Date: 20080501

Docket: IMM-1922-07

Citation: 2008 FC 566

Ottawa, Ontario, May 1, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicants

and

HECTOR MARTIN CORTEZ MURO
DIEGO ENRIQUE CORTEZ ALVARADO
MARIA EUFEMIA ALVARADO ROJAS
JASON MARTIN CORTEZ ALVARADO
KEVIN DAVID CORTEZ ALVARADO

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This case involves a former Peruvian naval cadet and whether he should be excluded from Canada because he was a member of an organization which had committed crimes against humanity.

[2] The Immigration and Refugee Board (Board) hearing this judicial review became somewhat muddled, distracted and mired in technical arguments about the amendments to the Personal Information Form (PIF) and whether such amendments should have been permitted. However, the Board did not lose its way in dealing with the important subject matter.

[3] The important matter before the Board was whether the principal Respondent, Hector Martin Cortez Muro (his family members were also claimants but their situation is not germane to this issue), was complicit in crimes against humanity by virtue of membership in an organization that committed such crimes. There was no evidence that Cortez Muro committed any crimes personally nor did he direct or order such crimes.

II. BACKGROUND

[4] The Board found that the Respondent was a person in need of protection and that finding is not challenged here. The facts are useful only to set out the context for the consideration of whether the Respondent should be excluded from protection.

[5] The basis of the Respondent's claim was that members of the Peruvian terrorist group "Shining Path" had set out to kill him. The reason for this threat is that the Respondent, while serving in the navy, was involved in the capture of some terrorists who, when released or after their escape, systematically targeted Cortez Muro and other members of his unit for assassination. The Respondent sought protection from the military after a number of his colleagues had been killed.

[6] The Board accepted his evidence and further found that state protection for him was inadequate. The Board also found that the Respondent did not have a viable IFA given the Peru-wide presence of the Shining Path.

Exclusion

[7] The other issue before the Board, and the principal one before this Court, was that of complicity in war crimes. Towards that end, the Solicitor General took the unusual step of filing a Notice of Intervention so as to participate in the Board's hearings.

[8] That Notice raised the issue of the potential for exclusion under Article 1F of the Convention. It is important to note the scope of that Notice, which reads in part:

> "The Solicitor relies on the following elements of fact and/or law:
>
> 1. The claimant has indicated that he was in the Peruvian navy from September 1984 to February 1988, he was also a member of a unit called "Caiman 20" and "Caiman 27".
>
> 2. Documentary evidence describes the serious violations of human rights committed by the Peruvian navy during that period which can be characterized as crimes against

> humanity, war crimes and /or acts contrary to the purposes and principles of the United Nations."

Naval Service

[9] Mr. Cortez Muro joined the Peruvian navy in October 1984 as a "student of the 1st cycle" (the Canadian equivalent of an officer cadet) and was subsequently promoted to the 2nd and 3rd cycle over the course of the following two years.

[10] Due to the emergency situation in Peru in 1986 involving the Shining Path, he was sent to the Los Cabitos military base in Ayacucho.

[11] The Respondent was assigned to a naval unit "Caiman 20" and as part of his duties, he engaged in searches for terrorists. At one point, he was assigned to guard four suspects and was ordered to abuse those prisoners, which he refused to do. He claimed that he was arrested upon return to the naval school in Lima and was confined to barracks for a month as a result of his refusal to follow orders.

[12] The Respondent continued his training and was later assigned to "Caiman 27" in 1987. While patrolling the Apurimac River, the Respondent and his unit were involved in a gunfight with the Shining Path resulting in the death of 15 guerrillas and one soldier and the capture of 18 other guerrillas. The Respondent, having fractured his ankle in the battle, was assigned to guard three prisoners who would later become his persecutors.

[13] The Respondent claimed that upon his return he was discharged from the naval school for missing his exams while on assignment to the Caiman units. He was later reinstated because the assignment was contrary to the military regulations which provided that more senior cadets were to be assigned to that kind of duty.

[14] The Respondent was eventually discharged from the navy in 1988 with full benefits. It should be noted that the Respondent had originally volunteered for military service.

[15] Finally, the Respondent claims that he did not notice, was not aware of, and did not participate in any abuse, torture or other mistreatment of prisoners during his service.

Personal Information Form (PIF)

[16] When the Respondent came to Canada and applied for protection, he retained the services of a lawyer and an interpreter working under that lawyer. Mr. Cortez Muro claims to have fired the lawyer in February 2005 after he found out that the PIFs which were filed by his former lawyer with the help of the translator did not contain an accurate translation of his narrative.

[17] The first PIF was signed on June 16, 2004 – part of the document was typed and part was written in the handwriting of the translator. The Respondent signed a "Declaration A" which essentially states that the Respondent affirms the contents of the PIF and understands English. This is an obvious error as neither the Respondent nor his wife could speak any English.

[18] The second PIF narrative was filed on January 18, 2005 which contained minor amendments to the original. This time, the appropriate “Declaration B” with regard to translation and interpretation was executed.

[19] At the original Board hearing scheduled for February 8, 2005, the former lawyer attended but was allowed to leave after the Respondent explained the situation of having fired the lawyer. The Respondent claimed that the PIFs had not been read to him and that he did not understand English. He claimed that he signed whatever he was told to sign by the lawyer. The Respondent’s wife also testified to essentially the same effect. The hearing was adjourned to allow the Respondent to obtain new counsel.

[20] For the third time, the PIFs were amended on April 8, 2005. A number of changes were made in regard to the information about Cortez Muro’s military service and the form contained an extended narrative giving more details about his involvement with the navy, his training and subsequent participation in areas of combat.

[21] The central issue with respect to the PIFs is whether or not the changes made between the first and third versions were a mere elaboration of the core of the Respondent’s claim or whether it constituted a completely different narrative. This issue is essentially one of credibility, both as to the reasons for the various PIF versions and as to the veracity of the events described or elaborated upon.

Board's Decision

[22] In the Board's decision rendered April 26, 2007, the Board found that the third PIF was a mere elaboration of incidents referred to in the first two PIFs. The Board also accepted the affidavit evidence of third parties corroborating Cortez Muro's explanation for making the changes. There was a considerable question raised as to the nature and the quality of the activities of the former counsel.

[23] The Board noted that there were a number of obvious errors between the first PIF and the third, errors of inconsistency on the face of the documents and errors which were clearly mistakes.

[24] The Board rejected the Applicants' contention that Cortez Muro was attempting to recast his story and essentially found as a matter of credibility that the amendments were made simply to provide more detail of his involvement and activities with the navy.

[25] The Board further found that the Minister had failed to meet the burden of proof in respect of the exclusion under Article 1F(a). The Board noted that the Respondent had given his evidence in a straightforward manner without hesitation and without omissions or exaggeration. The Board accepted his claim that he was not involved in atrocities and he was not aware of any crimes against humanity committed by naval personnel during his service.

[26] In considering the issue of the Respondent's complicity in atrocities during his military service, the Board considered the factors established in the jurisprudence including the nature of the organization, its method of recruitment, the Respondent's rank, length of service, opportunities to leave and knowledge of the crimes of the organization. The Board also examined the evidence with respect to the Peruvian navy as an organization having a limited and brutal purpose.

[27] As to findings of fact, the Board found that there was no documentary evidence presented by the Minister to indicate that the Peruvian navy was a terrorist organization or had a limited and brutal purpose. It relied on *Ramirez v. Canada (Minister of Employment and Immigration) (C.A.)*, [1992] 2 F.C. 306, which held that membership in a military organization that was involved in armed conflict with guerrillas (such as the Shining Path) and is involved in some human rights abuses is not sufficient in and of itself as a basis for exclusion. The Board further found that as for rank, recruitment and opportunities to leave, Cortez Muro was a student at all times during his service in the navy, that he joined voluntarily because of his sense of civic duty, and finally that he was only engaged in combat with armed guerrillas and was ultimately discharged due to his physical incapacity.

[28] In respect of Cortez Muro's knowledge of atrocities, the Board reviewed in detail the evidence relied upon by the Minister's counsel to establish a constructive knowledge on Cortez Muro's part and summarized the argument as being based on media reports and public debates which Cortez Muro would not have had access to since he was serving in remote areas of Peru. In

the result, the Board held that Cortez Muro's membership in the Peruvian navy was not sufficient in itself to find complicity.

III. ANALYSIS

[29] As indicated earlier, there are two principal matters for review. The first relates to the changes to the PIF, the substrata of that argument being issues as to the former counsel's competence and integrity. The second issue is that of complicity in crimes against humanity including the issue of the burden of proof with respect to complicity. In particular, the Minister argues that the Board erred in not considering the activities of Cortez Muro's naval units (Caiman 20 and 27) and that it was this organization that had a limited and brutal purpose.

Standard of Review

[30] With the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Court has clarified that there are only two standards of review - reasonableness regarding issues of fact and mixed fact and law and correctness on issues of law and procedural fairness. The standard of reasonableness requires the Court to take into account a number of factors including the nature of the Board, its expertise, and its opportunity to observe witnesses, all of which are relevant in this case. To the findings with respect to the PIF, these are largely questions of fact. As to the question of complicity, this is an issue of mixed fact and law which is also subject to standard of review of reasonableness.

Findings in respect of Personal Information Form (PIF)

[31] This issue was, for purposes of argument, divided into the question about the changes to the PIF and questions about the former lawyer's competence and integrity. In reality, those two issues directly relate to Cortez Muro's credibility and therefore should be considered as one issue.

[32] As stated earlier, the Board essentially found that the third PIF was an elaboration of incidents already referred to in the first PIF narrative. The Board further concluded that Cortez Muro made the amendments for the sole purpose of correcting mistakes and to add more details to the essential core of the story.

[33] In this regard, the Board is making findings of credibility as to Cortez Muro's explanation for the initial errors in the first PIF. The Board was in a far better position to assess the credibility of the witness than this Court and considerable deference is owed to the Board in this regard.

[34] Further, a comparison of the three PIFs in issue makes it clear that a reasonable person could come to the conclusion to which the Board came. Given the Supreme Court of Canada's explanation in *Dunsmuir* that a reasonable decision is one where the decision maker can choose one of a range of reasonable results, the Board's credibility finding with respect to Cortez Muro's explanation is a reasonable one.

[35] It would have been difficult for the Board to have reasonably rejected the Respondent's explanation in view of the Board's characterization of his evidence as being honest and

straightforward and the fact that the evidence was corroborated by sworn affidavits of two third parties and not otherwise contradicted. Furthermore, the explanation was consistent with the reading of the documents themselves.

[36] The Applicants also challenged the Board's decision in respect of that aspect of the case which turns on the alleged competence and integrity of counsel and to some extent the interpreter hired by the lawyer. The Applicants argued that in the absence of evidence from either the former lawyer or translator, the Board made an unreasonable decision with respect to finding that the cause of the errors in the first and second PIFs was the responsibility of former counsel and the translator.

[37] The courts have been loath to accept explanations from litigants that the blame for all of their problems rests with their counsel. These are easy allegations to make and generally difficult, if not impossible, to rebut. Certainly they are difficult to rebut as allegations of professional negligence in the context of an immigration review board hearing. Justice Pelletier in *Estimé v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 209, Justice Martineau in *Jaouadi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1347, as well as other decisions of this Court, have indicated that the Court is not prepared to accept allegations of wrongdoings against a lawyer without some factual foundation or some form of proceeding.

[38] These cases do not say, however, that in all cases a court would not be prepared to accept, nor should a board be prepared to accept, such allegations only in the circumstances of a complaint to the Law Society or some other proceeding. Indeed, those complaints or proceedings may be as

unmerited as the allegations themselves and would not likely be disposed of by the time the matter came before the decision maker.

[39] There is a critical distinction between this case and those of many other cases involving claims of professional negligence, incompetence and breach of duty. There was a factual foundation for the allegations both in the testimony of the Respondent, the nature of the changes in the PIF and the evidence of two third parties. Whether this resulted from negligence need not be determined by the Board. Indeed, the Board has no jurisdiction to do so.

[40] Under all of these circumstances, I am of the view that the Board's conclusion of accepting the third PIF and accepting the Respondent's explanation for those amendments is reasonable and in accordance with the very function which the Board is to carry out.

Complicity – Crimes Against Humanity

[41] The Applicants' principal contention in respect of this issue of complicity is that the Board erred in failing to analyse whether the naval unit stationed in Los Cabitos could be qualified as an organization with a limited brutal purpose in accordance with the finding in *Canada (Minister of Citizenship and Immigration) v. de Leon*, 2005 FC 1208. It was the Applicants' position that the Board was required, on its own, to break down the general allegation of brutality by the navy into the responsible sub-units, particularly those in which the Respondent served and in respect of the military activities in the geographic locations in which he was situated.

[42] With respect to Cortez Muro's specific navy units, the Applicants relied on documentary evidence of atrocities committed by "the navy" in and around Los Cabitos during the period of the Respondent's service. The Applicants argued that this general documentary evidence was sufficient to characterize an organization such as the Respondent's naval units as being principally directed to a limited and brutal purpose and that a rebuttable presumption of complicity arises once it is established that a person is a member of such an organization.

[43] It is well established law that the burden of proof to establish an exclusion falls on the Minister. In that regard, the Minister is required to give notice of the basis upon which the Minister relies for his claim of exclusion.

[44] The notice in this case identifies the organization said to have committed serious violation of human rights as "the Peruvian navy", not any particular sub-units thereof. It was the Minister who cast the net so wide. It was therefore the Minister's obligation to establish that the Peruvian navy had the limited and brutal purpose. This might be done by building the case up from the conduct of sub-units. The method of proof depends on the circumstances.

[45] A review of the transcript of the submissions of the Minister's counsel indicates, consistent with the Minister's Notice of Intervention, that the Minister was building this case and relying on documentary evidence of atrocities committed by the navy (and army) as the grounds upon which to find the Respondent complicit.

[46] There was no evidence in the record that the naval sub-units, most particularly the “Caiman 20” or “Caiman 27”, were involved in any of the activities which were said to form the atrocities committed by the military. There is also considerable doubt in the record with respect to the issue of burden of proof and whether that burden has shifted. That analysis is dependent upon the Minister showing that a person is a member of an organization which either directly committed the atrocities or had a limited and brutal purpose. The difficulty with the Applicants’ case is that in the absence of any evidence that the units to which Cortez Muro was actually assigned were engaged in atrocities, the only evidence relied upon against the Peruvian navy as an organization is a general statement of the situation in 1984 *prior* to Cortez Muro’s assignment.

[47] Even if the Board should have focused its attention on the navy units in which Cortez Muro served as being the units having a limited brutal purpose, any presumption of complicity is not irrefutable (see *Sungu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1207). The Board made findings which were open to it that rebutted any presumption that would have arisen from a determination that either the Peruvian navy or the particular units involved had a limited brutal purpose. There was no other evidence that Cortez Muro was complicit in crimes against humanity. There was no evidence of any atrocities committed by those units or behaviour which might be considered as grounds for concluding that those units were complicit.

[48] With respect to the general proposition that the Board must identify the particular sub-units of a military organization in its assessment of whether an organization has a limited brutal purpose,

that proposition depends on the allegations made by the Minister. In this case, the Notice of Intervention alleges the Peruvian navy is the targeted organization for that consideration. Having failed to make out a case that the whole of the Peruvian navy had a limited and brutal purpose, in the absence of any direct evidence in respect of the activities of the naval units, the Respondent would have been caught by surprise if there had been any finding that the specific units "Caiman 20" and "Caiman 27" were the organizations with the limited purpose. Indeed, there was no such evidence. There was no documentary evidence that indicated that the specific units to which Cortez Muro was assigned committed any impunable acts and there is no suggestion that he himself directly did so.

[49] Therefore, in view of all of the facts canvassed in this case, the Board, acting upon the Minister's Notice, reasonably considered the evidence in respect of the targeted organization and reached reasonable conclusions, both as to the involvement of the Peruvian navy and of the Respondent in regards to crimes against humanity.

IV. CONCLUSION

[50] In respect of the acceptance of the Respondent's evidence, the Board reached a reasonable conclusion on the evidence before it when it accepted the Respondent's explanation for the multiple PIFs. The Board committed no error, as suggested by the Applicants, nor did it shift the burden of proof in respect of Cortez Muro's justification for acceptance of his PIFs to the Applicants. The Respondent's obligation remained always to establish the grounds for his fear. If the Minister had

issues with respect to that evidence, it was open to the Minister to challenge that explanation and to call witnesses to rebut those of the Respondent.

[51] In respect of complicity, the Board reached a reasonable conclusion, consistent with the Minister's own Notice of Intervention, in examining the allegations that the Peruvian navy committed serious crimes of human rights. It was incumbent upon the Applicants to establish that either the navy as a whole or sub-units of the navy in which the Respondent was involved were complicit. The Board also made a reasonable finding regarding the Respondent's complicity in terms of his rank, length of service and knowledge of alleged atrocities.

[52] Therefore, this judicial review will be dismissed.

[53] The parties made submissions in respect of certified questions. The difficulty with the Applicants' proposed question regarding the Board's obligation to identify the specific units is that it is an academic question given the facts in this case and the basis upon which the Court reached its conclusion. Therefore, no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review will be dismissed.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1922-07
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS THE MINISTER OF CITIZENSHIP AND IMMIGRATION and HECTOR MARTIN CORTEZ MURO DIEGO ENRIQUE CORTEZ ALVARADO MARIA EUFEMIA ALVARADO ROJAS JASON MARTIN CORTEZ ALVARADO KEVIN DAVID CORTEZ ALVARADO
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 17, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	May 1, 2008

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