

Bermudez v. Canada (Minister of Citizenship and Immigration)

Between

Ivan Antonio Bermudez, Ana Bermudez, Ivan Bermudez, Grethell Bermudez, and Bryan Bermudez, applicants, and
The Minister of Citizenship and Immigration, respondent

[2000] F.C.J. No. 860
Court File No. IMM-1139-99

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

Heard: November 10, 1999.
Judgment: June 13, 2000.
(17 paras.)

Aliens and immigration — Grounds, well-founded fear of persecution — Right to a fair hearing — Disqualifications, crimes against humanity — Evidence — Appeals or judicial review.

This was an application for judicial review by the Bermudez family of the finding that they were not Convention Refugees. In the case of the mother and the minor children, the basis for the finding was that they did not have a well-founded fear of persecution. With respect to the father, although he had a well-founded fear, he was excluded from status as a Convention Refugee, as he was a person who had committed war crimes while in Nicaragua. With the exception of one of the minor children, the family were Nicaraguan citizens. The family argued that the CRDD violated the principles of fundamental justice because it gave no notice that it was considering a finding under war crimes and that it erred in law in its consideration of whether the father was involved in war crimes. The facts as disclosed at the hearing did not prima facie disclose potential war crimes, but rather crimes against humanity. The alleged activities of the father had to do with the mistreatment of prisoners in the course of a civil war.

HELD: Application allowed. The CRDD made a reversible error of law when it mis-applied the test for war crimes. It should have proceeded, in view of its concerns, under the law concerning crimes against humanity. In addition, the CRDD violated its duty of fairness when it failed to give the family proper notice of the ground on which exclusion was determined. The CRDD made an erroneous determination of the law in relation to war crimes. Crimes against humanity and war crimes were sufficiently different to require different evidence and argument and different submissions would be expected in response. The issue of crimes against humanity may have been reasonably

foreseeable, but war crimes were not reasonably foreseeable from the circumstances. War crimes have come to be understood internationally in the context of international conflict. The ill-treatment of civilians as a war crime was limited to crimes against the population or in the territory of a country other than that of the perpetrator, in the course of an international war. That was not the case here. The applicant may have committed crimes against humanity, but not war crimes. Although the claims of the mother and children were treated independently, their claims were not entirely distinct from that of the father. In the circumstances, it was appropriate that the claims of the whole family be reconsidered.

Statutes, Regulations and Rules Cited:

Charter of the International Military Tribunal, Article 6.

Criminal Code, s. 7(3.76).

London Agreement.

[Quicklaw note: Supplementary order and order was released June 8, 2001. [See [2001] F.C.J. No. 963.]

Counsel:

Micheal Crane, for the applicant.
Martin Anderson, for the respondent.

1 **MacKAY J.** (Reasons for Order):— The applicants seek judicial review of a decision of the Convention Refugee Determination Division ("CRDD"), dated 12 February 1999. In that decision, the CRDD found that the female applicant and her minor children, one of whom was born in the United States, were not Convention refugees as they did not have a well founded fear of persecution. In the same decision, the CRDD found that the male applicant did have a fear of persecution if he were to return to Nicaragua, but that he was excluded from status as a Convention refugee by Article 1(F)(A) as a person who had committed war crimes while in Nicaragua.

2 The applicants are Nicaraguan citizens, except for the one child born in the United States. The male applicant had been a member of the Nicaraguan Police and had participated in the interrogation of persons who had been arrested for political offenses. According to his submissions, he had not been a volunteer member, but was assigned to police duty. The CRDD found that he had joined the Sandinistas willingly, first as a guerilla. According to his testimony to the CRDD, he opposed the actions of the police on more than one occasion and he was detained for his objections. Once, he deserted from the police and when he was found about six months later, he was again detained for three months before being returned to police duties. His passport was taken from him. He

departed from Nicaragua in May 1989 after the state of emergency was lifted in that country.

3 The female applicant left the country in 1988, leaving her children then in the care of relatives. Only later were the children able to join her and her husband in the United States, where the family lived for a time before coming to Canada. She claimed to fear persecution in Nicaragua because of perceptions of others about her political opinion arising from her father's earlier political affiliation which had led to her own detention on a number of occasions, and because she had worked for some years in the Ministry of the Interior and Police headquarters of the Sandinistas.

Issues

4 The issues in this application for judicial review are set out in the memorandum of the applicant, as follows:

1. The CRDD violated the principles of fundamental justice because no notice was given that the CRDD was considering a finding under war crimes when counsel had only been prepared for submissions on crimes against humanity.
2. The CRDD erred in law in its consideration of whether the male applicant was involved in war crimes. Activities alleged cannot be war crimes in law.
 - (A) The context was not international, as required by law for a determination of a war crime.
 - (B) In law, a war crime cannot be committed against those of your own nationality.
 - (C) Alleged crimes were against political/criminal prisoners, not prisoners of war.
3. The CRDD erred in law in its consideration of duress in that it
 - (A) did not fully consider duress.
 - (B) misunderstood uncontradicted evidence relating to duress.
 - (C) did not consider defence of superior orders
 - (D) erred in requiring proportionality

- (E) did not consider if alleged mistreatment was to the level required by international law
- (F) considered interrogation simpliciter to be torture
- (G) found that the detention of prisoners was unlawful
- (H) found that unlawful detention of prisoners is a war crime

4. The CRDD did not apply the proper test for complicity.

5 The respondent disputes the applicants' submissions on each issue. In my view, the application may be dealt with on the basis of two principal issues: the failure of the panel to advise in advance that it would consider exclusion on the basis of war crimes, and the panel's understanding of war crimes in the circumstances of this case.

Issue I: Lack of notice

6 From the record and the submissions of the applicant, the CRDD did not give the applicants notice that an exclusion based on the commission of war crimes would be considered. The applicants argue that by not disclosing that it was considering war crimes as a particular activity within clause 1(F)(A) as distinct from crimes against humanity, the CRDD effectively prevented the male applicant from making submissions on that point, violating the panel's duty of fairness.

7 In support of this position, the applicant cites *Malouf v. MCI*¹, a decision of Mr. Justice Gibson. In *Malouf*, the refugee hearing officer gave notice to the applicant that the exclusion clause, particularly Article 1(F)(c) was being considered. With no opportunity given to the applicant to file additional materials, the panel ultimately based its decision on Article 1(F)(b). Justice Gibson held, at paragraph 48 of his reasons:

I am satisfied that this failure to effectively give notice and provide an opportunity to present evidence and make representations at any stage of the proceeding, tied as it was to the failure on the part of the CRDD and the refugee hearing officer to give notice to the Minister and an absence of involvement of the Minister on the Minister's own initiative, amounted to a failure to observe a principle of procedural fairness that goes to the heart of this matter. It is trite law that, in a matter such as this and in circumstances such as those before me, an applicant is entitled to reasonable notice of the issues considered to be central to the tribunal's decision and to an opportunity to respond. Over the two days on which this matter was heard, virtually all of the evidence and argument presented by the applicant related to the Convention refugee status of the applicant as against Lebanon. Only on the first day, and then very briefly and in the absence of

¹ [1995] 1 F.C. 537 (T.D.).

counsel, did the issue of the applicant's criminal record come up for consideration. In effect, the applicant herein was ambushed as to the basis for the CRDD's determination against him.

8 The applicant, in his argument, distinguishes Malouf from Arica v. MEI². In Arica, the applicant argued that the CRDD violated the duty of fairness by not giving adequate notice that it would be considering the "crimes against humanity" exclusion. Robertson J.A. found that the record indicated that the applicant and his counsel were well aware that the exclusion was in issue. The respondent in this case argues that since the possibility of exclusion under Article 1(F)(A) was known to the applicant, the applicant and his counsel had sufficient opportunity to address acts that might lead to exclusion. Further, counsel for the applicant made submissions about these acts, albeit directed to the concept of crimes against humanity, not war crimes. In its decision the CRDD specifically declined to consider whether Mr. Bermudez' activities constituted a crime against humanity.

9 Is the duty of fairness satisfied when the applicant is given general notice that exclusion under Article 1(F)(A) is a possibility, or does the CRDD have to go a step further and inform the applicant which of the three specific exclusions under that subsection are in issue (i.e. crimes against peace, crimes against humanity or war crimes)? In my opinion, the two possible grounds for exclusion in this proceeding under clause 1(F)(A), crimes against humanity and war crimes, are sufficiently different to require different evidence and argument and different submissions would be expected in response. Though this is more closely related to the second issue, the facts as disclosed at the hearing do not prima facie disclose potential war crimes, but rather crimes against humanity. That crimes against humanity may have been in issue was reasonably foreseeable, but war crimes were not reasonably foreseeable from the circumstances.

Issue II: Error of law in CRDD's understanding of war crimes

10 The applicant alleges that the CRDD erred in law in its interpretation of what is a war crime and particularly erred in finding that the applicant was involved in war crimes. The applicant specifically states that the CRDD made an error of law because the alleged actions were not international, were not against citizens of another country and were not against prisoners of war. These three factors would have to be present for the alleged acts of the applicant to be considered war crimes. As they were not, the CRDD erred in its holding.

11 The respondent argues that "war crimes" are not just restricted to the context of international conflict. It cites two cases of this Court, Diaz³ and Gracias-Luna⁴, and one of the Court of Appeal, Ramirez⁵, in support of the proposition that crimes committed

² [1995] F.C.J. No. 670 (C.A.).

³ Diaz v. M.C.I., [1995] F.C.J. No. 623 (T.D.).

⁴ Gracias-Luna v. MCI, [1995] F.C.J. No. 812 (T.D.).

⁵ Ramirez v. MCI, [1992] F.C.J. No. 109 (C.A.).

during a civil war against one's own nationals and the interrogation of prisoners have been held to be war crimes. With respect to counsel, these cases do not stand for such a proposition. None of the cases considered such actions to be war crimes. Gracias-Luna is entirely about crimes against humanity. In the Diaz case, my colleague Mr. Justice Muldoon upheld a CRDD decision that excluded a refugee applicant on the basis of crimes against humanity. In the decision of Ramirez, MacGuigan J.A. dealt with crimes against humanity and war crimes together, for simplicity's sake, and called them "international crimes." It should be noted that in Ramirez, MacGuigan J.A. declined to make a determination of whether a war crime could arise in a civil war.

12 In my opinion, "war crimes" have come to be understood internationally in the context of international conflict. The foundation documents for the concept of the international "war crime" are the London Agreement of 8 August 1945 and the Charter of the International Military Tribunal. Article 6 of the charter defines crimes against peace, crimes against humanity and war crimes:

- (a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing:
- (b) War Crimes: namely, violations of the laws or customs of war. Such violations 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:
- (c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

While the definition of war crime does not specifically state that it has to take place in the course of an international armed conflict, the context in which it appears in the Charter suggests this is so. An inhumane action that would be a war crime during war time may well be a crime against humanity in the absence of international war. In this case, the alleged activities of the applicant have to do with the mistreatment of prisoners in the course of a civil war. The ill-treatment of civilians as a war crime is limited to crimes against the population of or in the territory of a country other than that of the perpetrator, in the course of an international war. This was not the case here.

13 I note that this distinction between "war crimes" and "crimes against humanity" is reflected in the definition in the Criminal Code⁶ of Canada, in which s. 7(3.76) defines the terms as follows:

"crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations;

"war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

* * *

"crime contre l'humanité" Assassinat, extermination, réduction en esclavage, déportation, persécution ou autre fait -- acte ou omission -- inhumain d'une part, commis contre une population civile ou un groupe identifiable de personnes -- qu'il ait ou non constitué une transgression du droit en vigueur à l'époque et au lieu de la perpétration -- et d'autre part, soit constituant, à l'époque et dans ce lieu, une transgression du droit international coutumier ou conventionnel, soit ayant un caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations.

"crime de guerre" Fait -- acte ou omission -- commis au cours d'un conflit armé international -- qu'il ait ou non constitué une transgression du droit en vigueur à l'époque et au lieu de la perpétration -- et constituant, à l'époque et dans ce lieu, une transgression du droit international coutumier ou conventionnel applicable à de tels conflits.

14 It is my opinion that the CRDD made an erroneous determination of the law in relation to war crimes. The applicant may have committed crimes against humanity, but not war crimes. Following the Pushpanathan⁷ analysis, I conclude that this Court should not accord the CRDD deference on a matter of law. The issue raised is a question of law. The standard is correctness and, with respect, in my opinion, the board erred.

⁶ R.S.C. 1985, c. C-46.

⁷ [1998] 1 S.C.R. 982

Conclusion

15 It is my opinion that the CRDD made a reversible error of law when it mis-applied the test for war crimes. It should have proceeded, in view of its concerns, under the law concerning crimes against humanity. In addition, the CRDD violated its duty of fairness when it failed to give the applicants proper notice of the ground on which exclusion was determined i.e., war crimes as a particular ground. The other issues raised by the applicant need not be determined.

16 While the claim of Mrs. Bermudez, and indeed of the three children were all treated by the CRDD panel as individual claims, independent of one another, in my opinion their claims are not entirely distinct from that of Ivan Antonio Bermudez, the husband and father of the other claimants. In the circumstances of this case, it is appropriate that the claims of all these applicants be reconsidered.

17 For these reasons, an Order issues returning the applicants' applications to a differently constituted panel of the CRDD for redetermination, with adequate notice to the applicants of the grounds for any exclusion from the status of refugees sought by the Minister or to be considered by the new panel.

MacKAY J.