Federal Court  Cour fédérale

Date: 20240610

Docket: IMM-5525-23

Citation: 2024 FC 884

Ottawa, Ontario, June 10, 2024

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

NAHOM TEKLEHAIMANOT GEBREMICHAEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review of a decision by a Migration Officer [Officer] at Canada's High Commission in Nairobi dated April 12, 2023 [Decision], rejecting the Applicant's application for permanent residence pursuant to the Convention Refugee Abroad class or as a member of the Humanitarian-Protected Persons Abroad designated class.

[2] The Officer determined the Applicant was inadmissible to Canada on the grounds of violating human or international rights for 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*, SC 2000, c 24 [*Crimes Against Humanity and War Crimes Act*], pursuant to paragraph 35(1)(a) and subsection 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Facts

[3] The Applicant is a citizen of Eritrea. After 11th grade, in August 2013, he attended a military center for his 12th grade and military training. Upon completion of this mandatory training, the Applicant was stationed at the Ala military base. Despite the Applicant completing his national service requirements, he asserts he was further compelled to serve in the military.

[4] The Applicant's narrative indicates he was detained in December 2016 and February 2018 at two Eritrean prisons (Ala and Barentu prima) as punishment for attempting to leave the country.

[5] The timeframe in issue is the one year he spent in Ala prison where he was a prison guard. After one year as a prison guard, in late 2018/early 2019, the Applicant escaped from prison and fled Eritrea. He arrived in Ethiopia in February 2019. The Applicant sought refugee protection in Ethiopia and was recognized as a refugee by the United Nations High Commissioner for Refugees.

[6] In March 2021, the Applicant applied for permanent residence status in Canada under the Convention Refugee Abroad class. The Applicant was interviewed by the Officer on March 7,

2023 with the assistance of an interpreter. The Officer prepared contemporaneous notes of the interview and saved them for later when the Officer could enter them into the Global Case Management [GCMS] which she did on March 12, 2023.

[7] On April 11, 2023, the Officer made the Decision refusing the Applicant's request for refugee abroad status due to inadmissibility under section 11(1) of *IRPA* (her letter went the next day). In doing so, the Officer cut and pasted material from the contemporaneous notes typed at the time of the interview and completed her notes, saving the notes along with the text for the refusal letter in the GCMS.

[8] On April 12, 2023, the Applicant received the Decision, advising his application was refused. The Officer found that while the Applicant was a credible witness, the Applicant had repeatedly acknowledged working as a prison guard in Eritrea where detainees were tortured, admitted several times he was aware of the torture of detainees (a fact also thoroughly documented in objective country condition evidence) all of which together with other relevant evidence the Officer concluded rendered him inadmissible because based on his complicity. The Officer also weighed and considered but dismissed the defence of duress as a conscript.

III. Issues

[9] The issue is whether the Officer's decision is reasonable.

IV. Decision under review

[10] The refusal letter states:

> This letter is about your application for permanent residence in Canada.
>
> Subsection 35(l)(a) of the Immigration and Refugee Protection Act states that a permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for 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.
>
> Subsection 6(1) of the Crimes against Humanity and War Crimes Act states that every person who, either before or after the coming into force of this section, commits outside Canada (a) genocide, (b) crimes against humanity, or (c) a war crime, is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.
>
> During your interview, you have declared having worked as a prison guard at Ala Prison in Eritrea for one year. You have declared that you were aware that detainees were tortured. You have declared that you knew that Eritreans trying to escape the country were tortured at Ala prison. You declared that you were hoping not to be tortured like other prisoners if you were getting caught trying to cross the border specifically because you had worked as a prison guard.
>
> Subsection 11(1) of the Immigration and Refugee Protection Act states that the visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act. I am not satisfied that you are not inadmissible for the reasons set out above. 1 am therefore refusing your application pursuant to subsection 11(1) of the Act.
>
> Subsection 64(1) of the Immigration and Refugee Protection Act states that no appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on several grounds, including inadmissibility on security grounds. As a result, neither you nor your sponsor may appeal this decision to the Immigration Appeal Division.

[11] In the GCMS notes, the Officer sets out the following an analysis:

> *Officer Review: Analysis* ANALYSIS: CRIMES AGAINST HUMANITY Subsection 6(1) of the Crimes against Humanity and War Crimes Act states that every person who, either before or after the coming into force of this section, commits outside Canada (a) genocide, (b) crimes against humanity, or (c) a war crime, is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8. Per article 4(3) of the Crimes Against Humanity and War Crimes Act, crimes against humanity means "murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. Open source documentation shows that prison guards in Eritrea regularly inflict torture to detainees. Open source documentation also shows that arbitrary arrests and imprisonments are common practices in Eritrea. US State department states that 'significant human rights issues included credible reports of: forced disappearance; torture and cruel, inhuman, or degrading treatment or punishment by the government; harsh and life-threatening prison and detention center conditions' and that 'there have been reports of deaths of detainees at the hands of prison staff'. 'Data on death rates in prison and detention facilities were not available, although persons reportedly died from harsh conditions, including lack of medical care and use of excessive force. (https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/eritrea/). Based on the above, I am satisfied that the activities and tasks of prison guards in Eritrea constitute crimes against humanity.
>
> ANALYSIS: APPLICANT'S COMPLICITY IN CRIMES AGAINST HUMANITY: I apply the six factors outlined in the Ezokola test in assessing whether the applicant has voluntarily made a significant and knowing contribution to a crime or criminal purpose. The applicant was a prison guard at Ala prison. The Eritrean prison network falls under the authority of the Eritrean government. Thought the size of the Eritrean prisons' network is not known, Amnesty International states that the number of declared prison and secret prisons indicates that there is an 'infrastructure of repression' in Eritrea. I draw a negative inference from the nature and size of the organization. The applicant has

admitted being a prison guard at Ala prison. The applicant has admitted that the conditions in which detainees are kept at Ala prison were equivalent to torture. The applicant was working in a part of the organization that inflicts torture to detainees. I draw a negative inference from the applicant's involvement in the part of the Eritrea armed forces directly responsible for torture. The applicant's duties and activities within the organization included guarding detainees to make sure they would not escape the prison. I draw a negative inference from this. The applicant's position or rank in the organization was as a guard. I draw a positive inference from the applicant's low rank, but draw a negative inference from the applicant's statements that he knew about the living conditions and torture taking place in the prison. The applicant worked at Ala prison for 1 year. The applicant declared that he did not attempt to leave before this one year. I draw a negative inference from this. The applicant was recruited for compulsory service through conscription. I draw a positive inference from this. Based on the six factors above, 1 am concerned that the applicant made a voluntary contribution in that they did not mention that they have tried to leave before having worked at the prison for 1 year. I am concerned that the applicant made a significant contribution in that they directly worked for Ala prison as a prison guard. I am concerned that the applicant made a knowing contribution in that they declared during the interview that the detainees were tortured. I am therefore concerned that the applicant was complicit in the crime against humanity of torture of detainees held at Ala prison in Eritrea.

ANALYSIS: DURESS I have turned my mind to the defence of duress. I am satisfied that this defence does not apply because a reasonable person similarly situated would have a safe avenue of escape. The applicant waited for one year before trying to escape even though they thought that if they were getting caught at the border, they would get a special treatment at the prison because they were a former guard.

V. Relevant Provisions

[12] Under relevant inadmissibility, paragraph 35(1)(a) of *IRPA* states:

Human or international rights violations	**Atteinte aux droits humains ou internationaux**
35 (1) A permanent resident or a foreign national is	**35 (1)** Emportent interdiction de territoire pour atteinte aux

inadmissible on grounds of violating human or international rights for	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, 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;* or	**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, 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*;
…	…
(c.1) having engaged in conduct that would, in the opinion of the Minister, constitute an offence under section 240.1 of the *Criminal Code*.	**c.1)** avoir eu un comportement qui, de l'avis du ministre, constituerait une infraction à l'article 240.1 du *Code criminel*.
…	…

[13] Subsection 11(1) of *IRPA* states:

Application before entering Canada	**Visa et documents**

11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11 (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[14] Subsection 6(1) of the *Crimes Against Humanity and War Crimes Act* states:

Genocide, etc., committed outside Canada	**Génocide, crime contre l'humanité, etc., commis à l'étranger**
6 (1) Every person who, either before or after the coming into force of this section, commits outside Canada	**6 (1)** Quiconque commet à l'étranger une des infractions ci-après, avant ou après l'entrée en vigueur du présent article, est coupable d'un acte criminel et peut être poursuivi pour cette infraction aux termes de l'article 8 :
(a) genocide,	**a)** génocide;
(b) a crime against humanity, or	**b)** crime contre l'humanité;
(c) a war crime,	**c)** crime de guerre.
is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.	

VI. Analysis

A. *Standard of Review*

[15] The parties agree, as do I, the standard of review in this case is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that

> any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[16] The Supreme Court of Canada in *Vavilov* at paragraph 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies." *Vavilov* provides further guidance that a reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
>
> [Emphasis added]

[17] Furthermore, *Vavilov* makes establishes that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances." The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The

> reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[18] The Federal Court of Appeal recently repeated in *Doyle v Canada (Attorney General)*, 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence unless there is "fundamental error":

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

B. *Legal Framework*

[19] The Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] establishes the test for complicity in international crimes at paragraph 84:

> [84] In light of the foregoing reasons, it has become necessary to clarify the test for complicity under art. 1F(a). To exclude a claimant from the definition of "refugee" by virtue of art. 1F(a), there must be serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose.
>
> [Emphasis added]

[20] In assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose, the following factors from paragraph 91 of *Ezokola* serve as a guide:

> (i) the size and nature of the organization;
>
> (ii) the part of the organization with which the refugee claimant was most directly concerned;
>
> (iii) the refugee claimant's duties and activities within the organization;
>
> (iv) the refugee claimant's position or rank in the organization;
>
> (v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
>
> (vi) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.

C. *A preliminary point re the Officer's GCMS notes*

[21] The Applicant was interviewed on March 7, 2023, and the Officer saved her contemporaneous interview notes to the GCMS on March 12, 2023.

[22] The Applicant argues the notes are not accurate and are significantly different from his recollection. Notably, the Applicant argues he never stated he was a prison guard. The Applicant says he did not witness or have awareness of torture of prisoners at the Ala prison. The Applicant says he stated while he was in prison in 2018, he experienced torture and inhumane treatment firsthand when he was detained in Prima, Barentu prison for one year for attempting to flee the country for the first time. The Applicant blames inadequate interpreter services or the Officer's erroneous recording.

[23] The Respondent disagrees and says the notes are accurate, and I agree.

[24] The Respondent filed an affidavit of the Officer detailing the process by which contemporaneous notes were typed during the interview, pasted to the GCMS, and later reviewed and used in formulating the eventual Decision.

[25] In my respectful view, the Officer's contemporaneous notes are to be preferred over the Applicant's arguments in all respects where they disagree. In cases where there is a disagreement between an applicant's recollection and the contents of officer's notes, the jurisprudence establishes the Court will consider the following factors per Justice Kane in *Gebreselasse v Canada (Citizenship and Immigration)*, 2021 FC 865 at paragraph 49:

> [49] With respect to Mr. Gebreselasse's affidavit, which includes additional explanations or responses to the Officer's credibility concerns that are not reflected in the Officer's GCMS notes, the Officer's notes are relied on. In *Waked*, at para 22, the Court found:
>
> > [22] In cases where there is disagreement between an applicant's recollection and the contents of an officer's notes, this Court has typically relied on the

> officer's lack of interest in the outcome and the contemporaneous nature of the officer's notes in preferring the officer's version of events (*Sellappha v Canada (Citizenship and Immigration*), 2011 FC 1379 at paras 70–71; *Khela v Canada (Citizenship and Immigration)*, 2010 FC 134 at para 18; *Pompey v Canada (Citizenship and Immigration*), 2016 FC 862 at para 36; *Alvarez Vasquez v Canada (Public Safety and Emergency Preparedness*), 2018 FC 1083 at para 53).

[26] This jurisprudence is one of the reasons I am of the view the Applicant's arguments attacking his admissions are without merit. In addition, the Applicant's submissions are self-serving. I accept the detailed affidavit and contemporaneous recording of the interview by the Officer over the submissions of the Applicant. It is up to the Applicant to make out his case on judicial review. Yet, I was provided with no credible reason why the Officer would untruthfully record his interview. Nor was I given any explanation why the Officer would, in such a marked and detailed manner, fabricate the substance of the interview with false contemporaneous notes of what the Applicant was actually asked and answered. With respect, the Applicant's submissions beggar belief.

[27] Moving to the substance of this case, I accept the Officer's conclusions that the Applicant admitted on more than one occasion during the interview that he worked as a prison guard. This was not an isolated comment, and included the following additional evidence provided by the Applicant himself as captured in the GCMS notes at page 6 of the CTR:

> Where were you assigned after Sawa? I stayed for one year in my house but then they came and took me. Where did they bring you? They took me to Ala. This is close to Asmara? Around 58k. What did you do there? I was a guard. What were you guarding? I was just a guard so that people can't move. Is Ala a prison? Yes. So you were a prison guard? Yes. The people in the prison,why were

> they imprisoned? Those trying to escape from the national service and from the country. What was your job exactly? I was just guarding. Have you ever been arrested or detained yourself? Yes. Why? I was really tired from the national service so I tried to escape the country to Sudan and I got caught. For how long were you in prison? I was in Gashbarka prison for 9 months and then they returned me to Ala and then I stayed there for 3 months. For how long were you a prison guard before you decided to escape? 1 year.

[28] At page 7 of the CTR:

> You said earlier that there were people trying to cross the border at the prison you were guarding? Yes. So you knew what was happening to them? Yes. You knew there was torture for those people? I knew how prisoners were handled in Ala, but I didn't know how prisoners were handled in Prima. You are telling me that the prison conditions were better? There are open source documents saying that there are no prisons in Eritrea that respects human rights? No, I was comparing it to Prima. If I was arrested in Ala, since the soldiers were my colleagues, I would have had favorable treatment. What favorable treatment were you hoping for? I was hoping I would be released earlier, but no. And what about the living conditions? It's still very difficult but there I was working and unloading things for trucks and building houses for the soldiers and sometimes we did other labor work but we were allowed to wear shows. Did you have a special treatment in Ala because you were a special prison guard. Were you given sufficient food? No it was the same, once per day. So it was torture there too? Yes. It was the same for all the prisoners. So when you tried to escape, you knew that unless you were given a special treatment, this would be what would happen to you? I knew there was torture in the way we were handling prisoners in Ala but I thought if I got caught and got the chance to go to Ala I was hoping for a better treatment.

D. *Second preliminary point –new argument raised the evening before the hearing*

[29] After close of business the night before the hearing, the Applicant raised a new issue not addressed in his written filings – which he had ample time not only to update. The essence of the

new argument is that the notes made by the Officer contemporaneously with the interview and saved on the GCMS constituted a final decision that was defective in law, such that the Officer became *functus officio* on March 12, 2023. Given this argument, the Applicant says the Officer's decision of April 11, 2023 was of no legal effect and should not be considered.

[30] This submission is without merit. It flies in the face of the Officer's affidavit evidence, which the Court accepts, is unsupported on the face of the record, and is based on counsel's novel and unsupported argument that interim notes saved on the GCMS must have words to the effect that 'these notes are not to be considered a final decision' without which such notes constitute final binding decisions. This argument also ignores the reality that reasons are to be read holistically. As found above, in my view the notes entered first in the GCMS record the interview and preliminary considerations. The Decision is that of April 11, 2023 which engages both subsections 11(1) and paragraph 35(1)(a) of *IRPA*.

[31] Had I not dismissed this argument bereft of merit, I would have refused to hear it for the reasons set out by my colleague Justice Turley in *Kabir v Canada (Citizenship and Immigration)*, 2023 FC 1123 at paragraphs 19-21:

> [19] The well-established jurisprudence is that, absent exceptional circumstances, new arguments should not be entertained as to do so would prejudice the opposing party and leave the Court unable to fully assess the merits of the new argument: *Omomowo v Canada (Citizenship and Immigration)*, 2023 FC 78, at paras 26-28; *Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318, at para 81; *Del Mundo v Canada (Citizenship and Immigration)*, 2017 FC 754, at paras 12-14; *Adewole v Canada (Attorney General)*, 2012 FC 41, at para 15.
>
> [20] In my view, there are no exceptional circumstances in this case that warrant departing from this general principle. The Applicant could have raised the procedural fairness argument in

> his Memorandum of Fact and Law filed on the leave application or at the very least, he could have filed a further Memorandum and sought to address the issue at that time. Raising the new argument at the hearing for the first time deprived the Respondent of the opportunity to respond in a meaningful way.
>
> [21] Furthermore, as articulated by Justice Roy in *Mohseni v Canada (Minister of Citizenship and Immigration)*, 2018 FC 795, allowing new arguments adversely impacts the administration of justice:
>
> > [37] It is also a disservice to the administration of justice if an applicant is allowed to depart from the case he was authorized to bring before the Court. This provides an incentive to take the other side by surprise and gain a tactical advantage or force the Court to grant an adjournment. Indeed, IRPA establishes that time is of the essence as section 74 requires that the hearing take place no later than 90 days after leave was granted. In my view, unless there are truly extraordinary circumstances, the Court ought not to allow for cases to be derailed through new arguments being entertained the day of the hearing.

