Federal Court Cour fédérale

Date: 20240607

Docket: IMM-6921-23

Citation: 2024 FC 869

Ottawa, Ontario, June 7, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

ARJAN SINGH SANDHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicant seeks judicial review of a decision of the Immigration and Refugee Board of Canada's Immigration Division [ID], dated May 16, 2023, deeming him inadmissible to Canada under paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The ID found that the Applicant was inadmissible on the grounds that he was complicit in the commission of crimes against humanity, an offence under subsection 6(1) of the *Crimes Against*

Humanity and War Crimes Act, SC 2000, c 24 [*CAHWCA*]. More particularly, the ID relied on the Applicant's participation in a regiment within the Indian army (the 6th Rashtriya Rifles [RR] battalion), which has reportedly committed widespread and systematic human rights violations in its counterinsurgency operations.

[2] The Applicant challenges the ID's decision on two grounds. First, the Applicant argues that the ID erred in finding that he was involved in crimes against humanity. Second, the Applicant asserts that the ID hearing was procedurally unfair because he was not advised about the importance of having legal counsel in such proceedings.

[3] The applicable standard of review for the ID's inadmissibility findings is reasonableness: *Otabor v Canada (Citizenship and Immigration)*, 2020 FC 830 at paras 17-19; *Bafakih v Canada (Citizenship and Immigration)*, 2020 FC 689 at paras 19-23; *Abdulrahim v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 463 at paras 11-12. A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*].

[4] Allegations of breaches of procedural fairness are reviewable on a standard akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]. The reviewing court must assess whether the procedure followed by the decision-maker was fair and just in the circumstances: *Canadian Pacific* at para 54; *Canadian*

Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship), 2020 FCA 196 at para 35.

[5] For the reasons that follow, I find no merit to the Applicant's arguments. The ID applied the relevant legal analysis as set out in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] in concluding that the Applicant was complicit in crimes against humanity while being posted with the RR between April 2001 and March 2003. Furthermore, while the ID had no legal obligation to inform the Applicant of his right to be represented by counsel, he was so advised in his Notice to Appear at the admissibility hearing.

II. Analysis

A. *The ID's decision is reasonable*

[6] The Minister did not allege that the Applicant directly committed a war crime or a crime against humanity, but rather that he was complicit in such crimes based on his position within the 6th RR battalion in the Jammu and Kashmir region between April 2001 and March 2003. In considering the Minister's allegations, the ID thoroughly reviewed the evidence and submissions in a well-reasoned decision.

[7] As the ID pointed out, the relevant standard of proof is "reasonable grounds to believe": *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 112 [*Mugesera*]; *IRPA*, s 33. This standard requires "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities": *Mugesera* at

para 114. Ultimately, reasonable grounds exist "where there is an objective basis for the belief which is based on compelling and credible information": *Mugesera* at para 114, citing *Sabour v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16300 (FC), [2000] FCJ No 1615, 100 ACWS (3d) 642 (TD).

(1) The ID did not err in finding that the RR committed crimes against humanity during the relevant time period

[8] In its analysis, the ID first considered the definitions of "crimes against humanity" and "war crimes": ID Reasons and Decision dated May 16, 2023 at paras 12-22 [ID Reasons]. Notably, the Applicant takes no issue with the ID's conclusion that during the time that the Applicant was a member, some of the RR's operations constituted crimes against humanity, as defined in subsection 6(3) of the *CAHWCA*. The Applicant only takes issue with the ID's finding that he was complicit in these crimes.

[9] The ID was satisfied that there was credible and trustworthy evidence establishing that the Indian army, and more particularly the RR regiment operating in the Jammu and Kashmir region, committed crimes against humanity between April 2001 and March 2003. This involved torture, rape, and unlawful killings in a widespread or systematic attacks directed against civilians and militants, real or suspected, with the full knowledge of the army and the participants. The operations were systematic because they were clearly organized, followed a regular pattern, and were based on counterinsurgency state policies: ID Reasons at para 17.

[10] The ID noted that while the objective evidence largely referred to the "Indian army" committing human rights violations in the Jammu and Kashmir region, the ID was satisfied that this included the RR at the time that the Applicant served in that regiment. The evidence was clear that the RR was "specifically tasked" with counterinsurgency operations in those regions during the relevant time frame: ID Reasons at para 21.

(2) The ID did not err in applying the *Ezokola* factors

[11] In my view, the ID reasonably applied the *Ezokola* factors in finding that the Applicant was complicit in human rights violations in the Jammu and Kashmir region between April 2001 and March 2003.

[12] The Supreme Court adopted the "contribution-based approach to complicity": *Ezokola* at para 9. There is therefore no requirement that the individual personally committed any particular crime to be excluded from refugee protection. Rather, it requires finding that there are serious reasons for considering that the refugee claimant "voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime": *Ezokola* at para 29.

[13] The application of this "contribution-based test for complicity" is fact-dependent. The following non-exhaustive factors are relevant: (i) the size and nature of the organization; (ii) the part of the organization with which the refugee claimant was most directly concerned; (iii) the refugee claimant's duties and activities within the organization; (iv) the refugee claimant's position or rank in the organization; (v) the length of time the refugee claimant was in the organization,

particularly after acquiring knowledge of the group's crime or criminal purpose; and (vi) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization: *Ezokola* at para 91.

[14] Applying the relevant factors in assessing whether the Applicant was complicit in crimes against humanity, the ID made the following findings based on the evidentiary record:

- Size and nature of the organization: The RR is considered an elite unit. In particular, the 6th RR battalion is composed of 5 companies and about 1,200 men. According to the Applicant's testimony, the role of the RR is to fight the militants through encounters, as well as through cordon-and-search operations that were undertaken on a daily basis: ID Reasons at para 30. A cordon-and–search operation is a counterinsurgency tactic that consists of "operations in Muslim neighbourhoods where young men would be detained, summary killings of suspected militant and assaults on family members happened": ID Reasons at para 22.

- Position and/or rank in the organization: The Applicant was a Naik (corporal) during his posting with the RR and supervised 10 people: ID Reasons at paras 31-32.

- Length of time in the organization: The Applicant spent 15 years in the Indian army, and held various positions. The ID found that the length of time that he served in the army demonstrates that he accepted the role and responsibilities, and furthered the government's and army's objectives. The Applicant did not show that he was concerned about the army's activities but rather only left when he was in a position to retire: ID Reasons at paras 33-34.

- Knowledge of the crimes: The ID found that the Applicant's purported lack of knowledge of the crimes committed by the RR was "difficult to accept". The ID held that the issues facing residents of the Jammu and Kashmir region were widely documented and that the Indian government even legislated special laws to grant the military extensive powers and a level of impunity for the exercise of these powers. Having spent two years posted with the RR, the Applicant had ample time to become aware of the situation in the region. Further, the overall length of time that the Applicant spent in the army also militated in favour of knowledge of the crimes committed or the criminal purpose: ID Reasons at paras 36-37.

- Method of recruitment: The Applicant voluntarily joined the Indian army and did not object to his posting with the RR. There was no evidence that he attempted to leave the army before he was eligible for retirement: ID Reasons at para 38.

- Contribution: The ID concluded that the Applicant voluntarily and knowingly made a significant contribution to the army's illegal activities while posted with the RR: ID Reasons at para 40.

[15] The Applicant asserts that the ID erred in finding him complicit as he "was not in any position to make any decision": Applicant's Memorandum of Argument at para 30. The ID acknowledged that the position held by the Applicant was "at the lower level of the hierarchy": ID Reasons at para 41. As held by this Court, however, an applicant's low rank does not preclude a finding of complicity: *Jelaca v Canada (Citizenship and Immigration)*, 2018 FC 887; *Shalabi v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 961.

[16] The ID reasonably rejected the Applicant's testimony that he had never heard of or seen any human rights violations as not credible. In that regard, the ID relied on the length of time that the Applicant had served in the army, as well as the objective documentary evidence submitted by the Minister that demonstrates that the violations were neither "anecdotal or accidental": ID Reasons at para 42. Significantly, in an another case, this Court determined that the applicant, who had similarly engaged in cordon-and-search operations in the Jammu and Kashmir region, would have knowledge of the crimes being committed by the Indian army due to the objective and compelling evidence: *Khasria v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 773 at para 30.

[17] Based on the totality of the evidence, I find that the ID reasonably concluded that the Applicant was complicit in crimes against humanity committed by the RR between April 2001 and March 2003. This conclusion was based on the evidence on the record, including the objective evidence about the prevalence of crimes committed by Indian security forces conducting

counterinsurgency operations, as well as the Applicant's own testimony about the operations that he participated in as member of the RR.

B. *The ID did not breach procedural fairness*

[18] The Applicant acknowledges that the ID "was not bound to provide" the Applicant with a lawyer. However, he argues that the ID's hearing was procedurally unfair because "he [was] not even told about the importance of legal representation at such an important hearing": Applicant's Memorandum of Argument at para 43.

[19] While the Applicant states that "various case laws" support that it "can be unfair to an applicant if he doesn't have any legal representation", he failed to cite any such jurisprudence: Applicant's Memorandum of Argument at para 44. The only authority cited in support of his position is *Vavilov*, and more particularly the legal principle that a decision-maker's reasons must be responsive to the parties' evidence and submissions: Applicant's Memorandum of Argument at para 46.

[20] Notably, the Applicant did not assert that subsection 10(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 was triggered in this case. Subsection 10(b) provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right: *British Columbia (Attorney General) v Christie*, 2007 SCC 21 at para 24; *R v Orbanski; R v Elias*, 2005 SCC 37 at para 30. Here, the Applicant was not detained pending his admissibility hearing.

[21] Furthermore, subsection 167(1) of the *IRPA* only provides that "[a] person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel" [emphasis added]. As the Federal Court of Appeal explained, "the right to be informed of the right to have counsel in inadmissibility matters" was removed in 1992 with amendments to the *IRPA* [emphasis added]: *Canada (Minister of Citizenship and Immigration) v Cha*, 2006 FCA 126 at para 60.

[22] Despite there being no legal obligation, the Applicant was, in fact, informed about "the right to be represented by counsel at [his] own expense": Notice to Appear at an admissibility hearing dated August 4, 2022, Certified Tribunal Record at p 1152 [CTR]. In addition, the "Important Instructions" attached to that Notice to Appear provided a fuller explanation:

> **3. Counsel**:
>
> You have the right to be represented by counsel, at your own expense. You may, however, be able to receive assistance from Legal Aid. If you wish to be represented, you must take immediate steps to obtain counsel. If you choose to retain counsel who charges a fee, the counsel must be a member in good standing of either a provincial law society, the Chambre des notaires du Québec, or the College of Immigration and Citizenship Consultants (CICC). You must notify the Immigration Division Registry, in writing and without delay, of your counsel's contact information (name, address, telephone number, fax number and any email address). For counsel receiving a fee, you will also need to provide their membership identification number and the name of the organization. If you will be retaining counsel later, you must provide to the Immigration Division, in writing and without delay, the same contact information for your counsel.
>
> If any of this information changes, including the fact that you are no longer represented by counsel, you must immediately notify the Immigration Division and the Minister of Security and Emergency Preparedness.
>
> CTR at p 1165.

[23] Furthermore, at the outset of the admissibility hearing on January 10, 2023, the ID Member specifically asked the Applicant whether he was going to represent himself:

> **MEMBER:** I said I see that you're not represented by counsel so am I to understand that you're going to represent yourself?
>
> **PERSON CONCERNED:** Yes.
>
> Transcript of the Proceeding: Admissibility Hearing dated January 10, 2023 at p 1, CTR at p 1195 [Transcript].

[24] The Applicant was advised that there were concerns about his inadmissibility since at least the time of his interview with the Canada Border Services Agency in March 2021. Furthermore, at the hearing on January 10, 2023, the ID Member explained the proceeding to him, as well as the consequences of a finding of inadmissibility (a deportation order): Transcript at p 4, CTR at p 1198. The Applicant had ample opportunity to seek and retain counsel, but chose not to.

III. Conclusion

[25] For these reasons, I am dismissing the application for judicial review. The ID's decision exhibits all the requisite hallmarks of reasonableness – intelligibility, transparency, and justification: *Vavilov* at paras 99-100; *Mason* at paras 59-61. Moreover, the ID did not breach the Applicant's procedural fairness rights, as alleged.

[26] The parties did not raise a question for certification and I agree that none arises in this case.

JUDGMENT in IMM-6921-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question is certified for appeal.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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