Federal Court Cour fédérale

Date: 20220926

Docket: IMM-7671-21

Citation: 2022 FC 1336

Ottawa, Ontario, September 26, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

LAMINE SEYDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RPD], dated October 13, 2021, affirming a decision of the Refugee Protection Division [RPD], which found that the Applicant was excluded from refugee protection pursuant to Article 1(F)(a) of the Refugee Convention. To succeed the Applicant must establish an unreasonable application of the test for complicity. The RAD reconsidered the facts of this case and determined there was

no such error. With respect, that Decision is unreasonable in that it failed to deal with a central component of restraining law. Therefore, judicial review is granted.

II. Facts

[2] The Applicant is a citizen of Senegal and former member of the *Mouvement des forces démocratiques de la Casamance* [MFDC], a separatist rebel group from whom he now fears persecution. No adverse credibility finding was made against the Applicant. The following is his narrative.

[3] The Applicant alleges he was 15 years old when he was forced to join the MFDC in 1986. As a teenager, he escaped the MFDC and went to live with his uncle. Following the death of his father, the Applicant returned to his village to support his mother and siblings. The Applicant alleges by returning, he would have to rejoin the MFDC, or risk being killed. The Applicant agreed to work for the MFDC as an informant collecting information about Senegalese military checkpoints as well as information circulating about the MFDC. The Applicant did this from 1988 to 1995.

[4] It is not in dispute that the Applicant knew what MFDC was engaged in in terms of crimes against humanity, and that he made significant contributions to MFDC's operations both as a child and as an adult. Nor is in dispute that MFDC engaged in violent vicious crimes against humanity, including the murder of civilians. The only issue on this judicial review is whether the Applicant's involvement was voluntary.

[5] In December 1995, the Applicant learned the MFDC was planning an attack on the Senegalese military. The Applicant provided this information to a friend in the Senegalese military, which then carried out a pre-emptive attack. The Applicant went into hiding after the MFDC learned of his betrayal. As a result of his betrayal of MFDC the Applicant and his mother were the victims of an attack by MFDC agents. Specifically, the agents pushed the Applicant's mother, breaking her hip, and beat the Applicant so badly that he suffered multiple fractures and broken teeth. He was left for dead.

[6] He recovered, and fled Senegal to Gambia in 1996. The Applicant then made his way to the U.S. in 1999, where he lived until 2018. In June 2018, the Applicant crossed the border into Canada and claimed refugee protection.

[7] The RPD found that the Applicant was complicit in the MFDC's crimes against humanity, such that he should be excluded from refugee protection under the *Convention*.

III. Decision under review

[8] The only dispute at the RAD was the assessment of voluntariness of the Applicant's contribution. Central to this was the defence of duress. Conducting an independent analysis, the RAD found no error in the RPD's reasoning regarding the Applicant's choices as an adult. The RPD noted that the Applicant's years as a minor were not being counted against him given his forcible recruitment. However, the RPD did not believe that the Applicant acted under duress in his continued membership with the MFDC, noting a disbelief in the continuous threats against the Applicant after his return to Dhaka. The RPD specifically pointed to ceasefires in effect for

three years during the Applicant's membership as an adult during which time the Applicant did not attempt to leave Senegal. The RAD affirmed this finding and rejected the existence of continuous and ongoing threats against the Applicant's life. The RAD further affirmed the Applicant had the opportunity to leave the MFDC during those periods.

[9] The RAD did not accept the Applicant's explanation that due to earlier threats against him and his age, he decided to stay even though the ceasefire was in effect. In the RAD's view, considering the length of time that passed after the Applicant returned to his village and the "changed circumstances during the ceasefire", there did not remain an imminent threat to the Applicant's life or family.

[10] Similarly, the RAD did not accept the Applicant's argument that there was no safe avenue of escape during his time as an informant, noting specifically that the Applicant himself confirmed that his life had returned to normal during the ceasefire and that he was free to go about his daily activities. In the RAD's view, this was indicative of his ability to escape MFDC control once again. The RPD had pointed out that the Applicant had no difficulty in previously escaping to Gambia in 1996 when his life was in danger. The RAD affirmed this suggestion, and questioned why the Applicant could not have made arrangements to depart Senegal during the ceasefire.

[11] The RAD acknowledged the Applicant's allegation that he had provided useful information to the military about an MFDC attack and his refusal to take part in a combat role, but did not consider this enough to negate the voluntariness of his actions.

[12] The RAD found there were serious reasons for considering that the Applicant voluntarily made significant and knowing contributions to the commission of crimes against humanity. Given these issues, the RAD was satisfied that the text for complicity had been met.

IV. Issues

[13] The Applicant submits the following issues:

1) Did the Refugee Appeal Division apply a correct test for voluntariness?

2) Was the reasoning perverse?

3) Was the decision made without regard to the evidence before the Division?

[14] The Respondent submits the following issues:

1) Was it reasonable for the RAD to conclude that the applicant was excluded from refugee protection under Article 1F(a) of the Refugee Convention?

[15] Respectfully, the only issue in this application is whether the Decision is reasonable.

V. Standard of Review

[16] The parties submit and I agree the standard of review is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[17] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important

> values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

VI. Analysis

[18] The Supreme Court of Canada's decision in *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezakola*], sets out tests for determining complicity in the criminal activities of a group. This "contribution based" test requires: (1) a voluntary contribution to the crime or criminal purpose of the group, a central component of which is the defence of duress; (2) a significant contribution to the groups' crime or criminal purpose; and (3) knowledge of the crime or criminal purpose.

[19] The first part of the test in *Ezakola* concerns voluntariness and duress and is explained as follows:

> [86] It goes without saying that the contribution to the crime or criminal purpose must be voluntarily made. While this element is not in issue in this case, it is easy to foresee cases where an individual would otherwise be complicit in war crimes but had no realistic choice but to participate in the crime. To assess the voluntariness of a contribution, decision makers should, for example, consider the method of recruitment by the organization and any opportunity to leave the organization. The voluntariness requirement captures the defence of duress which is well recognized in customary international criminal law, as well as in art. 31(1)(d) of the *Rome Statute*: Cassese's International Criminal Law, at pp. 215-16.

[20] Several factors may be assessed when assessing voluntariness:

> [91] […] The following list combines the factors considered by courts in Canada and the U.K., as well as by the ICC. It should serve as a guide in assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose: […]
>
> > (i) the size and nature of the organization;
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> > (ii) the part of the organization with which the refugee claimant was most directly concerned;
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> > (iii) the refugee claimant's duties and activities within the organization;
> >
> > (iv) the refugee claimant's position or rank in the organization;
> >
> > (v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
> >
> > (vi) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.

[21] In terms of voluntariness, the Applicant also relies on the Supreme Court of Canada's decision in *R. v. Ruzic*, 2001 SCC 24, [2001] 1 SCR 687 for the proposition that, among other things, the courts must take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics.

[22] In this connection the Supreme Court in *Ruzic* stated:

> 60 Like necessity, the common law rule of duress evolved from attempts at striking a proper balance between those conflicting interests of the accused, of the victims and of society. It also

> sought to establish a hierarchy between them, as a full reconciliation appears problematic in this area of the law. Operating so as to avoid imposing the burden of criminal responsibility on an accused for an involuntary act, as discussed above, the defence of duress does not negate either the *mens rea* or *actus reus* of the crime, and will excuse the accused although Lamer C.J. left open, in the case of some unspecified criminal offences, that it might also negate the criminal intent or raise doubts about its existence […]
>
> 61 This particular excuse focuses on the search for a safe avenue of escape (see *Hibbert*, supra, at paras. 55 and 62), but rejects a purely subjective standard, in the assessment of the threats. The courts have to use an objective-subjective standard when appreciating the gravity of the threats and the existence of an avenue of escape. The test requires that the situation be examined from the point of view of a reasonable person, but similarly situated. The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics. The process involves a pragmatic assessment of the position of the accused, tempered by the need to avoid negating criminal liability on the basis of a purely subjective and unverifiable excuse. A similar approach is also to be used in the application of the defence of necessity […]
>
> [Emphasis added]

[23] The key additional requirement in *Ruzic* over *Ezakola* is the requirement set out in *Ruzic* at para 61 that when assessing duress, a central consideration in voluntariness, a tribunal must consider “the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics.”

[24] The Applicant submits the RAD erred in failing to come to grips with and deciding this aspect of the case, submitting this is a requirement established by our highest Court. He put it this way in his written submissions:

> 24. Here there was no consideration by the Refugee Appeal Division of the “ability [of the applicant] to perceive a reasonable alternative ... with an awareness of his background and essential characteristics”. The respondent did not claim that there was. There is no reference in either the reasons of the Refugee Appeal Division or Respondent's Memorandum of Argument to the word “perception” or any of its variations, or the word “ability” in relation to the applicants, or any of its variations.
>
> 25. The legal test mandated by the Supreme Court of Canada is just ignored. Instead, the Refugee Appeal Division and the respondent relied on objective considerations only, what is reasonable to a reasonable person only, rather than what would have been reasonable for the applicant knowing what he knew, perceiving what he perceived, having the ability, background and characteristics that he had.

[25] With respect, I agree with the Applicant’s analysis. The Respondent notes *Ruzic* is a criminal not a refugee determination, and it is, but suggests for that reason *Ruzic* is not applicable. In addition, the Respondent submitted the RAD made related findings from which, as I understood it, the Court could find its reasoning compliant with *Ruzic*.

[26] I am unable to accept either assertion. It seems clear to me the requirement to consider and assess an applicant’s “ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics” applies equally to criminal and immigration proceedings where voluntariness / duress are in issue. It is not logical to have differing tests on the same issue.

[27] Nor was I pointed to any principled basis on which to narrow the RAD's scope of inquiry and ignore the teachings of our highest Court in this case. Both deal with the same subject, namely duress. *Ezacola* and *Ruzic* have great focus on the defence of duress. Duress is a key component of voluntariness in the immigration context, and is of course both a common law and statutory defence in criminal law under our *Criminal Code*. The Supreme Court of Canada in *Ruzic* considered duress in the context of an importation of drugs context, where an accused was acquitted based on the defence of duress, which acquittal was upheld by the Ontario Court of Appeal and the Supreme Court. *Ezacola* was an appeal to the Supreme Court from a finding of complicity under provisions similar to those in the case at bar. The Supreme Court held voluntariness "captures the <u>defence of duress</u> which is well recognized in international criminal law, as well as in article 31(1)(d) of *Rome Statute, Cassese's International Criminal Law*, pp: 215 1 16." [Emphasis added].

[28] In my view *Ruzic* may be considered in the refugee context as well as the criminal law context where duress is in issue.

[29] Neither am I persuaded the other findings by the RAD are a substitute for the RAD asking and assessing "the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics."

[30] While I agree not all of the other findings of the RAD were based purely on objective determinations, and while some findings mentioned subjective factors, in my respectful view there is no substitute in this case for a direct determination of this element as set out in *Ruzic*.

[31] I therefore conclude the RAD should have come to grips with and assessed "the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics." In not doing so, it offended *Vavilov's* requirement at para 128 concerning grappling with central issues.

[32] While a number of other issues were argued, I decline to deal with them given the matter will be re-determined by a different tribunal.

VII. Conclusion

[33] In my respectful view, the Applicant has established that the Decision of the RAD was unreasonable for the foregoing reasons. Therefore, Application for judicial review will be granted.

VIII. Certified Question

[34] The Applicant proposed the following question for certification in the event I found against him on the applicability of *Ruzic*. The question was as follows:

> 1. Is the law of duress under the *Criminal Code* different from the law of duress under United Nations Refugee Convention Article 1F(a) for crimes against humanity?
>
> 2. In particular, does the requirement stated in the case of *R v Ruzic*, 2001 SCC 24, [2001] 1 SCR 687 at paragraph 61 that, in assessing a claim of duress of a person, a tribunal must "take into consideration his ability to perceive a reasonable alternative to committing a crime" apply to a claim of duress made under Article 1F(a) of the UN Refugee Convention for crimes against humanity?

[35] The Respondent submits the first question is not a proper question to certify because it is worded too broadly to be meaningful, and lacks any nuance connecting it to the specific issues that arise in this application. The interrelated issues of duress, voluntariness and complicity are multifaceted and contextual, and necessarily turn on the facts of any given case.

[36] The second, the Respondent submits is too narrow to be of utility in this case. The question relates to one of six conjunctive elements that an applicant must satisfy in order to benefit from the common law defence of duress: *R v Ryan,* 2013 SCC 3 at para 55. In this application, the applicant has only taken issue with the RAD's assessment of the "safe avenue of escape" element of that test: Applicant's further memorandum at para 14.

[37] With respect to both questions, the Respondent submits the Court has not benefited from fulsome argument on the underlying issue the applicant seeks to clarify. To the extent that the broader jurisprudence might benefit from further appellate guidance concerning the interplay between domestic law and international law in the areas of duress, voluntariness and complicity in crimes against humanity, those issues should be left to a future case where they have been fully argued from the outset.

[38] Given the above submissions and the conditional nature of the Applicant's proposed question, I respectfully decline to certify a question of general importance.

JUDGMENT in IMM-7671-21

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded for reconsideration by a differently constituted decision maker, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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