Federal Court  Cour fédérale

Date: 20180131

Docket: IMM-2652-17

Citation: 2018 FC 106

Ottawa, Ontario, January 31, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

EZZAT FAWZY HANNA GERGES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ezzat Fawzy Hanna Gerges, is an Egyptian citizen. He applied for permanent residence in Canada but was found not to meet the requirements for a visa. The Immigration Officer [Officer] concluded there were reasonable grounds to believe Mr. Gerges had been complicit in crimes against humanity while employed as a member of the Egyptian

National Police [ENP] between 1961 and 1986, and was therefore inadmissible pursuant to paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Gerges argues the Officer's decision was unfair and unreasonable as the Officer: (1) ignored or selectively reviewed relevant evidence; (2) failed to address submissions related to a claimed abuse of process arising from the delay in processing the application; (3) erred in applying the test in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]; and (4) fettered his or her discretion by wholly adopting the analysis undertaken by a third party in considering and applying the test in *Ezokola*. In written submissions Mr. Gerges also argued that the Officer erred by misapplying subparagraph 5(1)(a)(ii) of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [*War Crimes Act*]. This last argument was not pursued in oral submissions.

[3] The respondent submits that Mr. Gerges' submissions were considered, there was no error in the application of the *Ezokola* test and the decision was reasonable. The respondent further submits that the time taken to render a decision did not need to be addressed in the decision as it was not relevant to the Officer's duty to determine the question of admissibility.

[4] The application is granted. I am of the opinion that the Officer's failure to meaningfully engage with and address Mr. Gerges' submissions in response to a procedural fairness letter [PFL] that was sent in April 2016 renders the decision unreasonable.

[5] Counsel for Mr. Gerges submits that in granting the application I should also direct the respondent find Mr. Gerges not inadmissible. I have declined to do so as explained below. However, I have directed that the respondent redetermine the matter within five months of the issuance of this Judgment.

II. Background

[6] Mr. Gerges is a Coptic Christian who served in the ENP for 25 years. He was forced to retire from the ENP in 1986. He went on to become a law professor and is now fully retired. He was sponsored for permanent residence in Canada by his son, a Canadian citizen. The application was commenced in 2009.

[7] In April 2016 Mr. Gerges was sent a PFL citing concerns that his service with the ENP rendered him inadmissible to Canada under IRPA paragraph 35(1)(a) for committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *War Crimes Act*.

[8] Mr. Gerges' counsel provided submissions in response to the PFL in July 2016, and included with those submissions: (1) a statutory declaration from Mr. Gerges attaching a table describing his duties in various positions and at various ranks while serving with the ENP; (2) the Statutory Declaration of an author and journalist who had "covered all the aspects of the Egyptian society for more than 30 years"; (3) a letter from a Canadian terrorism expert and author who had reviewed the material; and (4) the Statutory Declaration of a retired senior member of the ENP who had served with Mr. Gerges.

[9] No decision was rendered after Mr. Gerges responded to the PFL. In March 2017 an application seeking a writ of *mandamus* compelling the Officer to make a decision was commenced. In June 2017 and prior to a hearing of the *mandamus* application the Officer rendered a decision.

[10] In the decision letter the Officer acknowledged reviewing Mr. Gerges' response to the PFL but dismissed his evidence and submissions:

> The majority of your response to the procedural fairness letter consists of character references stating that you are a good person. However, in our letter we were not addressing your character but your long service career as a member of the Egyptian police which there have been multiple documented sources attesting to the brutality of police officer [*sic*] during the interrogation process in Egypt during the period you were employed. Your educational certificates, employment letter and personal photos submitted are not relevant to my decision in this case. In addition, the submitted description is written by you and is not a documentary evidence of your duties during your 25 year police service.

[11] The Officer then addressed the issue of whether Mr. Gerges was inadmissible as a person described in paragraph 35(1)(a) of the IRPA on the basis of the six factors identified in *Ezokola.* The Officer's assessment, subject to a single and inconsequential editorial change, was copied verbatim from an analysis prepared by the National Security Screening Division within CBSA in April 2015. It appears that the CBSA assessment triggered the PFL sent to Mr. Gerges a year later in April 2016.

[12] The Officer adopts the conclusion reached in the CBSA assessment: that based on the *Ezokola* factors, the legislation, Mr. Gerges' specific information and open source information there were reasonable grounds to believe Mr. Gerges voluntarily made a significant and knowing

contribution to crimes against humanity committed by ENP members. He was found inadmissible to Canada under IRPA paragraph 35(1)(a).

III. Analysis

[13] The parties agree, and the Court concurs, that the standard of review applicable to matters involving the Officer's consideration of and assessment of the evidence in determining the question of admissibility, is reasonableness (*Canada (Citizenship and Immigration) v Verbanov*, 2017 FC 1015 at para 17; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 51, 53).

