Federal Court  Cour fédérale

Date: 20180424

Docket: IMM-3911-17

Citation: 2018 FC 437

Ottawa, Ontario, April 24, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

MOHAMMAD OMAR SARWARY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [Board], dated August 28, 2017, upholding the decision of the Board's Refugee Protection Division [RPD] which determined that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] on

the ground that he is a person described in Article 1F(a) of the *Convention and Protocol Relating to the Status of Refugees* [Refugee Convention].

[2] Through the operation of section 98 of the Act, Article 1F(a) of the Refugee Convention excludes from the ambit of sections 96 and 97 of the Act refugee claimants with respect to whom there are serious reasons for considering that they have committed - or were complicit in - crimes against humanity.

II. Background

A. *The Applicant's Arrival in Canada and Refugee Claim*

[3] The Applicant is a citizen of Afghanistan. He has been a member of the Afghan National Police [ANP] from 1980 to 1992 and then from 2001 to 2013. All those years, he worked within the Afghan prison system, in an administrative capacity.

[4] On September 15, 2013, the Applicant travelled to the United States as part of a group of Afghan officers who had been invited to attend prison reform training. At the time, he held the rank of Lieutenant Colonel in the ANP and was the head of the Detention Office in Kabul. Part way through the training, the Applicant left the United States for Canada where he made a refugee claim. He claimed that he feared returning to Afghanistan because he believed that he would be killed by the Taliban if he returned. He stated that he began receiving threats earlier in 2013 from a group of individuals claiming to be Taliban after he had refused to assist them in facilitating the escape of one individual.

[5] Once in Canada, the Applicant was interviewed on a number of occasions by officers of the Canada Border Services Agency. These interviews were held between October 2013 and July 2014. Subsequent to the interviews, a report under section 44 of the Act was issued against the Applicant. It was alleged that the Applicant was inadmissible to Canada pursuant to section 35 of the Act on grounds of violating human and international rights for 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*, SC 2000, c 24 [*Crimes Against Humanity and War Crimes Act*].

[6] The section 44 report was then referred to the Board's Immigration Division [ID] for an admissibility hearing. As a result, the Applicant's refugee hearing was suspended. However, on January 12, 2016, the referral of the section 44 report to the ID was withdrawn and the Applicant's refugee claim was reactivated. On that same date, the Minister of Public Safety and Emergency Preparedness [Minister] filed a Notice of Intervention before the RPD, claiming that there were serious reasons for considering that the Applicant was a member of the ANP, that the ANP had engaged in crimes against humanity and that the Applicant was complicit in such crimes.

B. *The RPD Decision*

[7] The Applicant's hearing before the RPD was held on September 22, 2016. In its decision dated October 22, 2016, the RPD assessed the *Ezokola* factors (*Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]). Based on its assessment of those factors, it concluded that on a balance of probabilities, given the length of time he worked in the Afghan

prison system and the rank he reached in the ANP, the Applicant would have been aware of the systemic and prevalent mistreatment of prisoners and use of torture in Afghan prisons.

[8] The RPD found that the Applicant's claim that he never observed or suspected anyone being mistreated or tortured in the prisons where he worked was not credible in light of objective reports indicating that the use of torture was systemic in Afghan prisons during the periods in which the Applicant worked there.

[9] The RPD's finding of complicity was also based on the fact that the Applicant worked in the Afghan prison system for 24 years and was responsible for the transfer of prisoners in and out of the facility where he worked as well as to other facilities. The RPD concluded that the Applicant had made a significant contribution to the torture of prisoners through his role of transferring prisoners and his administrative work which contributed to the efficiency of a system engaged in crimes against humanity.

C. *The RAD Decision*

[10] Before the RAD, the Applicant did not submit any new evidence or request an oral hearing. On August 21, 2017, in a 62 paragraph decision, the RAD upheld the RPD decision. It first determined that it was not obliged to defer to the RPD's credibility finding because, as this finding was based on the inconsistency between the documentary evidence and a substantial part of the Applicant's testimony, it related to the substance of the testimony, not to any behavioural or other element that only the RPD could observe.

[11] Then, the RAD noted that the definition of crimes against humanity includes "imprisonment, torture, [...] persecution or any other inhumane act or omission that is committed against any civilian population or identifiable group" and that the widespread use of torture in Afghan prisons was uncontested. Based on the documentary evidence from reports by the United Nations Assistance Mission in Afghanistan, Amnesty International and the United States Department of State, the RAD determined that there was a long-lasting prevalence of torture, ill-treatment and substandard conditions in Afghan prisons. Given the pervasiveness of torture, the RAD found that there was sufficient evidence to conclude that the Afghan government was involved in crimes against humanity in its prisons.

[12] To address whether the RPD applied the *Ezokola* factors properly, the RAD first laid out the three components to address complicity, which are voluntary contribution, significant contribution, and knowing contribution, and the six factors to consider when assessing these components. The RAD noted that in some components, some factors are more relevant and should be given more weight. The RAD explained that though the Applicant's argument centred on whether he had made a significant contribution to crimes against humanity, it was helpful to consider all three components.

[13] The RAD agreed with the RPD that there are serious reasons to consider that the Applicant voluntarily contributed to the Afghan prisons' criminal purpose. This conclusion was based on the fact that the Applicant applied for a position in the Afghan prison system on two separate occasions, he accepted promotions, and when he requested transfers he was told that with his experience he would be difficult to replace. The RAD did not give significant weight to

the Applicant's submissions on the consequences of leaving his position, such as imprisonment, as his family had not been contacted by his superiors or the Ministry of the Interior following his departure. Furthermore, the RAD found it difficult to reconcile the Applicant's statement that he only applied for the position the second time to avoid repercussions with the fact that he chose to return to Afghanistan and the life he led there after ten years in Pakistan.

[14] The RAD rejected the Applicant's central argument that he had not made significant contributions to the prisons' criminal purpose. Contrary to the Applicant's assertion, a finding of complicity does not require that the Applicant commit a positive act or took an action. Rather, the RAD reiterated that *Ezokola* clarified "that the contribution does not have to be directed to specific identifiable crimes but that the contribution can be directed to wider concepts of common design, such as the accomplishment of an organization's purpose by whatever means are necessary including the commission of war crimes" (RAD decision at para 35).

[15] In order to assess whether the Applicant had contributed to the common design of the organization, part of the purpose of which is the extraction of information through the abuse of prisoners, the RAD considered the factors suggested in *Ezokola*. Based on the size and nature of the organization in which the Applicant worked, his duties and activities within the organization, the length of time the Applicant worked for the organization, how long he remained a part of the organization after learning of its crimes against humanity, and his rank within the organization, the RAD concluded that the Applicant contributed significantly to an organization that uses torture to question prisoners.

[16] With respect to the size of the organization, the RAD noted that 10,000 members of the ANP worked in the prison system and that the Applicant's work spanned three facilities, one of which held thousands of prisoners. As to the nature of the organization, the RAD noted that while the prison system did have a legitimate purpose, documentary evidence indicated that the criminal acts were more prevalent. The RAD concluded that though the Afghan prisons were not limited to a brutal purpose, the level of torture and of brutal purpose was quite elevated during the time in which the Applicant was there, increasing the likelihood that he had knowledge of the organization's criminal purpose and that he was contributing to that purpose.

[17] The RAD further concluded that the Applicant's duties and activities within the organization indicate that he was "very involved in the bureaucratic support structure and had a significant amount of contact with the prisoners" (RAD decision at para 40). Without administrative support, the prison system could not have interrogated prisoners, a practice in which torture was used.

[18] The RAD noted that the Applicant was a member of the ANP working in the prison system for 20 years, under two separate regimes, both of which relied on torture as a means of interrogating prisoners. The RAD further noted that *Ezokola* points out that the length of time that the Applicant remained with the organization after learning of its crimes against humanity is particularly important.

[19] The RAD determined that it was more likely than not, given the widespread use of torture by both regimes and the nature of the Applicant's duties within the prison system, that the

Applicant would have become aware of the use of torture early on in both periods of employment. From its examination of the evidence, the RAD concluded that the Applicant's testimony that he had no knowledge of any torture and would have reported it if he had, was not credible, reliable or plausible. The Applicant also provided contradictory evidence such as consistently denying knowledge of any torture or seeing any signs that prisoners were mistreated because he never set foot in the prison and had but minor contact with prisoners, yet he stated he met with prisoners after they were interrogated and mentioned disapproving of the illegal treatment of prisoners, as well as their unequal treatment in matters such as haircuts, visits and drug use. Another example of contradictory evidence is that the Applicant claimed he did not have a great deal of seniority, but also claimed he couldn't leave because his level of experience made him difficult to replace.

[20] The last factor the RAD considered in determining the Applicant's contribution to crimes against humanity was his rank within the organization. The RAD found that there was evidence that the Applicant had more responsibilities within the organization than he claimed and rose to a significant rank over the course of his career. His rise through the ranks in the 1980s, the fact that he was targeted by the Taliban, and that he could not leave or be transferred due to his level of experience corroborate a conclusion that the Applicant was valued, supported the organization's practices, including torture, and contributed in a significant manner.

[21] The RAD rejected the Applicant's argument that the RPD's analysis was based on guilt by association, noting that the United Nations High Commissioner for Refugees stated that individual responsibility can flow from, among other things, aiding and abetting or contributing

to the commission of a crime by a group, or, for those in positions of authority within a military or civilian hierarchy, on the basis of command or superior responsibility. In the Applicant's case, the RAD found that his administrative work and involvement in the transfer or prisoners did not exonerate him as his administrative support enabled the interrogations and torture of prisoners.

[22] The RAD agreed with the RPD that there are serious reasons to consider that the Applicant voluntarily contributed to the Afghan prisons' criminal purpose. This conclusion was based on the fact that the Applicant applied for a position in the Afghan prison system on two separate occasions, he accepted promotions and when he requested transfers he was told that he would be difficult to replace due to his experience. The RAD did not give significant weight to the Applicant's submissions as to the repercussions of leaving his position, such as imprisonment, as his family had not been contacted by his superiors or the Ministry of the Interior following his departure. Furthermore, the RAD found it difficult to reconcile the Applicant's statement that he only applied for the position the second time to avoid repercussions with the fact that he chose to return to Afghanistan and the life he led there after ten years in Pakistan.

[23] Finally, the RAD rejected as unpersuasive the Applicant's argument that the Minister had concluded that the Applicant had not committed a crime against humanity because the Minister did not pursue the inadmissibility proceedings despite interviewing the Applicant several times. The RAD declined to speculate as to why the Minister withdrew the application to have the Applicant declared inadmissible before the ID and noted that it was not bound by the

determination of a party in a different process as it was required to perform an independent assessment based on the evidence before it and to come to its own conclusions.

III. Analysis

A. *Issues and Standard of Review*

[24] The issue to be determined in the present case is whether the RAD committed a reviewable error when it concluded, based on the totality of the evidence before it, that the Applicant was complicit in crimes against humanity as a member of the ANP working in the Afghan prison system and is, therefore, excluded from refugee protection pursuant to the combined effect of section 98 of the Act and Article 1F(a) of the Refugee Convention.

[25] As a general rule, RAD decisions are reviewed under a reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 33-35); this is also the applicable standard when reviewing inadmissibility decisions (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 860 at para 31 [*Ching*]; *Canada (Citizenship and Immigration) v Badriyah*, 2016 FC 1002 at para 15).

[26] The reasonableness standard will be met where the Court is satisfied that the impugned decision falls within a "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New-Brunswick*, 2008 SCC 9 at para 47). It is important to underscore that the Court's role in assessing the reasonableness of the decision of an administrative decision-maker is not to review the evidence and substitute its own findings for

those of the decision-maker (*Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 at para 33; *Canada (Citizenship and Immigration) v Ali*, 2016 FC 709 at para 46).

[27] The issue before the Court, therefore, is not whether the assessment of the evidence that was before the RAD could have led to a different outcome. This is immaterial (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 67; *Amri v Canada (Citizenship and Immigration)*, 2009 FC 925 at para 4). The issue is rather whether the RAD's decision, when considered as a whole, falls within a range of possible, acceptable outcomes.

[28] I have concluded that it does.

B. *Legal Framework*

[29] Section 98 of the Act states that "[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." The RPD and RAD found that the Applicant was a person described in Article 1F(a) as they were both satisfied that there are serious reasons to consider that he was complicit in crimes against humanity. Article 1F(a) of the Refugee Convention states:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

[30] In order to find a person complicit in crimes against humanity, there must be serious reasons for considering that they have voluntarily made a significant and knowing contribution to a group's criminal purpose or to an offence contrary to the *Crimes Against Humanity and War Crimes Act* (*Ezokola* at paras 29, 77 and 84; *Concepcion v Canada (Citizenship and Immigration)*, 2016 FC 544 at paras 9-15; *Hadhiri v Canada (Citizenship and Immigration)*, 2016 FC 1284 at para 20). Mere association or passive acquiescence is not sufficient to conclude that there is complicity (*Ezokola* at para 53, see also paras 70-77).

[31] *Ezokola* sets out the key components of a contribution-based test for determining whether there is complicity in crimes against humanity (*Ezokola* at paras 84-100 in particular). Those components are (1) the voluntary contribution to the crime or criminal purpose; (2) a significant contribution to the group's crime or criminal purpose; and (3) a knowing contribution to the crime or criminal purpose (*Ezokola* at paras 86-90). It lists several factors for determining if an individual's conduct meets the *actus reus* and *mens rea* for complicity (*Ezokola* at para 91). These factors are:

1) The size and nature of the organization;

2) The part of the organization with which the claimant was most directly concerned;

3) The claimant's duties and activities within the organization;

4) The claimant's position or rank within the organization;

5) The length of time the claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal activity;

6) The method by which the claimant was recruited and the claimant's opportunity to leave the organization.

[32] The applicable burden of proof in those cases is "serious reasons to consider," an evidentiary burden requiring more than a mere suspicion but less than a balance of probabilities (*Ching* at para 34; *Ezokola* at para 101). This evidentiary burden falls on the party seeking the applicant's exclusion (*Ezokola* at para 29).

C. *Was the RAD's Decision Reasonable?*

[33] The Applicant argues two main points in support of his contention that the RAD erred in determining that he is a person described in Article 1F(a) of the Refugee Convention.

[34] First, the Applicant submits that the RAD erred in its *Ezokola* analysis by misinterpreting the meaning of complicity and by coming up, as a result, with a finding of guilt by association. The Applicant argues that his individual complicity was not established as there is no direct or indirect evidence that he voluntarily made a significant and knowing contribution to the crimes committed within the Afghan prison system.

[35] Second, the Applicant argues that the Minister and its officials are the real experts in admissibility issues, not the RAD. Therefore, given that that Minister withdrew its referral of the section 44 report to the ID for an admissibility hearing, and given how inconceivable it is that it would do so if the Applicant was in fact inadmissible, the RAD should have also concluded that the Applicant was not inadmissible.

[36] Both arguments must fail.

(1) The *Ezokola* Analysis Argument

(a) *Voluntary Contribution*

[37] The Applicant argues that the RAD erred in finding that he had voluntarily contributed to the ANP's torture of prisoners. In particular, he contends that the RAD erred in concluding that the fact the Applicant's family had not heard from his supervisors after he left outweighed his testimony in which he claimed fearing repercussions from the Afghan authorities if he left the ANP. The Applicant claims that his superiors could not contact his family as they had moved after receiving several calls from the Taliban.

[38] I disagree with the Applicant's assessment of the RAD's conclusion of voluntary contribution. The RAD was faced with contradictory evidence: on the one hand, the Applicant claimed that there are significant repercussions for those who leave the ANP other than through retirement, on the other, the Applicant's family, which has remained in Afghanistan, has not heard from his superiors or the Ministry of the Interior (RAD decision at paras 31-32). With regard to any contradictions in the evidence before it, it is up to the RAD to determine how it will weigh that evidence; as stated previously, the deference owed on judicial review does not permit the Court to re-weigh the evidence unless such weighing is unreasonable, which is not the case here. Furthermore, contrary to the Applicant's assertions, the repercussions for leaving the ANP are but one of the factors the RAD considered in concluding that the Applicant made a voluntary contribution.

[39] As the Supreme Court of Canada clearly set out in *Ezokola*, certain factors, such as voluntary joining an organization with a criminal purpose, opportunities for leaving the organization, remaining with that organization for a long period of time, particularly after gaining knowledge of the organization's criminal purpose, and holding a position of authority or a high rank within the organization, favour a conclusion that the contribution was voluntary (*Ezokola* at paras 97-99). In the present case, the Applicant applied for positions within the ANP on two occasions, the second after ten years living outside the country, worked in the Afghan prison system for more than 24 years, accepted promotions within the ANP, rising until there were but four ranks above him, was informed that his experience made him difficult to replace, and his family has faced no repercussions since he left his positions abruptly during training in the United States.

[40] In my view, in light of the totality of the evidence on record, it was reasonably open to the RAD to conclude that there are serious reasons for considering that the Applicant voluntary contributed to the ANP's torture of prisoners.

(b) *Significant Contribution*

[41] The Applicant submits that neither the Minister, the RPD, nor the RAD found any evidence that he made a significant contribution to torture as a crime against humanity and argues that, based on excerpts pulled from the RAD's decision, the RAD found the Applicant guilty by association. The Applicant further implies that the RAD relied on a burden of proof of mere suspicion in reaching its conclusion on this *Ezokola* factor.

[42] Again, I disagree with the Applicant. In considering whether there were serious reasons to conclude that the Applicant had made a significant contribution to the crimes against humanity perpetrated by the ANP in Afghan prisons, the RAD conducted a broad and detailed analysis of the *Ezokola* factors. The RAD's assessment of these factors and its conclusion in this respect was reasonable, and does not consist of finding the Applicant "guilty by association." Furthermore, there is nothing in the RAD decision to support the Applicant's allegation that the RAD applied the wrong burden of proof. On the contrary, the RAD's decision demonstrates serious reasons for considering that the Applicant was complicit in crimes against humanity.

[43] In its decision, the RAD provided a clear and well-reasoned explanation as to why the size and nature of the ANP within the Afghan prison system favour of the significance of the Applicant's contribution:

> The Supreme Court of Canada in *Ezokola* also directs us to consider whether the organization had both legitimate and criminal acts, or it had a limited and brutal purpose. If limited and brutal, the likelihood of the participation and knowledge of the criminal purpose is higher. In this case, the prisons system had some of both. However, the distinctions are not on one extreme or the other. There is an area in between. In this case, the prison system did have some legitimate acts; however, the criminal acts were, according to the objective documentary evidence, as prevalent if not more so. While it may not be limited to solely a brutal purpose alone, the level of torture and brutal purpose was extremely high in the prisons in Afghanistan when the appellant was working in them. This does increase the likelihood that the appellant had knowledge of the organization's criminal purpose and that his conduct contributed to the purpose.
>
> (RAD decision at para 39)

[44] The Applicant argues that this is why the RAD found him complicit by association. However, although this factor alone does not provide reasonable grounds to believe that the

Applicant was complicit in crimes against humanity, it certainly contributes to such conclusion (*Ezokola* at para 94). When considered in combination with the length of time the Applicant remained in the organization, particularly given the fact that he must have known at the very early stages of his career in the Afghan prison system that the ANP engages in torture, as well as his rank, duties and activities within the ANP, the RAD's conclusion as to the significance of the Applicant's contribution is, in my view, entirely reasonable.

[45] In determining when, in his career of over 20-years in the ANP, the Applicant discovered that the organization engaged in torture, the RAD was faced with contradictions between the well documented prevalence of torture in the Afghan prison system and the Applicant's denial of ever having seen conflict-related detainees or evidence of torture. Again, it is not for this Court to reassess the evidence before the RAD, rather it is for the RAD to weigh the evidence before it and for this Court to assess whether its conclusion was reasonable. In the present case, the RAD provided a clear and well-reasoned explanation as to how it assessed the inconsistencies in the Applicant's testimony and reconciled this testimony with the documentary evidence before it. The RAD concluded as follows:

> The appellant did not provide credible evidence about when he knew that there was torture; without such evidence, the decision-maker must make the determination on the reliable evidence that is before it. In this case, the evidence of the prevalence of torture, the timing of the appellant's involvement, and the nature of his duties is such that the appellant must have known it existed at the very early stages of any employment at the prisons that he worked at. Certainly, as his duties involved seeing detainees after they had been questioned, it is more likely than not that he would have seen signs of torture at early stages of his positions at the different facilities that he worked in.
>
> (RAD decision at para 50)

[46] Despite the RAD's clear, intelligible and well-reasoned assessment of the factors contributing to the Applicant's complicity in crimes against humanity perpetrated in Afghanistan's prison system, the Applicant argues that his individual responsibility was not established and that the entirety of the RAD's decision is tainted by guilt by association.

[47] This is incorrect. First, by its very nature, complicity does not require that the individual personally commit the criminal act, but rather that they contribute to it, either directly, or through their role in an organization's criminal purpose (*Ezokola* at paras 7-8).

[48] Second, the RAD clearly addressed this argument it its decision, explaining how the Applicant contributed to the Afghan prison system, a system that uses torture to interrogate prisoners, even though he did not personally torture prisoners:

> Further, the administration and paper work and transferring the prisoners did not exonerate the appellant as the administrative support enabled the interrogations and torture to occur. He was at the prisons themselves, and while he stated that he did not go to the cell blocks, he was not in a central office at a different location. He processed paper work to make certain that the appellants (sic) were present and accounted for. He questioned the prisoners himself. He trained new policemen. He transferred prisoners, sometimes by plane. He was the head of three departments. He was responsible for the work of a considerable staff. He made a significant contribution.
>
> (RAD decision at para 57)

[49] Based on the evidence that was before the RAD and its assessment of the factors stated in *Ezokola*, notably the Applicant's rank, role within the Afghan prison system, and the length of his service, I am unable to find that the RAD's conclusion that there are serious reasons to

believe that the Applicant significantly contributed to a system that used torture to interrogate prisoners falls outside the range of possible acceptable outcomes.

(c) *Knowing Contribution*

[50] The Applicant made no argument that the RAD erred in concluding that he made a knowing contribution to crimes against humanity, nor did he argue before the RAD that the RPD had erred in its assessment of this factor. The Respondent did not address this part of the *Ezokola* test at all.

[51] Despite the RAD's brief assessment of this issue, its conclusions are reasonable. The RAD stated that the Applicant's knowledge of the use of torture in the Afghan prison system was addressed when examining his significant contribution (RAD decision at para 58). Based on the documentary evidence and the fact that the Applicant's work was important to his superiors, the RAD concluded that it was more likely than not that the Applicant knew of the torture. I would note that in *Ezokola*, the Supreme Court of Canada explained that "[a] high ranking individual in an organization may be more likely to have knowledge of that organization's crime or criminal purpose" (*Ezokola* at para 97), which supports the RAD's conclusion, as the Applicant had been promoted several times. Furthermore, the Applicant worked in the Afghan prison system for more than 20 years, which increases the likelihood that the Applicant was aware of the torture of prisoners (*Ezokola* at para 98).

[52] In sum, I see no reason to interfere with the RAD's *Ezokola* analysis in this case.

(2) The Minister's decision to not refer the Applicant for an admissibility hearing

[53] The Applicant finds fault with the RAD's unwillingness to give any weight to the fact that the Minister ultimately chose not to refer the section 44 report to an admissibility hearing before the ID.

[54] There is simply no merit to this argument as there is no evidence on record that the Minister's withdrawal of its referral to the ID was in any way, shape or form related to the Minister being of the view that the section 44 report could not be successfully sustained before the ID. As the RAD pointed out, there could have been a myriad of reasons for doing so but at this point, we can only speculate as to what these reasons might have been.

[55] On the other hand, the record shows that the Minister intervened right away in the proceedings before the RPD so as to raise Article 1F(a) concerns (Certified Tribunal Record at 598). It did the same before the RAD (Certified Tribunal Record at 1246). If this is indicative of anything, it is that the Minister still felt that there were serious reasons to consider that the Applicant had been complicit in crimes against humanity as a member of the ANP and that he should therefore be excluded from refugee protection and from the protection of section 97 of the Act.

[56] Be that as it may, it was well within the RAD's jurisdiction and expertise, as an administrative decision-maker separate and distinct from the Minister, to determine that the Applicant was excluded from refugee protection under Article 1F(a) of the Refugee Convention.

It was not bound by the Minister's decision not to refer the section 44 report to the ID, especially given the fact that the Minister's reasons for so doing are unknown and that the Minister made its concerns known to both the RPD and the RAD regarding the Applicant's complicity in the crimes against humanity committed by the ANP.

[57] Therefore, I see nothing wrong with the way the RAD has dealt with that argument.

[58] The Applicant's judicial review application will be dismissed.

[59] At the hearing of this application, the Applicant suggested that this might be a case for a certified question on the issue of the weight the RAD ought to have accorded to the Minister's decision to withdraw the referral of the section 44 report to the ID. However, the Applicant never submitted a proposed question.

[60] In any event, I am satisfied that this particular issue does not transcend the interests of the immediate parties to this case, is not of broad significance or of general importance and would not be dispositive of an appeal (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, at para 9). In other words, this case turns on its own facts and does not lend itself to the certification of a question for appeal.

JUDGMENT IN IMM-3911-17

THIS COURT'S JUDGMENT is that

1. The judicial review application is dismissed;

2. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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