Federal Court  Cour fédérale

Date: 20110222

Docket: IMM-4684-10

Citation: 2011 FC 208

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 22, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

JMS*

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review seeks to quash a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada. That decision, rendered on July 13, 2010, following a hearing on September 16, 2009, excluded the applicant from the

*This file is subject to a confidentiality order dated November 4, 2010. Owing to the nature of the threats alleged by the applicant, the purpose of the order is to avoid use of the applicant's name and any other information that might identify him.

protection granted to refugees and persons in need of protection under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). That decision was made under section 98 of the IRPA, according to which a person must be excluded from the protection granted by the IRPA if he or she is a person referred to in sections E and F of Article 1 of the *United Nations Convention Relating to the Status of Refugees* (the Convention). Leave to exercise legal recourse was granted by Justice Phelan on October 29, 2010.

Impugned decision

[2] The RPD panel was of the opinion that the applicant was a person referred to in Article 1F(a) of the Convention, in that he had allegedly committed a crime against peace, a war crime, or a crime against humanity, as defined in the applicable international instruments. That finding was based on the applicant's participation in the activities of a paramilitary group in an African country that had committed war crimes (the Group).

[3] The Panel was not satisfied with the applicant's explanation that he had initially become involved with the Group as an informant for a government agency (the Agency). The applicant explained that it was only some time later that he became more actively involved in the Group as a recruitment officer. The Panel analyzed several criteria and found that the applicant was a person referred to in Article 1F(a) of the Convention.

[4] The applicable standard of proof in such cases is whether there are "serious reasons for considering" that the applicant had committed a crime against peace, a war crime, or a crime against humanity. The RPD Panel did not fail to point out that this was indeed a lower standard

than the civil standard of the balance of probabilities but represents something more than a suspicion or conjecture (*Ramirez v. Canada (Minister of Employment and Immigration*), [1992] 2 F.C. 306 (F.C.A)). Then, the Panel determined that the Group was not an organization with a limited and brutal purpose during the time period in question, from 1999 to 2005. The analysis therefore turned on the question of the applicant's complicity in the acts alleged against the Group.

[5] The Panel continued its analysis by assessing the applicant's situation according to the applicable criteria for determining complicity as established by *Ramirez*, above. Both the applicant and the Minister conceded that the Group had regularly committed atrocities and war crimes during the time period in question. At the same time, the Panel assumed "that the organization also had a legitimate purpose and that it was not only an organization with a brutal and limited purpose".

[6] The second factor analyzed by the RPD Panel was that of the recruitment method. On this subject, the Panel rejected the applicant's explanation that he had initially been recruited into the Group under the auspices of the Agency. The Panel was of the opinion that he had voluntarily joined the Group. Moreover, he maintained his membership with the Group despite being formally prohibited from being a member of a political party because of his duties. It was only after the Minister intervened in the case that the applicant qualified his membership in the Group by referring to the Agency's involvement. The Panel made a negative inference from this belated disclosure of facts that were essential to the claim.

[7] Since the nature of the organization itself was not challenged, the RPD Panel analyzed the applicant's position or rank within the organization. The Panel was of the view that the applicant's "vague and evasive" answers regarding the Group's operations were consistent with the applicant's attempts to dissociate himself. The Panel noted that the applicant had been put in charge of recruitment in the capital, a role deemed to be important. The Panel also made the following remark: "The refugee protection claimant testified that he took advantage of the fact that he had worked with the [Group] to obtain a position . . .". Furthermore, that he had been able to obtain a meeting with a high-ranking authority figure from the Group at that time was seen to be an indication of the applicant's apparently important role within the Group.

[8] The other factors analyzed by the Panel also weighed against the applicant. The applicant himself testified that he had been aware of the atrocities committed by the Group in that country. However, he alleged that, being of a different ethnicity as that of the Group, he could not condone those reprehensible acts, as his family had been victims themselves of those acts. Since the Panel's opinion was that the applicant had taken advantage of his involvement in the Group, the applicant was found to have been aware of the atrocities. Moreover, the Panel noted that the applicant had voluntarily joined the organization and never left. The Panel wrote "that the refugee protection claimant was rather pleased about his membership in the [Group], which had good reasons to exist, and that he did not have any intention of leaving the organization at the first opportunity". In this context, the applicant was also criticized for having allegedly used his involvement in the organization to advance his career. In addition, the duration of the involvement, from 1999 to 2005, was found to be significant.

[9] In light of the analysis of the *Ramirez* factors, the RPD Panel determined that there were serious reasons to consider that the applicant had participated in acts referred to in Article 1F(a) of the Convention. Thus, he was excluded from the grounds of protection that might have been available to him (section 98 of the IRPA).

Parties' submissions

[10] The applicant put forward three arguments to challenge the Panel's decision. First, it is alleged that the RPD erred in failing to specify the crimes in which the applicant was complicit. Second, the finding regarding the applicant's position in the organization is challenged as unreasonable. Last, the Panel's finding on the issue of knowledge and a shared common purpose is allegedly unreasonable.

[11] The Minister contends that the Panel's decision is reasonable and that it adequately considered the evidence. Moreover, the Panel criticized the applicant for his lack of credibility, which solidifies the bases for the decision. In the Minister's view, the *Ramirez* factors were correctly analyzed. The alleged crimes were properly specified, and the findings on the *Ramirez* factors are reasonable.

Issues and applicable standard of review

[12] In the Court's opinion, the issues are as follows. Did the RPD Panel correctly analyze the evidence and the *Ramirez* factors? Did the Panel err in its assessment of the applicant's credibility? These more general questions encompass the three questions raised by the applicant.

[13] The standard of review that applies to the question of assessment of evidence is reasonableness, as it is a question of mixed fact and law (*Dunsmuir v. New Brunswick,* 2008 SCC 9; *Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 139; *Rathinasigngam v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 988). Thus, on this subject, the question is whether it was reasonable for the Panel to find that there were serious reasons to conclude that the applicant had been complicit in the alleged acts. The question of assessment of credibility is also gauged on the standard of reasonableness, since deference is owed to the decision maker in this respect (*Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178; *Rathinasigngam v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 988).

Analysis

A. *Issue of credibility*

[14] First, the Court must analyze the issue of the applicant's credibility. This issue was determinative for the RPD Panel. Whether or not the applicant was credible was the principal basis for the conclusions on the criteria regarding the recruitment method, position in the organization and possibility of leaving the organization.

[15] The Panel drew a negative inference from the fact that "[t]he refugee protection claimant testified that he [had taken] advantage of the fact that he had worked with the [Group] to obtain a position". This conclusion is wrong. First, there is nothing in the evidence to support it. Moreover, the political context in which the applicant obtained the position corroborates this fact. The Group, a faction of which was participating in what may be characterized as war

crimes, was a movement with very strong ethnic associations in 2001 and still removed from power. Thus, it is unreasonable, if not wrong, to state that the applicant benefitted from his association with a rebel group of a certain ethnicity, whereas the government at the time was of another ethnicity and definitely did not view the Group favourably. There is therefore no factual basis for the Panel's finding at paragraph 31.

[16] This finding as to the applicant's credibility is central to the Panel's conclusions on several, if not all, aspects of the determination that the applicant was excluded. On the standard of reasonableness, the Court's intervention is warranted where a decision does not fall within a range of possible outcomes which are defensible in fact and law (*Dunsmuir*, above, at para. 47). Here, since one of the bases for the finding regarding the applicant's credibility is not supported by the evidence, that finding is unreasonable.

B. *Panel's analysis of the Ramirez factors*

[17] At paragraph 11 of *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, the Federal Court of Appeal had the opportunity to rule on the criterion of complicity in the acts referred to in Article 1F(a):

> In our view, it goes without saying that "personal and knowing participation" can be direct or indirect and does not require formal membership in the organization that is ultimately engaged in the condemned activities. It is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organization. At p. 318 F.C., [in *Ramirez*,] MacGuigan, J.A. said that "[a]t bottom complicity rests . . . on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it". Those who become involved in an operation that is not theirs, but that they know will probably lead to

> the commission of an international offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation.

[18] In this regard, the Panel properly identified the nature of the Group's alleged acts, especially since the applicant acknowledged them. However, it is the analysis of the applicant's degree of participation that is problematic. Since the organization did not have a limited and brutal purpose, mere association with the Group was not enough: a more in-depth analysis was required (*Ramirez,* at para. 13). As submitted by the applicant, the alleged acts and, in particular, the applicant's ties to those acts, needed to be specified (*Cardenas v. Canada (Minister of Employment and Immigration)*, (1994) 74 F.T.R. 214 (F.C.A); *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (F.C.A)).

[19] As noted above, an incorrect conclusion regarding the applicant's credibility was central to the assessment of his complicity and necessarily tainted the Panel's decision. However, a thorough analysis of the case law and evidence before the Panel shows that the Panel erred in its assessment of the *Ramirez* factors.

[20] To begin with, without resolving the issue on the merits, the Court notes that the applicant's situation seems similar to the one presented in *Cardenas v. Canada (Minister of Employment and Immigration)*, (1994) 74 F.T.R. 21. The applicant's involvement in the Group was apparently not by participating directly in the commission of the acts referred to in paragraph F(a). Rather, because of his ethnicity, the applicant was put in charge of recruitment and political duties, that is, legitimizing the Group in the eyes of the population and the authorities. This is explained by the political context then, at a time when the Group allegedly

wanted to lay down its arms and integrate itself into the political process. The applicant commented quite clearly on his involvement in this regard and qualified it through the political context. However, the Panel relied on the applicant's general statements and failed to analyze the qualifications made by the applicant.

[21] It is also obvious that the Panel criticized the applicant for having held high enough positions so as to be able to use his involvement to advance his career. In doing so, the Panel not only came to a conclusion that was based on an incorrect credibility finding but also failed to address in its reasons the issue of the applicant's ethnicity and his ties to the Group. More specifically, the Panel should have commented on the evidence that a person of the same ethnic group as that of the applicant would not have been able to rise in the ranks of a movement of another ethnic group, given the political context. This evidence was important, and the Panel was required to analyze it and explain why it was rejected.

[22] The Court also notes, without commenting on its validity and probative force, that there is some evidence on file that the applicant has been involved in promoting human rights. This involvement seems to be central to his claim for refugee protection. While the Court draws no conclusions on the merits of this evidence, it may be submitted at the very least that involvement in the fight for human rights is relevant in the analysis of the duration of the involvement and the possibility of leaving the organization. This evidence was simply not taken into consideration.

[23] The Panel's analysis of the evidence is therefore related to the adequacy of the reasons for its decision. As noted by the Federal Court of Appeal in *VIA Rail Canada Inc v. National Transportation Agency*, [2001] 2 F.C. 25 (F.C.A.),

> [t]he obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.

[24] *A fortiori*, this reasoning applies when a decision maker fails to consider evidence that may be characterized as relevant. A decision maker must have actually assessed the evidence and given the reasons for excluding it. This is also consistent with the analysis required by the standard of review of reasonableness.

Conclusion

[25] The RPD Panel based its assessment of the applicant's credibility on elements that were not supported by the evidence on file. This credibility assessment was determinative in the evaluation of the criteria for complicity as set out in *Ramirez*. Next, the analysis of the criteria for complicity was conducted without reference to important evidence. It was therefore unreasonable for the RPD Panel to find that there were serious reasons for considering that the applicant had participated in the commission of the acts referred to in paragraph F(a).

[26] The parties proposed no question of general importance to be certified, and none arose.

JUDGMENT

THE COURT ORDERS AND ADJUGES that the application for judicial review is allowed and the matter is to be sent back for determination by a newly constituted RPD Panel.

There is no question to be certified.

"Simon Noël"
Judge

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT

SOLICITORS OF RECORD

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