Bamlaku v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 7252 (F.C.)

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Docket: IMM-846-97
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Date: 19971230

Docket: IMM-846-97

BETWEEN:

MULUALEM BAMLAKU

Applicant

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON, J.:

[1] These reasons arise out of an application for judicial review of a decision of the Convention Refugee Determination Division (the "CRDD") of the Immigration and Refugee Board wherein the CRDD determined the applicant not to be Convention refugee within the meaning of that expression in subsection 2(1) of the *Immigration Act*[1] (the "*Act*"). The CRDD held that, notwithstanding the applicant's well-founded fear of persecution on a Convention ground, he was excluded from protection pursuant to section F(a) of Article 1 of the Convention.[2] The CRDD's decision is dated the 10th of February, 1997.

[2] The factual background to this matter is essentially not in dispute. It may be summarized as follows. The applicant is a citizen of Ethiopia. He joined the Ethiopian People's Revolutionary Party (the "EPRP") in 1977. In mid-1978, by reason of his EPRP affiliation and activities, he was arrested, detained for six months and tortured by agents of the then government of Ethiopia (the "Derg Government"). On his release from detention, he ceased his involvement with the EPRP. In the autumn of 1983, he joined the Marine Transport Authority (M.T.A.) in Ethiopia. He was assigned to security duties at a strategic facility comprising a port and oil refinery. In late 1984, under intense pressure, he joined the Derg "Cadres" though, according to his testimony, he remained opposed to the Derg Government and its goals. In late 1986, he secretly rejoined the EPRP.

[3] On information provided by officials of the EPRP, the applicant investigated certain Ethiopian persons, each of whom was a member of either the Tigran People's Liberation Front or the Eritrean People's Liberation Front, both groups described as enemies of the EPRP. He informed on some or all of the individuals he investigated to security forces of the Derg Government. In the result, they were arrested and detained. In his testimony, the applicant acknowledged that, during the course of their detention, they were "probably" tortured. He expressed no remorse at this result. Further, he acknowledged that his motivation for informing on these individuals was mixed; partly because they were "enemies of the EPRP" and partly because he feared they represented threats of terrorist activity against the port and oil refinery facilities in respect of which he was employed. He testified that any such terrorist activity would have resulted in significant civilian casualties.

[4] In October of 1990, the applicant went to Belgium to study. When the Derg Government was overthrown in 1991, he unsuccessfully sought asylum in Belgium. He was a co-founder of an EPRP support group in Belgium. In Holland, he participated in a demonstration against the Ethiopian Prime Minister.

[5] In December of 1995, the applicant left Belgium for Canada.

[6] In its reasons for decision the CRDD wrote:

> Torture, when used systematically, can be termed a crime against humanity since the Nuremberg Charter condemns the use of ill-treatment. The prohibition of torture has been extensively codified in the 1984 United Nations Convention.
>
> Was the claimant complicit in the torture through "personal and knowing participation", even though he did not torture those arrested in a "physical" sense? The panel believes that he was. He had knowledge of the likelihood of torture, and, by denouncing his opponents to the Derg, shared in a common purpose. The claimant's actions either exposed individuals to likely torture or death, or were likely to facilitate torture or murder. This view finds support in recent jurisprudence.

For its reference to "personal and knowing participation" as a critical question, the CRDD refers

to *Ramirez v. Minister of Employment and Immigration*.[3] The reference to support in recent jurisprudence in the last sentence of the quotation is footnoted to *Rasuli* v. *Minister of Citizenship and Immigration*[4].

[7] The issue argued before me was whether or not the CRDD had committed a reviewable error in failing to evaluate the applicant's testimony that he regarded those whom he reported to Derg Government Security Officials as terrorists at risk of sabotaging the port and oil refinery facilities in respect of which he was employed with resultant significant loss of life and injury to innocent civilians. This, notwithstanding that the applicant also acknowledged that he was motivated in identifying the individuals in question by the fact that they were "enemies" of the EPRP.

[8] In *Rasuli*[5], a matter with facts quite similar to those in this matter, Mr. Justice Heald, wrote:

> In the case *Srour v. Canada (Solicitor General),* (1995), 91 F.T.R. 24, Rouleau J. held that a refugee claimant who knew that the persons arrested by him might be tortured, was excluded pursuant to subsection F(a) of Article 1. In this case the applicant reported suspected persons thereby exposing them to likely torture or death. In my view, the actions of this applicant, are, likewise, encompassed by the provisions of subsection F(a) of Article A1. His actions are also likely to facilitate torture and murder.

[9] In *Tutu* v. *Canada (Minister of Employment and Immigration)*[6], Mr. Justice Joyal had under review a decision of the CRDD where, as here, the applicant claimed that his humanitarian motivation as "...an undercover man for a rival organization..." should be applied to his benefit. Mr. Justice Joyal concluded:

> To do so, in my view of the evidence before the Board, would render inoperative Article A1F of the Convention. Terrorists fleeing would always find refugee under Convention rules.

In essence, he concluded that motivation was not a relevant consideration. Mr. Justice Joyal's conclusion is supported by the draft *Code of Crimes against Peace and Security of Mankind,* extensively referred to in an article by Joseph Rikhof and entitled War Crimes, Crimes Against Humanity and Immigration Law[7]. Article 4 of the draft code, under the heading "*Motives*" reads:

> Responsibility for a crime against the peace and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime.

Here, of course, the relevant "humanitarian motivation" was argued to be the concern for safety of civilians who would be at risk if a terrorist attack on the port and oil refinery facility in fact took place.

[10] Article 6(1) of the Charter of the International Military Tribunal[8] provides the following definition of crimes against humanity:

> ...
>
> murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecution 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.

[11] Similarly subsection 7(3.76) of the *Criminal Code*[9] defines "Crime against humanity" in the following terms:

> "Crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations;

[12] Clearly, neither of these definitions imports a test of motivation but a test may be implied through the use of the term "civilian population". In *Sumaida v. Canada (Minister of Citizenship and Immigration)*[10], Madame Justice Simpson wrote:

> The parties agreed that the Board relied on the appropriate definition of crimes against humanity...which...speaks of crimes or acts committed against "any civilian population". However, the Board did not address the meaning of "civilian", and it did not consider whether, in the murky world of terrorism, it would be possible for members of the Al Da'wa to be considered non-civilians.
>
> In my view, the word "civilian" may be used in the definition to import a notion of innocence or non-combatant status. If this approach is valid, then there is at least a question whether Al Da'wa student members in Manchester qualified as civilians.
>
> Accordingly, I have concluded that the Board erred when it failed to expressly consider whether the targets were civilians within the meaning of the definition.

[13] Here, the applicant essentially attested to his view that the people on whom he informed were not "civilians" but rather, were terrorists intent on sabotage of the port and oil refinery with which he was concerned in his work. By implication then, if his motivation was, through protection of the port and oil refinery, the protection of a true civilian population of which those informed against were not members by reason of their own terrorist motivation, then the actions of the applicant could be said to have been outside any appropriate definition of "crimes against humanity". As in *Sumaida,* the CRDD here failed to expressly consider whether those informed against were civilians within the meaning of the appropriate definition.

[14] The foregoing concern notwithstanding, I reach a different conclusion from that reached by Madame Justice Simpson. I conclude that, on the facts before it in this matter, the CRDD made no reviewable error. Whatever validity there may be in the Applicant's testimony to the effect that those he informed against were more in the nature of terrorists than members of the civilian population, his motivation in informing on them was not driven by humanitarian considerations alone. The applicant acknowledged that he was also motivated by the fact that those he informed on were "enemies" of the EPRP. Further, the applicant expressed no remorse or concern with the impact flowing from his actions. He gave no indication in his evidence that he weighed the torture to which those he informed on were "probably" subjected against the likelihood, however great or small of a terrorist attack on the port and oil refinery.

[15] In *Shugen Liu v. Minister of Citizenship and Immigration*[11], Mr. Justice Lutfy, after considering the definitions of "crimes against humanity" cited above, concluded in the following terms on the facts before him:

> I am satisfied that the Tribunal had serious reasons for considering that the applicant is a person within the scope of subsection F(1)(a). The findings of fact provided by the Tribunal in support of its decision are based on the applicant's testimony and properly set out its reasons as required by *Civakumar v. Canada (M.E.I.)*, 1993 CanLII 3012 (F.C.A.), [1994] 1 F.C. 433 (F.C.A.) at 449.

[16] I reach the same conclusion here, albeit that a more fulsome analysis of the evidence before the CRDD would have been preferable.

[17] For the foregoing reasons, this application for judicial review is dismissed.

[18] Counsel for the applicant proposes certification of the following questions which, she urges, are both serious and of general importance and would be determinative on an appeal of this decision.

> 1. Is there a materially relevant distinction to be drawn between combatant and civilian victims in determining who can be found to be an accomplice to crimes against humanity or war crimes committed by government authorities?
>
> 2. If so, is the motivation of the individual having no direct participation in atrocities committed against combatant victims a materially relevant factor in determining whether or not s/he is an accomplice to those crimes?

[19] In response, counsel for the respondent urged that the record before the Court in this matter provided an insufficient factual basis upon which to ground the proposed questions.

[20] While I share the view of counsel for the applicant that the proposed questions are serious questions of general importance, on the record before the Court in this matter, I cannot conclude that responses to them, in the abstract form in which the questions are posed, could be said to be determinative of an appeal of this decision. The decision of the CRDD here under review was essentially driven by its assessment of the evidence before it. I have concluded that the CRDD's decision was reasonably open to it on the facts before it. What counsel for the applicant is seeking is general guidance from the Court of Appeal which, without a reweighing of the evidence, would not be determinative. For the foregoing reasons, no question will be certified.

Judge

Ottawa, Ontario

January 16, 1998

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[1] R.S.C. 1985, c. I-2

[2] Section F(a) of Article 1 of the Convention, as set out in the Schedule to the *Immigration Act,* reads as follows:F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the International Instrument drawn up to make provision in respect of such crimes;

[3] reflex, [1992] 2 F.C. 306 at 317 (C.A.)

[4] (1996), 122 F.T.R. 263

[5] *Ibid*, at 265

[6] (1994), 74 F.T.R. 44 at 47

[7] (1993),19 Imm.L.R. (2d) 18 at 20

[8] See generally, *London Agreement for the Prosecution and Punishment of Major War Criminals in European Axis*

[9] R.S.C. 1985, c. C.- 46

[10] (1995), 116 F.T.R. 1 at 4 (under appeal: A-800-95)

[11] (1996), 37 Imm. L.R. (2d) 286 (F.C.T.D.)