Federal Court  Cour fédérale

Date: 20160805

Docket: IMM-3246-15

Citation: 2016 FC 901

Ottawa, Ontario, August 5, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

JADRANKA BLAZIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by a Visa Officer in Vienna, Austria by letter dated April 16, 2015 [Decision] which denied the Applicant's application for permanent residence under the Provincial Nominee in Canada class pursuant to subsection 42(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] on the grounds that the Applicant's then spouse was inadmissible under subsection 35(1)(a) of *IRPA*.

I. BACKGROUND FACTS

[2] On May 7, 2015, the Applicant sought reconsideration of the Decision. It was refused on May 12, 2015. By letter dated June 5, 2015 Applicant's counsel sought another reconsideration on the basis that her marriage had been annulled. On June 30, 2015 reconsideration was once again refused on the basis that the written explanation provided in the Decision (April 16, 2015) fully concluded the application.

[3] The persistence of the Applicant in seeking reconsideration is at least partially explained by the fact that approximately one year earlier, on April 4, 2014, her application had been refused on the same ground – her spouse was "a member of an inadmissible class of persons described in section 35(1)(a) of *IRPA*" and therefore her application was refused under subsection 42(1)(a) of *IRPA*. At that time, the Respondent voluntarily offered to have the application reconsidered in exchange for the Applicant discontinuing the Application for Leave and Judicial Review that she had commenced.

[4] The Applicant discontinued her application for leave, then her application for permanent residence was reconsidered and the result was the same – she was inadmissible because of the war time activities of her spouse in Yugoslavia.

[5] The Applicant is a citizen of Serbia who arrived in Canada in May, 2008 with her 2 children aged 16 and 17 at that time. The Applicant was approved as a Provincial Nominee on June 6, 2012. She filed her application for permanent residence on September 12, 2012. In the application she included her husband, Sinisa Jelisic, whom she had married on May 21, 2011 in

Serbia. The Applicant left Serbia for Canada on May 30, 2011 never to reside with her husband again. The marriage was annulled under Serbian law on or about May 29, 2105.

[6] The Applicant's permanent residence application was refused under section 42 of *IRPA* because her husband was found to be inadmissible under subsection 35(1)(a) of *IRPA* as result of having been a member of the Yugoslav People's Army and then the Bosnian Serb Army during the period 1991 to 1995. He was a guard in the 43rd Motorized Brigade between May and August 1992 during the time when "ethnic cleansing" was occurring in the area to which he was posted being Prijedor. The Applicant's husband worked as a guard at one of the barracks and there were reports that barracks served as prison and detention centres.

[7] A procedural fairness letter was sent to the Applicant on December 23, 2014. It expressed concerns over her husband's army service. Reference was made to several open source documents that had been consulted in forming those initial concerns. The letter also referred to a response made by her husband in January, 2013 in connection with the first application in which he said he only worked as a guard to watch over objects in empty barracks. He also said he "did not know what happened in Prijedor between May and August 1992 and his unit didn't participate in any kind of actions." The letter noted this information contradicted several of the reports listed in the letter. The letter concluded there were reasonable grounds to believe the Applicant's husband was aware of the events in Prijedor and in his role as a guard in the barracks "was aiding and abetting crimes against humanity and war crimes perpetrated in the district and town of Prijedor during his posting". A response within 60 days was requested.

[8] On February 18, 2015 counsel for the Applicant responded. He stated the accusations were speculative as the husband had reported his duties during his military service and they were innocuous. The thrust of the response was that while others may have committed war crimes, many of whom were "identified, named, published in official reports" and punished, the Applicant's husband was neither a war criminal nor was he among those identified nor did he deserve to be among them.

II. ISSUE

[9] This case turns on whether the correct test of inadmissibility was applied by the Visa Officer.

[10] In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 the Supreme Court reviewed the distinction between proof of questions of fact and determination of questions of law. There, as here, whether the facts meet the requirements of a crime against humanity is a question of law and the facts, as determined, must show that the husband's actions constituted a crime against humanity in law. (see para 116)

[11] For the reasons that follow, I find the facts were applied using the wrong legal test. As a result, the application will be allowed.

III. POSITIONS OF THE PARTIES

[12] The Applicant asserts that the Officer used speculation based on "reports" but there was no evidence the husband directed, influenced or controlled commission of any war crimes. The

husband was being found guilty using as evidence random generalized information to draw conclusions about his specific activities. The Applicant relies on the Supreme Court of Canada decision in *Ezokola v Canada (Citizenship and Immigration*) 2013 SCC 40 [*Ezokola*] to the effect that "Canada does not deprive people of their rights based on guilt by association".

[13] The Respondent submits the Officer had good reason to determine that the Applicant's spouse was inadmissible under *IRPA*. The documentary evidence consulted by the Officer supports that finding. Contrary to the Applicant's submission that her husband was being found inadmissible because of "guilt by association" the Respondent says the finding was that her spouse actively and directly participated in or, was complicit, because he aided and abetted the Commission of war crimes and crimes against humanity as a guard in the barracks in Prijedor.

[14] The Respondent also relies upon *Ezokola* and on *Varela v Canada (Minister of Citizenship and Immigration)*, 2008 FC 436 to say that complicity by association or passive acquiescence is to be avoided but, if one carries out acts "specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime" and the support has a substantial effect upon the perpetration of the crime, that is aiding and abetting.

IV. ANALYSIS

[15] The Court of Appeal in *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 [*Kanagendren*], at paragraph 21, confirms that paragraph 35(1)(a) of *IRPA* attaches criminal liability to both perpetrators and their accomplices. The application of paragraph 35(1)(a) involves consideration of whether the participant was complicit in the

commission of an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24. The Court of Appeal notes this is a different test than the one under subsection 34(1) where inadmissibility can arise from being a member of an organization that engages in terrorism. *Kanagendren* was determined before *Ezokola* but the analysis with respect to paragraph 35(1)(a) was not altered by *Ezokola*. What did change is the test for complicity.

[16] The question to be answered in this review is the one that was posed and answered by the Supreme Court of Canada in *Ezokola*: when does mere association become culpable complicity?

[17] The first decision in this matter was made pre-*Ezokola*. The CBSA notes informing that decision were also written pre-*Ezokola*. They are the only CBSA notes in the CTR. Those notes indicate the CBSA reviewing officer referred to the Federal Court of Appeal decision in *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2.F.C. 306 (C.A.) [*Ramirez*] when determining whether the husband "aided and abetted" in the commission of war crimes or crimes against humanity. The CBSA also relied on the judgment summary in the case *Prosecutor v Charles Ghankay Taylor*, a decision in the Special Court of Sierra Leone, specifically quoting that the "essential mental element required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator." (my emphasis)

[18] The nature or degree of assistance, which is also referred to as the contribution, is not a factor in those earlier cases. Pre-*Ezokola* that was an acceptable approach. Once *Ezokola* was

decided and released in July 2013 that approach was replaced with a new test. As I cannot improve upon the wording of the new test and the reasons for it as given by the Supreme Court, I make reference to some of the reasons provided in *Ezokola* that are most apropos this application:

> [9] This contribution-based approach to complicity replaces the personal and knowing participation test developed by the Federal Court of Appeal in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306. In our view, the personal and knowing participation test has, in some cases, been overextended to capture individuals on the basis of complicity by association. A change to the test is therefore necessary to bring Canadian law in line with international criminal law, the humanitarian purposes of the Refugee Convention, and fundamental criminal law principles.
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> [68] . . . At a minimum, complicity under international criminal law requires an individual to knowingly (or, at the very least, recklessly) contribute in a significant way to the crime or criminal purpose of a group.
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> . . .
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> [82] . . . unless an individual has control or responsibility over the individuals committing international crimes, he or she cannot be complicit by simply remaining in his or her position without protest.
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> . . .
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> [88] Given that 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. (all emphasis is mine)

[19] When the Decision under review was made *Ezokola* had been law for almost two years. It is not referred to in the Decision and it appears not to have been considered. The language in the

Decision follows *Ramirez*. It speaks of the husband being "aware of all the war crimes and crimes against humanity being committed by members of his own military unit" and that there are "reasonable grounds to believe that your spouse has either committed or been aiding and abetting the commission of war crimes".

[20] The reports relied upon in the Decision provide graphic details of the war crimes committed by the 43rd Motorized Brigade to which the husband belonged. There is no denying the magnitude of the crimes against humanity that were committed in the war in Bosnia. There is no denying the husband was present in Prijedor during the time those atrocities were committed. However, in *Ezokola* the Supreme Court at paragraph 74 warns that we must guard against "a complicity analysis that would exclude individuals from refugee protection on the basis of mere membership or failure to dissociate from a multifaceted organization which is committing war crimes."

[21] By not following and applying the law in *Ezokola* the Visa Officer made an error in law. The resulting Decision must be set aside.

[22] There is no serious issue of general importance for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The Decision is set aside and the matter is returned for redetermination by another officer.

3. There is no serious question of general importance for certification.

"E. Susan Elliott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Marshall E. Drukarsh	FOR THE APPLICANT
David Cranton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Marshall E. Drukarsh Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT