

Federal Court



Cour fédérale

Date: 20200127

Docket: IMM-2297-19

Citation: 2020 FC 130

Ottawa, Ontario, January 27, 2020

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

SAID AGBORERE HAMMED

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision made by the Refugee Protection Division (“RPD”) dated March 6, 2019. The RPD concluded the Respondent, Mr. Hammed, was not excluded from Canada by operation of section 98 of the *IRPA* for being a person referred to in articles 1F(a) and 1F(c) of the *United Nations Convention Relating to the Status of Refugees*

[*Convention*]. The RPD allowed his claim for refugee protection, along with the claims of four (4) other family members based upon religious persecution if they were to return to their country of origin, Nigeria. For the reasons set out below I dismiss the application for judicial review.

II. Summary of Facts and Decision Under Review

[2] Mr. Hammed, his spouse and their three (3) children claimed refugee protection under section 96 and subsection 97(1) of the *IRPA*. They are all citizens of Nigeria. They based their claims for asylum on events that occurred between November 15, 1998 and January 24, 2012, the date Mr. Hammed's spouse and children arrived in Canada. Mr. Hammed subsequently arrived in Canada on April 30, 2012. Mr. Hammed and his spouse claimed, in their Personal Information Forms, that they were persecuted by members of his family because of his conversion to Christianity. Mr. Hammed contends that, despite pressure from his family, he refused to return to the Islamic faith. As a result, a fatwa was issued against him that he be killed. Threats of violence, none of which are relevant to this judicial review application, were also made against Mr. Hammed's youngest daughter.

[3] The Minister of Public Safety and Emergency Preparedness intervened in Mr. Hammed's RPD hearing. The Minister contended Mr. Hammed should be excluded pursuant to section 98 of the *IRPA* due to his approximate 15 years of service in the Nigerian Army, most of which was as a public relations officer. The Minister contended Mr. Hammed participated, or was complicit, in the perpetration of crimes against humanity and/or war crimes. The Minister submitted a number of exhibits in support of his position, including a transcript of Mr. Hammed's interview with the Canada Border Services Agency ("CBSA"). The RPD found Mr. Hammed credible and

concluded he was not excluded pursuant to section 98 of the *IRPA* for being a person referred to in articles 1F(a) and 1F(c) of the *Convention*. The RPD then considered the refugee claim of Mr. Hammed and his family. It found their allegations of fear to be credible and that a prospective fear of persecution based upon a *Convention* ground existed in Nigeria. The RPD concluded neither state protection nor an internal flight alternative was available in the country.

[4] The Minister seeks judicial review of the RPD's finding that Mr. Hammed is not excluded by operation of section 98 of the *IRPA*. As a result, I will only summarize the RPD's reasons in this regard.

[5] The RPD referred to all of the parties' submissions on the issue of exclusion and stated that it "took care and the necessary time to read all the submissions and take them into account in its decision". It found that the documentary evidence established that the Nigerian Army committed crimes against humanity on numerous occasions during the period when Mr. Hammed was a member. However, the RPD concluded Mr. Hammed was truthful when he stated that he never directly participated in those crimes. The RPD then assessed whether Mr. Hammed, not having been directly involved in the crimes, was complicit in them. In determining whether Mr. Hammed was complicit, the RPD acknowledged it was required to follow the jurisprudential guidelines established by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*].

[6] The RPD acknowledged that, applying *Ezokola*, mere association does not suffice to exclude someone from protection: "there must be serious reasons for considering that he has

voluntarily made a significant and knowing contribution to the crimes or to the criminal purpose”. The RPD concluded there was insufficient evidence to demonstrate a significant contribution by Mr. Hammed. First, the RPD considered his duties as a public relations official with the Nigerian Army. It concluded those duties did not demonstrate a significant contribution to the Army’s crimes because, among other factors, he was always under the command of a superior officer and the contents of his press releases were conveyed to him by his superiors. Second, the RPD considered that Mr. Hammed had voluntarily enrolled in the Nigerian Army and remained there for 15 years. However, the RPD accepted he could not unilaterally leave because he would have been considered a deserter and sentenced to imprisonment. Third, the RPD considered Mr. Hammed’s rank. It accepted the Minister’s assertion that, as a Major, Mr. Hammed was a senior officer. While a major is far from the “top of an organization’s hierarchy,” the RPD observed that such an individual is more likely to have knowledge of crimes committed by the organization. However, the RPD concluded that Mr. Hammed did not exercise any control over the perpetrators of the criminal acts, nor that in the context of his public relations work he would have allowed crimes to be committed or concealed. In the result, the RPD rejected the Minister’s assertion that Mr. Hammed was complicit in crimes contrary to Articles 1 F(a) and 1F(c) of the *Convention*.

III. Relevant Provisions

[7] The relevant provisions are sections 96 and 98 of the *IRPA*, as well as Articles 1 F(a) and 1F(c) of the *Convention*, as set out in the attached Schedule.

IV. Positions of the Parties

[8] The only issue in this case is whether the RPD reasonably concluded that Mr. Hammed is not excluded from protection by reason of his alleged complicity in war crimes or crimes against humanity.

[9] The Minister contends the RPD committed four (4) errors that render the decision unreasonable. The first is that the RPD misapprehended the evidence regarding Mr. Hammed's interaction with reporters in his capacity as a public relations officer. The Minister contends that the RPD erred when it concluded Mr. Hammed had no right to respond to reporters' questions. The Minister refers to several newspaper articles where Mr. Hammed is credited with making statements to the media, including responding to questions, and is identified as the spokesperson for the Joint Task Force or for the Brigadier-General. These factors were, according to the Minister, overlooked by the RPD in its analysis. The Minister also notes that on at least two (2) occasions during the hearing, Mr. Hammed indicated that he met and spoke to the press in an effort to explain military action and to direct the press to his military commander if they required more information. The Minister contends the RPD was required to clearly explain its consideration of this evidence given that that evidence contradicts its finding that Mr. Hammed did not speak to reporters and that the Minister's representative specifically raised this issue. According to the Minister, failure to address the evidence and arguments made demonstrates unreasonableness: see *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 126-127 [*Vavilov*] and *Canada (Citizenship and Immigration) v Adeola*, 2018 FC 1222 at paras 33-34).

[10] Second, the Minister contends the RPD failed to properly consider his position that Mr.

Hammed significantly contributed to the crimes against humanity committed by the Nigerian Army. The Minister advanced the position that Mr. Hammed had issued pro-army press releases and other statements, which minimized the Army's transgressions. This, according to the Minister, contributed significantly to the impunity enjoyed by the Nigerian Army in committing its crimes.

[11] Third, the Minister contends the RPD did not properly examine the potential defense of duress. Given Mr. Hammed's assertions that he was working under duress or under authority as a public relations officer and his espoused fear of prosecution should he leave the Army early, the Minister contends the RPD should have engaged more fully with the evidence.

[12] Fourth, the Minister contends the RPD erroneously introduced the notion that the respondent did not "exercise control" over those who committed the criminal acts. The Minister points out that *Ezokola* does not require the element of "control" in order to exclude a claimant based upon crimes against humanity.

[13] Finally, the Minister opposes Mr. Hammed's claims for costs, asserting there are no special circumstances that warrant such an award.

[14] Mr. Hammed's response to the Minister's assertions are relatively straightforward. First, regarding the interaction with reporters, Mr. Hammed contends it was reasonable for the RPD to conclude that he did not communicate with them. The fact Mr. Hammed prepared press releases and communicated the Army's position was, according to Mr. Hammed, never in doubt. Rather,

the RPD's focus was properly on the source of the information and whether Mr. Hammed had any meaningful control over its content or dissemination. He contends the evidence is not inconsistent with his position or the RPD's finding that he was merely conveying information he received from his superiors. He contends the RPD reasonably accepted his explanations that his commanders provided the information contained in the press releases, that he was not in the field to verify the information, and that, when local media quoted him, they were actually using information included in press releases. Mr. Hammed cites *Kallab v Canada (Citizenship and Immigration)*, 2019 FC 706 at para 40 in support of his position that credibility findings can only be overturned in the clearest of cases. He contends this is not such a case.

