Federal Court  Cour fédérale

Date: 20210518

Docket: IMM-5888-19

Citation: 2021 FC 460

Ottawa, Ontario, May 18, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

OSEP GUZELIAN

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by an immigration officer dated September 11, 2019 to refuse the Applicant's request for permanent residence on humanitarian and compassionate (H&C) grounds. The officer determined that the Applicant was inadmissible on the basis of s 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, the application is granted.

II. **Background**

[3] The Applicant is a citizen of Lebanon of Armenian ethnicity born on March 14, 1960. He joined the Lebanese Army in December 1978 and shortly thereafter, as a private, was assigned to the intelligence section. The nature of his service thereafter is in dispute. What is undisputed is that he received training from the U.S. military in tactical operations and photography and for some time took part in border patrols. The Applicant says that, thereafter, he was primarily a vehicle mechanic and chauffeur. The Respondent contends that he transported detained persons to the Ministry of Defence building where they were interrogated by members of the Security Service and that the Applicant was aware that the interrogations would involve torture.

[4] The Applicant retired from the Army in 1997 at the rank of Sergeant. He came to Canada in April 2001 and sought protection on the ground that he was at risk of persecution from persons involved with the Syrian and Lebanese authorities and who were engaged in criminal activities. The Refugee Protection Division (RPD) rejected his claim in June 2003. In 2004, the Applicant applied for permanent residence on H&C grounds. The application was accepted at the first level on March 13, 2008. Inquiries were then made with the Respondent's security agency partners, including the RCMP and the CBSA, and in October 2010, a security interview was conducted by another agency.

[5] As a result of that interview and other inquiries no reports were received by the Respondent recommending that the Applicant should be found to be inadmissible.

[6] The Respondent interviewed the Applicant in May 2015 and a fairness letter was issued in August 2015. In response, extensive representations and evidence was submitted in September 2015. However, the officer who had carriage of the file and who had conducted the May 2015 interview was assigned to a post abroad in October 2015. Another officer was assigned the file. Relying on the material on file including the May 2015 interview, he refused the application under s 35(1)(a) on December 23, 2016.

[7] The Applicant sought judicial review of that decision. Before the matter could be determined by the Court, a settlement was reached whereby the matter would be reconsidered by another officer. It was reconsidered, but by the same officer who had conducted the May 2015 interview upon her return from her foreign assignment. She undertook to counsel for the Applicant that she would give the matter a fresh look.

[8] A string of emails in the CTR between officials indicates that a favourable assessment had been provided by the National Security Screening Division of CBSA in January 2019 and it appeared that the H&C application would be granted. However, that was not accepted by the officer considering the application for the Respondent. In an email dated September 10, 2019, she advised other departmental officials at CIC and CBSA “que nous allons en contrary outcome”. The following day she refused the application. This resulted in questions from CBSA as to whether the decision maker had consulted the agency’s National Security Screening Division.

[9] The Applicant has been in Canada since his arrival in 2001. Most of his immediate family are here and he is well established in his community.

III. **Issues**

[10] As a preliminary matter, the Court dealt with a motion by the Respondent under IRPA s 87 to protect information that would normally be disclosed to the Applicant in the Certified Tribunal Record (CTR) produced for this judicial review application. In a ruling issued on December 18, 2020, I granted the motion: 2020 FC 1165. In the reasons accompanying the order, I explained that I accepted the Respondent's evidence and submissions to the effect that disclosure of the minimal amount of redacted information in the CTR would be injurious to national security or the safety of any person. I also noted that the information provided to the Respondent by its federal security partners, which I authorized to be protected, did not support a finding that the Applicant was inadmissible nor was the redacted information capable of supporting the application. In other words, it was neutral.

[11] On the merits of this application, the Court is called upon to determine the reasonableness of the September 11, 2019 decision and whether the Applicant was accorded procedural fairness.

IV. **Relevant Legislation**

[12] The following provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 are relevant:

Humanitarian and compassionate considerations — request of foreign national

25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

Human or international rights violations

35 (1) A permanent resident or a foreign national is inadmissible on

Atteinte aux droits humains ou internationaux

35 (1) Emportent interdiction de territoire pour atteinte aux droits humains ou

grounds of violating human or international rights for	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;
[…]	[…]

[13] The following provision of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 is relevant:

Application of par. 35(1)(a) of the Act	**Application de l'alinéa 35(1)a) de la Loi**
15 For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 35(1)(a) of the Act, 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:	**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 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	**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

permanent resident is a person referred to in section F of Article 1 of the Refugee Convention; or	premier de la Convention sur les réfugiés;
[…]	[…]

V. **Standard of Review**

[14] The applicable standard of review in this matter is reasonableness. As determined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions.

[15] The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable (*Vavilov* at para 83).

[16] On issues of procedural fairness, the standard of review is correctness: *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Ambroise v Canada (Citizenship and Immigration)*, 2021 FC 62 at para 7.

VI. **Analysis**

[17] IRPA s 25 requires that the Respondent Minister examine a request by a foreign national in Canada who applies for permanent resident status and who is inadmissible, other than inadmissible under sections 34, 35, or 37. Thus the Minister may, if the Minister is of the opinion that it is justified by H&C considerations, grant an inadmissible foreign national permanent resident status or an exemption from any applicable criteria or obligations of IRPA. But the statute is clear, the Minister lacks authority to grant an exemption if the requestor is inadmissible under the terms of the three enactments.

[18] In arriving at her decision, the officer found that the H&C considerations presented by the Applicant were sufficient to grant an exemption under IRPA s 25, but that the Applicant was inadmissible under s 35(1)(a) for having been complicit in actions which would fall within the scope of sections 4-7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000 c 24. Those sections encompass genocide, crimes against humanity and war crimes. The crux of this matter is, therefore, whether that inadmissibility finding was reasonable.

[19] A person is inadmissible for complicity in the commission of international crimes where there are serious reasons for considering that he or she voluntarily made a knowing and

significant contribution to the crimes or to the criminal purpose of the group that allegedly committed them.

[20] The general principle is that the burden of proof falls on the party who seeks the exclusion, as recognized by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 29 [*Ezokola*]. Such would be the case, for example, should a report had been made against the Applicant under IRPA s 44 and an admissibility hearing conducted under IRPA s 45. In that case, the burden would rest with the government.

[21] This Court has held, however, that where an applicant seeks to have the Minister exercise discretion under s 25, it falls on the applicant to demonstrate that he is not inadmissible: *Ahmed v Canada (Citizenship and Immigration)*, 2020 FC 791 at paras 68-74 citing *Kumarasekaram v Canada (Citizenship and Immigration)*, 2010 FC 1311.

[22] As the Supreme Court noted in *Ezokola* at para 91, whether there are serious reasons for considering whether an individual is complicit in the commission of international crimes will depend on the facts of each case. The Court set out a number of factors to serve as a guide:

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.

[23] In this instance, the officer followed the framework of the *Ezokola* factors in conducting her analysis. In determining the facts, the officer relied on her notes of the 2015 interview and other statements made by the Applicant during his immigration proceedings, which she found to be inconsistent. The officer also relied on online research she conducted into the nature and activities of the Lebanese Army intelligence unit. Some of this material was of dubious value; such as that she gleaned from Wikipedia references. The officer quoted freely from the sources consulted at the conclusion of which she stated:

> À la lumière de tout ce qui précède, je suis satisfaite que le Ministère de la Défense de l'Armée libanaise soit une organisation qui s'est livrée à des crimes contre l'humanité et qui a perpétré des crimes internationaux.

[24] There is confusion in the officer's analysis over the name of the unit to which the Applicant belonged. This is more than mere "gaucheries de langage" as the Respondent submits. It indicates that the officer did not clearly understand the distinction to be drawn between the military and the security officers employed by the Ministry of Defence who were alleged to have tortured detainees. And it is an error that the officer consistently repeats including in her response to the CBSA questioning the negative decision.

[25] The Applicant was a member of the intelligence branch of the Lebanese Army. It is not clear that the army participated directly in torture. This was indicated in a U.S. Department of

State Country Report on Human Rights Practices in Lebanon in 1994, from which the officer quoted the following:

> (…) In September the Army's intelligence services arrested several individuals for their alleged involvement in authoring and distributing a leaflet opposing Syrian influence in Lebanon. Ministry of Defense security officers reportedly beat the male detainees, hung them by their wrists, and beat them on the testicles during interrogation.

[26] The Applicant freely acknowledged during the 2015 interview that the Ministry of Defence security services had a reputation for torturing suspects in the cells of the Ministry building. As he put it, everyone in the country knew that but he denied any personal involvement and there is no evidence in the record to the contrary. At worst, he acknowledged having conveyed detainees to the Ministry building and having been aware that it contained cells and that interrogations were conducted there. The officer draws a conclusion from this that the Applicant had consciously made a significant contribution to the actions of the security personnel that constituted complicity in torture or other crimes against humanity. That conclusion is not, in my view, reasonable.

