

Federal Court



Cour fédérale

Date: 20230210

Docket: IMM-5625-22

Citation: 2023 FC 203

Ottawa, Ontario, February 10, 2023

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

GAMAL ALI FARAJ ALAMRI

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [the “RAD”] dated May 13, 2022 [the “Decision”]. The Decision allowed the Respondent’s appeal, overruling the decision of the Refugee Protection Division, dated November 5, 2021.

[2] The RPD found the Respondent complicit in crimes against humanity and therefore excluded from Convention refugee protection. The RAD held that the RPD erred in excluding the Respondent and substituted its finding that the Respondent is a Convention refugee under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Background

[3] The Respondent, Gamal Ali Faraj Alamri, is a 50-year-old male citizen of Libya. Mr. Alamri applied for refugee protection on the grounds that he was at risk in Libya for having been a member of the Green World Revolutionary Guard [the “Revolutionary Guard” or the “Guard”] and personal bodyguard to former Libyan leader Mummar Gaddafi.

[4] At the relevant time, Libya was an authoritarian state ruled by Gaddafi. The Gaddafi regime repressed opposition and perpetuated serious human rights violations, including extrajudicial killings, torture, arbitrary arrest and terrorism.

[5] Gaddafi created the Revolutionary Guard in 1969; it expanded in size and relevance in the late 1970s. The Revolutionary Guard has been implicated in kidnappings, disappearances and incidents of torture against threats to the Gaddafi regime. Examples of atrocities committed by the Revolutionary Guard include hanging people in the streets and stadiums and hunting down Gaddafi regime dissidents, both in Libya and abroad. Revolutionary Guard members also operated as personal bodyguards to Gaddafi.

[6] Mr. Alamri was born and raised in Libya. In 1991, he joined the Revolutionary Guard and remained a voluntary member of the Revolutionary Guard and one of Gaddafi's bodyguards until 2011.

[7] As a bodyguard, the Respondent was charged with protecting Gaddafi. In an interview with Canada Border Services Agency, the Respondent stated that he was willing to take a bullet for Gaddafi and, if necessary, shoot attackers. The Respondent also claimed that he never shot, hit, tortured or interrogated anyone in his role.

[8] The Respondent first entered Canada along with his wife in September 2012. They applied for refugee protection together in 2019. The RPD granted refugee protection to the Respondent's wife; her status is not at issue in this judicial review.

[9] The Respondent's claim centers on his fear of persecution and reprisal at the hands of both Gaddafi loyalists and armed militia opponents.

[10] The Respondent's RPD hearing took place over five sittings. The Minister intervened and tendered expert evidence. The RPD ultimately rejected the Respondent's refugee claim on the grounds that there were serious reasons to consider the Respondent was complicit in crimes against humanity and therefore excluded from refugee protection pursuant to section 98 of the IRPA.

[11] The Respondent appealed this decision to the RAD. In a decision dated May 13, 2022, the RAD allowed the Respondent's appeal and found he was not excluded from claiming refugee protection under section 98 and that he was a Convention refugee.

[12] The Applicant asks the Court to set aside the RAD's decision and return the matter to the RAD for redetermination.

III. Decision Under Review

[13] The RAD adopted the following of the RPD's factual findings:

- A. The Gaddafi regime perpetrated widespread, systematic, egregious, serious, and sustained human rights violations that amount to crimes against humanity.
- B. The Revolutionary Guard was a central and prominent part of the regime's security services, which operated with impunity and were effective at combatting internal threats against the regime and against Gaddafi.
- C. The Revolutionary Guard served a regime in which Gaddafi held total or near total power and in which security services were used to protect the Gaddafi regime.
- D. The security services, including the Revolutionary Guard, were directly controlled by Gaddafi and carried out his policies of repression.

- E. Revolutionary Guards were implicated in kidnappings, disappearances and incidents of torture against any element posing a threat to Gaddafi's regime or its power.

[14] The Respondent's appeal of the RPD's decision turned on whether the RPD correctly applied the test for determining complicity in crimes against humanity (see *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]). Under the "significant contribution" test – or *Ezokola* test – for culpable complicity, an individual's contributions to a group's crime or criminal purpose must be voluntary, significant and knowing.

[15] The RAD found the Respondent's contributions were voluntary and knowing; however, the RAD found the contributions were not significant. The RAD made the following relevant findings:

- A. The Respondent served as a bodyguard and would act to protect Gaddafi's life and this alone did not amount to making a significant contribution to crimes against humanity.
- B. The Respondent's rank was a mitigating factor. The evidence indicated he had a relatively low rank. He did not have any supervisory responsibilities and had no control over the timing, circumstances, location and purpose of his deployments. The Respondent guarded Gaddafi infrequently, was directed by middle management when he did, and usually insulated from Gaddafi by Gaddafi's private guards.

C. The top rank in the Revolutionary Guard was General, followed by Lieutenant Colonels, then 1st and 2nd Lieutenants, paid soldiers, and about 2000 volunteers at bottom rank. The Respondent was one of the 2000 volunteers.

D. The Respondent never directly engaged in criminality.

[16] As well, the RAD found the Respondent faced a serious possibility of persecution and that there was no adequate state protection or internal flight alternative within Libya. Therefore, the Respondent was a Convention refugee.

IV. Issue

[17] Did the RAD err in its analysis of the Respondent's complicity in crimes against humanity?

V. Standard of Review

[18] The standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]).

VI. Analysis

[19] Section 98 of the IRPA excludes a person covered by Section F of Article 1 of the *Convention Relating to the Status of Refugees*, Can TS 1969 No 6 [*Refugee Convention*] from refugee status:

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

98 La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[20] Article 1F(a) of the *Refugee Convention* states that the *Refugee Convention* does not apply in respect of a person where there are serious reasons for considering that person has committed a crime against humanity:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes

...

F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:

a) qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes

...

[21] There is no dispute that the Gaddafi regime and the Revolutionary Guard committed crimes against humanity. The issue is whether the RAD's determination that the Respondent was not complicit in those crimes is reasonable.

[22] In *Ezokola*, the Supreme Court of Canada considered what was required for an individual to be complicit in Article 1F(a) crimes committed by a group. The Supreme Court held that an individual's contribution to those crimes or the organization's criminal purpose must be voluntary, knowing and significant (*Ezokola* at paras 29, 77 and 84).

[23] In applying the test, the Supreme Court suggested six non-exhaustive factors that decision makers may look to in order to determine whether an individual is culpably complicit in an organization's crimes or criminal purpose (*Ezokola* at para 91):

- A. The size and nature of the organization.
- B. The part of the organization with which the refugee claimant was most directly concerned.
- C. The refugee claimant's duties and activities within the organization.
- D. The refugee claimant's position or rank in the organization.
- E. The length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose.

F. The method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.

[24] While these factors provide guidance, the inquiry needs to focus on an individual's contribution to the organization's crime or criminal purpose (*Ezokola* at para 92).

[25] There is no dispute that the Respondent knowingly and voluntarily contributed to the criminal purpose of the Revolutionary Guard and Gaddafi regime. The only issue is whether that contribution was "significant".

[26] The Applicant advances three arguments for why the RAD erred in its significant contribution analysis: (1) the RAD erred by considering the Respondent's lack of direct involvement in the crimes as a mitigating factor; (2) the RAD did not explain how the Respondent's duties as a protector to Gaddafi – the central figure of a criminal and repressive regime – did not further the regime's criminal purpose; and (3) the Applicant takes issue with how the RAD weighed the *Ezokola* factors.

[27] The Respondent argues that the RAD did not consider his lack of complicity a mitigating factor, but merely noted he did not directly commit the crimes to invoke a complicity analysis under *Ezokola*. Further, the Respondent states that the Revolutionary Guard had both legitimate and criminal purposes; the legitimate purpose being protecting the life and safety of Gaddafi. According to the Respondent, his contributions on this legitimate front did not render him complicit in the Revolutionary Guard's criminal purpose, in that those contributions were not

significant. This distinction, the Respondent argues, serves to mitigate the significance of his role and complicity in the crimes committed by the Revolutionary Guard. I disagree.

[28] Firstly, I find that the RAD erred by finding the Respondent's indirect involvement in the crimes was a mitigating factor in this context. *Ezokola* makes clear that neither personal participation, nor personal proximity to the relevant crimes is necessary to be found complicit in crimes against humanity (*Ezokola* at paras 7-9, 67-77, 87-88). The purpose of the *Ezokola* test is to address the fine line between mere association and complicity in a criminal enterprise. This requires assessing whether duties performed by an individual, that are not necessarily in and of themselves criminal, nonetheless amount to a significant contribution to a group's crimes or criminal purpose. The *Ezokola* inquiry is necessarily engaged only when contribution is indirect; to diminish an individual's criminal culpability simply because they did not themselves commit Article 1F(a) crimes is to, at least in part, circumvent that inquiry.

[29] Furthermore, case law establishes that individuals may be criminally culpable despite engaging in activities that are seemingly indirect and remote from a crime (see *Khudeish v Canada (Citizenship and Immigration)*, 2020 FC 1124; *Elve v Canada (Citizenship and Immigration)*, 2020 FC 454; *Shalabi v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 961).

[30] I do not accept the Respondent's argument that the RAD noted his lack of direct involvement only to engage the *Ezokola* test. The impugned portion of the RAD's reasons

appears after the RAD has already cited the applicable law from *Ezokola* and began its analysis of the relevant factors.

[31] Reading the RAD's decision contextually, the RAD unreasonably found that the lack of the Respondent's direct involvement in criminal activity was a mitigating factor. The RAD's reasoning discloses both logical deficiencies and a failure to show appropriate regard for the governing pertinent case law as required under *Vavilov* (paras 102-103 and 111-114).

[32] I also find that the RAD failed to reasonably address the Applicant's argument that the Respondent was criminally complicit through his role as one of Gaddafi's bodyguards. The RAD acknowledged that the Minister had argued that the Respondent was complicit due to a duty to protect Gaddafi's life, but then engaged in a mechanical analysis of the Respondent's role and status within the Revolutionary Guard, concluding that the Respondent was merely a volunteer Guard that did not have much responsibility or access within the organization. The RAD fails to explain why a low-ranking volunteer member of the Revolutionary Guard is nevertheless not complicit in the Guard's or the Gaddafi regime's crimes or criminal purpose, particularly when the Respondent maintained his role as a member of the Revolutionary Guard and bodyguard to Gaddafi over two decades and knew or was wilfully blind to the Revolutionary Guard's crimes against humanity.

[33] Under *Ezokola*, the focus should remain on the individual's contribution to the crime or criminal purpose. The RAD failed to reasonably address the Minister's arguments and perform

an individualized and contextual analysis of the Respondent's role in contributing to the Gaddafi regime's crimes.

JUDGMENT in IMM-5625-22

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is referred to a different panel of the RAD for reconsideration.
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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