relocated to Uganda in September 2015. The Applicant alleges that, since that time, Eritrean officials have bribed the Ugandan government to assist in persecuting him and his family as they are outraged that he escaped.

[6] In 2016, police in Uganda investigated the Applicant for several crimes, including sexual abuse against his eight-year-old daughter, threatening violence, procuring defilement, and human trafficking. The Appellant alleges he was charged only with threatening violence, and he asserts the investigations and charges were a result of persecution by the Eritrean government, helped by the Ugandan government and members of his own family. He alleges that his daughter-in-law, Y, accepted money and falsely accused the Applicant of trafficking her and other women. The Applicant alleges that Y cooperated with HH, an Eritrean-Canadian citizen, who was later convicted of eloping with Y.

[7] The Applicant alleges he was attacked by gunmen in August 2017 in Uganda and, in November 2017, he was arrested in connection with the disappearance of another Eritrean businessman, but was released after 10 days. In December 2017, he travelled to the United States [US] with his family, where he helped them get to the Canadian border to make claims at a port of entry. The Applicant then returned to Uganda from the US and came to Canada on February 5, 2018.

[8] The Applicant initiated his refugee claim on or around March 12, 2018. The Minister of Public Safety intervened at the RPD on the issues of exclusion pursuant to Articles 1F(b) and 1E of the Refugee Convention, identity, credibility, and the well-foundedness of his claim. The Minister later withdrew the 1E exclusion allegation in regards to residency in South Sudan and submitted the exclusion burden was not met for the specific allegations of sexual assault and human trafficking, based on inability to obtain sufficient detailed information regarding the charges.

[9] The RPD found the Applicant was not credible and was excluded from protection under Article 1F(b) of the Convention, and he appealed to the RAD. In the Decision under review in this application, the RAD agreed with the RPD that the Applicant was excluded and dismissed his appeal.

III. Decision under Review

[10] The RAD dismissed the Applicant's appeal, finding that although the RPD made mistakes in parts of its assessment, there were serious reasons for considering the Applicant committed a serious non-political crime, trafficking in persons, outside the country of refuge. The RAD did not consider whether the Applicant was excluded for the crimes of sexual assault or assault causing bodily harm or with a weapon.

[11] Applying the correctness standard, the RAD reviewed all the evidence to decide if the RPD made the correct decision. In determining the Applicant was excluded from protection, the RAD first reviewed the Article 1F(b) exclusion and the allegations related to the Applicant's exclusion. As explained in more detail below, the RAD found there were serious reasons for

considering that the Applicant had committed the crime of trafficking in persons in Uganda. The RAD considered the Applicant's submission that the RPD was wrong to consider whether the Applicant was excluded for the crime of trafficking in persons, given that the Minister had submitted they had not met their burden, but the RAD found the RPD was not bound to accept the position of a party in a case.

A. *Credible and compelling evidence regarding crime*

[12] Before considering the evidence, the RAD considered the Applicant's submission that the RPD erred in failing to assess the allegations against him and to provide reasons for finding those allegations credible. The RAD agreed with the Applicant that the RPD did not specifically assess the credibility of the evidence upon which it relied. It therefore explained that it would conduct its own credibility analysis of the evidence.

[13] The RAD found that two pieces of evidence set out the crime: 1) a letter from the Uganda Police Force [UPF] dated August 16, 2016 [UPF Letter]; and 2) a letter from the Office of the Director of Public Prosecutions [DPP] dated September 8, 2020 [DPP Letter]. The RAD found both letters credible. The RAD found the UPF Letter probative as it confirmed the Applicant was being investigated in several cases, including human trafficking, and the RAD gave it full weight towards establishing the Ugandan police investigated the Applicant for human trafficking. The RAD found the DPP Letter reliable because it sets out the source of its information about Y's allegations (a signed statement from Y that was submitted to Interpol) and highly probative because it set out facts underlying the crime. The RAD gave the DPP Letter full weight towards establishing the Applicant was charged with human trafficking, citing *Legault v. Canada*

(*Secretary of State*) (1997), 219 NR 376 (FCA) [*Legault*]; *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250 [*Xie*] at paras 21-23, in support of the position that the RAD can rely upon an indictment or warrant to conclude there are serious reasons for considering a person has committed a serious crime outside Canada.