E. *The Officer's determination on the Applicant's role as a prison guard*

[32] The Applicant's primary submission is the Officer's findings is unreasonable on the voluntary, significant, and knowing contribution elements of the Applicant's alleged complicity with crimes against humanity as committed by the Eritrean government. Notably the parties do not dispute the legal test in this respect, simply the application of that law to the evidence in this case.

[33] The Applicant repeatedly submits he was a victim of a repressive military conscription policy imposed by the Eritrean government. With respect, his argument in this respect was

considered in the careful and detailed weighing and assessing of the evidence conducted by the Officer. It was one of very few factors given positive consideration in the Applicant's favour.

[34] The Applicant also argues the Officer disregarded the contribution-based analysis in *Ezekola* and relied on the personal and knowing participation test in *Ramirez v Canada (Employment and Immigration)*, [1992] 2 FC 306 (CA) test. This submission is incorrect. In fact, the Officer specifically referred to *Ezekola* and went through each of the factors set out in *Ezekola* considering, assessing and weighing the evidence as the law requires.

[35] The lack of merit of this point is obvious on the face of the record. The Officer's reasons regarding complicity and the *Ezokola* test are set out above and repeated here for convenience:

> ANALYSIS: APPLICANT'S COMPLICITY IN CRIMES AGAINST HUMANITY I apply the six factors outlined in the Ezokola test in assessing whether the applicant has voluntarily made a significant and knowing contribution to a crime or criminal purpose. The applicant was a prison guard at Ala prison. The Eritrean prison network falls under the authority of the Eritrean government. Thought the size of the Eritrean prisons' network is not known, Amnesty International states that the number of declared prison and secret prisons indicates that there is an 'infrastructure of repression' in Eritrea. I draw a negative inference from the nature and size of the organization. The applicant has admitted being a prison guard at Ala prison. The applicant has admitted that the conditions in which detainees are kept at Ala prison were equivalent to torture. The applicant was working in a part of the organization that inflicts torture to detainees. I draw a negative inference from the applicant's involvement in the part of the Eritrea armed forces directly responsible for torture. The applicant's duties and activities within the organization included guarding detainees to make sure they would not escape the prison. I draw a negative inference from this. The applicant's position or rank in the organization was as a guard. I draw a positive inference from the applicant's low rank, but draw a negative inference from the applicant's statements that he knew about the living conditions and torture taking place in the prison. The applicant worked at Ala prison for 1 year. The applicant declared that he did not attempt to

> leave before this one year. I draw a negative inference from this. The applicant was recruited for compulsory service through conscription. I draw a positive inference from this. Based on the six factors above, 1 am concerned that the applicant made a voluntary contribution in that they did not mention that they have tried to leave before having worked at the prison for 1 year. I am concerned that the applicant made a significant contribution in that they directly worked for Ala prison as a prison guard. I am concerned that the applicant made a knowing contribution in that they declared during the interview that the detainees were tortured. I am therefore concerned that the applicant was complicit in the crime against humanity of torture of detainees held at Ala prison in Eritrea.

[36] The Applicant argues we never worked as a prison guard. I have already considered and rejected this allegation, which is without merit as illustrated by the many times the Applicant directly or inferentially conceded in his interview that he in fact did serve as a prison guard at Ala prison.

[37] This argument, in addition and in common with most if not all of the Applicant's virtual line-by-line criticism of the Decision, in my respectful view also and impermissibly invites the Court to reweigh and reassess the record of evidence and inferences. Both the Supreme Court of Canada and Federal Court of Appeal instruct this Court to decline such invitations, and the Court will comply with these instructions given I am not persuaded there are either fundamental error or exceptional circumstances.

[38] As another example of the same line of argument, on voluntariness the Applicant submits he was compelled to join the national service against his will and in accordance with Eritrean law. The Applicant submits he tried to escape the country twice, resulting in his detention both times, before successfully fleeing to Ethiopia. As already observed, this argument was

considered by the Officer but was not enough to sway the balance in his favour, because among other things he served as a prison guard at the Ala prison for a year without trying to escape.

[39] Again, on significant contribution, the Applicant argues the alleged circumstances where the Applicant as a prison guard was involuntarily and compulsorily placed at the lowest rank in the Eritrean army, suggest that he could have not made any substantial contribution to the alleged crimes against humanity perpetrated by the Eritrean government. This argument is not only speculative, but was considered by the Officer and is answered in part by the fact detainees who tried to escape were special targets of torture and that his job as a guard was to prevent their escape.

[40] Finally, the Applicant submits the Officer did not make out the knowing contribution factor in this case. As the reasons illustrate this point also considered by the Officer as a matter of weighing and assessing the evidence. I see no fundamental error or exceptional circumstance in this aspect of the Officer's reasons.

F. *The Officer's consideration of Ezokola factors is reasonable*

[41] The Applicant also takes issue with the Officer's findings on the *Ezokola* factors. Again, this is mainly an attack on the weighing and assessing of evidence. There was no error in the legal test, which the Officer applied in this regard. I will in summary manner review these findings, and have concluded there is no merit in the Applicant's arguments in this regard either. As expected there is overlap in the submissions and there consideration by the Officer.

(1) Size and nature of the organization

[42] The Applicant submits the Officer attempted to narrow the Applicant's affiliation with the Eritrean prison system so that it would fit in to the smaller organization category. Rather, the Applicant submits he was coerced into indefinite national service by the Eritrean government and army. The Applicant submits the Eritrean government is a multifaceted, large and complex organization, which is not solely established for limited or brutal purposes.

[43] I am not persuaded. While the exact size of the prison system was unknown, the Officer included cites to documentary evidence available at pages 3-4 of the CTR:

- "Prison guards in Eritrea regularly inflict torture on detainees"
- The United States Department of State had noted the "harsh and life-threatening prison and detention centre conditions" and "deaths of detainees at the hands of the prison staff", and
- The "number of declared prison and secret prisons indicates that there is an 'infrastructure of repression' in Eritrea."

(2) Part of the organization with which the refugee claimant was most directly concerned

[44] The Applicant submits the Applicant's involvement with the Eritrean army as part of a national service obligation should be considered separately from the allegation that he was involved with the prison guards. I disagree. The Applicant was a prison guard and cannot avoid the consequences of his admissions about what he knew and did at his interview. The Officer reasonably concluded the Applicant worked for the part of the organization, in this case, the Ala

prison, in respect of which there is abundant evidence from the Applicant and country condition evidence that torture was inflicted by prison guards on detainees.

(3) The refugee claimant's duties and activities within the organization

[45] The Applicant submits as a guard, his primary responsibilities were focussed on maintaining security and order within the army compound or other facilities. His duties did not entail participation in or knowledge of any criminal acts committed by the organization. However, in my view the Officer reasonably concluded among other things, based on the Applicant's testimony, that his duties included guarding detainees to ensure they would not escape the prison. This finding is supported by the evidence and I am not persuaded it is unreasonable.

(4) The refugee claimant's position or rank in the organization

[46] The Applicant submits, as the Officer noted, that his lower-ranking position suggest he did not have decision-making power or control. In my view, the Officer reasonably found his activities as prison guards in Eritrea amounted to crimes against humanity. The Applicant himself stated his role was guarding "so that people can't move" which was a clear impediment from detainees escaping the risk of torture at the hands of the prison guards. In addition, he knew of the torture of detainees yet served as a prison guard and did not try to escape for a year.

(5) The length of time the refugee claimant was in the organization

[47] The Applicant submits his coerced involvement in the Eritrean army as part of the national service lasted only one year, a short time that reduces the likelihood that he had knowledge of any criminal purpose. That said, the Respondent submits and I agree it was reasonable for the Officer to draw an adverse inference from the year the Applicant worked as a prison guard, noting the Applicant made no attempt to escape. The Officer acknowledged the Applicant was conscripted, and as already noted gave him some credit in that respect.

(6) The method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave

[48] The Applicant submits he was conscripted and coerced to complete the national service, and that he had no opportunity to refuse this conscription and escape. This is a point that was made many times, which was considered and found in his favour, but was reasonably found not sufficient to avoid a finding of complicity.

[49] I am not persuaded the Officer made any fundamental or central errors regarding the *Ezokola* factors.

VII. Conclusion

[50] The Decision is in my view justified, transparent and intelligible. Judicial review must therefore be dismissed.

VIII. Certified Question

[51] Neither party proposed a question of general importance to certify, and I agree none arises.

JUDGMENT in IMM-5525-23

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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