Federal Court  Cour fédérale

Date: 20230127

Docket: IMM-9450-21

Citation: 2023 FC 135

Ottawa, Ontario, January 27, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ASADULLHA SAFI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Immigration Division [ID] of the Immigration and Refugee Board of Canada, dated November 25, 2021 [the Decision]. In the Decision, the ID found the Applicant inadmissible to Canada pursuant to paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Paragraph 35(1)(a) of the IRPA provides that a permanent resident or 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*, SC 2000, c 24 [the Act]. Those sections encompass genocide, crimes against humanity and war crimes.

[2] As explained in more detail below, this application is allowed, because the ID failed to substantively engage with the expert evidence tendered by the Applicant and failed to explain why it rejected this evidence.

II. **Background**

[3] The Applicant is a citizen of Afghanistan. In March 2011, he began working at the National Directorate of Security [NDS], which is the Afghani intelligence organization. After completing his training, he was assigned to the Directorate of Interrogation (sometimes referred to as Section 40) within the Counter Terrorism Directorate (sometimes referred to as Section 124). He was specifically tasked with seeking information on the financing of terrorist activities from those whom he interrogated.

[4] After two years with the Directorate of Interrogation, the Applicant was assigned to the Threat Finance Unit within the Counter Terrorism Directorate. While his work remained the same, he reported to a different Director.

[5] The Applicant lived in Afghanistan until he travelled to the United States in December 2016 to attend training in Virginia on interrogations and interviewing techniques. Fearing that his work with the NDS put his life at risk, he took the opportunity to flee and entered Canada in January 2017. He then initiated a refugee claim.

[6] On January 27, 2017, a report was written, pursuant to section 44 of the IRPA, alleging that the Applicant was inadmissible under paragraph 35(1)(a) of the IRPA on the grounds of violating human or international rights for committing an act outside of Canada that constitutes an offence referred to in sections 4 to 7 of the Act. A delegate of the Minister of Public Safety and Emergency Preparedness [Minister] referred the report to the ID.

[7] The basis of the report was that officials at the NDS, and specifically the department to which the Applicant was assigned, were reported to have engaged in systematic torture of detainees to obtain confessions and information. While the Minister never alleged that the Applicant personally or directly committed any of the alleged acts, the report alleged that the Applicant was wilfully blind to, and therefore complicit in, these acts.

[8] The Applicant's refugee claim was suspended pending the ID's determination of his inadmissibly. His admissibility hearing took place over four sittings in June and July 2021.

III. **Decision under Review**

[9] Before the ID, the Minister alleged that the Applicant is a foreign national who was part of an organization that engaged in committing crimes against humanity and war crimes and that, by virtue of his affiliation with this organization, he made a significant contribution at an operational level to the crimes perpetuated by the organization. The Minister further submitted that the Applicant had knowledge of the war crimes taking place at the facility where he was employed, or at least was wilfully blind to it, because he did not at any time make inquiries into the organization's treatment of detainees, even though he was aware he was conducting interrogations for an intelligence organization that was detaining and interrogating conflict-related detainees.

[10] The Applicant did not dispute that the NDS was involved in crimes against humanity. His principal submissions before the ID were that there was insufficient evidence to establish reasonable grounds to believe that he was complicit in war crimes. More specifically, he submitted that the Minister's evidence did not establish that the sections of the NDS where he worked (Section 40 followed by the Threat Finance Unit) engaged in torture or similar abuses, or that torture was systematically used by these sections, during his time there. He further argued that he did not engage in, and was not aware of or wilfully blind to, torture or other abuses, and hence he did not voluntarily make a significant and knowing contribution to any criminal purpose held by any part of the NDS.

[11] The Applicant tendered before the ID an expert report authored by Dr. Brian Williams, a tenured professor of Islamic culture at the University of Massachusetts, Dartmouth. The ID acknowledge that this Court has previously qualified Dr. Williams as an expert in aspects of Afghan politics and history (see *Harkat (Re)*, 2010 FC 1241 and *Almrei (Re)*, 2009 FC 1263). The ID was satisfied that Dr. Williams provided in-depth evidence related to the issues in the case and that he provided objective information about the NDS, the part of the NDS with which the Applicant was directly involved, and the type of work that employees like the Applicant performed. The ID also acknowledged Dr. Williams' significant knowledge of Afghanistan's counter-terrorism activities, as he had met with the financial team at the NDS headquarters while he was working for the Counter Terrorism Center of the United States [US] Central Intelligence Agency [CIA] in 2007.

