El-Hasbani v. Canada (Minister of Citizenship and Immigration)

Between
Georges Youssef El-Hasbani, applicant, and
The Minister of Citizenship and Immigration, respondent

[2001] F.C.J. No. 1269
2001 FCT 914
Court File No. IMM-3891-00

Federal Court of Canada - Trial Division
Toronto, Ontario
Muldoon J.

Heard: May 9, 2001.
Judgment: August 17, 2001.
(48 paras.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Disqualifications, acts contrary to the purposes and principles of the United Nations — Crimes against humanity — Appeals or judicial review, grounds.

Application by El-Hasbani for judicial review of a decision that his application for refugee status was excluded by the United Nation's Convention Relating to the Status of Refugees. El-Hasbani was a 36-year old citizen of Lebanon. He claimed to have a well-founded fear of persecution from the Lebanese authorities and from the Hizbollah. He based his claim on his perceived political opinion, his Christian religion and his 10 years spent in the employ of the South Lebanon Army. El-Hasbani voluntarily joined the army, and achieved the rank of sergeant. During his tenure he diffused explosives in the security zone. The Board held that El-Hasbani was excluded from the application of the Convention pursuant to Article 1F(a). The Board held that there were serious reasons for considering that El-Hasbani was complicit in crimes against humanity committed by the South Lebanon Army and that he must have had knowledge of the practices of the army given his longstanding service. However, it did not identify any specific activities to which El-Hasbani had been an accomplice. El-Hasbani argued that there was no evidence that he committed any human rights abuses. He further argued that the South Lebanon Army was not an organization directed towards a limited brutal purpose. The Board stated that had he not been excluded, it would have found him to be a Convention refugee.

HELD: Application allowed. The Board's decision was quashed and the matter was referred back to a differently constituted panel. El-Hasbani made a proper refugee claim.

Despite its finding, the Board did not retract its acquiescence in his personal credibility. Further there was a lack of proof against El-Hasbani. He risked his own life and safety daily to make the security zone safe for everyone, and he had not been shown to have harmed anyone. He was entitled to be believed.

Statutes, Regulations and Rules Cited:

Immigration Act, R.S.C. 1985, c. I-2, s. 2(1).

United Nation's Convention Relating to the Status of Refugees, Articles 1F(a), 2(1).

Counsel:

Linda Martschenko, for the applicant.
Mielka Visnic, for the respondent.

MULDOON J. (Reasons for Order):—

1. Introduction

1 This is an application for judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (the CRDD), dated June 16, 2000, wherein the CRDD held that the applicant was excluded from the application of the Convention pursuant to Article 1F(a).

2. Statement of Facts

2 The applicant is a 36-year-old citizen of Lebanon who claimed a well-founded fear of persecution from the Lebanese authorities, and from the Hizbollah. The applicant based his claim on his perceived political opinion, his Christian religion, and his past employment in the South Lebanon Army (the SLA). On June 23, 2000, the CRDD held that the applicant was not a Convention refugee because he was excluded from the application of the Convention pursuant to Article 1F(a). In its reasons, the CRDD stated that had he not been excluded, he would have been a Convention refugee.

3 The applicant was employed by the SLA from November, 1988, until August, 1998, in the Lebanese security zone. He joined voluntarily in 1988 because he wanted to protect Christians in Lebanon, because he needed work to survive, and because he thought that he would have been compelled to join. He was promoted once, in 1994, to the rank of sergeant. His activities were the same before and after the promotion, and he was never in command of other soldiers. The promotion resulted only in an increase in pay.

4 The applicant believed that the purpose of the SLA was to assure the survival of Christians in Lebanon. It is not an offensive army, but a defensive one. He was

employed by the SLA to diffuse Hizbollah explosives in the security zone. However, he became aware that he was a target of the Hizbollah when a bomb was placed under his car which was parked near his home.

5 The applicant once refused to carry out orders given to him and was assessed a $200 fine which was deducted from his salary. The incident occurred when he was ordered to blow up a house, rendering it useless for the Hizbollah. He refused because he believed that the house belonged to individuals who were not Hizbollah adherents.

6 The applicant knew that the SLA had shelled villages in the past. However, he believed that the SLA intended to shell the Hizbollah who were hidden amongst the villagers.

7 The applicant knew that the Israel Defence Force (the IDF) possessed phosphorous weapons, but he had never seen the SLA use that type of weapon. He also knew that the IDF had field mortars, but had never seen them being used. He knew of the existence of proximity bombs, but he did not believe that the SLA used such bombs. He did not know whether the IDF used such bombs.

8 The applicant had never been involved in the arrest or detention of enemies of the SLA, nor had he ever participated in prisoner interrogations. He was not permitted access to places where the prisoners were held.

9 Regarding "Operation Accountability", the applicant knew that the SLA had not shelled villages within the security zone, but that it had shelled locations outside of the security zone from which Hizbollah attacks had originated.

10 The applicant did not know that the SLA regularly shelled civilian targets. He did not believe that the SLA was involved in shelling against civilians.

11 The applicant was not a member of the security branch of the SLA, nor did he ever provide intelligence to the IDF.

12 Although the CRDD held that the SLA was not an organization directed towards a limited brutal purpose, it made the following findings of fact:

(a) The SLA security forces routinely commit acts of torture against detainees;

(b) An element of barbarous cruelty is present in the torture and unlawful confinement of detainees suspected of involvement in attacks against the SLA and against Israel;

(c) The SLA expelled Lebanese civilians from the security zone in a systematic fashion because of knowledge or suspicion of Hizbollah collaboration or sympathy;

(d) The SLA forcibly conscripted some of its recruits; and

(e) The activities of the SLA, or some of them, within the security zone constituted crimes against humanity.

13 The CRDD held that there were serious reasons for considering that the applicant was complicit in crimes against humanity committed by the SLA during the period of his employment between 1988 and 1998. He joined voluntarily, he served for 10 years, and he achieved the rank of sergeant. He also diffused explosives in the security zone

14 The CRDD held that the applicant must have had knowledge of the practices of the SLA given his long standing service. The CRDD found that his work kept SLA roads open in the security zone and permitted the SLA to carry out its functions.

15 The CRDD held that if the applicant had not been excluded from consideration as a Convention refugee under Article IF(a) the panel would have found him to be a Convention refugee.

3. Issue

16 Did the CRDD err in law when it held that the applicant was complicit in crimes against humanity which were committed by the SLA?

4. Applicants' Submissions

17 The Immigration Act excludes persons from the Convention under Article 1F. The statutory standard for exclusion requires that the Conventio n be not applied to any person where there are "serious reasons for considering" that the person falls within one of the exclusions.

18 Paragraph 149 of the UNHCR Handbook states that the exclusion clauses must be restrictively interpreted in light of the serious consequences of exclusion for the person concerned. This restrictive interpretation was commented on by Justice Jerome A.C.J. in Cardenas v M.E.I. (1994), 23 Imm. L.R. (2d) 244 (T.D.), where he stated at paragraph 24 that the "In light of the potential danger faced by such a claimant, the CRDD must base its decision to exclude only on clear and convincing evidence".

19 The Federal Court of Appeal stated in Moreno v M.E.I. (1993), 21 Imm. L.R. (2d) 221 (F.C.A.), that the applicability of the exclusion clause does not depend on whether a claimant has been charged or convicted of the acts set out in the Convention. The Minister's burden is merely to meet the standard of proof embraced by the term "serious reasons for considering". The "less-than-civil-law" standard, referred to by this Court in Ramirez v. M.E.I., [1992] 2 F.C. 306 (C.A.), is well below that which is required under either the criminal law (beyond a reasonable doubt) or the civil law (on a balance of probabilities or preponderance of evidence); that standard is consistent with the intent of the signatories to the Convention who were adamant that international protection be

unavailable to war criminals. The requisite standard of proof comes into legal play only when the tribunal is called on to make determinations which can be classified as questions of fact. The "less-than-civil-law" standard is irrelevant when the issue being addressed is essentially a question of law. For instance, it is a question of fact whether the appellant or members of his platoon killed civilians, or whether the appellant stood guard and watched often during the torture of a prisoner. But whether the act of killing civilians by military personnel can be classified as a crime against humanity is a question of law which must be decided in accordance with legal principles rather than by reference to a standard of proof.

20 The CRDD is required to make precise findings with respect to the crimes which it is considered the claimant has committed. In Sivakumar v. M.E.I., [1994] 1 F.C. 433 (C.A.), Mr. Justice Linden states:

> 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 of law.

21 Accomplices may be included in the exclusionary clause, but, the CRDD must determine the degree of complicity for the exclusion to be applicable. [Ramirez, supra]. Disarming bombs is quite consonant with Canada's stance against land mines.

22 Ramirez, supra, holds that mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status. The exception is when an organization is principally directed to a limited, brutal purpose, such as secret police. In such an instance, mere membership may by necessity involve personal and knowing participation in persecutorial acts.

23 Moreno, supra, states that complicity rests upon the existence of a shared common purpose, and the knowledge which all of the parties in question may have of it. Mens rea remains an essential element of the crime.

24 The applicant submits that the CRDD must recite the evidence which it used to support a finding that a claimant is excluded from the application of the Convention. The evidence must demonstrate a shared common purpose between the principal and the accomplice, and the individual's participation must be personal and knowing. [Moreno, supra; Penate v. M.E.I. (1993), 71 F.T.R. 171 (T.D.), and Bazargan v M.E.I. [1996] F.C.J. No. 1209 (C.A.)(QL)]. Guilt by association is repugnant to law.

25 Moreno, supra states that the further that an accomplice is distanced from the decision makers, the less likely that the required degree of complicity necessary to attract criminal sanctions or the application of the exclusion clause will be met.

26 In Cardenas, the Court stated that when the CRDD applies the exclusion clause, the CRDD should endeavor carefully to detail the criminal acts which it considers the claimant to have "committed" given the serious consequences to the claimant. This is particularly so in situations where the CRDD has concluded that the claimant has a well founded fear of persecution in his country of origin. Such is the case, here.

27 In applying the exclusion clause, the CRDD must link specific crimes against humanity to the applicant, and must provide an adequate analysis of how the claimant has shared the common purpose with knowledge of some of the acts of violence. In Saridag v M.E.I. (1994), 85 F.T.R. 307 (T.D.), the claimant was a member of an organization with a limited and brutal purpose and yet the Court required evidence greater than mere membership.

28 The applicant submits that evidence must exist which demonstrates that the claimant was a personal and knowing participant in the atrocities committed by the organization, even if the organization is characterized as a terrorist organization. [See Balta v M.E.I., (1995) 27 Imm. L.R. (2d) 226 (T.D.)]

29 There is a distinction between the "killing" and the "murder" of civilians in the context of a military confrontation. A finding of a war crime or a crime against humanity by a private soldier engaged in an action against an armed enemy is not to be reached within the Convention refugee exclusion definition. Killing of innocent civilians by private soldiers during an action against an armed enemy might amount to a crime against humanity if the casualties resulted from "intentional, deliberate and unjustifiable acts of killing and slaughtering". [Gonzales v M.E.I. (1994), 24 Imm. L.R. (2d) 229 (F.C.A.)]

30 The applicant submits that the CRDD erred in finding that the he was complicit in crimes against humanity committed by the SLA by virtue of his long term service in the SLA. The following evidence was before the CRDD:

a. The SLA began as an organization to ensure the survival of Lebanon's Christian forces;

b. the SLA defended the Christian population in the south of Lebanon from the rival Hizbollah, Amal and Druze militias as well as PLO armed factions during the 15 year Lebanese civil war between 1975 and 1990;

c. the SLA became allied with the IDF and the Israeli intelligence forces in controlling the security zone in south Lebanon in 1985;

d. the SLA ran the affairs of the security zone, and had administrative and military purposes in the security zone;

e. the most active group engaged against the SLA in south Lebanon was Hizbollah, and the security zone was the most explosive front line in the Arab-Israeli conflict;

f. Hizbollah guerrillas attempted to enter the zone to carry out terrorist attacks against the SLA and Israelis, both civilian and military, to lay mines, to ambush IDF and SLA patrols.

31 The applicant submits that the evidence demonstrates that the Hizbollah militia acted offensively by entering the security zone. The work of the SLA involved securing the safety of the inhabitants of the security zone. In particular, the SLA cleared the mines which were laid by the Hizbollah guerrillas. This was and is entirely consonant with Canada's leadership and treaty obligations, designed to eradicate all land mines.

32 The applicant submits that there was no evidence that he committed any human rights abuses. Moreover, the SLA is not an organization directed towards a limited brutal purpose, and he shared the SLA's goal of protecting the security zone from incursions.

33 The applicant submits that the CRDD erred when it held that protecting the security zone was a shared common purpose. The common purpose of protecting civilians from attacks by terrorist groups such as the Hizbollah is a valid purpose which is not offensive to the international community, and which does not trigger the exclusion clause. Further, the applicant submits that there was no evidence of knowing and personal participation by him in any persecutorial acts of the SLA. In fact, there was evidence to the contrary, notably when he refused to blow up a house, and suffered punishment for it.

34 The CRDD failed to identify specific criminal activities to which the applicant had been an accomplice. It failed to analyze the criminal acts which it considers the applicant to have committed. It did not determine that the SLA was an organization which had a brutal and limited purpose.

35 The CRDD did not challenge the applicant's credibility. In light the evidence given by the claimant, it is erroneous for the CRDD to make the finding that "the claimant must have known that detainees of the SLA were brutally tortured and imprisoned for lengthy periods without due process" and that "the claimant must have knowledge of all these practices after 10 years of service in the SLA". The CRDD erred manifestly.

5. Respondent's Submissions

36 The respondent submits that there was sufficient evidence to establish serious reasons for considering that the claimant was complicit in the crimes against humanity committed by the SLA. The CRDD did not base its decision on erroneous findings of fact, according to the respondent, nor did it err in law, nor did it make findings which were patently unreasonable. This Court rejects these submissions.

37 The Immigration Act demonstrates Parliament's intention to keep dangerous claimants out of Canada by excluding them from the Convention. [Canada (Attorney General) v. Ward [1993] 2 S.C.R 689 at 742]. This is correct.

38 Paragraph 2(1)(b) of the Immigration Act excludes certain people from the definition of a "Convention refugee" by reference to Article 1 of the Convention:

> 2(1) "Convention refugee"
>
> "Convention refugee" means any person who
>
> (b) has not ceased to be a Convention refugee by virtue of subsection (2), but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

39 Schedule F to Article 1 of the United Nation's 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:
>
> (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;

40 In Ramirez v. M.E.I., [1992] 2 F.C. 306 (C.A.), the Federal Court of Appeal interpreted the word "committed" in Article 1F(a) of the Schedule by enunciating the following principles:

> a. Mere membership in an organization involved in international offences is not sufficient for exclusion from refugee status;
>
> b. Personal and knowing participation in persecutorial acts is required;
>
> c. Membership in an organization which is directed to a limited, brutal purpose, such as secret police activity, may by necessity point to personal and knowing participation;
>
> d. Mere presence at the scene of persecutorial acts does not qualify as personal and knowing participation;
>
> e. Presence coupled with being an associate of the principal offenders amounts to personal and knowing participation; and

f. The existence of a shared common purpose and the knowledge that all the parties have of it is sufficient evidence of complicity.

The Court did not exclude proof of the above incidents.

41 When analyzing an applicant's membership in organization, the jurisprudence suggests that the type of organization should first be examined. If the organization does not exist for a limited and brutal purpose, and the commission of crimes against humanity is not its main function but is incidental to its mandate and is a regular part of its operations, an approach which analyzes the type of organization, the activities of a member of that organization, and the intention of that person in relation to that organization must be used. [Guitierrez v. M.E.I. (1994), 84 F.T.R 227 (T.D.); and Rahal v. Solicitor General, [1995] F.C.J. No. 129, (QL) (F.C.T.D., January 26, 1995, IMM-6894-93].

42 The respondent submits that armed liberation organizations such as the SLA fall within the category of the type of organizations which have committed crimes against humanity as part of their mandate and incidental to their regular operations. [M.C.I. v. Solomon (1995), 31 Imm. L.R. (2d) 27 (F.C.T.D.)]. This is not proof of anything!

43 Providing support functions and assisting in increasing the efficiency of the organization, as the applicant did here by diffusing explosives, is consistent with the type of activities which support a finding of complicity, says the respondent. [Ramirez v. M.E.I. [1992] 2 F.C. 306 (C.A.); Say v. M.C.I., [1997] F.C.J. No. 648, (F.C.T.D., May 17, 1997, IMM-2547-96)].

44 The CRDD held that the applicant here shared a common purpose with the SLA, namely to protect the security zone from incursions. The applicant was aware that forced conscription of recruits by the SLA was a common practice. He was also aware of the widespread use of forcible expulsion of mainly Muslim civilians from the security zone. The CRDD found that the applicant must have known that detainees of the SLA were brutally tortured and imprisoned for lengthy periods. The CRDD found that he must have had knowledge of these practices after ten years of service, but it did not retract its acquiescence in the applicant's personal credibility.

45 The respondent submits that it was reasonable for the CRDD to hold that the applicant knew, or must have known, about the activities committed by the organization to which he belonged, or that he was willfully blind to it, particularly because was a member for ten years.

46 In Bazargan, (1996) 205 N.R. 282 (F.C.A.), the Federal Court of Appeal stated at page 287:

> [11] In our view, it goes without saying that "personal and knowing participation" can be direct or indirect and does not require formal

> membership in the organization that is ultimately engaged in the condemned activities. It is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organization. At p. 318, MacGuigan J.A. said that "[a]t bottom, complicity rests ... on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it". Those who become involved in an operation that is not theirs, but that they know will probably lead to the commission of an international offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation.
>
> [12] That being said, everything becomes a question of fact. The Minister does not have to prove the respondent's guilt. He merely has to show -- and the burden of proof resting on him is "less than the balance of probabilities" ... that there are serious reasons for considering that the respondent is guilty.

47 The CRDD relied on documentary evidence to support its finding that the SLA was an organization that routinely committed crimes against humanity. The CRDD also relied on the applicant's evidence which supported that finding. Consequently, the respondent submits that the CRDD's finding that the applicant was complicit and should be excluded under Article 1F(a) was reasonable on the evidence. There is and remains a great lack of proof against the applicant. He risked his own life and safety daily to make the roads and territory safe for everyone, and he has not been shown to have harmed anyone. He is entitled to be believed,

6. Order Requested

48 The applicant requests this Court to allow the application and quash the decision of the CRDD, and refer the matter to a differently constituted panel of the CRDD. The respondent, of course, opposes, but the Court is convinced that the applicant made a proper refugee claim herein and that this case should be remitted to the CRDD to be decided in a way consonant with the Court's findings and determinations herein. The claim is allowed.

PINARD J.