Federal Court  Cour fédérale

Date: 20180111

Docket: IMM-1176-17

Citation: 2018 FC 24

Ottawa, Ontario, January 11, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

REY CORDERO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review application of a decision of a visa officer at the Canadian Embassy in Manila, Philippines [the Officer], dated February 9, 2017, dismissing the Applicant's spouse-sponsored application for permanent residence.

[2] The Applicant is a citizen of the Philippines born on November 27, 1983. From 2006 to 2011, he was a member of the Armed Forces of the Philippines [AFP]. While a member of the AFP, he joined the 11th Infantry Battalion [the Battalion], a division of the AFP known to have committed crimes against humanity in areas of the country where the Applicant was stationed.

[3] On March 22, 2014, the Applicant married Christiene June Labestre [Ms. Labestre], a Canadian permanent resident. A month later, he submitted his application for permanent residence. In August 2014, Ms. Labestre sponsored said application.

[4] In mid-December 2014, the Applicant, in the course of the processing of his application for permanent residence, was asked to complete a chart entitled "Details of Military Service" and was advised that an interview would be required to assess whether he met the requirements for a permanent resident visa as a member of the Family Class. That interview took place two years later on January 12, 2017. At the interview, the Applicant was asked questions about his time with the Battalion and his knowledge of alleged crimes committed by members of the Battalion against civilian populations.

[5] As indicated at the outset of these reasons, the Applicant's application was rejected. The Officer concluded that there were reasonable grounds to believe that the Applicant had been a member of the inadmissible class of persons described in subsection 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. Subsection 35(1)(a) provides that a foreign national is inadmissible on grounds of violating human or international rights for 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* [the *War Crimes Act*]. In particular, the Officer found that there were reasonable grounds to believe that the Applicant had been complicit of crimes against humanity while serving with the Battalion.

[6] The Applicant claims that the Officer's decision is flawed in three respects. First, he contends that he was not given a fair and meaningful opportunity to respond to the Officer's concerns regarding his past work experience with the Battalion, thereby breaching the duty of procedural fairness the Officer owed to him. Second, he submits that the Officer committed a reviewable error by not referring to the specific provision(s) of the *War Crimes Act* he had allegedly breached. Third, he says that in any event, the Officer's decision is unreasonable as there was insufficient evidence to conclude, on the basis of the test developed by the Supreme Court of Canada in *Ezokola (Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 1 SCR 678 [*Ezokola*]), that he made a significant, voluntary and knowing contribution to the commission of a crime against humanity while he was a member of the Battalion.

[7] In my view, the issue of whether the Applicant was given proper notice of the Officer's concerns regarding his alleged complicity in the crimes against humanity attributed to the Battalion and a fair opportunity to answer these concerns is the determinative issue in this case. The parties agree that the standard of review applicable to that issue is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43). In my view, the Applicant was denied both a proper notice and a fair opportunity to respond.

[8] It is trite law that the approach to procedural fairness is context-specific (*Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817, at paragraph 21). In the case of foreign nationals applying from abroad for permanent residence in Canada, this Court has held on numerous occasions that the duty of procedural fairness owed to these applicants is "minimal" (*Karakachian v Canada (Citizenship and Immigration)*, 2009 FC 948, at para 26 [*Karakachian*]).

This is generally so because the person affected - a non-citizen - has no right to enter or remain in Canada and faces neither detention nor removal. This is also so because decisions dismissing permanent residence applications filed from abroad by foreign nationals are highly discretionary and that the consequences for failed applicants, although they may be serious, do not normally engage their rights under the *Canadian Charter of Rights and Freedoms* (*Jahazi v Canada (Citizenship and Immigration)*, 2010 FC 242, at para 32).

[9] That said, it is also settled law that such applicants are at the very least entitled to know the case against them and to be afforded a meaningful opportunity to respond to it (*Karakachian*, at para 28; *Maghraoui v Canada (Citizenship and Immigration)*, 2013 FC 883, at para 22 [*Maghraoui*]).

[10] Here, the Applicant claims that when he was called to his interview, he expected to be questioned about his marriage, which is the topic of most spouse-sponsored application interviews, but that to his surprise, he was extensively questioned on his past experience with the Battalion and on various reports presented to him regarding the Battalion's poor human rights record. That is how he found out, he says, that the main reason behind the interview was to verify his admissibility to Canada with regard to his possible involvement in crimes against humanity, something he had absolutely no idea of prior to the interview.

[11] According to the Applicant, the duty of procedural fairness owed to him by the Officer would have been met if he had been either provided with a fairness letter prior to the interview, informed of the Officer's concerns in the letter inviting him to the interview, or provided with an

opportunity to respond to the Officer's concerns after the interview and before the decision was made. None of that, he says, was done.

[12] The Respondent does not dispute the rule that even though the degree of procedural fairness applicable in this case was minimal, the Applicant was entitled to know the case against him and to respond to it in a meaningful way, including by presenting evidence. However, while acknowledging that more could have been done in terms of prior notice, such as providing the Applicant with a fairness letter prior or after the interview, it says that this minimal threshold was met.

[13] The Respondent's contention in this regard is two-fold. First, it submits that the Applicant must have known that the interview would be about his time in the Battalion as he was asked in the early stages of the processing of his permanent residence application, to fill out the chart about his military service. Second, the Respondent claims that at the interview, the Applicant was made aware of the Officer's concerns and given ample opportunity to discuss the actions of the Battalion and his knowledge, or lack thereof, of the acts committed by some of them in the region where he was stationed.

[14] With all due respect, I cannot agree with the Respondent.

[15] First, there is a difference, in my view, between being asked to provide details about one's military career (rank, status, unit, duties, commanding officers, locations, commencement and end dates at various stages of military career) and being notified of concerns regarding one's

complicity in the commission of crimes against humanity. To say that one logically leads to the other, as contented by the Respondent, is a conclusion I am not prepared to draw in the circumstances of this case.

[16] The crux of the matter here is that the Applicant was invited to an interview in which he was accused of being complicit in crimes against humanity. There was no prior notice of that accusation. Given the seriousness of such allegations and the complexity of the notion of complicity to crimes against humanity in both international and domestic law, as evidenced by *Ezokola*, a foreign national in the position of the Applicant should not be left to speculate as to whether they might be required to defend against such allegations at an interview, if such interview is to be, as is the case here, their only opportunity to respond to them. In such circumstances, this, for me, is not adequate notice of the case to meet.

[17] Is this lack of proper notice saved by the fact the Applicant was asked questions at the interview about his military career and reports describing members of the Battalion as perpetrators of crimes against humanity? I find that it is not. Again, given the seriousness and gravity of the Officer's concerns, disclosing these concerns at an interview, without prior notice of any kind at to the nature of these concerns, and inviting the Applicant to comment on the spot on various reports regarding the actions of the Battalion in certain geographical areas at certain points in time, was simply not sufficient to provide the Applicant with a meaningful opportunity to address these concerns, especially if this was to be the Applicant's only opportunity to disabuse the Officer's concerns. In particular, this procedural choice by the Officer deprived the Applicant of the possibility to provide evidence to counter the allegations against him, something

the Respondent acknowledged as being part of the minimal content of procedural fairness owed to the Applicant.

[18] This choice of procedure is all the more questionable in that an inadmissibility assessment report had been prepared for the Immigration unit of the Canadian Embassy in Manila by the Canadian Border Services Agency regarding the Applicant's suspected complicity in crimes against humanity committed by the Battalion. That report was prepared more than a year before the Applicant's interview and it concluded, based on the six analytical factors set out in *Ezokola*, that there were reasonable grounds to believe that the Applicant had been complicit in these crimes. Yet, and although the Applicant might not have been entitled to be provided with an actual copy of that report (*Maghraoui* at para 27; *Nadarasa v Canada (Citizenship and Immigration)*, 2009 FC 1112, at para 25), none of the report's substantive information was provided to the Applicant, not even in a summary form, at any time prior to the interview.

[19] The Respondent did bring a motion under section 87 of the Act for an Order protecting some of the information contained in the report from disclosure. However, that information, which consisted of a few words on a single page of the report, was, from the Respondent's own contention, immaterial to the issues raised in the present judicial review proceeding and was not to be relied upon for the purpose of responding to said proceeding. In other words, there was no legal impediment to the substance of the information contained in the report being communicated to the Applicant, in one form or another, prior to the interview. There is no explanation on record as to why this was not done. From a procedural fairness standpoint, this, in

itself, is problematic (*Sinani c Canada (Citoyenneté et Immigration)*, 2017 CF 106, at paras 29-30).

[20] In such context, the Respondent's assertion that the duty of procedural fairness was met because the Applicant had two years to prepare for the interview and was provided with the opportunity to verbally refute allegations at the interview, doesn't hold much weight if the Applicant reasonably had no idea that he would be accused of complicity in crimes against humanity. To quote Madam Justice Mary Gleason, now a judge of the Federal Court of Appeal, in *Lukavica (Lukavica v Canada (Citizenship and Immigration)*, 2013 FC 118 [*Lukavica*]), also a subsection 35(1)(a) inadmissibility matter, "knowing the nature of what [the applicant] was suspected of doing was central to the applicant's ability to respond in a fulsome way, given the nature of the suspicions and the applicant's circumstances" (*Lukavica*, at para 14). This quote is, in my view, equally applicable to the case at hand.

[21] None of the case law submitted by the Respondent provides a satisfactory response to the fairness concerns arising from the Officer's procedural choices in this case. This is not to say that in all cases where a foreign national seeks a Canadian immigration visa, be it for permanent or temporary residence status, that there will be a breach of the rules of procedural fairness each time the visa officer's concerns are only conveyed at the interview. Again, the approach to procedural fairness is context-specific so that cases where a visa applicant is suspected of complicity in crimes against humanity or in war crimes are not to be viewed and treated, from a procedural fairness standpoint, in the exact same manner as cases where the officer's concerns

have to do, for instance, with whether an applicant meets the requirements of the Federal Skill Workers Program or of the Family Class.

[22] In sum, I find that the Officer has breached the duty of procedural fairness owed to the Applicant and that his/her decision must be set aside on that basis. This suffices to dispose of the present matter.

[23] No question for certification was proposed by the parties.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The judicial review application is allowed;
2. The decision of a visa officer at the Canadian Embassy in Manila, Philippines, dated February 9, 2017, dismissing the Applicant's spouse-sponsored application for permanent residence, is set aside and the matter is remitted to the Minister for redetermination by a different visa officer; and,
3. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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