Date: 20050920

Docket: A-539-04

Citation: 2005 FCA 303

CORAM: **LÉTOURNEAU J.A.**

ROTHSTEIN J.A.

MALONE J.A.

BETWEEN:

NASRULLAH ZAZAI

Appellant

(Applicant)

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

(Respondent)

Heard at Toronto, Ontario, on September 13, 2005.

Judgment delivered at Ottawa, Ontario, on September 20, 2005.

REASONS FOR JUDGMENT BY:
LÉTOURNEAU J.A.

CONCURRED IN BY:
ROTHSTEIN J.A.

MALONE J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] Upon dismissing the application for judicial review, Layden-Stevenson J. of the Federal Court (reviewing judge) certified the following question:

Does the definition of "crime against humanity" found at subsection 6(3) of the *Crimes Against Humanity and War Crimes Act* include complicity therein?

The Answer is unequivocally "Yes".

[2] The *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 (CAHWCA) enacted by Parliament serves a triple purpose. The main one iss to sanction crimes of genocide, crimes against humanity and war crimes committed in or outside Canada. The Act also implemented the Rome Statute of the International Criminal Court. Finally, it brought consequential amendments to other Acts.

[3] Paragraph 6(1)(*b*) of the CAHWCA makes it an indictable offence punishable in Canada to commit, outside Canada, a crime against humanity. I reproduce the relevant paragraph as well as subsection 6(3) which contains a definition of crime against humanity:

6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada (*a*) genocide, (*b*) a crime against humanity, or (*c*) a war crime, is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.	**6.** (1) Quiconque commet à l'étranger une des infractions ci-après, avant ou après l'entrée en vigueur du présent article, est coupable d'un acte criminel et peut être poursuivi pour cette infraction aux termes de l'article 8_: *a*) génocide; *b*) crime contre l'humanité; *c*) crime de guerre.
...	[...]
(3) The definitions in this subsection apply in this section. "crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.	(3) Les définitions qui suivent s'appliquent au présent article. « _crime contre l'humanité_ » Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait - acte ou omission - inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

Procedural and Factual Background

[4] I am content to reproduce paragraphs 1 to 4 of the reviewing judge's decision. They provide sufficient information as to the context which led to her review decision of the deportation order issued against the appellant on January 17, 2002:

[1] Since November 17, 1993, Mr. Zazai has lived in Canada. A deportation order was issued against him on January 17, 2002. He claims that the order should not have been made.

[2] A citizen of Afghanistan, Mr. Zazai came to Canada as a stowaway. He made a refugee claim after he arrived at Montreal Harbour. His personal information form (PIF) was completed on February 11, 1994 and his hearing before the Convention Refugee Determination Division of the Immigration and Refugee Board (CRDD) took place on October 11, 1994 and March 22, 1995. On August 10, 1995, the CRDD determined that Mr. Zazai was excluded from the definition of Convention refugee - under subsection 2(1) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the Act) - because of section F(a) of Article 1 of the United Nations Convention Relating to the Status of Refugees (the Convention). The board found that there were serious reasons for considering that he had committed crimes against humanity. Mr. Zazai's application for leave with respect to the CRDD decision was denied on January 5, 1996.

[3] On October 10, 1996, he submitted an application for landing as a post-determination refugee claimant in Canada. A report under section 27(2) of the Act was prepared and a section 27(3) direction for inquiry was issued on December 8, 2000. The inquiry was held before an adjudicator on June 26, 2001, October 26, 2001 and January 16, 2002. The adjudicator was satisfied that the allegation - that Mr. Zazai was a person described in paragraph 27(2)(a) coupled with paragraph 19(1)(j) of the Act - had been established. As a result, the adjudicator determined that he was subject to a deportation order under subsection 32(6) of the Act. The deportation order was signed on January 17, 2002.

[4] Mr. Zazai successfully sought leave to apply for judicial review of the adjudicator's decision. His application for judicial review was heard on May 7, 2003 and by order dated May 21, 2003, the Federal Court Trial Division, as it was then constituted, allowed the application (*Zazai v. Canada (Minister of Citizenship and Immigration*) 2003 FCT 639). The Minister appealed. The appeal was heard on March 2, 2004 and by judgment dated March 4, 2004, the Federal Court of Appeal allowed the appeal, set aside the order of the applications judge and remitted the matter to the Federal Court for redetermination (*Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365 (F.C.A.)).

The decision of the reviewing judge

[5] The appellant advanced two arguments before the reviewing judge. The first one alleged that the adjudicator who heard his case erred in making her credibility determinations. The reviewing judge was satisfied that the adjudicator's findings of fact were not unreasonable or vitiated by errors that would warrant her intervention. I cannot say that she erred in coming to that conclusion.

[6] At paragraph 6 of her decision, the reviewing judge summarized as follows the second argument of the appellant: "the notion of complicity in crimes against humanity by reason of membership in an organization with a limited brutal purpose, which has its genesis in refugee law, has no application in relation to the admissibility provisions of the [Immigration Act]", R.S.C. 1985, c. I-2, as amended (former Act). I reproduce paragraph 19(1)(*j*) of the former Act which contains the relevant inadmissibility rule as well as paragraph 35(1)(*a*) of the new *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (new Act) which replaced the former Act and is to the same effect:

19. (1) No person shall be granted admission who is a member of any of the following classes:	**19.** (1) Les personnes suivantes appartiennent à une catégorie non admissible :
[...]	
...	
(*j*) persons who there are reasonable grounds to believe have committed an offence referred to in any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;	*j*) celles dont on peut penser, pour des motifs raisonnables, qu'elles ont commis une infraction visée à l'un des articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;
35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35.** (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants_:
(*a*) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;	*a*) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;

For convenience, I shall refer to paragraph 35(1)(*a*) of the new Act as counsel for the appellant did at the hearing.

[7] Essentially, the argument of the appellant was that, while it may have been decided by this Court in *Ramirez v. Canada*, [1992] 2 F.C. 306; *Sivakumar v. Canada*, [1994] 1 F.C. 433; *Sumaida v. Canada*, [2000] 3 F.C. 66; and *Zrig v. Canada*, [2003] 3 F.C. 762 that complicity in the commission of a crime against humanity justifies, under Article 1F (a) and (b) of the UN Convention relating to the status of refugees, an exclusion from the scope of the protection offered by the Convention, these cases are, however, no authority for a finding that, under similar circumstances, a person is inadmissible to Canada pursuant to paragraph 35(1)(*a*) of the new Act.

[8] The reviewing judge dismissed the appellant's argument. At paragraph 43 of her decision, she pointed out, in the following terms, the incongruity that would result if the argument were accepted:

> [43] In my view, it is inconceivable that Parliament intended to exclude an individual who - but for the existence of serious grounds for considering that the individual had committed international crimes - may otherwise be entitled to Convention refugee status and, in the same breath, permit that individual to apply for and be granted permanent resident status - notwithstanding the inadmissibility provision - on the basis that the jurisprudence in relation to the exclusion provision does not apply to the inadmissibility provision. Despite their different purposes, it defies logic that one provision could collide so incongruously with the other.

[9] She came to her conclusion after reviewing the purposes of the two provisions (paragraph 19(1)(*j*) of the former Act and Article 1F of the Convention), the objectives of the immigration policy and the rules regarding the construction of statutes, especially the rule relating to the presumption of coherence in a statute.

[10] In the end, she dismissed the application for judicial review.

Analysis of the appellant's arguments submitted on appeal

[11] The appellant raises in a somewhat different form the arguments that were submitted to the reviewing judge.

The absence of a crime of complicity in paragraph 6(1)(*b*) of CAHWCA

[12] First, the appellant contends that paragraph 6(1)(*b*) of the CAHWCA contains no crime of complicity. He grounds his contention on subsection 6(1.1) of the CAHWCA in which one can find offences of conspiracy, attempt and incitement:

6. (1.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.	**6.** (1.1) Est coupable d'un acte criminel quiconque complote ou a l'intente de commettre une des infractions visées au paragraphe (1), est complice après le fait à l'égard ou conseille de la commettre.

He says, however, that he can find nowhere in these two provisions (6(1)(*b*) and 6(1.1)) the crime of complicity.

[13] I am not surprised that he can find no such crime because complicity is not a crime. At common law and under Canadian criminal law, it was, and still is, a mode of commission of a crime. It refers to the act or omission of a person that helps, or is done for the purpose of helping, the furtherance of a crime. An accomplice is then charged with, and tried for, the crime that was actually committed and that he assisted or furthered. In other words, whether one looks at it from the perspective of our domestic law or of international law, complicity contemplates a contribution to the commission of a crime.

[14] Complicity must not be confused with the inchoate crimes of conspiracy, attempt and incitement to commit a crime. These inchoate crimes found in subsection

6(1.1) of the CAHWCA are substantive offences of their own or stand-alone offences. Unlike complicity, they are not modes or means of committing a crime.

[15] The notion of complicity also exists in international criminal law. In *Prosecutor v. Dusko Tadic*, IT-94-1, July 15, 1999 and in *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1, June 25, 1999, the International Criminal Tribunal for the former Yugoslavia found low ranking individuals and camp guards responsible for their complicity in crimes committed by various groups.

[16] In *Prosecutor v. Miroslov Kvocka et al.*, IT-98-30, November 2, 2001, at paragraph 312, the Tribunal wrote:

> In sum, an accused must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise. The culpable participant would not need to know of each crime committed. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability. The aider or abettor or co-perpetrator of a joint criminal enterprise contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning. (emphasis added)

[17] Similar conclusions were reached by the International Criminal Tribunal for Rwanda in *Prosecutor v. Bagilishema*, ICTR-95-1, June 7, 2001; *Prosecutor v. Musema*, ICTR-96-13-1, January 27, 2000, November 16, 2001; *Prosecutor v. Rutaganda*, ICTR-96-3, December 6, 1999.

The repeal of complicity through the repeal of subsection 7(3.77) of the *Criminal Code*

[18] In support of his contention that paragraph 35(1)(*a*) of the new Act and paragraph 6(1)(*b*) of the CAHWCA do not punish complicity, the appellant attempts to draw an argument from the repeal of subsections 7(3.76) and 7(3.77) of the *Criminal Code* and their replacement by sections 4 and 6 of the CAHWCA.

[19] It should be recalled that subsection 7(3.76) provided a definition of crime against humanity and, for greater certainty, section 7(3.77) indicated that the definition included, in addition to a number of inchoate offences, complicity in the form of aiding and abetting any person in the commission of an act or omission (emphasis added). This last provision read:

7. (3.77) In the definitions "crime against humanity" and "warcrime" in subsection (3.76), "actcrime or omission" includes, for greatercertainty, attempting orconspiring to commit,	**7.** (3.77) Sont assimilés à un crime contre l'humanité ou à un crime de guerre, selon le cas, la tentative, le complot, la complicité après le fait, le conseil, l'aide ou

counselling any person tol'encouragement à l'égard d'un
commit, aiding or abetting anyfait visé aux définitions de ces
person in the commission of, ortermes au paragraphe (3.76).
being an accessory after the fact
in relation to, an act or omission.

[20] With respect, I do not think that the repeal of subsection 7(3.77) legally changed anything as regards complicity, except to say that the repeal of the provision, which had been enacted for greater certainty, was bound to either create confusion or fuel litigation, if not both. The repeal does not alter the law because the word "commits" in relation to a crime, as used in paragraph 6(1)(*b*) of the CAHWCA, refers to and includes the various means of committing that crime. The person who "commits" the crime may be the actual perpetrator of the act personally or through an innocent agent, an aider, an abettor, an instigator or a counsellor of the criminal act committed.

[21] To put it differently, the repeal of this *Criminal Code* provision, insofar as the notion of complicity is concerned, affects neither the common law rules governing the issue nor the jurisprudence developed by Canadian courts under Canadian criminal law. Subsection 6(1) of the CAHWCA which uses the word "commits" in relation to a crime against humanity is no exception to the principle, generally accepted under domestic and customary international law, that complicity refers to methods or means of committing a crime and criminally engages those who are found to be accomplices. As the Supreme Court of Canada reminded us in *Mugesera v. Canada (Minister of Citizenship and Immigration)*,[2005] S.C.J. No. 39, 2005 SCC 40, at paragraphs 126 and 133, subsections 7(3.76) and (3.77) of the *Criminal Code* were enacted to "expressly incorporate customary international law".

Whether the decision of the Supreme Court of Canada in *Mugesera* altered the law regarding complicity

[22] The appellant argued that the Supreme Court decision in *Mugesera* supports his contention regarding complicity. I respectfully disagree as the Supreme Court was not confronted with an issue of complicity in the commission of a crime by someone else. Mr. Mugesera was the actual perpetrator. In addition, the charges against him were the inchoate offences of incitement to genocide and incitement to hatred. As previously mentioned, complicity must not be confused with the inchoate crime of incitement.

Complicity as a broader concept than aiding and abetting

[23] The appellant submitted that the concept of complicity is broader than the act of aiding and abetting a crime. I do not disagree since this Court has recognized and accepted, under specific conditions, the concept of complicity by association: see *Ramirez*, *Sivakumar*, *Sumaida* and *Zrig*, *supra*. I do not see, however, how this helps the appellant's position legally.

Whether a mere membership in an organization that committed crimes against humanity outside Canada is sufficient to warrant a finding that a person committed a crime within the meaning of paragraph 6(1)(*b*) of the CAHWCA

[24] The appellant submits, rightly so in my view, that a mere membership in an organization that committed crimes against humanity outside Canada is not sufficient to trigger the application of paragraph 6(1)(*b*) of the CAHWCA and, therefore, result in an inadmissibility finding under paragraph 35(1)(*a*) of the new Act. However, this is not the situation in which the appellant finds himself.

[25] As a matter of fact, as found by the adjudicator and agreed by the reviewing judge, there is sufficient cogent evidence that the appellant was, knowingly and voluntarily, a participating and active member for five years in a secret service organization within the Ministry of State Security known as KHAD that tortured and eliminated people who were against the government. The evidence reveals that the appellant entered as a lieutenant and rose to the level of captain. Not only did he share and espouse the views of the brutal organization, he attended training sessions and provided the names of those who did not cooperate.

[26] According to the evidence, the appellant was willingly and to his benefit a member of an organization that only existed for a limited brutal purpose, i.e. the elimination of antigovernment activity and the commission of crimes which amount or can be characterized as crimes against humanity. He knew that the organization in which he was participating and that he assisted was committing crimes of torture and murder. Under both Canadian and international jurisprudence, the behaviour of the appellant amounts to complicity in the commission of crimes against humanity. Consequently, the Federal Court judge properly confirmed the decision of the adjudicator that the appellant was inadmissible pursuant to paragraph 19(1)(*j*) of the former Act or paragraph 35(1)(*a*) of the new Act.

[27] I would answer the certified question in the affirmative and dismiss the appeal.

"Gilles Létourneau"

J.A.

"I agree

Marshall Rothstein J.A."

"I agree

B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-539-04

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MALONE J.A.

DATED: SEPTEMBER 20, 2005

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