Federal Court  Cour fédérale

Date: 20110114

Docket: IMM-3882-10

Citation: 2011 FC 44

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 14, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

AMBROISE MAPANGU ISHAKU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] "Those who cannot remember the past are condemned to repeat it ...": Elie Wiesel (Nobel Peace Prize, 1986).

[2] A court can only determine what has already happened, as a testament to the history that is recorded by evidence, once it has been determined, as a *fait accompli*, creating simply another precedent.

[3] In this case, the applicant, a lawyer, should have known the consequences for himself when he joined an organization known for its actions and its history, and thus its present and future consequences.

[4] The Court is in complete agreement with the position so eruditely argued by counsel for the respondent, Normand Lemyre, that excluding the applicant is not unreasonable because the exclusion is not vitiated by any reviewable error of law.

II. Introduction

[5] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board dated June 4, 2010, in which the applicant's refugee protection claim was rejected because there are serious reasons for considering that he has committed crimes against humanity.

III. Facts

[6] The applicant, Ambroise Mapangu Ishaku, is 50 years old and a citizen of the Democratic Republic of the Congo (DRC). He arrived in Canada at the Lacolle, Quebec, port of entry on

January 2, 2008, and claimed refugee protection in Canada on that date, under section 96 and paragraphs 97(1)(*a*) and (*b*) of the IRPA. He was carrying a Congolese passport and had spent 16 days in New York, in the United States, to attend a conference of the International Criminal Bar.

[7] The applicant has 17 years of education and is a member of the bar of Kinshasa-Gomba in the DRC.

[8] The Minister of Public Safety and Emergency Preparedness intervened in this case to seek to have the applicant excluded by virtue of sections 96 and 97, under section 98 of the IRPA, because in the Minister's opinion the applicant is a person referred to in paragraphs 1F(*a*) and 1F(*c*) of the Convention Relating to the Status of Refugees (Convention). In the Minister's opinion, there are serious reasons for considering that the applicant has committed crimes against humanity and is guilty of acts contrary to the purposes and principles of the United Nations.

[9] The applicant claims to fear for his life because of his political activities as a member of the Movement for the Liberation of the Congo (MLC), a political/military movement founded in 1998 and supported by Uganda, armed by Libya and led by Jean-Pierre Bemba. By his own admission, the aim of the movement was to overthrow the dictatorial government of the DRC by political methods and armed struggle (Decision of the RPD at paras. 2 and 9).

[10] The applicant's problems allegedly began in late 2006 and culminated in his detention in 2007. The applicant was then supposedly released under pressure from the bar and managed to flee the DRC and go to the United States, where he was to attend a meeting of the International

Criminal Bar. As noted earlier, the applicant entered Canada on January 2, 2008, and claimed refugee protection that day (Decision of the RPD at para. 2).

[11] The RPD agreed with the parties that it would first decide the issue of the exclusion of the applicant and, in the event that it did not exclude him, the parties would be reconvened for a hearing concerning inclusion, that is, his alleged fear of persecution (Decision of the RPD at para. 5).

[12] On June 4, 2010, the RPD concluded that there are serious reasons for considering that the applicant "was complicit in crimes against humanity" (Decision of the RPD at para. 54).

[13] Accordingly, on that date, the RPD determined that the applicant is excluded from the application of the Convention under paragraph 1F(*a*) and therefore could not be granted the protection of Canada, as provided by section 98 of the IRPA (Decision of the RPD at para. 58).

[14] It is that decision that the applicant is contesting in this proceeding.

IV. Issue

[15] Is the exclusion of the applicant under paragraph 1F(*a*) of the Convention reasonable, having regard to the evidence and the applicable law?

V. Analysis

[16] In the opinion of the Court, the decision is entirely justified in its context. The Court is entirely in agreement with the respondent's position.

Applicable standards of review

[17] The purely factual findings on which the RPD based its reasoning in making its determination are subject to the reasonableness standard (*Tayar v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 567, [2009] F.C.J. No. 733 (QL/Lexis), at para. 14; *Noha v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 683, 347 F.T.R. 265, at para. 20; *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, 238 F.T.R. 194, at para. 14).

[18] Purely legal questions of general importance decided by the RPD are subject to the correctness standard (*Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 20; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 44).

[19] The question of whether the evidence discloses serious reasons for considering that the applicant is a person described in paragraph 1F(*a*) is subject to the reasonableness standard (*Ndabambarire v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1, [2010] F.C.J. No. 40 (QL/Lexis), at para. 27; *Canada (Minister of Citizenship and Immigration) v. Imeri*, 2009 FC 542, 353 F.T.R. 230, at para. 5; *Tayar*, above, at para. 14; *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 238, 324 F.T.R. 62, at para. 10, affirmed on other grounds: 2008 FCA 404, [2009] 4 F.C.R. 164).

[20] If the impugned decision has qualities that make it reasonable, that are concerned with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, it is reasonable (*Dunsmuir*, above, at para. 47).

[21] The issue in that regard is therefore whether there was evidence on which the RPD's conclusion that there are serious reasons for considering that the applicant is a person referred to in paragraph 1F(*a*) could **reasonably** be based. It is important to note that this Court does not perform the same functions as the RPD. The role of this Court is not to decide whether, based on the evidence submitted to the RPD, there were "serious reasons for considering"; it is solely to decide **whether it was unreasonable** for the RPD to reach that conclusion (*Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 122, [2007] 1 F.C.R. 474, at paras. 32-33; *Rizwan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 781, [2010] F.C.J. No. 957 (QL/Lexis), at para. 29; *Mohammad v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 51, 361 F.T.R. 184, at para. 49; *Dunsmuir*, above).

Applicable provisions relating to grounds for exclusion

[22] Section 98 of the IRPA reads as follows:

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] Under subsection 2(1) of the IRPA, the expression “Refugee Convention” means the above-mentioned Convention.

[24] The relevant parts of section F of article 1 of the Convention read as follows:

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;
…	[…]

[25] The RPD concluded that it had serious reasons for considering that the applicant had committed crimes against humanity.

[26] Contrary to the applicant’s submission, when an exclusion clause applies, the RPD need not rule as to inclusion, in particular by reason of section 98 of the IRPA (*Howbott v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 911, 160 A.C.W.S. (3d) 856, at para. 5; *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2005] 1 F.C.R. 304, at para. 38; *Gonzalez v. Canada (Minister of Employment and Immigration)*, (1994) 3 FC 646, 48 A.C.W.S. (3d) 388 (CA); *Arica v. Canada (Minister of Employment and Immigration)* (1995), 182 N.R. 392, 55 A.C.W.S. (3d) 1017 (FCA)).

Standard of proof

[27] The applicable standard of proof is set out in section 1F of the Convention, under which the provisions of the Convention do not apply to persons with respect to whom there are **serious reasons for considering** that they have committed, *inter alia*, a crime against humanity as defined above.

[28] An "exclusion" hearing under section 1F is not of the same nature as a criminal trial, at which the Minister must prove guilt or innocence beyond a reasonable doubt. Rather, the Minister has the burden of proving, having regard to the evidence presented to the Board, that there are "serious reasons for considering" that the applicant has committed a crime set out in paragraph 1F(*a*) or 1F(*b*) or has been guilty of acts contrary to the purposes and principles of the United Nations (1F(*c*)) (*Lai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125, 139 A.C.W.S. (3d) 113, at para. 23; *Sumaida v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 66, 79 F.T.R .148 (CA); *Bazargan v. Canada (Minister of Citizenship and Immigration)* (1996), 205 N.R. 282, 67 A.C.W.S. (3d) 132 (FCA)).

[29] In general, the RPD must assess and weigh the evidence that it has found to be credible or trustworthy in the case and decide whether the minimum test of "serious reasons for considering" that the alleged crime(s) or act(s) were committed has been met. The standard of proof that must be used in applying the minimum test requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and

credible information (*Lai*, above, at para. 25; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40 at para. 114; *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, at para. 39).

[30] That standard applies to decisions as to the facts. The issue of whether the act or omission in question constitutes a crime referred to in paragraph 1F(*a*) is a question of law (*Zazai v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 F.C.R. 78, 262 F.T.R. 246, aff'd 2005 FCA 303, 142 A.C.W.S. (3d) 828 at para. 26).

Exclusion of the applicant under paragraph 1F(*a*)

What is a "crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes"?

[31] Paragraph 1F(*a*) must be interpreted so as to include international instruments concluded since it was adopted in 1951, such that in applying that provision, regard must also be had to the definition of a crime against humanity set out in the *Rome Statute of the International Criminal Court*, adopted on July 17, 1998, and in effect on July 1, 2002 (*Harb*, above, at para. 8).

[32] Article 7 of the *Rome Statute* is important in applying paragraph 1F(*a*), since it contains a contemporaneous definition of crimes against humanity. The Statute is in fact the first multilateral international instrument of general application that provides a detailed definition of the list of acts characterized as crimes against humanity that were formerly recognized by various international instruments (*Harb*, above, at para. 7; Lison Néel, "La judiciarisation internationale des criminels de guerre : la solution aux violations graves du droit international humanitaire ?" (2000), 33(2) Criminologie 151 at p. 166).

[33] The relevant parts of paragraph 7(1) of the *Rome Statute* read as follows:

… "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:	[...] on entend par crime contre l'humanité l'un quelconque des actes ci-après lorsqu'il est commis dans le cadre d'une attaque généralisée ou systématique lancée contre toute population civile et en connaissance de cette attaque :
(a) Murder;	*a*) Meurtre ;
(b) Extermination;	*b*) Extermination ;
(*c*) Enslavement;	*c*) Réduction en esclavage ;
(*d*) Deportation or forcible transfer of population;	*d*) Déportation ou transfert forcé de population ;
(*e*) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;	*e*) Emprisonnement ou autre forme de privation grave de liberté physique en violation des dispositions fondamentales du droit international ;
(*f*) Torture;	*f*) Torture ;
(*g*) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;	*g*) Viol, esclavage sexuel, prostitution forcée, grossesse forcée, stérilisation forcée ou toute autre forme de violence sexuelle de gravité comparable ;
(*h*) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are	*h*) Persécution de tout groupe ou de toute collectivité identifiable pour des motifs d'ordre politique, racial, national, ethnique, culturel, religieux ou sexiste au sens du paragraphe 3, ou

universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;	en fonction d'autres critères universellement reconnus comme inadmissibles en droit international, en corrélation avec tout acte visé dans le présent paragraphe ou tout crime relevant de la compétence de la Cour ;
(*i*) Enforced disappearance of persons;	*i*) Disparitions forcées de personnes ;
(*j*) The crime of apartheid;	*j*) Crime d'apartheid ;
(*k*) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.	*k*) Autres actes inhumains de caractère analogue causant intentionnellement de grandes souffrances ou des atteintes graves à l'intégrité physique ou à la santé physique ou mentale.

[34] Paragraph 7(2) of the Statute provides:

2. For the purpose of paragraph 1:	**2.** Aux fins du paragraphe 1 :
(*a*) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;	*a*) Par « attaque lancée contre une population civile », on entend le comportement qui consiste en la commission multiple d'actes visés au paragraphe 1 à l'encontre d'une population civile quelconque, en application ou dans la poursuite de la politique d'un État ou d'une organisation ayant pour but une telle attaque ;
…	[...]
(*c*) "Enslavement" means the exercise of any or all of	*c*) Par « réduction en esclavage », on entend le

the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;	fait d'exercer sur une personne l'un quelconque ou l'ensemble des pouvoirs liés au droit de propriété, y compris dans le cadre de la traite des être humains, en particulier des femmes et des enfants ;
(*d*) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;	*d*) Par « déportation ou transfert forcé de population », on entend le fait de déplacer de force des personnes, en les expulsant ou par d'autres moyens coercitifs, de la région où elles se trouvent légalement, sans motifs admis en droit international ;
…	[...]
(*g*) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;	*g*) Par « persécution », on entend le déni intentionnel et grave de droits fondamentaux en violation du droit international, pour des motifs liés à l'identité du groupe ou de la collectivité qui en fait l'objet ;
…	[...]
(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that	i) Par « disparitions forcées de personnes », on entend les cas où des personnes sont arrêtées, détenues ou enlevées par un État ou une organisation politique ou avec l'autorisation, l'appui ou l'assentiment de cet État ou de cette organisation, qui refuse ensuite d'admettre que

deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.	ces personnes sont privées de liberté ou de révéler le sort qui leur est réservé ou l'endroit où elles se trouvent, dans l'intention de les soustraire à la protection de la loi pendant une période prolongée.

Crimes against humanity committed by the MLC during the relevant period

Time period considered

[35] The RPD examined the crimes against humanity committed by the MLC from June 1999 to the end of 2003, when the movement became a political party, properly speaking.

Sources of information

[36] The RPD relied on a very large number of excerpts from reports prepared by international organizations that monitor the human rights situation in the world, for example: Amnesty International, Human Rights Watch, the International Federation of Human Rights, the United Nations Economic and Social Council and Security Council, Reporters Without Borders and the United States Country Reports on Human Rights. These are reliable sources.

[37] Contrary to the applicant's submission, the RPD referred in its reasons concerning the crimes against humanity committed by the MLC at the relevant time to a number of specific documents from the above-mentioned sources of information (on this point, see footnotes 5 to 14, inclusive, and 29 to 35, inclusive, of the panel's reasons).

Crimes in issue

[38] According to extensive and overwhelming documentary evidence, members of the MLC committed murders of civilians, rape against women, girls and boys, arrests and arbitrary detentions, kidnappings, disappearances and arbitrary killings of civilians, torture, abduction for the purpose of forced labour, massacres, fires and pillaging of homes abandoned by fleeing populations with entire villages destroyed from top to bottom, forcible transfers of populations (over 10,000 people), genocide and ethnic cleansing, in the DRC and Central Africa, as premeditated tools of warfare. According to the evidence, all of these horrors were committed on a large scale, and thousands and thousands of innocent victims were targeted.

[39] The evidence also reports incidents of cannibalism by soldiers of the Armée de Libération du Congo (ALC [army for the liberation of Congo]), the armed branch of the MLC, with the knowledge of MLC leaders. The evidence further reports that the ALC recruited thousands of child soldiers and that in certain areas they constituted up to 40% of the armed forces. These children were subjected to unimaginable horrors, forced to fight and often to kill their own families, forced to engage in cannibalism, raped and used as sex slaves. It is important to point out that the ALC is an integral part of the MLC, which is clearly stated in the MLC's statutes.

Crimes against humanity

[40] Having regard to that evidence, it was not unreasonable for the RPD to conclude that the MLC had, from 1999 to 2003, systematically engaged in a very large number of barbarous and inhumane acts and severe persecution, and that the persecution was widespread and systematic against the civilian population and the groups targeted.

[41] These crimes, committed as part of a widespread or systematic attack directed against a civilian population and with knowledge of the attack, pursuant to or in furtherance of an organizational policy to commit such attack, are crimes against humanity as set out in the following subparagraphs of the *Rome Statute*: 7(1)(*a*) (murder), 7(1)(*c*) and 7(2)(*c*) (enslavement), 7(1)(*d*) and 7(2)(*d*) (forcible transfer of population), 7(1)(*e*) (imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law), 7(1)(*f*) and 7(2)(*e*) (torture), 7(1)(*g*) (rape, sexual slavery), 7(1)(*h*) and 7(2)(*g*) (persecution), 7(1)(*i*) (enforced disappearance of persons) and 7(1)(*k*) (other inhumane acts of a similar character) of the *Rome Statute*.

[42] The abuses committed by the MLC in Central Africa in 2002-2003 were denounced by the Central African Republic, which submitted the case to the International Criminal Court in 2006. In 2007, an international arrest warrant for war crimes and crimes against humanity was issued against the leader of the MLC, Jean-Pierre Bemba Gombo, who was arrested in Brussels that year. In January 2009, his trial was in progress.

[43] In the circumstances, it was not unreasonable for the RPD to conclude that the MLC committed crimes against humanity during the relevant period.

Complicity of the applicant by association

[44] The RPD considered whether there are serious reasons for considering that the applicant was complicit in crimes against humanity, either as an actor or as an accomplice, given that the evidence

did not support a conclusion that the applicant himself committed the acts referred to in the documentary evidence.

[45] The RPD therefore focused its analysis on the crimes against humanity committed by the MLC at the relevant time, to determine whether they could support an inference of complicity on the part of the applicant.

Period of time during which the applicant was a member of the MLC

[46] During his testimony at the hearing, the applicant denied that he was member of the MLC during the period that this movement committed the crimes mentioned. At the beginning of his testimony at the hearing, he alleged that he only joined the MLC in 2004 and that before that date, in 2002, he had briefly been a member of a welcoming committee whose goal was to welcome the MLC if it ever arrived in Kinshasa. He explained that as an elite intellectual, he wanted to ensure that he enjoyed certain benefits as soon as the MLC arrived, such as obtaining prestigious government positions, for example, adviser to a minister. He also claimed that after a few months, this welcoming committee had ceased to exist. The applicant alleged that he was not involved in any political activities until August 2004, when he officially joined the MLC.

[47] In the form he completed when he claimed refugee protection, the applicant indicated, however, that he became a member of the MLC's legal college in May 2000; he did not indicate that he had ceased being a member. Confronted with these major contradictions, the applicant first corrected his testimony and stated that he did indeed join the welcoming committee in 2000, and not in 2002. As for the contradiction between a [TRANSLATION] "welcoming committee" and a

[TRANSLATION] “legal college”, the applicant explained that these terms refer to the same organization.

[48] As for why he did not indicate in his form at the port of entry that he had ceased being a member of the “welcoming committee / legal college” in 2000 and that he did not join the MLC itself until 2004, but rather indicated that he had been a member of the MLC since 2000 without interruption, the applicant testified that it is in his nature to explain everything and that there was not enough space in the form to write down every detail.

