

SUMMARY OF THE IMMIGRATION DIVISION'S DECISION

On 13 May 2008, the Immigration Division of the Immigration and Refugee Board released its decision, finding that Ivan Apaolaza Sancho is inadmissible to Canada because he was a member of an organization that has committed terrorist acts—the Basque separatist group *Euskadi Ta Askatasuna* (ETA).

The Commissioner, Louis Dubé, begins with an overview of the evidence presented and the positions of the parties, including a list of the facts admitted by Ivan: that he is a foreign national, a citizen of Spain; that he entered Canada in April 2001 under a false identity, that he lived in Canada under two different false identities, and that he never sought to regularize his immigration status before his arrest in June 2007.

He then summarizes the position of the parties.

The Minister's position: The Spanish arrest warrants against Ivan link him to the ETA, as do the fact that he appears on the EU terrorist list and the declaration of Ana Belén Egües Gurruchaga, which is credible and was not obtained under torture.

Ivan's position: The information in the Spanish arrest warrants is based on the declaration of Ana Belén Egües Gurruchaga, which was obtained under torture. This evidence must therefore be set aside. The only other evidence against Ivan, the fact that his fingerprint was found in an ETA apartment in Salamanca, must be set aside because the Minister failed to produce a copy of the print and failed to provide information as to where exactly in the apartment the print was found.

The Commissioner mischaracterized Ivan's position, which briefly, is that the mere mention of having found a fingerprint in the Spanish arrest warrants proves nothing if the print itself and information on where it is found is not filed. The Minister did not file any evidence sustaining the allegation that Ivan's fingerprint was found in an ETA apartment in Salamanca. However, the Commissioner's decision is written as if such evidence was actually before it.

Mr. Dubé then finds that the ETA is a terrorist organization, which was not contested.

He then states the law concerning evidence obtained under torture as follows: **If there are reasonable grounds to believe that the evidence was obtained as a result of the use of torture, then the evidence must be excluded.**

He goes on to find that Ana Belén's declaration must be excluded because there are reasonable grounds to believe it was obtained under torture.

He also discards the EU terrorist list, because Ivan led expert evidence demonstrating that someone can be put on the list on the basis of a mere suspicion, and the state requesting the listing need not produce any evidence in support of its request.

However, Mr. Dubé goes on to find that the Spanish arrest warrants are valid evidence, even though their content is clearly linked to Ana Belén's declaration.

He finds that (1) foreign documents are presumed to be valid, citing Federal Court jurisprudence to this effect, and that (2) the information in the warrants is not based solely on the torture declaration, but is corroborated by other evidence.

This is the crux of the decision: The arrest warrants are retained even though they are, at least in part, based on the torture declaration.

The argument that foreign documents are presumed valid is misplaced. Ivan never contested the formal validity of the arrest warrant—what was contested was the reliability of the allegations contained within the warrants.

Mr. Dubé then provides a list of other sources (i.e. sources independent of the torture declaration) of the information in the arrest warrants: the declaration of Ana Belén's co-accused, Aitor Garcia Aliaga, the fruits of the police search of the Salamanca apartment, and the 'police inquiries' that revealed information about car thefts by the group and their comings and goings between France and Spain.

The reference to these other sources of information is problematic. The declaration of Ana Belén's co-conspirator was never produced, and there is no indication that Ivan was identified in that declaration. Indeed, according to the Spanish police, Aitor Garcia Aliaga would have joined the group only several months after Ivan would have left the group, and the two would thus not have even know each other.

Moreover, no evidence was filed before the Board linking Ivan to the Salamanca apartment, and no evidence whatsoever was filed concerning police investigations (apart from the torture of Ana Belén) that revealed information about car thefts or the groups travels to and from Franca.

Nonetheless, the Commissions finds that the information in the warrants need not be excluded because it is based, in part, on information independent from Ana Belén's declaration.

What Dubé fails to note is that none of that independent evidence (the mere existence of which is dubious) could have served to incriminate and identify Ivan, which could only have been accomplished through reliance on Ana Belén's declaration.

The arrest warrants are whitewashed because parts of them can supposedly be corroborated by independent sources, even though the information that allegedly incriminates Ivan personally could have come from only one source: Ana Belén's declaration. Further, the Commissioner simply presumes the existence of that independent evidence that was filed before him by the Minister.

Dubé also goes on to find that the 'evidence' of Ivan's fingerprint being found in the Salamanca apartment need not be discarded because the Minister failed to produce a copy of the print or information on where exactly it was found--thus sidestepping the rather important fact that there was no evidence at all filed concerning the fingerprint apart from the allegation in the arrest warrant claiming that such a print was found.

Finally, Dubé concludes with a brief analysis of Ivan's testimony.

Because the Minister had refused to file any of the incriminating evidence that allegedly exists, Ivan chose to invoke his right to silence and not answer questions about his activities in Spain—to not engage is a dangerous shadow-boxing match.

The Commissioner found that Ivan's refusal to testify about the alleged incidents in Spain left the Minister's evidence uncontradicted and therefore reliable. The Commissioner simply ignores the fact that this very same evidence was precisely that which was obtained under torture.

The Commissioner also found Ivan's testimony on his activities in Canada not to be credible because, in the Commissioner's view, it is implausible that Ivan and Victor Bilbao (another Basque man detained in Vancouver, also accused of membership in the ETA) would never have discussed their respective suspected membership in the ETA during the time they lived together.

He therefore concludes that Ivan is inadmissible to Canada because there are reasonable grounds to believe he is/was a member of a terrorist entity.

This decision is being contested in the Federal Court, where Ivan's lawyers will argue that the Commissioner did not respect the prohibition against the use of evidence obtained through torture, and based his decision on a series of presumptions lacking an evidentiary basis.

Ivan will also contest his detention by filing for a writ of *habeas corpus* in the Superior Court of Quebec, as he is being detained and denied bail on the basis of evidence obtained under torture.