[12] The ID noted that it was not bound to accept and give full weight to Dr. Williams' opinion and explained that it gave less weight to certain parts of his report, where the information seemed to be based on what the Applicant had told Dr. Williams.

[13] The ID ultimately found that there were reasonable grounds to believe that the Applicant is inadmissible pursuant to paragraph 35(1)(a) of the IRPA.

[14] In arriving at this determination, the ID noted that the allegation against the Applicant required that it be established that he: (i) is a permanent resident or foreign national, and (ii) that he was complicit in (iii) crimes referred to in sections 4 to 7 of the Act. The contemplated offences under the Act were crimes against humanity and war crimes.

[15] The ID found that the evidence clearly established that the Applicant is a citizen of Afghanistan and neither a Canadian citizen nor a permanent resident of Canada. Therefore, he is a foreign national as defined under subsection 2(1) of the IRPA.

[16] The ID also found that there were reasonable grounds to believe that the NDS committed crimes against humanity and war crimes. It relied on the documentary evidence, including a 2016 Preliminary Examination Report from the Office of the Prosecutor of the International Criminal Court [ICC Office], which concluded that there is a reasonable basis to believe that the NDS tortured conflict-related detainees and committed related ill-treatment. The ICC Office had found that the information available provided a reasonable basis to believe that crimes under articles 7 and 8 of the *Rome Statute of the International Criminal Court* [Rome Statute] (which define "crimes against humanity" and "war crimes", respectively) had been committed in Afghanistan. These crimes included imprisonment, deprivation of physical liberty, cruel treatment, and outrages upon personal dignity. The ID noted that Canada has accepted the Rome Statute as authority on international criminal principles and has implemented the treaty in domestic law through the Act (see *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] at para 49).

[17] The ID was also satisfied that these violations occurred during the Applicant's period of service with the NDS.

[18] The ID next concluded that the NDS was part of the state apparatus. It found that, although there was no clear written policy articulated by the Afghan government to the NDS, the

lack of action by the government led to the conclusion that it implicitly consented to the acts of abuse against detainees. Therefore, the ID found there to be an unspoken policy that encouraged crimes against humanity and war crimes and that it was widespread, sustained, and concerted, and involved decisions made at the highest ranks of the government.

[19] Finally, the ID conducted an analysis by which it concluded that the Applicant was complicit in the crimes committed. The ID noted the three-fold test for complicity outlined in *Ezokola*, which asks whether the individual voluntarily made a significant and knowing contribution to an organization's crime or criminal purpose. The Member also noted the analytical factors set out in *Ezokola* to assist in answering the question:

A. the size and nature of the organization;

B. the part of the organization with which the person was most directly concerned;

C. the person's duties and activities within the organization;

D. the person's position or rank in the organization;

E. the length of time the person was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and

F. the method by which the person was recruited and the person's opportunity to leave the organization.

[20] Following analyses of these factors, the ID was satisfied that they weighed in favour of the Applicant's complicity in the crimes of the NDS, and it found reasonable grounds to believe that the Applicant made a voluntary, knowing, and significant contribution to the NDS' crimes against humanity or criminal purpose such that he was complicit in the crimes. Therefore, the ID found him to be inadmissible to Canada pursuant to paragraph 35(1)(a) of the IRPA for violating human and international rights.

IV. **Issues**

[21] The Applicant raises the following two issues in challenging the Decision:

A. Did the ID err in its treatment of the expert evidence?

B. Did the ID err in assessing the first and second *Ezokola* factors?

[22] The parties agree (and I concur) that the Decision is reviewable on the reasonableness standard.

V. **Analysis**

[23] My decision to allow this application for judicial review turns on first issue raised by Applicant - the ID's treatment of the expert evidence.

[24] The report of the Applicant's expert witness, Dr. Williams, speaks both to whether the NDS committed crimes against humanity and war crimes (i.e. whether there is an institutional policy that encouraged such crimes) and whether the Applicant was complicit therein. The Applicant emphasizes the following aspects of Dr. Williams' evidence:

A. When President Obama came to the presidency in 2008, he ordered an immediate end to so-called "enhanced interrogation techniques" conducted by the CIA;

B. Resulting US policy changes, rejecting the use of torture, were taught to Afghan institutions including the NDS by US and NATO trainers;

C. President Karzai in Afghanistan took a personal role in monitoring Afghan institutions, including the NDS, for any reports of torture and created a human rights commission to monitor and prevent such abuses;

D. The time frame when the Applicant worked at the NDS, from 2011 to 2016, was after these anti-torture reforms, as part of a drive to recruit university-educated, civilian employees who would be receptive to human rights values;

E. Dr. Williams does not question the Minister's evidence that the NDS still engaged in torture following these reforms and during the Applicant's tenure at the NDS. However, he states that during this period the NDS was an officially changed organization that had intolerance of torture, and he opines that the remaining cases of unsanctioned torture would have been conducted by a few individuals and likely without the knowledge of the majority. He further opines that the financial counter-terrorism teams with which the Applicant worked were not among the remaining parts of NDS where torture may have continued.

[25] The Applicant acknowledges that the ID did not ignore Dr. Williams' evidence, as it is referenced in the ID's analysis. The Applicant also recognizes that the ID was not obliged to accept Dr. Williams' evidence over the evidence adduced by the Minister. However, he submits that the ID was required, and failed, to grapple intelligibly with Dr. Williams' evidence and explain why it was not accepted.

[26] In the course of its analysis as to whether the NDS had engaged in crimes against humanity and war crimes, and in its subsequent analysis of the Applicant's complicity, the ID noted Dr. Williams' evidence: (a) of efforts to crack down on torture at the time the Applicant worked for the NDS; (b) that torture did not reflect the majority of NDS' interrogations; (c) that the Applicant was part of the educated, urbanite cohort hired as a result of NDS' reform efforts; and (d) that the US did not endorse torture and would not rely on any information obtained through such means.

[27] However, based on the Minister's evidence, the ID was satisfied that many violations still occurred in Section 124 during the Applicant's period of service. Ultimately, the ID concluded that: (a) the Afghan government had an unspoken policy that encouraged war crimes and crimes against humanity; and (b) the department and location at which the Applicant worked, and the nature of his duties, supported a finding that he was complicit in such crimes. I agree with the Applicant's submission that, in the analyses leading to these conclusions, while the ID references components of Dr. Williams' evidence, it fails to explain why it rejects this evidence.

[28] The Respondent points to the ID's explanation that it is giving less weight to some parts of Dr. Williams' report where the information seems to be based on what the Applicant told him. The ID notes Dr. Williams expressing that his opinion about the Applicant's roles and duties is based on his personal conversation with the Applicant in which he was adamant that he did not engage in torture. The ID reasons that, while Dr. Williams is essentially stating that he believes what the Applicant told him, this aspect of Dr. Williams' evidence is not based on his expertise.

[29] I agree with the Respondent's submission that this aspect of the ID's analysis is reasonable. However, as the Applicant asserts, this analysis by the ID addresses only a very small component of the otherwise unchallenged report. The Decision states that the ID was satisfied that Dr. Williams provided in-depth evidence related to the issues in the case and that he provided objective information about the NDS. However, the Decision provides no explanation for rejecting Dr. Williams' evidence based on this expertise.

[30] The Respondent also argues that there was no significant inconsistency between Dr. Williams' evidence and that of the Minister and that the ID was therefore not required to explain why it rejected the expert evidence. The Applicant disputes this characterization of the evidence, and I agree with the Applicant on this point. While Dr. Williams acknowledged that torture still occurred during the time of the Applicant's tenure, it would be a vast oversimplification to suggest that his evidence and that of the Minister are aligned. As explained above, the thrust of Dr. Williams' evidence is that, by the time of the Applicant's tenure, the NDS was an officially changed organization that did not tolerate torture.

[31] As noted by Justice Gibson in *Naeem v Canada (Citizenship and Immigration)*, 2008 FC 1375 at paragraph 24, expert evidence offered on behalf of an individual facing an inadmissibility determination requires thoughtful and comprehensive analysis if it is to be rejected.

[32] Based on the lack of substantive engagement with the expert evidence, I find the Decision unreasonable and will allow this application for judicial review. It is therefore unnecessary for the Court to consider the Applicant's other arguments. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT in IMM-9450-21

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision set aside, and the matter is returned to a different member of the Immigration Division for re-determination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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