Federal Court  Cour fédérale

Date: 20160516

Docket: IMM-626-15

Citation: 2016 FC 544

Toronto, Ontario, May 16, 2016

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ORLANDO CONCEPCION
NHORLEO CONCEPCION
NOEMI CONCEPCION
GABBY CONCEPCION
JACKIELYN CONCEPCION
CARL IAN ORDANZA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms Nelly Concepcion wished to sponsor her husband, Orlando, for permanent residence in Canada. He currently resides in the Philippines. A visa officer in Manila found Mr

Concepcion to be inadmissible to Canada for having committed crimes against humanity when he served as a radio operator in the Philippine Army, citing s 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] (provisions of IRPA cited are set out in an Annex).

[2] Mr Concepcion maintains that the officer treated him unfairly by failing to give him adequate notice that his admissibility to Canada was in issue, and by relying on sources of information unknown to Mr Concepcion. He also submits that the officer applied an outdated and incorrect test for inadmissibility, and rendered an unreasonable decision. He asks me to quash the officer's decision and order the respondent Minister to process his permanent residence application and those of his children.

[3] I find that the officer applied an incorrect definition of inadmissibility and will allow this application for judicial review on that basis. It is unnecessary to address the other issues Mr Concepcion raised. I cannot, however, grant the relief Mr Concepcion seeks; I can only order another officer to reconsider the question of his admissibility to Canada. (*Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31 at para 14).

[4] Accordingly, the sole issue is whether the officer applied the correct test for inadmissibility.

II. The Officer's Decision

[5] In 2011, the officer interviewed Mr Concepcion about his possible inadmissibility to Canada based on his service in the army. The officer's concerns arose from public sources about the army's involvement in crimes against humanity.

[6] Two years later, the officer advised Mr Concepcion that he might be inadmissible to Canada for having committed crimes against humanity, referring to the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24. The officer did not specify which provision of the Act he was relying on. Mr Concepcion responded by telling the officer that he had never been involved in a crime against humanity. His role as a radio operator, he said, involved maintaining lines of communication in order to protect public safety.

[7] In 2014, the officer rendered her decision finding that Mr Concepcion was inadmissible to Canada. She concluded that he had been a member of units of the army that had been involved in atrocities – the 7th Infantry Division and the 56th Infantry Battalion. She found that he had been aware that some of his communications had resulted in the arrest and interrogation of members of the enemy, the New People's Army. He knew that his battalion had been involved in combat in 1987, although he had not been involved personally. Still, he had not taken any action to stop the army's atrocities or to disassociate himself from them.

[8] The officer found that Mr Concepcion was complicit in the army's crimes by having been aware of them and contributing to them by facilitating the transmission of communications. She

relied primarily on the analysis of complicity in *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306. She concluded that a person would be inadmissible if he or she committed an international crime, or was involved as a secondary party (*eg*, by aiding and abetting it). The officer went on to state that an association with a group involved in international crimes may amount to complicity, even if the person merely knew about them and tolerated them.

III. The Test for Inadmissibility

[9] Under s 35(1)(a) of 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 *Crimes Against Humanity and War Crimes Act*.

[10] The Supreme Court of Canada has held that, in order to prove that a person was complicit in a war crime, it must be shown that the person made a significant contribution to it; a person cannot be considered complicit by mere association: *Ezokola v Canada (Minister of Citizenship and Immigration)*, [2013] 2 SCR 678. In that case, the Court was dealing provisions of IRPA relating to exclusion from refugee protection, while this case deals with inadmissibility to Canada. Nonetheless, the language at issue is identical. In addition, *Ezokola* dealt with the proper scope of liability for international crimes, which is equally applicable both to exclusion under Article 1F(a) of the *Refugee Convention* and to inadmissibility under s 35(1)(a) of IRPA.

