

IMMIGRATION AND REFUGEE BOARD
(APPEAL DIVISION)



LA COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
(SECTION D'APPEL)

REASONS FOR DECISION AND ORDER

TA0-14244

APPELLANT(S)/APPLICANT(S)

APPELANT(S)/REQUÉRANT(S)

MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT

INTIMÉ

JOSE MARTIN PORTILLO
(A.K.A. JOSE MARTIN PORTILLO-RIVAS)
(A.K.A. JOSE PORTILLO)

DATE(S) OF HEARING

May 22, 2002

DATE(S) DE L'AUDIENCE

PLACE OF HEARING

Toronto, Ontario

LIEU DE L'AUDIENCE

DATE OF DECISION

June 27, 2002

DATE DE LA DÉCISION

CORAM

Shari A. Stein

CORAM

FOR THE APPELLANT(S)/APPLICANT(S)

Gudrun LeBlanc

POUR L'APPELANT(S)/REQUÉRANT(S)

FOR THE RESPONDENT

Represented Self

POUR L'INTIMÉ

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These are the reasons for the decision in the appeal by the Minister of Citizenship and Immigration pursuant to section 71 of the *Immigration Act*¹ (the "Act") from the decision of Adjudicator Willoughby, dated March 10, 2000, concerning the respondent, Jose Martin PORTILLO (a.k.a. Jose Martin Portillo-Rivas), (a.k.a. Jose Portillo). The adjudicator held that the respondent, who is neither a Canadian citizen nor a permanent resident, is not a person described in section 27(2)(a) of the Act - that is a person who, if he were applying for entry, would not be so granted by virtue of being a member of three inadmissible classes of persons described in section 19 of the Act. The three inadmissible classes of persons are as follows:²

19(1)(j) Persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or crime against humanity within the meaning of subsection 7(3.76) of the *Criminal Code* and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission.

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
 - (ii) have engaged in terrorism...

19(1) No person shall be granted admission who is a member of any of the following classes:

- (c.1) persons who there are reasonable grounds to believe
 - (ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,

The Minister has appealed that decision.

¹ 71. The Minister may appeal to the Appeal Division from a decision by an adjudicator in the course of an inquiry on any ground of appeal that involves a question of law or fact or mixed law and fact.

² Exhibits 1, 2, 3 and 4 to the Transcript of Adjudication Inquiry dated March 10, 2000

Issue

The issue for determination is whether the Minister has discharged its onus by proving that there are reasonable grounds to believe that the respondent is a person described in at least one of the inadmissible classes of persons described in section 19 of the *Act* above.

Determination

The Minister has discharged its onus by proving that there are reasonable grounds to believe that the respondent is a person described in at least one of the inadmissible classes of persons described in section 19 of the *Act* above. The appeal is allowed.

Background and Summary of the Record

The respondent was born in El Salvador on March 19, 1963 and is a citizen of that country. He left El Salvador in late 1984 or early 1985 and lived with no formal status in the United States until 1988. According to Report under section 27 of the *Act* entered as Exhibit 1 of the Adjudication Inquiry Transcript, the following occurred.

The respondent arrived in Canada at Fort Erie on March 10, 1988. He initiated a Convention refugee claim and was subsequently included in the Backlog Clearance Program. He was approved as a "ND2 H&C applicant"³ prior to his credible basis claim being heard. At an interview conducted by an immigration official on February 26, 1997, Mr. Portillo, by his own admission, stated that he had been involved in the Faribundo Marti National Liberation Front (the "FMLN") - an El Salvadorian guerilla group - from September 1983 to December 1984 and was responsible for a number of deaths and other atrocities. On the basis of this and other information that the respondent had provided Canadian authorities over a period of at least nine

³ Exhibit 1 of Transcript of Adjudication Inquiry dated March 10, 2000

years, he became the subject of the two reports under section 27 of the Act.⁴ He was never granted landing in Canada.

With respect to the respondent's Convention refugee claim, the following is contained in the Record. The respondent's Personal Information Form (PIF)⁵ includes a narrative at pages 7 and 8, in which he bases his claim on being drafted against his will into membership in the FMLN. He states that he was trained as a guerrilla fighter. He bombed electric stations. In November 1984, while involved in an operation intercepting arms shipped from Nicaragua, he was captured by the El Salvadorian military and was responsible for the death of two guards when he escaped their custody to avoid torture. The PIF dated May 29, 1991, contains a signed interpreter's declaration but is not signed by the respondent himself. Also part of Exhibit 5, is a Declaration dated February 26, 1992 signed by the respondent containing a similar narrative.

