

Federal Court



Cour fédérale

Date: 20130715

Docket: IMM-8311-12

Citation: 2013 FC 790

Ottawa, Ontario, July 15, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

SUMAN RAJ SAPKOTA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant seeks judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board dated June 28, 2012, wherein it was determined that he is excluded from refugee protection on the basis that he was complicit in crimes against humanity in Nepal as he was a member of the Nepali Police Force [NPF] pursuant to Article 1F(a) of the United Nations Convention Relating to the Status of Refugees [Refugee Convention]. The RPD held five (5) days of hearing and the certified tribunal record [CTR] consists of twelve (12) volumes.

I. Facts

[2] The Applicant was a police officer with the Nepali Police Service from 1991 until his departure from Nepal in 2009. After his training, he was given the rank of Assistant Sub-Inspector and was later promoted to the rank of Sub-Inspector and finally to the rank of Inspector.

[3] In early 1996, with the beginning of the Maoist revolution, he was posted to the Chaurjari, Rukum District, which was a troubled area where the Maoists were beginning to wage their revolution. He spent six (6) months in the area and was considered as the “officer in charge.” He had approximately thirty (30) policemen under his supervision and his group was responsible for six (6) Village Development Committees. On two (2) occasions, the Maoists launched attacks against his group. The Maoists captured and killed three (3) police officers and claimed responsibility for the deaths.

[4] After his first posting in the Rukum district, the Applicant was posted in many other areas with strong Maoist occupation, where he spent a total of ten (10) years.

[5] In 2006, he began receiving threatening calls from the Maoists, who also threatened to abduct his seven-year-old son. The Applicant placed his son in a boarding school in the Kathmandu area in April 2007. In May 2007, while on a motorbike, four (4) people approached him and told him to stop. He was attacked with knives. The attackers fled while bystanders tried to help the Applicant. He was rushed to a local hospital where he spent nearly two (2) weeks.

[6] Upon release from the hospital, he rested at home and returned to his job as a police officer but spent most of his time at the station doing administrative work. He began to make inquiries about leaving the country. After receiving a U.S. visa, he began to try to make arrangements for his wife and son. On February 18, 2009, the Applicant left Kathmandu for the United States. He spent fourteen (14) days at his sister's home in the United States and then made his way to a refugee shelter in Buffalo. He made arrangements for an appointment at the Canadian border on March 24, 2009, at which time he was permitted to enter Canada. He fears returning to Nepal as the Maoists or other affiliated Communist members may torture, abduct or kill him if they find him.

II. Decision under review

[7] The RPD began by setting out the Applicant's claim to refugee protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[8] The RPD then turned to the issue of exclusion under Article 1F(a) of the Refugee Convention and acknowledged the Minister's submission that the crimes against humanity in this matter are murder, forced disappearances, torture and other inhuman acts causing great suffering or bodily injury.

[9] The Member cited *Ramirez v Canada (Minister of Employment and Immigration)*, (1992) 89 DLR (4th) 173, 135 NR 390 (FCA) [*Ramirez*] for the proposition that a claimant may be found to be an accomplice and excludable if the requirements of complicity are met.

[10] With respect to the nature of the organization, the Member found that the NPF assumed responsibility of the internal security and that the documentary evidence establishes that the NPF committed serious human rights abuses such as forced disappearances, torture, extrajudicial executions, random killings, abuse in detention, rape, etc. The Member acknowledged that the NPF did not have a limited, brutal purpose but was involved in crimes against humanity.

[11] In consideration of the NPF's method of recruitment, the Member found that the Applicant joined the organization to get a job upon completing college.

[12] The Member then assessed the Applicant's position/rank in the organization, which primarily consists of the following stages:

- The Applicant initially gathered intelligence regarding political meetings.
- He was promoted and became a member of the armed police. His positions were in areas where Maoist rebels were active over the course of ten (10) years during which time he supervised and was responsible for between twenty (20) and forty (40) officers, depending on the location.
- At the conclusion of the ten (10) years, in 2005, he was posted to the Central Jail in Kathmandu, which holds 1500-1600 detainees. His duties consisted of ensuring that no one escaped and to transport detainees.

- He secured a promotion to the position of Inspector in 2007 and transferred to the armed police main base in Naxal where he was subordinate to the Superintendent of Police and the Deputy Superintendent of Police. There were three (3) Inspectors, including the Applicant, and four (4) divisions of 125 police officers each who reported to the Inspectors. His responsibilities were supervisory in nature and included preparing paperwork for transfers, weekly program schedules and conducting student exams.

[13] With respect to the Applicant's knowledge of the organization's atrocities, the Member noted that the Applicant denied knowledge of any act committed by the NPF. In particular, the Minister referred to documentary evidence that after March 10, 2008, Tibetans living in Kathmandu protested against the Chinese government's crackdown in Tibet. Nepali authorities opposed the demonstrations and engaged in excessive use of force, arbitrary arrest, sexual assault of women during arrest, arbitrary and preventative detention, beatings, unlawful threats of deportation and unnecessary restrictions on freedom of movement. The Applicant remembered the demonstrations but testified that he did not go. His colleagues attended and he would have gone if needed. In the course of the demonstrations, he ordered police officers not to touch protestors and that female police officers would deal with female protestors. If an officer's inappropriate behaviour persisted, the Applicant said there were measures in place, including stopping the officer's promotion grade.

[14] The Member provided a detailed review of the documentary evidence concerning the safety of Tibetans in Kathmandu. The RPD noted that such evidence establishes that the police acted as if they were above the law and that torture and mistreatment in custody was widespread. The

documentation also showed that torture in police detention centres is rampant. The Applicant responded that he heard rumours of torture during police incident investigations but did not address the rumours because he was too busy with his work. The Applicant explained that the issue also went unaddressed by the other Inspectors because they were different from the detainee section. The Applicant also stated that his position was that of a trainer and that after the trainees left, they were not under his direction. The documentation also reveals that prison conditions did not meet international standards.

[15] The Member then examined the two (2) times the Applicant came into contact with Maoist insurgents during his ten (10) years of postings, writing that the first time two (2) police officers were killed and the second time one (1) police officer was killed. The Applicant stated that he was unaware of abuses by the security forces during those ten (10) years. The documentary evidence describes abuse in police custody in 1996 and 1997, with no further investigations taking place. A particular incident in 1998 where the police killed and burned nine (9) villagers was documented and the Applicant testified that he arrived to another village of the same district in 1999.

[16] Given the Applicant's position, the location of the armed police base and his association with leadership at the base, the Member concluded that the Applicant must have been aware of the crimes.

[17] As to the length of time in the organization, the Member found the Applicant remained in his position up to until he chose to leave Nepal, totalling approximately eighteen (18) years.

[18] Finally, as to the opportunity to leave the organization, the Member wrote that the Applicant left Nepal, not to protest police actions, but rather because of alleged threats against him and his family.

[19] The Member went on to make a general comment that the Applicant answered questions evasively, which was commented on by his own counsel.

[20] The Member concluded that there are serious reasons for considering that the Applicant was complicit in crimes against humanity committed by the NPF by virtue of his membership and is thus excluded under Article 1F(a) of the Refugee Convention.

III. Applicant's submissions

[21] The Applicant submits that the RPD erred in finding that the Applicant is excluded from protection under Article 1F(a) of the Refugee Convention for being complicit in crimes against humanity.

[22] First, the Applicant argues that the Minister bears the onus of proving the Applicant's involvement in the crime against humanity. The Applicant submits that no proof was provided to the Member except the country condition documents which generalized the actions of the NPF.

[23] The Applicant submits that he joined the NPF not due to political belief but rather for his livelihood. He also relates that since the end of Monarchy rule in Nepal and the ensuing peace process in 2006, the security forces and police have not been accused of crimes against humanity.

The Applicant submits that he does not meet the test established in *Ramirez*, above of “personal and knowing participation” and that membership in an organization that commits international offences from time to time is not normally sufficient for exclusion from refugee status. The Applicant submits that he should not be excluded on the basis of one single incident of police excess.

[24] Second, the Applicant submits that the RPD erred in law by misinterpreting the concept of complicity in the context of Article 1F(a) of the Refugee Convention.

[25] He argues that his rank of Inspector within the NPF is an important factor and that at this position he did not make policy decisions. He submits that he was a junior officer and that in 2010 there were approximately 11234 Inspectors in the NPF. As such, the Applicant argues that he did not have the requisite *mens rea* component of the “personal and knowing participation” factor.

[26] Third, the Applicant submits that the RPD made an erroneous finding of fact when it considered that he had been complicit in crimes committed by his government. He argues that the RPD failed to observe that he was just a paid employee of the NPF who did not perform any acts of crimes against humanity and was not aware of acts being committed. To be excluded from refugee protection, there must either be evidence of membership in an organization that is singularly devoted to crimes against humanity or evidence of knowing and personal participation in those crimes. Neither is present here.

IV. Respondent's submissions

[27] The Respondent first submits that the Member applied the correct standard of proof of “serious grounds for considering,” which requires something more than mere suspicion but less than the civil standard of proof on a balance of probabilities. The Respondent submits that the standard of proof was reasonably applied to determine the Applicant’s complicity, based on the documentary evidence of the NPF abuses and the Applicant’s level of involvement in the organization. Given that the standard of proof was “serious reasons for considering,” neither the Minister nor the RPD were required to prove “conclusively that the Applicant was complicit in crimes against humanity committed by the Nepali Police Force.”

[28] The Respondent argues that the Member reasonably found that human rights abuses committed by the NPF were widespread. The Respondent submits that the definition of crimes against humanity, as per subsection 4(3) of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 includes murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, and persecution. The Respondent notes that the *Rome Statute of the International Criminal Court*, 17 July 1999, 2187 UNTS 90, entered into force 1 July 2002 also lists enforced disappearance of persons as a crime against humanity and that this statute is endorsed in Canada as a source of customary law.

[29] The Respondent submits that the Supreme Court of Canada established in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 119, 197 CCC (3d) 233 [Mugesera] that a criminal act rises to the level of a crime against humanity when four (4) elements are made out.

[30] The first element, which is that enumerated proscribed acts were committed, is evidenced in the supporting documents that the NPF committed acts of extrajudicial executions, random killings, abuse in detention and rape.

[31] The second element, which is that the act was committed as part of a widespread and systematic attack, is also supported in the documentary evidence which describes the attacks as “widespread” and that in some years the NPF committed “the largest number of disappearances in the world.”

[32] Third, the act must be directed against any civilian population or any identifiable group of persons. The documentary evidence provides that Maoist insurgents, protestors, villagers and adolescents were targeted by the NPF, establishing that the crimes were committed against a civilian population.

[33] Fourth, the Respondent submits that the Member reviewed the totality of the evidence and found, supporting the fourth element, that the Applicant knew his acts comprised part of the attack. In conclusion, as there was evidence to satisfy each of the criteria, the Member had reasonable grounds to determine that the NPF committed crimes against humanity during the time the Applicant was involved with the organization.

[34] The Respondent further submits that the RPD reasonably applied the test for complicity. The starting point for complicity in international crime is “personal and knowing participation” or a “shared common purpose” and active membership is not required.

[35] In review of the factors set out in *Ramirez*, above, the Respondent submits that, with regards to the nature of the organization, the NPF was not a “brutal purpose” organization, but was involved in crimes against humanity and that this conclusion was reasonably open to the Member on the evidence. As for the organization’s method of recruitment, the Respondent notes that the Applicant joined the NPF of his own free will and that he was not compelled to join the organization for any reason, economic or otherwise. The Respondent submits that the finding that the Applicant’s position/rank in the organization was higher than his allegation that he was a junior officer was supported by the training he received to be in a leadership role and by the fact that he was twice promoted. He was transferred to various areas where Maoists rebels were active and responsible for twenty (20) to forty (40) officers at any given time. Moreover, there was a case law before the RPD that shows that ordinary members of police/security forces were found complicit in crimes against humanity.

[36] The Respondent argues that the Applicant had knowledge of atrocities as the RPD in its decision outlined the evidence that NPF abuses were widespread and that specific incidents occurred in regions where the Applicant was posted. As the trier of fact, it was open to the RPD to find that the Applicant must have been aware that crimes were being committed. The Respondent cites the Member’s finding concerning the length of time spent at the organization and the fact that he did not take the opportunity to leave the organization until he received threats against himself and his family.

[37] The Respondent cites *Mugesera*, above to support the proposition that when a person has knowledge that his organization is committing crimes against humanity and does not take steps to

prevent them from occurring (provided he has the power to do so), nor disengages himself at the earliest opportunity, but lends active support for the group, he will have a shared common purpose and be held to be complicit. The Respondent submits that having assessed the factors set out in *Ramirez*, above, the Member reasonably concluded that the Applicant was complicit in the NPF crimes against humanity.

V. Applicant's reply

[38] The Applicant argues that the Respondent has not been able to show that the NPF have committed crimes against humanity. Indeed, it refers to both, the NPF as well as the Paramilitary Armed Force [PAF] created in 2001 as being involved in internal security, which has the effect of reducing the number of incidents of abuse committed by the NPF starting from 2002. Indeed, the majority of the documentary evidence refers to security forces which do not necessarily point to the NPF as the Armed Forces and the PAF were given more power to maintain security after 2001.

[39] Moreover, the specific incidences involving human rights abuse by the NPF are quoted in a report from 1994 and such back dated incidents should not be weighted so heavily.

VI. Issue

1. Did the Member err in finding that the Applicant is excluded from protection under Article 1F(a) of the Refugee Convention for being complicit in crimes against humanity?

VII. Standard of review

[40] The standard of review applicable to the issue of whether the facts give rise to exclusion is a question of mixed fact and law yielding substantial deference to the RPD. The standard of correctness applies to determine whether the correct legal test for exclusion was applied under Article 1F(a) of the Refugee Convention as it is a question of law of general application to the refugee determination process (*Canada (Minister of Citizenship and Immigration) v Ekanza Ezokola*, 2011 FCA 224 at para 39, 335 DLR (4th) 164; *Canada (Minister of Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 11, 402 NR 154). However, in the present case, the standard of reasonableness is applicable as the Applicant is challenging the RPD's determination that he should be excluded on the basis of Article 1F(a) of the Refugee Convention and not whether the RPD applied the correct legal test.

VIII. Analysis

[41] The RPD's determination that there are serious reasons for considering that he should be excluded on the basis of Article 1F(a) of the Refugee Convention is reasonable.

[42] First, it is important to recall that in *Ramirez*, above and *Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298 at para 15, 159 NR 210 (FCA), the Federal Court of Appeal determined that the Minister must abide by the standard of proof comprised in the expression "serious reasons for considering" in subparagraph 1F(a) of the Refugee Convention. This standard is much lower than the one required in criminal law, "beyond a reasonable doubt," or in civil law, "on a balance of probabilities."

[43] With regards to the Applicant's argument that the RPD erred in concluding that the evidence regarding human rights abuse involves Nepalese security forces generally and does not point specifically to the NPF, it cannot be accepted by this Court. There is substantive documentary evidence in the CTR to the effect that the NPF was directly involved in torture, extrajudicial executions, random killings, abuse in detention, rape, etc. during the Maoist revolution, which started in 1996. Moreover, a reading of the RPD's decision shows that it properly considered the four (4) factors set out in *Mugesera*, above at para 119 in determining whether the acts committed by the NPF rise to the level of a crime against humanity. The said factors are the following: an enumerated proscribed act was committed, the act was committed as part of a widespread or systematic attack, the attack was directed against any civilian population or any identifiable group of persons and the person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.

[44] Moreover, a number of reports contained in the CTR establish that human rights abuse by the NPF were "widespread" and directly targeted the Maoist insurgents. Finally, the evidence shows that the Applicant must have been aware of the fact that crimes were being committed by the NPF. Therefore, the RPD's determination that the NPF was involved in crimes against humanity is reasonable.

[45] With regards to the RPD's determination as to complicity, the case law is to the effect that active membership is not required but that a person is considered as complicit if he contributes to the organization while being aware that it is committing crimes against humanity (*Ramirez*, above). Complicity rests on the existence of a shared common purpose and the common knowledge that all

of the parties may have of it, which is defined as “personal and knowing participation” (*Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433, 163 NR 197 (FCA)). If a senior official remains in his or her position, defends the interests of the government for whom he or she works and is aware of the relevant atrocities, this is sufficient to demonstrate complicity (*Canada (Minister of Citizenship and Immigration v Ezokola)*, 2011 FCA 224 at para 72, 335 DLR (4th) 164).

[46] The Federal Court of Appeal articulated six (6) factors relevant to participation in *Bahamin v Canada (Minister of Employment and Immigration)* (1994), 171 NR 79, [1994] FCJ No 961: the nature of the organization, method of recruitment; position/rank in the organization, knowledge of atrocities, length of time in the organization, and opportunity to leave the organization. Each of them was considered by the RPD.

[47] As for the Applicant’s position in the organization, the Federal Court of Appeal established the following principle in *Sivakumar*, above at 202: “Bearing in mind that each case must be decided on its facts, 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.”

[48] The Applicant’s position in the NPF is probably one of the most illustrative indicators of his complicity in the atrocities committed. The Applicant was posted at the Central Jail in Sundhara, Kathmandu, where detainees included Maoists. He occupied a high level position, working just under the supervision of the Inspector, who was working under the supervision of the Deputy

Superintendent of Police, who held the highest position at the jail. He was also in direct contact with the detainees as he took care of their transfer and made sure no one escaped. Therefore, it may reasonably be inferred that while fulfilling his duties which included ensuring that no one escaped and transporting detainees, the Applicant was complicit in the human rights abuses, especially considering his high position while working at the jail. Indeed, it has been reliably established that the NPF did commit acts of torture on detainees.

[49] Moreover, before working at the Kathmandu jail, he fought Maoist rebels for about ten (10) years, while occupying various positions in the NPF, which all granted him a leadership and supervisory role. Indeed, he was at all times, responsible of a group of thirty (30) to forty (40) policemen.

[50] With regards to complicity, the RPD's findings are reasonable. It is a well established principle that a refugee claimant need not necessarily have participated directly in the perpetration of human rights abuses and crimes against humanity by the organization to which he belongs in order for him to be found an accomplice to such acts (see *Ramirez*, above). Therefore, it was not necessary for the RPD to have evidence showing the Applicant's personal implication in the crimes specifically, in order to determine that he committed a crime against humanity (*Mata Mazima v Canada (Minister of Citizenship and Immigration)*, 2012 FC 698 at para 26, 223 ACWS (3d) 1010).

[51] As for his knowledge of the abuses, his alleged ignorance of the abuses committed by the NPF was found not to be credible by the RPD. The Applicant gave a number of evasive answers, especially regarding the protest by the Tibetans in front of the Chinese consulate in Kathmandu in

2008. He claims that he did not attend any of the demonstrations and that his colleague did. He explained that he could only provide training to police officers showing inappropriate behaviour and that the measures he could take against such police officers were limited. The RPD reasonably questioned the validity of such explanation.

[52] Another relevant example is that when the Applicant was confronted with the evidence that torture occurred during the detention of a number of Tibetans following the protest, he explained that while at the base of the armed police, in Nexal, he “heard rumours” but however did not investigate the matter as he “was too busy with his work.” Such behaviour demonstrates the Applicant’s wilful blindness and unwillingness to question the acts of the NPF. It was reasonable for the RPD to reject his explanation.

[53] Therefore, the RPD reasonably drew a negative conclusion as to the Applicant’s credibility resulting from his manifest denial of the acts committed by the NPF.

[54] Although membership in itself will not suffice to establish complicity, it is however a relevant factor in determining personal and knowing participation. The Applicant belonged to an organization engaged in crimes against humanity, for a total of eighteen (18) years. For more than ten (10) years, the organization was known to be involved in crimes against humanity committed against the Maoists. The Applicant has not pointed to any evidence showing that he disapproved of the actions committed by the NPF. To the contrary, although he denies ever being aware of the acts committed by the NPF, he decided to stay with this organization although it kept on committing serious human rights abuses.

[55] On a final note, the RPD decision did rightly apply the law with the facts of this case. It is well written and deals with the facts in a meticulous way. There is no reason to intervene. It is a reasonable decision.

[56] The parties were invited to submit questions for certification but none were proposed.

JUDGMENT

THIS COURT'S JUDGMENT IS THAT:

1. This application for judicial review is dismissed.
2. No question is certified.

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-8311-12

STYLE OF CAUSE: SUMAN RAJ SAPKOTA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 10, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** NOËL J.

DATED: July 15, 2013

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