[27] The officer made the following express finding which is not supported by the record:

> Il faut se rappeler également que le demandeur lui-même a servi à titre d'agent du renseignement pour le Ministère de la défense de 1978 à 1995.

[28] The Applicant was a member of the army during that period. There is no evidence in the record that he was employed as an intelligence officer by the Ministry of Defence.

[29] In her assessment of the Applicant's complicity in these activities, the officer describes him as having had "une carrière militaire brillante pour l'Armée Libanaise de 1978 à 1997". This is an exaggeration. The Applicant entered the service as a private soldier and after twenty years retired as a Sergeant. He stated in his affidavit submitted in response to the procedural fairness letter that he reached that level largely because he belonged to the Armenian minority and there were quotas to be respected in promotions.

[30] At an earlier stage of his military career, the Applicant received some training from the U.S. military in conducting anti-terrorist operations as part of a "strike force" and in covert photography. In his 2010 interview, he described how he had gone on some border patrols but had never actually used the training he had received. In the November 2014 update submissions, it was stated that the Applicant had from time to time been called on for deployments in the streets to prevent conflicts between opposing factions. For most of his military career, the evidence is that he worked as a mechanic and driver in the vehicle section. In his 2015 interview, he described how his brother had a garage and he could get the military vehicles repaired there more quickly and at no cost. This was appreciated by his superiors as his unit was chronically underfunded.

[31] The Applicant did not help himself by engaging in some braggadocio relating to his training by the American forces. But to conclude that he was more than a relatively low ranking member of the military appreciated for his mechanical abilities was unreasonable.

[32] The officer's reliance on the description of the Applicant as a "secret agent" by the RPD was misplaced. She concluded that this finding was *res judicata* under s 15 (b) of the Regulations. The Respondent acknowledges that this was an error as there had been no indication during the RPD proceedings that the Applicant was a person within the meaning of Article 1 F of the Refugee Convention: *Mungwarere v Canada (Public Safety and Emergency Preparedness)* 2017 FC 708 at para 75. The error may have influenced the officer's analysis of the evidence as a whole if she proceeded from the assumption that the matter had been conclusively decided.

[33] Reading the officer's notes of the 2015 interview and her 2019 assessment of the record, in my view the officer displayed an excessive zeal and engaged in a microscopic search to find a basis on which to conclude that the Applicant was inadmissible despite the partners' findings to the contrary. As I read the interview notes, the officer set out to trap the Applicant into an admission of complicity in torture. The 2019 assessment is a long justification for her decision not to accept the partners' contrary views. The Respondent is correct to note that the officer was not bound by the partners' findings. However, in light of their greater expertise in matters of national security and access to a great many reliable sources, it is reasonable to expect that the officer would have addressed their findings and explained why she did not agree with them. The failure to do so undermines her analysis.

[34] The officer mentioned the Applicant's interview with the partners briefly only to draw a negative inference from the failure of the Applicant to mention at that time that vehicle repair

was among his principle responsibilities. From another perspective, the omission of that information at that time could be seen as an example of his efforts to bolster his military record.

[35] In light of my conclusion that the decision is not reasonable and must be overturned on that basis, I do not need to address the questions of procedural fairness argued by the Applicant. However, I would note that fairness did not require that the Applicant be confronted with the information that he had himself provided: *Azali v Canada (Citizenship and Immigration)*, 2008 FC 517 at para 26; *Quijano v Canada (Citizenship and Immigration)*, 2009 FC 1232 at paras 30, 33; *Abid v Canada (Citizenship and Immigration)*, 2012 FC 483 at para 18.

VII. **Conclusion**

[36] In her zeal to find grounds to exclude the Applicant, the officer lost a sense of proportion and balance in dealing with the evidence before her. I find that the decision is unreasonable and must be returned for consideration by another officer.

[37] In my view, it was an error to assign this file to the same officer who had conducted the 2015 interview and whose notes of that interview no doubt contributed to the first decision to deny the request. The Respondent ought to have found another officer who had not been involved in the interview or the decision that was returned for reconsideration to conduct a fresh review of the record. Handing the file back to the same officer who was responsible for it in 2015 and who conducted the May 2015 interview subsequently relied upon was not in keeping with the settlement agreement.

[38] For the reasons provided, this application is granted and the matter will be remitted for reconsideration by another officer who has not been involved with this file. No questions were proposed for certification.

JUDGMENT IN IMM-5888-19

THIS COURT ORDERS that the application is granted and the matter is returned for reconsideration by another officer who has had no prior involvement with the file. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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