Federal Court  Cour fédérale

Date: 20090522

Docket: IMM-5170-08

Citation: 2009 FC 530

Ottawa, Ontario, May 22, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

IMEDA LIQOKELI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated November 4, 2008, where it found the Applicant to be excluded from protection under Article 1F(a) of the *United Nations Convention Relating to the Status of Refugees* (the Convention) and found, in the alternative, that he was neither a Convention refugee nor a person in need of protection.

Issues

[2] This application raises the following questions:

1. Did the Board err in finding that the Applicant is excluded from protection under Article 1F(a) of the Convention for being complicit in crimes against humanity?
2. Did the Board err in finding that the Applicant had failed to demonstrate the inability of the state to provide adequate protection?

[3] For the following reasons, the application for judicial review shall be dismissed.

Factual Background

[4] The Applicant, a citizen of Georgia, was a police officer from December 1989 until June 1994, when he and other officers were suspended for allegedly helping some prisoners escape. The Applicant was exonerated and returned to the police force in February 1996 where he worked until July 1998. He then resigned because of the corruption and worked as a mini-bus driver. He rejoined the force from December 2005 until August 2006 because the new president said he was opposed to corruption.

[5] When the Applicant rejoined voluntarily the police force, he was assigned to work as a special guard responsible for investigating police officers who were smuggling contraband into the prison. On March 26, 2006, while he was working at Tblisi Prison Number 5, he overheard the chief

of his department discuss a plan to have some of his police officers shoot themselves and claim they had been shot by prisoners to allow an excessive use of force against the prisoners.

[6] The chief bribed two officers to shoot themselves and then a rumour spread that prisoners had shot the guards. Eight hundred armed officers were sent to the prison and killed twelve prisoners and wounded many others. The Applicant and other special officers were ordered to guard the morgue and not let reporters or other unauthorized persons enter.

[7] The Applicant spoke out in support of the prisoners to his superior officer, but he was ordered not to discuss the event or to speak to the press. During a Parliamentary investigation into the killings, he did not disclose what he knew about the planned riot.

[8] In May 2006, the Applicant spoke to a reporter and said that the truth would come out one day. He was suspended on the ground that he had provided guns to prisoners. He was interrogated at the National Security Office on June 26, 2007 and was beaten and detained overnight. The Applicant went into hiding until he could arrange to leave the country on August 23, 2008. He came to Canada and claimed asylum. The Applicant's wife and father have received calls asking for his whereabouts.

[9] On October 5, 2007, the Minister gave notice of his intention to participate on the issue of exclusion. The Minister alleges that the Applicant may be subject to the exclusionary clauses related to crimes against humanity pursuant to Article 1F(a) and (c) of the Convention. An amended Notice

to Participate indicated that the Minister has serious reasons to believe that the Applicant was complicit in crimes against humanity, against civilian population, pursuant to Article 1F(a) of the Convention. However, the amended notice did not refer to Article 1F(c).

Impugned Decision

[10] The Board found the Applicant to be excluded from protection under Article 1F(a) of the Convention for being complicit in crimes against humanity. The Board assessed the six factors set out in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.) to determine whether the Applicant was complicit in the crimes against humanity that were committed against the inmate population during the time he was there and concluded that there were serious reasons for believing so. In the alternative, the Board determined that even if the Applicant was not excluded from protection, he would still not be a Convention refugee or a person in need of protection because he failed to provide clear and convincing evidence of the inability of the state to provide adequate protection.

Analysis

Standard of review

[11] The Applicant's complicity in the riot on March 26, 2006 and his exclusion pursuant to Article 1F (a) of the Convention constitutes a question of mixed fact and law and the standard of review was reasonableness *simpliciter* (*Mankoto v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 294, 149 A.C.W.S. (3d) 1107 at para. 16; *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 CAF 39, 238 F.T.R. 194 at para. 14). Following the Supreme

Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the new articulated standard is reasonableness. According to the Court, the elements to consider are: justification of the decision, its transparency and its intelligibility. The outcome must be defensible in respect of the facts and the law (*Dunsmuir*, at para. 47).

[12] The question of state protection is one of mixed fact and law which is reviewable on the standard of reasonableness (*Chagoya c. Canada (Minister of Citizenship and Immigration)*, 2008 FC 721, [2008] F.C.J. No. 908 (QL) at para. 3; *Dunsmuir*, above at paras. 55, 57, 62 and 64), (*Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, 137 A.C.W.S. (3d) 392; *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 634, 139 A.C.W.S. (3d) 151 at para. 16; *B.R. v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 269, 146 A.C.W.S. (3d) 530 at para. 17).

1. Did the Board err in finding that the Applicant is excluded from protection under Article 1F(a) of the Convention for being complicit in crimes against humanity?

[13] At the time of the attack, the Applicant alleges that he was working as a prison guard and that the attacking unit was a special branch of the security services and not prison soldiers or guards. The Applicant's role during the riot and the aftermath was to evacuate medical staff and guard bodies in the morgue. The Applicant argues that the Board erred in a number of ways.

[14] A criminal act rises to the level of a crime against humanity when there is proof of four elements: 1. An enumerated proscribed act was committed; 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 (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 325, [2004] 1 F.C.R. 3 at para. 119).

[15] According to the Applicant, the Board made a clear error in relation to the requirement that the "act was committed as part of a widespread or systematic attack" as the Board interpreted this as whether the attack was organized. The Board found that the requirement was whether the act was committed in a systematic manner and found that the requirement was satisfied because the riot was organized and planned by the senior prison personnel. The Applicant submits that the Board had to identify a pattern of attacks and that the Board erred in failing to understand that the repression of the uprising had to be situated into "a widespread or systematic attack" to be a crime against humanity.

[16] The Applicant argues that the Board erred in finding that the prisoners were a civilian population or an identifiable group of persons because here, there is no such group as defined in *Mugesera*.

[17] The Board found that the Applicant was complicit because he was a police officer, but the attacks were committed by Special Forces. Numerous cases state that if an organization is legitimate, the Applicant must be within the specific group which commits crimes for him to be

complicit (see for example *Ardila v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1518, 143 A.C.W.S. (3d) 1072).

[18] The Minister argues that the Board found that prison guards engaged in torture, but the Board did not find that the Applicant was complicit in torture, nor that the organization was an organization equivalent to a secret police or terrorist group, whose only object was criminal. The Board did not find that the Applicant was excluded because of complicity in torture. The only ground was in relation to the attack on the prisoners.

[19] The Applicant submits that he was not a member of the police force at the time of the attack on the prison, which is the only event characterized as a crime against humanity. The documentary evidence is clear that the actual prison guards were not involved in the attack. The Applicant was not involved, nor were any other prison guards, except that they were present at their posts when the elite police squads descended on the prison. The Applicant testified that he and his two colleagues had been officially blamed by the authorities and that he did not have dealings with prisoners as part of his duties.

[20] The Board also erred in finding that the Applicant was complicit in crimes against humanity because torture was widespread in various prisons in Georgia and the police committed atrocities. The Applicant was a member of a legitimate organization, he was not involved in human rights violations and he was not a member of a unit involved in human rights violations. The fact that torture occurred from time to time by a few people across the entire prison system, does not lead to

complicity in the commission of crimes against humanity (*Vasquez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1302, 153 A.C.W.S. (3d) 186 at paras. 25-27).

[21] There is no allegation that the Applicant was personally involved in the riot. This Court has held that the rough treatment of prisoners is not even persecution let alone torture (*Mahalingam v. Canada (Solicitor General)*, [1993] F.C.J. No. 1140 (T.D.) (QL), 44 A.C.W.S. (3d) 571; *Abouhalima v. Canada (Minister of Citizenship and Immigration)* (1998), 144 F.T.R. 240, 77 A.C.W.S. (3d) 615 (F.C.T.D.); *Murugiah v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 230, 40 A.C.W.S. (3d) 1141 (F.C.T.D.)) and the Board does not state how this is torture or even a crime against humanity.

[22] The Respondent argues that whether the Applicant is complicit in one atrocity or several, at one time or over a period of time, is irrelevant to the determination that there are serious reasons for considering that the Applicant has committed a crime against humanity. What is relevant to the application of Article 1F(a) is that the Applicant belonged to an organization involved repeatedly in the commission of crimes against humanity in a widespread or systematic fashion (*Ramirez*, above; *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.) at 442 and 444; *Suliman v. Canada (Minister of Citizenship and Immigration)* (1997), 133 F.T.R. 178, 72 A.C.W.S. (3d) 343 (F.C.T.D.); *Ledezma v. Canada (Minister of Citizenship and Immigration)* (1997), 76 A.C.W.S. (3d) 151, [1997] F.C.J. No. 1664 (T.D.) (QL); *Canada (Minister of Citizenship and Immigration) v. Muto*, 2002 FCT 256, 117 A.C.W.S. (3d) 463; *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, 238 F.T.R. 194 (F.C.A.)).

[23] In the case at bar, the documentary evidence establishes that the Georgian police force was involved in the systematic commission of torture and human rights abuses in the prison system to which the Applicant was assigned. The Board noted that the prison officials were known to be human rights violators, participating in torture and arbitrary detention and that the conditions of detention in the prison to which the Applicant was assigned amounted to inhuman and degrading treatment.

[24] In *Ramirez,* the Federal Court of Appeal interpreted the word "committed" in Article 1F(a) of the Convention to include complicity by enunciating the following principles:

a) mere membership in an organization involved in international offences is not sufficient for exclusion from refugee status;
b) personal and knowing participation in persecutorial acts is required;
c) membership in an organization which is directed to a limited, brutal purpose, such as secret police activity, may by necessity point to personal and knowing participation;
d) mere presence at the scene of persecutorial acts does not qualify as personal and knowing participation;
e) presence coupled with being an associate of the principal offenders amounts to personal and knowing participation; and
f) the existence of a shared common purpose and the knowledge that all the parties have of it is sufficient evidence of complicity.

[25] The principle of complicity states that active membership in an organization is not required, but a person is complicit if they contribute, directly or indirectly, remotely or immediately, while being aware of the activities of the organization, or makes the organization's activities possible. In the present case, the Applicant admitted to voluntarily joining the police force assigned to the prison system when he was aware of the human rights abuses being committed in the prison system. He was also aware of the clandestine instigation of the prison riot but remained silent as requested by his superiors. The Applicant guarded the bodies in the morgue after the riot was over and did not leave the organization until he was under investigation. The Board found that the widespread systematic torture of prison inmates, which included the riot which was organized and planned by senior prison personnel in which prisoners were killed, rose to the level of crimes against humanity as set out in *Mugesera*.

[26] The Applicant's allegation that the Board erred in finding the inmate population in Georgia to be a civilian population is unfounded. The Respondent alleges that there was no evidence before the Board to indicate that the prison population in Georgia was not civilian (*Sumaida v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 66 (C.A.); *Varela v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 436, 166 A.C.W.S. (3d) 1121). It was therefore reasonably open to the Board to find that the Applicant was complicit in crimes against humanity.

[27] The Court must first establish the criteria to be considered in identifying complicity within the context of paragraph 1F(a) of the Convention. The Federal Court of Appeal examined the issue in *Ramirez* at para. 16:

> What degree of complicity, then, is required to be an accomplice or abettor? A first conclusion I come to is that mere membership in an organization which from time to time commits international offences if not normally sufficient for exclusion from refugee status.
> …
> It seems apparent, however, that where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts.

[28] Having considered the Board's reasons in light of the evidence before it, I do not find that it was unreasonable or that the intervention of this Court is warranted.

[29] It is a well established principle that a refugee claimant need not necessarily have participated directly in the perpetration of human rights abuses and crimes against humanity by the organization to which he belongs in order for him to be found an accomplice to such acts (see *Ramirez*, above).

[30] Considering the documentary evidence referred to by the Board that the Georgian prison guards had been involved in the abuse and torture of prisoners, it was not unreasonable for the Board to find the Applicant's explanation insufficient. The analysis of the *Ramirez* factors demonstrates a serious probability that the Applicant was complicit in the events surrounding the riot at Prison No. 5 on March 26, 2006.

2. Did the Board err in finding that the Applicant had failed to demonstrate the inability of the state to provide adequate protection?

[31] The Applicant submits that if one aspect of his fear of persecution is not assessed, the state protection finding cannot stand *Ayad v. Canada (Minister of Citizenship and Immigration)* (1996), 117 F.T.R. 270, 63 A.C.W.S. (3d) 126 (F.C.T.D.) citing *Torres v. Canada (Minister of Employment and Immigration)* (1994), 50 A.C.W.S. (3d) 865, [1994] F.C.J. No. 585 (C.A.) (QL). The Board has not understood that it is not the state who found that the riots were instigated by prison officials. The government's position, despite having conducted investigations into the riot, is that the riot was a response to a dangerous situation because the government said that prisoners shot at the police who then shot back at prisoners. The Board's finding that the investigation by the government translates into state protection constitutes mere speculation.

[32] The Board accepted that the Applicant was beaten by police officials for speaking to a reporter, therefore the Board's finding that the Applicant could have participated in the investigation is difficult to fathom. Moreover, the fact that he was beaten by police officers means that the presumption of state protection does not apply or at least, applies differently (*Musorin v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 408, 138 A.C.W.S. (3d) 348).

[33] The Applicant based his claim for refugee protection on a fear of persecution for what he knows about the involvement of senior prison officials in the organization of the riot at Prison No. 5 and on a fear of being blamed for bringing guns into the prison, which would result in an eight year prison sentence.

[34] The Board noted that according to the Applicant's military record and testimony, he was in the Penitentiary Department at the time of the riot. Based on the documentary evidence, the Board found that the Applicant had failed to provide clear and convincing evidence of the inability of the state to provide him with adequate protection if he decided to reveal what he knows about the orchestration of the prison riot.

[35] The Board is entitled to significant deference with respect to its findings on whether an Applicant has rebutted the presumption of state protection.

[36] In the present case, it was entirely open to the Board under the circumstances to conclude that the Applicant had failed to exhaust all avenues to seek alternative avenues of redress sanctioned by the state. The Applicant did not attempt to obtain assistance from any authority before deciding to flee to Canada.

[37] It was not unreasonable also for the Board to infer from the documentary evidence that no negative consequences to the Applicant would occur if he would report what he knew about the riot which had been the object of an investigation launched by the government.

[38] The parties did not suggest questions for certification and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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