[14] Mr. Gerges' counsel further submits that the fettered discretion argument raises a question of fairness that is to be reviewed against a standard of correctness. While I am satisfied that the issue of fairness alleged is reviewable against a standard of correctness (*Ibrahim v Canada (Citizenship and Immigration* 2015 FC 1033 at para 7), I need not address whether the verbatim adoption of the CBSA assessment amounted to a breach of fairness when assessed against the *Baker* factors (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28, 174 DLR (4th) 193) as the Officer's failure to meaningfully engage with and address Mr. Gerges' submissions renders the decision unreasonable.

[15] Complicity is a relevant consideration when assessing whether an individual is inadmissible under IRPA paragraph 35(1)(a): *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 21. A complicity analysis requires the decision-maker to remain focused on the individual's contribution to the crime or criminal purpose (*Ezokola* at para 92).

[16] The factors identified in *Ezokola* are intended to serve as a guide in undertaking this assessment. They are to be addressed having regard to all of the evidence and the actual role played by the individual. A properly conducted *Ezokola* analysis leaves no room for a finding of complicity based solely on association (*Ezokola* at paras 91, 92, 100-102).

[17] In this case relevant evidence was not considered and assessed. While the Officer acknowledged Mr. Gerges' response to the PFL and the evidence provided, the Officer discounts all the evidence finding the "majority of your response … consists of character references stating that you are a good person." The evidence is summarized as photos, certificates and an employment letter that is not relevant to the decision, and the Officer dismisses a summary of employment with the ENP on the basis that it was written by Mr. Gerges.

[18] The Officer's broad treatment of the submissions overlooks the simple fact that submissions were made and evidence was produced that was directly relevant to the assessment of the six *Ezokola* factors. This included:

A. Submissions from Mr. Gerges' counsel to the effect that (1) the documentation cited in the PFL suggested that human rights violations occurred within branches of the ENP that conducted political or national security investigations, and that human rights violations within prisons were targeted against political detainees; (2) the applicant never worked for ENP branches that conducted political or national security investigations, nor did he work in prisons; (3) the applicant worked entirely within the ENP's Public Security department; and (4) there is no

suggestion in any documentation that the Public Security department was involved in human rights violations.

B. Evidence from a journalist and human rights activist stating that as Egypt is an Islamic state, Christian police officers in Egypt are never placed in positions where they could commit abuses against Muslims; rather, they perform tasks such as issuing national ID cards and securing public buildings.

C. An opinion letter from an academic stating that the police system in Egypt would never have allowed the applicant to be in a position where he could have committed abuses.

D. Evidence from a colleague which stated that Mr. Gerges' responsibilities consisted of administrative matters and that he was never involved in political investigations or other work that would have involved human rights abuses.

[19] The Officer was under no obligation to accept the evidence and submissions identified above. However the Officer did need to address the evidence in undertaking the *Ezokola* analysis. The failure to do so and then adopting an earlier third party analysis prepared without the benefit of Mr. Gerges' submissions has resulted in a decision lacking in justifiability, transparency and intelligibility.

IV. Remedy and Costs

[20] Counsel for Mr. Gerges relies on *Ali v Canada (Minister of Employment and Immigration)* [1994] 3 FCR 73, 27 Admin LR (2d) 110 [*Ali*] to argue that due to the significant delay in processing the application it would be appropriate for this Court to direct Mr. Gerges be found admissible to Canada. I am not prepared to direct a determination.

[21] *Ali* identifies the types of questions to be addressed when specific direction is being considered. One of those questions is whether the evidence on the record is clearly conclusive of only one possible outcome. This is not the case here. As was noted in oral submissions the documentation relied on in completing the CBSA assessment in 2015 is not included in the Certified Tribunal Record [CTR]. Any consideration of Mr. Gerges' submissions would require a review of this documentation. Without it, there is no basis upon which to conclude that there is only one possible outcome in this case.

[22] In the alternative counsel requested the Court direct a redetermination within a fixed period of time. The long processing time for Mr. Gerges' application and the failure to render a decision before a *mandamus* application was filed is not addressed by the Officer in the decision and was unexplained by the respondent. The passage of time is, on its face, significant and, absent any explanation, troubling. The respondent was able to render the impugned decision within three months of the *mandamus* application being filed. In the circumstances it would, in my view, be reasonable to expect the respondent to complete the redetermination within five months of the date of this Judgment and Reasons.

[23] In oral submissions Mr. Gerges also sought costs. Pursuant to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, no costs shall be awarded unless the Court, for special reasons, so orders. While I am troubled by the unexplained delay in the determination of the application, on the facts before me I am unable to conclude that the delay alone amounts to special reasons justifying an award of costs.

V. Conclusion

[24] The application is granted. The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-2652-17

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The matter is returned for redetermination by a different decision-maker;
3. The redetermination shall be completed and the decision provided to the applicant not later than five (5) months following the date of this Judgment;
4. No costs are awarded;
5. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2652-17
STYLE OF CAUSE:	EZZAT FAWZY HANNA GERGES v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 18, 2018
JUDGMENT AND REASONS:	GLEESON J.
DATED:	JANUARY 31, 2018

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