Federal Court

Cour fédérale

Date: 20120829

Docket: IMM-8775-11

Citation: 2012 FC 1026

Ottawa, Ontario, August 29, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

CLAUDE ARMEL MFOUTOU NSIKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of the Republic of Congo [Congo] who voluntarily joined the Congolese army in 1991 and served until 1998, when he deserted following a coup d'état in the Congo. The applicant fled the Congo in 2000 and sought refugee protection in the United Kingdom, which was eventually denied. The applicant returned to the Congo in 2007 and was arrested upon his return. In November 2007, the applicant once again fled, this time to Canada, and, upon his arrival in December 2007, made a claim for protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act].

[2] In a decision dated November 9, 2011, the Refugee Protection Division of the Immigration and Refugee Board of Canada [the RPD or the Board] denied the applicant's refugee claim under section 98 of the IRPA, determining that there were serious reasons to believe that the applicant had been complicit in war crimes and crimes against humanity by reason of the role he played in the Congolese army. Section 98 of the IRPA provides that:

A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention Refugee or person in need of protection.	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.

Article 1F of the *Convention Relating to the Status of Refugees, 1951*, Can TS 1969 No 6 [Refugee Convention or Convention] states in relevant part that the Convention

[…] shall not apply to any person with respect to whom there are serious reasons for considering that:	[…] ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(a) He has committed a crime against peace, war crimes, or 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;
[…]	[…]

[3] In the present application for judicial review, the applicant seeks to have the RPD's November 9, 2011 decision set aside.

[4] In the decision, the RPD determined that the Congolese army committed crimes against humanity and war crimes over the period from 1993 to 1997, which included the killing and displacement of civilians, the arbitrary detention and torture of civilians, ethnically-targeted killings and rape. This finding is not challenged by the applicant in this application for judicial review.

[5] After determining that the Congolese army had committed these crimes against humanity and war crimes during the time that the applicant was a member of that army, the Board went on to consider whether the applicant was complicit in the crimes the army committed and found that he was. In conducting its complicity analysis, the RPD cited from several decisions of the Federal Court of Appeal, noting that "personal and knowing participation" by a claimant is required for complicity and that mere membership in an organization that commits international crimes is insufficient to ground a complicity finding. The Board then went on to apply the six so-called *Bahamin* factors (from the decision in *Bahamin v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 961, 171 NR 79), which have been endorsed by this Court several times as is more fully discussed in paragraphs 23-24 below. These factors involved consideration of the method of the applicant's recruitment, his position in the Congolese army, the nature of the Congolese army, his knowledge of the crimes or acts committed by the Congolese army, the length of his association with the Congolese army and the opportunity for him to have left the army before the date he deserted.

[6] In terms of recruitment, the applicant voluntarily joined the army, preferring an army career to working on his grandparents' farm, which were the choices he faced after being expelled from school.

[7] With respect to the applicant's position in the Congolese army, the Board found that his position as sergeant was "not a trivial one".

[8] In terms of the nature of the Congolese army, the Board noted that it had committed crimes against humanity and war crimes while the applicant was a member of it and also noted that the applicant's duties had included guarding and escorting shipments of funds between the airport and the central bank and protecting the headquarters of the Congolese television station in Brazzaville, a city where a number of atrocities were committed.

[9] As concerns the claimant's knowledge of the crimes or acts committed by the army, the Board noted that the applicant lived and worked in close proximity to the areas in Brazzaville where the army had committed atrocities. The applicant testified that he heard rocket fire and learned from the news media that a number of civilians had been killed in Brazzaville. However, he claimed that he did not realize that the Congolese army was involved in the rocket attacks. The RPD did not believe the claimant's denial in light of the fact that the army had cancelled his leave and recalled him to Brazzaville at the time the attacks were occurring and in light of the applicant's knowledge of the attacks, and, indeed, his having heard the rocket fire.

[10] With respect to the length of the applicant's association with the Congolese army and his opportunity to leave, the Board found that he served from 1991 until 1998, moved up the ranks to the position of sergeant and did not desert until the governing political party was displaced by a coup d'état. The record also indicates that the applicant was a member of this political party, the *Union Panafricaine pour la Démocratie Sociale*. With respect to the applicant's ability to leave the

army, the applicant testified that after he deserted he was arrested but was released shortly thereafter on the condition that he report to an army office daily. From this, the Board concluded that the applicant could have deserted or resigned from the military sooner than he did.

[11] In light of these facts, the RPD concluded that there were serious reasons to consider that the applicant had been complicit in the war crimes and crimes against humanity committed by the Congolese army and, accordingly, was disentitled to protection under the IRPA.

[12] In the present application for judicial review, the applicant argues that the correctness standard of review is applicable (the issue being one of law involving the interpretation of section 98 of the IRPA and Article IF of the Refugee Convention) and that the Board applied the incorrect test to determine applicant's complicity. More specifically, the applicant asserts that instead of focusing on the *Bahamin* factors, the RPD ought to have considered whether the applicant participated in any of the Congolese army's crimes in a manner analogous to that of a criminal accomplice. The applicant argues in this regard that in the recent decision of *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 224, [2011] 3 FCR 417, leave to appeal granted April 26, 2012 (2012 CarswellNat 1173) (SCC), judgment pending [*Ezokola*] the Federal Court of Appeal determined that, where, like here, a refugee claimant was a member of an army that committed war crimes or crimes against humanity, a finding of complicity requires a claimant to have been an accomplice to the crimes committed by the army. In other words, knowledge of the crimes, along with voluntary participation in the army and carrying out of tasks that further the army's objects, is not sufficient to ground a finding of complicity according to the applicant. Thus, according to the applicant, it was incorrect for the Board to have applied the *Bahamin* factors to

determine complicity. Rather, the applicant argues that in the absence of any evidence that he had assisted in committing the crimes committed by the Congolese army, the RPD erred in making a complicity finding. The applicant asserts that this case is on all fours with that of *Ardila v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1518, 143 ACWS (3d) 1072 [*Ardila*] where Justice Kelen overturned a similar finding made by the RPD.

[13] The respondent, for its part, concurs that the correctness standard is applicable to review of the test applied by the Board, but asserts that the RPD applied the correct test. In this regard, counsel for the respondent argues that, upon a careful reading of *Ezokola*, it is clear the Federal Court of Appeal has not mandated a new test for complicity and the *Bahamin* factors remain applicable to determine whether an individual has engaged in "knowing and willing" participation in war crimes or crimes against humanity. Thus, according to the respondent, active participation – akin to that of a criminal accomplice – is not required for a complicity finding. Rather, it is sufficient if the claimant knew of the crimes being committed by the organisation, stayed in the organisation voluntarily and engaged in acts that furthered the organisation's aims in a meaningful way and thereby fuelled its ability to commit war crimes. The respondent further argues that the Board's application of this test to the facts of the applicant's situation is reviewable on a reasonableness standard and that the RPD's decision was reasonable and accordingly should be maintained.

Standard of Review

[14] The parties are correct that, as the law currently stands, the correctness standard of review is applicable to the Board's interpretation of the scope of complicity for purposes of section 98 of the IRPA and Article 1F of the Refugee Convention. While there are several recent decisions of the

Supreme Court of Canada, decided in other contexts, which might suggest that the reasonableness standard is applicable since the Board is interpreting a provision in its constituent statute (see e.g. *Nolan v Kerry (Canada) Inc*, 2009 SCC 39 at para 34, [2009] 2 SCR 678; *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1, at para 34, [2011] 1 SCR 3; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26, [2011] 1 SCR 160; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 18, 23 and 24, [2011] 3 SCR 471 [*Canadian Human Rights Commission*]; *Alberta Information and Privacy Commissioner v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] 3 SCR 654; and *Doré v Barreau du Québec*, 2012 SCC 12 at paras 46-47, 343 DLR (4th) 193), the binding authority on this point is *Ezokola*. In that case, the Federal Court of Appeal held that the Board's determination of the "scope of the concept of complicity" is a question of law warranting review on the correctness standard (at para 39). The Federal Court of Appeal went on to note that review of the application of the test to the facts of a particular case is to be conducted on the reasonableness standard, holding that "[o]nce the test has been properly identified, the issue of whether the facts in [a] case trigger the application of Article 1F(a) is a question of mixed fact and law with respect to which the panel is entitled to deference" (at para 39).