As well, the respondent was interviewed by a CSIS⁶ official on July 10, 1992 and by Ms. K.C. Contini, a CIC official who prepared a Memorandum⁷ dated February 26, 1997. The report from the CSIS interview is not part of the Record. It is referred to, however, in the March 1, 1999 Report⁸ of Mary Leahy-Bennett, Citizenship and Immigration Counsellor. She indicated that Mr. Portillo stated during the CSIS interview that he was involved in direct combat against the military on 11 occasions. He personally captured 16 prisoners whom he thinks were all tortured to death. He was required to dispose of over 100 bodies.

The Memorandum of Ms. Contini is part of the Record. It states that during his interview, Mr. Portillo acknowledged that

⁴ Exhibits 1, 2, 3 and 4 to the Adjudication Inquiry Transcript

⁵ Exhibit 5 to the Adjudication Inquiry Transcript

⁶ Canadian Security Intelligence Service

⁷ Exhibit 7 to Adjudication Inquiry Transcript, Item 1. See as well Exhibit 8 to Adjudication Inquiry Transcript.

⁸ Exhibit 7 to Adjudication Inquiry Transcript, Item 2

as part of routine raids of townspeople, he personally was responsible for killing at least five people and participated in a group in at least 35 other killings of civilians. He said further that he was involved in battles with the military in which he personally was responsible for the death of 35 people and was part of a group that took approximately 35 to 40 prisoners of war, some of whom were killed. He was present when his group disposed of approximately 30 bodies. He was involved in numerous kidnappings of potential new FMLN members.

On the basis of these allegations, the respondent became the subject of the two Reports under section 27 of the *Act* noted above.

Preliminary Issue

At the appeal, the respondent was self-represented. He did not make a postponement request. However, the panel noted that this matter had been postponed at an earlier scheduled sitting to allow the respondent to obtain counsel. I also noted the seriousness of the allegations against him.

In response to questions from the panel, the respondent indicated that he had approached several counsels, none of who could represent him at the appeal. He did not provide a clear explanation as to why but said they were too busy. He said that he was prepared to proceed because he had been told that this date was peremptory on him. He said that if he was given eight more months, he could probably obtain counsel.

Counsel for the Minister indicated that she would object strenuously to the granting of a postponement as this matter had already been postponed on several occasions. I note that on both May 15, 2001 and October 3, 2001, the appeal was postponed due to illness of the respondent's counsel. It was postponed again on January 25, 2002 even though the date had been made peremptory on the respondent, as there had been a breakdown between him and his counsel he was then unrepresented. He was given four months to

obtain representation. He was told that the appeal would proceed on May 22, 2002 with or without counsel.

Although the respondent did not make a formal postponement request, I am satisfied that if he had, there would be no denial of natural justice in proceeding on May 22, 2002 even though the respondent was self-represented. I am satisfied that the respondent did have adequate time to obtain representation and that he did make efforts to do so. The appeal had already been postponed on three occasions, twice made peremptory on the respondent, and it is clear that he understood the seriousness of the appeal, the importance of being represented and that he had been warned by an earlier panel that the appeal was to proceed on May 22, 2002 with or without counsel.

Analysis of the Evidence

At the appeal, the respondent acknowledged that he came to Canada intending to make a refugee claim. He acknowledged that on several occasions during his attempt to obtain permanent residence status, he had indicated to Canadian officials - on forms or during interviews - that he had been a member of the FMLN in El Salvador and in that capacity, was responsible for a number of deaths and other atrocities. He did not deny having provided the information contained in the Record with respect to activities in which he was allegedly engaged. He said that he remembered filling out the forms and going for the interviews.

Specifically, in oral testimony, the respondent confirmed that he did provide the information contained in his PIF,⁹ in his statutory Declaration dated February 26, 1992,¹⁰ in the summary of the CSIS interview contained in Mary-Leahy Bennett's Report of March 1, 1999¹¹ (although he said that he was not aware that the interview was with CSIS) and in K.C. Contini's Report of February

⁹ *Supra*, footnote 5

¹⁰ *Supra*, footnote 5

¹¹ *Supra*, footnote 8

26, 1997.¹² He said, however, that when he provided the information, it was false. He said that it was a story he fabricated with the assistance of a friend he met in Canada and that he lied because he thought it would expedite his obtaining permanent residence status. He denied that he was ever a member of the FMLN. He stuck to this position consistently throughout the hearing as he had also done throughout the Inquiry.

