Federal Court  Cour fédérale

Date: 20141008

Docket: IMM-728-14

Citation: 2014 FC 955

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, October 8, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

EDOUARD NDIKUMASABO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Preliminary

[1] "[I]t is not a matter of intelligence or stupidity. A person who does not know that silent intercourse (in which we examine what we say and what we do) will not mind contradicting himself, and this means he will never be either able or willing to account for what he says or does; nor will he mind committing any crime, since he can count on its being forgotten the next moment." (Hannah Arendt)

[2] "(T)he closer a person is to being involved in the decision-making process and the less he or she does to prevent the commission of a crime against humanity, the more likely criminal responsibility will attach". This excerpt stems from an observation made on the case law pronounced by Chief Justice Crampton in *Kathiripillai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1172 at para 18 [*Kathiripillai*].

II. Introduction

[3] In spring 1972, following the assassination of King Ntare V and the Hutu uprising in southern Burundi, predominantly Tutsi groups massacred, tortured and imprisoned hundreds of thousands of, mainly Hutu, people, the result of ethnic divides and political and ethnic tensions.

[4] 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 of the Refugee Protection Division [RPD] dated November 28, 2013, finding that the applicant is neither a Convention refugee nor a person in need of protection under Article 1(F)(a) of the *United Nations Convention Relating to the Status of Refugees* [the Convention].

[5] The RPD concluded that there were serious reasons for considering that the applicant voluntarily made a significant and knowing contribution to the crimes against humanity largely attributed to the Burundi government, especially the Ministry of the Interior, and to regional governors and commissioners.

[6] The Court finds that it was not unreasonable for the RPD to conclude that the applicant was excluded from the definition of refugee under Article 1(F)(a) of the Convention.

III. Facts

[7] The applicant, a Burundi citizen and an ethnic Tutsi, alleges that he fears the former rebels of the National Liberation Forces [*Forces nationales de libération*, FNL], Hutu extremists who attack Tutsis in revenge.

[8] The applicant claims that he was a district commissioner in the Gitega and Ngozi provinces between 1966 and 1971. The respondent, however, submits that the applicant occupied these same positions from 1962 to 1972, that is, during the April, May and June 1972 massacres.

[9] On November 11, 1993, while the applicant was in the country with relatives, a group of Hutu rebels burst into the house they were in and killed his half-brother, his half-brother's wife and their two children. The applicant was shot in the leg. Believing him to be dead, the rebels left him there. In April 2009, the applicant filed a complaint with the police, reporting three former rebels who had committed crimes in the recognized colline near his home. After reporting them, the applicant received death threats. In 2008, the applicant's wife was assaulted, inciting her to leave the country and to obtain refugee protection in Belgium.

[10] In the night of April 1, 2010, individuals tried to break into the applicant's home. During this attack, the applicant's two dogs were killed. The applicant alleges that the attack was led by former FNL rebels as a result of his denunciation.

[11] Following these events, the applicant left Burundi and fled to the United States, where he stayed for two days before claiming refugee protection in Canada, on August 27, 2010.

IV. Decision

A. *Applicant's credibility*

[12] In the decision leading to this application for judicial review, the decisive factual issue identified by the RPD is whether the applicant was indeed district chief of the Gitega and Ngozi provinces at the time of the crimes committed in spring 1972.

[13] The RPD concluded that the applicant lacked credibility in several respects as a result of the many contradictions in his written and oral evidence, particularly with respect to his employment between 1962 and 1972.

[14] The RPD noted that the evidence submitted by the applicant, such as the immigration questionnaire, the Personal Information Form [PIF] and the testimony at the hearing, established that the applicant attempted on several occasions to amend the periods during which he was district chief in order to eliminate the key period, namely spring 1972.

B. *Applicant's complicity leading to his exclusion under Article 1(F)(a)*

[15] The RPD concluded that the applicant acted as an intermediary between the governor and the commune administrator, and fulfilled a wide range of duties. The RPD noted that the applicant held a position in the Ministry of the Interior as district chief from 1962 to 1972. He

therefore took orders from the governors of the Gitega and Ngozi provinces and was responsible for 20 or so employees.

[16] In light of all the evidence, the RPD concluded that there were serious reasons for considering that the applicant voluntarily made a significant and knowing contribution to the crimes against humanity committed in Gitega and Ngozi during his time as district chief in both provinces in spring 1972.

V. Issue

[17] Is the RPD's decision to exclude the applicant under section 98 of the IRPA pursuant to Article 1(F)(a) of the Convention reasonable?

VI. Statuary provisions

Convention refugee	**Définition de « réfugié »**
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,	**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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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) not having a country of nationality, is outside the	b) soit, si elle n'a pas de nationalité et se trouve

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

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

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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

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

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

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris

international standards, and	des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(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 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.	(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 protection.
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.

[18] In addition, Article 1(F)(a) of the Convention stipulates as follows:

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**1F.** 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	a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un rime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des

crimes;	dispositions relatives à ces crimes;

VII. Positions of the parties

[19] First, according to the applicant, the RPD erred in its conclusions regarding his credibility. For example, the RPD erred in his assessment of the evidence by noting that the applicant was a district commissioner from 1962 to 1972 rather than from 1966 to 1971. The applicant alleges that he did not hold the position of district commissioner at the time of the crimes perpetrated in spring 1972.

[20] The applicant alleges that his duties as a district commissioner were of a strictly administrative nature and that the RPD incorrectly concluded that the applicant had an enforcement and sanctioning power over the population of his district.

[21] The applicant also claims that, given the absence of any evidence of the applicant making a significant contribution to the alleged crimes, the RPD erred in basing its conclusions on assumptions regarding the applicant's complicity. The applicant further submits that the RPD unduly broadened the concept of complicity to include complicity by mere association. The applicant submits that the RPD erred in not establishing a personal connection between the applicant and the alleged crimes.

[22] In contrast, the respondent claims that, as a district commissioner and direct subordinate of the regional governors, who, in turn, were taking orders from the Ministry of the Interior, the

applicant was, at least, complicit in the furtherance of the criminal purpose of the Burundi government at the time.

[23] The respondent alleges that the applicant displayed a lack of credibility given the many contradictions revealed by the evidence, namely, the immigration form, the PIF, the employment confirmation letters and the applicant's oral testimony. According to the respondent, the applicant's first statement, which suggests that he was district commissioner between 1966 and 1972, is the most credible since it was made spontaneously and is consistent with the evidence.

[24] In addition, the applicant attempted to dissociate himself from the crimes of complicity he is said to be responsible for after the fact. The applicant attempted to change the term and the nature of his mandate as district commissioner by eliminating the key period during which the massacres took place from his narrative, thus undermining his credibility.

VIII. Standard of review

[25] Since this is a question of mixed fact and law, the standard of review applicable to the RPD's decision to exclude the applicant from the definition under sections 96 and 98 of the IRPA pursuant to Article 1(F)(a) of the Convention is that of reasonableness (*Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]; *Ryivuze v Canada (Citizenship and Immigration)*, 2007 FC 134 at para 15 [*Ryivuze*]; *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2006 FC 139 at para 13 [*Chowdhury*]).

[26] The standard of reasonableness also applies to the RPD's findings of fact (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Alonso v Canada (Minister of Citizenship and Immigration)*, 2006 FC 575 at para 5 [*Alonso*]).

[27] Reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as 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 SCC 9 at para 47).

IX. Analysis

[28] There is no doubt that the Burundi government, particularly the Ministry of the Interior and the local administrators under its leadership, were complicit in the crimes against humanity committed mainly against the Hutu population in 1972. The documentary evidence reveals that these systematic, generalized crimes were largely perpetrated by people in positions of authority, including in the regional administration.

[29] This Court's role is not to determine whether the applicant personally participated in the crimes perpetrated in Burundi in 1972, but rather whether the RPD's conclusions in this respect are reasonable (*Chowdhury*, above at paras 23-24; *Ryivuze*, above at para 3). In *Alonso*, Justice Pinard wrote as follows:

> [5] The Board may draw conclusions not only concerning inconsistencies in the evidence but also on the basis of the plausibility of the evidence. The Board may make an assessment of the evidence in the context of whether it was in harmony with the preponderance of the probabilities which a person would readily recognize as reasonable in the circumstances. Further, in assessing

> the plausibility of an applicant's evidence, the Board may consider the applicant's story in light of extrinsic criteria such as rationality, common sense and judicial knowledge, all of which require the drawing of inferences.

[30] The standard of proof applicable to the determination of the applicant's exclusion under Article 1(F)(a) of the Convention lies somewhere between "mere suspicion" and the balance of probabilities standard applicable in civil matters (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114; *Kathiripillai*, above at para 20). The burden of proof lies with the respondent, who has to establish that there are "serious reasons for considering" that a person should be excluded from the definition of refugee.

[31] Moreover, according to the doctrine of complicity, the respondent does not have to demonstrate direct involvement or physical presence in the place where the crimes were committed since the law recognizes that a person who did not personally commit the crimes can nonetheless be found responsible on the grounds of the person's voluntary contribution (*Ryiuvuze*, above; *Penate v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 79).

(a) **Voluntary, significant and knowing contribution**

[32] The Supreme Court's decision in *Ezokola*, above, sets out the applicable test for determining whether there was complicity in a crime against peace, a war crime or a crime against humanity under Article 1(F)(a) of the Convention. For mere association to be raised to the level of complicity in a crime (or in a group's criminal purpose), there must be "serious reasons for considering" that a contribution was voluntarily, significant and knowing.

[33] The Court finds that the RPD methodically analyzed complicity based on contribution in addressing the factors developed in the case law and set out in *Ezokola*.

[34] First, the contribution must be voluntary: "To assess the voluntariness of a contribution, decision makers should, for example, consider the method of recruitment by the organization and any opportunity to leave the organization." (*Ezokola* at para 86). The RPD noted that the applicant voluntarily took the position of district commissioner in the Ministry of the Interior and that there was nothing preventing him from leaving this position.

[35] Second, the contribution must be significant and can be directed to "wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes" (*Ezokola* at para 87). The RPD noted that the applicant received orders directly from the governors, specifically the military governor, Jérôme Sinduhije, who was blamed for several crimes, in particular in the applicant's province. The RPD concluded as follows:

> Consequently, given the many duties, tasks and responsibilities of the claimant, the importance of his position, and the prevalence of the crimes committed in his district, the panel finds that the claimant's contribution was significant.
>
> (Decision of the RPD at para 171)

[36] Third, the contribution must have been knowing: "To be complicit in crimes committed by the government, the official must be aware of the government's crime or criminal purpose and aware that his or her conduct will assist in the furtherance of the crime or criminal purpose" (*Ezokola* at para 89). The RPD reasonably concluded that the applicant was aware of the crimes committed by the Ministry of the Interior. The evidence shows that the applicant regularly received instructions from the provincial governors, who, in turn, were receiving their instructions from the Department. The applicant attempted to dissociate himself from the crimes by alleging that he learnt about them on the radio, which the RPD did not find credible. The applicant directly administrated the districts where most of the crimes were committed; therefore, according to the objective and subjective evidence, the chronology of the events and the inherent logic of the case before this Court, it is implausible that the applicant was not aware of the events that occurred on the territory he administered.

(b) **Application of test to establish complicity**

[37] In its reasons, the RPD analyzed each of the factors adopted by the Supreme Court in *Ezokola*, in order to weigh whether the applicant voluntarily made a significant and knowing contribution to the crimes or criminal purpose of the Ministry of the Interior. The factors are as follows:

(i) **The size and nature of the organization.** This factor assesses the "likelihood that the claimant would have known of and participated in the crime or criminal

purpose" (*Ezokola* at para 91). As commissioner of the Gitega and Ngozi districts, the applicant was a member of the Burundi government, at the regional administration level. Considering the size and nature of this organization, it is this Court's view that it was reasonable for the RPD to conclude that the applicant was aware of the government's contributions to the 1972 massacres.

(ii) **The part of the organization with which the claimant was most directly concerned.** The Court notes that the mere occupation of a position within an organization cannot in itself lead to a complicity finding. The degree of complicity increases depending on the nature of the position occupied within the organization. The RPD concluded that as district chief, and with about 20 people under his command, the applicant held a position that likely gave him broad control in the region. The Court finds that it was reasonable for the RPD to draw a negative inference from the applicant's attempts to dissociate himself from the army, the gendarmerie and the police by emphasizing the purely [TRANSLATION] "administrative" nature of his position.

(iii) **The claimant's duties and activities within the organization.** The evidence establishes that the territorial administration of the Gitega and Ngozi provinces, through its actions, contributed to the 1972 massacres. The RPD reasonably concluded that through the nature of his position and duties, the applicant did indeed have an enforcement and sanctioning power over the population of his district. The applicant's duties were broad and included agricultural management, market maintenance, literacy, birth records, hygiene, crop distribution to peasants, support to commune administrators and support to the population. In light of the

applicant's duties, closely related to various aspects affecting the population, including the holding of meetings and managing centralized data concerning the inhabitants of his district, the RPD reasonably concluded that the applicant not only contributed to facilitating the deployment of trucks making it possible to dig graves to bury thousands of bodies, but also led groups of the *Jeunesse révolutionnaire Rwagasore* [revolutionary youth brigade, JRR] for this purpose. Moreover, since the applicant was responsible for sanitation in his district and considering the state of emergency in his country as a whole, the RPD reasonably concluded that the applicant had indeed been involved in "managing" the corpses.

(iv) **The claimant's position and rank in the organization.** As noted by Chief Justice Crampton in *Kathiripillai* at paragraph 18, "the closer a person is to being involved in the decision-making process and the less he or she does to prevent the commission of a crime against humanity, the more likely criminal responsibility will attach". The RPD reasonably observed that the applicant was taking orders from the provincial governor: he was thus second in command in the province. Under his direction, there were district administrators, commune chiefs and colline chiefs, with whom he regularly had to deal and follow up with. His position gave him the power to intervene with commune, colline and zone chiefs, as well as with the JRR, who directly participated in the massacres. The RPD reasonably concluded that the applicant was aware of the decisions made in his district and that he did nothing to dissociate himself from the crimes being committed.

(v) **The length of time the claimant was in the organization.** The Court finds that, for the reasons set out above, the RPD reasonably concluded that the applicant was an employee of Burundi's Ministry of the Interior as district chief between 1962 and 1972.

(vi) **The method by which the claimant was recruited and the claimant's opportunity to leave the organization.** The RPD reasonably concluded that the applicant, having gone through the recruitment process, voluntarily took one or more positions within the state administration as district chief between 1962 and 1972 and continued to occupy this position during the time of the crimes committed in spring 1972.

X. Conclusion

[38] The Court concludes that, based on an in-depth analysis of the evidence and of the test applicable to exclusion under Article 1(F)(a) of the Convention, the RPD reasonably concluded that the applicant was complicit because there are serious reasons for considering that he voluntarily made a significant and knowing contribution to the crimes or criminal purpose of an organization.

[39] Moreover, it is important to note that the applicant, in his own words and through his evidence, established a range of inconsistencies, omissions and changes in his testimony, especially with regard to the nature and the term of the positions he occupied during the time of the massacres. It was therefore reasonable that the RPD gave weight to the applicant's spontaneous replies, such as the information he himself provided in the immigration form and his

own testimony at the hearings (*Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at para 21; *Chavez v Canada (Minister of Citizenship and Immigration)*, 2007 FC 10 at para 14).

[40] For all of the foregoing reasons, the Court concludes that the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. There is no question to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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