

Date: 20070308

Docket: IMM-4240-06

Citation: 2007 FC 265

Ottawa, Ontario, March 8, 2007

Present: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

KENNY MERCERON

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a negative decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board dated June 28, 2006, determining that the applicant is not a Convention refugee as defined in section 96 of the Act or a person in need of protection under section 97 of the Act, on the ground that he is a person referred to in Article 1F(a) and 1F(c) of the *United Nations Convention Relating to the Status of Refugees* (the Convention).

[2] The applicant, Kenny Merceron, is a citizen of Haiti. He states that he worked for the Haitian National Police (HNP) in Haiti from 1999 to 2003. He worked as a driver and body guard for a senior government minister.

[3] He alleges that he was arrested and threatened with death for visiting one of his police officer friends who was imprisoned in the national penitentiary. After a minister intervened, he was released, and his service weapon was seized in August 2003. Fearing for his life, he travelled to Canada on August 16, 2003, and sought refugee protection in December 2004.

[4] The RPD heard the claim on May 15, 2006. The respondent Minister intervened to ask the RPD to apply the exclusion clauses in Articles 1F(a) and 1F(c) of the Convention on the ground that the applicant was a member of the Haitian National Police from 1999 to 2003 after receiving four months of military training in 1998. The Minister was successful on this issue.

1. The appropriate standard of review

[5] A decision by the RPD that certain acts fall within the definition of “crimes against humanity” is a question of law, and the standard of review is correctness (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Mendez-Levy v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 846 (QL), 2001 FCT 523; *Gonzalez v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 646, [1994] F.C.J. No. 765 (QL).

[6] The applicant's complicity in acts committed by the Haitian National Police and his exclusion under Article 1 of the Convention is a mixed question of law and fact. The standard of review is reasonableness *simpliciter* (*Harb v. Canada (Minister of Citizenship and Immigration)* 2003 FCA 39, [2003] F.C.J. No. 108 (C.A.)(QL); *Salgado v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1, [2006] F.C.J. No. 1 (F.C.T.D.)(QL).

2. Excluding the applicant

[7] Section 98 of the Act provides that a person referred to in section E and F of Article 1 of the Convention is not a Convention refugee or a person in need of protection.

[8] Paragraphs (a) and (c) of section F, which are relevant to this proceeding, read as follows:

(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;

...

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

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;

[...]

c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[9] In *Harb*, above, the Federal Court of Appeal held that Article 1F(a) must be interpreted so as to include international instruments concluded since the Convention was adopted in 1951, including the definition of “crime against humanity” in the *Rome Statute*, which was adopted on July 17, 1998, and came into effect on July 1, 2002.

[10] Paragraph 7(1) of the *Rome Statute* (see Appendix) states that a “crime against humanity” is “committed as part of a widespread or systematic attack directed against any civilian population” and includes murder, torture, rape, persecution against any identifiable group on political, racial, national, ethnic or cultural grounds, and other inhumane acts of a similar character.

[11] Paragraph 7(2) of the same *Statute* provides that such an attack against a population involves the multiple commission of acts referred to in paragraph 1 “pursuant to or in furtherance of a State or organizational policy to commit such attack . . .”

[12] The situation envisaged is not one in which isolated incidents of international offences have occurred but where the commission of such offences is a continuous and regular part of the operation (*Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306; *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); (*Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79 (F.C.T.D.)).

[13] The onus is on the Minister to lead evidence demonstrating that there are “serious reasons for considering” that the applicant has been complicit in crimes against humanity (*Moreno*, above, *Ramirez*, above). The applicable standard of proof is something more than mere suspicion but less than the balance of probabilities standard (*Lai v. Canada (M.C.I.)*, [2005] F.C.J. No. 584 (QL), 2005 FCA 125; *Mugesera v. Canada (M.C.I.)*, [2005] 2 S.C.R. 100).

[14] The purpose of Article 1F(c) is to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting (*Pushpanathan*, above).

Complicity by association

[15] Complicity by association means that a person may be held responsible for crimes committed by others because of his or her close association with those who committed them (*Sivakumar*, above).

[16] In such circumstances, it is the nature of the crimes alleged against the organization with which the person is associated that leads to his or her exclusion (*Harb*, above).

[17] A refugee claimant is excluded for complicity if the claimant is a member of a group that

has committed a crime against humanity, has knowledge of the group's activities, actively supports the group and has failed to disengage himself or herself from it at the earliest opportunity (*Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79 (T.D.)).

[18] Essentially, complicity rests on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it (*Ramirez*, above; *Bazargan v. Canada (Minister of Citizenship and Immigration)*, (1996), 205 N.R. 282, [1996] F.C.J. No. 1209 (C.A.)(QL)).

[19] Mere membership in an organization that commits international crimes is an insufficient basis on which to invoke the exclusion clause against the applicant (*Ramirez*, above), unless the very existence of this organization is primarily directed to a limited, brutal purpose (*Saridag v. Canada (Minister of Employment and Immigration)* (1994), 85 F.T.R. 307).

[20] However, association with an organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes (*Sivakumar*, above at paragraph 13).

[21] In *Collins v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 732, at paragraph 24, Mr. Justice Yves deMontigny summarized the mental element required to establish complicity in crimes against humanity as follows:

The mental element required to establish complicity in crimes against humanity has been characterized variously as “shared common

purpose”, “personal and knowing participation or toleration of the crimes”, and participation in an organization knowing it commits crimes against humanity, when combined with a failure to stop the crimes or disassociate oneself.

[22] Moreover, 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. 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. In such circumstances, an important factor to consider is evidence that the individual protested against the crime or tried to stop its commission or attempted to withdraw from the organization (*Ramirez*, above; *Sivakumar*, above).

Application to this case

[23] The RPD analyzed the crimes and acts committed by the Haitian National Police and the *Chimères* and concluded that crimes against humanity were involved. However, the RPD did not find that the organization's existence was solely directed to a limited and brutal purpose, such that mere membership was a sufficient basis on which to invoke the exclusion clause (*Ramirez*, above). Mr. Merceron could not be regarded as complicit in crimes against humanity based solely on the fact that he was a member of the Haitian National Police.

[24] In *Loordu v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 141 (T.D.) (QL), where the applicant was also a member of a police force recognized as an organization

that committed international crimes (the Sri Lankan police), the Court found that mere membership in a police service does not meet the definition of “persecuting group” as interpreted in *Penate*, above.

[25] The RPD then had to determine the existence of a “shared common purpose” and “the knowledge that all of the parties in question may have of it” (*Ramirez*, above; *Moreno*, above).

[26] The case law has established the factors to consider when determining whether there are serious reasons to believe that a claimant could be considered as an accomplice in the perpetration of crimes referred to in section 1F of the Convention. These factors are: the method of recruitment, the claimant’s position and rank in the organization, the nature of the organization, the knowledge of atrocities, the length of time in the organization and the opportunity to leave the organization (*Ali v. Canada (Solicitor General)*, [2005] F.C.J. No. 1590 (QL), 2005 FC 1306; *Fabela v. Canada (M.C.I.)*, [2005] F.C.J. No. 1277 (QL), 2005 FC 1028).

[27] In this case, the RPD analyzed and considered the following elements in determining whether the applicant was aware of the acts of violence and human rights violations committed by the police and the *Chimères*:

- He freely joined the police force in 1998 and underwent military training before returning to his position as a police officer;
- He would have learned about police violence from his brother, who was a police officer, and from his training in 1998;

- He was a member of the close protection unit for the office of the delegate for the west and an armed driver for a minister, and therefore was even more aware of the police violence at the time;
- He learned techniques for the defence of the country's security and knew that the police were suppressing the population in the name of defending the country's security;
- He acknowledged that he had heard about human rights abuses committed by police officers;
- He and the minister for whom he was a bodyguard often met with members of the *Chimères*, a [TRANSLATION]"militia group dedicated to the bloody suppression of opponents";
- As a police officer and bodyguard, he could not have been unaware of the brutal and violent repression by the security forces, but did not distance himself from them.

[28] The fact that the applicant knew about the crimes was not in itself enough to establish that he shared a common purpose with the perpetrators of the crimes (*Collins*, above, paragraph 28).

[29] As stated by Mr. Justice Joseph Robertson in *Moreno*, above, at paragraph 50:

It is settled law that acts or omissions amounting to passive acquiescence are not a sufficient basis for invoking the exclusion clause.

[30] The RPD had no evidence before it to infer from the applicant's mere knowledge that he shared a common purpose of consciously participating in serious crimes. The RPD did not refer to

any fact, event or act by the applicant that would support a finding that he shared a common goal with the perpetrators of the crimes.

[31] Despite the lack of evidence on this point, the RPD stated that the applicant [TRANSLATION] “would not have survived in such a situation if he had not been perceived as sharing the common purpose of abusing the people.”

[32] If that were the case, every member of the Haitian police force during that time, regardless of his or her position, would be excluded from the Convention.

[33] The RPD could not find that the applicant was complicit in crimes against humanity without evidence to that effect.

[34] For these reasons, I find that the RPD made a reviewable error. The application for judicial review is allowed, and the matter is remitted for reconsideration by a differently constituted panel.

JUDGMENT

The application for judicial review is allowed, and the matter is remitted for reconsideration by a differently constituted panel.

“Danièle Tremblay-Lamer”

Judge

Certified true translation
Mary Jo Egan, LLB

Appendix A

Statutory Provisions

Subsection 2(1) of the *Immigration and Refugee Protection Act* states that the term “Refugee Convention” means “the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951.”

2.(1) The definitions in this subsection apply in this Act.	2.(1) Les définitions qui suivent s’appliquent à la présente loi.
...	[...]
“Refugee Convention”	« Convention sur les réfugiés »
Refugee Convention means the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951, and the Protocol to that Convention, signed at New York on January 31, 1967. Sections E and F of Article 1 of the Refugee Convention are set out in the schedule.	La Convention des Nations Unies relative au statut des réfugiés, signée à Genève le 28 juillet 1951, dont les sections E et F de l’article premier sont reproduites en annexe et le protocole afférent signé à New York le 31 janvier 1967.
...	[...]

Sections 96 and 97 of the *Immigration and Refugee Protection Act*.

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
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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 themselves 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,

(i) elle ne peut ou, de ce fait, ne veut se réclamer

unwilling to avail
themselves of the
protection of that
country,

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.

Section 98 of the Act reads as follows:

98. A person referred to in
section E and 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.

Paragraphs (a) and (c) of section F of Article 1 of the Refugee Convention read as follows:

<p>(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;</p> <p>...</p> <p>(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.</p>	<p>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;</p> <p>[...]</p> <p>c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.</p>
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Rome Statute of the International Criminal Court

<p>Article 7</p> <p>1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack;</p> <p>(a) Murder;</p> <p>(b) Extermination;</p> <p>(c) Enslavement;</p> <p>(d) Deportation or forcible transfer of population;</p> <p>(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of</p>	<p>Article 7</p> <p>1. Aux fins du présent Statut, on entend par crime contre l'humanité l'un quelconque des actes ci-après lorsqu'il est commis dans le cadre d'une attaque généralisée ou systématique lancée contre toute population civile et en connaissance de cette attaque:</p> <p>a) Meurtre;</p> <p>b) Extermination;</p> <p>c) Réduction en esclavage;</p> <p>d) Déportation ou transfert forcé de population;</p> <p>e) Emprisonnement ou autre forme de privation grave de liberté physique en violation des dispositions fondamentales</p>
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international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1

du droit international;

f) Torture;

g) Viol esclavage sexuel, prostitution forcée, grossesse forcée, stérilisation forcée ou toute autre forme de violence sexuelle de gravité comparable;

h) Persécution de tout groupe ou de toute collectivité identifiable pour des motifs d'ordre politique, racial, national, ethnique, culturel, religieux ou sexiste au sens du paragraphe 3, ou en fonction d'autres critères universellement reconnus comme inadmissibles en droit international, en corrélation avec tout acte visé dans le présent paragraphe ou tout crime relevant de la compétence de la Cour;

i) Disparitions forcées de personnes;

j) Crime d'apartheid;

k) Autres actes inhumains de caractère analogue causant intentionnellement de grandes souffrances ou des atteintes graves à l'intégrité physique ou à la santé physique ou mentale.

2. Aux fins du paragraphe 1:

a) Par « attaque lancée contre une population civile », on entend le comportement qui consiste en la commission multiple d'actes visés au

against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture", means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

paragraphe 1 à l'encontre d'une population civile quelconque, en application ou dans la poursuite de la politique d'un État ou d'une organisation ayant pour but une telle attaque:

b) Par « extermination », on entend notamment le fait d'imposer intentionnellement des conditions de vie, telles que la privation d'accès à la nourriture et aux médicaments, calculées pour entraîner la destruction d'une partie de la population;

c) Par « réduction en esclavage », on entend le fait d'exercer sur une personne l'un quelconque ou l'ensemble des pouvoirs liés au droit de propriété, y compris dans le cadre de la traite des êtres humains, en particulier des femmes et des enfants;

d) Par « déportation ou transfert forcé de population », on entend le fait de déplacer de force des personnes, en les expulsant ou par d'autres moyens coercitifs, de la région où elles se trouvent légalement, sans motifs admis en droit international;

e) Par « torture », on entend le fait d'infliger intentionnellement une douleur ou des souffrances aiguës, physiques ou mentales, à une personne se trouvant sous sa garde ou sous son contrôle; l'acceptation de ce terme ne s'étend pas à la douleur ou aux souffrances résultant

- uniquement de sanctions légales, inhérentes à ces sanctions ou occasionnées par elles;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- f) Par « grossesse forcée », on entend la détention illégale d'une femme mise enceinte de force, dans l'intention de modifier la composition ethnique d'une population ou de commettre d'autres violations graves du droit international. Cette définition ne peut en aucune manière s'interpréter comme ayant une incidence sur les lois nationales relatives à la grossesse;
- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- g) Par « persécution », on entend le déni intentionnel et grave de droits fondamentaux en violation du droit international, pour des motifs liés à l'identité du groupe ou de la collectivité qui en fait l'objet;
- (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- h) Par « crime d'apartheid », on entend des actes inhumains analogues à ceux que vise le paragraphe 1, commis dans le cadre d'un régime institutionnalisé d'oppression systématique et de domination d'un groupe racial sur tout autre groupe racial ou tous autres groupes raciaux et dans l'intention de maintenir ce régime;
- (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed
- i) Par « disparitions forcées de personnes », on entend les cas où des personnes sont arrêtées, détenues ou enlevées par un État ou une organisation politique ou avec l'autorisation, l'appui ou l'assentiment de cet

by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

État ou de cette organisation, qui refuse ensuite d'admettre que ces personnes sont privées de liberté ou de révéler le sort qui leur est réservé ou l'endroit où elles se trouvent, dans l'intention de les soustraire à la protection de la loi pendant une période prolongée.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4240-06

STYLE OF CAUSE: Kenny Merceron

and

Minister of Citizenship and Immigration

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: February 28, 2007

REASONS FOR JUDGMENT BY: MADAM JUSTICE TREMBLAY-LAMER

DATED: March 8, 2007

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