



**Date: 20111018**

**Docket: IMM-2050-11**

**Citation: 2011 FC 1170**

**Ottawa, Ontario, October 18, 2011**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**JOSE WILFREDO HERNANDEZ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Mr. Hernandez seeks to set aside a decision of the Refugee Protection Division of the Immigration and Refugee Board that held that he was excluded from refugee protection. Section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 provides that “[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.” The Board found that the applicant fell within the meaning of Article 1F(a) of the Convention which provides as follows:

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious 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;

...

[2] For the reasons that follow, this application is dismissed.

### **Background**

[3] The applicant, his siblings and the partner of one of his siblings came to Canada in September 2008. The Board determined that the applicant was excluded from refugee protection and it denied the claims of the others based on the evidence adduced. This application and decision relate solely to the exclusion decision affecting the applicant.

[4] Mr. Hernandez served in the military of El Salvador for two years from 1988 to 1990. He was a soldier without rank. He received no promotion; however, he was given a significant pay raise and was assigned to an elite battalion, Recondo-Battalion Atonal (the Atonal Battalion), which worked very closely with the air force. He stayed with this battalion for six months until he decided that the work was too hard. His stint was completed so he returned to his village while remaining a reservist.

[5] It was his military service, and in particular his service with the Atonal Battalion that led the Board to conclude that he was excluded from refugee protection.

### **Decision Under Review**

[6] There was no evidence that the applicant had participated in crimes against humanity. In fact, Mr. Hernandez denied participating in any such crimes. However, the Board, relying on the Court of Appeal's decision in *Ramirez v Canada (Minister of Employment and Immigration) (CA)*, [1992] 2 FC 306, found that the applicant was complicit in crimes against humanity during his two year stint with the Salvadoran military. In reaching this conclusion, the Board assessed the various factors set out in *Ramirez* including how the applicant had been recruited, the nature of the organization, his position or rank in the organization, his knowledge of the atrocities, his opportunity to leave the organization and the length of time served.

### **The Ramirez Factors**

#### *1. Method of Recruitment*

[7] The applicant voluntarily joined the military in 1988 just before turning 17. He was not forced or coerced into joining the army, and he joined before reaching age 18, the age of conscription. The applicant stated that he would have probably joined the military regardless of an obligatory conscription at age 18.

#### *2. Nature of the Organization*

[8] The documentary evidence satisfied the Board that the military in El Salvador, between 1980 and 1992, was known to frequently and brutally commit human rights violations. Many military men and members of the National Guard were closely affiliated with death squads which perpetrated much of the violence on innocent civilians. By 1988, when the applicant joined the military, the human rights violations had already become known in El Salvador as well as internationally. The Board noted that the government of El Salvador and the Farabundo Marti

Liberation Front (FMLN) signed a human rights accord in July 1990. However, the documentary evidence indicated that the number of civilian casualties, both dead and wounded, suggested that both sides had put non-combatants into the line of fire.

[9] The Board found that the military and paramilitary began a “witch-hunt” and that those who were even perceived to be supporting the FMLN including civilians, peasants, small landowners, journalists, Jesuit priests, and rich business people were targeted.

### 3. *Position or Rank in the Organization*

[10] The Board accepted that the applicant did not hold a rank in the military, but noted that he was moved into a special elite unit, the Atonal Battalion, which worked closely with the air force. The applicant testified to the effect that he did not want to join this special unit even though it meant he received a substantial pay raise. The applicant was with this unit for six months until he decided to leave, finding the work too hard. The Board found it important that this battalion, as well as another five, were described in a report from the United States Bureau of Citizenship and Immigration Services, *El Salvador: Bellosa Battalion*, 14 August 2000 as follows:

[F]ormed in the early 1980s with the training and assistance of the United States ... [these] BIRIs, all of them air mobile and each with about 1,000 specially trained men, were the backbone of the military's efforts against the [FMLN] guerrilla insurgency. They were arguably the most aggressive military units during the war, as is reflected in the high rate of human rights violations attributed to them in the El Rescate database on human rights violations during the El Salvadoran internal conflict [emphasis added].

### 4. *Knowledge of Atrocities*

[11] The Board found, despite the applicant's denial, that he had knowledge of the widespread atrocities that were being committed by his organization. It noted that the applicant stated that he read widely and would follow what was happening in the newspapers in regard to the war. The Board found that these papers would have carried information concerning the human rights violations being committed. The Board noted that although the human rights violations committed by these battalions had decreased as the war continued, there was an "increase in 'indiscriminate military attacks [such that the] repression was no less deliberate or systematic, but the effect not as lethal [footnote omitted].'"

[12] Although the applicant did not say much about his time in the military, he did testify that he once saved a couple of corn farmers that were captured by his unit. Even though he had been ordered to bring in all prisoners, he decided to release the farmers. When he was reprimanded by his superior, he answered with "how would you like it if someone killed your family". Based on this admission, the Board found that although the applicant did not admit to it, he must have known that the farmers were going to be killed on the order of his superiors.

[13] The Board also noted that the applicant also admitted that there were both good and bad people on both sides, but that he did not provide any further information on this.

