Federal Court  Cour fédérale

Date: 20150727

Docket: IMM-5138-13

Citation: 2015 FC 917

Ottawa, Ontario, July 27, 2015

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ALASSAN WILLIAMS

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The applicant challenges the legality of a decision of the Immigration Appeal Division of the Immigration and Refugee Protection Board of Canada [IAD], dated July 15, 2013, by which the Board found that the applicant [respondent in the IAD proceeding] was inadmissible to Canada under paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] and issued a deportation order.

[2] The applicant is a citizen of Sierra Leone who arrived in Canada on July 1, 2001, as a stowaway with six other individuals. He made a claim for refugee status, but that claim was rejected on May 7, 2002, by the Refugee Protection Division which concluded that there was no credible basis for the claim.

[3] On April 21, 2009, the Canada Border Services Agency issued an inadmissibility report under subsection 44(1) of the Act because the immigration officer found that there were reasonable grounds to believe that the applicant was inadmissible pursuant to paragraph 35(1)(a) of the Act which states that:

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	35. (1) Emportent interdiction de territoire pour atteinte aux 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*;

[4] On January 15, 2010, the Immigration Division [ID] concluded that the applicant was not inadmissible since there were no reasonable grounds to believe that he had committed 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 Act*]. However, on July 15, 2013, the IAD allowed the appeal of the Minister and concluded that there were reasonable grounds to believe that the applicant was complicit in acts that constitute an offence pursuant to paragraph 6(1)(b) of the *Crimes Against Humanity Act*, and accordingly, issued a deportation order.

[5] In long and detailed reasons, the IAD makes three findings. First, the Revolutionary United Front [RUF] and the Armed Forces Revolutionary Council [AFRC] are organisations with a limited and brutal purpose and they have committed crimes against humanity. Second, there are reasonable grounds to believe that the applicant was a member of the AFRC and the RUF. Third, the applicant was complicit in the RUF's and AFRC's acts that constitute crimes against humanity, an offence pursuant to paragraph 6(1)(b) of the *Crimes Against Humanity Act*. Based on *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867, the IAD noted that when an organization is found to have a limited and brutal purpose, membership to that organization is sufficient to establish complicity. The IAD found that the information of the source was reliable and trustworthy and linked the applicant to the AFRC and to the RUF, and consequently, this brings a presumption that he shared a common purpose in their cause, a presumption that was not rebutted by the applicant. Therefore, the IAD concluded that the applicant was inadmissible pursuant to paragraph 35(1)(a) of the Act.

[6] Today, before this Court, the first finding of the IAD that the RUF and AFRC are organizations with limited and brutal purposes and have committed crimes against humanity, is not challenged by the applicant, nor that the IAD has correctly stated in its decision the "reasonable grounds to believe" test which, by virtue of section 33 of the Act, is applicable to inadmissibility findings made pursuant to paragraph 35(1)(a) of the Act. Essentially, the applicant challenges the legality of the second finding, that is, that there are reasonable grounds to believe that he was a member of the AFRC and the RUF. Both parties to the present application convene that if the finding of membership made by the IAD cannot be sustained, then, the third corollary finding that the applicant was complicit in the RUF's and AFRC's acts

cannot be maintained, and the matter should be returned accordingly for redetermination by another panel of the IAD.

[7] The applicant argues that the impugned decision is unreasonable and that there has been a breach to natural justice. The present application for judicial review must fail.

[8] I will first start with the issue of reasonableness. The IAD found that the applicant was a member of the RUF and AFRC based on multiple factors, while the applicant did very little to rebut the evidence presented by the Minister. As explained below, the finding of membership is supported by the evidence and an articulate and convincing reasoning.

[9] Firstly, there is credible evidence on record which directly connects the applicant to the AFRC and RUF. In front of the IAD, the respondent relied on the documentary evidence submitted before the ID and called one witness, Robert Hotston, former senior criminal investigator at the Office of the Prosecutor of the Special Court for Sierra Leone [SCSL]. The IAD relied on a letter drafted by Mr. Hotston and on his testimony which revealed that a source, a former mid-level member of the RUF, had identified a picture of the applicant taken shortly after his arrival in Canada as "Andrew", a combatant who had been a member of the Sierra Leone Army before becoming a member of the AFRC and eventually, of the RUF. The IAD noted that according to Mr. Hotston, this particular source had testified as a prosecution witness before the SCSL and that his information had been corroborated by other sources and through independent investigation. Mr. Hotston also testified on how the meeting with the source to identify the photograph had occurred. The IAD also noted that the information provided by the

source was coherent with the documentary evidence. The IAD found Mr. Hotston to be a credible witness and after considering the way the information was obtained, found that there were enough safeguards in place to conclude that the source's information was reliable and objective.

