Canada (Minister of Citizenship and Immigration) v. Asghedom

Between
The Minister of Citizenship and Immigration, applicant
Yoseph Asghedom, respondent, and

[2001] F.C.J. No. 1350
2001 FCT 972
Court File No. IMM-5406-00

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

Heard: August 14, 2001.
Judgment: August 30, 2001.
(44 paras.)

Aliens and immigration — Admission, refugees — Disqualifications, crimes against humanity — Appeals or judicial review, grounds — Appeals or judicial review, discretion to declare applicant Convention refugee — Appeals or judicial review, scope of review.

Application by the Minister for judicial review of the Immigration and Refugee Board's determinatio n that Asghedom was a Convention refugee. Asghedom was forcibly recruited into the Ethiopian military as a truck driver. He served for two years and was honourably discharged. While serving, he committed crimes against humanity, such as torture, under orders. Asghedom provided evidence that there was imminent, real and inevitable threat to his life if he tried to evade conscription, to desert, or if he disobeyed an order. He also provided evidence that he did not have a safe opportunity to desert. The Minister provided evidence that many men evaded conscription and many soldiers deserted, while Asghedom served. The Board accepted Asghedom's defence of duress, and found he had left the army at the first opportunity, and could not have avoided conscriptio n. The Minister argued that the Board ignored the contrary evidence, and erred in law in accepting the unsubstantiated evidence of Asghedom. The Minister also argued that Asghedom's evidence did not establish that his life was in jeopardy if he evaded co nscription, deserted, or disobeyed orders.

HELD: Application dismissed. The Board considered and weighed all of the evidence. There was sufficient evidence to support each of the Board's findings of fact. It had acted within its discretion. The Minister had failed to show any error in law or fact.

Statutes, Regulations and Rules Cited:

Convention, article 1(F)(a).

Immigration Act, s. 2(1).

Counsel:

Claire Le Riche, for the applicant.
Paul VanderVennen, for the respondent.

---

1 **BLAIS J.** (Reasons for Order and Order):— This is an application for judicial review of the Immigration and Refugee Board's (the "Board") decision rendered in chambers on September 21, 2000 with written reasons dated November 7, 2000, wherein the Board determined that the respondent was a Convention refugee.

FACTS

2 The respondent is a citizen of Eritrea. He lived in Eritrea from the time of his birth until 1985, when he moved to Addis Ababa, Ethiopia, for high school.

3 After completing high school in 1986, the respondent became employed as a truck driver. As part of his duties as a truck driver in Addis Ababa, he was required to report to the municipal government authorities to get instructions as to where to load and unload his truck. Since the government of Ethiopia was a military government at that time, the respondent could not be a truck driver without reporting to these municipal authorities.

4 After two months of being employed as a truck driver, during one of his stops at the municipal authority to obtain instructions for driving his truck, the applicant was forcibly recruited into the Ethiopian military along with the truck that he was driving, which did not belong to him.

5 The respondent was 18 years old at that time. He was taken to a local military base. Within two days, he was transferred to a military camp in Eritrea, where he remained for the next two years until his release from the army.

6 Rebels in Eritrea had been fighting the Ethiopian government since Eritrea became an Ethiopian province in 1962.

7 The respondent remained in Eritrea throughout the time he was in the army. As a soldier his duties included standing guard when civilian homes were raided for ammunition and weaponry in Eritrea; pushing people onto the trucks who were then taken to the camp and at the camp, he was responsible, along with other soldiers, for burying dead bodies. He was aware that people were tortured and killed at the camp, namely the people arrested after having weapons found in their house.

8 The respondent was released from the army in late 1988, early 1989, and returned to Addis Ababa, where he continued being a truck driver until after a war started between Eritrea and Ethiopia in 1998. As a result of this war, he was arrested as a person of Eritrean descent in Ethiopia and ordered to be deported from Ethiopia to Eritrea. Fearing return to Eritrea, because of his past war activities against the current government who has ruled Eritrea since 1991, he bribed his way out of detention in Ethiopia and fled to Canada.

ANALYSIS

Did the Board err in law in determining the respondent not to be complicit in war crimes and/or crimes against humanity, and, specifically, in accepting the respondent's defence of duress and in ignoring the failure of the respondent to disassociate himself at the earliest available opportunity?

9 Subsection 2(1) of the Immigration Act (the "Act"), gives the definition of Convention refugee and states that the definition of Convention refugee:

> "Convention refugee" ...
>
> does not include any person to whom the Convention does not apply pursuant to section E or F of Article I thereof, which sections are set out in the schedule to this Act,
>
> * * *
>
> Sont exclues de la présente définition les personnes soustraites à l'application de la Convention par les sections E ou F de l'article premier de celle-ci dont le texte est reproduit à l'annexe de la présente loi.

10 In the case at bar, the Board asked itself whether the respondent was excluded from the application of the Convention by reasons of article 1(F)a) of the Convention.

11 Section F of article 1 of the Convention, as set out in the schedule to the Act provides:

> 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;
>
> * * *

> F. Les dispositions de cette Convention ne seront pas applicables aux personnes don't 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.

12 The applicant maintains that the respondent was clearly complicit in committing crimes against humanity by assisting the military to accomplish its aims and objectives in the war against Eritrea. Specifically, the respondent went into villages during house-to-house searches, picked up people and forced them into trucks. These people were then taken back to the military camp, where they were badly treated or tortured, shot, killed and their bodies dumped into the forest. The respondent then went into the forest, picked up the bodies and dumped them into a hole in the ground.

13 The applicant claims that the respondent was no innocent bystander: he was an integral, albeit reluctant (which the respondent asserts but the applicant does not concede), part of the military enterprise that participated in deliberate inhumanity. The respondent participated in the inhuman measures in keeping with the organization's common objectives. He remained a member until the military discharged him upon completion of his service, giving him a letter of good service.

14 The law relating to exclusion under article 1F(a) of the Convention was explained by the Federal Court of Appeal in Ramirez v. Canada (M.C.I.), [1992] 2 F.C. 306 (F.C.A.). The Federal Court of Appeal stated that the burden of establishing serious reasons for considering that international offences had been committed rested on the party asserting the existence of such reasons, the applicant herein, and is less than the balance of probabilities.

15 The Federal Court of Appeal, at page 315, also explained the degree of complicity required in order for accomplices to be subject to exclusion:

> The Convention provision refers to "the international instruments drawn up to make provisions in respect of such crimes." One of these instruments is the London Charter of the International Military Tribunal, Article 6 of which provides in part (reproduced by Grahl-Madsen, at page 274):
>
> > Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

I believe this evidence is decisive of the inclusion of accomplices as well as principal actors, but leaves to be answered the very large question as to the extent of participation required for inclusion as an "accomplice".

[...]

Hathaway, supra, at page 218, refers to a "mens rea requirement," implying a "knowing" state of mind. He states (at page 220):

> The last question to be addressed is the degree of involvement required to justify criminal liability. While mere presence at the scene of a crime may not be actionable, (Fedorenko v. United States, 449 U.S. 490 (U.S.S.C. 1981)) exclusion is warranted "when the evidence establishes that the individual in question personally ordered, incited, assisted or otherwise participated in the persecution" (Laipenieks v. I.N.S., 750 F. 2d 1427, at 1431 (U.S.C.A. 9th Cir. 1985)).

[...]

What degree of complicity, then, is required to be an accomplice or abettor? A first conclusion I come to is that mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status. Indeed, this is in accord with the intention of the signatory states, as is apparent from the post-war International Military Tribunal already referred to. Grahl-Madsen, supra, at page 277, states:

> It is important to note that the International Military Tribunal excluded from the collective responsibility 'persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations' [International Military Tribunal, i. 256].

It seems apparent, however, that where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts.

Similarly, mere presence at the scene of an offence is not enough to qualify as personal and knowing participation (nor would it amount to liability

> under section 21 of the Canadian Criminal Code), though, again, presence coupled with additional facts may well lead to a conclusion of such involvement. In my view, mere on-looking, such as occurs at public executions, where the on-lookers are simply by-standers with no intrinsic connection with the persecuting group, can never amount to personal involvement, however humanly repugnant it might be. However, someone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts.
>
> At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law (e.g., subsection 21(2) of the Criminal Code), and I believe is the best interpretation of international law.
>
> [...]
>
> One must be particularly careful not to condemn automatically everyone engaged in conflict under conditions of war. Probably most combatants in most wars in human history have seen acts performed by their own side which they would normally find reprehensible but which they felt utterly powerless to stop, at least without serious risk to themselves. While the law may require a choice on the part of those ordered actually to perform international crimes, it does not demand the immediate benevolent intervention, at their own risk, of all those present at the site. Usually, law does not function at the level of heroism.
>
> In my view, it is undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts.

16 In Moreno v. Canada (M.E.I.), [1994] 1 F.C. 298 (F.C.A.), the Federal Court of Appeal stated:

> It is well settled that mere membership in an organization involved in international offences is not sufficient basis on which to invoke the exclusion clause; see Ramirez, at page 317, and Laipenieks v. I.N.S., 750 F. 2d 1427 (9th Cir. 1985), at page 1431. An exception to this general rule arises where the organization is one whose very existence is premised on achieving political or social ends by any means deemed necessary. Membership in a secret police force may be deemed sufficient grounds for invoking the exclusion clause; see Naredo and Arduengo v. Minister of Employment and Immigration (1990), 37 F.T.R. 161 (F.C.T.D.), but see Ramirez at pages 318 et seq. Membership in a military organization

involved in armed conflict with guerrilla forces comes within the ambit of the general rule and not the exception.

In addressing the second question (participation as a guard), it is helpful to outline the basic principles which inform the criminal law of Canada. While I do not suggest that the task of the Board is to arrive at a conclusion which is fully supported by the application of criminal law principles, direction may be taken from the words of Mr. Justice Dickson (as he then was) writing for a majority of the Court in Dunlop and Sylvester v. The Queen, [1979] 2 S.C.R. 881, in which he considered the offence of aiding and abetting (at pages 891 and 896):

> Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch on enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit.
>
> ...
>
> ... I have great difficulty in finding any evidence of anything more than mere presence and passive acquiescence. Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement. There was no evidence that while the crime was being committed either of the accused rendered aid, assistance, or encouragement to the rape ... . There was no evidence of any positive act or omission to facilitate the unlawful purpose.

While mere presence at the scene of a crime (torture) is not sufficient to invoke the exclusion clause, the act of keeping watch with a view to preventing the intended victim from escaping may well attract criminal liability. In the instant case, however, the appellant could not have assisted in the prisoner's escape because he was never in possession of a key to the cell. In any event, a determination of the appellant's complicity should not hinge on possession of a key. In a similar vein, it remains to be determined whether the appellant should have attempted to prevent his superior officers from continuing with their acts of torture, as was inferred by the Board. The incisive reasoning of MacGuigan J.A. in Ramirez disposes readily of this argument (at pages 319-320):

> One must be particularly careful not to condemn automatically

> everyone engaged in conflict under conditions of war. Probably most combatants in most wars in human history have seen acts performed by their own side which they would normally find reprehensible but which they felt utterly powerless to stop, at least without serious risk to themselves. While the law may require a choice on the part of those ordered actually to perform international crimes, it does not demand the immediate benevolent intervention, at their own risk, of all those present at the site. Usually, law does not function at the level of heroism.

[...]

It is settled law that acts or omissions amounting to passive acquiescence are not a sufficient basis for invoking the exclusion clause. Personal involvement in persecutorial acts must be established. In this regard the reasoning in Ramirez is both binding and compelling (at page 318):

> At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it.

At page 320, MacGuigan J.A. concluded:

> In my view, it is undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts.

Applying the above reasoning, we must determine whether the appellant's conduct satisfies the criterion of "personal and knowing participation in persecutorial acts". Equally important, however, is the fact that complicity rests on the existence of a shared common purpose as between "principal" and "accomplice". In other words, mens rea remains an essential element of the crime. In my opinion, a person forcibly conscripted into the military, and who on one occasion witnessed the torture of a prisoner while on assigned guard duty, cannot be considered at law to have committed a crime against humanity.

On a superficial level, it could be maintained that the appellant knowingly assisted or otherwise participated in a persecutorial act. What is absent from that analysis is any evidence supporting the existence of a shared common purpose. However, the evidence does establish that the appellant disassociated himself from the actual perpetrators by deserting the army

> within a relatively short period after his forcible enlistment. In the circumstances, the appellant's presence at the scene of a crime is tantamount to an act of passive acquiescence. Accordingly, there is no legal basis on which to rest the application of the exclusion clause.
>
> [...]
>
> In reaching the conclusion that the acts of the appellant fail to meet the threshold established in Ramirez, I do not find it necessary to resort to the absolute defences often raised to absolve a claimant of culpability (e.g. duress). In my view, the requisite element of mens rea is simply lacking. As MacGuigan J.A. stated [at page 320], once the criterion of personal and knowing participation is accepted, "[t]he rest should be decided in relation to the particular facts." The facts in Ramirez are materially different from those relevant to the appellant's refugee claim.
>
> [...]
>
> In Ramirez the Court was satisfied "beyond a reasonable doubt" that the claimant had been personally and knowingly involved in persecutorial acts. The fact that Mr. Ramirez underwent an ideological conversion and then fled both the army and his country were not acts which by themselves could absolve him of complicity in crimes against humanity. In my view, what distinguishes the present case from Ramirez is the duration of the appellant's military service, his military rank and the passive role which he played in what clearly was a crime committed by ranking officers.

17 In Sivakumar v. Canada (M.E.I.), [1994] 1 F.C. 433 (F.C.A.), the Federal Court of Appeal explained:

> In my view, the case for an individual's complicity in international crimes committed by his or her organization is stronger if the individual member in question holds a position of importance within the organization. Bearing in mind that each case must be decided on its facts, the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime. Thus, remaining in an organization in a leadership position with knowledge that the organization was responsible for crimes against humanity may constitute complicity. In Crimes Against Humanity in International Criminal Law (1992), M. Cherif Bassiouni states, at page 345:
>
> > Thus, the closer a person is involved in the decision-making process and the less he does to oppose or prevent the decision, or fails to dissociate himself from it, the more likely that person's criminal responsibility will be at stake.

In such circumstances, an important factor to consider is evidence that the individual protested against the crime or tried to stop its commission or attempted to withdraw from the organization. Mr. Justice Robertson noted this point in Moreno, supra, when he stated [at page 324]:

> [T]he closer a person is involved in the decision-making process and the less he or she does to thwart the commission of inhumane acts, the more likely criminal responsibility will attach.

Of course, as Mr. Justice MacGuigan has written, "law does not function at the level of heroism" (Ramirez, supra, at page 320). Thus, people cannot be required, in order to avoid a charge of complicity by reason of association with the principal actors, to encounter grave risk to life or personal security in order to extricate themselves from a situation or organization. But neither can they act as amoral robots.

18 In Gonzalez v. Canada (M.E.I.), [1994] 3 F.C. 646 (F.C.A.), the applicant was drafted into the Patriotic Military Service in Nicaragua. He was assigned to a battalion which encountered counter-revolutionary forces hiding in a peasant's house. When the enemy opened fire on the battalion, the battalion returned the fire until there was no more shooting from the house. The applicant, after realizing that there were peasants, including women and children, in the house, objected to having to fire. However, the commandant told the applicant they could not do anything for the peasants. Shortly after, while on leave, the applicant deserted the army. Mahoney J.A. (Robertson J.A. concurring) of the Federal Court of Appeal held:

It is desirable to repeat a paragraph from the tribunal's decision in which, after reciting Article 6 of the London Charter, it said:

> The above-mentioned international instrument has explicitly made reference to the murder of civilians as part of its definition of "crimes against humanity." The claimant admitted having participated in the killing of nine civilian women and children. This panel therefore finds that the claimant has committed a crime against humanity, namely, the murder of civilians.

Counsel for the respondent dealt with that as though it was a matter of res ipsa loquitur. In my opinion, in the context of a military confrontation and notwithstanding a certainty of civilian casualties, a facile transition from murder to killing and back is indefensible in law.

The acts and omissions contemplated by those who defined the crimes of

> Article 1F are fully exposed in the record of the Nuremberg trial. The murder and ill-treatment of civilian population in Europe is extensively discussed. No particular quotation is possible. It is a litany of horror. The gist is to be gained by perusal of many pages. Expressing a conclusion no more embracing that the present appeal requires, I am of the opinion that a finding of a war crime or crime against humanity by a private soldier engaged in an action against an armed enemy is not to be reached within the Convention refugee definition. Tragic and appalling as its inevitable result, what the applicant admitted to was participation in a military action that does not reach the concepts of war crime or crime against humanity. It was war, not war crime.
>
> [Notes omitted]

19 As for Létourneau J.A. in the above decision of Gonzalez, supra, he agreed with Mahoney J.A. and added:

> In the present case, I believe the Board misconstrued the very notion of crime against humanity and erred in law in too readily assuming that the essential elements of the crime can consist of the mere killing of innocent civilians by military personnel during an action against an armed enemy. This is where the question of law resides and the error of law lies.
>
> I am satisfied that in the particular facts and circumstances of this case the applicant was, as a private soldier, engaged in an action against an armed enemy, and that his actual participation in the killing of innocent civilians by his platoon falls short of a crime against humanity. Had the Board properly construed the meaning of crime against humanity, it would have so found.
>
> However, I do not wish to be understood as saying that the killing of civilians by a private soldier while engaged in an action against an armed enemy can never amount to a crime against humanity or a war crime so as to never give rise to the application of the exclusion found in Article lF(a) of the Convention. Each individual case will depend on its own particular facts and circumstances. It may be that in a given situation, while the death of innocent civilians occurred at the time of, or during, an action against an armed enemy, such deaths were not the unfortunate and inevitable casualties of war as contended, but rather resulted from intentional, deliberate and unjustifiable acts of killing and slaughtering.

20 In the case at bar, the Board accepted that at the time the respondent was in the military, the Ethiopian military committed crimes against humanity and war crimes. The Board also found that the respondent had knowledge of those crimes. However, the

Board found that the respondent did not fall under the exclusion provision of the Convention based on the defence of duress.

21 The Board's conclusion was based on the facts that:

- the respondent was forcibly recruited into the Ethiopian Army;
- he held no rank other than a mere soldier;
- he did not have any opportunity to leave the army until he was released in late 1988, early 1989;
- he was compelled to do the duties that he was told to do, namely stand guard on people who were being arrested after having weapons found in their house, and also burying dead bodies;
- a soldier in a similar situation had tried to escape and had been killed;
- the respondent's evidence and the documentary evidence showed that if the respondent tried to desert, he would have faced severe punishment, including death;
- the respondent left at the first available moment that he could, namely upon his release after serving two years.

22 In order to find the respondent complicit of crimes against humanity or war crimes, the defence of duress raised by the respondent and accepted by the Board must be examined. In my view, it is not sufficient to accept that the respondent had knowledge of the crimes being perpetrated by the army in order to conclude to his exclusion under article 1F(a) of the Convention. The defence of duress and the circumstances of the case can lead to a conclusion that the respondent is not excluded even if he had knowledge of the crimes perpetrated by the army.

23 The applicant alleges that the Board erred in law in accepting the respondent's defence of duress and ignoring the failure of the respondent to dissociate himself at the earliest available opportunity.

24 In Ramirez, supra, at page 327, the Federal Court of Appeal stated on the issue of the defence of duress:

> The appellant did not argue the defence of superior orders, and his arguments as to duress and remorse are insufficient for exoneration. On duress, Hathaway, supra, at page 218, states, summarizing the draft Code of Offences Against the Peace and Security of Mankind, in process by the International Law Commission since 1947:

> Second, it is possible to invoke [as a defence] coercion, state of necessity, or force majeure. Essentially, this exception recognizes the absence of intent where an individual is motivated to perpetrate the act in question only in order to avoid grave and imminent peril. The danger must be such that "a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong". Moreover, the predicament must not be of the making or consistent with the will of the person seeking to invoke the exception. Most important, the harm inflicted must not be in excess of that which would otherwise have been directed at the person alleging coercion. [Footnotes omitted.]

If I were to accept this as the state of international law, as the appellant urged, I could find that the duress under which the appellant found himself might be sufficient to justify participation in lesser offences, but I would have to conclude that the harm to which he would have exposed himself by some form of dissent or non-participation was clearly less than the harm actually inflicted on the victims. The appellant himself testified as follows as to the punishment for desertion (Appeal Book, I at 49):

> A: Well, the punishment is starting with very, very hard training exercises and then after that they will throw you in jail for five to ten years.

This is admittedly harsh enough punishment, but much less than the torture and death facing the victims of the military forces to which he adhered.

25 In Penate v. M.E.I., [1994] 2 F.C. 79 (F.C.T.D.), Reed stated:

> As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with the safety of himself) but who lends his active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist. I note that the situation envisaged by this jurisprudence is not one in which isolated incidents occurred but where the commission of such offenses is a continuous and regular part of the operation.

26 In Gutierrez v. Canada (M.E.I.), [1994] F.C.J. No. 1494 (F.C.T.D.), MacKay J., stated on the issue of disassociation:

> Essentially then, three prerequisites must be established in order to provide complicity in the commission of an international offence: (1) membership in an organization which committed international offenses as a continuous and regular part of its operation, (2) personal and knowing participation, and (3) failure to disassociate from the organization at the earliest safe opportunity.
>
> [...]
>
> It appears from the jurisprudence that the Board may consider several factors in determining whether the applicant disassociated himself from the organization: (1) the period of time that the person was a member of the organization, (2) the earliest possible date that the person had an opportunity to leave the organization, (3) the consequences that the person would have exposed themselves to for speaking out against the commission of international offenses, for failing to respond to orders, or for desertion, and (4) the circumstances in which the person left the organization.
>
> In order to disassociate oneself from the organization, the person must leave the organization at the earliest safe opportunity. In Moreno, supra, the applicant, who had been forcibly conscripted into the Salvadoran army in early January, 1988, deserted at his first opportunity on May 5, 1988, while on his second leave of absence. Robertson J.A. found that he did not have a shared common purpose with the persecuting group and had disassociated himself. The appellant in Sivakumar, supra, was a long-term member. He became involved with the LTTE in 1978, and was associated with the organization in various positions of leadership until he was expelled in December 1988. Linden J.A. found that the appellant did not leave the LTTE even though he had several chances to do so. The applicant in Penate, supra, was also a long-term member. He had been placed in the army by his uncle at the age of 13 in 1978 and had served in various positions of leadership until he voluntarily left in 1988 to spend more time with his family.

27 In Equizabal v. Canada (M.E.I.), [1994] 3 F.C. 514 (F.C.A.), the Federal Court of Appeal, on the defence of obedience to the orders of a superior, stated at page 521:

> In counsel's view, this is clearly a case where the appellant is entitled to rely on the defence of obedience to the orders of a superior. He submitted that the facts at bar were "on all fours" with the facts in the Finta case. He relies on the appellant's testimony that he wanted to desert but did not have the opportunity to do so. Counsel also relies on his evidence supra, concerning the three deserters who were recaptured but never heard from again. He refers to the judgment of Cory J. in Finta, [1994] 1 S.C.R. 701, supra, at page 837:

> The defence of obedience to superior orders based on compulsion is limited to "imminent, real, and inevitable" threats to the subordinate's life ... the problem is to determine when threats become so imminent, real, and inevitable that they rise to the level of compulsion that disables a subordinate from forming a culpable state of mind.

He also refers to pages 837-838 where Mr. Justice Cory, in referring to an article by J. L. Bakker entitled "The Defense of Obedience to Superior Orders: The Mens Rea Requirement" (1989), 17 Am. J. Crim. L. 55, stated:

> Bakker suggests that it is only when the soldier faces an imminent, real and inevitable threat to his or her life that the defence of compulsion may be used as a defence to the killing of innocent people. "Stern punishment" or demotion would not be sufficient. She states at p. 74:
>
> > Whether a subordinate's belief in the existence of an imminent, real and inevitable threat to his life is justified should be a function of circumstances surrounding the subordinate faced with an illegal order. A number of circumstances may be considered including age, education, intelligence, general conditions in which subordinates find themselves, length of time spent in action, nature of the hostilities, the type of enemy confronted, and opposing methods of warfare.
> >
> > Circumstances that go directly to the state of mind of the offender confronted with a moral choice include the announced penalty for disobeying orders, the probable penalty for disobedience, the typical subordinate's reasonable beliefs about the penalty, the subordinate's belief as to what the penalty is, and any alternatives available to the subordinate to escape execution of the penalty.
>
> The element of moral choice was, I believe, added to the superior orders defence for those cases where, although it can readily be established that the orders were manifestly illegal and that the subordinate was aware of their illegality, nonetheless, due to circumstances such as compulsion, there was no choice for the accused but to comply with the orders. In those circumstances the accused would not have the requisite culpable intent.
>
> I would add this to the comments of the text writers. The lower the

> rank of the recipient of an order the greater will be the sense of compulsion that will exist and the less will be the likelihood that the individual will experience any real moral choice. It cannot be forgotten that the whole concept of the military is to a certain extent coercive. Orders must be obeyed. The question of moral choice will arise far less in the case of a private accused of a war crime or a crime against humanity than in the case of a general or other high ranking officer.

The Finta case, supra, is distinguishable from the case at bar since it was a prosecution under the Criminal Code [R.S.C., 1985, c. C-46] requiring proof beyond a reasonable doubt whereas this appeal concerns a hearing under the Immigration Act where the standard of proof is defined as "serious reasons for considering that" the appellant has committed one of the offences enumerated in Article l F supra. Nevertheless, the Finta decision is relevant to the issues in this appeal because, firstly, this appeal requires a consideration of the nature of war crimes and crimes against humanity, and, secondly, the appellant's principal defence for his actions is that of obedience to his superior's orders based on compulsion. Both of these matters are discussed at length in Finta.

[...]

Applying the Finta criteria, the first matter for consideration is whether the orders in issue are "manifestly unlawful." A manifestly unlawful order "must be one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong." In this respect, Mr. Justice Cory cites with approval a passage from Green "Superior Orders and Command Responsibility" ((1989), 27 Can. Y.B. Int'l L. 167, at page 169, note 8):

> The identifying mark of a 'manifestly unlawful' order must wave like a black flag above the order given, as a warning saying: 'forbidden'. It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of 'manifest' illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.

On the facts in this case, I have no difficulty in concluding that the orders

here in issue were manifestly unlawful. I refer particularly to the incident on February 6, 1991, where the appellant and two other soldiers beat four persons and tortured them over a period of three hours. Similarly, the incident on February 7, 1991 was also manifestly unlawful since it involved the vicious beating of a young man by this appellant. Surely the concept of torturing "the truth out" of someone is manifestly unlawful, by any standard. Undoubtedly such activity possesses the necessary level of moral turpitude to describe crimes against humanity.

The next matter for consideration pursuant to the Finta criteria is whether, on these facts, the appellant faced an "imminent, real, and inevitable threat" to his life. "Stern punishment" or demotion would not be sufficient. The appellant's evidence as summarized supra, sets out two reasons why, notwithstanding his understanding that the penalty for desertion was only 12 months in jail, he would be killed by the military if he returned: firstly, because he knew of three other deserters who had been apprehended and never heard from again; and, secondly, he would be killed by his lieutenant because of his knowledge of relatives of persons whom the lieutenant had tortured personally.

With respect to the first reason, the Refugee Division dismissed it as pure speculation without any credible evidence to support it. In my view, the Refugee Division was entitled to so conclude on this record. There is nothing on the record to support the appellant's conclusion that the three captured deserters had "disappeared." I agree that such a conclusion was sheer speculation on the part of the appellant.

[...]

On the basis of this evidence, in January of 1991 the appellant formed an intention to desert from the army before being sent to Guija. Yet, after he arrived in Guija, he had two days of leave when he and some of his fellow soldiers "strolled around" the town "looking at the young girls." In my view, these visits to Guija afforded the appellant an excellent opportunity to desert if he was so inclined. Accordingly the Refugee Division's negative findings with respect to the appellant's credibility on this point are amply supported by the evidence.

[Notes omitted]

28 In the present case, the applicant points out that the respondent, although in the military for two years, never once tried to flee or even to disobey the orders of his superiors who were directing him to participate in crimes against humanity. Rather he simply stayed in the army until it was "time to leave."

29 The applicant argues that the Board erred in law with respect to the respondent's defence of duress because there was no evidence that the respondent faced an "imminent, real and inevitable threat" to his life if he deserted from the army. Furthermore, the respondent never once attempted to desert from the army but continued working committing crimes against humanity for two years until he left the army at the end of his service.

30 The applicant submits that the Board ignored and failed to weigh the documentary evidence before it which stated that many soldiers had deserted Mengistu's army. Rather the Board improperly weighed the evidence before it in solely relying upon the unsubstantiated evidence of the respondent that someone who had failed to participate in the crimes against humanity had been assumed, with no proof, to have been killed.

31 On the issue of desertion, the Board referred to the respondent's testimony that in a similar situation, another soldier who had tried to escape, had been killed. The Board also referred to the documentary evidence which stated that if the respondent tried to desert, he would have faced severe punishment, including death. The Board concluded that the respondent did not have the opportunity to leave the Ethiopian Army before his release after serving two years.

32 The applicant submits that the Board should have accepted the documentary evidence, at page 259 of the tribunal record, that shows that soldiers deserted the army, in order to conclude that the respondent should have tried to desert. The evidence relied upon by the applicant states, at page 259 of the tribunal record:

> From 1976 to 1978, the command leadership crisis grew worse because of the fieldgrade rank without adequate preparation. Purges and defections by officers of Eritrean origin were also factors in the poor quality of field leadership. Growing disaffection throughout the army prompted several mutinies by front-line troops, including one at Jijiga in 1977, during which officers and NCOs demanded Mengistu's resignation. Further, the disparity in pay and lack of survivor benefits embittered the People's Militia.

At page 260 of the tribunal record, the same document states:

> There was also unrest among People's Militia conscripts. Throughout the 1982 Red Star campaign, thousands of government troops fled to Sudan to avoid combat.
>
> [...]
>
> The next major mutiny occurred in mid-February 1988, when elements of the Second Revolutionary Army revolted in Asmera. Mengistu responded to this crisis by making a much publicized sixteen-day tour of units stationed in the north and by ordering the arrest and execution of several

> NCOs and officers, including at least five generals. Morale fell further after the EPLF won a victory at Afabet in March. By the end of that year, veterans and discontented soldiers, many of whom had war injuries, demonstrated in Addis Ababa to pressure the Mengistu regime to end the war and increase veterans' benefits. The government suppressed the demonstration, killing several men in the process.
>
> [...]
>
> Although Mengistu succeeded in eliminating effective opposition in the armed forces (at least for the short term), morale problems continued to plague most military units, especially those assigned to war zones in northern Ethiopia, whose ranks were often filled with teenagers. In late, 1989, for example, thousands of government soldiers deserted, and scores of units disintegrated after the TPLF launched a major offensive.

33 At page 304, of the tribunal record, the Africa Watch Report states:

> All these problems, together with the constant fear of being shot for some real or imagined offence, created a very insecure atmosphere in the Army and many people became so desperate that they decided to desert at the first opportunity. A number of people even committed suicide rather than face the continuous strain of fighting and reprisals from the army.

34 However, I have reviewed the documentary evidence relied upon by the Board (pages 260, 273, 303, 304 and 305 of the tribunal record) and in my view, it supports the Board's conclusion that the respondent could not desert the army and support the conclusion that there was imminent, real and inevitable threat to the respondent's life, if he deserted the army or disobeyed an order.

35 In my view, the Board's conclusion was reasonable in light of the evidence before it. The Board was entitled to weigh the evidence as it did and I cannot conclude that it ignored the evidence, as alleged by the applicant. In fact, the Board based its decision on the documentary evidence provided by the applicant and even referred, in its decision, to the pages that the applicant alleges was ignored (p. 260 and 304 of the tribunal record).

36 It has to be remembered that the weighing of the evidence is the Board's jurisdiction. As was stated in Boye v. Canada (M.E.I.) (1994), 83 F.T.R. 1 (F.C.T.D.), by Jerome A.C.J.:

> To begin with, questions of credibility and weight of evidence are within the jurisdiction of the Refugee Division as the trier of facts in respect of Convention refugee claims.

37 Furthermore, the Federal Court of Appeal, in Florea v. Canada (M.E.I), [1993] F.C.J. No.598 (F.C.A.), explained at paragraph 1:

> The fact that the Division did not mention each and every one of the documents entered in evidence before it does not indicate that it did not take them into account: on the contrary, a tribunal is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown. As the tribunal's findings are supported by the evidence, the appeal will be dismissed.

38 In the case at bar, there was evidence that some soldiers from Mengistu's Army deserted, but there was also evidence that those who tried to desert were executed. The law does not function at the level of heroism and it does not require that a person tries to desert or disobey an order at the risk of his life. The respondent testified that, while in the Army, a man who had tried to desert had been killed (tribunal record page 543) and he also testified at page 529 of the tribunal record:

> I have some friends who were trying to interfere on behalf of the females, saying that, "Leave her alone. She is a female." And we saw them beaten up in front of us and since then, we never saw them again and we assume that they were killed.

39 The documentary evidence was also to the effect that persons who disobeyed an order were executed. It cannot be said that the harm inflicted was in excess of that which would otherwise have been directed at the respondent since the respondent was facing possible execution if he tried to desert and disobey. The respondent has provided documentary evidence on the threat faced by deserters and soldiers who disobeyed orders.

40 The Board was entitled to prefer that evidence and I find that it did not ignore the evidence or err in law, regarding the defence of duress and the respondent's possibilities of deserting. The respondent further testified that there was no leave while in the army and that he was always at the military camp (tribunal record pages 535 & 536). This supports the Board's finding that the respondent left the army at the first available opportunity, i.e. when he was discharged, two years after having served the army.

41 The applicant further submits that although national service was compulsory in principle, it was selective in practice. The applicant also points out that the respondent testified that he knew before he was recruited that he would be called up and sent to the war front in Eritrea and that he did not try to avoid service. The applicant suggests that, in making its decision, the Board ignored the evidence which demonstrated that many young men avoided conscription altogether.

42 On this issue, the evidence is that the respondent was forcibly conscripted and that it happened by surprise. The documentary evidence also states that those trying to evade

conscription were subject to harsh penalties including extrajudicial execution (for examples, applicant's application record p. 94 and p. 117). In my view, the respondent could not have avoided conscription based on his evidence and the documentary evidence; the Board cannot be said to have erred in law or ignored evidence.

43 Therefore, this application for judicial review is dismissed.

44 No questions were submitted for certification.

BLAIS J.