[14] The RAD found that the DPP Letter established that the Applicant had been charged with human trafficking in Uganda. However, because the charge had been withdrawn and the Applicant alleged it was fabricated, the RAD explained that it would assess the credibility of the evidence underlying the charge in the next sections of the Decision.

[15] The RAD considered the Applicant's denial of any criminal charges relating to Y's allegations of human trafficking, and his insistence that the allegations started and ended on Facebook. The RAD found the Applicant's testimony on this issue to not be credible. The RAD found the Applicant's own documents confirmed he was charged with human trafficking in Uganda in 2016. The RAD considered the Applicant's reliance on *Mohamad Jawad v. Canada (Citizenship and Immigration)*, 2012 FC 232, but distinguished that case based on the evidence before it, as the DPP letter contained underlying details specific to the alleged crime, the credibility of which the RAD again stated it would assess.

[16] Unlike the RPD, the RAD gave no weight to online posts by alleged victims or a letter from the Eritrea Community in Uganda, as the RAD found neither to be credible or reliable information on which it could base an exclusion decision.

[17] In summary, the RAD found there was credible and compelling evidence that the Applicant was charged with human trafficking in Uganda, as well as evidence of the circumstances underlying the charge, although again noting that it would assess the credibility of that latter evidence.

B. *Prosecution withdrawing charge not determinative*

[18] The RAD found the fact the Applicant's human trafficking charge in Uganda was withdrawn not to be determinative of whether there were serious reasons for considering he committed the crime. The RAD considered the Applicant's submissions that there were no serious reasons for considering he committed the crime, as there were no outstanding charges or warrants for his arrest, but was not persuaded by this submission. The RAD found that authorities cited by the Applicant, *Xie and Qazi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1204 [*Qazi*], do not require a warrant to be outstanding for it to be considered. Rather, the RPD or RAD can rely on an indictment or warrant to conclude there are serious reasons for considering a person has committed a serious crime outside Canada. The RAD also found that other jurisprudence allows a tribunal to consider evidence surrounding withdrawn or dismissed charges, although it would be an error to rely solely on the withdrawn charge itself (see *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 at paras 50-51).

[19] The RAD considered the Applicant's submissions that the RPD erred in relying on allegations which were not pursued by the judicial system in Uganda, but it was not persuaded by this submission. The RAD considered the Applicant's reliance on *Arevalo Pineda v. Canada*

(Citizenship and Immigration), 2010 FC 454 [*Arevalo Pineda*], but found the Court in *Arevalo Pineda* gave examples of where a court dismissal would not be conclusive, such as where there is credible evidence of the commission of the crime or where the dismissal is based on reasons that do not bind the tribunal. The RAD also cited *Abbas v. Canada (Citizenship and Immigration)*, 2019 FC 12, where the Court affirmed it was not wrong for the RPD to consider withdrawn and dismissed charges, given that the RPD in that case did not rely solely on the charges but also considered a supporting police report.

[20] Applying the above principles, the RAD found the prosecution's withdrawal of the charge was not determinative of whether there were serious reasons for considering the Applicant committed the crime. The RAD noted that a court had not dismissed the charge. Rather, a decision had been made by the prosecution, a circumstance that the RAD found less probative as to whether the Applicant committed the crime than if a court had dismissed the charge after a trial on the merits. The RAD also considered the reasons given by the prosecution for not pursuing the charge and found those reasons were based on considerations that did not undermine the credibility of the evidence underlying the charge.

