Federal Court  Cour fédérale

Date: 20190911

Docket: IMM-729-19

Citation: 2019 FC 1152

Ottawa, Ontario, September 11, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

EDGAR ALBERTO LOPEZ GAYTAN

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review brought by the Minister of Public Safety and Emergency Preparedness [the Minister], seeking to set aside a decision of the Immigration Appeal Division of the Immigration and Refugee Board [the IAD] dated December 31, 2018 [the IAD Decision].

[2] This is the second time Edgar Alberto Lopez Gaytan [the Respondent] has been before this Court in respect of this matter. In 2012, Justice Mactavish allowed the Respondent's (then Applicant's) application for judicial review and remitted the matter to a differently constituted panel of the Immigration Division [ID] for redetermination. The Respondent was successful before the ID, and the Minister appealed to the IAD.

[3] The IAD found that the Minister did not establish the Respondent was a person described in paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] and dismissed the appeal.

II. Background

A. *Facts*

[4] The facts underlying this application are not in dispute and are summarized by the IAD member at paragraphs 8-9 of the IAD Decision:

> [8] The following facts are not in dispute in this appeal. The Respondent is a citizen of Mexico and he characterized himself as a crystal meth addict around the time he turned 18 years old. He bought his drugs from affiliates of the Sinaloa Cartel in his town. He was forcibly recruited to work for the Cartel and worked for them for about 18 months. He would be picked up from his home by members of the Cartel in the morning and would spend the day packaging and selling drugs. At the end of the day, he would be brought home. At times, he also delivered bribe money to the police. During these 18 months, Mr. Lopez Gaytan was physically assaulted and serious threats were made against him and his mother. Instead of receiving payment for his services, Mr. Lopez Gaytan was supplied with drugs to fuel his addiction.
>
> [9] The drug house where the Respondent worked was raided by the police and the Respondent was arrested. He confided in the police in the hope of gaining freedom from the Cartel. However,

> that did not happen. Instead, the police brought him to a location where members of the Cartel beat him, stabbed him with a machete, and threatened to kill him. The following day, Mr. Lopez Gaytan overdosed on crystal meth. He then recalls waking up in a rehabilitation facility. Eventually his mother came to know where he was and moved him to a different facility under an alias. He remained there for three months and he has been free from drug addiction since then. Mr. Lopez Gaytan and his mother lived in a different city for about two years and then returned to their home town. Mr. Lopez Gaytan was identified by a member of the Cartel and he was shot at. He left Mexico the next day.

[5] In January 2012, a member of the ID found the Respondent inadmissible on the basis of paragraph 37(1)(a) of the IRPA. The Respondent unsuccessfully advanced the defence of duress. The ID member considered the defence, but concluded the Respondent had failed to establish all elements of the prevailing test for duress at that time.

[6] The Respondent (then Applicant) applied to the Federal Court for judicial review of the ID decision. Justice Mactavish allowed the application, finding that the ID member's analysis of the subjective component of the "safe avenue of escape" element of the duress defence was unreasonable (*Lopez Gaytan v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1075 at paras 32-36 [*Lopez Gaytan*]). Justice Mactavish found that the ID member did not address the impact of the Respondent's drug addiction on his ability to make a rational assessment of his potential avenues of escape, and remitted the matter to a differently constituted panel of the ID for redetermination. The Minister did *not* argue that the ID and IAD lack jurisdiction to consider the defence of duress in inadmissibility hearings.

[7] In a decision dated November 27, 2017, a different member of the ID found that the ID has jurisdiction to consider the defence of duress in inadmissibility matters, and that the

Respondent was excused from the application of paragraph 37(1)(a) of the IRPA having regard to the defence of duress. Prior to this hearing, the parties agreed that the Respondent's credibility was not in issue.

[8] The Minister appealed this decision to the IAD.

III. Decision Under Review

[9] In a decision dated December 31, 2018, the IAD dismissed the Minister's appeal. The IAD member found that the Minister had not established that the Respondent is a person described in paragraph 37(1)(a) of the IRPA, specifically, a member of a criminal organization (IAD Decision at para 20).

