Federal Court  Cour fédérale

Date: 20080731

Docket: IMM-2646-07

Citation: 2008 FC 930

Ottawa, Ontario, the 31st day of July 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ALI BOUASLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and Preamble

[1] On June 12, 2007, the Refugee Protection Division (the panel) determined that Ali Bouasla (the applicant), an Algerian citizen born in 1970, was excluded from the protection of the United Nations Convention Relating to the Status of Refugees (the Convention) by Article 1F(a) of the Convention (exclusion) and, in the alternative, that his fear of returning to Algeria was not well-founded and he was therefore not a Convention refugee (inclusion). Article 1F(a) of the Convention provides that protection under the Convention is not available "to any person with respect to whom there are serious reasons for considering that (a) he has committed a crime against

peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes". [Emphasis added]

[2] Before the panel, Mr. Bouasla was represented by counsel; in this Court, he represented himself.

[3] His application for judicial review relates solely to the panel's decision on exclusion; he is not challenging the panel's conclusion that he was not included because it could not find from the evidence that, if he returned to Algeria, there was a reasonable chance he would be persecuted by his country's authorities or an Islamic terrorist group.

[4] Before Mr. Bouasla began his argument, the Court questioned him about his choice not to challenge his non-inclusion. The Court wanted to know whether he understood the consequences of that choice. He explained to me that he wanted this Court to set aside the finding on exclusion because, if that finding were upheld, he would be inadmissible under section 35 of the new *Immigration and Refugee Protection Act* (*IRPA*) that came into force on June 22, 2002, and his spouse would therefore be unable to sponsor him.

[5] The Court accepted that explanation; the debate before it was therefore limited to exclusion and the panel's general conclusion that it was "of the opinion that there are substantial grounds to believe that Ali Bouasla was complicit through association in crimes against humanity and war crimes".

[6] The panel based that conclusion on what Justice Décary of the Federal Court of Appeal had stated in *Harb* (*Harb v. Minister of Citizenship and Immigration*, 2003 FCA 39):

> [19] As the Court noted in *Bazargan* at 286, membership in a group makes it easier to conclude that there was "personal and knowing participation" – which remains the first test – than when there was no membership, but the difference affects the evidence, not the principles. Counsel for the respondent would like the Court to clarify what is meant by "membership in a group". I do not think this is necessary. The expression was used in *Ramirez* in the context of a member whom the Court described as "active". The expression suggests the existence of an institutional link between the organization and the person, accompanied by a more than nominal commitment to the organization's activities. As everything is a question of fact, at the end of the analysis I feel that it is better to speak in terms of participation in the group's activities than of membership in the group. [Emphasis added]

[7] After assessing the applicant's testimony, which it considered credible, from the standpoint of his knowledge, rank and dissociation, the panel stated the following:

> In light of the evidence adduced, the panel determines that the claimant, through the positions he occupied, had "personal and knowing awareness" of the acts committed by the authorities of his country. The panel considers that the claimant has established his active, consistent and confident support for his government, whose security forces and penitentiary administration he joined voluntarily and knowingly and in which he occupied positions until leaving the country. After rising to various high-level positions, he took no action to dissociate himself from them even though he was aware of the exactions committed. Quite the contrary: he remained in those positions and even continued to offer his services. The panel is therefore of the opinion that, because the claimant was complicit through association in serious crimes against humanity, there are "serious reasons for considering" that he personally and knowingly participated in the crimes committed by the security forces and the penitentiary administration of his country under the authority of the Algerian government. [Emphasis added]
>
> The panel determines that there are serious reasons for considering that the claimant was complicit in crimes against humanity and in war crimes, and that, under Article 1F(a) of the Convention, he is excluded from the protection offered to "Convention refugee" claimants.

Facts

[8] Mr. Bouasla arrived in Canada on May 11, 2000 to claim this country's protection. The path taken by his claim in the Refugee Division and then the Refugee Protection Division was complex. I will describe what he went through:

- On November 20, 2001, the first hearing was held before two members under the former Act. The Minister of Citizenship and Immigration (the Minister) intervened to argue that the applicant was excluded by Article 1F(a) of the Convention, incorporated into Canadian law by the former *Immigration Act* and section 98 of the *IRPA*.

- On March 27, 2002, after several hearings, the evidence and part of the argument were completed, but the case was adjourned to April 16, 2002 to receive the written submissions of counsel for the applicant and an expert appraisal of certain documents.

- Two years later, on April 29, 2004, the Minister's representative sent the panel the results of the expert appraisal. The panel decided that the hearing would continue on June 30, 2004, but the hearing was postponed owing to the absence of a member who was seriously ill.

- On July 29, 2004, the coordinating member of the Immigration and Refugee Board of Canada (the Board) ordered that a *de novo* hearing be held on administrative grounds because it was unlikely that the absent member could return to work.

- On December 20, 2004, the applicant's claim was considered again by a single member (Member Jobin) under the provisions of the *IRPA*. Mr. Bouasla was not represented by counsel.

- On January 25, 2005, Member Jobin determined that the applicant was excluded under Article 1F(a) and (c) of the Convention. That panel did not rule on inclusion. The panel noted that the applicant "has responded directly and openly to the various questions put to him. . . . the claimant answered various questions directly and without evasion, even providing more details than the occasion called for." The panel found that the Algerian army, police and prisons were organizations established for a limited, brutal purpose. The applicant applied to the Federal Court for judicial review of that decision.

- On November 18, 2005, this Court set aside Member Jobin's decision on the ground that the applicant's claim should have been considered by two members under the former Act (see *Ali Bouasla v. Minister of Citizenship and Immigration*, 2005 FC 1544).

- On February 12, 2007, the applicant's claim was considered on the merits for half a day. The delay resulted partly from two pre-hearing conferences and from the instructions Mr. Bouasla gave his new counsel. At the pre-hearing conference held on January 29, 2007, Mr. Girard asked that all the transcripts of the previous hearings and the many exhibits previously admitted into evidence be entered into the panel's record. The panel approved this procedure, and a single witness,

> Mr. Bouasla, who had already testified before, was heard *viva voce* on February 12, 2007. On that date, neither the Minister's representative nor the Protection Officer (RPO) questioned Mr. Bouasla about exclusion, since they were of the opinion that the record had been complete for some time. The Minister's representative did not make any further arguments, and the RPO's comments were very brief; he did not impugn Mr. Bouasla's credibility.

[9] The parties confirmed before me that the panel and this Court had to decide the applicant's claim under the provisions of the former Act. Accordingly, the panel did not have to determine whether Mr. Bouasla was a person in need of protection under section 97 of the *IRPA*, a provision not found in the former Act.

[10] I note that the Minister's representative and the RPO questioned the credibility of some aspects of Mr. Bouasla's testimony before the first panel that considered his claim. However, that panel made no decision.

[11] The essential parts of his history in Algeria between 1988 and the end of 1999 are as follows:

- September 1988 - he enlisted voluntarily as an officer cadet at the Algerian air force's military college in Regaya with the goal of becoming an officer after a three-year training period;

- October 1988 - there were violent riots in Algiers at the beginning of the month. In restoring order, the army killed several hundred citizens. Mr. Bouasla claims that, after these events in which he did not participate, he disagreed with the army's shooting of civilians and asked to resign, but his resignation was rejected several times;

- May 1989 - he deserted, was arrested after 15 days and was given a one-month suspended prison sentence;

- August 1990 - his resignation was granted and he was therefore removed from the military college;

- September 1990 to December 1992 - studies in philosophy at Constantine University;

- Late 1991 and early 1992 - civil war (dirty war) broke out in Algeria;

- December 1992 - he was successful in a recruitment competition and underwent nine months of training (eight months of studies and a one-month training period) as a student police inspector at the police college in Châteauneuf, a district of Algiers;

- October 9, 1993 - active employment with the Direction générale de la Sûreté nationale (DGSN) (the national police) with the rank of student inspector at the

DGSN's headquarters in the village of Bab El Oued in Algiers; he did administrative work, mainly preparing reports;

- October 1993 - he witnessed torture for an hour and a half at the central police station after a sweep for which he did not volunteer; this was the first time he saw torture being inflicted; he did not participate in the torture;

- October 1993 - he refused to transfer to the Service régional de la répression du banditisme (SRRB) (regional unit responsible for fighting banditry) in Constantine, an anti-terrorism unit that became operational only in October 1994, with a unit made up of Ninjas; this was the start of his irregular absence from his position with the DGSN, although he continued to be paid until July 1995. In the meantime, he went on with his studies at Constantine University and obtained a degree in philosophy in 1995; he never went to work for the SRRB in Constantine because the Ninjas tortured people;

- January 1996 - he was dismissed from the DGSN;

- March 1996 - he managed a business in his hometown of Collo;

- March 1997 - he was a candidate in the municipal election of October 23, 1997;

- May 1997 - he wrote an article in *El Kahabar* criticizing the authorities and particularly General Zérouel. He signed the article as Inspector Bouasla;

- January 1998 - his friend and his cousin were killed; he feared for his life; he fled Algeria with his brother's Belgian visa but was stopped at the Tunis airport in February 1998 and returned to Algiers;

- March 1998 - he received a notice from the penitentiary administration asking him to train as a re-education officer; he agreed;

- July 1998 - after a few months of training, he worked as a re-education officer at the Skikda prison for three months, where he had the job of storeskeeper; he was transferred to the Constantine prison in November 1998, where he was assigned first to the stores unit and then, in May 1999, to the detention unit;

- November 1999 - the penitentiary administration offered Mr. Bouasla a position as the warden of a prison in the "death triangle", that is, the Bouira/Medea area; he never held that position;

- December 1999 - he fled Algeria and stayed in France;

- May 11, 2000 - he arrived in Canada and made his claim.

The Panel's Decision

[12] In its decision, the panel generally accepted Mr. Bouasla's history as described in the preceding paragraph. After setting out and commenting on the facts, the panel began its analysis by

looking at two issues: (1) Did the Algerian government commit crimes against humanity? and (2) Was the claimant complicit in the acts committed by the Algerian government?

