Federal Court  Cour fédérale

Date: 20180119

Docket: IMM-2996-17

Citation: 2018 FC 50

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 19, 2018

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

EMMANUEL MUSABYIMANA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review by Emmanuel Musabyimana (the applicant) of the decision by the Immigration Appeal Division (IAD) dated June 15, 2017, in which the IAD allowed the appeal filed by the respondent, the Minister of Public Safety and Emergency Preparedness (the Minister), of a decision by the Immigration Division (ID). The ID found that

the applicant is inadmissible under paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] because there are reasonable grounds to believe that he was complicit in crimes against humanity that were committed in Rwanda. A deportation order was issued against the applicant under paragraph 229(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the IRPR].

[2] For the reasons that follow, I find that this application must be dismissed.

II. The facts

[3] The applicant joined the École supérieure militaire rwandaise in 1985 and completed military and science training. He subsequently joined the Forces Armées Rwandaises [Rwandan Armed Forces] (FAR) in September 1989, which comprised 5,000 soldiers at that time. Throughout that period, and until his exile to the Democratic Republic of the Congo in July 1994, the applicant held several different positions, including training officer, platoon chief (in charge of a group of 36 soldiers) and company commander. The applicant achieved the rank of sub-lieutenant, lieutenant, and even acting battalion commander from December 1993 to mid-March 1994, at which time the FAR comprised over 40,000 soldiers. Aside from his military career with the FAR, the applicant was never employed in Rwanda.

[4] The applicant was also part of the staff reserve and was thus deployed to combat the Front Patriotique Rwandais [Rwandan Patriotic Front] (FPR) on various fronts. Because of his profile, the FPR attempted to recruit him on many occasions.

[5] The applicant's mother was Hutu, and his father was Tutsi. Given this mixed background, the applicant had to prove himself even more than the other soldiers in the army.

[6] The applicant's father was killed in April 1994 around the start of the genocide, during which more than 500,000 people (including 75% of the Tutsi population in Rwanda and thousands of moderate Hutus) were murdered in the 13 weeks following April 6, 1994 (the genocide period).

[7] His mother was beaten to death by the FPR in 1999 following a rumour that the applicant was in his home village to hold meetings. During that same incident, all the village residents were arrested.

[8] Before the genocide, the applicant had invested in Radio Télévision Libre de Mille Collines (RTLM). RTLM broadcast inflammatory statements about Tutsis on the radio.

[9] In an article by the Ligue des Droits de la Personne dans la Région des Grands Lacs [League of Human Rights in the Great Lakes region] dated January 22, 2009 (the press article), it was revealed that a former member of the FAR who was accused of genocide, Brigadier General Séraphin Bizimungu, had stated during his trial that the Tutsi victims had been killed following a military operation that sought people suspected of supporting the FPR rebellion and that the applicant was among those who were responsible for the deaths of those people as the deputy commander of Major Rusigarira, leader of the 81st Battalion.

[10] The applicant was landed in Canada on December 9, 2004, after having filled out the forms for Rwandan nationals who worked with the FAR, in which he disclosed relevant information about his time serving on the FAR.

[11] On January 5, 2010, the applicant submitted a citizenship application to the Canadian authorities. On April 2, 2012, he was summoned for an interview by a representative of the Canada Border Services Agency (the CBSA officer), during which he opted not to answer the questions. On June 13, 2012, he received a letter notifying him that the CBSA officer was of the opinion that he was inadmissible under paragraphs 35(1)(a) and (b) of the IRPA and giving him the opportunity to submit additional information that would prevent the execution of the removal order in question. An official report was finally issued to him on March 22, 2013, confirming that he was inadmissible as a result of his affiliation with the FAR.

[12] On March 26, 2013, the file was referred for a hearing before the ID. The ID hearing was held on February 4 and 5, 2014, without witnesses from the Minister. On April 24, 2014, the ID dismissed the Minister's submissions and affirmed that the applicant is not described in paragraph 35(1)(a) of the IRPA and that the Minister was unsuccessful in his allegation under paragraph 35(1)(b) of the IRPA.

[13] On May 23, 2014, the Minister filed his notice of appeal before the IAD, indicating the following reasons:

1. Mr. Musabyimana is described in paragraph 35(1)(a) of the IRPA for having committed an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;
2. The member erred in fact by not recognizing that the Rwandan Armed Forces (FAR) was an organization with limited and brutal purposes during the genocide period, i.e. from April to July 1994; and
3. The member erred in law with respect to the application of the *Ryan* judgment.

[14] The hearing for that appeal was held in Montreal on November 7 and 8, 2016. On June 15, 2017, the IAD allowed the Minister's appeal and issued a deportation order under paragraph 229(1)(b) of the IRPR.

III. Decision

[15] The IAD found that the ID had conducted an extensive analysis to determine whether the FAR had committed crimes against humanity. The IAD stated that there was no question that members of the FAR had contributed to the Rwandan genocide but agreed with the ID's finding that some FAR members had not participated in the atrocities in question. The IAD nevertheless found that a significant number of FAR members played a role in the Rwandan genocide.

[16] The IAD began with an analysis of the applicant's profile and his role within the FAR to determine whether he was a mere anonymous soldier, as he depicted in his testimony. Among the facts the IAD considered in this regard, I highlight the following:

1. The applicant joined the FAR before their numbers grew from 5,000 to 40,000 soldiers;

2. He held several important positions in the FAR;
3. Given his mixed ethnicity, he had to prove himself more than the other soldiers;
4. A rumour that he was present in his home village to hold meetings led to a major reaction by the FPR, which resulted in his mother's death;
5. Important members of the FPR attempted to recruit him on several occasions;
6. His investment in the RTLM station; and
7. The mention of his name in the press article recounting the trial of General Bizimungu.

[17] The IAD found that this profile did not correspond to that of an ordinary soldier.

[18] Next, the IAD considered whether the applicant's profile supported a finding of complicity. The IAD addressed this question by applying the tests set out by the Supreme Court in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]. The IAD reiterated the arguments raised in its analysis of the applicant's profile, noting some deficiencies in the applicant's credibility, to arrive at a finding of complicity justifying the applicant's inadmissibility under paragraph 35(1)(a) of the IRPA.

[19] The IAD therefore allowed the Minister's appeal and issued a deportation order, finding that there were serious grounds to believe that the applicant had made a significant, voluntary and knowing contribution to the criminal purpose of the FAR during the genocide period.

IV. Issues

[20] The five issues to be addressed in this case are as follows:

1. Did the IAD overstep its jurisdiction by ruling on issues outside the scope of the grounds of appeal raised by the Minister?
2. Did the IAD err in applying the wrong burden of proof or an irrelevant test to its analysis?
3. Did the IAD properly apply the legal tests set out in *Ezokola*?
4. Are the IAD's findings of fact erroneous and unreasonable?
5. Did the IAD err in failing to assess the applicant's credibility?

V. Analysis

A. *Standard of review*

[21] The parties agree on the fact that an IAD decision on inadmissibility must be reviewed according to the standard of reasonableness. I concur. See: *Al Khayyat v Canada (Citizenship and Immigration)*, 2017 FC 175, at paragraphs 17–18; *Parra v Canada (Citizenship and Immigration)*, 2016 FC 364, at paragraphs 17–18.

[22] As for the argument that the IAD allegedly applied the wrong legal test in its analysis, the applicant submits that the application of the correctness standard is required: *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336, at paragraph 17. In reply, the Minister submits that the IAD did not err in the applicable legal test but does not challenge the fact that the correctness standard applies.

B. *Did the IAD overstep its jurisdiction by ruling on issues outside the scope of the grounds of appeal raised by the Minister?*

[23] The applicant notes that the Minister's notice of appeal filed with the IAD alleges only two errors by the ID. The first error alleged was the failure to recognize that the FAR was an organization with limited and brutal purposes during the genocide period. The second error alleged concerns the application of *Ryan* (*R. v Ryan*, 2013 SCC 3) on the principle of the defence of duress. That second error was not further discussed before me because, according to the applicant, it is an alternative argument.

[24] The applicant acknowledges that the IAD was responsible for conducting a *de novo* analysis and was therefore not bound by the ID's findings: *Castellon Viera v Canada (Citizenship and Immigration)*, 2012 FC 1086, at paragraphs 10–12 [*Castellon Viera*]. However, the applicant argues that the IAD was bound by the scope of the appeal filed by the Minister and that the IAD overstepped its jurisdiction by ruling on issues beyond that scope.

[25] The Minister responds that neither the relevant legislation (IRPA and IAD Rules) nor the case law requires that a notice of appeal of an ID decision be comprehensive or that the IAD must limit itself to the scope of the appeal.

[26] In my opinion, the fact that the appeal before the IAD is *de novo* suggests that the IAD is free to consider any relevant issues and does not have to limit itself to the scope of the notice of appeal to determine whether a person is inadmissible. At paragraph 11 of *Castellon Viera*, Chief Justice Paul Crampton writes the following:

> ... there is nothing in the IRPA or the jurisprudence which limits the exercise of *de novo* jurisdiction by the IAD to situations in which new evidence which was not before the Immigration Division has been adduced.

[27] Furthermore, at paragraph 18 of *Mendoza v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 934, Justice Yves de Montigny confirms "the *de novo* jurisdiction of the IAD, irrespective of the reasons for which the appeal is allowed".

[28] I am satisfied that nothing limits the IAD's jurisdiction to rule on issues that exceed the scope of the grounds of appeal. I conclude that the IAD did not err in this regard.

C. *Did the IAD err in applying the wrong burden of proof or an irrelevant test to its analysis?*

[29] The parties agree on the applicable burden of proof, that is, the existence of reasonable grounds to believe that the applicant contributed in a significant, voluntary and knowing way to the commission of an offence referred to in paragraph 35(1)(a) of the IRPA. However, the applicant objects to the IAD considering his "profile" in its analysis of complicity in the offence in question, particularly before and after the genocide period. The applicant submits that the IAD should have instead considered the evidence of crimes personally committed by the applicant during the genocide period. The applicant adds that there is no such evidence. The applicant argues that by relying on his profile outside the genocide period, the IAD unreasonably engaged in speculation.

[30] The Minister notes that the IAD referred to the applicant's profile to find that certain aspects of his testimony were implausible and not credible. The Minister submits that this analysis was based on the evidence establishing a connection between the applicant's contribution and the FAR's criminal purpose and that it is therefore reasonable.

[31] I concur with the Minister. The IAD did not engage in speculation. Its analysis of the applicant's profile was permissible and reasonable.

D. *Did the IAD properly apply the legal tests set out in Ezokola?*

[32] The parties agree that *Ezokola* sets out the tests to determine a person's complicity in an offence referred to in paragraph 35(1)(a) of the IRPA. At paragraph 91 of its decision, the Supreme Court states the following:

> [91] Whether there are serious reasons for considering that an individual has committed international crimes will depend on the facts of each case. Accordingly, to determine whether an individual's conduct meets the *actus reus* and *mens rea* for complicity, several factors may be of assistance. The following list combines the factors considered by courts in Canada and the U.K., as well as by the ICC. It should serve as a guide in assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose:
>
> (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.

[33] The IAD considered the relevance of *Ezokola* and analyzed the applicable tests. It must be kept in mind that this analysis was based on the IAD's preliminary finding that a significant number of FAR members played a role in the Rwandan genocide. It should also be recalled that the threshold for inadmissibility set out in section 33 of the IRPA is not very high, and it consists of asking whether there are reasonable grounds to believe that the applicant committed the offence referred to in paragraph 35(1)(a) of the IRPA. Therefore, the IAD's analysis had to determine whether there are reasonable grounds to believe that the applicant was among the significant number of FAR members who played a role in the Rwandan genocide.

[34] The applicant attacks several of the IAD's findings in its analysis of the *Ezokola* tests, but it is clear that the IAD did not err by considering these tests. For example, the applicant submits that since the FAR comprised 40,000 members during the genocide period and was a multifaceted and heterogeneous organization, it is impossible to find that he was complicit merely because he was a member of the FAR.

[35] In my opinion, the analysis that was conducted of the applicant's profile to find that it did not correspond to that of an ordinary soldier was reasonable. I am also of the view that this analysis was relevant to the issue of his complicity. I find that this also applies to the applicant's other arguments concerning the analysis of the *Ezokola* tests. The IAD specified why it

considered the applicant's profile to be relevant, and it reasonably considered the evidence in that regard.

[36] Even for the findings that are not related to the applicant's profile, I am not satisfied that the IAD erred in its analysis of the *Ezokola* tests. I see no logical flaws, confusion or disregard of the evidence in the IAD's reasoning.

[37] The applicant also argues that the IAD erred in finding that, during the genocide period, the FAR was an organization with limited and brutal purposes. The applicant notes that this is a finding of fact based on the case law (as opposed to the evidence adduced at trial and before the IAD). The applicant also submits that it is contradictory and therefore unreasonable to find that a multifaceted and heterogeneous organization like the FAR could be legitimate at one moment and criminal the next.

