Federal Court  Cour fédérale

Date: 20131218

Docket: IMM-11654-12

Citation: 2013 FC 1261

Ottawa, Ontario, December 18, 2013

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

JAMES MOBWANO KAMANZI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

1. Introduction

[1] This is a judicial review application of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [RPD] dated October 25, 2012, finding that the applicant was not a Convention refugee nor a person in need of protection pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the reasons which follow, the application is dismissed.

2. The Facts

[3] Mr Kamanzi is a citizen of the Democratic Republic of Congo [DRC] of Tutsi ethnicity. He was born and grew up in Bukavu, DRC.

[4] He states that he finished school at the age of 19 and was unemployed for a year and a half while waiting to hear his results from the state examinations. In November 1996, at age 21 (he was born October 29, 1975), he was recruited as an intelligence agent by Anselme Masasu Nindaga [Mr Masasu], a leader of the *Alliance des forces démocratiques pour la libération du Congo* [AFDL]. This was not a salaried post; instead, he received periodic gifts of free food, gas, and money. He was tasked with checking information on local affairs in Bukavu. No training was provided. He did not become a member of the AFDL.

[5] Mr Masasu was arrested in 1997. He escaped from prison in 1998 and was rearrested soon after and remained in prison until 2000, after which he was released and, the same year, assassinated. The applicant continued to work on his behalf from 1997 to 1999. He also sold used cars. In 1999 he obtained a better paid job in Kinshasa as an intelligence agent for Azarias Ruberwa Manywa [Mr Ruberwa], a vice president of the DRC, sounding out local opinion and gathering information on prices of goods, supply of electricity, and such. This again was not a salaried position; Mr. Ruberwa would meet with the applicant once or twice a month and discuss his information, then give him envelopes containing varying amounts of cash.

[6] The applicant lived in Rwanda without status for two years. Eventually, he arrived in Canada on June 18, 2008 on a false passport. He applied for asylum in August 2008.

[7] At the opening of the hearing on June 29, 2012, the Board member noted that one of the issues was potential exclusion for complicity in war crimes or crimes against humanity in being complicit as an intelligence officer for Anselme Masasu Nindaga who was one of the main leaders and military commanders of the AFDL. Masasu had recruited 10,000 child soldiers during 1996 and 1997.

[8] At his refugee hearing, the applicant denied being a member of Mr Masasu's movement or any other political party in the DRC, but admitted to having gone to work for Masasu at the end of October 1996. The applicant noted that his family knew Masasu's family, and then provided an account of Masasu's military history and leadership role in the First Congo War which was consistent with the account provided in the documentary evidence. The applicant testified that Masasu had left to fight for the liberation of Tutsis in Rwanda in the 1990s but had returned as the "second commander" of the Rwandan troops after the fall of Bukavu to the rebels at the end of October 1996.

[9] The applicant described how he was recruited at the Bukavu Cathedral by Masasu, who offered to have the applicant work directly with him to assuage his mother's concerns about him becoming involved in the army. Masasu offered to teach the applicant how to do intelligence and proposed that the applicant work directly with him. The applicant stated that he saw Masasu often thereafter. He also explained that he could find information because he was born in Bukavu and

grew up there, so he knew many people – whereas Masasu grew up in Rwanda and needed someone to verify the local intelligence he was receiving.

[10] The applicant was asked several questions about what sorts of intelligence he provided to Masasu. He provided five main examples:

(i) He said he provided intelligence to Masasu on the local youth of Bukavu, who were seeking refuge in the Kahuzi-Biega forest to the west of Bukavu and going to fight for the *Mai Mai*. Masasu wanted to know how the *Mai Mai* were recruiting Bukavu youths. The applicant went and contacted young persons and did research in the *cité*, and discovered that most of them had joined voluntarily; the *Mai Mai* were not recruiting them.

(ii) He said he provided intelligence to Masasu on local military uprisings against the Rwandan troops in Bukavu. He also said he provided intelligence in relation to civilians whose houses had been pillaged and taken by Rwandan troops, and in relation to the unjust arrest of people and children. The applicant gathered this information to advise Masasu, who then dealt with the problem.

(iii) The applicant said he acted as an intermediary with local customary chiefs. These chiefs wanted Masasu – who was a military man – to create an office with staff, whom they could communicate with. The applicant facilitated this dialog and the creation of Masasu's first office.

(iv) The applicant also testified that he provided intelligence to Masasu in relation to the families in Bukavu which did not want their children to join the liberation army of the AFDL. These families organized meetings in the *cité* to stop their children from going to join the troops. They told their children and everyone else that they should not join the movement, because they were Rwandan occupiers and people should not be fighting against Mobutu. They organized local meetings to inform the youths. The applicant thus advised Masasu that there was this sort of movement to prevent people from joining the rebel movement or defending it. This pushed Masasu to take to the radio to try to encourage parents to offer up their children to go fight against Mobutu's regime. The applicant further explained that Masasu would use the intelligence he had gathered in assessing how to "intervene" on these issues.

(v) In 1997, the applicant also participated in negotiations between Masasu and the *Mai Mai* militias, who were rebelling against the Rwandan troops in Bukavu at the time. Masasu involved the applicant in these talks because he had grown up with two of the *Mai Mai* leaders in Bukavu before the war and knew them personally. This occurred three weeks before Masasu was arrested.

[11] The applicant explained how he started working for Masasu immediately after they met at the end of October 1996, moving from Bukavu to Kinshasa, before eventually quitting and returning to Bukavu in December 1999. The applicant said he even continued to work for Masasu after his arrest in November 1997, and believed he was the sole intelligence officer to do so – despite the dismantling of his network and office. The applicant ultimately described himself as Masasu's "right hand man" ("*homme de confiance*").

[12] The Board asked the applicant a series of questions about his knowledge of the recruitmend of child soldiers. He described how children were recruited at the outset of the war, and how Kabila and Kisase Ngandu (the then military chiefs of the AFDL) called on the population to offer up their children to fight Mobutu. The applicant was asked if he had any problems with the recruitment of child soldiers, and why he maintained his association with Masasu when he knew this was going on. He continued to deny that Masasu was implicated by stating that the recruitment of child soldiers was "official" and that it was "the AFDL and President Kabila and Kisase Ngandu who did it."

3. Contested Decision

[13] The decision referred to the exclusion pursuant to section 98 of *IRPA* and Article 1F(a) of the Convention. The Board noted that the recruitment of child soldiers was a war crime pursuant to Article 5 of the *Rome Statute of the International Criminal Court*.

[14] The Board applied the factors of the test for complicity enunciated by Justice Shore in *Ishaku v Canada (Minister of Citizenship and Immigration)*, 2011 FC 44 at para 70 [*Ishaku]*. This test based on the law at that time was complicity by association, which was described as follows: 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. Based on that test the Board member made the following findings of fact (as translated in respondent's memorandum) in respect of the factors cited in *Ishaku*:

(i) **Method of Recruitment**: The applicant testified that he met Nindaga at the cathedral in Bukavu (the capital of South Kivu province in eastern DRC) and was

offered a military post, which his mother was opposed to. The applicant ended up agreeing to work as an intelligence officer (*agent de renseignement*) for Nindaga, which the Board fouind to be an entirely voluntary association.

(ii) **Position and Rank**: The applicant worked as an intelligence officer for Nindaga from November 1996 to the end of 1999; he described his functions as the facilitation of meetings and the exchange of intelligence between Nindaga and local leaders, the transmission of so-called unjust arrests of youths and attendance at a meeting with "Mai-Mai" (local militia) military leaders at Nindaga's side – due to his knowledge of these leaders.

Without occupying a military post, the Board found the applicant filled a position of trust (*un poste de confiance*) and thus facilitated the work of Nindaga within the AFDL.

(iii) **Knowledge of the Crimes Committed**: The applicant was asked by the Board if he had any objective evidence that Nindaga was not responsible for war crimes. He responded that he did not have any such evidence. Based on the documentary evidence, the Board found Nindaga to be responsible for war crimes.

The applicant stated that he was aware of the recruitment of child soldiers because this occurred via television programs, among other means. The Board found he was aware of the recruitment of child soldiers by the AFDL, which Nindaga was part of.

(iv) **Nature of the Organization**: The AFDL was founded in 1996 and comprised several groups, including Nindaga's MRLZ group. Amnesty reported that Nindaga,

as the leader of an armed political group, recruited a large number of young men and child soldiers as fighters and security officers during the 1996 conflict that led to the overthrow of Mobutu Sese Seko. Similarly, the Board's research directorate also indicated that Nindaga played a major role in the recruitment and training of child soldiers, of whom 10,000 were recruited and used by the AFDL in 1996 and 1997.