[14] The Board found that given that his battalion and the other five were leading the way against the insurgency, and given the pervasive perception that many rural people were sympathizers with the FMLN, the applicant must, at the very least, have known about the widespread attacks on the civilian population.

*5. Opportunity to Leave the Organization*

[15] The Board noted that the applicant left the organization under his own accord. When asked why he decided to leave, he answered by saying that he did not like the way they were humiliated and made to feel small. He also said that there were many mines in the area and that the work was physically challenging. The Board also noted that the applicant remained a reservist until he left El Salvador for the United States.

*6. Length of Time in the Organization*

[16] The applicant served for just over two years in the military before leaving it. He remained a reservist thereafter.

*Summary*

[17] In summary, the Board stated that because the applicant joined the military voluntarily, stayed on for two years and was assigned to an elite battalion with a pay raise, he must have had knowledge of the atrocities committed by his battalion. The Board therefore found that the applicant was complicit in the crimes against humanity that were committed during his two years with the Salvadoran military.

**Issue**

[18] There is only one issue in dispute: Was the Board's finding that the applicant was complicit in crimes against humanity during his two years in the Salvadoran army supported by the evidence?

## Analysis

[19] The issue in this case is purely a question of fact and is reviewable on the standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9.

[20] Section 98 of the *Act* provides as follows:

98. 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.	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.
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Article 1F(a) of the Convention provides as follows:

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious 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.

[21] The applicant submits that, contrary to the Board's assertion, there is no specific mention of the Atonal Battalion as an abuser of human rights. He attempted to rely on an affidavit reflecting a web search of the Atonal Battalion in support of this point; however, that evidence was not before the Board and was rejected as having been inappropriately filed in this application.

[22] The applicant further submits that that even though the Board never specifically impugned his credibility, it found, contrary to his assertion, that he "had knowledge of the widespread atrocities that were being committed by his organization." The applicant submits that this finding is not supported by the facts and that there was no direct evidence that the Atonal Battalion was

committing a “witch-hunt” against civilians or that “widespread atrocities” were committed by his battalion during the time of his service.

[23] Lastly, he submits that although there is evidence that the Salvadoran military committed human rights abuses, the period of those abuses does not coincide with his time of service and he was not in a position of command, but was rather a combat soldier in a large, multi-faceted military organization.

[24] I can accept none of these submissions.

[25] First, there was evidence before the Board that the Atonal Battalion was an abuser of human rights. Exhibit 9, reproduced in part by the Board in its decision states:

Five of the BIRIs belonged to the army - the Atlacatl, Arce, Atonal, Belloso, Bracamonte Battalions ... The six BIRIs, all of them air mobile and each with about 1,000 specially trained men, were the backbone of the military's efforts against the [FMLN]. They were arguably the most aggressive military units during the war, as is reflected in the high rate of human rights violations attributed to them in the El Rescate database on human rights violations during the El Salvadoran internal conflict...

...

[A]ll of the BIRIs were geared for the same type of brutal tactics, particularly the systematic terrorizing of civilians in rural areas through what experts on repression in El Salvador have called a "strategy of mass murder" and "killing by zone"...[emphasis added]

[26] Second, while the Board generally found the applicant to be a credible witness, it did not accept his specific evidence as to his knowledge of the atrocities being committed by the military and therefore did not err in coming to the conclusion that the applicant “had knowledge of the widespread atrocities that were being committed by his organization.” A reading of the decision as



a whole shows that the Board weighed the applicant's oral testimony on many occasions, including this one. In this particular instance cited by the applicant, the Board wrote that "[a]lthough the principal claimant has denied that he personally participated in any human rights abuses, the panel finds that he had knowledge of the widespread atrocities that were being committed by his organization." Clearly the Board did impugn his credibility in this instance, although otherwise it generally found him to be a credible witness.

[27] Lastly, although the applicant says that the period of human rights abuses in El Salvador did not coincide with his time of military service being 1988 to 1990, the Board found otherwise. Accordingly, the applicant is essentially asking the Court to reweigh the evidence and reach a different conclusion than the one reached by the Board. Referring to the documentary evidence, the Board stated that "the military in El Salvador, between the years 1980 and 1992 was known to frequently and brutally commit human rights violations." In my view, that finding was supported by the documentary evidence before the Board. Although the reports do not mention specific human rights violations committed by the Atonal Battalion, as stated earlier, there was evidence that it participated in the violations. It was reasonable for the Board to find, on this evidence, that his battalion had committed human rights violations throughout the war against the FMLN even though there were no specific violations set out in the documents that related to his battalion.

[28] In any event, the respondent is correct that the particular time of membership in an organization is not relevant in that it is not required that the dates of an individual's membership in the organization correspond with the dates on which that organization committed acts of terrorism

or subversion by force: *Gebreab v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FCA 274.

### **Conclusion**

[29] For these reasons I find that the Board's decision was reasonable based on the evidence before it and this application must be dismissed.

[30] Neither party proposed a question to be certified.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is dismissed and no question is certified.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2050-11

**STYLE OF CAUSE:** JOSE WILFREDO HERNANDEZ v.  
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Calgary, Alberta

**DATE OF HEARING:** September 22, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** ZINN J.

**DATED:** October 18, 2011

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