

Date: 20070531

Docket: IMM-4222-06

Citation: 2007 FC 575

OTTAWA, Ontario, May 31, 2007

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

Alex Yale Ventocilla et al.

Applicant

and

The Minister of Citizenship and Immigration

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Refugee Board (“the Board”), dated May 17, 2006, wherein the Board held that the applicant was excluded from refugee protection under Article 1F(a) of the Refugee Convention.

Background

[2] Mr. Alex Yale Ventocilla and his wife, Ms. Ofelia Vargas Guerrero, were denied refugee claims on May 17, 2006. Initially, this application was a joint judicial review; however, the request for judicial review of the decision with respect to Ms. Guerrero has been discontinued; therefore these reasons are in regards to Mr. Ventocilla’s claim.

[3] Mr. Ventocilla served as Chief of Security and Troop Personnel for the Maintenance Unit at Las Palmas airbase from 1985 to 1992. He commanded between 150-200 subordinates during that time. In addition to his responsibility for military instruction, welfare and discipline of the troops and subofficers in the Maintenance Unit, as he was responsible for ensuring the security of the Maintenance Unit.

[4] The Board determined that the Mr. Ventocilla's claim must fail as he falls into the exclusion category under 1F(a) because there were serious grounds to believe he committed or was complicit in committing war crimes during his time in the armed forces.

Decision under review

[5] At the hearing, the Minister's Representative argued that there was insufficient evidence to find an exclusion under Article 1F(a) and attempted to abandon the exclusion proceedings. The Board disagreed and found serious reasons existed for considering that the applicant committed, or ordered to be committed war crimes, in particular, the murder and torture of Shining Force and Tupac-Amaru guerrillas. The Board also found that the applicant's continued service as Chief of Security while knowing that the military used torture and murder makes him complicit in the military's known war crimes. The Board determined that it was irrelevant if the Minister agrees if the exclusion clause applies, as this is within the Board's jurisdiction under s. 162(1) of the Act.

[6] The Board determined that the applicant should be excluded under Article 1F(a) for the following reasons: (1) there were serious reasons for considering that the applicant committed, or ordered to be committed war crimes, in particular, the murder and torture of Shining Force and Tupac-Amaru guerrillas; and (2) there were serious reasons for considering that the applicant was complicit in the war crimes committed by the armed forces because of his position as Chief of Security.

[7] There was no direct evidence, i.e. oral admissions, on which to base these findings. The Board concluded that the applicant's "blanket denial of knowledge or role cannot be interpreted as leaving the panel with no reliable information upon which to base an exclusion decision." The Board went to find that there were five grounds on which make a reasonable inference. First was the extensive coverage of the events of the relevant years in Peru in documents produced by organizations such as Amnesty International. Second is the military order to all personnel to "carry out killings without a trace and not to take prisoners." Third is the extrajudicial execution of 100 prisoners by armed servicemen in the Lima area in 1986. Fourth was the applicant's position as Chief of Security in the civil war against the guerrillas. Fifth is the applicant's steady rise to the position of Security Chief and his failure to disassociate himself with the torture and murder that was happening around him.

[8] Legislative scheme

Immigration and Refugee Protection Act, 2001, c. 27

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

Convention relating to the Status of Refugees, signed on July 28, 1951

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 provision in respect of such crimes;

F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :

a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

Charter of the International Military Tribunal, August 8, 1945

Article 6(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

Article 6(b) ' Les Crimes de Guerre ': c'est-à-dire les violations des lois et coutumes de la guerre. Ces violations comprennent, sans y être limitées, l'assassinat, les mauvais traitements et la déportation pour des travaux forcés ou pour tout autre but, des populations civiles dans les territoires occupés, l'assassinat ou les mauvais traitements des prisonniers de guerre ou des personnes en mer, l'exécution des otages, le pillage des biens publics ou privés, la destruction sans motif des villes et des villages ou la dévastation que ne justifient pas les exigences militaires;

