

Federal Court



Cour fédérale

Date: 20160226

Docket: IMM-1615-15

Citation: 2016 FC 253

Ottawa, Ontario, February 26, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

**MOHAMMADREZA HABIBI
AND MALIHEH KHOSHADEL**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Habibi is a 64 year old citizen of Iran who spent approximately 28 years as a police officer in Iran. In 2012, he and his wife, Maliheh Khoshadel, came to Canada seeking refugee protection on the basis of their religious persecution as Christians. Their claims were denied, however, by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada in a decision dated January 22, 2015. They now seek judicial review of the RPD's decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001,

c 27 [IRPA], asking the Court to set aside the decision and order that their claims be re-determined by a new panel of the RPD.

I. Background

[2] Mr. Habibi was raised as a Muslim, although his family did have distant Christian ancestry. During high school, he became interested in Christianity and had a best friend who was an Armenian Christian.

[3] In May 1971, Mr. Habibi began his mandatory two years of military service with the Iranian infantry; after that service ended in 1973 he started working as a criminal investigation officer in the District 8 Police Station in Tabriz, a large city in northern Iran. From November 1985 until November 1987, he spent two years at Tehran Municipal Police University; he graduated with a Diploma in Criminology. In November 1987, he returned to Tabriz to work for the criminal investigation department of the police force and, subsequently, from March 1998 until 2002 when he retired, Mr. Habibi trained new recruits for that department. By the time of his retirement, he had obtained the rank of Lieutenant Colonel in the Disciplinary Forces of the Islamic Republic of Iran. After his return to Tabriz in 1987, Mr. Habibi says he witnessed the revolutionary regime's suppression of ethnic and religious minorities and became disenchanted with Islam, yet stayed silent because he feared not only loss of his job, but also imprisonment and torture if he spoke out.

[4] After his retirement, Mr. Habibi moved to Karaj, Iran, and opened a bookstore there in September 2003. Among his customers was a young Christian couple with whom Mr. Habibi

developed a friendship. After inviting the couple to his home, Mr. Habibi and his wife expressed their interest in Christianity and this, in turn, led to an invitation to attend the couple's underground Christian services. In May 2004, Mr. Habibi started attending the underground services; his wife attended only a few times though because of concern for her safety. By April 2006, Mr. Habibi had converted to Christianity as had his wife and their youngest son, who was then 20 years old. Prior to and after his conversion, Mr. Habibi distributed Christian Bibles and fliers through his bookstore to individuals referred to him by underground church members.

[5] On March 26, 2012, Mr. Habibi's underground church was raided by intelligence officers and some of his fellow parishioners arrested. The next day, while on a business trip in Tehran, Mr. Habibi learned of the raid and, after he was warned that the authorities were looking for him, he told his wife to remove all Christian materials from their home; their youngest son went into hiding and subsequently fled to Germany where he was eventually granted refugee protection. Mr. Habibi remained in Tehran until March 30, 2012, when he fled to Canada utilizing a visitor's visa he had previously obtained. Shortly after Mr. Habibi fled to Canada, his bookstore and house were searched by the intelligence authorities who brought an arrest warrant for him, informing Ms. Khoshadel he was an infidel and evangelizing others to become Christians and detaining her for questioning; she denied having converted to Christianity and was released. Two days later, Ms. Khoshadel was again detained and questioned but was again released without being arrested.

[6] Ms. Khoshadel secured a visa to travel to Canada in October 2012, following an invitation to visit from her daughter who is a Canadian citizen. After she arrived in Canada on

November 3, 2012, Ms. Khoshadel and her husband [together, the Applicants] made a claim for refugee protection. The RPD hearing commenced on May 12, 2013, but was adjourned twice in order to invite the Minister's intervention due to Mr. Habibi's involvement with the Iranian national police force. The hearing proceeded on September 9, 2014, and in a decision dated March 18, 2015, the RPD found that because Mr. Habibi is a person referred to in Article 1F (a) of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, Can TS 1969 No 6 [*Convention*], he is excluded from refugee protection by virtue of section 98 of the *IRPA*. The RPD also determined that the Applicants are not Convention refugees or persons in need of protection.

