Federal Court  Cour fédérale

Date: 20110617

Docket: IMM-5122-10

Citation: 2011 FC 671

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 17, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

EVANS EUGENE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This Court must rule on an application for judicial review of the decision by an immigration officer in the Dominican Republic to refuse the applicant's application for permanent residence on the ground that he was [TRANSLATION] "inadmissible to Canada under section 35" of the *Immigration and Refugee Protection Act*, SC 2001, c 11 (IRPA). The applicant was found inadmissible because of [TRANSLATION] "reasonable grounds to believe that, from

1996 to 1999, while you were a member of the Haitian national police force [Police nationale d'Haïti (PNH)], you were complicit in a war crime, genocide or a crime against humanity."

[2] The body of the decision consists of a letter, dated May 18, 2010. The letter reproduces the definitions of the alleged offences as set out in the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24. The letter also details the consequences of inadmissibility. To complement this letter, it is necessary to read the officer's notes in the Computer-Assisted Immigration Processing System (CAIPS). Rather curiously, the CAIPS notes were entered in the system *after* the refusal letter was written. In this case, the CAIPS notes are a report of the interview held with the applicant.

[3] The notes contain the following key components of the decision:

a. The applicant began working as a police officer in the PNH in 1995. He then worked in a special unit, the Compagnie d'intervention et de maintien de l'ordre (CIMO) [public order and intervention force], operating in the capital city and assigned to crowd control during demonstrations. After that, he worked as a bodyguard for the Minister of the Interior.
b. While working for the CIMO, the applicant was on duty during three demonstrations. He carried a heavy weapon. He stated that he had heard of the CIMO's abuses at that time, but never witnessed any directly.
c. The CIMO's abuses are recorded in the documentary evidence, which recounts murders, disappearances and violence.
d. The officer was concerned about the applicant's presence at demonstrations and the role he may have played in repressing the expression of political opinions.
e. The officer found that the applicant was complicit in the abuses recounted.

[4] Aside from that, the decision also states that, at the end of the interview, the decision-maker advised the applicant of his inadmissibility.

[5] The applicant submits that the immigration officer's decision is in error, for two principal reasons. First, the applicant contends that he had no knowledge of the specific crimes alleged in the reasons. Inferring that these were repressive actions by the CIMO, the applicant argued that these actions are not crimes against humanity. Furthermore, since the applicant's alleged complicity is at issue, he contends that the reasons for the decision are inadequate in terms of the legal characterization of the applicant's "complicity". Thus, the legal argument concerns the adequacy of the reasons for the decision that the applicant is inadmissible for having taken part in crimes against humanity, war crimes or genocide.

[6] The Minister argued that it was possible and, in this case, desirable, that the Court supplement the reasons for the decision. This argument is rooted in the decision of the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, at paragraph 48, in which the Court stated that the reasonableness of a decision is assessed with respect "to the reasons offered or which could be offered in support of a decision", quoting from "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at page 286. Counsel for the Minister completed this argument with the Federal Court of Appeal's decision in *Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433 (FCA), which he relied on to contend that the Court of Appeal supplemented the trial Court's reasons and the reasons of the decision-maker. However, counsel for the Minister called attention to the following passage from the Supreme Court of Canada's decision in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12:

> *Dunsmuir* thus reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision maker to the applicant, to the public and to a reviewing court. Although the *Dunsmuir* majority refers

> with approval to the proposition that an appropriate degree of deference "requires of the courts 'not submission but a respectful attention to the reasons offered or which could be offered in support of a decision'" (para. 48 (emphasis added)), I do not think the reference to reasons which "could be offered" (but were not) should be taken as diluting the importance of giving proper reasons for an administrative decision, as stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43.

[7] The Court appreciates this honest and transparent clarification. The Minister thus submitted that the applicant was deemed inadmissible because of his activities in the PNH and the CIMO. Other evidence and statistics concerning the alleged abuses of the PNH and the CIMO were also filed. The applicable tests from the case law concerning complicity in crimes against humanity were also applied to the applicant's situation.

