Federal Court  Cour fédérale

Date: 20130123

Docket: IMM-1780-05
IMM-1783-05

Ottawa, Ontario, January 23, 2013

PRESENT: The Honourable Mr. Justice Barnes

Docket: IMM-1780-05

BETWEEN:

A, A

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1783-05

BETWEEN:

A, M
A, R

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

UPON motion by the Applicants for an Order to amend the style of cause and to redact personal identifiers from the Reasons for Order and Order rendered by Justice Michel Beaudry on February 10, 2006;

AND UPON the Respondent taking no position;

AND UPON determining that this motion be allowed for the following reasons:

1. The Applicant has identified a risk to personal safety from the online availability of the above-noted Reasons for Order and Order.

2. In the result that it is appropriate to amend the style of cause to substitute the Applicants' names with their initials to prevent the publication of any information which could identify the Applicants.

THIS COURT ORDERS that the Reasons for Order and Order rendered by Justice Beaudry on February 10, 2006 will be redacted in accordance with the schedule hereto annexed. The redacted Reasons for Order and Order will then be substituted in the Court record for the original Reasons for Order and Order on file in both official languages. The original Reasons for Order and Order will be marked as confidential and sealed.

"R.L. Barnes"

Judge

Federal Court  Cour fédérale

Date: 20060210

Docket: IMM-1780-05

Citation: 2006 FC 122

Ottawa, Ontario, February 10, 2006

PRESENT: THE HONOURABLE MR. JUSTICE BEAUDRY

BETWEEN:

A, A

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1783-05

A, M
A, R

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] These are joint applications for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) of a decision of the Refugee Protection Division (the Board) of the Immigration and Refugee Board rendered on [**...**] by commissioner [**...**], dismissing the applicants' claims.

[2] The Board found that [**...**] (the principal applicant) was excluded from refugee status and refugee protection pursuant to article 1F(a) of the Convention, as referred to in section 98 of the Act, and that it had not been established that his wife [**...**] and daughter [**...**] (the secondary applicants) have a well-founded fear of persecution in [**...**] for Convention reasons or a risk to their lives, a risk of cruel and unusual treatment or punishment or danger of torture.

ISSUES

[3] The applicants raise the following issues:

1. Did the Board commit a reviewable error in finding that the principal applicant was excluded from refugee status and refugee protection pursuant to article 1F(a) of the Convention, as referred to in section 98 of the Act?
2. Did the Board commit a reviewable error in finding that the secondary applicants did not establish that they have a well-founded fear of persecution in [**...**] for Convention reasons or a risk to their lives, a risk of cruel and unusual treatment or punishment or danger of torture?

[4] The answer to these questions is negative. The applications shall be dismissed.

BACKGROUND

[5] The applicants are citizens of [**...**]. They were married on [**...**], and their daughter [**...**] was born on [**...**].

[6] They arrived in Canada on December 1, 2001, filed a joint claim, and submitted a single Personal Information File (PIF) in support of their claim. The facts they allege are as follows.

[7] The principal applicant was a military officer with the [**...**] between 1989 or 1990 and 2001. During that time, he was promoted to the post of [**...**] and was later appointed [**...**], holding the rank of Major.

[8] The principal applicant claims never to have participated in any activities that could constitute crimes against humanity during the course of his career. The [**...**] responsibility was to locate and arrest members of Islamic terrorist groups. A different unit handled detention and interrogation of the suspects.

[9] The principal applicant had no knowledge of atrocities committed by the authorities against the civilian population until July 2000, when he learned that two prisoners had died in custody. His

inquiries about the incident to his superiors were not welcome, and though he tried to resign in October 2000, his superiors would not accept his resignation.

[10] Upon being appointed as [**...**], he was given a list of political opponents of the regime to arrest so that another unit could torture them and extract false confessions from them.

[11] At his request, he finally obtained his dismissal in June 2001. His dismissal letter prohibited him from leaving the country for five years, and his superior assured him that the next five years of his life were going to be extremely unpleasant. A highly ranked friend who had tried to protect him advised him to leave the country.

[12] The principal applicant's behaviour led the regime to view him as an opponent. He received several threats and he was unable to find employment. The police tried to frame him by planting evidence; he was badly beaten and had to escape the hospital in fear for his life. His daughter was the target of two attempted kidnappings.

[13] The principal applicant was able to obtain visas for himself and the secondary applicants to the United States in November 2001. The applicants then crossed into Canada at Niagara Falls, where they filed their claim.

DECISION UNDER REVIEW

[14] The Board found that there were serious reasons for considering that the principal applicant committed or had been complicit in crimes against humanity perpetrated by the government security forces against civilians.

[15] In its reasons, the Board proceeded to a six-part analysis to assess whether or not the principal applicant had been complicit in crimes against humanity:

1. Method of recruitment: the Board determined that the principal applicant had joined the [**...**] as a volunteer and that his promotions had been sought and were the result of hard work. The Board was not convinced by the principal applicant's attempts at the hearing to nuance or distance himself from the statements he made on this topic in his PIF.
2. Position / Rank in the organization: The Board found discrepancies between the principal applicant's PIF and his statements during the hearing, where he downplayed or denied his involvement in activities which could constitute crimes against humanity. It also noted that the principal applicant had risen to a relatively senior position, having eight officers under his command at the end of his career.
3. Nature of Organization: the Board relied on documentary evidence to conclude that [**...**] security and police forces had committed numerous and widespread crimes against humanity, ranging from arbitrary arrests to extrajudicial killings, with impunity. The extent of these activities led the Board to find that the principal applicant had been an "active, enthusiastic, and successful participant and

accomplice in state security institutions which had committed crimes against humanity".

4. Knowledge of atrocities: the Board stated that it found it wholly implausible that an officer like the principal applicant could not have known about the atrocities committed by [**...**]'s security forces until July 2000. The Board determined that although the evidence did not establish whether the principal applicant was personally involved in the commission of crimes against humanity, he had at the very least been wilfully blind to the acts perpetrated by government forces against the population.
5. Length of time in the organization: the principal applicant's involvement with the [**...**] lasted more than 12 years. The Board determined that this was a very lengthy period of time, which cast doubt on the credibility of his alleged ignorance or non-participation in crimes against humanity throughout the quasi-totality of his career.
6. Opportunity to leave the organization: the Board concluded that the principal applicant's statement that he was not able to make a full determination of just what happened until October 2000, or that he tried to resign immediately, was not credible. The Board added that even if these statements were true, they did not sufficiently discharge him as an accomplice to crimes against humanity.

[16] Relying upon its six-factor analysis of the evidence, the Board concluded that the principal applicant was excluded from refugee protection pursuant to Article 1F(a) of the Convention.

[17] The Board then addressed the claim of the secondary applicants. Since they did not submit individual PIFs or testify during the hearing, the Board based its findings upon the allegations in the principal applicant's claim.

[18] The Board noted numerous inconsistencies and discrepancies in the principal applicant's statements, and did not find his explanations credible. The following are among the inconsistencies noted by the Board:

1. The principal applicant claims to have received his dismissal letter in June 2001, but the letter is dated November 23, 2001, just a few days before the applicants left for Canada. The principal applicant stated that the letter may have been post-dated, but the Board found that his testimony about how he left the [**...**] was not credible.
2. The principal applicant claimed in his PIF that attempts were made to kidnap his daughter outside her school and later at the family home, but the sequence of these events is reversed in the Port of Entry ("POE") notes. The principal applicant stated that this may be due to an error in translation, but the Board did not find this explanation credible.

[19] The Board concluded that the evidence did not establish that the secondary applicants have a well-founded fear of persecution in [**...**] for Convention reasons or a risk to their lives, a risk of cruel and unusual treatment or punishment or danger of torture.

ANALYSIS

[20] The relevant provisions of the Act read as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention -- le réfugié -- la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes -- sauf celles infligées au mépris des normes internationales -- et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une

of protection is also a person in need of protection.	catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.
SCHEDULE	ANNEXE
(Subsection 2(1))	(paragraphe 2(1))
SECTIONS E AND F OF ARTICLE 1 OF THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES	SECTIONS E ET F DE L'ARTICLE PREMIER DE LA CONVENTION DES NATIONS UNIES RELATIVE AU STATUT DES RÉFUGIÉS
E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.	E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(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; […]	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; […]

1. Did the Board commit a reviewable error in finding that the principal applicant was excluded from refugee status and refugee protection pursuant to article 1F(a) of the Convention, as referred to in section 98 of the Act?

[21] The determination of whether or not the principal applicant is excluded from refugee protection under section 98 of the Act for having been an accomplice to crimes against humanity is a mixed question of fact and law, and the applicable standard of review is reasonableness *simpliciter* (*Rocha v. Canada (Minister of Citizenship and Immigration*), 2005 FC 304).

[22] The principal applicant argues that the Board erred, misinterpreted or ignored the evidence before it. He cites the following examples:

1. The Board erred in finding that the principal applicant had a senior rank, whereas he had received only three promotions during nine years of service. Moreover, the documentary evidence before the Board did not specify what particular rank of [**...**] officers committed human rights abuses.
2. The Board groundlessly inferred from the principal applicant's appointment to the post of [**...**] that he was complicit in crimes against humanity.
3. There was no evidence before the Board that every member of the [**...**] was guilty of human rights violations. The primary purpose of the service is to fight terrorism and protect the population.
4. The panel ignored evidence that the applicants were persecuted in [**...**].

[23] In cases such as this one, the Minister had the onus of proving that there were "serious reasons to believe" that the principal applicant had been an accomplice to crimes against humanity. The required standard of proof is lower than the balance of probabilities, but more than mere suspicion or conjecture (*Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.), *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.), *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.).

[24] The Board analyzed the evidence according to the six criteria set out by this Court in *Ali v. Canada (Solicitor General)*, 2005 FC 1306, and came to the finding that the Minister had met that burden.

[25] Despite the principal applicant's arguments to the contrary, I don't believe that the Board misinterpreted or ignored any of the evidence before it. It simply did not find the principal applicant's claims credible, and these findings are supported by numerous inconsistencies and implausible allegations in his statements.

[26] Having considered the Board's reasons in light of the evidence before it, I do not find that it was unreasonable or that the intervention of this Court is warranted.

[27] It is now a well established principle that a refugee claimant need not necessarily have participated directly in the perpetration of human rights abuses and crimes against humanity by the organization to which he belongs in order for him to be found an accomplice to such acts (*Ramirez, supra; Bazargan v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1209 (F.C.A.) (QL)).

[28] Considering the clear documentary evidence that **[...]** security forces have been involved in widespread human rights abuse, it was not unreasonable for the Board to find the principal applicant's alleged ignorance of these facts implausible. I agree with Teitlebaum J. in *Shakarabi v.*

Canada (Minister of Citizenship and Immigration), [1998] F.C.J. No. 444 (F.C.T.D.) (QL), in paragraphs 22 and 25:

> I find that if I were to accept the applicant's argument it could be used to justify the worst type of human rights abuses. One could argue that the purpose of many oppressive state organizations is domestic and foreign security, but that should not mean that significant human rights violations should occur without impunity. That would be counter to the principles of Article 1F(a) of the United Nations Convention Relating to the Status of Refugees. Thus, I have no difficulty denying this ground of appeal.
>
> […] It is much too simple to say that one is unaware of barbaric actions of an organization in order to try to distance oneself from these barbaric actions. If, as in the present case, an individual lives and works in a country where persons around him are disappearing and where one hears of persons arrested and tortured, it appears to me, to be totally unbelievable that one would not have knowledge of what is taking place. I believe that the Board came to the correct conclusion on the evidence before it.

[29] Despite the principal applicant's claims to the contrary, I agree with the Board's finding that he rose to a senior rank and post within the [**...**]. This increases the likelihood that he was complicit in the commission of many human rights abuses by the [**...**] security forces. In *Sivakumar*, *supra*, Justice Linden wrote at paragraph 10:

> In my view, the case for an individual's complicity in international crimes committed by his or her organization is stronger if the individual member in question holds a position of importance within the organization. Bearing in mind that each case must be decided on its facts, the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime. Thus, remaining in an organization in a leadership position with knowledge that the organization was responsible for crimes against humanity may constitute complicity. […]

2. Did the Board commit a reviewable error in finding that the secondary applicants did not establish that they have a well-founded fear of persecution in [**...**] **for Convention reasons or a risk to their lives, a risk of cruel and unusual treatment or punishment or danger of torture?**

[30] The secondary applicants submit that the board erred in misinterpreting important elements of the evidence before it. Specifically, they argue that the Board ignored the two kidnapping attempts on [**...**].

[31] Unfortunately, the secondary applicants did not testify or submit separate PIFs, and the Board could only come to a conclusion in their case by relying on the evidence submitted by the principal applicant.

[32] The secondary applicants had the onus to establish that they have a well-founded fear of persecution in [**...**] for Convention reasons or a risk to their lives, a risk of cruel and unusual treatment or punishment or danger of torture.

[33] The Board found inconsistencies in the order in which the principal applicant claimed that the attempted kidnappings took place, and did not find his explanation about an error in translation credible. Since the secondary applicants did not testify on this matter, it was not unreasonable for the Board to come to an adverse credibility finding regarding these alleged kidnapping attempts.

[34] The secondary applicants also submit that the Board failed to consider that they and the principal applicant left [**...**] because they are now viewed as opponents of the regime, and would be in great danger if they returned. However, the discrepancies as to the date on which the principal

applicant obtained his dismissal letter led the board to doubt the credibility of the circumstances of the principal applicant's departure from the [**...**].

[35] Since the Board found that the principal applicant had not clearly established the circumstances of his departure from [**...**], it was not unreasonable for it to conclude that the secondary applicants had not established that they would be in danger if they were to return to [**...**].

[36] Finally, the secondary applicants claim that they were not allowed to give evidence during the hearing. With respect, this statement is incorrect. While hindsight may reveal the applicant's decision to rely entirely on the testimony of the principal applicant as a poor strategic choice, this cannot be used as grounds for review. The transcript of the hearing clearly shows that the applicants' counsel chose not to present testimony from the secondary applicants (page 865, Tribunal Record).

> Member: Do you intend to elicit evidence, oral evidence from any other claimant?
>
> Counsel: If I do, I might be calling the daughter as a witness.
>
> Member: All right.
>
> Counsel: Not the wife.
>
> Member: And I'll just state that these claims are being heard jointly because you are a family of claimants and because you rely on the same story. […]

[37] The Board's findings regarding the credibility of the secondary applicant's claims are questions of fact, which should only be reviewed by this Court if they were made in a perverse or

capricious manner, or made without regard to the evidence *(Aguebor v. (Canada) Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.) (QL)).

[38] In this case, considering how undermined the evidence submitted by the principal applicant was by inconsistencies and implausible claims, I find that the Board did not commit a reviewable error in dismissing the secondary applicant's claim.

[39] The parties did not suggest questions for certification and none arise.

ORDER

THIS COURT ORDERS that the applications for judicial review are dismissed. No question is certified.

"Michel Beaudry"

JUDGE

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1780-05
STYLE OF CAUSE:	**A, A** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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STYLE OF CAUSE:	**A, M** **A, R** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 2, 2006
REASONS FOR ORDER:	BEAUDRY J.
DATED:	February 10, 2006

APPEARANCES:

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