[15] Thus, the correctness standard is applicable to the Board's enunciation of the test to be applied to determine complicity and the reasonableness standard of review is applicable to its application of that test to the facts of the applicant's case.

The RPD applied the correct test

[16] Contrary to what the applicant asserts, the decision of the Federal Court of Appeal in *Ezokola* does not mandate a new test for the determination of complicity nor does it indicate that the *Bahamin* factors are inapplicable in assessing complicity. Rather, in my view, the Federal Court of Appeal in *Ezokola* upheld and applied the previous case law setting the parameters of the notion of complicity for purposes of section 98 of the IRPA and Article 1F of the Refugee Convention.

[17] In *Ezokola*, the applications judge overturned a decision of the RPD which found that the individual who led the Permanent Mission of the Democratic Republic of the Congo to the United Nations was complicit in war crimes and crimes against humanity and, accordingly, was excluded from protection under the IRPA. In overturning the Board's decision, the applications judge found that complicity required a nexus between the individual and the crimes committed, which was absent in that case. The Court of Appeal overturned the applications judge’s decision, and reformulated the certified question as follows:

> For the purposes of exclusion pursuant to paragraph 1Fa) of United Nations Refugee Convention, can complicity by association in crimes against humanity be established by the fact that the refugee claimant was a senior public servant in a government that committed such crimes, along with the fact that the refugee claimant was aware of these crimes remained in his position without denouncing them?

[18] The Federal Court of Appeal answered the certified question in the affirmative, noting that the decided case law requires “personal and knowing participation” in the war crimes in order to found complicity, but that such participation is not equivalent to personal involvement in the crimes. Thus, a specific nexus between the individual and the crimes is not required and, therefore,

occupying a senior position in an organization, with knowledge of its having committed war crimes or crimes against humanity, may be sufficient to constitute complicity. The Court of Appeal, however, went on to note that merely being aware of international crimes committed by the organisation is not in and of itself sufficient to found complicity.

[19] As I read the decision of the Federal Court of Appeal in *Ezokola*, it is consistent with the previous case law of the Federal Court of Appeal and this Court regarding the test for complicity. That test has been developed in a number of cases, the most salient of which are *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 109, [1992] 2 FC 306 (CA) [*Ramirez*]; *Sivakumar v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1145, [1994] 1 FC 433 (CA); *Penate v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1292, [1994] 2 FC 79 (TD); *Bahamin* (cited above at para 5); *Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298, 107 DLR (4th) 424 (CA); *Mohammad v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1457, 115 FTR 161 (TD); *Bazargan v Canada (Minister of Citizenship and Immigration)* (1996), 119 FTR 240, 205 NR 282 (CA) [*Bazargan*]; *Canada (Minister of Citizenship and Immigration) v Hajialikhani*, [1998] FCJ No 1464, [1999] 1 FC 181 (TD); *Sumaida v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 66, 183 DLR (4th) 713 (CA); *Sungu v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1207, [2003] FC 192 (TD); *Harb v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, 238 FTR 194 [*Harb*]; *Ali v Canada (Solicitor General)*, 2005 FC 1306, [2005] FCJ No 1590 [*Ali*]; *Ardila* (cited above at para 12); *Zazai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 303, [2005] FCJ No 1567; *Ryivuze v Canada (Minister of Citizenship and Immigration)*, 2007 FC 134; *Sidna v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1046 [*Sidna*];

Bouasla v Canada (Minister of Citizenship and Immigration), 2008 FC 930; *Rizwan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 781; *Rutayisire v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1168, [2010] FCJ No 1541; *Ishaku v Canada (Minister of Citizenship and Immigration)*, 2011 FC 44; and *Ezokola*.

[20] The earliest of these cases – *Ramirez* – sets out the general parameters for the test to be applied to determine complicity for purposes of Article 1F of the Refugee Convention. In *Ramirez*, the Federal Court of Appeal noted that the requirement for there to be "serious reasons for considering" that an individual has committed a war crime or crime against humanity imports a lesser standard of proof than the balance of probabilities (at paras 5-7). The Court then made the following points regarding the level of participation required on the part of an individual to warrant exclusion under Article 1F. First, the Court noted that an individual cannot be complicit in an international crime without "personal and knowing" participation in the crime (at para 15; see also para 23). The Court then held that mere membership in an organization (unless it is a "limited brutal purpose" organization) or mere presence at the scene of a crime is insufficient to found complicity. Rather, what is required is the "existence of a shared common purpose and the knowledge that all of the parties in question may have of it" (para 18). The Court went on to hold that what is required for such purpose is very much related to the facts of the particular case and, accordingly, will vary from case to case. In the circumstances in *Ramirez*, the Court found that the appellant was clearly complicit under Article 1F of the Refugee Convention: while serving with the Salvadoran forces, he was present at many incidents of persecution, having guarded prisoners while they were being tortured, even though he was a low-ranking individual and did not order the torture of the prisoners.

[21] In the subsequent cases, this Court and the Federal Court of Appeal have applied the general criteria set out in *Ramirez* to a variety of different fact patterns. The following general propositions may be drawn from the decided cases regarding principles applicable to determining when an individual has engaged in acts sufficient to ground a complicity finding in circumstances where the organisation that committed the crimes is not a "limited brutal purpose" organization:

1. Active and willing participation by the claimant in the war crimes or crimes against humanity that the organization commits will generally be sufficient to ground complicity;
2. Such active participation, however, is not essential in order for there to be complicity. Complicity in the international crimes may be found to exist without active participation if the individual has knowledge of international crimes committed by the organization and takes no steps to prevent them (if he or she has the power to do so) or has knowledge of such crimes and willingly participates in other activities of the organization that fuel its ability to engage in the crimes;
3. Knowledge of the crimes may often be legitimately inferred where the claimant occupies a senior position in the organization;
4. Willing participation in the affairs of the organization may often be legitimately inferred if individual either voluntarily joins the organization or does not disassociate him or herself from it at the earliest opportunity; and
5. Formal membership in the organization is not required if the individual contributes to the activities of the organization in a sufficient fashion so as to constitute complicity.

[22] While the Federal Court of Appeal has not specifically endorsed the *Bahamin* factors in any case on complicity decided subsequent to *Bahamin*, its subsequent decisions – including *Ezokola* – are not inconsistent with those factors being key considerations for a finding of complicity. In *Ezokola*, as noted, the Court of Appeal answered the (modified) certified question in the affirmative; this is consistent with the factors listed in *Bahamin* as in answering the question affirmatively, the Court confirmed that participation - in the sense of aiding and abetting the commission of the war crimes - is not necessary for a finding of complicity. In *Bazargan* (cited above at para 19), in finding that an individual who does not belong to the organization may nonetheless be complicit in the international crimes it commits, the Federal Court of Appeal held that "…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" (at para 11) (see also *Harb* (cited above at para 19)). The endorsement of indirect participation is consistent with the factors from *Bahamin*, which are meant to gauge the degree of such participation.

[23] This Court has often upheld complicity findings made based on the application of the *Bahamin* factors, where the individual was a relatively senior individual in the organisation, acted to further its goals, had knowledge of the war crimes or crimes against humanity being committed and did not disassociate himself from the organization at the first available opportunity (see e.g. *Sivakumar*, *Penate*, *Bazargan*, *Ishaku* (all cited above at para 19)). For example, in *Sidna* (cited above at para 19) this Court upheld a complicity finding made by the Board in circumstances where the applicant rose through the ranks of the Mauritian army (to the position of captain), was aware of the abuses committed by other units in the army and did not resign.

[24] In other cases, this Court has upheld decisions of the RPD that found the provision of funds to an organization engaged in crimes against humanity, by an individual with knowledge of the crimes, to be sufficient to ground complicity. For example, in *Ali* and *Hajialikhani* (both cited above at para 19), this Court upheld findings by the RPD that contributing funds to an organization that committed international crimes amounted to complicity (*Ali* at para 49 and *Hajialikhani* at para 41). To similar effect, in *Ryivuze* (cited above at para 19) this Court upheld an RPD decision where the Board determined that the applicant – a high ranking civil servant whose work contributed to Burundi's obtaining credits and loans from the World Bank – was complicit in the international crimes committed by the regime.

[25] In my view, the test applied by the Board in this case was the correct one. In this regard, it is not an error for the Board to apply the *Bahamin* factors to gauge whether a claimant is a personal and knowing participant in the international crimes committed by the organization to which he or she belongs. These factors are meant to assess the degree of the applicant's participation, have been often recognised by this Court as being appropriate for the Board to apply and are consistent with the case law of the Federal Court of Appeal. Thus, the Board did not commit a reviewable error as the applicant alleges.

[26] While this determination is sufficient to dispose of this application for judicial review as the applicant has not contested the manner in which the RPD applied the test to the facts before it, I would note that the Board's decision in this regard was also reasonable. There was ample evidence before the Board from which it could reasonably conclude that the applicant was complicit in the war crimes and crimes against committed by the Congolese army. The applicant voluntarily joined

and stayed in the army, was promoted, had knowledge of the international crimes committed in the city he was serving in and carried out the tasks of guarding funds and protecting the television station over which the Congolese government broadcast its propaganda. As counsel for the respondent rightly notes, the decisions in *Ali*, *Hajialikhani* and *Ryivuze* support the notion that providing or facilitating the provision of funds to an organization with knowledge of its commission of international crimes, may found complicity and “[t]here is no principled distinction between funding an organization and ensuring an organization’s funds are secure: both situations involving ensuring the organization can continue to engage in violations of international criminal law by buying weapons and paying soldiers” (Respondent’s Further Memorandum of Argument at para 41). Likewise, ensuring a regime’s ability to broadcast its propaganda may well further its ability to commit international crimes and thus provide a basis for a finding of responsibility for crimes against humanity, as, indeed, the International Criminal Tribunal for Rwanda determined in *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appeal Judgment)*, ICTR-99-52-A, International Criminal Tribunal for Rwanda (ICTR), 28 November 2007, available at: http://www.unhcr.org/refworld/docid/48b5271d2.html [accessed 20 August 2012].

[27] The applicant’s situation is entirely distinguishable from that of the claimant in *Ardila* (cited above at para 12) that the applicant relied on. There, Mr. Ardila carried out no tasks that furthered the Colombian army’s ability to engage in international crimes. Rather, he spent almost all of his time in the army either in training or as a member of the Equestrian School and was well-removed from any atrocities committed by the army. On the other hand, the tasks performed by the applicant in this case were important in fostering the ability of the Congolese army to continue to operate and commit the crimes the Board found the applicant to be complicit in.

[28] Thus, the RPD's decision was reasonable and it applied the correct test in making it. Accordingly, this application for judicial review will be dismissed.

[29] The applicant requested that I reserve on the issue of certified question and remit the issue of whether a question should be certified under section 74 of the IRPA to the parties for submissions following the release of my decision. Counsel for the respondent, on the other hand, submitted that in the event I dismissed the application, I should not certify a question as I would be doing no more than applying the settled law. I believe that the respondent is correct in this regard: I have dismissed this application because I have determined that the Board properly articulated the settled law and applied it reasonably to the facts of the applicant's case. There is, therefore, no serious question of general importance that arises in this matter.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No question of general importance is certified; and

3. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Paul VanderVennen	FOR THE APPLICANT
Martin Anderson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

VanderVennen Lehrer, Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT