Ordonez v. Canada (Minister of Citizenship and Immigration)

Between
Luis Miguel Castaneda Ordonez, applicant, and
The Minister of Citizenship and Immigration, respondent

[2000] F.C.J. No. 1380
Court No. IMM-2821-99

Federal Court of Canada - Trial Division
Toronto, Ontario
McKeown J.

Heard: August 28, 2000.
Oral judgment: August 28, 2000.
(10 paras.)

Aliens and immigration — Admission, refugees — Disqualifications, crimes against humanity.

Application by Ordonez for judicial review of a decision of the Refugee Board that he was not a Convention refugee because of his crimes against humanity. Based on Ordonez's testimony, the Board found that he was a participant in war crimes during the period that he served in the Guatemalan Air Force as he knowingly provided maintenance for planes that bombed civilians and was in charge of the armoury. Ordonez did not withdraw from the Guatemalan Air Force at the earliest possible opportunity.

HELD: Application dismissed. In his employment with the Guatemalan Air Force, Ordonez shared a common purpose with the pilots. It was open to the Board to find that he was an accomplice in crimes against humanity.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 21.

Counsel:

Shane Watson, for the applicant.
Greg George, for the respondent.

1 **McKEOWN J.** (Reasons for Order, orally):— The applicant seeks judicial review of a decision of the Convention Refugee Determination Division (the "Board") dated May 10, 1999 in which the Board determined that the applicant was not a Convention refugee.

2 The issue is whether there was no evidence before the Board on which the Board could have found that the applicant should have been excluded under article 1F(a) namely a person who has committed a crime against peace, a war crime or a crime against humanity.

3 The standard of review is whether the Board was clearly wrong (see Cihal v. Canada (M.C.I.) [2000] F.C.J. 577 paragraph 18 F.C.A. May 4, 2000.

4 The relevant part of section F of article 1 of the Convention, as set-out in the Schedule to the Act is as follows:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> a) he has committed a crime against peace, a war crime or a crime against humanity as defined in the international instruments drawn up to make a provision in respect to such crimes.

5 In Ramirez v. Canada [1992] 2 F.C. 306 at 311, McGuigan J.A. found that the phrase "serious reasons for considering" in Article 1F(a) implied a standard of proof lower than that of the balance of probabilities.

6 This case is unusual in that there is limited documentary evidence showing that the Guatemalan Air Force indiscriminately bombed civilians. However, the applicant's own testimony provided the Board with serious reasons for considering that the applicant has committed an international offence when it stated:

> The international offence in question is as follows. The panel finds that the claimant was a participant in war crimes during the period he served in the Guatemalan Air Force when he knowingly provided maintenance for planes that bombed civilians, and when he was personally in charge of the armoury and the loading of weapons of war (rockets, bombs and machine guns) onto the planes that did the bombing. He testified orally to this effect.

[See 6 & 7 of Reasons]

7 In my view, it was open for the Board to infer from the applicant's own testimony that he met the test as set out in Ramirez v. Canada, supra at page 317, when McGugian J.A. stated:

> Similarly, mere presence at the scene of the offence is not enough to qualify as personal and knowing participation (nor would it amount to liability under section 21 of the Canadian Criminal Code), though, again, presence coupled with additional facts may well lead to a conclusion of such involvement. In my view, mere on-looking such as occurs at public executions, where the on-lookers are simply by-standers with no intrinsic connection with the persecuting group, can never amount to personal involvement, however humanly repugnant it might be. However, someone who is an associate of the principal offender can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts.
>
> At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law (e.g., subsection 21(2) of the Criminal Code), and I believe is the best interpretation of international law.

8 The applicant also did not withdraw from the Guatemalan Air Force at the earliest possible opportunity as was suggested by Reed J. in Penate v. Canada (Minister of Employment and Immigration) [1994] 2 F.C. 79 (T.D.) at page 84 where she stated:

> As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with safety for himself) but who lends his active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist. I note that the situation envisaged by this jurisprudence is not one in which isolated incidents of international offences have occurred but where the commission of such offences is a continuous and regular part of the operation.

9 There was a shared common purpose with the pilots. It was open to the Board to find that the applicant "was an accomplice in crimes against humanity under section F(a) of Article 1 of the Convention (see page 9 of the reasons).

10 The application for judicial review is dismissed.

McKEOWN J.