Date: 20040812

Docket: IMM-1439-03

Citation: 2004 FC 1125

BETWEEN:

JUMA KHAMIS SULEIMAN and

ZAKIA SALUM ABDULA

Applic

ants

- and -

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respond

ent

MARTINEAU J.

REASONS FOR ORDER

[1] The applicants seek judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated January 29, 2003, wherein the Board found that the applicants are not "Convention refugees" or "persons in need of protection" as defined in sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

BACKGROUND

[2] Mr. Juma Khamis Suleiman and his wife Mrs. Zakia Salum Abdula are citizens of Tanzania who allege a well-founded fear of persecution at the hands of Tanzanian authorities by reason of their political opinion and their membership in a particular social group, namely their family.

[3] The following facts are not disputed.

[4] Mr. Suleiman has been a member of the opposition party Civic United Front (CUF) since February 6, 1996. As a result of his CUF involvement, he was denied access to schooling, denied the right to vote in the 1995 elections, and was subjected to ongoing disruption of his business by police, including the 1996 confiscation of his goods. In April of the same year, he was detained for three days without charges during which time he was beaten and told to cease supporting the CUF. On August 20, 2000, when he attempted to register for the October 2000 elections, he was falsely charged by police with disrupting the election registration process. He was arrested and detained for two weeks during which he was interrogated

about his CUF activities and beaten with canes. He was released on September 4, 2000 on condition that he abandon his CUF activities.

[5] Mrs. Abdula, also a CUF supporter, was also refused voter registration and witnessed her husband's arrest. During his detention, she tried to visit him three times but was denied access. In addition, the police regularly visited the house to question her about her husband's CUF involvement.

[6] In mid-September 2000, after seeing three uniformed police officers at the front door of their home, the applicants fled through the back door to an uncle's residence where they remained in hiding. While in hiding, their friend, Mohamed Ali, with whom they had shared their residence, warned them that police had visited the house and questioned him about the applicants. He also informed them that a warrant was issued for the arrest of Mr. Suleiman. The applicants left Tanzania on September 21, 2000 and arrived in Canada on September 25, 2000 where they claimed refugee status. Following their arrival, they learned that Mr. Suleiman's brother, Salum, had been detained and beaten by police for being an alleged CUF mastermind. In addition, Mr. Suleiman testified at the hearing that police continue to show interest in him and that his cousin Mwalim had been killed in late January 2001 by government agents, for his political activities.

THE BOARD'S DECISION

[7] The Board found Mr. Suleiman credible and accepted that he suffered past persecution in Tanzania because of his opposition party activism and membership in the CUF. The Board also accepted that Mrs. Abdula had been harassed by police because of her political opinion and because she is the wife of a CUF member. The Board further found that Mr. Suleiman's brothers, Mohamed, Said and Salum and his cousin Mwalim also suffered persecution by police for their CUF activism. Nevertheless, the Board determined that, in light of the changed country conditions, the applicants' fear of persecution is not objectively well-founded and dismissed their claim for refugee status under the Convention.

[8] Before refusing Convention refugee status to the applicants, the Board considered the applicability of the "compelling reasons" exception found in subsection 108(4) of the Act. This provision, which closely resembles subsection 2(3) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the former Act), provides that despite the fact that the reasons for which a person sought refugee protection ceased to exist, refugee protection should nevertheless be conferred where "compelling reasons" arise out of previous persecution, torture, treatment or punishment which justify a person's refusal to avail herself of the protection of the country which she left.

[9] In the case at bar, although the Board found "the treatment afforded the principal claimant and his family to have been deplorable", and also accepted that Mr. Suleiman was detained (once for three days and once for twenty days) and maltreated by police who beat him repeatedly using canes, although "persecutory", such mistreatment did not, in the Board's view, reach a level to qualify it as "atrocious" and "appalling". While the Board accepted that Mr. Suleiman suffers from symptoms of clinical depression and post-traumatic anxiety as a result of past persecution, the Board concluded that the standard set in *Canada (Minister of Employment and Immigration) v. Obstoj* (1992), 93 D.L.R. (4th) 144 (F.C.A.); (1992) 142 N.R. 81 (F.C.A.) for the application of the "compelling reasons" exception was not met: "... it does not bring the claimant over the standard set in *Obstoj* for the application of compelling reasons. I find that the claimant did not suffer appalling and atrocious treatment as set out in *Obstoj*".

THE ISSUE

[10] At the hearing before this Court, counsel indicated that the applicants would no longer pursue the other grounds of review mentioned in their memoranda of arguments. Therefore, the sole remaining issue is whether the Board made a reviewable error in finding that the "compelling reasons" exception is not applicable.

ANALYSIS

[11] At the outset, it must be underlined that the determination of "compelling reasons" raises mixed questions of fact and law. While there is no statutory definition of the expression "compelling reasons" used in the Act, judicial dicta have served to delineate the general scope and purpose of this exception. Equipped with these guidelines, it is then for the competent tribunal to exercise its judgment in light of the particular experience of each claimant.

[12] In *Obstoj, supra,* reference by the Federal Court of Appeal is made to Article 1 C(5) of the United Nations Convention Relating to the Status of Refugees, 1951, 189 U.N.T.S. 137 (the Convention) which is clearly the inspiration for the "compelling reasons" exception found in subsection 2(3) of the former Act, and now in subsection 108(4) of the Act. Article 1 C(5) provides for the exemption from cessation based on change of circumstances for pre-1951 refugees (the statutory refugees) who are able to make a case for not returning home based on "compelling reasons arising out of previous persecution".

[13] Speaking of Article 1 C(5), James C. Hathaway, in his monograph *The Law of Refugee Status* (Markham: Butterworths, 1991) at pages 203-204, notes: "[T]he intention of the drafters was twofold: first, to recognize the legitimacy of the psychological hardship that would be faced by the victims of persecution were they to be returned to the country responsible for their maltreatment; and second, to protect the victims of past atrocities from harm at the hands of private citizens, whose attitudes may not have reformed in tandem with the political structure".[1] The express reference to Article 1 A(1) indicates that the exception applies only to statutory refugees, as noted in the *Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Office of the United Nations High Commissioner for refugees, Geneva, January 1988) (the Handbook). The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees as indicated at paragraph 136:

It is frequently recognized that a person who - or whose family - has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of régime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of refugee.

[14] Indeed, as was decided by the Federal Court of Appeal in *Obstoj, supra*, the Canadian legislation extends the "compelling reasons" exception contained in Article 1 C(5) of the Convention to both statutory refugees and modern day refugees. While Desjardins J.A. notes at page 159 that subsections 2(2) and (3) of the former Act "[were] added to the definition of a Convention refugee in order to "bring the definition into conformity with the United Nations Convention Relating to the Status of Refugees", Hugessen J.A. (as he then was) states in this respect at page 156:

[I]t is hardly surprising, therefore, that it should also be read as requiring Canadian authorities to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e. those who have suffered such appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution.

[15] Although Hugessen J.A. adds that "[t]he exceptional circumstances envisaged by subsection 2(3) must surely apply to only a tiny minority of the present day claimants", he immediately remarks that he "can think of no reason or principle ... why the success or failure of claims by such persons should depend upon the purely fortuitous circumstance of whether they obtained recognition as a refugee before or after conditions had changed in their country of origin". In reading the two sentences together, it is reasonable to infer that Hugessen J.A. is referring to the fact that since a great number of claims actually decided in Canada do not involve a change of circumstances in the country conditions, in practice, this leaves only a minority of claimants who will face the burden of establishing that "compelling reasons" warrants that they nevertheless be granted refugee status. Therefore, in my opinion, it would be wrong to interpret the *dicta* of Hugessen J.A. in *Obstoj, supra*, in a literal manner and without consideration to the "general humanitarian principle" referred to above.

[16] It must not be forgotten that subsection 108(4) of the Act refers only to "compelling reasons arising out of previous persecution, torture, treatment or punishment". It does not require a determination that such acts or situation be "atrocious" and "appalling". Indeed, a variety of circumstances may trigger the application of the "compelling reasons" exception.[2] The issue is whether, considering the totality of the situation, i.e. humanitarian grounds, unusual or exceptional circumstances, it would be wrong to reject a claim or make a declaration that refugee protection has ceased in the wake of a change of circumstances. "Compelling reasons" are examined on a case by case basis. Each case is a "cas d'espèce". In practice, this means that each case must be assessed and decided on its own merit, based on the totality of the evidence submitted by the claimants. As was decided by the Federal Court of Appeal in *Yamba v. Canada (Minister of Citizenship and Immigration)* (2000), 254 N.R. 388 at para. 6 (F.C.A.); [2000] F.C.J. No. 457 (F.C.A.), in every case in which the Board concludes that a claimant has suffered past persecution, where there has been a change of country conditions to such an

extent as to eliminate the source of the claimant's fear, the Board is obligated to consider whether the evidence presented establishes the existence of "compelling reasons".

[17] Accordingly, it would be hazardous to list all the circumstances which may warrant the application of the "compelling reasons" exception or to establish a rigid test (notably based on the level of atrocity). However, besides the general indications contained in the Handbook or flowing from *Obstoj* and the jurisprudence, James C. Hathaway's comments at page 204 provide some guidance:

The exemption clause in the convention is not ... structured to provide general humanitarian relief based on factors such as family circumstances or infirmity, but focuses squarely on compelling circumstances which are linked to past persecution. Atle Grahl-Madsen suggested that the existence of a psychological distance between the refugee and her former home, the continued unpopularity in the country of origin of the views or personal characteristics of the refugee, or the severing of familial, social and other linkages between the refugee and her state of origin are the sorts of concerns which warrant exemption from return. In contrast, essentially economic motivations or considerations of personal convenience are not sufficient.

[18] The following comments found in Lorne Waldman's *Immigration Law and Practice*, Vol. 1, at paragraph 8.94, are also helpful:

Where a refugee suffers continuing psychological trauma arising from past persecution, and associated in his or her mind with the home country, cessation would not be warranted if repatriation would cause the refugee emotional suffering. It is this consideration that leads Goodwin-Gill to argue that the clause should be liberally applied. Similarly, if supporters of the former persecuting regime pose a threat to the physical or emotional well-being of the refugee in the home country, cessation would not operate.

[19] The degree, to which a refugee claimant lives his anguish upon thought of being forced to return from where he came, is subject to the state of his psychological health (strength). The formulative question to ask in regard to "compelling reasons" is, should the claimant be made to face the background set of life which he or she left, even if the principal characters may no longer be present or no longer be playing the same roles? The answer lies not so much in established determinative conclusive fact but rather more to the extent of travail of the inner self or soul to which the claimant would be subjugated. The decision, as all decisions of a compelling nature, necessitates the view that it is the state of mind of the refugee claimant that creates the precedent - not necessarily the country, the conditions, nor the attitude of the population, even though those factors may come into balance. Moreover, this judgment does not involve the imposition of Western concepts on a subtle phenomenon which roots in the individuality of human nature, an individuality which is unique and has grown in an all-together different social and cultural environment. Therefore, consideration should also be given to the claimant's age, cultural background and previous social experiences.[3] Being resilient to adverse conditions will depend of a number of factors which differ from one individual to another.

[20] That being said, this Court has already recognized that past acts of torture and extreme forms of mental abuse, alone, in view of their gravity and seriousness, can be considered "compelling reasons" for giving Refugee status to a claimant and the members of his immediate family despite the fact that these acts have occurred many years before.[4] This should come as no surprise since the right not to be subject to torture and cruel, inhuman and degrading treatment is a fundamental right equally protected under domestic and international law which Canada is committed to guarantee and promote.[5] Moreover, while the case-law does not impose "a further test of continuing psychological after-effect"[6], the failure of the Tribunal to take account of relevant medical evidence in this regard constitutes a reviewable error.[7]

[21] Given what has happened to Mr. Suleiman and his family in Tanzania (not just the beatings with canes but also the disruption of business by police and the confiscation of his goods in 1996), the applicants' counsel further submits that if the latter does not come within the ambit of the compelling reasons exception, then no one can. While I recognize that the Board, with its experience and expertise, is best able to assess whether there are "compelling reasons"[8], this Court should not hesitate to interfere with the Board's conclusion where its unreasonableness is satisfactorily demonstrated. In the case at bar, it is apparent that the Board erred in inferring that the test in *Obstoj,supra*, necessitates that the persecution reach a level to

qualify it as "atrocious" and "appalling" for the "compelling reasons" exception to apply. This error of law vitiates the subsequent determination made by the Board that the applicants are not Convention refugees.

[22] While the Board acknowledged that Mr. Suleiman suffers from symptoms of clinical depression and post-traumatic anxiety, in view of its finding that the high standard set in *Obstoj*, *supra*, was not met, the Board failed to determine whether repatriation in Tanzania would cause him undue emotional suffering, so as to constitute, considering all the circumstances of this case and the gravity of the past persecution, "compelling reasons" justifying the applicants' refusal to avail themselves of the protection of their country. While *Obstoj*, *supra*, and *Hassan, supra*, refer to "exceptional circumstances", as I have explained earlier, it is by no means an invitation to apply the "compelling reasons" exception in a systemic manner or without regard to the effects past persecution has had on an individual claimant and his family. In the case at bar, the Board found the applicants' evidence credible. That which, alone and objectively, may not be considered grave or serious enough to constitute "compelling reasons", may in fact, in the particular circumstances of the claimant and his family in the state they find themselves, be nevertheless viewed as grave or serious enough to project an image of anguish, unreasonable to conceive the possibility of return. While it is not necessary that I express a definite opinion, in, at least a *prima faciae* fashion, the death of a cousin and the brunt of the maltreatment described above can certainly in the principal claimant's mind, due to his delicate state, bring undue hardship to bear. Therefore, the Board should have thoroughly examined this evidence in order to make a proper assessment with regard to subsection 108(4) of the Act.

[23] That being said, I note that in its decision, the Board qualified the treatment suffered by Mr. Suleiman and his family as "deplorable". In the *Canadian Oxford Dictionnary* (Oxford University Press, 2001), the words "deplorable" and "deplore" have the following meanings:

Deplorable: exceedingly bad

Deplore: be scandalized by; find exceedingly bad

[24] On the other hand, in the same dictionary, the words "appalling", "atrocious" and "atrocity" are defined as follows:

Appalling: shocking, unpleasant; bad

Atrocious: very bad or unpleasant; extremely savage or wicked

Atrocity: an extremely wicked or cruel act, esp. one involving physical violence or injury; extreme wickedness; something that evokes outrage or disgust

[25] The Board has saved the reader shocking details of Mr. Suleiman and family's sad story. Be that as it may, it seems to me that if the treatment suffered by Mr. Suleiman and his family, was "deplorable", that is "exceedingly bad", I fail to see then why it would not be "appalling" or "atrocious". Here, the Board accepted that Mr. Suleiman was beaten by the police with canes which, in itself, is certainly a cruel treatment. Luckily, Mr. Suleiman was not killed by the police as was his cousin Mwalim in 2001. Surely, if the treatment suffered by Mr. Suleiman and his family was "deplorable", the Board should state, in the circumstances of the present case, why the acts committed cannot be considered "compelling reasons". The mere fact that such maltreatment "was, lamentably, not unusual for persons running afoul of security forces in Tanzania at the time" does not excuse the gravity of the past persecution which in this case is still fairly recent and has apparently indelibly marked the mental state of Mr. Suleiman. Moreover, the generalized character of the past persecution in Tanzania should not serve as a bar to the application of the "compelling reasons" exception.

[26] For the above reasons, the application for judicial review shall be granted. The matter shall be referred back for redetermination by either the same member or another member of the Board (as is most convenient for the Board) on the basis of the existing record. The redetermination should be limited to whether or not the applicants fall within the ambit of the "compelling reasons" exception found in subsection 108(4) of the Act having particular regard to the indications contained in the present reasons for order. In view of the result of this case, it is not necessary to certify a question of general

importance to the Federal Court of Appeal. The respondent has proposed no question for certification. The first question proposed by applicants' counsel with respect to the nature of the burden of proof is not determinative, and the second question regarding the nature of the test under subsection 108(4) of the Act is answered by the case law.

"Luc Martineau"

Judge

OTTAWA, ONTARIO

AUGUST 12, 2004

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1439-03

STYLE OF CAUSE: JUMA KHAMIS SULEIMAN ET AL. v. M.C.I.

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REASONS FOR ORDER: THE HONOURABLE MR. JUSTICE MARTINEAU

DATED: AUGUST 12, 2004

APPEARANCES:

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MR. ROBERT BAFARO	FOR THE RESPONDENT

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[1] In this regard, another commentator also suggested that the exception "is mainly intended to cover the case of victims of racial persecution where, unlike political persecution, the population as well as the government often took an active part" (Pompe, C.A. "The Convention of 28 July 1951 and the international protection of refugees", HCR/INF/42 (May 1958) 10, N.3; originally published in Dutch in *Rechtsgeleerd Magazyn Themis*, (1956), 425-01; as quoted by Goodwin-Gill, Guy S., *The refugee in international law* (Oxford University Press, New-York, 1996), at p. 87).

[2] In this regard, as stated by Rouleau J. in *Elemah v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1123 at para. 28 (F.C.T.D.) (QL); 2001 FCT 779 (F.C.T.D.) "The Court in *Obstoj*, *supra*, did not establish a test which necessitates that the persecution reach a level to qualify it as "atrocious" and "appalling". Rather, the Board must thoroughly consider all the documentary and oral evidence, including the nature of the incidents of torture and the medical reports provided by the parties in order to assess, as is stated in the legislation, if there are "compelling reasons" not to return him". MacKay J. in *Kulla v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1347 at para. 6 (F.C.T.D.) (QL), has framed in a similar manner the issue the Board must address where the "compelling reasons" exception is raised. (My emphasis).

[3] This is always the case where the tribunal is assessing human behaviour or the subjective fear of any claimant: *Ye v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 584 (F.C.A.) (QL); *Rahnema v. Canada (Solicitor General)* (1993), 68 F.T.R. 298 at para. 20 (F.C.T.D.); [1993] F.C.J. No. 1431 (F.C.T.D.) (QL); *El-Naem v. Canada (Minister of Citizenship and Immigration)* (1997), 126 F.T.R. 15 (F.C.T.D.); [1997] F.C.J. No. 185 (F.C.T.D.) (QL).

[4] For example, in *Arguello-Garcia* (1993), 64 F.T.R. 307 (F.C.T.D.); [1993] F.C.J. No. 635 (F.C.T.D.) McKeown J. found that the torture and sexual assault experienced several years before by the claimant in El Salvador, based on objective factors alone, was clearly sufficiently serious, "atrocious" and "appalling" to warrant the application of subsection 2(3). In this regard, he referred to the definitions of "atrocious", "atrocity" and "appalling" found in the *Concise Oxford Dictionary of Current English* (Clarendon Press, Oxford, 1990) which variously characterize them as "very bad or unpleasant", "extremely savage or wicked", "an extremely wicked or cruel act, esp. one involving physical violence or injury", "shocking, unpleasant, bad". While noting that "the right not to be subject to torture and cruel, inhuman and degrading treatment is a fundamental right which enjoys the highest intentional protection", he concluded that the Board had clearly erred in determining that "the test set out in *Obstoj* is not met". Similarly, in *Velasquez v. Canada (Minister of Employment and Immigration)* (1994), 76 F.T.R. 210 (F.C.T.D.); [1994] F.C.J. No. 477 (F.C.T.D.) (QL), Gibson J. suggested that the claimant, a woman of seventy years of age who had witnessed a number of years before the rape of her husband by members of a death squad in El Salvador, could certainly invoke the "compelling reasons" exception, even though she "may not have suffered directly, appalling persecution".

[5] Subsection 3(3) of the Act and section 12 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[6] *Jiminez v. Canada (Minister of Citizenship and Immigration)* (1999), 162 F.T.R. 177 at paras. 32-34 (F.C.T.D.); [1999] F.C.J. No. 87 (F.C.T.D.) (QL).

[7] *Arguello-Garcia*, *supra*, at paras. 13-16; *Biakona v. Canada (Minister of Citizenship and Immigration)* (1999), 164 F.T.R. 220 at paras. 42-43 (F.C.T.D.); [1999] F.C.J. No. 391 (F.C.T.D.) (QL); *Kulla, supra*, at para. 7.

[8] *Hassan v. Canada (Minister of Employment and Immigration)* (1994), 77 F.T.R. 309 at para. 14 (F.C.T.D.); [1994] F.C.J. No. 630 (F.C.T.D.)