Federal Court  Cour fédérale

Date: 20200130

Docket: IMM-3785-19

Citation: 2020 FC 167

Ottawa, Ontario, January 30, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ARSEN KHACHATRYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Arsen Khachatryan is a citizen of Armenia. He seeks judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board. The RPD found that Mr. Khachatryan was excluded from refugee protection pursuant to Article 1F(a) of the

Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150 [Convention] and s 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Khachatryan was a member of the Armenian Police during a time when it engaged in serious human rights abuses. The abuses were well-documented and are not in dispute.

[3] The RPD found "serious reasons for considering" that Mr. Khachatryan was complicit in crimes against humanity: he made a voluntary, significant and knowing contribution to illegal detentions and acts of torture, and there was nothing to excuse his conduct.

[4] Mr. Khachatryan says the RPD applied the wrong standard of proof, sometimes referring to "serious reasons for considering" and sometimes to "reasonable grounds to believe". He also says the RPD mistakenly found detainees in Armenia to be an identifiable civilian group that was subjected to a widespread or systematic attack. Finally, Mr. Khachatryan says the RPD's finding that he made a voluntary, significant and knowing contribution to crimes against humanity was unreasonable.

[5] There is little, if any, practical difference between "reasonable grounds to believe" and "serious reasons for considering". In its reasons, the RPD referred to the former standard four times, and to the latter standard nine times, notably in its conclusion. Mr. Khachatryan has not demonstrated how a more consistent use of "serious reasons for considering" would have affected the outcome.

[6] The RPD's conclusion that Mr. Khachatryan is excluded from refugee protection under Article 1F(a) of the Convention and s 98 of the IRPA was reasonable. The application for judicial review is dismissed.

II. Background

[7] Mr. Khachatryan was born in Yerevan, Armenia in 1982. He joined the Armenian Police in 2006. He rose in rank from Sergeant (2006), to Police Sergeant (2008), to Police Senior Sergeant (2010), to Police Lieutenant (2011), and eventually to Police Senior Lieutenant (2013).

[8] On July 3, 2013, Mr. Khachatryan was involved in a police raid of a house where illegal weapons and contraband were discovered. These belonged to a wealthy parliamentarian. Mr. Khachatryan says he was later threatened by the parliamentarian, causing him to flee Armenia for Canada.

[9] Mr. Khachatryan entered Canada on August 12, 2014, and made a refugee claim.

[10] On May 14, 2015, the Minister of Citizenship and Immigration [Minister] intervened in Mr. Khachatryan's case to address questions of credibility and exclusion from refugee protection. The Minister took the position that Mr. Khachatryan served with the Armenian Police during a period when it committed well-documented crimes against humanity. These crimes included the torture of detainees, some of whom were driven to suicide, and the extraction of confessions by torture and duress.

[11] The RPD heard Mr. Khachatryan's refugee claim on September 6, 2018, and dismissed it on May 17, 2019. Mr. Khachatryan was informed of the RPD's decision on May 30, 2019.

[12] The RPD did not make a finding that Mr. Khachatryan had personally committed crimes against humanity; only that he was complicit. The RPD accepted publicly-available reports that confirmed the Armenian Police had committed crimes against humanity during Mr. Khachatryan's tenure, including illegal detentions, deaths in custody, and torture during interrogations and investigations.

III. Decision under Review

[13] The RPD found that the Armenian Police had an "established pattern" of police brutality and torturing criminally-accused individuals and detainees. The RPD held that criminally-accused individuals and detainees are an identifiable group or civilian population for the purposes of s 4(3) of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 and Article 7 of the *Rome Statute of the International Criminal Court*, UN Doc A/CONF 183/9, July 17, 1998. The torture was widespread, systematic, and aimed at the identifiable group on a scale that met the standards established by the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 [*Mugesera*] at paragraphs 153 to 171.

[14] Applying the test for complicity in *Ezokola v Canada (Citizenship and Immigration*), 2013 SCC 40 [*Ezokola*] at paragraphs 84 to 100, the RPD found as follows:

(a) while the Armenian Police is a relatively large force, Mr. Khachatryan had a special role with small and elite Special Forces units;

(b) the tactical units' activities often involved investigating, searching for and arresting criminal suspects who were brought to police stations for further processing and interrogations—Mr. Khachatryan was a Lead Investigator;

(c) Mr. Khachatryan rose through the ranks and served in leadership roles with the Special Forces units—his lengthy career suggests he actively supported the organization;

(d) Mr. Khachatryan joined the Armenian Police voluntarily, and spent seven years in its service, rapidly ascending to high ranks;

(e) there was no evidence that Mr. Khachatryan was obliged to remain with the Armenian Police, and he won numerous awards and commendations for his service;

(f) Mr. Khachatryan's caseload implies he was arresting people on a near-daily basis;

(g) given his position, a 2013 poll of public awareness of police brutality, and evidence that his own unit severely beat a man, Mr. Khachatryan was aware of the abuses committed at local police stations on a balance of probabilities; and

(h) on a balance of probabilities, Mr. Khachatryan's contributions were therefore voluntary, significant and knowing.

