Federal Court Cour fédérale

Date: 20231010

Docket: IMM-8838-21

Citation: 2023 FC 1342

Toronto, Ontario, October 10, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

DAVID CAMILO ERASO AGUDELO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

[1] By decision dated November 10, 2021, the Refugee Protection Division ("RPD") dismissed the applicant's claim for protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*). The RPD concluded that there were serious reasons for considering that the applicant was complicit in crimes against humanity. He was therefore excluded from refugee protection under section 98 of the *IRPA* and Article 1F(a) of the Refugee Convention.

[2] In this application for judicial review, the applicant submitted that the officer's decision was unreasonable and should be set aside, applying the principles in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, [2019] 4 SCR 653.

[3] For the reasons that follow, I conclude that the application must be dismissed.

I. <u>Events Leading to this Application</u>

[4] The applicant is a citizen of Columbia. In 2002, at age 16, he joined the Colombian military. He graduated from military school in 2005. He remained a member of the military until late 2007. During this time, the Colombian military was engaged in combat with the Revolutionary Armed Forces of Colombia (known as the "FARC").

[5] In April 2007, as a second lieutenant in command of approximately 25 other soldiers, the applicant participated in a mission during which other members of the Colombian military killed civilians. The deceased were falsely reported to be FARC guerrillas who were killed in combat (so-called "false positives"). The applicant was not personally involved in any such deaths. He testified that he did not engage in combat or discharge his weapon at any time and deliberately tried to impede the mission through various means.

[6] The applicant learned that two false positives occurred during the mission, within days of its completion in April 2007. He informed his superior officer and requested a discharge from the military. After the military disciplined the applicant for his conduct during the mission, it discharged him in October 2007.

[7] In 2017, the applicant claimed protection in Canada based on a fear of the Colombian military on return to Columbia. The question arose whether he was excluded from refugee protection owing to his complicity in the Colombian military's "false positive" killing of civilians.

[8] The RPD invited the Minister of Public Safety and Emergency Preparedness to participate in its hearings. The Minister declined. By letter dated January 30, 2018, Canada Border Services Agency ("CBSA") advised that the applicant's military service history had been thoroughly analysed by Canadian immigration officials in Bogotá and Ottawa (presumably owing to the applicant's prior request for permanent residency as a dependant of his father). CBSA's letter advised that in 2011, "after a thorough investigation, a conclusion was reached not to pursue an inadmissibility finding" under section 35 of the *IRPA*.

[9] The RPD held that it nonetheless had to determine whether the applicant was excluded from refugee protection through the operation of *IRPA* section 98 and Article 1F(a) of the Convention. These provisions exclude persons from refugee protection if there are serious reasons for considering that they have committed crimes against peace, a war crime or a crime against humanity.

[10] The RPD found that the false positives were a crime against humanity because they involved the murder of civilians by state actors.

[11] The RPD referred to evidence that between 2002 and 2008, army brigades across Columbia routinely executed civilians to show their superiors “positive” results in the war against guerrillas. The RPD found that the number of “false positives” in Columbia included over 6,400 civilians during the period 2002-2008 when the Colombian government was at war with the FARC. The Colombian military employed the applicant during this time period.

[12] The RPD found that the “killings were largely systematic with almost all brigades under every single division allegedly committing these civilian killings.”

[13] The RPD’s decision considered the principles to establish complicity in *Ezokola v. Canada (Minister of Citizenship and Immigration),* 2013 SCC 40, [2013] 2 SCR 678. The RPD concluded that the applicant voluntarily contributed to the Colombian military and made a significant contribution to it at the time it was combating the FARC. The RPD concluded that there was a link between the applicant’s conduct and the crimes committed by the Colombian military and the subsequent cover-up of those crimes. It found he was “aware of the crimes and the cover-up and was aware that his conduct would assist in that endeavour”. Overall, the RPD determined that there were “serious reasons for considering that the applicant knowingly made a voluntary and significant contribution to the crimes against humanity committed by the Colombian military”.

[14] The applicant challenged the RPD’s decision in this judicial review proceeding.

II. Analysis

A. *Standard of Review*

[15] The standard of review for the RPD's substantive decision is reasonableness: see e.g. *Mugisha v. Canada (Citizenship and Immigration),* 2023 FC 1055, at para 7; *Al-Fahham v. Canada (Citizenship and Immigration),* 2022 FC 322, at paras 6-7.