I have carefully considered all the evidence before me as well as submissions made by both parties (including those made by the respondent's previous counsel during the Inquiry). I find, on a balance of probabilities, that the respondent's testimony that he was lying about his involvement with the FMLN, is not credible. Following are my reasons.

There were serious problems with the credibility of the respondent's testimony during the appeal. Firstly, I do not find that the respondent's explanation for how and why he put forward a story that was allegedly untrue to be believable. The respondent maintained his allegation that he was a member of the FMLN throughout a period of at least nine years. He repeated his story and elaborated on it on numerous occasions to numerous officials on both forms and in interviews. He testified that he invented the story on the advice of a friend, Mr. Antonio Ramirez, whose opinion he trusted. He also said that he believed that the story would assist him in being granted landing sooner.

However, when questioned about Mr. Ramirez, the respondent revealed that he knew very little about him. Although he said he spent time with this friend and trusted his opinion on important matters, he knew virtually nothing about Mr. Ramirez's life. He did not know if he had been married. He was unable to give a clear answer to the panel's question as to how long he kept up contact with Mr. Ramirez. He did not know Mr. Ramirez's immigration status here in Canada. He had no idea whether Mr.

¹² *Supra*, footnote 7

Ramirez had himself been a member of the FMLN. He said he never asked him. It is unbelievable that the respondent would rely so heavily on a person whom he knew so little about. This is particularly so since the respondent testified that he had consulted a lawyer in the United States on three occasions with respect to a possible asylum claim there.

Also, although the respondent said he used his story because he thought it would expedite his being granted landing, in actual fact, it was not expediting matters at all. Years had gone by without any confirmation of the respondent's immigration status. It is inconceivable to the panel that the respondent would hold on to an allegedly totally false story on the advice of a person whom he hardly knew, particularly when it was achieving the exact opposite of the result it was designed to achieve.

Secondly, while the respondent maintained that his allegations of involvement with the FMLN were totally false, he was unable to explain what was actually the truth. He was unable to do this in two important areas.

Firstly, when the panel asked the respondent what he was in fact doing during the months that he had lied about being involved with the FMLN (approximately the fall of 1983 - fall of 1984), he was unable to provide a coherent answer. He said he was working in a factory but did not remember for how long. He said that the factory was called Facela, but was vague as to what it produced. Later, when the panel pointed out that his PIF stated that he worked at Facela only until 1983, he said that he was working in another company and then he said that he was in school. When it was pointed out that his answers were inconsistent, he responded that he was going to school during the day and working part-time at night - in a bakery. His responses to these questions were notably confused and were not presented in a straight-forward manner. If the respondent's allegations of involvement in the FMLN were false, then it is reasonable to expect that he would have been able to explain clearly what he

was in fact doing in El Salvador during this period. His failure to do so causes me to seriously doubt his credibility.

Similarly, when the panel asked what the basis of the respondent's refugee claim would have been had he not invented a story, he was unable to provide an adequate answer. His response was vague in that he said: "I was coming like anyone else applying for refugee status". By letter dated December 15, 1999,¹³ the respondent's previous counsel indicated at the bottom of the second page that "Mr. Portillo maintains that while the story that he presented to Canada Immigration was false, he left El Salvador for fear of persecution and states that he is ready and expects to be given an opportunity to put his claim forward." However, on being asked during the appeal what his claim was actually based on, he was unable to provide a clear answer.

This inability on the part of the respondent to provide both an acceptable explanation for what he was actually doing in El Salvador at the time of the allegedly phony involvement in the FMLN as well as for the real basis of his refugee claim causes me to draw a strongly negative credibility inference.

The Minister was able to demonstrate that the respondent lacked credibility in other ways. For example, in answer to the question as to whether he was ever in receipt of social assistance in Canada, the respondent said that he was in 1992 or 1993. This contradicted the information contained in Ms. Contini's Memorandum of February 26, 1997¹⁴ in which she stated that he was in receipt of general welfare assistance at the time of the interview in early 1997. When asked about this, the respondent said that in 1997, he was working part-time and receiving social assistance. When asked why he had not indicated that earlier, he responded "[n]o one asked me". This further

¹³ Exhibit 10 to the Adjudication Inquiry Transcript

¹⁴ *Supra*, footnote 7

calls into question the over-all reliability of the respondent's testimony.

Finally, the Adjudicator based his decision in part on the finding that the Minister had not discharged its evidentiary burden because the only evidence available was evidence the respondent himself provided. The Adjudicator relied on the fact that the respondent later retracted this evidence and found there was no independent corroborative evidence. I do not agree with this finding. Firstly, corroboration is not necessary since I do not find the retraction credible. However, I find that documentary evidence disclosed by the Minister does corroborate the allegations against the respondent. I agree with the Minister's submissions¹⁵ which state in part:

...Yet Mr. Portillo's evidence concerning his membership in the FMLN and his activities in that group are consistent with the documentary evidence.

Human Rights Watch report,¹⁶ Lost Agenda: Human Rights and UN Field Operations states that the execution of captured prisoners, forced recruitment, the endangerment of civilians through widespread use of landmines, and executions of captured noncombatants were practiced by the guerrillas during the mid-1980s.

RIR SLV12086¹⁷ dated 14 Dec 1992 speaks to the activities of the FMLN during the early 1980s.

"After a failed attempt at urban insurrection in early 1981 and the ferocious repression that followed, the FMLN withdrew from the cities to the countryside where a long and difficult process of constructing a revolutionary army and a defensible strategic rear guard, or 'zones of control' began."

"Beginning in 1982, the FMLN grouped its fighters into larger and larger concentrations and launched a series of spectacular actions.

In smaller, yet more significant actions during the same period, rebel forces systematically overwhelmed government outposts in the zones of control and their surroundings."

"By 1984 the fireworks were largely over. In place of brigade-sized assaults on fixed army positions, FMLN fighters were blowing up telephone poles. Instead of capturing prisoners of war and valuable war material, they were dispersing in the face of army advances."

This is precisely what Mr. Portillo was explaining to the immigration officer who interviewed him on 26 February 1997. He stated that he was in a large group of guerrillas (*lived in a compound with approximately 500 other FMLN members*) and that his group was involved in attacking army posts and seizing their arms.

¹⁵ Written Submissions dated February 2, 2000 prepared for Adjudication Inquiry, pp.10-11

¹⁶ Exhibit A-2, Item 5, pp.26-29, Minister's Documentary Evidence

¹⁷ Exhibit A-2, Item 4, pp.22-25, Minister's Documentary Evidence

The New York Times article¹⁸ dated 12 July 1984 refers to the transportation of arms from Nicaragua to the FMLN guerrillas. This is also consistent with Mr. Portillo's previous statements that he was enroute to obtain delivery of these weapons from Nicaragua when he was ambushed by the military.

(Typed as per original document with errors and/or omissions.)

Based on the serious negative credibility inferences drawn above as well as on the corroborating documentary evidence, I find that the respondent's allegation that he was lying about his involvement in the FMLN is neither trustworthy nor believable. I find therefore that based on the information he provided over a nine-year period and his inability to provide any alternative explanation for what he was actually doing in El Salvador during the period in question, that he was a member of the FMLN and that he did engage in the activities that he reported on and which are contained in the record.

The question still remains, however, whether there are reasonable grounds to believe that the FMLN is a terrorist group and whether the activity engaged in by the respondent bring him within at least one of the inadmissible classes of persons described in section 19 of the Act.

Section 19(1)(f)(ii) of the Immigration Act Allegations:

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
 - (ii) have engaged in terrorism,

I agree with the Minister's submissions that the standard of proof required to establish *reasonable grounds* is more than a flimsy suspicion but less than the civil test of balance of probabilities.¹⁹

As the Minister's counsel indicated in her submissions, *Terrorist Group Profiles*²⁰ states that the FMLN was formed in El Salvador in 1980 with the political objectives to create and sustain a war of attrition against the elected government of the

¹⁸ Exhibit A-1, Item 12, pp.132-134, Minister's Documentary Evidence

¹⁹ *Ramirez v. M.E.I.* (1992) 2 F.C. 306

²⁰ Exhibit A-2, Item 10, pp.118-122

state and to create its destruction and replacement by a leftist pro-Cuban, pro-Soviet and anti-U.S. state. It had an estimated membership of approximately 7,500. The scope of the FMLN activities was broad, including guerilla warfare in rural regions. It also resorted to terrorist tactics, especially when its more conventional military tactics were weak. This document outlines a chronology of selected terrorist acts committed by the FMLN between 1977 and 1987 including murders, kidnappings and holding people for ransom.

The *FAS Intelligence Resource Program*²¹ describes the FMLN's activities as "bombings, assassinations, economic sabotage, arson among other rural and urban operations".

Numerous other documents found in Exhibit A-2 provide accounts of FMLN activities.

The decision of *Manickavasagam Suresh*²² recently upheld by the Federal Court of Appeal²³ made a number of findings in relation to terrorism. I agree with the summary in the Minister's counsel's written submissions for the Inquiry dated February 2, 2000 reads as follows:

- 1) there is no need to define the term; "When one sees a 'terrorist act', one is able to define the word."
- 2) the term is not vague or imprecise. The term is defined in a dictionary as "using terror and violence to intimidate, subjugate, etc. especially as a political weapon or policy"...
- 3) the term "terrorism" or "terrorist act" must receive a wide and unrestricted interpretation;
- 4) in general, attacks on civilians are terrorist attacks.

(Typed as per original document with errors and/or omissions.)

The Court in *Suresh* also stated:²⁴

As Parliament did not define the term "terrorism" with respect to the Immigration Act, it is not incumbent upon this court to define it. However, for the purposes of this case, I must determine whether there are reasonable grounds to believe that the two organizations in question have engaged in terrorism...

And later:

²¹ Exhibit A-2, Item 9, p.116

²² Book of Case law, Item 7, *Suresh, Manickawasagam* - FCJ No. 1537 DRS 98-00676 DES 3-95

²³ January 18, 2000, A-415-99

²⁴ Exhibit A-1

I am of the view that the purpose of ss. 19(1)(f)(ii)...of the Act, in very general terms, is to prevent the arrival of persons considered to be a danger to this society...

I have been guided by the above as well as by the allegations of the respondent himself regarding his involvement in the FMLN, which I have already found on a balance of probabilities to be true. I find that there are reasonable grounds to believe that the FMLN was a terrorist organization and that the respondent, during his involvement with the FMLN, did engage in acts of terrorism.

Mr. Portillo acknowledged in oral testimony that he did make the statements contained in M.C. Leahy-Bennett's March 1, 1999 summary of the CSIS interview - that he was involved in direct combat against the military on 11 occasions; that he personally captured 16 prisoners whom he thinks were all tortured to death; and that he was required to dispose of over 100 bodies. He also acknowledged in oral testimony that he did provide the information contained in the February 26, 1997 report by Ms. Contini - that as part of routine raids of townspeople, he personally was responsible for killing at least five people and participated in a group in at least 35 other killings of civilians; that he was involved in battles with the military in which he personally was responsible for the death of 35 people and was part of a group that took approximately 35 to 40 prisoners of war, some of whom were killed; that he was present when his group disposed of approximately 30 bodies and was involved in numerous kidnappings of potential new FMLN members.

As such, I find that there are reasonable grounds to believe that the FMLN is a terrorist group and that the respondent has engaged in terrorist activity. Mr. Portillo is a member of an inadmissible class of persons described in section 19(1)(f)(ii) of the Act.

Since I have found that the respondent is a member of an inadmissible class of persons described in section 19 of the Act, namely section 19(1)(f)(ii), as set out in the Report under section 27 of the Act, there is no need to decide whether he

falls within any other inadmissible class of persons under section 19. I do note, however, that with regard to section 19(1)(c.1)(ii), it is obvious that since I have found that there are reasonable grounds to believe that the respondent committed murder which is an offence under the Criminal Code of Canada which is punishable by a maximum term of imprisonment of ten years or more, that the respondent is also inadmissible under section 19(1)(c.1)(ii).

I order that the respondent be removed from Canada in accordance with section 73(2)(a) of the *Act*.

ORDER

The Immigration Appeal Division orders that the appeal be **allowed**.

The Immigration Appeal Division further orders the conditional deportation of **Jose Martin PORTILLO (a.k.a. Jose Martin Portillo-Rivas), (a.k.a. Jose Portillo)** in accordance with section 73(2)(a) of the *Immigration Act*, because he is a person described in sections 27(2)(a), 19(1)(f)(ii) and 19(1)(c.1)(ii) of the *Immigration Act*.

"Shari A. Stein"

 Shari A. Stein

DATED at Toronto this **27th** day of **June, 2002**.

You have the right under ss. 82.1(1) of the *Immigration Act* to apply for a judicial review of this decision, with leave of a judge of the Federal Court - Trial Division. You may wish to consult with counsel immediately as your time for applying for leave is limited under that section.