[13] On the first issue, the panel noted that Mr. Bouasla had "stated that the authorities of his county [*sic*] practised torture. As well, in light of the evidence available to the panel, there is no doubt that the numerous exactions committed by the Algerian government during the time the claimant was living in Algeria correspond to the definition of crimes against humanity" developed by the Supreme Court of Canada and the Federal Court of Appeal. The panel looked at the documentary evidence and quoted several reports, including a March 1993 report by Amnesty International, as well as Exhibit M-2, "Human Rights Calls on Algeria to Set Up Independent Investigation of Atrocities", among other documents. According to the panel, Exhibit M-2 described numerous dreadful and atrocious forms of torture, particularly at the Bab El Oued police station. The panel also cited Exhibit P-20, which stated that the Ninjas of the anti-terrorist police were "actual death squads" and that the forms of torture described in the documentary evidence were "simply appalling".

[14] The panel concluded: "Obviously, the Algerian government is not an organization with limited, brutal purposes. . . . [I]n the panel's opinion, there is no doubt that the numerous exactions committed by the Algerian government through its security forces during the time before the claimant left Algeria correspond to the definition of crimes against humanity set out in the international instruments and in [the case law]. Those exactions are serious crimes, inhuman acts systematically and broadly committed against a civilian population. The evidence has clearly established that the Algerian government engaged in the repression of human rights and in

massacres of the civilian population during the time the claimant was working for it. This finding is corroborated by the admissions made by the claimant in his narrative." [Emphasis added]

[15] In this Court, Mr. Bouasla qualified the panel's analysis by stating that his membership in the army and the national police had been very limited in time and that there had been only isolated occurrences of torture in the two prisons where he had worked as a public servant.

[16] The panel dealt with the second issue, namely whether Mr. Bouasla was complicit through association in a crime against humanity, in two stages: (a) overview of the case law and (b) application of the case law to the facts.

[17] The panel cited with approval the following passage from Justice Reed in *Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79, at pages 84-85:

> **6** As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with safety for himself) but who lends his active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist. I note that the situation envisaged by this jurisprudence is not one in which isolated incidents of international offences have occurred but where the commission of such offences is a continuous and regular part of the operation. [Emphasis added]

[18] Relying on the judgment of the Federal Court of Appeal in *Sivakumar v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 F.C. 872 (*Sivakumar*), the panel identified the following principles relating to "complicity through association":

- Complicity through association can mean that individuals may be rendered responsible for the acts of others because of their close association with the principal actors.

- Furthermore, the case for an individual's complicity in international crimes committed by his or her organization is stronger if the individual member in question holds a position of importance within the organization. The closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime.

- In such circumstances, an important factor to consider is evidence that the individual protested against the crime or tried to stop its commission or attempted to withdraw from the organization.

- Association with an organization responsible for the perpetration of international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. [Emphasis added.]

[19] With regard to the scope of the concept of "personal and knowing participation", the panel quoted the decision of the Federal Court of Appeal in *Bazargan v. Minister of Citizenship and Immigration* (1997), 205 N.R. 282 (*Bazargan*), at paragraph 11, *per* Justice Décary:

> **11** In our view, it goes without saying that "personal and knowing participation" can be direct or indirect and does not require formal membership in the organization that is ultimately engaged in the condemned activities. It is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organization. At p. 318 [F.C., in *Ramirez*], MacGuigan J.A. said that "[a]t bottom, complicity rests . . . on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it". Those who become involved in an operation that is not theirs, but that they know will probably lead to the commission of an international offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation. [Emphasis added]

[20] The panel applied *Collins v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 732, a decision by my colleague Justice de Montigny, at paragraph 24, to describe the required mental element:

> **24** The mental element required to establish complicity in crimes against humanity has been characterized variously as "shared common purpose", "personal and knowing participation or toleration of the crimes", and participation in an organization knowing it commits crimes against humanity, when combined with a failure to stop the crimes or disassociate oneself. [Emphasis added]

[21] I will look in greater detail at the panel's analysis of the three factors it assessed in support of its conclusion.

(i) Knowledge

[22] The panel acknowledged that it had no evidence that Mr. Bouasla had himself participated in the commission of a crime as a perpetrator or associate. The panel wrote the following about his knowledge:

> Contrary to the claimant's allegations, the panel need not link him directly to the crimes committed by the authorities of his country in order to find him complicit through association. The claimant knew about the crimes committed, and the common purpose that may be inferred from his voluntary association with the Algerian authorities suffices for the panel to determine that he was complicit through association, as set out in *Bazargan*. [Emphasis added]

[23] To support this conclusion, the panel relied on the following facts and reasoning.

[24] First, it found the following:

- Mr. Bouasla knew that the Algerian police tortured people before becoming a student at the police college in Châteauneuf and later being "employed by the DGSN";

- In October 1993, his unit participated in a major "sweep" and, once he returned to the central police station, he witnessed reports being falsified and torture being inflicted for an hour and a half;

- He testified that the unit to which he had been assigned in the DGSN directorate in Bab El Oued was a non-operational unit and that his job was to process files and facsimile messages, but "the evidence has established that that allegedly 'non-operational' unit could become 'operational'". The panel was referring to the October 1993 sweep in which his unit was ordered to participate.

The panel added:

> The claimant did not hesitate to enter the competition to become a member of the police forces and, although he witnessed torture practised by the security forces of his country, he entered another competition in order to work in the prisons in Algeria. It is clear, after reading and hearing the claimant's testimony, that he was aware of the exactions committed by the authorities of his country during the time he was working for them. He has established impressive knowledge of the organizational structure and the operations of the various security forces in his country. The panel also notes that his career path demonstrates the confidence that the Algerian government had in him. [Emphasis added]

[25] Second, the panel described Mr. Bouasla's experiences in the penitentiary administration in Algeria. It quoted his testimony "that he witnessed torture and drug dealing in the prisons where he worked" and that:

> One prisoner died because the warden and the unit chief did not do their job. He suffocated to death in the room because there was no ventilation.

[26] According to the panel, Mr. Bouasla "also stated that he witnessed a prisoner being killed after being released by the SM" (the military security force) and said:

> that torture was not systematic in Constantine as it was in Lambese, where torture was systematic and a daily occurrence. According to the claimant, occurrences of torture were isolated in Constantine. However, he testified that actual torture was practised in the police stations, gendarmerie stations and security forces premises.

[27] Third, the panel quoted Mr. Bouasla's answer to the following question put to him by Member Jobin during the *de novo* hearing in December 2004: "why were you in places . . . in a police force or a penitentiary administration, where torture is practised or where there is the possibility of torture being practised . . . [i]f you are opposed to that principle"?

> **A.**: It's obvious. In the third world and in Algeria, power belongs to those who hold public force, to change things, in the third world, and you can see that in the history of humanity and the third world. Only governments change things, because there is no other way to change systems.
>
> And inside, someone who wants to change from the inside has to get into circles, decision-making circles, where there are, that's it, decision-making circles, like the political police, like the army, like the military security force. Eventually, I understood. I explained why I left the army, because I thought the army had power in Algeria; but it wasn't the army, it was the military security force, to be exact ...
>
> ...
>
> Personally, I think of my people, of changing things. I can sacrifice myself, finally, for example, for, in order to change things. But all that, all that is ... said that I was confronted with torture, at the central police station, I realized that I can't, even if, for example, I want to change things, I can't stay in that, with that power. You can't, it's impossible. Either you become involved, you become involved, or else ... you withdraw, for example. If you stay that way, between ... you might be killed or be ...

[28] The panel concluded as follows:

> Although the claimant alleged that he neither was involved nor withdrew, on the contrary he remained and signed. Since he did not withdraw, it is reasonable to believe that he became involved.

[29] Fourth, according to the panel, Mr. Bouasla had admitted that Exhibit M-14 indicated that torture was practised at the police college, although he claimed that that document did not distinguish sufficiently between the college and the Ninja centre and that he and his classmates had never seen any torture there. The panel determined the following:

> The panel notes that the documentary evidence refers to the police college in Châteauneuf as one of the 13 centres for illegal and prolonged detention in Algiers and surrounding area. Exhibit M-14 describes the centre in Châteauneuf as one [*sic*] five torture centres in Algiers. A document on torture and repression, adduced as Exhibit M-4, reads as follows:
>
> > [TRANSLATION] The torture methods vary little from the small local police stations to the "specialized" centres such as the police college in Châteauneuf – known to victims as the "torture college" – the central Algiers police station, and the military security force centres in Ben Aknoun and Bouzarea. These methods range from the "chiffon" to sodomization and include electric shock; pulling out nails; beating with sticks; burning with cigarette butts, blowtorches and soldering irons; ladder torture; suspension in handcuffs from the ceiling for several days; flagellation; and the use of electric drills.
>
> The claimant alleged that people confused the police college in Châteauneuf with the centre in Châteauneuf. However, the evidence clearly distinguishes between these two entities. [Emphasis added]

(b) Rank

[30] Relying on well-known case law, the panel stated, as a preamble to its analysis of this factor, that it is well established in Canadian law that a refugee claimant who is not identified as the direct perpetrator of a crime against humanity may still be subject to the application of the exclusion clause because of complicity and that the required extent of participation is established by the case law. Referring to the decision of my colleague Justice Tremblay-Lamer in *Zrig v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 F.C. 559, the panel noted that "the closer one is to a position of leadership or command within an organization, the easier it will be to draw an inference of awareness of the crimes and participation in the plan to commit the crimes".

[31] According to the panel:

> The evidence has established that the claimant voluntarily enlisted in the army in order to become an officer and then voluntarily entered a competition in order to join the security forces of his country. He testified that, at the police college in Châteauneuf, police inspectors and officers followed the same program. He stated that police investigators conducted interrogations and investigations and were the pillars of the police stations. As for the claimant himself, the evidence has established that he worked at the DGSN, to which all of Algeria's security forces reported. As well, the claimant testified that the members of the directorate for which he worked were called in as reinforcements during a sweep in October 1993. The claimant occupied a position, not in a mere local police station, but at the DGSN. His attempt to dissociate himself from the acts of torture committed by the security forces of his country by noting that he had begun to be absent from work is insufficient to attenuate his involvement. [Emphasis added]

[32] The panel quoted Exhibit P-11, a letter dated August 31, 1996 from the human resources directorate of the Sûreté nationale (national security) that read as follows: [TRANSLATION] "In response to your request dated March 20, 1995, in which you ask to return to the Sûreté nationale, I regret to inform you that, because of the reasons for the dismissal (irregular and prolonged absence, and refusal to report to your new assignment), no favourable response can be given to your request." According to the panel, Mr. Bouasla claimed that this letter was inaccurate because he had made no request to return to the Sûreté nationale on March 20, 1995 but that the other part of the letter stating that he had been absent from work and had refused to report to his new assignment was accurate. The panel was of the opinion that the claimant had made a request to return to the SN "and gives Exhibit P-11 all the weight it deserves".

