Federal Court Cour fédérale

Date: 20120613

Docket: IMM-3842-11

Citation: 2012 FC 745

Ottawa, Ontario, June 13, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

NADARAJAH KURUPARAN
BAHMINI KURUPARAN
MAIYURAN KURUPARAN
KIRUSHANTHY KURUPARAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated May 18, 2011, wherein the applicants were determined to be neither Convention refugees within the meaning of section 96 of the Act nor persons in need of protection as defined in subsection 97(1) of the Act.

[2] This conclusion was based on the Board's finding that Nadarajah Kuruparan, the principal applicant, was excluded from refugee protection under section 98 of the Act due to his position and involvement in the Sri Lankan Navy, an organization found to have committed crimes against humanity and war crimes within the scope of article 1F(a) of the *United Nations Convention relating to the Status of Refugees*, July 28, 1951, [1969] Can TS No 6 (the UN Convention). The other applicants' claims were based on the principal applicant's claim.

[3] The applicants request that the Board's decision be set aside and the matter be referred back for redetermination by a differently constituted panel.

Background

[4] The principal applicant is Nadarajah Kuruparan. The other applicants are related to the principal applicant as follows: Bhamini Kuruparan (shown as Bahmini Kuruparan in the style of cause), his wife; Maiyuran Kuruparan, his son; and Kirushanthy Kuruparan, his daughter.

[5] All of the applicants are citizens of Sri Lanka. The principal applicant is of Tamil ethnicity.

[6] The principal applicant is trained as an electrical engineer. He joined the Sri Lankan Navy (the Navy) in 1981 as a service officer cadet and became an acting sub-lieutenant in 1985. By 2008, he had risen to the rank of Commodore, a position third to the Rear Admiral of the entire Navy. During his time in the Navy, the principal applicant never participated in combat. However, as one of only five Tamil officers in the Navy, the principal applicant testified that he faced many

challenges. He was suspected by his superiors as being a sympathizer of the Liberation Tigers of Tamil Eelam (LTTE) and was allegedly denied advancement at the rate he earned it.

[7] In 2001, the principal applicant was approached by a Tamil man who sought to engage his help in the LTTE cause, particularly with respect to information about offensive naval operations. Although he refused to support the LTTE, similar requests were later made of him. To protect himself and his family, the principal applicant reduced his involvement in the community, the time he spent with other Tamils and limited his visits to family members.

[8] In 2006, the LTTE relaunched its war against the government and the situation in Sri Lanka worsened. The Sri Lankan government forces retaliated and many Tamil civilians were killed. The Navy was an integral part of the government's efforts and succeeded in blocking many LTTE supplies.

[9] In 2008, when the LTTE was in dire need of military intelligence to execute their operations, the principal applicant was again contacted by various LTTE supporters requesting his aid. He was also threatened by phone.

[10] In August 2008, the principal applicant was summoned by the Navy's intelligence unit and questioned about relatives that had visited him. The principal applicant responded to the inquiries and was then permitted to return to his duties. In the same month, the principal applicant's wife was threatened by youths with handguns. They demanded that the principal applicant assist their movement or face severe consequences. Later, the principal applicant's close friend, a high ranking

Navy officer, allegedly warned him of the risk he faced from paramilitary personnel of the Sri Lankan military and from other Tamil groups. In response, the principal applicant moved his family into the Officers' married quarters in September 2008.

[11] Between 2001 and 2009, the principal applicant allegedly submitted several requests to be taken from active duty; these requests were all denied. On June 1, 2009, the principal applicant retired from the Navy and joined the Regular Naval Reserve, a mandatory requirement for all retired Navy personnel.

[12] After retirement, a pro-government Tamil group began to threaten the principal applicant. They repeatedly demanded money, which the applicants repeatedly refused. The principal applicant feared the government and pro-government militias for their belief that, as a Tamil, he would divulge sensitive information about the Navy to the LTTE. Subsequently, he also feared the LTTE for his refusal to grant them the information they requested.

[13] On July 3, 2009, armed men abducted the principal applicant's wife for a short time in a van. She testified that the men identified themselves as belonging to the Karuna group. The men claimed that they knew the principal applicant was aiding the LTTE and demanded payment of a large sum of money within a month else the entire family would be killed. In fear, the principal applicant decided to flee Sri Lanka with his family. Using an unused U.S. visa obtained to visit relatives in 2008, the applicants left Sri Lanka in July 2009. From the U.S., they came to the Canadian border on August 4, 2009 where they claimed refugee status.

[14] The hearings of the applicants' refugee claims were held on January 26, 2010 and January 11, 2011.

Board's Decision

[15] The Board released its decision on March 23, 2011. In its reasons, the Board first summarized the facts as presented in the principal applicant's Personal Information Form (PIF).

[16] The Board then acknowledged two issues that were raised during the hearings: exclusion and inclusion.

Exclusion

[17] Commencing with the exclusion issue, the Board referred to article 1F(a) of the UN Convention. It noted that it is established jurisprudence that the standard of "serious reasons for considering", as used in article 1F(a), may be understood as "reasonable grounds to believe". This standard means more than suspicion or conjecture, but less than proof on a balance of probabilities. It applies to questions of fact, whereas whether those facts meet the requirements of a crime against humanity or a war crime is a question of law.

[18] Turning to the definition of "crimes against humanity", the Board cited the definition under Article 7 of the *Rome Statute of the International Criminal Court*, signed July 17, 1998 (the Rome Statute) and the endorsement of this definition in Canadian law.

[19] The Board found that the question in this case pertained to whether the principal applicant was legally responsible as an accomplice for the crimes against humanity perpetrated by the Navy during his years of naval service. To analyze this question, the Board referred to the *Charter of the International Military Tribunal*, 8 August 1945 (the IMT Charter) which states in part at Article 6:

> Leaders, organizers, 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.

[20] The principle of the complicity of an accomplice has been examined in the jurisprudence, and the Board cited relevant sections in its decision before proceeding with its analysis.

[21] The Board acknowledged that the Navy is not characterized as a limited, brutal-purpose organization and therefore, the principal applicant's mere membership in it was not sufficient to establish that he was complicit in the human rights abuses committed by it. However, the Board found that the evidence did indicate that the principal applicant had been complicit in the crimes against humanity because he had a long service with the Navy; an organization that was known to regularly and systematically commit human rights abuses against the LTTE, the Tamil population and individuals suspected or perceived to be LTTE collaborators or sympathizers. The Board found the following factors particularly notable in its finding that the principal applicant was complicit in crimes against humanity. The principal applicant:

Had been aware of the atrocities committed by the Sri Lankan security forces, including the Navy, since voluntarily joining in 1985;

Had a long service with the Navy;

Received promotions during his long service; and

Did not leave his employment earlier when he had opportunities to do so.

[22] In determining whether the principal applicant was complicit, the Board examined the facts according to the following six factors recognized in the jurisprudence: nature of the organization; method of recruitment; position/rank in the organization; knowledge of the organization's atrocities; length of time in the organization; and opportunity to leave the organization.