[11] The Federal Court of Appeal has found that *Ezokola* does not apply directly to the inadmissibility clause in s 34(1)(*f*) of IRPA, which deals with membership in an organization

engaged in terrorism (*Kanagendren v Canada (Minister of Citizenship and Immigration*, 2015 FCA 86). However, it specifically distinguished s 34(1)(*f*) from s 35(1)(*a*), noting that s 35(1)(*a*) is "the domestic inadmissibility provision that parallels Article 1F(a)". Therefore, the Supreme Court's analysis will surely apply here. Indeed, in effect, the Minister concedes that it does.

[12] In *Ezokola*, the Supreme Court held that complicity under Article 1F(a) requires a nexus between the person's conduct and the group's purpose: "While individuals may be complicit in international crimes without a link to a *particular crime*, there must be a link between the individuals and the *criminal purpose* of the group . . . " (at para 8; emphasis in the original).

[13] The Court applied a "contribution-based approach" to replace the "knowing participation test" developed in *Ramirez*. It emphasized the need to respect rules of liability that have been developed in relation to international crimes, given their "extraordinary nature" (para 44): "International criminal law, while built upon domestic principles, has adapted the concept of individual responsibility to this setting of collective and large-scale criminality, where crimes are often committed indirectly, and at a distance" (para 45).

[14] After looking to the *Rome Statute* and other sources of international criminal law principles, the Court concluded:

> At a minimum, complicity under international criminal law requires an individual to knowingly (or, at the very least, recklessly) contribute in a significant way to the crime or criminal purpose of a group. (para 68)

[15] Therefore, the test for inadmissibility under s 35(1)(a) requires serious reasons for considering that a person has voluntarily made a significant and knowing contribution to an offence contrary to the *Crimes Against Humanity and War Crimes Act*, or to a group's criminal purpose.

IV. Did the officer apply the correct test?

[16] The Minister maintains that the officer made no error in applying the test in *Ramirez* as it amounts, in substance, to the same standard articulated and applied by the Supreme Court of Canada in *Ezokola*.

[17] While I agree with the Minister that there are many common elements in *Ramirez* and *Ezokola*, there are also, in my view, some significant differences. Specifically, in *Ezokola*, the Supreme Court explicitly departed from the concept of complicity by association (a notion that derives not from *Ramirez* itself, but from its progeny; See, *eg*, *Sivakumar v Canada (Minister of Employment & Immigration)*, [1994] 1 FC 433 at para 9). As discussed above, the test now requires proof of a significant contribution to an international crime. The Minister argues that that test was met in this case by evidence showing that Mr Concepcion made a "voluntary, significant and knowing contribution to the Philippines Military for many years when it was committing atrocities". In my view, that is not the proper test. The evidence must show, at least, that the person made a significant contribution to a crime or the organization's criminal purpose, not just a contribution to the organization.

[18] In any case, however, the officer applied even a lesser test than that offered by the Minister. The officer found that an association with an international crime group would amount to complicity if the person knew about and acquiesced in the group's activities. That standard can no longer be applied after *Ezokola*, which requires evidence that a person made a significant contribution to a crime or a group's criminal purpose.

[19] Accordingly, the officer should have applied the principles of liability set out in *Ezokola*. Failure to do so amounted to an error of law.

V. Conclusion and Disposition

[20] The test applied by the officer did not correspond to the principles set out by the Supreme Court of Canada in *Ezokola*. I must, therefore, allow this application for judicial review. Given the existing case law on this issue (*eg*, *Kanagendren*), no question of general importance arises.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, and the matter is returned to another officer for redetermination.
2. No question of general importance is stated.

"James W. O'Reilly"
Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Security	Sécurité
34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
…	[…]
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).
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*;

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-626-15
STYLE OF CAUSE:	ORLANDO CONCEPCION, NHORLEO CONCEPCION, NOEMI CONCEPCION, GABBY CONCEPCION, JACKIELYN CONCEPCION, CARL IAN ORDANZA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 16, 2015
JUDGMENT AND REASONS:	O'REILLY J.
DATED:	MAY 16, 2016

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