Federal Court  Cour fédérale

Date: 20150126

Docket: IMM-5514-13

Citation: 2015 FC 99

Ottawa, Ontario, January 26, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

HOMAYON AAZAMYAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] Pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], the Applicant requested exemptions from several requirements of the *IRPA* on humanitarian and compassionate [H&C] grounds. A senior immigration officer [Officer] refused that request on July 29, 2013. The Applicant now seeks judicial review of that refusal under

subsection 72(1) of the *IRPA*, asking the Court to set aside the negative decision and return the matter to a different officer for re-consideration.

[2] The Applicant is now a 49 year-old citizen of Afghanistan who came to Canada with his wife and two daughters (then ages 1 and 3) on April 15, 2008. They immediately sought refugee protection and, before their hearing, the Applicant's wife gave birth to another daughter in 2011. On June 1, 2012, the Refugee Protection Division [the RPD] of the Immigration and Refugee Board decided that the Applicant's wife and his two older children were Convention refugees.

[3] However, the RPD determined that the Applicant was not a Convention refugee since, between 1984 and 1989 or 1991, he had been a member of the Afghan Air Force [the AAF], an organization which had committed war crimes and crimes against humanity during that time. The Applicant had voluntarily joined the AAF and eventually attained the rank of captain. Although the Applicant claimed to just be an instructor who primarily trained civilian pilots, the RPD did not consider him credible. The RPD also found that the Applicant knew or should have known about the crimes the AAF was committing and could have left at any time without repercussions. When the Applicant eventually deserted from the AAF, the RPD determined it was only because it had become too dangerous and not because he was uneasy about the human rights abuses the AAF was committing. The RPD decided that there were serious reasons to consider that the Applicant was complicit in war crimes and crimes against humanity and, therefore, excluded from refugee protection pursuant to section 98 of the *IRPA* and article 1F (a) of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, Can TS 1969 No 6.

[4] In November, 2012, the Applicant applied for a pre-removal risk assessment [PRRA] pursuant to subsection 112(1) of the *IRPA*, but that application was dismissed on February 13, 2013. The Applicant's family had only received refugee protection because of his wife's employment, and the PRRA officer did not believe that anyone would remember that the Applicant's wife had worked for a western organization over five years ago or target the Applicant for that reason. The PRRA officer also determined that the Applicant was only eligible for protection under section 97(1) of the *IRPA*, and while there might be some risks to the Applicant in Afghanistan, the PRRA officer was not convinced that any of them were personalized. Thus, the PRRA officer dismissed the application, and this Court denied the Applicant leave to apply for judicial review of that decision on June 20, 2013 (*Aazamyar v Minister of Citizenship and Immigration*, IMM-1932-13).

[5] Meanwhile, the Applicant had also applied for humanitarian and compassionate [H&C] consideration on June 29, 2012, and he submitted additional information on December 18, 2012.

II. Decision under Review

[6] On July 29, 2013, the Officer refused the Applicant's H&C application.

[7] After summarizing the decisions of the RPD and the PRRA officer, the Officer determined that the Applicant was fairly well-established in Canada. He has a Bachelor degree, works a number of part-time jobs, and plans to open a business with his wife. In the Officer's determination, the Applicant was thus financially self-sufficient and did not depend on social assistance. The Officer also accepted that the Applicant volunteers for the Salvation Army and

helps his elderly neighbours. As well, the Officer noted that the Applicant's wife and two oldest children are Convention refugees and had applied for permanent residence. The Officer decided that these facts supported the Applicant's H&C application.

[8] The Officer next considered the best interests of the Applicant's three children. The Applicant had made some arguments with respect to articles 9 and 18 of the *Convention on the Rights of the Child*, 1577 UNTS 3, Can TS 1992 No 3, but these were dismissed. The Officer found that neither article governed when it could be acceptable to separate children from their parents through incarceration or deportation. Nevertheless, the Officer accepted that an indefinite separation of the children from their father was the likeliest outcome of deporting the Applicant, since his wife and children would face a serious risk of persecution if they returned with him to Afghanistan. The Officer accepted that this would be a severe disruption, since the family was close-knit and the Applicant was a fine father. While the children may eventually adjust, the Officer accepted that the absence of their father would have a serious impact on them. The Applicant's absence would also make life difficult for his wife, who would be forced to care for all three children on her own with reduced finances, which would probably delay or end her plans to open a business or go to law school. The Officer concluded that "it is clearly in the children's best interest that Mr. Aazamyar remain in Canada with them."

