

Federal Court



Cour fédérale

Date: 20141020

Docket: IMM-603-14

Citation: 2014 FC 996

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 20, 2014

Present: The Honourable Mr. Justice Shore

BETWEEN:

MARINO MANUEL PACHECO MOYA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Preliminary

[1] [TRANSLATION] “According to the Truth and Reconciliation Commission, the Shining Path is allegedly responsible for the death of 32,000 victims. Extreme violence that has no

precedent in the history of Latin Americans guerilla movements” (Daniel Dupuis, *¿Dónde Están?: Terreur et disparitions au Peru (1980-2000)*, Éditions Le Passager clandestin, 2009, p 29, Tribunal Record, Exhibit M-2, p 343).

[2] As illustrated above, the members of the Shining Path (SP) movement have, for several decades and under the guise of an ideological and political project, perpetrated violent acts with little regard for human life. Making excuses to avoid responsibility for actions is a refrain that has been repeated throughout the history of atrocities committed against humanity.

II. Introduction

[3] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision dated November 28, 2013, of the Refugee Protection Division (RPD) to exclude the applicant from the definition of refugee, through section 98 of the IRPA and Article 1F(a) of the *United Nations Convention relating to the Status of Refugees* (the Convention), for his complicity in crimes against humanity.

[4] The Court considers that the RPD properly determined complicity based on the applicant’s contribution, in accordance with the teachings of the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 (*Ezokola*). Therefore, the application for judicial review must be dismissed.

III. Facts

[5] The applicant, a citizen of Peru, seeks refugee protection in Canada. The applicant alleges the following facts.

[6] The applicant claims that he is persecuted by the SP. He fears that he will be tortured and exposed to a threat to his life in Peru, because of the interest taken in him and other members of his family by members of the SP.

[7] In August 1996, the applicant studied at the Universidad Nacional del Centro del Perú (UNCP), in Huancayo, at the faculty of chemical engineering.

[8] In August 1997, because of conflicts with the SP, the Peruvian army entered into several public universities, including the UNCP. Students disappeared and some were killed, including a young female student who lived with the applicant's family.

[9] At the end of August 1999, the applicant was a victim of a first attack. Three masked persons approached him to attempt to persuade him to join the SP. After he refused to join the SP, he was tortured by members of this organization.

[10] On December 20, 1999, in Huancayo, the applicant was a victim of a second attack. He was stabbed in numerous places on his body, which led him to drop out of the UNCP to continue his studies at the National Industrial Training Service until December 2002.

[11] After obtaining a visa, the applicant left Peru to arrive in the United States at the end of June 2003. It was then that the applicant met his spouse, the mother of his son Ken Leonardo. They started to live together on September 20, 2003.

[12] On December 5, 2008, the applicant's brother was the victim of an attack by members of the SP, who questioned him regarding the applicant's location. In November 2009, it was the applicant's eldest brother who was intercepted by two armed persons, who tortured him and questioned him regarding the applicant's location.

[13] Fearing deportation in the United States, the applicant, his spouse and their son claimed refugee protection in Canada on August 27, 2010.

IV. Decision

[14] Two hearings were held before the RPD, one on March 7, 2013, and the other on September 26, 2013, so as to determine the refugee status of the applicant, his spouse and their son. The RPD dismissed the applicant's application because of his lack of credibility and his contribution to crimes against humanity committed by the SP, according to the test set out in *Ezokola*, above.

(a) The RPD's conclusions as to the applicant's lack of credibility

[15] First, the RPD found that the applicant lacked credibility because of the numerous contradictions in his testimony:

[TRANSLATION]

[T]he omission regarding the threat made to the students and the applicant to oblige them to participate in the meetings, the inconsistency regarding the duration of this training that allegedly took place over 6 months or in 4 meetings of a few hours and the contradiction regarding the security measures that were absent then present at the university, then partially present, undermined the applicant's credibility with respect to the alleged climate of terror that reigned in his department and his university at the time. (RPD Decision, para 50)

[16] First, the RPD determined that the applicant voluntarily provided two litres of acid, meant for bomb-making, to his professor affiliated with the SP without duress. According to the RPD, the contradictions in the applicant's testimony regarding the presence of armed and masked members of the SP in UNCP laboratories undermined his credibility.

[17] Then, the RPD found that the applicant's story regarding the security measures at the UNCP was not credible. The applicant first testified that there were security guards monitoring student cards of people who introduced themselves into the university, then he stated that the university was not secure, thereby enabling the introduction of armed and masked members of the SP into the UNCP.

[18] Further, the RPD found that the applicant provided contradictory statements relating to the favouritism existing with respect to access to university services for those that co-operated with the SP, particularly in favour of chemistry, metallurgy and mining students since they had access to laboratories. First, the applicant testified that free services were provided to him in exchange for his contribution and presence at speeches held by the SP. During the second

hearing, the applicant contradicted himself by denying this favouritism and testifying that he had to pay for these services, as of the second quarter.

[19] The RPD also noted contradictions relating to the paramilitary training taken by the applicant, which undermined his credibility. In particular, at question 8 of his Personal Information Form (PIF), the applicant then indicated that he allegedly took paramilitary training from May 15 to November 30, 1997. When confronted by the respondent with this statement, the applicant stated that he attended two speeches relating to the SP's ideologies, then stated that he attended four speeches in 1996 and 1997 without mentioning that these meetings were held under the threat armed men, then contradicted this last point.

[20] Further, the RPD drew a negative inference from the applicant's contradictions as to the period where he allegedly studied at the faculty of chemistry and found that:

[TRANSLATION]

[T]he contradictions relating to the duration of the period of his studies done in the faculty of chemistry and concerning the possibility of stopping his studies, undermined the applicant's credibility regarding the duration of the period spent at the faculty of chemistry with respect to the speed with which he left this faculty; the panel was surprised about this delay in leaving his faculty. (RPD Decision, at para 57)

[21] Finally, the RPD noted that the applicant first attempted to minimize his knowledge of the facts surrounding the SP to then show that he was indeed aware of the SP's ideological project and the attacks committed by this group. On this point, the RPD found that

[TRANSLATION] "the applicant was fully aware of the acts committed by the members of this group in his university before registering in 1996, 16 years after the start of the civil war, while

he was living in the centre of the provinces where numerous massacres had occurred” (RPD Decision, at para 53).

[22] The Court considers that the RPD reasonably found that the applicant lacked credibility, given the contradictions, omissions and implausibilities in the applicant’s testimony, explained above.

(b) The applicant’s contribution to the crimes against humanity committed by the SP

[23] Second, the RPD found that the applicant was complicit in crimes against humanity, because of his significant, voluntary and conscious contribution to the crimes perpetrated by the SP. In its reasons, the RPD indicated at paragraph 144:

[TRANSLATION]

Given the size of this organization, the Shining Path, and the number and the severity of the crimes against humanity that they were guilty of, given that the applicant, even if he is not part of this organization, was approached by this organization, invited to participate in training on their ideology, in bomb-making courses, and especially provided on two occasions chemical material to his professor, who he believes is associated with this organization and, since the applicant benefitted from free services from student unions because of his activities with this group, the panel finds that the applicant is complicit in crimes against humanity.

[24] With respect to the applicant’s defence of duress, the RPD notes that it was only at the second hearing, after the possibility of exclusion under Article 1F(a) was raised, that the applicant testified that he was threatened by armed and masked members of the SP, forcing him to co-operate. Therefore, given the applicant’s lack of credibility and the evidence presented, the RPD found that the applicant was complicit in crimes committed by the SP.

V. Issue

[25] Was the RPD decision to exclude the applicant under section 98 of the IRPA and Article 1F(a) of the Convention reasonable?

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

- (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
- (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

- (a) to a danger, believed on

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

- a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
- b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

- a) soit au risque, s'il y a des

substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

- (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
- (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

- (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
- (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
- (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
- (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de

Exclusion – Refugee Convention

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.

protection.

Exclusion par application de la Convention sur les réfugiés

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.

[26] Moreover, Article 1F(a) of the Convention states:

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that :

(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.

1F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :

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.

VI. Position of the parties

[27] First, the applicant alleged that the RPD's findings as to the applicant's lack of credibility are unreasonable. According to the applicant, the RPD displayed a lack of objectivity by not considering the applicant's explanations, based on all of the evidence.

[28] Further, the applicant argued that the RPD erred in finding that the applicant was complicit in the crimes committed by the SP and in rejecting the defence of duress. The applicant

claims that he provided the SP with litres of acid under direct threat of armed members of the SP. Further, the applicant claims that he was the victim of attacks by the SP, because he left the faculty of chemistry.

[29] Second, the respondent claimed that the applicant contributed to the criminal activities of the SP by providing it with litres of acid used to make destructive and deadly bombs, obtained because of his access to chemistry laboratories. The respondent claimed that this voluntary, significant and conscious contribution shows that the applicant was complicit in the crimes against humanity perpetrated by the SP.

[30] The respondent argued that the defence of duress raised by the applicant has no basis, given the absence of explicit or implicit threats to cause death or bodily harm (*R. v Ryan*, 2013 SCC 3). Further, because of his lack of credibility, the RPD reasonably rejected the applicant's testimony according to which he was threatened by armed and masked members of the SP.

VII. Standard of review

[31] Since the determination of the applicant's complicity in crimes against humanity committed by the SP is a question of mixed facts and law, the applicable standard is that of reasonableness (*Ezokola*, above; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Harb v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39 at para 14).

[32] It has been established that the determination of the reasonableness of a decision is concerned "mostly with the existence of justification, transparency and intelligibility within the

decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 1 SCR 190 at para 47).

[33] In addition, the Court must give a high degree of deference to the RPD, who is in the best position to analyze the evidence and draw the appropriate conclusions. As a reminder, Justice John Evans stated in *Cepeda-Gutierrez*, [1998] FCJ No 1425 (QL):

[14] It is well established that section 18.1(4)(d) of the *Federal Court Act* does not authorize the Court to substitute its view of the facts for that of the Board, which has the benefit not only of seeing and hearing the witnesses, but also of the expertise of its members in assessing evidence relating to facts that are within their area of specialized expertise. In addition, and more generally, considerations of the efficient allocation of decision-making resources between administrative agencies and the courts strongly indicate that the role to be played in fact-finding by the Court on an application for judicial review should be merely residual. Thus, in order to attract judicial intervention under section 18.1(4)(d), the applicant must satisfy the Court, not only that the Board made a palpably erroneous finding of material fact, but also that the finding was made “without regard to the evidence [before it]”...

[15] The Court may infer that the administrative agency under review made the erroneous finding of fact “without regard to the evidence” from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.

VIII. Analysis

[34] The Court considers that the RPD's finding that the applicant was not credible was reasonable, as was its finding of complicity in the crimes against humanity committed by the SP.

(a) The applicant's credibility

[35] The role of this Court is not to reassess the evidence so as to draw its own conclusions on the applicant's credibility, but rather to determine whether the RPD's findings in this respect are reasonable (*Cepeda-Gutierrez*, above).

[36] As determined by the RPD in its reasons, the fundamental question before the RPD was whether the applicant had voluntarily given the litres of acid to his professor, knowing that this material would be used to make bombs for the SP.

[37] From the outset, the RPD validly noted that the explanations provided by the applicant during the second hearing, on September 26, 2013, were substantially different from those provided at the first hearing of March 7, 2013.

[38] The Court rejects the applicant's argument that the RPD had allegedly zealously attempted to find inconsistencies in the applicant's testimony. Rather, the Court finds that the RPD systematically addressed explanations provided by the applicant and weighed all of the evidence so as to draw reasonable conclusions with respect to the applicant's credibility and contribution, as a result of its analysis.

[39] Further, the applicant's allegation that the RPD allegedly demonstrated bias is without basis. The Court finds that the applicant submitted no probative evidence to support this claim. The applicant instead demonstrated that he does not agree or is not satisfied with the RPD's findings.

[40] The RPD noted that it was only after the respondent intervened on the possibility of exclusion under Article 1F(a) of the Convention that the applicant did an about-face by offering a contradictory version of the facts in his original testimony. Specifically, because of the numerous contradictions and implausibilities in the applicant's story, the Court considers that the RPD reasonably found that the applicant lacked credibility, especially with respect to

- (a) the contributions of litres of acid made by the applicant under the armed threat of members of the SP in the UNCP chemistry laboratories;
- (b) the payment by the applicant to access university services in exchange for his contribution and attendance at SP speeches;
- (c) the level of security existing at the UNCP and the presence of the Peruvian army;
- (d) the ideological and paramilitary training with the SP taken by the applicant;
- (e) the duration of the applicant's studies at the faculty of chemistry;
- (f) the nature of the attacks by the SP on the applicant.

(b) Complicity in crimes against humanity committed by the SP

[41] For mere association to be raised to the level of complicity in a crime (or to a group's crime or criminal purpose), there must be "serious reasons for considering" that a contribution to

the organization's crime or criminal purpose was voluntary, significant and conscious (*Ezokola*, above at para 86).

[42] As set out in *Harb*, above, at para 11:

The first of these arguments does not apply in the case at bar. It is not the nature of the crimes with which the appellant was charged that led to his exclusion, but that of the crimes alleged against the organizations with which he was supposed to be associated. Once those organizations have committed crimes against humanity and the appellant meets the requirements for membership in the group, knowledge, participation or complicity imposed by precedent (see inter alia, *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.); *Moreno v. Canada (Minister of Citizenship and Immigration)*, [1994] 1 F.C. 298 (C.A.); *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.); *Sumaida v. Canada (Minister of Employment and Immigration)*, [2000] 3 F.C. 66 (C.A.); and *Bazargan v. Minister of Employment and Immigration* (1996), 205 N.R. 232 (F.C.A.)), the exclusion applies even if the specific acts committed by the appellant himself are not crimes against humanity as such. In short, if the organization persecutes the civilian population the fact that the appellant himself persecuted only the military population does not mean that he will escape the exclusion, if he is an accomplice by association as well.

[43] In this case, it is not disputed that the SP is responsible for serious crimes against humanity, perpetrated against the civilian population in a general and widespread manner. As the RPD stated, the crimes committed by the SP are [TRANSLATION] “murders and kidnappings, forcible confinement and forced recruitment that also obliges the population to be displaced” (RPD Decision, at para 86).

[44] The fact that in his testimony, the applicant admitted having provided the litres of acid to members affiliated with SP, that he knew that these acids were used to make bombs and that he also took training on bomb-making, the RPD found

[TRANSLATION]

[T]hat the applicant is not a principal actor in these crimes but he could be an accomplice of this group, the Shining Path, because he allegedly contributed to the crime perpetrated by this organization by providing them with chemical material. (RPD Decision, para 110)

[45] The Court noted that, contrary to the context of Canadian criminal law, in an exclusion proceeding under section 98 of the IRPA, the burden of proof is on the respondent to show that there are “serious reasons for considering” that a person should be excluded from the definition of refugee. This standard lies between “mere suspicion” and the balance of probabilities applicable in civil matters (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114).

[46] Afterward, in its reasons, the RPD conducted a methodical analysis of each of the non-exhaustive criteria set out by the Supreme Court in *Ezokola*, above (see paras 91 and following):

- (i) *The size and nature of the organization:* The RPD found that, according to the documentary evidence, the SP is an organization that generally is clearly directed to a limited, brutal purpose.
- (ii) *The part of the organization with which the refugee claimant was concerned:* The RPD found that the applicant, though not a member of the organization, had contact with the SP because of his membership in the faculty of chemistry.

- (iii) *The refugee claimant's duties and activities within the organization:* The applicant contributed to the SP's activities since he stated that that he had knowingly given them chemical material. The RPD noted that the applicant obtained in return for this material free access to university services. Further, the applicant participated in ideological training meetings with the SP and took an extracurricular course on bomb-making.
- (iv) *The refugee claimant's position or rank in the organization:* The RPD noted that the applicant did not hold a particular position within the SP and does not seem to have exercised any particular authority or influence in the group.
- (v) *The length of time the refugee claimant was in the organization;* (vi) *the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization:* The RPD noted that these two factors are not relevant since the applicant was not a member of the SP.

[47] Afterward, the RPD analyzed the voluntary, conscious and significant nature of the applicant's contribution to the SP.

[48] First, the RPD analysed the voluntary nature of the applicant's contribution. On this point, the applicant raised the defence of duress since he stated that he had been forced to co-operate with the SP. The RPD rejected this allegation and the applicant's defence of duress because of his lack of credibility. When the applicant was questioned regarding the consequences he would have experienced if he had not co-operated with the SP, the applicant stated that he

would have lost the privilege of free access to university services. From this standpoint, the RPD reasonably found that the applicant provided litres of acid to the SP voluntarily.

[49] Second, the RPD found that the contribution of the two litres of acid is a significant contribution, since the bombs made with these chemicals were used to kill people. Further, the RPD relied on a statement of the applicant contained in his PIF that indicates that this material was used to make [TRANSLATION] “high impact” domestic bombs.

[50] Third, the RPD found that, by providing the litres of acid, the applicant contributed consciously since he was aware that the use of these chemicals was intended to make deadly bombs. Further, he knew of the ideology and abuses committed by the SP. The RPD relies on the applicant’s statements in his PIF according to which he knew that the SP was using explosives, in particular to blow up bridges, colleges and town halls.

IX. Conclusion

[51] The RPD's conclusion that there are "serious reasons for considering" that the applicant was complicit in the crimes committed by the SP, resulting in the applicant's exclusion as a person subject to Article 1F(a) of the Convention is reasonable.

[52] Therefore, the Court's intervention is not warranted.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;
2. There is no question for certification.

“Michel M.J. Shore”

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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