Federal Court  Cour fédérale

Date: 20211207

Docket: IMM-4134-20

Citation: 2021 FC 1362

Ottawa, Ontario, December 7, 2021

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

BENEDIQUE JEAN-BAPTISTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Refugee Appeal Division (RAD) found that there were serious reasons to believe that Benedique Jean-Baptiste was complicit in torture through his actions and knowledge as a member of the Haitian National Police (PNH) between 1996 and 1997. Mr. Jean-Baptiste knew that PNH interrogators were using "strong measures" against suspects causing visible injuries, but he nonetheless continued to work as a police officer, arresting suspects and turning them over

to interrogators. The RAD found that interrogators tortured suspects and that Mr. Jean-Baptiste's actions as a police officer constituted a voluntary, knowing and significant contribution to that torture. It concluded that Mr. Jean-Baptiste was a person referred to in Article f1F(a) of the *Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137, entered into force April 22, 1954 [Refugee Convention] and that, under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], he could not be a refugee or a person in need of protection. The RAD therefore rejected his refugee protection claim in a decision dated August 3, 2020.

[2] In its decision, the RAD carried out a detailed analysis of the tests applicable to allegations of crimes of complicity and against humanity set out in leading decisions of the Supreme Court of Canada, namely *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, and *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40. Despite this detailed analysis, I find that the RAD did not adequately examine one central issue, namely whether the evidence showed that the "strong measures" applied by the PNH constituted an intentional infliction of "severe pain and suffering". This is a critical aspect of the definition of torture.

[3] Given the serious nature of a finding of complicity in the commission of a crime against humanity, I find that the RAD's decision is unreasonable and cannot stand. The application for judicial review is therefore allowed, and Mr. Jean-Baptiste's appeal is referred back to the RAD for reconsideration.

II. Issues and standard of review

[4] Mr. Jean-Baptiste's claims in this application for judicial review raise the following issues:

A. Did the RAD err by dealing with the issue of exclusion under section 98 of the IRPA before considering the refugee protection claim under sections 96 and 97 of the IRPA?

B. Did the RAD err in finding that the PNH committed a crime against humanity, namely torture?

C. Did the RAD err in finding that Mr. Jean-Baptiste was complicit in that crime?

[5] These issues go to the merits of the RAD decision. The parties agree that the issues require the application of the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. In conducting a reasonableness review, the Court considers "the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified": *Vavilov* at para 15. A reasonable decision must be "based on an internally coherent and rational chain of analysis" and be "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85, 90, 99, 105–7. The " legal constraints" can include relevant Canadian case law and the principles of customary and conventional international law: *Vavilov* at paras 11–14.

III. Analysis

A. *The RAD did not err in dealing with the issue of exclusion under section 98 before dealing with the refugee protection claim*

[6] Mr. Jean-Baptiste's refugee protection claim is based on a fear of danger from criminals he claimed to have arrested in the past. Mr. Jean-Baptiste was a police officer with the PNH from when he joined in 1995 to when he fled Haiti in 2013. After the earthquake that devastated Haiti in January 2010, criminals escaped from prison and attacks began against the police to [TRANSLATION] "settle scores". In 2012, Mr. Jean-Baptiste and his family were assaulted and threatened by criminals he had apprehended in the past. In November 2013, about 10 individuals were looking for him, and he narrowly escaped a shooting. He left Haiti the next day.

[7] Neither the Refugee Protection Division (RPD) nor the RAD considered this account on its merits. Both started by examining the issue of whether Mr. Jean-Baptiste was excluded from protection under section 98 of the IRPA and Article 1F(a) of the Refugee Convention. These provisions read as follows:

IRPA	LIPR
Exclusion – Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
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.

Refugee Convention	*Convention sur les réfugiés*
Article 1	**L'Article premier**
F The provisions of this Convention shall not apply to any person in respect of 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 crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
[Emphasis added.]	[Je souligne.]

[8] Mr. Jean-Baptiste criticizes the RAD for not assessing the risk he would face should he return to Haiti. He contends that the analysis of exclusion under Article 1F(a) without an examination of inclusion ruled out an analysis of the facts and his specific circumstances.

[9] I disagree with this argument. It is clear from section 98 of the IRPA that the refugee protection claim of a person referred to in Article 1F of the Refugee Convention cannot be allowed even if it is well-founded. Indeed, the Federal Court of Appeal has even indicated that the RAD would exceed its jurisdiction by ruling on the merits of a refugee protection claim when section 98 applies: *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38; *Han v Canada (Minister of Citizenship and Immigration)*, 2006 FC 432 at paras 39–41; *Islam v Canada (Citizenship and Immigration)*, 2010 FC 71 at paras 34–35; but also see *Gurajena v*

Canada (Citizenship and Immigration), 2008 FC 724 at para 5 concerning the possibility of determining this issue as an alternative finding.

[10] The RAD found that exclusion is "an issue that must be settled first because of the wording of section 98". This conclusion is consistent with the case law and is reasonable.

B. *The RAD finding of a crime against humanity is unreasonable*

(1) The evidence and the RAD finding

[11] The RAD conclusion that Mr. Jean-Baptiste is excluded under section 98 of the IRPA is based on his testimony before the RPD. In particular, Mr. Jean-Baptiste testified that, for the first half of 1996, he was working in the PNH as a level two rank police officer in an intervention squad at the Petit-Goâve police station. He was then assigned to the police station in Demas, where he worked until March 1997, first at a fixed point and then in an intervention squad. In his work, he arrested suspects and brought them to the police station, where they were held and interrogated.

[12] Mr. Jean-Baptiste testified that there were members of the PNH at the police stations who used "strong measures" in their interrogations. Mr. Jean-Baptiste never took part in such interrogations but knew that they were taking place because [TRANSLATION] "people talk" and because he sometimes saw injuries on suspects after they were interrogated. In particular, on two occasions in Petit-Goâve and one occasion in Delmas, Mr. Jean-Baptiste saw that an individual who he had brought in had undergone [TRANSLATION] "a change" following an interrogation,

that is, he had been injured. That said, he was sure that those types of violent interrogations were happening more often.

[13] Applying the principles set out in *Mugesera*, the RAD found that a crime against humanity had been committed by members of the PNH. At paragraph 119 of *Mugesera*, the Supreme Court held that, based on the principles of international law, a criminal act rises to the level of a crime against humanity when four conditions are made out:

1. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);

2. The act was committed as part of a widespread or systematic attack;

3. The attack was directed against any civilian population or any identifiable group of persons; and

4. 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.

[14] In respect of the first condition, the proscribed act, the RAD noted that torture is defined in the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [CAHWCA] as follows:

torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;	par ***torture***, on entend le fait d'infliger intentionnellement une douleur ou des souffrances aiguës, physiques ou mentales, à une personne se trouvant sous sa garde ou sous son contrôle; l'acception de ce terme ne s'étend pas à la douleur ou aux souffrances résultant uniquement de sanctions légales, inhérentes à ces sanctions ou occasionnées par elles;

[15] I note that the RAD indicated that the definition above is found in subsection 7(2) of the CAHWCA. More specifically, this definition of torture appears in article 7(2)(e) of the *Rome Statute of the International Criminal Court* [Rome Statute], which is included in the schedule to the CAHWCA. This slight error is insignificant given the stipulation in subsection 4(4) of the CAHWCA that the crimes referred to in article 7 of the Rome Statute are, as at July 17, 1998, crimes according to customary international law.

[16] The RAD summarized Mr. Jean-Baptiste's testimony about the "strong measures" used in the interrogations, as described in paragraph [12] above. It noted that Mr. Jean-Baptiste saw injuries to prisoners on three occasions and that he was certain that it was happening more often. It found that "[t]he RPD therefore did not err in concluding that torture was practised by the PNH during the relevant period."

[17] The RAD also affirmed the RPD's conclusion in respect of the second condition, namely, that Mr. Jean-Baptiste's testimony showed that the torture was part of a "widespread or systematic attack". Citing *Mugesera*, the RAD noted that, as "a course of conduct involving the commission of acts of violence", torture is included in the definition of a widespread or systematic attack: *Mugesera* at para 153. It found that Mr. Jean-Baptiste's testimony showed that "torture was practised by the PNH in most of the police stations in Haiti" and that he had personally seen the results on three occasions in two different police stations in the shape of injuries to prisoners. The fact that torture was "a common and widespread practice in almost every police station in Haiti" led the RAD to conclude that it was committed as part of a widespread or systematic attack.

[18] In respect of the last two conditions in *Mugesera*, the RAD also affirmed the RPD's conclusions that the Haitians held in cells were an identifiable population of civilians targeted by the attack and that, as the ones committing the attack, the PNH was aware of the torture taking place in its police stations. The RAD thus found that the PNH had committed "acts of torture, which is a crime against humanity under the [CAHWCA], at least between January 1996 and March 1997".

(2) The public official as perpetrator of a crime against humanity

[19] Mr. Jean-Baptiste is challenging the RAD's conclusion that the police abuse he witnessed was torture. First, he claims that as the national police force, the PNH had the legitimate goal of protecting the public and therefore could not commit torture in a widespread or systematic manner.

[20] I reject that argument. There is no doubt that a national police force *can* commit torture *and* crimes against humanity. Evidence of this can unfortunately be seen all over the world. This has also been affirmed by this Court, which on several occasions has accepted allegations of torture as a crime against humanity committed by a police service: *Popoola v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 305 at paras 5, 9; *Khachatryan v Canada (Citizenship and Immigration)*, 2020 FC 167 at paras 25–29; *Bedi v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1550 at paras 2, 28–29; *Hadhiri v Canada (Citizenship and Immigration)*, 2016 FC 1284 at paras 3, 22–23, 33.

[21] This conclusion is confirmed by the definition of torture in the first article of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [Convention against Torture]. This definition, which paragraph 97(1)(a) of the IRPA incorporates by reference, is similar to the definition in the Rome Statute, but also refers to the goals of torture. Specifically, the definition in the Convention against Torture includes the infliction of severe pain or suffering by a "public official" to obtain "information or a confession":

1 For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason	**1** Aux fins de la présente Convention, le terme ***torture*** désigne tout acte par lequel une douleur ou des souffrances aiguës, physiques ou mentales, sont intentionnellement infligées à une personne aux fins notamment d'obtenir d'elle ou d'une tierce personne des renseignements ou des aveux, de la punir d'un acte qu'elle ou une tierce personne a commis ou est soupçonnée d'avoir commis, de l'intimider ou de

based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.	faire pression sur elle ou d'intimider ou de faire pression sur une tierce personne, ou pour tout autre motif fondé sur une forme de discrimination quelle qu'elle soit, lorsqu'une telle douleur ou de telles souffrances sont infligées par un agent de la fonction publique ou toute autre personne agissant à titre officiel ou à son instigation ou avec son consentement exprès ou tacite. Ce terme ne s'étend pas à la douleur ou aux souffrances résultant de sanctions légitimes inhérentes à ces sanctions ou occasionnées par elles.
2 This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.	**2** Cet Article est sans préjudice de tout instrument international ou de toute loi nationale qui contient ou peut contenir des dispositions de portée plus large.
[Emphasis added.]	[Je souligne.]

[22] It is clear from this definition that international criminal law contemplates torture by an investigative body such as a police service. The first argument by Mr. Jean-Baptistes does not reveal an error by the RAD.

(3) Analysis of the serious nature of the pain and suffering

[23] Second, Mr. Jean-Baptiste notes the serious nature of [TRANSLATION] "crimes against humanity" and submits that this concept cannot include all actions occasionally committed by the police of a country, including [TRANSLATION] "a few blows given during an arrest".

[24] It must be noted that Mr. Jean-Baptiste is not seeking to defend police abuse. The Court must also emphasize that any abuse by the police, be it physical or mental, is heinous and must clearly be condemned. However, I agree that, based on Canadian and international law, not all abuse or violence by a police officer is torture or a crime against humanity. As submitted by Mr. Jean-Baptiste, and as affirmed by the Supreme Court, "[c]rimes against humanity should not be trivialized by applying the concept to fact situations which do not warrant the full opprobrium of international criminal sanction": *Mugesera* at para 141.

[25] So, what makes police abuse a crime against humanity? The answer lies in the definitions of torture and crime against humanity. Both the definition of torture in the Rome Statute found in the CAHWCA and the one in the Convention against Torture incorporated in the IRPA require the infliction of "severe" ("aiguë" in French) pain or suffering. Although this term is somewhat subjective, it is an important aspect of the definition of torture.

[26] Canadian courts and tribunals have not given much direct consideration to the issue of "severe" pain or suffering. In *X (Re)*, 2003 CanLII 55309 (CA IRB), sub nom *IOS (Re)*, [2003] RPDD No 108 (QL), the RPD noted as follows:

> Torture is distinguishable from other forms of harm on the basis of the severity of the pain or suffering inflicted. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment. The term "torture" is reserved for deliberate treatment causing particularly cruel suffering, mainly acts by which severe pain or suffering, either physical or mental, is intentionally inflicted. This is the definition established in by the European Court of Human Rights, in the case of *Ireland*.
>
> [Emphasis added.]

[27] The *Ireland* case referred to by the RPD is the decision of the European Court of Human Rights (ECHR) in *Ireland v the United Kingdom*, No 5310/71 (January 18, 1978), [1978] ECHR 1 [*Ireland I*]. In that case, the ECHR examined the actions of authorities in the United Kingdom against prisoners in Northern Ireland. The ECHR had evidence of violent beatings and of "five techniques" of interrogation, including wall-standing and deprivation of sleep and food: *Ireland I* at paras 96, 110–16, 120–21, 129–30. The ECHR noted the distinction between "violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States" and violence that constitutes torture. The latter term "attach[es] a special stigma to deliberate inhuman treatment causing very serious and cruel suffering": *Ireland I* at para 167. The majority of the ECHR found that the use of the "five techniques" did not constitute torture: *Ireland I* at para 167 and final conclusion 4. It drew the same conclusion concerning the beatings, finding that "the severity of the suffering that they were capable of causing did not attain the particular level inherent in the notion of torture as understood by the Court": *Ireland I* at para 174 and final conclusion 7. The ECHR was recently asked to review its judgment in *Ireland I* concerning the "five techniques" in light of new facts but refused to do so: *Ireland v The United Kingdom*, No 5310/71 (March 20, 2018, [2018] ECHR 247 at paras 130–37 [*Ireland II*].

[28] This is not to say that the scope of the definition of torture has remained unchanged since 1978. On the contrary, as noted by O'Leary J. in his dissenting opinion in *Ireland II*, international law has changed since that time: *Ireland II* at para 10, citing *A and others v Secretary of State for the Home Department (No 2)*, [2005] UKHL 71 at para 53, citing in turn *Selmouni v France*, No. 25803/94 (July 28, 1999) (ECHR) at para 101. In *Selmouni*, the ECHR

found that “severe” pain and suffering “depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”: Selmouni at para 100; see also the judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Milorad Krnojelac*, IT-97-25-T, Judgement (March 15, 2002) at paras 179–87, 219–307 (Trial Chamber), varied by the Appeals Chamber, IT-97-25-A (September 17, 2003) at paras 166–72. As explained by the Supreme Court in *Mugesera*, though decisions by international tribunals such as the ICTY are not binding upon Canadian courts, the expertise of these tribunals should not be disregarded lightly by Canadian courts applying domestic legislative provisions that incorporate customary international law: *Mugesera* at para 126; *Vavilov* at para 114.

[29] The RAD did not examine or determine whether the evidence before it established, under the applicable standard of “serious reasons for considering”, that the PNH inflicted pain or suffering so severe that it is contemplated by the definition of torture. It mentioned the “strong measures” of interrogation and the “injuries”, as well as the frequency of this occurrence, but did not make a finding on this fundamental aspect of the definition of torture. These questions are also relevant to the analysis of Mr. Jean-Baptiste’s knowledge and his complicity in the commission of a crime against humanity.

[30] This is not a merely superficial or peripheral flaw: *Vavilov* at para 100. On the contrary, it goes to the heart of the RAD’s finding that the PNH practised torture at the Petit-Goâve and Delmas police stations while Mr. Jean-Baptiste was performing arrests there. I am satisfied that

this flaw or shortcoming is sufficiently central to render the decision unreasonable: *Vavilov* at para 100.

[31] It is important to note that a determination that an applicant is excluded under section 98 of the IRPA and Article 1F of the Refugee Convention has serious consequences. In addition to preventing consideration of the refugee protection claim, this exclusion means that a decision on a refugee protection claim as part of a pre-removal risk assessment (PRRA) can only have the effect of staying a removal order, not that of conferring refugee protection on the applicant: IRPA, ss. 112(3), 114(1). These consequences result in a heightened responsibility for the RAD to ensure that its reasons demonstrate that the consequences are justified: *Vavilov* at paras 133–35.

[32] I therefore find that the RAD's decision is unreasonable and that Mr. Jean-Baptiste's appeal must be referred back for reconsideration.

[33] Before closing though, I would add an observation on the recent decision by this Court in *Verbanov*, which was rendered after the decision by the RAD: *Canada (Public Safety and Emergency Preparedness) v Verbanov*, 2021 FC 507. The parties before me have not cited this decision but it is relevant to the RAD's decision given its reference to the CAHWCA and *Mugesera*. In *Verbanov*, the Immigration Appeal Division (IAD) found that there were reasonable grounds to believe that Moldovan police officers had committed torture. However, the IAD found that the torture did not amount to a crime against humanity because it was not carried out pursuant to a state policy: *Verbanov* at paras 37–46. In *Mugesera*, the Supreme Court

found that such a policy was not a requirement for a crime against humanity but did not discount the possibility that international law may evolve over time so as to incorporate a policy requirement: *Mugesera* at paras 157–58. In *Verbanov*, referring to the Rome Statute and the CAHWCA in which the Rome Statute is incorporated, the IAD found that international criminal law has evolved since the backdrop against which *Mugesera* was decided and that the existence of a state policy was a mandatory element of the concept of "widespread or systematic attack": *Verbanov* at paras 40–41.

[34] Grammond J. of this Court affirmed the IAD's decision. He found that the IAD's decision was consistent with international criminal law given that the alleged conduct took place after the Rome Statute and the CAHWCA came into force: *Verbanov* at para 52. He noted that the facts of *Mugesera* took place in 1992, while the events in question in *Verbanov* took place from 2007 to 2011: *Verbanov* at paras 29, 55.

[35] In this case, the facts took place between 1996 and 1997, five years after the facts in *Mugesera* but just before the adoption of the Rome Statute on July 17, 1998. As discussed by Grammond J., "member States intended to reflect customary international law as it existed at the time, not to create new principles": *Verbanov* at para 18. The definition of "crime against humanity" in the Rome Statute, and particularly the definition of an "attack directed against any civilian population" includes the requirement that the attack be "pursuant to or in furtherance of a State or organizational policy to commit such attack": Rome Statute, arts 7(1), 7(2)(a), Schedule to the CAHWCA.

[36] The RAD relied on the definition of “torture” in the Rome Statute and consequently in the CAHWCA. However, the RAD did not consider the definition of “crime against humanity” or that of an “attack directed against any civilian group” in the same statute. In my view and in light of the decisions of the IAD and this Court in *Verbanov*, these are relevant issues for the RAD to consider in its reconsideration.

[37] Having found that the RAD’s crime against humanity determination was unreasonable, I do not need to dispose of the question of complicity.

IV. Conclusion

[38] For these reasons, the application for judicial review is allowed, and Mr. Jean-Baptiste’s appeal is referred back to the RAD for reconsideration.

[39] The parties have raised no questions for certification, and none arise.

JUDGMENT in IMM-4134-20

THIS COURT ORDERS as follows:

1. The application for judicial review is allowed. The decision by the Refugee Appeal Division dated August 3, 2020, is set aside, and the appeal of Benedique Jean-Baptiste is referred back for reconsideration by a differently constituted panel of the Refugee Appeal Division.

"Nicholas McHaffie"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

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