Federal Court Reports
Zrig v. Canada (Minister of Citizenship and Immigration) (C.A.) [2003] 3 F.C. 761

Date: 20030407

Docket: A-33-02

Citation: 2003 FCA 178

CORAM: **DÉCARY J.A.**

LÉTOURNEAU J.A.

NADON J.A.

BETWEEN:

MOHAMED ZRIG

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Hearing held at Montréal, Quebec on December 17, 2002.

Judgment rendered at Ottawa, Ontario on April 7, 2003.

REASONS FOR JUDGMENT:
NADON J.A.

CONCURRED IN BY:
LÉTOURNEAU J.A.

CONCURRING REASONS:
DÉCARY J.A.

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REASONS FOR JUDGMENT

[1] This is an appeal pursuant to s. 83(1) of the *Immigration Act*, R.S.C. 1985, c. I-2 ("the Act") from a judgment of Tremblay-Lamer J., [2002] 1 F.C. 559, which dismissed the appellant's application for judicial review of a decision by the Immigration and Refugee Board ("the Refugee Division") on January 27, 2000.

[2] The Refugee Division concluded that the appellant was not a refugee within the meaning of the *United Nations Convention Relating to the Status of Refugees*, T.S. 1969 ("the Convention"), on the ground that he should be excluded because of the provisions of Article 1F(*b*) and (*c*), which states the following:

1F The provisions of this *Convention* shall not apply to any person with respect to whom there are serious reasons for considering that:	1F Les dispositions de cette *Convention* ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
. . . . .	. . . . .
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that	*b)* qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme

country as a refugee;	réfugiés;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.	*c)* qu'elle se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[3] The main issue raised by the appeal at bar is as to the interpretation of Article 1F(*b*) of the Convention. It took the form of two questions certified by the judge, namely:

1. are the rules laid down by the Federal Court of Appeal in *Sivakumar v. Canada [(Minister of Citizenship and Immigration)]*, [1994] 1 F.C. 433, on complicity by association for purposes of implementing Article 1F(*a*) of the *United Nations Convention Relating to the Status of Refugees*, applicable for purposes of an exclusion under Article 1F(*b*) of the said Convention?

2. if so, can a refugee status claimant's association with an organization responsible for perpetrating "serious non-political crimes" within the meaning of that expression in Article 1F(*b*) of the *United Nations Convention Relating to the Status of Refugees* entail the complicity of the claimant for purposes of applying the said provision simply because he knowingly tolerated such crimes, whether committed during or before his association with the organization in question?

In particular, the question is whether the rules laid down by this Court in *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433, on complicity by association for purposes of implementing Article 1F(*a*) of the Convention, are applicable in connection with an exclusion under Article 1F(*b*).

<u>Version of facts presented to Refugee Division by appellant</u>:

[4] A brief summary of the version of the facts presented by the appellant will be helpful in understanding the Refugee Division's decision, and consequently the judgment by the trial judge.

[5] The appellant, a citizen of Tunisia, was born at Gabès on August 29, 1957. In October 1978 or October 1979 (depending on whether one looks at the Personal Information Form - "the PIF" - which he completed and signed on October 12, 1992, or that completed and signed on May 21, 1996), he began his study of physics and chemistry at the Faculty of Science of the University of Tunis.

[6] In 1980 the appellant became a sympathizer of the Mouvement de la tendance islamique ("the MTI"), which officially came into existence in May 1981, when a founding committee of 23 individuals announced its creation at a press conference and published a statement of its political platform.

[7] In June 1981, the appellant gave up his studies because of problems with the police authorities occasioned by his militancy within the MTI, and because he lost his scholarship due to unsatisfactory academic results.

[8] Consequently, in November 1981, he returned to Gabès, where he found work with the Société Arabe des Engrais Phosphatés et Azotés ("the Société"). At the end of 1982, the appellant became involved in the union known as the Union générale des travailleurs tunisiens ("the Union"), and became the Union's secretary general at the Société's Plant 2 in January 1988.

[9] In January 1988, he became a member of the MTI (in the PIF which he completed and signed on October 12, 1992, the appellant said he became a member of the MTI in 1980). In December 1988 or January 1989, the MTI changed its name to "Ennahda", when the Tunisian government adopted legislation prohibiting political parties using any reference to concepts such as race, language, religion or even a region in their names.

[10] In fall 1990, the appellant took over responsibility for the political bureau of Ennahda in Gabès because the executive office of the organization was dismembered by arrests of members of its leadership. The appellant then became responsible for the executive committee until late 1991.

[11] On April 9, 1991, the Tunisian police carried out a search at his residence. When he was told of this police action, the appellant ceased working for the Société and began living in hiding. He fled to Gabès until October 30, 1991, and stayed with friends and members of his family. He later left Gabès and fled to Kébili, and then ceased his activities for Ennahda.

[12] In February 1992, an examining magistrate in Gabès summoned the appellant for trial together with 143 co-accused, associated directly or indirectly with Ennahda. On May 20, 1992, after he left Tunisia, he was sentenced *in absentia* to 21½ years in prison by the Gabès Appeal Court. The sentence was broken down as follows:

- 8 years' imprisonment for membership in a criminal association;

- 8 years for supporting such an association;

- 2 years for participating in an unauthorized organization;

- 2 years for manufacturing explosives;

- 1 year for possession of weapons without a licence;

- 4 months for carrying weapons without a licence; and

- 2 months for collecting money without authorization.

[13] On March 10, 1992, the appellant left Tunisia to come to Canada. After spending two weeks in Libya, he headed for the Sudan, where he lived until April 20, 1992. He then returned to Libya, which he left for Austria on June 16, 1992. After a few days in Austria, he arrived in Germany in late June 1992, and claimed refugee status. On October 2, 1992, even before a decision was made on his refugee status application, he left Germany for Canada and claimed refugee status on arrival.

Refugee Division's first decision:

[14] On June 30, 1994, the Refugee Division dismissed the appellant's refugee application on the ground that there was no basis for his fear of persecution if he returned to Tunisia. The appellant was not satisfied with this decision and filed an application for judicial review in the Trial Division, which on July 6, 1995, allowed his application for judicial review because the Refugee Division had ignored a large part of the evidence regarding the general human rights situation in Tunisia.

[15] Consequently, the case was referred back to a panel of different members of the Refugee Division for re-hearing.

Refugee Division's second decision:

[16] The re-hearing before the Refugee Division stretched over 64 days, between May 15, 1996 and May 21, 1999. During the course of the hearing 1,422 exhibits were filed, that is nearly 2,000 documents representing many tens of thousands of pages. The Refugee Division heard 12 witnesses, 6 expert witnesses and 5 ordinary witnesses.

[17] In its decision of January 27, 2000, the Refugee Division came to the following conclusions:

(i) the appellant's fear of being persecuted for his political opinions was valid, since there can be no doubt that if he returned to Tunisia he would be imprisoned, tortured or killed;

(ii) in view of his involvement and his position as a leader in MTI/Ennahda, there are serious reasons for considering that the appellant was an accomplice in the commission of 12 serious non-political crimes;

(iii) in view of his involvement and his position as a leader in MTI/Ennahda, there are serious reasons for considering that the appellant was guilty as an accomplice "of acts contrary to the purposes and principles of the United Nations";

(iv) as Article 1F(*b*) and (*c*) applies, the appellant must be excluded from the definition of a refugee, despite the existence of a reasonable fear of persecution.

[18] In concluding that the appellant should be excluded from the definition of a refugee, the Refugee Division painstakingly reviewed the considerable evidence that was before it. In particular, the Refugee Division dwelt at length on MTI/Ennahda and its leader, Rached Ghannouchi, in an effort to understand the purposes, aims and activities of the movement and its leader. Based on this evidence, the Refugee Division noted the following facts.

[19] MTI/Ennahda is a movement which supports the use of violence: it is composed of an armed branch which uses terrorist methods and is financed by several countries and movements. This branch of the movement is involved in assassinations and bombings. The movement, which exists in over 70 countries, is also involved in

weapons trafficking and the financing of Algerian fundamentalists, including the Front Islamique du Salut ("the FIS"). The ultimate aim of the movement is the Islamization of the state, that is, the creation of an Islamic state in Tunisia.

[20] The leader of the movement, Rached Ghannouchi, a terrorist who is an integral part of the international Islamist movement, is regarded by some sources as one of the masterminds of terrorism. Mr. Ghannouchi has called for violence against the U.S. and threatened to destroy its interests in the Arab world. He has also demanded the destruction of the state of Israel.

[21] MTI/Ennahda committed 12 crimes which may be described as serious non-political crimes, namely:

(i) bombing attacks in France in 1986;

(ii) bombing attacks at Sousse and Monastir in 1987;

(iii) automobile fires in 1987 and 1990;

(iv) throwing acid in people's faces in 1987;

(v) conspiracies to assassinate leading persons in the Tunisian government in 1990, 1991 and 1992;

(vi) conspiracy to overthrow the former Tunisian President Habib Bourguiba by force in 1987;

(vii) physical attacks in schools and universities from 1989 to 1991;

(viii) the use of Molotov cocktails in 1987, 1990 and 1991;

(ix) arson at Bab Souika in February 1991;

(x) attempting to set fire to a university building in 1991;

(xi) threatening letters in 1991 and 1992; and

(xii) weapons trafficking from 1987 onwards.

[22] In its conclusion that the appellant should be held responsible as an accomplice for the crimes attributed to MTI/Ennahda, the Refugee Division relied in particular on the following facts:

- the appellant became a sympathizer of the MTI in 1980: he attended MTI meetings at the university; from 1983 to December 1990 he was part of an educational MTI cell, in which he studied the ideology of the movement; until 1988 he attended MTI general meetings;

- he became an MTI member in 1988: the appellant stated at the hearing that in order to become a member he had to have complete belief in the MTI and take an oath to the leaders and the movement;

- in the PIF which he completed and signed on October 12, 1992, the appellant said he became a member of the MTI in 1980;

- the appellant was kept in hiding by the movement to ensure control in the event the situation required it; the command structure was clandestine; this is what accounted for the appellant taking no part in the "public" activities of MTI/Ennahda;

- from January to May 1988, the appellant was on the MTI cultural committee in Gabès, and from June 1988 to December 1990, he was part of the union committee in Gabès; these committees reported to the Gabès regional executive office; between 1988 and November 1990, he took part in clandestine MTI/Ennahda meetings where internal problems of the movement, among other things, were dealt with; the appellant said that during these clandestine meetings he read a number of documents produced by his leader Rached Ghannouchi;

- in 1989, the appellant was selected by the leaders in the Gabès executive office to be a member of the committee organizing the elections of April 2, 1989, in the region; meetings were secret and the appellant worked clandestinely; his activities involved programming the electoral campaign, providing guidance in speeches, drafting pamphlets and putting out propaganda for the five independent candidates entered on the electoral list in the region: one candidate was Rached Ghannouchi's brother; during this period the appellant prepared several press releases for MTI/Ennahda;

- following a wave of arrests of Ennahda leaders in late 1990, the executive office became the political office; the leadership asked the appellant to be responsible for this from November or December 1990 onwards; the appellant was at the highest leadership level in Gabès and so was part of the movement's leadership at a very high level;

- between December 1990 and October 30, 1991, the appellant supervised the meetings of members of the Gabès political office; at those meetings he explained to members the directives and positions taken by the movement regarding events in Tunisia and elsewhere in the world; at that time, the appellant received his instructions and information from the central headquarters of Ennahda in Tunis, through telephone communications or in person; the appellant also prepared pamphlets for the movement;

- in his testimony the appellant stated: [TRANSLATION] "I do not think - I do not imagine anything could happen inside Ennahda that I am not aware of, that I was not aware of";

- the appellant had contacts with the members of Rached Ghannouchi's family: he organized the Tunisian electoral campaign of Khaled Ghannouchi, Rached Ghannouchi's brother; he had contacts with Rached Ghannouchi's daughter in Canada; he had telephone discussions with a nephew of Ghannouchi, Souhaiel, who was living

in the U.S.; Rached Ghannouchi himself was to come and testify in the appellant's case at the latter's request;

- on November 26, 1998 the appellant was still a member of Ennahda and Rached Ghannouchi was still its president.

[23] The Refugee Division also found that the appellant completely lacked sincerity and honesty. In its view, he tried to minimize his role in MTI/Ennahda and his knowledge of the violence promoted by the movement. Clearly the appellant could not be regarded as an ordinary member. The appellant was accepted by the movement as a member and he chose to live in hiding, as he was advised to do, and not to take a public part. In the view of the Refugee Division, the appellant was part of the movement's clandestine command structure. As the person in charge of the Gabès political office, he could take decisions of importance for the movement.

[24] Notwithstanding the fact that the appellant testified that he had no knowledge of the serious non-political crimes committed by MTI/Ennahda, the Refugee Division concluded, at pp. 128 and 130 of its decision, that he was responsible for those crimes as an accomplice:

[TRANSLATION]

> It appeared from the evidence that not only was and is the claimant a member of MTI/Ennahda, but he held important duties in that movement. In view of the claimant's important function in MTI/Ennahda, the panel concludes that he was aware of the crimes committed by the organization and for that reason shared in the aims and purposes pursued by his movement in committing those crimes. In this regard, the panel refers to the many acts of violence, serious non-political crimes, committed by MTI/Ennahda and listed earlier, including the use of Molotov cocktails by members; acid thrown into university students' faces and also at members of the judiciary in Tunisia and Algeria; physical attacks in schools and universities; threatening letters; burning of automobiles; conspiracy to murder leading figures in the Tunisian government; attempted fires in faculties; bomb attacks, including those at Sousse and Monastir on August 2, 1987; arson at Bab Souika in February 1991, where a man died; terrorist attacks, including a bomb attack that occurred in France in 1986; weapons trafficking in Europe, from 1987 onwards, and conspiracy to violently overthrow the former Tunisian President, Habib Bourguiba, a conspiracy which lasted from 1986 to November 1987.
>
> None of these crimes may be described as political, that is, with a realistic political purpose, since the means used were disproportionate to the end sought. In this regard, we cite the following passage from *Gil v. Canada*, [1995] 1 F.C. 509:
>
> The political element should in principle outweigh the common law character of the offence, which may not be the case if the acts committed are grossly disproportionate to the objective, or are of an atrocious or barbarous nature.

> Several of these acts may quite easily be described as atrocious or barbarous. We think of the acid thrown in people's faces, the Bab Souika attack, where a watchman was burned alive, and the terrorist attacks at Sousse and Monastir, in which 13 persons, civilians, were injured.
>
> We feel it is important to note that the claimant never left MTI/Ennahda, even when he could easily have done so. On the contrary, he continued to discharge duties as a leader in the movement. In fact, at no time during the hearing did the claimant renounce MTI/Ennahda and/or its leader Rached Ghannouchi.
>
> Consequently, in accordance with *Gil, Malouf, Moreno, Ramirez, Sivakumar* and *Pushpanathan*, the panel has serious reasons for considering that the claimant has been guilty by association of the commission of serious non-political crimes, listed above, as a result of his involvement and leadership role in MTI/Ennahda. In fact, the panel is of the opinion that the claimant's mere membership in MTI/Ennahda is sufficient, since as we indicated earlier the primary aims of the movement were limited and brutal. The panel places this membership by the claimant in MTI/Ennahda at 1983, when he was part of an educational MTI cell in which he studied the movement's ideology. At that time he also attended general meetings of the movement. Previously, that is in 1980, he attended MTI meetings at the university as a sympathizer.
>
> Accordingly, from 1983 to October 1992, the date he arrived in Canada, the claimant was responsible by association for serious non-political crimes committed by MTI/Ennahda.

[25] This is why the Refugee Division concluded that the appellant should be excluded from the definition of a refugee under Article 1F(*b*) of the Convention.

Trial judgment:

[26] The trial judge had to decide whether the Refugee Division had committed an error justifying the Court's intervention, and whether certain facts could arouse a reasonable fear of bias or lack of independence by the Refugee Division. The trial judge gave negative answers to these two questions.

[27] In the judge's view, although the Refugee Division found that the appellant was responsible for 12 non-political crimes, including the Bab Souika arson in February 1991, only the crimes committed after the appellant became a member of MTI/Ennahda in 1988 could be held against him. Consequently, the crimes noted by the Refugee Division as being committed before 1988 could not be considered in determining the appellant's complicity by association.

[28] On this point the judge limited herself to one non-political crime, namely the Bab Souika arson in 1991, since she felt that one serious non-political crime sufficed to exclude the appellant.

[29] Before indicating that she was satisfied that the Refugee Division's conclusion, namely that MTI/Ennahda had perpetrated the Bab Souika arson, was not patently unreasonable, the judge carefully reviewed the Refugee Division's reasons

given in support of its conclusion and concluded that the evidence mentioned by the Refugee Division could reasonably serve as a basis for that conclusion.

[30] Further, after describing the Bab Souika fire as "barbarous and atrocious" and relying on this Court's judgment in *Gil v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 508, and on the House of Lords' decision in *T. v. Secretary of State for the Home Department*, [1996] 2 All E.R. 865, the judge concluded that the Bab Souika fire was a serious non-political crime within the meaning of Article 1F(*b*) of the Convention. This finding by the judge was not disputed by the appellant, who also did not challenge the conclusion that the other crimes noted by the Refugee Division were non-political.

[31] The judge then turned to the concept of complicity by association. Noting that the Refugee Division had concluded that the appellant, placed at the highest hierarchical level of MTI/Ennahda in Gabès, could not have been unaware of the existence of the arson at Bab Souika, the judge said that in her view this inference could reasonably be based on the evidence.

[32] The judge noted the Refugee Division's finding that, despite the commission of violent crimes by MTI/Ennahda, the appellant did not leave the movement or cease to hold his position of leadership. This finding led the Refugee Division to conclude that the appellant had knowingly "tolerated" the Bab Souika arson. In view of this evidence the trial judge concluded that the Refugee Division could find that there had been complicity by association in the Bab Souika arson by the appellant.

[33] In view of the important position the appellant held in MTI/Ennahda, the judge felt it was not necessary to consider the Refugee Division's finding that MTI/Ennahda was dedicated to limited and brutal purposes. In support of this viewpoint, the judge noted that the appellant made no move to withdraw from the organization as three of its influential members did. At paras. 123 and 124 of her reasons, the trial judge came to the following conclusions:

[123] For these reasons, it was not unreasonable for the Refugee Division to conclude that it had serious reasons to consider that the applicant committed the aforesaid non-political crime as an accomplice by association.

[124] As I said earlier, since only one serious non-political crime will suffice for exclusion of the applicant, there is no need to consider the validity of the panel's decision on the other exclusionary points.

[34] On the exclusion of the plaintiff under Article 1F(*c*) of the Convention, the judge felt that in view of her conclusion that the appellant was a person covered by Article 1F(*b*), it was not appropriate for her to rule on that point.

[35] Finally, the judge addressed the appellant's arguments regarding the Refugee Division's impartiality and independence, and concluded that none of the acts or incidents raised by the appellant resulted in a reasonable fear of bias by the Refugee Division.

[36] At the hearing before the trial judge, the parties asked that a number of questions be certified for determination by this Court. After reviewing these questions, the judge certified the questions set out in para. 3 of these reasons.

[37] Clearly, the appeal is not limited to these questions, since in*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada indicated that when questions of general importance were certified this Court was not limited to those questions and could consider all the questions raised by the appeal.

Questions at issue:

[38] The appellant asked the Court to answer the following questions:

1. Does a person's association with a political organization entail complicity in non-political crimes allegedly committed before such association for purposes of the exclusion stated in Article 1F(*b*) of the Convention?

2. Are the rules on complicity by association for purposes of Article 1F(*a*) of the Convention applicable to the crimes noted by the Refugee Division for the period from January 1990 to December 1991, so as to exclude the appellant under Article 1F(*b*)?

3. If so, can these crimes allegedly committed by MTI/Ennahda be attributed to the appellant as an accomplice by association in accordance with the rules stated by this Court in *Sivakumar, supra*?

4. Was the appellant tried by an independent and impartial tribunal after a fair and just trial?

5. Did the Refugee Division derive from the evidence erroneous findings of fact that it made in a perverse or capricious manner without regard for the exculpatory material before it?

[39] The appellant also invited this Court to decide four questions dealing with the application of Article 1F(*c*) of the Convention. For the reasons that follow, it will not be necessary for me to deal with those questions.

Analysis:

[40] I begin my analysis with the last question raised by the appellant, namely whether on the evidence certain of the Refugee Division's findings of fact could be described as unreasonable or patently unreasonable.

[41] There can be no question, as the judge noted at para. 103 of her reasons, that the Refugee Division examined the oral and documentary evidence before it with great care before formulating its findings of fact. As well, the Refugee Division dwelt at some length on the credibility of the witnesses, including the appellant, whom it had occasion to hear.

[42] After a careful review of the evidence and of the Refugee Division's decision, I am entirely unable to conclude, as the appellant wishes me to do, that certain findings of fact made by the Refugee Division were perverse, capricious or without regard to the evidence. I entirely concur in the judge's opinion that the evidence could reasonably serve as a basis for the Refugee Division's findings of fact. What the appellant is actually asking this Court to do is what we cannot do on an application for judicial review, that is, to reassess the evidence that was before the Refugee Division.

[43] At para. 162 of his memorandum the appellant indicated that he would deal [TRANSLATION] "jointly with questions 8 and 9" (that is, questions 4 and 5 at issue in this Court), namely whether the appellant was tried by an independent and impartial tribunal after a fair and just trial, and whether the Refugee Division derived from the evidence erroneous findings of fact that it made in a perverse or capricious manner without regard for the exculpatory evidence before it. A careful reading of paras. 163 to 176 of his memorandum, where these questions are dealt with, discloses no argument regarding question 5 and no example of a finding of fact allegedly made in a perverse or capricious manner or without regard to the evidence.

[44] Accordingly, the appellant did not persuade the Court that the Refugee Division relied on erroneous findings of fact made in a perverse or capricious manner or without regard to the evidence, which would justify the Court's intervention.

[45] The fourth question raised by the appellant was based on the assumption that he was not tried by an independent and impartial tribunal after a fair and just trial. The acts and incidents which the appellant mentioned under this heading are essentially the same as those he raised before the judge, namely:

(i) the coordinating member, Michel Shore, did not have the right to appoint members to re-hear the appellant's refugee application after his application for judicial review was approved by the Trial Division, since the appointment of members was part of the decision-making process of the hearing *de novo*: according to the appellant, the Refugee Division's independence was affected in view of the appointment made by Mr. Shore, who had sat as a member of the panel which rendered the Refugee Division's first decision;

(ii) renewing the mandate of one of the members of Refugee Division, Mr. Ndejuru, while the proceeding was ongoing placed the latter under the discretionary and arbitrary influence of the executive;

(iii) the involvement of the Immigration and Refugee Board in financing the respondent's case;

(iv) the Refugee Division neither administered nor assessed the evidence in a fair way; in support of this statement, the appellant gave the following example: (a) although the Refugee Division agreed to translate simultaneously from English into French the testimony of two expert witnesses for the Minister, it denied the appellant similar treatment when he asked that an interpreter be available to translate simultaneously his wife's testimony from Arabic into French; (b) the Refugee Division favoured the Minister and his expert witnesses, Messrs. Duran and Héchiche; (c) the Refugee Division relied for its conclusion regarding interpretation of Article

1F(*c*) of the Convention on a legal opinion by the Institut suisse de droit comparé, despite its dismissal of the testimony of Tinkley Abiem, which in its opinion was speculative, whereas the legal opinion by the Institut suisse de droit comparé was to the same effect as that of Mr. Abiem.

[46] At paras. 126 to 152 of her reasons the judge painstakingly analyzed each of the appellant's arguments regarding the Refugee Division's impartiality and independence and, at para. 156, concluded as follows:

[156] In short, therefore, I consider that an informed person viewing the matter realistically and practically, and having thought the matter through, would not fear that the panel had been partial because of acts done by the administrative staff, decisions made by Mr. Shore as coordinator, the renewal of Mr. Ndejuru's mandate or the panel's decision on the administration and assessment of the evidence.

[47] The judge's conclusion and the reasons she gives in support of that conclusion seem to me to be entirely beyond reproach. In my view, an informed person would have absolutely no fear of bias by the Refugee Division or of any impairment of its independence.

[48] I now turn to the first question. The appellant asked the Court to conclude that there can be no complicity in non-political crimes through association by a person with a political organization, for purposes of the exclusion in Article 1F(*b*) of the Convention, when the crimes were committed before the person was associated with the political organization. In my opinion, it is not necessary to answer this question in the case at bar. I will explain.

[49] The Refugee Division concluded that 12 non-political crimes committed between 1986 and 1992 could be attributed to MTI/Ennahda, and that the appellant could be held responsible for them as an accomplice. Despite that finding, the judge concluded that only the crimes committed after January 1988, the time at which the appellant became a member of MTI, were to be considered.

[50] With no explanation, the judge dismissed the Refugee Division's conclusion found at p. 129 of its decision, namely that the appellant's association with MTI/Ennahda began in 1983:

[TRANSLATION]

> The panel places this membership by the claimant in MTI/Ennahda at 1983, when he was part of an educational MTI cell in which he studied the movement's ideology. At that time he also attended general meetings of the movement. Previously, that is in 1980, he attended MTI meetings at the university as a sympathizer.

[51] This conclusion by the Refugee Division resulted from a careful and painstaking examination of all the evidence, including the appellant's PIFs. In particular, in the PIF which he completed and signed on October 12, 1992, the appellant said he joined the MTI in 1980. At p. 115 of its decision the Refugee Division noted this statement:

[TRANSLATION]

> In January 1988 the claimant became a member of the MTI. In doing this, he said he had to have a complete belief in the MTI and "take an oath" to the leaders and the movement. His membership was based on confidence in the movement. It is important to note that according to Exhibit P-1a (the claimant's PIF dated and signed on 12/10/92), at p. 8(a) of the document in question, the claimant stated that he became a member of the MTI/Ennahda in 1980: "as I said earlier, I have been a member of the Mouvement de la tendance islamique (which in 1988 became the "Nahda" movement) since 1980".

[52] Accordingly, it appears that the judge erred when she set the appellant's membership in MTI/Ennahda at January 1988, since on the evidence the Refugee Division's finding was not in any way unreasonable.

[53] I therefore consider that all the serious non-political crimes committed by MTI/Ennahda since 1983 could have been considered by the Refugee Division in connection with the appellant's complicity by association. Consequently, it is not necessary in the case at bar for me to decide whether the concept of complicity by association can be applied to crimes committed before the person was associated with the said political organization.

[54] I must now address the second question which the appellant asked the Court to decide. This accordingly leads me to the main question raised by this appeal, namely interpretation of Article 1F(*b*) of the Convention. This question also leads me to frame a reply to the first question certified by the judge. For ease of reference, I reproduce it again:

> Are the rules laid down by the Federal Court of Canada in *Sivakumar v. Canada [(Minister of Citizenship and Immigration)]*, [1994] 1 F.C. 433, on complicity by association for purposes of implementing Article 1F(*a*) of the *United Nations Convention Relating to the Status of Refugees* applicable for purposes of an exclusion under Article 1F(*b*) of the said Convention?

[55] In *Sivakumar, supra*, this Court concluded in connection with the application of Article 1F(*a*) of the Convention that an individual could be held responsible for acts committed by others on account of his close association with those others. This is what Linden J.A. said at 439, 440 and 442:

> Another type of complicity, particularly relevant to this case is complicity through association. 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 onlooker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts" (*Ramirez, supra*, at page 317).

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 . . .

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 . . .

. . . . .

Similarly, 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. Complicity by reason of one's position of leadership within an organization responsible for international crimes is analogous to the theory of vicarious liability in torts, but the analogy is not altogether apt, since it is clear that, in the context of international crimes, the accused person must have knowledge of the acts constituting the international crimes.

To sum up, association with a person or organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. Mere membership in a group responsible for international crimes, unless it is an organization that has a "limited, brutal purpose", is not enough (*Ramirez, supra*, at page 317). Moreover, 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.

[Emphasis added.]

[56] In *Bazargan v. M.E.I.* (1996), 205 N.R. 282, this Court restated these principles *per* Décary J.A. at 287:

[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., 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.

> [12] That being said, everything becomes a question of fact. The Minister does not have to prove the respondent's guilt. He merely has to show - and the burden of proof resting on him is "less than the balance of probabilities" (*Ramirez, supra*, at p. 341 F.C.) - that there are serious reasons for considering that the respondent is guilty. In the case at bar, the Board concluded as follows (A.B., at p. 71):

> [TRANSLATION] Because of the training he received and the responsible positions he held, inter alia between 1974 and 1978 and from 1978 until the fall of the Shah of Iran, Mr. Bazargan could not have failed to be very well informed about the kind of repressive measures used by SAVAK to punish any social and political dissidence in the country. However, he collaborated with that organization for many years as a senior police officer in the Iranian security forces. Accordingly, given the notoriousness of SAVAK's human rights violations, the positions of authority the claimant held until 1980 and the knowledge he necessarily had of the situation, we must conclude that in this case there are serious grounds for considering that the claimant tolerated, encouraged or even facilitated SAVAK's acts and therefore became guilty of acts contrary to the purposes and principles of the United Nations.

[57] Recently, in *Harb v. M.C.I.*, 2003 FCA 39, dated January 27, 2003, Décary J.A. explained at para. 11 of his reasons the concept of complicity by association on which the exclusion under Article 1F(*a*) could be based.

> [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. [References omitted.]

[58] The appellant is asking this Court to conclude that the rules relating to complicity by association for the purposes of Article 1F(*a*) are not applicable so as to exclude him under Article 1F(*b*). In the appellant's submission, the Refugee Division and the judge gave Article 1F(*b*) an excessive meaning which is contrary to the restrictive and limited interpretation that such an exceptional provision should be given. In so doing, the purpose of Article 1F(*b*) was not observed.

[59] In the appellant's submission, the intention of the signatories of the Convention was to ensure that persons committing non-political crimes could not avoid extradition proceedings, criminal prosecution or the execution of a sentence of imprisonment in their countries by seeking refugee status in a third country. Since there is no direct or indirect evidence to link him to the crimes ascribed to him by the Refugee Division, the appellant argued that he could not be excluded under Article 1F(*b*). He further submitted that he could not be the subject of any type of criminal prosecution since there is no physical proof to connect him in any way whatever with the commission of the crimes ascribed to him. The appellant concluded by submitting that the deduction of complicity by association for establishment of a serious non-political crime is contrary to Article 1F(*b*) of the Convention.

[60] In support of his arguments, the appellant referred to the judgments of the Supreme Court of Canada in *Canada v. Ward*, [1993] 2 S.C.R. 689, and *Pushpanathan v. Canada*, [1998] 1 S.C.R 982, as well as the judgment of this Court in *Chan v. Canada*, [2000] 4 F.C. 390.

[61] In *Chan, supra*, this Court had to decide whether a claimant could be excluded from the definition of a refugee under Article 1F(*b*) of the Convention on the ground that he was convicted in the U.S. of offences relating to drug trafficking and had served his sentence there. The Court concluded that a claimant could not be excluded in such circumstances.

[62] Relying *inter alia* on the Supreme Court's judgments in *Pushpanathan, supra*, and *Ward, supra*, Robertson J.A. for the Court said that in his opinion giving Article 1F(*b*) an interpretation that will have the effect of excluding a claimant on account of a crime committed abroad, for which he had served a sentence, would be contrary to the general structure of the *Immigration Act*, and in particular would have the effect of repealing s. 46.01(1)(*e*)(i) of that Act. At para. 15 of his reasons Robertson J.A. said the following:

> [15] In summary, it is clear that the broad interpretation which the Minister wishes to place on Article 1F(*b*) is in conflict with the purpose of that provision as articulated in *Pushpanathan, supra*, and as confirmed by academic commentators. Moreover, that interpretation fails to recognize that the *Immigration Act* has already in place a statutory scheme for dealing with persons who have been convicted of serious crimes committed outside Canada. The one thread that runs throughout the relevant provisions is that no one who seeks or has obtained refugee status can be removed from Canada simply because they have been convicted of a serious crime in another country. In both instances, the Minister must issue a danger opinion before any steps can be taken to remove the person from Canada. By contrast, the broad interpretation that the Minister seeks to place on Article 1F(*b*) has the effect of removing this safeguard which is premised on the reality that a person may have a valid refugee claim even though they have garnered a criminal record in another jurisdiction. If one were to accept the Minister's interpretation of Article 1F(*b*), a prior conviction for a serious non-political offence would operate to automatically deny that person's right to a refugee hearing, regardless of the person's attempts at rehabilitation and whether or not they constitute a danger to the Canadian public. Bluntly stated, the interpretation

> being advanced by the Minister has the effect of virtually abrogating subparagraph 46.01(1)(*e*)(i) of the *Immigration Act* by eliminating the need for the Minister to issue a danger opinion. As a matter of statutory interpretation, the only way in which the apparent conflict can be resolved is to construe Article 1F(*b*) in a manner consistent with its known purpose.

[63] It is important to note the comments by Robertson J.A. at para. 8 of his reasons, namely that the wording of Article 1F(*b*) is "extremely broad". His refusal in that case to interpret Article 1F(*b*) so as to exclude Mr. Chan is due solely to the fact that such an interpretation would have the effect of conflicting with the general system of the Act.

[64] In my opinion, this Court's judgment in *Chan, supra*, does not help the appellant in any way, since in the case at bar he was neither charged with nor convicted of the crimes for which the Refugee Division held him responsible as an accomplice by association.

[65] In *Chan, supra*, as I indicated earlier, Robertson J.A. based his conclusion in part on the comments of Bastarache and La Forest JJ. in *Pushpanathan* and *Ward, supra*. In *Pushpanathan*, at 1033 and 1034 (para. 73 of his reasons), Bastarache J. made the following comments:

> It is also necessary to take account of the possible overlap of Article 1F(*c*) and F(*b*) with regard to drug trafficking. <u>It is quite clear that Article 1F(*b*) is generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status, but that this exclusion is limited to serious crimes committed before entry in the state of asylum</u>. Goodwin-Gill, *supra*, at p. 107, says:
>
> With a view to promoting consistent decisions, UNHCR proposed that, in the absence of any political factors, a presumption of serious crime might be considered as raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery.
>
> The parties sought to ensure that common criminals should not be able to avoid extradition and prosecution by claiming refugee status. Given the precisely drawn scope of Article 1F(*b*), limited as it is to "serious non-political crimes" committed outside the country of refuge, the unavoidable inference is that serious non-political crimes are not included in the general, unqualified language of Article 1F(*c*). Article 1F(*b*) identifies non-political crimes committed outside the country of refuge, while Article 33(2) addresses non-political crimes committed within the country of refuge. Article 1F(*b*) contains a balancing mechanism in so far as the specific adjectives "serious" and "non-political" must be satisfied, while Article 33(2) as implemented in the Act by ss. 53 and 19 provides for weighing of the seriousness of the danger posed to Canadian society against the danger of persecution upon *refoulement*. This approach reflects the intention of the signatory states to create a humanitarian balance between the individual in fear of persecution on the one hand, and the legitimate concern of states to sanction criminal activity on the other. The

> presence of Article 1F(*b*) suggests that even a serious non-political crime such as drug trafficking should not be included in Article 1F(*c*). This is consistent with the expression of opinion of the delegates in the *Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees* (1989), vol. III, at p. 89. [Emphasis added.]

[66] In this passage Bastarache J. indicated that the purpose of Article 1F(*b*) was to prevent non-political criminals from avoiding extradition by claiming refugee status. It is important to note, first, that in the case at bar the claimant is a fugitive, that is, he fled his country before being prosecuted for the crimes for which he was sentenced *in absentia* to 21½ years' imprisonment by the Gabès Appeal Court. Secondly, most if not all of the non-political crimes at issue here, namely those attributed to MTI/Ennahda and for which the Refugee Division held the appellant responsible, are extraditable crimes under the rules applicable to extradition. Third, the appellant was not convicted of any of the 12 non-political crimes for which the Refugee Division concluded that there was serious reasons for considering that he had committed them.

[67] With all due respect for the contrary view, I cannot find any intention in the remarks of Bastarache J. to limit the non-political crimes covered by Article 1F(*b*) to those which are extraditable under a treaty. Such a limitation would be surprising to say the least, since first it is in no way contained in the wording of Article 1F(*b*), and second, the limitation would lead to an absurd situation in which extraditable criminals would be excluded from refugee protection whereas offenders whose crimes were not extraditable crimes would not be excluded because Canada had not concluded an extradition treaty with the country in which the serious non-political crimes were committed.

[68] Rather, I feel that the comments by Bastarache J. are simply an indication of the nature and seriousness of crimes which may fall under the Article 1F(*b*) exclusion, that is, serious crimes to which the extradition treaties might be fully applicable.

[69] I would add that it is important to bear in mind that the issue in *Pushpanathan, supra*, concerned the interpretation of Article 1F(*c*) of the Convention, and in particular whether an individual who had pleaded guilty to the crime of drug trafficking in Canada could be excluded from the definition of a refugee because of the application of Article 1F(*c*). In my opinion, the Supreme Court's judgment in *Pushpanathan, supra*, did not have the effect of making the rules on complicity by association stated by this Court in *Sivakumar, supra*, and *Bazargan, supra*, inapplicable.

[70] The other judgment on which Robertson J.A. relied in *Chan, supra* is *Ward, supra*, in which at p. 743 of his reasons La Forest J. said the following:

> The articulation of this exclusion for the "commission" of a crime can be contrasted with those of s. 19 of the Act which refers to "convictions" for crimes. Hathaway, *supra*, at p. 221, interprets this exclusion to embrace "persons who are liable to sanctions in another state for having committed a genuine, serious crime, and who seek to escape legitimate criminal liability by claiming refugee status". In other words, Hathaway would appear to confine paragraph (*b*) to accused persons who are fugitives from prosecution. <u>The</u>

> interpretation of this amendment was not argued before us. I note, however, that Professor Hathaway's interpretation seems to be consistent with the views expressed in the *Travaux préparatoires*, regarding the need for congruence between the Convention and extradition law; see statement of United States delegate Henkin, U.N. Doc. E/AC.32/SR.5 (January 30, 1950), at p. 5. As such, Ward would still not be excluded on this basis, having already been convicted of his crimes and having already served his sentence. This addition to the Act does answer, however, in a more general fashion, the concerns raised by the majority of the Court of Appeal and renders less forceful the argument that morality and criminality concerns need be accommodated by narrowing the definition of "particular social group". [Emphasis added.]

[71] At para. 7 of his reasons in *Chan, supra*, Robertson J.A., before reproducing the above-cited passage from *Ward, supra*, noted that in an *obiter* La Forest J. had adopted the viewpoint expressed by Prof. Hathaway at pp. 221 and 222 of his text, *The Law of Refugee Status*, namely that exclusion under Article 1F(*b*) is limited to accused persons who are fugitives from prosecution.

[72] It is also worth noting that in *Ward, supra*, the Supreme Court did not have to interpret Article 1F(*b*) in order to dispose of the case before it. Consequently, La Forest J.'s remarks were clearly made *obiter*. This is apparent on reading his comments found at p. 743. I therefore consider that like *Pushpanathan, supra, Ward, supra*, is not in any way a bar to the application of the rules on complicity by association stated in *Sivakumar, supra*. Further, the British Court of Appeal and the Federal Court of Australia have categorically rejected the interpretation of Article 1F(*b*) which the Supreme Court of Canada appears to suggest.

[73] In *In the Matter of B*, [1997] E.W.J. No. 700, a bench of two judges of the British Court of Appeal had to decide whether an application for leave to an appeal an Immigration Appeal Tribunal decision should be granted. Since such leave could only be granted if the appeal raised a point of law, the Court of Appeal had to decide whether the point of law raised by B was a serious one, namely whether he could be a person in respect of whom there were serious reasons for considering that he had committed a serious non-political crime, when there was no evidence whatever that he had committed a specific identified crime.

[74] The relevant facts of that case were the following. In 1988 B, a Marxist-Leninist, became associated with the Turkish Revolutionary Fighting Association, and in 1991 he became associated with the Kurdish movement in Turkey, the PKK. After a training period in which he was given a rifle and a uniform, B became responsible for propaganda and logistics in the PKK, a terrorist organization engaged in the commission of crimes, in particular murders and terrorist attacks on military targets and on the civilian population.

[75] In a short time B, as commander, was made responsible for 150 to 500 persons who were members of the PKK. At all relevant times he was a senior member of the PKK and was part of a team the function of which was to make the organization's terrorist activities possible. There could be no doubt that B knew the PKK was engaged in violent activity and that he considered that activity fully justified in order to attain the organization's ends.

[76] The Immigration Appeal Tribunal refused to believe that B had left the PKK or dissociated himself from it in 1993, and concluded that the murders and terrorist attacks on the civilian population were not in any way political crimes and that there were serious reasons for considering that B had committed serious non-political crimes. The tribunal based this conclusion on the fact that B held a position of responsibility in the PKK, that he had been associated with the PKK's activities and that consequently he could not avoid the consequences of that association by saying that the evidence did not show his direct participation in the commission of any specific crime, such as a bombing.

[77] B's argument was that he could not be excluded under Article 1F(*b*) unless a serious non-political crime was identified and he could be held responsible for that crime. In B's submission, it was not enough to show that he was part of a group the members of which committed serious non-political crimes. In order to exclude him the evidence had to show that he had in fact committed a particular crime. Since there was no evidence of his direct participation in the commission of a serious non-political crime, he could not be excluded under Article 1F(*b*).

[78] Lord Justice Mummery, for the Court of Appeal, concluded that leave to appeal should be denied since the interpretation of Article 1F(*b*) suggested by the applicant had no real chance of success. Lord Justice Mummery disposed of the question as follows, at para. 21 of his reasons:

> [21] In my judgment Mr. Nicol's construction does not have any real prospect of being accepted by the Court of Appeal. Asylum cases are to be contrasted with the position on extradition. In the case of T the House of Lords found assistance in the extradition cases in deciding on the proper meaning to be given to the expression "serious non-political crime". In an extradition case it will however also be necessary to identify an extradited crime of which the person has been accused or convicted. The position in asylum is different, as is clear from the less specific language of Article 1F*(b)*. The question to be answered (which was answered correctly by the Appeal Tribunal) was not whether B had committed or been convicted of a crime or whether he had been accused of an extradited crime, which would require identification of a particular offence. The question is: is B a person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime? The emphasis is on the "serious reasons for considering" that he has committed such a crime. The facts in the decision of the Special Adjudicator and the Appeal Tribunal plainly justified the Tribunal in answering that question in the affirmative, even though neither the Special Adjudicator nor the Appeal Tribunal identified any particular occasion or incident in which the commission of a crime occurred. The Tribunal correctly interpreted this provision. They correctly applied it to the facts of the case. For that reason I would not give leave to appeal. [Emphasis added.]

[79] Accordingly, in the view of the British Court of Appeal, in a political refuge situation, unlike the well-settled rules on extradition, it is not necessary for a specific crime to be attributed to a claimant or for the latter to be accused of that crime in order for him to be excluded under Article 1F(*b*). The only question that must be answered is whether there are serious reasons for considering that a claimant

committed a serious non-political crime. Applied to the facts in the case at bar, the question is whether there are serious reasons for considering that the appellant was responsible for one or more of the serious non-political crimes attributed to the organization with which he had been associated since 1983.

[80] It is important to note that for all practical purposes the facts in *In the matter of B, supra*, are identical to the facts in the case at bar. B was a member of the PKK and the appellant was a member of MTI/Ennahda, both organizations being engaged in violent activity such as murder and bombing attacks. B was a leading member of the PKK and the appellant held important duties in MTI/Ennahda. Although they knew that their organizations were committing serious crimes, neither B nor the appellant dissociated himself from his organization.

[81] In *Ovcharuk v. Minister for Immigration and Multicultural Affairs* (1998), 158 A.L.R. 289, the Australian Federal Court also had to deal with a problem of the interpretation of Article 1F(*b*). Although the factual situation in that case was different from that in the case at bar and from *In the Matter of B, supra*, the rules stated by the Australian Court in response to two of the questions raised by the appeal are in my opinion relevant and applicable to the facts in the case at bar. At p. 297 of his reasons, Branson J.A. stated those two questions as follows:

The appeals were brought on the following, to some extent alternative, grounds:

> (1) that Art 1F(*b*) of the Refugees Convention applies only to "fugitives from justice"; that is, to persons who have committed serious crimes overseas and are seeking to escape criminal liability by claiming refugee status;
>
> . . . . .
>
> (4) that where the respondent relies on Art 1F(*b*), the respondent must identify with precision and particularity the relevant "serious non-political crime" which was committed outside Australia and must show that there are "serious reasons for considering" that the applicant has committed that crime:
>
> . . . . .

[82] For Branson and Whitlam JJ.A., the answer to the first question was to be found in the very wording of Article 1F(*b*). At p. 300, Branson J.A. answered as follows:

> Nothing in the context, object and purpose of the Refugees Convention, in my view, requires that Art 1F(*b*) should be construed other than according to the ordinary meaning of the words in the Article. According to such ordinary meaning, the article is not confined, in its operation, to fugitives from foreign justice. [Emphasis added.] . . .

Whitlam J.A. answered the question as follows, at 294:

> In my opinion, the ordinary meaning of the words used in Art 1F(*b*) does not suggest the qualification contended for by the appellant's counsel. What is

most striking to me about Art 1F is the plain, matter-of-fact requirement that there should be "serious reasons for considering that" a person "has committed" a specific type of crime (paras (*a*) and (*b*)), or "has been guilty" of the proscribed acts: par (*c*). <u>Charges or convictions are not required</u>. Indeed, in some cases, even though a person claiming to be a refugee has been charged with or convicted of an offence, it may be perfectly clear that there are no serious reasons to consider that person has committed a crime. In other cases, such facts may be strongly probative of such serious reasons. It all depends on the facts of the particular case. <u>Certainly the language may also apply to fugitives from prosecution or, for that matter, punishment. But there is no obvious reason to confine the plain meaning of the words to that category of persons or to those in respect of whom an extradition request may be made to the country of refuge.</u> [Emphasis added.]

[83] Sackville J.A. concurred with the interpretation of Article 1F(*b*) arrived at by Branson and Whitlam JJ.A. Saying that he concurred with Branson J.A.'s reasons, Sackville J.A. at 302, 303 and 304 dealt *inter alia* with the appellant's arguments that the Travaux Préparatoires for the Convention supported a limiting interpretation of Article 1F(*b*):

> I accept that, at the time the Refugees Convention was framed, the international community had expressed the view that people seeking to escape prosecution for serious criminal offences should be entitled neither to asylum from persecution, nor to the protection of the IRO. But that fact does not determine whether Art 1F(*b*) of the Refugees Convention, read in context, was intended to exclude *only* such people from the protection afforded by the Refugees Convention, as distinct from others who have committed serious crimes outside the country of refuge. As Grahl-Madsen acknowledges (p. 290), the wording of Art 1F(*b*) of the Refugees Convention (unlike Art 7(*d*) of the High Commissioner Statute) makes no mention of extradition. Nor does it refer to the existence of any extradition treaty between the countries in question. This contrasts with earlier draft proposals for Refugee Conventions which incorporated express references to Art 14(2) of the Universal Declaration of Human Rights: see Memorandum by the Secretary-General of the United Nations to the United Nations Economic and Social Council Ad Hoc Committee on the Statelessness and Related Problems, and the Draft convention Relating to the Status of Refugees, Art 3 and Commentary (3 January 1950, UN Doc E/AC 32/2, p. 22); France: Proposal [to the Ad Hoc Committee] for a Draft convention, Art 1 (17 January 1950 UN Doc E/AC 32/L.3, at 3).
>
> . . . <u>Scrutiny of the debates supports Goodwin-Gill's observation that "the travaux préparatoires provide no hard answers" as to the intended scope of Art 1F(*b*)</u>: G Goodwin-Gill, *The Refugee in International Law* (2nd ed, 1996), p. 104.
>
> . . . . .

> As is so often the case, the text of Art 1F(*b*) of the Refugees Convention represented an accommodation among competing views. One important strand of opinion at the Conference was that the receiving country should not be required to grant refugee status to persons who had committed serious crimes outside that country. The formulation ultimately reflected that strand of opinion. In short, the travaux préparatoires do not support the view that Art 1F(*b*) should be construed so as to be confined to persons who have committed crimes of an extraditable character, or who are fleeing from threatened prosecution. Accordingly, the appellant's first argument should be rejected.
>
> [Emphasis added.]

[84] After a careful reading of the Travaux Préparatoires I can only agree with G. Goodwin-Gill when he says in his text *The Refugee in International Law* that the Travaux Préparatoires give no clear answer on the scope of Article 1F(*b*). Consequently, I cannot accept Prof. Hathaway's opinion, which appeared to find favour with Bastarache and La Forest JJ. in *Pushpanathan, supra*, and *Ward, supra*, that the exclusion under Article 1F(*b*) is limited to persons charged with serious non-political crimes who seek to evade prosecution.

[85] On the second point, regarding the particularization and specific identification of the crime with which the claimant is charged, Branson J.A. replied specifically at 301:

> In my opinion, the terms of Art 1F(*b*) suggest against a requirement that every element of an identified offence must be able to be identified and particularized before the article may be relied upon. What is required is that "there are serious reasons for considering" that the person seeking refuge "has committed a serious non-political crime outside the country of refuge prior to his admission to that country". Whether there are serious reasons for so considering will depend upon the whole of the evidence and other material before the decision-maker. [Emphasis added.]

[86] It should be mentioned that Branson and Whitlam JJ.A. considered that the Supreme Court of Canada's judgment in *Ward, supra*, and *Pushpanathan, supra*, were not conclusive as *inter alia* the interpretation of Article 1F(*b*) was not at issue in either of those cases (see p. 294 for the reasons of Whitlam J.A. and p. 300 for those of Branson J.A.).

[87] The judgment of the Federal Court of Australia is consistent with that of the British Court of Appeal in *In The Matter of B, supra*. Those two judgments support the interpretation which the respondent is asking this Court to accept. I should like to conclude my review of precedent by noting that the Deuxième Chambre française of the Commission permanente de recours des réfugiés ("the Commission") came to a similar conclusion on the interpretation of Article 1F(*b*) of the Convention to that of the British and Australian Courts in a case involving an Algerian claimant who was a member of the FIS (ref.: 94/993/R2632 - March 28, 1995).

[88] In that case, the claimant was seeking refugee status in France. The story he gave the Commissaire général aux réfugiés et aux apatrides ("the Commissaire

général") was that in 1993, in view of the Pakistani government's decision to deport any Islamist militant from an Arab country, he feared deportation from Pakistan, where he was working for humanitarian organizations assisting Afghan refugees, and decided to seek asylum in Europe.

[89] The Commissaire général relied *inter alia* on a report by the Belgian Embassy in Islamabad, that the FIS was an organization involved in international terrorism, and concluded on July 8, 1994, that the claimant should be excluded under Article 1F of the Convention.

[90] Before the Commission, Belgium, intervening in the case, asked that the Commissaire général's decision be upheld and submitted *inter alia* that there were serious reasons for considering that the claimant had been in contact in Belgium with radical Islamist movements supporting violence. In Belgium's submission this contradicted the claimant's story that he was a humanist and pacifist who had no connection with the violent wing of the movement with which he was associated.

[91] Concluding that the Commissaire général's decision should be upheld, and that the claimant should consequently be excluded under Article 1F of the Convention, the Commission made the following comments:

> [TRANSLATION]
>
> Whereas implementation of the exclusion clause [Article 1F of the Convention] as defined by the Geneva Convention is within the discretion of each state, the only condition being the existence of "serious reasons to consider" that the party concerned has been guilty of one of the proscribed acts (see in particular J.C. Hathaway, *The Law of Refugee Status*, Butterworths, Toronto and Vancouver, 1991, p. 206; D. Ramacieri, *Jurisprudence récente en Droit canadien sur la clause d'exclusion 1, F.A. de la Convention de 1951*, Doc-Ref. 21/April 30, 1992, suppl. at No. 181, p. 2);
>
> whereas it does not concern only the direct perpetrators of the crimes listed, but may also affect accomplices or members of criminal organizations considered collectively responsible for such acts, in so far as they acted with knowledge of the criminal purposes pursued, and there is no particular circumstance exempting them from responsibility (see F. Schyder, *The Status of Refugees in International Law*; A.W. Sijthoff, Leyden, 1955, p. 277, which applies this reasoning to Art. 1F(*a*) with reference to Articles 6, 9 and 10 of the Statute of the Nuremberg International Military Tribunal);
>
> . . . . .
>
> Whereas with respect to the instant case the information contained in the record about the organizations and that relating to the applicant's *préventions à charge* are indications to suggest that he could have been involved in an international terrorist network directly connected with the violent Islamist movements that are rife in Algeria;

whereas the latter organize, perpetrate and take responsibility for attacks, murder and other crimes committed on a grand scale;

whereas such acts, as well as being infringements of the most basic human rights, the right to life and the right to physical integrity . . .

whereas they may also be defined as serious nonpolitical crimes . . .

whereas the Commission considers that it cannot be the purpose of the Geneva Convention to protect persons who have been guilty of or accomplices in such acts;

whereas the circumstance that the applicant did not directly participate in such acts is irrelevant when there are serious reasons for considering that he knowingly encouraged and facilitated them by his material assistance;

whereas the infringements of human rights alleged against the Algerian authorities do not exempt him from liability . . .

[Emphasis added.]

[92] Accordingly, I have no hesitation in concluding that there is no basis for making any distinction between Article 1F(*a*) and Article 1F(*b*), so far as the rules laid down by this Court in *Sivakumar, supra*, are concerned. First, it should be noted that the two paragraphs deal with the commission of serious crimes. For ease of reference, I set out Article 1F of the Convention:

1F The provisions of this *Convention* shall not apply to any person with respect to whom there are serious reasons for considering that:	1F 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 crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	*b)* qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
(*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.	*c)* qu'elle se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[93] Article 1F(*a*) refers to a crime against peace, a war crime or a crime against humanity. Needless to say, these crimes are all crimes that can only be described as serious. Under Article 1F(*b*) the exclusion results from the commission of a serious non-political crime by the refugee status claimant. Both paragraphs describe the nature of the crimes that will result in the exclusion of someone who has committed them.

[94] In order to exclude persons covered by Article 1F(*a*) and (*b*), it will be necessary to show that there are "serious reasons for considering" that the serious crimes identified were committed, but it will not be necessary to attribute any one specifically to the claimant. This test applies to both Article 1F(*a*) and Article 1F(*b*). Paragraph 149 of the United Nations High Commission for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* ("UNHCR Handbook") deals with the degree of evidence required to exclude a person under Article 1F of the Convention:

> The competence to decide whether any of these exclusion clauses are applicable is incumbent upon the Contracting State in whose territory the applicant seeks recognition of his refugee status. For these clauses to apply, it is sufficient to establish that there are "serious reasons for considering" that one of the acts described has been committed.

[95] Accordingly, in considering an exclusion based on Article 1F(*b*), the Refugee Division will be justified in excluding a claimant from refugee protection if it has serious reasons for considering that a serious non-political crime was committed for which the claimant may be held responsible.

[96] In my view, the interpretation of Article 1F(*b*) which the plaintiff is asking the Court to adopt conflicts with the very wording of the article. Additionally, this interpretation has been categorically rejected by the British Court of Appeal and the Federal Court of Australia, and I concur entirely with the reasons given by those Courts in support of their interpretation of Article 1F(*b*). In view of the wording of Article 1F(*b*) and the judgments in *In the Matter of B, supra*, and *Ovcharuk, supra*, I cannot subscribe to the interpretation of Article 1F(*b*) suggested by the appellant.

[97] Of course, this Court is not bound by the British and Australian judgments. At the same time, as I have just said, I share the viewpoint of those courts on the interpretation of Article 1F(*b*) and naturally it is preferable, where possible, for the courts of the signatory countries to an international convention to adopt the same interpretation of the provisions of that Convention. In *T. v. Secretary of State for the Home Department, supra*, Lord Lloyd made this point at 891:

> In a case concerning an international convention, it is obviously desirable that decisions in different jurisdictions should, so far as possible, be kept in line with each other . . .

[98] Consequently, the answer to the first question certified by the judge will be yes.

[99] I now need only dispose of the third point at issue, namely whether the crimes committed by MTI/Ennahda can be attributed to the appellant as an accomplice by association. This question takes in the second question certified by the trial judge, which I again reproduce for ease of reference:

> If so, can a refugee status claimant's association with an organization responsible for perpetrating "serious non-political crimes" within the meaning of that expression in Article 1F(*b*) of the *United Nations Convention Relating to the Status of Refugees*, entail the complicity of the claimant for purposes of applying the said provisions simply because he knowingly tolerated such crimes, whether committed during or before his association with the organization in question?

[100] As Décary J.A. said in *Bazargan, supra*, the answer to such a question necessarily depends on the facts of the case. In the case at bar, in view of the evidence, the Refugee Division concluded that the appellant had to be held responsible for the crimes attributed to MTI/Ennahda, as an accomplice by association.

[101] In support of its conclusion, the Refugee Division relied on the abundant evidence which I have described in para. 22 *inter alia* of my reasons. Additionally, the Refugee Division attached no weight to the appellant's testimony. In the Refugee Division's opinion, the appellant was not just a member of the movement but someone who performed important duties. In view of his function in the movement, the fact that he never left the movement, although he was able to do so, and the fact that at the time of the hearing before the Refugee Division he was still a member of the movement, the Division concluded that he should be held responsible by association for the crimes attributed to MTI/Ennahda. Additionally, the Refugee Division considered that in the case at bar the appellant's mere membership in the movement sufficed to make him responsible, since MTI/Ennahda existed primarily for limited and brutal purposes.

[102] Since I have not been persuaded that the Refugee Division's findings of fact were unreasonable, I can only conclude that the crimes attributed to MTI/Ennahda may be ascribed to the appellant as an accomplice by association in accordance with the rules set forth in *Sivakumar, supra*.

[103] In view of the conclusion to which I have come, namely that by the duties he performed the appellant knowingly tolerated, if not encouraged, the serious non-political crimes attributed to his organization since 1983, there is no need to answer the second question as worded and to decide whether his responsibility extends to the crimes committed before his association with MTI/Ennahda.

[104] In the circumstances, as I indicated earlier, there will be no reason to dispose of the questions relating to the interpretation of Article 1F(*c*) of the Convention.

[105] For these reasons, I would dismiss the appeal with costs.

"M. Nadon" J.A.

"I concur.

Gilles Létourneau, J.A."

Certified true translation

Suzanne M. Gauthier, C. Tr., LL.L.

<u>DÉCARY J.A.</u>(concurring)

[106] I have had the advantage of reading the reasons for judgment prepared by my brother Nadon J.A. I have come to the same conclusion as to the outcome of the appeal, but for different reasons, which leads me to give a different answer to the first question certified. I would dispose of the other points dealt with by him in the manner he suggests. Also, I adopt his review of the facts.

[107] To begin with, it is worth recalling what the two questions certified by the motions judge were:

Question 1:

Are the rules laid down by the Federal Court of Appeal in *Sivakumar v. Canada [(Minister of Citizenship and Immigration)]*, [1994] 1 F.C. 433, on complicity by association for purposes of implementing Article 1F(*a*) of the *United Nations Convention Relating to the Status of Refugees*, applicable for purposes of an exclusion under Article 1F(*b*) of the said Convention?

Question 2:

If so, can a refugee status claimant's association with an organization responsible for perpetrating "serious non-political crimes" within the meaning of that expression in Article 1F(*b*) of the *United Nations Convention Relating to the Status of Refugees*, entail the complicity of the claimant for purposes of applying the said provision simply because he knowingly tolerated such crimes, whether committed during or before his association with the organization in question?

and to reproduce the relevant passages from s. 2(1) of the *Immigration Act* and Article 1 of the *United Nations Convention Relating to the Status of Refugees* (Can. T.S. 1969, No. 6 - "the Convention"):

Immigration Act	***Loi sur l'immigration***
2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
. . . . .	. . . . .

"Convention refugee" means any person who

(*a*) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(*b*) has not ceased to be a Convention refugee by virtue of subsection (2),

but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

« réfugié au sens de la Convention »

Toute personne :

a) 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 :

(i) soit se trouve hors du pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays,

(ii) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ou, en raison de cette crainte, ne veut y retourner;

b) qui n'a pas perdu son statut de réfugié au sens de la Convention en application du paragraphe (2).

Sont exclues de la présente définition les personnes soustraites à l'application de la Convention par les sections E ou F de l'article premier de celle-ci dont le texte est reproduit à l'annexe de la présente loi.

[Emphasis added.]

Convention

1F The provisions of this *Convention* shall not apply 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 provisions in respect of such crimes;

(*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Convention

1F Les dispositions de cette *Convention* ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :

a) qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

b) qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

c) qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[108] In a few words, my conclusion is the following:

- the crimes and acts to which Article 1F(*a*) and (*c*) of the Convention applies are extraordinary actions which shock the international conscience;

- the crimes to which Article 1F(*b*) applies are ordinary crimes which are recognized by traditional criminal law;

- for there to be a "serious non-political crime" within the meaning of Article 1F(*b*), there must be a crime within the meaning of traditional criminal law, that crime must not be political and the non-political crime must be serious;

- among its other aims, Article 1F(*b*) seeks to enable the country of refuge to exclude the perpetrators of non-political crimes which it considers it should not allow into its territory because of the seriousness of the crimes which it suspects they have committed;

- Article 1F(*b*) is not limited to cases of extradition or to crimes associated with extradition, although for all practical purposes it can be assumed that the crimes associated with extradition are serious crimes;

- complicity is one method of committing a crime: the concept of "complicity by association" has been developed in international criminal law in connection with international crimes or acts of the type covered in Article 1F(*a*) and (*c*) of the Convention; the concept of a "party to an offence" has been developed in traditional Anglo-Saxon criminal law in connection with the non-political crimes covered by Article 1F(*b*) of the Convention;

- it would not be advisable to import into the definition of a "non-political crime" in Article 1F(*b*) the concept of complicity by association developed in international criminal law in the context of international crimes which have no real comparison with non-political crimes and which are governed by rules unknown to traditional criminal law;

- as the Minister did not seek to show that there were serious reasons for considering that under the rules of Canadian criminal law the appellant had been a party to the crimes committed by the Ennahda movement, it would be better not to rule on the application of Article 1F(*b*) in the case at bar;

- however, the Minister established on the basis of complicity by association within the meaning of international criminal law that there were serious reasons for considering that the appellant had been guilty of acts contrary to the purposes and principles of the United Nations, namely the acts of terrorism committed by the Ennahda movement: accordingly the Article 1F(*c*) exclusion applies.

[109] In preparing these reasons I have referred to a number of texts, articles and publications. There is no unanimity on the general meaning to be given to Article 1F(*b*), and where there is any consensus it is not always easy to determine what it is. However, what is certain is that this is an area which is constantly changing, the older texts must be read with caution and, if I may say so, we should avoid putting all our eggs into the same writer's basket. It should also be borne in mind that the disparity results from the system itself, which requires the courts of the countries of refuge to

interpret the Convention, rather than an international body, and inevitably they do so in terms of their own legal cultures. It is true that in theory unanimity should be sought when interpreting an international document: it would be achieved in the case at bar if, as I believe, the courts of the signatory countries recognized that the authors of the Convention intended to interpret the word "crime" in Article 1F(*b*) in accordance with domestic law. Of course, the meaning of the word "crime" would then vary with the state. This is the result intended by the system, which is readily understandable when we reflect that what is being done is to determine the types of criminal against which a country of refuge feels it must protect itself. When an international convention refers to domestic law, the rule that such a convention should not be interpreted in accordance with a single legal system obviously does not apply.

[110] I have consulted, *inter alia*, Alex Takkenberg and Christopher C. Tahbaz, *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees*, vol. 1-3, Amsterdam: Dutch Refugee Council, 1990; *Handbook on Procedures and Criteria for the Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, United Nations High Commission for Refugees, Geneva, 1992; *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après : Bilan et Perspectives*, a publication of the Institut International des droits de l'homme, Bruylant, Brussels, 2001; Geoff Gilbert, "Current Issues in the Application of the Exclusion Clauses, une étude préparée à la demande du Haut Commissariat et destinée à une table ronde organisée en 2001 à l'occasion du 50e anniversaire de la Convention" (2001), on line: UNHCR < http://www.unhcr.ch > ; *International Journal of Refugee Law*, Special Supplementary Issue on Exclusion (2000), Oxford University Press; Peter J. van Krieken (ed.), *Refugee Law in Context: The Exclusion Clause*, T.M.C. Asser Press, The Hague, 1999; Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, Clarendon Press, 1996; James C. Hathaway, *The Law of Refugee Status*, Toronto, Butterworths, 1991; Atle Grahl-Madsen, *The Status of Refugee Law*, A.W. Sijthoff, Leyden, 1966; M.C. Bassiouni, *Crimes Against Humanity in International Law*, Kluwer Law International, The Hague, 1999; M.C. Bassiouni, *International Criminal Law*, vol. 1, 2nd ed. (New York, Transnational Publishers, 1999).

Preliminary remarks

[111] So far as I know this is the first time that this Court has had to consider the concept of "complicity by association" recognized in international criminal law in relation to Article 1F(*b*) of the Convention. In *Gil v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 508 (C.A.), the Court had to decide in what cases a non-political crime ceased to be non-political for purposes of Article 1F(*b*), for the reason that it was political in nature. In *Chan v. Canada (Minister of Employment and Immigration)*, [2000] 4 F.C. 390 (C.A.), the Court had to decide whether Article 1F(*b*) applies so as to exclude a claimant who has been convicted of committing a serious non-political crime abroad and who served his sentence before coming to Canada. In *Malouf v. Canada (Minister of Citizenship and Immigration)* (1995), 190 N.R. 230 (F.C.A.), the Court simply noted that under Article 1F(*b*), as under Article 1F(*a*) and (*c*), the seriousness of the crime was not determined in relation to the alleged fear of persecution. In*Brezinski v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 535, a Trial Division judgment, Lutfy J. examined the criteria that could be

used in concluding that a crime which was recognized in Canadian criminal law was a "serious" crime within the meaning of Article 1F(*b*). I will return to *Gil* and *Chan*.

[112] Counsel for the parties submitted some 20 decisions from other jurisdictions to the Court. Those which were of the greatest assistance on the general meaning to be given to Article 1F(*b*) are the House of Lords decision in *T. v. Secretary of State for the Home Department*, [1996] 2 All E.R. 865, and the judgments of the Australian High Court in *Minister for Immigration and Multicultural Affairs v. Singh*, [2002] H.C.A. 7, the U.S. Supreme Court in *Immigration and Naturalization Service v. Aguirre-Aguirre*, 526 U.S. 415; 119 S. Ct. 1439 (1999), and the Federal Court of Australia in *Ovcharuk v. Minister for Immigration and Multicultural Affairs* (1998), 158 A.L.R. 289. These decisions give a more complete overview than that contained in the two judgments of the Supreme Court of Canada to which I will return, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, rendered in cases in which Article 1F(*b*) was not at issue and was only the subject of remarks made *obiter*.

[113] None of the decisions to which the Court was referred, and I did not find any others, dealt directly with the point at issue here, namely whether we should apply the rules on complicity in traditional criminal law or the rules on complicity in international criminal law in determining whether there has been a "crime" within the meaning of Article 1F(*b*). The only comments I have found which deal directly with this question are remarks made *obiter* by Sackville J. of the Federal Court of Australia at p. 306 of his reasons in *Ovcharuk*. These comments, which coincide with my conclusion, will be considered below at para. 162.

[114] In trying to determine whether the international rules on complicity by association apply to the exclusion mentioned in Article 1F(*b*), we must be careful not to refer to the many judgments which have been rendered on the question of whether the crime was a political rather than an ordinary one.

[115] Thus, for example, in *T*. Lord Lloyd (at 899) applied Article 1F(*b*) to a claimant who was "an active member of a terrorist organisation which was prepared to advance its aims by random killing" and who was " closely associated with the attack on the airport". What was at issue in that case was the political nature of the crime, not the fact that it would have been a crime under British criminal law if it was not a political one. The question of the standard to be used in determining complicity was not considered.

[116] In *Aguirre-Aguirre*, the claimant had admitted that he himself burned buses, attacked passengers and destroyed private property for purposes which he claimed were political. In trying to decide whether the crimes committed were political in nature, the U.S. Supreme Court considered in particular "whether the political aspect of an offence outweighs its common-law character" (at 1448; emphasis added).

[117] Similarly, in *Singh* the trial court's findings of fact were that the testimony of the claimant himself

. . . provided serious reasons for considering that he was an accessory to the killing of a police officer, and that he was knowingly concerned in the movement of weapons and explosives which were used to "hit" people who were "targets" of the KLF . . .

(Gleeson C.J., para. 6)

[Emphasis added.]

and the Court accepted from the outset this finding by the tribunal, that

. . . the applicant knowingly and actively participated in the unlawful killing of the police officer. The applicant did so by the provision of information and intelligence pertaining to the whereabouts and movements of the police officer knowingly for the purpose of the killing of him by other members of the KLF.

(para. 9)

[Emphasis added.]

From comments by McHugh J., at para. 54:

The murder of the policeman was a cold-blooded one, and Mr. Singh played an important part in its execution.

Kirby J. at para. 126:

Given that what is posited is a "serious crime" and that, ordinarily, the "country of refuge" would be fully entitled to exclude a person suspected of such "criminal conduct" from its community, a duty of protection to refugees that exists under the Convention and municipal law giving it effect, must be one that arises in circumstances where the political element can be seen to outweigh the character of the offence as an ordinary crime.

[Emphasis added.]

and Callinan J., at para. 167:

It was the most violent of crimes . . . He was, at the least, and applying the Briginshaw test which I think appropriate, an accessory to the crime of murder, or a conspirator in a plan to murder, and, on one view, a significant contributor to, and therefore a principal in, the crime of murder.

[Emphasis added.]

it is clear that the Court considered that there was complicity within the meaning of Australian criminal law. This is especially clear when we see that the precedents on which Callinan J. relied came exclusively from Australian domestic law.

Purposes of Article 1F of the Convention in general, and Article 1F(*b*) in particular

[118] My reading of precedent, academic commentary and of course, though it has often been neglected, the actual wording of Article 1F of the Convention, leads me to conclude that the purpose of this section is to reconcile various objectives which I would summarize as follows: ensuring that the perpetrators of international crimes or acts contrary to certain international standards will be unable to claim the right of asylum; ensuring that the perpetrators of ordinary crimes committed for fundamentally political purposes can find refuge in a foreign country; ensuring that the right of asylum is not used by the perpetrators of serious ordinary crimes in order to escape the ordinary course of local justice; and ensuring that the country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because of the seriousness of the ordinary crimes which it suspects such criminals of having committed. It is this fourth purpose which is really at issue in this case.

[119] These purposes are complementary. The first indicates that the international community did not wish persons responsible for persecution to profit from a convention designed to protect the victims of their crimes. The second indicates that the signatories of the Convention accepted the fundamental rule of international law that the perpetrator of a political crime, even one of extreme seriousness, is entitled to elude the authorities of the State in which he committed his crime, the premise being that such a person would not be tried fairly in that State and would be persecuted. The third indicates that the signatories did not wish the right of asylum to be transformed into a guarantee of impunity for ordinary criminals whose real fear was not being persecuted, but being tried, by the countries they were seeking to escape. The fourth indicates that while the signatories were prepared to sacrifice their sovereignty, even their security, in the case of the perpetrators of political crimes, they wished on the contrary to preserve them for reasons of security and social peace in the case of the perpetrators of serious ordinary crimes. This fourth purpose also indicates that the signatories wanted to ensure that the Convention would be accepted by the people of the country of refuge, who might be in danger of having to live with especially dangerous individuals under the cover of a right of asylum.

[120] Like my brother judge, I do not feel that LaForest J.'s opinion in *Ward* on the scope of Article 1F(*b*), at 743, is conclusive. His remarks on that Article amount to this:

> The articulation of this exclusion for the "commission" of a crime can be contrasted with those of s. 19 of the Act which refers to "convictions" for crimes. Hathaway, *supra*, at p. 221, interprets this exclusion to embrace "persons who are liable to sanctions in another State for having committed a genuine, serious crime, and who seek to escape legitimate criminal liability by claiming refugee status". In other words, Hathaway would appear to confine paragraph (*b*) to accused persons who are fugitives from prosecution. The interpretation of this amendment was not argued before us. I note, however, that Professor Hathaway's interpretation seems to be consistent with the views expressed in the *Travaux préparatoires*, regarding the need for congruence between the Convention and extradition law; see statement of United States delegate Henkin, U.N. Doc. E/AC.32/SR.5 (January 30, 1950), at p. 5.

[Emphasis added.]

[121] Clearly these comments are *obiter*. In indicating that "the interpretation of this amendment was not argued before us" (emphasis added), La Forest J. was referring to the amendment made to the *Immigration Act* in 1988 (R.S.C. 1985, c. 28 (4th Supp., ss. 1(2) and 34)), by which from then on the definition of a refugee in s. 2(1) excluded persons covered by Article 1E and F of the Convention. The reference to the "amendment" thus for all practical purposes is a reference to Article 1F(*b*). This incidental comment was made in connection with a discussion of the phrase "particular social group" contained in the definition of a "refugee". What is more, the comment gives as its basis only the opinion of Hathaway and the view of a delegate expressed not at the conference of plenipotentiaries held from July 2 to 25, 1951, but at one of the 32 meetings of the first *ad hoc* committee held on January 30, 1950. (This view is reported in vol. I of the *Travaux préparatoires*, at p. 175).

[122] Like my brother judge, I also feel that in *Pushpanathan* Bastarache J. did not intend to limit the application of Article 1F(*b*) to extraditable persons, when he wrote at para. 73 that:

> It is quite clear that Article 1F(*b*) is generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status, but that this exclusion is limited to serious crimes committed before entry in [*sic*] the State of asylum. Goodwin-Gill, *supra*, at p. 107, says:
>
> With a view to promoting consistent decisions, UNHCR proposed that, in the absence of any political factors, a presumption of serious crime might be considered as raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs [*sic*] trafficking and armed robbery.
>
> The parties sought to ensure that common criminals should not be able to avoid extradition and prosecution by claiming refugee status.

[123] The comment of Goodwin-Gill referred to by Bastarache J. deals with the presumption of seriousness, which may result from proof of the perpetration of a crime generally covered by extradition treaties. Earlier, however, at p. 104, Goodwin-Gill had recognized that as to the nature of crimes the Travaux Préparatoires "provide no hard answer", and the objectives sought by Article 1F(*b*) included the following:

> Finally, a principled basis justifying the continuing exclusion of serious non-political criminals is offered by the need to ensure the integrity of the international system of protection of refugees. The commission of a serious non-political crime may be sufficient reason for exclusion because it is indicative of some future danger to the community of the State of refuge; or because the very nature and circumstances of the crime render it a basis for exclusion in itself, regardless of extradition, prosecution, punishment or non-justiciability.

[Emphasis added.]

[124] These observations by Goodwin-Gill coincide with those of Grahl-Madsen, at p. 291. After noting that the framers of the Convention had deliberately chosen not to limit Article 1F(*b*) to cases of extradition, he said:

> As Article 1Fb) is worded it is clear that it does not matter whether the person concerned is actually wanted for any specific crime, and it matters even less whether there exists any extradition treaty between the countries in question under which his extradition may be requested.

[125] It is clear that the question of extradition was central to the discussion and Bastarache J. was not wrong to attach great importance to it. However, the fact remains that the framers of the Convention had other concerns to reconcile, and they did so by using language which goes beyond just the concern with extradition.

[126] Moreover, it would have been surprising if the signatories, who expressly discussed extradition in the Travaux Préparatoires, had disregarded that term in adopting the final wording, if their intention was to limit the application of the article to cases of extradition or to crimes defined in extradition treaties. I feel that an interpretation which is closer to the intention of the signatories would be that the word "crime" was used to apply to any crime recognized by ordinary criminal law, and that the word "serious" was used to ensure that exclusion would only be justified by ordinary crimes the seriousness of which corresponded to the crimes generally associated with extradition. The signatories placed their emphasis on the "seriousness" of the crime, not the fact that the crime could formally be, or had been, the subject of extradition proceedings.

[127] With respect, I am not sure that this Court's judgment in *Chan* can be given the meaning suggested by counsel for the appellant. First, that judgment relies on *Ward* and *Pushpanathan* and on Hathaway as a basis, for all practical purposes, for the premise, which to me seems questionable, that Article 1F(*b*) applies essentially to cases of extradition. Second, it relies on ss. 19, 46 and 53 of the *Immigration Act* as a basis for concluding that Article 1F(*b*) does not apply to claimants who have been convicted of a crime abroad and have served their sentences before coming to Canada. Those sections do not cover the situation in which the appellant finds himself. He was not convicted of a serious offence before coming to Canada (the Minister did not argue that the trial and conviction of the appellant *in absentia* after his departure from Tunisia on a series of charges, which moreover were not laid in connection with the crimes here attributed to the organization of which the appellant was a member, constituted a conviction of a serious offence).

[128] In short, in *Chan* the Court was dealing with a different situation and the comments it made on Article 1F(*b*) of the Convention must be read with caution, as the very wording of that article indicates that it applies to more than the cases covered by Canadian law in the three aforementioned sections. There is also no question, as the Court held in *Chan*, that the country of refuge can certainly decide not to exclude the perpetrator of a serious non-political crime who has already been convicted and has served his sentence. However, I do not think the Court decided that the country of refuge could not decide to exclude the perpetrator of a serious non-political crime, whatever the circumstances, provided he has been convicted and has served his sentence.

[129] It is thus easy to understand why, in dealing with "non-political crimes", the courts of the signatory countries have tended to refer to extradition treaties in defining the seriousness of such crimes, and why those courts have tended to limit these "political crimes" to crimes in which the political aspect transcended everything else. It is a sort of compromise, which allows States to leave their borders open to genuine political criminals and close them to persons who have committed non-political crimes the seriousness of which, for example, approximates to crimes generally covered by extradition treaties. It follows that under Article 1F(*b*) it is possible to exclude both the perpetrators of serious non-political crimes seeking to use the Convention to elude local justice and the perpetrators of serious non-political crimes that a State feels should not be allowed to enter its territory, whether or not they are fleeing local justice, whether or not they have been prosecuted for their crimes, whether or not they have been convicted of those crimes and whether or not they have served the sentences imposed on them in respect of those crimes.

<u>"Complicity by association" is a concept of international criminal law which does not apply to domestic criminal law</u>

[130] Where I part company with my brother judge is when he applies the concept of complicity by association indiscriminately whether Article 1F(*a*) and (*c*) or Article 1F(*b*) is in question. As Kirby J. of the High Court of Australia notes at para. 92 of his reasons in *Singh*,

> The context in which par. (*b*) appears in Art. 1F of the convention is obviously relevant. Article 1F(*b*) is found between two other exclusions, each of them applicable to highly reprehensible conduct, namely the commission of serious international crimes (par. (*a*)) and acts contrary to the principles of the United Nations (par. (*c*)).

Similarly, in *Ovcharuk* Whitlam J. of the Federal Court of Australia says, at p. 294 of his reasons:

> . . . the transparent policy of Art 1F(*b*) is to protect the order and safety of the receiving State. <u>That is why para (*b*) deals with topics that are very different from paras (*a*) and (*c*) in Art 1F</u>.
>
> [Emphasis added.]

[131] Article 1F(*a*) and (*c*) deals with extraordinary activities, that is international crimes in the case of Article 1F(*a*), or acts contrary to international standards in the case of Article 1F(*c*) (which explains the presence of the word "committed" in Article 1F(*a*), which deals with crimes, and the fact that it is not present in Article 1F(*c*), which deals with acts that are not necessarily crimes). 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*)). 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. 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.

[132] Accordingly, in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.), MacGuigan J.A., at 315, agreed in a case involving the application of Article 1F(*a*) of the Convention, that the Court could not "interpret the 'liability' of accomplices under this Convention exclusively in the light of s. 21 of the Canadian *Criminal Code*, which deals with parties to an offence". MacGuigan J.A. went on, "that provision stems from the traditional common law approach to 'aiding' and 'abetting'. An international convention cannot be read in the light of only one of the world's legal systems". Of course, the last sentence cannot be applied where, as here in the case of Article 1F(*b*), an international convention makes reference to domestic law.

[133] 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, Linden J.A. explained at 437 *et seq.* the introduction of the concept of complicity by association by its presence in international instruments dealing with international crimes. In particular, he said at 441:

> This 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 [*Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, August 8, 1945, 82 U.N.T.S. 279] which defines crimes against peace, war crimes and crimes against humanity and then states:
>
> 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.
>
> This principle was applied to those in positions of leadership in Nazi Germany during the Nuremberg Trials . . .

[134] Article 1F(*b*) is of a completely different order and, as we have seen, is designed for different purposes. The phrase "serious non-political crime" requires that three conditions be met: there must be a crime, the crime must be a non-political one and the crime must be serious.

[135] The courts and commentators have so far considered the second and third conditions, in my view probably because it was generally assumed that the first condition simply required there to be a "crime" within the meaning of the ordinary criminal law of the country of refuge. The English wording of Article 1F(*b*) justifies this approach. It speaks of a "serious non-political crime", and it is the word "non-

political"which is rendered in French by "de droit commun". "Crime"in English is of course "crime" in French, and "serious" in English is "grave" in French. The word "crime", which is the word that interests us here, can only be understood in its ordinary meaning in criminal law, as opposed to those crimes said to be international that are covered by Article 1F(*a*), namely crimes against peace, war crimes or crimes against humanity, and as opposed to the "délit" [crime] referred to by the French version of Article 33 of the Convention. In short, on the question that arises here the wording of Article 1F(*b*) seems clear to me.

[136] Article 1F(*b*) deals with ordinary crimes, non-political crimes, which if I might so phrase it are committed in the ordinary course of life in a society. Such crimes have not been defined by the international community acting collectively. Such crimes are not defined by the Convention: on the contrary, Article 1F(*b*) incorporates concepts of domestic law. As I have already mentioned, strictly speaking it can be said that crimes recognized in extradition treaties have been the subject of international consensus and constitute serious non-political crimes in the eyes of the international community; but such crimes are not international crimes in themselves and are defined in terms of the applicable domestic law. Although in practice it is assumed that such ordinary crimes, which are usually the subject of extradition treaties, generally constitute serious crimes, the other crimes will be the subject of debate and each time the question will arise as to whether an act is an ordinary crime, and if so whether it is a serious crime within the meaning of the Convention. In the absence of an international consensus on the seriousness of a crime, a court which has to interpret the Convention will naturally look to its domestic law, while striving to reconcile this with the law of other States so far as possible. In Canada, as Hugessen J.A. noted in *Gil* (*supra*, para. 111, at 529), the Court will more readily rely on Anglo-American precedents, which are "more consonant with our own legal traditions". If in this context the Court comes to the conclusion that there are serious reasons for considering that a crime recognized as such in Canadian law has been committed, and that this crime is a serious one, it will apply the exclusion mentioned in Article 1F(*b*).

[137] 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.

[138] This question was only lightly touched on by the writers whom I have been able to consult.

[139] In *Current Issues in the Application of the Exclusion Clauses*, Prof. Geoff Gilbert says the following, at p. 14:

Nevertheless, Article 1F(*b*) only excludes from refugee status those who have committed a serious non-political crime and the international law of armed conflict has a highly developed understanding of command responsibility <u>not to be found in ordinary criminal law to which Article 1F(*b*) applies</u>.

[Emphasis added.]

[140] The High Commission *Handbook* comments on Article 1F(*b*) as follows:

> 151. The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence.
>
> . . . . .
>
> 155. What constitutes a "serious" non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term "crime" has different connotations in different legal systems. In some countries the word "crime" denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a "serious" crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1F(*b*) even if technically referred to as "crimes" in the penal law of the country concerned.
>
> . . . . .
>
> 157. In evaluating the nature of the crime presumed to have been committed, all the relevant factors - including any mitigating circumstances - must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

[141] Goodwin-Gill says the following at p. 104:

> . . . Finally, a principled basis justifying the continuing exclusion of serious non-political criminals is offered by the need to ensure the integrity of the international system of protection of refugees. The commission of a serious non-political crime may be sufficient reason for exclusion because it is indicative of some future danger to the community of the State of refuge; or because the very nature and circumstances of the crime render it a basis for exclusion in itself, regardless of extradition, prosecution, punishment or non-justiciability. In such cases, the principle of balancing crime against consequences becomes redundant.

[142] Hathaway, at p. 224, expresses the view that:

> Fourth, the crime must be an ordinary, common law offence . . .

[143] Van Krieken, for his part, notes the following at pp. 32 and 33:

(i) Serious Crime

50. The term "serious crime" obviously has different connotations in different legal systems. The IRO Constitution excluded "ordinary criminals who are extraditable by treaty." This is echoed in the language of the UNHCR Statute, which excludes a person in respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition. Similar language in regard to extraditable crimes was not retained for the 1951 Convention, which describes the nature of the crime with greater precision. In the light of developments in extradition law, the fact that a crime is covered by an extradition agreement will not of itself constitute a ground for exclusion. It must meet the "serious, non-political crime" criterion.

51. The *Handbook* specifies that a "serious" crime refers to a capital crime or a very grave punishable act. Examples would include homicide, rape, arson and armed robbery. Certain other offenses could also be deemed serious if they are accompanied by the use of deadly weapons, serious injury to persons, evidence of habitual criminal conduct and other similar factors. It is evident that the drafters of the 1951 Convention did not intend to exclude individuals simply for committing non-capital crimes or non-grave punishable acts. The seriousness of the crime can be deduced from several factors, including the nature of the act, the extent of its effects, and the motive of the perpetrator. The overriding consideration should be the aim of withholding protection only from persons who clearly do not deserve any protection on account of their criminal acts. While there are risks in seeking to define crimes which would not be thus covered, crimes such as petty theft, or the possession and use of soft drugs should not be grounds for exclusion under Article 1F(*b*), because they do not reach a high enough threshold to be regarded as serious.

[Footnote omitted.]

[144] Grahl-Madsen says at p. 297:

As we see it, Article 1F(*b*) should only be applied in cases where the person in question is considered guilty of a major offence (a *'crime'* in the French sense of the word), and only if the crime is such that it may warrant a really substantial punishment, that is to say: the death penalty or deprivation of liberty for several years, <u>and this not only according to the laws of the country of origin, but also according to the laws of the country of refuge</u>.

[Emphasis added.]

I note that no evidence of Tunisian law was submitted, and accordingly I do not have to consider whether the acts the appellant is alleged to have committed are crimes within the meaning of Tunisian law.

[145] In an article titled " 'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses" published in 12 *International Journal of Refugee Law*, Special Supplementary Issue on Exclusion (2000), the Australian lawyer Michael Bliss says the following at p. 125, in a comment under note 134:

> 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*); <u>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*)</u>.
>
> [Emphasis added.]

[146] I understand from these comments by Mr. Bliss that, in so far as article 25(3) of the Rome Statute of the International Criminal Court (which came into effect on July 1, 2002) adopts the rules of complicity recognized in traditional criminal law, that article can be applied to Article 1F(*b*) of the Convention. I also understand from what he says that the rules of complicity recognized in international criminal law elsewhere in the Rome Statute and in other international instruments do not apply to Article 1F(*b*). Accordingly, our arguments coincide. However, I would add that in my opinion it is the rules of complicity in Canadian criminal law that must be applied in the event of disparities between these rules and those set out in Article 25(3) of the Rome Statute.

[147] In short, I share Prof. 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.

[148] I think it goes without saying that in emphasizing extraditable crimes we are assuming that the crimes in question are crimes recognized in ordinary criminal law. These crimes are only crimes in terms of the criteria laid down in domestic law, and in Anglo-Canadian law among these criteria is the concept of a "party to the offence". I find it hard to see, for example, how the concept of complicity by association, developed in relation to international crimes, to the extent that it differs from the concept of a "party to the offence", could transform into an extraditable crime one which was not a crime in domestic law.

[149] In addition to these textual arguments, there is one argument of judicial policy which seems to me to be of the highest importance: it would not be advisable to

import into Article 1F(*b*) of the Convention concepts borrowed from international instruments such as the Statute of the International Military Tribunal and the Rome Statute of the International Criminal Court (see *Harb v. Canada (Minister of Employment and Immigration)*, 2003 FCA 39 (C.A.), para. 5). International criminal law has developed in a particular, initially military, context, which has nothing to do with the context in which domestic law developed.

[150] The Rome Statute of the International Criminal Court cannot really be transposed to domestic law. It applies in Article 5 to "the most serious crimes of concern to the international community as a whole". The crimes in question are the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The first three of these crimes are defined in great detail in Articles 6, 7 and 8. Article 9 states that the "Elements of Crimes" that will assist the Court in interpreting Articles 6, 7 and 8 will be those adopted by a two-thirds majority of the members of the Assembly of States Parties. Article 21 indicates that the applicable law is "in the first place, this statute, Elements of Crimes and its Rules of Procedure and Evidence", "in the second place . . . applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict" and "<u>failing that, general principles of law derived by the Court from national laws of legal systems of the world</u>" (emphasis added). Articles 22 to 23 define "the general principles of criminal law", including in Article 25 that relating to "individual criminal responsibility", and that article sets out a series of rules covering various types of complicity. Only this last article can be transposed into domestic law with impunity, subject to the qualifications I indicated in this regard in para. 146 of my reasons.

[151] In short, this Statute is a complete criminal code. It governs the crimes against humanity and the war crimes covered in Article 1F(*a*) of the Convention. It only refers to the traditional criminal law by default ("failing that"). Article 1F(*a*) must now be interpreted in light of this Statute, *inter alia* (see *Harb*). Saying that the rules laid down by the Statute also apply to crimes covered by Article 1F(*b*) would in my opinion be to distort the meaning of the said article and give it a scope which the signatories of the Convention never foresaw or intended.

[152] Additionally, the *Crimes Against Humanity and War Crimes Act* (S.C. 2000, c. 24), which received Royal Assent on June 29, 2000, lays down specific rules in Canada regarding the guilt of a "military commander" or "a superior". In s. 14 the Act expressly excludes defences covered by ordinary criminal law and incorporates into Canadian law certain provisions of the Rome Statute of the International Criminal Court. I do not think that in adopting this Act the federal Parliament intended to modify the traditional rules of Canadian criminal law respecting ordinary crimes.

[153] It is implicit in the judgments rendered in *Moreno v. Canada (M.E.I.)*, [1994] 1 F.C. 298, *Ramirez* and *Sivakumar*, in connection with Article 1F(*a*), that the test deriving from the concept of a "party to the action" in Canadian criminal law is not necessarily the same as that deriving from the concept of "complicity by association" in refugee law. The concepts overlap, but are not identical.

[154] For these reasons, I do not think it is possible to apply to Article 1F(*b*) the rules developed by the courts with regard to Article 1F(*a*) and (*c*). Unlike my brother

judge, I feel that this Court's judgments in *Sivakumar, supra*, para. 133; *Moreno, supra*; *Bazargan v. Minister of Employment and Immigration* (1996), 205 N.R. 282 (C.A.); *Sumaida v. Canada (Minister of Employment and Immigration)*, [2000] 3 F.C. 66 (C.A), and *Harb*, *supra*, are of little value when Article 1F(*b*) is to be interpreted. In *Harb*, I indicated at para. 17 that I saw

> . . . no reason not to apply to Article 1F(*a*) the principles regarding complicity followed with respect to Article 1F(*c*). The analogy is such, between "acts contrary to the purposes and principles of the United Nations" (Article 1F(*c*)) and "crime[s] against humanity" (Article 1F(*a*)), that there is no danger of distorting the concept of "complicity" by applying it to either one.
>
> For the reasons I have explained, there is no such analogy between Article 1F(*a*) and (*c*) on the one hand and Article 1F(*b*) on the other. What is more, those judgments were rendered in a very fluid international context and should probably be updated to take account, for example, of the Rome Statute of the International Criminal Court.

[155] In support of his conclusion, my brother judge relies on three judgments, two of which in my opinion do not deal directly with the point at issue in the case at bar, and the third actually confirms my interpretation.

[156] I am unable to give the judgment by two members of the British Court of Appeal, rendered on an application for leave to appeal in *In the matter of B*, [1997] E.W.J. No. 700, the scope given it by my brother judge. That case involved a claimant who had joined the ranks of the PKK, a Kurdish movement in Turkey "widely regarded as a terrorist organisation which has for years engaged in activities likely to involve indiscriminate killings or injury of innocent members of the public" (para. 8). What is more, the claimant "quickly rose to the position of a commander of 150, sometimes as many as 500, people in the PKK . . . It was common ground that while a member, he was a trusted senior member of the PKK. He was part of a team which enabled terrorist activities to take place" (para. 9). The appellant argued that "it is only if a particular crime is identified that it is possible to carry out the investigation envisaged in the decision of the House of Lords [in *T.*, *supra*] to determine whether it is a political or non-political crime" (para. 15). The fact that the series of crimes in question in that case constituted ordinary crimes, and the degree of participation by the claimant in the series of crimes required by domestic law, do not seem to me to have been at issue.

[157] The decision of the Commission permanente de recours des réfugiés (2e Chambre française, Ref. 94/993/R2632-28/3/1995 - Algeria) cited by my brother judge does not seem to me to be particularly persuasive. It is as brief as possible, it concludes in a few lines that the claimant can be excluded under each paragraph of Article 1F, it does not deal squarely with the question raised in the case at bar, and Tiberghien's comments, on which it is based, seem to me to confirm in each of the decisions to which he refers that there was criminal responsibility within the meaning of French criminal law.

[158] The judgment of the Federal Court of Australia in *Ovcharuk, supra*, para. 112, supports my interpretation. That case concerned a Russian national who had been

convicted of importing narcotics into Australia. The evidence was that the claimant, who was serving his sentence in Australia, had conspired with another person in Russia to commit the offence. Refugee status was denied under the exclusion mentioned in Article 1F(*b*).

[159] The Court held that an offence had been committed outside Australia, that Article 1F(*b*) did not apply only to criminals threatened with criminal prosecution abroad and that the question of whether there were serious reasons for considering that a serious non-political crime had been committed had to be decided in accordance with the concepts of criminality recognized in the country of refuge.

[160] I agree completely with these conclusions.

[161] At 294, Whitlam J. said:

> . . . the obviously humanitarian object and purpose of the Refugees Convention do not require that a country of refuge should accord refugee status to a person where it has serious reasons for considering that person has committed outside that country a serious crime against one of its own laws . . .
>
> . . . the transparent policy of Art 1F(*b*) is to protect the order and safety of the receiving State. That is why para (*b*) deals with topics that are very different from paras (*a*) and (*c*) in Art 1F.
>
> [Emphasis added.]

[162] At 305, Sackville J. said that:

> If the law of the receiving country renders criminal conduct which takes place outside its borders, that is sufficient to constitute the conduct a "crime" for the purposes of Art 1F(*b*).
>
> [Emphasis added.]

and a little further on:

> . . . the elements of the offence of conspiracy under Australian law were complete when the criminal agreement was concluded.
>
> [Emphasis added.]

He concluded his reasons for judgment at 306 by this passage, which deals specifically with the point at issue:

> I should add a comment concerning the fourth of the suggested constructions of Art 1F(*b*). I think that there are difficulties with the notion (not explored in depth in the argument) that "crime" in Art 1F(*b*) refers to conduct regarded as criminal by the common consent of nations. Such a construction requires an implicit qualification to be read into the Art 1F(*b*). The suggested construction seems to give little effect to the word "serious" which is obviously intended (as the drafting history shows) to cut down the reach of Art 1F(*b*). Furthermore, the language of Art 1F(*b*) contrasts with that of Art 1F(*c*) which

> covers "*acts* contrary to the practices and principles of the United Nations". While recognising the dangers of placing too much reliance on consistency in the drafting of Conventions, <u>if Art 1F(*b*) had been intended to apply to acts or conduct considered to be criminal by international norms, it is likely that it would have been worded differently</u>. However, since the issue was not debated in full, it is neither necessary nor appropriate to resolve it in the present case.
>
> [Emphasis added.]

This comment was of course made *obiter*, but it seems to me to be persuasive.

[163] Additionally, when Branson J. said at 301 that:

> In my opinion, the terms of Art 1F(*b*) suggest against a requirement that every element of an identified offence must be able to be identified and particularised before the article may be relied upon.

> in my opinion she was simply saying that once a domestic criminal law offence has been identified, each of its component elements does not have to be identified for purposes of applying Article 1F(*b*), as it will suffice to have "serious reasons for considering that the crime has been committed".

<u>Whether a crime within the meaning of Canadian criminal law</u>

[164] This leads me to the question of whether in Canadian criminal law the crimes committed by the organization of which the appellant is a member can be attributed to him. The appellant did not argue, or is no longer arguing, that the crimes committed by the organization were not serious crimes or that they were of a political nature. However, once it is established that the appellant did not commit those crimes himself, the question that arises is the following: in Canadian law, can the appellant, as a result of the fact that he was a member of the organization which committed them, be regarded as a person in respect of whom it is possible to have serious reasons for considering that he committed them?

[165] Canadian criminal law has long recognized that complicity is one means of perpetrating a crime. Sections 21 and 22 of the Canadian *Criminal Code*, for example, establish the guilt of a person who, though not actually committing the offence himself, does or fails to do something to aid any other person to commit it, abets any other person in committing it or advises another person to participate in an offence. These sections have given rise to a large number of decisions.

[166] Accordingly, in *R. v. Greyeyes*, [1997] 2 S.C.R. 825, Cory J. speaking on this point for the Supreme Court of Canada noted that the term "aid" in s. 21(1)(*b*) of the *Criminal Code* "means to assist or help the actor", and the term "abet" in s. 21(1)(*c*) "includes encouraging, instigating, promoting or procuring the crime to be committed" (para. 26). He went on to say that in order to establish the *mens rea* for complicity within the meaning of s. 21(1)(*b*), "the Crown is required to prove only that the accused intended the consequences that flowed from his or her aid to the principal offender, and need not show that he or she desired or approved of the consequences" (para. 37). For there to be complicity within the meaning of s.

21(1)(*c*), "the Crown must prove not only that the accused encouraged the principal with his or her words or acts, but also that the accused intended to do so" (para. 38).

[167] In *Preston v. R.*, [1949] S.C.R. 156, Estey J. for the majority concluded that in order for a person to be convicted of aiding, abetting, advising or promoting it only had to be shown that the person understood what was happening and by some act on his or her part incited or contributed to the commission of the offence (at 159).

[168] In *R. v. Dunlop*, [1979] 2 S.C.R. 881, Dickson J. for the majority considered that "a person cannot properly be convicted of aiding or abetting in the commission of acts which he does not know may be or are intended" (at 896). Earlier, at p. 891, he said:

> 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 on [*sic*] enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act . . .

[169] In *R. v. Kirkness*, [1990] 3 S.C.R. 74, Wilson J., dissenting, cited this passage, which I do not think is open to question, from Rose, *Parties To An Offence* (Toronto, 1982):

> One of the facts a person must know, in order to be susceptible to conviction as an aider and abettor, is the principal's intention to commit the offence. It is not, however, essential to prove that an alleged aider or abettor knew the *precise* crime which would be committed; it will suffice that he actually knew that the principal planned on committing a certain *type* of offence, that a crime of that type was in fact committed, and that the accused had intentionally aided or abetted its commission. [Emphasis in original.]

[170] Counsel for the Minister did not argue in this Court, nor apparently in the lower courts, that there were serious reasons for considering that the appellant was a party to the offences committed by the Ennahda movement, within the meaning of ss. 21 and 22 of our *Criminal Code*. Accordingly, counsel for the appellant did not have to examine this possibility either. As these are separate questions of law and fact from those which have been considered from the outset by the Minister himself, by the Refugee Division and by the Federal Court Trial Division, and since the solution is not self-evident, it would not be proper for this Court to make a ruling in this regard at this stage. In the circumstances, it would be proper to refer the matter back to the Minister for him to re-assess the appellant's case in light of these reasons. However, in view of the conclusion I have arrived at with regard to Article 1F(*c*), it will be unnecessary to do this.

[171] For some years the Canadian *Criminal Code* has also recognized that "participation in a criminal organization" is a crime (s. 467.1 of the *Criminal Code*, adopted in 1997) and that "participation in the action of a terrorist group" is also a crime (s. 83.18, adopted on December 18, 2001). The fact that it was necessary to adopt specific provisions to make participation in certain activities (a criminal organization and terrorism) a crime is instructive.

[172] Counsel for the Minister did not argue in this Court that these two new sections could be applied in the case at bar, probably because they were adopted after the acts the appellant is alleged to have committed here. It is certainly conceivable that these sections, which have become an integral part of Canadian criminal law, could now serve as a basis for an exclusion under Article 1F(*b*). It is also conceivable that s. 83.18, because it makes participation in the activity of a terrorist group a crime in Canada, should be interpreted in light of international criminal law, which is rapidly expanding in this area. As these points were not raised in this Court, I simply note them in passing.

Exclusion under Article 1F(*c*)

[173] This does not necessarily mean that the appellant's problems end here. The Refugee Division also based his exclusion on Article 1F(*c*), indicating that in its opinion there were serious reasons for considering that he had committed acts contrary to the purposes and principles of the United Nations. The motions judge did not feel it necessary to deal with Article 1F(*c*): she was entitled to limit her consideration to Article 1F(*b*), since in her view that article by itself justified his exclusion.

[174] In *Ramirez* (*supra*, para. 132) at 312, this Court noted that the standard of evidence required by the phrase "serious reasons for considering" in Article 1F is "less than the balance of probabilities" and that this standard "is less strict than the usual civil standard". In *Sumaida* (*supra*, para. 154), at para. 25, the Court said "there must be more than suspicion or conjecture, but less than proof on a balance of probabilities".

[175] The Refugee Division set out its conclusions on Article 1F(*c*) as follows at pp. 130 to 133 of its reasons:

[TRANSLATION]

> 5.3.16 Acts contrary to purposes and principles of United Nations
>
> We must now still consider whether there are "serious reasons for considering" that the claimant has been guilty of "acts contrary to the purposes and principles of the United Nations".
>
> First, several documents in the panel's record describe MTI/Ennahda as a terrorist movement which uses terrorist methods, and the leader Rached Ghannouchi is a terrorist leader. We referred to these documents earlier.
>
> The 1998 edition of the *Petit Larousse illustré* gives us the following definition of "terrorist": [TRANSLATION] "Someone who organizes, participates in, an act of terrorism", and "terrorism" means: [TRANSLATION] "Series of acts of violence (attacks, hostage taking, etc.) committed by an organization to create a climate of insecurity, to bring undue pressure on a government, to satisfy hatred against a community, country, system".

On January 16, 1997 the General Assembly of the United Nations adopted the resolution entitled "Measures to Eliminate International Terrorism". The relevant passages from that resolution are the following:

Guided by the purposes and principles of the Charter of the United Nations,

Deeply disturbed by the persistence of terrorist acts, which have taken place worldwide,

Stressing the need further to strengthen international cooperation between States and between international organizations and agencies, regional organizations and arrangements and the United Nations in order to prevent, combat and eliminate terrorism in all its forms and manifestations, wherever and by whomsoever committed . . . (page 1)

Noting that terrorist attacks by means of bombs, explosives or other incendiary or lethal devices have become increasingly widespread . . . (page 2)

1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;

2. Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them . . . (page 2)

Further, the "Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism" of December 17, 1996 provides:

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations,

Recalling the Declaration on Measures to Eliminate International Terrorism adopted by the General Assembly in its resolution 49/60 of 9 December 1994 . . .

Deeply disturbed by the worldwide persistence of acts of international terrorism in all its forms and manifestations . . .

Noting that the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, does not provide a basis for the protection of perpetrators of terrorist acts, noting also in this context articles 1, 2, 32 and 33 of the Convention . . .

Solemnly declares the following:

1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed, including those which jeopardize friendly relations among States and peoples and threaten the territorial integrity and security of States;

2. The States Members of the United Nations reaffirm that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations; they declare that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations . . .

On the concept "of acts contrary to the purposes and principles of the United Nations", the *Handbook on Procedures and Criteria for Determining Refugee Status* deals with that phrase in para. 162:

It will be seen that this very generally-worded exclusion clause overlaps with the exclusion clause in Article 1F(*a*); for it is evident that a crime against peace, a war crime or a crime against humanity is also an act contrary to the purposes and principles of the United Nations. While Article 1F(*c*) does not introduce any specific new elements, it is intended to cover in a general way such acts against the purposes and principles of the United Nations that might not be fully covered by the two preceding exclusion clauses.

In *Pushpanathan* Bastarache J. noted that it was not necessary for the perpetrator of the acts contrary to the purposes and principles of the United Nations to have acted on behalf of the state, namely that he participated in the exercise of power by the state:

The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees.

He subsequently mentions that:

As mentioned earlier, the Court must also take into consideration that some crimes that have specifically declared to contravene the purposes and principles of the United Nations are not restricted to State actors.

In *Sivakumar* Linden J.A. mentioned at 445:

When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status.

Consequently, the panel concludes that as a terrorist movement, led by a terrorist leader and using methods regarded as terrorist, MTI/Ennahda was guilty of "acts contrary to the purposes and principles of the United Nations"

> at least from January 1997 onwards [emphasis added], the date of adoption of the resolution to eliminate international terrorism.
>
> We do not feel it is necessary to repeat the analysis given earlier regarding the concept of the claimant's complicity by association as a result of his membership in MTI/Ennahda: suffice it to say that concept also applies here. In view of the claimant's involvement and his important function in his movement, there are serious reasons for considering that he was guilty of "acts contrary to the purposes and principles of the United Nations". We may briefly recall that on November 26, 1998 the claimant said he was still a member of MTI/Ennahda.

[176] This conclusion was based on the evidence in the record and I see no error of law in it. Accordingly, as this is an application for judicial review there is no basis for intervention.

[177] However, I feel it is worth adding a clarification.

[178] The Refugee Division may have erred on the side of caution in saying that in its view terrorism had become an act contrary to the purposes and principles of the United Nations "at least from January 1997 onwards, the date of adoption of the resolution to eliminate international terrorism".

[179] It is in fact possible, as Bastarache J. did in *Pushpanathan* at paras. 66 and 67, to establish the existence of a "reasonable consensus of the international community" based on international conventions and United Nations resolutions as well as, for example, decisions of the International Court of Justice. On the question of terrorism, Bassiouni makes the following observation in *International Criminal Law*, at p. 766:

> The United Nations bodies and agencies have produced, between 1963-1999, fourteen international conventions, six draft conventions, thirty-four resolutions, forty-six reports, seven studies by the *Ad Hoc* Committee on International Terrorism, five Notes by the Secretary-General and eighteen miscellaneous documents pertaining to "terrorism", totalling 112 instruments and documents on the subject.

[180] It is thus not impossible that there was an international consensus on certain forms of terrorism, including the one at issue in the case at bar, before January 1997. However, it is not necessary for me to decide the point since it was established in the case at bar, during the hearing before the Refugee Division which ended in May 1999, that the Ennahda movement was at that time a terrorist group within the meaning of the resolution adopted by the General Assembly of the United Nations on January 16, 1997 on "Measures to Eliminate International Terrorism". It was further established before the Refugee Division that on November 28, 1998, the appellant said he was still a member of the movement. Accordingly, it was open to the Refugee Division to conclude, based on the evidence presented of the appellant's position in the movement, that there were serious reasons for considering that the appellant had been guilty by association of terrorist acts contrary to the purposes and principles of the United Nations within the meaning of Article 1F(*c*) of the Convention.

Disposition

[181] To the first question certified,

Are the rules laid down by the Federal Court of Appeal in *Sivakumar v. Canada, [(Minister of Citizenship and Immigration)]* [1994] 1 F.C. 433, on complicity by association for purposes of implementing Article 1F(*a*) of the *United Nations Convention Relating to the Status of Refugees*, applicable for purposes of an exclusion under Article 1F(*b*) of the said Convention?

I would answer that the rules on complicity by association developed with respect to Article 1F(*a*) of the Convention do not apply as such to Article 1F(*b*).

[182] Accordingly, there is no reason to answer the second question certified.

[183] I would dismiss the appeal with costs.

"Robert Décary"

J.A.

Certified true translation

Suzanne M. Gauthier, C. Tr., LL.L.

FEDERAL COURT OF CANADA

APPEAL DIVISION

SOLICITORS OF RECORD

FILE:	A-33-02
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CONCURRING REASONS:	Décary J.A.
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