



IMMIGRATION AND REFUGEE BOARD
(REFUGEE DIVISION)

LA COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
(SECTION DU STATUT DE RÉFUGIÉ)

IN CAMERA
HUIS CLOS
T98-07418

CLAIMANT(S)

XXXXXXXXXXXXXXXXXXXXXXX

DEMANDEUR(S)

DATE(S) OF HEARING

**October 14, 1999
December 7, 1999
March 3, 2000**

DATE(S) DE L'AUDIENCE

DATE OF DECISION

September 28, 2000

DATE DE LA DÉCISION

CORAM

**Gregory James
Milagros J. Eustaquio**

CORAM

FOR THE CLAIMANT(S)

**Raoul Boulakia
Barrister and Solicitor**

POUR LE(S) DEMANDEUR(S)

REFUGEE CLAIM OFFICER

Neil Willard

AGENT CHARGÉ DE LA REVENDICATION

DESIGNATED REPRESENTATIVE

Nil

REPRÉSENTANT DÉSIGNÉ

MINISTER'S REPRESENTATIVE

Gudrun Leblanc

REPRÉSENTANT DU MINISTRE

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The claimant, XXXXXXXXXXXXXXXXXXXXXXXX, asserts that he would be persecuted if he returned to Guatemala because he deserted from the military in 1988. The Minister's counsel asserts that the claimant is excluded from being a Convention refugee because he allegedly was complicit in a murder while serving in the Guatemalan military, and that he was generally complicit in the brutal repression carried out by the Guatemalan army.

The following assertions form the basis of the claim. The claimant is a Mayan. He was a 17-year-old student when, in 1987, he was travelling on a bus from his family home to Guatemala City where he studied. He was taken from the bus, with others, and forcibly recruited into service, though youths of 17 years and students were both supposed to be exempt from military service. During his service he was subject to rigorous and even brutal training techniques, was sent on missions to spy and inform on civilians in town, was seconded to a politician to provide protection, and was identified as being a candidate for the elite, but criminal, military unit called the "Kaibil". While seconded to the politician he was nearby when three other soldiers murdered a rival politician and a companion. He drove them to and from the location of the murders. He was present in a camp where civilians were being executed, and fearful that he might be required to participate in the torture and execution of civilians, deserted the military and made his way to Mexico. He was in the military for seven months.

The claimant has relied upon his own testimony, and that of two other witnesses: his mother XXXXXXXXXXXXXXXXXXXX; and a former United Nations human rights investigator, XXXXXXXXXX ("XXXXXXX") who worked in Guatemala for 15 months pursuant to the Peace Accords.

Exclusion

My concerns with respect to exclusion arise from two factors. First, the Guatemalan military was, before and during the claimant's membership in the

organisation, a brutal organisation that carried out widespread human rights atrocities. Second, the claimant was present when a serious crime was committed, namely the murder of a local politician and a woman who was also present at the time.

I will deal with these two concerns separately.

Membership in the Guatemalan military

Minister's counsel has submitted that the kinds of assignments given to the claimant suggest that he was trusted by his officers, and therefore was believed by them to support military objectives and strategies. From this the Refugee Division is invited to infer that the claimant was in fact a willing participant in and supporter of the military's objectives and activities.

Minister's counsel also asserts that the Guatemalan military is well known to have committed numerous atrocities during the civil war in that country, over a period that preceded and continued during the claimant's service.

I agree that the Guatemalan military committed numerous atrocities during the civil war. However, I find that the actions of the claimant did not conform to a personal and knowing participation in the persecutory actions of other members of the institution.

I also find that, apart from the murder of the rival politician (which I will deal with separately), the claimant was not personally involved, or complicit, in human right abuses.

I make these findings for the following reasons.

The claimant was a minor when recruited into the Guatemalan military, just before his 18th birthday. He was 18 years and six months old when he deserted. The youth of the claimant is a relevant factor.

The claimant was forcibly recruited into the Guatemalan military, when he technically was not even eligible for service.

The claimant never held a rank that suggested any degree of responsibility for the actions of others.

I find that the fact that the military assigned the claimant to certain tasks is not evidence, standing alone, that he was trusted by the military as sharing the military's ethos,¹ although it may have been that he was trusted to follow orders.

XXXXXX testified that the assignment of personnel to work as spies is indiscriminate.

More importantly, the documentary evidence and the testimony of XXXXXXXX make it clear that recruitment and indoctrination techniques in the Guatemalan military were brutal and highly manipulative. These techniques are clearly intended to break the independence of recruits, including any independent moral scruples. Implicating recruits in human rights abuses is one means of accomplishing this. I find that, on a balance of probabilities, the Guatemalan military deliberately sought to implicate some recruits in human rights abuses (from informing to torture and murder) as a deliberate means of psychological manipulation, intended to significantly compromise the recruits' ethics, and inure them to abuse of civilians and prisoners.

Moreover, superiors in all fields generally seek to identify development potential early. In order to test that potential, or to see it realised, superiors may engage in certain strategies to train, co-opt, and mould the new recruit. In repressive and brutal organisations like the Guatemalan military, they may seek to break the recruit down (including his ethical framework), in order to build him up again on the institution's own model.

The claimant testified that he was not persuaded by the efforts to indoctrinate him that Mayans were bad, that the guerrillas were necessarily Mayans, and that all those

¹ That involvement in acts is not necessarily evidence of trust is found in, among other places, the following reference to Guatemala's "elaborate information network":

The common perception is that those who act as *orejas* [informants] are trying to clear their own names from suspicion or are paid for the information they pass on.

outside the military were dangerous and likely the enemy. In other words, he did not adopt the ethos of the Guatemalan army. In this respect, I found him quite articulate and persuasive.

Those at risk of being drawn into complicity in human rights abuses are expected to take reasonable steps to avoid that possibility. Generally speaking, those in the military can be expected to desert, if there are no internal means of objection. In the Guatemalan military, there was no internal means of objecting to being implicated in such activities. As noted above, it was probably a deliberate strategy to implicate recruits in such activities. That leaves desertion as the only option.

Claimants can only be expected to conduct themselves on the basis of the situation as they understand it. The claimant testified that recruits were shown bodies and told that they were bodies of deserters. The claimant described the manner in which minor breaches of discipline were handled by the Guatemalan military, aspects of which are corroborated in the documentary evidence. The claimant had good reason to believe that the Guatemalan army would show no hesitation in abusing or executing deserters. In these circumstances, a prospective deserter was justified in being circumspect. Having said this, it must also be recognised that, given what is at stake, it would be appropriate for someone who had moral objections to military activities to assume some risk in order to separate himself from that organisation. Waiting for a risk free or perfect opportunity to desert is not consistent with a genuine moral objection to participation in that organisation.

The claimant was in the military for a limited period before deserting, a period of seven months. I am persuaded that the claimant did not have a reasonable opportunity to desert prior to that point. He was almost always subject to some form of supervision, and when he was alone (such as when he was acting as an informant) geography made it very difficult to desert and survive. For example, the claimant and XXXXXXXX both testified

that there was only one road in and out of San Francisco, one of the places where the claimant was ordered to gather information.

I also note that there is no evidence that he was unsuccessful in avoiding direct participation in any abuses up to that point. Although no recruit, knowing that they may be implicated in abuses, should wait until after they have been implicated to desert, the urgency of doing so may also be mitigated by their ability to avoid being so implicated.

The evidence of abuses that occurred during the seven months of the claimant's service is limited to testimony from the claimant himself. The documents set out allegations of wrongdoing in the Guatemalan military. However, Minister's counsel did not refer to evidence of abuse that was specific with respect to place and time, and did not link any reported incidents directly to the claimant personally.

For these reasons, I find that the claimant's membership in the Guatemalan military is not evidence, standing alone, that he was a supporter of military objectives or strategies during the civil war. As such I do not find him to be complicit in actions in which he was not personally involved, and especially not those that did not take place during his period of service.

Was the claimant personally involved or implicated in any human rights abuses (aside from the murder of the rival politician)?

The claimant was sent on missions to spy on civilians, to ascertain their political views or collect information about guerrilla activities. These civilians might have been subject to harm. The claimant testified that he gave no useful information to the authorities because he did not support their objectives. I find it credible that he did not pass harmful information along, as I have no valid reason to doubt the testimony of the claimant.

The Minister's counsel pointed out that the claimant was identified as a possible recruit to the Kaibil. However, although the claimant was a candidate for the Kaibil unit, he was not yet a member of that unit, and therefore cannot be associated with its crimes.

The claimant was in a camp where, he believed, civilians were being tortured and killed. His duties, prior to his desertion, did not require him to participate directly or indirectly in those abuses. He was guarding the perimeter of the camp. He was neither guarding nor transporting prisoners. He was never required to deal with any prisoner who was seeking to escape. An order to guard the perimeter of a camp against intruders is a legitimate military order – it is not an order that is manifestly unlawful.

Although it is not definitive, XXXXXXXXX enquiries of human rights groups in Guatemala disclosed no allegations concerning the claimant.

I find that there are not serious grounds for believing that the claimant was personally involved or implicated in any military crimes during the seven months of his service, aside from, possibly, the murder of the rival politician (which is being dealt with separately). It cannot be said that he had personal and knowing participation in any such crimes.

For these reasons I find that the claimant's short membership in the Guatemalan military is not sufficient to make him complicit in crimes against humanity carried out by the organisation during the civil war.

Murder of rival politician

During his service, the claimant was assigned to protect a local politician, XXXX XXX (“XXX”), a man known to be associated with the military. While working with XXX, he was subject to the politician's direction. He testified that his duties included watching crowds during campaign meetings, and watching the XXX residence from outside the house.

Other soldiers were also assigned to this duty at the same time as him. On one occasion, three of the other soldiers were summoned to talk to XXX. The claimant was not present for that discussion, but XXX then ordered him to drive the three other soldiers to a specified location. When they arrived, the three soldiers left the vehicle and went out

of sight. The claimant heard two shots fired, and the three soldiers returned to the vehicle. Apparently, the soldiers had killed a rival politician, on the orders of XXX.

The claimant later learned that they had also killed a female companion of the murdered politician. Ironically, it turned out that she was a niece of XXXX. When XXXX learned this he was extremely angry and checked the claimant's weapon. When he found it contained all the bullets, he let the claimant go, as the claimant was only a driver and it appeared the claimant had not fired his weapon. The claimant believes that XXXX had the other three soldiers killed.

The Minister's counsel asserts that the claimant's involvement in this attack also gives rise to exclusion.

The most important part of this analysis will be the findings of fact. What, on a balance of probabilities, did the claimant know and do during this episode?

The claimant says that he was not told why he was driving the soldiers to this location, but only to drive.

However, the claimant also said that the soldiers discussed their mission in the vehicle, while he was driving them to the site. He did become aware of their purpose before he had delivered them to the site of the crime.

The Federal Court of Appeal has held that "mere presence at the scene of an offence is not enough to qualify as personal and knowing participation" unless the onlooker has an intrinsic connection with the persecuting group. Complicity requires the "existence of a shared common purpose and the knowledge that all of the parties have in it".²

The murder of a rival politician is not an act that a mere recruit can be reasonably expected to anticipate. The army was involved in numerous crimes, such as the killing of civilians suspected of supporting guerrillas, the execution of guerrillas, torture to obtain information, etc., all of which recruits might have anticipated being asked to participate

in. These activities take place in anticipation of, during, and in the aftermath, of combat. Although assassinations of rival politicians were known to occur with disturbing frequency in Guatemala, is not something that a mere recruit can be expected to have anticipated. The size of the military and the sensitivity of such events made it highly unlikely that any particular recruit would be expected to participate in such a crime.

In this case, the claimant did not find out the purpose of the trip until he was already on the way.

I found above that the claimant did not share the ethos of the Guatemalan military. That finding is not disturbed by his presence nearby the murders, because it could not have been reasonably anticipated and he did not learn of it until it was about to happen.

I have also found that he left the military at the first available opportunity.

I find that his presence was more akin to that of a mere onlooker than a participant.

For these reasons, I find the claimant did not share a common purpose with XXXX or the other three soldiers. His mere presence at the scene is not enough to make him complicit in 1F(a) or 1F(b) crime and therefore he is not excluded from the Convention refugee definition.

Inclusion

The claimant says he is now afraid to return to Guatemala because he is a former deserter, and for this reason may be killed upon his return. His fear is increased by the assertion that he shared information about the Guatemalan military with human rights activists while in Canada, and the Guatemalan military may have become aware of that.

I find the claimant's fears of being harmed because he shared information with human rights activists here in Canada to be speculative. There is insufficient evidence to establish that the claimant's activities in Canada are or would become known to hostile

² *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.).

persons in Guatemala. The claimant himself is not aware that that information has been shared.

However, that the claimant deserted does, in the circumstances of this case, give rise to a serious possibility of persecution upon his return.

The claimant's mother testified that since his departure the military has come to her home looking for him and his brothers on a number of occasions. In 1999, prior to her departure for Canada, she had such visits.

Although the documentary evidence is largely silent on the question of treatment of deserters, XXXXXXXXX testimony was very helpful. He testified that during the three years that he was in Guatemala he was exposed to many Guatemalans including many who were reporting human rights violations. He knew no one who identified himself as a deserter who had returned to Guatemala. This may serve to explain the absence of reports of deserters having difficulty. He testified that the harsh code of the Guatemalan military is still enforced in extreme ways.

Although there have been elections, the most recent ones returned to office a party associated with many of the crimes of the 1980s.

XXXXXXX testified that the military still keeps tabs on those perceived to be political enemies.

There have been important changes in Guatemala since the claimant's departure. However, in the circumstances of this claim I am satisfied that, on a balance of probabilities, the authorities are still interested in him (or would become interested in him) and that there is a serious possibility that they will kill him if he returns to Guatemala. Under the circumstances, his desertion would be perceived to be an expression of political opinion.

Conclusion

For these reasons, I determine that XXXXXXXXXXXXXXXXXXXXXXXX is a Convention refugee.

"Gregory James"

Gregory James

Concurred in by:

"Milagros J. Eustaquio"

Milagros J. Eustaquio

DATED at Toronto this 28th day of September 2000.

KEYWORDS - REFUGEE DIVISION - EXCLUSION CLAUSES - ART. 1F(a) - ART. 1F(b) - CRIMES AGAINST HUMANITY - SERIOUS NON-POLITICAL CRIME - MILITARY SERVICE - DESERTERS - ACCOMPLICES - MALE - POSITIVE - GUATEMALA