Federal Court  Cour fédérale

Date: 20190923

Docket: IMM-66-19

Citation: 2019 FC 1200

Ottawa, Ontario, September 23, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ANDRES DAVID GIL LUCES

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Andres David Gil Luces, [the Applicant], a Venezuelan citizen, challenges the December 2018 finding of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board that he is inadmissible to Canada under section 37(1)(a) of *IRPA* because of his membership in a criminal organization.

[2] The ID dismissed the Minister's claim that the Applicant was inadmissible, finding that he acted under duress when he joined the Saltamontes gang. The IAD's decision allowed the Minister's appeal on the grounds that the threat the Applicant faced was too general in nature and not sufficiently temporally connected to his action of joining the gang.

[3] The point of law at the centre of this case is the defence of duress to inadmissibility under s. 37 of *IRPA*. The Applicant admits that he was a member of the Saltamontes gang from age 14 or 15. At the IAD, he argued that he joined and remained a member under threat of kidnapping or other violent crime, and that as a result the defence of duress should vitiate his inadmissibility. At the IAD, the parties disagreed on whether the circumstances faced by the Applicant amounted to duress that forced him to join the Saltamontes. In particular, the dispute concerned whether the threat was sufficiently specific, and the effect of the Applicant being a minor throughout his membership.

I. Facts

[4] The Applicant was born in 1995 and grew up in Venezuela, where organized crime significantly affected his childhood. Before turning 18, he was kidnapped four times. The first kidnapping was at approximately age nine. In about 2009 (at age 13 or 14), after a theft of a propane tank from the home where he lived with his mother, he approached the Saltamontes gang because his uncle told him the gang may have been responsible for the theft. The gang offered to protect the Applicant and his mother in exchange for payment. The Applicant and his mother agreed and began paying the gang protection money. Nevertheless, he was kidnapped again in approximately 2010 and for a third time in 2011. After the 2011 kidnapping, he

complained that the gang had failed to protect him. Their reply was that he would need to become a member of the gang to be protected, which he agreed to do.

[5] As part of the gang's initiation, the Applicant was assaulted and required to steal a car. He stole the car as well as meeting the other initiation rites and became a member. As a gang member from 2011 to 2013, he did not wear gang colours or get gang tattoos, but was required to organize events and procure alcohol as well as run cocaine on occasion for the Saltamontes. During this time he witnessed three murders and was required to deliver drugs on three occasions. Once he was a member, the Applicant was provided with two bodyguards.

[6] In July or August 2013, the Applicant was kidnapped a fourth time while visiting Caracas. On this occasion, the gang who kidnapped him released him when they confirmed he was a member of their allies the Saltamontes. Later that year, the Applicant left Venezuela arriving in Canada on September 7, 2013.

[7] For the reasons that follow I will dismiss this application.

II. Issues

[8] This application raises the following issues:

1. Did the IAD give inadequate deference to the ID's decision?

2. Did the IAD commit a reviewable error by finding the Applicant inadmissible under s 37(1)(a) despite his status as a minor at the time of his membership?

3. Did the IAD commit a reviewable error by finding that the decision by the Applicant to join the Saltamontes was not made under duress?

III. Relevant Statutes (see Appendix A)

IV. Standard of Review

[9] The Applicant argued that deference should not be given to the IAD as they did not have a hearing and were deciding on the record. For support, the Applicant relied on *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571. This case was pre-*Dunsmuir*, however, and the subsequent jurisprudence as set out in *Dunsmuir* has determined the standard of review for this tribunal.

[10] Though a hearing did not take place, the IAD had the transcript from the ID as well as other transcripts and notes from interviews. There was no question at the IAD regarding the Applicant's credibility.

[11] Under *Dunsmuir v New Brunswick*, 2008 SCC 9, the standard of review to be applied by this Court is reasonableness, since the IAD is an expert tribunal interpreting its home statute within its specialized area of expertise, and this case does not present a question of central importance to the legal system.

V. Analysis

A. *Issue one: Did the IAD give inadequate deference to the ID's decision?*

[12] The Applicant argues that in hearing the appeal of the ID's decision, the IAD was not empowered to reach its own findings of fact and that the IAD gave insufficient deference to the findings of the ID, which heard the *viva voce* evidence and found the Applicant credible. The Applicant also argues that it was unreasonable for the IAD to accept the ID's conclusions that he was a vulnerable and thrice kidnapped 15-year-old child, and yet to find he had the mental capacity and appreciation of consequences of an adult.

[13] As the Respondent points out, the Applicant's arguments do not overcome the obstacles identified by the IAD. On deference, s 67 of *IRPA* states clearly that the IAD has the power to substitute its own decision for that of the ID; this is the opposite of a deferential review. The IAD therefore gave the ID's decision adequate deference.

B. *Issue Two: Did the IAD commit a reviewable error by finding the Applicant inadmissible under s 37(1) (a) despite his status as a minor at the time of his membership?*

[14] The Applicant submitted that his age would have made him vulnerable and this would have somehow affected his ability to use the defence of duress. He argues that the IAD's finding that "his age was not a defence" is incorrect. The Applicant notes that in *Poshteh v Canada (MCI)*, 2005 FCA 85 (at paras 46–52), the Federal Court of Appeal found that the age of an individual who is the subject of an inadmissibility assessment is relevant to the defence of duress, as it is possible for a minor to lack the requisite knowledge or mental capacity to understand the nature or effect of their actions. The Applicant's position is that it was an error to find that the Applicant possessed the mental capacity of an adult.

[15] However, the evidence shows that the Applicant was young in age but very savvy and in control when making these decisions. The Applicant at the IAD and ID did not present any arguments that he was too young when he made the decisions he did. Instead, the Applicant just put forward that he wanted to use the defence of duress, and as such his age and vulnerability will be considered as part of the duress analysis below.

C. *Issue Three: Did the IAD commit a reviewable error by finding that the decision by the Applicant to join the Saltamontes was not made under duress?*

[16] In *R v Ryan*, 2013 SCC 3, the Supreme Court of Canada noted that "the defence of duress is available when a person commits an offence while under compulsion of a threat made for the purpose of compelling him or her to commit it" (para 2). The Court went on to set out six required elements for the defence of duress (para 81). The Applicant disputes the IAD's application of three of the duress requirements in *Ryan*: no safe avenue of escape, close temporal connection between the threat and the offence, and proportionality of the offence to the threat.

[17] The Applicant argues that the threat he faced every day was very real and immediate; that his eventual departure for Canada at age 18 did not equate to a safe avenue of escape at the time he joined the gang; and that his criminal acts, including theft of a car and drug deliveries, are less severe than the violence that he sought to avoid.

[18] In submissions, the Applicant also advanced that the *Ryan* test for duress used by the IAD was too narrow. At the hearing, the Applicant argued that *Ryan* was applicable to criminal cases but this was immigration and the legal test should be more relaxed.

[19] To support his argument the Applicant draws an analogy to Article 1(F) cases, which have developed unique tests for crimes against humanity to comply with international legal instruments. The Applicant presented the cases of *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (FCA) and *Canada (Minister of Citizenship and Immigration) v Asghedom*, 2001 FCT 972 (FCTD). The Applicant argues that these cases show that moral involuntariness and compulsion in joining a gang should be the key consideration, in an "open-textured" analysis that takes a different approach from the criminal cases that follow *Ryan*.

[20] However, as pointed out at the Judicial Review hearing, those cases both dealt with refugees who were being excluded for being complicit in crimes against humanity. These cases are distinguishable from the present case because, firstly the applicants were refugees arguing against complicity and in the case at hand the Applicant was not. But secondly (and more telling) because there is an international consensus surrounding crimes against humanity (see for e.g. Article 7 of the *Rome Statute of the International Criminal Court* which lists examples of crimes against humanity, and section 4(3) of Canada's *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, which describes crimes against humanity as being decided according to international law). The facts of this case are distinguishable, and the analysis of complicity differs from the analysis of duress.

[21] The test for the defence of duress is set out in *Ryan* and there is not a body of international law like the law surrounding crimes against humanity. Furthermore, Justice Mosley has noted that there is "persuasive authority" from this Court that the six-factor *Ryan* test for

duress should be applied in the immigration context: *Mohamed v Canada*, 2015 FC 622 at para 28. His full quote is: "The Supreme Court restated the test for duress in R v Ryan, 2013 SCC 3 (CanLII) at para 55 [Ryan]. Although it did not insist on a strict criterion of imminence, the Supreme Court explained that there must be a threat of physical harm that the targeted person believes will be carried out. There must also be a "close temporal connection between the threat and the harm threatened", so that the individual does not have a reasonable opportunity to escape that harm through lawful means. My colleague Justice Phelan explicitly used the *Ryan* test in *Ghaffari* v. *Canada (Minister of Citizenship and Immigrati*on) , [2013] F.C.J. No. 704, a case involving paragraph 34(1)(f). This is a persuasive authority that should be followed. Indeed, the IRPA does not contain any provision which defines duress in a different way."

[22] The IAD therefore applied the proper test, and reasonably assessed whether the defence of duress applied after the Applicant argued that he had satisfied the defence. It is no different than if he had claimed the defence of self-defence. The IAD would look to the Supreme Court of Canada for the test for self-defence, which would come from criminal law jurisprudence. Here you look to the jurisprudence to find the test for duress, which was developed in the context of criminal law. *Ryan* was therefore the correct test for the IAD to apply and it was applied reasonably.

[23] The central shortcoming of the Applicant's argument is that there is no evidence the threat he faced was made with the purpose of compelling him to join the Saltamontes gang. Duress requires the compulsion of a threat "made for the purpose" of compelling the individual to commit the offence (*Ryan* at para 2). The lack of this essential element from *Ryan* means that

the Applicant's defence of duress must fail, regardless of the other duress arguments in his memorandum about proportionality, temporal connection, and safe avenue of escape.

[24] With regard to age and maturity, the Applicant dealt with the difficult situation he and his mother faced by choosing to approach the gang and agreeing to become a member. His awareness of the gang's protection activities and initiating the contact with them are evidence of a relatively mature understanding of the consequences of joining.

[25] The findings by the IAD that he did not act under duress and that he possessed the same moral responsibility as an adult were reasonable and should not be disturbed.

[26] There were no certified question presented and none arose.

JUDGMENT IN IMM-66-19

This Court`s judgment in IMM-66-19 is that:

1. The application is dismissed;

2. No costs are awarded.

"Glennys L. McVeigh"
Judge

Appendix "A" The following provisions of the *IRPA* are relevant in this application:

Organized criminality

37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for:

> (a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern;
>
> …

Appeal allowed [by the IAD]

> **67** (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of
>
> (a) the decision appealed is wrong in law or fact or mixed law and fact;
>
> …

Effect [of the IAD allowing an appeal]

> (2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

Activités de criminalité organisée

37 (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

> (a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;
>
> …

Fondement de l'appel

67 (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

> a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
>
> …

Effet

> (2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-66-19
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