Federal Court Cour fédérale

Date: 20120720

Docket: IMM-489-12

Citation: 2012 FC 905

Montréal, Quebec, July 20, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ERNIE VILLEGAS LUMOCSO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] [1] It is understood that the rule of law and the recognition of international law, therein, cannot be a recipe for society's suicide in the midst of the chaos of terror. Exceptional circumstances necessitate exceptional responses; yet, the rule of law cannot be held hostage to chaos, it must be acknowledged as an antidote for recalibration of society's equilibrium-barometer throughout, or, at the very least, restored in an incremental manner, if not completely, at the first opportunity for its ultimate "desired" retrieval.

How the war on violence is waged and the limits it imposes on itself, in our time, are components of the same equation of society's measurement of its past action – each component to be weighed on an on-going basis.

> In the fight to subjugate violence bred of terror, at what cost is law set aside; and thus, the deepest values, the law embodies, held in abeyance, or even discarded – when the innocent and the guilty are undistinguished from one another. A reflection for judgment becomes "a luxury" that certain authorities deem dispensable due to the danger of annihilation in the midst of chaos.
>
> Can the pendulum of the law and justice be recalibrated or can its recalibration even be contemplated in the heat of the action? Is there a possibility that the law, too, then, together with life, becomes a casualty irretrievably lost to the deemed indiscriminate danger of annihilation? Is the rule of law, simply, to be considered as a reflection of serenity's hindsight, not appropriate for consideration on the battlefield of chaos?
>
> In that situation, measured or weighed, response or strategy is deemed by certain authorities to be the naïveté of those distant from danger's battlefield, not engaged or caught up in the heat or line of fire of the situation.
>
> If that would be the case, the rule of law and the recognition of international law, therein, would no longer have a place in society. The rule of law cannot simply be a bystander when chaos reigns; it must serve as an eventual witness; thus, it formulates a response to the disproportionate use of force, as used by units such as the one to which the Applicant belonged.
>
> Furthermore, it must be recognized that a particular background, setting and context to **the human condition of a specific situation must be examined, in and of itself, before it can be compared to any other particular background, setting and context** to the human condition, unfolding, or unfolded, **elsewhere**.

As the undersigned, himself, had written in a decision, *Petrov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 465, the same holds as such in this decision.

II. Introduction

[2] The Applicant, who was an intelligence official in the Armed Forces of the Philippines [AFP], was denied refugee protection because there were serious grounds to consider that he had participated, as an accomplice, in crimes against humanity committed by the AFP.

[3] The following excerpts describe the context:

> Two ongoing conflicts and resulting counter-insurgency operations contextualise the third vulnerable group consisting of suspected insurgents and sympathizers. The first conflict is that between the AFP and the armed wing of the Communist Party of the Philippines (CPP) the New People's Army (NPA), the second that between the AFP and Muslim secessionists in Mindanao. In both situations those who are thought to be associated with or sympathetic to the insurgent groups are at a higher risk of torture and other grave human rights violations.
>
> …
>
> Individuals, groups and communities associated with the Moro Islamic Liberation Front (MILF), the Moro National Liberation front (MNLF), the Abu Sayyaf and related factions <u>have also faced increased risks of torture and other grave human rights violations in the context of counter-insurgency campaigns</u>. [Emphasis added].

(Exhibit M-16, entitled, Philippines: Torture persists: appearance and reality within the criminal justice system, from Amnesty International, dated January 2003, Tribunal Record [TR] at p 398).

[4] Having considered the evidence and the applicable law, the intervention of this Court is not warranted.

III. <u>Judicial Procedure</u>

[5] This is an application, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board [Board], dated January 3, 2012, in which the Applicant's refugee protection claim was rejected due to serious reasons to consider that he has committed crimes against humanity.

IV. <u>Background</u>

[6] The Applicant, Mr. Ernie Villegas Lumocso, is a citizen of the Republic of the Philippines.

[7] The Applicant was a member of the AFP from December 1995 to August 2007. He acted successively as a soldier, a radio operator, an intelligence operator, and as a team leader in the Intelligence Service of the Armed Forces of the Philippines [ISAP].

[8] As an intelligence officer, the Applicant tracked members of the Abu Sayyaf separatist organization and arrested the leader of the organization, named Galib Andang "Commander Robot", in December 2003.

[9] The Applicant entered Canada on August 6, 2007 with a visitor's visa <u>for the purpose of the study of the English language as a part of a military training program</u>.

[10] Should he return to his country of origin, the Applicant alleges a fear of persecution by the Abu Sayyaf separatist organization due to his participation in the arrest of its leader.

V. <u>Decision under Review</u>

[11] The Board excluded the Applicant from the benefit of refugee protection pursuant to section 98 of the *IRPA* and sections 1F(*a*) and 1F(*c*) of the *United Nations Convention relating to the Status of Refugees* [*Convention*].

[12] The Board relied on the documentary evidence demonstrating the existence of serious grounds to consider that the AFP had committed crimes against humanity. The Board had confronted the Applicant with the evidence.

[13] The Board found that serious grounds exist by which to consider that the Applicant had participated in crimes against humanity as an accomplice during his military service. To support its conclusion, the Board considered the six criteria stated by this Court in *Ryivuze v Canada (Minister of Citizenship and Immigration)*, 2007 FC 134, 325 FTR 30.

[14] With respect to the nature of the organization, itself, the Board recognized the army's overall legitimate role.

[15] With regard to the method of recruitment, the Board concluded that the Applicant was not recruited forcibly and joined the AFP voluntarily because it provided stable employment.

[16] Concerning the third criterion, which is the position in the organization, the Board explained that the exceptional service rendered by the Applicant to the AFP allowed him to reach the rank of a technical sergeant. He was an active member of the intelligence in the global war against the Abu Sayyaf terrorist group conducted by the AFP.

[17] Regarding the Applicant's knowledge of the atrocities committed within his organization, the Board compared the documentary evidence to the Applicant's testimony. According to the Applicant, the crimes were committed by the communists and Abu Sayyaf and not by the army.

[18] The Board preferred the documentary evidence to that of the Applicant. The Board found that the Applicant had actively been involved as an intelligence official and had acted with wilful

blindness (*Shakarabi v Canada (Minister of Citizenship and Immigration)* (1998), 145 FTR 297, [1998] FCJ No 444 (QL/Lexis)).

[19] With respect to the length of time in the organization, the Board noted that the Applicant was a member of the AFP for a considerable period of time, from the beginning of December 1995 until August 2007.

[20] With regard to the Applicant's opportunity to leave the organization, the Board noted that the Applicant even wore his military uniform to the Board hearings and he had remained an AFP member even subsequent to his arrival in Canada to study English. Eventually, he alleges that he would be considered a deserter. The Board concluded that the Applicant neither chose nor wanted to be disassociated from the AFP.

VI. <u>Issue</u>

[21] Is the Board's decision to exclude the Applicant from refugee protection for complicity in crimes against humanity, pursuant to section 98 of the *IRPA*, reasonable?

VII. <u>Relevant Legislative Provisions</u>

[22] The following legislative provision of the *IRPA* is relevant:

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.

[23] The following legislative provisions of the *Convention* scheduled to the *IRPA* are relevant:

SCHEDULE	**ANNEXE**
(Subsection 2(1))	**(paragraphe 2(1))**
SECTIONS E AND F OF ARTICLE 1 OF THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES	**SECTIONS E ET F DE L'ARTICLE PREMIER DE LA CONVENTION DES NATIONS UNIES RELATIVE AU STATUT DES RÉFUGIÉS**
E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.	**E.** Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.
F. The provisions of this Convention shall not apply to any person with respect to 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;
(*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	*b*) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
(*c*) he has been guilty of acts	*c*) Qu'elles se sont rendues

contrary to the purposes and principles of the United Nations.	coupables d'agissements contraires aux buts et aux principes des Nations Unies.

VIII. Position of the Parties

[24] The Applicant submits that the Board failed to provide reasons in support of several of the criteria of *Ryivuze*, above, relating to the method of recruitment. In addition, the Applicant argues that the Board failed to establish a link between his position and his alleged complicity in crimes against humanity. The Applicant explains that his role was not one of leadership and that he was simply subordinate to his officers' orders. He contends that his mission to capture the leader of the Abu Sayyaf group was a legitimate one. He added that, in an armed conflict, civilians are regrettably victims of human rights violations.

[25] The Applicant, then, argues that *Shakarabi*, above, does not apply to his case as he acted against a terrorist group, not against civilians, and that the AFP has no brutal purpose; therefore, the information he obtained as an intelligence officer did not concern the innocent population but rather an internal enemy.

[26] The Applicant submits that the Board omitted to address the sixth criterion and, furthermore, did not question his credibility. Consequently, his testimony to the effect that he had not participated in crimes against humanity should have been believed. The Applicant adds that the Board failed to address the country of origin's documentary evidence and, specifically, his certification from the Human Rights Commission, therein.

[27] The Respondent submits that, according to the documentary evidence, the Board's finding that the AFP is an organization that has committed crimes against humanity is reasonable in light of the evidence.

[28] With respect to the Applicant's complicity, the Respondent contends that the Board, having recognized the active role the Applicant played as an intelligence official, was entitled to find that the Applicant was complicit in crimes against humanity, especially, given the fact that the documentary evidence demonstrates crimes were committed in the same region where the Applicant operated.

[29] The Respondent argues that the reasons given by the Board should be read as a whole, not microscopically, and that they are supported by the jurisprudence of this Court.

IX. Analysis

[30] The decision to exclude the Applicant from the definition of refugee under subsections 1F(*a*) and (*c*) of the *Convention* is reviewable under the standard of reasonableness; therefore, the Board's conclusion must fall in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47; *Ryivuze*, above).

[31] Furthermore, according to the Supreme Court of Canada, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of

possible outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 14).

[32] It should also be noted that the words "serious reasons for considering that", pursuant to section 1F of the *Convention*, refers to a burden of proof less onerous than the civil burden of proof on a balance of probabilities (*Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306).

[33] This Court is of the opinion that the Board provided a detailed analysis that gave sufficient reasons to support its conclusion.

Crimes against Humanity

[34] The Applicant's own admission of the existence of serious grounds to consider that the AFP had committed crimes against humanity is significant, despite the fact that the Board itself did not qualify the AFP as an organization with a limited brutal purpose.

[35] Given the documentary evidence assessed and the context of the Applicant's admission, the Applicant has not demonstrated that the Board erred in its finding that the AFP had committed crimes against humanity as per section 7 of the *Rome Statute of the International Criminal Court*, adopted on July 17, 1998.

[36] The evidence cited by the Board demonstrated unequivocally that these crimes were committed as part of a widespread or systematic attack directed against a civilian population and

were in the nature of crimes against humanity (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39, [2005] 2 SCR 91).

[37] The Board specifically focused its analysis on the human rights violations against civilians that had been committed by the AFP during its war against the Abu Sayyaf separatist organization (Board's Decision at paras 13-16).

Complicity

[38] The main issue raised by the Applicant concerns his complicity. Essentially, he denies knowledge of the AFP's crimes against humanity given the methods and activities of the organization in its military role.

[39] Complicity is based on the existence of a shared common purpose and knowledge that a said individual has of the commission of the specific crimes discussed (*Ishaku v Canada (Minister of Citizenship and Immigration)*, 2011 FC 44 at para 57; *Thomas v Canada (Minister of Citizenship and Immigration)*, 2007 FC 838).

[40] As stated by the Federal Court of Appeal, it must be recognized that "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 [militant segment of the] population does not mean that he will escape the exclusion, if he is an accomplice by association as well" (*Harb v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39 at para 11).

[41] The Board did not qualify the AFP as an organization with a limited brutal purpose. To the contrary, the Board conceded that the AFP is an organization with a legitimate purpose despite the ample documentary evidence that demonstrates that this organization does not always act within the limits of the law and that it does commit human rights violations. The Board did correctly set out the applicable law in the present case.

[42] The Board did not commit a reviewable error when it referred to the case of *Shakarabi*, above, in its analysis, which had been involved with an entity that had a limited brutal purpose. To the contrary, the Board demonstrated how the Applicant would or should have been aware of the crimes committed. As stated in *Tayar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 567:

> [26] According to the case law, where an individual is or should be aware that information the individual provides to a group responsible for committing crimes against humanity, or information that may have harmful consequences for the persons it concerns (such as torture, rape, imprisonment without being charged or tried, mass expulsion of civilians from their territory), a panel may reasonably conclude that the individual was complicit, as that term is understood in international criminal law, in the crimes against humanity so committed … [Emphasis added].

[43] The Board did not apply a presumption of knowledge as the Applicant contends. Rather, the mental element or *mens rea* required was not inferred because of his mere membership; rather, the Board conducted a detailed analysis to demonstrate how the Applicant had been an accomplice in the commission of crimes against humanity.

[44] In the present case, applying the criteria of *Ryivuze*, above, the Board noted *inter alia* that the Applicant:

a) Joined the AFP voluntarily and had been a member for 12 years;

b) While he was not an officer, he had been a sergeant in a high-ranking position and had acted as an intelligence officer;

c) Had excellent military service that provided him with the opportunity as a result to progress within the army hierarchy;

d) Gathered information and conducted investigations that led to the arrest of the leader of the Abu Sayyaf group;

e) Provided information to soldiers by which to neutralize the leader of the Abu Sayyaf group;

f) Conducted interrogations;

g) Had an active role in the operations conducted by the ISAP by which to arrest Abu Sayyaf organization members and the commander himself, in December 2003;

h) Admitted having heard of the atrocities against civilians through the media, but denied that the AFP had been the author of such atrocities;

i) Entered Canada due to the AFP in order to learn English for its needs;

j) Wore his uniform during the Board's hearings and remained associated with the AFP even subsequent to his arrival in Canada.

[45] All of these findings are not contested by the Applicant. They led the Board to the conclusion that the Applicant had knowingly participated in the commission of the crimes against humanity by the AFP. On this matter, itself, the Court disagrees with the Applicant, who contends that the Board did not provide sufficient reasons.

[46] It is clear that the position held by the Applicant had had an impact on the Board's negative inference subsequent to the Federal Court of Appeal's decision in *Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433, [1993] FCJ No 1145 (QL/Lexis) (CA):

> **10** In my view, the case for an individual's complicity in international crimes committed by his or her organization is stronger if the individual member in question holds a position of importance within the organization. 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. Thus, remaining in an organization in a leadership position with knowledge that the organization was responsible for crimes against humanity may constitute complicity …

(Reference is also made to *Abbas v Canada (Minister of Citizenship and Immigration)*, 2004 FC 17, 245 FTR 174; *Torkchin v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 113 (QL/Lexis))

[47] The Applicant was an intelligence official who had contributed directly and effectively to the capture of the leader of the enemy organization, the AFP. His efforts had been recognized by the AFP and he had been recommended for the Distinguished Conduct Star Award (TR at p 195).

[48] As noted by the Board, the documentary evidence demonstrates that operations conducted in 2003 involved violence of an inhumane degree which had, in fact, been directed against the civilian population.

[49] Reference is made to Exhibit M-21 which is entitled, "Terrorism and Human Rights in the Philippines Fighting Terror or Terrorizing?". It emanates from the International Federation for Human Rights, dated April 2008, and specifies:

> Along with the President, the Armed Forces of the Philippines (AFP) are one of the main stakeholders in the fight against terrorism. Along with the police, the army is generally pointed out as the main perpetrator of human rights violations in the Philippines: most of the civilians met during the fact finding mission said they were more scared by the army than by terrorist groups.
>
> …
>
> Testimonies collected by the FIDH mission confirm that torture occurs in most cases when the Armed Forces of the Philippines (AFP) and the law enforcement agencies arrest an individual suspected of rebellion or of being an "enemy of the State." Some persons met by the mission spoke about a "culture of torture" within the AFP. Victims met by the mission unanimously pointed out to the responsibility of AFP or the Philippine National Police (PNP). Civilian auxiliaries under the control of AFP are also accused of practicing torture. [Emphasis added].
>
> (TR at pp 676 and 706).

[50] Moreover, Exhibit M-13, entitled, US Department of State Country Report on Human Rights Practices 2002 – Philippines, dated March 31, 2003, states:

> Within the AFP, the CHR observed greater sensitivity to the need to prevent human rights violations. Officers with human rights violations cannot be promoted. Nevertheless, abuses still occurred. Human rights activists complained of abuses by government security forces against suspected ASG and NPA members in captivity. According to the Moro Human Rights Center, members of the AFP frequently beat ASG suspects.
>
> The CHR documented one case of torture from January through June; TFDP reported seven cases from January through June. The AFP was implicated in many of these cases.
>
> On March 31, AFP units reportedly beat 27 suspected ASG members in Zamboanga City. The 27 complained that they were tied, blindfolded, and punched until they admitted to membership in the ASG. As of July, the authorities still detained seven, including two minors, in the Basilan provincial jail. The rest had been released.
>
> (TR at pp 291-292).

[51] Finally, with regard to the certification from the Philippine Commission on Human Rights, it is noted that the Board is not obligated to mention every piece of evidence submitted;

furthermore, the relevance of this document was not demonstrated by the Applicant. It provides only information to the effect that, as of September 2010, the Applicant had not had any cases pending against him (TR at p 201).

[52] Having regard to the evidence and the applicable law, this Court is of the opinion that the Board's decision is reasonable.

X. Conclusion

[53] For all of the above reasons, the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be dismissed.

No question of general importance for certification.

Obiter:

Any decision is, of course, not only a dialogue with, and between, the parties themselves; but, it is also a silent dialogue between the three branches of government, (each within its limits, exercising restraint): recognizing, that the executive branch decides the direction of government and implements legislation by initiating, managing and executing policies inherent to, and flowing from, legislation; the legislative branch approves and enacts or passes legislation; the judiciary interprets and applies legislation.

For this dialogical process, the constitution, in its supremacy, serves as a guide for the three branches of government. The legislative branch is not to enact legislation that would subject anyone to cruel and unusual treatment or punishment; neither is the executive branch to deprive anyone of their right to life, liberty and security of the person, except in accordance with the principles of fundamental justice.

In the case at bar, the gamut does not end with this decision. It is left to the executive branch to act and effect the next step, which is, now, its alone to take, within its jurisdiction [subsequent to an eventual Pre-Removal Risk Assessment on which a determination will be made as to whether the Applicant's life is in peril due to potential pursuit further to his having been directly instrumental in the arrest of a renowned terrorist organization leader]. [Emphasis added].

The obiter, in large measure, is drawn from an obiter to a decision of the undersigned wherein potential peril to the Applicant was considered a likelihood (*Soe v Canada (Minister of Citizenship and Immigration)*, 2007 FC 671).

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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