[16] Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov,* at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov,* esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v. Canadian Union of Postal Workers,* 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61. See also *Mason v. Canada (Citizenship and Immigration),* 2023 SCC 21, at paras 8, 59-61, 66.

[17] Not all errors or concerns about a decision will warrant the Court's intervention. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. The problem(s) cannot be merely superficial or peripheral, but must be sufficiently central or significant to render the decision unreasonable: *Vavilov,* at para 100; *Canada Post,* at

para 33; *Alexion Pharmaceuticals Inc v. Canada (Attorney General),* 2021 FCA 157, [2022] 1 FCR 153, at para 13.

[18] Absent exceptional circumstances, this Court's role is not to agree or disagree with the decision under review, to reassess the merits, or to reweigh the evidence: *Vavilov,* at paras 83, 125-126; *Alexion Pharmaceuticals*, at para 24.

B. ***Did the RPD make a reviewable error by failing to apply the principles for complicity in Ezokola?***

[19] The applicant's submissions recognized that the RPD correctly stated the proper legal test for complicity from *Ezokola* at several places in its decision. The test required proof that he made a "voluntary, knowing and significant contribution to the crime or criminal purpose" of the group alleged to have committed the crime. However, the applicant argued that the RPD erred in law when it applied the complicity test.

[20] The applicant made two principal arguments. First, he submitted that in analysing whether he made a voluntary, significant and knowing contribution, the RPD failed to focus on whether he made a significant contribution "to the crime or criminal purpose of the group" as required by *Ezokola*: see paras 8, 29, 87-88, 91-92.

[21] The applicant argued specifically that the RPD erred in law when it concluded that he made a "significant contribution to the Colombian military", rather than determining whether he made a significant contribution to the crimes or criminal purposes of the military. The applicant submitted that the RPD in fact reached no conclusion on whether he made a significant

contribution to the crimes committed by the Colombian military. Associated with this submission, the applicant contended that the RPD focused erroneously on the applicant's whole military career, rather than on the key time period in question (December 2006 to April 2007).

[22] The applicant further argued that, based on the RPD's summary of the applicant's brief military career, it was hard to understand how it could be concluded that his contribution to the military was significant even if that were the test. The applicant did not engage in combat or draw his weapon and mainly did reconnaissance work and gathered information from civilians during three missions, one of which lasted nine days.

[23] The applicant's second submission was that the RPD failed to consider properly the mental element (*mens rea*) of the complicity analysis required by *Ezokola*, with a focus on whether he intended to further the crimes of the Colombian military. According to the applicant, the RPD erred because it accepted his evidence that he deliberately sabotaged the April 2007 mission through his own conduct, which implied that he did not intend to contribute to the military's crimes. He referred to *Ezokola* (at paragraphs 89-90) and the Supreme Court's discussion of the Rome Statute starting at paragraph 54 of *Ezokola*.

[24] The respondent disagreed. The respondent argued that the RPD's reasons demonstrated that it was well aware that it was required to assess the applicant's "contribution to the crime or criminal purpose" of the organization. The respondent submitted that it was permissible for the RPD to carry out this task by assessing an individual's career and their voluntary contribution to the organization responsible for the crime (citing *Wijenayake v. Canada (Citizenship and*

Immigration), 2022 FC 1224, at para 70). The respondent noted that the RPD was alive to applicant's contribution to the false-positive events, and analysed when the applicant first acquired knowledge of false positives and his actions afterwards, particularly his voluntary participation in the April 2007 operation and his continued tangential involvement with the military after his discharge. The respondent argued that it was open to the RPD to find that the applicant made a significant contribution to the military, including after acquiring a subjective awareness of the military's criminal purpose with respect to false positives.

[25] On the *mens rea* issue, the respondent observed that the RPD expressly considered the applicant's testimony that he had deliberately delayed his part of the mission, although the respondent argued that the RPD did not necessarily accept that testimony. The respondent noted the RPD's findings that the applicant was quiet after learning of the "false positives" and that he continued to help the military achieve its goals after hearing rumours of the "false positives" several months before the April 2007 mission.

[26] Applying the reasonableness standard of review, I agree with the respondent's position that the RPD did not make a reviewable error.

[27] First, the RPD repeatedly stated the correct legal standard for complicity as instructed in *Ezokola*. Near the beginning of its reasons, the RPD stated:

> [9] A claimant need not directly participate in crimes against humanity, or crimes or crimes against peace. A finding of exclusion can apply where the individual is complicit in the crimes if there is a link between that individual and the knowledge of the crime or criminal purpose of the group. The Supreme Court of Canada has held that this link will be established when there are

> serious reasons for considering that a claimant made a voluntary, knowing and significant contribution to the crime or criminal purpose of the group who is alleged to have committed the crime. Mere association or passive acquiescence is not sufficient to conclude that there is complicity.
>
> [10] The standard to be applied to the test is "serious reasons for considering", which is less than the civil side standard of "balance of probabilities" but higher than "mere suspicion or reasonable grounds for suspecting."

[28] The applicant did not challenge these statements of law and indeed, expressly agreed that paragraph 9 of the RPD's reasons was correct: see *Ezokola,* at paras 8, 91-92, 101-102. The RPD made additional correct legal statements or conclusions on relevant issues, including at paragraph 34 and in its conclusion at paragraph 54 of its reasons. The RPD also set out and considered the six analytical factors provided by the Supreme Court as a guide for assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose: *Ezokola,* at para 91. The applicant did not argue that the RPD erred in its use of those factors.

[29] Second, the RPD did not err in law merely by assessing the applicant's contribution to the military and reaching a conclusion on that issue. The Supreme Court held in *Ezokola* that to establish the requisite link between the individual and the group's criminal conduct, the accused's contribution does not have to be "directed to specific identifiable crimes" but can be directed to "wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes": *Ezokola,* at para 87 (quoting *R. (J.S. (Sri Lanka)) v. Secretary of State for the Home Department,* [2010] UKSC 15, [2011] 1 A.C. 184, at para 38). The Supreme Court further stated that

because contributions of almost every nature to a group could be characterized as furthering its criminal purpose, the degree of the contribution must be carefully assessed. The requirement of a significant contribution is critical to prevent an unreasonable extension of the notion of criminal participation in international criminal law: *Ezokola,* at para 88.

[30] Consistent with this guidance in *Ezokola* at paragraphs 87-88, this Court has concluded that it is not a reviewable error to assess an applicant's contribution to the organization that committed the crimes if that organization operated a system or implemented a policy of widespread crimes against humanity or war crimes: *Wijenayake,* at paras 13, 27, 67, 70 (widespread systemic police abuses, including torture, during criminal processing and interrogation); *Al-Fahham v. Canada (Citizenship and Immigration),* 2022 FC 322, at paras 25-29, 31 (widespread crimes against humanity under government party's policy/philosophy); *Rutayisire v. Canada (Citizenship and Immigration),* 2021 FC 970, at paras 21-22, 46-49 (genocide planned and implemented by central government in Rwanda); *Ali v. Canada (Citizenship and Immigration),* 2021 FC 698, at paras 14, 20, 54-56 (system predicated on widespread torture and widespread abuses of human rights including disappearances, killings and sexual violence against civilians and identifiable groups); *Yousif v. Canada (Citizenship and Immigration),* 2019 FC 128, at paras 13, 27-31 (elite Republican Guard specifically stationed in marshes of southern Iraq to commit war crimes and crimes against humanity); *Sarwary v. Canada (Citizenship and Immigration),* 2018 FC 437, at paras 7, 42-49 (systemic and prevalent use of torture by national police in Afghan prisons); *Talpur v. Canada (Citizenship and Immigration),* 2016 FC 822, at paras 33-44 (police abuses, including torture and killings).

[31] Also consistent with *Ezokola*, the Court has emphasized that mere association or membership in the organization (including a military), without more, cannot constitute complicity: *Niyungeko v. Canada (Citizenship and Immigration),* 2019 FC 820, at paras 58-65; *Concepcion v. Canada (Citizenship and Immigration),* 2016 FC 544, at para 17. As Justice O'Reilly stated in *Concepcion,* "[t]he evidence must show, at least, that the person made a significant contribution to a crime or the organization's criminal purpose, not just a contribution to the organization".

[32] The analysis of complicity is highly fact-driven: *Ezokola,* at paras 10, 91, 92.

[33] Third, it must also be remembered that the RPD's task was to assess the evidence against the "unique evidentiary standard" in Article 1F(a) of "serious reasons for considering" – a standard that is less demanding than the usual civil standard of a balance of probabilities: *Ezokola,* at paras 8, 101-102.

[34] Fourth, turning to the circumstances of the present case, the RPD found that the Colombian military's false positive "killings were largely systematic with almost all brigades under every single division allegedly hitting these civilian killings." On the applicant's contribution to those crimes, the RPD considered the nature of the applicant's association with the Colombian military and its activities, and the degree of his contribution. The RPD considered his rank in the military, his responsibilities with a platoon he commanded and his specific activities in the two battalions to which he was assigned. The RPD concluded that the applicant had extensively contributed to the Colombian military during the time he was deployed. He was

active in gathering intelligence, interacting with civilians and patrolling for the FARC with which the military was engaged in conflict. He was actively involved in the military's operations to combat the FARC and had a leadership role in the organization as head of a platoon with approximately 25 soldiers under his command. He was in a position of some authority and had some control over his soldiers.

[35] The applicant is correct that in the particular section of the RPD's analysis that he challenged, the RPD did not identify specific conduct that contributed to the military's crimes or criminal purpose. It may well have been preferable to do so expressly at that point. However, I do not believe that the omission in this section of the reasons was fatal to the reasonableness of the RPD's decision in this case because, shortly after, the RPD did identify the conduct in question and assessed the applicant's knowledge and conduct in relation to the Colombian military's crimes.

[36] To elaborate, the applicant challenged the RPD's finding under the heading "The Claimant Made a Significant Contribution" and the subheading "Claimant's Degree of Contribution". Following that section, the RPD turned to whether the applicant made a knowing contribution, and analyzed whether there was a "link between the [applicant]'s conduct and the criminal conduct of the group", including his "awareness that his conduct will assist in the furtherance of those crimes/criminal purpose". The RPD analyzed how long the applicant was with the military, particularly after acquiring knowledge of the crimes/criminal purpose.

[37] In this next step of its analysis, the RPD identified conduct during the period after the applicant became aware of rumours of "false positives", and later, actual news of them having occurred during the April 2007 mission. Along with his continued participation in the military generally, the applicant's conduct included his active leadership of a platoon during that mission.

[38] The RPD found that before going on that mission, the applicant testified that he knew it was not legitimate and that it was going to result in "false positives"; the applicant did not challenge these findings. The mission resulted in two deaths classified as "false positives", although the applicant was not involved with them. The RPD also identified the applicant's conduct in helping to cover up the false positives by not disclosing them when asked by Canadian officials.

[39] The RPD's analysis concluded there was a link between the applicant's conduct and the crimes committed by the Colombian military, and that he was "aware that his conduct would assist" in the crimes and the cover up of them. The analysis was consistent with the requirements for complicity in *Ezokola*, including its *mens rea* component: see *Ezokola*, esp. at paras 71, 87, 89.

[40] As may be apparent, the RPD's findings indicated that this was not a case involving mere membership in, or association with, the Colombian military. Nor did the RPD focus only on the applicant's whole military career to the exclusion of the time period from December 2006 to April 2007, as the applicant contended.

[41] Even if there were facts that could have led the RPD to a different conclusion or if the facts were less convincing than some prior cases that have come before this Court, I am not permitted on judicial review to evaluate the RPD's decision on its merits. Likewise, I may not determine whether the RPD reached the correct conclusion and substitute my own conclusion for that of the RPD if I disagree: *Vavilov,* at paras 75, 83 and 125-128.

[42] Looking at the RPD's reasons as a whole, including its repeated correct statements about the legal standard for complicity (particularly at paragraphs 9, 34 and 54 of its reasons), the RPD did not make a reviewable error as argued by the applicant in applying *Ezokola* principles to the evidence. Applying the *Vavilov* reasonableness standard of review, the RPD's decision was justified because it respected the legal and factual constraints bearing on its decision and its reasoning was intelligible and transparent. There is therefore no basis on which this Court may intervene: see *Vavilov,* at paras 15, 85, 99, 300-301.

III. <u>Conclusion</u>

[43] The application will therefore be dismissed.

[44] Neither party proposed a question to certify for appeal and none arises in the circumstances of this application.

JUDGMENT in IMM-8838-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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