Federal Court  Cour fédérale

Date: 20171220

Docket: IMM-1870-17

Citation: 2017 FC 1157

Ottawa, Ontario, December 20, 2017

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

JAIME CARRASCO VARELA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review seeks to set aside a decision rejecting the Applicant's claim to humanitarian and compassionate (H&C) relief brought under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The decision under review was made by a Senior Decision Maker [Officer] on March 15, 2017 [Decision]. It was necessary for the Applicant, Jaime Carrasco Varela [Mr. Carrasco], to apply for H&C relief because he had been held by the Immigration Division [Board] to be inadmissible to Canada for having

committed crimes against humanity as defined by subsection 6(3) of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24. That decision was later upheld by Justice Sean Harrington in *Varela v Canada (Citizenship and Immigration)*, 2008 FC 436, [2008] FCJ No 568.

[2] At the center of this case lies an unsettling personal history, including findings against Mr. Carrasco of inhumane conduct. Notwithstanding that history and the fact that Mr. Carrasco has never been held accountable for it, he sought H&C relief on the strength of his Canadian establishment and the benefits of maintaining the unity of his family.

[3] It is essential from the outset to appreciate that this application concerns the reasonableness of the H&C Decision. It is decidedly not about the outcomes of any of the earlier proceedings and, most notably, this is not an opportunity to challenge the merits of the inadmissibility findings made against Mr. Carrasco. At the admissibility stage he was found to have taken part in the inhumane treatment of political prisoners under his watch. His excuse of superior orders was rejected on the basis that the orders he followed were known by him to be manifestly unlawful and, yet, he did not withdraw from military service. His excuse of duress was similarly rejected because the consequences of withdrawal were minor in comparison to the harm that was inflicted on prisoners.

[4] In the end, most of Mr. Carrasco's exculpatory testimony was rejected. For example, his assertion that he was unaware that disappearing prisoners were being murdered was rejected. His evidence that his military service was essentially passive and that he frequently confronted

his superiors about their tactics was also rejected, largely because, well into his tenure, he had been hand-picked to participate in an execution squad that murdered four detainees, including a juvenile. Even after that abhorrent act, the Board observed that it took Mr. Carrasco another year to leave Nicaragua. The Board's findings on this history are reflected in the following passage:

> In the final analysis, I find on a balance of probabilities, that little if any credence can be applied to the preponderance of Jaime Carrasco Varela's evidence before this admissibility hearing. I am not convinced that he ever experienced discipline problems while being employed by the Nicaraguan army or as a member of the Sandinista Front of National Liberation. I find that there are reasonable grounds to believe he was an active and willing participant in combat against the contras within the country of Nicaragua, activities that included the committing of atrocities against individuals under his guard, the killing of peasants in the mountains and the execution of 4 prisoners responsible for the kidnapping of a Soviet attaché. I believe that this execution represented yet another example of a widespread and systematic attack against any civilian population, specifically, 4 individuals operating contrary to the rule of the FSLN.

For the purpose of Mr. Carrasco's H&C application, the above findings were correctly found by the Officer to be immutable: see *Sabadao v Canada (Citizenship and Immigration)*, 2014 FC 815 at para 22, 462 FTR 121, and the Officer's reasons at Certified Tribunal Record, Vol 1, pp 7-8, lines 93-99.

[5] Mr. Crane raises several issues in support of Mr. Carrasco's claim to relief. They are the following:

1. Did the Officer err by applying only an identity code to the Decision under review?
2. Did the Officer err in considering the best interests of Mr. Carrasco's children?

3. Did the Officer err by taking into account irrelevant evidence in the form of the current prison conditions in Nicaragua?
4. Did the Officer err in the assessment of the defences of duress, superior orders, and complicity?
5. Did the Officer err in considering the issue of a Nicaraguan amnesty?

[6] I will apply the standard of correctness to the first issue and reasonableness to the rest.

Did the Officer Err by Applying Only an Identity Code to the Decision Under Review?

[7] There is no merit to this argument. A strong presumption of regularity applies to decisions of this sort: see *Canada v Weimer*, (1998) 228 NR 341 at paras 12-13, [1999] WDFL 60. The presumption can be rebutted with convincing evidence that the decision-maker lacked the authority to decide, but here no such evidence was presented. This situation is, in practical terms, no different than one where the decision-maker's signature is illegible. If identity of the decision-maker is somehow a material issue on judicial review, the affected party has a duty to ask for it. Standing silent and complaining later is not an available option.

Did the Officer Err in Considering the Best Interests of Mr. Carrasco's Children?

[8] Mr. Carrasco asserts that the Officer erred in considering the best interests of his five children. In particular he says that the Officer failed to make a decision about whether the interests of the children would best be served by him remaining in Canada or, conversely, would

be harmed by his removal. This argument is supported, he says, by the Officer's references to the children's best interests being satisfied in any of the possible eventualities.

[9] I reject this argument because it relies on the isolation of language from its surrounding context. The Officer clearly understood that if Mr. Carrasco was removed and his adult children either remained in Canada or returned with him to Nicaragua they would face "emotional and logistical difficulties".

[10] Viewed holistically, the Decision recognizes that the family unit would ultimately benefit from being left intact in Canada. This is reflected in the Officer's summary of the factors favouring relief:

> I have balanced the known history of Mr. Carrasco in Nicaragua, and his involvement in crimes against humanity while he was a guard at El Chipote prison in Managua against the positive factors in this case: his prolonged residence in Canada, the presence of his children in Canada, all of whom are now Canadian citizens, the potential separation from his spouse, his good civic record, and evidence of his establishment demonstrated by his involvement in his local community and the letters of support submitted on his behalf. It is my opinion that the seriousness of the circumstances surrounding his inadmissibility outweighs the factors in favour of allowing the exemption, including consideration of the best interests of the children directly impacted by this decision.

[11] Overall, the Officer's treatment of this issue was thorough and thoughtful and evinces no reviewable error.

[12] The suggestion that the Officer erred by failing to address the children's wishes is equally without merit. The Officer clearly understood where their perceived interests lay and she

recognized that those interests favoured family unity in Canada. But in the end she reasonably found that the identified family hardships paled in significance to the harm Mr. Carrasco had inflicted on his many victims. That was a reasonable conclusion on the evidentiary record. Indeed, to have found otherwise would tend to shock the conscience of reasonable people in any civilized community. Individuals like Mr. Carrasco who commit the kinds of atrocities he carried out should rarely expect to find a safe haven in Canada based on humanitarian concerns of the sort he raised.

Did the Officer Err by Taking Into Account Irrelevant Evidence in the Form of the Current Prison Conditions in Nicaragua?

[13] While I accept the point made by Mr. Carrasco's counsel that the Officer's discussion about current Nicaraguan prison conditions was not relevant to her assessment, there is also no basis to infer that this evidence had any material bearing on the outcome. In context, it is nothing more than an extraneous and immaterial observation that not much had changed in the intervening years.

Did the Officer Err in the Assessment of the Defences of Duress, Superior Orders and Complicity?

[14] Mr. Carrasco's concerns about the Officer's treatment of the issues of duress, superior orders, and complicity are not entirely clear. These points were fully considered by the Officer but, drawing on the views of Justice Harrington, each of them was rejected. Mr. Carrasco could not benefit from the defence of superior orders because those orders were manifestly unlawful. He could not benefit from duress because, as he was never in imminent physical peril, there was

none. While Justice Harrington's views may have been *obiter* they nevertheless represent a correct view of the law on these issues. It was not an error for the Officer to adopt Justice Harrington's analysis as his own. It was also not open to Mr. Carrasco, in the context of an H&C assessment, to challenge the rejection of these defences made at the admissibility stage.

[15] Mr. Carrasco complains that the Officer considered the decision in *Ezokola v Canada*, 2013 SCC 40, [2013] 2 SCR 678, on the issue of complicity only to dismiss its relevance (see para 87 of the Applicant's Memorandum of Argument). What the Officer actually said was the following:

> I am cognizant that new jurisprudence in the case of *Ezokola* provides guidance on the assessment of complicity in human rights violations in the case of individuals who are excluded from refugee protection or who are found inadmissible, as Mr. Carrasco has been. However, Mr. Carrasco's inadmissibility stems not from complicity with the Sandinista regime, but from his activities as a prison guard at El Chipote, where, in providing support to the perpetrators, he contributed substantially to the commission of the crimes that he described in detail and that he [sic] took place in that prison during his tenure.

[16] This is not only a reasonable interpretation of *Ezokola*, above, it is the correct interpretation. Mr. Carrasco was not a passive observer of the serious criminal acts that had taken place over several years in the El Chipote Prison; he was an active and knowing participant in that mistreatment. As the Officer noted, Mr. Carrasco was a persecutor in his own right, and *Ezokola*, above, did not apply to his situation.

Did the Officer Err in Considering the Issue of a Nicaraguan Amnesty?

[17] The Officer dealt with the amnesty issue by adopting the views of Justice Harrington in the earlier judicial review of the Board's admissibility finding. Justice Harrington's decision on this point was as follows:

> [36] The Board noted Mr. Carrasco's argument that the Managua Accord led to a general amnesty in favour of Sandinistas and Contras alike. This amnesty is claimed to serve as a complete discharge or exoneration, and as a defence to all inadmissibility allegations. The Board obviously considered the submissions were without merit, but never analyzed them. The more important the issue, the more important it is to give reasons. If one is to be branded as one who has committed a crime against humanity, and one submits what may be a defence then that defence should be considered and reasons given why it was rejected.
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> …
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> [39] The legal issue is whether an amnesty could have benefited Mr. Carrasco at the admissibility hearing. The Minister argues that the record does not contain sufficient detail of the amnesty. That may, or may not, be so, but the Board did not make a ruling on that point.
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> [40] Two interesting articles were cited to me; Rikhof "The Treatment of the Exclusion Clauses in Canadian Refugee Law" (1994), 24 Imm. L.R. (2d) 31 and Yasmin Naqvi "Amnesty for War Crime: Defining the Limits of International Recognition", [2003] 85 *Int'l Rev. Red Cross* 583. They make the assertion that amnesties do not presently have international effect. However, within the Canadian context, they really address the issue whether a person could or should be charged with a crime against humanity, notwithstanding a general pardon or amnesty. More on point are the United Nations Refugee Agency (UNHCR) *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*. [HCR/GIP/03/05, 4 September 2003]. Paragraph 23 thereof provides;
>
> > Where **expiation** of the crime is considered to have taken place, application of the exclusion clauses may no longer be justified. This may be the case

> where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any expression of regret shown but the individual concerned. In considering the effect of any pardon or amnesty, consideration should be given to whether it reflects the democratic will of the relevant country and whether the individual has been held accountable in any other way. Some crimes are, however, so grave and heinous that the application of Article 1F is still considered justified despite the existence of a pardon amnesty.

[41] Section 36 of the IRPA specifically provides that inadmissibility on the grounds of serious criminality may not be based on a conviction in respect of which a pardon has been granted, or if there has been a final acquittal. Furthermore, rehabilitation is taken into account. Although section 35 which deals with war crimes and crimes against humanity is silent on these matters, given the international context of the case, the United Nations Guidelines cannot simply be ignored.

[42] The *Crimes Against Humanity and War Crimes Act*, but again I emphasize in the criminal charge context rather than in the immigration and refugee context, sets out at section 12 that if the person has been tried and dealt with outside Canada in such a manner that if he or she had been tried and dealt with in Canada a plea of *autrefois acquit, autrefois convict* or pardon would be available, the person is deemed to have been so tried and dealt with in Canada.

[43] Mr. Carrasco has not been dealt with on the criminal level in Nicaragua, Canada or elsewhere.

[44] In any event, I hold, taking into account the UNHCR Handbook, that Mr. Carrasco's participation in a death squad and in the treatment of prisoners above described was so grave and heinous that as a matter of law the full application of section 35 of IRPA cannot be mitigated.

[45] It follows, as per *Sivakumar*, above, that it is not necessary to send this matter back for a new determination, as there was only one legal conclusion open to the Board.

[18] Mr. Crane makes a similar argument to the one rejected by Justice Harrington. He contends that the Officer erred by failing to deal with a new argument that had not been raised at the admissibility hearing, that is to say, that Article 6(5) of *Additional Protocol II to the Geneva Conventions* should be considered.

[19] While it is true that the Officer did not deal with this issue, there was no need to do so. Neither the above-noted Article nor the Nicaraguan amnesty had any application to the types of crimes for which Mr. Carrasco was found responsible.

[20] I have no doubt that the existence of an applicable amnesty or a pardon would be relevant to an H&C review. But, whether or not the home authorities have, for domestic purposes, elected not to hold persecutors accountable or have otherwise turned a blind eye to their crimes, Canada is still entitled to refuse H&C relief to individuals like Mr. Carrasco. If, as Justice Harrington noted above, an amnesty would not protect Mr. Carrasco from an adverse admissibility finding, it surely could not absolve him for his crimes in the context of an application in Canada for H&C relief. There was no error in the Officer's treatment of this issue.

[21] For the foregoing reasons, this application is dismissed.

[22] Mr. Crane has proposed the following question for certification:

> Did the Senior Decision Maker have to address the argument relating to the application of Article 6(5) of Additional Protocol II to the Geneva Conventions in relation to the "defences" to Crimes Against Humanity?

[23] For the reasons given by the Minister's counsel in correspondence dated December 7, 2017, I decline to certify this question. The law is settled that an applicable amnesty in one's home country is relevant to admissibility. It follows that the issue would be relevant and must be considered in a H&C assessment. In this case, it was considered and dismissed because of the gravity of Mr. Carrasco's crimes. Accordingly, the above question would neither be dispositive of the case nor does it raise an issue extending beyond the particular facts of this case.

JUDGMENT in IMM-1870-17

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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