Federal Court		Cour fédérale

Date: 20100414

Docket: IMM-240-09

Citation: 2010 FC 403

BETWEEN:

JOSE VALLE LOPES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a negative admissibility decision and a deportation order issued by the Immigration Division of the Immigration and Refugee Board, (the Board), dated December 30, 2008. The Board found the applicant to be described in paragraph 35(1)(a) of the Act and thus inadmissible to Canada.

[2] The applicant requests that the matter of his admissibility be stayed, or in the alternative, remitted to the Immigration Division for redetermination.

Overview of Case Before the Board

[3] This case focuses on events which occurred primarily in Honduras in the early 1980s. The precise nature of the events that occurred and the applicant's level of involvement or complicity in them were the subjects of dispute before the Board.

[4] What is known is that the applicant is a citizen of Honduras. He joined the army in 1973 at the age of 15 and remained with the military until 1984. He left Honduras in 1985, entered Canada on a Minister's permit and has resided in Canada since then.

[5] The matter was referred to the Immigration Division by the Minister's Delegate on February 24, 2003 in order to determine whether the applicant was inadmissible to Canada on the grounds that he is described in paragraph 35(1)(a) of the Act. The referral was based on an officer's report (the section 44 report) which alleged that there are reasonable grounds to believe that the applicant committed offences under sections 4 to 7 of the Canadian *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

[6] The section 44 report stated that the applicant publicly admitted to having voluntarily joined the Directorate of Special National Investigations for Honduras (DIN, also referred to as Battalion

3-16) from 1980 to 1984 and that during this period, he participated in acts of kidnapping and torture against a civilian population. A principal piece of evidence was the English transcript of a CBC television show, “Man Alive”, which aired on January 19, 1988 titled, “Story of a Torturer” featuring the applicant.

Background

[7] In the early 1980s, several changes occurred within the Honduran army. This was due in part to the assistance and support the Honduran government received from the United States to wage war against communist and leftist threats in the region. According to U.S. Congress Country studies, by the early 1980s, Honduras’s Public Security Force (FUSEP), a branch of the armed forces, had a complex organizational structure and had its own investigative unit, DIN or Battalion 3-16. The unit, according to a former member, was led by Major Alexander Hernandez in 1982 and was comprised of four sections: personnel, intelligence and counter-intelligence, operations and analysis and supplies. The operations section contained a kidnapping group and an interrogation section.

[8] The applicant admits joining the army’s G-2 military intelligence unit in the late 1970s and being involved in information gathering and confirmation. At the admissibility hearing, he testified that he was never part of Battalion 3-16 and that at all times he was unaware of any of the things that units other than his own were doing. He claims that while at G-2, his job was restricted to information gathering.

[9] The respondent Minister alleges that the applicant joined Battalion 3-16 or its predecessor voluntarily. Battalion 3-16 was essentially a military death squad that tortured and murdered civilians. According to the testimony of former members of Battalion 3-16, several members were sent to the U.S. for training in interrogation techniques by the C.I.A. They testified that although the C.I.A. rejected torture, General Alvarez, who oversaw DIN or Battalion 3-16 and was later the Armed Forces Chief of Staff, disagreed and promoted its use.

[10] Battalion 3-16 operated as follows. Major Hernandez would give orders to investigate, watch and follow people. After the investigation was completed, the results would be communicated to Hernandez by telephone. If the subject was working for a left-wing group or trafficking in arms, Hernandez would authorize the kidnapping section to move in. After abduction, the victim would be turned over to the interrogation group whose techniques included electric shock, a rubber hood, cold water, near drowning and food deprivation. Members trained by the C.I.A. in psychological methods of interrogation were under orders by General Alvarez to only use those methods and let others conduct the torture. Hernandez rarely let anyone go after interrogation, but sometimes discussed a case with his superiors such as General Alvarez. The victim would usually be turned over to the execution team which was made up of prisoners from the Central Penitentiary who were serving long sentences and forced to work with Battalion 3-16.

[11] General Alvarez was ousted from his position in 1984 and fled the country. A former member of Battalion 3-16 testified that Major Hernandez left at the same time and that after their departure, kidnapping activity decreased significantly. Before then, there were two or three

operations per day. Various reports indicate that the unit was involved in the disappearance of 100 to 150 individuals between 1981 and 1984. There was also evidence that Battalion 3-16, often ignored or mocked civilian judges attempting to carry out writs of *habeas corpus* on the missing persons.

The Section 44 Report

[12] The report included evidence that the applicant first worked in surveillance and then moved into the kidnapping unit of Battalion 3-16. In "Story of a Torturer", the applicant is interpreted as saying:

> We were given courses on surveillance… We went to the city to do actual practices, real interrogation, real torture… I repeatedly asked for a transfer. It was denied. We were told that once in the task force, there was no way out. We knew too much.

[13] The transcript also includes the applicant discussing his misgivings about the work the unit did, but that their training prepared them psychologically and brainwashed them, turning them into machines with no feelings, no sorrow, no pity. They would sometimes laugh at the sight of someone being tortured. He is interpreted as saying: "Those persons captured by the [unit] never-never got out of there alive" and discussing how even children became victims of the unit. He also discussed his departure, saying that he feared his own squad would kill him and he fled to Mexico with the help of a human rights organization. Looking back, he is interpreted as saying:

> I have always admitted that I was a member of the army, that I was a torturer. This is what I was. I could have come to this country lying, saying that I was a communist. It would have been easier.

He also indicated that had he known from the start what he would be involved in, he never would have joined the army.

[14] The other important pieces of evidence implicating the applicant were a Baltimore Sun article from June 13, 1995 and a Toronto Life article from March 1989. The Baltimore Sun article implicated the applicant specifically, discussing his favourite torture techniques and discussing his working relationship with Hernandez. The Toronto Life article entitled "The Torturer's Tale" by Keith Atkinson, confirmed his work with Battalion 3-16 and discussed orders received from General Alvarez to torture or kill children in front of their parents. The article also discussed his inability to leave the unit without being killed. The article also includes his evidence regarding how he helped someone escape and then became a target of Battalion 3-16 himself and how he subsequently escaped.

