Federal Court  Cour fédérale

Date: 20210921

Docket: IMM-3206-20

Citation: 2021 FC 970

Toronto, Ontario, September 21, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

FAUSTIN RUTAYISIRE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant and his family came to Canada as refugees in 2003. The applicant was a permanent resident of Canada on his arrival. He lost that status after the Immigration Division determined that he was inadmissible to Canada because he was complicit in crimes committed during the 1994 genocide in Rwanda.

[2] In 2012, the applicant applied for relief under s. 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "IRPA"), asking that the Minister grant an exemption and reinstate him as a permanent resident of Canada on humanitarian and compassionate ("H&C") grounds. After the Supreme Court released its decision in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678, he submitted that the law on complicity had changed and he would no longer be found complicit in the crimes in Rwanda. That conclusion, if correct, could affect the outcome of his H&C application.

[3] In a decision dated July 17, 2020, a senior immigration officer refused his request for an H&C exemption. Applying the legal principles in *Ezokola*, the officer concluded that the applicant would still be found complicit in the crimes. After considering the applicant's position on the hardship he and his family would suffer if he returned to Rwanda, the officer concluded on the evidence that given the very serious nature of the applicant's inadmissibility, an exemption on H&C grounds was not warranted.

[4] On this application for judicial review, the applicant asks the Court to set aside the officer's decision and return the matter to another officer for re-determination.

[5] For the reasons below, I conclude that the officer did not make a reviewable error. The application is therefore dismissed.

I. Facts and Events Leading to this Application

[6] The applicant is a citizen of Rwanda. He is of Hutu background. Before April 1994, he was a math teacher and active in Rwandan politics as a founding member of an opposition party. The applicant lived in Butare, the southernmost province of Rwanda.

[7] On April 6, 1994, an aircraft carrying Rwandan President Juvénal Habyarimana was shot down, killing the President and igniting a genocide perpetrated by Rwanda's majority Hutus against the minority Tutsis. The genocide lasted from April to July 1994, when a Tutsi-led party overthrew the Hutu regime.

[8] From late April 1994 until he fled Rwanda in early July 1994, the applicant was a senior official (a sub-prefect) of the government in Butare.

[9] In 2002, the applicant successfully applied for refugee status in Canada at the High Commission of Canada in South Africa. On his application for permanent resident status, the applicant disclosed that he had been sub-prefect of Butare, so there was no issue of misrepresentation. The applicant, his wife and children landed in Canada as permanent residents in November 2003. His wife and children are now Canadian citizens.

[10] On January 21, 2005, a report was prepared under subsection 44(1) of the *IRPA* alleging the applicant was inadmissible to Canada: (a) as a person who committed offences outside Canada, listed in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, or (b) as a prescribed senior officer in the service of a government that has engaged in genocide or crimes against humanity.

[11] By decision made on December 4, 2009, the Immigration Division (the "ID") of the Immigration and Refugee Board determined that the applicant was inadmissible to Canada by virtue of paragraph 35(1)(*a*) of the *IRPA*. This Court dismissed an application for judicial review of the ID's decision: *Rutayisire v Canada (Citizenship and Immigration),* 2010 FC 1168 (Pinard J.). Justice Pinard's reasons set out in detail the factual circumstances of the Rwandan genocide and the applicant's role as sub-prefect of Butare, as well as the contents of the ID's decision that led it to find that the applicant was inadmissible as complicit in the genocide.

[12] Following the ID's decision, the applicant lost his status as a permanent resident of Canada and a removal order was issued against him. However, he remains a protected person in Canada due to his refugee status.

[13] In July 2014, the Canada Border Security Agency requested that the Minister issue a danger opinion in respect of the applicant. That opinion has not yet been released.

II. The Decision under Review

[14] As already mentioned, by application made in January 2012, the applicant requested that the Minister reinstate his status as a permanent resident of Canada on H&C grounds. On July 17, 2020, the senior officer dismissed that application under *IRPA* subs. 25(1). The record does not provide a complete explanation for the years of delay since *Ezokola* until the decision was made.

[15] The officer's reasons described the applicant's immigration history and the process leading to the H&C decision, including reference to two so-called procedural fairness letters sent to the applicant. The officer then considered, at length, the two major areas of concern to the

H&C decision: (a) whether the applicant would continue to be considered inadmissible after *Ezokola*, and (b) the applicant's submissions on hardship to him and his family and other factors affecting the H&C decision.

[16] The officer's consideration of complicity was for the purposes of assessing the applicant's s. 25 application only, to determine the weight to be given to the inadmissibility finding before weighing the H&C factors. The officer's decision did not reconsider the ID's final decision on complicity.

