Federal Court  Cour fédérale

Date: 20160331

Docket: IMM-3712-15

Citation: 2016 FC 364

Toronto, Ontario, March 31, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

LEONARDO FABIO MENDIETA PARRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the decision of a Member of the Immigration Division [ID] of the Immigration and Refugee Board of Canada, finding the applicant inadmissible under paragraph 35(1)(a) of the IRPA on grounds of violating human or international rights, 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 [CAHWCA], specifically a crime against humanity.

[2] For the reasons that follow the application is denied.

I. Background

[3] The applicant is a citizen of Columbia born on June 22, 1967 in that country. He began his mandatory military service in approximately April, 1985 and served with the 20th Brigade of the Columbian military until October 1, 1986 when he completed his mandatory military service. The Minister alleged before the ID that while serving with the 20th Brigade, the applicant was complicit in crimes against humanity. There is no dispute between the parties that the 20th Brigade was engaged in the commission of acts that amounted to crimes against humanity during the period the applicant served with the unit. The issue is whether the applicant was complicit in the commission of these acts.

[4] While with the 20th Brigade, the applicant's duties included surveying and arresting individuals and bringing them to where he knew they would be interrogated and tortured. This included surveillance of the Fuerzas Armadas Revolucionarias de Colombia [FARC] and paramilitaries by listening to, taping or intercepting communications. The applicant would also secure the areas where more senior officers were interrogating and torturing individuals. The applicant witnessed acts of torture, and some of the victims of torture included members of the civilian population.

[5] The nature of the applicant's work subsequent to the completion of his mandatory service on October 1, 1986 is not entirely clear. It appears it involved the provision of security support to humanitarian activities as part of or on behalf of the Colombian military through a private company.

[6] The applicant arrived in Canada in February, 2014 and claimed refugee protection. The applicant was interviewed by the Canadian Border Services Agency [CBSA] several times between February 23 and February 28, 2014 [the CBSA Interviews]. In the course of these Interviews he discussed his military service extensively.

[7] As a result of the CBSA Interviews, CBSA formed the opinion that the applicant may be inadmissible pursuant to paragraph 35(1)(a) of the IRPA and completed a subsection 44(1) Report and a subsection 44(2) Referral to the ID.

II. ID Decision

[8] Before the ID, neither the applicant's service in the 20th Brigade, or the fact that the 20th Brigade was responsible for the commission of crimes against humanity during the period of the applicant's service was in dispute.

[9] The issues before the ID were (1) whether the ID should rely on the evidence the applicant gave during the CBSA interviews and (2) whether the applicant voluntarily contributed to the commission of crimes against humanity or was subject to duress as a result of the involuntary nature of his military service.

[10] The applicant submitted that the CBSA Interviews should be discounted in favour of the applicant's evidence before the ID on the basis that counsel was not present for the CBSA Interviews and that there were issues with the translation. In respect to the CBSA Interviews, the ID noted the following:

A. Before the ID, the applicant did not deny any of the statements made during the course of the CBSA Interviews, but rather sought to minimize his role and justify his involvement with the 20th Brigade on the basis that he was coerced;

B. The applicant was extensively interviewed and while providing candid details of his experience he did not mention a desire to escape from the 20th Brigade or indicate that he had been subjected to intimidation and daily threats of harm to himself or his family;

C. That CBSA Officers made the applicant aware of his right to counsel during the CBSA Interviews; and

D. That at no time prior to the ID hearing did the applicant, who was represented by counsel, file statements pointing to inaccuracies in the declarations provided by CBSA Officers or request an audit of the CBSA Interviews to assure the accuracy of interpretation.

[11] The ID rejected the argument that the CBSA Interviews should be dismissed or discounted, instead determining that the Interview statements were a credible and trustworthy recounting of the applicant's experience while a soldier in the Colombian military. The ID

further found the applicant's testimony at the ID hearing relating to duress and voluntariness not to be credible because he failed to provide this information at the CBSA Interviews.

[12] The ID found the applicant's involvement with the 20th Brigade amounted to significant and knowing contribution to the torture and that torture is identified as a crime against humanity under subsection 6(3) of the CAHWCA.

