Federal Court  Cour fédérale

Date: 20111027

Docket: IMM-24-11

Citation: 2011 FC 1190

Ottawa, Ontario, this 27th day of October 2011

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Williams W. URIOL CASTRO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On December 18, 2010, Williams W. Uriol Castro (the "applicant") filed the present application for judicial review of the decision of Me Michelle Langelier, member of the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, (the "Act"). The Board determined that the applicant was not a Convention refugee or a person in need of protection under

sections 96 and 97 of the Act, falling under the exclusion of subsection 1F(*a*) of the *United Nations Convention Relating to the Status of Refugees* (the "Convention") for having been complicit in crimes against humanity (section 98 of the Act).

[2] The applicant is a citizen of Peru. From January 1992 to January 2008, the applicant was an intelligence officer for the Peruvian Air Force Intelligence Division (the "Air Force Intelligence Service"), thereby participating in various reconnaissance missions. The applicant collected information which was ultimately transferred to the National Intelligence Service of Peru ("NIS").

[3] From 1992 to 2001, the applicant collected information regarding subversion in the country. To further his investigation of subversion within the country, from 1994 to 2000, the applicant operated his own small printing and photocopying business near the San Marcos University in Lima. The applicant would type the homework of students and photocopy documents. If a student brought a subversive book, he reported them in a weekly report sent to the Air Force Intelligence Service.

[4] In February 2001, the applicant undertook an intelligence mission against drug traffickers. During the years following this mission, he received threats and had multiple confrontations with drug traffickers he investigated, causing him to fear for his life. Consequently, he fled Peru in January 2008, arriving in the United States on February 1, 2008. The applicant then left the United States on March 16, 2008, arriving in Canada the same day. It is in March 2008 that the applicant claimed refugee protection under sections 96 and 97 of the Act.

[5] Before the hearing, the Minister of Public Safety and Emergency Preparedness intervened, asking the claimant be excluded under subsections 1F(*a*) and (*c*) of the Convention, pursuant to section 98 of the Act.

* * * * * * * *

[6] In its decision, the Board concluded that the applicant did not qualify for refugee protection under the Act because he was excluded by the operation of section 98 of the Act and subsection 1F(*a*) of the Convention as there were "serious reasons" to believe the applicant was complicit in the commission of crimes against humanity.

[7] The Board begins its decision by setting out the steps of its analysis: firstly, had the applicant collaborated with the NIS; did the NIS committed crimes against humanity; and lastly, was the applicant complicit in these crimes. While the Board concluded that the applicant was not in direct collaboration with the NIS (paragraph 14 of its decision), the applicant was nonetheless associated with the NIS during his employment with the Peruvian Air Force: the pertinent information he obtained was ultimately sent to the NIS.

[8] The Board then compares crimes against humanity, as defined by the applicable jurisprudence and the *Rome Statute of the International Criminal Court*, and the documentary evidence depicting human rights violations committed by the NIS. The Board emphasized the existence of *La Colina*, a death squad lead by the NIS which committed two infamous massacres, notably one in 1992 against university students in Lima. Based on this documentary evidence, the

Board concluded that the NIS perpetrated crimes against humanity. This finding remains uncontested by both parties. However, the applicant disagrees with the Board's finding of complicity.

[9] The last step in the Board's analysis was determining whether the applicant was complicit in the crimes against humanity perpetrated by the NIS. The Board goes over the jurisprudence defining complicity, concluding that complicity rests on a finding of a shared purpose and common knowledge (*Thomas v. Minister of Citizenship and Immigration*, 2007 FC 838; *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.)). Despite its finding that the applicant was not a member of the NIS, the Board concluded that the applicant knowingly collaborated with the NIS, an organization it goes on to qualify as having a limited and brutal purpose. Consequently, the applicant was presumed to have the knowledge required to be considered complicit in the NIS' commission of crimes against humanity. In the Board's opinion, after having gone over the six accepted factors to determine complicity, as set out in *Ryivuze v. Minister of Citizenship and Immigration*, 2007 FC 134, the applicant did not manage to rebut this presumption of complicity. The Board did not believe the applicant's claims that he did not know how the information he was transmitting was being "processed", nor that the applicant never identified a student by name, nor that he was not aware that crimes against humanity were being carried out by the NIS. Consequently, the Board concluded that the applicant was complicit in the atrocities committed by the NIS during his years of collaboration with this organization.

* * * * * * * *

[10] The issue raised by this application is whether the Board erred in finding that the applicant knowingly collaborated with the NIS, and, therefore, in concluding that the applicant was excluded from the definition of refugee under subsection 1F(*a*) of the Convention and section 98 of the Act.

[11] The applicable standard of review to the Board's decision to exclude the applicant from the definition of refugee under subsection 1F(*a*) of the Convention and section 98 of the Act is reasonableness (see *Ryivuze* at para 15, and *Harb v. Minister of Citizenship and Immigration* (2003), 302 N.R. 178).

[12] The Board's application of the test for complicity to the case at hand is a question of fact and law, and therefore must also be reviewed according to a standard of reasonableness (*Thomas* at para 15; *Ezokola v. Minister of Citizenship and Immigration*, 2011 FCA 224 at para 39). Therefore, the Board's conclusions must fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para 47).

[13] This same standard of reasonableness applies to the Board's findings of fact (*Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339; *Thomas* at para 14).

[14] In the case at bar, the applicant admits that the NIS carried out crimes against humanity. Moreover, he does not contest the Board's finding that the NIS was an organization with a limited brutal purpose. However, the applicant claims that the Board erred in finding that he was associated

with the NIS. The issue then turns to whether the Board erred in finding that the applicant knowingly collaborated with the NIS.

[15] The applicant first asserts that the Board erred in concluding that through the operation of his print shop, he collaborated with the NIS. The applicant contends that he did not have a sufficient degree of involvement in the NIS to be a knowing collaborator. The applicant emphasizes the chain of transmission of the information he provided. The applicant never directly communicated with the NIS, nor could he. Rather, being a "second technician", the information he gathered went through a hierarchy of personnel who analyzed the information and someone down the line would eventually transmit what was pertinent to the NIS. Therefore, the applicant claims that the Board erred by not explaining how he collaborated with the NIS and not commenting on his degree of involvement.

[16] The applicant further claims the Board erred in concluding that he had personal knowledge of the crimes against humanity being committed by the NIS and in its qualification of the use his information was being put to. The Board would be in error in concluding the applicant was willfully blind when he alleged that in the seven years he provided information from his print shop and despite media reports, he did not know human rights abuses were being committed. Rather, the applicant, being a member of the army, was trained to follow orders, not to ask questions and did not know that he was contributing to the NIS. However, this argument is tantamount to an assertion of willful blindness. In *Halsbury's Laws of Canada*, "Criminal Offences and Defences" by Alan D. Gold, willful blindness is said to occur "where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant." The applicant cannot rely on his obligation to follow orders to justify his

supposed ignorance. Such reasoning ignores that in the commission of crimes against humanity, responsibilities and tasks are compartmentalized so that each perpetrator can claim ignorance. To address this reality, the law is designed to declare complicit not only those directly ordering or carrying out the acts of violence, but also those who choose to remain ignorant as to the consequences of their seemingly meaningless acts (*Rutayisire v. Minister of Citizenship and Immigration*, 2010 FC 1168 at paras 48 and 50).

[17] Moreover, the Board's factual determinations have to be given deference (*Khosa*, above). The applicant has failed to prove that the Board's factual findings were unreasonable. As the respondent mentions, the Board explained which portions of the applicant's testimony it did not find credible and why, namely that the applicant tried to minimize his involvement during the second hearing. Therefore, considering the applicant was an intelligence officer and not an ordinary citizen, the various media reports, and the applicant's affirmed knowledge of the harm suffered by those who opposed the government, it was not unreasonable for the Board to conclude that the applicant knew the bleak fate of those he reported as being subversive. The Board's conclusions fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

[18] As to the applicable law, the parties are in agreement. No one contests that membership only suffices to establish complicity when an organization has a limited and brutal purpose (*Ramirez v. Canada (Minister of Employment and Immigration*), [1992] 2 F.C. 306 (C.A.)). Since the Board found the applicant was not a member of the NIS, the applicant could only be found complicit if it was established that he personally and knowingly participated in the affairs of the NIS. In *Bazargan*

v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 1209, 205 N.R. 282, at paragraph 11, the Federal Court of Appeal stated:

> . . . "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. . . .
>
> (Emphasis added.)

[19] As stated in *Bazargan*, at paragraph 12, this determination is a question of fact. Therefore, in the absence of membership, the question becomes whether the Board erred in concluding that the applicant knowingly participated "in the proscribed crimes [based] on the standard of "serious reasons for considering"; a standard lower than the balance of probabilities" (*Savundaranayaga v. Minister of Citizenship and Immigration*, 2009 FC 31, at para 37; *Murillo v. Canada (Minister of Citizenship and Immigration*), [2003] 3 F.C. 287 (T.D.) at para 30).

[20] Accordingly, in terms of its factual findings, while this Court may have come to different conclusions, the Board's factual determinations were reasonable, being supported by documentary and oral evidence. Therefore, the Board did not err in finding that the applicant knowingly collaborated with the NIS, thereby being complicit in crimes against humanity and excluded from the definition of refugee by the operation of section 98 of the Act and subsection 1F(*a*) of the Convention.

* * * * * * * *

[21] For the above-mentioned reasons, this application for judicial review is dismissed.

[22] I agree with counsel for the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board, determining that the applicant was not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-24-11
STYLE OF CAUSE:	Williams W. URIOL CASTRO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 21, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	October 27, 2011

APPEARANCES:

Me Cristina Marinelli	FOR THE APPLICANT
Me Catherine Brisebois	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cristina Marinelli Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT