Federal Court  Cour fédérale

Date: 20110427

Docket: IMM-3825-10

Citation: 2011 FC 475

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 27, 2011

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

DEO BUGEGENE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of the decision dated June 8, 2010, of the Immigration and Refugee Board's Refugee Protection Division (the panel). It determined that the applicant was excluded from the definition of refugee within the meaning of paragraph 1F(a) of Article 1 of the *United Nations Convention Relating to the Status of Refugees* (the Convention).

[2] For the reasons explained below, the application will be dismissed.

Facts

[3] The applicant is a citizen of Burundi. He claimed refugee protection in Canada with his spouse and children.

[4] The applicant was excluded from the definition of refugee, while the members of his family were accepted.

[5] The applicant is a Tutsi from the northwest of the country. He joined the army in 1973.

[6] Two weeks after he enlisted in the army, he left to participate in anti-aircraft artillery training in the USSR until 1977. He alleges that he suffered discrimination because he was not a southern Tutsi.

[7] Upon his return to Burundi in 1977, the applicant attended an officer training school, where he focused on anti-aircraft defence.

[8] He returned to the USSR from 1987 to 1990 for further training equivalent to the level of a Masters in military science. During these years, the army committed atrocities against the Hutus in his country.

[9] The southern officers attempted a coup on July 3, 1993. A subsequent attempted coup on October 21, 1993, resulted in the assassination of President Ndadaye. The applicant explained how he resisted the rebels in his Personal Information Form (PIF) (Tribunal Record pages 69 to 71). He fled to the Democratic Republic of the Congo (DRC) to seek asylum, where he was arrested and detained for 21 months.

[10] He was charged with the murder of President Ndadaye but the charge was later withdrawn. He was also charged with deserting the army. He received a conditional six-month sentence, but appealed that sentence and the proceedings before the Supreme Court have not yet been completed.

[11] Upon his return to Burundi, the applicant continued to have problems with the authorities because of statements he had made during the events of 1993. In October 2006, he took advantage of a change in the political environment and held a press conference in order to rebuild his reputation and advance his legal proceedings.

[12] After this press conference, he started having serious problems: in 1997 someone threw a grenade into his business; in 2001 he was arrested and detained for four hours; in 2003 or 2004, his takes were increased considerably and his application for a pardon was unsuccessful. Fearing for his and his family's lives, he fled. They arrived in Canada on April 9, 2007, and claimed refugee protection.

Impugned decision

[13] On the issue of credibility, the panel found that the applicant's testimony contained no contradictions, that he answered spontaneously and without hesitation and that much of his testimony was corroborated by an abundant amount of documentary evidence.

[14] The panel also determined that the applicant had been persecuted by reason of his political opinion. It was of the view that his political opinion had been demonstrated by his actions at the time of the failed coup in 1993, his departure to the DRC, his appeal of his sentence, and finally his press conference in 2006 at which he spoke openly about the situation and voiced his opinion (decision, at paras. 36 to 46).

[15] The panel determined that the members of the applicant's family are Convention refugees by reason of their membership in a particular social group, namely that of family.

[16] However, given that the applicant had been a member of the army for 20 years, namely from 1973 to 1993, and even if he had not personally committed crimes against humanity, the panel excluded him by reason of his knowledge of the crimes committed by the army and by reason of the rank he held, namely that of major. He could have disassociated himself from the army by resigning, which he did not do. The panel determined that he was complicit by association, citing *Pineda Collins v. Canada (Minister of Citizenship and Immigration),* 2005 FC 732.

[17] Based on the abundant amount of documentary evidence, the panel found that crimes had been committed by the army, particularly in 1965, 1972, 1988 and 1991. It did not believe the applicant when he stated that at the time he joined the army in 1973 and although he was only 20 years old, that he did not know about the atrocities committed by the army in 1965, and especially those committed in 1972.

[18] Similarly, the panel did not believe the applicant when he stated that he was in Russia in 1988 and had not been informed about the crimes committed by the army that year. The applicant alleged that he had only heard rumours.

[19] As for the massacre in 1991, once again the panel found it impossible that the applicant, who commanded a military camp in Bujumbura, knew so little about this, since the government had admitted that 500 people had died. The massacre had taken place in the province of Cibitoke and in Bujumbura.

[20] The panel referred to the applicant's PIF and the transcript of his press conference on October 23, 2006, to infer that he had been aware of the crimes committed by the army. The panel wrote the following at paragraph 81 of its decision "… It is not certain that the male claimant had enough influence to oppose the army's actions. Regardless, he did not try to dissociate himself. The male claimant stated that he knew only one colleague who had resigned, and that person suffered economic hardship as a result because of an order preventing him from being hired without the army's authorization. The panel is of the opinion that these problems did not affect his safety and could not be a valid reason for the male claimant to maintain his association with the army … ".

[21] In conclusion, the panel was of the opinion that the applicant could have left the army well before 1993 and did not do so. Furthermore, due to his knowledge of the crimes committed and his high rank in the army, there were therefore serious reasons for considering that he had committed a crime against humanity.

