

Federal Court



Cour fédérale

**Date: 20180906**

**Docket: IMM-5335-17**

**Citation: 2018 FC 887**

**Ottawa, Ontario, September 6, 2018**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**DUSKO JELACA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Dusko Jelaca seeks judicial review of a decision by an officer with Citizenship and Immigration Canada to refuse his application for a temporary residence visa. The officer found Mr. Jelaca to be inadmissible to Canada pursuant to s 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for committing an act outside Canada that constitutes an

offence referred to in ss 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [CAHWCA].

[2] As I explain below, it was open to the visa officer to find there were reasonable grounds to believe that Mr. Jelaca made a voluntary, significant and knowing contribution to the siege of Sarajevo. There is no dispute that the siege, the longest one involving a capital city in modern warfare, involved crimes against humanity. There was no breach of procedural fairness in this case. The application for judicial review is therefore dismissed.

## II. Background

[3] Mr. Jelaca is a citizen of Bosnia and Herzegovina. His mother and sister are Canadian citizens, and his daughter works legally in Calgary, Alberta.

[4] Mr. Jelaca was a member of the Bosnian Serb Army, also known as the Vojska Republike Srpske [VRS], from August 1993 to January 1996. He was stationed as a guard at a pedestrian bridge over the River Miljacka in the Grbavica neighbourhood of Sarajevo.

[5] Mr. Jelaca visited Canada briefly in 2006. Since then, his applications for temporary residence visas have been refused. He sought judicial review of a refusal dated January 12, 2016. The application was discontinued on consent, and the matter was remitted for reconsideration by a different visa officer.

[6] Mr. Jelaca attended an interview with a visa officer in Vienna, Austria on November 14, 2016. A procedural fairness letter was sent to him on April 4, 2017 advising him of concerns respecting his application. Mr. Jelaca responded on June 30, 2017.

### III. Decision under Review

[7] Mr. Jelaca's application for a temporary residence visa was refused on December 4, 2017. He was found to be inadmissible pursuant to s 35(1)(a) of the IRPA for committing an act outside Canada that constitutes an offence referred to in ss 4 to 7 of the CAHWCA.

[8] The visa officer expressed doubt about Mr. Jelaca's credibility due to numerous contradictions in his statements. The officer also found that Mr. Jelaca's response to the procedural fairness letter did not adequately address his concerns. The officer concluded that Mr. Jelaca had not answered all questions truthfully, contrary to s 16(1) of the IRPA.

[9] The visa officer preferred open source documents to Mr. Jelaca's testimony. The officer found that the area where Mr. Jelaca was stationed was a high conflict zone, particularly for the seven month period between August 1993 and March 1994. Mr. Jelaca said he attempted to avoid conscription by hiding at his cousin's house for 15 months; however, a letter provided by his cousin stated that he had left due to "poor life conditions". The officer noted that there were no documents to substantiate Mr. Jelaca's account, or explain why he returned to Sarajevo when it was reasonably foreseeable that this would cause him to join the VRS.

[10] The visa officer also preferred open source documents with respect to whether the VRS and members of the First Sarajevo Motorized Brigade committed crimes against humanity. Grbavica was one of the first areas to be “ethnically cleansed”. Given his extended exposure to the front line, there were reasonable grounds to believe that Mr. Jelaca knew of the crimes against humanity that occurred there. The main road bridge, which was also unsafe to cross, was only 200 meters away from where Mr. Jelaca was stationed. Mr. Jelaca admitted in his interview that he was aware war crimes were being committed, although he claimed to know of snipers only through television broadcasts.

[11] The visa officer concluded there were reasonable grounds to believe that Mr. Jelaca had made a voluntary, significant and knowing contribution to the VRS. He took no action to end his active service prior to 1996. In his role as a guard at a bridge over the River Miljacka, particularly between August 1993 and March 1994, Mr. Jelaca supported the VRS’ efforts to prevent civilians from fleeing, or humanitarian aid from entering. His complicity therefore extended to aiding and abetting the perpetrators of crimes against humanity. Based on all of the foregoing, Mr. Jelaca was held to be inadmissible to Canada.

#### IV. Issues

[12] This application for judicial review raises the following issues:

- A. Was the visa officer’s decision reasonable?
- B. Was the visa officer’s decision procedurally fair?

V. Analysis

[13] A visa officer's determination that a person is inadmissible to Canada under s 35(1)(a) of the IRPA is subject to review by this Court against the standard of reasonableness (*Al Khayyat v Canada (Citizenship and Immigration)*, 2017 FC 175 at para 18 [*Al Khayyat*]). The Court will intervene only if the decision falls outside 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).

[14] Questions of procedural fairness are reviewable by this Court against the standard of correctness (*Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at para 43).

A. *Was the visa officer's decision reasonable?*

[15] Pursuant to s 35(1)(a) of the IRPA, a person is inadmissible to Canada for violating human or international rights if he or she has committed an act outside Canada that amounts to an offence under ss 4 to 7 of the CAHWCA. "Crimes against humanity" is defined in s 6(3) of the CAHWCA, and includes the murder of civilians.

[16] An individual is complicit in crimes against humanity if there are reasonable grounds to believe that he or she has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose (*Talpur v Canada (Citizenship and Immigration)*, 2016 FC 822 at para 21). "Reasonable grounds to believe" exist where there is an objective basis for the belief that is based on compelling and credible information. This is a lower standard than a

balance of probabilities (*Ghazala Asif Khan v Canada (Citizenship and Immigration)*, 2017 FC 269 at para 24 [*Khan*]).

[17] In assessing whether an individual has made a significant and knowing contribution to the crimes committed by an organization, consideration should be given to the following non-exhaustive factors (*Khan* at para 36):

- (a) the size and nature of the organization;
- (b) the part of the organization with which the individual was most directly concerned;
- (c) the individual's duties and activities within the organization;
- (d) the individual's position or rank within the organization;
- (e) the length of time the individual was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
- (f) the method by which the individual was recruited and his or her opportunity to leave the organization.

[18] The burden is on the Minister to establish that an applicant committed acts supporting a finding of inadmissibility pursuant to s 35 of IRPA (*Al Khayyat* at para 27).

[19] Mr. Jelaca argues that the visa officer did not consider the size or nature of the VRS, in particular that the VRS is composed of smaller brigades and battalions. Where an organization is multifaceted and engages in acts that are both legitimate and criminal, the link between the individual's contribution and the criminal purpose will be more tenuous (citing *Habibi v Canada (Citizenship and Immigration)*, 2016 FC 253 at para 25). Mr. Jelaca maintains that he held the lowest possible rank, he had no authority and was not privy to any information regarding war crimes, and he was not personally involved in committing any crimes.

[20] The Minister responds that the visa officer relied on a broad range of objective evidence. This may be contrasted with Mr. Jelaca's testimony, which was found to lack credibility. Mr. Jelaca refused to answer some questions and provided contradictory answers to others. The documentary evidence confirmed that Mr. Jelaca's battalion was responsible for guarding bridges to prevent anyone from leaving. Those who tried to leave were shot.

[21] The Minister acknowledges that the visa officer did not explicitly list and discuss each of the criteria identified in *Khan*. However, he maintains that all relevant factors were considered:

- (a) the nature of the organization: the VRS led a siege of Sarajevo;

- (b) Mr. Jelaca's role in the organization: he was a soldier in the First Sarajevo Motorized Bridage, stationed in an area known as "sniper alley";
- (c) Mr. Jelaca's duties: as a guard he prevented civilians from crossing the bridge or aid from entering the city;
- (d) Mr. Jelaca's rank: the Minister concedes he held a low rank, but says he was on the front line in a high conflict zone;
- (e) Mr. Jelaca's length of service: August 1993 to January 1996; and
- (f) Mr. Jelaca's opportunity to leave: the visa officer found no evidence that Mr. Jelaca tried to leave or dissociate himself from the VRS after joining.

[22] The Minister compares this case to *Shalabi v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 961, where the applicant was also a low ranking guard at a checkpoint, but was nevertheless found to be inadmissible to Canada.

[23] Mr. Jelaca argues that guilt by association is insufficient for the purposes of s 35(1)(a). He relies on *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at paragraphs 81 to 82, where the Supreme Court of Canada held that Article 1F(a) of the United Nations *Convention Relating to the Status of Refugees*, Can TS 1969 No 6, forecloses exclusions based on guilt by association. He also relies on *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA



86 at paragraph 19, where the Federal Court of Appeal held that that s 35(1)(a) is the domestic inadmissibility provision which parallels Article 1F(a). Mere presence and acquiescence are insufficient (*Kathiripillai v Canada (Citizenship and Immigration)*, 2011 FC 1172 at para 18).

[24] Mr. Jelaca says his military service was not voluntary, because he was conscripted and forced to serve. He tried to avoid conscription by hiding at his cousin's home, and left because of poor living conditions and a fear of being reported. He returned to Sarajevo because he had nowhere else to go. He was unemployed and had no documents to find employment elsewhere. Once conscripted, he was unable to leave.

[25] The Minister replies that it was reasonable for the visa officer to conclude Mr. Jelaca's actions were voluntary, because he was on the front line and made no attempt to dissociate or physically distance himself from the VRS. Given his position, there are reasonable grounds to believe that he witnessed and directly contributed to the commission of war crimes.

[26] The burden of proof resting on the Minister is comparatively modest: reasonable grounds to believe, which is a less onerous standard than a balance of probabilities. The visa officer had the opportunity to interview Mr. Jelaca and assess his demeanour. The officer concluded that a number of his statements were untruthful and self-serving.

[27] Mr. Jelaca does not dispute that he served as a guard at a pedestrian bridge over the River Miljacka. He gave inconsistent statements regarding civilian use of the bridge, saying first that no-one was courageous enough to use it, and later that it was easy for people to cross. He

claimed to have no orders or instructions regarding those who attempted to cross the bridge, but also said that one of his duties was to stop or at least challenge anyone who attempted to use the bridge.

[28] Mr. Jelaca acknowledged an awareness of war crimes committed in the area, but said he had no direct exposure to them. He served with the VRS for approximately two and a half years, including between August 1993 and March 1994, the time of highest conflict. There is no indication that he made any attempt to leave. He served as a guard in the vicinity of “sniper alley”.

[29] In my view, it was open to the officer to conclude there were reasonable grounds to believe that Mr. Jelaca made a voluntary, significant and knowing contribution to the siege of Sarajevo. There is no dispute that the siege, the longest one involving a capital city in modern warfare, involved crimes against humanity.

[30] Mr. Jelaca also argues that the visa officer improperly dismissed as self-serving the letter provided by his cousin. However, it is not the role of the Court to re-weigh evidence. In any event, confirmatory evidence of family members and friends that is not subject to cross examination may be accorded little probative value or credibility (*Fadiga v Canada (Citizenship and Immigration)*, 2016 FC 1157 at para 25).

B. *Was the Decision procedurally fair?*

[31] In the procedural fairness letter, the visa officer cited four “open-source” articles and included relevant excerpts. Mr. Jelaca complains that he was able to locate only three of the four documents. He requested a copy of the missing document from the officer, but it was never provided. He therefore argues that he was not accorded procedural fairness. He also disputes that the documents support the officer’s decision.

[32] The Minister says that Mr. Jelaca was owed a minimal degree of procedural fairness (citing Lorne Waldman, *Immigration Law and Practice*, 2nd ed (Markham: Lexis Nexis Canada Inc) (loose-leaf updated October 2017, release 65), ch 5 at 5-6). In the procedural fairness letter, the officer identified the “open source” documents relied upon and, importantly, included relevant excerpts.

[33] In my view, this was sufficient to apprise Mr. Jelaca of the case he had to meet, and give him a reasonable opportunity to respond. Procedural fairness does not require that all documents relied upon be disclosed (*Nwankwo v Canada (Citizenship and Immigration)*, 2017 FC 29 at para 23). I am satisfied that the documents and information disclosed by the officer met the requirements of procedural fairness (*Azizian v. Canada (Citizenship and Immigration)*, 2017 FC 379 at para 23).

VI. Conclusion

[34] The application for judicial review is dismissed. No question is certified for appeal.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

"Simon Fothergill"

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5335-17

**STYLE OF CAUSE:** DUSKO JELACA v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** JULY 17, 2018

**JUDGMENT AND REASONS:** FOTHERGILL J.

**DATED:** SEPTEMBER 6, 2018

**APPEARANCES:**

Rekha McNutt FOR THE APPLICANT

Maria Green FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Caron & Partners LLP FOR THE APPLICANT  
Barristers and Solicitors  
Calgary, Alberta

Nathalie G. Drouin FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Ottawa, Ontario