The *Res Judicata*/Issue Estoppel Application

[15] The admissibility hearing was adjourned on January 26, 2005 for the Board to consider counsel's motion that the hearing be quashed or in the alternative, that it be adjourned pending a decision by the Canadian government to release relevant material. The applicant argued that the matter of his paragraph 35(1)(a) inadmissibility should be declared *res judicata*, given that Canadian authorities were fully aware of all of the facts relating to the commission of crimes against humanity, but admitted him in 1985 as a Convention refugee nevertheless. To further establish this,

the applicant sought to have the Canadian government release the relevant documents it had pertaining to his entry in 1985.

[16] The applicant gave the following testimony under oath on January 26, 2005 when questioned by his counsel. He was interviewed for three days at the Canadian Embassy in Mexico, in April of 1985. When asked if he recalled the "Man Alive" show, he respondent by saying: "Yes, I remember because all what was said there was my declaration at the Embassy in Mexico." When asked if anything was said during the "Man Alive" interview that was not said to Canadian government officials at the Embassy in 1985, he replied: "All what I said at the Embassy in Mexico was repeated to in the program, Man Alive."

[17] The Board dismissed the applicant's motion, saying that the Minister's permit in 1985 did not qualify as a final decision by a court of competent jurisdiction. The Board would not rule on whether the information used by the Minister was the same information it had in 1985.

Application under Section 38 of the *Canada Evidence Act*

[18] Despite the Board's rejection of the *res judicata* motion, the applicant continued to seek the Canadian government's acknowledgement that it had full knowledge of all relevant matters at the time it granted the applicant a Minister's permit.

[19] The applicant notified the Attorney General, with a letter dated May 26, 2005, pursuant to subsection 38.01(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that he intended to present sensitive information at the admissibility hearing described in that section of the Act. The letter cited 13 areas of testimony including: how the applicant was trained to commit crimes against humanity, the involvement of U.S. agencies, training materials (including the C.I.A. torture manual), how he arranged to come to Canada, evidence that the Canadian government was aware that he had committed crimes against humanity and his debriefing at the Canadian Embassy.

[20] On October 13, 2005, Gerard Norman, the general counsel for the National Security Group of Justice Canada, responded with a letter authorizing the disclosure of all the information referred to in the applicant's notice, but limited the authorization to those listed items, since "…the Attorney General of Canada cannot make a decision with respect to the disclosure of information for which he is unaware."

[21] The applicant replied that the documents were in the government's custody, not the applicant's. The applicant was of the position that disclosure of the documents was a breach of national security and sought a declaration from the Federal Court that the government was under a statutory duty under paragraph 38.04(2)(a) of the *Canada Evidence Act* to bring an action.

[22] In *Lopes v. Canada (Attorney General)*, 2006 FC 347, [2006] F.C.J. No. 436, Chief Justice Lutfy struck the application. The primary reason was because the Attorney General had consented to the disclosure of all the information set out in the section 38.01 notice. The Chief Justice

indicated that the application was clearly not the intended use of paragraph 38.04(2)(a) and opened his reasons by stating that the application was "… so clearly improper as to be bereft of any possibility of success." The Federal Court of Appeal affirmed this ruling in *Lopez v. Canada (Attorney General)*, 2007 FCA 109, [2007] F.C.J. No. 401.

Admissibility Hearing Resumes in 2008

[23] Contrary to what the applicant stated to the Attorney General when he began testifying at the resumed hearing in 2008, he denied any involvement with Battalion 3-16 and any personal knowledge of its atrocities or crimes against humanity beyond what was generally known to the public.

[24] The hearing in 2008 was conducted on five days between March 31 and May 21. On the first day, the applicant testified extensively about the events in question. He confirmed that he joined the Honduran army in 1973, but stated that he was trained in the United States and Panama to work in an anti-narcotics unit that was part of the war on drugs. He stated that he was part of the G-2 military intelligence unit and mentioned that he asked for transfers but was denied. Senior officers told him the only way to leave was by death. He was finally transferred on December 20, 1984 shortly before he was detained by the police or military on December 24. He attributed his arrest to his requests to leave the narcotics unit that were interpreted as presenting a risk of betrayal. He was taken to a sugar cane farm and made to ingest an insecticide. Later he was taken to uniformed police who were told he was found drunk. When the police went to investigate a nearby shooting, he was

able to escape. He travelled to Tegucigalpa, four hours away, and was treated by a doctor. A friend then took him to a safe house where, with the help of the Honduran Human Rights Commission, he was able to get asylum in the Mexican Embassy and a safe conduct pass to travel to Mexico.

[25] At the second day of the hearing, he said he had been tricked into taking the military intelligence course, having been told that the course was about agrarian reform. He also testified that his section head with G-2 was Captain Alexander Hernandez and that he worked at G-2 headquarters in Tegucigalpa until his transfer in 1984.

[26] At the third day of the hearing, he testified about specific assignments he carried out. He testified that all the assignments in question involved information gathering, sometimes regarding individuals with communist ideology, but that he did not participate in any arrests, as this work was always done by the operative group.

[27] At the fourth day of the hearing, he testified that while on assignment at SANA, the national water authority, in February of 1984 he befriended a union president. When the union president was later kidnapped, he told his family where he was being held, by whom, and that they should go to court to ask for *habeas corpus*. The union president was released but later taken again. In November of 1984, he asked his group chief for a transfer out of G-2. To protect himself, he took some documents and stashed them with a local farmer. His group chief suspected that some documents had disappeared and had the applicant's house ransacked. In the last week of November 1984, he

was given his transfer. After his arrival in Canada, Canadian officials were able to retrieve the documents he had stashed.

[28] He stated that he wanted to leave G-2 because he did not agree with what was happening. Although he was only involved in information gathering, he was surprised to notice that some people he interviewed were then detained. He did not know what the other sections were doing. They kept information from him, while using him as a conduit for information leading to arrests.

[29] He recounted his attempted arrest as follows. He was at his mother's house shortly after receiving his transfer when a police officer came to the door. When he declined to go with the officer, seven more officers showed up and took him to a sugar cane field and forced him to drink pesticide to make his death look like a suicide. After escaping from the police station, as described above, he said that he took a cab to the local hospital, paying for the ride with his watch. The doctor told him that four uniformed officers were looking for him, so he left. He then went to a relative's house and borrowed some money to take a bus to Tegucigalpa.

The Board's Decision

[30] In its 34 page decision, the Board recounted the background events and evidence described above in much greater detail.

