Federal Court  Cour fédérale

Date: 20210602

Docket: IMM-3148-20

Citation: 2021 FC 523

St. John's, Newfoundland and Labrador, June 2, 2021

PRESENT: The Honourable Madam. Justice Heneghan

BETWEEN:

WALE FRANCIS AKINPELU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Wale Francis Akinpelu (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Immigration Division (the "ID") determining that he is inadmissible to Canada, pursuant to paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 7 (the "Act").

[2] The Applicant is a citizen of Nigeria. Together with his wife and minor child, they arrived in Canada on March 8, 2018 and sought refugee protection. Protection was denied because the ID found reasonable grounds to believe he was inadmissible for complicity in crimes against humanity.

[3] On September 18, 2019, the Applicant was served with a Request for Admissibility Hearing. This notice said that the referral was made pursuant to paragraph 35(1)(a) of the Act, which provides as follows:

Human or international rights violations	**Atteinte aux droits humains ou internationaux**
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] The ID determined that the Applicant is inadmissible, on the grounds that there were reasonable grounds to believe that the Nigeria Police Force ("NPF"), in which he declared that he voluntarily served, had committed crimes against humanity during his tenure.

[5] In seeking judicial review of the decision, the Applicant raises several arguments. However, in my opinion, it is only necessary to address one argument, that is the submission that the ID breached procedural fairness by shifting the burden of proof from the Minister of Citizenship and Immigration (the "Respondent") to the Applicant in respect of paragraph 35(1)(a) of the Act.

[6] The ID said the following in its decision:

> As a foreign national who has not been authorized to enter Canada, the burden rested on Mr. Akinpelu to prove that he is not inadmissible as per subsection 45(d) of the *IRPA*.

[7] The Applicant says this finding by the ID is contrary to the decision in *Ezokola v. Canada (Citizenship and Immigration)*, [2013] 2 S.C.R. 678 (S.C.C.) where the Supreme Court of Canada ruled that the Respondent bears the burden of establishing complicity of an individual in the commissioning of crimes against humanity.

[8] The Respondent argues that the ID did not err. He submits that the Applicant entered Canada illegally and is subject to section 45 of the Act which imposes a burden upon the Applicant to show that he is not inadmissible. Section 45 provides as follows:

Admissibility Hearing by the Immigration Division	**Enquête par la Section de l'immigration**
Decision	**Décision**
45 The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:	**45** Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :

(a) recognize the right to enter Canada of a Canadian citizen within the meaning of the Citizenship Act, a person registered as an Indian under the Indian Act or a permanent resident;	**a)** reconnaître le droit d'entrer au Canada au citoyen canadien au sens de la Loi sur la citoyenneté, à la personne inscrite comme Indien au sens de la Loi sur les Indiens et au résident permanent;
(b) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act;	**b)** octroyer à l'étranger le statut de résident permanent ou temporaire sur preuve qu'il se conforme à la présente loi;
(c) authorize a permanent resident or a foreign national, with or without conditions, to enter Canada for further examination; or	**c)** autoriser le résident permanent ou l'étranger à entrer, avec ou sans conditions, au Canada pour contrôle complémentaire;
(d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.	**d)** prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

[9] I disagree with the submissions of the Respondent.

[10] The notice given to the Applicant clearly and specifically says that the referral to the ID is made under paragraph 35(1)(a) of the Act.

[11] The ID apparently considered the issue of admissibility under section 45 of the Act.

[12] Whether this error is called a breach of procedural fairness, reviewable on the standard of correctness, or a mistake of fact, reviewable on the presumptive standard of reasonableness pursuant to the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), 441 D.L.R. (4th) 1 (S.C.C.), it is a reviewable error.

[13] When inadmissibility is in issue pursuant to paragraph 35(1)(a), the burden lies on the state. When section 45 is involved, the burden lies on an applicant.

[14] The ID erred in imposing the burden in this matter upon the Applicant and the application for judicial review will be granted. The matter will be remitted for consideration by a differently constituted panel of the ID. There is no question for certification arising.

JUDGMENT in IMM-3148-20

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Immigration and Refugee Board, Immigration Division is set aside and the matter is remitted to a differently constituted panel of the Immigration Division for re-determination.

There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3148-20
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APPEARANCES:

Abdul Rahman Kadiri	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kadiri Law Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT