Federal Court  Cour fédérale

Date: 20190318

Docket: IMM-2564-18

Citation: 2019 FC 324

Ottawa, Ontario, March 18, 2019

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

IURII VERBANOV

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Defendant

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Iurii Verbanov seeks judicial review of a removal order issued by the Immigration Appeal Division (IAD) on May 14, 2018. The IAD found that there were reasonable grounds to believe that Mr. Verbanov made a voluntary, significant and knowing contribution to the crimes against humanity committed by the Moldovan police and issued a removal order against him pursuant to subsection 67(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the

Immigration Act] and paragraph 229(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Immigration Regulations].

[2] For the reasons exposed hereinafter, the Application will be allowed on the complicity issue raised by Mr. Verbanov, as the Court is satisfied the IAD has erred in applying the test for complicity set out by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]. As this issue allows the Court to dispose of the matter, the other issue raised by Mr. Verbanov will not be examined.

II. BACKGROUND

[3] It is not disputed that in 2005, Mr. Verbanov became a student at the police college in Moldava and that, from 2007 to 2011, he worked as a police officer in Chisinau, Moldova. He held the grade of a "plutonier-major", which can be said to be in the higher range of the non-officers' hierarchy. Mr. Verbanov worked for the Chisinau municipal police service, in a public transit and services crime unit, and his work consisted of arresting pickpockets and bringing them to the police station. On July 12, 2011, Mr. Verbanov was granted Canadian permanent residency status as the spouse of a skilled worker.

[4] On December 20, 2013, Mr. Verbanov became the subject of two inadmissibility reports, prepared by the Canada Border Services Agency and referred to the ID, pursuant to section 44 of the Immigration Act. The Minister alleged that Mr. Verbanov was inadmissible for serious criminality under paragraph 36(1)(c) of the Immigration Act, and for crimes against humanity under paragraph 35(1)(a) of the Immigration Act.

[5] On April 16, 2015, the ID found that Mr. Verbanov was not inadmissible on the aforementioned grounds. Particularly, regarding the allegations of crimes against humanity under paragraph 35(1)(a) of the Immigration Act, the ID found that neither Mr. Verbanov, nor the members of his public transit and services crime unit, committed any acts that could constitute crimes against humanity. Before the ID, Mr. Verbanov testified having no knowledge of any torture being inflicted on the people he arrested and brought to his superiors, and that to the contrary, those he arrested were usually released on payments of bribes to his superiors. The ID found Mr. Verbanov's testimony credible (ID's decision at paras 8, 18, 48, 68, 69).

[6] The Minister appealed the ID's decision. Mr. Verbanov testified before the IAD, and on April 3, 2017, the IAD rejected the appeal. It concluded that Mr. Verbanov's version of facts was credible, and that neither Mr. Verbanov nor his unit committed acts of violence or torture that could constitute crimes against humanity (IAD's first decision at para 7). The IAD also refused to accept the Minister's argument that Mr. Verbanov was complicit.

[7] On November 8, 2017, the Federal Court allowed the Minister's application for judicial review and referred the matter back to the IAD, essentially concluding that the IAD had failed to examine Mr. Verbanov's actions in determining his complicity, as is required by *Ezokola*.

III. IMPUGNED DECISION

[8] The file was remitted to the IAD for a new determination, and on May 14, 2018, the IAD allowed the Minister's appeal. The IAD concluded that (1) the crimes committed by the Moldavan police force are crimes against humanity; and (2) there are reasonable grounds to

believe that Mr. Verbanov, who served in the police force, made a voluntary, significant and knowing contribution to such crimes. Consequently, the IAD issued a removal order under subsection 67(2) of the Immigration Act and paragraph 229(1)(b) of the Immigration Regulations, that refers to inadmissibility on grounds of violating human rights under subsection 35(1) of the Immigration Act.

[9] This is the decision under review in these proceedings.

[10] Before the new panel of the IAD, Mr. Verbanov did not testify again, except to confirm his previous evidence, which comprised of statements to a CBSA officer and of his testimonies before the ID and the IAD.

[11] The IAD noted that it had to determine, based on the evidence submitted, whether Mr. Verbanov was complicit in an act that constitutes an offence referred to in the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [Crimes Against Humanity Act]. This required the IAD to determine, first, whether the Moldovan police force committed a crime against humanity and, if so, whether Mr. Verbanov was complicit in that crime, by virtue of his voluntary, significant and knowing contribution.

[12] Regarding the crimes against humanity, the IAD determined that there were reasonable grounds to believe that the Moldovan police committed crimes against humanity, because the four elements of a crime against humanity, as recognized by *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, were present.

[13] Regarding Mr. Verbanov's complicity, the IAD confirmed the burden of proof was on the Minister to establish that there are reasonable grounds to believe that the person made a voluntary, significant and knowing contribution to the alleged crime.

[14] The IAD referred to the considerations outlined in *Ezokola*, and on those considerations, noted that (1) the Moldovan police force is a large, legitimate, structured and hierarchized organization that cannot be described as having a limited and brutal purpose; Mr. Verbanov's voluntary, significant and knowing contribution to the alleged acts is hence more difficult to establish than if he had been part of a smaller group; (2) Mr. Verbanov served in the Moldovan police force of his own free will and could have left the organization simply by expressing his desire to do so, despite his obligation to reimburse the government for funding his education; (3) he served from 2007 to 2011, a considerable period of time, during which he could not have been unaware of the torture committed, due to its widespread nature; (4) he worked in the department responsible for combatting crime in public places and on urban transport, which monitors and apprehends pickpockets; his rank was neither an entry level position nor a very high-ranking position; his department was not specifically mentioned in the documentary evidence, although suspects of non-political crimes were reported to be tortured in Chisinau police stations; and (5) Mr. Verbanov's job was to monitor, arrest, and bring pickpockets to a police station where they would be interrogated and released by higher-ranking officers. The IAD found Mr. Verbanov's version of events too watered down compared to the strength of the documentary evidence, which confirms that the practice of torturing suspects in police stations is widespread and reported by reliable sources. It stated that it is difficult to imagine there were not more incidents of suspects resisting arrest, but that it does not mean none of his testimony was credible. In fact,

the IAD gave some deference to the previous two panels, but found Mr. Verbanov embellished reality by failing to mention certain negative events that must have occurred.

[15] In determining whether Mr. Verbanov made a voluntary, significant and knowing contribution, the IAD discussed the difficulty the Minister faces in meeting his burden and the issue with blaming a young police officer without any more concrete evidence against him.

[16] The IAD stressed that Mr. Verbanov "could not have been unaware" of the torture committed and that "he must have known" that the practice was widespread (IAD's second decision at para 91). Ultimately, the IAD concluded that the documentary evidence indicates "a practice so common in the Moldovan police force that Mr. Verbanov must have contributed to it during the performance of his duties" (IAD's second decision at para 94).

[17] The IAD allowed the appeal and issued the removal order against Mr. Verbanov.

IV. PARTIES' SUBMISSIONS

A. *Mr. Verbanov's Position*

[18] Mr. Verbanov submits the IAD erred in concluding that (1) the police in Moldova committed crimes against humanity during the years of Mr. Verbanov's employment and (2) Mr. Verbanov was complicit in crimes against humanity committed by Moldovan police.

[19] The Court will examine only the second issue as it is sufficient to dispose of the present matter.

[20] On the matter of complicity, Mr. Verbanov submits that the IAD's application of the *Ezokola* test is subject to review on the standard of reasonableness. He submits that (1) the IAD erred by making unreasonably vague credibility findings and (2) the IAD's analysis does not support its conclusion.

[21] First, Mr. Verbanov argues that the IAD did not clearly reject any precise part of Mr. Verbanov's testimony, but rather expressed vague doubts over its plausibility and reliability (*Murillo v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1240; *Alam v Canada (Citizenship and Immigration)*, 2014 FC 556 at paras 32–33).

[22] Second, Mr. Verbanov submits that the IAD's finding of complicity is no more than guilt by association, which is prohibited by the Supreme Court in *Ezokola* at paragraph 84. Mr. Verbanov essentially argues that the IAD's analysis of *Ezokola* factors discloses little evidence suggesting complicity and, therefore, its conclusion lacks transparency and is unjustified. In addition, Mr. Verbanov emphasizes the fact that the length of his service, in light of the jurisprudence, is not significant (*Hadhiri v Canada (Citizenship and Immigration)*, 2016 FC 1284 at para 34 [*Hadhiri*]; *Musabyimana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 50 at para 3 [*Musabyimana*]; *Sarwary v Canada (Citizenship and Immigration)*, 2018 FC 437 [*Sarwary*]; *Talpur v Canada (Citizenship and Immigration)*, 2016 FC 822 at para 38 [*Talpur*]; *Ndikumasabo v Canada (Citizenship and Immigration)*, 2014 FC

955 [*Ndikumasabo*]). Finally, Mr. Verbanov notes that the IAD's complicity finding is inconsistent with reports from 2008 and later that reveal the Moldovan government's efforts to combat torture.

B. *The Minister's Position*

[23] The Minister submits that the IAD's decision on complicity is reasonable and that the IAD did not infer complicity nor did it make vague and unsupported findings. The IAD's finding was not one based on guilt by association, but a reasonable finding based on the evidence before it.

[24] Specifically, the Minister contends that the facts showed Mr. Verbanov joined the Moldovan police force willingly; that arresting, detaining and bringing suspects for questioning amounts to a significant contribution and that similar applications for judicial review have been dismissed (*Shalabi v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 961; *Sarway*); and that the IAD can conclude that Mr. Verbanov had knowledge since knowledge can be inferred or one may be willfully blind (*Petrov v Canada (Citizenship and Immigration)*, 2007 FC 465 at para 59).

[25] On the issue of credibility, the Minister argues that (1) the IAD is not bound by previous decision-makers' findings and has explained its different conclusion (*Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2007 FC 6 at paras 17–19), (2) the IAD's credibility finding is not vague or unclear, and (3) the IAD is free to find Mr. Verbanov not credible

(*Loayza v Canada (Minister of Citizenship and Immigration)*, 2006 FC 304 at para 41; *Uriol Casiro v Canada (Citizenship and Immigration)*, 2011 FC 1190 at paras 16–17).

V. DISCUSSION

A. *Standard of review*

[26] An appeal before the IAD is a hearing *de novo* in the broad sense and is not limited to the record before the ID (*Yiu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 480 at para 16 [*Yiu*]; *Castellon Viera v Canada (Citizenship and Immigration)*, 2012 FC 1086 at para 10 [*Castellon Viera*]). The IAD can set aside the ID's decision and substitute a determination that, in its opinion, should have been made (subsection 67(2) of the Immigration Act). The IAD owes no deference to the ID, nor is it bound by the ID's findings (*Musabyimana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 50 at para 24; *Yiu* at para 16; *Castellon Viera* at para 12). The IAD must not determine whether the ID correctly or reasonably concluded that a person is inadmissible, but rather whether the person is in fact inadmissible (*Castellon Viera* at para 11). Nonetheless, the IAD should consider the ID's findings where the applicant has not testified before the IAD (*Patel v Canada (Citizenship and Immigration)*, 2013 FC 1224 at para 27).

[27] An inadmissibility finding is a question of mixed fact and law subject to judicial review on the standard of reasonableness (*Canada (Citizenship and Immigration) v Verbanov*, 2017 FC 1015 at para 17). A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to

outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

B. *Complicity test – inadmissibility under subsection 35(1)(a) of the Immigration Act*

[28] 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 Act (paragraph 35(1)(a) of the Immigration Act). Section 6 of the Crimes Against Humanity Act defines crimes against humanity as including torture, which is at play here. As recognized by the Supreme Court in *Ezokola*, individuals can be inadmissible for international crimes "through a variety of modes of commission", including complicity (*Ezokola* at para 2).

[29] The parties do not dispute that the complicity test set out in *Ezokola* is the one applicable to Mr. Verbanov's situation, although this case does not engage refugee protection considerations. In *Ezokola*, the Supreme Court redefined the test for complicity, having found that the "personal and knowing participation test" developed by the Federal Court of Appeal in *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 had been overextended to capture individuals on the basis of complicity by association. The Supreme Court eliminated the "guilt by association" approach to complicity, on the principle that "a concept of complicity that leaves any room for guilt by association or passive acquiescence" violates fundamental criminal law principles (*Ezokola* at paras 81–82).

[30] The Supreme Court redefined a contribution-based test for complicity, whereby a person is complicit for having "voluntary made a significant and knowing contribution to the organization's crime or criminal purpose" (*Ezokola* at para 84).

[31] The Supreme Court outlined that the key components of the contribution-based test are (1) a voluntary contribution, whereby decision makers should, for example, consider the method of recruitment by the organization, any opportunity to leave the organization and the defence of duress; (2) a significant contribution, whereby the accused's contribution 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" (*Ezokola* at para 87); and (3) a knowing contribution, whereby the person "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" and whereby knowledge is "awareness that a circumstance exists or a consequence will occur in the ordinary course of events" (*Ezokola* at paras 89–90).

[32] The Supreme Court then provides a list of six factors destined to serve as a guide in the application of the test it outlined, in assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose. Those factors are : (1) the size and nature of the organization; (2) the part of the organization with which the refugee claimant was most directly concerned; (3) the refugee claimant's duties and activities within the organization; (4) the refugee claimant's position or rank in the organization; (5) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the

group's crime or criminal purpose; and (6) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.

[33] It is noteworthy that the Supreme Court refers particularly to factors (1), (4) and (5) when assessing whether or not the person had knowledge of the organization's crime or criminal purpose.

C. *Application of the test by the IAD in this case*

[34] In order for the IAD to find Mr. Verbanov complicit, the Minister had to establish, on the standard of "reasonable grounds to believe", that Mr. Verbanov made a voluntary, significant and knowing contribution to the crime or criminal purpose of a group.

[35] The IAD acknowledged that it was difficult for the Minister to satisfy its burden; and it appears clear, despite best efforts from counsel to convince the Court otherwise, that the IAD, in its efforts to alleviate the Minister's burden, essentially found Mr. Verbanov guilty by association.

[36] The Court fails to understand how the IAD's examination of the *Ezokola* considerations can lead to the conclusion that the Minister has met its burden. Rather, the IAD's analysis could suggest, on the contrary, that this burden was not met. Neither the size and nature of the police service, nor Mr. Verbanov's rank in the organization allowed the IAD to infer that he had knowledge of the group's criminal purpose, and the case law on the impact of one's length of

service is not determinative (*Hadhiri* at para 34; *Musabyimana* at para 3; *Sarwary* at paras 3, 48; *Talpur* at para 38; *Ndikumasabo*).

[37] Yet, despite its conclusion on those factors that weighed in favour of Mr. Verbanov, and despite Mr. Verbanov's testimony, the IAD relied on the documentary evidence showing widespread practice of torturing suspects in police stations to conclude that Mr. Verbanov "could not have been unaware" of the torture committed and that "he must have known" that the practice was widespread (IAD's decision at para 91). Not only did the IAD infer Mr. Verbanov's knowledge from the widespread nature of the torture and, it also determined that, consequently, Mr. Verbanov made a significant contribution to the crimes by arresting suspects.

[38] The IAD's finding of complicity amounts to guilt by association, which is prohibited by the Supreme Court in *Ezokola* at paragraph 84. The IAD failed to engage in an analysis as to whether or not the Minister had met his burden to establish, on reasonable grounds to believe, that Mr. Verbanov had made a knowing contribution. The IAD relied solely on the documentary evidence on the Moldavan police's activities to infer knowledge. It "inappropriately shifted its focus towards the criminal activities of the group and away from the individual's contribution to that criminal activity" (*Ezokola* at para 79). The IAD's decision is unreasonable.

D. *Question to certify*

[39] The parties have jointly submitted a question for certification by the Court on the issue of crimes against humanity. However as they pointed out, since the Court did not examine this issue, it will consequently not certify the question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed;
2. The matter is referred back to the Immigration Appeal Division for a new determination;
3. No question is certified.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2564-18
STYLE OF CAUSE:	IURII VERBANOV V. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO
DATE OF HEARING:	FEBRUARY 27, 2019
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	MARCH 18, 2019

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