Federal Court Cour fédérale

Date: 20140620

Docket: IMM-5820-13

Citation: 2014 FC 591

Ottawa, Ontario, June 20, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KALALA PRINCE DEBASE
BETOUKOUMESOU

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

**JUDGMENT AND REASONS**

[1] This is an application for judicial review of a decision by a Citizenship and Immigration Canada (CIC) Officer refusing Mr. Kalala Prince Debase Betoukoumesou's application for permanent residence on humanitarian and compassionate (H&C) grounds under s 25 of the *Immigration and Refugee Protection Act*, 2001 SC, c 27 [*IRPA*].

## I. **BACKGROUND**

[2] The application was heard in conjunction with an application for judicial review of a negative Pre-Removal Risk Assessment decision in court file IMM-5559-13. Separate reasons have been provided for that decision.

[3] Mr. Betoukoumesou is a 52 year-old citizen of the Democratic Republic of Congo (DRC). While living in the DRC, Mr. Betoukoumesou had a small transportation business with two minibuses and a small store. In 1990, he became a member of one of the major opposition parties, the "*Union pour la démocratie et le progrès social*" (Union for Democracy and Social Progress or UDSP). In September 1991, his shop was pillaged and destroyed by soldiers. From that moment on, he had difficulty providing for his family. In September 1992, he was introduced to someone who worked for the "*Service national d'intelligence et de protection*" (SNIP). Mr. Betoukoumesou was eventually hired as a civilian driver for the SNIP. He drove military staff from their homes to the SNIP office in the morning and back home after work.

[4] On February 22, 1993, Mr Betoukoumesou was asked by his supervisor to take part in an operation that turned out to be a mission to abduct three people. The supervisor ordered that any targets who resisted the abduction be killed. One of the targets was an individual who lived in the same neighbourhood as Mr Betoukoumesou and who was a member of the political opposition. Mr. Betoukoumesou was recognized and, as a result, was threatened the next day at his home by a mob of approximately 20 people who were all armed with makeshift weapons. They set his

house on fire. Mr. Betoukoumesou escaped in his car. He spoke to his supervisor to report the incident and request protection and assistance, but this was refused.

## II. **DECISION UNDER REVIEW**

[5] The matter before the officer related to whether H&C grounds existed which would justify granting Mr. Betoukoumesou an exemption from his inadmissibility to Canada on the basis of having committed offences referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [*Crimes Against Humanity and War Crimes Act* or *Act*] under s 35(1)(a) of the *IRPA*.

[6] The officer declined to postpone the decision pending the release of the Supreme Court of Canada's decision in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*], distinguishing that case on the ground that the allegations against Mr Betoukoumesou were that he was a member of an organization « ayant des fins limitées et brutales et ayant commis des crimes contre l'humanité » ("pursuing a limited brutal purpose and having committed crimes against humanity") and that he was aware of the nature of the organization and the acts it committed when he joined it.

[7] The Immigration and Refugee Board (IRB) had previously concluded that, based on his own testimony and the documentary evidence, Mr. Betoukoumesou was excluded from refugee protection under article 1(F) of the *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954) [Refugee Convention]. Pursuant to subsection

15(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, Mr. Betoukoumesou was therefore found to be inadmissible to Canada under s 35(1)(a) of the *IRPA*.

[8] Upon reviewing the evidence the officer concluded that Mr. Betoukoumesou's submissions contained no new credible facts in relation to his inadmissibility to support a reversal of the IRB's findings of fact. The defence of superior orders was not available to him, the officer concluded, as it was only applicable in the context of war crimes. Further, the defence of duress was rejected on the basis that there was no evidence to establish that as a result of the physical danger to which he had been subjected, Mr Betoukoumesou did not have the freedom to choose not to participate in the abductions. Thus, the officer determined that the IRB's finding was determinative and that Mr Betoukoumesou is inadmissible to Canada under s 35(1)(a) of the *IRPA*.

[9] With regard to the H&C considerations, the officer noted that a negative decision would not have an impact on the status of Mr Betoukoumesou's wife and the four children who came to Canada in 1997. They had been granted refugee status and became permanent residents in September 2008. Mr Betoukoumesou and his wife have had two children since their arrival in Canada. They are Canadian citizens. The officer noted that Mr Betoukoumesou has lived in Canada for fifteen years and appeared to have worked throughout most of this time. The evidence therefore demonstrated a certain degree of establishment in Canada.

[10] The officer considered that the interests of the four adult children would not be adversely affected by the applicant's return to the DRC. With respect to the two minor children, the officer

considered that they would be able to remain in contact with their father and would be able to continue to receive his support and counsel.

[11] With respect to Mr. Betoukoumesou's allegations that he would face the risk of detention and torture upon removal to the DRC on the basis of his membership in the Union for Democracy and Social Progress (UDSP), the officer held that the documentary evidence did not establish systemic discrimination in the DRC on the basis of membership in the UDSP. Furthermore, while a letter from the UDSP alleged risks to Mr Betoukoumesou, including the allegation that he is wanted, there were no details as to why Mr Betoukoumesou is wanted or by whom.

[12] The officer therefore found that while the best interests of the child and his establishment in Canada both weighed in favour of granting the H&C application, they were outweighed by the gravity of the facts of his inadmissibility. The objectives of the *IRPA* also weighed in favour of rejecting the application, in particular paragraphs 3(1)(i), 3(3)(a), and 3(3)(f).

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| Objectives - Immigration | Objet en matière d'immigration |
| 3. (1) The objectives of this Act with respect to immigration are | 3. (1) En matière d'immigration, la présente loi a pour objet : |
| […] | […] |
| (i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals | i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour |

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| or security risks; and | la sécurité; |
| […] | […] |
| Application | Interprétation et mise en oeuvre |
| (3) This Act is to be construed and applied in a manner that | (3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet. |
| (a) furthers the domestic and international interests of Canada; | a) de promouvoir les intérêts du Canada sur les plans intérieur et international |
| […] | |
| (f) complies with international human rights instruments to which Canada is signatory. | f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire. |

## III. **ISSUES**

[13] The applicant raises the following issues:

1. Did the officer act unreasonably or breach the duty of fairness in deciding not to postpone the decision-making process in order to consider the principles set out in *Ezokola*?
2. Did the officer err by finding that the defence of superior orders was not applicable?
3. Were the officer's findings with regards to the best interests of the child and the applicant's membership with the UDSP reasonable?

[14] The applicant raises questions of fact and law as well as questions of law, which are reviewable on standards of reasonableness and correctness respectively: *Y.U. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 557.

## IV. **ARGUMENT AND ANALYSIS**

### A. *Did the officer err in deciding not to postpone the decision until the Supreme Court released its decision in Ezokola?*

[15] The applicant submits that the officer breached procedural fairness by not postponing the decision until the Supreme Court judgment in *Ezokola* was released. The respondent's position is that the officer was under no obligation to delay making a decision in favour of a determination by the Court in unrelated cases, brought by other individuals. Moreover, the respondent submits, the Supreme Court's reasoning in *Ezokola* would have been of no assistance to the applicant had the officer waited until it was released. *Ezokola* clarified the law on complicity in relation to exclusion from refugee protection - it did not displace other modes of liability such as aiding and abetting.

[16] I agree with the respondent that the applicant was a knowing accomplice to the perpetration of crimes rather than an unwitting member of an organization which committed some human rights violations. He was aware of the consequences of driving the militiamen who had been ordered to kidnap opposition members and to kill those who resisted. Based on the facts of this case and the findings made by the officer, the applicant would still have been found to be inadmissible post-*Ezokola* because he made a voluntary, knowing and significant contribution to SNIP's commission of international crimes.

[17] I note that Justice O'Reilly expressed the view *in obiter* in *Joseph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1101 at paras 14-15 that the Supreme Court's concern

that individuals should not be found complicit in wrongful conduct based merely on their association with a group engaged in international crimes logically extends to the issue of inadmissibility. I don't disagree with that view but it does not assist the applicant as his association with SNIP was more than mere "indirect contact" but reckless in that he actively participated in the event and knew that resistance by the opposition members would be met with violence.

[18] In my view, although it may have been advisable for the officer to have awaited the outcome of *Ezokola* before rendering her decision in case it had some bearing on the matter before her, she was not bound to do so. Her choice to proceed does not make the resulting decision unreasonable.

B. *Did the officer err in finding that the defence of superior orders was not available to the applicant?*

[19] The applicant submits that the officer erred in not applying the defence of superior orders. She relied upon a memorandum prepared by the Canadian Border Services Agency, disclosed to the applicant, which concluded that the defence was only available for war crimes and not for crimes against humanity based on the *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) [*Rome Statute*] and the *Crimes Against Humanity and War Crimes Act*.

[20] Article 1 F (a) of the Refugee Convention reads as follows:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
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> …
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> F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
>
> a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

[21] The *Crimes Against Humanity and War Crimes Act* implements the *Rome Statute*, to which Canada adhered in 1998. The *Act* was brought into force on October 23, 2000. It contains definitions of "crime against humanity", "genocide" and "war crime" linked to customary or conventional international law and creates indictable offences for the commission of those acts in or outside of Canada.

[22] In this matter, the applicant was excluded because of his involvement with acts constituting crimes against humanity. Such crimes are defined in s 4 of the *Crimes Against Humanity and War Crimes Act* as follows:

> "crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal

according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission

[23] Subsection 6 (5) provides:

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| 6(5) For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following: | 6(5) Il est entendu qu’un crime contre l’humanité transgressait le droit international coutumier ou avait un caractère criminel d’après les principes généraux de droit reconnus par l’ensemble des nations avant l’entrée en vigueur des documents suivants : |
| (a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and | a) l’Accord concernant la poursuite et le châtiment des grands criminels de guerre des Puissances européennes de l’Axe, signé à Londres le 8 août 1945; |
| (b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946. | b) la Proclamation du Commandant suprême des Forces alliées datée du 19 janvier 1946. |

[24] Section 14 of the *Act* excludes the defence of superior orders unless the accused was under a legal obligation to obey the orders, did not know that the order was unlawful and the order was not manifestly unlawful. These limitations to the defence were recognized under the general principles of law long before the adoption of the Rome Statute and the Act. Under s 14 (2) the Act provides that orders to commit crimes against humanity are manifestly unlawful.

[25] The applicant relies on *Ventocilla et al v Canada (Minister of Citizenship and Immigration)*, 2007 FC 575 [*Ventocilla*], a case involving a former member of the Chilean military who had committed acts in the internal civil war in that country that were acknowledged to constitute war crimes as defined by the *Rome Statute*. At paras 15-17, the Court held that the definitions of "war crime" in the *Rome Statute* and the *Crimes Against Humanity and War Crimes Act* could not be applied retroactively to the acts in question because they were committed before the *Rome Statute* became part of international law. This conclusion was based on the definition of "war crime" in the *Crimes Against Humanity and War Crimes Act* and the principle of non-retroactivity in international criminal law. Justice Teitelbaum found, at para 20, that the Board had erred in "assuming that war crimes could be committed during an internal conflict."

[26] *Ventocilla* is of limited assistance to the applicant as it dealt with a definition of war crimes that is not applicable in the present proceedings. Moreover, the question in the present matter was not of retroactive application of the offences in the 2000 legislation but the effect of its declaratory aspects. Section 14 of the *Crimes Against Humanity and War Crimes Act* is declaratory, in my view, of what the law was at the time the applicant worked for the SNIP in what was then Zaire. Alternatively, it is valid retrospective legislation that attaches new consequences for the future to events that took place before the statute was enacted: *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at paras 39-40 (SCC).

