Federal Court		Cour fédérale

Date: 2009030

Docket: IMM-4775-08

Citation: 2009 FC 984

Ottawa, Ontario, September 30, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PUGLIO RODOLFO MARINAS RUEDA,
DIONISIA PATRICIA CORNEJO BERRIOS,
JOEL ROMARIO MARINAS CORNEJO,
RODOLFO MARIO MARINAS CORNEJO

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision from the Refugee Protection Division dated October 6, 2008, which found the Applicant Marinas Rueda to be excluded from the definition of a Convention refugee and which rejected the remaining Applicants' claim as Convention refugees or persons in need of protection.

BACKGROUND

[2] Mr. Puglio Marinas Rueda, (the Applicant), his wife, Dionisia Berrios, and his two sons, Joel Cornejo and Rodolfo Cornejo are citizens of Peru. They arrived in Canada on October 29, 2004 and filed for refugee protection that day.

[3] The Applicant served in the Peruvian Navy. He completed his mandatory military two year service in 1983 and voluntarily re-enlisted, staying with the Navy until 1992. He was present at the events that occurred at Isla Fronton prison on June 17 and 18, 1986.

[4] The Peruvian Navy had been called to help quell a riot at the Isla Fronton prison. Some 97 prisoners were killed in the attack on the prisoners. Peruvian military forces personnel were involved in the execution of prisoners. To cover up the events, a prison building, the Blue Pavilion, was blown up by a Navy unit and the trapped prisoners left to die. The actions of the Peruvian military forces had been held to be a crime against humanity by the Inter-American Court of Human rights.

[5] The Applicants claim for refugee protection was initially rejected on September 29, 2005. The Refugee Protection Division of the Immigration and Refugee Board found there were serious reasons for believing that the Applicant was complicit in crimes against humanity perpetuated by the Peruvian Navy. The Board therefore excluded the Applicant and his family.

[6] In the first judicial review, Justice Mactavish found there was no evidence to support the Board's conclusion that the Applicant was directly involved. She also found there was no consideration of evidence that could have led to an inference that the Applicant did not share a common purpose with the perpetrators of the atrocities, specifically, his writing a report expressing disapproval of what happened and being disciplined for doing so by his superiors as well as his subsequent transfer to a different unit within the Peruvian Navy. She also found, and the Minister conceded, that the Board erred in applying its exclusion finding concerning the Applicant to his family members and in failing to consider their inclusion claims.

[7] On rehearing, the Board decided on December 15, 2008 the Applicant is excluded from the application of the definition of Convention refugee and that from the status of persons in need of protection pursuant to Article 1F(a) of the *United Nations Convention Relating to the Status of Refugees* (the *Refugee Convention*). Further, the Board decided the Applicant and his family are not included as Convention refugees or persons in need of protection.

DECISION UNDER REVIEW

[8] The Board found that there was evidence that the Applicant was an accomplice in the crimes against humanity perpetrated by the Peruvian Navy during of his service. As such he is excluded from protection in Canada pursuant to Article 1F(a) of the *Refugee Convention*.

[9] The Board accepted the Applicant's mere membership in the Peruvian Navy is not sufficient to establish he was complicit in human rights abuses committed by the Navy since it

could not be characterized as a limited, brutal-purpose organization. To determine whether the Applicant was complicit, the Board considered the factors enumerated by the Federal Court in *Fabela v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1028.

[10] The Board found that the crimes against humanity committed by the Peruvian armed forces were not limited to the El Fronton incident. Rather, the Board found that there were many other incidents involving the disappearance, outright killings, and torture of civilians in Peru from 1980 to the early 1990's. The Board concluded on documentary evidence that human rights abuses against civilians by the Peruvian armed forces including the Navy were widespread and systematic.

[11] The Board noted the Applicant joined the military in 1983 as part of his compulsory military service and voluntarily re-enlisted to pursue a career in the Peruvian military in April 1985.