[33] The panel then added the following:

> Next, the evidence has established the claimant's rising career, from 1998 when he joined the penitentiary administration until he was offered a position as the warden of a prison in a particularly difficult area, at a time when he allegedly had

little experience. The panel cannot ignore the claimant's exceptional analytical capacity. To convince oneself of this fact, one need only read the lengthy argument that lasted for one and a half hours at his *de novo* hearing in December 2004, at which he represented himself. As well, the claimant himself pointed out that his superiors wanted to keep him in their unit because of his analytical capacity.

The claimant adduced as Exhibits P-25 to P-33 numerous complaints, grievances and proceedings not only against his former employers and two of the many lawyers who have represented him but also against the Assistant Deputy Chairperson of the Board. When asked to explain to the panel the relevance of these new exhibits adduced in advance of the hearing before this panel, the claimant's counsel pointed out that he wanted to demonstrate the anti-establishment profile of the claimant, who allegedly has been in trouble with the authorities. Obviously the claimant does not have the profile of a person who merely carries out orders and would be content to be a mere onlooker. In fact, all of the proceedings referred to in these exhibits establish the claimant's standing and authority.

As well, with regard to the claimant's candidacy in the October 23, 1997, municipal election, he stated:

> [Translation] ... Personally, I was in the army, in the security forces. When I ran for office, that meant in a way that I had some degree of popularity; not just anybody could run for office.

This alleged popularity of the claimant cannot be reconciled with the subservient role of an administrative officer that he allegedly played for his country's authorities.

After analyzing the preceding information, it is reasonable to determine that the claimant had "personal and knowing awareness" of the acts by the Algerian security forces, which is "the starting point for the existence of complicity." [Emphasis added]

(c) Dissociation

[34] Relying on the following facts and analysis, the panel found that the claimant had taken no action to dissociate himself from the "security forces and penitentiary administration" of his country:

- "The claimant was asked whether he considered resigning after October 1993 when he witnessed torture. Although he answered in the affirmative, he alleged that not

everyone in the police force was bad or committed atrocities and torture. He added that he wanted to change things and was unable to withdraw immediately. He then began to be absent from work. Did he submit an official resignation document? He stated that it was not very urgent to submit his resignation since he could resign at any time. [Emphasis added.]"

- The discussion between the panel and Mr. Bouasla about why a person with a degree in philosophy would agree to work in the Algerian penitentiary administration; the panel concluded from the claimant's statements that, when he had been unsuccessful in the competition to join the penitentiary administration in 1996, he had thought he would gather evidence on a coup allegedly fabricated by the military security force;

- The panel's question as to why he had not kept his arcade business, and the claimant's answer "that he could not just fold his arms and leave his people in danger";

- Why had Mr. Bouasla not reported the acts he had observed at the prison in Constantine or made complaints about what was happening there?

- The following passage by the panel: "The claimant stated that he did not send his superiors a notice of resignation. He attempted to extricate himself by stating that he witnessed torture in the summer of 1999 and was already preparing his visa file, and so there was no need to resign, and it would have served no purpose to attract the

attention of the authorities. He added, [Translation] ‘It’s ... it’s really complicated; it’s ... that’s not how ... how the ... it was 1999, the summer of 1999; in Algeria, Constantine was completely devastated’”;

- The panel’s assessment of his previous testimony that his objective was to occupy positions of authority in order to change things; it wondered why, in this context, he had not accepted the prison warden position so he could “change things”. According to the panel, the applicant answered as follows: [TRANSLATION] “No, in the penitentiary administration, no, you don’t change anything.” He added that nothing could be hoped for in an area like the death triangle.

[35] The panel concluded as follows on the dissociation factor:

> If it is true, as the claimant has alleged, that he wanted to change things, the panel is obliged to note that he did nothing and attempted nothing whatsoever and that, despite this manifest failure of which he was well aware, he voluntarily continued to work at the DGSN without making the slightest effort to dissociate himself from it or to resign when he was entirely free to do so.
>
> The claimant testified that, as a detention officer, he was responsible for supervising between 30 and 40 prison guards who reported to him. In the particular circumstances of the present case, his attempt to minimize his duties by stating that he had to watch these people in order to ensure that they did not abandon their positions is insufficient. [Emphasis added]

Issues Raised by Mr. Bouasla

[36] First, he argues that Member Michel Venne looked at him contemptuously because of his past and his conduct, thus giving rise to a reasonable apprehension that Member Venne was so biased that he could not render justice to his claim. The fact that the panel substituted itself for the Minister’s representative confirmed this apprehension. It was the panel that questioned the

applicant; the Minister's representative did not question him about exclusion during the hearing on February 12, 2007. Mr. Bouasla also argues that the Board is not an independent tribunal but is under the political influence of the Canadian government. In support of this argument, he refers to the February 2007 resignation of the Board's Chairperson, who wanted to reform the method of appointing members, the lifting of the moratorium on deportations to Algeria after the Minister of Citizenship and Immigration Canada visited that country and, finally, Canada's complicity with the Algerian police, who were given training by the RCMP.

[37] Second, Mr. Bouasla points to the accidental failure to record a decisive part of the hearing on February 12, 2007.

[38] Third, the panel exceeded its authority [TRANSLATION] "by playing psychologist". However, Mr. Bouasla acknowledges that the panel had the authority to analyse his conduct and attitude in the hearing room but had no expertise to assess him psychologically. He cites a passage from the panel's decision stating that he "does not have the profile of a person who merely carries out orders and would be content to be a mere onlooker. In fact, all of the proceedings referred to in these exhibits establish the claimant's standing and authority".

[39] Fourth, the applicant reproaches the panel for not ruling on his credibility. He cites Exhibit P-11 and the panel's conclusion rejecting his testimony that the first part of the letter concerning his request to return to the DGSN was an administrative error. According to Mr. Bouasla, the panel should have ruled on the credibility of his explanation before deciding this point.

[40] Fifth, he submits that the panel improperly applied the test for complicity. I note the following points from his submissions:

1. He cites *Bety Plaisir v. Minister of Citizenship and Immigration*, 2007 FC 264, a decision by my colleague Justice Tremblay-Lamer: "It is settled law that acts or omissions amounting to passive acquiescence are not a sufficient basis for invoking the exclusion clause." In his memorandum, Mr. Bouasla writes the following:

> [TRANSLATION] In my case, I joined the Algerian police voluntarily, as in every police force in the world; I held an administrative position for 20 days at the DGSN, which is not an operational unit, and I worked in the field once during a sweep near the directorate, which took me to the central police station in Algiers because of transportation.

2. Next, he cites the decision of my colleague Justice Kelen in *Ardila v. Minister of Citizenship and Immigration*, 2005 FC 1518, and makes the following points in his memorandum:

> [TRANSLATION]
>
> - Nature of the organization: the decision makers did not characterize my office at DGSN headquarters, since the central police station in Algiers was not my office in October 1993, the Skikda and Constantine prisons between July 1998 and December 1999;
>
> - Method of recruitment: voluntary;
>
> - Position or rank in the organization: student at the police college, student inspector at the DGSN, student at the school for re-education officers, officer in the stores unit at the Skikda prison and re-education officer and third assistant to the chief of detention in Constantine;
>
> - Length of time in the organization: nine months at the police college, 20 days at the DGSN, about four and a half months at the school for re-education officers, about four months at the Skikda prison, 14 months at the Constantine prison;

- Opportunity to leave the organization: in the case of my office at the DGSN, I began an irregular and prolonged absence after 20 days on the job, and I was subsequently dismissed. In the case of the two prisons, I was looking for a visa to leave the country, and no crimes against humanity were committed in those prisons;

- Knowledge of atrocities committed by the organization: I was aware that the police had a bad reputation, since I experienced it myself when I was 10 years old, but this was the case in certain police units.

[41] Mr. Bouasla argues that the panel, in applying the case law, obviously took no account of his testimony that he had never held a leadership position.

[42] Sixth, Mr. Bouasla argues that the panel made perverse findings. I will refer to the relevant extracts from his memorandum.

A. Career and Confidence

[43] He cites the following finding by the panel: "The panel . . . notes that his career path demonstrates the confidence that the Algerian government had in him." He replies:

> [TRANSLATION]
>
> Career: how can it be imagined that one year as an active officer cadet at a military college (the training lasts three years), desertion and then expulsion after another year of going back and forth between the college and my home represent a career? How can it be imagined that nine months as a student police inspector at the police college, 20 days as a student police inspector at the DGSN, an irregular and prolonged absence and dismissal represent a career? How can it be imagined that 22 months in the penitentiary administration represent a career? According to the decision makers, roughly 43 months and 20 days in various forces a long time ago represent a career and a career path. This is completely illogical. [Emphasis added]
>
> Confidence: this finding was made in a perverse manner without regard for other evidence, such as my dismissal from the police, for which the applicable procedures were not followed, the death threats, the article I wrote in a newspaper (intellectual and political life) in 1997, the blackmail before the 1997 election, the refusal of my candidacy papers for the election and, finally, my problems in the penitentiary

> administration. In any event, this perverse finding, which uses the term "government", served only to exaggerate my status and present me as someone who had climbed the ranks in support of a government the decision makers do not see as a criminal government.

B. Return to the Police

[44] Relying on Exhibit P-11, the panel was of the opinion that the claimant had indeed asked to return to the Sûreté nationale. Mr. Bouasla disputes this, writing:

> [TRANSLATION] This perverse finding is based on erroneous facts and an illogical chronology of events, since I continued being paid until July 1995, the notice from the judicial police chief telling me to return to the police was dated December 13, 1995, I was dismissed in January 1996, the letter in question was dated August 31, 1996 and the alleged request to return was dated March 20, 1995. Why would I have asked to return on March 20, 1995 while I was being paid and had not yet been dismissed from the police?