[10] Secondly, the IAD indicated that the applicant arrived in Canada with several scars on his forearms and hands for which the explanation provided by the applicant was found not to be credible by the RPD. The IAD also found that the applicant's statements regarding his knowledge of the other six stowaways was not credible since the evidence pointed to a connection between them as they all had similar UNHCR documents, and his statements regarding when he noticed the other stowaways and that they had not discussed their situation during the war were not plausible. In addition, the IAD found that the applicant had arrived to Canada in possession of multiple colour pictures of atrocities perpetrated on the civilian population and of a combatant. The applicant had given multiple different versions as to why and how he had obtained these pictures and who the combatant in those pictures was, and he had arrived to Canada with these pictures in an envelope bandaged with gauze around his thigh. The IAD also noted that the evidence showed that these pictures were not widely circulated in the general population and that Mr. Hotston had testified that the only people he had seen in possession of this type of pictures were ex-combatants who carried photos of atrocities, as souvenirs or as a form of intimidation. The IAD also noted various discrepancies in the statements given by the applicant on his relationship with Mohammed Conteh, the man the applicant had identified as the combatant in photos #3 and #17 and who had given the photos to the applicant. Evidence was given by Mr. Hotston that two investigators had identified this man

as Issa Sesay, but further evidence given by the applicant and a facial comparison done by the respondent led the IAD to conclude that the evidence was insufficient to determine whether that man was Issa Sesay. However, the IAD concluded that the evidence showed that this man was a rebel and well-known to the applicant.

[11] Thirdly, the IAD found various issues concerning the applicant's identity, including: that he offered very different versions before the RPD and ID regarding how he obtained his birth certificate and that no identification process is required to obtain the birth certificate, as well as the fact that the applicant's birth certificate was very similar to that of Mohamed Kallon, a stowaway who arrived at in the same ship as the applicant and later admitted that his birth certificate was false; that the security clearance certificate presented a number of anomalies and consequently, was of no probative value; that the police clearance certificate and passport were obtained on the basis of the birth certificate. The IAD concluded that it did not know who the applicant was and his motives for hiding his true identity was a pertinent and central issue.

[12] Fourthly, the IAD also found that the applicant was not credible regarding his whereabouts before and as of January 1999. The IAD noted various inconsistencies or contradictions in the statements given by the applicant to immigration officers, the ID and the RPD regarding his time spent in a refugee camp in Guinea, and noted that the documents of the Office of the United Nations High Commissioner for Refugees [UNHCR] provided by all seven stowaways were found to be fraudulent by the UNHCR. The IAD further found that the applicant was not credible regarding his occupation as a shopkeeper in Freetown, since the applicant had at first testified that he had not witnessed any kind of human rights violations and later, recognized

witnessing violence, looting and people dying, and had not provided any objective documentary evidence regarding his time as a shopkeeper. The IAD concluded that the applicant had not demonstrated where he was and what he was doing in Sierra Leone from 1997 to 1999.

[13] The applicant argues that lack of credibility by itself is not evidence that he was a member of the AFRC and of the RUF or that he was complicit in crimes against humanity. Furthermore, on the question of the assessment of the evidence by the IAD, the applicant submits that the IAD made unreasonable findings on the applicant's identity documents since documents issued by a foreign country are presumed to be valid (*Mutombo v Canada (Citizenship and Immigration)*, 2007 FC 731 at para 16) and there was no evidence to challenge the authenticity or validity of the birth certificate or of the passport. In addition, the IAD itself recognized that the passport may have been properly issued and the analysis on the police clearance certificate was inconclusive. The applicant also argues that the IAD erred by relying on the hearsay evidence of the anonymous source since the evidence was not credible and trustworthy and the IAD ignored the deficiencies in the investigation, including that the procedures for a source to be brought to testify in front of the SCSL were not followed. Furthermore, the applicant submits that the IAD relied on certain non-pertinent or minor contradictions such as minor contradictions regarding his whereabouts before and as of January 1999 and regarding his limited knowledge of the violence. In addition, the applicant argues that there was no evidence of the scars in front of the IAD, that the information coming from the other stowaways was not credible and that there was no evidence that the other stowaways were members of combatant groups. Also, the applicant submits that the IAD ignored evidence that media were taking pictures of the atrocities and that they were circulating, which is confirmed by Mr. Lamin's statements, and minimized

the value of the facial recognition report which indicates that the man in photo #17 is probably not Issa Sesay. According to the applicant, the IAD's inference that the applicant knew this man and that he was a rebel was arbitrary since the applicant has always maintained that he was a government soldier.

