Federal Court  Cour fédérale

Date: 20111024

Docket: IMM-771-11

Citation: 2011 FC 1214

Ottawa, Ontario, October 24, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

HABTEAB KFLESUS, HAGOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] It has been said that "one's man's terrorist is another man's freedom fighter".[1]

[2] Habteab Kflesus Hagos contends that he was a member of the Eritrean People's Liberation Front [the EPLF or the Front], an organization that was engaged in a war of self-determination in which the Eritrean people were seeking to liberate themselves from the vicious regimes of Ethiopian leaders Haile Selassie and Mengistu Haile Mariam.

[1] This statement has been variously attributed to former US Attorney General Ramsey Clark and Sinn Fein, the political wing of the Irish Republican Army.

[3] However, the Immigration Division of the Immigration and Refugee Board concluded that Mr. Hagos was inadmissible to Canada for being a member of a terrorist organization and for being complicit in crimes against humanity committed by the Front.

[4] Mr. Hagos seeks judicial review of this decision, asserting that the Board erred in concluding that there were reasonable grounds to believe that the Front was responsible for acts amounting to terrorism during the liberation struggle. The Board further erred, Mr. Hagos says, in determining that there were reasonable grounds to believe that the Front committed an act that constituted an offence under sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24. Finally, Mr. Hagos argues that the Board erred in finding that he was complicit in any crimes against humanity that may have been committed by the Front.

[5] For the reasons that follow, I have concluded that the Board did not err in finding that Mr. Hagos was a member of an organization for which there were reasonable grounds to believe has engaged in terrorism. I am further satisfied that the Board's finding that the Front had committed crimes against humanity was reasonable. However, the Board did err in its examination of whether Mr. Hagos was complicit in crimes against humanity committed by the Front. Consequently, Mr. Hagos' application for judicial review will be allowed to the extent that it relates to the issue of complicity.

1. Background

[6] Mr. Hagos is a citizen of Eritrea. He came to Canada on February 13, 2007 and submitted a claim for refugee protection a couple of weeks later. The processing of Mr. Hagos' refugee claim has been suspended pending a final decision on the issue of his admissibility.

[7] Eritrea is a small country in northeast Africa. It was under colonial rule until 1952. In 1962, Eritrea was annexed by the Ethiopian government of Haile Selassie, who imposed imperial rule over Eritrean territory. Thirty years of civil war followed. In 1991, Eritrean rebels defeated Ethiopian President Mengistu Haile Mariam and established a provisional government in Eritrea. Eritrea officially gained its independence in 1993 following a UN-supervised referendum process.

[8] Mr. Hagos was born in what is now Eritrea. However, he fled to Sudan in 1982 at the age of 15 after witnessing Ethiopian soldiers carry out violent attacks in his community. These included the shooting of Mr. Hagos' uncle, the burning of 120 villagers in a mosque, and the murder of his aunt during a massacre.

[9] In 1983, while Mr. Hagos was still living in Sudan, he joined the Eritrean People's Liberation Front. The Front was one of several rebel groups fighting for Eritrea's self-determination in the civil war.

[10] Between 1983 and 1986, Mr. Hagos was a part-time member of the Front. In 1986, he became a full-time member of the organization, administering one of four Front offices in Sudan.

One of Mr. Hagos' main responsibilities was recruiting new members and encouraging them to take up arms in support of Eritrean self-determination. Mr. Hagos was never himself involved in combat.

[11] In 1992, after Eritrea's *de facto* independence, Mr. Hagos returned to Eritrea, where he continued his involvement with the Front and its successor organization, the People's Front for Democracy and Justice [or PFDJ]. The PFDJ became the provisional government of Eritrea in 1991 and the official Government of Eritrea in 1994.

[12] Mr. Hagos worked as the EPLF/PFDJ's District Administrator from 1992 to 1996. He then managed the PFDJ's membership campaigns as Party Leader of Anseba Province from 1996 to 2006. In 2006, Mr. Hagos was assigned to work at the Eritrean Mission in Canada. According to Mr. Hagos, his role in Canada was to administer membership drives for the Eritrean community in the diaspora.

[13] Mr. Hagos testified that he had begun to develop serious misgivings about the PFDJ before coming to Canada. His concerns started when the PFDJ failed to hold promised elections and instead became focused on securing its own hegemony. Mr. Hagos says that his concerns crystallized in 2001 with the arrest of dissenters within the government.

[14] Mr. Hagos asserts that he would have left the PFDJ while he was still in Eritrea if he could have done so. However, he claims that he was unable to leave the organization without putting himself and his family at risk of imprisonment and torture.

[15] Mr. Hagos says that after he came to Canada, he continued to be unable to leave the PFDJ because his family remained behind in Eritrea. According to Mr. Hagos, it was only when the Eritrean government ordered him to return home after he had criticized PFDJ policies that he had no alternative but to defect. At that point, he felt that the risks of detention and torture were simply too grave.

[16] After Mr. Hagos' defection, his daughter, brother and parents were all imprisoned in Eritrea. Mr. Hagos' wife and other children were smuggled out of the country and now live in Sudan.

[17] Subsequent to Mr. Hagos filing his refugee claim, two reports prepared under section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*] were forwarded to the Immigration Division. A March 30, 2008 report alleged that Mr. Hagos was inadmissible to Canada on grounds of security under paragraph 34(1)(f) of *IRPA.* A second report, this one dated December 4, 2008, alleged that Mr. Hagos was inadmissible for violations of human rights under paragraph 35(1)(a) of *IRPA.*

[18] After a lengthy hearing, the Immigration Division concluded that Mr. Hagos was indeed inadmissible to Canada, both for being a member of a terrorist organization and for being complicit in crimes against humanity.

2. The Legislative Authority for the Decision

[19] Before turning to examine the arguments advanced by Mr. Hagos, it is helpful to first review the legislative framework governing inadmissibility findings such as this.

[20] The inadmissibility findings in this case were made under the provisions of paragraphs 34(1)(f) and 35(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The operative portions of paragraph 34(1) of *IRPA* provide that:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
…	…
(c) engaging in terrorism;	c) se livrer au terrorisme;
…	…
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph *(a), (b)* or *(c)*.	*f*) être membre d'une organisation don=t il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a), b)* ou *c)*.

[21] Paragraph 35(1)(a) states that:

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;

[22] In making findings under paragraphs 34(1)(f) or 35(1)(a) of the Act, an immigration officer is also to be guided by section 33 of *IRPA*, which provides that:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

3. The Paragraph 34(1)(f) Inadmissibility Finding

[23] The Board found that Mr. Hagos was inadmissible under paragraph 34(1)(f) of *IRPA* as he had been a member of the Front, and there were reasonable grounds to believe that the Front was an organization that had engaged in acts of terrorism.

[24] Mr. Hagos admits to having been a long-standing member of the Front. He argues, however, that mere membership in the organization should not provide a sufficient basis for a finding of inadmissibility.

[25] According to Mr. Hagos, section 34 of *IRPA* should be interpreted in a manner that is congruent with section 35 of the Act. Under section 35 of the Act, membership *simpliciter* in an organization is insufficient to show complicity in an international crime unless the organization in question is one that is dedicated to a limited brutal purpose. Otherwise, the individual must be shown to have been complicit in the activities of the organization.

[26] Because the Front was not an organization dedicated to a limited brutal purpose, Mr. Hagos argues that he should not have been found to be inadmissible to Canada under paragraph 34(1)(f) of the Act unless it had first been established that he was complicit in the activities in issue. Given that Mr. Hagos claims to have been unaware of the alleged terrorist activities carried out by the Front, he submits that he could not have been found to have been complicit in their commission.

[27] Mr. Hagos has cited no jurisprudence that is directly on point to support his argument, however, and there are two major difficulties with it.

[28] First of all, Mr. Hagos's argument requires me to ignore the clear differences in the wording of the two legislative provisions. A section 34 inadmissibility finding is based upon membership in an organization, whereas a section 35 inadmissibility finding requires the commission of an offence. An individual may be found to have committed an offence either as a principal actor or as an accomplice. This brings the concept of complicity into play in relation to a section 35 inadmissibility analysis.

[29] Nothing in the language of section 34(1) of *IRPA* contemplates a complicity analysis in a section 34 inadmissibility case. Indeed, this Court has stated that "the issue of complicity is irrelevant to a determination under paragraph 34(1)(f) of the Act" (*Omer v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 478, [2007] F.C.J. No. 642, at para. 11).

[30] Moreover, I agree with the respondent that if Parliament had wished for the two sections to be interpreted in the same way, it would have used similar language in each section. It did not.

[31] Mr. Hagos' argument also runs contrary to appellate court authority as to the proper interpretation of the term "member" as it appears in section 34 of the Act. For example, in *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] F.C.J. No. 381, the Federal Court of Appeal specifically rejected the suggestion that the Board should have considered an individual's level of integration within the organization in determining whether or not an individual was a "member" of a particular organization – a consideration that would have been relevant in a complicity analysis. Rather, the Court held, at paragraph 29, that the term "member", as it is used in subsection 34(1) of *IRPA*, is to be given a broad and unrestricted interpretation.

[32] I accept Mr. Hagos' point that there may be individuals who are found to be members of a terrorist organization, whose involvement with the organization was brief or limited. There may also be individual members who were unaware of the organization's terrorist activities. However, as the Supreme Court of Canada recognized in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para.110, the recourse available to people who innocently contribute to or become members of terrorist organizations is an application for Ministerial relief under what is now subsection 34(2) of *IRPA*.

[33] Mr. Hagos argues that there is statistical evidence demonstrating that Ministerial relief is an illusory remedy. However, that statistical information is not before the Court. As a result, there is no evidentiary foundation for the argument.

[34] Mr. Hagos does not take issue with the Board's understanding of the "reasonable grounds to believe" evidentiary standard. In this regard, the Board adopted the description articulated by the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at para. 114. There, the Court explained that the "'reasonable grounds to believe' standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities". The Supreme Court stated that reasonable grounds will exist "where there is an objective basis for the belief which is based on compelling and credible information".

[35] Thus, the determinative issue, insofar as the Board's finding of inadmissibility under section 34 of the Act is concerned, is whether there were reasonable grounds to believe that the Front is an organization that engages, has engaged or will engage in terrorism. The Board's finding on this point is reviewable against the standard of reasonableness (see, for example, *Omer*, above, at para. 9, and *Jalil v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 246, 52 Imm. L.R. (3d) 256 at paras. 19-20).

[36] In answering this question, the Board had regard to the stipulative definition of "terrorism" established by the Supreme Court of Canada in *Suresh*, above at paragraph 98. There, the Supreme Court defined terrorism as including any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".

[37] It should be noted that the Supreme Court definition of terrorism specifically contemplates that acts of terrorism can occur during situations of armed conflict.

[38] The Front does not appear on the lists of groups proscribed by the UN, Canada and the United States as terrorist organizations. However, the Board identified two incidents purportedly involving the Front in its reasons which, it said, qualified as acts of terrorism. The first of these incidents was the kidnapping of the British Honorary Consul in Asmara in 1975-76. The second incident was an attack on a Polish freighter sailing in the Red Sea in 1990.

a) ***The Kidnapping of the British Honorary Consul***

[39] Mr. Hagos does not dispute that the kidnapping of Mr. Burwood-Taylor, the British Honorary Consul in Asmara, was properly characterized by the Board as a terrorist act. He does, however, deny that the kidnapping was carried out by the Front.

[40] In this regard, Mr. Hagos observes that the kidnapping occurred in 1975, and that Mr. Burwood-Taylor was held for some five months, with his period of confinement extending into early 1976. According to Mr. Hagos, the Eritrean People's Liberation *Forces* committed the kidnapping, not the Eritrean People's Liberation *Front*, which did not even come into being until 1977. While Mr. Hagos concedes that the Front emerged from the Eritrean People's Liberation Forces, he nevertheless argues that the Front was a vastly different organization to the Forces, with the result that acts committed by the Forces should not be attributed to the Front.

[41] The Minister submits that the Board acted reasonably in finding that the Front and the Forces were the same organization. According to the Minister, the Eritrean People's Liberation Forces disassociated itself from the Eritrean Liberation Front-Popular Liberation Front (or "ELF-PLF") and underwent a name change in 1977, but otherwise remained essentially the same group.

[42] It is clear from the jurisprudence that, in making an inadmissibility finding under paragraph 34(1)(f) of *IRPA*, immigration authorities must identify the terrorist organization in question with specificity (see *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1174, [2004] F.C.J. No. 1416 at paras. 66-68; *Dirar v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 246, [2011] F.C.J. No. 364).

[43] In this case, the Board properly understood that the entity at issue in these proceedings was the Front (see the Board's reasons at para.78). At paragraph 41 of its reasons, the Board stated that "the documentary evidence indicates that the acronym EPLF originally referred to the Eritrean People's Liberation Forces". The Board then went on to state that "[t]he documentary evidence is consistent on the fact that the name, Eritrean People's Liberation Forces, was changed at the 1st National Congress in 1977 to the Eritrean People's Liberation Front (EPLF)."

[44] At paragraph 80, the Board stated that:

> In 1973[,] the Eritrean People['s] Liberation Forces broke away from the ELF-PLF. At the National Congress in January 1977 the Eritrean People['s] Liberation Forces took on the new designation as the Eritrean People['s] Liberation Front (EPLF). This re-named entity, the EPLF, eventually emerged as one of the major national liberation fronts active in Ethiopia until the collapse of the Lt.-Colonel Mengistu regime in August 1991.

[45] Mr. Hagos submits that in the above passage, the Board acknowledged that the Forces and the Front were two distinct groups. As a result, Mr. Hagos submits that it was unreasonable for the Board to find that the Front was a terrorist organization based upon acts committed by the Forces. In the alternative, Mr. Hagos argues that it was unreasonable for the Board to find on the evidence before it that the two entities were the same group.

[46] When the Board's reasons are read as a whole, it is clear that the Board did not find that Forces and the Front were two distinct groups. Rather the Board found that the original group, the Eritrean People's Liberation Forces, underwent a name-change in 1977 and became the Eritrean People's Liberation Front. I am satisfied that this was a conclusion that was reasonably open to the Board on the record before it.

[47] I have carefully reviewed the documentary evidence with respect to the history of the Forces and the Front that Mr. Hagos says was ignored by the Board when it concluded that the Forces and the Front were the same group. In particular, I have examined the extract from *From Guerillas to Government: The Eritrean People's Liberation Front*, by David Pool, evidence that Mr. Hagos says demonstrates that the Front and the Forces were in fact two different organizations. Having read the document in question, it is not at all clear to me that this was in fact the case.

[48] Indeed, I note that at page 81 of the Pool text, the author discusses the actions of the "EPLF" during a four-year period between 1974 and 1978. Mr. Pool makes no attempt to distinguish the

actions of the Forces from those of the Front. Instead, he treats the “EPLF” as a single entity operating throughout the period in question.

[49] As a consequence, Mr. Hagos has not persuaded me that the Board ignored evidence or otherwise erred in concluding that the 1975-76 kidnapping of the British Honorary Consul by the Eritrean People’s Liberation Forces was a terrorist activity that was properly attributable to the Eritrean People’s Liberation Front.

b) ***The Attack on the Polish Freighter***

[50] The second incident cited by the Board to support its finding that there were reasonable grounds to believe that the Front was an organization that had engaged in acts of terrorism was the 1990 attack on a Polish cargo ship near the port of Massawa on the Red Sea.

[51] On January 4, 1990, members of the Front attacked the *Boleslaw Kryzwousty*. When a second Polish ship came to the aid of the first, the attackers fired on it as well, and the second ship was forced to withdraw. The *Boleslaw Kryzwousty* was then set ablaze, and the attackers took the 30-person crew prisoner. After nearly three weeks of captivity, the captors released the sailors to the American Ambassador to Sudan. It was at the demand of the Front that the crew be released to representatives of the United States rather than to Polish authorities.

[52] Mr. Hagos acknowledges that the Front took responsibility for the attack, but points out that it also claimed that the attack was the result of a case of mistaken identity. The Front stated publicly

at the time that it had believed the ship was a Russian ship carrying military supplies when it attacked, rather than a Polish ship carrying merchant cargo as was in fact the case.

[53] Citing the Supreme Court decision in *Mugesera*, above, Mr. Hagos submits that both the *actus reus* and the *mens rea* must be present for an action to constitute an act of terrorism. Indeed, in *Suresh*, the Supreme Court of stated that for an act to qualify as terrorism, there must be an intent to cause death or serious bodily injury to civilians. Mr. Hagos says that the Board erred by selectively relying on evidence and ignoring other evidence to find that the necessary *mens rea* was present in the attack on the Polish cargo ship. The result of this error is that the Board's finding that the attack on the Polish cargo ship constituted an act of terrorism was unreasonable.

[54] The Board was clearly satisfied that the Front possessed the necessary *mens rea* in its attack on the ship. I am satisfied that this conclusion was one that was reasonably open to the Board on the evidence before it.

[55] In coming to the conclusion that the Front had the required *mens rea*, the Board had regard to the fact that the EPLF knew civilian vessels were using the port of Massawa. It noted that the ship was flying both Polish and Ethiopian flags. Moreover, Front members had fired on the ship intensely for two and a half hours, actions that were clearly intended to cause death or serious bodily harm to crew members. The Board further observed that the Front had stated publicly that it would prioritize military objectives over civilian shipping interests.

[56] It is true that the Board's reasons did not specifically refer to the specific passages in news reports which suggested that the Front may have initially mistaken the ship for a Soviet one. However, decision-makers are presumed to have considered all the evidence unless there is a glaring omission (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration*), [1998] F.C.J. No. 1425, 157 F.T.R. 35 at paras. 14-17). That is not the case here.

[57] Moreover, even if there had been some initial confusion over the nationality of the ship, the fact is that after the true nationality of the sailors was discovered, Front fighters nevertheless continued to forcibly detain the civilian crew members for some three weeks after the attack.

[58] Mr. Hagos also contends that the Board applied the wrong test in finding that the attack on the ship was carried out for "political purposes". According to the stipulative definition of "terrorism" described in *Suresh*, above, at paragraph 98, the test is not whether the impugned act is committed for a political purpose, but rather whether it is committed to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act. In concluding that the Front was motivated by political purposes when it released the ship's crew to the U.S. Ambassador, Mr. Hagos says that the Board committed a reviewable error.

[59] I am not persuaded that the Board erred as alleged. The Board's comments related specifically to the release of the crew members to American authorities, and did not refer to the Front's purposes in attacking the ship or in taking the crew members prisoner.

[60] The Board correctly identified the test articulated by the Supreme Court in *Suresh* in its reasons. Moreover, when the reasons are read as a whole, it is clear that the Board applied the correct legal principles when it concluded that the Front's actions in relation to the attack on the freighter amounted to an act of terrorism as the attack was intended to intimidate merchant shipping vessels and to compel the American and other Western governments to support Eritrea's cause in the civil war.

c) ***Mr. Hagos' Other Arguments***

[61] Mr. Hagos argues that the wording of paragraphs 34(1)(c) and 34(1)(f) of the Act does not contemplate exclusion for membership in an organization that has committed a single act of terrorism. Given my conclusion that the Board's finding that the Front had committed two acts of terrorism was reasonable, it is not necessary to address this argument.

[62] Mr. Hagos has also advanced a number of other arguments which, he says, should be taken into account in evaluating the conduct of the Front. These include the fact that the Front generally treated civilians well, and that the actions relied upon by the Board to find that the Front had engaged in terrorism may have been isolated incidents.

[63] Mr. Hagos also asks the Court to have regard to the fact that the Front was engaged in a struggle for self-determination, seeking to liberate the Eritrean people from an extremely brutal and oppressive regime, and that it had a legitimate right to use violence to that end. Finally, Mr. Hagos asks the Court to consider the fact that the Front received considerable support from the international community in its struggle to liberate its people.

[64] Indeed, the focus of many of Mr. Hagos' submissions was on the justification for the conflict, rather than on the methods employed by the Front in achieving its goal of Eritrean self-determination.

[65] In my view, these are arguments that would be better advanced in the context of an application for Ministerial relief under subsection 34(2). They do not form part of the analysis under subsection 34(1) of *IRPA*.

4. The Paragraph 35(1)(a) Inadmissibility Finding

[66] The Board found that Mr. Hagos was also inadmissible to Canada on the grounds that he was complicit in crimes against humanity committed by the Front. The Board identified two acts that it found constituted 'crimes against humanity' under section 6 of the *Crimes Against Humanity and War Crimes Act*: an attack on a food convoy in 1987, and the mass expulsion of Ethiopians from the territory of Eritrea in 1992.

[67] The Board was satisfied that the Front was not an organization dedicated to a limited brutal purpose. However, the Board determined that Mr. Hagos was complicit in the commission of these crimes, and was thus inadmissible to Canada under paragraph 35(1)(a) of *IRPA*.

a) ***The Attack on the Food Convoy***

[68] The first of the crimes against humanity identified by the Board was an October 23, 1987 attack on a food convoy. In the course of this attack, Front fighters destroyed a famine relief convoy carrying 450 tons of wheat, an amount that would have been sufficient to feed 45,000 people for one month.

[69] Mr. Hagos argues that the Front carried out this attack based upon the mistaken assumption that the food convoy was actually carrying military supplies. As a consequence, Mr. Hagos says that the Front lacked the necessary *mens rea* for the commission of a crime against humanity.

[70] The Board carefully reviewed the evidence relating to the attack on the food convoy, and explained clearly why it concluded that the organization did indeed possess the requisite *mens rea*. This finding was reasonably open to the Board on the record before it, particularly in light of the contemporaneous statement of a Front spokesman who confirmed that the attack on the food convoy was “not a mistake”.

b) ***The Expulsion of the Ethiopians***

[71] The second crime against humanity identified by the Board was the forcible expulsion of approximately 120,000 Ethiopians in June of 1992, shortly after Eritrea declared *de facto* independence from Ethiopia. Approximately 80,000 of the deportees were captured Ethiopian soldiers and their dependants, whereas 40,000 of the deportees were civilians such as teachers and government officials.

[72] The Board referred to an Amnesty International report that noted that these individuals were "put across the border with Ethiopia without transport. Hundreds died of starvation or illness in transit camps or while making their way south". The Board found that these actions were perpetrated by the Front in a widespread and systematic fashion against a civilian population and that they constituted "inhumane acts" as defined in the *Crimes Against Humanity and War Crimes Act*.

[73] Mr. Hagos argues that one of the elements of the crime against humanity of "deportation" is that the individuals deported be lawfully on the territory from which they were expelled. Having failed to address whether the 120,000 Ethiopians were lawfully on the territory of Eritrea, Mr. Hagos says that the Board erred in finding that the essential elements of the crime against humanity of deportation had been made out.

[74] There are two difficulties with this argument.

[75] The first difficulty is that the Board did not find that the Front committed the crime against humanity of "deportation". Rather, it found that the mass expulsion and deportation constituted "other inhumane acts" as defined in the *Crimes Against Humanity and War Crimes Act*.

[76] The *Crimes Against Humanity and War Crimes Act* describes "other inhumane act[s] or omission[s]" as being actions taken against a civilian population or identifiable group that constitute 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".

[77] Conventional international law has recognized "other inhumane acts" as crimes against humanity. Most recently, the *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544, U.N. Doc. A/CONF. 183/9 (as corrected by the *procès-verbaux* of November 10, 1998, July 12, 1999, November 30, 1999 and May 8, 2000) has defined crimes against humanity to include, amongst other things, the "[d]eportation or forcible transfer of population" and "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

[78] The forcible expulsion of thousands of Ethiopians who were left by the Front to die in the desert, without food, water or transport, clearly meets the definition of an "other inhumane act", within the meaning of the *Crimes Against Humanity and War Crimes Act*.

[79] The second difficulty with Mr. Hagos' argument is that even if the crime against humanity in issue was that of deportation, international jurisprudence teaches that the term "lawfully present" should not be given the narrow meaning suggested by Mr. Hagos. By way of example, in the recent decision of the International Criminal Tribunal for the former Yugoslavia, Trial Chamber, in *Prosecutor v. Popovic*, IT-05-88-T, Final Judgment (10 June 2010) at para. 900, the Tribunal stated that:

> [The] words "lawfully present" should be given their common meaning and should not be equated to the concept of lawful residence. The clear intention of the prohibition against forcible transfer and deportation is to prevent civilians from being uprooted

> from their homes and to guard against the wholesale destruction of communities. In that respect, whether an individual has lived in a location for a sufficient period of time to meet the requirements for residency or whether he or she has been accorded such status under immigration laws is irrelevant. Rather, what is important is that protection is provided to those who have, for whatever reason, come to "live" in the community – whether long term or temporarily…

[80] The Tribunal went on to state that "the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for "residency" to be demonstrated as a legal standard".

[81] Consequently, I am satisfied that the Board did not err in finding that the Front had committed crimes against humanity. However, as will be explained in the next section of these reasons, I find that the Board did err in concluding that Mr. Hagos was complicit in those crimes.

c) ***Mr. Hagos' Complicity in the Crimes against Humanity Committed by the Front***

[82] A finding of inadmissibility under section 35 of *IRPA* requires that the individual have either committed the enumerated offence himself, or that he be complicit in its commission. In cases where the organization in question is principally directed to a limited, brutal purpose, mere membership in the organization provides a sufficient basis for a finding of complicity (*Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 109, [1992] 2 FC 306).

[83] In this case, the Board was satisfied that the Front was not an organization "principally directed to a limited, brutal purpose" as contemplated by the Federal Court of Appeal in *Ramirez*, above at 317. Thus the fact that Mr. Hagos was a member of the Front was not enough to establish

that he had personally and knowingly participated in the crimes against humanity committed by the organization.

[84] As a result, the Board had to examine the nature and scope of Mr. Hagos' involvement with the Front in order to determine whether he should be deemed to have been complicit in the crimes against humanity committed by the group.

[85] The determination of whether someone has been complicit in crimes against humanity in situations where the organization in question is not principally directed to a limited, brutal purpose is essentially a factual question that needs to be examined on a case-by-case basis. There is, however, a considerable body of jurisprudence emanating from the Federal Court of Appeal which establishes certain general principles to be followed in making such a determination. These include cases such as *Ramirez*, above; *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1145, [1994] 1 F.C. 433; and *Moreno v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 912, [1994] 1 F.C. 298.

[86] The guiding principles from the Federal Court of Appeal jurisprudence with respect to the level of participation required to establish complicity were synthesized by Justice Layden-Stevenson in *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1356, [2004] F.C.J. No. 1649 at paragraph 27, where she stated that:

> Accomplices as well as principal actors may be found to have committed international crimes... The court accepted the notion of complicity defined as a personal and knowing participation in *Ramirez* and complicity through association whereby individuals may be rendered responsible for the acts of others because of their close association with the principal actors in *Sivakumar*. Complicity

> rests on the existence of a shared common purpose and the knowledge that all of the parties may have of it: *Ramirez*; *Moreno*.

[87] Six factors have emerged from the jurisprudence which should be considered in determining whether an individual is complicit in crimes against humanity committed by an organization. These include the nature of the organization, the organization's method of recruitment, the individual's position or rank within the organization, the individual's knowledge of the organization's atrocities, the length of time that the individual was in the organization, and whether the individual had an opportunity to leave the organization.

[88] In this regard, the Board found that:

> (i) The Front was a military organization aimed at achieving self-determination for Eritrea through armed resistance;
>
> (ii) Mr. Hagos joined the Front voluntarily;
>
> (iii) Mr. Hagos' duties within the Front during the 1980's included the recruitment and possible conscription of new fighters. Mr. Hagos subsequently accepted increasingly important positions in the Provisional Government and Government of Eritrea;
>
> (iv) Mr. Hagos received the Front's 'political education', and thus must have been aware of the Front's wrongdoing, and, specifically, its use of violence and conscription;
>
> (v) Mr. Hagos was involved in the Front from 1983 through the period that it formed the Government of Eritrea and thereafter until 2007; and
>
> (vi) Mr. Hagos did not take any steps to leave the EPLF/PFDJ until 2007.

[89] From this, the Board concluded that Mr. Hagos was complicit in the crimes against humanity committed by the Front.

[90] I agree with Mr. Hagos that the Board erred in its complicity analysis.

[91] As noted above, complicity rests on the existence of a shared common purpose and the knowledge that all of the parties may have of it. Mere membership in an organization involved in international offences is not a sufficient basis for a finding of inadmissibility, unless the organization in question is one that is principally directed to a limited, brutal purpose.

[92] The Board found that the Front was a secessionist movement aiming to overthrow the Ethiopian government in Eritrea. It further found that the Front used guerilla warfare and armed resistance to achieve its goals, and that at no time did the organization reject the use of violence as a means of achieving its political objective of self-determination. The "common purpose" identified by the Board that was shared by Mr. Hagos and the EPLF that was the achievement of self-determination for Eritrea, by violent means if necessary (see the Board's reasons at para. 162).

[93] In coming to the conclusion that Mr. Hagos would have been aware of the atrocities committed by the Front during the liberation struggle, the Board stated at paragraph 170 of its reasons that:

> Given the history of the long and brutal liberation struggle … it is not plausible that Mr. Hagos was completely unaware of the EPLF activities in that liberation struggle. When Mr. Hagos joined the EPLF it already was an identifiable organization known to be involved in a war of liberation against the Lt.-Col. Mengistu's regime (*sic*). It is not plausible that in receiving the political

> education which stressed Eritrean history [and] politics that he was not aware of the use of violence in pursuing self-determination. … Given the scale of personal tragedies of the Eritrean refugees; and the brutally (*sic*) of death from war and famine, Mr. Hagos' statement that he was not aware of any atrocities or wrongdoing by the EPLF is not plausible.

[94] With respect, the question for the Board was not whether Mr. Hagos "was completely unaware of the EPLF activities in that liberation struggle". Rather, the question was whether Mr. Hagos was aware of the actions of the EPLF as they related to the attack on the food convoy in 1987 and the mass expulsion of Ethiopians form the territory controlled by the Eritreans in 1992.

[95] What the Board appears to have done is to conclude that because Mr. Hagos supported the goal of Eritrean liberation and endorsed the use of force, if necessary, and because bad things happened in the course of the conflict, it therefore followed that Mr. Hagos was complicit in any crimes against humanity that may have been committed by the EPLF in the course of the liberation struggle. With respect, one conclusion does not follow from the other.

[96] As the Federal Court of Appeal observed in *Ramirez*, above at 319, "[o]ne must be particularly careful not to condemn automatically everyone engaged in conflict under conditions of war". The fact that Mr. Hagos was undoubtedly committed to the EPLF's overall goal of Eritrean self-determination through violent means, if necessary, does not mean that he shared a common purpose with those who were specifically engaged in the attack on the food convoy or the expulsion of the Ethiopians.

[97] The failure of the Board to address the proper question in assessing whether Mr. Hagos was complicit in the crimes against humanity committed by the EPLF results in its complicity finding being unreasonable.

Conclusion

[98] For these reasons, I have concluded that the Board's finding that Mr. Hagos was inadmissible to Canada under paragraph 34(1)(f) of *IRPA* for being a member of a terrorist organization was reasonable. I am further satisfied that the Board's finding that the EPLF had committed crimes against humanity was one that was reasonably open to it on the record before it. However, the Board's finding that Mr. Hagos was complicit in the crimes against humanity committed by the EPLF was not reasonable. Consequently, Mr. Hagos' application for judicial review is allowed.

Certification

[99] Mr. Hagos proposes the following question for certification:

> Is membership *simpliciter* of an organization under section 34(1)(c) and (f) of the *IRPA* applicable only in relation to membership of a limited and brutal purpose organization?

[100] This is not, in my view, an appropriate question for certification. It runs contrary to the express wording of the legislation, and contemplates an interpretation of paragraph 34(1)(f) that is contrary to a large body of settled jurisprudence, including decisions of appellate Courts. As a consequence, I decline to certify it.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different member of the Immigration Division of the Immigration and Refugee Board for re-determination in accordance with these reasons; and,

2. No serious question of general importance is certified.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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