[21] The RAD considered the DPP Letter's explanation why the prosecution found the case was not tenable. One concern expressed in the letter was the lack of continued contact with Y or an indication that she was interested in pursuing the case. The RAD found the prosecution's concern relied on an incorrect assumption that survivors of gender-based violence will behave in a particular manner, such as pursuing a criminal complaint, and found the lack of continued contact with Y was not binding on an exclusion assessment. The RAD found that concern did not undermine the credibility of the evidence underlying the charge. Another concern expressed in

the DPP Letter was the lack of a physical examination of Y, which the RAD found was not binding as the charge was based on historical evidence and a physical exam done years later would not provide useful evidence in assessing whether Y was trafficked or exploited. The DPP also referred to the absence of evidence obtained through legal means, which the RAD dismissed, finding the admissibility of evidence in the RAD is different than in a criminal prosecution. Finally, the RAD considered the concern that Y made up allegations of child sexual exploitation and physical abuse against the Applicant to seek asylum in a Schengen country. The RAD noted that the basis for this concern was not explained and therefore found it not binding in assessing exclusion.

[22] Based on its assessment of the DPP Letter, the RAD found it could appropriately consider the withdrawn charge.

C. *Allegation charge is fabricated is not credible*

[23] The RAD found that the Applicant had not established, on a balance of probabilities, that the human trafficking charge was fabricated. The RAD first considered the Applicant's submission that the RPD had required he prove his innocence or had reversed the applicable onus. The RAD found the RPD did not err by considering whether the Applicant had provided credible evidence supporting his position that the charges were fabricated, having properly followed the Court's direction in *Qazi*. As for the Applicant's submission that the RPD found it implausible the Eritrean government would persecute him in the ways he described, the RAD found the RPD did not make such a finding. Rather, it had found the Applicant did not credibly

establish that the charges and allegations against him were part of a conspiracy against him by the Eritrean government.

[24] Next, the RAD considered the Applicant's submission that some of the RPD's negative credibility findings were not relevant to assessing whether the charge is fabricated. The RAD agreed in part, but it also found that some of the findings were relevant. Upon its own independent assessment, the RAD agreed with the RPD that the Applicant had not established that he escaped from Eritrean prison in 2015 as alleged, nor had he established that Eritrean ambassadors to Uganda and South Sudan threatened him in 2016. The RAD found that these credibility concerns about the Applicant's alleged history of persecution related to the credibility of his allegations that the charge against him was fabricated.

[25] Finally, the RAD considered the Applicant's supporting documents and found they did not establish that the human trafficking charge was fabricated. The RAD found the news articles from Hello Daily, Red Pepper papers, The Kampala Sun, and The Second Opinion were not credible sources of information, as their contents did not provide reliable reporting and are tabloid style newspapers. The RAD therefore placed no weight on the articles from these papers that reported that the charge of human trafficking was fabricated. The RAD also considered an article from an unknown news source disclosed by the Minister but found it was not a reliable source of information and therefore did not support the Applicant's allegation that the charge was fabricated.

[26] The RAD found articles from Vision papers, Daily Monitor, EastAFRO.com, TesfaNews, Assenia.com, InFocus, and The Observer to be credible sources of information, but none of them supported the Applicant's allegation that the human trafficking charge was fabricated.

[27] The RAD also considered two letters from the Applicant's Ugandan law firm, both of which stated the Applicant faced fabricated criminal charges in Uganda. The RAD gave these documents minimal weight towards establishing the human trafficking charge was fabricated, finding they had low probative value because they presented only the lawyer's opinion and neither letter specified the human trafficking charge.

[28] The RAD was not persuaded by the relevance of the Applicant's submission that the Canadian charge of uttering threats against HH was dropped, nor did the RAD find the fact that HH was convicted of eloping with Y meant the human trafficking charge was fabricated. The RAD considered the Applicant's submission that, because the allegation he sexually assaulted his eight-year-old daughter was false, the other charges were also false. The RAD did not agree this demonstrated the human trafficking charge was fabricated, because of the independence of the DPP Letter that set out the underlying crime of human trafficking.

[29] The RAD reviewed the other evidence in the record and found it did not support the Applicant's allegation that the human trafficking charge was fabricated. The fact the Applicant disclosed most of the evidence of the charges against him also did not alter the RAD's assessment. Ultimately, the RAD found the Applicant had not established, on a balance of probabilities, that the human trafficking charge was fabricated.

D. *Serious Reasons for Considering the Applicant committed elements of the crime*

[30] In considering whether there were serious reasons for considering the Applicant committed the elements of the offence of trafficking in persons, assessed against Canadian law at the time of the exclusion assessment, the RAD referenced section 279.01 of the *Criminal Code*, related to trafficking in persons, and section 279.04 of the *Criminal Code*, which defines exploitation.

[31] The RAD reiterated its conclusion that the reasons the charge was withdrawn in Uganda were based on considerations that did not bind the RAD in the exclusion assessment and did not undermine the credibility of the evidence underlying the charge. The RAD also found the Applicant did not establish that the charge was fabricated and therefore gave full weight to the evidence underlying the charge set out in the DPP Letter.

[32] Having found that there was credible and compelling evidence about the circumstances underlying the charge, the RAD noted it was still necessary to assess whether the credible evidence established serious reasons for considering the Applicant committed the elements of the crime of trafficking in persons set out in section 279.01 of the *Criminal Code*. The RAD found there were serious reasons for considering the following facts:

- A. In 2013, the Applicant lured Y from Eritrea to Uganda with the promise of education and a high quality of life. He also promised that Y would eventually marry the Applicant's son.

B. After arriving in Uganda on March 31, 2013, Y was forced to have sex with the Applicant's son and became pregnant. She gave birth in February 2014.

C. The Applicant sexually exploited Y in his house. Y disclosed her experiences to her sister and the Applicant's wife at the time. Y witnessed the Applicant sexually assault other girls, seven of whom she named.

[33] The RAD found these facts established serious reasons for considering the Applicant committed the necessary elements of the crime.

E. *Crime is Serious*

[34] The RAD found that the crime of trafficking in persons is presumptively serious because, if the crime were committed in Canada, it carried a maximum sentence of 14 years imprisonment (*Criminal Code*, subsection 279.01(1)(b); *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 62). The RAD also found the facts and elements of the crime to be serious, as it involved the intentional exploitation of a vulnerable young woman. The RAD found the mode of prosecution and penalty prescribed to be neutral in its assessment, as the prosecution did not pursue the charge and there was no penalty prescribed to consider. The RAD found there were no mitigating circumstances in the Applicant's case to weigh against a finding of seriousness.

[35] In considering aggravating circumstances, the RAD found the RPD had erred in saying there were numerous aggravating factors without setting them out. The RAD found two aggravating factors: the fact that the Applicant sexually exploited Y and the duration of the crime from 2013 to 2015.

[36] Finally, in considering that the Canadian sentencing range for the crime spans from four to eight years, the RAD found even a four year imprisonment was a considerable period that weighed in favour of seriousness.

[37] In conclusion on the seriousness of the crime, the RAD weighed all the factors and found they did not rebut the presumption of seriousness.

F. *Crime is non-political*

[38] The RAD found the crime was non-political.

G. *Conclusion on Exclusion*

[39] The RAD therefore found the Applicant was excluded from protection because there were serious reasons for considering he committed a serious non-political crime outside the country of refuge. It dismissed the appeal, confirming the RPD's determination.

IV. Issue and Standard of Review

[40] The sole issue for the Court's determination is whether the Decision is reasonable. The parties agree, and I concur, that this issue is reviewable on the presumptive reasonableness standard (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 653 [*Vavilov*] at para 16).

V. Analysis

A. *Preliminary issue*

[41] As a preliminary matter, the Applicant submits the style of cause should be amended to reflect the accurate spelling of his last name: TEMELSO, not TIMELSO. The Respondent does not oppose this amendment and my Judgment will so provide.

B. *Whether the Decision is reasonable*

[42] Although the Applicant advances several arguments in support of his position that the Decision is unreasonable, my decision to allow this application for judicial review turns on his submission that the RAD erred in concluding that the Applicant was charged with human trafficking in Uganda.

