Date: 20010426
Docket: IMM-4151-99
Neutral Citation: 2001 FCT 390

BETWEEN:

GBENGE YOGO

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HANSEN J.

INTRODUCTION

[1] This is an application for judicial review of the July 27, 1999, decision of the Immigration and Refugee Board ("IRB"). The applicant, Gbenge Yogo, a citizen of the Democratic Republic of the Congo ("DRC"), claimed Convention refugee status on the ground of a well–founded fear of persecution in the DRC by reason of his membership in a particular social group, namely, a judicial

police officer in the Garde Civile, and by reason of his relationship with the son of the late dictator Kongulu Mobutu, during the government of Mobutu and the Mouvement populaire de la révolution.

[2] The IRB concluded the applicant is excluded from the definition of Convention refugee under subsection 2(1) of the *Immigration Act*, R.S.C. 1985, c. I-2, by reason of section F(a) of Article 1 of the United Nations Convention Relating to the Status of Refugees on the basis that there are serious reasons for considering that he had committed a crime against humanity. The respondent Minister participated at the hearing and made written submissions concerning the applicant's exclusion. The IRB did not assess the applicant's fear of persecution.

[3] The issue before the IRB was whether the applicant was complicit in the commission of crimes against humanity perpetrated by President Mobutu's security apparatus. In particular, the IRB examined the applicant's role as a member of the Garde Civile and its function within the President's security apparatus and his association with Kongulu Mobutu.

BACKGROUND

[4] As the key issue in this judicial review centers around the IRB's characterization of the nature of the organization with which the applicant was associated, only a brief recital of the facts is necessary.

[5] In 1990, after two years of study at l'Institut du Parquet in Kinshasa, the applicant was appointed as a judicial police officer at the Parquet de la Grande Instance in Kinshasa. In May1993, he was transferred to the Garde Civile where after the completion of military training he held the position of Chef de Bureau chargé de l'administration.

[6] The applicant testified his duties in both positions were administrative in nature. At the Parquet de la Grande Instance he verified offences, received the information, complaints and reports concerning those offences, carried out research, interrogated the suspects and sent his reports to the competent authorities at the Parquet de la Grande Instance. In his position as Chef de Bureau, he also supervised the activities of eight judicial police officers and reported to Général Baramoto, Chef de la Garde Civile.

[7] In May 1994, he was assigned to work for Kongulu Mobutu, the son of President Mobutu and a Captain in the Division spéciale présidentielle (DSP). The applicant testified that in addition to being the "[TRANSLATION] social advisor" for Kongulu Mobutu's company, Yoshad, he also interviewed individuals wishing to bring their requests and complaints to the attention of his superior. He testified he had a good working relationship with Kongulu Mobutu for the first year, however, it deteriorated when Kongulu Mobutu wanted him to cover up his "[TRANSLATION] mistakes outside the law, immoral, inhuman". He reported this conflict to a superior in the Ministry of Justice and asked to be reassigned. When Kongulu Mobutu learned of the applicant's complaints he had him

arrested and threatened him with death if he did not change his position. In order to pressure the applicant into changing his mind, Kongulu Mobutu forced him to participate in "[TRANSLATION] certain fetishistic rituals" to strengthen his "weak spirit".

[8] In mid 1995, believing his life was in danger and in an attempt to leave the army without being charged with desertion, the applicant began to absent himself from work on the pretext of being ill. In 1996, he was able to obtain a medical certificate to the effect that he was unable to work due to illness. In November 1996, he was arrested by the DSP, accused of treason and tortured. He was held in custody until February 1997 when he was able to escape and left the DRC three days later.

[9] As there was no evidence of the applicant's direct involvement in the commission of crimes against humanity, the IRB considered factors it identified, based on the jurisprudence of the Federal Court, as being relevant to the determination of complicity; namely, the method of recruitment, the nature of the organization, the rank of the applicant, his knowledge of the atrocities being committed, the possibility of disassociating himself from the organization, and the length of his association with the persecuting group.

[10] The IRB found that the applicant voluntarily joined the Garde Civile and later worked for Kongulu Mobutu. Prior to joining the Garde Civile, the applicant was aware that it was responsible

for human rights abuses. The Garde Civile was "[TRANSLATION] one of Mobotu's security services, well-known for its suppression of political opponents and human rights abuses, . . . ". Further, "[TRANSLATION] all of Mobotu's security services were responsible for serious human rights violations. The Garde Civile committed flagrant crimes against humanity in a widespread systematic fashion." The applicant was aware of the atrocities being committed by the President's security service during the period 1993 to 1997. Knowing of the crimes against humanity being perpetrated by the Garde Civile and Kongulu Mobutu, the applicant continued his association with the Garde Civile and Kongulu Mobutu for a period of four years and did not exercise his option of leaving. The applicant facilitated, encouraged and undoubtedly participated in crimes against humanity perpetrated by the Garde Civile.

[11] The IRB concluded: ". . . [TRANSLATION] that the claimant, Yogo Gbenge, participated personally and knowingly in the organization's objectives (dictator Mobutu's security service). The Tribunal is of the view that the claimant belonged to an organization principally directed to a limited brutal purpose. He is presumed complicit in the atrocities committed by that organization and he has not rebutted this presumption, as his testimony on this point is not credible."

ANALYSIS

[12] The applicant submits the decision was based on suspicion and conjecture, exaggerationof the facts, and erroneous findings of fact not supported by the evidence. Specifically, the applicant

takes issue with the IRB's findings that he joined the Garde Civile and worked for Kongulu Mobutu voluntarily, that he worked for an organization directed to a limited brutal purpose, and that he worked for the Garde Civile for four years. Further, the applicant argues the IRB incorrectly applied the test for complicity and failed to specify the crimes against humanity for which the applicant is alleged to be an accomplice.

[13] Counsel for the respondent acknowledged that the IRB did err in some of its findings of fact, however, he argued that these errors were not material to the IRB's final conclusion and accordingly should not result in the decision being set aside.

[14] In *Penate v. Canada (Minister of Citizenship and Immigration)*, [1994] 2 F. C. 79 at page 83, Reed J. provides the following useful summary of the principles relevant to the issue of complicity enunciated by the Federal Court of Appeal in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.); *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.); *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.):

> 1. The burden of proof which must be met by the Minister to demonstrate that the Convention does not apply to a given individual is less than the balance of probabilities...
>
> 2. An individual who has been complicit in (an accomplice to) an act which is physically committed by another is as responsible for the offence as the person who physically committed the act...

> 3. In order to be complicit in the commission of an international offence the individual's participation must be personal and knowing. Complicity in an offence rests on a shared common purpose...
>
> The *Ramirez*, *Moreno* and *Sivakumar* cases all deal with the degree or type of participation which will constitute complicity. Those cases have established that mere membership in an organization which from time to time commits international offences is not normally sufficient to bring one into the category of an accomplice. At the same time, if the organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may indeed meet the requirements of personal and knowing participation. The cases also establish that mere presence at the scene of an offence, for example, as a bystander with no intrinsic connection with the persecuting group will not amount to personal involvement. Physical presence together with other factors may however qualify as a personal and knowing participation.
>
> 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 from occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with safety for 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 of international offences have occurred but where the commission of such offences is a continuous and regular part of the operation.

[15] From these principles, it follows that where there is no evidence of direct involvement in the commission of crimes against humanity, the characterization of the nature of the organization is a critical factor in a finding of complicity. Where an organization is characterized as being principally directed to a limited brutal purpose, a presumption operates which may result in a finding of complicity in the absence of any further evidence other than membership. The fact that the organization exists for a single purpose leads to the assumption that, as stated by McKeown J. in

Saridag v. Canada (Minister of Employment and Immigration), [1994] F.C.J. No. 1516 at paragraph 10 "... its members intentionally and voluntarily joined and remained in the group for the common purpose of actively adding their personal efforts to the group's cause. This assumption gives rise to a presumption of complicity on the part of any refugee claimant who was found to be a member of such a group ...". A shared common purpose is presumed unless the applicant is able to rebut the presumption.

[16] With respect to the IRB's finding that the presidential security service was an organization principally directed to a limited brutal purpose, the applicant argues that there is no evidence to support this characterization.

[17] The respondent submits that although providing presidential security is a legitimate activity, one can infer from the nature of Mobutu's dictatorship that his security service existed for a limited brutal purpose.

[18] Although the documentary evidence clearly establishes the presidential security service and the Garde Civile, in its role within the

structure of the security service, engaged in the commission of crimes against humanity, the Tribunal did not point to the evidence it relied upon for its characterization of the organization as being principally directed to a limited brutal purpose.

[19] In cases such as this, where there is no evidence of the applicant's direct involvement in the commission of crimes against humanity, it is important to recognize the distinction between an organization where the commission of such crimes is a continuous and regular part of the operation and an organization having a single brutal purpose. The evidence relied upon to make such a characterization should be clearly identified in the reasons. In *Canada (Minister of Citizenship and Immigration) v. Hajialikhani*, [1999] 1 F.C.181 at page 197, Reed J. stated:

> ... Specific acts in which the individual has been complicit need not be identified because of the notoriety and singular purpose of the group. It is important in this context to scrutinize labels carefully. Labels can block analysis. If one is going to conclude that membership in, or close association with, a group automatically leads to a conclusion of complicity in crimes against humanity committed by members of that group, the evidence concerning the characterization of the organization must be free from doubt. In addition, in the case of an organization, which changes over time, it is important to assess its characterization during the time or times when the individual in question was associated with it.

[20] In my view, the documentary evidence in this matter does not support the IRB's characterization of the nature of the organization and accordingly its finding constitutes reviewable error.

[21] As noted earlier, the IRB in reaching its decision considered the method of recruitment, the rank of the applicant, his knowledge of the atrocities being committed, the possibility of disassociating himself fromthe organization, and the length of the association with the persecuting group. While these are relevant factors to be taken into account in a finding of complicity, they must be considered within the context of the nature of the organization in question.

[22] Having carefully reviewed the reasons of the IRB, it remains unclear whether the applicant's complicity was based on the operation of the presumption and his failure to rebut the presumption because his evidence was disbelieved or whether the personal and knowing participation was inferred from its analysis of the factors enumerated in the preceding paragraph.

[23] Counsel for the respondent acknowledged that the IRB erred in its findings that the applicant voluntarily joined the Garde Civile and he continued this association for four years. Under these circumstances, and in the absence of a finding that the applicant was a participant in an organization with a singular purpose, it would be speculative for the Court to conclude the IRB would have reached the same decision.

[24] For these reasons, the application for judicial review is allowed, the July 27, 1999 decision is set aside and the matter is remitted back for reconsideration by a differently constituted panel.

"Dolores M. Hansen"
J.F.C.C.

OTTAWA, ONTARIO
April 26, 2001