C. Involvement

[45] On this point, the panel stated the following: "Although the claimant alleged that he neither was involved nor withdrew, on the contrary he remained and signed. Since he did not withdraw, it is reasonable to believe that he became involved". In his memorandum, Mr. Bouasla states:

> [TRANSLATION] The purpose of or spirit behind withdrawing or dissociating oneself is to distance oneself physically from the group. I worked for the police for 20 days and then began an irregular and prolonged absence starting in October 1993. I was sent a notice on December 13, 1995 telling me to resume my duties with the police, but I did not do so, and, finally, I was dismissed in January 1996. Irregular absence from the police is equivalent to desertion in the army and, in any event, resignation, desertion and irregular absence are ways of withdrawing. [Emphasis added]

D. Intention to Change Things

[46] The panel inferred the following: "If it is true, as the claimant has alleged, that he wanted to change things, the panel is obliged to note that he did nothing and attempted nothing whatsoever. . . ." Mr. Bouasla submits that the panel ignored the evidence. He refers to several

actions he took and attempts he made to change things, including being a candidate in the municipal election, publishing his articles in the press, trying to investigate the unlawful use of sand in 1997 and making improvements to the Skikda prison in 1998 when he was the storeskeeper.

E. High-Level Positions

[47] In response to the panel's finding that he had "ris[en] to various high-level positions", the applicant asks the following questions:

> [TRANSLATION]
>
> How can it be imagined that being an active officer cadet at a military college, a student police inspector for 20 days at DGSN headquarters and a re-education officer who was the third assistant to the chief of detention for a few months in a small prison amounted to holding high-level positions?
>
> Was working at the DGSN as an inspector in an office that processed facsimile messages a high-level position? I cannot imagine that Federal Court employees are all judges and all hold high-level positions. It is completely illogical to think that a branch of whatever kind has only high-level positions.

[48] In its decision, the panel found that ". . . at the police college . . . [t]he claimant occupied a position, not in a mere local police station, but at the DGSN". Mr. Bouasla submits that the panel ignored his explanation, which is also [TRANSLATION] "general information accessible to everyone, that the rank of police inspector is lower than the rank of officer, commissioner, senior commissioner, police chief and senior police chief".

[49] Eighth, he alleges that some of the panel's findings were based on erroneous facts. I will list the most important ones:

1. The panel noted that Mr. Bouasla "also stated that he witnessed a prisoner being killed after being released by the SM." Mr. Bouasla denies witnessing a prisoner being killed. According to him, the panel misinterpreted his testimony. Mr. Bouasla knew that the prison warden was involved in drug dealing outside the prison. He testified that he had inferred that drug dealers had killed the prisoner after he was released by military security.

2. The panel made another mistake when it found that the claimant "testified that . . . he was a student police inspector at the SRRB in Bab El Oueb. . . . He testified that he worked for the judicial police of the DGSN for only 20 days". Later, the panel found that the applicant had said that his home office "reported to the judicial police directorate . . . responsible for searches of homes and individuals". According to Mr. Bouasla, this description is not faithful to his testimony, since he had explained that:

    - There was no <u>regional</u> unit responsible for repressing banditry (SRRB) in Algiers;

    - On October 9, 1993, he had been assigned to the judicial police directorate of the DGSN, a purely administrative unit;

    - The DGSN's judicial police directorate in Algiers was not responsible for searches, which were performed by the judicial police of the gendarmerie and security forces;

[50] Mr. Bouasla submits that these errors are important because they give the impression that he was attached to an operational unit, which is not true.

[51] The panel's finding that he "therefore left the army in order to join Algeria's political police" was also based on a misunderstanding of the facts, since, according to the applicant, the panel never properly grasped or understood that the military security force was not the political police but that there were political police in the military security force just like there were political police in the police force.

[52] Ninth, the applicant submits that the panel made several contradictory, capricious or perverse findings. The most important relates to his resignation. The panel's reasons read as follows: "He stated that it was not very urgent to submit his resignation since he could resign at any time".

[53] According to Mr. Bouasla, the panel that made the impugned decision did not address this point at all, took no account of his explanations and summarized his testimony of March 27, 2002 in a capricious manner.

[54] During the hearing on March 27, 2002, the presiding member of the panel asked him [TRANSLATION] "whether you considered resigning after October 1993", to which he answered:

> [TRANSLATION]
>
> Of course, it was . . . resigning was something I thought about, but it wasn't really . . . I mean, the police weren't . . . how can . . . not everyone was bad. When I say . . . perhaps you think that when I say the police committed . . . atrocities, it wasn't all police officers.
>
> So even if I didn't resign . . . even if I didn't resign (inaudible), a position, for example, in a unit that isn't connected, in administration, with no connection to the judicial police. It's . . . for example, if I dream of making a change but I withdraw or give up immediately, that's not normal either, it's not . . . it's not the way to . . . to think. [Emphasis added]

[55] When the Minister's counsel asked him whether he had made an official request stating that he wanted to resign, Mr. Bouasla testified as follows:

> [TRANSLATION]
>
> I didn't make one, but . . . because I was . . . completely absent. So submitting my resignation wasn't really urgent. For example, if I'd been forced, been transferred again, been forced . . . if there had been something really . . . that's another matter, since I could have resigned at any time. [Emphasis added]
>
> In the police and the public service, you can resign at any time . . . at any time, but . . . what good does resigning immediately do for Algerians? That's . . . the problem, what's the point of . . . I mean, you . . . you want to do something for your people and then . . . you withdraw because of a small obstacle that . . . that too isn't . . . I think it's . . . it's not normal, anyway. [Emphasis added]

Analysis

1. Standard of Review

[56] Prior to the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, there were three possible standards for reviewing a tribunal's decision; following that decision, there are now only two such standards: correctness and reasonableness. The standard of patent unreasonableness has been included in the standard of reasonableness.

[57] *Dunsmuir* discussed the method for selecting the appropriate standard of review in individual cases. At the outset, Justices Bastarache and Lebel wrote the following at paragraph 51:

> [51] . . . As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[58] The highest court recognized that "[a]n exhaustive review is not required in every case to determine the proper standard of review". At paragraph 62, the two judges held as follows:

> [62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. [Emphasis added]

[59] I believe that several decisions of the Federal Court of Appeal have already established the appropriate standard of review for the questions that may arise in determining the legality of a decision by the Refugee Protection Division finding that a claimant is excluded under Article 1F(a).

[60] In *Harb v. Minister of Citizenship and Immigration*, 2003 FCA 39 (*Harb*), Justice Décary wrote the following for the Court of Appeal at paragraph 14:

> [14] In so far as these are findings of fact they can only be reviewed if they are erroneous and made in a perverse or capricious manner or without regard for the material before the Refugee Division (this standard of review is laid down in s. 18.1(4)(*d*) of the *Federal Court Act*, and is defined in other jurisdictions by the phrase "patently unreasonable"). These findings, in so far as they apply the law to the facts of the case, can only be reviewed if they are unreasonable. In so far as they interpret the meaning of the exclusion clause, the findings can be reviewed if they are erroneous. [Emphasis added]

[61] In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 (*Mugesera*), the Supreme Court of Canada did not have to determine the standard of review at trial because the decision before it was an appeal decision of the Federal Court of Appeal setting aside the decision of Justice Nadon, then a member of the Trial Division. For the purposes of this case, I find it helpful to quote paragraphs 36, 37 and 38 of *Mugesera*. As we shall see, the principles set out in those paragraphs will be used to decide the application for judicial review before this Court:

> **36** In the case at bar, we find that the FCA exceeded the scope of its judicial review function when it engaged in a broad-ranging review and reassessment of the IAD's findings of fact. It set aside those findings and made its own evaluation of the

> evidence even though it had not been demonstrated that the IAD had made a reviewable error on the applicable standard of reasonableness. Based on its own improper findings of fact, it then made errors of law in respect of legal issues which should have been decided on a standard of correctness.
>
> **37** Applications for judicial review of administrative decisions rendered pursuant to the *Immigration Act* are subject to s. 18.1 of the *Federal Court Act*. Paragraphs (*c*) and (*d*) of s. 18.1(4), in particular, allow the Court to grant relief if the federal commission erred in law or based its decision on an erroneous finding of fact. Under these provisions, questions of law are reviewable on a standard of correctness.
>
> **38** On questions of fact, the reviewing court can intervene only if it considers that the IAD "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (*Federal Court Act*, s. 18.1(4)(*d*)). The IAD is entitled to base its decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances: s. 69.4(3) of the *Immigration Act*. Its findings are entitled to great deference by the reviewing court. Indeed, the FCA itself has held that the standard of review as regards issues of credibility and relevance of evidence is patent unreasonableness: *Aguebor v. Minister of Employment & Immigration* (1993), 160 N.R. 315, at para. 4. [Emphasis added]

2. Standard of Proof

[62] Paragraphs F(a), (b) and (c) of Article 1 of the Convention are subject to the standard of proof set out in the introductory sentence: "F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that . . . he has committed a crime. . ." . [Emphasis added]

[63] *Mugesera*, above, concerned a provision of the former *Immigration Act* authorizing the deportation of a permanent resident of Canada where there were reasonable grounds to believe that the permanent resident had committed a "crime against humanity" outside Canada.

[64] According to the Federal Court of Appeal's decisions in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.) (*Ramirez*), and *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.) (*Moreno*), there is no great

difference between the concepts of “serious reasons for considering” and “reasonable grounds to believe”, and both standards require less than the balance of probabilities (see *Ramirez*, at paragraph 6, and *Moreno*, at paragraph 16).

[65] In *Mugesera*, the Supreme Court of Canada approved those Federal Court of Appeal decisions and, like Justice Robertson in *Moreno*, explained the circumstances in which the standard of proof must be applied.

[66] The Supreme Court of Canada wrote the following about the standard of proof at paragraph 114:

> **114** The first issue raised by s. 19(1)(*j*) of the *Immigration Act* is the meaning of the evidentiary standard that there be “reasonable grounds to believe” that a person has committed a crime against humanity. The FCA has found, and we agree, that the “reasonable grounds to believe” standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship & Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.). [Emphasis added]

[67] The Supreme Court of Canada wrote the following about the application of the standard of proof at paragraph 115:

> **115** In imposing this standard in the *Immigration Act* in respect of war crimes and crimes against humanity, Parliament has made clear that these most serious crimes deserve extraordinary condemnation. As a result, no person will be admissible to Canada if there are reasonable grounds to believe that he or she has committed a crime against humanity, even if the crime is not made out on a higher standard of proof. [Emphasis added]

[68] In *Moreno*, Justice Robertson found at paragraph 22 of his reasons that the requisite standard of proof "comes into legal play only when the tribunal is called on to make determinations which can be classified as questions of fact" and "is irrelevant when the issue being addressed is essentially a question of law". He added the following at paragraph 23: "A finding of fact has been described as a determination that a phenomenon has happened, is, or will be happening independent of or anterior to any determination as to its legal effects".

[69] In the case before him, Justice Robertson concluded as follows:

> **25** In my view, the standard of proof envisaged by the exclusion clause was intended to serve an evidential function in circumstances where it is necessary to weigh competing evidence. It must not be permitted to overstep its legislated objective. In the present context, the standard of proof becomes relevant only in respect of the following questions of fact.
>
> **26** It is a question of fact whether the appellant or members of his platoon killed civilians. The standard of proof to be applied is that embodied in the term "serious reasons for considering". Similarly, it is a question of fact whether the appellant stood guard during the torture of a prisoner. As that fact is admitted, the requisite standard of proof has been satisfied. That standard, however, has no bearing on the following determinations.
>
> **27** It is a question of law whether the act of killing civilians by military personnel can be classified as a crime against humanity. It must be accepted that such acts satisfy the legal criteria found within the Act and the Convention. . . . It is also a question of law whether the appellant's acts or omissions as a guard constitute a crime against humanity. That determination can only be made by reference to legal principles found in the existing jurisprudence dealing with "complicity". Finally, it is a question of law whether membership in a military organization, such as the Salvadoran army, constitutes sufficient complicity to warrant application of the exclusion clause. [Emphasis added]

3. Burden of Proof

[70] The courts have consistently held that the burden of proof is on the Minister, since the Minister is the one alleging that Mr. Bouasla is excluded.

4. Concept of Complicity in International Law

[71] The leading case is *Ramirez*; the reasons were written by Justice MacGuigan on behalf of his colleagues Justices Stone and Linden. The facts of the case are important.

[72] Mr. Ramirez had enlisted voluntarily in the Salvadoran army for two years but had ended up deserting in November 1987 after signing up for two more years of service so that his hospitalization would be paid for by the army (he had injured his foot) and his pay would continue. According to his testimony, during his first 20 months of active service, when he had been promoted to corporal and then to sub-sergeant, he had been involved in between 130 and 160 instances of combat during which his platoon had captured enemy guerrillas, interrogated them using torture and then killed them. Mr. Ramirez had been present during many interrogations but had not inflicted any torture.

[73] Justice MacGuigan reviewed the principles applicable to the concept of complicity in the context of the Convention. The issue was "the extent to which accomplices, as well as principal actors, in international crimes should be subject to exclusion".

[74] In other words, according to Justice MacGuigan, the issue was the extent of participation required for a participant to be found liable for an international crime in which the participant was not a principal actor. To decide this issue, he referred to the London Charter of the International Military Tribunal, Article 6 of which reads as follows:

> Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. [Emphasis added]

[75] In his view, complicity for the purposes of the Convention is a concept broader than the one in section 21 of the *Criminal Code*, which deals with parties to an offence; section 21 stems from the traditional approach to aiding and abetting.

[76] After reviewing American case law, he concluded that it "represents a helpful starting point as to the meaning of the word 'committed' in the Convention". At paragraph 15 of his reasons, he found the following:

> **15** . . . From the premise that a *mens rea* interpretation is required, I find that the standard of "some personal activity involving persecution," understood as implying a mental element or knowledge, is a useful specification of *mens rea* in this context. Clearly no one can "commit" international crimes without personal and knowing participation. [Emphasis added]

[77] Having established that "no one can 'commit' international crimes without personal and knowing participation", Justice MacGuigan asked the following question: "What degree of complicity, then, is required to be an accomplice or abettor?" He reached the following conclusions:

- "[M]ere membership in an organization which from time to time commits international offenses is not normally sufficient for exclusion from refugee status";

- "It seems apparent, however, that where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts";

- "[M]ere presence at the scene of an offence is not enough to qualify as personal and knowing participation . . . though, again, presence coupled with additional facts may

> well lead to a conclusion of such involvement." In Justice MacGuigan's view, mere on-looking, such as occurs at public executions, where the on-lookers are simply bystanders "with no intrinsic connection with the persecuting group, can never amount to personal involvement, however humanly repugnant it might be. However, someone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts. At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law (e.g., s. 21(2) of the *Criminal Code*), and I believe is the best interpretation of international law". [Emphasis added]

[78] As a Canadian example, Justice MacGuigan cited *Naredo v. Canada (Minister of Employment and Immigration)* (1990), 11 Imm. L.R. (2d) 92. That case involved a husband and wife who had been members of the intelligence service of the Chilean police and who were facing an order of deportation from Canada. The evidence showed that they had belonged to a team of four persons which had tortured prisoners, frequently to death, but that they had not themselves applied force to any of the detainees, merely acting as guards or as witnesses to the statements extracted from them. Justice MacGuigan stated that Justice Muldoon had "cast [his] net too broadly" in saying that "[j]ust watching is equally culpable with just torturing".

[79] Justice MacGuigan explained:

> **30** No doubt in the circumstances of that case, where four members of a police force who had freely chosen their occupation, were isolated in a room with a victim with no other purpose than collectively to apply torture to the victim,

> guards, witnesses and watchers were all equally guilty of personal and knowing involvement in persecutorial acts. But, as I see it, that is a determination that can be made only in a particular factual context, and cannot establish a general rule that those who look on are always as guilty as those who act. In fact, in my view there is no liability on those who watch unless they can themselves be said to be knowing participants. [Emphasis added]

[80] He added that "[o]ne must be particularly careful not to condemn automatically everyone engaged in conflict under conditions of war" because, in his view, combatants have probably seen reprehensible acts performed by their own side "which they felt utterly powerless to stop, at least without serious risk to themselves. While the law may require a choice on the part of those ordered actually to perform international crimes, it does not demand the immediate benevolent intervention, at their own risk, of all those present at the site. Usually, law does not function at the level of heroism".

[81] Justice MacGuigan ended his overview of the applicable principles by reaffirming the basic principle of complicity in the following terms:

> **23** In my view, it is undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts. [Emphasis added]

[82] The Federal Court of Appeal's decision in *Moreno* on September 14, 1993 was rendered immediately after *Ramirez*. Mr. Moreno had been forcibly recruited into the Salvadoran army at the age of 16. He had deserted the army after four months of service, three of which he had spent immersed in his training program.

[83] The facts are important. According to Justice Robertson, the appellant had been assigned to general guard duty throughout his training period. On one such occasion, he had been required to

stand watch outside of a prisoner's cell, to which he had not been given a key. Near the end of his watch, two armed lieutenants had arrived and begun to interrogate the prisoner. The prisoner's failure to provide suitable responses to questions posed by his interrogators had resulted in acts of torture. The prisoner's fingertips had been cut off, portions of his ears had been removed and his cheek had been slashed. The appellant had witnessed these acts but had rendered no assistance. The appellant testified that he believed he would have been killed had he done so. He had learned from other recruits that the prisoner had been taken away later that night and killed.

[84] He had also participated in five armed confrontations with guerrilla forces over a 20-day period. Immediately following the military campaign, he had been granted a three-day leave. He had returned home to find that money which he had requested from his siblings in the United States had arrived. The next day, he had deserted the army.

[85] The Refugee Division found that, during the confrontations with guerrilla forces, Mr. Moreno, either alone or in concert with members of his platoon, had participated in the killing of civilians. This was therefore a ground for exclusion, the other ground being the Refugee Division's condemnation of his failure to assist the prisoner. Justice Robertson set aside that finding by the Refugee Division on the basis that it was contrary to the evidence. He stated the following at paragraph 42 of his reasons:

> **42** . . . the evidence falls significantly short of establishing that there are "serious reasons for considering" that the appellant or members of his platoon participated in the killing of civilians. Had the appellant been a long-term member of a military unit well known for its inhumane treatment of civilians, then it might have been open to the Board to reach the conclusion that it did. But in the given circumstances, the most that can be said is that the appellant was a member of a military regime engaged in the commission of crimes against humanity. In these circumstances, the culpability of the appellant can arise only by association. [Emphasis added]

[86] According to Justice Robertson, such an error was sufficient reason for setting aside the decision and remitting the matter back for redetermination. However, he found that the panel that reheard the claim "would be left with the task of determining whether the appellant's acts and omissions surrounding the guarding of a prisoner, together with his membership in a group whose code of conduct embraces the killing of civilians, is sufficient justification for invoking the exclusion clause". At paragraph 44 of his reasons, Justice Robertson expressed the view that the success of Mr. Moreno's appeal hinged on the resolution of two questions:

1. Was the appellant's membership in a military organization responsible for inhumane acts against members of the civilian population, in and of itself, sufficient justification for invoking the exclusion clause? In other words, was the appellant "guilty by association"?

2. Was the appellant's participation as a guard in the torture of a prisoner a sufficient basis to deem him an "accomplice" and therefore subject to the application of the exclusion clause? The question was premised upon the understanding that an "accomplice" is as culpable as the "principal" – the one who pulls the trigger. The alternative was to classify the appellant an "innocent by-stander".

[87] He considered the first question under the heading "Guilt By Association" and restated the principle that "[i]t is well settled that mere membership in an organization involved in international offences is not sufficient basis on which to invoke the exclusion clause", although an exception "arises where the organization is one whose very existence is premised on achieving political or social ends by any means deemed necessary. Membership in a secret police force may be deemed sufficient grounds. . . ." Relying on *Ramirez*, he expressed the view that "[m]embership in a military

organization involved in armed conflict with guerrilla forces comes within the ambit of the general rule and not the exception".

[88] Under the heading "Accomplice v. Innocent By-stander", although Justice Robertson acknowledged that the answer to the second question could not be based solely on Canadian criminal law, he cited the decision of the Supreme Court of Canada in *Dunlop and Sylvester v. The Queen*, [1979] 2 S.C.R. 881, in which Justice Dickson (as he then was) considered the offence of aiding and abetting and reached the following conclusions at pages 891 and 896:

> **12** Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch or enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit. [Emphasis added]
>
> . . .
>
> **20** . . . I have great difficulty in finding any evidence of anything more than mere presence and passive acquiescence. Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement. There was no evidence that while the crime was being committed either of the accused rendered aid, assistance, or encouragement to the rape. . . . There was no evidence of any positive act or omission to facilitate the unlawful purpose. [Emphasis added]

[89] Justice Robertson concluded as follows at paragraphs 47 and 48 of *Moreno*: "While mere presence at the scene of a crime (torture) is not sufficient to invoke the exclusion clause, the act of keeping watch with a view to preventing the intended victim from escaping may well attract criminal liability. In the instant case, however, the appellant could not have assisted in the prisoner's escape because he was never in possession of a key to the cell". In response to the Board's criticism

that the appellant had not attempted to prevent his superior officers from continuing with their acts of torture, Justice Robertson rejected this proposition, relying on the words of Justice MacGuigan in *Ramirez* cited at paragraph 80 of these reasons.

[90] At paragraph 48 of his reasons, Justice Robertson found as follows:

> **48** Applying the criteria set out by Mr. Justice Dickson in *Dunlop and Sylvester v. The Queen* to the facts of the present appeal, I am driven to the conclusion that the appellant's acts or omissions would not be sufficient to attract criminal liability as a matter of law. The appellant did not possess any prior knowledge of the acts of torture to be perpetrated. Nor can it be said that the appellant rendered any direct assistance or encouraged his superior officers in the commission of an international crime. . . . [Emphasis added]

[91] Referring to *Ramirez*, he stated that "[t]he complicity of the appellant cannot be decided on the basis of criminal law provisions alone", and he then considered the principles of refugee law, "which, not surprisingly, overlap those of criminal law".

[92] One of those principles is as follows: "It is settled law that acts or omissions amounting to passive acquiescence are not a sufficient basis for invoking the exclusion clause. Personal involvement in persecutorial acts must be established". [Emphasis added]

[93] At paragraphs 51 and 52, Justice Robertson explained the Court's task as follows:

> **51** Applying the above reasoning, we must determine whether the appellant's conduct satisfies the criterion of "personal and knowing participation in persecutorial acts". Equally important, however, is the fact that complicity rests on the existence of a shared common purpose as between "principal" and "accomplice". In other words, *mens rea* remains an essential element of the crime. In my opinion, a person forcibly conscripted into the military, and who on one occasion witnessed the torture of a prisoner while on assigned guard duty, cannot be considered at law to have committed a crime against humanity.

> **52** On a superficial level, it could be maintained that the appellant knowingly assisted or otherwise participated in a persecutorial act. What is absent from that analysis is any evidence supporting the existence of a shared common purpose. However, the evidence does establish that the appellant disassociated himself from the actual perpetrators by deserting the army within a relatively short period after his forcible enlistment. In the circumstances, the appellant's presence at the scene of a crime is tantamount to an act of passive acquiescence. Accordingly, there is no legal basis on which to rest the application of the exclusion clause. [Emphasis added]

[94] He stated that, in reaching this conclusion, he was influenced by one commentator's view "that the closer a person is involved in the decision-making process and the less he or she does to thwart the commission of inhumane acts, the more likely criminal responsibility will attach. . . . Of course, the further one is distanced from the decision makers, assuming that one is not a 'principal', then it is less likely that the required degree of complicity . . . will be met. I take it for granted that . . . foot soldiers will not be accorded the same legal treatment as those who command the war".

[95] He held that "the acts of the appellant fail to meet the threshold established in *Ramirez* . . . the requisite element of *mens rea* is simply lacking".

[96] The reasons for the Federal Court of Appeal's decision in *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433, were written by Justice Linden three months after the reasons in *Moreno*. The Refugee Division had held Mr. Sivakumar responsible for crimes against humanity alleged to have been committed by the Liberation Tigers of Tamil Eelam (LTTE) even though he had not been personally involved in the actual commission of the criminal acts. The evidence showed that Mr. Sivakumar had been a member of the LTTE and had held positions of importance:

- He had studied military history and strategy in university and had "concluded that armed struggle was the only way for the Tamils to achieve their goals of liberation". He had become involved with the LTTE in 1978 and had become a student leader;

- In 1981, he had left the LTTE; between 1983 and 1985, he had became aware that the LTTE was naming people working against the LTTE as traitors and killing those people as punishment. The leader of the LTTE had discussed those killings with Mr. Sivakumar, who testified that, while he had never had any direct connection with these killings, he had "accepted" what his leader had told him;

- In 1985, he had rejoined the LTTE as military advisor and taught at the organization's military training college; he had taken part in peace talks that year;

- In 1986, he had developed a military intelligence division for the LTTE; he had been appointed to the rank of major within the LTTE;

- In 1987, he had been instructed to establish a police academy for the organization;

- In 1987, LTTE forces had massacred about 40 unarmed members of other rival Tamil groups. Mr. Sivakumar had demanded that the LTTE leader punish the guilty parties; those parties had been punished lightly; he had complained to Mr. Prabaharan again but nothing had been done; he had remained a member of the LTTE;

- After the commander in Jaffna died, he had been ordered to take charge of the defence of Jaffna Town; he had participated in peace talks.

[97] Justice Linden concluded as follows at paragraph 30:

> **30** The evidence clearly shows that the appellant held positions of importance within the LTTE. In particular, the appellant was at various times responsible for the military training of LTTE recruits, for internationally organized peace talks between the LTTE and the Sri Lankan government, for the military command of an LTTE military base, for developing weapons, and, perhaps most importantly, for the intelligence division of the LTTE. It cannot be said that the appellant was a mere member of the LTTE. In fact, he occupied several positions of leadership within the LTTE including acting as the head of the LTTE's intelligence service. Given the nature of the appellant's important role within the LTTE, an inference can be drawn that he knew of crimes committed by the LTTE and shared the organization's purpose in committing those crimes. The Refugee Division was correct in determining that the appellant's leadership role within the LTTE left the appellant open to a charge of complicity in crimes against humanity alleged to have been committed by the LTTE. [Emphasis added]

[98] Justice Linden found as follows at paragraph 31 of his reasons:

> **31** The Refugee Division's reasons are deficient, however, because of the absence of factual findings of acts committed by the LTTE as well as of the appellant's knowledge of the acts and shared purpose with the LTTE, and the lack of findings in relation to whether those acts were crimes against humanity. The Refugee Division simply stated:
>
> > Therefore, the panel believes that there are serious reasons for considering that the claimant, in his leadership position, must be held individually responsible for crimes against humanity committed by the LTTE and documented elsewhere in these reasons. (Case, at page 600).

[99] At paragraph 37, Justice Linden set out his conclusion concerning Mr. Sivakumar's exclusion:

> **37** As for the requirement of complicity by way of a shared common purpose, I have already found that the appellant held several positions of importance within the

> LTTE (including head of the LTTE's intelligence service) from which it can be inferred that he tolerated the killings as a necessary, though perhaps unpleasant, aspect of reaching the LTTE's goal of Tamil liberation. Although the appellant complained about these deaths and spoke out when they occurred, he did not leave the LTTE even though he had several chances to do so. No evidence was presented that the appellant would have suffered any risk to himself had he chosen to withdraw from the LTTE. The panel's finding that there was no serious possibility that the appellant would be persecuted by the LTTE supports the conclusion that the appellant could have withdrawn from the LTTE and failed to do so. I conclude that the evidence discloses that the appellant failed to withdraw from the LTTE, when he could have easily done so, and instead remained in the organization in his various positions of leadership with the knowledge that the LTTE was killing civilians and members of other Tamil groups. No tribunal could have concluded on this evidence that there were no serious reasons for considering that the appellant was, therefore, a knowing participant and, hence, an accomplice in these killings. [Emphasis added]

[100] I do not intend to review the legal principles on which Justice Linden relied in elaborating on the concept of complicity. He cited with approval *Ramirez* and *Moreno* and the decisions referred to in those two cases.

[101] According to Justice Linden, "[i]t is clear that if someone personally commits physical acts that amount to a . . . crime . . . that person is responsible. However, it is also possible to be liable for such crimes – to 'commit' them – as an accomplice . . . and concluded that the starting point for complicity in an international crime was 'personal and knowing participation'". With regard to the application of this principle, he stated that "[t]his is . . . a factual question that can be answered only on a case-by-case basis". One example he chose was as follows: "Moreover, those involved in planning or conspiring to commit a crime, even though not personally present at the scene, might also be accomplices, depending on the facts of the case. Additionally, a commander may be responsible for international crimes committed by those under his command, but only if there is knowledge or reason to know about them". [Emphasis added]

[102] He characterized the case before him as "[a]nother type of complicity . . . complicity through association", about which he stated:

> **9** . . . In other words, individuals may be rendered responsible for the acts of others because of their close association with the principal actors. This is not a case merely of being "known by the company one keeps." Nor is it a case of mere membership in an organization making one responsible for all the international crimes that organization commits (see *Ramirez*, at page 317). Neither of these by themselves is normally enough, unless the particular goal of the organization is the commission of international crimes. It should be noted, however, as MacGuigan J.A. observed: "someone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts" (*Ramirez*, *supra*, at page 317).
>
> **10** In my view, the case for an individual's complicity in international crimes committed by his or her organization is stronger if the individual member in question holds a position of importance within the organization. Bearing in mind that each case must be decided on its facts, the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime. Thus, remaining in an organization in a leadership position with knowledge that the organization was responsible for crimes against humanity may constitute complicity. . . . [Emphasis added]

[103] He cited *Moreno* with approval, noting that, in such circumstances, an important factor to consider is evidence that the individual protested against the crime, tried to stop its commission or attempted to withdraw from the organization.

[104] According to Justice Linden, "[t]his view of leadership within an organization constituting a possible basis for complicity in international crimes committed by the organization is supported by Article 6 of the Charter of the International Military Tribunal", which was applied to those in positions of leadership in Nazi Germany during the Nuremberg Trials. He added that, "if the criminal acts of part of a paramilitary or revolutionary non-state organization are knowingly tolerated by the leaders, those leaders may be equally responsible for those acts".

[105] Two years after *Sivakumar*, the Federal Court of Appeal, *per* Justice Décary, rendered judgment in *Bazargan v. Canada (Minister of Citizenship and Immigration)* (1996), 205 N.R. 282. The Refugee Division had found that, because of the positions the respondent had held in Iran under Shah Reza's rule, there were serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations. He had joined the Iranian national police in 1960 and pursued his career there for 20 years. He had become a colonel in 1977, and the Shah had been about to make him a general when his regime was overthrown.