Crimes against Humanity and War Crimes Act, 2000, c. 24

4(3). "war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its

4 (3). «crime de guerre » Fait — acte ou omission — commis au cours d'un conflit armé et constituant, au

commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

moment et au lieu de la perpétration, un crime de guerre selon le droit international coutumier ou le droit international conventionnel applicables à ces conflits, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

Rome Statute of the International Criminal Court, signed July 17, 1997, entered into force July 1, 2002

Article 8 (2)

Article 8 (2)

For the purpose of this Statute, "war crimes" means:

Aux fins du Statut, on entend par « crimes de guerre » :

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

a) Les infractions graves aux Conventions de Genève du 12 août 1949, à savoir l'un quelconque des actes ci-après lorsqu'ils visent des personnes ou des biens protégés par les dispositions des Conventions de Genève :

[...]

[...]

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness,

c) En cas de conflit armé ne présentant pas un caractère international, les violations graves de l'article 3 commun aux quatre Conventions de Genève du 12 août 1949, à savoir l'un quelconque des actes ci-après commis à l'encontre de personnes qui ne participent pas directement aux hostilités, y compris les membres de forces armées qui ont déposé les armes et les personnes qui ont été mises hors de combat par maladie, blessure, détention ou par toute

wounds, detention or any other cause: autre cause :

- | | |
|--|--|
| (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; | i) Les atteintes à la vie et à l'intégrité corporelle, notamment le meurtre sous toutes ses formes, les mutilations, les traitements cruels et la torture ; |
| (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; | ii) Les atteintes à la dignité de la personne, notamment les traitements humiliants et dégradants ; |
| (iii) Taking of hostages; | iii) Les prises d'otages ; |
| (iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable. | iv) Les condamnations prononcées et les exécutions effectuées sans un jugement préalable, rendu par un tribunal régulièrement constitué, assorti des garanties judiciaires généralement reconnues comme indispensables ; |

Issues

[9] The issues are as follows:

1. Did the Board err in concluding, for the purposes of exclusion under Article 1F(a), war crimes could be committed during an internal conflict?
2. Did the Board reasonably determine that the applicant was complicit in committing war crimes?

Did the Board err in law by finding that war crimes could be committed in the context of an internal armed conflict?

[10] The parties agree that the question of whether the meaning of war crimes in Article 1(F)(a) is limited to those offences committed during an international armed conflict is a question of law to which the standard of review of correctness applies (*Bermudez v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 860 (QL)).

[11] Subsection 1F(a) of the *Refugee Convention* states that

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 provision in respect of such crimes.

[12] The Board referred to the *Charter of the International Military Tribunal* for the definition of war crimes. In *Bermudez* at paragraph 12, Mr. Justice MacKay noted that the *London Agreement of 8 August 1945*, along with its annex the *Charter of the International Military Tribunal*, is the foundation documents for the concept of “war crimes”. He noted that while the definition of war crimes in the *Charter of the International Military Tribunal* does not specifically state that it has to take place in the course of an international armed conflict, the context in which it appears suggests this is so. He also made reference to the definition of war crimes in the *Criminal Code* and concluded that “war crimes” have come to be understood internationally in the context of international conflict.

[13] Here the Board made no reference to the interpretation of war crimes set out in *Bermudez* and simply assumed that war crimes could be committed in an internal conflict. This was an error of law. The respondent submits that the error is one of form and not substance arguing that *Bermudez* is no longer good law and that the definition of war crimes has changed so as to include acts committed during internal conflicts. The respondent bases this argument on two grounds. First, international treaty law, specifically the *Rome Statute of the International Criminal Court* (Rome Statute), recognizes that war crimes are not limited to international armed conflicts. Second, the section of the *Criminal Code* referred to by MacKay J. in *Bermudez* has since been repealed and has been replaced by the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 which defines war crimes more broadly as “acts committed during an armed conflict”.

[14] There is no question that the Rome Statute is an international instrument which can be used to interpret the crimes in article 1F(a) (see *Harb v. Minister of Citizenship and Immigration*, 2003 FCA 39 at paras. 7-8 and the UNCHR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, dated September 4, 2003) and the acts attributed to the applicant, namely the torture and murder of “prisoners of war” (Shining Path and/or Tupac-Amaru guerrillas), fall within the list of acts considered war crimes in an internal conflict (article 8(2)(c)(i) of the Rome Statute).

[15] The applicant acknowledges that the acts attributed to the applicant would be considered war crimes under the definitions set out in the Rome Statute but

submits that the Rome Statute cannot be applied to the acts attributed to the applicant because it came into force on July 1, 2002 and the acts attributed to him took place between 1985 and 1992. In effect, the applicant submits that the definition of war crimes provided in the Rome Statute cannot be applied retroactively. The applicant notes that the Rome Statute contains a retroactivity clause. Moreover, the applicant relied on *Ramirez* for the proposition that a person must have the *mens rea* for an international crime in order to be found excluded from refugee protection (*Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 109 (QL)) and submits that this principle extends such that a person cannot have the *mens rea* to commit an international crime if he is not aware that the acts in question are international crimes.

[16] I agree with the applicant that the definitions in the Rome Statute cannot be applied retroactively. The definition of “war crimes” set out in *Crimes against Humanity and War Crimes Act* supports the applicant’s argument. It provides that that:

‘war crime’ means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission (emphasis added)

[17] Since the Rome Statute was not part of international law at the time of the commission of the acts in question reference should not be made to how it defines war crimes for the purpose of determining whether the acts attributable to the applicant constitute war crimes.

[18] This interpretation is supported by the principle in international criminal law of non-retroactivity. This principle is described as the “second corollary of the principle of legality. It means that a person cannot be judged or punished by virtue of a law which entered into force after the occurrence of the act in question” (John R.W.D. Jones and Steven Powles, *International Criminal Practice*, (Ardsley, N.Y.: Transnational Publishing, Inc., 2003 at § 6.1.21).

[19] Furthermore, I conclude that the definition of war crimes provided in the Rome Statute cannot be used to determine whether the acts in question constitute war crimes because they were committed before the Rome Statute was part of international law.

[20] Consequently, in assuming that war crimes could be committed during an internal conflict, the Board erred in law. This error was determinative given that the current definition of war crimes in international law cannot be applied retroactively. This application for judicial review will be allowed and the matter should be sent back to a different Board to be re-determined.

[21] The applicant asked the Court to certify two questions, the first one being whether a refugee claimant be excluded under section 1F(a) of the *Refugee Convention* for commission of war crimes for acts that took place during an internal

armed conflict or insurgency prior to the adoption and/or coming into force of the Rome Statute of the International Criminal Court.

[22] In order for a question to be certified, it must be a question that transcends the interests of the immediate parties to the litigation, contemplates issues of broad significance or general application and must be determinative of the appeal (*Liyanagamage v. Minister of Citizenship and Immigration*, [1994] F.C.J. No. 1637 (QL)).

[23] I have no doubt that this is a question of serious general importance that transcends the interests of the immediate parties. If definitions of war crimes provided in the Rome Statute can be applied to acts committed before the Rome Statute was signed, this would have serious impact to determinations of exclusion and presumably would result in more claimants being found to be excluded from refugee protection. The respondent submits that the question should not be certified unless it is determinative of the appeal and submits that if Court does not uphold the Board's evidentiary findings with respect to the applicant's complicity in the relevant acts than the question about the Rome Statute would not be determinative. For this reason, I have analysed the second issue before the Court: whether the Board reasonably concluded the applicant was complicit in committing war crimes.

Did the Board reasonably determine that the applicant was complicit in committing war crimes?

[24] The applicable standard of review for the Board's determination of whether the applicant is excluded under article 1F(a) for complicity in committing war crimes is reasonableness *simpliciter*. The question before the Board is one of mixed fact and law (*Petrov v. Minister of Citizenship and Immigration*, 2007 FC 465). While the Board has relative expertise in making findings of fact, such as what the applicant's role was in the armed forces, the Court has more expertise in determining the applicable criteria to determine whether the applicant was complicit and the proper application of the law. These factors point to a standard of reasonableness *simpliciter*.

[25] The burden of proof is on the Minister to show that there are "serious reasons for considering" that Mr. Ventocilla committed war crimes (see *Ramirez, Moreno v. Minister of Employment and Immigration*, [1994] 1 F.C. 298 (F.C.A.), *Sivakumar v. Minister of Employment and Immigration*, [1994] 1 F.C. 433). It is trite law that this standard requires more than mere suspicion or conjecture but less than the civil standard of proof on a balance of probabilities as explained in *Sivakumar*.

[26] In *Petrov* at paragraph 53, Mr. Justice Shore set out six factors which are used in determining whether an individual is considered an accomplice:

- (1) Nature of the organization;
- (2) Method of recruitment;
- (3) Position/rank in the organization;
- (4) Knowledge of organization's atrocities;
- (5) Length of time in the organization;
- (6) Opportunity to leave the organization.

Shore J. noted the reasonableness of a decision could be evaluated with reference to how the Board dealt with these factors.

[27] The Board noted the applicant had a high position in the organization, noting that he held the position Chief of Security and that he commanded 150-200 subordinates. The Board also noted that the applicant served in the air force for over 30 years and that he chose to leave the organization only when he retired.

[28] The Board did not make any findings of fact with respect to the applicant's knowledge of the atrocities committed by the armed forces. Its conclusion that the applicant had knowledge of the atrocities was based on inferences and what was essentially a negative credibility finding.

[29] The applicant submits that a finding of complicity in committing war crimes cannot be based on a negative credibility finding. He relies on the decision *La Hoz v. Minister of Citizenship and Immigration*, 2005 FC 762, wherein Mr. Justice Blanchard held:

[21] In my view, the Board's decision to exclude the male applicant from application of the Convention cannot be upheld because it found he lacked credibility. The burden, however, is on the Crown to establish that there are "serious reasons for considering" that the male applicant committed acts described in section 1F. In this case, the Board seems to have concluded that the male applicant should be excluded because he did not provide convincing evidence that he did not commit these acts. This burden is not on the male applicant. The Board's reasoning on this matter is erroneous and warrants the intervention of this Court, since it erred in law.

[...]

[23] The evidence must show that there are serious reasons for considering that the male applicant committed crimes against humanity. The Board did not address this issue. It did not establish which war crimes the male applicant allegedly committed. It simply referred to war crimes in broad terms and found that the Peruvian army frequently uses torture and commits acts of violence against civilians in areas where Tupac Amaru and Shining Path rebels are found. Since it ruled that the male applicant's testimony was not credible, the Board concluded that, because he was a member of the Peruvian army, he was responsible for these crimes. In my view, these reasons are not sufficient to establish that the male applicant committed crimes against humanity.

[30] In my view, *La Hoz* is directly applicable. The Minister cannot meet his burden through inferences, particularly ones that are not reasonably drawn.

[31] In *Petrov*, the Board found that the applicant had knowledge of the torture being committed within his unit because the applicant admitted to handing over criminals other soldiers and admitted to hearing prisoners being beaten or tortured. ” In my view, in that case the Board reasonably made an inference as to the knowledge the applicant had based on a finding of fact. Here there are no such facts on which to base an inference that the applicant knew of the atrocities committed by the armed forces. In such circumstances it was unreasonable for the Board to conclude that the Minister had met his burden. The Board’s determination was not based on any evidence and consequently cannot be upheld.

[32] This judicial review should be allowed on both issues. Having found the Board’s decision on the second issue cannot be upheld, the first issue is not determinative and consequently the first question proposed for certification should not be certified. The second question proposed for certification will not be certified as it does not meet any of the criteria for certification.

JUDGMENT

THIS COURT ADJUDGES that the application for judicial review is allowed and this matter is returned to a different Board for a new hearing to be determined in accordance with the above reasons.

“Max M. Teitelbaum”

Deputy Judge