Analysis

[22] The applicant submits that the panel made two significant errors. First, that it erred in law in the definition of complicity by association and second, that it erred in fact when it stated that it did not believe the applicant on the subject of his knowledge of the crimes committed by the army at the time he joined in 1973. Same scenario for the massacres in 1988 and 1991.

[23] With regard to the first argument, the applicant cited the following decisions: *Ramirez v. Canada (Minister of Citizenship and Immigration)* 1992 2 FC 306; *Bazargan* FCA A-400-95; *Bouasla v. Canada (Minister of Citizenship and Immigration)* 2008 FC 930; *Zazai v. Canada (Minister of Citizenship and Immigration)* 2005 FCA 303; *Contreras Magan v. Canada (Minister of Citizenship and Immigration)* 2007 FC 888; *Ezokola v. Canada (Minister of Citizenship and Immigration)* 2010 FC 662; *Valère v. Canada (Minister of Citizenship and Immigration)* 2005 FC 524; *Pineda Collins v. Canada (Minister of Citizenship and Immigration)* 2005 FC 732.

[24] On the basis of these cases, the applicant argued that in addition to having knowledge about the crimes committed, there must be a shared common purpose, a personal involvement [TRANSLATION] "the person has to have put his own hand to the workings" to arrive at the notion of complicity by association.

[25] As for the second argument, the applicant claimed that the massacres in 1965 and 1972 were not relevant because the Burundian army was not considered to be an organization directed toward a limited and brutal purpose. In addition, at the time he joined the army he did not know that the army had committed crimes, he believed instead that it had intervened to restore calm at the school where he was studying.

[26] As for the events in 1988, he indicated that he was in the USSR and that the information that he received was only fragmentary and that there were rumours circulating to the effect that there had been confrontations between the rebels and the army.

[27] As for the 1991 massacre, the applicant mentioned that when he returned to the country in 1990, the president at the time had adopted a policy of national reconciliation which included the creation of a commission tasked with promoting unity as well as the integration of Hutus into the governing party and the government**.**

[28] The panel should have taken the applicant at his word when he explained that he had never been directly or indirectly associated with the crimes committed by the army. If he had moved up through the ranks of the army, this was due to the fact that he had no disciplinary file and because ranks were obtained in an automatic manner.

[29] Finally, the best evidence provided by the applicant regarding his lack of a shared common purpose with the violent acts committed by the army is his conduct during the events of 1993. In fact, he had been involved in the coup against his will. He had tried to stop those involved in the coup but the men under his command disobeyed his orders. He had never supported the coup

because he knew full well that it would mean an end to the democratic reforms that he supported. He therefore fled the country and later suffered persecution to such an extent that members of his family were recognized as being refugees.

[30] For its part, the respondent pointed out to the Court that in the *Ezokola* case, an appeal has been filed with the Federal Court of Appeal. That case is to be heard soon. The two parties agree that a judgment should be rendered in this case without waiting for the result of the Federal Court of Appeal's judgment since the facts in this case are very unusual.

[31] With regard to the law, the respondent noted that the Minister does not have to prove that the applicant is guilty within the meaning of the Criminal Code in order for him to be complicit by association. This evidence is much less onerous, that is to say, [TRANSLATION] "having serious reasons to believe" that a person committed a crime, *Bazargan v. Canada (Minister of Citizenship and Immigration).*

[32] Recently, Justice Boivin of our Court, in *Ndabambarire v. Canada (Minister of Citizenship and Immigration)* 2010 FC 1**,** undertook an exhaustive analysis of the case law regarding complicity by association. From this he identified the following criteria: method of recruitment; position and rank in the organization; nature of the organization; knowledge of atrocities; length of participation in the organization's activities; opportunity to leave the organization. He went so far as to conclude, at paragraph 38, that:

> "…Complicity by association is established by analyzing the nature of the crimes of which the persecuting organization or group with which the claimant was associated is accused, even if the persecuting group is not an organization directed to a limited, brutal purpose.

> Complicity by association can be established even if the person covered by the exclusion clause was not a member of the persecuting group."

[33] I agree with this reasoning and with the choice of standard of review. In applying the principles identified in that matter to the facts in the case under review, I do not find it unreasonable that the panel determined that the applicant was complicit by association in crimes committed by the army, at least for the massacre in November 1991.

[34] Allow me to explain. Assuming, but without deciding that the panel was mistaken by linking the applicant to the atrocities committed by the army in 1965, 1972 and 1988, I find that the panel's findings excluding the applicant for the 1991 atrocities are supported by the evidence. In fact, the documentary evidence the panel relied upon with regard to the existence and location of the crimes committed in 1991 is not contested.

[35] The applicant held a very high-ranking military position (commander) in the army in Bujumbura, one of the locations of the massacre in 1991. The applicant only dissociated himself from the army in 1993, during the coup. When the panel writes, at paragraph 70, that "... His dissociation had nothing to do with the crimes committed by the army previously, when the male claimant was not only a member of the army, but also a member of its senior leadership", this finding is not unreasonable in light of the evidence.

[36] The same applies with regard to the panel's assertion that the applicant knew about the crimes against humanity committed by the Burundian army while he was among its ranks.

[37] The Court’s intervention is not warranted.

[38] No question was proposed for certification. This record does not contain any.

JUDGMENT

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

"Michel Beaudry"
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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