[106] I will summarize his career between 1974 and 1980:

- From 1974 to 1977, he had worked in Tehran as the officer in charge of liaison between the police forces and SAVAK, from which he had received some of his training. SAVAK was an internal security agency under the Shah's authority. The documentary evidence showed that SAVAK "was a brutal, violent instrument of repression". Mr. Bazargan had been in charge of the network for exchanging classified information between the police forces and SAVAK;

- In 1997, he had become the chief of the police forces in Hormozgan province, strategically located in southwestern Iran on the Persian Gulf; he had held that position until the fall of the monarchist regime in 1979. According to his testimony, as chief of the police forces for that province, he had collaborated with the head of SAVAK for the area, but he had never been a member of SAVAK.

[107] The motions judge allowed the application for judicial review because she was of the opinion that complicity assumes membership in the organization (SAVAK). The Federal Court of Appeal concluded that the motions judge should not have intervened.

[108] Justice Décary found that the Court had "expressly refused to make formal membership in an organization a condition for the exclusion clause to apply", quoting Justice MacGuigan in *Ramirez*, who had said that it was "undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts". [Emphasis added]

[109] Justice Décary stated the following:

> **10** . . . It is true that among "the particular facts" of the case with which MacGuigan J.A. went on to deal in his reasons was the fact that Ramirez was actually an active member of the organization that committed the atrocities (the Salvadoran army) and the fact that he was very late in showing remorse, but those were facts that helped determine whether the condition of personal and knowing participation had been met; they were not additional conditions. Membership in the organization will, of course, lessen the burden of proof resting on the Minister because it will make it easier to find that there was "personal and knowing participation". However, it is important not to turn what is actually a mere factual presumption into a legal condition. [Emphasis added]

[110] He concluded as follows at paragraph 11:

> **11** In our view, it goes without saying that "personal and knowing participation" can be direct or indirect and does not require formal membership in the organization that is ultimately engaged in the condemned activities. It is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organization. At p. 318, MacGuigan J.A. said that "[a]t bottom, complicity rests . . . on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it". Those who become involved in an operation that is not theirs, but that they know will probably lead to the commission of an international

> offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation. [Emphasis added]

[111] *Bazargan* was followed by *Sumaida v. Minister of Citizenship and Immigration*, [2000] 3 F.C. 66 (C.A.). Mr. Sumaida was a citizen of Iraq and Tunisia. During his studies in England between 1983 and 1985, he had joined Al Da'wa, a group opposed to Sadam Hussein and his government. He had left the group shortly thereafter and become an informant; he had chosen to report the names of Al Da'wa members to the Iraqi secret police, the Mukhabarat, "a brutal police organization which serves as Hussein's private army", and had later become a Mukhabarat member.

[112] *Sumaida* raises points of law with which we are not concerned here. However, I note Justice Létourneau's comments on the interpretation of the legal principles applicable to the notion of complicity. I will summarize those comments:

- In *Ramirez*, the Court held that mere membership in an organization principally directed to a brutal purpose, such as a secret police activity, may, by necessity, involve personal and knowing participation in the persecutorial acts performed by that organization.

- "Our Court never required in that case that a claimant be linked to specific crimes as the actual perpetrator or that the crimes against humanity committed by an organization be necessarily and directly attributable to specific acts or omissions of a claimant."

- "Indeed, short of that kind of direct involvement and of evidence supporting it, our Court accepted the notion of complicity defined as a personal and knowing participation in *Ramirez* (see page 438 of the *Sivakumar* decision) as well as complicity through association whereby individuals may be rendered responsible for the acts of others because of their close association with the principal actors (see pages 439-440 of the *Sivakumar* decision)."

- "Moreover, despite the Board's failure to make findings of fact as to specific crimes, our Court found therein [in *Sivakumar*] that there was ample evidence that civilians were killed as part of a systematic attack on a particular group, that these killings constituted crimes against humanity, that the refugee claimant had knowledge of these crimes committed by the LTTE and that he had a shared common purpose with it evidenced by the 'several positions of importance [that he held] within the LTTE . . . [and] from which it can be inferred that he tolerated the killings as a necessary, though perhaps unpleasant, aspect of reaching the LTTE's goal of Tamil liberation' (see page 450 of the decision)."

- "In that case [*Sivakumar*], our Court thus found that the refugee claimant had committed crimes against humanity by virtue of his accomplice liability involving a shared purpose and knowledge." [Emphasis added]

[113] Three years later, in 2003, the decision in *Harb*, above, was rendered. In that case, Mr. Harb, a citizen of Lebanon and member of the Amal movement, had collaborated with the South Lebanon Army (SLA) as an informant. Both of those organizations were engaged in

crimes against humanity. The evidence showed that the SLA was an organization with brutal, limited purposes. Mr. Harb was excluded by the Refugee Division.

[114] One of Mr. Harb's arguments was that he had committed no crime against humanity because the crimes with which he had been charged had been directed against military personnel rather than the civilian population. Justice Décary rejected that argument at paragraph 11 of his reasons:

> **11** . . . It is not the nature of the crimes with which the appellant was charged that led to his exclusion, but that of the crimes alleged against the organizations with which he was supposed to be associated. Once those organizations have committed crimes against humanity and the appellant meets the requirements for membership in the group, knowledge, participation or complicity imposed by precedent . . . the exclusion applies even if the specific acts committed by the appellant himself are not crimes against humanity as such. In short, if the organization persecutes the civilian population the fact that the appellant himself persecuted only the military population does not mean that he will escape the exclusion, if he is an accomplice by association as well. [Emphasis added]

[115] Justice Décary discussed the concept of complicity by association, noting that, in *Ramirez*, *Moreno* and *Sivakumar*, "this Court dealt with complicity by association by persons who were members of the organization involved".

[116] Because Mr. Harb had not been a member of the SLA, he wrote: "but in *Bazargan, supra*, this Court held that the rules relating to complicity of a member applied to complicity by a non-member, *mutatis mutandis*".

[117] Under the heading "Complicity by association", Justice Décary cited paragraph 11 of *Bazargan*, quoted above at paragraph 110 of my reasons in this case, and concluded as follows at paragraph 19 of *Harb*:

> **19** As the Court noted in *Bazargan* at 286, membership in a group makes it easier to conclude that there was "personal and knowing participation" – which remains the first test – than when there was no membership, but the difference affects the evidence, not the principles. Counsel for the respondent would like the Court to clarify what is meant by "membership in a group". I do not think this is necessary. The expression was used in *Ramirez* in the context of a member whom the Court described as "active". The expression suggests the existence of an institutional link between the organization and the person, accompanied by a more than nominal commitment to the organization's activities. As everything is a question of fact, at the end of the analysis I feel that it is better to speak in terms of participation in the group's activities than of membership in the group. [Emphasis added]

[118] A few months after *Harb*, the Federal Court of Appeal decided *Zrig v. Minister of Citizenship and Immigration*, 2003 FCA 178. The facts of that case were that Mr. Zrig, a citizen of Tunisia, had become either a sympathizer or a member of the Mouvement de la tendance islamique (the MTI) in 1980. In 1989, that organization had changed its name to Ennahda. In 1990, Mr. Zrig had taken over responsibility for the political bureau of Ennahda in Gabès.

[119] The Refugee Division excluded him because the organization was a movement that supported the use of violence; it had an armed branch that used terrorist methods and was involved in assassinations and bombings. The Refugee Division concluded that he was responsible as an accomplice for the crimes attributed to Ennahda. Although Mr. Zrig testified that he had no knowledge of the serious crimes committed by Ennahda, the Division held him responsible because he had "held important offices within that movement". Given his important role within the organization, the panel concluded that he "was aware of the crimes committed by the organization, and accordingly that he shared the aims and goals of his movement in the perpetration of those crimes". Mr. Zrig was unsuccessful in this Court and the Court of Appeal. Justice Nadon wrote the reasons, which were concurred in by Justice Létourneau. Justice Décary wrote concurring reasons.

[120] What is relevant for our purposes is Justice Décary's examination of the concept of complicity by association in the context of Article 1F(a) of the Convention. It is important to note that the issue in *Zrig* was how the concept of "complicity by association" applied in the context of Article 1F(b) of the Convention, which applies to any person with respect to whom there are serious reasons for considering that he or she has committed "a serious non-political crime" outside the country of refuge prior to admission to that country as a refugee.

[121] Justice Décary concluded that complicity by association is a concept of international criminal law that does not apply to domestic criminal law. His reasoning was as follows:

1. Article 1F(a) and (c) "deals with extraordinary activities, that is international crimes in the case of Article 1F(a). . . ."

2. "These are activities which I characterize as extraordinary because, if I might so phrase it, they have been criminalized by the international community collectively for exceptional reasons, and their nature is described in international instruments (Article 1F(a)) or in terms of such instruments (Article 1F(c))."

3. "One feature of some of these activities is that they affect communities and are conducted through persons who do not necessarily participate directly in them. In order for the persons who really are responsible to be held to account, the international community wished responsibility to attach to the persons, for example, on whose orders the activities were carried out or who, aware of their existence, deliberately closed their eyes to the fact that they were taking place."

4. "It is in these circumstances that the concept of complicity by association developed, making it possible to reach the persons responsible who would probably not have been responsible under traditional criminal law. Fundamentally, this concept is one of international criminal law."

5. Similarly, in *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), another case of exclusion based on the perpetration of international crimes, Justice Linden explained at pages 437 *et seq.* the introduction of the concept of complicity by association by its presence in international instruments dealing with international crimes (i.e. Article 6 of the Charter of the International Military Tribunal).

6. In short, complicity by association is a method of perpetrating a crime which is recognized in respect of certain international crimes and applied in the case of international crimes covered by Article 1F(a), and by analogy in the case of acts contrary to the international purposes and principles sought by Article 1F(c). This method of perpetration is not recognized as such in traditional criminal law.

[122] Justice Décary continued his analysis by quoting a passage from an article by Michael Bliss published in Vol. 12 *International Journal of Refugee Law*, Special Supplementary Issue on Exclusion (2000), at page 125:

> The fact that a person may be criminally responsible even if he or she did not participate in the actual physical commission of a crime is recognized in both common law and civil law systems, as well as in the emerging body of international criminal law. Article 25(3) of the Rome Statute of the International Criminal Court, above n. 47, recognizes the concepts of conspiracy, facilitation, aiding and abetting, ordering, soliciting, inducing, encouraging, inciting, furthering, contributing and attempting in its provisions on criminal responsibility. Article 25(3) is the appropriate measure of criminal responsibility in the application of Article 1F(a) and 1F(c); in the absence of clear international standards of criminal responsibility for serious non-political crimes, it is also an appropriate standard in the application of Article 1F(b).