[17] The officer first considered inadmissibility under paragraph 35(1)(*a*) of the *IRPA*, which provides:

Human or international rights violations	**Atteinte aux droits humains ou internationaux**
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 officer stated that in *Ezokola*, the Supreme Court concluded that complicity for the purposes of paragraph 35(1)(*a*) arises by contribution. The officer set out the following six non-exhaustive factors to determine whether an individual's conduct should be considered as complicity:

1. the size and nature of the organization;

2. the part of the organization with which the claimant was most directly concerned;
3. the claimant's duties and activities within the organization;
4. the claimant's position or rank in the organization;
5. the length of time the claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
6. the method by which the claimant was recruited and the refugee claimant's opportunity to leave the organization.

See *Ezokola*, at para 91. These Reasons refer to this list as the "*Ezokola* factors".

[19] The officer set out the following passage from paragraph 92 of *Ezokola*:

> Depending on the facts of a particular case, certain factors will go "a long way" in establishing the requisite elements of complicity. Ultimately, however, the factors will be weighed with one key purpose in mind: to determine whether there was a voluntary, significant, and knowing contribution to a crime or criminal purpose.[Emphasis added.]

[20] The officer described the general situation in Butare in 1994 and the findings of the ID and the Federal Court in respect of the applicant. Recognizing her role as an independent decision maker, the officer decided to give "great weight" to the findings of the ID and this Court, particularly because of the hearing at the ID during which the applicant testified.

[21] The officer then analyzed each of the six *Ezokola* factors. In summary, the officer found:

- The applicant played a role in the prefecture of Butare, which was a large organization with hundreds of employees.

• The applicant performed duties as sub-prefect responsible for technical and economic affairs of the prefecture.

• The applicant was also a member of the prefectural security council. These councils were used by the central interim government "as a tool to manage the implementation of their genocidal plan in each prefecture". The officer found that the applicant attended meetings of the Butare security council aimed at implementing the genocidal campaign.

• One central government directive to the security councils was to establish a "civilian self-defense committee" in an effort to finance the genocide. Funds were raised from the Rwandan population to buy weapons and feed the militia. The applicant was a signatory for the self-defence committee's bank account, although the applicant testified that he could not refuse the signing authority without danger and never signed a cheque on the account.

• The applicant's membership on the prefectural security council meant that he knew about crimes that had already happened. He also knew about plans for future crimes and strategies that were implemented to help reach the central government's goal of exterminating the Tutsis in Rwanda.

• The applicant's duties and activities included rationing and redistributing items such as gasoline and food, and he was responsible for providing travel passes and military escorts.

• Like the ID, the officer found that performing some of the applicant's duties "clearly facilitated the commission of the crimes". Thus:

> If the killers had no drink and no food provided to them, they would have killed less efficiently. If no travel passes and no gasoline had been provided to genocide organizers and/or killers for transport, more victims would have survived. If no civilian self-defense committees had existed to provide weapons, organize and motivate the population to kill, the genocide would have been less effective.

• The officer found that the applicant was involved in many of the administrative tasks of the prefecture that facilitated the implementation of the central government's plan to exterminate the Tutsis.

• The applicant's position as sub-prefect was a high-level position, just one step below the highest position in the prefecture. Although the applicant stated that he had no decision-making power, the officer concluded:

> As the sub-prefect in charge of technical and economic affairs, I am satisfied that granting a safe passage or not, giving somebody fuel or not, providing food and drink to the killers or not, attending a meeting of the prefectural security council or not are all decisions that [the applicant] did make. Those decisions had impacts for the people involved and on the level of efficiency of the genocide.

- The applicant was a member of the organization from the beginning of May 1994 until the beginning of July, a period of two months. He knew from the beginning that the organization was involved in criminal activities and was aware of the massacres committed in the prefecture. He remained in his position until the organization was overpowered by the Rwandan Patriotic Front, a military force opposed to the genocide.

- While the applicant did not seek to join the organization, he did not accept the sub-prefect position under duress and could have left earlier than he did.

[22] The officer concluded that the applicant's "high position in the organization added to his belonging to the prefectural security council and the high relevance of his particular duties in maintaining the efficiency of the genocide" were the three *Ezokola* factors that carried the most weight. The officer found that the applicant was aware of the crimes that were happening and, by continuing to perform the duties assigned to him despite this situation, he "willingly contributed in a significant fashion to the smooth continuation and efficiency of the genocide in Butare". The officer concluded that the applicant was complicit in the genocide in Rwanda and determined that this factor should weigh heavily against him in the H&C analysis.

[23] The officer then turned to the H&C factors raised by the applicant: family ties, establishment, hardship to the applicant and his family, and best interests of the children.

[24] Family ties weighed significantly in favour of the applicant, because he may never see his wife and children again if he is returned to Rwanda. The applicant was successfully established in Canada and was a contributing member of society with a good civil record, resulting in

significant weight in the officer's assessment. The officer found that best interests of the applicant's adult children should not be given any weight. The officer's analysis of these three factors is not at issue on this application.

