Federal Court  Cour fédérale

Date: 20180208

Docket: IMM-2767-17

Citation: 2018 FC 146

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 8, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

EDER LUIS MOLINA DURANGO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Eder Luis Molina Durango, is a citizen of Colombia. From 2004 to 2008, the applicant worked as an analyst for the intelligence section of the Colombian National Police [CNP] (*Seccional de intelligencia de la Policia*, SIPOL) in the Colombian department of Caquetá, in the context of the fight against the Revolutionary Armed Forces of Colombia [FARC].

[2] On December 10, 2009, the applicant filed an application for permanent residence at the Canadian embassy in Colombia. His application was rejected on June 5, 2017, by a visa officer [the officer], who found that there are reasonable grounds to believe that the applicant is inadmissible under paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA].

[3] The applicant is seeking judicial review of that decision. He maintains that the officer did not apply the criteria set out by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]. Although he acknowledges that the CNP committed crimes against humanity and other human rights violations, the applicant criticizes the officer for failing to consider the evidence showing that he did not commit any crimes against humanity. In particular, the applicant had presented the officer with letters from various police and legal institutions in Colombia attesting that they had no records against the applicant, along with a letter from the applicant's father-in-law. His father-in-law explains that he had done research on the applicant before the applicant married his daughter and did not discover any trace of crimes or human rights violations committed by the applicant while he was working for the CNP.

[4] The determination of whether a person is inadmissible under paragraph 35(1)(a) of the IRPA is a question of mixed fact and law that must be reviewed according to the reasonableness standard (*Al Khayyat v Canada (Citizenship and Immigration)*, 2017 FC 175 at paragraph 18 [*Al Khayyat*]; *Khasria v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 773 at paragraph 16).

[5] Where the reasonableness standard applies, this Court's role is to determine whether the decision falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law." If "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility," it is not open to this Court to substitute its own view of a preferable outcome (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 59).

[6] Pursuant to paragraph 35(1)(a) of the IRPA, a person is inadmissible in Canada on grounds of violating human or international rights for 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*, SC 2000, c. 24.

[7] The applicant argues that he could not have committed crimes against humanity because he held only a subordinate position in the police force and because no criminal charges have been brought against him in Colombia.

[8] With respect, the Supreme Court of Canada ruled in *Ezokola* that personal participation in a crime is not necessary. An individual can be complicit without being present at the crime and without physically contributing to the crime if the individual knowingly made at least a significant contribution to the group's crime or criminal purpose (*Ezokola* at paragraphs 8, 77; *Talpur v. Canada (Citizenship and Immigration)*, 2016 FC 822 at paragraph 30 [*Talpur*]; *Concepcion v. Canada (Citizenship and Immigration)*, 2016 FC 544 at paragraph 12 [*Concepcion*]; *Mata Mazima v. Canada (Citizenship and Immigration)*, 2016 FC 531 at

paragraphs 44–45 [*Mata Mazima*]). Although *Ezokola* deals with the scope of article 1F(a) of the United Nations' *Convention Relating to the Status of Refugees*, the Federal Court of Appeal and this Court have recognized that the principles set out in that case also apply to inadmissibility under paragraph 35(1)(a) of the IRPA (*Kanagendren v. Canada (Citizenship and Immigration)*, 2015 FCA 86 at paragraphs 15–22 [*Kanagendren*]; *Al Khayyat* at paragraphs 22–24; *Talpur* at paragraph 20; *Concepcion* at paragraph 10).

[9] Each case has its own facts. *Ezokola* provides a non-exhaustive list of the factors that are used to determine whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose: (1) the size and nature of the organization; (2) the part of the organization with which the refugee claimant was most directly concerned; (3) the refugee claimant's duties and activities within the organization; (4) the refugee claimant's position or rank in the organization; (5) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and (6) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization (*Ezokola* at paragraph 91).

[10] Lastly, the standard of evidence that applies to paragraph 35(1)(a) is specified in section 33 of the IRPA, that is, the existence of "reasonable grounds to believe". That standard requires more than mere suspicion, but is less strict than the balance of probabilities that applies in civil matters (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paragraph 114).

[11] In contrast to the applicant's claims, the Court finds that the officer properly identified and applied the criteria set out by the Supreme Court of Canada in *Ezokola*. Upon reading the decision, it is clear that the officer analyzed each of the six (6) factors used to determine whether the applicant had voluntarily made a significant and knowing contribution to a crime or criminal purpose. After having carefully analyzed each of the factors, the officer found that there were reasonable grounds to believe that the applicant was inadmissible under paragraph 35(1)(a) of the IRPA.

[12] That finding is supported namely by the following facts. The applicant voluntarily joined the CNP in 2002, and he worked there for four (4) years as an analyst for the CNP's intelligence section. He only resigned from his position in 2008 because he had heard that his presence in the CNP could pose a problem for obtaining permanent residence in Canada. While the applicant was an analyst at SIPOL, the CNP worked in cooperation with other intelligence and security agencies during a period when the Colombian authorities were engaged in intense armed conflicts with the FARC and during which numerous crimes against humanity and other human rights violations were reported. The applicant admitted that, as part of that cooperation, he had attended meetings with Brigade 12 of the Colombian Army, an organization identified as having committed acts of torture. In addition, the applicant acknowledged that he had been involved in planning certain operations, that the intelligence he had gathered as part of his duties was used by paramilitary groups identified as being responsible for kidnappings, torture, forced disappearances and murder, and that this intelligence had led to the interrogation and arrest of individuals. The applicant admitted that he himself had participated in those interrogations or, at the very least, had been a witness to them. During his interview with the Canada Border Services

Agency [CBSA], the applicant also acknowledged that he had heard rumours that human rights violations were being committed by government forces in the region where he was deployed with the CNP.

[13] In this case, the Court must determine whether it was reasonable for the officer to find that there are reasonable grounds to believe that the applicant was an accomplice in crimes against humanity. Given the evidence that was at the officer's disposal and considering the applicable standard of evidence, the Court finds that the officer's decision is reasonable because it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at paragraph 47). It is not open to this Court of judicial review to reassess the evidence to substitute the outcome it would have preferred (*Talpur* at paragraph 28).

[14] The Court recognizes that the officer did not make explicit reference to the term "significant" when he discussed the applicant's contribution. Even though it would have been preferable for the officer to have used that qualifier in his decision, the Court is satisfied that the officer used the right criteria to determine whether the applicant was complicit in the criminal acts of which he is accused. First, it appears from the record that the officer relied on a CBSA report that clearly indicates what factors must be considered in order to determine whether the individual voluntarily made a significant and knowing contribution to a crime or criminal purpose. Second, the evidence on record supports such a finding. Third, the officer determined that the applicant sought to downplay his role and involvement in the operations that led to the arrest of FARC members. The Court finds that such a conclusion implies that the applicant's

contribution was significant or, necessarily, more than an infinitesimal contribution, as stated in *Ezokola* (*Ezokola* at paragraphs 56–57; *Mata Mazima* at paragraph 44).

[15] The applicant also maintains that the officer erred by not ruling on the letter of support from the applicant's father-in-law. The Court is of the view that the letter in question would not have influenced the officer's finding, since inadmissibility does not lie in individuals having committed crimes against humanity themselves (*Ezokola* at paragraphs 84–90).

[16] In his factum, the applicant criticizes the officer for having disregarded the evidence concerning the protection of the family unit and the best interests of his two (2) children who are living in Canada with their mother. At the hearing, however, the applicant did not insist on that argument, which he described as being secondary. The Court concurs with the respondent's argument that, with regard to inadmissibility under section 35 of the IRPA, there are no exceptions for humanitarian and compassionate considerations (*Kanagendren* at paragraphs 26–27). Therefore, the officer was not required to review the humanitarian and compassionate considerations raised by the applicant.

[17] In closing, the Court does not intend to address the preliminary arguments raised by the respondent, given the finding that it has made on the application for judicial review.

[18] Consequently, the application for judicial review is dismissed. The parties did not propose any questions to be certified, and the Court is of the view that this matter does not raise any.

JUDGMENT in IMM-2767-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
This 16th day of September 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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