Date: 20070906

Docket: IMM-6787-06

Citation: 2007 FC 888

Ottawa, Ontario, September 6, 2007

PRESENT: THE HONOURABLE MR. JUSTICE SHORE

BETWEEN:

MIGUEL LUIS CONTRERAS MAGAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

OVERVIEW

[1] [27] I will rely on case law of this Court, according to which merely belonging to an organization that, as the male applicant argues, is a legal entity responsible for defending Peruvian territory and is recognized by the Peruvian constitution is insufficient to establish complicity or complicity through association, unless the organization is principally directed to a limited, brutal purpose, such as a secret police: *Ramirez, supra; Sivakumar, supra*. At the hearing, it was agreed that the Peruvian army is not such an organization.

[28] In his affidavit and testimony, the male applicant stated that he did not hold a strategic position in the Peruvian army in the early years of his military service. When he became a pilot, he had no decision-making powers and flew reconnaissance, not combat, aircraft. As chief of the intelligence section, he had to prevent drug traffickers from infiltrating the battalion and protect the base from terrorist attacks. He argues that he never had a post in the insurgent areas where,

> according to the documentary evidence, the Peruvian army has committed acts of repression. He maintains that he was not aware of the army's plans concerning the intervention at the Japanese embassy during the hostage-taking incident.

(*La Hoz v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 762, [2005] F.C.J. no. 940 (QL); also, IMM-5239-04, specifying the case of Miguel Luis Contreras Magan.)

[2] On June 18, 2002, the applicant, Mr. Miguel Luis Contreras Magan, claimed refugee status in Canada.

[3] The hearing before the Immigration and Refugee Board (the Board) was held on February 16 and March 2, 2004. The Board rendered its decision on May 10, 2004. On November 17, 2004, leave was granted to commence an application for judicial review.

[4] On May 30, 2005, the Federal Court ordered that the application for judicial review be allowed. (*La Hoz*, hereinabove)

[5] Mr. Justice Edmond Blanchard allowed the application for judicial review of the Board's decision, where it held that the Convention did not apply to the male applicant, ordered that the Board's decision in this regard be set aside and that the matter be referred back for a new hearing before a differently constituted panel.

[6] Accordingly, a new hearing was held on April 6, 2006 and on September 13, 2006. The Board rendered its negative decision on November 1, 2006.

[7] In this new decision, the Board failed to take into account Blanchard J.'s reasons for order dated May 30, 2005 (*La Hoz, supra*) with respect to Mr. Magan.

[8] Illustrating the kind of grounds to be taken into consideration, Blanchard J. wrote as follows:

> [23] The evidence must show that there are serious reasons for considering that the male applicant committed crimes against humanity. The Board did not address this issue. It did not establish which war crimes the male applicant allegedly committed. It simply referred to war crimes in broad terms and found that the Peruvian army frequently uses torture and commits acts of violence against civilians in areas where Tupac Amaru and Shining Path rebels are found. **Since it ruled that the male applicant's testimony was not credible**, the Board concluded that, because he was a member of the Peruvian army, he was responsible for these crimes. **In my view, these reasons are not sufficient to establish that the male applicant committed crimes against humanity.**
>
> [24] The second step in assessing exclusion is determining the extent of the male applicant's involvement. The various degrees of involvement in perpetrating crimes against humanity have been clearly set out by the Federal Court of Appeal in *Sivakumar, supra*. Depending on the facts, an individual can be:
>
> - directly involved
> - complicit
> - complicit through association.
>
> [25] In determining the validity of exclusion on grounds of complicity or complicity through association, it must be established that the refugee claimant personally and knowingly participated in acts of persecution: *Ramirez, supra*. As the Federal Court of Appeal has stated at paragraph 39 of its decision in *Moreno, supra*, complicity rests also on the existence of common intent of the perpetrator and accomplice.
>
> > At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it.
>
> [26] In my view, the Board found, without providing sufficient reasons, that the male applicant was responsible for perpetrating the acts listed in paragraphs (*a*) and (*c*) of section 1F of the Convention simply because he had been a member of the Peruvian army, which, according to documentation on current conditions in Peru, has members that have committed these acts. My review of the entire record leads me to conclude that the Board did not consider whether it had been proven that the

male applicant personally and knowingly participated in the perpetration of these crimes.

[27] I will rely on case law of this Court, according to which merely belonging to an organization that, as the male applicant argues, is a legal entity responsible for defending Peruvian territory and is recognized by the Peruvian constitution is insufficient to establish complicity or complicity through association, unless the organization is principally directed to a limited, brutal purpose, such as a secret police: *Ramirez, supra; Sivakumar, supra*. At the hearing, it was agreed that the Peruvian army is not such an organization.

[28] In his affidavit and testimony, the male applicant stated that he did not hold a strategic position in the Peruvian army in the early years of his military service. When he became a pilot, he had no decision-making powers and flew reconnaissance, not combat, aircraft. As chief of the intelligence section, he had to prevent drug traffickers from infiltrating the battalion and protect the base from terrorist attacks. He argues that he never had a post in the insurgent areas where, according to the documentary evidence, the Peruvian army has committed acts of repression. He maintains that he was not aware of the army's plans concerning the intervention at the Japanese embassy during the hostage-taking incident.

[...]

[31] No such specific findings were made in this case. Procedural fairness requires that specific findings be made regarding crimes the Board feels have been committed by a claimant. In my view, the Board limited itself to drawing inferences without clearly establishing the crimes the male applicant participated in. It simply laid responsibility on him for crimes committed by the Peruvian army, that is, acts of torture and abuses against the civilian population, based on documentary evidence on Peru. The Board did not establish the male applicant's complicity in the perpetration of these acts. Since it found the male applicant was not credible, the Board concluded that he had been involved in the commission of broadly defined crimes. The Court cannot uphold this conclusion. Since this omission is an error of law, I find that the Board's decision is incorrect and that intervention is warranted in this case with respect to the finding of the male applicant's exclusion.
(emphasis added)

[9] Therefore, it is clear that, <u>for the second time</u>, the Board erred in law and in fact.

[10] The Board made a significant error of law.

[11] The applicant's arguments are substantially well-founded; they raise serious issues and demonstrate the need to refer the matter back to the tribunal of first instance a second time for a *de novo* review before a differently constituted panel.

[12] Accordingly, the decision is set aside and a new hearing is ordered.

JUDGMENT

The Court has, for the second time, in the same case, followed the same reasoning to make the same findings that were ignored by the tribunal of first instance.

THE COURT ORDERS that the decision of the tribunal of first instance be set aside and that the matter be referred back to the tribunal of first instance for a *de novo* review before a differently constituted panel.

"Michel M.J. Shore"
Judge

Certified true translation
François Brunet, LLB, BCL

FEDERAL COURT

SOLICITORS OF RECORD

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