Federal Court Cour fédérale

Date: 20160708

Docket: IMM-49-16

Citation: 2016 FC 773

Ottawa, Ontario, July 8, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

KARAMJIT SINGH KHASRIA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board of Canada, Immigration Division [ID], dated December 14, 2015, which found the Applicant inadmissible to Canada pursuant to paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the Act].

II. Background

[2] The Applicant is a 47 year old citizen of India. He voluntarily served in the Indian Army from September 1985 to March 2001.

[3] He arrived in Canada on September 16, 2013 and asked for refugee protection on grounds of political opinion.

[4] On November 13, 2014, a report pursuant to subsection 44(1) of the Act was issued against the Applicant indicating that there were reasonable grounds to believe that he was inadmissible to Canada for having committed crimes against humanity while serving in the Indian Army.

[5] The Applicant's refugee claim was suspended that same day pending a decision from the inadmissibility hearing.

[6] Following the inadmissibility hearing, the ID found that there were reasonable grounds to believe that the Applicant was complicit to human rights abuses and crimes against humanity committed by the Indian Army during operations conducted in Jammu and Kashmir [J & K] and Assam at the time he was assigned to those regions.

[7] Relying on the test for complicity set out in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*], the ID found the Applicant inadmissible pursuant to paragraph 35(1)(a) of the Act since the Applicant either knew of the attacks against civilians, insurgents and/or perceived insurgents or took the risk that his actions contributed to those attacks.

[8] The ID assessed the size and nature of the Indian Army and found that given the size of the Indian Army (1.3 million people) and considering that the army performed various functions, the evidence was insufficient to support a finding that it is an organization with a limited and brutal purpose. Yet, the ID found that this factor was not relevant to determine the Applicant's contribution to any crime.

[9] The ID then assessed the part of the organization with which the Applicant was most directly concerned. The ID found that (i) the Applicant was a member of the Charlie Company in the 18th Punjab Regiment; (ii) he admitted to taking part in at least one cordon-and-search operation and the documentary evidence states that massive human rights violations were committed by the Indian Army during such operations; and, (iii) the Applicant is among a group of soldiers who received medals, two of which relate to counterinsurgency operations, and that counterinsurgency operations had led to widespread and systematic human rights violations.

[10] The ID then assessed the Applicant's duties and activities within the Indian Army and found that he was assigned specific duties and participated in activities that made him complicit to crimes against humanity since the Applicant: (i) indicated in the Security Screening Questions

document that while he did not participate in active combat, he took part in confrontations with militants; (ii) participated in at least one cordon-and-search operation; and (iii) was awarded medals for participating in specific operations, at least two of which were counterinsurgency operations.

[11] The ID considered the Applicant's testimony and found that he lacked credibility for the following reasons:

1. The Applicant omitted to disclose his military career on his visa application to come to Canada, instead portraying himself as a government employee. When confronted at the hearing, the Applicant indicated that someone else completed the application and he just signed it. The ID drew a negative inference from the Applicant's omission, finding that it was another example of the Applicant trying to minimize his service in the Indian Army;

2. The Applicant testified that he suffered a back injury that prevented him from participating in operations and that he was granted leave to go home by a doctor, yet he provided no corroborating evidence in this regard. Moreover, there is no mention of any medical condition in the Applicant's military discharge booklet. The tribunal therefore gave little weight to the Applicant's testimony on this point;

3. The Applicant contradicted himself as to the number of cordon-and-search operations he participated in. During an interview with a border officer he declared he had participated in two cordon-and-search operations, yet at the hearing he mentioned he had made a mistake and actually only participated in one such operation. The ID reviewed the transcripts of his interview with the border officer and found that it was clear that the Applicant participated in more than one such operation;

4. During the hearing, the Applicant stated that he never used explosives in operations. This statement contradicted statements made during his interview with the border officer. Confronted with this contradiction, the Applicant stated that he was depressed at the time of the interview with the border officer and did not know what he was saying;

5. In the *Basic Security Screening Questions* document, the Applicant wrote that as part of his army duties "We rounded up the militants and there were few of us who went inside and killed them. But I did not kill them." During the hearing before the ID, the Applicant indicated that he was describing the only cordon-and-search operation he participating in. He testified that only one militant was caught, contrary to what he wrote and that he never witnessed a militant being killed. He also said that he did not know what he was saying when he answered the security screening questions document; and,

6. The Applicant denied any knowledge of wrongdoing by the Indian Army while stationed in J & K and Assam despite the documentary evidence describing massive human rights violations in these areas at the time the Applicant was posted for duty there. The Applicant also denied that there was any trouble in those two States during his stay there.

[12] Moreover, the ID found that the Applicant's testimony regarding the medals he received was not credible and that it was directly contradicted by the evidence concerning the medals. The Applicant testified that the medals he received were awarded to the unit and not individual members of a unit and was unable to give details about the medals during the hearing. Since the documentary evidence demonstrates that each medal has a special meaning and that they are only awarded if precise criteria are met, the ID inferred that the Applicant was awarded the *Special Service Medal clasp Suaksha* for having participated in Operation Rakshak, a counterinsurgency operation taking place in J & K from November 15, 1989. The ID also found that the *Samanya Seva Medal clasp Tirap* was awarded for service in counterinsurgency operations in the Tirap district of Arunachal Pradesh, which is an adjoining State with Assam. Based on this evidence, the ID concluded that the Applicant was awarded this medal for participating in counterinsurgency operations in Arunanchal Pradesh.

[13] The ID then assessed the Applicant's rank within the Indian Army and found that the Applicant obtained three promotions throughout his career. Since he retired as a sergeant, he was most probably receiving orders rather than giving orders. The ID further noted that the Applicant spent 15 years in the military, that he had joined voluntarily at the age of 17 and remained in the military voluntarily until he was eligible for a pension.

[14] The Applicant contends that the evidence does not support a finding of inadmissibility since there is no direct evidence demonstrating that the Applicant, his regiment or company were personally linked to one single incident related in the documentary evidence describing human rights violations by the Indian security forces. The Applicant argues that at best, the ID found him to be an accomplice by association, which is insufficient to render him inadmissible to Canada. The Applicant also contends that India has a right to self-defend itself and use force, including killing insurgents and militants. He also argues that his *mens rea* has not been established in the present case.

III. Issue and Standard of Review

[15] The issue to be determined in this case is whether the ID committed a reviewable error as contemplated by subsection 18.1(4) of the *Federal Courts Act*, RSC, 1985 c F-7.

[16] The question of whether a foreign national is inadmissible to Canada pursuant to section 35 of the Act is a question of mixed fact and law. The applicable standard of review is therefore the reasonableness standard (*Qureshi v Canada (Citizenship and Immigration),* 2012 FC 335, at para 12; *Dhanday v Canada (Citizenship and Immigration),* 2011 FC 1166, at para 13).

IV. Analysis

[17] As a preliminary issue, the Respondent argues that the Court should decline to entertain the Applicant's application on the sole basis that he does not have clean hands. In effect, the Respondent argues that the Court should use its discretionary power to dismiss this application for judicial review because a warrant for arrest was issued against the Applicant on February 24, 2016 as a result of the Applicant's failure to attend at an interview for removal arrangements.

[18] The Federal Court of Appeal considered the clean hands doctrine in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham,* 2006 FCA 14 [*Thanabalasingham*], where it noted that "a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief" where it is satisfied that "an applicant has lied, or is otherwise guilty of misconduct" (at para 9).

[19] In exercising its discretion in this regard, the Federal Court of Appeal observed that the role of the reviewing court is to "strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights" (*Thanabalasingham*, at para 10).

[20] The Federal Court of Appeal then listed the following non-exhaustive list of factors at paragraph 10 of *Thanabalasingham* that may be taken into account in this exercise:

> [10] […] the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[21] In *Baron v Canada (Minister of Public Safety and Emergency Preparedness),* 2009 FCA 81, the Federal Court of Appeal indicated at paragraph 64 that high on the list of relevant factors in this regard is persons who "fail to comply with the requirements of the Act or act in a way so as to prevent the enforcement thereof."

[22] The Applicant's failure to meet with immigration authorities is a serious breach of the requirements of the Act and presents serious challenges for the enforcement thereof. The Respondent alleges that the Applicant has essentially gone into hiding and is now untraceable. In my view, this kind of behaviour undermines the integrity of Canada's immigration system and should be not be condoned so as to encourage others to fail to comply with the requirements of the Act. I find that the balance therefore lies in favour of the Respondent.

[23] The Applicant does not have clean hands and, consequently, his application is dismissed on this ground alone.

[24] In any event, I am of the opinion that the ID's decision was reasonable for the following reasons.

[25] Section 6 of the *Crimes Against Humanity and War Crimes Act* (SC 2000, c 24), [War Crimes Act] states that every person who commits, conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to a crime against humanity outside Canada is guilty of an indictable offence. Thus, individuals who have personally committed crimes against humanity or are complicit in such offences may be found inadmissible pursuant to paragraph 35(1)(a) of the Act (*Gebremedhin v Canada (Citizenship and Immigration)*, 2013 FC 380, at para 18, 431 FTR 42; see also *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 224, at paras 52-60, 69-70, [2011] 3 FCR 417).

[26] The War Crimes Act defines "crimes against humanity" as follows:

crime against humanity means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.	*crime contre l'humanité* Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

[27] The commission of offences referred to section 6 of the War Crimes Act is assessed on the "reasonable grounds to believe" standard of proof pursuant to section 33 of the Act. In *Mugasera v Canada (Minister of Citizenship and Immigration),* 2005 SCC 40, [2005] 2 SCR 100, the Supreme Court of Canada stated that this standard "requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities" (at para 114) and that ultimately, reasonable grounds exist "where there is an objective basis for the belief which is based on compelling and credible information" (at para 114 citing *Sabour v Canada (Minister of Citizenship and Immigration),* 195 FTR 69, 100 ACWS (3d) 642).

[28] The six non-exhaustive factors of the complicity test enunciated by the Supreme Court in *Ezokola* are:

> (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.

[29] In my view, the ID assessed the Applicant's role in the Indian Army in accordance with the test for complicity set out in *Ezokola*. While it may be true that there is no direct evidence demonstrating that the Applicant committed a crime against humanity, contrary to the Applicant's submissions, direct evidence is not necessary to find the Applicant inadmissible to Canada pursuant to paragraph 35(1)(a) of the Act. As indicated by the Supreme Court of Canada at paragraph 101 of *Ezokola,* the ID does not make determinations of guilt. Exclusion decisions are not based on proof beyond a reasonable doubt or the general civil standard of balance of probabilities**.** An inadmissibility hearing is not a criminal trial, the ID's sole task is to make "exclusion determinations; it does not determine guilt or innocence" (*Ezokola,* at para 38).

[30] Further to a review of the record, including the documentary evidence, I am satisfied that the ID reasonably found the Applicant inadmissible. The Applicant was posted in J & K and in Assam during periods of political and social unrest and there is objective and compelling evidence demonstrating that during this time, the Indian Army was among several groups committing crimes against humanity against the civilian population. He also admitted to participating in at least one cordon-and-search operation where he witnessed insurgents being killed and it was not unreasonable for the ID to find that the Applicant's testimony altering this admission lacked credibility. Moreover, given that two of the medals awarded to the Applicant corresponded to counterinsurgency events taking place in areas in which the Applicant was stationed, it was not unreasonable for the ID to infer that the Applicant was awarded these medals for having participated in those counterinsurgency operations.

[31] I also find that the ID reasonably found that the Applicant lacked credibility, especially in his failure to acknowledge that the Indian Army committed any crimes, including extrajudicial killings, despite admitting to a border officer that he witnessed such killings.

[32] Moreover, I am of the view that the Applicant's submissions that the Applicant's *mens rea* has not been established is without merit given that the *Ezokola* test assesses the Applicant's *mens rea*. In my view, it was reasonably open for the ID to find that the Applicant's complicity was voluntary given that he joined the Indian Army voluntarily and only left the army once he became eligible to take a pension after having served 15 years.

[33] In sum, the Applicant has not convinced me that the ID committed reviewable error in this case.

[34] The application for judicial review is dismissed. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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