[15] Second, in considering whether his contribution was significant, Mr. Hammed contends it could not have been significant because any inaccurate information he helped disseminate did not counter the predominantly negative image of the military or mislead the audience. The crimes committed by the Nigerian Army were widely reported in the international media, and the content of those articles differed from that provided by the Army's public relations group. It follows that any of the Army's press releases disseminated by Mr. Hammed would have been countered by the numerous other reports from international groups. In this case, the RPD member said he considered all the facts and submissions of the parties. It follows, according to Mr. Hammed, that the RPD did not commit a reviewable error by failing to address each point raised by the Minister, citing *Vavilov* at para 91. Mr. Hammed contends the RPD's decision was consistent with the evidence.

[16] Third, regarding Mr. Hammed's alleged duress, he says he admitted that he doubted the

accuracy of some of the information in the press releases. However, his testimony about his lack of influence and fear of suffering consequences in the event he tried to speak up was deemed credible by the RPD. His evidence was corroborated by the documentary evidence concerning the environment of fear, injustice, duress and the lack of due process in the Nigerian military.

[17] Fourth, Mr. Hammed contends it was appropriate for the RPD to consider whether he exercised control over those who committed the acts. According to *Ezokola*, a finding of complicity is linked to whether “an individual has control or responsibility over the individuals committing the crimes”. Contrary to the Minister’s assertion, consideration of Mr. Hammed’s control or lack thereof, was, according to him, a relevant consideration.

[18] Finally, Mr. Hammed contends there are special reasons to award costs in the amount of \$5,000. Mr. Hammed says the Minister should have obtained the RPD audio recording before alleging that the RPD did not consider all the arguments and evidence. This failure to obtain the audio recording and fully investigate the merits, according to Mr. Hammed, undermined the integrity of the RPD procedures and unnecessarily prolonged the agony of his family.

V. Analysis

[19] The parties both contend that the applicable standard of review is reasonableness. I agree and conclude that the standard is not altered by *Vavilov*. This, regardless of whether the question is framed narrowly as one of credibility or broadly, as a review of a question of mixed fact and law. When reviewing a decision based upon reasonableness review, “a court must consider the

outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified” (*Vavilov* at para 15).

[20] The RPD decision meets the test of reasonableness. While the evidence established that the Nigerian Army engaged in human rights abuses, the task of the RPD was to determine whether Mr. Hammed was complicit in them. Although all the *Ezokola* factors are relevant to this determination, it appears duress and Mr. Hammed’s duties within the organization were the primary considerations. Furthermore, in determining whether Mr. Hammed was complicit, the RPD was dependent largely upon Mr. Hammed’s own testimony as it was the only direct evidence of his responsibilities. In this regard, he testified that he had no control over the content of the press releases he helped prepare. It was open for the RPD to find him credible in this regard. In reaching its conclusion on credibility, the RPD compared Mr. Hammed’s testimony to the information he provided at the CBSA interview. Second, although the Minister relies on news articles that quote Mr. Hammed, this does not constitute proof he had control over the information he was disseminating. The fact he was quoted corroborates his testimony that he prepared the releases based on instructions given to him, and that his name appeared as the signatory. Furthermore, while the Minister contends the RPD misinterpreted the facts when it accepted that Mr. Hammed did not speak to the media despite evidence from numerous media outlets attributing remarks to Mr. Hammed, I note that the interpretation of the evidence falls within the domain of the RPD. In these circumstances, it is evident the RPD accepted Mr. Hammed’s version that his task was limited to preparing press releases based upon information received from his superiors, his freedom to respond was limited by his superiors and he did not engage reporters in exchanges about his interpretation. The only interpretation he was permitted

to convey was that of his superiors. The information being cited was therefore that of his superiors. It was open to the RPD to conclude that Mr. Hammed was only cited because his name appeared as the signatory. Based upon the evidence, it was also open to the RPD to conclude Mr. Hammed did not “talk” to reporters. Contrary to the Minister’s assertions, these, in the circumstances, are not unreasonable evidentiary findings.

