Federal Court  Cour fédérale

Date: 20120928

Docket: IMM-2674-12

Citation: 2012 FC 1145

Ottawa, Ontario, September 28, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

DZANI JASAREVSKI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review involves an individual who was excluded from his refugee claim by operation of Article 1F(a) of the *Convention Relating to the Status of Refugees, 1951*, Can TS 1969 No 6 – serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity.

[2] There are two issues in this judicial review:

1. Did the Immigration and Refugee Board member [the Member] apply the wrong legal test for exclusion?
2. Did the Member make credibility findings that led to inferences about the Applicant's involvement in such crimes and thereby reverse the onus regarding exclusion?

II. FACTS

[3] The Applicant is a Croatian, a Roma, and a Muslim. He spent his year of conscripted service (1984-85) in the Yugoslavian Army as a military policeman.

[4] He was later conscripted in 1991 into the Croatian National Army as a military policeman where he claims to have remained for two years – beyond the conscription period required for all males over 18 years.

[5] The Applicant claimed that he left the Croatian military in 1993 because of their actions against Muslims.

[6] During his second period of military service the Applicant was stationed in and around Zagreb. It is well-documented that during this period the Croatian army forcefully evacuated from their residences, beat and sometimes killed Serbs. This was during the height of the wars in the former Yugoslavia which pitted Croatians against Serbs (as well as wars with Bosnians and Kosovars).

[7] The Applicant claimed that his duties as a military policeman were solely to take care of drunken soldiers.

[8] The Member in his decision outlined the relevant case law including *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 224, leave to appeal to SCC granted, 2012 CarswellNat 1173 (SCC) [*Ezokola*], which confirmed the test for complicity as the "personal and knowing participation" rather than "personal and knowing awareness", which was the test applied by the Federal Court in *Ezokola*.

[9] There was no issue that the Applicant had not committed any of the crimes specified in Article 1F(a):

> 1.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;

[10] The Member then turned to the factors mandated to be examined in a complicity case:

- method of recruitment;
- nature of the organization;
- position in the organization;
- knowledge of atrocities;
- length of time as a member; and
- opportunity to leave the organization.

[11] The Member's conclusion is summarized at paragraph 47 of the decision:

> Considering the evidence before me, I find the claimant voluntarily associated with the Croatian Military Police longer than required to [*sic*] as required by conscription laws. On a balance of probabilities, I find that he was aware of atrocities being committed by the Croatian Military Police against the Serbian civilian population and persons deprived of their freedom, whether civilian or *hors de combat* militants, in Zagreb and throughout Croatia. I conclude that the Croatian Military Policy contributed to the Croatian Army's goal of "cleansing" Croatia of ethnic Serbs. As part of a unit in charge of the "Defense of Zagreb" and given his role of patrolling the streets, I do not find credible that his role was restricted only to bringing drunken soldiers back to the barracks. As such, I find that there are serious reasons for considering that the claimant was also involved in military operations. I therefore find that there are serious reasons for considering that the claimant facilitated the commission of those crimes and that he is complicit in crimes against humanity and therefore excluded under Convention article 1F(a).

III. ANALYSIS

A. *Standard of Review*

[12] With regard to the standard of review, the standard of correctness applies to the question of the test for complicity (*Esokola* at para 38).

[13] Correctness also applies to the analytical framework for the use of credibility findings. Both in *La Hoz v Canada (Minister of Citizenship and Immigration)*, 2005 FC 762, 278 FTR 229, and in *Ventocilla v Canada (Minister of Citizenship and Immigration)*, 2007 FC 575, 314 FTR 102, this Court has made clear that it is the Minister who bears the burden of establishing the "serious reasons for considering" and that negative credibility findings cannot be used to infer that an individual is complicit where the burden has not been met in the first place.

[14] The proper analytical framework is to require the Minister to meet the burden. Credibility may be looked at where the individual attempts to explain away what on the face meets that burden.

[15] As to whether the facts meet the applicable legal tests is examined on a standard of reasonableness (*Esokola*, above).

B. *Legal Test*

[16] It is important to bear in mind that the test is "serious reasons for considering", a threshold which is lower than that of the balance of probabilities.

[17] The Applicant criticizes the decision by arguing that the Member used the word "awareness" rather than "knowledge" (or "knowing"). This occurs at paragraph 38 of the decision under the heading "Knowledge of Atrocities" and in paragraph 47 as previously quoted. The Applicant argues that this word usage indicates the same issue as *Ezokola*, where the Federal Court relied on a "knowing and personal awareness" test, rather than the correct "knowing and personal participation" test.

[18] The Federal Court of Appeal has said that test for complicity is "personal and knowing participation" rather than simply "personal awareness". It is a precondition to "participation" that the person knows or is aware of the offending actions. In this case, the Member used the term "awareness" as synonymous with knowledge or knowing in the sense that "one knows" is the same as "one is aware".

[19] The term "participation" in the context of complicity does not mean actual commission of the crime by the individual, but participation in the general activities of an organization. In this case, an organization "with a limited and brutal purpose" with the knowledge that the organization was involved in such crimes.

[20] The Member did make an unreasonable finding when she found that the Applicant must have been an officer because he could not be both a "private" and a "military police officer". The term police officer does not suggest or even imply that such person was an officer – a person holding command responsibility. This finding, however, was not crucial to the finding of complicity. The Applicant's complicity did not arise by virtue of his status as an officer but from his knowing participation in an organization with a limited and brutal purpose. The Applicant does not contest that finding in regard to the Croatian Military Police. The Member understood and applied the correct legal test.

C. *Credibility Findings*

[21] It was open to the Member to make a negative credibility finding as to the actual role the Applicant played as a military policeman. The Minister established that:

(a) the Applicant stayed in military police longer than required; a fact admitted.

(b) he was aware of the atrocities committed by the Croatian military police; again, a fact he acknowledged that he knew because these abuses were reported in the media.

(c) the military police contributed to the Croatian Army's goal of ethnic cleansing including in Zagreb; a fact which the documents established.

(d) the Applicant was involved in street patrols in Zagreb; a fact admitted.

(e) his role was not simply that of bringing soldiers back to barracks; a fact denied.

[22] The last fact engages the adverse credibility finding. Given the finding that the Croatian Army and its military police functioned with a limited and brutal purpose of cleansing ethnic Serbs from Croatia and given the other findings, it was reasonable to conclude that the Minister had met its burden.

[23] The Applicant opened the credibility issue by attempting to diminish his role. It was open to the Member to accept or reject his evidence. It is arguable (but I need not decide it) that even if his role was taking care of drunken soldiers, he had sufficient "personal and knowing participation" to be complicit given the nature of the organization.

[24] The Member's credibility findings were properly open to her.

IV. CONCLUSION

[25] Considering the decision as a whole, I find no reason for the Court to intervene.

[26] This judicial review will be dismissed. The parties agree that there is no question for certification.

JUDGMENT

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

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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