[123] Justice Décary wrote the following at paragraph 147 of his reasons in *Zrig*:

> [147] In short, I share Professor Gilbert's opinion that Article 1F(b) refers to the "ordinary criminal law". Once the crimes covered by Article 1F(b) differ from those covered by Article 1F(a) and (c), it follows that a method of perpetration accepted with respect to one is not necessarily applicable to the others. A state may undoubtedly argue, as in the case at bar, that a given crime falls both under Article 1F(b) and under Article 1F(c), but this must still be established in the legal framework appropriate to each one.

[124] He dismissed Mr. Zrig's appeal, concluding as follows:

> We consider it to be unnecessary to review our earlier analysis regarding the concept of the claimant's complicity through association as a result of his membership in MTI/Ennahda; suffice it to say simply that it applies here as well. Having regard to the claimant's involvement and major role within his movement . . .

[125] I will end this overview of the case law on the concept of complicity by referring to *Zazai v. Minister of Citizenship and Immigration*, 2005 FCA 303, a case decided by the Federal Court of Appeal on September 20, 2005. The question before the Court was whether the definition of "crime against humanity" in subsection 6(3) of the *Crimes Against Humanity and War Crimes Act* included complicity therein notwithstanding the repeal of complicity through the repeal of subsection 7(3.77) of the *Criminal Code* and the fact that paragraph 6(1)(*b*) of that Act contained no crime of complicity.

[126] Justice Létourneau stated that he was not surprised that that there was no crime of complicity in that paragraph, "because complicity is not a crime. At common law and under Canadian criminal law, it was, and still is, a mode of commission of a crime. It refers to the act or omission of a person that helps, or is done for the purpose of helping, the furtherance of a crime. An accomplice is then charged with, and tried for, the crime that was actually committed and that he assisted or furthered. In other words, whether one looks at it from the perspective of our domestic law or of international law, complicity contemplates a contribution to the commission of a crime". He added the following at paragraph 4: "Complicity must not be confused with the inchoate crimes of conspiracy, attempt and incitement to commit a crime. These inchoate crimes found in subsection 6(1.1) of the CAHWCA are substantive offences of their own or stand-alone offences. Unlike complicity, they are not modes or means of committing a crime".

[127] He explained that the concept of complicity also exists in international criminal law, and he referred to certain cases decided by the International Criminal Tribunal for the former Yugoslavia.

[128] Finally, Justice Létourneau discussed whether complicity is a broader concept than aiding and abetting. He stated:

> [23] The appellant submitted that the concept of complicity is broader than the act of aiding and abetting a crime. I do not disagree since this Court has recognized and accepted, under specific conditions, the concept of complicity by association: see *Ramirez*, *Sivakumar*, *Sumaida* and *Zrig*, *supra*. I do not see, however, how this helps the appellant's position legally.

Conclusions

[129] I am well aware that judicial review of an administrative tribunal's decision calls for deference, especially when reviewing the tribunal's findings of fact. As Justice L'Heureux-Dubé stated in the Supreme Court of Canada's decision in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, at paragraph 85: ". . . the standard of review on the factual findings of an administrative tribunal is an extremely deferent one . . . Courts must not revisit the facts or weigh the evidence. Only where the evidence viewed reasonably is incapable of supporting the tribunal's findings . . . An example is the allegation . . . that there is no evidence at all for a significant element of the tribunal's decision". See also *Mugesera*, at paragraph 38, where the Supreme Court of Canada stated that the Federal Court can intervene on questions of fact only if the federal board, commission or other tribunal based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[130] I am also bearing in mind what Justice Décary wrote in *Aguebor v. Minister of Employment and Immigration* (1993), 160 N.R. 315 (C.A.), namely that the Refugee Division had complete jurisdiction to draw the necessary inferences from a claimant's account. According

to Justice Décary: “As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review”.

[131] Although the standard of proof to be met by the Minister requires less than the balance of probabilities standard applicable in civil matters, I note that the Court concluded as follows with regard to the belief that a person has committed crimes against humanity: “In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information”. I would add that, according to *Moreno*, this lower standard comes into play only in cases where a panel is dealing with questions or findings of fact.

[132] I come back now to the standard of review applicable in this case. Complicity under Article 1F(a) of the Convention is a legal concept whose content must be reviewed on the standard of correctness; the panel is not entitled to misapprehend the concept of complicity as defined in the case law. The application of this legal concept to the facts of this case is a question of mixed fact and law and is reviewable on a standard of reasonableness (*Harb*, above, at paragraph 14; *Valère v. Minister of Citizenship and Immigration*, 2005 FC 524, at paragraph 12, a decision by my colleague Justice Mactavish).

[133] The case law is very clear about the elements of the concept of complicity in international crimes. As Justice MacGuigan explained in *Ramirez*, personal and knowing participation in persecutorial acts is the basic principle and *sine qua non* that must be established by the Minister for a panel to exclude a person from this country’s protection on the ground that there are serious reasons for considering that the person has committed a crime against humanity. *Mens rea* requires that “some personal activity involving persecution” be shown. At paragraph 15 of

Ramirez, Justice MacGuigan expressed the following opinion: "Clearly no one can 'commit' international crimes without personal and knowing participation". At paragraph 23, he wrote that "it is undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts".

[134] The courts have specified that complicity rests on the existence of a shared common purpose as between "principal" and "accomplice" (*Moreno*, at paragraph 51).

[135] This Court's decisions have established a number of factors to consider in determining whether a person can be considered an accomplice: the method of recruitment, the claimant's position and rank in the organization, the nature of the organization, the knowledge of atrocities, the length of time in the organization and the opportunity to leave the organization: *Merceron v. Minister of Citizenship and Immigration*, 2007 FC 265. In that case, my colleague Justice Tremblay-Lamer concluded that "[t]he fact that the applicant knew about the crimes was not in itself enough to establish that he shared a common purpose with the perpetrators of the crimes". (See also *Valère*, at paragraphs 29 to 33.)

[136] Like the respondent, I am of the opinion that the factors set out in this Court's decisions are merely facts the panel must assess as a whole, having regard to all the evidence before it, to decide whether there was personal and knowing participation. The view I am expressing is supported by the words of Justice Décary in *Bazargan*, at paragraph 10:

> **10** Moreover, in light of MacGuigan J.A.'s comments in *Ramirez*, it is clear that the Court expressly refused to make formal membership in an organization a condition for the exclusion clause to apply. At p. 320 of his reasons, MacGuigan J.A. took care to specify that it was

> undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts.
>
> It is true that among "the particular facts" of the case with which MacGuigan J.A. went on to deal in his reasons was the fact that *Ramirez* was actually an active member of the organization that committed the atrocities (the Salvadoran army) and the fact that he was very late in showing remorse, but those were facts that helped determine whether the condition of personal and knowing participation had been met; they were not additional conditions. Membership in the organization will, of course, lessen the burden of proof resting on the Minister because it will make it easier to find that there was "personal and knowing participation". However, it is important not to turn what is actually a mere factual presumption into a legal condition.

[137] The issue before the panel was simply whether the Minister had presented evidence demonstrating Mr. Bouasla's personal and knowing participation in the alleged crimes justifying his exclusion.

[138] After reading the evidence presented during the hearings and applying that evidence to the principles established in the case law relating to complicity, I find that this application for judicial review must be allowed, first because the panel failed to apply the essential test for assessing Mr. Bouasla's complicity, namely personal and knowing participation in the crimes committed by the army, the national police and the penitentiary administration in Algeria, and second because the panel did not have regard to all the evidence before it when it applied the case law.

[139] The case law requires evidence of personal and knowing participation by Mr. Bouasla in the alleged crimes, essentially torture.

[140] As Justice Décary stated in *Bazargan*, to find complicity, the panel had to have evidence showing that the applicant was guilty of "knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organization". The evidence had to show that Mr. Bouasla had "become involved in an operation" that was not his but that he knew would "probably lead to the commission of an international offence".

[141] With respect, it cannot be concluded from a careful reading of the panel's reasons for decision that the panel applied this essential test.

[142] Moreover, in my view, the panel had no evidence establishing a belief that there were serious reasons for considering Mr. Bouasla an accomplice. Mr. Bouasla was found to be credible, and the panel did not conclude that the Algerian army, national police and penitentiary administration were organizations with a limited, brutal purpose justifying exclusion on the sole basis of membership. Absent evidence of personal and knowing participation in the alleged crimes, and absent evidence of *mens rea* indicating that Mr. Bouasla shared a common purpose with the perpetrators of the alleged crimes, the fact is that the panel excluded him simply because he had been a member of the national police for 20 days and had been part of the penitentiary administration in Algeria. I am disregarding his time in the army, since he was never a member of the Algerian armed forces but was merely a student who did not complete his course.

[143] It is true that Mr. Bouasla witnessed torture: once when he was working for the DGSN and happened to be at the central police station in Algiers after a sweep for which he had not volunteered, once at the Skikda prison and once at the Constantine prison. The evidence shows that he was simply a bystander at the central police station, and both times in the prisons he intervened

to prevent the torture or punish the person who had inflicted it. There is no evidence that he participated in or tolerated the acts of torture. He testified that he had always refused to participate in torture. In addition, he testified that torture in the Skikda and Constantine prisons was an isolated occurrence and thus not a crime against humanity.

[144] Finally, I find that the panel misinterpreted the evidence when it concluded that the applicant had held positions of importance at the DGSN, where he was a student inspector for 20 days, and in the penitentiary administration, since there is no evidence that he had a leadership position on which the panel could base a finding that he was responsible as an accomplice. With respect, I find the same flaw in the panel's analysis of dissociation. The panel refused to recognize the reality that Mr. Bouasla, who was absent for a prolonged period, was no longer part of the national police force in Algeria after the end of October 1993 and could not be excluded solely because he was part of the penitentiary administration.

[145] In light of all the evidence before the panel, it was unreasonable to conclude that Mr. Bouasla was excluded. Clearly, the credible evidence before the panel could not reasonably support such a conclusion.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is allowed, that the panel's decision of June 12, 2007 is set aside insofar as the panel determined that Mr. Bouasla was excluded from Canada's protection as a person to whom Article 1F(a) of the Convention applied, and that the question of his exclusion shall be reconsidered by a differently constituted two-member panel. I am giving each party the opportunity to submit to me one or more questions to be certified by August 11, 2008, with a reply by the other party to be served and filed by August 18, 2008.

"François Lemieux"

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Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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