Federal Court Cour fédérale

Date: 20160824

Docket: IMM-670-16

Citation: 2016 FC 961

Ottawa, Ontario, August 24, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ALAA SABRI AHMAD SHALABI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] In this application, the Applicant seeks to set aside a decision of the Immigration and Refugee Board of Canada, Immigration Division [ID] rendered on January 26, 2016 [Decision], in which the ID, following a private admissibility hearing conducted pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], determined that the Applicant is inadmissible to Canada by virtue of section 35(1)(a) of *IRPA* for committing an act outside of Canada that constitutes an offence referred to in section 6 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [Act].

I. **Background Facts**

[2] The Applicant is a stateless Palestinian. Prior to the creation of the Palestinian Authority pursuant to the Oslo Accords, the Applicant voluntarily joined the Jordan-based Badr Brigades of the Palestinian Liberation Army.

[3] Upon the signing of the Oslo Accords, a portion of the Badr Brigades was transferred to the new Palestinian Authority to form part of the security services. The Applicant was among those transferred: he served in the Palestinian National Security Force [NSF] from June 1994 until he resigned in September 2000, moving up the ranks from a Private to a Sergeant.

[4] The Applicant's duties in the NSF for most of this period involved manning checkpoints in Gaza and the West Bank. The Applicant would stop suspicious cars for an inspection. Other times the checkpoints were given specific vehicles or individuals to watch out for to stop. If one of these individuals was found at a checkpoint, it was the responsibility of the Applicant and the other staff at the checkpoint to arrest that person until one of the other branches of the General Security Service [GSS] could take custody of the detainee. It was alleged before the ID that these detainees were tortured by the other branches of the GSS.

[5] According to the Applicant, because he was involved in the arrests of prominent members of Hamas and Islamic Jihad, he became a target for those groups.

II. **The Decision Under Review**

[6] The ID held an oral hearing. The only witness was the Applicant. In addition, the Minister submitted the transcript of an interview of the Applicant by the Canada Border Services Agency [CBSA] and background reports from various NGOs alleging that branches of the GSS

routinely engaged in physical and psychological torture of suspected terrorists and drug dealers. Written submissions were made to the IRB after the oral hearing.

[7] In finding that the Applicant was inadmissible, the ID first looked at whether the GSS had committed crimes against humanity. Then, in order to determine whether or not the Applicant had been complicit in such crimes, the ID considered the component parts of the contribution-based test for complicity established by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*].

A. *Crimes Against Humanity*

[8] The ID reviewed the provisions of section 6 of the Act and Article 7 of the *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) [*Rome Statute*], each of which define a “crime against humanity”. It then considered whether the NSF committed crimes against humanity while the Applicant was a member. The ID accepted the documentary evidence put forward by the Minister, finding that it was “replete with acts undertaken by the Palestinian Security Services that confirm crimes falling within the heading of crimes against humanity”. The ID found that the information was consistent, came from independent well-known sources and the level of corroboration amongst the reports led them to find that the facts in the reports were credible and trustworthy. Based on the reports, the ID concluded that the NSF, a force under the GSS, committed crimes against humanity within the meaning of paragraph 35 of the *IRPA*.

[9] The ID then turned to examine whether the Applicant, as a member of the NSF, was complicit in the crimes. It divided the analysis between the three elements of the *Ezokola* test:

that a complicit person is one who makes a voluntary, knowing and significant contribution to the crime or criminal purpose.

B. *Voluntary Contribution*

[10] The ID found that the Applicant made a voluntary contribution to crimes against humanity because he joined the Badr Brigades voluntarily and did not resign from the NSF until 2000, despite his departure that year proving that it was possible to leave the NSF before retirement age.

C. *Knowing Contribution*

[11] There were contradictions between the testimony given by the Applicant before the ID and his earlier interview by the CBSA. The ID found that the Applicant deliberately minimized his involvement and responsibility when testifying. Where there were any contradictions between the testimony at the ID and the CBSA interview, the ID chose to accept what was said in the earlier interview.