[25] The applicant claimed hardships to himself and to his family if he is returned to Rwanda. The officer found that the applicant would probably face hardship because he is suspected of complicity in the genocide. The officer found insufficient evidence to support the applicant's position that he would suffer discrimination in Rwandan society due to the allegations. The officer also found insufficient evidence that he would not receive a fair trial in Rwanda, but concluded that detention conditions included overcrowding and scarcity of food. The officer was not satisfied that earlier issues of access to health care and medication for prisoners continued in prisons operated by the Rwanda Correctional Service. The officer found that the applicant, as an educated person who worked as a teacher for many years and lived more than half his life in Rwanda, could find employment to support himself if returned there.

[26] The officer concluded that the applicant would face significant hardship if deported to Rwanda, including facing the justice system. If convicted, he would experience difficult prison conditions. After being prosecuted or once freed, he would face the challenge of re-establishing himself in Rwanda, which would be difficult. The officer granted "important weight" to hardship in the H&C assessment.

[27] Weighing the inadmissibility of the applicant and the H&C factors, the officer was satisfied that "significant" H&C factors existed. The officer found that the applicant's return to Rwanda would "implicate suffering for the whole family" and that he would face significant hardship once in Rwanda, particularly if the authorities chose to prosecute him. The officer also

found that the applicant's admissibility was "one of the most serious a person can face" under the *IRPA* and that his actions during the genocide in Rwanda "contributed to the death and/or suffering of a large number of people". The officer stated that the hardship he would face if returned to Rwanda was "in large part, a consequence of his behaviour during the genocide". Overall, the officer granted more weight to the applicant's inadmissibility than to the humanitarian considerations involved.

[28] Given the "very serious nature of the specific inadmissibility involved", the officer concluded that the H&C factors were not sufficient to warrant an exemption under s. 25 of the *IRPA*.

III. Issues Raised by the Applicant

[29] In this Court, the applicant raised four issues:

(a) Did the officer properly apply the legal standard in *Ezokola*?

(b) Did the officer fail to analyze evidence of coercion in determining that the applicant acted voluntarily?

(c) Did the officer fail to conduct a proper balancing of factors under *IRPA* s. 25?

(d) Did the officer deprive the applicant of procedural fairness?

[30] Each of these issues will be analyzed below.

IV. General Legal Principles

A. *Standard of Review for the Substantive Merits of the Decision*

[31] The standard of review of the officer's substantive decision is reasonableness, as described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. The

onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

[32] Reasonableness review entails a sensitive and respectful, but robust, evaluation of administrative decisions: *Vavilov*, at paras 12-13. Starting with the reasons provided by the decision maker, the Court's review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 85-86. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, at paras 85 and 99. The reviewing court must read the reasons holistically and contextually, and in conjunction with the record that was before the decision-maker: *Vavilov*, at paras 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at para 31.

[33] The court's review is both robust and disciplined. Not all errors or concerns about a decision will warrant intervention. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100; *Canada Post*, at para 33; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36.

B. ***H&C Applications under the IRPA***

[34] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada, if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. The H&C discretion in subs. 25(1) is a flexible and responsive exception to the ordinary operation of the *IRPA*, to mitigate the rigidity of the law in an appropriate case: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 19.

[35] The discretion in subs. 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 74-75; *Kanthasamy*, at paras 25 and 33.

[36] The onus of establishing that an H&C exemption is warranted lies with the applicant: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360, at paras 35, 45 and 61. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant: *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, at paras 5 and 8.

V. Reasonableness of the Officer's Decision

A. *Did the officer properly apply the legal standard in* Ezokola*?*

[37] In *Ezokola*, the Supreme Court stated at paragraph 8:

> While individuals may be complicit in international crimes without a link to a *particular crime*, there must be a link between the individuals and the *criminal purpose* of the group — a matter to which we will later return. […] this link is established where there are serious reasons for considering that an individual has voluntarily made a significant and knowing contribution to a group's crime or criminal purpose. As we shall see, a broad range of international authorities converge towards the adoption of a "significant contribution test".
>
> [Original emphasis.]

[38] The applicant submitted that the focus must always be on an individual's actual contribution when determining whether there are serious reasons for considering that the individual has made a voluntary, significant and knowing contribution to an international crime or the criminal purpose of a group (citing *Ezokola*, at paras 91-92).

[39] In this case, the applicant argued that the officer's conclusion of complicity relied on an unreasonable line of inferences, made without regard to the evidence. The applicant contended that the officer did not identify any crime to which the applicant made any contribution. There was no finding that he held extremist views or that he ever incited, advocated or endorsed violence, or discriminated against Tutsis in his government work. He argued there was no basis for a finding that he ever endorsed or voluntarily contributed to the central government's criminal purpose of committing genocide. According to the applicant, it must be shown that the

applicant contributed to particular crimes committed by members of the organization. He contended that the officer failed to identify any such crime and at no point suggested that the applicant acted with the intention to promote the criminal purpose of genocide.

[40] The applicant also submitted that while the ID's decision found him complicit because he facilitated the commission of crimes in the prefecture, *Ezokola* changed the legal test for complicity. Based on *Ezokola* and decisions of this Court, the applicant maintained that the officer found him complicit due to mere association with the prefecture or by passive acquiescence in the organization's acts, which in law no longer constitutes complicity (citing *Ezokola*, at para 80; *Concepcion v Canada (Citizenship and Immigration)*, 2016 FC 544, at para 17; and *Niyungeko v Canada (Citizenship and Immigration)*, 2019 FC 820, at paras 49, 61 and 64).

[41] The applicant specifically argued that the officer found no guilty act, pointing to a paragraph in *Ezokola* in which the Supreme Court stated that the Federal Court of Appeal's reasons in *Ezokola* should not be improperly relied on to find complicity "even where the individual has committed no guilty act and has no criminal knowledge or intent, beyond a mere awareness that other members of the government have committed illegal acts": *Ezokola*, at para 80. To the contrary, the officer expressly stated that it was reasonable to assume that the applicant was "working on the regular and technical affairs of Butare which was a legitimate occupation". The officer made no finding of any specific contribution to any crime and held that he performed only facially legitimate duties without any finding of criminal purpose or consequence. On this view, the applicant's mere membership in the security council was

insufficient to show a guilty act for complicity purposes and there was no evidence that he did anything in relation to the bank account beyond being appointed as a signing authority. In the applicant's submission, the officer's finding of facilitation obscured the absence of any guilty act in this evidence.

[42] The respondent's position was that the officer reasonably concluded the applicant was complicit because he voluntarily made a significant and knowing contribution to the crimes and/or criminal purpose of the Butare prefecture and the security council. According to the respondent, the officer made no reviewable error for two principal reasons: (a) the applicant was complicit in crimes committed by the prefecture, because his duties were critical in facilitating the implementation of the prefecture's criminal purpose and his own acts facilitated the commission of crimes; and (b) the evidence supported the officer's conclusion that the applicant was a member of the prefecture security council used by the central government to implement the genocide and was a signing authority for the civilian self-defense committee's bank account used to finance the genocide. Such membership was demonstrative of a voluntary, knowing and significant contribution to the genocide. The respondent referred to Chief Justice Crampton's conclusions in *Canada (Citizenship and Immigration) v Kljajic*, 2020 FC 570, [2020] 3 FC 317, (at para 212) and submitted that the evidence and officer's findings here were more than mere association or mere membership and contribution to the organization's legitimate activities (distinct from cases such as *Niyungeko*, at para 61).

[43] The respondent also referred to paragraphs 87 to 89 of *Ezokola*, which I reproduce below:

> (2) Significant Contribution to the Group's Crime or Criminal Purpose

> [87] In our view, mere association becomes culpable complicity … when an individual makes a *significant* contribution to the crime or criminal purpose of a group. As Lord Brown J.S.C. said in *J.S.*, to establish the requisite link between the individual and the group's criminal conduct, the accused's contribution does not have to be "directed to specific identifiable crimes" but can be directed to "wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes": para. 38. This approach […] is consistent with international criminal law's recognition of collective and indirect participation in crimes discussed above, as well as s. 21(2) of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, which attaches criminal liability based on assistance in carrying out a common unlawful purpose.
>
> [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.
>
> (3) Knowing Contribution to the Crime or Criminal Purpose
>
> [89] To be complicit in crimes committed by the government, the official must be aware of the government's crime or criminal purpose and aware that his or her *conduct* will assist in the furtherance of the crime or criminal purpose.
>
> [Original italics.]

[44] I have concluded that the officer made no reviewable error in applying *Ezokola* and in concluding, for the purposes of the *IRPA* s. 25 application, that the applicant was complicit in the Rwandan genocide.

[45] The officer set out the correct overall legal test from *Ezokola* – whether the applicant made a voluntary, significant, and knowing contribution to a crime or criminal purpose. The present issue is in the officer's application of the significant contribution aspect of the *Ezokola* test to the evidence.

[46] In my view, the officer made no reviewable error by concluding that the applicant made a significant contribution to the crimes or criminal purpose of the genocide. The officer made findings of conduct by the applicant that went well beyond mere association or membership in a neutral organization.

[47] The officer found that the applicant was a high-level official in the prefecture. The applicant did not quarrel with the officer's findings about the applicant's knowledge of the crimes that were occurring and that were planned, which the applicant obtained from his own observations and through membership on the Butare security council.

[48] The officer identified conduct by the applicant that contributed to the crimes and to the criminal purpose of the genocide. In considering the third *Ezokola* factor, the officer set out the applicant's specific duties and expressly linked his conduct in carrying out those duties to the efficiency and effectiveness of the genocide – that is, to the number of people who were killed. The officer agreed with the ID that the administrative acts performed by the prefecture facilitated the implementation of the central government's plan to exterminate the Tutsis and that the applicant was involved in many of those administrative tasks. In considering the fourth *Ezokola* factor, the officer rejected the applicant's argument that he had no decision-making power. The

officer found that in carrying out his duties, the applicant did make decisions and that those decisions had impacts for the people involved and on the level of efficiency of the genocide. I note that both the ID (at paras 73 and 81) and the Federal Court made similar factual findings and referred to the same evidence in their analyses before *Ezokola*: see 2010 FC 1168, at paras 15, 18, 21, 36, 44 and 48-49. See also *Kljajic*, esp. at paras 201-212.

[49] Part of the applicant's argument was that when the officer assessed the second *Ezokola* factor, the officer characterized the applicant's work on the regular technical and economic affairs of Butare as a "legitimate occupation". That is true as far as it goes, but I do not believe that statement transcends the officer's entire analysis or demonstrates a reviewable error. It was certainly open to the officer to find that the applicant carried out some legitimate work but that certain activities contributed to the genocide and were significant enough to ground complicity. I also observe that some of the applicant's activities could not be characterized as legitimate. For example, it is hard to see how his membership in the Butare security council and attendance at its meetings could be part of any "legitimate" duties for complicity purposes, given the illicit purpose of the council and the role it played in the genocide. His membership and attendance at the security council meetings also supported his knowledge of the crimes and the criminal purpose of the prefecture's activities in implementing the genocidal plan.

[50] The applicant also contended that the officer erred by considering his status as a signing authority on the security council's bank account, when in fact the applicant testified that he never signed a cheque or took any steps with respect to the money in that account. I see no error in the

officer's use of that evidence. Whether that kind of evidence would be sufficient on its own to establish complicity does not arise in this case.

[51] I conclude that the applicant has not demonstrated that the officer made a reviewable error in applying the legal standards set out by the Supreme Court in *Ezokola*.

B. ***Did the officer fail to analyze evidence of coercion in determining that the applicant acted voluntarily?***

[52] The applicant's second overall argument was that the officer limited his analysis about the voluntariness of the applicant's contribution to the crimes or criminal purpose to the issue of duress, and did not address evidence of coercion short of duress.

[53] In *Ezokola*, the Supreme Court held that coercion that does not rise to the level of duress may still negate voluntariness (at paras 86 and 99) and that a full contextual analysis would necessarily include any viable defences, including, but not limited to, the defence of duress (at para 100). The applicant relied on *Al Khayyat v Canada (Citizenship and Immigration)*, 2017 FC 175, in which Strickland J. found a reviewable error in the voluntariness assessment in the decision under review because it considered only duress, and had not conducted the full contextual analysis required by *Ezokola*: see *Al Khayyat*, at paras 54-60.

[54] The applicant made three points. First, the applicant submitted that the officer failed to address his argument that he did not accept the position of sub-prefect voluntarily and only did so when informed that he and his family would be killed if he did not accept it. He noted that

these facts were not contradicted and ID accepted them. Second, the applicant observed that the officer found that he did not try to refuse the nomination as sub-prefect, when in fact the evidence demonstrated that he did try to refuse. He noted that the officer recognized the evidence of his initial refusal early in the officer's reasons, but failed to account for it when considering voluntariness and coercion. Third, the applicant argued that he left his position as soon as he believed it was safe for him and his family to do so – as soon as he believed they were not in danger, which goes directly to the issue of voluntariness. He noted that another sub-prefect and family were killed for opposing the regime. On this third point, the applicant seeks to re-argue the merits and asks the Court to either come to its own view or reweigh the evidence, which cannot be done on judicial review: *Vavilov*, at paras 83 and 125.

[55] In *Ezokola*, the Supreme Court stated that its sixth listed factor directly impacts voluntariness:

> [99] *The method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.* As mentioned, these two factors directly impact the voluntariness requirement. This requirement may not be satisfied if an individual was coerced into joining, supporting, or remaining in the organization. Similarly, an individual's involvement with an organization may not be voluntary if he or she did not have the opportunity to leave, especially after acquiring knowledge of its crime or criminal purpose. The Board may wish to consider whether the individual's specific circumstances (i.e. location, financial resources, and social networks) would have eased or impeded exit.
>
> [Original italics.]

[56] When he was a member of this Court, LeBlanc J. summarized the law in *Ezokola* as follows in *Sarwary v Canada (Citizenship and Immigration)*, 2018 FC 437, at para 39:

> As the Supreme Court of Canada clearly set out in *Ezokola*, certain factors, such as voluntary joining an organization with a criminal purpose, opportunities for leaving the organization, remaining with that organization for a long period of time, particularly after gaining knowledge of the organization's criminal purpose, and holding a position of authority or a high rank within the organization, favour a conclusion that the contribution was voluntary (*Ezokola* at paras 97-99).

