Date: 20081118

Docket: IMM-1299-08

Citation: 2008 FC 1286

Ottawa, Ontario, November 18, 2008

Present: The Honourable Mr. Justice Beaudry

BETWEEN:

JOSE CARLOS HERMIDA GONZALEZ
RITA MONTERO HERMIDA FERNANDEZ
LUIS ALBERTO HERMIDA MONTERO
CARLOS OMAR HERMIDA MONTERO

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), against a decision of the Refugee Protection Division of the Immigration and Refugee Board (the panel) rendered by Member Girard Landry on February 20, 2008. According to that decision, the principal applicant, Jose Carlos Hermida Gonzalez, was excluded from the definition of refugee within the meaning of paragraphs 1F(a) and 1F(c) of Article 1 of the United Nations' *Convention Relating to the Status of Refugees* (the

Convention). The panel also concluded that the female applicant and her two children were not Convention refugees or “persons in need of protection”.

I. Issues

[2] The following issues are relevant:

1. Did the panel err in concluding that the principal applicant is excluded under the Convention?
2. Did the panel err in finding that the testimonies of the other applicants were not credible?

II. Facts

[3] The principal applicant, Jose Carlos Hermida Gonzalez, 43 years old, and his spouse, Rita Montero Fernandez, 42 years old, have two children: Luis Alberto Hermida Montero and Carlos Omar Hermida Montero, aged 12 and 17 years respectively, all of them Mexican citizens.

[4] Rita Montero Fernandez and her children based their claim for refugee protection on that of the principal applicant.

[5] The principal applicant is a professor and worked for the Mexican army from January 17, 1992, to May 30, 1997, as an infiltrator (mole).

[6] He worked as a chief petty officer in the naval infantry, Special Service Operations, and carried out secret operations against drug traffickers. The applicant would draft reports and hand

them in to his Dependency, which then forwarded them to the Third Naval Zone. This could lead to arrests and detention.

[7] According to him, municipal police and federal highway police arrested and jailed subjects on the basis of the reports he completed, and his role was restricted to infiltrating the criminal underworld.

[8] Following the applicant's transfer to the 4th Dependency, north of Veracruz, he was told by a mole that the captain was one of the heads of a gang of drug traffickers in that region. The captain had allegedly asked him to gather intelligence on his own gang.

[9] On May 30, 1997, on his way home, the applicant was attacked by a group of armed persons. He was injured, and one of his friends, a veterinarian, obtained medicine for him because the applicant did not want to be traced to a hospital.

[10] Next, he learned that two of his co-workers, as well as a corporal who received the reports, had been tortured and murdered. He then decided to desert the army.

[11] Fearing that he would be spied on, and in order to save his life, he settled illegally in the United States from March 3, 1998. Following the events of September 11, 2001, and seeing that his chances of obtaining legal status were minimal, he returned to Mexico on September 4, 2003. He arrived in Canada on July 21, 2004, and claimed refugee protection.

[12] The wife and children lived in hiding at her parent's home in Mexico before leaving the country on August 16, 2005, to join the principal applicant, claiming refugee protection that same day.

III. Impugned decision

[13] The panel concluded that the principal applicant is excluded under paragraphs 1F(a) and 1F(c) of Article 1 of the Convention. The panel also rejected the claims of the other applicants, finding them not to be credible.

[14] During the period in which the applicant did his infiltration work and supplied lists of persons to arrest, the documentary evidence shows that police forces, the army and security services committed abuses and torture. The panel cites excerpts from this documentary evidence and concludes that all services and the army and navy corps have committed abuses, torture, kidnappings and murders.

[15] At the hearing, the applicant testified to the fact that he had no knowledge of these crimes committed by the Mexican army. However, considering the period from 1992 to 1997 during which the applicant wrote his reports and gave names, the panel is of the opinion that it had serious reasons for considering that he was an accomplice in the crimes mentioned in the documentary evidence.

[16] Quoting *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (F.C.A.), the panel applied the six criteria mentioned.

[17] Regarding the first criterion, that is, the method of recruitment, the panel considers that the applicant voluntarily enlisted out of altruism and worked for five years. Next, the nature of the organization: the applicant conducted secret investigations by infiltrating drug trafficking gangs to dismantle distribution networks. Then, he held the rank of chief petty officer in the organization. According to the panel, because of this rank and the time spent in the organization, it was implausible that the applicant was not aware of the abuses committed by the organization. He could have resigned at any time without risk to himself, but he left only when he had no choice.

[18] Therefore, the panel determined that there were serious reasons for considering that the applicant had been an accomplice to crimes against humanity because of his continuous participation over a period of several years in the activities of the Third Naval Military Zone of Mexico.

[19] Regarding the spouse and children, the panel did not believe the female applicant’s testimony to the effect that they remained in hiding for seven years without leaving the house and that the children did not go to school. When the panel asked the spouse what she was afraid of, she was unable to answer. The children told the immigration officer that they were students, thus contradicting their mother, who claimed that they never left the house and that she sometimes gave them courses.

[20] At the hearing, the spouse acknowledged that she had never known what her husband did or why they had fled Mexico. It was only at the hearing on October 10, 2006, that she learned the name of their persecutor. The panel concluded that the spouse's attitude was contrary to that of a person who feared for her life.

IV. Relevant legislation

[21] Article 1 of the 1951 *Convention Relating to the Status of Refugees* reads as follows:

Article 1. Definition of the term "refugee"	**Article premier. -- Définition du terme « réfugié »**
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.	**F.** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(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;	**a)** Qu'elles ont commis un crime contre la paix, un crime de guerre ou un rime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.	**c)** Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

V. Analysis

A. *Standard of review*

[22] The applicant's complicity in acts committed by the Mexican army and his exclusion under Article 1 of the Convention is a question of mixed fact and law (*Mankoto v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 294, 149 A.C.W.S. (3d) 1107, at paragraph 16; *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, 238 F.T.R. 194, at paragraph 14). The applicable standard of review was reasonableness *simpliciter*.

[23] Following the recent judgement in *Dunsmuir v. New-Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the applicable standard is the new reasonableness standard. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, but it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, at paragraph 47). The Court must not intervene so long as the decision of the administrative tribunal is reasonable, and it cannot replace that decision with its own opinion simply because it would have reached another conclusion.

[24] Case law before *Dunsmuir* was to the effect that purely factual questions were subject to the patent unreasonableness standard (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at paragraph 38; *Aguebor v. Canada (Minister of Citizenship and Citizenship)*, (1994) 160 N.R. 315, 42 A.C.W.S. (3d) 886 (F.C.A.), at paragraph 4).

[25] As regards the second issue, that is, whether the testimonies of the other applicants were credible, the assessment is a question that is part of the expertise of the panel and is subject to the reasonableness standard according to *Dunsmuir*.

1. Did the panel err in concluding that the principal applicant is excluded under the Convention?

[26] The applicant cites several decisions and submits that the panel misinterpreted the facts and law in this case (*Canada (Minister of Citizenship and Immigration) v. Nagra* (1999), 93 A.C.W.S. (3d) 130, [1999] F.C.J. No. 1643 (F.C.T.D.) (QL); *Salazar v. Canada (Minister of Citizenship and Immigration)*, (1999) 166 F.T.R. 109, 89 A.C.W.S. (3d) 120 (F.C.T.D.); *Musansi v. Canada (Minister of Citizenship and Immigration)* (2001), 105 A.C.W.S. (3d) 727, [2001] F.C.J. No. 65 (F.C.T.D.) (QL); *Alwan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 109, 120 A.C.W.S. (3d) 276).

[27] In *Ramirez*, the Federal Court of Appeal established six criteria for determining whether an individual is to be considered as an accomplice to a crime against humanity. Those factors are as follows: method of recruitment, the applicant's position and rank in the organization, his knowledge of atrocities, length of time in the organization and the opportunity to leave the organization.

[28] Regarding the first criterion, the applicant submits that he voluntarily enlisted in the Mexican army on January 17, 1992, but this, according to the documentary evidence, was one year before the army committed human rights abuses. His work was limited to obtaining names and addresses. He was not involved in arresting drug traffickers.

[29] Regarding the second and third criteria, the applicant submits that the panel did not determine that the army was an organization with a limited and brutal purpose. The applicant states that he never had any knowledge of the alleged abuses.

[30] The applicant submits that he was only a “mole” and that had no decision-making power in the organization; therefore, he was not an accomplice because of the position he held.

[31] Regarding the fourth criterion, he submits that he had little knowledge of the organization as such. He adds that his work was limited to giving names of individuals to the municipal or federal police forces, which then made arrests. Before 1997, he never had any knowledge of murders or torture. He did not have access to the documentation mentioned by the panel in its decision and, at that time, did not use Internet.

[32] As for the last two criteria, the applicant claims that he deserted the Mexican army as soon as he learned about the human rights violations committed by persons linked to the organization.

[33] The respondent submits that the panel ruled on the issue as to whether the organization to which the applicant belonged had committed crimes against humanity but did not determine that the organization had a cruel and brutal purpose. This is why the panel analyzed the *Ramirez* criteria.

[34] The respondent submits that the panel did not err when it considered the six criteria in *Ramirez*.

[35] The respondent also notes that the panel was warranted in drawing inferences from the evidence based on rationality and common sense (*Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (F.C.A) (QL)).

[36] The respondent is of the view that it was not unreasonable for the panel to conclude that the applicant's lack of knowledge of the crimes committed by the organization was implausible.

[37] According to the respondent, in order to determine there was complicity by association, case law never required that the claimant must be linked to specific crimes or must be the actual perpetrator, or that the crimes be directly or indirectly attributable to specific acts or omissions of the refugee claimant himself (*Sumaida v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 66 (F.C.A)).

[38] The respondent states that in applying paragraphs 1F(a) and 1F(b) of the Convention, the Federal Court of Appeal has already decided that the Minister need only comply with the standard of proof implicit in the expression "serious reasons for considering". This standard is less than what is required in criminal law (beyond a reasonable doubt) or in civil law (balance of probabilities) (*Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (F.C.A.)).

[39] Complicity by association was explained in *Bazargan v. Canada (Minister of Citizenship and Immigration)*, (1996) 205 N.R. 282, 67 A.C.W.S. (3d) 132 (F.C.A.), at paragraphs 11 and 12:

> In our view, it goes without saying that "personal and knowing participation" can be direct or indirect and does not require formal membership in the organization that is ultimately engaged in the condemned activities. It is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organization. At p. 318, MacGuigan J.A. said that "[a]t bottom, complicity rests . . . on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it". Those who become involved in an operation that is not theirs, but that they know will probably lead to the commission of an international offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation.
>
> That being said, everything becomes a question of fact. The Minister does not have to prove the respondent's guilt. He merely has to show - and the burden of proof resting on him is "less than the balance of probabilities" - that there are serious reasons for considering that the respondent is guilty. . . .

[40] In *Harb*, at paragraph 11, it was explained how complicity by association could be the basis of an exclusion under paragraph 1F(a) of the Convention:

> . . . It is not the nature of the crimes with which the appellant was charged that led to his exclusion, but that of the crimes alleged against the organizations with which he was supposed to be associated. Once those organizations have committed crimes against humanity and the appellant meets the requirements for membership in the group, knowledge, participation or complicity imposed by precedent (see *inter alia*, *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.); *Moreno v. Canada (Minister of Citizenship and Immigration*), [1994] 1 F.C. 298 (C.A.); Sivakumar *v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.); *Sumaida v. Canada (Minister of Employment and Immigration)*, [2000] 3 F.C. 66 (C.A.); and *Bazargan v. Minister of Employment and Immigration* (1996), 205 N.R. 232 (F.C.A.)), the exclusion applies even if the specific acts committed by the appellant himself are not crimes against humanity as such. In short, if the organization persecutes the civilian population the fact that the appellant himself persecuted only the

> military population does not mean that he will escape the exclusion, if he is an accomplice by association as well.

[41] In this case, I am of the opinion that the impugned decision raises some problems. The panel noted from the documentary evidence that numerous abuses had been committed by the Mexican army. However, mere membership in an organization responsible for crimes against humanity is not sufficient to constitute complicity. In *Sivakumar*, the Court stated that the more important an individual's position within the organization is, the more likely it will be that he or she was complicit in that organization's crimes.

[42] In the case at bar, the title of the position held by the applicant appears to show that he held an important position, but in reality he only gathered names and addresses and did not hold a decision-making position in management. The evidence does not show that he participated either directly or indirectly or that he approved of or influenced the crimes that were committed. In addition, the applicant reported to a corporal who did not have an officer's title. The applicant was given the title of petty officer, the lowest title on the scale for the officers' category, for pay purposes (panel record, page 861).

[43] Nothing shows that the applicant had a shared common purpose. In his testimony, he stated that when he enlisted in the army, he was a professor, and his intentions were highly laudable: he wanted to help young people to stay away from taking drugs (panel record, page 859).

[44] I consider the evidence to be too tenuous and flimsy to allow the applicant's exclusion. Apart from the documentary evidence about Mexico and the position held by the applicant, I am of the opinion that the panel did not have sufficient evidence to show that the applicant was an accomplice by association.

2. Did the panel err in finding that the testimonies of the other applicants were not credible?

[45] In her memorandum, the female applicant states that her children were not locked up as such: they were at home and did not go out in public except to see the doctor or in case of an emergency. According to her, nothing contradicted her testimony.

[46] The testimony of the eldest son confirms the female applicant's testimony to the effect that he stopped going to school after Grade 3 and did not know why he could not finish elementary school (panel record, pages 926 and 927). He corroborates his mother's testimony about the courses she gave him to help him read.

[47] The applicant explained that she went into hiding on orders from her husband, who did not want to tell her who the persecutor was because he wanted the family to know as little as possible so as to protect them. However, she had feared being killed ever since the attack on her husband on May 30, 1997.

[48] After attentively reading the stenographic notes, I consider that the panel misinterpreted the testimonies given by the applicants. It is true that at first sight there seems to be some inconsistencies. However, when comparing testimonies, no flagrant contradictions may be found.

[49] For example, it is not unreasonable for the children to consider themselves to be students because their mother, their Uncle Sergio and their Aunt Flore gave them lessons (panel record, page 928).

[50] The female applicant testified to the fact that she had to take refuge at her mother's home even though she did not know who the persecutor was. However, she did know that it had something to do with her husband's work. The family home was ransacked in 2004, which makes her testimony more credible.

[51] The Court's intervention is warranted because the reasons for the decision are not supported by the evidence.

[52] No question was proposed for certification, and there is none in the record.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed. The matter is referred back to a differently constituted panel for rehearing and redetermination. No question is certified.

"Michel Beaudry"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1299-08
STYLE OF CAUSE:	**JOSE CARLOS HERMIDA GONZALEZ** **RITA MONTERO HERMIDA FERNANDEZ** **LUIS ALBERTO HERMIDA MONTERO** **CARLOS OMAR HERMIDA MONTERO**
	and
	MINISTER OF CITIZENSHIP AND IMMIGRATION
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