IV. Issues

[15] This application for judicial review raises the following issues:

A. Did the RPD apply the wrong standard of proof?

B. Was the RPD's decision unreasonable?

V. Analysis

[16] The RPD's decision to exclude Mr. Khachatryan from refugee protection pursuant to Article 1F(a) of the Convention and s 98 of the IRPA is subject to review by this Court against the standard of reasonableness (*Ndikumasabo v Canada (Citizenship and Immigration)*, 2014 FC 955 at paras 25-27; *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65 [*Vavilov*]).

[17] The Court will intervene only if it is satisfied "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether it falls within the

range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

A. *Did the RPD apply the wrong standard of proof?*

[18] The RPD referred to "reasonable grounds to believe" four times in its decision. Mr. Khachatryan says it should instead have applied the "serious reasons for considering" standard of proof, exclusively and consistently.

[19] The Minister responds that the RPD applied the "serious reasons for considering" standard of proof nine times in its reasons, including in its conclusion. Furthermore, this Court has previously held that there is no practical difference between the two standards: *Kuruparan v Canada (Citizenship and Immigration)*, 2012 FC 745 at paragraph 83 [*Kuruparan*] and *Pourjamaliaghdam v Canada (Citizenship and Immigration)*, 2011 FC 666 at paragraph 48 [*Pourjamaliaghdam*].

[20] Counsel for Mr. Khachatryan says he would not advance this argument were it not for the following statements in *Ezokola* (at paras 101-102):

> Ultimately, the above contribution-based test for complicity is subject to the unique evidentiary standard contained in art. 1F(a) of the *Refugee Convention*. To recall, the Board does not make determinations of guilt. Its exclusion decisions are therefore not based on proof beyond a reasonable doubt nor on the general civil standard of the balance of probabilities. Rather, art. 1F(a) directs it to decide whether there are "serious reasons for considering" that an individual has committed war crimes, crimes against humanity or crimes against peace. For guidance on applying the evidentiary

> standard, we agree with Lord Brown J.S.C.'s reasons in *J.S.*, at para. 39:
>
> > It would not, I think, be helpful to expatiate upon article 1F's reference to there being "serious reasons for considering" the asylum seeker to have committed a war crime. Clearly the tribunal in *Gurung*'s case [2003] Imm AR 115 (at the end of para 109) was right to highlight "the lower standard of proof applicable in exclusion clause cases" — lower than that applicable in actual war crimes trials. That said, "serious reasons for considering" obviously imports a higher test for exclusion than would, say, an expression like "reasonable grounds for suspecting". "Considering" approximates rather to "believing" than to "suspecting". I am inclined to agree with what Sedley LJ said in *Al-Sirri v Secretary of State for the Home Department* [2009] Imm AR 624, para 33:
> >
> > > "[The phrase used] sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says."
>
> In our view, this unique evidentiary standard is appropriate to the role of the Board and the realities of an exclusion decision addressed above. […]
>
> [Emphasis added.]

[21] The Supreme Court of Canada confirmed in *Ezokola* that "serious reasons for considering" is a more onerous standard than "reasonable grounds to suspect", and that the former "approximates rather to believing than to suspecting". While the Court cautioned against trying to paraphrase the unique evidentiary standards prescribed by the Convention, both "serious grounds for considering" and "reasonable grounds to believe" fall somewhere between "reasonable grounds to suspect" and "more likely than not", *i.e.*, the balance of probabilities.

[22] In *Kuruparan*, Justice John O'Keefe said the following at paragraph 83:

> In assessing whether a person falls within the scope of article 1F(a), there is little difference between "serious reasons for considering" (as used in article 1F(a)) and "reasonable grounds to believe" (see *Sivakumar v Canada (Minister of Employment and Immigration)* (CA), [1994] 1 FC 433, [1993] FCJ No 1145 [*Sivakumar*] at paragraph 18; and *Mugesera* above, at paragraph 114). As explained further by Mr. Justice Linden in paragraph 18 of *Sivakumar* above:
>
> > […] Both of these standards require something more than suspicion or conjecture, but something less than proof on a balance of probabilities. This shows that the international community was willing to lower the usual standard of proof in order to ensure that war criminals were denied safe havens. […]

[23] The Federal Court of Appeal has recently reiterated the importance of judicial comity, which operates to prevent the same legal issue from being decided differently by members of the same Court. A departure from previous jurisprudence is authorized only when a judge is convinced that the prior decision is wrong, and can advance cogent reasons in support of this view (*Canada (Citizenship and Immigration) v Kassab*, 2020 FCA 10 at para 35). The caution in *Ezokola* against attempting to paraphrase the unique evidentiary standards contained in the Convention can be reconciled with, and does not warrant a departure from, the prior authority of this Court in *Kuruparam* and *Sivakumar* (see also *Pourjamaliaghdam* at paras 24, 31-34 & 48).