[12] The ID determined that the Applicant knew that a crime was being committed because, based on his CBSA interview, he was well-aware that torture was used by the intelligence services as a way of forcing cooperation by detainees.

D. *Significant Contribution*

[13] The ID acknowledged that in *Ezokola*, mere association with a group becomes culpable complicity only when an individual makes a significant contribution to the crime or criminal purpose of the group. It examined his length of service, promotions received, his responsibilities

including arresting and handing over suspects to intelligence officers who sometimes used torture and his own role of using force to control confrontational detainees.

[14] The ID considered the Applicant's interview with the CBSA, and concluded from his admissions that he was aware torture was being used in the GSS to extract information from detainees. It concluded that although the Applicant did not personally torture any detainees, "his role is but one link in the chain of a whole security apparatus that ultimately led to widespread human rights violations and the inflicting of severe pain and suffering on individuals that were initially arrested by [the Applicant] and his colleagues in the course of their work."

III. **Issues**

[15] The Applicant has identified three areas of dispute with the Decision.

[16] First, he has alleged the ID erred in determining credibility when it preferred the evidence the Applicant gave to the CBSA in his initial interview over the subsequent evidence he gave before the ID when he answered questions about his role and torture of people he detained and handed over to Military Intelligence.

[17] Second, he challenges the definition of "crimes against humanity" as applied by the ID saying that contact with thirteen individuals from Hamas over a period of five years cannot be considered an attack directed at a civilian population.

[18] Third, he alleges that the ID failed to properly interpret the complicity principle in *Ezokola* by failing to take into account the actions of the Applicant as a secondary actor who was not part of or directly concerned with the section of the GSS Intelligence that, in performing a

legitimate security purpose, may have crossed the line on occasion and committed crimes against humanity.

[19] In this respect, the Applicant also submits that the common purpose of the GSS was not criminal but rather was to protect the Palestinian population from security threats under the new laws made pursuant to the Oslo Accords. The Applicant's only responsibility was to hand over identified security threats to the intelligence branch. As such, he says he was a mere secondary actor. The Applicant also says that by stopping security threats he was not being complicit in crimes against humanity but was helping to protect the Palestinian civilian population from terrorists.

[20] The issues to be reviewed are:

i. Did the ID err by preferring the evidence of the Applicant given to the CBSA?

ii. Did the ID err in finding that crimes against humanity were committed?

iii. Did the ID err when it applied the test for complicity outlined in *Ezokola*?

IV. **Standard of Review**

[21] The findings made in the Decision and the outcome of inadmissibility is reviewable on a standard of reasonableness as it is a question of mixed fact and law: *Khasria v Canada (Public Safety and Emergency Preparedness*), 2016 FC 773 at para 16.

[22] The decision is reasonable if the findings made by the ID come within the range of possible, acceptable outcomes that are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

V. **Submissions of the Parties**

A. *Credibility*

[23] The Applicant submits that there was no "meeting of the minds" as to what the CBSA interviewer meant when he was questioning the Applicant about "torture". He says the examples he gave—putting detainees in a small cell with twenty other people or in an individual cell for four hours with no washrooms—might be mistreatment but would not commonly be considered torture. The Applicant also told the CBSA interviewer that he did not believe any detainees were beaten, but if they were it would not have been "very hard".

[24] The Applicant submits that there were many different levels and branches of the GSS, each with different responsibilities. Although the Applicant had heard that some of these branches may have mistreated some of those in their custody, he did not know if the information was true and had never personally witnessed any mistreatment. He also did not know if any of the individuals that he stopped and detained at checkpoints were specifically mistreated.

[25] The Respondent points to parts of the CBSA interview where the Applicant said his job was to arrest people he was told to look out for and that on at least four occasions he also arrested people of his own accord. To make the arrests he used a gun, made the detainees face a wall, questioned them and passed them on to Military Intelligence. If they did not co-operate with subsequent interrogation they would be subject to "[n]ot really a very bad torture but yes, just enough to make them, just enough to make them co-operate." By contrast, at the ID hearing he claimed he did not interrogate anyone, but merely stopped cars and handed them over to officers who detained them. He told the ID he only kicked one person and once gave another "a slight hit".