[49] The evidence contains another key statement from the applicant: he was summoned for an expedited interview on January 8, 2009. During the interview, which was recorded, the RPD officer explained to the applicant that his membership in the MLC could be problematic, given the human rights violations committed by that movement. After this clearly worded warning, the applicant stated that he was indeed a member of the MLC; when asked since when, he stated that he had been [TRANSLATION] “a contributing member since 2000”. On that statement, the expedited interview ended (Tribunal Record (TR), at pp. 75-76, 1090-1108, 1115-1116).

[50] At the hearing before the RPD, the applicant was confronted with the statements he made at the expedited interview. He then changed his account and indicated that he had meant to say welcoming committee when he said MLC. He was going to explain himself at the end of the interview, but found himself in the situation of being unable to explain.

[51] When asked at the hearing for his definition of “contributing member,” the expression that he had used at the expedited interview, the applicant testified that he was talking about the welcoming committee.

[52] At the hearing in March 2010, the applicant tried to change testimony that he subsequently realized was highly incriminating, given the Minister’s intervention submitted in March 2009. It can reasonably be considered that both at the port of entry in January 2008 and at his expedited interview in January 2009 he **spontaneously** told the truth about his membership in the MLC.

[53] A person’s first story is usually the most genuine and, therefore, the one to be most believed (*Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429, 231 F.T.R. 276, at para. 21; *Chavez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 10, 159 A.C.W.S. (3d) 266, at para. 14).

[54] There is no reason here to doubt the truth and accuracy of the statements made by the applicant to the immigration officer at the port of entry and before the RPD at the expedited process stage. Moreover, the applicant is an educated man, given that he is a lawyer, and speaks excellent French. It is therefore reasonable to expect him to be able to give the immigration officer and the Board a clear explanation of his reasons for leaving his country. Finally, this is not a case in which the evidence on record shows that real prejudice was caused to a claimant for refugee protection because of flagrant mistakes in interpretation made by an interpreter at the hearing or at the initial interview with the immigration officer (*Chavez*, above, at para. 15).

[55] Given his level of education and especially his profession, the applicant should have known the importance of the statements he was making to the Canadian immigration authorities, whom he was asking to protect him.

[56] Accordingly, it was not unreasonable for the RPD to conclude that the applicant had been a member of the MLC since 2000 and that he had not ceased to be a member until he left the DRC in 2007.

The caselaw on complicity by association

[57] Accomplices as well as principal actors may be found to have committed crimes within the meaning of international criminal law: international crimes. The concept of complicity is recognized in the caselaw, defined as personal and knowing participation, and complicity by association, whereby individuals may be rendered responsible for the acts of others because of their close and voluntary association with the principal actors in an organization that commits international crimes. **Complicity rests on the existence of a shared common purpose and the knowledge that the individual in question has of the commission of the crimes** (*Zazai*, above, at para. 27, aff'd 2005 FCA 303; *Ryivuze v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 134, 325 F.T.R. 30, at para. 28).

[58] Mere membership in an organization which from time to time commits international offences is not normally sufficient to bring one into the category of an accomplice. At the same time, where the organization's **primary objective** is achieved by means of crimes against humanity, or it is directed to a limited, brutal purpose, membership will generally be sufficient to establish

complicity (*Zazai*, FC, above, at para. 28; *Thomas v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 838, 317 F.T.R. 6, at para. 23).

[59] A person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them from occurring (if he or she has the power to do so) nor disengages himself or herself from the group at the earliest opportunity (consistent with safety for himself or herself) but who lends his or her active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist. That statement is not one in which isolated incidents of international offences have occurred but where the commission of such offences is a continuous and regular part of the operation (*Zazai*, CF, above at para. 28; *Ndabambarire*, above, at para. 38).

[60] Association with an organization responsible for international crimes may imply complicity if the person concerned personally or knowingly participated in the crimes, or knowingly tolerated them (*Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433, 44 A.C.W.S. (3d) 563 (CA)).

[61] The mental element required to establish complicity in crimes against humanity has been characterized variously as “shared common purpose”, “personal and knowing participation or toleration of the crimes”, and **participation in an organization knowing it commits crimes against humanity, when combined with a failure to stop the crimes or disassociate oneself**. (*Sabadao v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 292, 146 A.C.W.S. (3d) 698, at para. 24).

[62] A person's rank within an organization, among other things, speaks to the likelihood of that person's knowledge and involvement in the organization's bad acts. However, one need not be in a leading position in order to be found complicit. Thus, the person's position in the organization may demonstrate that person's personal and knowing participation, and ultimately the person's complicity in the organization's commission of crimes. The higher the person concerned is in the ranks of the organization, the more likely it is that he or she was aware of the crimes committed and shared the organization's purpose in committing them. Accordingly, a person who remains in a high position in the organization, knowing that it has been responsible for crimes against humanity, may be considered to be complicit (*Escorcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 644, 158 A.C.W.S. (3d) 796, at paras. 15-16; *Thomas*, above, at paras. 26-48; *Ryivuze*, above, at paras. 44-45, 58; *Collins v . Canada (Minister of Citizenship and Immigration)*, 2005 FC 732, 276 F.T.R. 60, at para. 25).

The MLC was an organization with a limited, brutal purpose

[63] It is therefore important to determine whether, during the period when the applicant was a member, starting in 2000, the MLC may be described as an organization with a limited, brutal purpose.

[64] The caselaw indicates that an organization whose very existence "is premised on achieving political or social ends by any means deemed necessary" creates a presumption that mere membership in the organization implies complicity, without the need to connect the applicant's

complicity to a particular crime committed by the organization (*Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298, 42 A.C.W.S. (3d) 1048 (CA), at para. 45).

[65] In this case, from 2000 to the end of 2003, the years when the applicant was a member, the MLC's primary objective was to succeed in having the MLC overthrow the dictatorship of President Kabila and take power. That objective is even set out in the statutes of the movement. In addition, although the applicant was a member of the political branch of the movement and not its armed branch, as a member of the "legal college", it is clear that the MLC intended to achieve its objectives primarily through the actions of its armed branch, which was not separate from it. The statutes of the movement, again, are clear on that point, and it is confirmed by the documentary evidence.

[66] The evidence is that all means considered necessary were used by the MLC to achieve its objective, as described earlier: arbitrary arrests, murders, rapes, summary executions, cannibalism, massacres, systematic torture, pillaging, fires, the use of child soldiers, genocide and ethnic cleansing.

[67] In the circumstances, it is not unreasonable to conclude that, beyond a doubt, during the years when the applicant was a member, the MLC continuously and regularly engaged in crimes against humanity to achieve its political objective. This suggests that the MLC was an organization with a limited, brutal purpose (*Imeri*, above, at para. 12). It should be noted that in that case, membership in such an organization is generally sufficient to establish complicity (*Thomas*, above, at para. 23).

[68] The RPD could therefore reasonably have presumed that the applicant had the mental element required, the necessary *mens rea*, for a finding of complicity, and that he was therefore complicit in the crimes against humanity committed by the MLC from 2000 to the end of 2003.

[69] However, that is a rebuttable presumption (*Imeri*, above, at para. 6; *Thomas*, above, at para. 24; *Yogo v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 390, 205 F.T.R. 185, at para. 15; *Saridag v. Canada (Minister of Employment and Immigration)* (1994), 85 F.T.R. 307, 50 A.C.W.S. (3d) 1284).

[70] The case law has laid down the factors to be taken into consideration in determining whether there genuinely are serious reasons for considering that a claimant may be considered to be complicit in the commission of crimes or acts referred to in section 1F of the Convention. Those factors are: the method of recruitment, the applicant's position and rank in the organization, the nature of the organization, the applicant's knowledge of the crimes or acts committed, the length of his or her participation in the organization's activities, and the opportunity to leave (*Ndabambarire*, above, at paras. 38-44; *Thomas*, above, at para. 20; *Muchai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 944, 160 A.C.W.S. (3d) 682, at para. 7).

[71] If these factors are applied in this case, they confirm the applicant's complicity.

Nature of the organization

[72] At the relevant time, the MLC was a rebel movement and not a political party.

[73] As noted earlier, according to the abundant evidence cited by the RPD, in the years when the applicant was a member of the MLC it continuously and regularly engaged in crimes against humanity to achieve its political objective.

Method of recruitment

[74] It is clear that the applicant joined the MLC voluntarily: in fact, he testified that he wanted to better position himself on the political ladder and become a close government advisor when the MLC toppled President Kabila and assumed power. He also testified, [TRANSLATION] “I espoused their political convictions; I was hoping for a new political era” (Decision of the RPD at para. 39).

Position within the organization

[75] The applicant held a decision-making position, or at the very least an advisory position, as a member of the movement’s legal college. He was not a subordinate who did not know the direction his organization was taking. In view of his activism and the positions he took against the government in place, he was counsel to Jean-Pierre Bemba Gombo, who was, as noted earlier, the leader of the MLC, in the Supreme Court of Justice of the DRC (TR at p. 181).

Knowledge of atrocities

[76] The claimant’s testimony regarding his knowledge of the atrocities committed by the MLC was not credible.

