Federal Court  Cour fédérale

Date: 20120316

Docket: IMM-1390-11

Citation: 2012 FC 317

Ottawa, Ontario, March 16, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

SAMPSON JALLOH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] A panel of the Immigration and Refugee Board (Immigration Division) found Mr. Sampson Jalloh to be inadmissible to Canada for being a member of an organization believed on reasonable grounds to have engaged in acts of terrorism and subversion, and to have committed crimes against humanity. Mr. Jalloh admitted being associated with such an organization but insists that he was held captive by it and that his acts were carried out under duress to avoid being killed. The Board

rejected that explanation, finding that he had opportunities to flee during the four years of his alleged captivity.

[2] Mr. Jalloh maintains that the Board overlooked important evidence that was relevant to his defence of duress and that it rendered an unreasonable decision. He asks me to quash the Board's decision and send the matter back to another panel of the Board for redetermination.

[3] There are two issues:

1. Did the Board ignore evidence?
2. Was the Board's decision on duress reasonable?

II. Factual Background

[4] Mr. Jalloh is a citizen of Liberia, of Mandingo ethnicity. He arrived in Canada in 2006, and made a claim for refugee protection. He was alleged to be inadmissible to Canada on security grounds for being a member of an organization that there are reasonable grounds to believe has engaged in acts of subversion by force and terrorism (s 34(1)(*b*),(*c*) and (*f*) of the *Immigration and Refugee Protection Act*, SC 2002, c 27 [IRPA]; see Annex for statutory references). He was also alleged to be inadmissible on grounds of violating human or international rights for committing an act outside Canada that constitutes an offence referred to in ss 4-7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 (s 35(1)(*a*) of IRPA). A delegate of the Minister referred Mr. Jalloh's case to the Board for a hearing.

[5] Mr. Jalloh claimed that in late 1992 he was forcibly conscripted by rebels who executed his father (and many others), was tortured and beaten, and was then forced to participate in the activities of the National Patriotic Front of Liberia [NPFL]. He maintained that the consequence of failing to follow the NPFL's orders would have been his death. He said that he was a captive throughout his four years with the group, that all the rebel group members carried guns (although he never did), and that he never committed an act of violence.

[6] He testified that his role was to go into villages and call out to persons of Mandingo ethnicity. When they came out of their homes, they would be tortured and murdered by the rebel fighters. He would then wait in a truck until the raid was finished.

[7] Mr. Jalloh claimed that some of the raids were undertaken by the Small Boys Unit [SBU], most of whose members were younger than he was. He witnessed persons being tortured and killed, and at times he had to transport corpses. He said he was repeatedly beaten and tortured.

[8] Mr. Jalloh conceded that the information he gave to Canadian officials was significantly different than the information he had provided to Dutch officials in connection with a previous refugee claim in the Netherlands. He said that that story was given to him by a smuggler. When his Dutch refugee claim failed, he fled to Canada to avoid removal back to Liberia. With the benefit of counsel to help him complete his written narrative, he claimed he was now telling the truth.

III. The Board's Decision

[9] The Board considered allegations that Mr. Jalloh had been involved with the NPFL, an organization alleged to be engaged in subversion, terrorism, and acts of atrocity, as well as the SBU.

[10] The burden fell on the Minister to show that there were reasonable grounds to believe that Mr. Jalloh was a member of a group involved in terrorism or subversion, or that he had committed acts contrary to ss 4-7 of the *Crimes Against Humanity and War Crimes Act*. The Board began by considering whether Mr. Jalloh was a "member" of the NPFL. The term "member" has been given a broad meaning in the case law (*eg*, *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 (CA), at paras 27-29). Persons may be considered members of an organization if they belong to it, devote themselves significantly to the organization and the furtherance of its aims and purposes, or if they have associated with its members for a substantial period of time.

[11] The Board concluded that Mr. Jalloh's participation in the NPFL raids made him directly responsible for the harm caused to the victims. The raids sometimes took place several times a week, throughout the four years he was with the group. The only time Mr. Jalloh was not involved was during a four-month period in the fall of 1993, when the area of Gbarnga returned to Liberian government control. Mr. Jalloh claimed he was tied up and monitored during that period. Once the NPFL regained control, his role in the raids resumed. This continued until late 1995 or early 1996, when he was able to escape to Guinea.

[12] Given his lengthy and extensive involvement in the raids, their violent nature, his lack of effort to distance himself from the group, and his failure to take steps to protect the victims of the NPFL, the Board found Mr. Jalloh fell within the broad definition of a member. It left the question of duress to a separate analysis.

[13] The Board then referred to the definition of terrorism articulated by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, at para 98:

> ... "terrorism"…includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".

[14] With respect to the term "subversion by force," the Board adopted the definition from *Qu v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 399, at para 12: "accomplishing change by illicit means or for improper purposes related to an organization".

[15] The Board noted that the term "crime against humanity" is defined in both the *Criminal Code*, RSC 1985, c C-46, and in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at para 119, where the Supreme Court stated that, for a criminal act to rise to the level of a crime against humanity, four elements must be present:

1. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);

2. The act was committed as part of a widespread or systematic attack;

3. The attack was directed against any civilian population or any identifiable group of persons; and

> 4. The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.

[16] There was no dispute before the Board about the nature of the NPFL and SBU. They had clearly committed acts of subversion and terrorism, as well as crimes against humanity in a systematic and widespread fashion against the civilian population.

[17] The Board then considered whether Mr. Jalloh was complicit in the crimes committed by the NPFL and SBU. It concluded that, since these were organizations with a "limited, brutal purpose", Mr. Jalloh's involvement amounted to complicity. His participation contributed to the success of the raids. Further, there was no doubt that his participation was critical to the rebels' actions. He knew that serious human rights violations had been carried out, and he had been personally involved in them for four years. The Board was not persuaded that Mr. Jalloh had had no opportunity to leave during that time.

[18] Finally, the Board considered Mr. Jalloh's claim that he participated in the raids only because he was forced to do so. He maintained that if he had tried to escape, he would have been killed, as others were. In *Kathiravel v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 680, at paras 8-10, the Court held that the defence of duress:

> [R]ecognizes 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". (…) Most important, the harm inflicted must not be in excess of that which would otherwise have been directed at the person alleging coercion.

[19] The Board accepted that documentary evidence confirmed that the NPFL and SBU had forcibly conscripted individuals, but it did not believe Mr. Jalloh's assertion that he was continuously held captive and had no chance to escape.

[20] Mr. Jalloh testified that he had some freedom in the camps, and that there were periods when he was without supervision. The Board found that he tried to leave only when he feared for his own safety, which called into question his assertion that his actions were involuntary.

[21] The Board noted that thousands of people fled Liberia during the same time frame. Indeed, when he arrived in the Netherlands, Mr. Jalloh claimed that he was one of those fleeing the violence. The Board concluded that the evidence did not support Mr. Jalloh's claim that he was unable to extricate himself from his circumstances.

[22] In the end, the Board found Mr. Jalloh to be inadmissible in accordance with paragraphs 34(1)(*f*) and 35(1)(*a*) of *IRPA*.

IV. Issue One – Did the Board ignore evidence?

[23] Mr. Jalloh argues that the Board erred by failing to consider medical evidence supporting his claim of coercion and duress. In particular, in its analysis of the issue of duress, the Board made no reference to Mr. Jalloh's medical evidence. This included evidence from a doctor, a psychologist's report and a letter from his trauma counselor. All three reports confirmed that Mr. Jalloh was beaten and tortured by the rebels, and that he continues to suffer from Post Traumatic Stress Disorder

[PTSD]. This evidence, he submits, is relevant to his state of mind at the time, including the question of whether he was genuinely under duress and psychologically incapable of escape.

[24] In fact, the Board actually accepted that Mr. Jalloh had been beaten and tortured by the rebels, and found it credible that he suffered from PTSD due to his experiences in Liberia. Simply because it did not mention that evidence again in its analysis of duress does not mean it ignored the impact of the evidence on that aspect of Mr. Jalloh's claim.

[25] In addition, although Mr. Jalloh submitted medical evidence showing that he bore physical and psychological scars from his experiences in Liberia, the Board did not find that those experiences prevented him from escaping. Indeed, at a certain point, he did escape.

[26] In the circumstances, while Mr. Jalloh disagrees with the way the Board weighed the medical evidence, that is not a basis for allowing an application for judicial review.

V. Issue Two – Was the Board's conclusion on duress reasonable?

[27] Mr. Jalloh submits that the Board's reasons for finding that he was not under duress, and had voluntarily taken part in NPFL atrocities, were based on the following weak premises:

(i) The rebels did not conscript Mandingos, they butchered them. However, this did not contradict Mr. Jalloh's contention that he was in constant fear of torture and death while behind rebel lines. In fact, it actually supported his assertion. As a Mandingo, he was afraid of trying to escape because he had seen what the rebels did to Mandingos.

(ii) Mr. Jalloh was able to listen to the radio and was permitted to have an affair with a local woman, so he should have been free to leave. Again, this evidence did not contradict

Mr. Jalloh's contention that he was an involuntary participant in the rebels' crimes and would be shot if he tried to escape. He testified that he had seen many other captives killed when they attempted to run.

(iii) Mr. Jalloh did not run while the rebels were executing Mandingos in the raided villages; the lack of supervision during this time meant he should have been able to flee. In effect, the Board expected a Mandingo man to run through areas controlled by the rebels while those same rebels were butchering Mandingos. An attempt to run, he says, would have been a death sentence. Further, he testified that he was tied up during the raids and could not get away.

(iv) Thousands of other people managed to escape Liberia during the civil war, so Mr. Jalloh should have been able to do so as well. Although thousands of people did manage to flee, there is no documentary evidence and nothing in the Board's reasons that suggests those people were similarly situated to him. There is no indication that any of them were known to the rebels, were of Mandingo ethnicity, or were held captive.

[28] Mr. Jalloh also submits that the Board was selective in its credibility findings. It found credible Mr. Jalloh's testimony about his involvement with the NPFL, the beatings and torture he endured, his forced conscription, his role in the group, the NPFL's conduct, and the treatment of persons of Mandingo ethnicity, but it disbelieved his claim that he was unable to escape. Accordingly, it held that he was not under duress. Mr. Jalloh argues that it was more than reasonable for him to have been afraid to escape after he had seen the rebels murder his father and those who tried to flee; after he had been captured, beaten and tortured; and after he had seen them executing Mandingos.

[29] In my view, the Board was entitled to accept the majority of Mr. Jalloh's evidence while rejecting the parts that were inconsistent or minimized the extent of his cooperation with the NPFL. In effect, the Board concluded that, at various points, Mr. Jalloh had a safe avenue of escape available to him. This finding defeated Mr. Jalloh's claim that his conduct was involuntary.

[30] Still, there are parts of the Board's decision that are difficult to comprehend. The Board found there were reasonable grounds to believe that Mr. Jalloh was a member of the NPFL. Given that it was clear that the NPFL was involved in terrorism and subversion, the finding that Mr. Jalloh was a member was sufficient to find him inadmissible to Canada under s 34(1)(*f*) of IRPA. Similarly, given that the NPFL was an organization with a "limited, brutal purpose", the finding that Mr. Jalloh was a member was sufficient to find him at least presumptively inadmissible to Canada under s 35(1)(*a*) of IRPA. The Board went on, out of caution, to consider other evidence of complicity.

[31] As I see it, the Board confused the issues when it concluded that Mr. Jalloh was complicit in the activities of the NPFL because it was an organization with a limited, brutal purpose. The latter finding is relevant to complicity only where the person clearly is a member of the organization. The nature of the organization alone is not a basis for a finding of complicity.

[32] On the facts here, to be inadmissible, Mr. Jalloh would have to be a person believed on reasonable grounds to be a member of a group involved in terrorism or subversion (s 34(1)(*f*)), or to have been involved in crimes against humanity (s 35(1)(*a*)). The key question under s 34(1)(*f*) is whether the person actually was a member. With respect to crimes against humanity, the key question is whether the person actually committed, or was complicit in, that kind of crime. The Board did not recognize these distinctions. In some cases, where a group has a limited, brutal purpose, complicity can be presumed if the person clearly was a member.

[33] A further confusion in the Board's reasons arises from its conclusion that Mr. Jalloh was a member of the NPFL based on his lengthy and extensive involvement in the raids, their violent nature, his lack of effort to distance himself from the group, and his failure to take steps to protect the victims of the NPFL. In determining whether Mr. Jalloh was a member, the Board did not consider evidence relating to coercion, leaving it to be weighed separately in respect of the defence of duress.

[34] The Board proceeded correctly from the proposition that the word "member" should be given a broad meaning. A member is someone who belongs to a group, devotes significant efforts to furthering its purposes, or has associated with other members over a substantial period of time.

[35] However, it is difficult to conceive of a situation where a person could be considered a member of a group and, at the same time, mount a successful defence of duress. The Board appears to have proceeded on the assumption that the two issues were entirely separate. It first found Mr. Jalloh to be a member of the NPFL and then considered whether his defence of duress was made out. But the Board's own reasons make clear that this is a somewhat artificial exercise. For example, it used evidence that Mr. Jalloh had failed to avail himself of opportunities to escape to conclude that he was a member of the group. It used the same evidence to determine that the defence of duress was not available to him.

[36] In my view, it is preferable to consider the evidence of membership along with the evidence of coercion in determining whether there are reasonable grounds to believe the person genuinely was a member of the group. One way of looking at this issue is to regard evidence of duress as

defeating the *mens rea* of membership (*Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 339). Accordingly, evidence relating to duress must be considered along with the evidence relating to membership in deciding whether the person really was a member of the group or, rather, was motivated by self-preservation.

[37] In sum, a person cannot be considered to be a member of a group when his or her involvement with it is based on duress. At a minimum, a member is someone who intentionally carries out acts in furtherance of the group's goals. A person who performs acts consistent with those goals while under duress cannot be said to be a genuine member.

[38] Therefore, the finding of membership should rest on indicia that the person's intentions were consonant with the group's objects, not survival. The evidence should be considered as a whole to determine whether the person was truly a member or whether his or her acts carried out in the group's name were coerced. It must be remembered, of course, that the issue to be decided under s 34(1)(*f*) is whether there are reasonable grounds to believe that the person was a member, not whether the evidence establishes such a connection on a balance of probabilities, or whether duress has been made out on any particular standard of proof. This, too, suggests that all of the relevant evidence should be considered together.

[39] Notwithstanding these observations, I cannot conclude that the Board committed any reviewable error. Its factual findings were supportable on the evidence and any lack of clarity in its analysis did not derogate from its ultimate conclusion that there were reasonable grounds to believe

that Mr. Jalloh was a member of the NPFL. Again, that conclusion was reasonable based on the facts and the law.

VI. Conclusion and Disposition

[40] The Board's conclusion was intelligible, justified and transparent; it came within the range of defensible outcomes based on the facts and the law. I must, therefore, dismiss this application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. No question of general importance is stated.

"James W. O'Reilly"
Judge

Annex

Immigration and Refugee Protection Act, SC 2002, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Security	Sécurité
34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
(*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;	*a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(*b*) engaging in or instigating the subversion by force of any government;	*b*) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(*c*) engaging in terrorism;	*c*) se livrer au terrorisme;
(*d*) being a danger to the security of Canada;	*d*) constituer un danger pour la sécurité du Canada;
(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	*e*) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*).	*f*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*) ou *c*).
Human or international rights violations	Atteinte aux droits humains ou internationaux
35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35.** (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants:
(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act.*	*a*) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre.*

FEDERAL COURT

SOLICITORS OF RECORD

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