[27] The applicant submits that this Court has held that the defences of obedience to superior orders and compulsion were available to members of the military or police forces in prosecutions

for war crimes and crimes against humanity before the *Rome Statute* came into force: *Varela v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 483, [2001] 4 FC 42 (TD) [*Varela*] at para 27 citing *R v Finta*, [1994] 1 SCR 701 [*Finta*]. The applicant in *Varela* had been a member of the Nicaraguan military and served as a guard at a prison.

[28] Mr Finta was a member of the Royal Hungarian Gendarmerie, a paramilitary police force under the command of the German SS at the relevant time, which engaged in the deportation of Hungarian Jews to the Nazi death camps. He was charged in Canada with unlawful confinement, robbery, kidnapping and manslaughter under the definition of those crimes in the *Criminal Code* as it existed at that time. The indictment added that these offences constituted crimes against humanity and war crimes under s 7(3.71) of the *Criminal Code* in order to rely on the extraterritorial jurisdiction granted by that enactment.

[29] While the terms "war crimes" and "crimes against humanity" are often used interchangeably, they are distinct concepts. In *Finta*, the Supreme Court relied on the definitions in s 7 (3.6) of the *Criminal Code* as they were then but since repealed. These definitions were virtually identical to those set out in s 4 of the *Crimes Against Humanity and War Crimes Act*.

[30] The majority in *Finta* held, at para 180, that Canadian courts had jurisdiction to try crimes allegedly committed on foreign soil only when the alleged crime constituted a war crime or a crime against humanity as defined in s 7 (3.6) of the Code. As noted by Justice Cory at para 183, for the majority, the additional element required to be proven with respect to war crimes is that the actions constitute a violation of the laws of armed conflict. With respect to crimes

against humanity, the additional element is that the inhumane acts are widespread or systematic crimes against any civilian population or any identifiable group: *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 119.

[31] Justice Cory discussed the defence of superior orders at paras 222-270 in the context of the actions of military or police personnel in a war setting. He summarized the availability of the defence at para 270 as follows:

> The defence of obedience to superior orders and the peace officer defence are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defences are subject to the manifest illegality test. That is to say, the defences will not be available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior orders and the peace officer defence will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. That is to say, there was such an air of compulsion and threat to the accused that the accused had no alternative but to obey the orders. As an example, the accused could be found to have been compelled to carry out the manifestly unlawful orders in circumstances where the accused would be shot if he or she failed to carry out the orders.

[32] This was the law in respect of the defence of superior orders as it was recognized by the international community at the end of World War II. In the *Finta* case, the defence had an air of reality, as discussed by Justice Cory at paras 273-274, because of the accused’s position in a para-military police organization, the existence of the war, the occupation by the German forces and the imminent invasion by the Soviet army.

[33] There is nothing of a comparable nature in the facts of this case. The events in question did not take place in the context of a war. Mr Betoukoumesou was not a member of a military or

police organization subject to the regulations or discipline of that organization. He took the job as chauffeur to the SNIP for financial reasons. There is no indication in his evidence that there was such an air of compulsion to this employment that he had no alternative but to obey the orders.

[34] The RPD found that the SNIP was an organization with a limited and brutal purpose, that the applicant knew of this and that his participation consciously implicated him in their acts of persecution. The actions of the SNIP in Zaire at the time of the applicant's participation were not part of an "international armed conflict" but rather crimes against the civilian population on a systematic and widespread basis in the nature of "mass arrests, gruesome torture, summary executions and other atrocities" to prop up a ruthless regime. These were manifestly unlawful crimes against humanity for which the defence of superior orders could not be invoked.

[35] The officer considered whether Mr Betoukoumesou was compelled to participate in the mission of February 22, 1993 of which he had testified before the RPD. She concluded, reasonably in my view, that he had voluntarily joined in supporting the SNIP despite his knowledge of their manifestly illegal crimes. He did not give evidence that he had been forced to participate or faced an immediate and grave danger if he had refused. Rather than immediately disassociate himself from the activities of the SNIP, he had sought the protection of the commander when he feared the reaction of the members of his community.

[36] The officer did not err in my view in concluding that the defence of superior orders was not available to Mr. Betoukoumesou

C. *Were the officer's findings with regards to the best interests of the child and the applicant's membership with the UDSP reasonable?*

[37] The applicant submits that the officer erred in failing to conduct a true balancing of the children's interests in comparison with the inadmissibility finding. His adult age children were entitled to receive the benefit of his continued attention and support and that should have been given greater weight in the analysis. The mere fact that a child is over 18 should not relieve an officer from considering his or her best interests: *Herdoiza Mancheno v Canada (Minister of Citizenship and Immigration)*, 2013 FC 66 at para 27. It was unreasonable to find that because the children's education and current life would not be disrupted, that the best interests of the child are respected. Their current life includes their father, who will be at risk if he returns to the DRC: *Malekzai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1571 at para 25.

[38] The applicant also contends that the officer also unreasonably found that the applicant's membership in the UDSP would cause him difficulties but that these would not amount to undue hardship. He submits that he would be at risk of arrest, torture, detention and disappearance.

[39] The respondent argues that the officer reasonably dealt with the consideration of the best interests of the children. The applicant is not entitled to approval of his H&C application on the basis of his family status. The officer's balancing of this factor against the serious conduct that supports the inadmissibility determination was eminently reasonable, in the respondent's submission.

[40] With regard to the applicant’s relationship with the UDSP, the respondent submits that the officer was also entitled to find the evidence of risk upon return to be insufficient to justify a positive determination on the application. The applicant relied upon a vague letter which asserts that the applicant is “wanted”, but did not provide any details as to whom wants him or why. The applicant does not challenge this finding, but points to general country conditions evidence and asserts unreasonableness on this basis. The respondent submits that this argument is unsupported and does not demonstrate unreasonableness. There is no linkage to the applicant’s circumstances.

[41] In my view, the officer’s consideration of the humanitarian and compassionate factors was intelligible, transparent and justified. She did not fail to consider the best interests of the children but rather discussed them at length. It was reasonable for her to take into account the fact that some of the children are not minors. It was also reasonable for the officer to find that their lives would not be unduly disrupted by the removal of their father. The officer recognized that it would be difficult for the family, especially the younger children, but considered that this did not outweigh the factors supporting exclusion. While I am sure that the applicant and his family consider that conclusion harsh, it was one that was open to the officer to make. There is much to be said for permitting the applicant to remain in Canada, and the case for that outcome was thoroughly presented by the applicant’s counsel. However, the Court can not substitute its own sense of the balance between the factors so long as the decision falls within the acceptable range and is defensible.

[42] As for the officer’s findings regarding the membership with the UDSP, these were reasonable as well. The evidence did not indicate that UDSP members in general were being

systematically discriminated against, but rather that leaders of the group were targeted for house arrest or prohibited from leaving the country. Since the applicant is not a leader of the UDSP, it was reasonable for the officer to find that the applicant would not be subjected to a risk to his life on the basis of his membership in the UDSP if he were to be removed to the DRC.

[43] In conclusion, I am satisfied that the officer's findings were intelligible, justified and transparent and fell within a range of acceptable outcomes defensible in light of the facts and the law.

[44] The application is dismissed. No questions were proposed for certification.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application is dismissed. No questions are certified.

"Richard G. Mosley"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **STYLE OF CAUSE:** | KALALA PRINCE DEBASE BETOUKOUMESOU V THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
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| **DATE OF HEARING:** | MAY 8, 2014 |
| **JUDGMENT AND REASONS:** | MOSLEY J. |
| **DATED:** | JUNE 20, 2014 |

**APPEARANCES:**

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| Micheal Crane | FOR THE APPLICANTS |
| Leanne Briscoe | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Micheal Crane<br>Barrister & Solicitor<br>Toronto, Ontario | FOR THE APPLICANTS |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |