Baqri v. Canada (Minister of Citizenship and Immigration) (T.D.)

Syed Safdar Ali Baqri (applicant)
v.
The Minister of Citizenship and Immigration (respondent)

[2002] 2 F.C. 85
[2001] F.C.J. No. 1509
2001 FCT 1096
Court File No. IMM-4211-00

Federal Court of Canada - Trial Division
Lutfy A.C.J.

Heard: Toronto, May 2, 2001.
Judgment: Ottawa, October 9, 2001.
(41 paras.)

Citizenship and Immigration — Status in Canada — Convention Refugees — Judicial review of CRDD decision applicant excluded from consideration as Convention refugee by Art. 1F(a), stating Convention shall not apply to any person with respect to whom serious reasons for considering committed crime against humanity — Mohajir Quami Movement (MQM) political party in Pakistan accused of torture, execution of dissident members, opponents — Applicant elected MQM member of legislative assembly — Denial of involvement with crimes against humanity not challenged on cross-examination — CRDD concluded applicant had knowledge of violence committed by MQM while involved in MQM, applicant in leadership position, as such shared common purpose of MQM — Inferred complicity in crimes against humanity — Application allowed — Minister bears onus of proof under Art. 1F(a) — Use of "committed" implying mental element — In seeking to show complicity, Minister must show advance knowledge of crimes, shared purpose — Leadership role may support inference of knowing participation — CRDD erred in law due to: vagueness of credibility finding; failure to provide clear, unmistakable reasons concerning credibility; omission in stating specific crimes for which applicant found to be complicit; failure to question applicant about those crimes.

This was an application for judicial review of the Convention Refugee Determination Division's (CRDD) decision that the applicant was excluded from consideration as a Convention refugee under United Nations Convention Relating to the Status of Refugees, Article 1F(a) as a result of his involvement with the Mohajir Quami Movement (MQM) which reportedly illegally detained, tortured and sometimes executed dissident members and political opponents. Article 1F(a) states that the Convention shall not apply to any

person [page86] with respect to whom there are serious reasons for considering that he has committed a crime against humanity as defined in international instruments. The CRDD referred to the Charter of the International Military Tribunal which defines "crimes against humanity" and deals with the responsibility of "leaders". Article 6 thereof provides that leaders participating in the formulation or execution of a common plan to commit crimes against humanity are responsible for all acts performed by any person in execution of such a plan. Between 1990 and 1992 the applicant was an elected MQM member of the legislative assembly in the province of Sindh in Pakistan and was appointed provincial Minister for Industries. In 1992 the MQM was targeted in a joint army and police operation, which resulted in the applicant's resignation and his decision to flee Pakistan. He was convicted in absentia in a high-profile kidnapping case, but an appeal was upheld and he was acquitted. After six years in the United States of America, his claim for asylum was denied. He came to Canada and claimed refugee status. The CRDD stated that the claimant acknowledged that he was aware of the violent acts committed by the MQM but denied that the MQM leadership condoned the violent acts. It found that it was not credible that the claimant would not have knowledge of the atrocities committed by the MQM. Having concluded that the applicant was a leader of the MQM and that his leadership role was linked to the violence attributed to the MQM, the CRDD found that the applicant was complicit in crimes against humanity.

Held, the application should be allowed.

The Minister bears the onus of proof in Article 1F(a) cases. Use of "committed" in Article 1F(a) implies a mental element. Absent a finding that the organization is principally directed to a limited, brutal purpose, the Minister, in seeking to establish complicity, must show that the member had advance knowledge of the crimes in question and shared the organization's purpose in committing them. A leadership position, while not necessarily justifying a conclusion of complicity, may support the inference of a knowing participation in the organization's plan and purpose to commit the international crimes.

The CRDD erred in law in the manner in which it concluded that the application came within the scope of Article 1F(a), both as to the assessment of the applicant's credibility and by not specifying the crimes against humanity concerning which the applicant was found to be complicit.

The negative finding of credibility was not explained in clear and unmistakable terms. The applicant's denial of his involvement in crimes against humanity was not challenged on cross-examination. There was neither a negative finding concerning his evidence nor one explained in clear and [page87] unmistakable terms. In these circumstances, the applicant's leadership position in 1992, without further questioning concerning his possible advance knowledge and role in the planning of the atrocities, was not a sufficient basis from which to infer his complicity in crimes against humanity.

The panel's reasons did not disclose the criminal acts for which the applicant is said to be complicit. They spoke in broad general terms of a broad range of violent and

criminal acts. The conclusion that the claimant had knowledge of the violence was equally general and not directed to any of the specific allegations referred to in the documentary evidence. This omission was of even greater significance in view of the absence of any cross-examination of the applicant to challenge his denial of involvement.

The CRDD's errors of law concerning the vagueness of the credibility finding, the absence of clear and unmistakable reasons concerning credibility, the omission in stating the specific crimes for which the applicant was found to be complicit and the lack of questioning the claimant concerning those specific crimes required that the finding under Article 1F(a) be set aside.

Statutes and Regulations Judicially Considered

Charter of the International Military Tribunal, Annex of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279, Art. 6.
United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Art. 1F(a).

Cases Judicially Considered

Applied:
Sivakumar v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 433; (1993), 163 N.R. 197 (C.A.).
Ramirez v. Canada (Minister of Employment and Immigration), [1992] 2 F.C. 306; (1992), 89 D.L.R. (4th) 173; 135 N.R. 390 (C.A.).
Cardenas v. Canada (Minister of Employment and Immigration) (1994), 74 F.T.R. 214; 23 Imm. L.R. (2d) 244 (F.C.T.D.).

Referred to:
Hilo v. Canada (Minister of Employment and Immigration) (1991), 15 Imm. L.R. (2d) 199; 130 N.R. 236 (F.C.A.).

APPLICATION for judicial review of the Convention Refugee Determination Division's decision that the applicant was excluded from consideration as a [page88] Convention refugee under United Nations Convention Relating to the Status of Refugees, Article 1F(a) as a result of his leadership role with the Mohajir Quami Movement (MQM) and the inference of complicity drawn from his admitted knowledge of violent acts committed by MQM members, despite his denial that these were the result of any plan or participation by the party hierarchy. Application allowed.

Appearances:

Lorne Waldman, for the applicant.
I. John Loncar, for the respondent.

Solicitors of record:

Jackman, Waldman & Associates, Toronto, for the applicant.
Deputy Attorney General of Canada, for the respondent.

The following are the reasons for order rendered in English by

1 **LUTFY A.C.J.**:— The Convention Refugee Determination Division found that the applicant, Syed Safdar Ali Baqri, a citizen of Pakistan, was complicit in crimes against humanity as the result of his involvement with the Mohajir Quami Movement (MQM) and, accordingly, was excluded from consideration as a Convention refugee under Article 1F(a) of the United Nations Convention Relating to the Status of Refugees [July 28, 1951, [1969] Can. T.S. No. 6].

2 The panel also found that the applicant would face more than a mere possibility of persecution should he return to Pakistan. While its decision does not state so directly, it is reasonable to infer the panel would have determined that the applicant was a Convention refugee if it had not made its exclusion finding.

The historical background of the MQM

3 The panel noted that Mohajir means "refugee" in Urdu, the national language of Pakistan. The Urdu-speaking Muslims, who migrated from India to Pakistan after partition in 1947, were Mohajirs. There are over 30 million Mohajirs in Pakistan and they comprise some [page89] 50% of the population of Sindh province. The largest urban centre in Sindh is the coastal city of Karachi.

4 In 1984, the Mohajir Quami Movement was formed under the leadership of Altaf Hussain. Its objectives were to represent the interests of the Mohajirs and to safeguard their rights in opposition to other Sindhi parties. According to the 1993 Amnesty International report, the MQM was the third strongest party in Pakistan. The applicant testified that there were some 35,000 MQM party workers in Karachi in the early 1990's. Amnesty International described the MQM as "a tightly organized party and reportedly has a militant wing that has been held responsible for a number of offences".

5 The MQM was "highly successful", in the panel's words, in the Sindh provincial elections in 1988, 1990 and 1997.

6 In 1991, dissension set in within the MQM and a splinter group known as the MQM Haqiqi (MQM-H) was created. Sometime thereafter, the original MQM under the leadership of Altaf Hussain changed its name to Muttahidda Quami Movement (Altaf Faction) (MQM(A)).

7 Amnesty International portrayed the MQM as both a perpetrator and a victim of human rights violations:

> The MQM, before and during its tenure as a coalition partner of the government in Sindh, reportedly maintained torture cells in which it illegally detained, tortured and sometimes executed dissident members of the MQM and political opponents. Since June 1992, MQM activists as also friends and family members of MQM members have reportedly been subjected to illegal detention and torture in police and military custody; some of these prisoners have reportedly died as a result of torture and some may deliberately have been killed.

The applicant's background

8 Syed Safdar Ali Baqri was born in 1964 in Karachi where he resided until he fled Pakistan. In 1982, the applicant joined the All Pakistan Mohajir Student [page90] Organization. He was active with this group during his medical studies, participating in MQM political rallies and assisting the party in the 1987 municipal elections. He assumed greater responsibilities for the party in the 1988 provincial and national elections. In June 1990, the applicant completed his post-graduate studies in medicine.

9 During his medical residency, the applicant worked for the medical aid committee of the MQM in providing medical care to Mohajirs and other ethnic groups. For some four months during the same period, he also worked and resided at the party headquarters in Karachi which was also the residence of Altaf Hussain.

10 Between October 1990 and July 1992, Dr. Baqri was an elected MQM member of the legislative assembly in Sindh and was appointed provincial Minister for Industries. In 1991, for some two or three weeks, he was appointed head of an MQM zone in Karachi.

11 In June 1992, the MQM was targeted in a joint army and police operation. This resulted in Dr. Baqri's resignation from the Sindh government and his decision to flee Pakistan some five months later. In 1994, the applicant was convicted in absentia in the high profile "Major Kaleem" kidnapping case and sentenced to imprisonment for 27 years. He was jointly convicted with Altaf Hussain and some 15 other MQM leaders. In February 1998, the Sindh High Court upheld the appeal against these convictions and sentences and acquitted the applicant and his fellow accused.

12 In late 1992, because the applicant and others in the MQM were being targeted by government authorities, he left Pakistan for the United States of America. His claim for asylum in the U.S. was denied in early 1998. He then came to Canada where he claimed refugee status.

13 While in the United States, Dr. Baqri was part of a small central organizing committee to strengthen and expand the presence of the MQM in North America. He has continued this political activity while in Canada. He has organized protests in Ottawa and in Toronto against [page91] the government in Pakistan. There are some 9,000 MQM supporters in Canada. Funds raised from these persons have been spent solely on organizational activities in Canada.

14 Since 1992, Dr. Baqri has travelled between North America and the United Kingdom on some five occasions to visit the MQM leader, Altaf Hussain in London. The evidence does not link the applicant's contacts with Mr. Hussain during these visits with any of the violence attributed to the MQM subsequent to 1992. The exchanges between Dr. Baqri and Mr. Hussain concern the former's role as representative for the party in Canada.

The tribunal decision

15 In its decision, the panel concluded that the applicant "was aware of the atrocities committed by the MQM Altaf during the years he was present in Pakistan and involved in the MQM". After noting the absence of any reliable evidence to substantiate that the MQM publicly condemned the violence committed by its workers, the panel added that: "It is not credible that, considering his particular political profile, [the applicant] was ignorant of the MQM's participation in the committing of atrocities and human rights abuses during his years when he was active in the MQM in Pakistan." (Emphasis added.) Here, the panel must be referring to atrocities and human rights abuses committed prior to the applicant fleeing Pakistan in 1992.

16 The panel concluded with the following findings:

> The panel finds that the claimant had knowledge of the violence committed by the MQM. The panel finds that he continues to be active in the MQM outside his country, Pakistan... . The panel finds that the claimant was in a leadership position and he shared in the common purpose of the MQM. [Emphasis added.]

17 Earlier in its reasons, the panel reviewed the applicant's knowledge of the commission of violent acts and his leadership role with the MQM. In the words of the panel:

> The claimant acknowledges that he was aware of the violent acts committed by the MQM but denies that the MQM leadership condoned the violent acts. He said that the MQM took steps to expel members who engaged in violent acts. However, he did not provide any reliable evidence to substantiate that the MQM was not complicit in the political violence and he did not provide any reliable evidence that the MQM routinely expelled members who committed violent acts. He was only able to name two or three MQM members who were expelled by Altaf Kussein.
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> The claimant was a Cabinet Member of the Pakistan Sindh Provincial Assembly and he was in a position of power and trust within the MQM leadership. It is not credible that the claimant would not have knowledge of the atrocities committed by the MQM. He said that he attended MQM

> rallies and strikes and he saw MQM members and workers carry weapons. He denied that he saw weapons used by any workers or members. He acknowledged that business owners would be threatened or beaten if they did not close their premises during strikes and rallies. There is no reliable evidence that the claimant took steps to prevent this violence. There is no evidence that he disassociated himself from the MQM-Altaf.

18 In my view, it was open to the tribunal to find that Dr. Baqri was and is a leader of the MQM. However, the tribunal's linkage of his leadership role with "the violence", "the violent acts" or "the political violence" attributed to the MQM invites further analysis of the conclusion that he was complicit in crimes against humanity.

Analysis

19 Article 1F(a) of the United Nations Convention Relating to the Status of Refugees states:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
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> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; [Emphasis added.]

From among the crimes referred to in Article 1F(a), the panel in this case found the applicant to be complicit in crimes against humanity.

20 One of the international instruments referred to in Article 1F(a) is the 1945 Charter of the International Military Tribunal [Annex of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279]. The Military Tribunal was established for "the trial and punishment of major war criminals." The definition of crimes against humanity as set out in Article 6(c) of the Charter was referred to by the panel:

> Article 6
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> ...
>
> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against

> any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

21 The panel also noted as relevant the last paragraph of Article 6 of the Charter which dealt with the responsibility of "leaders":

> Article 6
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> ...
>
> Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. [Emphasis added.]

22 In Sivakumar v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 433 (C.A.), Justice Linden also considered the role of "leaders", as defined in Article 6, in the context of the Nuremberg trials (at page 441):

> This principle was applied to those in positions of leadership in Nazi Germany during the Nuremberg Trials, as long as they had some knowledge of the crimes being committed by others within the organization. For example, the trial of Erhard Milch, United States Military Tribunal at Nuremberg, Law Reports of Trials of War Criminals, Vo1. VII, page 27, involved an Inspector-General and a Field-Marshal in the German Air Force who was accused of committing war crimes and crimes [page94] against humanity in the form of illegal and appalling experiments carried out on German nationals as well as members of armed forces and civilians from countries at war with Germany. Though convicted of another charge, he was acquitted with respect to the experiments on the basis that, while the illegal experiments had been carried out by people under Milch's command, Milch had not personally participated in or instituted the experiments, nor had he any knowledge that the experiments were being carried out.

23 It is common ground that the Minister bears the onus of proof in Article 1F(a) cases: Ramirez v. Canada (Minister of Employment and Immigration), [1992] 2 F.C. 306 (C.A.), at page 314.

24 In Ramirez, Justice MacGuigan stated that the Convention's use of the word "committed" in Article 1F(a) implied a mental element. In his words (at page 317), "no one can 'commit' international crimes without personal and knowing participation."

25 Justice MacGuigan further stated that an associate of the principal offender can be characterized as an accomplice where the evidence establishes (at page 318) "the existence of a shared common purpose and the knowledge that all of the parties in question may have of it."

26 In Sivakumar, the complicity of a person who can be characterized as "a leader" of the organization guilty of international crimes was considered by Justice Linden in these terms (at pages 440 and 442):

> Bearing in mind that each case must be decided on its facts, the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime. Thus, remaining in an organization in a leadership position with knowledge that the organization was responsible for crimes against humanity may constitute complicity.
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> ...
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> ... the closer one is to a position of leadership or command within an organization, the easier it will be to draw an inference of awareness of the crimes and participation in the plan to commit the crimes.

27 Absent a finding that the organization is principally directed to a limited, brutal purpose, "the Minister seeking to establish complicity must show that the member had knowledge of the crimes in question and shared the organization's purpose in committing them": Cardenas v. Canada (Minister of Employment and Immigration) (1994), 74 F.T.R. 214 (F.C.T.D.), at paragraph 13. In Cardenas (paragraphs 16 and following), Associate Chief Justice Jerome had in mind advance knowledge of the crimes against humanity attributed to the organization. The applicant in Cardenas was described (at paragraph 18) "at most, only very remotely connected to the criminal activities attributed to the dissident faction of his organization."

28 In summary, complicity requires evidence of a shared common purpose. A leadership position, while not necessarily justifying a conclusion of complicity, may support the inference of a knowing participation in the organization's plan and purpose to commit the international crimes.

29 With these principles in mind and on the basis of the record in this proceeding, I am satisfied the panel erred in law in the manner in which it concluded that the application came within the scope of Article 1F(a). My reasons are based on two of the applicant's principal arguments.

(i) The panel's assessment of the applicant's credibility

30 The respondent acknowledges that the panel did not characterize the MQM as an organization "principally directed to a limited, brutal purpose". Similarly, the respondent recognizes that neither the evidence nor the panel's decision suggests the applicant was personally involved in the commission of the violent acts. The exclusion finding under Article 1F(a) is linked only to the applicant's leadership role in the MQM and the inference of complicity drawn from his admitted knowledge of violent acts committed by MQM members despite his denial that these were the result of any plan or participation by the party hierarchy.

31 Concerning the applicant's knowledge of the atrocities, it is useful to repeat the panel's two statements related to its view of the applicant's credibility (supra, paragraph 17): (a) "[t]he claimant acknowledges that he was aware of the violent acts committed by the MQM but denies that the MQM leadership condoned the violent acts"; and (b) "[i]t is not credible that the claimant would not have knowledge of the atrocities committed by the MQM." It is difficult to accept that the second statement represents a coherent negative finding of credibility in the light of the applicant's acknowledgment recognized in the first statement. In any event, any such finding has not been explained in "clear and unmistakable terms": Hilo v. Canada (Minister of Employment and Immigration) (1991), 15 Imm. L.R. (2d) 199 (F.C.A.).

32 In response to a direct question from his counsel, the applicant stated that he had nothing to do with kidnapping and torture. Here, the testimony was with reference to the kidnapping in the "Major Kaleem" case, supra, paragraph 11, and the army disclosure in June 1992 that it had uncovered 23 torture cells in Karachi. According to the 1993 Amnesty International report, "the MQM reportedly tortured, and sometimes killed MQM dissidents and political opponents; military spokesman said these cells had been found in MQM offices, schools and hospitals."

33 The applicant was cross-examined by the Minister's representative, the refugee claims officer and the panel members. The cross-examination was twice as long as the examination-in-chief. However, the applicant was never challenged with respect to his denial of any involvement in kidnapping or torture. Not a single question was asked in this regard by any of the four persons who cross-examined the applicant. Their questioning focussed principally on his leadership role with little, if any, probing of his advance knowledge, planning or participation with respect to the crimes against humanity.

34 The applicant's denial of his involvement in crimes against humanity was not challenged during his testimony. In my view, there is neither a negative finding concerning his evidence nor one explained in clear and unmistakable [page97] terms. In these circumstances, the applicant's leadership position in 1992, without further

questioning concerning his possible advance knowledge and role in the planning of the atrocities, was not a sufficient basis from which to infer his complicity in crimes against humanity.

(ii) The panel's failure to specify the crimes against humanity concerning which the applicant was found to be complicit

35 It was also open to the panel, on the basis of the documentary evidence, to find that MQM members were involved in the commission of violent and criminal acts. Some of these, such as the operation of torture chambers, fall within the definition of crimes against humanity.

36 The panel also referred to the MQM's reliance "on strong-armed methods and criminal elements to impose its will and collect bhatta (protection money) from businesses across Sindh". These acts, while reprehensible and repugnant, do not necessarily constitute crimes against humanity.

37 In its reasons, the panel also noted, supra, paragraph 17, that the applicant "acknowledged that business owners would be threatened or beaten if they did not close their premises during strikes and rallies. There is no reliable evidence that the claimant took steps to prevent this violence." Again, there is no analysis or explanation by the panel from which to understand that these particular violent acts, while criminal, rise to the level of crimes against humanity.

38 The reasons do not disclose the criminal acts for which the applicant is said to be complicit. In Cardenas, supra, Associate Chief Justice Jerome stated (at paragraph 22):

> ... the Board has made little effort to link the applicant to specific criminal activities. Rather, it chose to refer only in general terms to shootings and bombings carried out by the military faction. Given the serious consequences to [the [page98] refugee claimant] of the application of the exclusion clause, the Board should have endeavoured to carefully detail the criminal acts which it considers the claimant to have "committed".

39 Similarly, in Sivakumar, supra, Justice Linden underlined the importance of providing findings of fact as to specific crimes against humanity which the refugee claimant is alleged to have committed (at page 449):

> 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 or law.

40 In its reasons, the panel speaks in general terms of a broad range of violent and criminal acts. Its conclusion that the claimant had knowledge of the violence is equally general and not directed to any of the specific allegations referred to in the documentary evidence. This omission is of even greater significance in view of the absence of any cross-examination of the applicant to challenge his denial of involvement.

41 It is not for this Court to determine the applicant's complicity in the crimes against humanity because of his leadership position. However, the panel's errors of law concerning the vagueness of the credibility finding, the absence of clear and unmistakable reasons concerning credibility, the omission in stating the specific crimes for which the applicant was found to be complicit and the lack of questioning the claimant concerning those specific crimes require that the finding of exclusion under Article 1F(a) be set aside. Accordingly, this matter will be referred to a differently constituted panel for rehearing and redetermination. The parties may suggest a question for certification within seven days of the date of these reasons.