Analysis

[8] In adopting the IRPA in 2001, Parliament placed greater emphasis on the security of Canada and its citizens (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1). Besides the amendments to the IRPA, inadmissibility arrived hand in hand with the adoption of the *Crimes Against Humanity and War Crimes Act*. Parliament's security concerns are clear, just as is the absence of an unqualified right for non-residents to enter and remain in Canada (*Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711). It is also true that the issuing of a permanent resident visa is, to a certain extent, discretionary, and that the assessment of crimes against humanity is a question of fact (see, among others, *Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298 (FCA); *Ogunfowora v Canada (Minister of Citizenship and Immigration)*, 2007 FC 471).

[9] However, it goes without saying that a decision and its reasons must be supported adequately so that anyone reading it may deduce the key elements of the alleged conduct, and all the more so when the issue is a question as important as crimes against humanity. The lack of adequate reasons is an error of law reviewable by this Court (*Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433 (FCA); *Plaisir v Canada (Minister of Citizenship and Immigration)*, 2007 FC 264).

[10] Obviously, since these are administrative decisions, the standard is not whether the decision was perfect. As Justice Hughes recently stated, a decision-maker is not held "to a standard of clarity and legal analysis that would impress even the most critical reader" (*Singh Warainch v. Canada (Citizenship and Immigration)*, 2011 FC 55).

[11] In this case, upon reading the letter and the CAIPS notes, it is not possible to discern that the decision-maker had a real understanding of the legal framework applicable to crimes against humanity. First, the brevity of the May 18 letter should be emphasized. An applicant can validly be excluded for involvement in genocide, a war crime or a crime against humanity. However, the letter must specify which of the three categories applies. Reciting the legal definitions of the three categories, without specifying which one applies, is not enough.

[12] The CAIPS notes provide an understanding of the decision-maker's concerns about the employments in the PNH and the CIMO and as bodyguard of the Minister of the Interior. However, the letter states that only the years 1996 to 1999 in the CIMO are held against the applicant, so the decision concerns only the alleged conduct of the CIMO, a special unit that

provides crowd control during demonstrations. Genocide and war crimes must be excluded from the analysis outright, since there is no recognition that a war or genocide happened in those years. When such an inference is drawn at this stage, it is a sign that the reasons for a decision are weak.

[13] The Canadian legal framework on war crimes has been made clear by a number of courts, including the Supreme Court and the Federal Court of Appeal. In *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, the Supreme Court stated that for there to be a war crime, there must first be the elements of a crime: (1) a criminal act; and (2) a guilty mind (paragraph 127). Second, the criminal act alleged must (1) be one of the enumerated proscribed acts in the *Criminal Code*; (2) the act must be done as part of a widespread or systematic attack; and (3) the attack must be directed against any civilian population or any identifiable group (paragraph 128). The decision, conveyed by the letter and the CAIPS notes, does not identify any of these elements. With some zeal, it would be possible to infer those elements from the decision, but that is not the problem, for the applicant's *complicity* is also at issue.

[14] The decision is devoid of any analysis of the legal framework applicable to complicity in the crimes against humanity alleged. First of all, the Court is concerned that the applicant's guilt would seem to result solely from his association with the CIMO. Mere membership in an organization which from time to time commits international offences is not normally adequate justification for inadmissibility (*Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (FCA)), unless this organization owes its very existence to a limited, brutal purpose (*Saridag v Canada (Minister of Employment and Immigration)*, (1994) 85 FTR 307

(FCTD)). Many factors have been identified in the case law, particularly in *Ramirez*, above, and *Sivakumar*, above. For example, the Court notes the following:

a. The individual's personal and knowing participation in or toleration of the crimes;
b. Importance of the individual's functions, both the duties themselves and the individual's position in the hierarchy of the organization;
c. The individual's opposition to the conduct, or the individual's attempts to prevent them or to leave the organization;
d. Shared common purpose of the organization; and
e. Length of participation in the group.

[15] Furthermore, the burden of proof for establishing inadmissibility under section 33 of the IRPA is "reasonable grounds to believe". As explained by the Federal Court of Appeal, this requires more than mere suspicion or conjecture, but less than proof on a balance of probabilities (*Sivakumar*, above). In this case, the Court is not satisfied from reading the reasons that this standard of proof has been met.

[16] Consequently, the decision is flawed because of inadequate reasons. The application for judicial review is allowed. No question has been proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT IS that the application for judicial review is allowed. The application for a permanent resident visa is referred back for reconsideration by a different immigration officer. No question is certified.

"Simon Noël"
Judge

Certified true translation
Sarah Burns

FEDERAL COURT

SOLICITORS OF RECORD

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