[31] The Board concluded that the applicant had not been truthful at all times. This was due to the applicant's testimony under oath on January 26, 2005 that everything that was said on "Man Alive" was told to Canadian officials. Those statements were an admission of having participated in kidnappings, enforced disappearances, imprisonment without judicial oversight, torture, inhumane acts and murder. This version of events was used in support of a *res judicata* application and the application to this Court under section 38 of the *Canada Evidence Act*. In the 2008 hearing, the applicant then denied having admitted to any wrongdoing during any of the media interviews. He attributed the incriminating statements in the press and on the television show to poor translation. The Board did not find this explanation credible, given his free and voluntary affirmation of the statements to the Attorney General, Federal Court and Federal Court of Appeal. His later recantation is likely due to a tactical retreat when he failed to have the admissibility hearing ended.

[32] The Board also did not find it plausible that independent interviews given to three different media outlets in three different years saying substantially the same thing are all wrong in pith and substance because of faulty interpretation. If the applicant was concerned about the substance of the media reports, he failed to complain in a timely fashion. He then tried to use base legal applications to stop the admissibility hearing on the grounds that the media articles conveyed an accurate presentation of events. The Board concluded that more weight should be given to the applicant's previous admissions than to his subsequent recantations.

[33] The Board noted other inconsistencies in the applicant's 2008 testimony. The Board noted that at one point, he stated that he worked for an anti-narcotics unit within G-2, yet at another point

he indicated that he worked in the area of confirmation of information within G-2. While he denied having worked for Battalion 3-16, he admitted that he worked for DIN, after being transferred to G-2. According to evidence of former members, Battalion 3-16 had been referred to by different names at different times. The Board concluded at page 29:

> The description of the [applicant's] chain of command and his duties, coupled with the admission that he worked for G-2 military intelligence in the special investigations directorate led by Hernandez is consistent with the documentary evidence filed that indicates that this unit became known as Battalion 3-16 sometime between 1982 and 1984. The [applicant] was likely a member of the G-2 special investigations directorate from 1977 until 1984.

[34] The Board also found as fact that the unit received instructions on interrogation techniques from the U.S., but that the individuals who employed psychological methods were separate from the individuals who employed torture. A separate unit carried out the executions and between 100 and 150 people were killed.

[35] The Board then quoted from the *Velasquez Rodriguez* case, judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), where the judge of the Inter-American Court of Human Rights wrote:

> The testimony and documentary evidence, corroborated by press clippings, presented by the Commission, tend to show: a. That there existed in Honduras from 1981 to 1984 a systematic and selective practice of disappearances carried out with the assistance or tolerance of the government; … c. That in the period in which those acts occurred, the legal remedies available in Honduras were not appropriate or effective to guarantee his rights to life, liberty and personal integrity.
>
> …

> Disappearances followed a similar pattern, beginning with the kidnapping of the victims by force, often in broad daylight and in public places, by armed men in civilian clothes and disguises, who acted with apparent impunity and who used vehicles without any official identification, with tinted windows and with false license plates or no plates.

[36] The Board also quoted from a Human Rights Watch report entitled "Honduras: The Facts Speak for Themselves", and an article from the Center for International Policy which elaborated on the systematic disappearances and Battalion 3-16's involvement.

[37] The Board found that the documentary evidence establishes that the G-2 unit the applicant worked with specialized in locating, interrogating and eliminating people and that the applicant's membership alone was sufficient to ground the Minister's claim.

> Operations were carried out in an organized and systematic manner that had a limited and brutal purpose that would likely have been known to all members. The [applicant's] testimony that he investigated subjects without knowing what the other sections were doing is not credible…. I am satisfied that his admitted work as an investigator is sufficient for him to be considered as a member of a limited brutal-purpose organization that committed crimes against humanity, even if he was never personally involved with kidnapping and torture.

[38] The Board concluded that the applicant was a member of Battalion 3-16 and its predecessor G-2 special investigation units.

[39] The Board went on to hold that even if Battalion 3-16 were not a limited brutal purpose organization, the applicant was nonetheless complicit in crimes against humanity. The Board cited

the applicant's length of service and rank in the organization and his failure to leave as factors indicating his complicity in the unit's crimes. Thus, even if his testimony to the media was untrue, his work confirming information for G-2 is sufficient to establish culpable complicity. In addition, the Board concluded that the applicant, more likely than not, personally committed crimes against humanity.

[40] With regards to the defence of duress, the Board acknowledged that the applicant would have been killed if he had left without permission. However, the harm of the evil threatened was not on balance greater than the evil inflicted on victims. When the applicant did find himself in actual danger, he was able to escape to the Mexican Embassy. The Board also noted that the circumstances surrounding his defection were unclear, due to his conflicting accounts of the events. In any event, the possibility of the applicant's own death did not justify a defence of duress given the greater harm inflicted on a number of people.

Issues

[41] The issues are as follows:

1. Should the paragraph 35(1)(a) allegations have been quashed because they were *res judicata* or by application of the doctrine of issue estoppel?
2. Was the paragraph 35(1)(a) proceeding an abuse of process?
3. Did the Board err by applying paragraph 35(1)(a) retrospectively?

4. Did the Board err in finding that the applicant was complicit in crimes against humanity and in rejecting his defence of duress?

5. Should this Court rule that the proceedings were procedurally unfair due to the conduct of the applicant's counsel?

Applicant's Written Submissions

[42] In regards to issue estoppel, the Board was to consider whether the same issue had been decided, whether the decision had been final and whether the parties were the same (see *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 482, [2003] F.C.J. No. 1931). Instead, the Board simply found that the Minister's permit was not a final decision.

[43] Section 34 of the former *Immigration Act*, R.S.C. 1985, c. I-2, read in part "No decision given under this Act prevents the holding of a further inquiry by reason of the making of another report…". *Al Yamani* above, decided that that sentence overrode the common law doctrine of *res judicata*. The Board was required to consider whether the Act, with no similar provision, contains the same meaning. Here, the member who adjudicated the *res judicata* issue did not adequately apply *Al Yamani* above, to the applicant's case. Proper application would suggest that the issue of the applicant's involvement in human rights crimes was estopped.

[44] The applicant submits that the Minister's permit in 1985 was given by a competent government authority and the permit was renewed in 1986. Then he was subsequently granted

permanent resident status. Under these circumstances, the decision should have been considered a "final decision". It was final in the sense that the parties agreed to the remedy.

[45] The cases where this Court has not found *res judicata* are cases where there had been a flaw in the first proceeding, such as where the first proceeding did not conclude or where the second proceeding was based on a different set of facts. That was not the case here. Furthermore, the policy rationales noted by the respondent on this issue fail to note another important consideration, namely, the fairness issue of preventing "the hardship to the individual of being twice vexed for the same cause", especially regarding questions the parties had an opportunity of raising.

[46] Even if the applicant does not succeed in his *res judicata* application, the applicant submits that this inquiry was unfair and should be considered an abuse of process. Judges should use their discretion to stay proceedings where there is oppressive and unfair state decision making (see *Connelly v. D.P.P.*, [1964] A.C. 1254, at page 1354).

[47] The applicant submits that in addressing the issue of abuse of process, the question to be asked is whether the proceeding would violate those principles which underlie the community's sense of fair play (see *R. v. Jewitt*, [1985] 2 S.C.R. 128, at paragraph 25). The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure in a way that would be manifestly unfair to a party or bring the administration of justice into disrepute (see *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64 (QL) at paragraph 37). The *CUPE* Court also stated that

Canadian courts have applied the doctrine of abuse of process where the strict requirements of issue estoppel are not met.

[48] The applicant submits that abuse of process may be established where: (i) the proceedings are vexatious, and (ii) violate the principles of society's sense of fair play (see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, 23 Admin. L.R. (3d) 175). The two criteria are to be read cumulatively (see *Charkaoui (Re)*, [2006] 3 F.C.R. 325, [2005] F.C.J. No. 2038 (QL) at paragraph 75). Here, the applicant was determined to be a refugee by the UNHCR and granted the Minister's permit. Not only was his story known, but he was used by Canadian authorities for a number of years as an informant. A letter from the Canadian Ambassador to Honduras confirms the high regard for his evidence. At no time was he considered a threat. The proceedings were then brought against him 18 years later, 16 years after the CBC show and 15 years after the enactment of Bill C-71 which created the first version of the currently applicable removal provision. This delay is exacerbated by the fact that the applicant has been unable to get the interview notes from his conversations with Canadian officials.

[49] Abuse of process is a more complex inquiry than the respondent suggests. The common law doctrine of abuse of process has been subsumed into the principles of the Charter (see *Al Yamani* above, at paragraph 24). Courts must therefore assess the person's psychological integrity, but even if the circumstances do not amount to a Charter breach, the administrative remedy for abuse of process must still be considered (see *Blencoe* above, at paragraph 55).

[50] The applicant submits that when considering whether a delay is so egregious that it amounts to an abuse of process or is oppressive, one factor is whether the person concerned had carried on thinking that his problems were behind him (see *Ratzlaff v. British Columbia (Medical Services Commission)*, [1996] B.C.J. No. 36, 17 B.C.L.R. (3d) 336). The *Al Yamani* Court also noted that the Minister's litigation choice, length of time transpired and gravity of the allegations were to be considered (paragraphs 26 to 39). The applicant submits that he was prejudiced by the flaws in the CBC show and his inability to get documents from the government. The applicant is prejudiced by the fact that there was a complete absence of diligence in pursuing this matter in a timely manner. His file seems to have fallen through the cracks for a number of years. While section 33 of the Act allows inadmissibility inquiries to consider events that have occurred in the past, there is nothing stating that this inquiry can be done regardless of how long officials have known about it. Even if the passage of 16 years does not alone render the admissibility decision invalid, it is still a relevant consideration which the Board did not consider.

[51] The applicant also submits that there is a presumption against the retrospective application of laws and points out that paragraph 35(1)(a) did not exist when he came to Canada. There is now a more purposive and contextual approach to the proscription against retrospectivity (see *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301, [1989] S.C.J. No. 15 (QL) paragraphs 47 to 48). When an act or section is repealed, it does not affect a right, privilege, obligation or liability acquired, accrued, accruing, or incurred under the enactment so repealed (*Interpretation Act*, R.S.C. 1985, C. I-21, section 43). The applicant clearly had an accrued right to remain in Canada as a permanent resident. The current wording of section 35 cannot be used as the basis for the

applicant's removal from Canada on past conduct which existed prior to the amendments, says the applicant. Section 35 refers to the present tense of "committing" an offence. There is no specific provision allowing the retroactivity of the section.

[52] Contrary to the respondent's submissions, the applicant submits that the fact that section 33 of the Act includes events that have occurred, simply confirms the presumption against retrospectivity. Moreover, section 190 does not make it clear that sections 34 to 37 should have retrospective application. Finally, the Minister cannot argue that the provisions require retrospective application for the purposes of furthering public safety when the applicant has never been considered a danger and in fact, was considered a help to Canadian officials.

[53] The applicant testified that his involvement was limited to surveillance. The Board held that even if that were true, "he was likely aware of the nature, purpose and operations of the unit" and that "his work as an investigator alone makes him complicit…".

[54] The applicant submits that while membership can give rise to a finding of complicity, *mens rea* remains an essential element of the crime. Equally important is the finding of a shared common purpose as between principal and accomplice (see *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298, [1993] F.C.J. No. 912 (C.A.) (QL) at paragraph 51). That an individual has the *mens rea* to be complicit merely because of membership is just a factual starting point which is rebuttable (see *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636).

[55] The Board erred in failing to analyze complicity in regards to the mental element of knowledge and intentional participation says the applicant. The Board held that he “held rank” despite evidence that the applicant was low ranking and was not privy to the decision making. The Board similarly held that “he likely knew what was going on in the unit” despite insufficient evidence. The applicant says that in reality, he worked with an arm’s length subunit (G-2) and can only be assessed with regards to that particular subunit.

[56] The applicant submits that the Board also erred in its analysis of duress. The Board erred by finding that the applicant’s possible death was not equal to the harm inflicted by those in the Honduran army. The Board ignored the evidence of how the applicant feared leaving when it held that the risk to his life was not imminent, given that it was conditional on future conduct that also gave him the opportunity to leave.

[57] Finally, the applicant submits that he was prejudiced by the incompetence of his previous counsel whose strategy resulted in procedural unfairness. This compromised the result of the hearing. Counsel’s actions were outside the range of reasonable professional assistance. Despite this case being novel and complex, counsel failed to provide written submissions at the end of the hearing. As a result, the applicant’s case was seriously compromised. Counsel also failed to provide oral submissions while the Minister did. The applicant subsequently filed a complaint with the Law Society.

Respondent's Written Submissions

[58] The respondent submits that the matter before the Board was not *res judicata* or issue estopped, nor was it an abuse of process. The paragraph 35(1)(a) ground of inadmissibility did not exist in 1985 so it was not possible to have had those grounds assessed then. Further, *res judicata* only applies to judicial decisions. The previous decision to grant the applicant entry does not attract the application of the doctrine. Nor does the policy behind *res judicata* apply, since there is no need to preserve judicial resources. The Immigration Division hearing was the first and only hearing on the matter.

[59] The respondent submits that the passage of time does not prevent the applicant from being subject to an inadmissibility proceeding. As a permanent resident, the applicant's admissibility to Canada is a continuing question. There is no limitation period. Section 33 of the Act allows inadmissibility allegations to be based on past activities regardless of when they occurred or how long Canadian officials have known about them. The *Al Yamani* decision above, does not assist the applicant. It does not alter the fact that the Act itself makes inadmissibility a continuing question and does not place limitation on when such allegations can be pursued.

[60] The respondent submits that to establish abuse of process, the circumstances must render it so impossible for the applicant to receive a fair inadmissibility hearing that the only remedy would be to not have the allegations assessed on their merits. Here, the applicant has not established that his right to a fair hearing has been prejudiced. Secondly, he has not shown that the only cure is to

not hold the hearing at all. Thirdly, the public interest would not warrant the granting of the relief spelled out in *Blencoe* above. The applicant has not shown that there would be damage to the public interest if the allegation is assessed on its merits. Fourthly, the inadmissibility decision does not stop the applicant from seeking relief. He still has the opportunity to make a PRRA application and if unsuccessful, could still request that the Minister not proceed with removal under subsection115(2) of the Act.

[61] The applicant cannot claim he was not given a fair hearing due to not receiving documents. Procedural fairness requires that he get everything used to establish the paragraph 35(1)(a) claim. He got that. He cannot claim a heightened level of disclosure.

[62] Even if this Court finds that the Board erred in its assessment of the abuse of process issue, the proper action is to send the matter back for redetermination. Judicial review is not an appeal.

[63] The respondent also submits that the presumption against retrospectivity does not apply to paragraph 35(1)(a) because it does not have any retrospective application, and if it does, then that was clearly Parliament's intent. Section 35 does not reach back and alter the rights and privileges the applicant enjoyed as a permanent resident. The section 35 allegations allege that the applicant is removable today because of his involvement in violations of human rights. The principle that a permanent resident can be removed if he or she becomes inadmissible has been affirmed by the Supreme Court (see *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1

S.C.R. 711 at 733 and 734). The applicant cannot assert that he had an accrued right not to be the subject of an inadmissibility allegation.

[64] When enacting section 35 of the Act, Parliament chose to treat past involvement in human rights violations as a continuing fact that poses a danger to Canada's national interest. People involved in such activities are considered a threat to national interest, regardless of when they were actually involved. In *Brosseau* above, the Supreme Court held that the presumption has no application to statutes that impose a disqualification for having a certain status, when the objective is not to punish the person but to protect the public (paragraph 55).

[65] In any event, parliamentary intent trumps the presumption says the respondent. Section 33 of the Act clearly shows that Parliament intended paragraph 35(1)(a) to apply to conduct that occurred before its enactment. Section 33 speaks of events that "…have occurred, are occurring or may occur." This drafting was a legitimate and non-arbitrary choice by Parliament to not allow certain persons to remain in the country.

[66] The respondent submits that even if *mens rea* is still a requirement of complicity, the Board's determination that the applicant was a knowing and willing participant, provides a proper basis for a *mens rea* finding. While the applicant disagrees with the Board member's weighing of the harms in the defence of duress, his ultimate finding was one that was open to him.

Analysis and Decision

[67] **Standard of Review**

Issues 1, 2, 3 and 5 are matters of pure law or procedural fairness upon which the Court must come to its own conclusion. Issue 4 reviews a question of mixed fact and law within the Board's jurisdiction and expertise to answer. Accordingly, it is to be afforded deference and will only be interfered with if it is found to be unreasonable.

[68] **Issue 1**

Should the paragraph 35(1)(a) allegations have been quashed because they were *res judicata* or by application of the doctrine of issue estoppel?

The applicant claims that he spoke extensively with Canadian officials at the Mexican Embassy in 1985 and that the Minister was fully aware at the time he was allowed to enter Canada in April 1985, of the allegations underlying the present admissibility hearing. Despite being aware of those allegations, the applicant was granted a Minister's permit by a competent government authority and was later granted permanent resident status. Thus, says the applicant, the issue has already been decided.

[69] The Board relied on an interlocutory decision of another officer, DeCarlo, who, in a transcript dated April 13, 2005, gave reasons dismissing the issues of *res judicata* and issue estoppel.

[70] In general, parties are not permitted to relitigate issues which have already been determined. This has become known as the doctrine of *res judicata* of which there are two branches. This was discussed by Mr. Justice Rothstein, then of the Federal Court of Appeal, in *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 482, [2003] F.C.J. No. 1931:

> 10 There are two branches of the doctrine of res judicata. Cause of action estoppel "precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction" (*Angle v. M.N.R.*, [1975] 2 S.C.R. 248 at 254. Issue estoppel applies "where, the cause of action being different, some point or issue of fact has already been decided" (*Angle* at 254, quoting Higgins J. in *Hoystead v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at 561 (H.C.A.)).

[71] There is clearly no cause of action estoppel here. Neither the current cause of action, paragraph 35(1)(a) of the Act, nor its predecessor, paragraphs 27(1)(g) and (h) of the former *Immigration Act*, were in existence at the time the applicant was granted landing.

[72] Turning to issue estoppel, there are three requirements that must be met:

1. The same question has been decided;
2. The judicial decision which is said to create the estoppel was final; and
3. The parties to the judicial decision or their privies are the same.

(See *Al Yamani* above, at paragraph 15, and *Angle* above, at 254, quoting Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at 935 (H.L.)).

[73] The applicant's primary argument is a technical one. The applicant seemingly does not dispute the member DeCarlo's ultimate conclusion on the matter, but says the analysis was inadequate. The applicant argues that member DeCarlo did not properly separate the two branches and did not adequately analyze each requirement of the test for issue estoppel.

[74] The issue of *res judicata* is a purely legal matter that had little to do with the underlying paragraph 35(1)(a) allegations or the credibility of the applicant. It is not a matter that immigration officers are expected to have expertise dealing with, yet it is something the applicant had the right to have determined correctly. In my view, the only question on the judicial review of a *res judicata* motion is whether the correct result was achieved. In other words, a member's reasons may be somewhat helpful to a court upon review, but a correct result will not be overturned due to a mere flaw or omission in the administrative officer's written analysis.

[75] The transcript indicates that the *res judicata* application failed both the first and second requirements of the test outlined in *Al Yamani* above. While the officer's legal analysis is unimportant, I agree with her conclusion and would similarly reject the applicant's arguments.

[76] First, the Minister's permit in 1985 and the current inadmissibility allegations under paragraph 35(1)(a) were not determinations of the same question. The legislation at the time did not have a provision excluding individuals involved in war crimes or crimes against humanity. Second, neither the Minister's permit, nor the granting of permanent resident status constituted a judicial decision that was final. Clearly they were not decisions made by a court or even a body resembling

a court and thus, they were not judicial decisions. Nor were they final. One positive admissibility decision does not excuse subsequent inadmissibility. The Act gives permanent residents only a conditional and qualified right to remain in Canada so long as they are not inadmissible (see *Chiarelli* above, at 733 and 734).

[77] **Issue 2**

Was the paragraph 35(1)(a) proceeding an abuse of process?

In the applicant's submission, the following factors taken as a whole, would suggest that the inquiry was an abuse of process.

1. The applicant was determined to be a refugee by the UNHCR in Mexico in 1985 and granted a Minister's permit.

2. Not only was his story known by Canadian officials, but he was used by Canadian authorities for a number of years as an informant. The applicant alleges that a letter from the Canadian Ambassador to Honduras confirms the high regard for his evidence.

3. He says that at no time was he considered a threat.

4. These proceedings were then brought against him 18 years later, 16 years after the CBC show aired and 15 years after the enactment of Bill C-71 which created the predecessor to paragraph 35(1)(a).

5. The applicant has been further prejudiced because he is unable to get the interview notes from his conversations with Canadian officials.

[78] It is not necessary for me to determine whether or not the Board had jurisdiction to hear a motion for abuse of process. The Board did not make any determination on the matter. Perhaps one can infer that the Board member did not consider it an abuse of process by the simple fact that he allowed the process to continue. In any event, like *res judicata*, the issue of abuse of process is a matter for which the Court can make its own determination. I now will analyze the applicant's arguments on whether the proceeding itself was an abuse of process at law.

[79] The common law doctrine of abuse of process may be made out under varying requirements depending on the nature of the remedy sought. Typically, it is invoked in a motion to have proceedings stayed. In the context of a breach of subsection 11(b) of the Charter, a stay has been found to constitute the only possible remedy (see *R. v. Askov*, [1990] 2 S.C.R. 1199), but in the administrative context, other remedies are sometimes available. Thus, when a stay of proceedings is the remedy sought, the applicant will bear a heavy burden (see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, 23 Admin. L.R. (3d) 175, [2000] S.C.J. No. 43 (QL) at paragraphs 116 to 117).

[80] The *Blencoe* Court explained why, in the context of an administrative delay, courts have stringent requirements before allowing an abuse of process motion:

> 116 The respondent's case is that there has been an unacceptable delay in the administrative process which has caused him to be prejudiced by the stigma attached to the two Complaints to an extent that justifies the process being terminated now. Abuse of process is a common law principle invoked principally to stay proceedings where to allow them to continue would be oppressive. As stated by Brown and Evans, [*Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf)], at pp. 9-71 and 9-72:

> The stringency of the requirements for showing that delay constitutes a breach of fairness would seem to be due, at least in part, to the drastic nature of the only appropriate remedy. Unlike other instances of procedural unfairness where it is open to a court to remit the matter for redetermination in a procedurally fair manner, the remedy for undue delay will usually be to prevent the tribunal from exercising its legislative authority, either by prohibiting it from proceeding with the hearing, or by quashing the resulting decision.
>
> [Emphasis added]

[81] In assessing claims of abuse of process, courts typically address four areas of concern: length of the delay and who caused it, whether the fairness of the hearing is compromised as a result, other prejudice suffered by the applicant and public interest considerations.

[82] I do not accept the applicant's argument that the fairness of the hearing was compromised due to the delay in this case. The evidence on which the inadmissibility allegation is based comes from the applicant's own admission. The passage of time has not eroded the quality of that evidence or his ability to challenge it and his right to rebut the allegations remains fully intact. Likewise, his failure to obtain documents from his interviews at the Embassy did not render the process unfair. Procedurally, the applicant was only entitled to receive documentation the respondent relies on in bringing the paragraph 35(1)(a) allegations. In any event, by the applicant's own admission, the interviews in 1985 would only confirm his comments on the "Man Alive" show.

[83] The respondent asserts that in order for an abuse of process claim to be made out, the circumstances must render it impossible for the applicant to receive a fair inadmissibility hearing and that those circumstances can only be remedied by not having the allegations assessed on its merits. I disagree. The *Blencoe* above Court, at paragraph 115, considered the possibility that an unacceptable delay "…may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised." However, the Court continued at paragraph 115 by stating:

> Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. …
>
> [Emphasis added]

[84] Thus, when the fairness of the hearing has not been compromised, the applicant claiming abuse of process and seeking a stay will have an even heavier burden and must firmly establish the other elements with strong evidence. In this case, the applicant has not met the high burden.

[85] While it is regrettable that such a long delay occurred, the applicant has not brought any evidence of intentional delay or bad faith. The respondent explains that the paragraph 35(1)(a)

allegations were only available to the Minister after the current Act came into force in 2002, because paragraphs 27(1)(g) and (h) of the former *Immigration Act* that addressed the same issue could not be applied to crimes committed prior to the enactment.

[86] More significantly, the applicant has brought forward little evidence of any prejudice suffered by him personally. In *Blencoe* above, a former provincial Minister accused of sexual assault in front of a human rights commission was the subject of intense media attention during the delay, considered himself "unemployable", suffered from severe depression for which he sought counselling and was prescribed medication and even moved his family to Ontario to escape media attention. Yet the Supreme Court of Canada was unwilling to find an abuse of process.

[87] Finally, when granting relief for abuse of process, one must balance competing public interests. While it is not necessary to canvass all arguments under this heading, it will suffice to say that there is significant public interest behind the enactment of paragraph 35(1)(a) and the general condemnation of crimes against humanity committed abroad. Those interests militate in favour of getting at the truth and holding those accused of committing such crimes accountable, even though much time has passed. As stated in *Al Yamani* above, at paragraph 38:

> While the respondent does not challenge the applicant's assertions that he provided assistance to Canadian authorities, by providing information, it is unlikely that the Canadian public would agree that such assistance should be sufficient to grant an individual a full pardon from such crimes.

[88] **Issue 3**

Did the Board err by applying paragraph 35(1)(a) retrospectively?

As stated above, paragraph 35(1)(a) did not exist at the time the applicant entered Canada. Nor did paragraphs 27(1)(g) and (h) of the former *Immigration Act*. The applicant argues that the presumption against the retrospective application of laws prevents the application of paragraph 35(1)(a) in his case.

[89] There is now a more purposive and contextual approach to the proscription against retrospectivity (see *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301, [1989] S.C.J. No. 15 (QL) paragraphs 47 and 48). Despite the arguments of both parties on this issue, in my view, nothing turns on the presumption.

[90] In my view, the application of paragraph 35(1)(a) is not retrospective and thus does not attract the presumption in the first place. The section reads as follows:

> 35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for
>
> (a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;
>
> …

[91] When enacting paragraph 35(1)(a), Parliament chose to treat past and present participation in a crime against humanity as a continuing fact. In this sense, paragraph 35(1)(a) has a prospective application as it merely changes the consequences for a continuing fact.

[92] In *Al Yamani* above, the applicant argued that there had been a retrospective application of clause 19(1)(f)(iii)(B) of the former Act. The applicant in that case came to Canada in 1985 and had severed ties with the terrorist organization in question by 1992. Clause 19(1)(f)(iii)(B) was later enacted in 1993. The former section read:

> 19.(1) No person shall be granted admission who is a member of any of the following classes:
>
> ...
>
> (f) persons who there are reasonable grounds to believe
>
> ...
>
> (iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in
>
> ...
>
> (B) terrorism,
>
> except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;

[93] Mr. Justice Rothstein stated:

> 8 In any event, I do not think applying clause 19(1)(f)(iii)(B) to a person who retired from a terrorist organization in 1992 or, indeed, at any time before February 1, 1993, constitutes a retrospective application of the provision. Having been a member of a terrorist group is a continuing status. Put another way, finding that an individual is ineligible to remain in Canada on the basis that he was formerly a member of a terrorist organization is the imposition of a present consequence based on past behaviour in order to protect public safety. That is not retrospective application of legislation (*Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 at 319-20).
>
> [My emphasis]

[94] Similar to the case in *Al Yamani* above, in my opinion, paragraph 35(1)(a) is drafted in such a way that having committed a crime against humanity is a continuing status. It does not have a retrospective application.

[95] Furthering the notion that paragraph 35(1)(a) does not have a retrospective application is the fact that its application does not change one's past legal status. It does not interfere with a vested right, since permanent residents cannot be said to have a "vested" right to remain in Canada (*Chiarelli* above, at 733 and 734). The application of paragraph 35(1)(a) does not change the fact that the applicant has lived in Canada as a permanent resident since 1986. It does not reach into the past and alter the rights and privileges that he enjoyed as a permanent resident. The allegation is only that the applicant is removable today because of his participation in crimes against humanity. Paragraph 35(1)(a) is applied to the applicant's present situation to determine if he can continue to be a permanent resident in the future.

[96] In *Rudolph v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 653 at 657, [1992] F.C.J. No. 400 (C.A.) (QL), the Federal Court of Appeal held that:

> …it is not retrospective legislation to adopt today a rule which henceforward excludes persons from Canada on the basis of their conduct in the past.

This principle was reaffirmed in *McAllister v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 F.C. 190, [1996] F.C.J. No. 177 (QL) at paragraph 52.

[97] Even if it could be established that paragraph 35(1)(a) does have retrospective application and it was found that the presumption applied, I would find that it is rebutted by a clear Parliamentary intention to have section 35 apply to past events. The words of section 33 could not make Parliament's intention more clear:

> 33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.
>
> [My emphasis]

[98] Parliament's intent to have paragraph 35(1)(a) apply to persons such as the applicant is clear from this unambiguous language. In other words, it was intended that these sections would properly apply to the relevant crimes or conduct whenever that crime or conduct occurred.

[99] **Issue 4**

Did the Board err in finding that the applicant was complicit in crimes against humanity and in rejecting his defence of duress?

The applicant challenges the Board's finding that he is inadmissible under paragraph 35(1)(a) due to a finding of culpable complicity in crimes against humanity. Complicity, was in fact only the second of three distinct findings of fact, any one of which render the applicant inadmissible under paragraph 35(1)(a).

[100] The Board's first determination was that the applicant was a member of the unit referred to as Battalion 3-16 and that Battalion 3-16 was a limited brutal purpose organization (see *Ramirez v.*

Canada (Minister of Employment and Immigration), [1992] 2 F.C. 306, 89 D.L.R. (4th) 173, [1992] F.C.J. No. 109 (C.A.)). That being his finding, he concluded that mere membership in Battalion 3-16 by necessity involved personal and knowing participation in its abductions and interrogations in which torture was used.

[101] Then after a separate finding of complicity, the Board determined that the applicant more likely than not personally committed crimes against humanity. Evidence such as the applicant's admission on the CBC show, "… I was a torturer" likely helped the Board obtain reasonable grounds for this finding.

[102] Because the conclusion of inadmissibility was based on three independently sufficient findings, challenging the Board's conclusion on the finding of complicity alone does not assist the applicant, even if such a challenge were to be successful. In any event, I have found no reviewable error in the Board's factual finding on complicity. The Board set out the six factors to consider in determining whether an individual is complicit in crimes against humanity from *Bahamin v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 961, 171 N.R. 79 (C.A.) (QL): the nature of the organization, the method of recruitment, position/rank in the organization, knowledge of the organization's atrocities, length of time in the organization and the opportunity to leave the organization. The Board then reviewed the evidence thoroughly and applied those factors in a reasonable fashion.

[103] The applicant makes the argument that he did not have the required *mens rea* which remains an essential element to a finding of complicity (see *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298, [1993] F.C.J. No. 912 (C.A.) (QL) at paragraph 51). In this context, *mens rea* can be presumed but that presumption can be rebutted (see *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636), which the applicant argues he did in his testimony at the hearing. Yet it was clear that the Board did not find the applicant's testimony on that point to be credible and instead gave more weight to the applicant's prior admissions. The applicant does not challenge the Board's credibility findings.

[104] The applicant finally challenges the Board's conclusion that the defence of duress was not made out. That defence is embodied in the consideration "opportunity to leave the organization" in a complicity analysis (see *Bahamin* above). The Board acknowledged that if the applicant had attempted to leave he would likely have been killed, but subsequently concluded that "the possibility of the applicant's own death does not justify a defence of duress given the greater harm that was inflicted on a number of people." The applicant argues that it was improper for the Board to implicitly find that a singular death was unequal to multiple deaths.

[105] In *Canada (Minister of Citizenship and Immigration) v. Asghedom*, [2001] F.C.J. No. 1350, 210 F.T.R. 294, the respondent, pleading duress argued that the harm inflicted by the Ethiopian army in engaging in international crimes was not in excess of what he would suffer for deserting, namely, death by execution. The Board accepted his defence. Mr. Justice Blais at paragraph 35 upheld the Board's decision on the application of the reasonableness standard of review:

> In my view, the Board's conclusion was reasonable in light of the evidence before it. The Board was entitled to weigh the evidence as it did and I cannot conclude that it ignored the evidence, as alleged by the applicant. In fact, the Board based its decision on the documentary evidence provided by the applicant and even referred, in its decision, to the pages that the applicant alleges was ignored (p. 260 and 304 of the tribunal record).

[106] As displayed by the ruling in *Asghedom* above, a tribunal's final determination on the defence of duress is to be accorded significant deference. This is due to the highly contextual nature of the defence and the emphasis on the weighing of facts. Courts are to afford administrative fact finding based decisions a high degree of deference and should refrain from second guessing a tribunal's judgment (see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12 (QL)).

[107] The applicant appears to argue that the possibility of death for desertion is a *carte blanche* excuse for participation in the commission of atrocities. I know of no authority in support of this principle. The Board is free to weigh the evidence before it and come to its own conclusion on whether an individual ought to have attempted to leave.

[108] While the applicant may disagree with the result, in my view, it was reasonable for the Board to make the determination it did. The Board surmised that while leaving the organization may have put the applicant in grave danger when weighed against the atrocities they were committing, it was the only acceptable course of action. The Board accepted that Battalion 3-16 would likely attempt to hunt down and kill deserters, but it felt that the applicant was not in

imminent harm when he was participating in crimes against humanity. He was not under constant watch and a carefully planned desertion could have been executed much earlier. The Board also considered that when the applicant found himself in danger of imminent harm, he was able to escape. It was not unreasonable for the Board to consider these factors. The weight it placed on each factor is not something the Court is entitled to interfere with. Thus, the Board's conclusion stands.

[109] **Issue 5**

Should this Court rule that the proceedings were procedurally unfair due to the conduct of the applicant's counsel?

At the end of the inadmissibility hearing, the applicant's counsel failed to file a written submission. The applicant argues that this incompetence resulted in a miscarriage of justice. The applicant suggests that the correct remedy is for the matter to be sent back for re-hearing. I cannot accept the applicant's request. In order to request such relief in the context of a claim of incompetent counsel, the applicant is required to demonstrate some basis upon which the Board's decision might have been different had the applicant had more competent counsel (see *Yang v. Canada (Minister of Citizenship and Immigration),* 2008 FC 269, [2008] F.C.J. No. 344). The applicant has not established any such basis other than suggesting that given the complexity of the case, final written submissions were necessary. In my view, this is not enough. An applicant must point to some argument, aspect of law, or piece of evidence that could have made a material difference in the outcome.

[110] As a result of my findings, the application for judicial review must be dismissed.

[111] The respondent submitted the following proposed serious questions of general importance for my consideration for certification:

> 1. If an inadmissibility allegation was not available against an individual when he or she was admitted to or granted permanent residence in Canada, is it an abuse of process to pursue the inadmissibility allegation when the law changes and makes the allegation open as against them, even though some time may have passed since the person entered Canada?
>
> 2. Is the failure of counsel at the Immigration Division to file final written submissions a breach of procedural fairness? If so, does the breach warrant returning to [*sic*] matter to the Immigration Division for re-assessment, even though the same decision would be made again?
>
> 3. Where an abuse of process issue is not raised before the Immigration Division, but is advanced for the first time before the Federal Court on judicial review, is it appropriate for the Federal Court to assess the abuse of process issue at first instance?

[112] I am not prepared to certify any of these questions as the outcome in this case was fact specific.

[113] The applicant, in his letter to the Court dated November 2, 2009, made the following request:

> Two issues which may warrant a certified question relate to the retrospective application of s. 35, and the issue of duress. However, both also require analysis of the unique characteristics of this case, and as such may not transcend the particularities of this case and rise to a question of general importance.
>
> Nonetheless, should either of these issues prove determinative in the final decision, the Applicants [*sic*] request the opportunity to provide further submissions regarding a related certified question.

[114] Should the applicant wish to make further submissions with respect to these or another proposed question for certification, he may do so within five days of the date of these reasons. The respondent will have five days to make any response.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

35.(1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	35.(1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants:
(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;	a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;
(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act; or	b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la Loi sur les crimes contre l'humanité et les crimes de guerre;
(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to	c) être, sauf s'agissant du résident permanent, une personne dont l'entrée ou le séjour au Canada est limité au titre d'une décision, d'une résolution ou d'une mesure d'une organisation internationale d'États ou une association d'États dont le Canada est membre et qui impose des sanctions à l'égard

impose sanctions in concert with that organization or association.	d’un pays contre lequel le Canada a imposé — ou s’est engagé à imposer — des sanctions de concert avec cette organisation ou association.
(2) Paragraphs (1)(b) and (c) do not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Les faits visés aux alinéas (1)b) et c) n’emportent pas interdiction de territoire pour le résident permanent ou l’étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l’intérêt national.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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