[23] Nature of the Organization

The Board reviewed the jurisprudence and first found that the scope of the organization of reference does not need to be narrowed to the individual unit in which the person was serving. The determining factor is the existence of a shared common purpose and knowing participation in the organization's commission of war crimes against humanity. The Board referred to examples of war crimes or crimes against humanity committed by the Navy as set out in the documentary evidence. Based on this evidence, the Board found that the Sri Lankan security forces, including its Navy, committed serious human rights abuses whilst the principal applicant was a Navy officer.

[24] Method of Recruitment and Position/Rank in the Organization

The Board noted that the principal applicant voluntarily joined the Navy and was promoted and given numerous awards throughout his long-standing career. By 2009, he had become a senior member of the Navy with a very high position. The Board cited jurisprudence regarding the connection between an individual's rank or position in an organization and their complicity in international crimes committed by their organization.

[25] The Board found that the principal applicant's activities as an electrical engineer maintaining and repairing bases and ships and proposing electrical, electronic and communication requirements for the Navy showed that he participated in facilitating the Navy's operations, which included the darker aspects of those operations. His physical and operational remoteness did not bar him of complicity given that he facilitated the Navy in the commission of atrocities. The Board found that this was further supported by: the principal applicant's admitted knowledge of the crimes committed by the Navy and security forces during his employment; his positions of importance in the Navy; and his failure to withdraw from the Navy.

[26] Knowledge of Organization's Atrocities

On this point, the Board sought guidance from the Supreme Court of Canada's decision in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 at paragraphs 172 to 177. The Board highlighted the principal applicant's admission that he had been aware of the atrocities committed by the Navy as early as 1985. He was aware of these atrocities through the media and fellow naval officers and discussed them with his peers. Further, the principal applicant testified that he was involved in strategy meetings to input on equipment capacity as it was his duty to ensure maximum ship performance. The Board found that although the principal applicant stated he did not support or tolerate the Navy's behaviour, his failure to disengage from the Navy at the earliest opportunity indicated otherwise. As such, the *mens rea* element for complicity was satisfied.

[27] Length of Time in the Organization

The Board reiterated the principal applicant's length of service in the Navy and his long-time knowledge of the atrocities committed by it. Despite this knowledge, the principal applicant supported the Navy's activities for over twenty years and received promotions throughout his career. The Board found the principal applicant's tolerance of the Navy's crimes, his continued association with the Navy and his rank as indicated the common purpose that he shared with the Navy in the commission of the crimes.

[28] Opportunity to Leave the Navy

The Board acknowledged the principal applicant's attempt to leave the Navy in 2001, although he had prior knowledge of the Navy's crimes as early as 1985. Further, no documentary evidence was provided to support his claim that he was refused discharge from the Navy. The principal applicant testified that there was a mandatory service period of 20 years and 2001 was therefore his first opportunity to leave the Navy. However, the Board rejected this claim on the basis that the principal applicant did not join the Navy until 1985, after completing his four-year engineering degree. Therefore the twenty-year time limit would not have ended in 2001, but instead in 2005 and there was no documentary evidence to suggest that the principal applicant had sought discharge from the Navy in 2005.

[29] Further, although the principal applicant testified that he actively pursued retirement from the Navy between 2007 and 2009, the Board found no persuasive documentary evidence to support this claim. The certificate of service describing the principal applicant's employment with the Navy did not indicate any discharge attempts. The Board therefore found that the principal applicant had

not persuasively established that he attempted to leave the Navy as alleged. Instead, the Board found that the principal applicant had fabricated his story about attempting to leave for the sole purpose of his refugee claim.

[30] The principal applicant indicated that if he left the Navy without permission, his actions would have amounted to absence without leave or desertion. The maximum punishment listed under Sri Lankan law for these crimes is two years imprisonment or death (if cowardice is shown), respectively. However, the Board acknowledged recent documentary evidence that indicated that the punishment for desertion was not as severe as set out in the legislation. Further, in 2005, the principal applicant would have served twenty years. Therefore, on a balance of probabilities, the Board found that the principal applicant would not have been liable for any punishment for leaving the Navy in 2005 since he was allowed to do so given he had completed his obligations by that time.

[31] In addition, the principal applicant had several opportunities between 1993 and 2006, when he had visited other countries, to defect and seek refugee protection abroad. He testified that he did not do so because he did not wish to be a deserter. However, the Board found that he could have done so without being a deserter on any of his trips abroad after 2005.

[32] Based on the totality of the evidence before it, the Board concluded that there were serious reasons for considering that the principal applicant was an accomplice in the war crimes and crimes against humanity committed by the Navy and the Sri Lankan security forces. Therefore, the Board found that the principal applicant was excluded from protection in Canada pursuant to article 1F(a) of the UN Convention.

Inclusion

[33] Turning to the issue of inclusion, the Board found that the determinative issues were credibility, subjective fear and whether the applicants' fear of persecution was objectively well founded. The principal applicant indicated that he feared groups from both sides of the conflict: the People's Liberation Organization of Tamil Eelam (PLOTTE), LTTE, Karuna group and the Sri Lankan government paramilitaries and intelligence agency.

[34] No evidence was adduced on PLOTTE and the Board therefore did not find that the applicants had an objective fear of persecution at the hands of this group. With regards to the LTTE, the Board noted that the LTTE was defeated by Sri Lankan security forces in May 2009 and there was no persuasive documentary evidence that LTTE targeted ex-military for execution. The Board reviewed documentary evidence dated post-May 2009 that suggested that the LTTE forces had emerged in different forms. However, there was no indication that these different forms would threaten or target former Navy or military personnel.

[35] On the applicants' fear of the government groups, the principal applicant indicated that in 2008, one of his close friends warned him that the government paramilitary group and intelligence may try to eliminate him. The principal applicant did not provide any affidavit from his friend to corroborate this statement. Although the principal applicant is Tamil, the Board found that based on his clean records and good standing in the Navy, it was not plausible that these government groups would have an interest in eliminating him for sympathizing with the LTTE. The Board found that the principal applicant's fear of a false report being written against him was purely speculative;

particularly as he had been informed while in Canada that he was not on a “wanted list”. Therefore, the Board did not find that the principal applicant had any objectively well-founded fear of persecution by government groups if he returned to Sri Lanka.

[36] The principal applicant indicated that his grounds for claiming refugee protection did not arise until July 2009 when his wife was abducted at gunpoint by men claiming to be from the Karuna group. The men demanded a large sum of money and threatened the applicants should they not pay. The Board reviewed extensive documentary evidence that indicated that the Karuna group and paramilitaries had in the past abducted suspected LTTE members and supporters for ransom and had committed other violent attacks against civilians.

