

Federal Court



Cour fédérale

Date: 20131025

Docket: IMM-8892-12

Citation: 2013 FC 1076

Toronto, Ontario, October 25, 2013

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**AMITHA LAL DASANAYAKE DASANAYAKE
MUDIYANSELAGE
(A.K.A. AMITHA LAL DASA DASANAYAKE
MUDIYANSE)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant's claim for refugee protection is based on his evidence that, as a citizen of Sri Lanka, he has a well-founded fear of persecution from government authorities in Sri Lanka because he has been accused of being an LTTE supporter. In the present Application, the Applicant

challenges the August 1, 2012 Decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD) in which the determination was made pursuant to s. 98 of the *Immigration and Refugee Protection Act* that he is excluded from the status of a Convention Refugee and from the status of a person in need of protection.

[2] In the Decision the RPD found that, with respect to Article 1F(a) of the *United Nations Convention Relating to the Status of Refugees*, there are serious reasons for considering that because between 1992 and 2003 the Applicant was a police officer in the Sri Lankan Police Force (SLPF), and because during that period the SLPF committed crimes against humanity in specifically targeting ethnic Tamils, the Applicant was complicit in the commission of the crimes. An important feature of this conclusion is the weight that the RPD placed on the Applicant's mid-level management position in the SLPF.

[3] The paramount issue in the present Application is whether it is fair and just to set the Decision aside because the RPD rendered it on an application of a legal standard set by the Federal Court of Appeal in *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 224 with respect to complicity under Article 1F(a) that has been "clarified" by the Supreme Court of Canada in its appeal decision of July 19, 2013 (*Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40).

[4] Justice Noël in the Federal Court of Appeal decision at paragraph 72 provides the following answer to a certified question:

I therefore find that the certified question as reformulated must be answered in the affirmative. In my view, a senior official may, by

remaining in his or her position without protest and continuing to defend the interests of his or her government while being aware of the crimes committed by this government demonstrate "personal and knowing participation" in these crimes and be complicit with the

government in their commission. It is useful to remember, however, that the final outcome will always depend on the facts particular to each case (Ramirez, p. 220; Bazargan, para. 12).

[5] In reaching the exclusion decision presently under consideration, the RPD applied the Federal Court of Appeal's opinion by concluding "the FCA found that the 'personal and knowing participation' test should be applied more broadly than requiring personal participation of the claimant" (Decision, para. 36). After an examination of the evidence with respect to the Applicant's denials of knowledge of crimes against humanity committed by the SLPF, the RPD made a finding of negative credibility and further came to the broad conclusion as follows:

Based on the negative inference drawn the Panel finds on a balance of probabilities that the claimant was aware of the human rights violations committed by the SLPF and was complicit in them. The claimant worked in many areas of Sri Lanka, in many different stations and detachments and by failing to protect the civilians targeted by the SLPF, he contributed to the human rights violations. In the alternative the claimant was wilfully blind to the atrocities, especially given that according to this testimony he was trained in human rights and that the SLPF gave human rights training internationally.

[Emphasis added]

(Decision, para. 64)

On appeal, the Supreme Court of Canada has provided the following clarification of the Federal Court of Appeal's approach:

By answering "yes" to the certified question, the Federal Court of Appeal's reasons could be seen as having endorsed an overextended approach to complicity, one that captures complicity by association or passive acquiescence (para. 79).

[...]

Accordingly, the decision of the Federal Court of Appeal should not be taken to leave room for rank-based complicity by association or passive acquiescence. Such a reading would perpetuate a

departure from international criminal law and fundamental criminal law principles (para. 83).

[Emphasis added]

And, in addition to making it clear that an overextended approach to complicity is to be avoided, the Supreme Court decided to set a new test:

In light of the foregoing reasons, it has become necessary to clarify the test for complicity under [Article] 1F(a). To exclude a claimant from the definition of "refugee" by virtue of [Article] 1F(a), there must be serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose (para. 84).

[Emphasis added]

[6] In my opinion, the Supreme Court of Canada's efforts to bring clarity to complicity under Article 1F(a) has the effect of impugning the RPD's decision. This is so because the legal test applied by the RPD has been effectively extinguished as a matter of law.

[7] Nevertheless, Counsel for the Minister advances the following argument:

While the RPD did not have the benefit of the SCC *Ezokola* decision, the impact on the ultimate decision was minimal because in effect the RPD found that the Applicant has voluntarily and with knowledge provided significant contribution to the crimes and criminal purpose of the Sri Lankan Police Force (SLPF).

(Respondent's Memorandum of Argument, September 20, 2013).

In my opinion, the argument has no weight because it is directed at a specific request with which I cannot comply: a determination by me of the Applicant's claim on an application of the evidence on the record before the RPD to the new test stated by the Supreme Court of Canada. In my opinion

this is the sole responsibility of the RPD on a redetermination of the present Application. I find that the fair and just result in the present Application is to require the RPD to exercise its responsibility.

ORDER

THIS COURT ORDERS that for the reasons provided, the decision under review is set aside and the matter is referred back for redetermination before a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

Docket:

imm-8892-12

STYLE OF CAUSE:

AMITHA LAL DASANAYAKE DASANAYAKE
MUDIYANSELAGE (A.K.A. AMITHA LAL DASA
DASANAYAKE MUDIYANSE) v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING:

TORONTO, ONTARIO

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**REASONS FOR ORDER
AND ORDER:**

CAMPBELL J.

DATED:

OCTOBER 25, 2013

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