[43] The RAD appears to have based this conclusion on its analysis of the DPP Letter. In this analysis, the RAD recited a number of the factual allegations made by Y against the Applicant as recorded in the DPP letter based on a statement that Y submitted to Interpol Uganda; a referenced case file that matched one of the case numbers listed in the UPF Letter; and what the RAD described as a court file number. The RAD then stated that it gave the DPP Letter full weight towards establishing that the Applicant was charged with human trafficking, and the RAD expressed its finding that this letter established that there were serious reasons for considering that the Applicant had been so charged.

[44] I agree with the Applicant's submission that the Decision does not disclose intelligible reasoning for this finding. The DPP Letter does not state that the Applicant was charged. To the extent this finding represents an inference based on the DPP Letter referencing a court file number, I again agree with the Applicant that this reasoning is not intelligible. Neither the

Decision nor the documentary evidence discloses a basis for a conclusion that the file reference in the DPP letter (which reads “Our Ref: HQS – CO – 0194 – 2016”) relates to a court file from which it can be inferred that the Applicant had been charged.

[45] At the hearing of this application, the Respondent’s counsel pointed out that the Decision also refers to certain media articles as having stated that the Applicant was charged with crimes including human trafficking and that those charges were withdrawn. However, those references appear in a later portion of the Decision, when the RAD was analysing whether the media articles that had been submitted by the Applicant established that the charge was fabricated. I do not read the Decision as demonstrating that the RAD relied on those articles to find that the Applicant had been charged. Indeed, the RAD stated that overall those articles were not reliable, because the reporting therein was coloured by unsourced information, contradictory details, and circular citation patterns.

[46] At the hearing, I also questioned the Applicant’s counsel on whether the RAD’s finding, that the Applicant had been charged, was material to the overall Decision. Having considered the Applicant’s submissions and reviewing the Decision as a whole, I am satisfied that this finding was material.

[47] In broad strokes, the RAD’s train of reasoning was to conclude that there was credible evidence that the Applicant was charged with the crime of human trafficking; that the withdrawal of this charge was not determinative of whether there are serious reasons for considering he committed the crime, as the reasons for withdrawal did not bind the RAD and did not undermine

the credibility of the evidence underlying the charge; and that the Applicant had not established on a balance of probabilities that the charge was fabricated. The RAD therefore gave weight to the evidence underlying the charge as set out in the DPP Letter and concluded that there was credible and compelling evidence about the circumstances underlying the charge.

[48] The starting point for that reasoning was the RAD's finding that the Applicant had been charged with the crime of human trafficking in Uganda, which finding the RAD based on the DPP Letter and authorities (*Legault* and *Xie*) that the RAD may rely upon an indictment or warrant (*i.e.*, a formal criminal charge) to conclude that there are serious reasons for considering a person has committed a serious crime outside Canada. While the RAD subsequently considered the credibility of the evidence underlying the charge, I agree with the Applicant that the conclusion that the Applicant had been charged was material to the reasoning leading to the exclusion finding. As such, and as the Decision does not disclose reasoning in support of that conclusion that demonstrates the intelligibility required by *Vavilov*, the Decision is unreasonable and must be set aside.

[49] This application for judicial review will therefore be allowed, and it is unnecessary for the Court to consider the Applicant's other arguments, including an argument advanced in support of a proposed question for certification for appeal. As the outcome of this application does not turn on that latter argument, no question will be certified.

JUDGMENT IN IMM-5663-23

THIS COURT'S JUDGMENT is that:

1. The style of cause in this matter is amended to read as set out above.
2. This application for judicial review is allowed, the Decision is set aside, and the matter is returned to a differently constituted panel of the RAD for redetermination.
3. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5663-23

STYLE OF CAUSE: MIHRETAB SIUM TEMELSO v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 27, 2024

JUDGMENT AND REASONS: SOUTHCOTT J.

DATED: MAY 28, 2024

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