[21] Third, documentary evidence corroborated Mr. Hammed’s assertion that members of the army were punished for insubordination and often denied due process. The Minister is correct that positions advanced by him were not specifically addressed by the RPD. However, upon reading the decision as a whole, and given the instruction in *Vavilov* at para 91, I am satisfied there is no requirement, in this case, to specifically address each argument raised. When the RPD says it has considered the evidence and the submissions, it can be taken to have done so unless the remainder of the decision clearly demonstrates otherwise. That is not the case here.

[22] Similarly, I find the Minister’s argument that the RPD failed to properly consider whether Mr. Hammed significantly contributed to the crimes against humanity committed by the Nigerian Army to have no merit. The RPD is not required to refer to every piece of evidence (*Vavilov* at para 91, *Jean-Baptiste v Canada (Citizenship and Immigration)*, 2018 FC 285 at para 20 citing *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at paras 31-34, 421 FTR 309 (Eng), *Quebrada Batero v Canada (Citizenship and Immigration)*, 2017 FC 988 at para 13). In the circumstances, the Minister alleged Mr. Hammed’s contribution was significant. The RPD’s reasons addressed this argument squarely by stating: “it has not been demonstrated to the panel that there is evidence demonstrating a significant contribution”. The rationale for this finding is

evident from the reasons. The RPD arrived at this conclusion in considering (1) the nexus between the accused's behaviour and the behaviour of the group in question and (2) Mr. Hammed's explanation that it was his superior officer who controlled the content of the Army's messages. Mr. Hammed's preparation of press releases, based upon instructions received, was insufficient to satisfy the RPD that he made a significant contribution to the Nigerian Army's crimes. Based upon the record, I find the RPD's conclusion in this regard to be reasonable.

[23] The Minister's third ground of attack against the decision, namely, that the RPD did not properly examine the potential defense of duress, is equally without merit. The Minister claims the RPD's reasons do not discuss Mr. Hammed's assertion that he was consistently working under duress or under authority as a public relations official. However, this claim is explicitly discussed at paragraphs 37-39 of the RPD's reasons under the subheading "Voluntary contribution and duress". The RPD had already stated at paragraph 23 that it had no reason not to believe Mr. Hammed's testimony, which explains why it accepted, at paragraphs 37-39, his explanation that he was working under duress or authority. In addition, paragraphs 40-45 discuss the circumstances under which Mr. Hammed joined the Nigerian Army and the opportunity he had to leave it. *Ezokola*, at para 86, lists these as examples of factors that may properly be considered in assessing the voluntariness of a contribution. It is readily apparent the RPD discussed Mr. Hammed's allegation of duress.

[24] Regarding the Minister's fourth contention, he is correct that control over those who commit criminal acts is not required for an inadmissibility finding. However, Mr. Hammed is correct when he asserts that unique considerations are involved in assessing the role of control in

a determination of complicity (see *Ezokola* at paras 41 and 82). Upon my review of the record, I am not satisfied the RPD concluded control was necessary in order to establish inadmissibility. Had it reached that conclusion, it would have been incorrect. However, I am satisfied the RPD simply considered “control” to be one factor, among several, in its assessment of the issue of complicity.

[25] Finally, I do not consider this an appropriate case in which to award costs. Mr. Hammed contends costs are warranted because the Minister should have obtained the RPD audio recording before alleging the RPD had failed to consider all the arguments and evidence. I do not consider it appropriate to require the Minister, or any other party for that matter, to seek out and listen to the audio recording before receipt of the Certified Tribunal Record. Notices of Appeal and Applications for Judicial Review are routinely issued prior to transcripts being made available. I see no justification for a court-imposed requirement that parties listen to recordings before preparing notices of appeal or applications for judicial review.

VI. Conclusion

[26] The application for judicial review is dismissed without costs. Neither party proposed a question for certification for consideration by the Federal Court of Appeal, and none arises in the circumstances. No question is certified for consideration by the Federal Court of Appeal.

JUDGMENT in IMM-2297-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, without costs. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"

Judge

ANNEX

Immigration and Refugee Protection Act, SC 2001, c 27***Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27*****Convention refugee****Définition de réfugié**

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Exclusion — Refugee Convention**Exclusion par application de la Convention sur les réfugiés**

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

98 La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de

personne à protéger.

Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees

Sections E et F de l'article premier de la Convention des Nations Unies relative au statut des réfugiés

F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

F Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2297-19

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