[12] The Board noted that there was no evidence to suggest that the Applicant was forced to participate in the incident at El Fronton on June 18 and 19, 1986. The Board also noted that the Applicant progressed from a low rank in the Fuerza De Operaciones Especiales (FOES and GOES) as a student to higher rank as an Officer at Sea during his career which ended in 1992.

[13] In the Board's view, the Applicant's participation in the events at El Fronton prison was more significant than his low rank. The Board found the Applicant witnessed and acquired direct knowledge of the abuses committed in the attack on the prison. It concluded the Applicant was closer to the events than he said. It found he could not have otherwise been able to give the detailed

description of the killing of prisoners who were still alive after the explosions destroyed the Blue Pavilion. The Board found that the Applicant was not forthcoming with regard to his role at El Fronton as his testimony changed about the role of his group at the incident.

[14] The Board found the Applicant's subsequent continuation of service from 1986 until 1992 within the Peruvian Navy, including his progression to higher rank, together with his participation in the high profile operation at El Fronton, were strong inferences of his complicity in crimes committed by the organization.

[15] The Board found that the Applicant had knowledge of the human rights violations by the Peruvian military throughout his career in the Navy.

[16] The Board was not persuaded that the Applicant wrote a report indicating his disagreement with the events at El Fronton since he did not provide a copy of the report nor provide evidence regarding the substance of his statements. The Board stated that even if he made such a report (which it did not believe) there was no persuasive evidence to suggest that he could not have terminated his services within the Peruvian Navy immediately after the El Fronton event.

[17] In conclusion, the Board found that the Applicant's knowledge of the Peruvian Navy's human rights violations, his participation and knowledge of the atrocities at El Fronton, and his long service in the Peruvian Navy indicated he shared a common purpose with the organization. The Board found the Applicant was complicit in crimes against humanity.

[18] With regard to the inclusion findings, the Board found the Applicants are not Convention refugees, nor persons in need of protection pursuant to section 97 of the *Immigration and Refugee Protection Act*, (IRPA).

[19] The Board found that the Applicant and his family, whose claims are based on his, are not Convention refugees or persons in need of protection. The Board found that the determinative issues were lack of subjective fear, well-founded fear of persecution, a viable internal flight alternative (IFA) and the availability of state protection.

[20] The Applicant left the Navy in 1992. He was subsequently arrested and detained for three months in 1993. He did not leave Peru until 1995 when he visited France. In 1996 he again went to France, without his family, and made a refugee claim which was denied in 1999. He returned to Peru that year. In November 2000 he visited the United States, returning to Peru in December 2000. In May 2001 he and his family went to the USA on a six-month permit, and they stayed there illegally for three years.

[21] The Board found the Applicant did not have a well-founded fear of persecution in Peru. It decided, on a balance of probabilities, the Peruvian authorities did not have any interest in harming the Applicant or his family.

[22] The Board found the Applicant and his family had a viable IFA in Callao, Peru. Where the Applicant lived and worked between 1999 and 2000 in Callao without problems. The Board found

that since the Applicant's detention in 1993, his agents of persecution have not made any efforts to target him.

[23] Finally, the Board found that there was adequate state protection. The Applicant had not attempted to access any state protection agency. The Board found there was no evidence the state entities would not assist him. Furthermore, the Board cited documentary evidence demonstrating military officers and heads of state were being prosecuted for the atrocities committed against civilians. The Board found, though not necessarily perfect, state protection is available to the Applicants in Peru.

LEGISLATION

[24] Section 98 of IRPA provides:

> 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.

[25] Section F(a) of Article 1 of the Convention provides:

> F. the provisions of this Convention shall not apply to any person with respect to whom there are serous 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.

ISSUES

[26] In my view the issues are:

a. on the question of the Applicant's exclusion, did the Board err in consideration of the evidence of the Applicant's complicity in crimes against humanity;

b. on the question of inclusion, did the Board err with respect to assessing subjective fear of persecution, internal flight alternative, and state protection.

STANDARD OF REVIEW

[27] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada decided that there were two standards of review, correctness and reasonableness. The standard of review for questions of law was correctness. The standard of correctness must be maintained to promote just decisions and avoid inconsistent and unauthorized application of law. *Dunsmuir*, para. 50.

[28] The standard of review was reasonableness for questions of fact and mixed fact and law. *Dunsmuir*, para. 53. For a decision to be reasonable, there must be justification, transparency and intelligibility within the decision making process. The decision must fall into a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. *Dunsmuir*, para. 47.

[29] The central issue in this application is whether the Board erred in its conclusion that the Applicant is excluded from the definition of a refugee due to complicity in crimes against humanity pursuant to Article 1F(a) of the *Refugee Convention* and section 98 of IRPA. There is no evidence that the Applicant personally committed crimes against humanity and the Board had to determine if, on the facts, the evidence supported an inference of complicity. This being a question of mixed fact and law, the standard of review is reasonableness. *Harb v. Canada (Minister of Citizenship and Immigration)*, (2003) 302 N.R. 178 at para. 14, *Rueda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 754 at para. 14.

ANALYSIS

[30] The Applicant submits that the Board's decision is unreasonable for a number of reasons, including: the Board did not properly define the organization with which the Applicant was complicit, identifying the entire Peruvian Navy. The Applicant relies on *Bedoya v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1092. The Board also erred in inferring that the Applicant shared a common purpose with the Peruvian Navy by reference instead to his total service in the Peruvian Navy in disregard of his low student trainee rank during the El Fronton event. The Applicant also disputes the Board's rejection of the Applicant's claim to have written a report critical of the El fronton incident.

[31] The Applicant relies on Justice Mactavish's finding at para. 35 of *Rueda*, where she stated:

> There was evidence before the Board that could have led to an inference that Mr. Marinas did not share a common purpose with the perpetrators of the atrocities. That is, Mr. Marinas prepared a written report after the fact in which he expressed his disapproval of what had happened at the prison. This report evidently led to Mr. Marinas having been disciplined by his superiors. There is, however, no consideration in the Board's reasons as to what, if any, weight should be attributed to this.

[32] The Applicant also submits the Board did not consider the ten complicity factors in *Mohammad v. Canada (M.C.I.)*, [1995] F.C.J. No. 1457.

[33] The Applicant submits the Board failed to address submissions as to why the Peruvian authorities continue to have an interest in the Applicant a consideration in the questions of subjective fear, IFA and state protection.

[34] The Respondent submits that the Board's finding regarding The Applicant's complicity in crimes against humanity is reasonable. A person may be found to have committed a crime against humanity even if they did not commit the specific crime alleged through complicity. *Harb v. Canada (M.C.I.)*, 2003 FCA 39 at para. 11.

[35] The Respondent submits that when a person has knowledge that his organization is committing serious crimes and does not take steps to prevent them, or to disengage himself that person will be considered to have a shared common purpose and held to be complicit.

[36] The Respondent distinguishes *Bedoya* on the basis that, Justice Hughes found in that case that there was no conclusion drawn that the claimant personally participated or that his particular unit engaged in atrocities. In this case, the Board clearly found the Applicant's FOES unit had been directly involved in and committed crimes against humanity at El Fronton.

[37] The Respondent cites a number of other decisions in which this Court found that an applicant was complicit on similar facts: *Rubianes v. Canada (M.C.I.)*, 2006 FC 1140, at paras. 7, 12-24; and *Osayande v. Canada (M.C.I.)*, 2002 FCT 368, at para. 14.

[38] The Respondent notes that the Board properly inferred the Applicant shared a common purpose with his organization despite his low rank because he was in the FOES and GOES unit. The Respondent submits that a high rank is not a requirement for a finding of complicity. Rank is only one factor to be considered.

