Federal Court  Cour fédérale

Date: 20120606

Docket: IMM-2851-11

Citation: 2012 FC 698

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 6, 2012

PRESENT: The Honourable Mr. Justice Montigny

BETWEEN:

EUGENE MWALUMBA MATA MAZIMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the panel) dated April 8, 2011. The panel determined that the applicant was not a Convention refugee or a person in need of protection, under section 98 of the Act and Article 1F(*a*) of the *United Nations Convention Relating to the Status of Refugees* (the Convention). For the reasons that follow, this application should be dismissed.

I. Facts

[2] The applicant, Eugene Mwalumba Mata Mazima, was born on March 1, 1977, in Kinshasa, Democratic Republic of Congo (CRC). In 2001, when he completed his university studies, he obtained a position in charge of computer services in the Congolese armed forces (FAC) with the help of his cousin, Admiral Baudoin Liwanga Mata Nyamunyobo (Admiral Liwanga), Chief of Staff in the FAC. In his interview with the Security and War Crimes Unit on November 13, 2008, he stated that his job consisted, more specifically, of creating a local computer network to connect the office with the other departments of the army so they would have the same database, and that he entered reports, managed computer tools to ensure that the equipment functioned, and sometimes replied to certain [TRANSLATION] "regular" emails from Admiral Liwanga. He did not have access to secret emails, and he had no one under him. He also stated that he had never participated directly in army operations. As well, he stated that he was aware of the fact that the Congolese army had committed human rights violations, but he had never witnessed violations of that nature.

[3] In 2004, he had to leave his job with the FAC when Admiral Liwanga was dismissed. After briefly returning to school, he obtained a position as a new technology research officer for the Ministry of Foreign Affairs in Kinshasa. His job at that time was to create a computer tool to connect the office and the transmission department of the Ministry of Foreign Affairs, which was in charge of correspondence between the office and Congolese embassies abroad.

[4] When the government that was installed for a transitional period, after a new constitution was adopted in December 2005, was replaced following the legislative and presidential elections

held in 2006, the applicant was relocated to the Embassy of the DRC in Algeria as second secretary. He was in charge of administration and Congolese scholarship students in Algeria.

[5] In July 2007, the chargé d'affaires at the Embassy began to suspect that the applicant was a member of the Alliance des patriotes pour la refondation du Congo, an opposition party, because of the favours he was doing for certain non-scholarship students from that party. In August 2007, the applicant learned of a letter sent to the chargé d'affaires at the Embassy by the government of the DRC directing that he be repatriated to his country to be interrogated by the intelligence service.

[6] The applicant's already precarious position with his government worsened when his half-brother, Veron Mwalumba, physically assaulted Francis Kalombo, a close associate of President Joseph Kabila, at the 62nd General Assembly of the United Nations in New York.

[7] The applicant therefore decided to leave Algeria, and on November 27, 2007, he travelled to New York with his wife and two children. On November 29, 2007, they travelled by bus to the Canadian border, where they claimed refugee status.

II. Impugned Decision

[8] It is important to note, first, that the Minister's representative did not assert that the applicant had personally committed a crime against peace, a war crime, or a crime against humanity, or that he was guilty of acts contrary to the purposes and principles of the United Nations, as those offences are described in Article 1F, paragraphs (*a*) and (*c*), of the Convention. Accordingly, the panel reviewed the case law relating to complicity, and stated that it was of the opinion that the five

following factors must be considered in order to determine whether an individual is complicit in a crime against humanity: (1) the methods of recruitment; (2) the nature of the organization; (3) the applicant's rank and length of time in the organization; (4) his knowledge of the organization's atrocities; and (5) his opportunity to leave the organization.

[9] The panel then examined each of those factors in detail. It noted, first, that the applicant was not forcibly recruited into the army, and on the contrary, got his position through his cousin, Admiral Liwanga, who was at that time one of the most powerful men in the country, as Chief of Staff in the FAC.

[10] Second, the panel noted that the documentary evidence referred to a violent civil war that had raged in the DRC between 2001 and 2005. That war was marked by extreme violence and human rights violations committed by both the rebel factions and military troops. The panel agreed that it would be incorrect to conclude that the entire Congolese army was directed to a limited and brutal purpose, but nonetheless, certain battalions had committed human rights violations. In the circumstances, the panel found that there were serious reasons for considering that Admiral Liwanga, as the Chief of Staff, had approved the acts committed by those battalions and the alliances that the government made with crooked militias and warlords who had also committed crimes of that nature.

[11] The panel believed that the applicant had facilitated communication between Admiral Liwanga and the various battalions and armed militias that were committing acts of

violence against the civilian population. He had therefore been a [TRANSLATION] "link in the chain" and actively participated in that savage civil war.

[12] In addition, the panel stressed the fact that the applicant was aware of the acts of violence committed by the FAC. In his Personal Information Form (PIF), the applicant wrote: [TRANSLATION] "Having worked for over a year with the highest authorities of our army, I know very well how our intelligence services proceed, both civil and military, to obtain confessions from someone who is accused of treason; they do not hesitate to use torture and other degrading methods" (Decision of the panel, Applicant's Record, p. 15).

[13] In spite of that knowledge, the applicant continued to work for the Chief of Staff. He did not leave that position with the army for moral or political reasons; he did so solely after succeeding in a competition to work in the Ministry of Foreign Affairs as a research officer for the Minister. He therefore left the Chief of Staff to go and work elsewhere for the same government, which turned a blind eye to the abuses committed by its army.

[14] The panel therefore concluded that there were serious reasons to consider that the applicant was complicit in crimes against humanity or war crimes committed by factions of the FAC and was excluded under Article 1F(*a*) of the Convention.

[15] On the other hand, the applicant's wife and children established a well-founded fear of persecution, given that the wife is the daughter of an important member of the opposition and that

her brother, who is also involved in the opposition, was allegedly a victim of the secret police. Obviously, this application for judicial review is not intended to reopen that portion of the decision.

III. Issues

[16] Two questions must be decided in disposing of the application made by the applicant:

- Did the panel err in law by misinterpreting the concept of complicity in the context of Article 1F(a) of the Convention?
- Did the panel make an erroneous finding of fact when it found that the applicant had been complicit in crimes committed by his government?

IV. Analysis

[17] The first question is plainly a legal one. In the case of that type of question, the panel may not err, because different interpretations of the concept of complicity, in applying the exclusion clause, would not be permissible. Accordingly, the standard that must be applied is correctness (see, *inter alia*, *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2010 FC 662 at paragraphs 54-59, [2011] 3 FCR 377 (*Ezokola #1*) aff'd 2011 FCA 224 at paragraph 39, [2011] 3 FCR 417 (*Ezokola #2*)).

[18] In addition, the second question involves considerations of mixed fact and law. Accordingly, it must be analyzed by applying the reasonableness standard. As the Supreme Court stated in *Dunsmuir v New Brunswick*, 2009 SCC 9 at paragraph 47, [2008] 1 SCR 190, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the

decision-making process, and also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

(A) *Did the panel err in law by misinterpreting the concept of complicity in the context of Article 1F(a) of the Convention?*

[19] Section 98 of the Act provides that a person referred to in Article 1F(a) of the Convention is not considered to be a refugee or a person in need of protection, and accordingly may not be granted the protections afforded by the Convention and the Act. Those provisions read as follows:

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.
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 rime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

[20] In this case, the Minister did not attempt to prove that the applicant had personally committed one of those crimes. However, it is settled law that complicity is just as reprehensible as

the commission of the act itself. As the Federal Court of Appeal wrote in *Canada (Minister of Citizenship and Immigration) v Bazargan* (1996), 205 NR 282 at paragraph 11, 67 ACWS (3d) 132 (*Bazargan*): "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." The culpability of an accomplice is accordingly no less than that of the individual who committed the crime. The question is therefore whether the panel correctly interpreted the concept of complicity, having regard to the abundant case law of this Court and the Federal Court of Appeal on the subject.

[21] This question was recently the subject of exhaustive examination in *Ezokola #2*, above. After reviewing its leading decisions on this subject (*Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (available on QL) (*Ramirez*); *Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298 (available on QL); *Sivakumar v Canada (Minister of Employment and Immigration)*, [1996] 2 FC 872 (available on QL); *Bazargan*, above; *Sumaida v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 66 (available on QL); *Harb v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, 238 FTR 194), the Court of Appeal reiterated the criterion of "personal and knowing participation" developed by Justice MacGuigan in *Ramirez*, above. Justice Noël. summarized that decision as follows:

> In *Ramirez*, MacGuigan J.A. states that an individual cannot have committed crimes under Article 1F(a) of the Convention—including crimes against humanity—"without personal and knowing participation" (pp. 316, 317). He adds that mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status. This is not the case, however, where an organization is principally directed to a limited, brutal purpose (p. 317). MacGuigan J.A. adds that members of an organization may, depending on the facts, be considered to be personal and knowing participants. In such cases,

> "complicity rests . . . on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it" (pp. 317, 318). He also states that it is undesirable to go beyond the criterion of "personal and knowing participation" in persecutorial acts in establishing a general principle; the rest should be decided in relation to the particular facts of each case (p. 320).
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> *Ezokola #2*, above, at paragraph 52.

[22] Having regard to the criterion of personal and knowing participation, the Court of Appeal concluded that the applications judge had applied too narrow a test in requiring personal participation by the individual in the crimes alleged, whether by carrying them out personally or facilitating their commission in the manner described. On the other hand, the Court of Appeal also held that the panel had erred in applying a "personal and knowing awareness" test and confusing "awareness" with "participation". As noted by the Court of Appeal, personal knowledge is certainly one of the elements required for personal and knowing participation, but it is not sufficient in itself.

[23] A careful reading of the panel's reasons does not disclose any error in terms of the test adopted for assessing the applicant's complicity. At the hearing, counsel for the applicant did not in fact question the analytical process used by the panel, although she cited the decision of the Federal Court in *Ezokola #1*, above, in arguing that the applicant could not be considered to be complicit in the crimes committed by his government simply because he had knowledge of those crimes and worked in that government.

[24] In fact, the panel applied the standard of proof correctly in finding that the Minister had established that there were "serious reasons for considering" that the claimant had engaged in the acts alleged against him. Obviously, that standard is considerably lower than the standard that

applies in criminal law ("beyond a reasonable doubt") or even in civil law ("on a balance of probabilities"). The reason for this is simply that the panel is required to determine not whether the person concerned is criminally responsible, but only whether they may claim refugee protection in Canada (*Ramirez*, above, at pages 311-312; *Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433 at page 445 (available on QL) (FCA); *Bazargan*, above, at paragraph 12; *Kaburundi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 361 at paragraph 18, 155 ACWS (3d) 915).

[25] Although it is not disputed that the FAC committed crimes against humanity between 2001 and 2004, the panel acknowledged that the FAC could not be considered to be an organization directed to a limited and brutal purpose. Accordingly, the applicant could not be presumed to have participated in crimes against humanity simply because of his membership in his country's armed forces. Accordingly, the Minister had the onus of proving, according to the applicable standard of proof, that he participated in his government's crimes.

[26] It is settled law that personal and knowing participation does not require physical presence on the scene of the crime and may be proved by showing the existence of a common intention. That is precisely what the panel sought by examining the following factors: (1) the methods of recruitment; (2) the nature of the organization; (3) the applicant's rank and length of time in the organization; (4) his knowledge of the organization's atrocities; and (5) his opportunity to leave the organization. Those factors are all consistent with the decisions of this Court (see, *inter alia*, *Petrov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 465 at paragraphs 53, 57 ACWS (3d) 599; *Fabela v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1028 at paragraph 24,

277 FTR 20; *Kathiripillai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1172 at paragraph 19, 398 FTR 178; *Rutayisire v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1168 at paragraph 11, 379 FTR 44).

[27] In short, I am of the opinion that the panel stated the legal principles that are applicable to complicity correctly. It now remains to determine whether it applied them correctly.

(B) *Did the panel make an erroneous finding of fact when it found that the applicant had been complicit in crimes committed by his government?*

[28] In this case, the applicant did not challenge the panel's decision that he was never forced to hold the position of person in charge of computer services in the FAC, or that he had knowledge of the atrocities committed by certain members of the FAC before accepting the position in question, or that he left that job voluntarily, or following the dismissal of Admiral Liwanga, according to his testimony at the hearing, and not at the first available opportunity.

[29] In fact, the issue between the parties relates to the panel's finding that the applicant had held an important position in the FAC that enabled the commission of crimes against humanity. Where the applicant minimizes the effects of his functions, the respondent is of the opinion that through the position he held, the applicant facilitated or encouraged the commission of the crimes alleged against the FAC.

[30] The applicant contended that he had performed relatively unimportant functions in his government, which were limited to computer logistics and non-military administration, that he had never worked in places where military operations were taking place, that he was not in charge of anyone, and that he had no decision-making power and could not have influenced the decisions made by his government. In the same vein, the applicant argued that his subsequent positions in the Ministry of Foreign Affairs and at the Embassy of the RDC in Algeria were not such as would have enabled him to commit, encourage or conceal the crimes alleged against his government, or to participate in them.

[31] However, that is not the test applied for determining whether an applicant was complicit in war crimes or crimes against humanity, as we saw earlier. The question is not so much whether the applicant was directly involved in crimes of that nature, but whether he knowingly facilitated, encouraged or collaborated in the commission of crimes of that nature.

[32] The applicant admitted that he had worked for one of the most powerful men in the RDC for three years, and in question 31 of his PIF, he admitted that he was aware of the acts of violence committed by the FAC and the militias funded by the FAC against the population of his country. At the hearing before the panel, he did attempt to minimize the impact of that admission by saying that he been informed of the FAC's excesses only because his brother-in-law had been tortured, but that explanation is not very credible, given the extent of the violence committed or encouraged by the army during the period and the fact that it was common knowledge.

[33] By creating and maintaining a computer network to connect the office of the Chief of Staff with the other units of the army throughout the country, the applicant was not a mere spectator; he was contributing to the conduct of the military operations. Even if the panel did not have direct evidence of it, it was not unreasonable to conclude that the applicant had put his shoulder to the wheel and knowingly participated in the crimes against humanity and war crimes committed by the FAC in the course of its military operations.

[34] The applicant could have left his job at any time and put an end to his involvement in the acts of violence committed by the FAC. He did not do that, and left his position only after Admiral Liwanga was dismissed.

[35] In an application for judicial review, the role of this Court is not to decide whether the applicant participated personally and knowingly in the crimes committed by the FAC, it is to determine whether it was reasonable for the panel to draw that conclusion. In light of the evidence in the record, and for the reasons stated in these reasons for decision, I am of the opinion that the panel could have reached that conclusion, and this Court should therefore not intervene. The application for judicial review is accordingly dismissed.

[36] Counsel for the applicant proposed that the following question be certified:

> [TRANSLATION] What degree of personal and knowing participation (*mens rea*) is required for a person to be complicit in a crime against humanity?

[37] Counsel for the respondent objected to certification of the question, on the ground that it did not meet the test laid down in the case law for applying paragraph 74(*d*) of the Act. I agree.

[38] The legal principles surrounding the concept of complicity have been examined on numerous occasions by this Court and the Federal Court of Appeal. A number of those decisions have been referred to in these reasons. The Court of Appeal considered this question again in *Ezokola #2*, above, which was decided less than a year ago. Although the Supreme Court has granted leave to appeal from that decision, it would not be in the interests of justice to reserve decision in this case until *Ezokola #2* has been decided by the highest court in the land, given the time that this could take.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board dated April 8, 2011, is dismissed.

"Yves de Montigny"
Judge

Certified true translation
Monica F. Chamberlain

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2851-11
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