

Federal Court



Cour fédérale

Date: 20160719

Docket: IMM-5782-15

Citation: 2016 FC 822

Ottawa, Ontario, July 19, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**HINA TALPUR
MUHAMMAD ASGHAR JAMALI
SUHAAD JAMALI (MINOR)
SAMEEN JAMALI (MINOR)
ALI HASNAIN JAMALI (MINOR)
BY THEIR LITIGATION GUARDIAN HINA
TALPUR**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the November 17, 2015 decision of an immigration officer, denying permanent resident status to the Principal Applicant, Ms. Hina Talpur, and her family on the basis of her husband's inadmissibility.

II. Background

[2] The Applicants are citizens of Pakistan who applied for permanent residency based on the Principal Applicant's occupation as a financial manager. The immigration officer [the Officer] denied the application after determining there were reasonable grounds to believe that the Principal Applicant's husband, Muhammad Asghar Jamali, was inadmissible pursuant to subsection 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], for complicity in crimes against humanity.

[3] Mr. Jamali has been a police officer in the Sindh region of Pakistan since 2002. Since 2005, he has worked primarily as an Assistant Sub-Inspector of police in the city of Hyderabad. His duties involve patrol, investigation, preparation of interrogations and supervision of the preliminary investigation of cases. Over the course of his career he has received training on human rights violations and how to incorporate gender sensitivity into policing. His affidavit stresses that police officers face sanctions if they violate force policies in this regard, and states he has not witnessed officers acting unlawfully.

[4] On July 16, 2015, the Principal Applicant received a procedural fairness letter from the Canadian immigration office, conveying that the application may not meet the requirements for permanent residence status. The Officer found there may be reasonable grounds to believe that Mr. Jamali's involvement with the Sindh Police Force renders him inadmissible under subsection 35(1)(a) of the Act. The letter notes that during Mr. Jamali's tenure as an officer in the Sindh region, open source documentation indicates the force perpetrated crimes against humanity, including "illegal detentions, deaths in custody, police torture during interrogations and extra-judicial killings", in the locations where Mr. Jamali was stationed.

[5] The Applicants responded by letter on September 3, 2015, emphasizing that the Officer is required to consider the nexus between an applicant's role and duties within an organization and its criminal purpose. Mr. Jamali's evidence of non-involvement with crimes against humanity is not contradicted, and thus any link to crimes against humanity committed by the Sindh Police is tenuous at best. Moreover, the Applicants submitted that Mr. Jamali was not voluntarily employed in the force, as he was appointed to the position, and alternative job opportunities are limited.

[6] The Applicants also submitted supporting documentation, including:

- (a) certificates relating to Mr. Jamali's training in the prevention of gender-based violence;
- (b) documentation to illustrate the size and multifaceted nature of the Sindh Police Force – it is a legitimate police force with multiple branches, despite the evidence of its engagement in illegal activity;

(c) descriptions of Mr. Jamali's role and rank within the force, which demonstrates he is under direct supervision and control of a superior officer.

[7] By letter dated November 17, 2015, the Officer denied the application, having concluded after review of the application, the procedural fairness letter, and the responding submissions, that although Mr. Jamali himself may not have been directly involved in crimes against humanity, there are reasonable grounds to believe he was complicit in such crimes. The Officer's reasons are contained in the Global Case Management System [GCMS] notes for the file, which together with the November 17, 2015 letter, comprise the decision under review.

[8] The Officer disagreed with Mr. Jamali's assertion that there is no direct evidence of the Sindh Police Force carrying out crimes against humanity. The Officer referenced several open source documents indicating the Sindh Police do in fact carry out such crimes. Specifically, a 2009 report of the Asian Human Rights Commission identifies Hyderabad – the city in which Mr. Jamali has been employed almost continuously since 2005 – as having a particularly high incidence of police torture. The Officer disagreed this is a tenuous link: while the entire force is not directly responsible for these crimes, those working “in an operational way on a day-to-day basis, including investigating officers, inspectors and their management” will inherently be more closely linked to the crimes than others. This fact negated Mr. Jamali's argument of non-complicity on the basis he has not quickly ascended the ranks of the force.

[9] The Officer also rejected Mr. Jamali's argument that his employment with the Sindh Police Force is non-voluntary. Though it may not be his preferred occupation and he may face

difficulties finding other employment due to economic conditions, he is and has not been forced to stay in his current job.

[10] Citing *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 [*Mugesera*], the Officer found that torture constitutes a crime against humanity when it is widespread, systematic and aimed at a civilian population or identifiable group. The open source documentation conveys that the Sindh Police engage in torture as an investigatory tool, murder, extrajudicial killings, beating and arbitrary detentions on a scale that meets this standard.