[10] The IAD member found that while the Respondent was engaged in criminal activity on behalf of the Sinaloa Cartel [the Cartel], the criminal activity was carried out under duress.

[11] The Minister argued that the defence of duress should not be considered at the inadmissibility determination stage. The IAD member rejected this argument summarily, stating "[i]n the case of *Canada v Aly*, the Court clearly finds that the defences of necessity and duress can be raised before the ID and the IAD…" (IAD Decision at para 10, citing *Canada (Public Safety and Emergency Preparedness) v Aly*, 2018 FC 1140 [*Aly*]).

[12] The IAD member went on to consider the test for duress articulated by the Supreme Court of Canada in *R v Ryan* (2013 SCC 3 at para 81 [*Ryan*]). The only contested element of the

test was the existence of a “safe avenue of escape.” The IAD member found that a reasonable similarly situated person could not have extricated themselves from the situation of duress, and therefore no safe avenue of escape existed.

IV. Issues

[13] The issues are:

A. Is the defence of duress within the jurisdiction of the ID and IAD when determining inadmissibility under section 37(l)(a) of the IRPA?

B. Did the IAD err in its finding that the Respondent had no safe avenue of escape?

V. Standard of Review

[14] The application of the defence of duress to a set of facts is a question of mixed fact and law (*Thiyagarajah v Canada (Citizenship and Immigration)*, 2011 FC 339 [*Thiyagarajah*]) and the standard of review is reasonableness.

VI. Relevant Provisions

[15] Subsection 37(1) of the IRPA lays out grounds of inadmissibility based on 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; or
>
> (b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.

[16] Subsection 42.1(1) provides an avenue for Ministerial relief from the application of section 34, paragraphs 35(1)(b) and (c), and subsection 37(1) of the IRPA:

> 42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.

VII. Analysis

A. *Does the defence of duress fall within the jurisdiction of the ID and the IAD when determining inadmissibility under paragraph 37(1)(a) of the IRPA?*

[17] The Federal Court has consistently found that the defence of duress is applicable in inadmissibility proceedings (*Thiyagarajah*, above at paras 16-17; *Lopez Gaytan*, above at para 25; *Ghaffari v Canada (Citizenship and Immigration)*, 2013 FC 674 at paras 18-23; *B006 v Canada (Citizenship and Immigration)*, 2013 FC 1033 at para 107 [*B006*]; *Aly*, above at paras 44-47). Moreover, the Supreme Court of Canada has endorsed the consideration of any viable defences, including duress, by the Refugee Protection Division of the Immigration and Refugee

Board when deciding whether a claimant satisfies the definition of "refugee" (*Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 100 [*Ezokola*]).

[18] The crux of the Minister's argument is that the ID and the IAD do not have jurisdiction to consider the defence of duress in inadmissibility proceedings, as the proper forum for considering duress is an application for Ministerial relief under subsection 42.1(1) of the IRPA.

[19] The Minister argues that if the ID and IAD were to consider duress in inadmissibility proceedings, this would deprive subsection 42.1(1) of its function. This provision provides foreign nationals with an avenue to apply for Ministerial relief from inadmissibility for matters referred to in section 34 (security), paragraphs 35(1)(b) and (c) (human or international rights violations), and subsection 37(1) (organized criminality).

[20] The Minister cites *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 103 at paragraphs 64-65 in support of this position. In that case, the Federal Court of Appeal considered the scope of Ministerial relief under subsection 34(2) of the IRPA, which has since been replaced by subsection 42.1(1):

> [64] As I read the Supreme Court's decision, it concluded that the saving provision of section 19 of the Immigration Act would apply to protect persons who innocently joined or contributed to organizations that, unbeknownst to them, were terrorist organizations. There may be other cases in which persons who would otherwise be caught by subsection 34(1) of the IRPA may justify their conduct in such a way as to escape the consequence of inadmissibility. <u>For example, those who could persuade the Minister that their participation in a terrorist organization was coerced might well benefit from ministerial relief.</u>
>
> [65] There is thus an area in which subsection 34(2) of the IRPA operates to provide ministerial relief to persons who would

> otherwise be found inadmissible as a result of activities described in subsection 34(1). I agree with Shore J. who wrote at paragraph 54 of his reasons in *Chogolzadeh v. Canada (Minister of Public Safety and Emergency Preparedness),* 2008 FC 405, [2008] F.C.J. No. 544: "The relief, in subsection 34(2), is not illusory, but it is clearly intended to be exceptional."
>
> *(emphasis added)*

[21] Justice Kane rejected this argument in *B006*, stating that the Court of Appeal was simply providing an example of factors that could be considered in a Ministerial relief application, not ruling out the possibility of duress being raised at inadmissibility hearings (*B006*, above at paras 98-103).

[22] Justice Kane canvassed cases where duress and necessity were raised at inadmissibility determinations before concluding:

> [103] Therefore, contrary to the submissions of the [Minister], the ability to raise relevant factors, including those related to duress, in an application for Ministerial relief does not prevent the applicant from raising duress in the determination of inadmissibility.
>
> [104] Moreover, the defences of duress and necessity have been raised at admissibility determinations and have been considered by this Court in many cases.
>
> […]
>
> [107] There are many other cases where this Court has considered whether the Board's assessment of duress is reasonable. The Court has not held that the defence may not be raised at an admissibility hearing. The issue, as in this case, is whether the Board's assessment of duress and its determination is reasonable.

[23] Justice Simpson rejected the same argument as it related to the defence of necessity in *Aly* (*Aly* at paras 42-47).

[24] I agree that the ability to raise duress as a factor in an application for Ministerial relief does not preclude raising duress in an inadmissibility hearing.

[25] The Minister submits that the IAD member erred by failing to consider the jurisdictional argument, and ignoring the submissions of Mr. Anton Osterling. The IAD member found that in *Aly*, the Federal Court clearly found that the defences of necessity and duress can be raised before the ID and the IAD (IAD Decision at para 10). Failure to address the Minister's arguments to the contrary in her reasons does not amount to a reviewable error.

[26] The Minister attempts to distinguish *Aly* and *B006*, as both of those cases dealt with paragraph 37(1)(b) of the IRPA. The Minister asserts that the findings on necessity and duress in *Aly* and *B006* should not be applied to inadmissibility proceedings involving other provisions of the IRPA.

[27] There is no principled reason for distinguishing between paragraphs 37(1)(a) and 37(1)(b). The defences of necessity and duress are both classified as excuses; the underlying rationale is moral involuntariness (*Ryan*, above at para 23). An individual who is forced into membership in a criminal organization under duress is not acting voluntarily.

[28] The Minister suggests that when raised in the criminal law context, duress acts to negate the mental element, or *mens rea*, required for the offence, and that there is no such mental element required to demonstrate inadmissibility. However, as stated by Chief Justice Lamer in *R*

v Hibbert, "duress can provide a 'defence' in either of two distinct ways – as an excuse, or by 'negating' mens rea" (*R v Hibbert*, [1995] 2 SCR 973 at para 22).

[29] The defence of duress is not limited to negating *mens rea*. In situations where duress provides a defence by way of excusing the actions of the individual, the requisite *mens rea* of the act in question is irrelevant. While the Respondent admitted that he was a member of the Cartel, it was open to the ID and the IAD to consider whether his membership was involuntary.

[30] Finally, the Minister makes a lengthy statutory interpretation argument, the bottom line being that certain inadmissibility sections of the IRPA use the phrase "engaging in," whereas others use the word "committing." Specifically, paragraph 37(1)(a) and several paragraphs of subsection 34(1) use the phrase "engaging in" and certain other provisions not covered by subsection 42.1(1), including paragraph 35(1)(a), use the word "committing." Based on principles of statutory interpretation, "engaging in" and "committing" must have different meanings.

[31] The Minister's assertion that "engaging in" and "committing" must have different meanings does not influence the applicability of the defence of duress to the various inadmissibility provisions of the IRPA. As an excuse, the defence of duress goes to the voluntariness of the act in question, whether that be membership in an organization or otherwise. The mental element required to "engage in" or "commit" certain acts is not relevant.