[14] The merits of the decision that the applicant is inadmissible, involve questions of mixed fact and law which are subject to reasonableness review standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Qureshi v Canada (Citizenship and Immigration)*, 2012 FC 335 at para 12). Overall, I am satisfied that the result reached by the IAD is reasonable and that the various findings and inferences drawn by the Board are supported by the evidence on record. First, the IAD did not err in its treatment of the applicant's identity documents since multiple factors pointed to the birth certificate as not being authentic, and that, regardless of whether they were authentic or not, since the police clearance certificate, security clearance and passport had been obtained on the basis of the birth certificate, these documents had no probative value. Second, the IAD did not err in finding that identification provided by the source was reliable since the source had no motive to mislead, since they were not told why they were asked to identify the applicant's picture and since past information given by this source in the conduct of SCSL investigations and trials had been corroborated. The IAD can consider informant evidence (*Balathavarajan v Canada (Citizenship and Immigration)*, 2006 FCA 340 at para 12) and in this case, the source's information was consistent with the documentary evidence. In addition, there were numerous contradictions in the applicant's testimonies regarding his whereabouts during the period the source says he was involved with the RUF and AFRC and it was improbable that he did not witness any violence in Freetown, and consequently, it was reasonable for the IAD to

conclude that the applicant was trying to hide what he did during the war. Furthermore, the applicant gave very different explanations as to how or why he obtained the photographs of the atrocities, and the evidence showed that generally, only media or ex-combatants would have these pictures and the man in the pictures was a rebel and known by the applicant. Moreover, the applicant travelled with a former rebel and used similar identity documents with no credible explanation as to why.

[15] In the case at bar, the applicant is essentially asking the Court to reweigh the evidence that was in front of the IAD. While I would not necessarily have come to the same conclusions as the IAD on every element of evidence, this Court only has to determine whether the decision has the attributes of reasonability. In this case, the IAD examined every element in detail and justified its conclusions in long and intelligible reasons. Contrary to the applicant's arguments, the IAD did not ignore evidence, and even directly mentions contradictory evidence, such as paragraph 176 of the decision where the IAD quotes an email that states that possessing photographs of atrocities does not necessarily mean that the individual was a combatant. The conclusion to which the IAD comes was open to it and falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[16] Be that as it may, the applicant now submits that there is new evidence that contradicts the evidence that was before the IAD. The failure to consider this new evidence amounts to a breach of natural justice. On September 27, 2013, more than two months after the IAD issued its decision, Brenda Hollis, then Prosecutor of the SCSL, wrote an email to Robert Petit, Counsel

and Team Leader of the War Crimes and Crimes Against Humanity Section of Justice Canada, to express the position of the Office of the Prosecutor [OTP] of the SCSL vis-à-vis the information that they could or could not confirm. In that email, Ms. Hollis indicated that the OTP could find no documentation to show that the determinations that the birth certificate and police clearance of the applicant were authentic were passed on to the Canadian officials. Ms. Hollis also indicated that:

> We cannot confirm the identification of the individual in photo #24 [photo of the applicant] nor the source who is to have given this information. Nor can we confirm that the identification was corroborated by other sources or by independent investigation. Our investigators indicated they made no such identification nor were they present when such an identification was made.

[17] Ms. Hollis also wrote that one of the investigators, Magnus Lamin, had indicated that it was "absolutely possible" for pictures of the atrocities to have been circulated to the general public during the war. Ms. Hollis also indicated that Mr. Lamin had not been able to identify the man in photos #3 and #17 showed to him in April 2009 by Mr. Hotston. Ms. Hollis concluded that:

> The OTP is not giving an opinion as to the identity of Mr. Williams or whether he had any involvement with the SLA, AFRC or RUF; we are rather just pointing out that we cannot verify the information and confirmations provided by Mr. Hotston.

[18] According to the applicant, the fact that this new evidence was not brought by the Minister to the attention of the IAD demonstrates that the applicant did not have a "fair hearing" and that, as a result, he is suffering a prejudice. The applicant alleges a breach of procedural fairness, which is subject to correctness review. The applicant's learned counsel has invited the Court to conclude that there is a fundamental flaw in the evidence, some sort of "vice de

preuve", which taints the result reached by the IAD. The applicant relies on Ms. Hollis' email to argue that the information provided by Mr. Hotston was "without basis." According to the applicant, Ms. Hollis' email suggests that either Mr. Hotston or the source made false or inexact declarations, or that the source does not exist or was not a former witness for the OTP. The applicant argues that Ms. Hollis' email shows misconduct by Mr. Hotston with regards to an incomplete and inexact record on the applicant's identity documents, on the question of possession of photographs of atrocities and on the question of the identification of Issa Sesay by Mr. Lamin. The applicant further notes that it is strange that after seeing the email, Mr. Hotston did not attempt to contact Ms. Hollis to confirm his information. The applicant also notes that the new evidence submitted by the respondent does not contradict the fact that the OTP cannot confirm the identification of the applicant nor the source. The applicant alleges that the lack of disclosure of this information was a violation of procedural fairness and that the fact that the information regarding the photographs was not in front of the IAD was also a violation of procedural fairness.

