Federal Court Cour fédérale

Date: 20190130

Docket: IMM-2252-18

Citation: 2019 FC 128

Ottawa, Ontario, January 30, 2019

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

NASSIM HABIB YOUSIF
ALIN BELLO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Principal Applicant, Nassim Habib Yousif ("PA") is a citizen of Iraq who has been found to be inadmissible to Canada because of his complicity in crimes against humanity as a former member of Iraq's Republican Guard. He seeks review of the denial of his application for permanent resident status on humanitarian and compassionate grounds ("H&C"). For the

reasons that follow, this judicial review is dismissed as the decision of the H&C Officer is reasonable.

[2] As a preliminary matter, at the request of the Respondent, the style of cause is hereby amended to identify the Minister of Citizenship and Immigration as the Respondent.

Background

[3] The PA's refugee claim was denied in 2004 when the Refugee Protection Division (RPD) found that he was excluded from consideration as a Convention refugee on the basis of Article 1(F)(a) of the United Nations High Commissioner for Refugees *Convention and Protocol Relating to the Status of Refugees* ("Convention"), of which Canada is a signatory. This Article states that the Convention shall not apply to anyone who has committed a crime against peace, a war crime, or a crime against humanity. This Article has been enshrined under paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[4] The PA allegedly held the rank of private and worked in the Iraq's Republican Guard, specifically the Hammurabi Division under the regime of Saddam Hussein, which committed crimes against humanity in the southern marshes of Iraq from 1990-1995.

[5] The PA reconnected with Alin Bello ("Wife") who is a citizen of the United States (US) when he entered the US and made a refugee claim there in March 2002. The two had previously known each other when they both lived in Iraq. In June 2002, the PA came to Canada. The

Applicants married in October 2005 and started to live together in Canada in September 2008. They have two Canadian-born sons who are dual citizens of Canada and the US.

[6] In 2004, the PA filed his first application for permanent resident status on H&C grounds. This application was denied in July 2012.

[7] In the interim, in September 2011, the PA had a pre-removal risk assessment (PRRA) and was granted a stay of removal from Canada pursuant to paragraph 114(1)(b) of the *IRPA* on the grounds that he was at risk as a Christian if he were to return to Iraq.

[8] The PA filed another H&C application with his Wife in December 2012, which was rejected in April 2018. While he cannot be returned to Iraq, the PA does not have protected person status due to his inadmissibility. He seeks an exemption to his inadmissibility so he can become a permanent resident of Canada and sponsor his Wife, a citizen of the US. The refusal of his H&C application is the basis for this judicial review.

Decision under review

[9] The PA submitted his application for permanent resident status prior to the legislative changes in the *Faster Removal for Foreign Criminals Act*, SC 2013, c 16 that came into force, which would have barred him from consideration on H&C factors if found inadmissible on grounds of violating human or international rights.

[10] To be found complicit in crimes against humanity and, therefore, excluded from refugee protection by paragraph 35(1)(a) of the *IRPA*, the PA must have made a contribution that is voluntary, knowing, and significant to the crimes described. The Supreme Court of Canada outlined this test in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*].

[11] Here the H&C Officer noted that, although the test for complicity was refined in *Ezokola*, elements of the former test from *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 [*Ramirez*] as relied upon by the RPD in its March 29, 2004 decision, constitute findings of fact that remain relevant.

[12] In considering the *Ezokola* test for complicity being a voluntary, knowing, and significant contribution to the crime or criminal purpose of a group, the H&C Officer considered the size and nature of the organization, and the specific part of the organization that the PA was directly affiliated with. The PA was part of the Hammurabi Division of the Republican Guard. The previous findings of fact as well as country condition documentary evidence caused the Decision Maker to conclude that the Republican Guard committed crimes against humanity in the southern marshes of Iraq in the 1990s, during the same time that the PA was a member and was serving in the area where those crimes were perpetrated.

[13] The H&C Officer also considered the position, rank, duties, and activities of the PA within the organization. The PA claimed that he was a mechanic for the Iraqi army and that, after receiving his basic training, he was transferred to the Republican Guard but did not receive any weapons training and was not issued a weapon. The RPD found it unlikely that a new recruit

would receive no weapons training whatsoever and subsequently be appointed to the elite Republican Guard, particularly given the documentary evidence to the contrary. The PA had not been forthcoming with information about his activities with the Republican Guard and the Hammurabi Division between 1990 to 1995, and he had provided inconsistent information at various times and proffered what the RPD deemed fraudulent evidence. As such, the RPD made a finding of fact that he was not an ordinary conscript soldier but was instead an active member of the elite Republican Guard, known for its fierce loyalty to Saddam Hussein's regime. The H&C Officer ultimately agreed with the RPD's original findings regarding admissibility.

[14] Based upon this, the H&C Officer concluded that the PA had knowledge of the crimes committed and that he must have knowingly contributed to the commission of these crimes in a manner that was voluntary. The H&C Officer acknowledged that, while the PA was unable to obtain permanent resident status due to the principles in the *IRPA*, he is nevertheless permitted to remain in Canada and apply for a work or study permit because of Canada's international obligations against refoulement.

[15] The H&C Officer determined that it was not necessary to consider the risks that the PA might face in Iraq as those risks would be merely speculative considering his removal has been stayed.

[16] In considering the best interests of the children ("BIOC"), the H&C Officer recognized that a refusal of the PA's application for permanent resident status might mean that the children will be raised in a single-parent household until such a time that the PA's status in the US is

resolved, given that his wife is a US citizen. The H&C Officer noted that the family had several options, including the PA's Wife and children relocating to a town in the US on the border in Windsor, Ontario where the family currently resides. The H&C Officer noted that these are the usual issues that result from family separation and were not sufficient to grant H&C relief.

[17] In considering all the factors and alternatives, the H&C Officer determined that the refusal of the permanent residence application was appropriate and lawful, especially considering Canada's commitment to the objectives of the *IRPA* with respect to denying status to those who have committed international crimes.

Standard of Review

[18] An H&C Officer's decision to deny relief under subsection 25(1) of the *IRPA* is an exercise of discretion and is reviewed on a reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 at para 39 [*Kanthasamy*].

[19] The standard of review for decisions involving an exercise of discretion on questions of mixed fact and law is reasonableness. Reasonableness is a deferential standard and is concerned with the existence of "justification, transparency and intelligibility within the decision-making process" and whether the decision falls within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

Issues

[20] The PA raises a number of issues which can be addressed as follows:

a. Inadmissibility considerations
b. BIOC
c. Other H&C factors

Analysis

a. Inadmissibility considerations

[21] The PA argues that the H&C Officer should have followed the conclusions reached in his PRRA application that there was no evidence of acts of substantial gravity. The PA argues that the Officer erred by not taking into account the conclusion of the Minister's Delegate who stated that he could not determine that the nature and severity of the PA's acts while in the Republican Guard could be elevated to a level of substantial gravity.

[22] However, the PA's position is incorrect as he has confused the test for non-refoulement with the test for inadmissibility due to complicity. A finding that there is not sufficient evidence of acts of substantial gravity such that the PA can be refouled to a situation of risk, is not the same as a finding that the PA is inadmissible for war crimes.

[23] The test under paragraph 115(2)(b) of the *IRPA* is a specific test of when the principle of non-refoulement can be overruled, namely when there is direct personal involvement or criminal complicity in acts so severe that an individual can be refouled to a situation of risk (see

Nagalingam v Canada (Citizenship and Immigration), 2008 FCA 153 at para 84). It is a very high threshold to overcome and is different from the test for inadmissibility.

[24] The test for inadmissibility under paragraph 35(1)(a) of the *IRPA* as set out in *Ezokola* is whether the PA made a knowing, voluntary and significant contribution to the crimes against humanity.

[25] The issue for the H&C Officer here was not the PA's refoulement to Iraq. The H&C Officer acknowledged there was a stay of the PA's removal. The issue for the H&C Officer was if the PA had sufficient H&C factors that could overcome the inadmissibility finding previously made against him. In considering this issue, the H&C Officer properly turned to a consideration of *Ezokola* for the test of complicity under Article 1(F)(a) and under the *IRPA*, which is a contribution-based test that requires a "voluntary, knowing, and significant contribution to the crime or criminal purpose of a group" (at para 36).

[26] The H&C Officer considered voluntariness by recognizing that, although military service is compulsory in Iraq, the PA chose to remain with the military for longer than the requisite time period. The PA changed his story several times about his time in the military, stating both that he served for 36 months and that he only served for one year and then paid to leave. The H&C Officer had no evidence to come to a different conclusion than the RPD. Furthermore, the PA went above and beyond what was required of him by joining not only the elite Republican Guard but the elite Hammurabi Division within the Republican Guard. These promotions indicated a voluntariness of service on the part of the PA.

[27] With respect to the analysis of whether the PA made a significant contribution to the crime or criminal purpose of a group, *Ezokola* recognizes at paragraph 87 that such contribution need not be directed to specific identifiable crimes, but can be directed to the wider accomplishment of an organization's purpose. Given that the PA was a member of the most elite group in the Iraqi military during a period of known crimes, this in itself can indicate a contribution to a criminal purpose. The H&C Officer considered the well-sourced documentary evidence to determine that the Hammurabi Division was specifically stationed in the southern marshes of Iraq to commission war crimes and crimes against humanity during the same period as the PA's service. Further, his testimony to the contrary was inconsistent and unsubstantiated. The PA was deemed to have made a significant contribution to the crime or criminal purpose of the group.