[38] I do not find any mistakes here, either. It is difficult to deny the existence of the Rwandan genocide in 1994. It is also difficult to deny the involvement of FAR members in that genocide. The case law cited by the IAD (*Seyoboka v Canada (Citizenship and Immigration)*, 2009 FC 104, at paragraph 17; *Rutayisire v Canada (Citizenship and Immigration)*, 2010 FC 1168, at paragraph 34; *Seyoboka v Canada (Citizenship and Immigration)*, 2012 FC 1143, at paragraph 34) is based on numerous objective pieces of public evidence. Nothing suggests to me that this objective evidence or these findings are incorrect. I am satisfied that the IAD's finding that the FAR was an organization with limited and brutal purposes during

the genocide period was reasonable. I agree with this finding even though the FAR was legitimate at one point before the genocide.

E. *Are the IAD's findings of fact erroneous and unreasonable?*

[39] The applicant submits that the IAD made a number of errors with respect to its findings of fact. I will not refer to all the alleged errors. Suffice it to say that I am not satisfied that any of the IAD's findings of fact are unreasonable.

[40] I acknowledge that two of these findings of fact are debatable, but they are not significant enough to have been able to change the outcome. First, the IAD stated that the applicant trained "thousands of new soldiers". Even if the number of new soldiers cannot be quantified in the thousands, I am satisfied that the IAD's analysis in this regard is reasonable. The other debatable finding of fact concerns the indication that Major Habyarimana Emmanuel, who participated in efforts to recruit the applicant to the FPR, was a former Rwandan Minister of Defence. In fact, he is currently a former Minister of Defence, but, at the time, he was a future Minister of Defence. I see no errors in the IAD's findings about the importance of people who tried to persuade the applicant to join the FPR.

[41] The applicant also notes the IAD's consideration of his admission that, because of his mixed ethnicity, he had to prove himself even more than the other soldiers in the army. He submits that the IAD could not reasonably find that he was complicit on the sole basis of his determination to be a diligent member of a combat unit. I am satisfied that the IAD's findings

must be considered as a whole and that the IAD did not make any of these findings on that sole basis.

[42] The applicant criticizes the IAD's assessment of the investment in the RTLM station, affirming that it was unreasonable to find that the applicant could have known the identity and future intentions of its founders (influential people from the government and the FAR). I am satisfied that the IAD did not err in finding that this investment was a relevant consideration. Furthermore, the IAD considered the evidence on this subject (including the context at the time of the applicant's initial investment and his subsequent actions, namely his failure to withdraw his investments) and was correct in drawing its primary finding that it was unlikely that the applicant did not know the majority shareholders and was unaware of the station's purpose.

[43] The applicant also criticizes the IAD's reference to the press article regarding the trial of a former member of the FAR who was accused of genocide and who names the applicant as being responsible for deaths. It is clear that the IAD did not place much weight on this evidence, recognizing that it is "very circumstantial". It simply found that, in light of other aspects of the applicant's profile from both before and after the genocide period, the fact that he was mentioned in the press article is an additional aspect to consider in determining whether the applicant was an ordinary soldier among 40,000 others who had no knowledge of or did not participate in the acts of genocide during the genocide period. I find this conclusion to be reasonable.

F. *Did the IAD err in failing to assess the applicant's credibility?*

[44] The applicant argues that the IAD did not rule explicitly on his credibility and that it cites some passages from the applicant's testimony that are allegedly out of context.

[45] In my opinion, in assessing the *Ezokola* tests, the IAD reasonably stated when it based its findings on the applicant's lack of credibility and why. I am not satisfied that the IAD erred in this regard. Nor am I satisfied that the IAD cited the applicant's testimony out of context.

VI. Conclusions

[46] I conclude that this application for judicial review should be dismissed.

[47] The IAD appropriately established the existence of reasonable grounds to believe that the applicant made a significant, voluntary and knowing contribution to the FAR's criminal purposes based on the tests in *Ezokola*.

[48] The applicant requests that I certify a serious question of general importance on the matter of the IAD's jurisdiction to rule on issues that exceed the scope of the grounds of appeal raised in the notice of appeal of the ID's decision.

[49] Considering the parties' arguments, as well as the authorities cited in the analysis of this question above, I am of the view that there is nothing to support the applicant's position. He does not cite any sections of the IRPA or any case law contrary to the authorities cited above. Since

there are no grounds for believing that the applicant's position could have merit, I find that the question proposed by the applicant is not serious.

JUDGMENT in IMM-2996-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No serious question of general importance is certified.

"George R. Locke"
Judge

Certified true translation
This 28th day of November 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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