Federal Court  Cour fédérale

Date: 20200721

Docket: IMM-5071-19

Citation: 2020 FC 773

Ottawa, Ontario, July 21, 2020

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

ZALMAI SAILAB

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, Zalmai Sailab, seeks judicial review of a decision of the Immigration Division [ID] of the Immigration and Refugee Board of Canada dated June 27, 2018. The ID found the Applicant inadmissible under paragraph 35(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for his complicity in crimes against humanity.

[2] The Applicant is a citizen of Afghanistan. In March 2009, he joined the Afghan National Army where he had been working as a driver since 2007. In late 2009, the Applicant became a member of the Afghan Special Forces and rose to the level of Master Sergeant. During his time with the Special Forces, he was stationed in Kabul and worked as a supply sergeant.

[3] In 2011, the Applicant visited the United States for military training. After the United States military selected him for further training, he visited the United States again in February 2016 for approximately six (6) months of English language training and further military training thereafter. In September 2016, the Applicant entered Canada from the United States and claimed refugee status based on his fear of Taliban retribution due to his previous work with the Afghan military. An Inland Enforcement Officer [Officer] with the Canada Border Services Agency [CBSA] interviewed the Applicant twice in relation to his claim for refugee status.

[4] On November 16, 2016, the Officer prepared a report under subsection 44(1) of the IRPA. The Officer noted the Applicant's admission that he was a member of and engaged in combat with the Afghan National Army and Afghan Special Forces from 2009 to 2016. The Officer also noted evidence that the Afghan National Army and Afghan Special Forces engaged in crimes against humanity, offences under sections 4 to 7 of Canada's *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24. On these grounds, the Officer determined that the Applicant was inadmissible by virtue of paragraph 35(1)(*a*) of the IRPA for violating human or international rights. The next day, the Minister's Delegate referred the Applicant to an admissibility hearing before the ID.

[5] The ID heard the matter on November 16, 2017. At the beginning of the hearing, the Minister's representative clarified that the inadmissibility allegation was based on the Applicant's complicity in crimes against humanity because of his role in the transfer of prisoners from the Afghan National Army to Afghanistan's National Directorate of Security [NDS], thereby colluding in the torture of prisoners by the NDS.

[6] On June 27, 2018, the ID confirmed the inadmissibility finding. The ID first considered the Applicant's evidence regarding whether he had taken part in combat missions against the Taliban, his role in the transfer of prisoners to the NDS and his knowledge regarding the mistreatment of prisoners by the NDS. The ID rejected the Applicant's explanation for why some of the statements he made to the CBSA Officer differed from others he made in the narrative he attached to his Basis of Claim Form and during his testimony at the admissibility hearing. The ID determined that the Applicant's role with the Afghan National Army included some combat and the transfer of prisoners to the NDS. The ID also found that the Applicant was aware of media reports in Afghanistan alleging that the NDS tortured Taliban prisoners.

[7] The ID then concluded that the NDS had tortured Taliban detainees prior to March 2012 and, therefore, committed crimes against humanity. After finding that the Minister had not established the Applicant knew of the NDS's use of torture, the ID instead assessed whether the Applicant was willfully blind. The ID noted that (1) the Applicant was aware of media reports that the NDS tortured Taliban detainees; (2) in his own unit, the officers made the soldiers leave before they "asked the big questions"; and (3) the Applicant's father and brother worked for the NDS. Based on these findings, the ID reasoned that the Applicant's suspicions would have been

aroused, but he saw no need to ask about torture because he did not want to know how the prisoners were treated. Therefore, the ID concluded that, while the Applicant may not have had direct knowledge of torture, his behaviour amounted to wilful blindness.

[8] The ID then assessed whether the Applicant was complicit in the crimes against humanity committed by the NDS. Applying the components and factors set out by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*], the ID determined that the Applicant's contribution was voluntary, significant, and made knowingly. Accordingly, it found him complicit in the crimes against humanity committed by the NDS.

[9] Based on this finding, the ID concluded that the Applicant is a person described in paragraph 35(1)(*a*) of the IRPA, and it issued a deportation order against him pursuant to paragraph 45(*d*) of the IRPA.

[10] The Applicant seeks judicial review of the ID's decision. While his arguments are framed differently in his submissions, the Applicant essentially contends that the decision is unreasonable because the evidence on the record does not support the ID's conclusions.

II. Analysis

[11] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada held that reasonableness is the presumptive standard of review for administrative decisions (*Vavilov* at paras 10, 16-17). None of the exceptions described in *Vavilov* apply here.

[12] A reasonable decision must be based on an internally coherent and rational chain of analysis and must be justified in relation to the facts and the law (*Vavilov* at para 85). It must also bear "the hallmarks of reasonableness – justification, transparency and intelligibility" (*Vavilov* at para 99). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

[13] I agree with the Applicant that the ID unreasonably inflated the conclusions of the documentary evidence.

[14] The Respondent's documentary evidence consisted of three (3) documents. The first was a three-page CBC News article dated January 23, 2013 about the release of a report from the United Nations Assistance Mission in Afghanistan [UNAMA Report] on the abuse of prisoners in Afghanistan. The second document was a two-page press release from the United Nations dated October 10, 2011 about the same report, summarizing some of its findings. The third document was a report from the Afghanistan Independent Human Rights Commission and Open Society Foundations dating from March 2012.

[15] Based on these documents, the ID drew the following conclusions in determining that the torture used by the NDS constitutes a crime against humanity:

> [53] The documentary evidence filed by the Minister establishes that torture was used by the NDS against suspected Taliban members in a <u>widespread and systemic manner</u>.
>
> …
>
> [56] The NDS knowingly tortured an identifiable group (suspected Taliban guerrillas) as part of a <u>widespread and systemic practice</u> prior to 2012. …

[Emphasis added.]

[16] Aside from the fact that the UNAMA Report was not adduced as evidence before the ID, the problem with this conclusion is that the evidence upon which the ID relies establishes that the "systemic" use of torture was only found at specific NDS facilities, not all of them. The ID fails to engage in any analysis to connect the Applicant's military deployments with the specific NDS facilities found to have used torture.

[17] The ID also fails to set out a particular timeframe when the crimes against humanity occurred. This is particularly important since the Applicant's involvement in the transfer of prisoners ended after he joined the Afghan Special Forces at the end of 2009.

[18] Finally, in determining that the Applicant's behavior amounted to wilful blindness, the ID fails to establish when the Applicant would have become aware of the abuses as a result of the media reports, or when the Applicant's father or brother would have joined the NDS and what their role was in the organization.

[19] I recognize that it is not the role of this Court to reweigh the evidence before the ID. However, the test regarding complicity under paragraph 35(1)(*a*) of the IRPA requires that there be serious reasons for considering that an individual has voluntarily made a significant and knowing contribution to an organization's crime or criminal purpose (*Ezokola* at para 84). In this case, the ID based its complicity findings on an incomplete and erroneous understanding of the evidence on the record. It also failed to establish where and when the Applicant was involved in transferring prisoners to the NDS or otherwise establish a connection between the Applicant and

the NDS facilities where torture was used. For these reasons, I am not satisfied that the ID's decision meets the reasonableness standard set out in *Vavilov*.

[20] As a result, the application for judicial review is allowed and the matter is referred back for redetermination by a different panel. No questions of general importance were proposed for certification, and I agree that none arise.

JUDGMENT in IMM-5071-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The decision of the Immigration Division dated June 27, 2018 is set aside and the matter is remitted back to a different panel for redetermination;
3. The style of cause is amended to replace the "Minister of Citizenship and Immigration" with the "Minister of Public Safety and Emergency Preparedness" as the Respondent; and
4. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5071-19
STYLE OF CAUSE:	ZALMAI SAILAB v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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