[9] The Officer also observed that Afghanistan is a country to which Canada has temporarily stayed removals. Although the Applicant cannot benefit from that stay, it was evidence that conditions are very difficult in that country. Nevertheless, the Officer noted that millions of Afghan refugees have returned to Afghanistan since the war ended, and 60% of them

reintegrated themselves into their home communities. As well, large cities like Kabul and Herat were relatively safe, and the Officer noted that the Applicant had lived in Kabul from 2002 to 2007 and only left for India in 2007 because of the risks faced by his wife. The Officer was unable to discern what further hardships the Applicant would suffer if he returned to Afghanistan now, apart from the separation from his family. Despite this, the Officer accepted that the Applicant would likely experience some hardship because of the general conditions in Afghanistan.

[10] The Officer then said that the question was whether such hardship would be unusual, undeserved, or disproportionate. Despite the findings of the RPD, the Officer noted that the Applicant continued to deny and minimize his complicity in war crimes and crimes against humanity. The Officer thus wrote as follows:

> Here, Mr. Aazamyar does not come with clean hands. He continues to deny or minimize or misrepresent his complicity with war crimes or crimes against humanity. These self-serving statements show a disregard for the gravity of the RPD findings or the nature of the conflict with which he was involved. Even more seriously, it shows a disregard for the many victims of the Afghan Air Force, in which he held an important post. This is a strong negative factor and I give it considerable weight.

[11] While this complicity ended over 20 years ago and the Applicant presented no risk to Canada now, the Officer stated that the *IRPA* typically intends that people like the Applicant be kept out of Canada. In this regard, the Officer stated:

> Mr. Aazamyar's complicity appears to have ended in either 1989 or 1991. He appears to have a positive record since then. He does not appear to be a security risk with respect to a forward-looking risk to Canada.

> However, given the CBSA submissions and RPD findings, there are reasonable grounds to believe Mr. Aazamyar is inadmissible under s. 35 for his complicity. Mr. Aazamyar acknowledges this, with his request for a waiver of inadmissibility.
>
> There are always exceptional situations but in my understanding the goal of IRPA is to deny "access to Canadian territory" to persons who are so described, notwithstanding that they are not a present threat.

[12] Thus, the Officer found that the Applicant's complicity was a strong negative factor that vastly outweighed the hardships that his removal from Canada would cause him and his family. As the Officer stated in section 5 of his decision:

> The RPD conducted a thorough assessment and found he was complicit in war crimes or crimes against humanity. He was not a credible witness. Here, he repeats his misrepresentation about the nature of his role with the Afghan Air Force (that he was a trainer of civilian pilots, rather than a commander in a fighting unit) and does not engage the RPD's arguments. He is not being as candid about his past as he is about his family life.

[13] Ultimately, considering all of the circumstances, the Officer concluded that "the potential hardship in this case is not unusual, undeserved or disproportionate," and thus decided that this situation was not so exceptional that the Applicant should be exempt from inadmissibility or any other requirements of the *IRPA*.

III. The Parties' Submissions

A. *The Applicant's Arguments*

[14] The Applicant says that the Officer consulted a number of documents that he neither submitted nor even possessed, and he argues that it was unfair for the Officer not to disclose them to him and invite his input.

[15] The Applicant also argues that the Officer's decision with respect to the Applicant's complicity in war crimes is unreasonable since it was made without explicit reference to *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*], which was released some 10 days before the date of the Officer's decision. The Applicant notes that the Officer relied heavily upon the RPD's reasons, and he argues that the Officer did not properly consider the reduced scope of complicity that was established by *Ezokola*.

[16] Specifically, the Applicant submits that although the Officer could rely upon the factual findings made by the RPD, the Officer was wrong to adopt the RPD's legal conclusion that the Applicant was complicit. Accordingly, the Applicant argues that the Officer did not reasonably assess the degree and scope of the Applicant's complicity in war crimes. Moreover, the Applicant submits that there is some doubt as to whether an H&C officer has statutory authority or the requisite training to make a legal conclusion as to the Applicant's complicity.