(v) **Length of Association** and (vi) **Opportunity to Leave**: The applicant became associated with Nindaga in November 1996 and his association continued during the period of recruitment of child soldiers. The applicant continued to act as an intelligence officer for Nindaga up until the end of 1999, when he wanted a higher paying post. The Board found that the applicant could have severed his relationship with Nindaga well before the end of 1999 if he had wished to.

[15] On the basis of the foregoing findings, the Board concluded that there existed "serious reasons for considering" that the applicant was complicit with Masasu in the war crimes contrary to the requirements of section 98 of the *IRPA* and the international treaties respecting these forms of crimes. Accordingly, the member dismissed the application.

[16] Subsequent to this decision, the Supreme Court in *Ezokola v Canada (Minister of Citizenship and Immigration),* 2013 SCC 40 [*Ezokola*] modified the test for complicity to require "serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose" (at para 84).

4. Issue

[17] The issue is whether the decision of the Board should be set aside based on the new test for complicity prescribed by the Supreme Court of Canada in *Ezokola*?

5. Standard of review

[18] In *Nsika v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1026, at paras 14-15, Justice Gleason, based upon the reasons of the Federal Court of Appeal in *Ezokola*, 2011 FCA 224 held that the standard of review is correctness for the enunciation of the test for complicity and reasonableness for the application of the test. The only issue in this case concerns the application of the test.

6. Analysis

[19] The applicant relies upon the recent decision of Justice Campbell in *Mudiyanselage v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1076 [*Mudiyanselage*] which held that because the test applied by the RPD had been extinguished as a matter of law, that it was appropriate that the matter be re-determined. I quote the relevant passages of the case for the purposes of this application as follows:

> [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:
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> > 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.

[20] In response to the applicant's argument, the respondent submits that this is one of the rare cases where the "futility doctrine" first enunciated by the Supreme Court of Canada in *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 [*Mobil Oil*] should be applied as it was by the Federal Court of Appeal in *Cartier v Canada (Attorney General)*, 2002 FCA 384, where a re-determination of this claim would result in the same outcome. Specifically reference was made to paras 32-33 of the decision:

> **32** I readily admit that in Mobil Oil, supra, it was a case of a breach of natural justice and a matter in which the answer to the point of law at issue was "inevitable" (at page 228) even if the party had an opportunity to be heard.
>
> **33** Nevertheless, I do not see any reason why the rule developed in Mobil Oil cannot be applied to other types of situation. A judge must of course act with extreme caution to avoid the process of reviewing the legality of a decision becoming a process of reviewing its merits. However, it seems to me that if a judge may ignore a breach of natural justice when the outcome is inevitable he must a fortiori be allowed to overlook an error of law when it is not conclusive or when he is [page334] satisfied that if the Court had applied the right test it would have come to the same conclusion. I note that this Court has applied Mobil Oil at least twice, in Yassine v. Canada (Minister of Employment and Immigration) (1994), 27 Imm. L.R. (2d) 135

> (F.C.A.), in which Stone J.A. applied the futility rule, explaining that "[t]he limits within which Professor Wade's distinction should operate are yet to be established" (at paragraph 10), and in Patel v. Canada (Minister of Citizenship and Immigration) (2002), 288 N.R. 48 (F.C.A.), in which Evans J.A. dismissed an application for judicial review because "the error made by the visa officer was not material to the outcome of the visa application" (at paragraph 6). Rothstein J.A. also referred to it at paragraph 88 of his dissent in Canadian Magen David Adom for Israel v. M.N.R., 2002 FCA 323; [2002] F.C.J. No. 1260 (C.A.) (QL).
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> [Emphasis added]

[21] In *Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433 (FCA) [*Sivakumar*], the Federal Court of Appeal applied the futility doctrine to a situation of war crimes, indicating that while it would be inappropriate for a Court to review the record and make findings of fact, if no properly instructed tribunal could come to a different conclusion, the decision may be upheld. Paras 32 to 35 are set out below:

> **32** However, the closest the panel came to documenting the LTTE's actions, as well as the appellant's knowledge of and intent to share in the purpose of those acts, and to determining whether those acts constituted crimes against humanity were vague statements about "atrocities" and "abhorrent" tactics committed by all parties to the civil strife in Sri Lanka (Case, at pages 9-10).
>
> **33** The <u>importance of providing findings of fact as to specific crimes against humanity</u> which the refugee claimant is alleged to have committed cannot be underestimated in a case such as this where the Refugee Division determined that the claimant has a well-founded fear of persecution at the hands of the Sri Lankan government. For example, the Amnesty International Report of 1989 indicates that the Sri Lankan government is responsible for arbitrary arrest and detention without charge or trial, "disappearances", torture, death in custody, and extrajudicial killings. Given the seriousness of the possible consequences of the denial of the appellant's claim on the basis of section F(a) of Article 1 of the Convention to the appellant and the relatively low standard of proof required of the Minister, it is crucial that the Refugee Division set out in its reasons those crimes against humanity for which there are serious reasons to consider that a

> claimant has committed them. In failing to make the required findings of fact, I believe that the Refugee Division can be said to have made an error of law.
>
> **34** In some cases, the inadequacy of the Refugee Division's findings would require the case to be sent back to the Refugee Division for a new determination. However, as MacGuigan J.A. held in Ramirez, supra, this Court may uphold the decision of the Refugee Division, despite the errors committed by the panel, if "on the basis of the correct approach, no properly instructed tribunal could have come to a different conclusion" (pages 323-324). In my opinion, under the standard articulated in Ramirez, supra, it is not necessary to send this matter back to the Refugee Division for a new determination for no properly instructed tribunal could come to any other conclusion than that there were serious reasons for considering that the appellant had committed crimes against humanity.
>
> **35** While it would be inappropriate for this Court to review the record and make findings of fact based on the credibility of the materials and witnesses before the tribunal, that is not necessary in this appeal. It is incontrovertible that the appellant knew about the crimes against humanity committed by the LTTE. The appellant testified before the Refugee Division that he knew that the LTTE was interrogating and killing people deemed to be traitors to the LTTE (Case, at pages 113-115). The appellant testified that he argued with Prabaharan, the leader of the LTTE, about civilian deaths not being in the interest of the LTTE's cause after the LTTE was accused of civilian deaths (Case, at page 123). The appellant also stated that while he never allowed any civilian deaths to occur, he did witness or find out about civilian deaths caused by the LTTE (Case, at page 124). Further, the appellant testified that he was aware of an incident in which a member of the LTTE, Aruna, shot 40 members of rival Tamil groups with a machine gun.
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> [Emphasis added]

[22] It does not appear that the court in *Mudiyanselage* had the benefit of submissions based on the "futility doctrine". As this doctrine has been endorsed by the Federal Court of Appeal, including being applied in a war crimes situation to uphold the decision of the RPD, I conclude that "if on the basis of the correct approach, [in this case the test in the Supreme Court decision in *Ezokola*] no

properly instructed tribunal could have come to a different conclusion" (*Sivakumar*, above, at para 34) that the Board's decision should be upheld.

[23] By Articles 5(1)(c) and 8(2)(b)(xxvi) of the Rome Statute of the International Criminal Court "Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" is a war crime.

[24] The *actus reus* of the particular war crime in question is that of participating in conscripting child soldiers to participate in hostilities. It does not require the use of intimidation or force to conscript the children, merely the act of participating in a voluntary conscription program meets the requirements to be a war crime.

[25] I am satisfied that the answers provided by the applicant to questions described above (see paragraph 10) are overwhelmingly sufficient and persuasive that were the matter to be re-determined by the Board with instructions to apply the Supreme Court test of active knowing participation as the basis for complicity, the Board would conclude the matter by having "serious reasons to consider" that the applicant voluntarily and knowingly participated in the conscription of child soldiers.

[26] In particular, paragraph 10 (iv) above, describes the active knowing participation of the applicant in obtaining information from families who did not want their children to join the Army and providing that information to Masasu to assist him in assessing how to 'intervene' on these issues. I agree with the respondent that the record shows that the applicant was directly involved in

providing Masasu with important intelligence regarding those who opposed the recruitment of child soldiers, which Mr Masasu then acted upon. His personal work thus facilitated the terrible crime.

[27] Being satisfied that it would be futile to return this matter to the Board for a re-determination because the Board, properly instructed, would come to the same conclusion dismissing the applicant's application on the basis that the applicant participated in the war crime of conscripting child soldiers, I therefore dismiss the application.

7. Conclusion

[28] For the above reasons, the application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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