Date: 20080917

Docket: IMM-1355-07

Citation: 2008 FC 1042

Vancouver, British Columbia, September 17, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ORLANDO ARIAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board") rendered on March 1, 2007. In its decision, the Board found that Orlando Arias (the "Applicant") is not a Convention refugee who is in need of protection.

[2] The Applicant is a citizen of Columbia. He served in the Columbian army from 1965 to 1980. In 1971, he sustained an injury and trained as a nurse and pharmaceutical assistant. In 1972, he was declared unfit for combat and worked in a military pharmacy. From 1981 to 1987, the Applicant was a pastor.

[3] The Ejercito Liberación Nacional (the "ELN") approached the Applicant directly and indirectly in 1987 and 1993. In 2002, the Fuerzas Armadas Revolucionarias de Columbia (the "FARC") threatened him. On December 10, 2002, the Applicant and his family left for the United States; they arrived in Canada in February 2003 and sought refugee protection.

[4] The Minister of Citizenship and Immigration (the "Respondent") intervened in the hearing to argue that the Applicant was ineligible to be recognized as a Convention refugee pursuant to the application of Articles 1E and 1F(a), *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969 No. 7 (the "Convention"). Articles 1E and 1F(a) are incorporated by reference in the Act as a Schedule.

[5] The Board found that Article 1E did not apply to the Applicant since he had no permanent right of entry to Venezuela and his claim was assessed only be reference to Columbia. The Applicant's claim was rejected on the grounds that he was complicit in the commission of crimes against humanity and was therefore inadmissible to Canada pursuant to Article 1F(a). The Applicant's wife and children were accepted as Convention Refugees.

[6] After the completion of the evidence, the Respondent, through his representative, took the position that he had failed to adduce sufficient evidence to show that the Applicant was complicit in crimes against humanity and therefore excludable. This position was presented in writing to the Board in submissions dated November 4, 2005.

[7] The Board found that there was credible evidence to support the Applicant's fear of returning to Columbia. It drew a negative credibility inference regarding the Applicant's evidence about his knowledge of military matters and crimes against humanity committed by his brigade.

[8] The Board found that the Applicant's brigade was an organization that was principally directed to a limited brutal purpose between 1965 and 1980. It found that the Applicant voluntarily chose to remain with the brigade for 15 years in order to pursue a military career following completion of his mandatory service. It found that he held supervisory responsibilities and was promoted five times, attaining the rank of first sergeant.

[9] The Board concluded that the Applicant was excluded from protection because he was complicit in the commission of crimes against humanity.

[10] The Applicant raises two main submissions. First, he argues that the Board erred in finding that he is excluded under Article 1F(a). He submits that the Board based its decision on erroneous findings of fact that were made without regard to the evidence. Second, he argues that the Board

erred by basing its decision upon independent research into documents that are not part of the Tribunal Record.

[11] For his part, the Respondent submits that the Board's findings of fact are supported by the evidence and that its findings on credibility should be respected in the absence of evidence that the Board had erred in its understanding of the evidence, including the evidence of the Applicant.

[12] The Respondent further argues that the Applicant has failed to show that the Board committed any breach of procedural fairness by going outside the record to find evidence upon which to base its decision. The Respondent submits that the Applicant did not identify any evidence relied on by the Board that had not been properly disclosed to the Board prior to the hearing.

[13] The Board's decision is subject to review, relative to findings of fact, on the standard of reasonableness, in view of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[14] Insofar as the issue of procedural fairness is concerned, the standard of correctness will apply; see *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195.

[15] In this case, I am satisfied that the Board committed no breach of procedural fairness. I agree with the submissions of the Respondent that the Applicant has failed to show that the Board improperly went outside the record to find documentary evidence that had not been disclosed.

[16] However, I am not satisfied that the Board's findings as to the Applicant's complicity in crimes against humanity are well-founded. The Board relied heavily on documentary evidence but did not relate it to the evidence of the Applicant. However, in my view, the Board did not adequately discuss why it rejected the Applicant's evidence, for example, with respect to the issue of his alleged role in withholding medical treatment, when determining, in the face of his evidence, that he was aware of the existence of detainees.

[17] The application for judicial review is allowed and the matter remitted to another panel of the Board for re-determination. There is no question for certification arising.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and the matter remitted to another panel of the Board for re-determination. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1355-07
STYLE OF CAUSE:	**ORLANDO ARIAS v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 24, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	HENEGHAN J.
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APPEARANCES:

Roderick McDowell	FOR APPLICANT
Sharon Stewart Guthrie	FOR RESPONDENT

SOLICITORS OF RECORD:

Roderick McDowell Toronto, ON	FOR APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, ON	FOR RESPONDENT