

Federal Court



Cour fédérale

Date: 20120911

Docket: IMM-836-12

Citation: 2012 FC 1075

Ottawa, Ontario, September 11, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

EDGAR ALBERTO LOPEZ GAYTON

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Edgar Alberto Lopez Gayton was found to be inadmissible to Canada by the Immigration Division of the Immigration and Refugee Board because of his involvement with the Sinaloa Cartel in Mexico. The Board did not accept Mr. Lopez Gayton's claim that he had been acting under duress throughout the time that he worked for the Cartel.

[2] For the reasons that follow, I have concluded that the Board erred in its application of the law relating to the defence of duress. Consequently, Mr. Lopez Gayton's application for judicial review will be allowed.

Background

[3] The Board made no negative findings with respect to the credibility of Mr. Lopez Gayton's evidence and appears to have accepted his story in its entirety.

[4] According to Mr. Lopez Gayton, he began using drugs when he was 12 years old. He started with marijuana, but by the time he was 15, he was using crystal methamphetamine on a regular basis. By the time he turned 18, he had become addicted to the drug.

[5] Mr. Lopez Gayton purchased his drugs at a house in his neighbourhood. The drug dealers operating out of the house were affiliated with the Sinaloa Cartel. When he was 18, the dealers began beating Mr. Lopez Gayton, and he was forcibly recruited into working for the Cartel. Mr. Lopez Gayton's life was threatened, and he was told that his mother would be killed if she told anyone that her son was working for the Cartel.

[6] For the next 18 months, the drug dealers picked Mr. Lopez Gayton up at his home every morning, and he would spend his days packaging and selling drugs. On occasion, Mr. Lopez Gayton would deliver protection money to the police on behalf of members of the Cartel who wanted to ensure that it could continue to operate unhindered by police investigations or criminal charges. Mr.

Lopez Gayton was beaten on a regular basis throughout this period, and he was told that if he tried to leave the Cartel, he and his mother would both be killed.

[7] Mr. Lopez Gayton was not paid for his services, but the dealers would provide him with drugs to feed his growing addiction.

[8] Some 18 months after he started working for the Cartel, the house where he was working was raided by the police and Mr. Lopez Gayton was taken into custody. He decided to tell the police what was going on, in an effort to escape from the Cartel.

[9] After he told them his story, the police took him to another house where members of the Cartel were waiting for him. Mr. Lopez Gayton says that he was severely beaten and was stabbed with a machete. The Cartel members threatened to kill Mr. Lopez Gayton for talking to the police.

[10] The following day, Mr. Lopez Gayton overdosed on crystal meth. He is unsure what happened next, but when he woke up, he was in a rehabilitation facility. He was told that he had been thrown out of a truck outside the facility. Mr. Lopez Gayton's mother then moved him to a different rehabilitation facility, where he stayed under an assumed name. He remained in rehab for three months, and was ultimately able to overcome his addiction to drugs.

[11] Mr. Lopez Gayton and his mother then moved to another city, where they were able to live and work safely for two years. Assuming that things would have cooled down by then, they moved back to their home town, albeit to a different part of the city. According to Mr. Lopez Gayton,

shortly after he returned home he was spotted by a member of the Cartel who began shooting at him. He left Mexico for Canada the next day.

The Board's Decision

[12] Mr. Lopez Gayton was found to be inadmissible to Canada under paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which provides that:

<p>37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for</p>	<p>37. (1) Empoventent interdiction de territoire pour criminalité organisée les faits suivants :</p>
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(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; [...]

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; [...]

[13] Mr. Lopez Gayton conceded before the Board that the Sinaloa Cartel was a criminal organization within the meaning of paragraph 37(1)(a), and that he had personally been engaged in criminal activities that were part of the Cartel's criminal enterprise. Thus the only issue for

determination by the Board was whether Mr. Lopez Gayton's actions should be excused through the application of the common law defence of duress.

[14] The Board found that the threats faced by Mr. Lopez Gayton were not "imminent" within the meaning of the jurisprudence, and that he had a safe avenue of escape from the clutches of the Cartel. Consequently, the Board found that the defence of duress had not been made out, and Mr. Lopez Gayton was found to be inadmissible to Canada for having engaged in criminal activities that supported the Sinaloa Cartel.

Analysis

[15] As the Supreme Court of Canada observed in *R. v. Hibbert*, [1995] 2 S.C.R. 973, the defence of duress arises where an individual is subjected to an external danger (such as threats of physical harm or death) and commits a criminal act in order to avoid the threatened harm. While it does not negate the physical or mental elements of the crime, the defence operates to relieve an accused of the penal consequences of his or her conduct.

[16] To establish the defence of duress, three conditions must be met:

- a. There must be a clear and imminent danger;
- b. The accused must not have a reasonable legal alternative to breaking the law, such as a safe avenue of escape; and
- c. There must be proportionality between harm inflicted and harm avoided.

[17] The Board properly identified the elements that had to be established by an individual seeking to avail him or herself of the defence of duress. It concluded that Mr. Lopez Gayton had failed to establish either the first or the second element of the test. Given that the test is conjunctive, the Board concluded that Mr. Lopez Gayton should be held responsible for his actions, and that he was inadmissible to Canada as a result.

[18] As will be explained below, I am satisfied that the Board erred in its findings with respect to both the first and the second elements of the test. As a result, the application will be allowed.

The Immediacy of the Threat

[19] The Board accepted that Mr. Lopez Gayton had been forcibly recruited into the Sinaloa Cartel and that the threat of death or physical peril was present when the drug dealers first came to his home. However, it went on to find that the threat ceased to be “imminent” over the next year and a half. The basis for the Board’s conclusion was its finding that “[a]lthough the drug dealers continued to beat Mr. Lopez Gayt[o]n, he was not held under their control 24 hours a day. He went home to his mother’s house almost every night.”

[20] Thus it appears that the Board understood that for Mr. Lopez Gayton to establish the first element of the test for duress, he had to show that he was under the physical control of the Cartel at all times. This is clearly not what the law requires.

[21] As the Supreme Court of Canada observed in *R. v. Ruzic*, [2001] 1 S.C.R. 687, the requirement that the threat to an accused be “imminent” must be interpreted and applied in a

flexible manner: at para. 86. It may include threats of future harm to the accused or to a third party. What is required is “a close temporal connection between the threat and the harm threatened”, such that the person “loses the ability to act freely”: at paras. 96 and 65.

[22] In this case, the Board accepted that:

- a. Mr. Lopez Gayton was forcibly recruited into the Sinaloa Cartel;
- b. He was suffering from an addiction to drugs and the Cartel provided him with drugs on a daily basis to feed his addiction;
- c. He was often subjected to beatings by members of the Cartel;
- d. Threats to kill either Mr. Lopez Gayton or his mother were made by Cartel members on a regular basis;
- e. His one attempt to seek help from the police led directly to his being severely beaten and stabbed.

[23] Moreover the documentary evidence before the Board demonstrated that the Sinaloa Cartel was a powerful organization that often used violence as a means to achieve its goals.

[24] Each of these factors was potentially relevant to whether the threats faced by Mr. Lopez Gayton continued to be “imminent” throughout the 18 months he spent working for the Cartel. They were not, however, taken into account by the Board as a result of its erroneous understanding that Mr. Lopez Gayton had to be under the physical control of the Cartel on a constant and continual basis throughout the time that he was affiliated with the organization for the “imminence” requirement to be satisfied.

[25] As a consequence, I am satisfied that the Board erred in its assessment of the first element of the test for duress. There is, moreover, a real concern that the Board's error with respect to the first element of the test tainted its analysis of the second element of the test, given the statement by the Board that "with respect to the facts of this case, the first and second elements of duress blend together": at para. 33.

[26] Furthermore, an examination of the Board's analysis of whether Mr. Lopez Gayton had a safe avenue of escape from the Cartel reveals additional errors in the Board's reasoning. These will be addressed next.

The Safe Avenue of Escape

[27] The Board found that Mr. Lopez Gayton had a legal way out of his predicament when he was not in the presence of, or under the direct control of the drug dealers, "when considered from both an objective and a subjective standpoint": at para. 34.

[28] The "safe avenue of escape" element of the defence of duress requires that an accused demonstrate that there was "no legal way out" of the situation that faced by the accused. That is, an accused will not be able to rely on the common law defence of duress if a safe avenue of escape was open to him or her. Where the accused does in fact have a safe avenue of escape, the decision to commit the offence in question becomes a voluntary one for which the accused is culpable: see *Hibbert*, above, at para. 55.

[29] In other words, where an accused could have taken steps that would have enabled him or her to avoid committing an offence, it can no longer be said that the individual had no real choice in deciding whether or not to break the law: *Hibbert*, above, at para. 62.

[30] The question of whether or not an accused had a safe avenue of escape is to be determined according to an objective standard. When considering the perceptions of a “reasonable person”, the Court must also take the personal circumstances and frailties of the accused into account: *Hibbert*, above, at para. 62 and 67.

[31] That is, an “objective-subjective” standard must be applied. As the Supreme Court of Canada observed in *Ruzic*, above, at para. 61:

The test requires that the situation be examined from the point of view of a reasonable person, but similarly situated. The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics.

[32] In this case, the Board did not address the impact of Mr. Lopez Gayton’s acknowledged drug addiction on his ability to make a rational assessment as to his potential avenues of escape.

[33] Mr. Lopez Gayton argued before the Board that his serious drug addiction impaired his ability to assess whether he had a safe way out of the control of the Cartel. While the Board did not dispute the fact that Mr. Lopez Gayton was suffering from a drug addiction throughout the time that he was associated with the Cartel, it nevertheless summarily dismissed his argument that he did not have a safe avenue of escape when viewed from his subjective perspective. The sum total of the

Board's reasoning on this issue was that Mr. Lopez Gayton had "not provided any evidence that he was forced to take the drugs" and that he was "voluntarily using the drugs that were given to him": at para. 35.

[34] To the extent that the Board was faulting Mr. Lopez Gayton for having started to use drugs, it was essentially blaming him for all that subsequently befell him. As was argued by Mr. Lopez Gayton's counsel, this would be akin to dismissing claims of spousal abuse on the basis that a battered woman had voluntarily married her abuser.

[35] If the Board was instead blaming Mr. Lopez Gayton for using the drugs that were provided to him by the Cartel, then it seems to have totally disregarded the evidence regarding Mr. Lopez Gayton's drug addiction. Indeed, it is the essence of an addiction that the individual loses the ability to voluntarily control his or her consumption of the substance in question.

[36] Either way, the Board's analysis of the subjective component of the "safe avenue of escape" element of the defence of duress was unreasonable.

Conclusion

[37] For these reasons, the application for judicial review is allowed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination.

“Anne Mactavish”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-836-12

STYLE OF CAUSE: EDGAR ALBERTO LOPEZ GAYTON v.
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: September 6, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** MACTAVISH J.

DATED: September 11, 2012

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