Goncalves v. Canada (Minister of Citizenship and Immigration)

Between
Lenvo Miguel Goncalves, plaintiff, and
The Minister of Citizenship and Immigration, defendant

[2001] F.C.J. No. 1161
2001 FCT 806
Court No. IMM-3144-00

Federal Court of Canada - Trial Division
Montréal, Quebec
Lemieux J.

Heard: April 5, 2001.
Judgment: July 19, 2001.
(28 paras.)

Aliens and immigration — Admission, refugees — Grounds, well founded fear of persecution — Right to counsel — Disqualifications, crimes against humanity — Appeals or judicial review, whether claim reasonable — Appeals or judicial review, scope of review — Referral to board where decision quashed.

Application for judicial review by Goncalves of a decision by the Refugee Division (tribunal) denying his claim for Convention refugee status on the ground that he had committed crimes against humanity. Goncalves was able to leave the Angolan army, in which he had been forcibly enrolled, by joining a special organization of the Mouvement populaire pour la liberation de l'Angola (MLPA) made up of adolescent youths. Members of the organization were to obtain information on people in the district regarding their political affiliation. Goncalves became leader of a group of 30 youths. Initially Goncalves knew that as a result of the information provided, the persons denounced were reported kidnapped. He later learned that they had disappeared or been shot. He then discovered that the MLPA was responsible for the murder of his father. He wanted to leave the organization but did not know how and continued to provide information. Goncalves then became a mole for the rival political group providing information about the MPLA. He had fled Angola in July 1999 but returned. He learned that he was being sought, that his brother had been arrested and his family was scattered. In November he entered Canada via South Africa and the United States and claimed refugee status. The tribunal found Goncalves' testimony credible and that he had a well- founded fear of persecution. However, it concluded that Goncalves was subject to exclusion for his participation in the MLPA organization, the purpose of which was to physically eradicate political opponents. The tribunal found that Goncalves willingly and knowingly participated in an organization committing crimes against

humanity. Goncalves argued that the decision was unreasonable and failed to take into account the evidence, that the tribunal did not apply the correct standard of evidence and erred in excluding Goncalves.

HELD: Application granted. The tribunal placed a manifestly incorrect construction on the evidence. The key findings of fact were not supported by the evidence. Specifically, the tribunal erred in finding that Goncalves was aware of the nature of the activities of the organization from the outset. The finding that he voluntarily joined the organization was incorrect. The evidence showed that joining the organization was the only way for Goncalves to leave the army. There was no evidence to support the tribunal's conclusion that the information disclosed by Goncalves after becoming aware of the MLPA's criminal tactics led to torture, murder, kidnapping or crimes against humanity. The tribunal also applied the wrong law. The decision was quashed and Goncalves' claim referred to a new panel for determination.

Statutes, Regulations and Rules Cited:

Immigration Act, s. 2.

Counsel:

Patrick Fernandez, for the plaintiff.
Martine Valois, for the defendant.

REASONS FOR ORDER

LEMIEUX J.:—

INTRODUCTION

1 Lenvo Miguel Goncalves, a citizen of Angola, is asking the Court to quash a decision by the Refugee Division ("the tribunal") on May 26, 2000 which ruled that he was excluded from the Convention pursuant to art. 1(F)(a) on the ground that he was active in and an accomplice to crimes against humanity.

2 The wording of art. 1(F)(a) of the Convention, incorporated in the Immigration Act ("the Act") by s. 2, is 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 instruments

drawn up to make provision in respect of such crimes ... [My emphasis.]

* * *

F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:

a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes ... [je souligne]

3 The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol on Refugee Status states in para. 150 that the most complete definition of crimes against humanity is that given in the Agreement of London, 1945 and in the Charter of the International Military Tribunal. Under art. 6 of that Charter, crimes against humanity include

"murder, extermination ... and other inhumane acts committed against any civilian population ... or persecutions on political, racial or religious grounds ... "

TRIBUNAL'S DECISION

(a) Facts as seen by tribunal

4 In its decision, the tribunal mentioned the following facts.

(a) In 1992 the plaintiff's father was murdered by members of the Mouvement populaire pour la libération de l'Angola ("MPLA") for allowing members of the Union pour l'indépendance totale de l'Angola ("UNITA") to stay in his hotel during legislative elections. The plaintiff learned that his father had been murdered much later, some time in August 1998, when he was 17 1/2 years old. Up to then, the claimant had the vague impression that his father had been killed by accident.

