Federal Court  Cour fédérale

Date: 20170921

Docket: IMM-4354-16

Citation: 2017 FC 845

Ottawa, Ontario, September 21, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

MIRZAALI VAEZZADEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a October 5, 2016 decision denying the Applicant's permanent residence application on humanitarian and compassionate [H&C] grounds.

[2] For the reasons that follow, this judicial review is dismissed.

I. Preliminary Matter

[3] At the opening of the hearing, legal counsel for the Applicant requested that his client be identified by only the initial "M". No reasons were provided for making this request and this request was not made as part of the Application for Leave and for Judicial Review. Likewise the Applicant provided no evidence as to why this was necessary. In the absence of reasons for the request, and in the absence of evidence that such an order is necessary, I decline to grant it.

II. Background

[4] The Applicant is an Iranian citizen who entered Canada with his spouse in 1997. In 1998, they filed refugee claims. The Applicant's wife was granted refugee status. She became a permanent resident of Canada in 2003 and a citizen in 2007.

[5] In 2001, the Applicant's refugee claim was dismissed by the Convention Refugee Determination Division [CRDD] of the Immigration and Refugee Board [IRB] as he was found to be inadmissible under section 27 of the former *IRPA*, on the basis that there were reasonable grounds to believe he was complicit in the commission of crimes against humanity pursuant to Article 1(F)(a) of the *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 150, Can. T.S. 1969 No. 6 [the Convention]. The CRDD concluded that the Applicant carried out administrative duties for SAVAK (Iran's secret police) to identify enemies of the regime of the Shah of Iran. The CRDD concluded that the Applicant had knowledge that the people he referred to his superiors could be subjected to torture and therefore he was excluded from refugee protection pursuant to Article 1 (F)(a) of the Convention (CRDD exclusion decision).

[6] The Federal Court dismissed the Applicant's judicial review of the CRDD exclusion decision. In the decision, reported at *M. v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 833, the Court, in considering the "personal and knowing" test for complicity from *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FCR 306 (FCA) [*Ramirez*], held that the CRDD did not err in finding that there were serious reasons for concluding that the Applicant was complicit in the crimes against humanity during his time with SAVAK.

[7] This judicial review concerns the denial of the Applicant's H&C application submitted in August 2010. Prior to the decision being made, on April 7, 2015 the Applicant was invited to provide additional information, but chose not to do so. The H&C application was denied by a decision dated October 5, 2016.

III. H&C Decision

[8] In the H&C decision, the Officer considered the CRDD exclusion decision, noting that the CRDD based its decision on the Applicant's complicity when he served as a SAVAK official during the period when the SAVAK was engaged in torture and mistreatment. According to the CRDD, the Applicant became aware of these practices in 1964, but continued to work with SAVAK until 1970. Further, the CRDD concluded that the Applicant had knowledge that the people he referred on to his superiors could be subjected to torture and mistreatment. Therefore the CRDD held that he was aware of the commission of crimes against humanity by SAVAK during his period of employment and he took no steps to distance himself from SAVAK. Based upon this, the CRDD excluded the Applicant under section 1(F)(a) of the Convention.

[9] In considering the H&C application, the H&C Officer referred to the Supreme Court of Canada decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] which was released after the CRDD exclusion decision. *Ezokola* changed the legal test for criminal complicity, from that previously outlined in *Ramirez*. Instead of requiring "personal and knowing participation" (*Ramirez*), the *Ezokola* test requires that an individual have "significant and knowing contribution" to an organization's crime or criminal purpose. In this context, the Officer considered the CRDD exclusion decision and the facts of the Applicant's involvement in SAVAK.

[10] The Officer noted that while with SAVAK, the Applicant assessed the files of over 20,000 potential dissenters, of which some 8,000 were referred to his superiors. The Applicant acknowledged that, once referred, the individuals could be subject to torture, detention, mistreatment, and even death. Based upon the findings of the CRDD, the Officer concluded that there were serious reasons to conclude that the Applicant made "significant and knowing contribution" to SAVAK's crimes.

[11] With respect to the H&C factors, the Officer noted that the Applicant has lived in Canada with his wife since 1997. One of his children also lives in Canada while his other four children are in Iran. The Officer stated that the possible separation of the couple was the most important factor for consideration and attributed it significant weight. The Officer also took note of health issues with the Applicant's wife for which she relies upon the Applicant for assistance with daily tasks.

[12] With respect to the personal risk to the Applicant in returning to Iran, the Officer gave significant weight to a 2008 Pre Removal Risk Assessment [PRRA] which found that since over 37 years had passed since the Islamic Revolution, former members of SAVAK are no longer of interest to Iranian authorities.

[13] Overall, the Officer concluded that the gravity of the acts committed through the Applicant's complicity while he was with the SAVAK had to be given significant weight, which the H&C considerations did not overcome. The Officer stated:

> "[…] the gravity of the acts committed through the subject's complicity when he was a member of the secret police under the Shah of Iran is given significant weight in my evaluation. This decision also is made in consideration of paragraph 3(1)(i) of the Act, which is designed to foster the application of the IRPA in such a way as "to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks."
>
> Given the subject's average level of establishment, I am not of the opinion that the length of his stay in Canada, the possible severing of ties with Canadian society and even the possible separation from his wife could support the granting of an exemption that may eventually lead the subject toward permanent residency."

IV. Issues

[14] The Applicant raises a number of issues with the H&C decision which can be addressed as follows:

1. Is the decision reasonable?
2. Was there a breach of procedural fairness?

V. Analysis

A. *Standard of review*

[15] The Applicant argues that the applicable standard of review is correctness.

[16] However, an H&C Officer's decision to deny relief under subsection 25(1) of the *IRPA* is an exercise of discretion and is reviewed on a reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 at para 44 [*Kanthasamy*].

[17] Further and contrary to the Applicant's submission, the Officer's treatment of the *Ezokola* test does not fall into the residual category of questions of central importance to the legal system and beyond the expertise of the decision-maker to which correctness applies (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 55 [*Dunsmuir*]). The Applicant is asserting that his facts do not satisfy the *Ezokola* test in the context of the H&C analysis. This is a question of mixed law and fact which involves the Officer's home statute, presumptively inviting the application of the reasonableness standard (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47 at para 22). The Applicant has failed to rebut this presumption.

[18] A decision will be reasonable when it is justifiable, intelligible, and transparent and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir,* at para 47).

[19] Issues of procedural fairness are to be assessed on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). On a correctness review, the court shows no deference to the decision maker's reasoning process and will substitute its own view if it does not agree with the decision maker's determinations (see *Dunsmuir* at para 50).

1. Is the decision reasonable?

[20] The Applicant argues that the H&C decision is unreasonable because the Officer made an inadmissibility finding under the *Ezokola* test which the Officer was not authorized to do. Further, the Applicant argues that the Officer erred in applying the *Ezokola* test particularly by concluding that the Applicant made a significant contribution to SAVAK's crimes.

[21] The Officer considered the CRDD exclusion decision in light of *Ezokola* for the purposes of balancing the seriousness of the Applicant's contribution to SAVAK with the remaining H&C factors. The Officer's conclusion that there were "serious reasons" to conclude that the Applicant made a significant and knowing contribution to SAVAK was supported by the evidence and the findings of the CRDD, which were upheld on judicial review. The CRDD did not find the Applicant complicit on the basis of mere association or acquiescence. Rather, it concluded that the Applicant knew of SAVAK's acts and continued to work with them despite this knowledge. Therefore his actions within the organization were relevant. The H&C Officer cited the following from the CRDD exclusion decision:

> "The Panel also finds that by interviewing detainees, preparing reports on the basis of those interviews, and then handing detainees over for further action by others, the claimant was serving the purpose of SAVAK and thereby sharing in the purpose of those crimes directly perpetrated by other in the organization."

[22] There was also evidence before the CRDD that the Applicant was involved in some 20,000 files of potential dissenters, 8,000 of which the Applicant referred to his superiors knowing that those individuals could be subjected to torture or other mistreatment.

[23] The Officer balanced these factors against the positive H&C factors, including the length of the Applicant's time in Canada and the separation of the Applicant and his wife. The Officer concluded that the "subject's average level of establishment" and potential hardships were not enough to outweigh "the gravity of the acts committed through the subject's complicity when he was a member of the secret police." This latter factor was given "significant weight" in the overall H&C analysis. Had the Applicant's level of complicity been different, the overall H&C balance might have been different.

[24] In weighing the various factors in the context of the H&C application, it was both necessary and reasonable for the Officer to consider the CRDD findings in light of the revised standards of complicity created by *Ezokola*. Based upon the test outlined in *Ezokola*, it was reasonable for the Officer to consider the facts of the Applicant's case, as found by the CRDD, to come to an ultimate conclusion on the H&C application.

[25] Accordingly, the H&C decision is reasonable and there is no basis for this court to intervene.

2. Was there a breach of procedural fairness?

[26] The Applicant argues that the Officer reconsidered the CRDD exclusion decision and therefore the Applicant should have been given the opportunity to make submissions with respect to the applicability of the *Ezokola* criteria.

[27] However, a judicial review of the CRDD exclusion decision was dismissed in 2002 therefore the exclusion decision is final. The H&C Officer could not reconsider the exclusion decision. The Officer was required to make the H&C determination in accordance with the law. This required the Officer to consider and weigh all of the relevant factors when assessing the Applicant's H&C submissions (*Kanthasamy*, at para 25). As such, the Officer was required to consider the significance of the exclusion decision for the purpose of determining whether or not exceptional relief was warranted. Had the Officer concluded in keeping with the current state of the law that the Applicant's complicity was by mere association, he may have given the exclusion decision less weight in the overall assessment of the H&C factors.

[28] Furthermore, the Applicant has had previous H&C and PRRA determinations all of which considered the exclusion decision. The Applicant would have known that the exclusion decision would be a factor in the H&C decision. Therefore I do not find that there was a duty on the Officer to inform the Applicant that his involvement with SAVAK would be a factor that would be considered as part of the H&C application.

[29] As noted above, I conclude that the Officer was required to take the exclusion decision into consideration, and to do so in light of subsequent changes to the law. This Court's jurisprudence requires the Officer to consider the H&C application in a manner consistent with *Ezokola* (*Hamida v Canada (Citizenship and Immigration)*, 2014 FC 998 at paras 79-80; *Sabadao v Canada (Citizenship and Immigration)*, 2014 FC 815 at para 22). This was a proper factor to consider in the overall H&C assessment.

[30] Likewise, the Applicant cannot ask this Court to effectively reopen the final, binding exclusion decision on the basis of *Ezokola* such that he should be given an opportunity to make new submissions. Cases decided with finality cannot be reopened by a change in the law (*Régie des rentes du Québec v Canada Bread Company Ltd.*, 2013 SCC 46 at paras 29-30).

[31] I conclude that there was no requirement for the Applicant to be given the opportunity to address the *Ezokola* decision. I therefore conclude that there was no breach of procedural fairness.

VI. Certified question

[32] The Applicant proposes the following certified question:

> "Where a foreign national applies for permanent residence on humanitarian and compassionate grounds under the Immigration and Refugee Protection Act section 25, and the person has been excluded from refugee protection prior to the SCC decision in *Ezokola* what procedures must be followed in processing the application under section 25 to take the *Ezokola* decision into account?"

[33] In *Burton v Canada (Citizenship and Immigration)* 2014 FC 910 at para 57, the Court outlined the test to be applied for certification of issues as follows:

> [57] The Federal Court of Appeal has outlined the test for certification of issues for purposes of appeal under section 74 of the IRPA several times (*Liyanagamage v Canada (Secretary of State)* (1994), 176 NR 4, [1994] FCJ No 1637 (FCA) at para 4, *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] FCJ No 368 at para 11, *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145, [2009] FCJ No 549 at para 28, and *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, [2013] FCJ No 764 at para 9). Based on these authorities, it is well-established that this Court may certify a question only if it transcends the interests of the parties, has broad significance or general application and is determinative of an appeal. To be determinative of an appeal, the issue must have been decided by the applications judge so that it arises before the Court of Appeal in its examination of the appeal.

[34] The factual circumstances here are specific to this case alone. Furthermore, the impact of the change in the law was considered by the Officer.

[35] As the Court in *Azimi v Canada* (*Public Safety and Emergency Preparedness)*, 2015 FC 1177 at para 32 acknowledged, the number of refugee claimants impacted by the change in the legal test for "complicity" from *Ezokola* is "small and getting smaller."

[36] In the circumstances, I am not satisfied that this case raises a serious question of general importance that transcends the interests of the parties in this case.

[37] I therefore decline to certify the question posed by the Applicant.

JUDGMENT in IMM-4354-16

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No serious question of general importance is certified.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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