[11] The Officer considered the below six factors for assessing whether an individual has voluntarily made a significant and knowing contribution to an organization's crime or criminal purpose enunciated by the Supreme Court of Canada in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 at paras 91-100 [*Ezokola*]:

- i. the size and nature of the organization;
- ii. the part of the organization with which the applicant was most directly concerned;
- iii. the applicant's duties and activities within the organization;
- iv. the applicant's position or rank in the organization;
- v. the length of time the applicant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
- vi. the method by which the applicant was recruited and the applicant's opportunity to leave the organization.

[12] Given the size and nature of the organization, the Officer accepted that there will be many members of the Sindh Police Force who are not complicit in crimes against humanity. However, the Officer found there is an increased probability that an individual in an investigative and operational role will be complicit. Mr. Jamali has been serving since 2002 to the present, and the Officer found that “his lengthy and on-going career ... demonstrates his active support for the organization”. As an Assistant Sub-Inspector Investigation Officer for over twelve years, Mr. Jamali supervised investigations, visited places of incidents, and prepared memos and interrogations. The documentation evinces the Sindh Police were responsible for crimes against humanity throughout the province, that the city in which Mr. Jamali served was a location of serious concern, and that these crimes occurred in particular during arrest, detention and interrogation of suspects.

[13] The Officer cited Mr. Jamali’s statement that he has “not remained present at the scene of crimes against humanity” as evidence that he was aware of such crimes and merely turned his back. Further, in this case, Mr. Jamali’s lower rank does not work in his favour, as it places him closer to the perpetration of the crimes. His long-standing tenure and responsibilities during a time when documented human rights abuses were committed by the Sindh Police provided reasonable grounds for the Officer to believe he was complicit in the human rights violations committed by the Sindh Police over the years.

[14] On the above analysis, the Officer found there were “reasonable grounds to believe that the applicant made a significant and knowing contribution to the commission of the acts of

torture and other crimes against humanity perpetrated by the Sindh police force”, and that accordingly Mr. Jamali was inadmissible pursuant to subsection 35(1)(a) of the Act.

III. Issue

[15] Was it reasonable for the Officer to find Mr. Jamali inadmissible under subsection 35(1)(a) of the Act?

IV. Standard of Review

[16] The issue of whether Mr. Jamali could reasonably have been excluded under subsection 35(1)(a) of the Act is a question of mixed fact and law, and is thus reviewable on the standard of reasonableness (*New Brunswick v Dunsmuir*, 2008 SCC 9 at para 51).

[17] This case involves review of the Officer’s application of statute and of a judicial test to the particular facts. Thus, it is distinguishable from the standard of review analysis in *Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324 at paragraphs 22-25, in which the Court of Appeal applied the correctness standard to review a decision involving the interpretation of a provision of an international Convention “that should be interpreted as uniformly as possible”.

V. Analysis

[18] Under subsection 35(1)(a) of the Act, 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 sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c-24.

[19] In *Ezokola*, above, the Supreme Court of Canada outlined the framework of analysis for assessing complicity in crimes against humanity under Article 1F(a) of the *Refugee Convention*, incorporated into Canadian law by section 98 of the Act, which excludes an individual from refugee protection when there are serious reasons for considering he or she has committed an international crime. The Supreme Court explicitly rejected the concept of “guilt by association”, finding that “individual criminal responsibility has not been stretched so far as to capture complicity by mere association or passive acquiescence”. Rather, complicity is based on an intentional and knowing contribution to a group’s crime or criminal purpose (*Ezokola*, at paras 53, 68).

[20] Though decided in the context of exclusion from refugee protection, the test for complicity set out in *Ezokola* equally applies to inadmissibility under subsection 35(1)(a) of the Act (*Kanagendren v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 86 at para 21).

[21] In order to find culpable complicity, there must be a link between the individual and the crimes or criminal purpose of the group. This link is established where the Officer has reasonable grounds to believe that an individual has voluntarily made a significant and knowing contribution to a group’s crime or criminal purpose (*Ezokola*, at para 6).

[22] Accordingly, it is not sufficient for an individual merely to be associated with a group that committed crimes. As the Supreme Court noted in *Ezokola* at paragraph 68, following review of complicity under international law:

68 In sum, while the various modes of commission recognized in international criminal law articulate a broad concept of complicity, individuals will not be held liable for crimes committed by a group simply because they are associated with that group, or because they passively acquiesced to the group's criminal purpose. 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.

[23] The six enumerated factors for assessing complicity are to be applied as follows:

92 When relying on these factors for guidance, the focus must always remain on the individual's contribution to the crime or criminal purpose. Not only are the factors listed above diverse, they will also have to be applied to diverse circumstances encompassing different social and historical contexts. [...] Thus, the assessment of the factors developed in our jurisprudence, the decisions of the courts of other countries, and the international community will necessarily be highly contextual. Depending on the facts of a particular case, certain factors will go "a long way" in establishing the requisite elements of complicity. Ultimately, however, the factors will be weighed with one key purpose in mind: to determine whether there was a voluntary, significant, and knowing contribution to a crime or criminal purpose.

Ezokola, at para 92

[24] The Applicants submit the Officer erred in applying the *Ezokola* factors to this case. They claim the Officer's finding that Mr. Jamali's employment as a police officer with operational duties link him to crimes against humanity is flawed, as it in effect deems all officers with such duties inadmissible. This is contrary to the holding in *Ezokola* that there must be individual

criminal responsibility, not just association or passive acquiescence. With a force of over 70,000 officers, it is an error to find that all are deemed to have contributed.

[25] The Officer accepted both that Mr. Jamali is a low-ranking officer and that he himself had not committed any crime against humanity. The Applicants argue it was an error to reject the well-established principle that rank is positively correlated with knowledge and support of the organization's crimes, and to fail to explain why Mr. Jamali's position as a low ranking officer increases his odds of being complicit. Mr. Jamali did not have any effective control over those responsible for crimes or torture.

[26] Moreover, the Applicants state it was unreasonable for the Officer to find Mr. Jamali complicit on the basis he had been aware of crimes against humanity and had removed himself from the scene of their commission. The Officer misinterpreted Mr. Jamali's statement that "I have not remained present at the scene of crimes against humanity", which the Applicants claim intended to state he had never perpetrated crimes against humanity. Knowledge of such crimes within a large and multi-faceted police force does not constitute complicity.

[27] Finally, as the Sindh Police Force is a legitimate organization, the Applicants argue it was unreasonable for the Officer to place weight on the length of Mr. Jamali's employment as indicative of his complicity. The evidence before the Officer indicated that Mr. Jamali is a law abiding citizen, who works for a legitimate police force: he was not linked to any crimes, and cannot be expected to have left legitimate employment. These factors should be evaluated as neutral at best.

[28] Though the Court may have preferred a different outcome in this case, the foundation of reasonableness review requires that it pay deference to the Officer's findings when the reasons provided are transparent, justified and intelligible, and when the Decision falls within a range of acceptable outcomes in respect of the law and evidence. For the following reasons, I find no basis upon which the Court may legitimately interfere with the Officer's decision, and I would dismiss the application.

[29] The issue before the Officer was whether there were reasonable grounds to believe Mr. Jamali voluntarily made a knowing and significant contribution to acts of torture alleged to have been committed by the Sindh Police Force. The "reasonable grounds to believe" standard, which by virtue of section 33 of the Act is applicable to inadmissibility findings made pursuant to subsection 35(1)(a), requires more than mere suspicion but is a lower standard than proof on a balance of probabilities (*Mugesera*, above, at para 114).

[30] The Officer explicitly acknowledged that there is no evidence to suggest Mr. Jamali himself directly committed crimes against humanity. However, this does not undermine the Officer's conclusion there were reasonable grounds to believe Mr. Jamali contributed to the crimes of the Sindh Police Force. Complicity arises by *contribution*, and while there must be a link between the individual and the criminal purpose of the group, an individual may be found complicit in international crimes without being present at or physically contributing to those crimes (*Ezokola*, at paras 7, 8, 77). The Officer's assessment thus considered whether Mr. Jamali's position in the police force as an operational officer for an extended period of time

provided those reasonable grounds to support a finding of complicity, pursuant to the standard set out in *Ezokola*.

[31] To be found culpably complicit, Mr. Jamali's contribution to the crime or criminal purpose must be (1) voluntary; (2) knowing; and (3) significant (*Ezokola*, at paras 86-90).

[32] I find it was reasonable for the Officer to conclude that there was both a voluntary and a knowing contribution to the organization's crimes or criminal purpose. On the issue of voluntariness, there was no evidence that Mr. Jamali was forced into employment of the police force, or that it was obligatory that he remain. With regards to Mr. Jamali's knowledge of the crimes against humanity perpetrated by the Sindh Police Force, the Officer drew an inference from Mr. Jamali's position and tenure in the organization, which I find was a reasonable basis upon which the Officer could conclude Mr. Jamali knew of and was exposed to the ongoing and widespread incidents of torture.

[33] The central issue in this case comes down to whether it was reasonable for the Officer to have found that Mr. Jamali's contribution was "significant" on the evidence.

[34] The Officer appropriately considered the six factors, and the analysis accords with the Supreme Court's guidance at paragraphs 94 to 100 of *Ezokola*. The analysis is contextual and the determination as to which factors are most influential is discretionary. The Officer placed significant weight on the 3rd and 4th factors (Mr. Jamali's duties, activities and rank within the organization), finding they illustrated that Mr. Jamali was aware of and had been exposed to the

crimes committed by the Sindh Police and that he had consciously removed himself from the scene of their commission in the past.

[35] However, Mr. Jamali's association with the Sindh Police Force and his knowledge and acquiescence towards the group's activities, without more, does not amount to complicity. Complicity requires a nexus between the person's conduct, and the group's crimes (*Ezokola*, at para 8).

[36] In this case, the Officer considered the link between the duties and activities of Mr. Jamali, and the crimes perpetrated by the organization. The Officer noted that Mr. Jamali's responsibilities during his ongoing tenure with the Sindh Police, particularly since 2008, were primarily direct, operational policing work, including interrogations, investigations, arrests and searches.

[37] The Officer found that in a large police organization such as the Sindh Police, it is more likely that the acts of torture and other crimes against humanity are committed at the lower, direct policing level. Though the Supreme Court reasoned that "a high rank or rapid ascent through the ranks of an organization could evidence strong support of the organization's criminal purpose" (*Ezokola*, at para 97), I find the Officer's conclusion was reasonable and demonstrates he took a contextual approach in assessing the factors on the particular facts. In this case, the Officer's above conclusion was supported by documentary evidence indicating that incidents of torture, illegal arrests, violent interrogations and extrajudicial killings were regularly perpetrated by police officers during the course of arrests and interrogations of suspects.

[38] The Officer determined that Mr. Jamali knowingly made a significant contribution to the crimes of the police force based on the Mr. Jamali's tenure and his positions where he held responsibilities of supervision, and conducted investigations and patrol functions, including arrest, detention and interrogation for the Sindh Police while serving most of his time in Hyderabad. I do not find that this conclusion, especially given the supportive documentary evidence, fell outside the range of reasonable outcomes.

[39] Particularly compelling support for the reasonableness of the Officer's decision is the documentary evidence describing the torture, illegal detentions, and extrajudicial-killings committed by the Sindh Police as "routine", "common" and "widespread and/or systematic". Yet another document before the Officer discussing human rights violations by the police in Sindh province indicates that "[t]he police have institutionalized torture to a point where it is viewed as the primary method of crime detention. Police torture has become so commonplace that it has slowly lost the capacity to shock and disgust". This is not a case where the abuses are discrete, uncommon and perpetrated by few, wherein a link for finding individual complicity on these facts may indeed be more tenuous.

[40] I disagree with the Applicants that the Officer's finding in this case in effect deems all police complicit in the crimes committed by the Sindh Police Force. The Officer noted it was Mr. Jamali's *operational* and direct role in carrying out arrests, interrogations and investigations, for twelve years, in a region cited as conspicuous for high rate incidents of police torture, that was satisfactory to meet the "reasonable grounds to believe" standard that Mr. Jamali was complicit in and contributed to the human rights violations committed by the Sindh Police Force.

[41] I also do not find the Officer's interpretation of Mr. Jamali's affidavit unreasonable. The Officer read Mr. Jamali's statement "I have not remained present at the scene of crimes against humanity" to be an admission that when incidents were taking place, Mr. Jamali knew about them, and would remove himself from the scene. Though Mr. Jamali argues this was an error of law, it involves the Officer's interpretation of the evidence and findings of fact – a task entitled to deference.

[42] As well, Mr. Jamali's claim that the voluntary nature and length of service are neutral factors that cannot support a finding of complicity, not only contradicts the judgment in *Ezokola*, but essentially amounts to a disagreement with the Officer's weighing of the factors and the evidence, which is not a reviewable error upon which this Court is entitled to intervene.

[43] There is also no indication that the Officer disregarded, misapprehended or failed to consider the positive evidence presented by Mr. Jamali, including his references, his participation in community events and human rights projects, and his training regarding gender sensitivity and gender-based violence. The reasons explicitly find that "[Mr. Jamali's] training record does not alter his degree of complicity in the crimes against humanity that were occurring".

[44] I do not find that the Officer applied and considered the factors outlined in *Ezokola* in a mechanical manner without proper analysis. On the contrary, the Officer appropriately concentrated on the Mr. Jamali's role, and took into account the material aspects of that role in

conjunction with documentary evidence, finding there was a reasonable basis to conclude Mr. Jamali voluntarily and knowingly contributed to the crimes committed by the Sindh Police.

[45] On the evidentiary standard of “reasonable grounds to believe”, and given the deference owed the Officer’s decision, I find the reasons were transparent, intelligible and justified, and fell within the range of reasonable outcomes considering the evidence and the governing law.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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