[13] The ID then considered the question of complicity, noting that complicity is a mode of commission of an offence. The ID relied on the six factors identified in *Ezokola v Canada (Citizenship and Immigration)*, [2013] 2 SCR 678 [*Ezokola*] to assess whether the applicant was complicit in the crimes of the 20th Brigade during his period service.

[14] The ID concludes that while the applicant did not participate in torture, he was aware of it, was close to it, supported it, did not question it, and sought employment with the Columbian military even after leaving the 20th Brigade at the completion of his compulsory service. The ID also noted that (1) the applicant's evidence at the CBSA Interviews that he perceived the 20th Brigade to be a good unit as compared to the rest of the Columbian military and (2) the lack of evidence of any legal obligation to remain in the 20th Brigade detracted from the applicant's argument that he could not leave the 20th Brigade during his compulsory service.

[15] The ID found that the applicant shared a common purpose with his unit, did not disengage at the earliest opportunity and is complicit in torture and crimes against humanity. The ID found the applicant inadmissible under paragraph 35(1)(a) of the IRPA.

III. Issues

[16] The application raises the following issues:

A. What is the applicable standard of review;

B. Did the ID have a rational basis to prefer the CBSA Interviews over the applicant's testimony at the ID hearing;

C. Did the ID err in failing to mention all of the applicant's arguments and evidence the applicant presented; and

D. Did the ID understand and apply the *Ezokola* test?

IV. Analysis

A. *Standard of Review*

[17] The reasonableness standard of review applies to the ID's decision on questions of fact and mixed fact and law, including on whether the applicant was complicit in crimes against humanity (*Lopes v Canada (Minister of Citizenship and Immigration)*, 2010 FC 403 at para 67, 367 FTR 41).

[18] In reviewing the ID's decision on a reasonableness standard, the question before the Court is not whether the applicant can advance an alternative interpretation of the evidence and submissions before the ID, but rather whether there is a reasonable basis in the law and facts, i.e., the evidence, for the ID to have concluded that the applicant's conduct constituted complicity in

torture, a crime against humanity (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47; *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 59; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at para 17 [*Newfoundland Nurses*]).

B. *Is there a rational basis to prefer the CBSA Interviews?*

[19] The applicant submits it was unreasonable for the ID to reject his testimony before the ID as not credible where it minimized his role in the activities of the 20th Brigade or sought to demonstrate that his participation was coerced. The applicant argues that these matters were not addressed in the applicant's CBSA Interviews because they were not asked.

[20] The applicant also argues that although he agreed to proceed with the CBSA Interviews in the absence of counsel and that there is no issue relating to the denial of counsel, the ID should have considered the absence of counsel when assessing the applicant's testimony before the ID. The applicant submits that he could not reasonably have been expected to have knowledge of the information that was relevant to a finding of complicity and the absence of this information from the Interviews where CBSA Officers did not question the applicant on this topic was not unreasonable.

[21] The applicant further submits that his concerns with the interpreter were not that the interpretation was poor but rather the applicant was not in a position to recognize, through the interpreter if something he had said was not properly understood so that he could have clarified his response. Finally the applicant argues that he wanted to provide some clarifications at the

outset of his fourth and final CBSA interview but was not permitted to do so and this issue is not addressed by the ID.

[22] I am not persuaded by the applicant's arguments. It was rationally open to the ID to prefer the applicant's evidence from the CBSA Interviews over his testimony at the ID hearing.

[23] The applicant's membership in, role with, and the actions of the 20th Brigade were not in dispute. The real dispute at the ID and on this judicial review is whether the applicant's role was voluntary and if he was under duress when serving. In reaching its conclusion that no duress existed and the applicant's actions while serving in the 20th Brigade were voluntary, the ID preferred the applicant's evidence at the CBSA Interviews which demonstrated the absence of duress and involuntariness, as opposed to the applicant's testimony before the ID which the ID characterized at paragraph 9 of the decision as an attempt to "minimize his role and explain that he was coerced into his duties."