[32] Further, as previously addressed, the Minister's argument runs counter to past decisions of this Court where the defence of duress was explicitly found to be applicable in inadmissibility hearings under subsection 34(1) and paragraph 37(1)(b). Notably absent from the Minister's argument is any mention of Justice Mactavish's implicit endorsement of consideration of duress by the ID in the subsection 37(1)(a) context in this very matter.

[33] Having found that the defence of duress is applicable in inadmissibility hearings under paragraph 37(1)(a) of the IRPA, the only issue is whether the IAD erred in finding that the Respondent had no safe avenue of escape.

B. *Did the IAD err in finding that the Respondent had no safe avenue of escape?*

[34] The defence of duress was set out by the Supreme Court of Canada in *Ryan* at paragraph 81:

> [81] The defence of duress, in its statutory and common law forms, is largely the same. The two forms share the following common elements:
>
> • There must be an explicit or implicit threat of present or future death or bodily harm. This threat can be directed at the accused or a third party.
>
> • The accused must reasonably believe that the threat will be carried out.
>
> • There is no safe avenue of escape. This element is evaluated on a modified objective standard.
>
> • A close temporal connection between the threat and the harm threatened.
>
> • Proportionality between the harm threatened and the harm inflicted by the accused. The harm caused by the accused must be

> equal to or no greater than the harm threatened. This is also evaluated on a modified objective standard.
>
> • The accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

[35] The only contested element is whether the Respondent had a "safe avenue of escape."

[36] The Minister challenges the reasonableness of the IAD member's decision on the basis that the Respondent's drug addiction could not have left him with an impaired ability to perceive the reasonable alternative of moving away from his hometown, because he later moved back to his hometown approximately two years later. Because the Respondent returned to the danger when his mind was unimpaired by addiction, the drug addiction was not the determining factor in his inability to perceive a safe avenue of escape.

[37] This argument is without merit. The IAD member did not state that drug addiction was the determining factor in the Respondent's movement and residency decisions. In fact, the IAD member specifically referred to the following factors that limited the Respondent's assessment regarding a safe avenue of escape (IAD Decision at paras 16-17):

> 1. Repeated beatings
>
> 2. The psychological grip of addiction
>
> 3. Continuous death threats
>
> 4. The genuine belief that the Cartel had the will and ability to track down the Respondent and his mother.

[38] The testimony of the Respondent, who was found to be credible, and the Respondent's April 2017 psychological assessment both support these findings.

[39] Further, the fact that the Respondent moved back to his hometown after a period of sobriety does not change the circumstances that limited his assessment of a safe avenue of escape at the relevant time.

[40] The IAD member placed significance on the fact that the group threatening the Respondent was the Sinaloa Cartel, noting that the Cartel is a "powerful organization that often uses violence to achieve its goals" (IAD Decision at para 17).

[41] The IAD member also found that when the Respondent attempted to extricate himself from the situation of duress, the police simply returned him to the Cartel, reinforcing the non-existence of a safe avenue of escape (IAD Decision at para 17).

[42] The Minister's arguments merely invite the Court to reconsider the evidence. The IAD member reasonably accepted Justice Mactavish's direction to consider the impact of the Respondent's drug addiction on his ability to make a rational assessment of his potential avenues of escape.

[43] The IAD member's conclusion that a reasonable similarly situated person could not have extricated themselves from the situation of duress falls within a "range of possible, acceptable

outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). The decision was reasonable.

VIII. Proposed Certified Question

[44] The Minister proposes the following question for certification under paragraph 74(d) of the IRPA:

> *1. Is duress, a factor properly considered by the Minister personally for Ministerial relief, also a factor that the ID and IAD may consider in assessing inadmissibility pursuant to s. 37(1)(a)?*
>
> *a. If yes, does the Board consider duress as a factor that negates a mental element to membership or to engaging in, or does the Board consider duress as a defence?*
>
> *b. If considered as a factor to negate a mental clement what is the mental element that would be negated?*

[45] The test for certification of a question was recently reaffirmed by the Federal Court of Appeal in *Lewis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paragraph 36:

> [36] The case law of this Court establishes that in order for a question to be properly certified under section 74 of the IRPA, and therefore for this Court to have jurisdiction to hear an appeal, the question certified by the Federal Court must be dispositive of the appeal, must transcend the interests of the parties and must raise an issue of broad significance or general importance.

[46] As raised by the Respondent, the ID and IAD have considered the defence of duress in previous cases. Further, as noted above, the Supreme Court of Canada has endorsed the consideration of any viable defences, including duress, by the Refugee Protection Division of the

Immigration and Refugee Board when deciding whether a claimant satisfies the definition of "refugee" (*Ezokola,* above at para 100).

[47] I have decided that the ID and IAD are entitled to consider the defence of duress in inadmissibility proceedings under paragraph 37(1)(a) of the IRPA. This Court has made the same finding with respect to the defences of duress and necessity in the context of subsection 34(1) and paragraph 37(1)(b) of the IRPA. This issue will be dispositive of an appeal, transcends the interests of the parties, and raises an issue of general importance.

[48] Therefore, I find that the following question should be certified:

> In determining whether an individual is inadmissible under paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, are the Immigration Division and Immigration Appeal Division of the Immigration and Refugee Board entitled to consider the defence of duress?

IX. Costs

[49] The Respondent seeks a costs award of $5000.

[50] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules,* SOR/93-22 provides that:

> 22 No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

[51] The Respondent submits that special reasons warrant the granting of costs in this case. The Respondent argues that the Minister has failed to provide any new evidence, and has repeatedly raised the same arguments in an attempt to get a different result. Because of the protracted nature of the inadmissibility proceedings, the Respondent has been unable to advance his refugee claim.

[52] In *Ndungu v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 208 at para 7, the Federal Court of Appeal listed instances in which the Court has recognized "special reasons" such that costs were awarded against the Minister:

- The Minister causes an applicant to suffer a significant waste of time and resources by taking inconsistent positions in the Federal Court and the Federal Court of Appeal;
- An immigration official circumvents an order of the Court;
- An immigration official engages in conduct that is misleading or abusive;
- An immigration official issues a decision only after an unreasonable and unjustified delay;
- The Minister unreasonably opposes an obviously meritorious application for judicial review.

[53] In this case, the 5-year delay between the 2012 remittal order and the redetermination of the matter at the ID in 2017 appears to be the result of miscommunication and diffusion of responsibility. Special reasons do not necessarily arise because the Minister then elected to exercise his statutory rights of appeal to the IAD and judicial review to this court, and is unsuccessful (*Canada (Citizenship and Immigration) v Suleiman*, 2015 FC 891 at para 49).

[54] The Minister did not object to the application of the defence of duress by the ID the first time this matter came before this Court. This argument was not raised until *after* Justice Mactavish remitted the matter to the ID for redetermination. By raising the jurisdictional issue before the ID, IAD, and now the Federal Court, and attempting to distinguish between paragraphs 37(1)(a) and 37(1)(b) of the IRPA, the Minister has taken inconsistent positions in the Federal Court between 2012 and today, costing the Respondent in terms of both delay and financial resources.

[55] Had the Minister raised the jurisdictional argument before Justice Mactavish in 2012, the issue may well have been settled at that time.

[56] For these reasons, I find that costs to the Respondent should be granted in the amount of $5000.

JUDGMENT in IMM-729-19

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. The following question is certified:

   In determining whether an individual is inadmissible under paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, are the Immigration Division and Immigration Appeal Division of the Immigration and Refugee Board entitled to consider the defence of duress?

3. Costs to the Respondent in the amount of $5000.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-729-19
STYLE OF CAUSE:	MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v EDGAR ALBERTO LOPEZ GAYTAN
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	SEPTEMBER 9, 2019
JUDGMENT AND REASONS:	MANSON J.
DATED:	SEPTEMBER 11, 2019

APPEARANCES:

Stephen McLachlin	FOR THE APPLICANT
Bjorn Harsanyi	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Saskatoon, Saskatchewan	FOR THE APPLICANT
Stewart Sharma Harsanyi Immigration, Family and Criminal Law Barristers and Solicitors Calgary, Alberta	FOR THE RESPONDENT