[19] The arguments made by the applicant in support of a breach to natural justice are unfounded. New evidence cannot be brought to the Court in an attempt to discredit or render unreasonable a finding which was based on the available evidence before the IAD. Moreover, I also find that there has been no breach to procedural fairness in this case. I recognize that a breach of procedural fairness can occur from other factors than the actions of the tribunal, including translation errors or misrepresentations discovered after the hearing (see for example *Mah v Canada (Citizenship and Immigration)*, 2013 FC 853). However, such is not the case in the present application. First, the probative value of Mr. Hotston's testimony was discussed in

front of the IAD and he was cross-examined. Second, Ms. Hollis has no personal knowledge of the facts and she did not submit an affidavit, nor was she cross-examined, contrary to Mr. Hotston. Contrary to what is suggested in Ms. Hollis' email, Mr. Hotston never testified that there had been corroboration of the identification of the applicant, nor did he testify that he had discussed the availability of photographs with Mr. Lamin. The respondent argues that Mr. Hotston provided exact, complete and true information, including passing on the fact that the birth certificate appeared to be authentic. The evidence provided by Mr. Hotston shows that Ms. Hollis was not involved in any meetings related to the identification of the applicant. In addition, Mr. Lamin's opinion on the pictures was not discussed with Mr. Hotston, nor was it provided to the respondent or to the IAD. On a balance of probability, I am satisfied that the evidence on record shows that there was no misconduct, and that neither Mr. Hotston nor the Minister misled the IAD as suggested by the applicant.

[20] Indeed, counter to what is alleged by the applicant, Ms. Hollis' email does not suggest that Mr. Hotston attempted to mislead the IAD by making false or inexact declarations, nor that the source did not exist: the email does not contradict the testimony of Mr. Hotston, it simply states that the OTP cannot confirm its content. In addition, the way in which Mr. Hotston had obtained the information from the source, which is confirmed in his affidavit, was in front of the IAD, as was the credibility of Mr. Hotston who was cross-examined, while Ms. Hollis has no personal knowledge of these events and simply indicated what the OTP could or could not confirm. This is apparent from a number of factual inaccuracies in Ms. Hollis' email, including that Mr. Hotston would have stated that the identification of the applicant had been corroborated

by other sources and that no information showed that the determination of authenticity of the birth certificate had been passed on to the Canadian authorities.

[21] This is not a case such as *Lopez Diaz v Canada (Citizenship and Immigration)*, 2010 FC 131, where a police officer who had provided information that no records existed of the police report presented to the RPD by the applicant recanted after the decision was rendered. Mr. Hotston confirmed all of the elements of his testimony in his affidavit, including the process followed to obtain the identification of the applicant. The only direct contradiction between Ms. Hollis' email and Mr. Hotston testimony is related to the identification of the man in photo #17 by Mr. Lamin as being Issa Sesay, a fact that is not material in this case as the IAD held that there was not enough information to conclude that the man in photo #17 was Issa Sesay. In addition, Mr. Lamin's opinion on the circulation of photographs of atrocities does not show a violation of procedural fairness, as neither Mr. Hotston nor the respondent had any knowledge of that opinion, and Mr. Hotston provided his opinion as well as that of Mr. Koroma.

[22] In summary, the applicant has not shown any misconduct on the part of the Minister, nor on the part of Mr. Hotston. Ms. Hollis' email, and the information contained therein, was not in the possession of the Minister before the IAD made its decision and consequently, there could not have been a breach of procedural fairness from the lack of disclosure. In addition, the content of Ms. Hollis' email does not demonstrate a breach of procedural fairness. Procedural fairness does not require a witness' testimony to be confirmed or corroborated by an outside entity. The IAD came to its decision based on the testimony of Mr. Hotston, and though they were not

confirmed by Ms. Hollis, the essential elements of that testimony were not contradicted or challenged be her either. Consequently, there was no breach of procedural fairness.

[23] There are a number of other subsidiary arguments of attack made by the applicant in his written submissions. Suffice it to state that they were also considered and that I have found them all unfounded in fact and law. I endorse in this regard the arguments and rationale found in the Minister's written representations.

[24] Consequently, the application for judicial review must be dismissed. Counsel convene that there are no question of general importance to certify in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that application for judicial review be dismissed. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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