[24] On the issue of the presence of counsel during the CBSA Interviews, the respondent submits, and the applicant does not dispute, that before each of the first three CBSA Interviews, the CBSA Officer that interviewed the applicant made him aware of his *Charter* right to counsel which he waived. In addition, prior to the fourth CBSA Interview, the applicant spoke to a lawyer over the phone, and it was during this Interview that the most pertinent information was provided by the applicant. While the applicant submits that during this fourth CBSA Interview he was denied the opportunity to provide clarification of previous statements, as the respondent noted in oral and written submissions the applicant was provided opportunities to disclose

relevant information on the issue of complicity. The applicant correctly notes that the CBSA Officer early in the fourth CBSA Interview stated the purpose of the Interview was to discuss potential human rights violations and not issues relating to a detention review. I agree with respondent's submission that there were many opportunities throughout the CBSA Interviews, particularly the fourth Interview, for the applicant to explain that he remained with the 20th Brigade due to daily threats and intimidation, but he did not do so.

[25] I am satisfied that the ID had a rational basis to prefer the evidence the applicant provided in CBSA Interviews, particularly the fourth Interview, over that provided before the ID on the issue of complicity and that the applicant's arguments do not undermine the reasonableness of the ID's finding in this regard.

C. *Did the ID need to address all the evidence?*

[26] The ID did not err in failing to address each of the issues the applicant raised. As has been stated by the Supreme Court of Canada in *Construction Labour Relations v Driver Iron Inc*, [2012] 3 SCR 405 at paragraph 3, "This Court has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable."

[27] While there is a lack of clarity in regard to the applicant's connection with the Colombian military after the completion of his mandatory service in 1986, this confusion arises out of the inconsistent nature of the applicant's evidence not a misapprehension of the evidence by the ID.

Although the ID does not mention the applicant's evidence before it as it relates to the applicant being employed by an independent contractor, the fact is the applicant subjectively viewed himself as still being part of the Columbian military between 1986 and 1990, based upon the contents of the CBSA Interviews. Since the ID preferred the evidence at the CBSA Interviews over the applicant's testimony at the ID hearing due to credibility, the ID did not, in my opinion, err in relying on the applicant's evidence in the CBSA Interviews regarding his perception of still being part of the Columbian military after leaving the 20th Brigade. As such it was not unreasonable for the ID to consider this evidence for the purpose of finding that the applicant's testimony before the ID to the effect that he wanted to leave the 20th Brigade was not credible.

[28] Similarly, the failure to address the applicant's age when joining the military is not an oversight that impugns "the validity of either the reasons or the result under a reasonableness analysis" (*Newfoundland Nurses* at para 16). The evidence establishes that the applicant was in no different a position than any other young male in Colombia in that he was subject to mandatory military service. In addition, while the evidence indicates recruitment occurred over two months before the applicant's 18th birthday, the evidence also indicates that his involvement in crimes against humanity did not occur until after his 18th birthday. While it may have been preferable for the ID to have addressed the question of the applicant's vulnerability on the basis of his age at the time of his recruitment, the fact that a decision does not address all of the issues a reviewing court would prefer does not render the decision unreasonable (*Newfoundland Nurses* at para 16).

D. *Did the ID understand and apply the Ezokola test?*

[29] Justice LeBel and Justice Fish's unanimous decision in *Ezokola* contains the test for determining inadmissibility in this case. In *Ezokola*, the Supreme Court of Canada makes clear that criminal responsibility does not rest solely with the direct perpetrators of crime, and that individuals may be excluded from refugee protection through a variety of modes of commission, but that exclusion cannot arise on the basis of guilt by association (*Ezokola* at paras 1-3, 82).

[30] Instead, the Court held that "To exclude a claimant from the definition of "refugee" by virtue of art. 1F(a), there must be serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose" (*Ezokola* at para 84). The Court then set out the key components of the contribution-based test for complicity (*Ezokola* at paras 85-91), the very components identified and adopted by the ID in the conduct of its analysis.

[31] In this case, while the ID makes reference to *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 109, 135 NR 390 (CA), it is clear that the ID recognized that *Ezokola* contains the applicable legal test and the ID applied that test in this case.

V. Conclusion

[32] I am satisfied that the ID has reasonably concluded the applicant is inadmissible under paragraph 35(1)(a) of the IRPA.

[33] The parties have not identified a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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