[37] Based on this evidence, the Board found that on a balance of probabilities, the leaders of the Karuna group (notably Vinayagamoorthi Muralitharan (VM)) were aware of their group’s extortion activities. However, there was no evidence to suggest that these leaders had refused to do anything about it. Therefore, the Board found that some individual members extorted money from civilians on their own initiative. In addition, there was insufficient evidence to find that the leader’s power was used to sanction extortion by persons claiming to be members of the Karuna group. Therefore, the principal applicant’s claim that members of the Karuna group who were trying to extort money from him were doing so under the authority and power of VM was uncorroborated and the power structure of VM would not be used against him to ensure success of extortion. The Board held that the applicants’ fear of extortion by a group involved in criminal activities did not provide them with a nexus to a Convention refugee ground.

[38] The Board also found that the principal applicant's fear of being kidnapped if returned to Sri Lanka is a generalized fear faced by all Sri Lankans. The Board noted there was no persuasive evidence that anything other than money had motivated the perpetrators to target the applicants. The principal applicant's fear was of a generalized risk of persecution by some members of the Karuna group involved in criminal activities. Therefore, the principal applicant did not fall within the protection of paragraph 97(1)(b) of the Act. In addition, as the Board had found that the principal applicant's fear of state agencies in Sri Lanka had no objective basis, his claim did not fall within the scope of paragraph 97(1)(a) of the Act.

[39] Finally, as the other applicants' claims were based on the principal applicant's claim, the Board denied their claims as well.

Issues

[40] The applicants submit the following points at issue:

1. Is there any evidence which supports the applicants' submissions with respect to the issues set out below, and are any of these issues, either singly or in combination, serious ones?

2. Did the Board err in fact, err in law, breach fairness or exceed jurisdiction in determining the applicants as not Convention refugees in that state protection was reasonably forthcoming?

[41] I would phrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in excluding the principal applicant on the basis of being complicit in crimes against humanity under article 1(F)(a) of the UN Convention?

3. Did the Board err in denying the applicants' refugee claims?

Applicants' Written Submissions

[42] The applicants submit that the task before the Board was to: identify which units of the Navy were involved in crimes; identify the crimes as crimes against humanity; and link the principal applicant to the units that had committed those crimes.

[43] The applicants refer to *Marinas Rueda v Canada (Minister of Citizenship and Immigration)*, 2009 FC 984, [2009] FCJ No 1203, in which they submit that this Court found the Board over-generalized in finding that the Navy as a whole was the relevant organization responsible for crimes against humanity.

[44] On the unit responsible for the acts, the applicants submit that the case of *Canada (Minister of Public Safety and Emergency Preparedness) v Cortez Muro*, 2008 FC 566, [2008] FCJ No 718, demonstrates that the relevant unit to be analyzed is the one specified by the Minister; in this case that unit was the Navy. However, the applicants submit that the evidence the Board relied on showed that specific units, rather than the Navy as a whole, committed the human rights abuses.

[45] Further, the applicants submit that this Court has found that large military branches in democratic countries cannot be entirely responsible for human rights abuses. In support, the

applicants point to this Court's finding on the Columbian army in *Ardila v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1518, [2005] FCJ No 1876 (at paragraph 12).

[46] Next, the applicants submit that the Board erred in failing to identify crimes against humanity in which the principal applicant had a shared common purpose. The applicants submit that the Board's analysis contains an extensive list of crimes and atrocities, some of which are not crimes against humanity. This included, for example, a report of torture against Tamil fisherman, presumably citizens of India, who accidentally crossed into Sri Lankan waters.

[47] The applicants submit that the Board was required to identify crimes using proper legal principles and then proceed to determine whether these crimes amounted to crimes against humanity based on the elements specified by the Supreme Court in *Mugesera* above, at paragraph 119.

[48] In assessing whether the principal applicant belonged to the units that had committed the crimes against humanity, the applicants submit that leaders, organizers, instigators and accomplices participating in the formulation and execution of a common plan or of a conspiracy to commit crimes, are responsible for them. Criminal responsibility will more likely attach to an individual that is deeply involved in the decision-making process or that does little to thwart the planning or the commission of the relevant act.

[49] Turning to the principal applicant's role in the Navy, the applicants submit that it pertained to the performance of ships, as per his electrical engineering and business education. The principal

applicant's career did not involve combat and he only served on a ship early in his career when he was a junior engineer. His long service was predominantly spent in the dockyard or in military schools. He was also one of only five Tamil officers in the Navy where the majority of the officers were Sinhalese (there was also a very small percentage of Muslim officers). The applicants submit that the Board erred in not considering that the principal applicant's leadership position was not close to the crimes or the planning of them but rather pertained to technical, teaching and administrative duties.

[50] The applicants submit that the analysis of complicity starts with the definition of individual criminal responsibility as set out in article 25 of the Rome Statute. Next, the Board must link the applicant to specific crimes. In support, the applicants distinguish the facts in this case from *Penate v Canada (Minister of Employment and Immigration)* (TD), [1994] 2 FC 79, [1993] FCJ No 1292, a case relied on by the Board in its analysis of an individual's complicity in an army's actions based on an embracement and effective support of the army and its goals. The applicants highlight the fact that in *Penate* above, the applicant was a career soldier in the Salvadoran army who knew of the atrocities committed and had witnessed at least one international offence. Contrary to this case, the applicant in *Penate* above, therefore had a sufficient degree of complicity to be found guilty of crimes against humanity.

[51] Instead, the applicants point to *Loordu v Canada (Minister of Citizenship and Immigration)*, 199 FTR 308, [2001] FCJ No 141, in which the applicant was a Tamil and a low-ranking member of the police force. This Court found that although elements of the Sri Lankan police force

committed crimes against humanity, there was no evidence that the police force was an organization with a limited brutal purpose.

[52] The applicants also refer to this Court's decision in *Bonilla Vasquez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1302, [2006] FCJ No 1627; a case pertaining to an army Major who had served fifteen years in the Colombian military. In *Vasquez* above, this Court found that due to the applicant's high rank, leadership position and long-term service, he had to be aware of the operations that were undeniably penetrating crimes against civilians. He thereby lent his support and "knowingly participation" to those crimes (at paragraph 15). The Court in *Vasquez* above, stated that the law on "complicity" was two fold: (1) a shared common purpose and (2) knowledge. The shared common purpose must constitute a crime against humanity, as defined in paragraphs 151, 154 to 156 and 161 of *Mugesera* above. As mentioned previously, the applicants submit that in this case, the Board erred by not determining which crimes were crimes against humanity.

[53] The applicants submit that the Board erred in fact and in law in basing its complicity finding on a common purpose with the Navy. The applicants submit that there is no jurisprudence in which this Court has upheld exclusions based on belonging to a Navy that has been found to be complicit in crimes against humanity. Conversely, in *Ruiz Blanco v Canada (Minister of Citizenship and Immigration)*, 2006 FC 623, [2006] FCJ No 793, this Court quashed a Board's decision excluding a twenty-year non-commissioned Navy officer on the basis that there was too little evidence on crimes committed by the Navy.

