Federal Court  Cour fédérale

Date: 20171020

Docket: IMM-644-17

Citation: 2017 FC 941

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, October 20, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JEAN DE DIEU IKUZWE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The officer found that, based on the compelling and credible information provided by the applicant himself in his Personal Information Form [PIF] about his involvement in the Rwandan Patriotic Army [RPA], it was reasonable to believe (or to consider) that the applicant was complicit (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at

paragraph 114 [*Mugesera*]). The officer considered the evidence submitted by the applicant regarding his involvement in, and his contribution to, the RPA. The officer therefore did not consider only the applicant's mere membership in the RPA (*Zazai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 303, at paragraphs 24 to 27). Consequently, given the applicant's direct involvement in the RPA, as described in his initial narrative, it was certainly logical for the officer to consider the applicant's first version upon his arrival in Canada.

II. Nature of the matter

[2] This is an application for judicial review of a decision rendered on December 16, 2016, by a senior immigration officer of Immigration, Refugees and Citizenship Canada [officer]. In that decision, the officer found that the applicant is inadmissible under paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

III. Facts

[3] The applicant, age 46, is a citizen of Rwanda of Tutsi origin.

[4] In January 2001, he left Rwanda and filed a refugee claim in Canada. He has lived in Canada for 16 years now.

[5] On April 24, 2003, the Refugee Protection Division [RPD] of the Immigration and Refugee Board denied the applicant's refugee claim because there are serious reasons for considering that the applicant was complicit in crimes against humanity within the meaning of

articles 1(F)(a) and 1(F)(c) of the United Nations' *Convention Relating to the Status of Refugees*, and that, therefore, he was excluded from Canada's protection under section 98 of the IRPA. No application for judicial review was filed against that decision.

[6] In its decision, the RPD essentially noted that, in his first PIF and at the Canadian border in Lacolle, the applicant had declared during his interview for the refugee claim that he had been a member of the RPA from 1994 to 1997.

[7] More than 10 years later, on October 16, 2013, the applicant submitted an application to reopen his refugee claim, which the RPD denied on December 3, 2013. The application for judicial review of that decision, heard by Justice Luc Martineau of this Court, was dismissed on September 15, 2014, on the ground that there had been no breach of a principle of natural justice.

[8] The applicant had alleged that the RPD should have considered the decision made in 2013 by the Supreme Court in *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*], in which the Supreme Court redefined the notion of complicity. The applicant had also alleged that, because he has schizophrenia (undiagnosed at the time), his mental condition could have had an effect on the assessment of his credibility at the time of the hearing before the RPD.

[9] On March 6, 2012, the applicant also applied for a pre-removal risk assessment. However, he voluntarily withdrew his application on May 28, 2015.

[10] On November 29, 2010, the applicant applied for permanent residence on humanitarian and compassionate considerations [HC].

IV. Decision

[11] On December 16, 2016, the officer found that the applicant is inadmissible following his application for permanent residence on humanitarian and compassionate considerations. In arriving at her decision, the officer conducted an analysis to determine whether there are reasonable grounds to believe that the applicant is inadmissible in Canada under paragraph 35(1)(a) of the IRPA.

[12] More specifically, the officer made the following findings in her analysis of the applicant's admissibility in Canada:

> [TRANSLATION]
>
> I find that the tasks performed by the applicant within the RPA could have facilitated the perpetration of the crimes committed by that organization. In particular, the disclosure of information regarding the whereabouts of the Hutus and the arms they possessed as well as regarding the transportation of ammunition and food are factors that directly contribute to strategic development and the ability to attack the perceived enemy, be it military or civilian.
>
> . . .
>
> Lastly, I am of the opinion that the applicant was unable to satisfactorily demonstrate that he had been compelled to act or that his mental state absolved him of criminal liability.
>
> In this context, I find that the applicant's contribution to the crimes committed by the RPA was significant, conscious and voluntary.

> Based on the preceding analysis, I am of the opinion that there are reasonable grounds to believe that the applicant is inadmissible under paragraph 35(1)(a) of the IRPA.
>
> (Applicant's Record, page 17, Reasons for Decision.)

[13] That decision is the subject of this application for judicial review.

V. Issues

[14] As a preliminary issue, given that the applicant filed his application for leave and for judicial review outside the prescribed 15-day time limit, and it was in fact filed 10 years later, the respondent is asking the Court whether the applicant raised a valid ground that enables the Court to intervene under subsection 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7 [FCA].

[15] The issue before the Court is whether the officer made a reasonable decision in establishing that the applicant was inadmissible pursuant to paragraph 35(1)(a) of the IRPA.

[16] The parties do not dispute that the standard of review that applies to the issue of an officer's decision to find that a person falls under paragraph 35(1)(a) of the IRPA is that of reasonableness (*Khasria v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 773, at paragraph 16 [*Khasria*]).

VI. Relevant provisions

[17] The officer found that the applicant was inadmissible in Canada pursuant to paragraph 35(1)(a) of the IRPA:

35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35** (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(a) 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;	a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;

[18] The standard of evidence for paragraph 35(1)(a) of the IRPA is that provided under section 33 of the IRPA:

33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

[19] There were reasonable grounds to believe that the applicant was complicit in crimes against humanity and war crimes, pursuant to the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24:

6 (1) Every person who, either before or after the coming into force of this section, commits outside Canada	**6** (1) Quiconque commet à l'étranger une des infractions ci-après, avant ou après l'entrée en vigueur du présent article, est coupable d'un acte criminel et peut être poursuivi pour cette infraction aux termes de l'article 8 :
…	[…]
(b) a crime against humanity,	b) crime contre l'humanité;

or	
(c) a war crime,	c) crime de guerre.
is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.	

VII. Submissions of the parties

A. *Submissions of the applicant*

[20] With regard to the preliminary issue, counsel for the applicant wants this application to be allowed. In fact, counsel submits that she identified problems related to her client's case. She explains that there is no error by the applicant because he acted in good faith and presents serious issues to be determined for this application and because the delay in serving and filing this application for leave and for judicial review did not cause any prejudice to the respondent.

[21] Second, the applicant submits that the officer's decision is unreasonable.

(1) The applicant's illness: a central element

[22] The applicant alleges that he has paranoid schizophrenia and obsessive-compulsive disorder and that his mental condition justifies why he initially gave a false account at the Canadian border (that he had belonged to the RPA). In fact, the officer reportedly conducted a detailed analysis of certain documents filed into evidence in the HC record, but she apparently did not conduct the same analysis of the applicant's mental state. The officer apparently erred in her analysis by finding that the judgment delivered by Martineau J. in September 2014 justified

giving less weight to the applicant's mental condition. By only briefly considering the applicant's mental disorders, the officer allegedly failed to consider a central and significant element in making her decision.

(2) Notion of complicity

[23] The applicant submits that the officer also erred in her analysis concerning the notion of complicity. In fact, the officer noted in her analysis that the applicant never mentioned which section of the RPA he allegedly belonged to, or even what position or rank he held. The applicant explains that this is perfectly logical, because he categorically denies that he had any involvement with the Rwandan army. Therefore, the officer should not have cited an excerpt of *Human Rights Watch* to support the idea that the applicant was part of a special and identifiable brigade involved with the RPA.

[24] Finally, the applicant alleges that he could not have been part of the RPA given that he was a student in 1996 and 1997. Therefore, the applicant feels that the officer speculated by suggesting that [TRANSLATION] "the applicant could have been in the army while pursuing his studies, or rather, he could have returned to full-time studies in 1997 after he left the army, as he states on several forms" (Applicant's Record, page 10, Reasons for Decision).

B. *Submissions of the respondent*

[25] First, the respondent submits that the application for leave and for judicial review must be dismissed because the applicant filed it out of time. As the impugned decision was delivered on

December 16, 2016, the applicant had 15 days to file his application. The respondent argues that error or inadvertence of counsel does not, in general, justify an extension of time (*Cornejo Arteaga v. Canada (Citizenship and Immigration)*, 2010 FC 868 at paragraph 17 [*Cornejo Arteaga*]).

[26] Second, the respondent submits essentially that the officer's decision is founded in fact and in law and is therefore reasonable.

(1) The applicant's illness: a central element

[27] The respondent submits that the officer analyzed all the medical evidence in the applicant's record. The evidence indicates, among other things, that the applicant was hospitalized for the first time in 2008 and that, therefore, there is no indication that he had schizophrenia in Rwanda in the 1990s or during the hearing before the RPD in 2003 (*Ikuzwe v. Canada (Citizenship and Immigration)*, 2014 FC 875, at paragraph 9).

(2) Notion of complicity

[28] According to the respondent, the officer did not err in finding that the applicant made a voluntary, conscious, and significant contribution to crimes against humanity and to war crimes committed by the RPA. In fact, individuals who personally commit crimes against humanity or who are complicit in such offences may be found inadmissible under paragraph 35(1)(a) of the IRPA (*Khasria*, above, at paragraph 25). In making her decision, the officer applied the factors set out in *Ezokola*, above.

[29] In fact, the officer specified that the RPA's members committed crimes against humanity. Furthermore, the applicant did not state which section of the organization he belonged to or what position or rank he held within the RPA, and he stated in his PIF and at the Canadian border that he was a member of the RPA from 1994 to 1997, describing to the RPD his functions and activities within the RPA. Based on the evidence on record, the officer found that the applicant pursued his studies in 1997, that he did not leave the army until 1997, and that he therefore did not leave at the first opportunity he had to do so after 1994.

[30] It was therefore reasonable for the officer to find that the applicant must have been aware of the crimes committed by the RPA, as well as of the role that he played or could have played in the chain of events. Consequently, the respondent submits that the officer could not have overlooked the fact that the applicant's actions might have facilitated the perpetration of murders and violent crimes.

[31] Lastly, the respondent argues that the officer did not err in her analysis by considering the applicant's initial version of events when he arrived in Canada, because a person's first story is usually the most genuine and, thus, the most reliable (*Athie v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 425, at paragraph 49; *Ishaku v. Canada (Citizenship and Immigration)*, 2011 FC 44, at paragraph 53). It is therefore on the basis of this fact, among other things, that the officer found that the applicant was complicit in crimes against humanity and was consequently inadmissible pursuant to paragraph 35(1)(a) of the IRPA.

VIII. Analysis

[32] For the reasons that follow, this application for judicial review is dismissed.

A. *Preliminary issue*

[33] First, the Court must address the issue concerning the application for an extension of time. This Court has already established that "it is up to the applicant to provide a valid reason for being late" (*Kumar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1196, at paragraph 7 [*Kumar*]; *Semenduev v. Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No. 70; *Buhalzev v. Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No. 1098). In this case, the 10-year delay was not raised in a manner that could transform the information submitted to the Canadian authorities upon the applicant's arrival in Canada to such an extent that this information should be set aside.

[34] The following questions enabled this Court to exercise its discretion and extend the time prescribed by the FCA (*Canada (Attorney General) v. Larkman*, 2012 FCA 204, at paragraph 61 [*Larkman*]; *Monla v. Canada (Citizenship and Immigration)*, 2017 FC 668, at paragraph 12):

> 1. Did the moving party have a continuing intention to pursue the application?
>
> 2. Is there some potential merit to the application?
>
> 3. Has the Crown been prejudiced from the delay?
>
> 4. Does the moving party have a reasonable explanation for the delay?

[35] Even though these factors are established by the jurisprudence, each case has its own facts and must be examined as a unique whole, with the knowledge that each case has an encyclopedia of references, a dictionary of terms, a gallery of portraits and the need to examine whether there is harmony or dissonance in the inherent logic of the context and circumstances. However, "[t]he overriding consideration is that the interests of justice be served" (*Larkman*, above, at paragraph 62).

[36] The Court notes that the respondent was not prejudiced by the delay. In fact, the respondent was able to make full and complete submissions. As for the applicant, he was unable to provide a reasonable explanation for the delay caused by his counsel, because an error by counsel, good faith, and ignorance of the Act are not valid grounds (*Cornejo Arteaga*, above, at paragraph 17). Therefore, the Court is not persuaded that the delay resulted from an unforeseen event, beyond the applicant's control (*Kumar*, above, at paragraph 8).

[37] The applicant also failed to establish why the officer's decision was unreasonable.

B. *The officer's decision was reasonable*

[38] As stated, each case has its own facts, especially when an individual is declared inadmissible in Canada. In fact, "[c]aution must be exercised to ensure that such findings are properly made" (*Alemu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 997, at paragraph 41 [*Alemu*]; cited in *Bankole v. Canada (Citizenship and Immigration)*, 2011 FC 373, at paragraph 25).

[39] In this case, the Court must determine whether it was reasonable for the officer to find that there were "reasonable grounds to believe" that the applicant was complicit in crimes against humanity. This standard of evidence requires more than mere suspicion, but is less strict than the balance of probabilities (*Mugesera*, above, at paragraph 114). Therefore, the Court does not have to reassess the evidence that the officer had before her when she found that the applicant was inadmissible pursuant to paragraph 35(1)(a) of the IRPA, when the analysis and the basis for the decision are reasonable (*Alemu*, above, at paragraph 41).

[40] In fact, the officer found that, given the compelling and credible information provided by the applicant himself in his PIF regarding his involvement with the RPA, it was reasonable to believe (or to consider) that the applicant was complicit (*Mugesera*, above, at paragraph 114). The officer considered the evidence submitted by the applicant regarding his involvement in, and his contribution to, the RPA. The officer therefore did not consider only the applicant's mere membership in the RPA (*Zazai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 303 at paragraphs 24 to 27). Consequently, given the applicant's direct involvement in the RPA, as described in his initial narrative, it was certainly logical for the officer to consider the applicant's first version upon his arrival in Canada.

[41] The courts have consistently held that RPD decisions are *res judicata* on findings of fact. However, immigration officers are not bound by the RPD's findings of mixed fact and law. Thus, when decision-makers must determine admissibility in Canada, they are required to consider the findings of fact in light of the provisions of section 35 of the IRPA (*Johnson v. Canada (Citizenship and Immigration)*, 2014 FC 868 at paragraph 25), based on the facts of the

story that emerges from each record according to the inherent logic of the record as a whole. That is what the officer did in this case. She was not required to repeat the RPD's findings and thus undertook to consider any new evidence the applicant submitted, such as the letter from his brother Emmanuel, in order to determine whether the applicant was complicit in the acts committed by the RPA.

> [TRANSLATION]
>
> Although it is a finding of fact by the RPD member that the applicant belonged to the RPA during that period, I nonetheless examined the evidence filed by counsel on this subject because most of it was not submitted to the RPD.
>
> (Applicant's Record, page 9, Reasons for Decision.)

[42] Similarly, the Court finds that, based on the record as a whole, the officer considered all of the evidence. Among other things, she noted that the applicant's studies, in 1996 and 1997, did not prevent him, according to his statements, from continuing his activities within the RPA. If the officer gave more probative value to certain documents in particular, it is because, in her opinion, there were significant contradictions regarding the essential facts throughout the applicant's record.

[43] Therefore, the officer's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47).

IX. Conclusion

[44] This application for judicial review is therefore dismissed.

JUDGMENT in IMM-644-17

THIS COURT ORDERS that the application for judicial review is dismissed. There is no question of importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
This 21st day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Annick Legault	FOR THE APPLICANT
Michel Pépin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Annick Legault Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT