Date: 20090129

Docket: IMM-1497-08

Citation: 2009 FC 91

Ottawa, Ontario, January 29, 2009

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

Domingo CONTRERAS GARCIA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by the Minister of Citizenship and Immigration (Minister) pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. (2001), c. 27 (Act), of a decision of the Immigration and Refugee Board, Refugee Protection Division (RPD), dated March 12, 2008, allowing the respondent's claim for refugee protection.

* * * * * * * *

[2] The respondent, Domingo Contreras Garcia, is a citizen of Peru. His claim for refugee protection, granted by the RPD on March 12, 2008, was based on a fear of persecution in Peru by reason of his political opinion.

[3] The Minister contends that the respondent is not a refugee because there are serious reasons for considering that he committed acts referred to in Article 1F of the *United Nations Convention Relating to the Status of Refugees* (Convention).

[4] The respondent alleges that he would be subjected to a danger of torture, to a risk to his life or to a risk of cruel and unusual treatment or punishment should he return to Peru because of the ties he had with the National Intelligence Service (*Servicio de Inteligencia Nacional*, or SIN), when he worked from 1991 to 2001 as chief of security for Samuel and Mandel Winter (the Winter brothers), who were close to the Alberto Fujimori government. During that period, he participated in the takeover by the Winter brothers of a television station known as Canal 2.

[5] On August 9, 2001, the respondent left Peru for the United States, where he claimed asylum, which was refused. He arrived in Canada on August 13, 2004, and claimed refugee protection at the port of entry. He filed his Personal Information Form (PIF) on August 14, 2004. On January 18, 2005, the respondent was questioned by the Security and War Crimes Unit.

[6] The first hearing before the RPD was held on February 20, 2006. However, the member presiding at the proceeding was unable to make a decision because of health reasons. It was then decided that a new member would hear the matter *de novo*. The second hearing took place before

the new member on March 30, 2006. The Minister of Public Safety and Emergency Preparedness intervened to argue that there are serious reasons for considering that the respondent committed acts referred to in Article 1F of the Convention.

* * * * * * * *

[7] The RPD's decision was rendered on March 12, 2008. The first part deals with the question of the respondent's exclusion under section 98 of the Act, raised by the Minister of Public Safety and Emergency Preparedness. The panel first summarized the Minister's arguments, as presented in his notice of intervention:

- the claimant indicated that he worked for Peru's National Intelligence Service;
- the existing documentary evidence indicates that the National Intelligence Service allegedly violated human and international rights;
- the claimant may have participated in or have been an accomplice in crimes against humanity or in acts that are contrary to the purposes and principles of the United Nations.

[8] The panel noted that the respondent had categorically denied working for the SIN, and invoked errors in translation or in comprehension to explain all of the references to his ties to the SIN that are found in his PIF, in the interview at the port of entry, in his file for his claim for asylum in the USA and in the testimony of his friend, Pedro Ruiz Castro. The RPD concluded the following:

> Having considered all of the testimony and the documentary evidence, the panel is of the opinion that the claimant had ties to the SIN during the period of almost 10 years that he worked for the Fujimori government as head of security for the Winter brothers. The panel considers that the claimant's arguments that the many references in his file to his ties to the SIN are errors in interpretation or comprehension are not reasonable.

> However, the panel is of the opinion that the claimant's complicity in the activities that the National Intelligence Service (SIN) is accused of having perpetrated has not been established. The panel is also of the opinion that it has not been demonstrated that the National Intelligence Service (SIN) of Peru, under the Fujimori regime, was in fact an organization with limited, brutal purposes, as was the case with the SAVAK under the Shah of Iran.

[9] The panel then considered the case law that applies to complicity in the acts referred to in Article 1F of the Convention. He considered the decisions of the Federal Court and of the Federal Court of Appeal in *Ramirez v. Canada (M.E.I.)*, [1992] 2 F.C. 306 (C.A.), *Saridag v. Canada (M.E.I.)*, [1994] F.C.J. No. 1516 (QL), 85 F.T.R. 307 and *Ruiz v. Canada (M.E.I.)*, 2003 FC 1177, [2003] F.C.J. No. 1507 (QL), before ruling as follows at page 6 of his decision:

> In light of the jurisprudence, and given the evidence on file, the panel is of the opinion that the Minister's representative did not discharge her burden of establishing that there are serious reasons to believe that the principal claimant committed or was an accomplice in the perpetration of crimes against peace, war crimes, crimes against humanity or in acts contrary to the purposes and principles of the United Nations. Consequently, the panel determines that the claimant is not excluded under articles 1F (a) and (c).

[10] The last part of the decision concerns inclusion under sections 96 and 97 of the Act.

* * * * * * * *

[11] The applicant is raising the following questions:

1. Did the panel err in not giving reasons for his determination that

    a. it has not been established that the respondent was complicit in the SIN?
    b. it has not been demonstrated that the SIN was under the Fujimori regime?
    c. it has not been demonstrated that the Fujimori regime was an organization with limited, brutal purposes?

2. Did the panel err in not correctly applying the tests for complicity developed by the Federal Court of Appeal?

3. Did the panel take into account the documentary evidence on the role of the SIN in the atrocities committed under the Fujimori regime?

* * * * * * * *

[12] Procedural fairness requires that the RPD provide adequate reasons for its decision, which is determined on a correctness standard (*C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539; *Minister of Citizenship and Immigration v. Charles*, 2007 FC 1146, [2007] F.C.J. No. 1493 (QL)).

[13] In the case at bar, the applicant asserts that even without subjecting the RPD's reasons to a probing examination, they do not make it possible to understand the basis of its decision, or to follow the reasoning leading to its determinations, and for that reason alone, this Court's intervention is warranted. I agree.

[14] It is impossible to determine whether the decision is reasonable if the underlying reasons are not sufficiently clear and detailed. It is not enough to quote the law; reference must be made to the relevant evidence. In *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, the Court of Appeal pointed out the following:

> [17]The duty to provide reasons is a salutary one. Reasons serve a number of beneficial purposes including that of focussing the

> decision maker on the relevant factors and evidence. In the words of the Supreme Court of Canada:
> Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision [*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at p. 845].
>
> [18]Reasons also provide the parties with the assurance that their representations have been considered.
>
> [19]In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision maker erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.
>
> …
>
> [21]The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons" [*Administrative Law: Cases, Text and Materials* (4th ed.), (Toronto: Emond Montgomery, 1995), at p. 507].
>
> [22]The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion…. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based…. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors….

[15] Moreover, the Supreme Court of Canada clearly stated in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, that the reviewing court, in inquiring into the qualities that make a decision reasonable, must be concerned with the existence of justification, transparency and intelligibility

within the decision-making process. If the reasons are not adequate, the Court cannot assess the decision. Thus, there must be adequate reasons for the Court to be able to analyze the reasonableness of the decision.

[16] As Mr. Justice Luc Martineau wrote at paragraph 5 of *Minister of Citizenship and Immigration v. Koriagin*, 2003 FC 1210, [2003] F.C.J. No. 1534 (QL):

> To fulfil the obligation under paragraph 69.1(11)(*b*) of the Act, the reasons must be sufficiently clear, precise and intelligible to allow the Minister or the person making the claim to understand the grounds on which the decision is based and, where applicable should the decision be appealed, to allow the Court to satisfy itself that the Refugee Division exercised its jurisdiction in accordance with the Act.

[17] In this case, the RPD, in making its determinations, did not refer to any element of the voluminous documentary evidence. Despite the fact that it identified the parties' arguments and the correct principles of law, the Court is unable to follow its reasoning. It is obvious that the RPD decided that the Minister of Public Safety and Emergency Preparedness had not discharged his burden of establishing that there are serious reasons for considering that the respondent committed or was an accomplice in the commission of crimes against peace, war crimes, crimes against humanity or acts contrary to the principles and purposes of the United Nations. However, it did not explain, with regard to the evidence, how it arrived at this determination. This is an error of law.

[18] In my view, the respondent erred in focusing his arguments on the merits of the panel's decision, that is, on the correctness of its determinations, and not on the adequacy of the justification and reasoning. On the contrary, it is not enough for the determination to be correct, which does not

concern the Court in this case; the panel is required to provide adequate reasons so that the Court can validly assess them.

[19] Finally, concerning the respondent's written claim that it was up to the intervener, the Minister of Public Safety and Emergency Preparedness, to bring the application, and not the Minister of Citizenship and Immigration, reference need only be made to subsection 4(1) of the Act:

4. (1) Except as otherwise provided in this section, the Minister of Citizenship and Immigration is responsible for the administration of this Act.	**4.** (1) Sauf disposition contraire du présent article, le ministre de la Citoyenneté et de l'Immigration est chargé de l'application de la présente loi.

[20] Thus, I am of the opinion that the application could be brought by the Minister of Citizenship and Immigration.

* * * * * * * *

[21] For all these reasons, the application for judicial review is allowed and the matter is referred back to the Refugee Protection Division for reconsideration by a differently constituted panel, in accordance with these reasons.

JUDGMENT

The application for judicial review is allowed. The decision dated March 12, 2008, is set aside and the matter is referred back to the Refugee Protection Division of the Immigration and Refugee Board for reconsideration by a differently constituted panel, in accordance with the reasons given on this date.

Yvon Pinard
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1497-08
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. Domingo CONTRERAS GARCIA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 21, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	PINARD J.
DATED:	January 29, 2009

APPEARANCES:

Michèle Joubert	FOR THE APPLICANT
Michel Le Brun	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
Michel Le Brun Lasalle, Quebec	FOR THE RESPONDENT