[26] The Respondent also disputes that the Applicant merely talked about possible mistreatment with the CBSA and not torture. The examples he gave to the CBSA, such as crowding in a small cell, sleep deprivation and standing for hours are all well documented forms of torture used by the Palestinian Authority and the Military Intelligence according to the NGO reports before the ID.

[27] The Respondent submits that it was reasonable for the ID to view with skepticism the subsequent retraction of previous statements by an individual who has gained an understanding of his risk of inadmissibility.

B. *Crimes Against Humanity*

[28] The Applicant submits that the Board erred with reference to many of the examples that it used to try and compare the Applicant's actions with those of a group dedicated to widespread attacks against a civilian population. He notes the GSS was composed of ten branches with different responsibilities, and it is only the branch to which he belonged—the NSF—that should be examined.

[29] The Applicant says that it is not possible that his limited contact with perhaps thirteen members of Hamas over a five year period, who may or may not have been tortured, can amount to an attack against a civilian population.

[30] At the hearing, counsel for the Applicant quoted from the recent remarks of the Minister of Public Safety and Emergency Preparedness, that "[t]here is no greater responsibility of the Government than to keep its citizens safe." Ultimately, the Applicant argues that he was involved

in law enforcement, not torture. He was stopping terrorists from entering his area and he had no real idea what happened to them once he handed them over to Military Intelligence.

[31] The Respondent argues that the Applicant misunderstands the "widespread or systemic attack against a civilian population" requirement of a crime against humanity when he says his actions affected only thirteen Hamas members. The Respondent points out that the Applicant's actions must be "part of" a widespread or systemic attack on a civilian population, but need not itself be one: *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 156 [*Mugesera*]. According to the Respondent, the ID reasonably found that the civilian population targeted was persons suspected of Hamas membership or being involved in jihad or drugs.

[32] The Respondent says that the Applicant informed the CBSA that the people he detained were transferred to the Security Forces or Military Intelligence and then he described the various forms of torture, both psychological and physical, employed during the interrogation by these organizations. The fact that the torture was sometimes psychological does not take it outside the ambit of a crime against humanity, as the definition of torture under the *Rome Statute* includes mental pain and suffering: *Rome Statute*, art 7, s 2(e).

C. *Application of the Complicity Test in Ezokola*

[33] The Applicant submits that he was not complicit in any crimes against humanity. He had no personal knowledge of whether any of the individuals he detained at checkpoints were subsequently mistreated or not. He held a lowly rank, being just one of over 14,000 checkpoint guards. He was following orders by stopping members of Hamas from entering his area.

[34] The Applicant says that the evidence, as shown in his CBSA interview, is ambiguous as to whether or not he had any knowledge that detainees he handed over would be tortured. The Applicant has also stated that there is no real evidence of torture of those particular detainees and that what the Applicant called torture in the CBSA interview was mistreatment that fell short of torture.

[35] The Applicant relies on the principles in *Ezokola* to say that he should not be held culpable as an individual for acts by the GSS. He says there is no link between his actions and the group's criminal actions because the GSS had a legitimate security purpose. If it occasionally strayed over the line and did commit a crime against humanity then he, as a secondary actor, should not be held responsible for those acts.

[36] Finally, the Applicant says he did not make a significant contribution as he stopped at least 31,000 cars during the four years he was serving at a checkpoint and he only detained thirteen known members of Hamas. That is less than one-half of one per cent of all those with whom he came in contact. He adds that his actions in no way were made with the "aim" of furthering the criminal activity or purpose of the group because the group did not have a criminal purpose. Rather, the purpose was to safeguard the residents. Interrogation of suspected terrorists was a legitimate, legal obligation and if subsequent actions by other members of the GSS exceeded legal interrogation then those actions were not related to the Applicant's actions.

[37] The Respondent argues that there was ample evidence before the ID to support a finding of complicity. Specifically, the ID made a finding, contrary to the Applicant's position, that the NSF itself and not just the other branches of the GSS engaged in crimes against humanity.

[38] The Respondent notes that in arriving at its finding of complicity, the ID canvassed the *Ezokola* factors. The ID found that the Applicant's participation was voluntary based on his voluntary departure in 2000. The CBSA interview showed he was aware that other branches of the GSS used torture, both physical and psychological, when someone refused to co-operate. The ID found the Applicant's contribution was significant given his length of service, his promotions in rank and that he was charged with arresting high-ranking officials of Hamas and Islamic Jihad whom he then handed over to Military Intelligence for further interrogation.

VI. **Analysis and Conclusion**

A. *Credibility of the Applicant*

[39] The issue of credibility is entwined with the questions of whether the Applicant could have left the NSF and whether he was aware of the occurrence of torture during interrogation.

[40] In assessing the credibility of the Applicant, the ID reviewed the jurisprudence on reconciling sworn testimony and inconsistent answers. It found that the Applicant had a significant interest in obtaining a favourable outcome given the risk of deportation if found inadmissible. After providing several examples of various inconsistencies and the Applicant's attempt to minimize his activities, the ID provided cogent reasons for preferring the original evidence given to the CBSA officer over that provided at the admissibility hearing.

[41] The ID is owed considerable deference in assessing the credibility of the Applicant given its advantage in having seen and heard his testimony. I have reviewed the materials in the application record and the certified tribunal record, including the transcript of the CBSA interview, the transcript of the hearing before the ID and the written submissions of the parties. The decision by the ID is entirely consistent with the materials in the record and is reasonable.

B. *Crimes Against Humanity*

[42] The definition of a crime against humanity in subsection 6(3) of the Act includes torture as well as persecution or any other inhumane act committed against any civilian population or any identifiable group. The Applicant argues there is either no evidence of torture or the evidence is ambiguous. This overlooks the extensive NGO documentary evidence that was before the ID, which clearly establishes that the NSF routinely used torture during interrogation. It also fails to address the quality of the evidence required under section 33 of the *IRPA*, which is that the ID was only required to determine that there were "reasonable grounds to believe" the Applicant was complicit in crimes against humanity. This is more than a mere suspicion but less than a balance of probabilities. Reasonable grounds to believe will exist where there is an objective basis for the belief which is based on compelling and credible information: *Mugesera* at para 114.

[43] The ID's conclusion that the NSF, which employed the Applicant, committed crimes against humanity was made after considering the uncontradicted evidence contained in reports by Amnesty International, Human Rights Watch and B'Tselem that after February-March 1996, torture became widespread "during interrogation of those arrested for political or security reasons": *Palestinian Self-Rule Areas – Human Rights under the Palestinian Authority*, Human Rights Watch, Vol. 9 No. 10 (E) September 1, 1997. These reports contain compelling and credible evidence. As a result, it was entirely open to the ID to find that during interrogation of detainees, the NSF engaged in acts of torture that met the definition of crimes against humanity.

[44] As to the argument that members of Hamas are terrorists and not part of a civilian population, it has been held that it is not necessary that the entire population of a region be the

target. It is sufficient if the attack is directed against an identified segment of the population "rather than against a limited and randomly selected number of individuals": *Prosecutor v Kunarac et al.*, case no. IT-96-23/1A, Judgement, June 12, 2002 at para 90. The evidence from the Applicant before the ID was that suspected Hamas members were specifically targeted at checkpoint stops where they were detained, interrogated and subjected to forms of physical and psychological torture.

[45] That Hamas, as terrorists, might try to kill the Applicant and harm the civilian population the Applicant was protecting only permits him and the GSS to detain and question suspected members. The international community has determined that torture, as defined in the Act, is not an acceptable counter-terrorism tactic. Similarly, the fact that members of Hamas could be inadmissible to Canada is irrelevant. Such inadmissibility does not permit or justify torture by a captor who wishes to extract information where there is, as the Applicant testified, a failure to co-operate.

[46] Even if suspected Hamas members did not constitute a civilian population, the Applicant also admitted to detaining suspected drug dealers for interrogation. Drug dealers are another group identified in NGO reports as GSS torture targets, and they are undoubtedly civilians.

C. *Application of the Complicity Test in Ezokola*

[47] *Ezokola* considered precisely the situation the Applicant puts forward: general participation in a group's criminal activity. The Supreme Court dealt with the question of when that participation becomes a culpable contribution. The Supreme Court expressly focussed on the modes of committing the crimes, recognizing in the process that the *Rome Statute* recognizes a broad residual mode of commission of crime in Article 25(3)(d) by including conduct that "in

any other way contributes to a crime committed or attempted by a group acting with a common purpose" and, as such, "individuals may be complicit in crimes without possessing the *mens rea* required by the crime itself". It also confirmed that the role of the ID is not to establish guilt, but to determine exclusions based on whether there are "serious reasons for considering" that an Applicant has committed crimes against humanity: *Ezokola* at paras 54, 59 and 101.

[48] The Applicant's argument that: (1) he was a mere secondary actor; and (2) of the 31,000 cars he stopped at his checkpoint, he detained less than one-half of one percent so there was no systemic or widespread attack ignores the law as it has developed through the International Tribunal that "only the attack, not the individual acts of the accused must be widespread or systematic." The Applicant's broader argument that he was only involved in legitimate law enforcement also ignores the fact that a crime against humanity can be committed in pursuit of a legitimate security goal. The GSS had an extensive and forceful system of checkpoints in place to find and detain suspected terrorists—in part so that torture could be used to obtain intelligence in aid of that goal. Without checkpoint guards like the Applicant to extract suspects from the general population and transfer them to Military Intelligence, the GSS would not have had those civilians in their custody to torture.

[49] The Applicant also stressed that he never saw an act of torture. However, he neither had to see such an act nor commit one in order to be aware of and complicit in the torture of detainees. In *Ezokola,* at paragraph 68, the requirement is stated to be that he had to "knowingly (or, at the very least, recklessly) contribute in a significant way to the crime". The ID properly noted that knowledge of a group's criminal activity can be inferred. The ID found clear evidence from his CBSA interview that the Applicant was aware torture was being used by the security

services. He was able to describe the methods of torture and knew he was handing over detainees for further interrogation. Even though the Applicant did not directly observe torture, it was reasonable for the ID to infer his knowledge of what happened to the detainees he transferred.

[50] The Applicant submits that he held a low rank, was just one of over 14,000 checkpoint guards and was following orders by stopping members of Hamas from entering his area. Therefore, he was simply protecting the Palestinian population as permitted under the Oslo Accords. One of the conclusions drawn in *Ezokola* was that complicity is not based on rank but on intentionally or knowingly contributing to a group's crime or criminal purpose.

[51] The finding by the ID that the Applicant was complicit in the acts of torture carried out by the NSF and that he made a voluntary, knowing and significant contribution to the crime or criminal purpose was intelligible, justified and transparent. It was reasonable and fell within the possible, acceptable outcomes based on the ID finding that:

1. the Applicant made a significant contribution as one link in a chain that led to human rights abuses, and the checkpoints were an integral part of the system of identifying, detaining, interrogating and torturing targets, for which work the Applicant was promoted;

2. given his admissions to the CBSA, the Applicant knew what would happen to the targets he transferred to intelligence services and the ID reasonably preferred that evidence over his testimony at the hearing; and

3. the Applicant remained with the NSF voluntarily; he did not even seek to leave until 2000 when he perceived personal risk to himself, at which point he left the NSF without difficulty.

[52] The test for complicity as set out in *Ezokola* was identified by the ID and reasonably applied. The ID's findings on credibility, complicity and that crimes against humanity were committed were well supported by the evidence. They were reasonable, particularly given the

low burden of proof to establish inadmissibility. The decision-making process was intelligible, transparent and justified. The outcome of inadmissibility was defensible on the facts and law. The *Dunsmuir* criteria were met.

[53] For these reasons the application is dismissed.

[54] Neither party suggested a question for certification and none exists on these facts.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No serious question of general importance arises on these facts.

"E. Susan Elliott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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