[57] In this case, the officer's analysis on factor 6 directly considered the issues raised in paragraph 99 of *Ezokola*, as follows:

> [The applicant] did not seek to join the organization, he learned over the radio that he was appointed sub-prefect, a fact that weighs in his favor. I note, however, that he did not try to refuse his nomination. Despite [the applicant's] claim that he and his family were in danger, the ID determined that he was not under duress. [The applicant] did not provide any element to me which could lead me to the conclusion that there was imminent danger for him or his loved ones if he failed to comply; therefore, I also find that he was not under duress. [The applicant] states that he left as soon it was safe to do so. Open source literature demonstrates, however, that other people in similar circumstances left earlier. Even taking into consideration the fact that he did not seek to join and that there might have been some danger in refusing the appointment, the present element remains unfavorable to [the applicant] mostly because of his failure to leave until the arrival of the RPF.

The reference to the RPF is to the Rwandan Patriotic Front, which as noted already was a military force opposed to the genocide that overpowered the regime in early July 1994. The officer found that the applicant remained in his position until that time.

[58] In my view, the officer's reasons sufficiently considered both duress and more broadly, voluntariness. *Ezokola*, at paragraph 99, contemplates a consideration of recruitment and opportunity to leave the organization. The officer considered both and had earlier addressed the

applicant's high position as sub-prefect and member of the security council, and his knowledge of the crimes that had occurred and were planned.

[59] Like the ID, the officer found no duress when the applicant accepted the position. The officer did not expressly conduct a separate analysis of voluntariness apart from duress. However, immediately following the officer's consideration of the elements described in *Ezokola* at paragraph 99, the officer addressed the required elements of voluntary, significant and knowing contribution. The officer concluded expressly that the applicant was aware of the crimes that were occurring and by continuing to perform the duties assigned to him, the applicant "willingly contributed in a significant fashion to the smooth continuation and efficiency of the genocide in Butare".

[60] That conclusion of a willing contribution, when considered with (a) the officer's findings that the applicant had knowledge of the crimes, yet continued to perform his duties and failed to leave before the regime was overthrown in early July 1994, and (b) the legal sufficiency of the officer's analysis of the factors as described in paragraph 99 of *Ezokola*, lead me to conclude that the officer's analysis of voluntariness contained no reviewable error.

[61] The applicant submitted that the officer did not account for certain evidence that supported his position that remaining in his position was not voluntary. For example, he pointed to his evidence that he feared for his life, and that another sub-prefect was killed while attempting to flee from Rwanda. I do not believe that this evidence compelled the officer to decide differently than she did, nor that she necessarily had to deal with it in the reasoning.

[62] I do agree with the applicant that in the officer's reasoning on factor 6, the officer incorrectly stated that the applicant did not try to refuse his nomination. As the applicant acknowledged, the officer's reasons here are inconsistent with the officer's earlier statement that the applicant did not want the position of sub-prefect and accepted it after the prefect told him he would be killed if he refused.

[63] The question is the effect of that error. As noted earlier, *Vavilov*, *Canada Post* and *Mason* instruct that a reviewing court may intervene if an error is sufficiently serious or central that the decision does not exhibit sufficient justification, intelligibility and transparency. Each case must be judged on its own facts and specific circumstances: see e.g., *6586856 Canada Inc (Loomis Express) v Fick*, 2021 FCA 2, at para 57; *Alexander v Canada (Citizenship and Immigration)*, 2021 FC 762 (Norris J.), at para 67.

[64] Here, the officer considered both how the applicant was recruited and his opportunities to leave. The officer's error concerned the applicant's initial acceptance of the position and inferentially, why he continued in the position. Seemingly due to insufficient evidence, the officer found no "imminent" danger to the applicant and his family if he failed to comply with the request to take the position. In determining the weight of the sixth *Ezokola* factor in the contribution analysis, the officer recognized "some" danger in refusing the appointment.

[65] Importantly, however, the officer concluded that the sixth factor was unfavourable to the applicant "mostly" due to the applicant's failure to leave as others did until after the regime was overthrown in early July 1994, about two months after he became sub-prefect.

[66] In addition, the officer's overall conclusion on the applicant's complicity by contribution, considering all six *Ezokola* factors, went beyond mere voluntariness. The officer concluded that the applicant's contribution was willing.

[67] In these circumstances, the factual misstatement or inconsistency within the officer's reasons was not so central or integral as to render the officer's voluntariness analysis unintelligible or (as the applicant submitted) not transparent.

C. ***Did the officer fail to conduct a proper balancing of factors under IRPA s. 25?***

[68] The applicant contended that the officer's balancing of the H&C factors was unreasonable because it lacked transparency. According to the applicant, the officer failed to properly assess the gravity of his actual contribution to the admittedly serious crimes and instead simply weighed the seriousness of the crimes themselves. The applicant maintained that the officer was required to engage in a much more nuanced assessment and weighing of the voluntariness of his actions and his actual degree of complicity in the crimes (which did not involve direct participation).

[69] I do not agree with the applicant's submissions. In my view, the officer did understand, assess and weigh the gravity of the applicant's acts that gave rise to his complicity in the crimes or criminal purpose.

[70] Before reaching the balancing or weighing stage of the H&C analysis, the officer had assessed the six factors from *Ezokola*. As the respondent observed, factor 2 included a finding

that the applicant was a member of the prefectural security council, which the officer concluded was used by the central government as a "tool to manage the implementation of their genocidal plan" and which provided the applicant with knowledge of crime already committed and plans for future crimes. The officer's assessment of *Ezokola* factors 3 and 4 necessitated analysis of the applicant's duties and activities and his position in the prefecture, as already discussed.

[71] After considering all six factors, the officer concluded that the applicant's high position in the prefecture, added to his membership in the security council and the "high relevance of his particular duties in maintaining the efficiency of the genocide", carried the most weight and that he "willingly contributed in a significant fashion to the smooth continuation and efficiency of the genocide in Butare". As a consequence of finding he was complicit in the genocide based on *Ezokola*, the officer gave the applicant's inadmissibility "its full importance" and found it would weigh "heavily against him in the following H&C analysis".

[72] After assessing the H&C factors raised by the applicant, including hardships that would be suffered by the applicant and by his family, the officer concluded that the applicant's inadmissibility was

> one of the most serious a person can face under the IRPA. His actions during the genocide in Rwanda contributed to the death and/or suffering of a large number of people. The hardship he would face if returned to Rwanda is, in large part, a consequence of his behaviour during the genocide. Overall, I grant more weight to [the applicant's] inadmissibility than to the humanitarian considerations involved.

[73] Given the officer's analysis of *Ezokola* factors 2, 3 and 4, the officer's overall statements in conclusion on the six *Ezokola* factors and the weighing passage just quoted, I do not agree

with the applicant's submission that the officer did little more than make an observation that it is serious to be found inadmissible for human or international rights violations. The officer's reasons assessed the gravity of the applicant's acts giving rise to his complicity, in a manner consistent with the cases cited by the parties: see *Vaezzadeh v Canada (Citizenship and Immigration)*, 2017 FC 845, at paras 21-24; *Mirza v Canada (Citizenship and Immigration)*, 2016 FC 510, at paras 39-42; *Figueroa v Canada (Citizenship and Immigration)*, 2014 FC 673, at paras 31-34 and 37-38; *Sabadao v Canada (Citizenship and Immigration)*, 2014 FC 815, at paras 23-24; *Betoukoumesou v Canada (Citizenship and Immigration)*, 2014 FC 591, at paras 33-35 and 37-43; and *Oladele v Canada (Citizenship and Immigration)*, 2017 FC 851, at paras 82-87 (discussing unintelligibility and the need for clarity on the *Ezokola* factors).

[74] For the same reasons, the officer's weighing of the applicant's inadmissibility against the H&C factors he raised did not suffer from a lack of transparency. The reasoning sufficiently disclosed the basis for how the officer balanced or weighed the elements in the required assessment: *Vancouver Airport Authority v PSAC*, 2010 FCA 158, [2011] 4 FCR 425, at paras 13-14 and 16(d); *Romania v Boros*, 2020 ONCA 216, at paras 29-30; *Kanthasamy*, at para 25.

[75] Accordingly, I conclude that the applicant has not demonstrated that the officer failed to carry out a proper balancing or weighing under IRPA s. 25.

D. ***Conclusion on Substantive Review Issues***

[76] The applicant has not demonstrated that the officer's decision was unreasonable on *Vavilov* principles. I turn now to his submissions on procedural fairness.

VI. Procedural Fairness

[77] The standard of review for procedural fairness is correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121, esp. at paras 49 and 54; *Canadian Association of Refugee Lawyers v Canada (Minister of Immigration, Refugees and Citizenship)*, 2020 FCA 196, at para 35. The Court must determine whether the procedure was fair having regard to all of the circumstances, focusing on the nature of the substantive rights involved and the consequences for the individual(s) affected: *Canadian Pacific Railway*, at para 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[78] The applicant's position was that the officer assessed and relied on updated, extrinsic evidence of changed country conditions concerning whether the applicant would suffer hardship in Rwanda, without disclosing that evidence and giving him an opportunity to make additional submissions. The applicant argued to the officer that he would suffer hardship due to societal discrimination, unfair judicial processes and poor conditions in detention. In assessing these submissions, the officer relied on "more recent" evidence than was submitted by the applicant.

[79] The applicant maintained that the officer should have requested additional submissions about the risks in Rwanda before reaching a conclusion about any positive change in country conditions. The applicant noted that the officer sent two procedural fairness letters in 2017 and 2018 and easily could have included a request for submissions on hardship in light of the new evidence.

[80] The applicant submitted that there are two lines of cases concerning procedural fairness and the duty to disclose new evidence to be relied upon, one rooted in *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 (CA) and a second emanating from *Haghighi v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 407 (CA), a case decided after the Supreme Court's decision in *Baker*. The applicant also emphasized that he will have no additional opportunity to make submissions on the hardship he will face because he cannot make a fresh H&C application: *IRPA* subs. 25(1), as amended in 2013 by the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16, s. 9. He contended that his situation was akin to the historical situation on risk assessment when *Mancia* was decided in 1998. The applicant referred to Justice Bédard's reasons explaining the legal standard in *Majdalani v Canada (Minister of Citizenship and Immigration)*, 2015 FC 294. The respondent referred to *Bradshaw v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 632, at paras 64-69 and *Shah v Canada (Citizenship and Immigration)*, 2018 FC 537, at paras 34-42.

[81] Overall, it is important to determine whether the applicant had a meaningful opportunity to participate in the officer's decision-making process, including a full and fair opportunity to present his case: *Baker*, at paras 28, 30 and 32; *Haghighi*, at para 26; *Kisana*, at para 45; *Majdalani*, at paras 36 and 58.

[82] A combination of points leads me to the conclusion that the process used by the officer was procedurally fair to the applicant.

[83] The first is the public nature and sources of the evidence at issue. The applicant's submissions did not specify which documents were of concern, but looking at the officer's references to recent documents and the footnotes in the decision, the relevant reports were: United States, Department of State, *Country reports on Human Rights Practices for 2015*; Amnesty International, *Annual Report 2016/2017 for Rwanda*; and Netherlands, Ministry of Foreign Affairs, *Country Report on Human Rights and Justice in Rwanda*, August 2016. These reports were publically available, prepared by reputable sources, and the applicant could have easily accessed them: *Majdalani*, at para 53-54; *Shah*, at paras 36-38 (discussing decisions of this Court adopting the post-*Baker* contextual approach) and 41-42; *Bradshaw*, at paras 62 and 70.

[84] Second, the applicant had the overall and evidentiary burden in relation to the hardship issues he raised: *Shah*, at para 42; *Majdalani*, at para 40.

[85] Third, from a process perspective, the applicant participated in the decision-making process. He had ample opportunity to make submissions to the officer, and in fact did so: see *Majdalani*, at paras 36 and 58.

[86] To elaborate, the applicant made lengthy submissions with his original application in 2014. Those were supplemented by lengthy submissions on the impact of *Ezokola* sent by letter dated August 14, 2014 in response to a request made by letter dated July 11, 2014. The officer sent two additional procedural fairness letters dated November 21, 2017 and July 30, 2018. The applicant responded to both.

[87] In the procedural fairness letter dated July 30, 2018, the officer offered the opportunity to make additional submissions on *Ezokola*, on top of the applicant's existing submissions on that topic made in 2014 and in December 2017. In the applicant's responding letter dated August 28, 2018, the applicant made submissions on the requested issue, but also included considerable additional information relevant to his H&C application generally. He included medical documents about his own and his son's health, letters of support and financial information. This additional information was submitted expressly as evidence of the applicant's establishment in Canada and the hardship he and his family would experience should they have to leave Canada. The applicant could have easily updated his hardship submissions relating to country conditions at the same time. By August 2018, all three of the country condition reports used by the officer had been published and were therefore available to the applicant.

[88] Fourth, the officer concluded that the applicant would face "significant hardship if deported to Rwanda" and gave "important weight" to that hardship. It is plausible that if the applicant had provided additional references to country condition evidence in the reports, it could have had an impact on the officer's assessment of the degree of hardship the applicant would face. However, the applicant did not refer the Court to any specific new information that he would have brought to the attention of the officer, either in those reports or in other reports on Rwandan country conditions, that may have contradicted or affected the officer's conclusions or influenced the outcome. I am therefore unable to assess whether another opportunity to make submissions may have affected the weight given to hardship or influenced the outcome: *Majdalani*, at para 37; *Yang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 20, at paras 17 and 29; *Haghighi*, at paras 28(a), 37 and 42.

[89] Rather than the specific contents of the reports relating to country conditions, the applicant's submissions on procedural fairness focused on the recency of the evidence – that the country condition evidence relied upon by the officer was more recent than the evidence submitted by the applicant. On recency, I believe that this Court should tread carefully before interfering with an officer's use of the latest publically available country condition evidence: see *Bradshaw*, at para 62. Everyone has an interest in ensuring that officers make decisions on the best available country condition evidence from independent and reliable sources, while respecting procedural fairness to individual applicants. In my view, the mere fact that the officer referred to recent country condition evidence that was not proactively disclosed for comment to the applicant does not of necessity lead to procedural unfairness. The specific circumstances matter. For example, if the contents of a recent report relied upon by an officer could genuinely provoke a new or different submission on the country conditions, an applicant may well have a more attractive argument about procedural unfairness than if the report contained nothing new. In this case, the officer's use of recent country condition evidence was not unfair to the applicant.

[90] For these reasons, I conclude that the applicant has not shown that the officer failed to provide procedural fairness by relying on recent country condition information in the decision on H&C relief.

VII. Conclusion

[91] The application is therefore dismissed.

[92] Neither party proposed a question for certification and none is stated.

JUDGMENT in IMM-3206-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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