



Summary of February 6, 2014 Oral Argument

Appeal to the Board of Immigration Appeals by General Eugenio Vides Casanova from Removal Decision by Immigration Judge James Grim, Orlando, FL., August 2012

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At oral argument before a three judge panel of the Board of Immigration Appeals (“Board” or “BIA”), Diego Handel, lawyer for Eugenio Vides Casanova, former Director of the National Guard and Minister of Defense of El Salvador, argued that U.S. government support for the Salvadoran regime in the 1980s prohibited the Board from upholding the judge’s removal decision. Vides-Casanova had been ordered removed from the U.S. under a 2004 law which allows for removal of persons who “ordered, incited, assisted or otherwise participated in torture or extra-judicial killing.” Handel argued that the case should be tossed as a non-justiciable political question or as a matter of equitable estoppel – that is, the U.S. government should now be prohibited from trying to remove someone who was once an ally of the U.S. in its “battle against communism.” While U.S. policy in Central America hung over the small, crowded hearing room like a black cloud, the Board members appeared unpersuaded that they were prohibited from acting in the case because of prior foreign policy choices of the executive branch in the 1980s. Board Member Hugh Mullane pressed Handel for precedent for his position; at one point, he noted that Handel apparently was advocating that this case was without precedent – and, therefore, should be one to make new law. That clearly was not a favored prospect.

Board Member Garry Malphrus asked Handel whether the U.S. approved of the Salvadoran military’s record of human rights violations and how it would interfere with U.S. policy for the BIA to hold accountable members of the Salvadoran military for those violations. In this regard, Board Member Mullane pointed to meetings between the U.S. Ambassador, and even Vice President Bush, and Vides Casanova in which they urged Vides to take action against human rights violators; he did not do so.

Board Member Mullane asked whether one act of torture or extra-judicial killing would be sufficient to satisfy the statute’s requirements. Handel answered no, and further, that Vides was not directly involved in any abuses. Board Member Mullane, then, pointed to the testimony of CJA client, Dr. Juan Romagoza, who was tortured in the National Guard Headquarters; Vides had interrogated him in his cell. Handel attempted to discount Romagoza’s testimony. Board Member Malphrus then raised the testimony of CJA client Daniel Alvarado; he noted that the U.S. government had conducted an independent investigation and determined that Alvarado had been tortured and wrongfully accused of killing an American military advisor; further, in a meeting in his office, the US Ambassador had warned Vides directly to release Alvarado and punish his abuser. But as Board Member Malphrus stated, Vides did nothing. “That was not passive leadership; that was a refusal to act,” he said. But Mr. Handel cited “the fog of war” as a justification for what happened to Alvarado and for Vides’ inactions. Finally, when Board Member Michael Creppy asked whether the Board’s decision in *Matter of D-R-*, ID 3708, 25 I&N Dec. 445 (BIA 2011) controlled this case, Handel replied that *D-R-* required Vides’ direct,

personal involvement in persecution which he claimed the Department of Homeland Security (DHS) had not proved.

David Landau, appellate attorney for DHS, then took the podium. He used his argument time to answer the questions posed previously by the Board. He stated that the plain meaning of the statute was that one act of torture or extra-judicial killing was sufficient to trigger application of the law. He noted that even Vides' own U.S. government witnesses, former U.S. Ambassadors David Passage and Edwin Corr, admitted that the U.S. supported investigations of human rights abuses in El Salvador and conceded that human rights violations were occurring during Vides' time as Minister of Defense. Landau also argued that the BIA made many decisions in which foreign policy was implicated, and that the U.S. Supreme Court had termed the BIA the "expert body" to make those judgments.

Landau pointed to several examples of Vides' specific actions in which he assisted or participated in torture or extra-judicial killing. Vides allowed Alvarado to languish in prison, never investigated the true killer of the American military advisor, and obstructed the investigation of the killing of four American churchwomen. Landau eloquently recalled the testimony of Dr. Romagoza regarding his torture and emphasized that Vides personally had participated in Romagoza's interrogation and did nothing to shut down Romagoza's horrendous treatment.

Board Member Creppy rose whether Vides could be held responsible for the actions of rogue units. Landau argued Vides had the capacity to investigate the actions of any members of the military who were committing human rights abuses. A lengthy colloquy focused on whether Vides was motivated to create a climate in which human rights abuses were permissible when he failed to or subverted investigations of abuses or whether he simply was trying to hide human rights violations from his patrons, the U.S. government. Landau argued that a finding on this point was not essential to the inquiry before the Board; whatever the motivation, the outcome was the permissive environment in which human rights violations were rampant. Board Member Mullane referred to the Immigration Judge's finding that Vides' had "acquiesced" in the assassination of Rudolf Viera, the head of the Salvadoran Land Reform Institute. He wanted to know if one could acquiesce after a killing had already occurred. Landau responded that Vides had told the officer responsible for the killing that he approved of the killing and encouraged and protected this officer.

In final remarks, Landau emphasized that no exceptions to the statute's reach exist – if a person assisted or otherwise participated in an act of torture or extra-judicial killing, he is removable from the U.S. Further, Landau responded to Handel's frequent complaint that these events occurred long ago in a foreign country and, this made them an inappropriate subject for BIA review. Landau reminded the hearing room that the statute applies retroactively. The torture and extra-judicial killing could have occurred last week, last year or 50 years ago – Vides was still susceptible to removal because of his assistance and participation in them.

The Board took the case under advisement and will render their decision in writing.