Federal Court  Cour fédérale

Date: 20110118

Docket: IMM-2116-10

Citation: 2011 FC 55

Toronto, Ontario, January 18, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

SARDUL SINGH WARAINCH
DALBIR KAUR WARAINCH and
SUKHWINDER KAUR WARAINCH

Applicants

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the First Secretary (Immigration) of the Canadian High Commission in India dated 9 March, 2010 refusing the application of the Principal Applicant to enter Canada as a permanent resident. The Secretary determined that the Principal Applicant had committed crimes against humanity and thus was inadmissible under the provisions of sections 35(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, IRPA). For the reasons that follow, I am dismissing this application.

[2] The Principal Applicant is an adult male citizen of India. At the relevant time he was a member of the Punjabi Police Force (PPF). His Counsel admits that the evidence demonstrates that, during his tenure with the PPF, that Force engaged in acts of violence against civilians, including interrogations accompanied by beatings, and that the Principal Applicant himself admitted to using such methods "but only once or twice". It is also admitted that the Principal Applicant was engaged in delivering civilians to premises which he knew were being used by the PPF for that purpose.

[3] Given such admissions, it is also admitted that, based upon the record as it presently stands, a person such as the First Secretary could reasonably conclude that the Principal Applicant is inadmissible into Canada by reason of having committed serious crimes. The issue in the present case is whether the Principal Applicant is inadmissible for having committed a crime against humanity as provided for in section 35(1)(a) of the IRPA.

> ***35.*** *(1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for*
>
> *(*a*) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;*

[4] The distinction is important in that, if the Principal Applicant is found to be inadmissible only for a serious crime, a right to appeal to the Immigration Appeal Division exists under section 64(1) of the IRPA, whereas if it has been determined that the Principal Applicant committed a crime against humanity, no right to appeal exists.

[5] In the present case, the Principal Applicant was interviewed by the First Secretary, who made more or less verbatim notes of the questions asked and answers given, as well as the conclusions arrived at by the First Secretary as a result. All of this is recorded in the so-called CAIPS notes, which are part of the record and form part of the reasons for the First Secretary's decision. Those notes include the following entries:

> *There is no doubt in my mind that applicant of his own admission was complicit and took part in the commission of human rights abuses includign (sic) acts of arbitrary arrests and torture-like methods of interrogation. he admittedusing (sic) it a few times and being well aware of themethods (sic) being used in the inerrogations (sic)centres where he would turn over people he ahd (sic)arrested. He also knew a out the summary executions, rapes, disappearances and other gross human righhts (sic) violations and neither denounce nor condemn them. He only expressed dismay that some people actually engaged in them to obtain faster promotions! He also admitted that both he and other who used forceful interrogation methods and techniques were consciously breaking Indian laws.*
>
> *Procedural fairness letter re A35 will be sent to give PA opportunity to respond to charges.*
>
> . . .
>
> *Pa/s answer to my procedural fairness letter is to say that he respects and uphel (sic) human rights and did not do anything wrong during his career wit the Punjabi Police Force.However (sic) the fact remains that during hisinterview(sic) he admits using only once or twice. I am spectical (sic) that in 40 years he only used such methods once or twice111) beatings and other forceful interrogation techniques on suspects. Ithink (sic) he probably used it mroe (sic) often and perhaps on a regular basis as this was the prevalent culture in the PPF at the time.Thre's (sic) no questions that he delivered suspects to be submitted to torture and mistreated (prisoners himself. he admitted that those who committed such acts vioplated (sic) Indian law and that included himself although he tried to disculpate (sic) himself by saying eh was acting under orders from his superiors.Thus (sic) I am satisfied that he is inadmissible under A 35 (1) m (a) of IRPA.*

[6] As a result, the First Secretary sent a letter dated 8 March 2010 to the Principal Applicant refusing his application for a visa to enter Canada as a permanent resident. This letter, which is the decision at issue, stated *inter alia:*

> *This letter concerns your application for admission to Canada.*
>
> *After careful and thorough consideration of all aspects of your application and the supporting information provided, I have determined that you do not meet the requirements for a permanent resident visa.*
>
> *Your application is refused because there is reason to believe that you are a member of the inadmissible class of persons described in paragraph 35(1)(a) of the Immigration and Refugee Protection Act, namely:*
>
> > *35.(1)(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act.*
> >
> > . . .
> >
> > *Specifically, from 1963 until 2001 you have been employed as a police officer with the Punjabi Police Force. Your initial rank was Sepoy Constable and you retired with the rank of Assistant Commander in June 2001.*
> >
> > *During your interview, you admitted that you used such methods as beating suspects on the soles, pulling their hair, depriving them of sleep and keeping them standing up for hours. You also admitted to taking part in summary arrests and also carrying out orders from your superiors that you knew were illegal. You also admitted having full knowledge about the use of torture and other human violations and even condoning them. You also admitted that all those who used such forceful or third degree interrogation methods and techniques were consciously breaking Indian laws.*
> >
> > *You did not express any regrets nor remorse for your actions and those of others who served with you in the Punjabi Police Force nor did you dissociated yourself from the organisation for which you worked for 38 years. In fact the only dissatisfaction that you expressed about the use of such*

> *methods was that they were used by some to get faster promotions.*
>
> *Given the above, there are reasonable grounds to believe that you are a member of the inadmissible class of persons described in subsection 35(1)(a) of the Immigration and Refugee Protection Act.*

ISSUE

[7] The issue is whether the First Secretary applied the correct legal test in coming to the conclusion that the Principal Applicant committed crimes against humanity.

ANALYSIS

[8] It is admitted that the Principal Applicant, at least on one or two occasions, committed acts of violence against civilians. It is further admitted that he delivered persons, largely civilians, to others who committed such acts. He did not endeavour to disassociate himself from the PPF or those conducting such activities.

[9] In order to constitute a crime against humanity, the Supreme Court of Canada in *Mugusera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 enumerated four elements that must be established. Joint reasons were written, which said at paragraph 119:

> ***119*** *As we shall see, based on the provisions of the Criminal Code and the principles of international law, a criminal act rises to the level of a crime against humanity when four elements 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.*

[10] Of particular concern in the present case is whether the attacks were either widespread or systematic. These concepts were described by the Supreme Court at paragraphs 154 to 156 of *Mugusera*:

> ***154*** *A widespread attack "may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims" -- it need not be carried out pursuant to a specific strategy, policy or plan: Akayesu, Trial Chamber, at para. 580; and Prosecutor v. Kayishema, Case No. ICTR-95-1-T (Trial Chamber II), 21 May 1999, at para. 123. It may consist of a number of acts or of one act of great magnitude: Mettraux, at p. 260.*
>
> ***155*** *A systematic attack is one that is "thoroughly organised and follow[s] a regular pattern on the basis of a common policy involving substantial public or private resources" and is "carried out pursuant to a ... policy or plan", although the policy need not be an official state policy and the number of victims affected is not determinative: Akayesu, Trial Chamber, at para. 580; and Kayishema, at para. 123. As noted by the ICTY's Trial Chamber in Kunarac, at para. 429: "The adjective 'systematic' signifies the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes -- that is the non-accidental repetition of similar criminal conduct on a regular basis -- are a common expression of such systematic occurrence."*
>
> ***156*** *An attack need be only widespread* or *systematic to come within the scope of s. 7(3.76), not both: Tadic, Trial Chamber, at para. 648; Kayishema, at para. 123. The widespread or systematic nature of the attack will ultimately be determined by examining the means, methods, resources and results of the attack upon a civilian population: Kunarac, at para. 430. Only the attack needs to be widespread or systematic, not the act of the accused. The IAD, relying on Sivakumar, appears to have confused these notions, and to the extent that it did, it erred in law. Even a single act may constitute a crime against humanity as long as the attack it forms a part of is widespread or systematic and is directed against a [page160] civilian population: Prosecutor v. Mrksic, Radic and Sljivancanin, 108 ILR 53 (ICTY, Trial Chamber I 1996), at para. 30.*

[11] In the present case, the concern is whether the First Secretary directed his mind to whether the attacks which were committed by the Principal Applicant personally or by others in the PPF to whom he delivered persons or of which he had knowledge, were either “widespread” or “systematic” as defined by the Supreme Court of Canada.

[12] I have no doubt, particularly in reading the CAIPS notes set out earlier in these reasons, that the First Secretary addressed his mind not only to the acts of violence; but also to the scale of the acts carried out by the PPF, the multiplicity of victims, that the PPF carried out such attacks as part of a policy, the “persistent culture” , and that they were not simply random or accidental. In other words, the acts were both widespread and systematic, even though they needed only to be one or the other to constitute a crime against humanity.

[13] The next question is whether the reasons, including the CAIPS notes, make it sufficiently clear that the First Secretary directed his mind to the issue as to whether the attacks were widespread or systematic. The letter of 8 March 2010 does not. However, I find that the CAIPS notes make it sufficiently clear that the mind of the First Secretary was appropriately directed to the issues. One is not required to hold such a person to a standard of clarity and legal analysis that would impress even the most critical reader. It is enough that it be sufficiently clear that the relevant issues were addressed. Here, it is sufficiently clear.

[14] Given that the First Secretary's mind was directed to the appropriate issues, the determinations made on the evidence I find to be reasonable and correct and should not be set aside. Accordingly, the application will be dismissed. No party requested a certified question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question is to be certified; and

3. No Order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2116-10
STYLE OF CAUSE:	SARDUL SINGH WARAINCH, DALBIR KAUR WARAINCH and SUKHWINDER KAUR WARAINCH v. THE MINISTER OF CITIZENSHIP & IMMIGRATION
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