[54] The applicants submit that although the principal applicant testified that he was aware of human rights abuses, mere knowledge of atrocities does not equate to shared purpose and complicity. The applicants submit that the Board erred in finding that the principal applicant's participation in strategy meetings for improving equipment performance was relevant to him being involved with crimes of any kind. The Board erred by failing to: make findings on the evidence that civilians who were wrongly believed to be LTTE members were killed by accident; not clarifying whether the principal applicant's knowledge of civilian deaths by Navy shelling was a crime against humanity; making no reference as to whether the shelling was in relation to legitimate actions or not; and not referring to Navy complicity in the military and police actions against civilians in Colombo in 2006.

[55] The applicants also distinguish *El-Kachi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 403, [2002] FCJ No 554, a case relied upon by the Board, on the basis that it did not concern a member of a national army. Rather, that case pertained to a militia independent of the government.

[56] In addition, the applicants submit that the Board erred in finding that the principal applicant's knowledge of the crimes led to his complicity in them. Mere knowledge of atrocities is not determinative of complicity in them.

[57] The applicants submit that the Board erred in finding that the principal applicant had fabricated his efforts to leave the Navy between 2007 and 2009 solely on the basis of lacking corroborative documentation. Similarly, the Board erred by making a negative inference from the

lack of an affidavit from the principal applicant's friend corroborating the claim that he had notified him of the risk he faced from paramilitary groups. In refugee claims, the applicants submit that it is an error to reject evidence or impugn credibility solely for reason of lacking corroborating evidence. The principal applicant should have been granted the benefit of the doubt. Therefore, the Board's inferences were unreasonable and should not stand.

[58] The applicants submit that the Board erred in finding that the leaders of the various paramilitary-political parties are not known to have sanctioned the human rights abuses by their organizations. The applicants also submit that the Board erred by failing to recognize that extortion can be persecution. Failure to consider the reason for extortion and the motivation for paying extortion is a reviewable error.

[59] Finally, the applicants submit that the risk they face is not generalized, rather, they have been directly affected.

Respondent's Written Submissions

[60] The respondent submits that the issue of whether the facts support the principal applicant's exclusion from refugee protection under article 1F(a) of the UN Convention is reviewable on a reasonableness standard. Similarly, the Board's decision on whether the applicants are Convention refugees or persons in need of protection under sections 96 and 97 of the Act attracts a standard of review of reasonableness.

[61] The respondent notes that the principal applicant's refugee claim was rejected on two grounds: exclusion from refugee protection under article 1F(a) of the UN Convention and failure to establish a well-founded fear of persecution or personal risk.

[62] To succeed on judicial review, the respondent submits that the applicants must establish errors on both of these findings.

[63] The respondent submits that the principal applicant was reasonably excluded under article 1F(a) of the UN Convention. The proper approach to the application of the exclusion clause is first, by reference to existing jurisprudence and second, by reference to the clear intent of the signatories of the UN Convention. It is irrelevant whether the principal applicant was complicit in one atrocity or several, at one time or over a period of time. What matters is whether the principal applicant belonged to an organization that had repeatedly been involved in the commission of crimes against humanity in a systemic or widespread fashion.

[64] The respondent submits that like all crimes, crimes against humanity consist both of a criminal act and a guilty mind. An individual may be found to have "committed" a crime against humanity where they have been complicit in the commission of the offence. A determination of complicity must be made on a case-by-case basis. Complicity can be based on "personal and knowing participation" or on the existence of a "shared common purpose".

[65] The respondent submits that the Federal Court of Appeal has held that the "personal and knowing" participation test is broader than merely requiring the personal participation of the

individual in the alleged crimes, be it by carrying them out personally or facilitating their commission.

[66] A shared common purpose will arise where an individual has knowledge that his organization is committing crimes against humanity and does not take steps to prevent them from occurring or disengage from the organization at the earliest opportunity consistent with his or her safety, but rather lends active support to the organization.

[67] The respondent submits that in this case, the documentary evidence establishes that the Navy was directly involved and provided material support to the other security forces in committing atrocities.

[68] Relying on general principles on “complicity” that have emerged from the jurisprudence, the respondent submits that the Board correctly interpreted and applied the law on article 1F(a) of the UN Convention. The respondent submits that the Board considered the relevant six factors, as required.

[69] The first factor pertains to the nature of the organization. The respondent submits that the Board reasonably found that the Sri Lankan Navy had committed, on its own or jointly with other security forces, acts considered to be war crimes or crimes against humanity. These acts were committed whilst the principal applicant was a Navy officer. The respondent submits that the Board also reasonably assessed the second factor, the method of recruitment, and found that the principal applicant had voluntarily joined the Navy in 1985, after having already served as an officer cadet.

[70] Turning to the third factor, the position or rank in the organization, the respondent highlights the principal applicant's acknowledgement that he was a high ranking officer and indispensable to the operation of the Navy. The Board reasonably found that the principal applicant's activities as an electrical engineer facilitated the Navy operations, which included the darker aspects of those operations.

[71] Fourthly, the respondent submits that the Board made a reasonable finding on the knowledge of the organization's atrocities. The principal applicant admitted his awareness of the atrocities from the media and fellow naval employees. Further, although the principal applicant testified that he was not personally involved, he was occasionally involved in strategy meetings to provide input on equipment capacity. The respondent submits that the Board reasonably found that the principal applicant's behaviour and failure to disengage from the Navy indicated that he supported or tolerated the Navy's behaviour.

[72] On the fifth factor, the length of time in the organization, the respondent submits that the Board reasonably found that the principal applicant's length of service (over twenty years) was indicative of a common purpose shared with the Navy in the commission of the crimes.

[73] Finally, the respondent submits that the sixth factor, opportunity to leave the organization, was also reasonably assessed by the Board. The Board considered the principal applicant's testimony and his military documents and reasonably found that he fabricated his story about attempting to leave the Navy. Further, the principal applicant's testimony indicated that his primary concern was with his career development and he only left for fear of his and his family's safety. The

Board reasonably sought corroborating evidence of his attempts to leave after noting that the principal applicant would not have been liable for punishment after 2005 and had had several opportunities to travel abroad; opportunities during which he had never applied for refugee protection. The principal applicant failed to produce any such evidence and did not withdraw or protest at the first reasonable opportunity.

[74] Based on its analysis of these factors, the respondent submits that the Board's decision that the principal applicant was complicit in crimes against humanity was a finding that was reasonably open to it.

[75] The respondent also submits that the Board's decision that the applicants were not Convention refugees or persons in need of protection under sections 96 and 97 of the Act was reasonable. The respondent submits that risk was not established on either the principal applicant's former position in the Navy or on the threat of extortion.

[76] On the risk associated with his former position in the Navy, the respondent submits that the Board reasonably found insufficient evidence that remnants of the LTTE and sympathizers are targeting former military personnel. It also reasonably found no persuasive evidence that government paramilitaries or intelligence would have any interest in the principal applicant especially due to his clean record, numerous promotions and good standing. A false report implicating the principal applicant in providing intelligence to the LTTE was reasonably deemed purely speculative. Further, if he had been a suspected LTTE supporter, the principal applicant would have faced problems at the airport; problems that he testified that he did not face. The

principal applicant also confirmed that his contacts in Sri Lanka had told him that he was not on a "wanted list" of the government or paramilitaries. Based on this evidence, it was reasonable for the Board to search for corroborating evidence to support the claim of possible threats from the government or paramilitaries. The principal applicant did not provide such evidence.

[77] The respondent also submits that the Board made a reasonable finding that the risk of extortion faced by the applicants was a risk generally faced by others in the country. There was no inconsistency in the Board's initial reference to the principal applicant's or his wife's past targeting of extortion and its final determination that the nature of this risk is faced generally by other individuals in or from Sri Lanka.

[78] Further, the jurisprudence has established that the ability to distinguish a subcategory from the citizenry at large does not remove that group from the generalized risk category. In this case, the Board reasonably determined that the risk faced by the applicants in the identified subcategory was prevalent and widespread and thereby faced generally by other individuals. The evidence also showed that money was the sole motivation of the perpetrators targeting the applicants. As recognized by the Board, victims of crime do not qualify as at risk under subsection 97(1) of the Act. In particular, wealth or perceived wealth does not constitute personalized risk and extortion alone does not amount to persecution unless it is linked to a Convention ground. Therefore, the respondent submits that the Board reasonably concluded that the extortion faced by the applicants was generalized and random crime, not personalized crime. There was therefore no nexus to a Convention ground.

Analysis and Decision

[79] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[80] In *Canada (Minister of Citizenship and Immigration) v Ekanza Ezokola*, 2011 FCA 224, [2011] FCJ No 1052, the Federal Court of Appeal stated the standard of review as follows at paragraph 39:

> The fundamental issue identified by the applications judge is the scope of the concept of complicity by association for the purposes of applying Article 1F(a) of the Convention. As he indicates, this is a question of law subject to the standard of correctness. Once the test has been properly identified, the issue of whether the facts in this case trigger the application of Article 1F(a) is a question of mixed fact and law with respect to which the Panel is entitled to deference (*Canada (Minister of Citizenship and Immigration) v. Zeng*, 2010 FCA 118, para. 11).

[81] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paragraph 59). It is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (see *Khosa* above, at

paragraphs 59 and 61). Conversely, where the standard of review is correctness, no deference is owed to the decision-maker (see *Dunsmuir* above, at paragraph 50).

[82] **Issue 2**

Did the Board err in excluding the principal applicant on the basis of being complicit in crimes against humanity under article 1(F)(a) of the UN Convention?

Background: Article 1F(a) of the UN Convention excludes "any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity" from Convention refugee protection. In Canada, section 98 of the Act excludes individuals that fall within the scope of article 1F(a) from the refugee protection available under both section 96 and subsection 97(1) of the Act.

[83] In assessing whether a person falls within the scope of article 1F(a), there is little difference between "serious reasons for considering" (as used in article 1F(a)) and "reasonable grounds to believe" (see *Sivakumar v Canada (Minister of Employment and Immigration)* (CA), [1994] 1 FC 433, [1993] FCJ No 1145 at paragraph 18; and *Mugesera* above, at paragraph 114). As explained further by Mr. Justin Linden in paragraph 18 of *Sivakumar* above:

> […] Both of these standards require something more than suspicion or conjecture, but something less than proof on a balance of probabilities. This shows that the international community was willing to lower the usual standard of proof in order to ensure that war criminals were denied safe havens.[…]

[84] In *Mugesera* above, the Supreme Court also explained that "reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information" (at paragraph 114).

[85] Where an applicant has not himself committed crimes against humanity, he may still be legally responsible as an accomplice to such crimes. Article 6 of the IMT Charter attaches liability to accomplices that participate in the "formulation or execution of a common plan or conspiracy to commit" crimes against humanity.

[86] A leading case on findings of complicity of accomplices is *Ramirez v Canada (Minister of Employment and Immigration)* (FCA), [1992] 2 FC 306, [1992] FCJ No 109. In that case, the Federal Court of Appeal established that both "personal and knowing participation" in the crimes and a "shared common purpose" were essential requirements for a finding of complicity (see *Ramirez* above, at paragraphs 15 and 18).

[87] More recently in *Bukumba v Canada (Minister of Citizenship and Immigration)*, 2004 FC 93, [2004] FCJ No 102, Mr. Justice Von Finckenstein summarized the principles that have been enunciated with regards to complicity in crimes against humanity (at paragraph 19):

1. An individual may be an accomplice to an international crime even though a specific act or omission is not directly attributable to him;

2. An individual who associated with a person or organization responsible for international crimes may be an accomplice to these crimes if he knowingly participated in or tolerated them;

3. An individual may be an accomplice to an international crime if, having knowledge of that crime, he fails to take steps to prevent it occurring or to disengage himself from the offending organization at the earliest opportunity consistent with his own safety;

4. An individual will be an accomplice to an international crime if he provides information about others to an organization with a limited, brutal purpose with knowledge that they will likely come to harm; and

5. Membership in an organization with a limited, brutal purpose leads to a presumption of knowledge as to the act which this organization is undertaking.

[88] The relevant factors for assessing an individual's complicity in crimes against humanity have been applied by this Court on numerous occasions (see for example *Fabela v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1028, [2005] FCJ No 1277 at paragraph 24). These factors were correctly stated by the Board as: nature of the organization; method of recruitment; position and rank in the organization; knowledge of the organization's atrocities; length of time in the organization; and opportunity to leave the organization.

[89] These factors have been described as "the most important factors to consider when determining whether there were serious reasons to believe that the principal applicant had personal knowledge, or could be considered as an accomplice in the perpetration of crimes against humanity" (see *Fabela* above, at paragraph 24).

[90] In its decision, the Board considered the above principles and applied the facts to the above enumerated factors. Based on this assessment, the Board found that the principal applicant was complicit in the Navy's crimes against humanity and was thereby excluded from refugee protection.

[91] Alleged Errors: The applicants raise several issues with the Board's assessment of the article 1F(a) exclusion. The Board's main alleged errors are: over-generalization in finding that the Navy as a whole, rather than specific units, was responsible for the crimes against humanity; failure to specifically identify the crimes against humanity and the war crimes; failure to adequately link the principal applicant to the specific units of the Navy that had committed crimes against humanity and to which the principal applicant had a shared common purpose; and error in finding on the basis of lacking corroborative documentation that the principal applicant had fabricated his efforts to leave the Navy between 2007 and 2009.

[92] The first alleged error pertains to the characterization of the "organization" that committed the crimes. The Board found that the Navy was not characterized as a limited, brutal-purpose organization. However, it found that the documentary evidence indicated that war crimes or crimes against humanity had been committed by the Navy alone or jointly with other security forces.

[93] In criticizing the Board's characterization of the Navy as a whole responsible for the atrocities, the applicants rely on *Rueda* above. In that case, the principal applicant served in the Peruvian Navy prior to coming to Canada with his family and filing refugee claims. While the principal applicant was a member of the Peruvian Navy, the Navy was called to quell a riot at a

prison. The Peruvian Navy's actions in quelling the riot were held to be crimes against humanity by the Inter-American Court of Human Rights.

[94] The Court in *Rueda* above, overturned the Board's decision excluding the principal applicant on the basis that the Board over-generalized without determining if the Peruvian Navy, as an entity, was purposely responsible for crimes against humanity. Specifically, the Court found that the Board made the following errors (at paragraph 48). The Board did not assess: the conduct of the leadership in command of the Navy; whether general naval orders directed or facilitated the commission of atrocities by navy units; whether officers in the navy chain of command passed on instructions that contributed to the commission of crimes against humanity; and the degree of knowledge seamen and officers had of atrocities committed by the Navy.

[95] The Court in *Rueda* above, also noted that the Board recited a wide sweep of government forces in which the Navy was only mentioned four times (at paragraph 46). The corresponding documents in which the Navy was mentioned specified that political-military commands in charge of local administration were largely responsible for committing the atrocities and that the Navy's involvement in human rights violations decreased after the prison incident (at paragraphs 49 and 50). For these collective reasons, the Court held that the Board's finding that the Peruvian Navy as a whole had a common purpose of generalized and systematic commission of crimes against humanity was questionable (at paragraph 52).

[96] In this case, the Board did not explicitly address the enumerated errors identified above in *Rueda*. However, a review of the documentary evidence relied on in its decision indicates

significant differences from the evidence relied upon by the Board in *Rueda* above. The Board in this case cited numerous excerpts from documentary country evidence in support of its finding. Of these examples, a few referred broadly to the Sri Lankan government forces, while the large majority explicitly mentioned the Navy acting alone or in conjunction with other government security forces. With regards to the Navy, atrocities were documented in various locations across the country and in the surrounding waters. Units were seldom mentioned due to the recognized difficulty in identifying specific ones. This was further complicated by the Navy's expanded involvement into land-fighting roles. Collectively, I find this evidence, which is compelling and comes from credible sources such as the United Nations and the Asian Human Rights Commission, provides an objective basis for the Board's finding (see *Mugesera* above, at paragraph 114).

[97] The applicants also rely on *Ardila* above, in submitting that this Court has found that large military branches in democratic countries cannot be entirely responsible for human rights abuses. However, the facts of *Ardila* above, are also distinguishable from this case. In *Ardila* above, the applicant had spent eight of his twelve years in the army either riding horses or as a student. Although some members of the army had committed notorious crimes against humanity, these were largely isolated incidents and were not representative of the general conduct by the army (at paragraph 10). It was therefore reasonable for the Court in *Ardila* above, to find that not every member of the army was complicit in crimes against humanity (at paragraph 12).

[98] Again, the facts in this case differ from those in *Ardila* above. In this case, the principal applicant held a much more senior position in the Navy and the documentary evidence suggested systemic crimes against humanity by the Navy and security forces for several decades as opposed to

singular isolated incidents. I therefore do not find that the reasoning in *Ardila* above, relied upon by the applicants is applicable to the Board's decision in this case.

[99] Finally, the applicants also submit that the evidence the Board relied on showed that specific units, rather than the Navy as a whole, committed the human rights abuses. However, the applicants do not specify which evidence they are referring to in support of this submission and I do not agree with this characterization of the evidence cited by the Board.

[100] For these reasons, I do not find that the Board came to an unreasonable conclusion in characterizing the Navy as a whole as having committed the crimes against humanity during the time that the principal applicant was an officer.

[101] On the second alleged error, the applicants submit that the Board simply enumerated acts it considered to be war crimes or crimes against humanity without specifying reasons why. Rather, the Board should have identified crimes using proper legal principles and then proceeded to determine whether these crimes amounted to crimes against humanity.

[102] The importance of clearly specifying the crimes against humanity was highlighted in *Sivakumar* above. Mr. Justice Linden explained (at paragraph 33):

> Given the seriousness of the possible consequences of the denial of the appellant's claim on the basis of section F(a) of Article 1 of the Convention to the appellant and the relatively low standard of proof required of the Minister, it is crucial that the Refugee Division set out in its reasons those crimes against humanity for which there are serious reasons to consider that a claimant has committed them.

[103] The Supreme Court has explained that the criminal act of a crime against humanity consists of the following essential elements (see *Mugesera* above, at paragraph 128):

1. One of the enumerated proscribed acts is committed;
2. The act occurs as part of a widespread or systematic attack; and
3. The attack is directed against any civilian population or any identifiable group.

[104] Crimes against humanity are defined in Article 7 of the Rome Statute and this definition has been incorporated into Canadian legislation. Under subsection 4(3) of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, crimes against humanity are defined as:

> murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

[105] Several of the Navy and Sri Lankan security forces' acts described in the documentary evidence, as referred to by the Board, fall within the scope of this definition.

[106] The Supreme Court has explained the meaning of "widespread or systematic attack" in the following manner (see *Mugesera* above):

> […] in most instances, an attack will involve the commission of acts of violence […] (at paragraph 153)
>
> […] It [a widespread attack] may consist of a number of acts or of one act of great magnitude […] (at paragraph 154)

> A systematic attack is one that is "thoroughly organised and follow[s] a regular pattern on the basis of a common policy involving substantial public or private resources" and is "carried out pursuant to a [...] policy or plan", although the policy need not be an official state policy and the number of victims affected is not determinative […] (at paragraph 155)
>
> […] The widespread or systematic nature of the attack will ultimately be determined by examining the means, methods, resources and results of the attack upon a civilian population […] (at paragraph 156)

[107] The extensive sources of evidence and the reporting contained therein, including references to tens of thousands of disappearances and the institutionalization of torture, supports a finding that the Navy and security forces' acts were part of a widespread or systematic attack in Sri Lanka.

[108] Finally, the evidence indicates that the violence was disproportionately directed against the Tamil minority population. As stated by the Supreme Court, a prototypical example of a "civilian population" would be a particular national, ethnic or religious group (see *Mugesera* above, at paragraph 162). The Tamil population in Sri Lanka clearly falls within this description.

[109] In summary, although the Board did not explicitly undertake the analysis of the crimes, the information contained in the excerpts of the documentary evidence that it included in its decision adequately establishes the essential elements of crimes against humanity. I do not find the Board's failure to explicitly undertake this analysis is sufficient to render its decision unreasonable.

[110] On the third alleged error, the applicants submit that the Board failed to adequately link the principal applicant to the specific units of the Navy that had committed crimes against humanity and to which the principal applicant had a shared common purpose.

[111] The applicants submit that the principal applicant's role in the Navy was not related to the planning or commission of the crimes, but rather pertained to technical, teaching and administrative duties. However, the Board found that the principal applicant's participation in strategy meetings for improving equipment performance was relevant to him being involved in the crimes against humanity. This position is supported by the Supreme Court's finding in *Mugesera* above, at paragraph 174:

> It is important to stress that the person committing the act need only be cognizant of the link between his or her act and the attack. The person need not intend that the act be directed against the targeted population, and motive is irrelevant once knowledge of the attack has been established together with knowledge that the act forms a part of the attack or with recklessness in this regard. […]

[112] The Supreme Court also explained that in assessing whether an applicant possessed the requisite knowledge, the following may be considered: the applicant's position in a military or other government hierarchy, public knowledge about the existence of the attack, the scale of the violence and the general historical and political environment in which the acts occurred. The applicant does not need to know the specific details of the attack to possess the requisite knowledge (see *Mugesera* above, at paragraph 175).

[113] Further, it is established jurisprudence that what makes an individual an accomplice to the acts committed by that organization, is "the fact of knowingly contributing to these activities in any

manner whatsoever" (see *Ezokola* above, at paragraph 55, [emphasis added]). Stated another way, "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" (see *Bazargan v Canada (Minister of Employment and Immigration)*, 67 ACWS (3d) 132, [1996] FCJ No 1209 at paragraph 11).

[114] It is also notable that in *Ezokola* above, the Federal Court of Appeal recently answered the following certified question affirmatively (at paragraphs 44 and 72):

> For the purposes of exclusion pursuant to paragraph 1F(a) of the United Nations Refugee Convention, can complicity by association in crimes against humanity be established by the fact that the refugee claimant was a senior public servant in a government that committed such crimes, along with the fact that the refugee claimant was aware of these crimes and remained in his position without denouncing them?

[115] In this case, the principal applicant testified that he was aware of the atrocities committed by the Navy. At the January 2010 hearing he testified that:

> … we do not really get involved with any conflict but we support with all of our technical support to those people who are going to the front.

[116] The principal applicant's work on equipment performance and technical matters, coupled with his senior position, his involvement in strategy meetings and his knowledge of the history of violence in Sri Lanka, renders the Board's finding that he was cognizant of the link between his acts and the crimes committed by the Navy reasonable.

[117] Finally, on the fourth alleged error, the applicants submit that the Board erred in finding that the principal applicant had fabricated his efforts to leave the Navy between 2007 and 2009 on the basis of lacking corroborative documentation. This issue arises from the final factor for assessing an individual's complicity in crimes against humanity; namely, the principal applicant's opportunity to leave the Navy. It is notable that the other five factors all pointed to the principal applicant being complicit; particularly the fact that he joined the Navy voluntarily, held a senior position, had long been aware of the Navy's atrocities and had been in the Navy for over two decades.

[118] In its decision, the Board acknowledged the principal applicant's testimony that he first attempted to leave the Navy in 2001 and had actively pursued retirement from 2007 to 2009. However, on review of the principal applicant's naval employment documents, the Board found no evidence of these efforts to leave the Navy. The Board therefore found that the principal applicant had not established persuasively that he had attempted to leave the Navy, but rather that he had fabricated this story to support his refugee claim. The applicants submit that the Board erred by rejecting evidence or impugning credibility solely for reason of lacking corroborating evidence.

[119] In support, the applicants refer to *Ahortor v Canada (Minister of Employment and Immigration)*, 65 FTR 137, [1993] FCJ No 705, in which the Court found that the Board could not relate a failure to offer documentation of an arrest to the applicant's credibility in the absence of evidence that contradicted the allegations (at paragraph 45). The Court found that there was in fact evidence, both from the applicant's oral testimony and documentary evidence, to explain the non-availability of arrest reports (at paragraph 46). There was no basis for the Board to disbelieve the applicant (at paragraph 48).

[120] Conversely, in this case, the Board reviewed the principal applicant's naval employment records and found no indication that the principal applicant had attempted to leave the Navy. In light of the Board's findings on the other complicity factors, the absence of evidence to support the principal applicant's claims, the principal applicant's recent promotion to Commodore in 2008 (during the time that he was allegedly actively seeking to retire) and the lack of information on attempted departures from the Navy in the principal applicant's employment records, I find that there was sufficient basis for the Board to doubt the principal applicant's credibility regarding his intention to leave. This accords with the established jurisprudence that an applicant's testimony will be presumed true unless there is a reason to doubt it (see *Tellez Picon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 129, [2010] FCJ No156 at paragraph 9).

[121] Finally, it is notable that the Board did not limit its analysis to the principal applicant's alleged attempts to leave the Navy, but also conducted a thorough analysis of potential hardships that the principal applicant could have faced in so doing. I find no error in this respect.

[122] In summary, I do not find that the Board's decision on exclusion is unreasonable. Rather, the Board's conclusion is transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it.

[123] **Issue 3**

Did the Board err in denying the applicants' refugee claims?

In assessing the applicants' refugee claims under section 96 and subsection 97(1) of the Act, the Board identified three determinative issues: credibility; subjective fear; and whether the

applicant's fear of persecution was objectively well-founded. The applicants submit that the Board made the following errors in its analysis:

Made negative inferences on the applicants' risk from paramilitary groups on the basis of lacking corroborating evidence;

Found that the paramilitary-political parties posed a generalized risk as opposed to a systemic, racial targeting attack on Tamils; and

Found that extortion *per se* cannot be persecution.

[124] The first alleged error pertains to the Board's negative inferences on the lack of an affidavit from the principal applicant's friend confirming that he had informed him of the risk that the applicants faced from paramilitary groups. In support, the Board referred to the principal applicant's employment record as evidence that he was not a suspect. The applicants submit that the Board unreasonably impugned credibility based on the lack of corroborating evidence and made unreasonable inferences based on the principal applicant's employment record.

[125] In support, the applicants refer to *De Urbina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 494, [2004] FCJ No 650. In that case, this Court found that the panel had failed to conduct further analysis after finding that the applicant's father's explanation was conjecture (at paragraph 16). The Court explained that "[a]n assessment of the plausibility of testimony requires that the testimony be tested against known or undisputed facts" (at paragraph 17).

[126] Conversely, in this case, the Board noted the lack of an affidavit and the applicants' responsibility to submit one. However, the Board's analysis did not end there. As acknowledged by the applicants, the Board noted the principal applicant's successful career, coupled with a lack of punishment for any disobedience. Further, the Board noted that the applicants had remained in Sri Lanka after his phone call with his friend, without being targeted by the government or paramilitaries. In addition, since arriving in Canada, the principal applicant had discovered that he was not on any government or paramilitary "wanted list". This type of search for confirmatory evidence where a decision-maker has concerns about the reliability of a witness' testimony has been approvingly described as "a matter of common sense" (see *Ortiz Juarez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 288, [2006] FCJ No 365 at paragraph 7).

[127] Without further evidence before it, I find that it was reasonable for the Board to conclude that the creation of a false report against him was purely speculation. As recognized by this Court in *De Urbina* above, "findings of implausibility should not be set aside lightly, and that great deference is owed to credibility findings made by the Refugee Protection Division" (at paragraph 21). Based on the evidence before the Board and its thorough assessment of that evidence, I do not find that the Board's findings of implausibility are unreasonable.

[128] Secondly, the applicants submit that the Board erred in finding that the paramilitary-political parties posed a generalized risk as opposed to a systemic, racial targeting attack on Tamils. A systemic targeting of Tamils would provide a nexus to the Convention refugee definition.

[129] The applicants submit that the Board erred in finding that the leaders of the paramilitary-political parties had not sanctioned the human right abuses committed by their organizations. The Board also allegedly erred in finding that specific members could not pose a risk if their organizations did not pose a risk. The applicants submit that there was evidence showing that individual members were acting under the name of their organizations.

[130] On review of the documentary evidence cited by the Board, I do not agree with the applicants' submissions. In its decision, the Board noted that conditions giving rise to the applicants' refugee claim did not arise until July 2009 when the principal applicant's wife was temporarily abducted for ransom. The Board cited recent documentary evidence indicating previous targeting of Tamil businessmen by government-supported paramilitaries. However, as the government refused to pay these groups, the state of affairs had evolved into "increasing lawlessness and insecurity for all minority businessmen" (see paragraph 110 of the Board's decision).

[131] Further, the evidence indicated that some individual members of the Karuna group extorted money from civilians, but there was no persuasive evidence that these acts were done under the authority and power of the leaders of the organizations. The importance of this observation is that if violence against Tamils was found to be promoted by the leaders of the organization, it could be indicative of a nexus with a Convention refugee ground. Conversely, if individual members are committing criminal acts against the population at large, no such nexus exists (see *Prophète v Canada (Minister of Citizenship and Immigration),* 2008 FC 331, [2008] FCJ No 415 at paragraph 23; affirmed in 2009 FCA 31, [2009] FCJ No 143).

[132] The Board found that the documentary evidence as a whole suggested that criminal activities were occurring against civilians across the country. The extortion of the principal applicant was therefore found to be related to the perception that he was a wealthy individual. As the fear of extortion pertained to a group involved in criminal activities, the Board found that this fear did not amount to a nexus with any Convention refugee grounds. On review of the Board's reasoning and the available documentary evidence, I do not find that the Board erred in its finding on this issue.

[133] Finally, the applicants submit that the Board erred in finding that extortion *per se* cannot be persecution. However, the Board did not explicitly state that extortion *per se* could not be persecution, but rather that the extortion faced by the applicants did not amount to persecution because they were targeted due to their wealth. As I stated in *Carias v Canada (Minister of Citizenship and Immigration)*, 2007 FC 602, [2007] FCJ No 817, wealth does not constitute personalized risk; it is a generalized risk (at paragraph 27). Further, contrary to the applicants' submissions, the Board did consider that the reason for extortion was to obtain money and that the applicants' motivation for paying it was to avoid being kidnapped.

[134] In summary, I find that the Board's decision on the issue of inclusion was also reasonable. As with its finding on the exclusion issue, the Board's conclusion on inclusion was transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it. I would therefore dismiss this judicial review application.

[135] The respondent proposed the following question for certification as a serious question of general importance:

> For the purposes of exclusion pursuant to paragraph 1F(A) [*sic*]of the *Refugee Convention*, does the "personal and knowing participation" test for liability for complicity with respect to crimes against humanity still apply to soldiers and officers in the military chain of command, including high ranking or senior officers, who otherwise may not be liable as commanders?

[136] The applicants agreed. I am not prepared to certify this question as it would not be determinative of the appeal. In addition, the Federal Court of Appeal has also ruled on the matter.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
. . .	. . .
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans

	le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

United Nations Convention relating to the Status of Refugees, July 28, 1951, [1969] Can TS No 6

Article 1. - Definition of the term "refugee"	Article premier. -- Définition du terme "réfugié"
. . .	…
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(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;	a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un rime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

Rome Statute of the International Criminal Court, A/CONF183/9, 17 July 1998

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:	3. Aux termes du présent Statut, une personne est pénalement responsable et peut être punie pour un crime relevant de la compétence de la Cour si :
(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;	a) Elle commet un tel crime, que ce soit individuellement, conjointement avec une autre personne ou par l'intermédiaire d'une autre personne, que cette autre personne soit ou non pénalement responsable ;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;	b) Elle ordonne, sollicite ou encourage la commission d'un tel crime, dès lors qu'il y a commission ou tentative de commission de ce crime ;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;	c) En vue de faciliter la commission d'un tel crime, elle apporte son aide, son concours ou toute autre forme d'assistance à la commission ou à la tentative de commission de ce crime, y compris en fournissant les moyens de cette commission ;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:	d) Elle contribue de toute autre manière à la commission ou à la tentative de commission d'un tel crime par un groupe de personnes agissant de concert. Cette contribution doit être intentionnelle et, selon le cas :
(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or	i) Viser à faciliter l'activité criminelle ou le dessein criminel du groupe, si cette activité ou ce dessein comporte l'exécution d'un crime relevant de la compétence de la Cour ; ou
(ii) Be made in the knowledge of the intention of the group to commit the crime;	ii) Être faite en pleine connaissance de l'intention du groupe de commettre ce crime ;
(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;	e) S'agissant du crime de génocide, elle incite directement et publiquement autrui à le commettre ;
(f) Attempts to commit such a crime by	f) Elle tente de commettre un tel crime par

taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

des actes qui, par leur caractère substantiel, constituent un commencement d'exécution mais sans que le crime soit accompli en raison de circonstances indépendantes de sa volonté. Toutefois, la personne qui abandonne l'effort tendant à commettre le crime ou en empêche de quelque autre façon l'achèvement ne peut être punie en vertu du présent Statut pour sa tentative si elle a complètement et volontairement renoncé au dessein criminel.

Charter of the International Military Tribunal, 8 August 1945

Article 6.

. . .

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there
shall be individual responsibility:

(a) ' Crimes against peace: ' namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(c) ' Crimes against humanity.- ' namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Article 6.

. . .

Les actes suivants, ou l'un quelconque d'entre eux, sont des crimes soumis à la juridiction du Tribunal et entraînent une responsabilité individuelle :

(a) ' Les Crimes contre la Paix ': c'est-à-dire la direction, la préparation, le déclenchement ou la poursuite d'une guerre d'agression, ou d'une guerre en violation des traités, assurances ou accords internationaux, ou la participation à un plan concerté ou à un complot pour l'accomplissement de l'un quelconque des actes qui précèdent;

(c) ' Les Crimes contre l'Humanité ': c'est-à-dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux ou religieux, lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en

liaison avec ce crime.

Leaders, organizers, 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.

Les dirigeants, organisateurs, provocateurs ou complices qui ont pris part à l'élaboration ou à l'exécution d'un plan concerté ou d'un complot pour commettre l'un quelconque des crimes ci-dessus définis sont responsables de tous les actes accomplis par toutes personnes en exécution de ce plan.

FEDERAL COURT

SOLICITORS OF RECORD

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