II. The RPD's Decision

[7] In its decision, the RPD acknowledged the submissions of Mr. Habibi's counsel that, for him to be excluded from refugee protection, there had to be evidence of him having a personal, significant, and knowing participation in crimes or crimes against humanity; and that he should not be excluded because there was no evidence he personally made a voluntary, knowing and significant contribution to the crimes or criminal purposes of the Iranian regime. In reviewing the Minister's submissions as to how Mr. Habibi had voluntarily made a significant and knowing contribution to the crimes and criminal purposes of the Revolutionary regime, the RPD adopted as its own the Minister's conclusion that Mr. Habibi's retirement after 28 years' service as a police officer did not "connote an individual who has been making long standing efforts to divorce himself from an offending organization at the earliest opportunity."

[8] The RPD noted Mr. Habibi's insistence that his department looked after only domestic issues and minor crimes and the police looked after public security. Nonetheless, the RPD found that:

[25] ... even if the PC's department was not involved in some of the actions of certain units such as enforcing musical choices or "appropriate" public behaviour, it would most certainly be aware of other actions and likely supported their enforcement. As a Colonel in the national police and a career police officer, the panel finds that, more likely than not, he, not only would have been aware of the police's co-operation with and support for other agencies such as the Komiteh, but also have been involved in providing direction to the actions of police when working with other agencies.

[9] Although Mr. Habibi testified that he and his department had never transferred a prisoner to another security or enforcement agency which had committed crimes and crimes against humanity, such as the Pasdaran, Komiteh, Basij or Ministry of Intelligence and Security, the RPD accepted the Minister's documentary evidence in this regard, noting that such evidence "indicates that the police worked closely" with such agencies.

[10] The RPD acknowledged there is no specific evidence of Mr. Habibi's direct involvement in any acts by agents of the Iranian regime which were crimes against humanity. Nevertheless, the RPD found that:

[28] ... given the PC's voluntary service of 28 years and his senior rank in the Iranian police force, who actively supported other security/enforcement agencies, it is reasonable to conclude that he was well aware, not only of the activities of the other agencies, but also of the police's involvement with and support of their actions against the Iranian people. Given his profile, it is also reasonable to conclude that he would have been involved directly or indirectly through direction to others in acts which have been determined by international law to be "crimes against humanity".

The RPD thus concluded that the Minister had met the burden of proof to show that “there are serious reasons for considering” that Mr. Habibi has “committed a crime” as contemplated by Article 1F (a) of the *Convention*.

[11] After concluding that Mr. Habibi had committed a crime as contemplated by Article 1F (a), the RPD next assessed his credibility. It found he was not a credible witness, stating that it was implausible that he was not aware of the actions of other enforcement agencies. In the RPD’s view, Mr. Habibi was not credible because: (a) there was no evidence of a break in his service despite his claim of being suspended and in hiding for three months following the 1979 revolution; (b) there were inconsistencies between the number of witnesses who provided evidence to the authorities about his Christian actions and how many were required to prove anything against him; and (c) Mr. Habibi attributed his wife’s detentions and releases to a lack of documentation against her and assistance from his friends, yet at the same time indicated that these friends would not be able to help him and acknowledged that the authorities might detain his wife to get at him.

[12] In assessing the Applicants’ fear of persecution, the RPD questioned why they were required to go to Bible study sessions in Toronto if they had been practicing Christians in Iran. In addition, the RPD noted that although Ms. Khoshadel was accused of converting to Christianity, she was not arrested, a fact which ran counter to Mr. Habibi’s assertion that an arrest warrant was issued for him based on someone saying that he was distributing Christian materials. Accordingly, in view of its credibility concerns, the RPD concluded there was insufficient reliable or trustworthy evidence to show: that the Applicants left Iran because the authorities are

searching for them due to their conversion to Christianity; that they were ever members of an underground church in Iran; or that they were motivated to join a Christian church in Canada because of their faith, since it was more likely than not they joined to establish a basis for their claim for refugee protection. The RPD thus determined that neither of the Applicants is a Convention refugee or a person in need of protection, and that Mr. Habibi was excluded from refugee protection as contemplated by Article 1F (a) of the *Convention*.

III. Issues

[13] While the parties raise various issues, only three need to be addressed by the Court, namely:

1. What is the Standard of Review?
2. Did the RPD adopt and apply the proper test for complicity in international crimes for purposes of Article 1F (a) of the *Convention*? and
3. Was it unreasonable for the RPD to find the Applicants' fear of persecution not credible?

IV. Analysis

A. *What is the Standard of Review?*

[14] I agree with the Applicants that the standard of review for the RPD's interpretation of Article 1F (a) is correctness. Hence, its interpretation of the scope of Article 1F (a) is owed no deference by the Court.

[15] In *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324, [2014] 2 FCR 224 [*Febles*], the Federal Court of Appeal offered the following rationale for why the applicable standard for the RPD's interpretation of Article 1F of the *Convention* is one of correctness:

[24] ... the normal presumption that reasonableness is the standard of review applicable to tribunals' interpretation of their enabling statute does not apply in this case. Article 1F (b) is a provision of an international Convention that should be interpreted as uniformly as possible: see, for example, *Jayasekara* at para. 4. Correctness review is more likely than reasonableness review to achieve this goal, and is therefore the standard to be applied for determining whether the RPD erred in law by interpreting Article 1F (b) as precluding consideration of Mr Febles' post-conviction rehabilitation and his present dangerousness. Further, the interpretation of Article 1F (b) does not give rise to any ambiguity.

[16] This determination was neither commented upon nor expressly upheld by the Supreme Court when it overturned the Court of Appeal's decision in *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431.

[17] As for the other aspects of the RPD's decision, notably as to the RPD's finding that the Applicants' fear of persecution was not credible, these are to be reviewed on the reasonableness standard. Accordingly, the Court should not interfere if the RPD's decision is intelligible, transparent, and justifiable, and falls within a range of possible, acceptable outcomes defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. It is not up to this

Court to reweigh the evidence that was before the RPD, and it is not the function of this Court to substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339.

B. *Did the RPD adopt and apply the proper test for complicity in international crimes for purposes of Article 1F(a) of the Convention?*

[18] Although the RPD's decision is devoid of any reference to the test and factors for complicity emanating from the Supreme Court's decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*], that fact alone does not make its decision unreasonable (see: *Aazamyar v Canada (Citizenship and Immigration)*, 2015 FC 99, at para 36, 249 ACWS (3d) 188). The RPD did acknowledge the submissions of Mr. Habibi's counsel that in order for Mr. Habibi to be excluded from refugee protection, there had to be evidence of him personally making a voluntary, knowing and significant contribution to crimes against humanity or the criminal purposes of the Iranian regime; at least to this extent, the RPD was somewhat mindful of the test for complicity. Furthermore, the Minister's written submissions explicitly directed the RPD to *Ezokola* and, in particular, to the six non-exhaustive factors identified by the Supreme Court which serve as a guide to deciding whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose of an organization with which the individual is associated.

[19] However, in this case, even if it might be said that the RPD understood the *Ezokola* test for complicity, it incorrectly and unreasonably applied the test. Its decision as a whole rests more upon a "guilt by association" approach to complicity, an approach which was explicitly rejected

in *Ezokola*, than upon the refined test and factors for complicity emanating from *Ezokola*. Consequently, for the reasons that follow, the matter must be returned for re-determination by a different panel member of the RPD in accordance with these reasons.

[20] The test for complicity following *Ezokola* requires that there be “serious reasons for considering that ...[an individual] voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime” (para 29). There are three requirements under the test: (1) a *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 (at paras 86-90). Neither party suggests that Mr. Habibi joining and working for the national police force was anything other than voluntary; indeed, he served with that force for some 28 years. Rather, their arguments focus upon whether he made any significant and knowing contribution to any crimes against humanity or the criminal purposes of the Revolutionary regime, and whether the national police force was even privy to any such crimes or purposes.

[21] Whether there is a significant and knowing contribution depends on the facts of each case. In applying the test, the Supreme Court offered the following guidance in *Ezokola*:

[91] Whether there are serious reasons for considering that an individual has committed international crimes will depend on the facts of each case. Accordingly, to determine whether an individual’s conduct meets the *actus reus* and *mens rea* for complicity, several factors may be of assistance. The following...factors...should serve as a guide in assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose:

- (i) the size and nature of the organization;

- (ii) the part of the organization with which the refugee claimant was most directly concerned;
- (iii) the refugee claimant's duties and activities in the organization;
- (iv) the refugee claimant's rank or position in the organization;
- (v) the length of time the claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
- (vi) the method by which the claimant was recruited and the claimant's opportunity to leave the organization.

...

[22] The Supreme Court noted in *Ezokola* that application of these factors is highly contextual, with the ultimate purpose "to determine whether there was a voluntary, significant, and knowing contribution to a crime or criminal purpose" (at para 92).

[23] Although the RPD in this case did not explicitly state and address the guiding factors from *Ezokola*, it did make at least some passing references to several of the above factors. For example, the RPD did note Mr. Habibi's rank or position as a Lieutenant Colonel in the national police force, as well as the manner by which he joined that organization and his opportunity to leave it. The RPD also highlighted that Mr. Habibi acknowledged human rights violations under the regime and expressed his distaste for the government's actions, yet he did not attempt to leave government service.

[24] However, in the circumstances of this case, the RPD's overall assessment of Mr. Habibi's alleged complicity was at best generalized, and its conclusion that there are serious reasons for

considering that Mr. Habibi has committed a crime as contemplated by Article 1F (a) of the *Convention* cannot be justified. As even the RPD acknowledged, there is no specific evidence of any direct involvement by Mr. Habibi in any crimes or crime against humanity committed by other enforcement agents within the Iranian regime. This being so, the RPD should have clearly set its mind to a full and transparent assessment and analysis of the relevancy and weight of the six factors noted above, rather than, for the most part, simply concurring with the Minister's conclusions. The failure to explicitly set out the test and factors for complicity, while in itself not a fatal flaw in the RPD's decision, strongly indicates that the RPD did not reasonably or properly consider the six factors and their respective relevance or weight in Mr. Habibi's case.

[25] For example, nowhere in its reasons does the RPD address the size and nature of either the national police force as a whole or the District police station where Mr. Habibi worked. The documentary evidence suggests that the national police force numbered some 50,000 members during the mid-1980s and engaged in "the usual urban police activities." In *Ezokola*, the Supreme Court noted (at para 94) that the size of an organization can assist in determining the likelihood that a refugee claimant would have known of and participated in the crime or criminal purpose, and that where "the organization is multifaceted or heterogeneous, i.e. one that performs both legitimate and criminal acts, the link between the contribution and the criminal purpose will be more tenuous." Although the RPD did mention Mr. Habibi's testimony as to his duties and activities as a police officer, it relied on vague documentary evidence which suggested that the members of the national police force "worked closely" with the Pasdaran or Komiteh and that cooperation between the Pasdaran and the police was "institutionalized" in order to find Mr. Habibi complicit in the crimes committed by other agencies of the Revolutionary regime.

[26] This reliance, however, cannot be justified and is therefore unreasonable. The RPD in this case failed to fully assess whether Mr. Habibi had *personally* made a significant and knowing contribution to some crime or crime against humanity. The RPD found Mr. Habibi was associated with the national police, who were in turn associated with other enforcement agencies in Iran who committed crimes against humanity. This reasoning is inherently problematic. The RPD essentially finds Mr. Habibi guilty by association; that is, Mr. Habibi is associated with the national police force, and because the police in turn are associated with other enforcement organizations which committed crimes against humanity, that makes him complicit in those crimes. There was no evidence before the RPD that Mr. Habibi in particular, or other members of the District 8 Police Station in Tabriz, had participated in any abuses or played any role in working with other enforcement agencies.

C. *Was it unreasonable for the RPD to find the Applicants' fear of persecution not credible?*

[27] The RPD's erroneous conclusion concerning Mr. Habibi's complicity is sufficient in itself to return the matter to the RPD for re-determination. However, it is necessary to briefly address this final issue because the RPD's negative credibility findings about Mr. Habibi when assessing his alleged complicity infected its assessment of each of the Applicants' fear of persecution.

[28] It is well established that plausibility findings should only be made in the clearest of cases; that is, where the facts presented are outside the realm of what could reasonably be expected or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant (*Valtchev v Canada (Minister of Citizenship*

and Immigration), 2001 FCT 776 at paras 7, 17, 208 FTR 267), and with a clear explanation for those findings (*Saeedi v Canada (Citizenship and Immigration)*, 2013 FC 146 at para 30, [2013] FCJ No 173) (see also: *Cortes v Canada (Citizenship and Immigration)*, 2014 FC 598 at para 19, 242 ACWS (3d) 167).

[29] The RPD questioned why the Applicants were required to go to Bible study sessions in Toronto if they had been practicing Christians in Iran, and because of this attendance drew a negative inference as to whether they had in fact been practising Christians in Iran. This inference is neither justifiable nor reasonable because the RPD ignored evidence before it in the National Documentation Package for Iran which suggests that attendance at Bible study sessions could be reasonable for someone who had converted to Christianity through an underground church in Iran because there are different levels of Christian knowledge for converts in Iran.

V. Conclusion

[30] For the reasons stated above, this application for judicial review is allowed and the matter is returned for re-determination by a different panel member of the RPD in accordance with these reasons. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned for re-determination by a different panel member of the Refugee Protection Division of the Immigration and Refugee Board of Canada in accordance with the reasons for this Judgment; and no serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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