[39] The Respondent submits that the Board did not err by referring to the entire time the Applicant was in the service. The Respondent submits the Peruvian Navy was found to have committed numerous other human rights violations and crimes against humanity while the Applicant was a member of the Peruvian Navy.

[40] The Respondent submits the Board's decision to reject the critical report allegedly by the Applicant was reasonable. He had not requested a copy of the report written for the hearing nor did he say what was in it.

[41] The Respondent submits that the five factors identified by the Applicant were either considered by the Board or they were not relevant. The ten complicity factors set out in *Mohammad*, as cited by the Applicant, are considerations that may be relevant in some cases and not in others. The Respondent submits that the six factors set out in *Bedoya* and *Ali v. Canada (Solicitor General)*, 2005 FC 1306, are more relevant.

Complicity

[42] In *Rueda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 754 paras. 15 to 26, Justice Mactavish thoroughly reviewed the law on complicity. To summarize:

- Article 1F(a) of the *Refugees Convention* excludes from the scope of the convention any person with respect to whom there are serious reasons for considering that 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 to such crimes.

- Section 98 of the *Immigration and Refugee Protection Act* incorporates Article 1F(a) of the *Convention* into Canadian domestic law.

- The Minister bears the burden of establishing that an individual has been directly or indirectly involved in crimes against humanity: *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (F.C.A.), at para. 10. The standard of proof is more than a mere suspicion, but less than the civil standard of a balance of probabilities: *Lai v. Minister of Citizenship and Immigration*, [2005] F.C.J. No. 584, 2005 FCA 125, at para. 25. The Minister merely has to show that there are serious reasons for considering that the claimant is guilty: *Ramirez*, at para. 5, *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (F.C.A.) at para. 16.

- The determination of whether someone has been complicit in crimes against humanity is a factual question that needs to be examined on a case by case basis.

- The jurisprudence from the Federal Court of Appeal establishes certain general principles to be followed in making such a determination. These cases include the *Ramirez, Moreno* and *Harb* decisions previously cited, as well as *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 and *Bazargan v. Canada (Minister of Citizenship and Immigration)* (1996), 205 N.R. 282. One need not be the actual perpetrator of the crimes against humanity in question in order to fall within the exclusion. In certain circumstances, individuals may be held responsible for the actions of others.

- Passive acquiescence is not sufficient to establish a basis for exclusion. Personal involvement in the persecutorial acts must be established in order to demonstrate complicity: *Moreno*, at para. 50. *Mens rea* is an essential element of the crime: *Moreno*, at para. 51.

- The rank of the individual within the organization is relevant. The closer one is to the decision-making process, the more likely criminal responsibility will attach. Conversely, the further from the decision-makers, the less likely it the required degree of complicity necessary to attract the application of the exclusion clause: see para. 53. See also *Sivakumar*, at para. 9 and 10.

- A factor to consider is whether the individual attempted to stop the crimes from being carried out, protested against their commission or attempted to withdraw from the organization: *Sivakumar* at para. 10. The law does not require that

> people place themselves in grave peril in order to extricate themselves from the organization in question. Neither, however, can they be "amoral robots": *Ramirez*, para. 22 and *Moreno*, at para. 47.

[43] The Board decided on the documentary evidence that the Peruvian Navy committed numerous atrocities during the period the Applicant was serving in the Navy. The Board found his involvement at the El Fronton incident and his service with the Peruvian navy for the six years following was indicative of his complicity in crimes against humanity by the Navy.

Nature of the Organization

[44] The degree of association with others is a relevant consideration in assessing complicity. Justice Layden-Stevenson considered the question of complicity in *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1356 at para 27:

> Accomplices as well as principal actors may be found to have committed international crimes (although, for present purposes, I am not concerned with principal actors). The Court accepted the notion of complicity defined as personal and knowing participation in Ramirez and complicity through association whereby individuals may be rendered responsible for the acts of others because of their close association with the principal actors in *Sivakumar v. Canada* [1993] F.C.J. No. 1145. Complicity rests on the existence of a shared common purpose and the common knowledge that all of the parties may have of it: Ramirez; Moreno. (emphasis added)

[45] The nature of the organizations one is associated with is a consideration. In *Bedoya*, Justice Hughes accepted as the considerations for “complicity” the following factors:

a. the nature of the organization
b. the method of recruitment
c. the position/rank in the organization
d. the length of time in the organization
e. the opportunity to leave; and
f. the knowledge of the organization’s atrocities

Justice Hughes emphasized the importance of properly characterizing "organization". He found in that case that the panel was incorrect in law in stating that the activity of the "army" could be attributed to the claimant. In fact, the army as a whole was not found to have a limited brutal purpose.

[46] The first difficulty with the Board's exclusion analysis lies firstly in its conclusion that the Peruvian Navy as an entity committed crimes against humanity. It reasoned that the variously described entities committed atrocities. The entities were described as the Peruvian armed forces, government forces, military and police, agents of the military and the police, the military services, the Peruvian military and the police, the navy and the Sinchis, counter-insurgency units of what was then the Civil Guard, the army, the army, the police and combined forces, members of the army, other official forces . . . included the navy's marines, investigative police, combined forces, the intelligence services and regular police, the army and navy counter –insurgency forces and the Peruvian Navy. It is to be noted that the Board included a wide sweep of government forces in its recitation in which the Navy is mentioned but four times.

[47] The Board concluded that:

> "The aforementioned examples are only a few of the innumerable atrocities that were committed by the Peruvian Military, including the Peruvian Navy. Based on the documentary evidence entered as exhibits, the panel concludes that crimes against humanity were committed by Peruvian armed forces, including the navy, without limiting it to the events of the El Fronton when the claimant was a member of the Peruvian Navy within the Peruvian armed forces."

[48] In my view, the Board over-generalized without ever determining if the Peruvian Navy, as an entity, was purposely responsible for crimes against humanity. It did not assess the conduct of the leadership in command of the Navy. It did not assess whether general naval orders directed or facilitated the commission of atrocities by navy units. It did not assess whether officer in the navy chain of command passed on instructions that contributed to the commission of crimes against humanity. It did not assess the degree of knowledge seamen and officers had of atrocities committed by the Navy.

[49] The Board's selected summary of documents mentions the Peruvian Navy on four occasions, one of which relates to the atrocity at El Fronton. An examination of another of the documents mentions the Peruvian Navy but goes on to specify political-military commands in charge of local administration (CPM) were largely responsible for committing atrocities. This is counter to the Board's finding of a pattern of conduct or *modus operandi* by the Peruvian Navy as a whole. The final report of Truth and Reconciliation Commission (TRC) in Peru described the role of CPMs. It stated:

> 55. The TRC affirms that at some places and moments in the conflict, the behaviour of members of the armed forces not only involved some individual excesses by officers or soldiers, but also entailed generalized and/or systematic practices of human rights violations that constitute crimes against humanity as well as transgressions of the norms of International Humanitarian Law.
>
> 56. The TRC concludes that, in this framework, the political-military commands (CPM), designated the highest state authority in the emergency zones, may bear the primary responsibility for these crimes. The judiciary must establish the exact degree of criminal responsibility of CPM commanders, whether for ordering, inciting, facilitating or engaging in cover-ups or for having neglected the fundamental duty to put a stop to the crimes. (emphasis added)

[50] The TRC also determined that the armed forces were capable of learning lessons which allowed them to refine their strategy to become more efficient and less prone to massive violations of human rights such that during the period of most intense internal armed conflict (1989-93) also reflected significant decrease in victims of actions by state agents. Another report indicates the Navy was less involved in human rights violations post El Fronton. This general trend puts in doubt the notion that the Peruvian Navy as a whole has a common purpose of generalized and systematic commission of crimes against humanity.