[77] He initially testified that he did not know any details concerning the armed branch of the MLC. However, the documentary evidence indicates that the violations committed by the ALC were well-known and highly publicized.

[78] After several questions and confrontations, the claimant finally testified that between 2000 and 2004, he was aware of the human rights violations committed by the MLC (TR at pp. 992-993, 999, 1001, 1005-1006, 1008, 1010, 1012, 1035, 1043-1044, 1046). Concerning the massacres in North-Kivu, the applicant testified that he had been aware of them, but not in detail (TR at p. 994). He said that he heard through media reports that there was a war and, according to him, stray bullets that might hit a civilian are normal, that in a state of war, civilians sometimes died, but he was not aware that civilians were the target of attacks (TR at p. 995). When asked whether he had heard of the systematic rape of women, girls and boys as a weapon of warfare, and the murder of civilians, he claimed that he had not (TR at pp. 995-996, 998), and then admitted that he was in fact aware of that (TR at pp. 1043-1044, 1046) (Decision of the RPD at para. 44).

[79] When he was asked whether the government talked about the abuses committed by the MLC at that time, he testified that it was difficult to treat these reports as the truth and he put them down to political brainwashing (TR at pp. 998-999, 1001-1002). However, he did not try to verify whether the reports were true because, according to his testimony, he was very busy with his work at a law firm (TR at p. 1003) (Decision of the RPD at para. 45).

[80] When asked about the fires and massacres of entire villages in April 2001, which were widely reported in the media, the claimant testified that he had heard about the clash between the

MLC and the *mayi-mayi*; but knew nothing about that exact incident. However, he knew that there had been massacres generally by the MLC (TR at pp. 1010-1011). Later in his testimony the applicant tried to minimize the situation, essentially saying that it depended on the meaning given to the word **massacre**. [TRANSLATION] “When I hear that someone died, am I going to try to find out if it was a massacre?” (Decision of the RPD at para. 46; TR at pp. 1022-1024).

[81] About operation “Effacez le tableau” [wipe the slate], which was widely reported in the documentary evidence, the applicant knew only that [TRANSLATION] “the MLC killed a group of pygmies and attacked the pygmies” (TR at p. 1011). However, he added that at first he had believed it, but then he doubted the information because it was beyond human understanding that there was cannibalism in the Congo (TR at pp. 1012-1013). When confronted with the fact that even Bemba, the leader of the MLC, admitted in January 2003 that his movement engaged in cannibalism (TR at p. 596), the applicant answered that it might have happened, but [TRANSLATION] “the population doubts it” (TR at pp. 1014, 1017).

[82] It was not unreasonable for the RPD not to accept these attempts to offer justification. First, the conduct of the applicant in attempting to minimize the abuses committed by the MLC, while at the same time claiming that he was not a member, was contradictory. In addition, it is implausible that the applicant was not aware of the gravity and the systematic and systemic nature of the crimes committed by the MLC (Decision of the RPD at para. 47).

[83] If, as in this case, an individual lives and works in a country where thousands of people are victims of crimes against humanity and where one hears about it, it is totally unbelievable that one

would not have knowledge of what is taking place (*Shakarabi v. Canada (Minister of Citizenship and Immigration)* (1998), 145 F.T.R. 297, 79 A.C.W.S. (3d) 133 at para. 25).

[84] Concerning the mass recruitment of child soldiers, the applicant testified that he was aware of it, but according to him, it was done in 1998-1999 by soldiers of the former Mobutu regime, to supplement its forces (TR at pp. 1036, 1039-1040). When confronted with the fact that this practice continued in 2002, the applicant stated that he was not aware of it (Decision of the RPD at para. 48).

[85] At one point during the hearing, the applicant stopped his denials and admitted that the MLC was an armed movement before 2004 and that he knew it (TR at pp. 1046-1047), and that he knew that even the political branch supported the armed conflict, in accordance with the movement's statutes (Decision of the RPD at para. 49).

Length of time in the organization

[86] As noted earlier, the RPD did not believe the applicant when he alleged that he did not join the MLC until 2004. Having regard to the evidence described above, it was not unreasonable for the RPD to conclude that he was an active member of the MLC starting in 2000 and until the end of 2003, during a period when the movement was continuously and regularly committing the crimes against humanity referred to earlier.

Opportunity to leave the organization

[87] The applicant voluntarily remained with an organization that he knew was committing or had committed serious human rights violations.

[88] The applicant's testimony when confronted with the atrocities committed by the MLC was nonchalant and completely lacking in empathy for the thousands of victims. He spoke of this period in his country's history as a period of isolated incidents, [TRANSLATION] "pockets of resistance," the normal consequences of war. However, the massacres of civilians, the systematic rape of women, girls and boys, and the recruitment of child soldiers are not the collateral damage of a war. The applicant's speech is that of an active member of the MLC who knew what was going on but who, out of political ambition, chose that movement, the only party that, in his opinion, could have removed either of the Kabilas from power. He testified that his goal was to become a close government advisor (TR at p. 1113; Decision of the RPD at para. 52).

[89] Having regard to the foregoing, it was not unreasonable for the RPD to conclude that the applicant had not rebutted the presumption that he was complicit in crimes against humanity committed by the MLC between 2000 and 2004.

> The RPD did not have to conclude that a crime against humanity set out in paragraph 1F(*a*) committed by the MLC was necessarily and directly attributable to the specific acts or omissions of the applicant

[90] The applicant further submits that no crime set out in paragraph 1F(*a*) is attributable to him personally.

[91] In the case of complicity by association, it is not the nature of the crimes with which the applicant was charged that lead to his exclusion, but that of the crimes alleged against the organization with which he was associated. On that point, the Court of Appeal quoted with approval

the following passage from the reasons of the Court in *Harb*, above, in *Zrig v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 FC 761, 2003 FCA 178 (CA), at paragraph 57:

> [11] The first of these arguments does not apply in the case at bar. It is not the nature of the crimes with which the appellant was charged that led to his exclusion, but that of the crimes alleged against the organizations with which he was supposed to be associated. Once those organizations have committed crimes against humanity and the appellant meets the requirements for membership in the group, knowledge, participation or complicity imposed by precedent (see *inter alia*, *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.); *Moreno v. Canada (Minister of Citizenship and Immigration)*, [1994] 1 F.C. 298 (C.A.); *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.); *Sumaida v. Canada (Minister of Employment and Immigration)*, [2000] 3 F.C. 66 (C.A.); and *Bazargan v. Minister of Employment and Immigration* (1996), 205 N.R. 232 (F.C.A.)), the exclusion applies even if the specific acts committed by the appellant himself are not crimes against humanity as such. ...

[92] It should also be noted that in exclusion cases the courts have never required, in order for a claimant to be found to be complicit by association, that he or she be connected with specific crimes or acts as the person who actually committed them, or that the crimes or acts committed by an organization be necessarily and directly attributable to specific omissions or acts by the claimant (*Sumaida*, above, at paras. 31-32; *Sivakumar*, above; *Bazargan*, above, at paras. 3-13; *In the matter of B*, [1997] E.W.J. No. 700 (CA), at paras. 7 *et seq.* (CA England and Wales); *Harb*, above, at para. 11; *Zrig*, above, at paras. 55-56).

VI. Conclusion

[93] In light of the caselaw and the evidence, it was not unreasonable for the RPD to have serious reasons for considering that the applicant has committed crimes against humanity.

[94] It was therefore not unreasonable for the RPD to exclude the applicant from the application of the Convention under paragraph 1F(*a*).

[95] Accordingly, the applicant may not be granted the protection of Canada, as set out in section 98 of the IRPA.

[96] The applicant had knowledge of the crimes committed by the MLC at the relevant time and he shared the criminal intentions of that organization.

[97] The applicant's entirely voluntary association with the MLC for three years, in the knowledge of the crimes committed by that organization, shows that he adhered to the purposes and practices of that movement, and this makes him complicit in those crimes.

[98] As noted earlier, citing lengthy caselaw, when an applicant is aware that the group to which he or she belongs is continuously and regularly committing crimes or acts referred to in section F of Article 1 of the Convention and does not try to disengage himself or herself from that group at the earliest opportunity, consistent with safety for himself or herself, the RPD may then reasonably conclude that the applicant cannot have status as a refugee or person in need of protection under section 98 of the IRPA.

[99] It is plain, moreover, that the crimes committed by the MLC at the relevant time, as found by the RPD, were crimes against humanity within the meaning of paragraph 1F(*a*).

[100] Accordingly, based on the evidence and the applicable law, the applicant was complicit in crimes against humanity, merely by reason of his close and voluntary association with the MLC, since he knowingly tolerated them and did not leave the movement at the earliest opportunity.

[101] For all of the foregoing reasons, the exclusion of the applicant under paragraph 1F(*a*) is not unreasonable and is not vitiated by any reviewable error of law.

[102] For all of the reasons set out above, the applicant's application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. the applicant's application for judicial review be dismissed;

2. no serious question of general importance be certified.

"Michel M.J. Shore"

Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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