Federal Court  Cour fédérale

Date: 20130201

Docket: IMM-1036-12

Citation: 2013 FC 118

Ottawa, Ontario, February 1, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

ALMIR LUKAVICA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of what is now Bosnia-Herzegovina. When he was 18, he was conscripted into the Army of the Republic of Bosnia and Herzegovina [the Bosnian Army], where he served for nine months. Approximately three years ago, the applicant's wife, who is a Canadian citizen, sought to sponsor the applicant for landing in Canada as a member of the Family Class.

[2] In a decision rendered December 1, 2011, an immigration officer at the Canadian Embassy in Vienna denied the applicant's application for a permanent resident visa, finding there to be

reasonable grounds to believe that the applicant is inadmissible under paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act]. More specifically, the officer found that there were reasonable grounds to believe that the applicant was complicit in atrocities committed by the Third Corps of the Bosnian Army in the Ozren Mountains during September of 1995.

[3] In this application, the applicant argues that this decision should be set aside because he was denied procedural fairness in that he was not provided with the substance of the officer's suspicions nor with the salient facts contained in two documents before the officer, which the officer considered in making his decision. These documents consist of a detailed email to the officer from a Senior Program Officer in the War Crimes Section of the Canada Border Services Agency and an excerpt from an Internet blog entitled, "Slobodna Bosna, War crimes "Vozunca case", 6 years later, 9/13/01". The applicant further argues that the officer lacked evidence to substantiate his findings and applied a flawed and incorrect test to find complicity. More specifically, the applicant submits that the officer's conclusion is perverse because there was no evidence before the officer from which he could reasonably have concluded that the applicant was complicit in a war crime or crime against humanity, under the well-established law defining complicity, given the applicant's low rank of private, the fact he was conscripted, his lack of knowledge of the atrocities in question and the lack of evidence of the applicant having undertaken any tasks while in the Bosnian Army, with the exception of training and standing guard at an Army barracks 40 kilometres away from where the atrocities occurred. The applicant requests a directed verdict, which would require that the officer who re-determines the applicant's application to not find the applicant to be inadmissible under paragraph 35(1)(a) of the Act. The applicant finally seeks his costs in this matter, in the

amount of $3000.00, arguing that the officer's decision is egregious and unfair in that the errors in it ought to have been obvious to the respondents from the outset.

[4] The respondents dismiss each of these objections to the decision, arguing that the applicant was provided with fulsome procedural rights, having been given three interviews, during the last of which the officer specifically indicated that concerns about the applicant's involvement in war crimes were at issue. In addition, the respondents argue that the questions posed provided all necessary particulars of the officer's suspicions. The respondents further argue that the documents relied upon by the officer concerned general conditions at the time in Bosnia and thus need not have been disclosed to the applicant. The respondents submit that that the officer's complicity finding was reasonable, particularly as the applicant was not forthcoming during the interviewers about his activities in the Bosnian Army. The respondents finally argue that there is no reason to depart from the normal rule that costs are not recoverable in immigration judicial review applications since this case is in no way out of the norm.

[5] As is more fully detailed below, I have determined that this application must be granted because the applicant was denied procedural fairness. In light of this determination, I have decided that it is not appropriate to grant the applicant's request for a directed verdict as the application will be remitted to another visa officer for a new hearing and the evidence in respect of that hearing will be different from that before this officer. (At the very least, the applicant will doubtless file exculpatory evidence that was not before the officer, including the affidavits from his commanding officers in the Bosnian Army that he filed in connection with his application.) That said, the procedural fairness finding in this case is influenced by the facts and context, which provide no

basis for the applicant to have anticipated why or how he was being suspected of having been complicit in a war crime or crime against humanity, because there is no basis on these facts to anticipate how or why any such finding could be made. Finally, I have concluded that this is not an appropriate case to award costs. My reasons for each of these conclusions appear below.

Was the applicant denied procedural fairness?

[6] Two procedural fairness issues arise in this case: (a) Whether the applicant was sufficiently on notice that he was suspected of having been involved in war crimes; and (b) whether the applicant had a right to disclosure of the documents relied upon by the officer and to an opportunity to respond to their contents. Either issue would provide a basis for overturning this decision.

[7] Turning to the first issue, the parties do not dispute that the applicant was entitled to know the case against him and to be afforded a fair opportunity to respond to it. Indeed, the case law so establishes. In *Khwaja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 522 at para 16, cited by the respondents, Justice Blanchard identified the established principle of law in the following way: "a visa officer must disclose his or her specific concerns to the applicant and grant that person sufficient opportunity to respond to the concerns in a meaningful way". The parties, however, differ as to whether the applicant was sufficiently put on notice.

[8] The respondents rely on *Liao v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1926 at para 17, 101 ACWS (3d) 998, for the proposition that an officer may simply "[adopt] an appropriate line of questioning or [make] reasonable inquiries which give the applicant the opportunity to respond" and submits that such a line of questioning was employed in this case.

The respondents argue that the applicant was given three interviews and was asked questions that related to the specifics of the events during which war crimes were committed during his second interview – including the units and prison camps involved, and the name of the operations – and was told at the beginning of his third interview that "there were concerns that he might be complicit in a war crime". The respondents assert that this should have been sufficient to put the applicant on notice of the suspicions against him and to place him in a fair position to defend himself.

[9] With respect, I do not agree for several reasons. First, the facts in *Liao* are quite different from those at issue here. In *Liao*, the applicant was seeking a permanent resident visa as an engineer. The officer reviewing her application found that she was more professor than engineer, given the proportion of her time spent teaching and the title of her position ("associate professor"). The officer questioned the applicant about her duties, and based on her answers and the rest of the record reached his conclusion. Justice Blais (as he then was) found that the questioning had provided the applicant with sufficient notice that the officer had concerns about the nature of her employment activities and that through the questioning the applicant had had sufficient opportunity to respond. The applicant knew what her job was and could provide all necessary details about it.

[10] In contrast, here, there was no reason for the applicant to suspect there were concerns he was implicated in the commission of war crimes against prisoners of war in the Ozern Mountains in September of 1995.

[11] As mentioned, the applicant was interviewed three times. During the first interview, he was told to provide "as many details as possible" and was then asked general questions about his service

in the Bosnian Army. At this stage, the officer did not find the applicant credible so referred his file to the War Crimes Section. The War Crimes Section suggested a series of topics about which to question the applicant, which was done during the second interview.

[12] At the beginning of the second interview, the applicant was again asked to provide as many details as possible in his responses, and then, without context, was asked the following questions:

- Were you ever ordered to/did you ever render any military services whatsoever to the 35th Division, 37th Division, the 328th Mountain Brigade or any sub-Divisions or sub-units to these Divisions/Brigade?
- Were you ever ordered to/did you ever render any military services or support whatsoever to the El Majahed Detatchment (EMD)?
- Did you do any minesweeping?
- Were you ever ordered to participate in either Operation Farz or Operation Hurricane?
- Did you or your unit ever encounter, or were ordered to stage attacks against civilians, and did your unit handle prisoners of war?
- Did you ever guard civilians or prisoners of war in Tesanj or anywhere else over the course of your military service?

  […]

- Did you witness or have knowledge of the detention of any prisoners?
- Have you ever been to – or worked in any capacity (ex: guard, etc) at the Kamenica camp?
- Were you at any time ever deployed outside of Tuzla, Tesanj or Lukavac over the course of your military services for any military operations?
- Were you ever deployed from Tesanj to or towards Vozuca?

  […]

- Could you hear the fighting?

- Even during Operations Farz and Hurricane?

  […]

[13] The applicant replied "no" to virtually all of these questions. The officer found significance in this, noting, "Despite our request for as many details as possible, the applicant was extremely vague, and most of the time he simply answered no". With respect, assuming the applicant was telling the truth, it is unclear what else he should have said.

[14] Indeed, knowing the nature of what he was suspected of doing was central to the applicant's ability to respond in a fulsome way, given the nature of the suspicions and the applicant's circumstances. For example, the applicant could have provided alibi evidence like the statements he subsequently obtained from his commanding officers, which corroborate he was not involved in the atrocities that were committed in the Ozren Mountains.

[15] The applicant was a young, conscripted soldier who was in training in an engineering unit at a site separate from that of the atrocities throughout the time period in question. Considering this profile, there is no reason that the line of questioning – a series of factual questions about events that were devoid of any context and essentially asked the applicant if he was at certain places at certain times – should have alerted the applicant to the fact that he was suspected of being linked to the specific war crimes in question. (On this point, I would again note that there was nothing in the record to link him to these war crimes other than his relative physical proximity – 40 km – to their commission.) The applicant had no authority in the Army and thus it would not be surprising for

him to have no knowledge about operations undertaken by other units. Given this context, his answers were not unnecessarily vague.

[16] Apart from the questions highlighted above, the only indications to the applicant as to the officer's suspicions were a statement in an email response to his wife that his claim was being reviewed by the War Crimes Unit and an apparent statement by the interviewing officer, without any specifics or context, that there were concerns regarding war crimes, at the beginning of the third interview. In my view, these vague references were insufficient to alert the applicant as to what was at issue, especially when the concerns of the officer involved specific incidents at a specific time and location.

[17] Thus here, unlike in *Khwaja* (cited at para 7, above), I do not believe the applicant was sufficiently "given notice of the substance of allegations against him" (to borrow the language of Justice Blanchard at para 21). As such, I find there to have been a violation of procedural fairness.

[18] Given this finding, I need not rule on whether the two documents should have been provided to the applicant. Indeed, applicant's counsel suggested that her concern was not necessarily that the documents themselves needed to have been provided, but more that the "gist" of them should have been shared with the applicant so that he could have responded. I agree, but find that this could have been accomplished by alerting the applicant to the concerns, as discussed above.

Should a directed verdict be ordered?

[19] Counsel for the applicant asked that I issue a directed verdict in this case, given that the applicant is being kept apart from his wife, who is here in Canada. I do not find it appropriate to do so, because new evidence will likely be before the next decision-maker. However I would note that, on the present facts, and in light of the current state of the law, there is little or nothing to support a finding that the applicant was complicit in war crimes. In that respect, the facts of this case are comparable to those in *Ardila v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1518 in which Justice Kelen overturned a finding of complicity of a young conscript into the Colombian Army who had spent the majority of his time in the Army in training and whose unit had not been implicated in war crimes. The present case, and *Ardila*, are to be contrasted with situations in which membership and participation in the affairs of a limited brutal purpose organization gives rise to a complicity finding (see e.g. *Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1143), or where one's seniority in an organization may similarly justify a finding of complicity (*Ezokola v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 224, [2011] 3 FCR 417, leave to appeal granted April 26, 2012 (2012 CarswellNat 1173) (SCC), judgment pending; *Nsika v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1026). In contrast, here, it is wholly plausible that a young conscript, with no seniority, in the Army for a short period of time, would be unaware of war crimes committed elsewhere by another unit, and would have done nothing to further their commission.

Costs and Certified Question

[20] Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 provides that special reasons are required for costs to be awarded in an application for judicial

review in the immigration context. Such special reasons have been held to include situations where one party has unreasonably prolonged proceedings, acted in an oppressive or improper manner or in bad faith or pursued a clearly unmeritorious case (*Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262 at para 26 [Johnson]; *Ndererehe v Canada (Minister of Citizenship and Immigration)*, 2007 FC 880 at para 29; *Benhmuda v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1222 at para 41). Notwithstanding my conclusion that there was a violation of procedural fairness, I do not find the conduct of the respondents to have been so egregious as to constitute special circumstances to justify the awarding of costs. Accordingly, they are not awarded.

[21] As this case is fact specific and does not raise any new legal issues, there is no basis to certify a question under section 74 of the IRPA and accordingly, none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;
2. The officer's decision is set aside;
3. The applicant's application for permanent residence as a member of the Family Class is remitted to the respondents for re-determination by a different visa officer;
4. No question is certified; and
5. There is no order as to costs.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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