[51] In *Bedoya*, Justice Hughes found the relevant organizational unit was Mobile Brigade 1 which the claimant was a member of, not the whole Columbian Army. In *Rubianes*, Justice Pinard found the Board reasonably inferred the claimant, with responsibilities in the areas of intelligence and as leader of a platoon, shared a common purpose with the activities of a specific unit, Mobile Brigade 1. Applying this approach, I conclude the organization which is relevant is the FOES and GOES unit that the Applicant was a member at the time of the El Fronton incident

[52] The Board instead considered the Peruvian Navy as the organization of reference. It had accepted that the Peruvian Navy was not an organization with a limited, brutal-purpose. Given this assessment and given the inadequacy of the Board's overly generalized analysis of the role of the Peruvian Navy as a whole in atrocities committed in Peru during the period 1985 to 1992, it cannot be said with any confidence that the common purpose of the Peruvian Navy was the commission of crimes against humanity much less that the Applicant "shared a common purpose with the Navy, and the Marine Force, given that he tolerated that murder was part of their modus operandi."

The Applicant's Actions

[53] In *Harb*, Justice Decary, for the Federal Court of Appeal, noted that the South Lebanon Army had committed crimes against humanity and further noted that the Board had found it as a terrorist organization and one for a limited and brutal purpose. Justice Decary stated that a simple denial cannot suffice to negate the presence of a common purpose. He stated a claimant's actions can be revealing and the circumstances may be such that it can be inferred that a person shares the objectives of those with whom he is collaborating.

[54] In *Ramirez v. Canada (Minister of Citizenship and Immigration)*, [1992] 2. F.C. 306 (F.C.A.) at para. 15., Justice MacGuigan said:

> From the premise that a mens rea interpretation is required, I find that the standard of "some personal activity involving persecution," understood as implying a mental element or knowledge, is a useful specification of mens rea in this context. Clearly no one can "commit" international crimes without personal and knowing participation."

[55] The Board found the Applicant was knowledgeable and complicit in the crimes against humanity committed by the Peruvian Navy FOES and GOES unit at El Fronton. However, the Applicant's evidence was that he wrote a report critical of the navy's conduct at El Fronton. That report is crucial to his claim of not being complicit in the commission of that atrocity. The Board did not believe he wrote a report condemning the navy's actions at El Fronton because he neither produced a copy of the report nor did he testify about the substance of his report. However in the Applicant's materials he states:

> 1. I totally disagreed with what they did to the inmates. Our group of eight had to file a report on what had occurred, and in that report I expressed my

> opposition to what had happened. When my superiors knew about my position there was a great conflict and they humiliated me and psychologically tortured me. I was excluded from various duties and training sessions.
>
> 2. As I had made it clear that I disagreed with what they had done to the inmates therefore they considered me their enemy so the threats and sanctions against me were constant. My personal life as well as my professional life was ruined.

[56] The Applicant has a responsibility to provide evidence in support of his claim. The Applicant was questioned about the report's whereabouts and he gave an explanation why he did not have it which the Board is entitled to accept or reject. However, there does not appear to be any questions to the Applicant about the report's contents. Since he did testify about his report, the absence of specific questioning about the precise contents, weakens any contention that he should be disbelieved because he failed to describe further what was in his report.

[57] Justice Mactavish found the previous panel's failure to refer to the Applicant's writing a critical report and getting disciplined for doing so was part of the grounds for granting judicial review of its decision and sending it back for re-determination. It is clear that the Board must not only address evidence about the report but also evidence about the Applicant being disciplined for writing it.

[58] The Board rejects the Applicant's evidence about making the report but makes no reference to relevant evidence corroborating the Applicant's account. Included is an entry in the Applicant's Navy of Peru Personal Notebook dated just one day after the events at El Fronton. That entry reads (as translated):

Date	Reason	Punishment
20/06/86	Disloyalty Was not truthful (Fronton Island)	30 days *C/A*

[59] As such, the above entry in the Applicant's service record is evidence that is supportive of the Applicant's account of writing a critical report and being disciplined for it. Moreover, the Applicant was questioned about being disciplined after the events at El Fronton, questions which he answered. In my view, the Board was obligated to address this evidence in its reasons. Instead, the Board fails to make any mention the Applicant being disciplined. The implication is that the Board did not consider or ignored this relevant evidence. As such, the Board erred.

[60] Justice Mactavish also found that the Board failed to have regard to the significance of the Applicant's attempts to disassociate himself from the actions of his colleagues after the events at El Fronton by transferring to a different unit within the Peruvian navy.

[61] Madam Justice Reed in *Penate v. Canada (Minister of Employment and Immigration),* [1994] 2 F.C. 79 (T.D.) para. 6 stated:

> As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them from occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with safety for himself) but who lends his active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist. I note that the situation envisaged by this jurisprudence is not one in which isolated incidents of international offences have occurred but where the commission

> of such offences is a continuous and regular part of the operation. (emphasis added)

[62] The Applicant was a student trainee in the FOES and GOES unit at the time of the El Fronton atrocity. As a junior member, he would hardly be in a position to take steps to prevent the atrocity from happening.

[63] The Board took his remaining with the Peruvian Navy as a contributing factor in its complicity finding. As I have stated above, the organization of reference is the FOES and GOES unit.

[64] There is no evidence the other units the Applicant served with after El Fronton later in his naval career were involved in any way in crimes against humanity. He transferred to CITN School and worked in the instruction section in 1987 and 1988 where he served in an administrative role. He was recalled to his unit and sent to Pucalla in 1991. He denied being engaged in any fighting other than on one operation to rescue some soldiers that fled an ambush. Later, he found himself in disagreement with his superiors which led to his desertion from the Peruvian navy in 1992.

[65] It is incumbent on the Board to consider whether the Applicant's transfer to another unit was an act of disassociation with the conduct of the FOES and GOES group at El Fronton. It did not. Again, the Board erred.

[66] I find that the Board's analysis of the evidence concerning the Applicant's complicity in the commission of crimes against humanity to be flawed in respect of identifying the Peruvian Navy as an entity to have purposely committed crimes against humanity. The Board also erred when it did not consider corroborative evidence indicating the Applicant was disciplined for writing a report criticizing the actions at El Fronton. Finally, the Board erred in failing to consider whether the Applicant's transfer to another navy unit after the incident at El Fronton was a way of disassociating himself from the FOES and GOES conduct.

[67] The cumulative effect of these errors is to render the Board's decision with respect to exclusion to be unreasonable.

Inclusion Claim

[68] The Applicant and his family's refugee claim rests on his fear of being at risk because he was a witness to the events at El Fronton in 1983 and that those in power who were under investigation have threatened him and his family since he could testify against them. He bases this claim on two specific events. The first is his arrest and detention in 1993 and the threats made during his detention to kill him and his family if he didn't change his position about what occurred at El Fronton. The second was an attempt to kill his brother which he believes was an attack targeted at himself because of his knowledge about El Fronton.

[69] The underlying basis for the Applicant's claim for refugee status is his account of the events at El Fronton and his opposition to it, an account which the Board rejected. As I indicated above,

the Board's reasoning is flawed on that issue. Given the problems with the Board's treatment of the underlying claim, I consider it unsafe to allow the Board's decision in respect of all Applicants on the inclusion issues to stand.

CONCLUSION

[70] For the foregoing reasons, this application for judicial review is granted.

[71] The Applicant proposed awaiting the decision before submitting a proposed question of general importance. The parties will have 14 days from the date of this Order to propose a certified question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted, and the matter is remitted back to a differently constituted panel for de-determination.
2. The parties will have 14 days from the date of this Order to propose a certified question.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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