[28] The PA argues that the Republican Guard had grown to 150,000 members at the time of his involvement, substantially reducing the likelihood that any of his actions had a significant impact on any criminal purpose of the group. However, there is no merit to the argument that the PA could not have made a significant contribution because he was only one of 150,000 army members. The fact that the PA was one of 150,000 does not absolve his complicity. Although the previously leading case of *Ramirez* required there to be "personal and knowing participation in prosecutorial acts" (at para 15) in order for there to be a finding of complicity, that is no longer the case in the revised *Ezokola* test.

[29] The PA continues to rely on the reasons by the Minister's Delegate during his PRRA application, that the PA's acts are unable to be elevated to the level of substantial gravity.

However, substantial gravity and significant contribution are not synonymous as the PA argues. Even though the PA asserts that the findings of the Minister's Delegate should be given deference due to Rule 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, these findings are not relevant to the considerations of inadmissibility which were before the H&C Officer.

[30] Finally, an individual must be aware of the government's crime or criminal purpose and be aware that his or her conduct will assist in its furtherance (*Ezokola* at para 89). Based upon the information of the PA's position, rank, length of service, duties and activities within the organization, as well as the size and nature of the organization concerned, the H&C Officer determined that it was unreasonable to conclude that the PA did not have knowledge of the crimes committed by the Iraqi military generally and the Hammurabi Division of the Republican Guard specifically. The PA's military personnel record, for example, shows that he was trained in the use of AK47 assault rifles and that his certificate to confirm that he was a mechanic in Iraq was not reliable as it was rife with errors and was issued years after he left Iraq. Even without relevant documentary evidence, the PA's statement that a new recruit with no weapons training would be allowed to join the elite Hammurabi Division of the Republican Guard is not credible.

[31] The H&C Officer reasonably concluded that the PA made a knowing, voluntary, and significant contribution to crimes against humanity. This conclusion is reasonable and within the range of reasonable, possible outcomes given the evidence. To overcome this conclusion on inadmissibility would require significant H&C factors.

BIOC

[32] The PA argues that the H&C Officer erred in the BIOC analysis. He argues that the Officer made assumptions that are not supported by the evidence.

[33] However the decision shows that the H&C Officer considered the options available to the Applicants to mitigate the consequences of family separation. For example, he noted that the PA's Wife and children could move to a bordering city in Michigan to be closer the PA. As the PA's Wife is a US citizen and the children are dual citizens of both Canada and the US, this would be an alternative to the separation of the family.

[34] The H&C Officer concluded that this is not a situation in which the circumstances of the family warrant an exemption from such a serious inadmissibility as the PA's. Although a two-parent family is ideal, the absence of one parent from the family home, without more, is not necessarily detrimental to the best interests of the children.

[35] The H&C Officer gave sufficient consideration to the best interests of the PA's children. These interests were well-identified, defined, and examined with a great deal of attention in light of all the evidence (see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 39). It is clear from the decision that the Officer was "alert, alive, and sensitive" to the best interests of the Applicant's children (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75).

[36] Overall, this is a reasonable finding as the hardship of leaving behind family is inherent in the removal process and is generally insufficient to warrant a positive H&C determination, especially in light of a serious inadmissibility finding (*Singh v Canada (Citizenship and Immigration)*, 2012 FC 612 at para 17).

[37] As stated in *Sabadao v Canada (Citizenship and Immigration)*, 2014 FC 815 at paragraph 32, "The likely degree of hardship to a child caused by the removal of a parent must be weighed against other public policy considerations such as Canada's abhorrence of crimes against humanity."

[38] Given these considerations, the H&C Officer's decision that the PA did not establish circumstances warranting the granting of permanent resident status on H&C factors is reasonable.

Other H&C factors

[39] The PA argues that the H&C Officer failed to properly consider his level of establishment in Canada, namely that he has been in Canada for 16 years, his involvement in the community and that he has been employed.

[40] Although these factors were considered by the H&C Officer, they contrasted with the Officer's credibility concerns and, in light of the inadmissibility findings and the BIOC, they were not sufficient to tip the balance in the PA's favour. Of particular concern was that the PA

could not explain why he left the US and abandoned his US asylum claim despite his wife being a US citizen.

[41] The H&C Officer considered the family's desire to live together in Canada, the PA's positive work history in Canada, his lengthy period of residence in Canada, the stay of removal which allows him to stay in Canada, and his social ties in Canada. However, on balance these were not sufficient when considered against the inadmissibility factors.

[42] The H&C Officer properly exercised his discretion and this was a reasonable conclusion which is entitled to deference.

[43] For the foregoing reasons, this judicial review is dismissed.

JUDGMENT IN IMM-2252-18

THIS COURT'S JUDGMENT is that

1. The style and cause is amended to name the Minister of Citizenship and Immigration as the Respondent;
2. The judicial review is dismissed; and
3. There is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2252-18
STYLE OF CAUSE:	NASSIM HABIB YOUSIF et al v MCI
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