(b) In April 1998, thanks to the intervention of his aunt with Capt. Beto Kagamba, one of her former colleagues, the claimant left the Angolan army, in which he had been forcibly enrolled since October 1997. In return, Capt. Kagamba required that he join the [TRANSLATION] "civilian association", a special organization of

the MPLA, made up of adolescent youths.

(c) The organization, the "civilian association", was created to infiltrate the other parties and collect information. The "civilian association" consisted of young people 14 to 18 years old who, under cover of various physical activities (soccer), were to obtain information on people in the district so as to find out whether they were members of opposition parties or were working with UNITA.

(d) These youths in the "civilian association" infiltrated everywhere in the districts so as to collect information on UNITA.

5 After a few months, the plaintiff became the sole leader of a group of 30 youths. He discovered and quickly understood what he had to do. The plaintiff testified that he served as a contact between young people who obtained the information and the person chiefly responsible, Capt. Beto Kagamba. The information collected by the young people and passed on by the plaintiff to Capt. Kagamba concerned the government's political opponents, namely UNITA.

6 At pp. 2 and 3 of its decision, the tribunal wrote:

> [TRANSLATION]
>
> The claimant testified that as a result of the information provided, the persons denounced were kidnapped, punished, some were mistreated, shot or found to have disappeared. He stated that initially he noticed that after he provided information on individuals they were listed as having been kidnapped. In November 1998, he began finding that the people had been shot or listed as missing. At the outset, he said, he did not pay any attention and did not know of it. He stated that initially he sometimes thought that people were going to prison for a month or a week and would be released afterwards. It was not until later that he found that the persons reported had disappeared or been shot, but at the same time he never saw the individuals being shot. [My emphasis.]

7 From November or December 1998 the claimant thought about his father's death and, after putting the question to his mother, realized that it was the MPLA which had killed his father. According to the tribunal, he realized he had made a serious mistake.

8 However, as he did not know how to cut short his work as an informer, he continued providing information and delivered information to the MPLA party on two occasions. He stopped taking information to the MPLA in February/March 1999, but the tribunal said that later he said he stopped providing information in July.

9 The plaintiff became a mole when he decided he would no longer work for the MPLA cause and would no longer provide information on UNITA, but instead would

warn members of UNITA about the MPLA's moves and the espionage activities of the "civilian association".

10 After an internal investigation was held in the "civilian association", the plaintiff was suspected. On July 15, 1999 he fled from Angola, but returned. He learned that he was being sought, his brother had been arrested and his family was scattered. He remained in hiding at the homes of his grandfather and a friend. On November 21, 1999, using a U.S. visa and assisted by his friend, who was an employee with the Ministry of Foreign Affairs, he was able to take a plane via South Africa and the U.S. before arriving in Canada and claiming refugee status. He feared returning to Angola because a warrant of arrest and search had been issued against him for providing information against the security of the State.

(b) Assessment of evidence and tribunal's decision

11 In general, the tribunal found the plaintiff's testimony credible and the personal documentary evidence established that he had a well-founded fear of persecution if he returned to Angola. However, as indicated, the tribunal concluded that he was subject to exclusion.

12 At p. 5 of its decision the tribunal wrote:

> [TRANSLATION]
>
> Though still a minor, the claimant joined a secret and criminal organization, the MPLA's "civilian association", the purpose of which appears to have been to physically eradicate political opponents. The claimant participated fully in the organization and indeed admitted that he quickly understood the purpose of the organization. Unlike the claimant, other young people who were with him resigned or left the organization, about ten in total. The claimant admitted that the mission was secret and that he was required to maintain the secrecy of the organization. Accordingly, he kept his participation secret from his brother and mother because he knew that they would be against it. [My emphasis.]

13 The tribunal proceeded with its analysis, noting that the plaintiff admitted he was the leader of a group, was active and worked hard, recruited younger people by motivating them and always went with them to deliver information to the captain. At p. 6 of its decision the tribunal concluded:

> [TRANSLATION]
>
> Although he apparently recognized that the information provided was being used to harass and do away with the persons reported, the claimant made two more deliveries of information before he stopped reported the MPLA's political opponents. In this case, we apply the same reasoning as

> in Rasuli, in which the claimant was excluded from the definition of refugee status for reporting persons to an organization which he knew was committing crimes against humanity and at the same time was aware that this kind of atrocity was being committed.
>
> Clearly, this young claimant carries the marks of Angolan society, which has been in a state of civil war for over 30 years, and this has made the public cynical and insensitive to murders which were a daily occurrence. This state of mind and the discounting of violence would seem to explain the cynicism and misunderstanding of the consequences of the claimant's acts. However, the fact remains that the claimant, aware of the consequences of his actions but discounting them, was active in and an accomplice to crimes against humanity and that he should be excluded from the Convention for these reasons. [My emphasis.]

ARGUMENTS MADE BY PLAINTIFF

14 In this Court the plaintiff challenged the tribunal's conclusion that the [TRANSLATION] "claimant, aware of the consequences of his actions but discounting them, was active in and an accomplice to crimes against humanity". [My emphasis.]

15 First, the plaintiff argued that the tribunal arrived at an unreasonable decision without taking into account the evidence at its disposal; second, that the tribunal did not apply the correct standard of evidence and erred in making a parallel with the Court's reasoning in Rasuli; and third, the tribunal made an error by applying the exclusion provisions to the plaintiff's refugee status claim.

ANALYSIS

(1) First reason - unreasonable decision not taking into account evidence at its disposal

16 In support of this argument, the plaintiff made two points:

(1) the Board never had any testimony from the claimant about the fact that he was aware prior to late 1998 of the criminal consequences of his acts; and

(2) there is no basis in the analysis for a conclusion that the claimant was aware of the ultimate purpose of the organization and participated willingly and actively.

(i) Awareness before late 1998 of criminal consequences of his acts

17 In the plaintiff's submission, his testimony showed that:

(a) until his conscience troubled him in late 1998, he thought the people reported were probably thrown into prison for a few days or weeks and were subsequently released;

(b) it was in late 1998 that he became aware that the disappearance of certain people could have a connection with the information provided by him to the captain;

(c) as soon as he realized this, in particular once he became aware of what was happening, he began working for UNITA;

(d) from that time on he was giving all the information collected to a UNITA parliamentarian;

(e) although he testified that in early 1999 on two occasions he took young people to the captain so they could give him information, it was all done in order to allay suspicions concerning him and to pacify the captain, who was beginning to find it suspicious, and in any case the tribunal could conclude that the same information was provided by him to UNITA members.

18 Counsel for the plaintiff maintained that as the tribunal had no testimony to the contrary, even if it did not come to the conclusion that the information provided on these last two occasions was passed on to UNITA members, it could not solely on the evidence of these facts have serious reasons for considering that the plaintiff should be excluded from the protection offered by the Convention, noting that in its decision it had concluded as follows:

> [TRANSLATION]
>
> The MPLA and the members of the "civilian association" apparently began having difficulty perpetrating their criminal activities against opposition parties as, using information provided by the claimant, the latter were able to thwart them and avoid capture by MPLA members.

(ii) Willing and active participation

19 Counsel for the plaintiff argued that there was no evidence that the latter knew the ultimate purpose of the organization and participated willingly and actively in it. He contended that the only conclusion the tribunal could come to was that the claimant was under the captain's authority and could not decide to abandon his duties of his own accord. Further, he argued that there was nothing in the plaintiff's testimony to support the conclusion that the latter had prior knowledge of the purposes of the "civilian association" or of the consequences of his actions.

20 This first argument made by the plaintiff must be analyzed in accordance with the guidelines laid down by L'Heureux-Dubé J. in Canadian Union of Public Employees, Local 301 v. Montréal (City), [1997] 1 S.C.R. 793, 844:

> We must remember that the standard of review on the factual findings of an administrative tribunal is an extremely deferent one ... Courts must not revisit the facts or weigh the evidence. Only where the evidence viewed reasonably is incapable of supporting the tribunal's findings will a fact finding be patently unreasonable. An example is the allegation in this case, viz. that there is no evidence at all for a significant element of the tribunal's decision ... [My emphasis.]

21 It is also worth recalling the following passage per Décary J.A. in Aguebor v. Minister of Employment and Immigration (1993), 160 N.R. 315, at para. 4:

> There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review.

22 The plaintiff was the sole witness before the tribunal, which found him credible, and the Minister was not represented. My reading of his testimony leads me to conclude that the tribunal placed a manifestly incorrect construction on the evidence, to support certain of its findings of fact which were essential to its decision to exclude him from protection by the Convention.

23 I consider the following findings of fact to be incorrect.

(1) The plaintiff was aware from the very beginning: the plaintiff's testimony was quite clear and he said several times that it was only during the 1998 holidays and early 1999 that he realized the information he was passing on to Capt. Kagamba on people who were members or sympathizers of the UNITA could have harmful consequences for them (see certified record, pp. 167, 168, 169, 171, 172, 174, 192 and 200).

(2) Before this realization in late 1998, he testified as follows at p. 171:

[TRANSLATION]

> I thought it right ... the information I was giving, well, what would happen was the people would be in prison because they do that there ... Because they ... they put people in prison there for a week, a month, and then they are released.

(3) He knew from the outset that the function of the "civilian association" was criminal: at p. 182 of the certified record, he testified [TRANSLATION] "to begin with, I did not know, when I began ... ".

(4) He joined a secret and criminal organization voluntarily: the plaintiff testified at p. 150 that the captain [TRANSLATION] "said to me, you cannot simply leave the military. You must ... you must join another group, so he was the one who got me out of the military".

(5) There was no evidence before the tribunal on which it could conclude that the information disclosed on two occasions after he became aware of what was happening led to torture, murder, kidnapping and so on, or any other crime against humanity. The tribunal did not know whether this information had also been revealed to UNITA.

(6) At p. 190 he testified that after he realized what was happening he did not know exactly how he could stop giving information and how he could leave the group.

24 After making these findings of fact which are not supported by the evidence, the tribunal applied without qualification Nazir Ahmad Rasuli v. Minister of Citizenship and Immigration, IMM-3119-95, October 25, 1996, [TRANSLATION] "in which the claimant was excluded from the definition of refugee status for reporting persons to an organization which he knew was committing crimes against humanity, and at the same time was aware that this kind of atrocity was being committed".

25 In Rasuli, Heald D.J., at p. 4 of his judgment, wrote this:

> I turn now to the factual scenario in this case. After describing the applicant's evidence as being "evasive and disturbingly smug" the Division stated "... a picture emerged of a young man who had attended a special school for children of important officials and Party members. He was then offered three career choices ... he chose to became an informer" ... "after some evasiveness and inconsistency, he admitted to knowing the nature of Khad, whose brutal activities he justified as being directed only at dangerous persons." The tribunal added ... "individuals who knowingly offer human beings to be grist for torture should be excluded from being recognized as refugees in Canada."

26 The evidence in the record in the case at bar was not a basis for application of Rasuli by the tribunal.

27 Counsel for the defendant referred the Court to several other cases that could justify exclusion of the plaintiff under art. 1(F)(a) of the Convention. However, I consider that it is not my function in judicial review to determine the facts necessary to support a finding of exclusion. That is the function of the Refugee Division.

DISPOSITION

28 For all these reasons, the application for judicial review is allowed, the tribunal's decision of May 26, 2000 is set aside and the plaintiff's claim should be considered again by a panel of different members. No serious question of general importance was suggested.

Certified true translation: Suzanne M. Gauthier, LL.L. Trad. a.