[17] Furthermore, the Applicant says it was unreasonable for the Officer to conclude that the Applicant would not experience undue hardship simply because he failed to grapple with the

RPD's findings of complicity. The Applicant submits that the RPD's factual findings speak for themselves, so it was inappropriate for the Officer to focus upon the Applicant's lack of candour or failure to show any remorse for his complicity. As that was the primary reason for the decision and his application was otherwise supported by all the other factors outlined in section 5.11 of the Operational Manual, IP5, *Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds*, the Applicant says that the Officer's whole decision was unreasonable.

[18] Finally, the Applicant submits that the "nail in the coffin" in the Officer's decision is the fact that he cannot apply for permanent residency from abroad if he is inadmissible for complicity in war crimes and crimes against humanity.

B. *The Respondent's Arguments*

[19] The Respondent argues that it does not matter that the Applicant cannot apply for permanent residency from abroad; this is an H&C application for an exemption from the requirement of the *IRPA*, and the Respondent says that separation of families is sometimes an inevitable outcome in this process. According to the Respondent, the Officer had due and appropriate regard to the best interests of the children in this case. That factor alone, however, is not determinative. The Respondent also notes that this is not a correctness review which allows the Court to assess whether the factors were properly weighed. The fact of the matter, according to the Respondent, is that the Applicant failed to fully and candidly deal with his complicity in the AAF's war crimes, which the Officer determined was a significant negative factor.

[20] Further, the Respondent says that the Officer has jurisdiction to consider the factors surrounding the Applicant's complicity in the war crimes, and that it was necessary to address such issues because the question of the Applicant's inadmissibility was clearly in issue. Citing the decision in *Syed v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1163 at para 23, 300 FTR 132 [*Syed*], the Respondent states that the Officer was obliged to accept the RPD's determination that the Applicant was complicit in war crimes and crimes against humanity.

[21] The Respondent argues that the Supreme Court of Canada's decision in *Ezokola* does not change that, because it simply refined the prior law concerning complicity; it did not radically depart from it. According to the Respondent, one still needs to look to any culpable complicity, and this is not a case of the Applicant's guilt by association in the war crimes committed by the AAF. On the contrary, the Applicant was a senior officer. In the Respondent's view, the Officer appropriately imported the RPD's factual findings concerning the Applicant's complicity in such crimes, and they support the Officer's conclusion that the Applicant was complicit in the AAF's crimes. Thus, according to the Respondent, *Ezokola* does not affect the Officer's decision.

[22] The Respondent therefore urges the Court, on the basis of *Kamanzi v Canada (Citizenship and Immigration)*, 2013 FC 1261 (available on CanLII) [*Kamanzi*], to apply the "futility doctrine", since it would be pointless to send the matter back to another officer who, even applying the refined test set out in *Ezokola*, could only find the Applicant was complicit in the AAF's war crimes.

[23] Finally, the Respondent also argues that the process was fair. None of the allegedly undisclosed documents contained information that was unknown to the Applicant, and the Officer did not rely on them in any event. Rather, the RPD decision was the focus of the decision, and that was something the Applicant clearly had.

IV. Analysis

A. *Standard of Review*

[24] The appropriate standard of review for an H&C decision is that of reasonableness since it involves questions of mixed fact and law: see, e.g., *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18. The Federal Court of Appeal recently confirmed in *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at paras 30, 32, 372 DLR (4th) 539, that an H&C decision is analogous to the type of decision that attracted the reasonableness standard of review in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559.

[25] The Court should not interfere, therefore, if an H&C officer's decision is intelligible, transparent, justifiable, and falls within the range of possible, acceptable outcomes defensible in respect of the facts and the law. It is not up to this Court to reweigh the evidence that was before the Officer, and it is not the function of this Court to substitute its own view of a preferable outcome: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61, [2009] 1 SCR 339. As a corollary, this means that the Court does not have "carte blanche to reformulate a tribunal's

decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54, [2011] 3 SCR 654).

B. *Was the Officer's Decision Reasonable?*

[26] Neither party argued that the Officer's determinations in respect of the best interests of the Applicant's children and the Applicant's degree of establishment were not reasonable. Those factors favoured the Applicant and, thus, the issue of complicity was the determinative factor in the Officer's mind.

[27] The essential question to address, therefore, is: was the Officer's decision with respect to the Applicant's complicity reasonable? Although officers considering a request for an H&C exemption are not necessarily responsible for finding foreign nationals inadmissible, an important factor in this case was the Officer's belief that the Applicant is inadmissible to Canada by virtue of subsection 35(1) of the *IRPA*. Therefore, it must first be determined whether the Officer was bound by the RPD's legal conclusion that the Applicant was complicit in the crimes against humanity committed by the AAF.

[28] Paragraph 15(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], provides as follows:

15. For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 35(1)*(a)* of the Act,	**15.** Les décisions ci-après ont, quant aux faits, force de chose jugée pour le constat de l'interdiction de territoire d'un étranger ou d'un résident

if any of the following decisions or the following determination has been rendered, the findings of fact set out in that decision or determination shall be considered as conclusive findings of fact:	permanent au titre de l'alinéa 35(1)*a)* de la Loi :
…	…
(*b*) a determination by the Board, based on findings that the foreign national or permanent resident has committed a war crime or a crime against humanity, that the foreign national or permanent resident is a person referred to in section F of Article 1 of the Refugee Convention; …	*b*) toute décision de la Commission, fondée sur les conclusions que l'intéressé a commis un crime de guerre ou un crime contre l'humanité, qu'il est visé par la section F de l'article premier de la Convention sur les réfugiés;

[29] In *Syed*, this Court suggested that not only the factual findings of the RPD but also its determination of complicity are binding "findings of fact" when making admissibility findings under section 35 of *IRPA* (*Syed* at paras 14-23). In contrast, in *Abdeli v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1047 at para 19, [2006] FJC No 1322 (QL) [*Abdeli*], the Court stated that an officer "must make the findings of fact that the applicant committed crimes against humanity. These factual findings are different from any conclusion the Board may have made with respect to whether a person is excluded."

[30] Recently, in *Johnson v Canada (Citizenship and Immigration)*, 2014 FC 868, [2014] FCJ No 893 (QL) [*Johnson*], my colleague Madam Justice Anne Mactavish determined that the

interpretation of paragraph 15(b) of the *Regulations* in *Abdeli* is the correct one. In this regard, Justice Mactavish stated as follows:

> [24] Subsection 15(b) of the *Regulations* stipulates that the *findings of fact* made by the Board in an exclusion proceeding are to be considered as conclusive findings of fact in an admissibility determination under section 35 of *IRPA*. This makes sense, as it limits the potential for re-litigation of factual matters that have already been assessed by an expert tribunal in the context of an oral hearing.
>
> [25] Nothing in subsection 15(b) of the *Regulations* suggests that officers are bound by *findings of mixed fact and law* that have been made by the Board. Rather the task of immigration officers making admissibility determinations is to take the findings of fact that have been made by the Board and consider them in light of the provisions of section 35 of *IRPA* in order to determine whether or not the individual in question is admissible to Canada.
>
> [Emphasis in original]

[31] I agree with the foregoing conclusion which, in turn, means that although an H&C officer making an admissibility determination must accept and adopt the RPD's findings of fact, he or she needs also to independently make whatever findings of mixed fact and law that are necessary to decide if the individual in question is inadmissible. Accordingly, in the present case, while the Officer was bound by the RPD's factual findings, he was not bound by its conclusion that the Applicant was complicit in the crimes against humanity committed by the AAF.

[32] It is therefore necessary to consider whether it was reasonable for the Officer to reject the Applicant's application without referring to *Ezokola*. In this regard, Mr. Justice Yves de Montigny said the following in *Sabadao v Canada (Citizenship and Immigration)*, 2014 FC 815 at para 22 (available on CanLII):

> [A]n officer ought to consider recent jurisprudential developments, not for the purpose of indirectly or implicitly overturning a final decision, but for the purpose of balancing that factor with other H&C grounds. … If, as a result of a new jurisprudential interpretation of an inadmissibility provision, the Applicant's refugee claim might have turned out differently, it is obviously a factor that the Officer should have taken into consideration in assessing his H&C claim.

[33] After the RPD's determination of the Applicant's complicity and shortly before the Officer's decision, the Supreme Court determined in *Ezokola* that the Canadian approach to criminal participation in crimes against humanity or war crimes had been overextended and it refined the test to fix that problem.

[34] Now, mere association becomes culpable complicity only "when an individual makes a *significant* contribution to the crime or criminal purpose of a group" (*Ezokola* at para 87 (emphasis in original)). Furthermore, a claimant must be aware of the organization's crime or criminal purpose and be aware that "his or her *conduct* will assist in the furtherance of the crime or criminal purpose" (*Ezokola* at para 89 (emphasis in original)). When deciding if there are serious reasons for considering that someone is complicit, the six guiding factors are to "be weighed with one key purpose in mind: to determine whether there was a voluntary, significant, and knowing contribution to a crime or criminal purpose" (*Ezokola* at para 92).

[35] It is clear from the record that the RPD reviewed and applied the pre-*Ezokola* test for assessing the Applicant's complicity, notably with reference to the test in *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FCR 306, 89 DLR (4th) 173 (CA)

[*Ramirez*] and *Moreno v Canada (Minister of Employment and Immigration)* (1993), [1994] 1 FCR 298, 107 DLR (4th) 424 (CA). It is not clear, however, whether the Officer did the same.

[36] Although the Officer here did not specifically refer to or apparently rely upon the test for complicity as refined by the Supreme Court in *Ezokola*, that fact alone does not make his decision unreasonable. As noted above, this Court should not interfere if the Officer's decision is intelligible, transparent, justifiable, and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

[37] It cannot be said that the Officer did not review and assess the Applicant's complicity, nor can it be said that he simply listed the factual findings made by the RPD and concluded that the Applicant was inadmissible to Canada by reason of such complicity. On the contrary, the Officer prefaced his assessment of the Applicant's complicity by quoting the Applicant's following reason for seeking the H&C exemption:

> "I am requesting this exemption as the rest of my family were accepted as Convention refugees and because my role in the Afghan military was as a result of my desire to be a pilot and the fact that there were no civilian pilot training programs at that time in Afghanistan. I have not been involved in the commission of war crimes, or crimes against humanity and my desire was only to be a pilot and to train others as pilots."

[38] The Officer then remarked that the Applicant was aware of the RPD's assessment of his complicity, "yet he did not engage with those findings here." Thus, the Officer stated that he preferred the RPD's assessment over the Applicant's "bland" statements, which the Officer regarded as "an effort to misrepresent his history."

[39] In making his determination as to the Applicant's complicity, however, the Officer adopted and quoted the following finding by the RPD:

> "On a balance of probabilities, I find that the claimant knew, or ought to have known, that pilots he trained operated in support of this goal [terrify, maim and kill civilians] and that he is not credible when he alleged that he trained pilots for commercial purposes only, nor did he provide evidence to that effect."
>
> [Insertions added by the Officer]

[40] This finding by the RPD, that the Applicant "knew, or ought to have known" about the goal of the AAF, is troublesome, in that it formed part of the factual matrix by which the Officer assessed the Applicant's complicity. Although the Officer reached his own conclusion as to the Applicant's complicity and resultant inadmissibility, this conclusion was informed by the above finding which appears to be very much like the sort of "guilt by association" that was rejected by *Ezokola*.

[41] It is impossible to ascertain from the reasons for the Officer's decision here as to whether the Applicant's complicity and inadmissibility may or may not have been assessed and based upon the refined test set out by the Supreme Court in *Ezokola*. Accordingly, insofar as the Officer's decision was based upon the RPD's legal conclusion that the Applicant was complicit in war crimes and crimes against humanity (which was clearly made in view of the *Ramirez* test), his decision is not defensible in respect of the facts and the law.

[42] The Respondent submits that this matter should not be remitted back for re-determination as the outcome would inevitably be the same given the RPD's factual findings with respect to the Applicant's role and involvement with the AAF. According to the Respondent, another officer,

properly instructed as to the new test in *Ezokola*, would come to the same conclusion dismissing the Applicant's application on the basis of his complicity with the AAF's crimes.

[43] I disagree. The facts in this case are not as straight forward as was the case in *Kamanzi* (see para 10) and the applicant's credibility in that case was not seriously challenged. Moreover, it is not the function of this Court to determine the Applicant's H&C application but, rather, the responsibility for that determination is with an immigration officer (*Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at paras 37-38, 372 DLR (4th) 567).

[44] As the decision must therefore be set aside, there is no reason to consider the Applicant's argument that he was denied procedural fairness.

V. Conclusion

[45] In view of the foregoing reasons, the Applicant's application for judicial review is allowed and the matter is remitted to a different officer for re-determination in accordance with the decision of the Supreme Court of Canada in *Ezokola*.

[46] Neither party raised a question of general importance for certification, so none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to a different officer for re-determination in accordance with the decision of the Supreme Court of Canada in *Ezokola*.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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