[24] Furthermore, the RPD referred nine times to "serious reasons for considering", including in its conclusion. Mr. Khachatryan has not demonstrated how a more consistent use of this term, untarnished by the four references to "reasonable grounds to believe", would have affected the outcome. The issue is not determinative in this case.

B. *Was the RPD's decision unreasonable?*

[25] Mr. Khachatryan says the RPD incorrectly cited *Mugesera* for the proposition that torture constitutes a crime against humanity when it is widespread, systematic and aimed at a civilian population.

[26] The Supreme Court of Canada held in *Mugesera* that a criminal act rises to the level of a crime against humanity when there is proof of four elements:

(a) an enumerated proscribed act is committed;

(b) as part of a widespread or systematic attack;

(c) directed against any civilian population or identifiable group; and

(d) the individual knew of the attack or took the risk that their act comprised part of it.

[27] Torture is a criminal act in Canada. While the Supreme Court did not specifically identify torture as a crime against humanity in *Mugesera*, the RPD reasonably applied the analytical framework of that authority to the case before it.

[28] Mr. Khachatryan also disputes the RPD's finding that there was an attack against an identifiable group, although his counsel did not seriously pursue this argument in oral submissions. There is ample jurisprudence to support the RPD's conclusion that civilian

detainees may constitute an identifiable group (*Sarwary v Canada (Citizenship and Immigration)*, 2018 FC 437; *Vaezzadeh v Canada (Citizenship and Immigration)*, 2017 FC 845; *Hadhiri v Canada (Citizenship and Immigration)*, 2016 FC 1284; *Talpur v Canada (Citizenship and Immigration)*, 2016 FC 822; *Liqokeli v Canada (Citizenship and Immigration)*, 2009 FC 530; and *Canada (Citizenship and Immigration) v Verbanov*, 2017 FC 1015).

[29] Finally, Mr. Khachatryan argues that the RPD unreasonably applied the *Ezokola* test for complicity to his circumstances. He says that the Armenian Police is a large and legitimate organization. Therefore it was incumbent on the RPD to find he was a member of a particular group within the organization that was engaged or complicit in crimes against humanity (citing *Ardila v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1518 [*Ardila*]). He also complains that it is unclear from the RPD's reasons whether he made a knowing contribution, or was merely reckless that crimes against humanity might occur.

[30] In *Ardila*, Justice Michael Kelen held it was unreasonable for the RPD to find a member of the Colombian military complicit in crimes against humanity when he served only as an equestrian and a student. The case is clearly distinguishable on its facts. The RPD based its finding that Mr. Khachatryan's contribution was voluntary, significant and knowing on his own testimony regarding his role and actions as a member of the Armenian Police. The RPD made an explicit finding that Mr. Khachatryan "knew of and was exposed to the ongoing abuses and widespread incidents of torture". The finding of recklessness was subsumed within this analysis.

VI. Certified Questions

[31] Mr. Khachatryan asks this Court to certify a question for appeal regarding the standard of proof to be applied by the RPD in determining whether a person is excluded from refugee protection under Article 1F(a) of the Convention and s 98 of the IRPA, and whether the standards of "serious reasons for considering" and "reasonable grounds to believe" are equivalent. The Minister opposes certification of a question.

[32] The jurisprudence of this Court clearly establishes that there is little, if any, practical difference between the two standards (*Kuruparam*; *Sivakumar*; *Pourjamaliaghdam*). Furthermore, for the reasons expressed above, the issue would not be dispositive of an appeal in this case (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36). I therefore decline to certify a question for appeal.

[33] A further certified question proposed by Mr. Khachatryan concerns the test for recklessness in determining complicity. However, once again this question would not be dispositive of an appeal, and it is therefore unsuitable for certification.

VII. Conclusion

[34] The application for judicial review is dismissed. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3785-19
STYLE OF CAUSE:	ARSEN KHACHATRYAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 22, 2020
REASONS FOR JUDGMENT AND JUDGMENT:	FOTHERGILL J.
DATED:	JANUARY 30, 2020

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