Federal Court  Cour fédérale

Date: 20210728

Docket: IMM-924-20

Citation: 2021 FC 800

Ottawa, Ontario, July 28, 2021

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

SHALAW ABU-BAKER MAHMOOD

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Immigration Appeal Division, Immigration and Refugee Board of Canada [the "Panel"], dated January 16, 2020, dismissing the Applicant's appeal of the November 20, 2018 decision of the Immigration Division and finding that the Respondent is not inadmissible to Canada pursuant to subsection 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [the "Decision"].

II. Background

[2] The Respondent, Shalaw Abu-Baker Mahmood, was born in Iraq. He was a prison guard at Fort Suse in Iraq from 2006 to 2012.

[3] The Respondent was a private when he commenced work at the prison and resigned in 2012 as a sergeant or sergeant major. The Respondent held various supervisory and administrative positions and was involved in prisoner transfers. His primary duty included managing a barbershop.

[4] American officials were initially in charge of Fort Suse, but eventually withdrew. The Respondent highlights that Fort Suse is generally considered to be a model prison in Iraq. While there was no evidence of systemic problems at Fort Suse, this was a time when torture, beatings, abuse and ill-treatment was widespread in the Iraqi prison system.

[5] The Respondent entered Canada on July 21, 2017 and made a refugee claim. The officer that interviewed the Respondent prepared an inadmissibility report and a Minister's delegate referred the Respondent for an admissibility hearing before the Immigration Division, under section 44 of the *Act*.

[6] The Immigration Division rendered a decision, dated November 20, 2018, finding that the Respondent was not complicit in the commission of crimes listed in the *Crimes Against*

Humanity and War Crimes Act, SC 2000, c 24 [*Crimes Against Humanity and War Crimes Act*].

The Respondent was found to be not inadmissible under subsection 35(1)(a) of the *IRPA*:

Human or international rights violations	**Atteinte aux droits humains ou internationaux**
35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35 (1)** Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(a) 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;	**a)** commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;

III. Decision Under Review

[7] The Applicant Minister appealed the decision to the Immigration Appeal Division. The appeal was dismissed in the Decision, dated January 16, 2020. This Decision is the subject of this current judicial review. The Applicant seeks an Order quashing the Decision and referring the matter back to the Panel for redetermination.

[8] The Panel considered the widespread, systemic use of torture in prisons in Iraq, occurring during the time the Respondent worked as a prison guard. The Panel found that the acts were crimes against humanity. The Panel then turned to consider the test for complicity in crimes against humanity as set out by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration*, 2013 SCC 40 [*Ezokola*], which the Panel stated as:

> …An individual will be inadmissible under section 35(1)(a) of the Act for complicity in international crimes if there are serious reasons for considering that the person voluntarily made a knowing

> and significant contribution to the crime or criminal purpose of group alleged to have committed the crime.

[9] The Panel found that the evidence weighed in favour of finding that the Respondent was complicit in crimes against humanity because "his participation in the prison system was voluntary and he knowingly complied with orders to transfer inmates to institutions where they would likely be tortured".

[10] However, the Panel also found that the Respondent's role was not significant. The Panel considered that:

A. There is no evidence that any torture or ill-treatment of prisoners occurred at Fort Suse;

B. The Respondent was hired as an ordinary guard at a prison that did not engage in the torture or ill-treatment of prisoners;

C. He did not have any control over the transfer of inmates to or from other prisons;

D. He supervised other guards and was primarily responsible for haircuts and supervising haircutters;

E. He reported to the director or manager of the prison, but there is little evidence that he had full access to prisoner records or that he was asked for input on management decisions;

F. It is not reasonable to place the supervisor of other guards in the barbershop as a high-ranking prison officer; and

G. Even if the Respondent participated in punching or kicking a prisoner, which he denied, stating that he was deployed to restrain an uncooperative prisoner, there is no evidence that it was part of a systematic approach to prisoners in Fort Suse or unusual behaviour on the part of the Respondent.

IV. Issue

[11] The issue is whether the Panel's Decision is unreasonable for finding that the Respondent's role in the prison system was not significant?

V. Standard of Review

[12] The presumptive standard of reasonableness review applies to a review of the merits of the Decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25).

VI. Analysis

[13] The Applicant argues that the Panel unreasonably restricted the facts when assessing the test for complicity in crimes against humanity, as set out in *Ezokola*, above. The Panel's conclusion that the Respondent did not make a significant contribution is unreasonable in light of

the Panel's factual findings and prior cases discussing what is required to find significant contribution – administrative or bureaucratic duties in a prison system, such as the one in Iraq at the relevant time, constitute significant contribution. I disagree.

[14] The Panel assessed and weighed all of the evidence and considered the applicable jurisprudence before it determined that the Respondent was not complicit in crimes against humanity. The Decision shows a clear and rational chain of analysis, justified in relation to the facts and the law. The Panel did not restrict the facts, but rather determined which facts were significant based on the evidence before it. The prior case law relied upon by the Applicant shows only that various factors are considered in assessing whether a person made a significant contribution to a crime or criminal purpose – it does not mandate a particular outcome for every case.

[15] A reasonable decision is based on an internally coherent and rational chain of analysis, justified in relation to the facts and the law that constrain the decision-maker (*Vavilov*, above at para 85). The party challenging the decision bears the burden of showing that the decision is unreasonable (*Vavilov* at para 100).

[16] To be inadmissible under subsection 35(1)(a) of the *IRPA* for complicity in international crimes requires "voluntary, knowing, and significant contribution to the crime or criminal purpose of a group" (*Ezokola* at paras 36, 61, 86-91).

[17] In *Ezokola*, the Supreme Court of Canada provided that whether there are serious reasons for considering that an individual has committed international crimes depends on the facts of each case (*Ezokola* at para 91). The degree of contribution must be carefully assessed and the requirement of a significant contribution is critical, given that a contribution of almost any nature to a group could be characterized as furthering its criminal purpose (*Ezokola* at para 88). The Supreme Court of Canada further provided the following list of factors to serve as a guide in assessing "whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purposes" (*Ezokola* at para 91):

A. the size and nature of the organization;

B. the part of the organization with which the refugee claimant was most directly concerned;

C. the refugee claimant's duties and activities within the organization;

D. the refugee claimant's position or rank in the organization;

E. the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and

F. the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.

[18] As it relates to the above factors, the Supreme Court of Canada further specified (*Ezokola* at para 92):

> [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. Refugee claimants come from many countries and appear before the Board with their own life experiences and backgrounds in their respective countries of origin. 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.

[19] The Applicant raises a number of cases with this Court in arguing that the Panel's finding is unreasonable in light of "what is required to find significant contribution". Specifically, that administrative or bureaucratic duties in a prison system such as the one in Iraq constitute a significant contribution.

[20] I find that the Panel did not err in reaching its conclusion on the Respondent's lack of significant contribution based on his role in the prison system in Iraq. As found in *Ezokola*, this assessment is a highly factual one and the Decision is reasonable in light of the factual matrix and the law that bears upon it in this case (*Vavilov* at paras 105, 126).

[21] The Panel considered the evidence comprehensively, noting that the Respondent:

A. Voluntarily applied to and worked as a prison guard in Fort Suse;

B. Testified that he was aware that prisoners were tortured in other prisons;

C. Was told by prisoners that they had been tortured or ill-treated while in detention in other prisons in Iraq;

D. Observed prisoner injuries that he thought were consistent with torture;

E. Thought that transferred prisoners would be returned and tortured once they healed from their injuries at Fort Suse; and

F. Accompanied a prisoner to another prison and observed the kicking and beating of that prisoner by guards of that prison.

[22] The Panel did not restrict the facts by dismissing the Applicant's argument that the Respondent was a high-ranking prison officer. The Panel found:

> … [T]hat is not my understanding of the evidence. Although the respondent supervised six or twelve other guards, there is little evidence that he had any influence over management decisions or which prisoners would be transferred to other prisons or when they would be transferred. He did not have full access to inmates' files and merely transferred them from where they were housed within the prison to the barbershop or hospital. The respondent worked a regular one-week-on and two-weeks schedule and by all accounts, prison guards at Fort Suse treated detainees well.

[23] It is unclear in what other manner the facts may have been restricted, as alleged by the Applicant. Absent exceptional circumstances, a reviewing Court should not interfere with the factual findings of a decision-maker (*Vavilov* at para 125). The Decision falls within a range of possible, acceptable outcomes "which are defensible in respect of the facts and law" (*Vavilov* at para 86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[24] The Applicant has not met the onus of demonstrating that the Decision is unreasonable by simply raising prior jurisprudence, in which different factual matrixes were taken into consideration.

VII. Conclusion

[25] For the reasons above, this Application is dismissed.

[26] There is no question for certification.

JUDGMENT in IMM-924-20

THIS COURT'S JUDGMENT is that

1. The Application is dismissed; and

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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