Citation: Gonzalez v. Canada (Minister of Employment and Immigration) (C.A.), [1994] 3 F.C. 646
Date: May 26, 1994
Docket: A-48-91

Luis Alberto Irias Gonzalez (*Applicant*)

v.

The Minister of Employment and Immigration (*Respondent*)

Indexed as: Gonzalez v. Canada ***(*Minister of Employment and Immigration*) (*C.A.*)***

Court of Appeal, Mahoney, Létourneau and [ho]Robertson JJ.A."Vancouver, April 19; Ottawa, May 26, 1994.

Citizenship and Immigration " Status in Canada " Convention refugees " Appeal from CRDD decision applicant not Convention refugee " Applicant, Nicaraguan, returning fire as member of military platoon against Contras hiding in peasant's house " Women, children, 10 Contras killed " Board holding applicant committing crime against humanity, i.e. murder of civilians, therefore excluded from definition of Convention refugee " Appeal allowed " Private soldier in action against armed enemy not guilty of war crime or crime against humanity within Convention refugee definition " Applicant participating in war, not war crime " As neither war crime nor crime against humanity, tribunal erred in applying exclusion clause " Each case turning on own facts.

This was an appeal from a decision of the Refugee Division holding that the applicant was excluded from the definition of Convention refugee by reason of Article 1F(a) of the *United Nations Convention Relating to the Status of Refugees* because it found that there was serious reason to believe that he had committed a crime against humanity. *Immigration Act*, subsection 2(1) defines "Convention refugee" as any person who, by reason of a well-founded fear of persecution for enumerated reasons is outside the country of nationality and is unable or unwilling by reason of that fear to avail himself of the protection of the country. Article 1F provides that the Convention does not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against humanity. The applicant, a citizen of Nicaragua, was drafted and assigned to a "battalion" which encountered counter-revolutionary forces hiding in a peasant's house. When the enemy opened fire on the battalion, it returned the fire until there was no more shooting from the house. Three peasant women and six children were killed along with about ten Contras. The applicant had objected to firing on the women and children, but his commander had said that they could not do anything for them. Shortly thereafter, while on leave, the applicant went underground, left Nicaragua, and arrived in Canada in 1989. The Board found that he had participated in a crime against humanity, namely the murder of civilians.

The issues were (1) whether the Board had erred in law in failing to consider whether the applicant met the inclusionary requirements of the definition of Convention refugee; (2) whether the Board had erred in law in determining that the applicant had committed a crime against humanity because it misconstrued either the meaning of crime against humanity or the evidence before it.

Held, the appeal should be allowed.

Per Mahoney J.A. (Robertson J.A. concurring): The applicant argued that a finding on the merits was essential because the quality of persecution which a claimant might suffer if returned must be weighed against the gravity of what had been done to engage the exclusion clause. Nothing in the Act permits the Refugee Division to weigh the severity of potential persecution against the gravity of the conduct which has led it to conclude that what was done was an Article 1F(a) crime. The exclusion of Article 1F(a) is, by statute, integral to the definition. Whatever merit there might otherwise be to the claim, if the exclusion applies, the claimant cannot be a Convention refugee. Practically though, the Refugee Division should deal with all elements of a claim in its decision so that if on appeal it is found to have erred, the Court can make the necessary declaration without requiring the Refugee Division to deal with it again.

A finding of a war crime or crime against humanity by a private soldier engaged in an action against an armed enemy is not to be reached within the Convention refugee definition. The applicant's participation in this military action did not fall within the concepts of war crime nor crime against humanity. It was war, not war crime. Since there was neither a war crime nor crime against humanity, the tribunal erred in applying the exclusion clause.

Per Létourneau J.A. (concurring): The Board misconstrued the very notion of crime against humanity and erred in law in too readily assuming that the essential elements of the crime can consist of the mere killing of innocent civilians by military personnel during an action against an armed enemy. In these particular facts and circumstances the applicant was, as a private soldier, engaged in an action against an armed enemy, and his participation in the killing of innocent civilians by his platoon fell short of a crime against humanity. Each individual case will depend on its own particular facts and circumstances. It may be that in a given situation, while the death of innocent civilians occurred at the time of or during an action against an armed enemy, such deaths were not the unfortunate and inevitable casualties of war as contended, but resulted from intentional, deliberate and unjustifiable acts of killing and slaughtering.

Statutes and regulations judicially considered

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 82 U.N.T.S. 279, Charter of the International Military Tribunal, Art. 6, 8.

Immigration Act, R.S.C., 1985, c. I-2, s. 2 (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1).

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Art. 1F(a),(b).

Cases judicially considered

Applied:

Rasaratnam v. Canada (Minister of Employment and Immigration), [1992] 1 F.C. 706; (1991), 140 N.R. 138 (C.A.).

Considered:

Ramirez v. Canada (Minister of Employment and Immigration), [1992] 2 F.C. 306; (1992), 89 D.L.R. (4th) 173; 135 N.R. 390 (C.A.); *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433; (1993), 163 N.R. 197 (C.A.); *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298; (1993), 159 N.R. 210 (C.A.).

Referred to:

R. v. Finta, [1994] 1 S.C.R. 701; (1994), 165 N.R. 1; *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise* (1956), 1 D.L.R. (2d) 497 (S.C.C.); *D/M.N.R. for Customs and Excise v. G.T.E. Sylvania Canada Ltd.*, [1986] 1 C.T.C. 131; (1985), 64 N.R. 322 (F.C.A.); *Air Atonabee Ltd. v. Toronto Harbour Commissioners* (1991), 135 N.R. 118 (F.C.A.); *R. v. B (G.)*, [1990] 2 S.C.R. 57; (1990), 86 Sask. R. 142; 56 C.C.C. (3d) 181; 111 N.R. 62; *Sokoloski v. The Queen*, [1977] 2 S.C.R. 523.

Authors cited

Goodwin-Gill, Guy S. *The Refugee in International Law*, Oxford: Clarendon Press, 1983.

Grahl-Madsen, Atle. *The Status of Refugees in International Law*, Leyden: A.W. Sijthoff, 1966.

Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945"1 October 1946.

United Nations. Office of the United Nations High Commissioner for Refugees. *Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practice Violence, Paper 5*, Ottawa, August 1989. (Unofficial paper issued by United Nations).

United Nations. Office of the United Nations High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, September 1979.

APPEAL from a decision of the Refugee Division ([1990] C.R.D.D. No. 739 (QL)) holding that the applicant was not a Convention refugee as he fell within the exclusion clause of the definition in that it had serious reason to believe that he had committed a crime against humanity. Application allowed.

Counsel:

Jennifer Chow for applicant.

Deirdre A. Rice for respondent.

Solicitors:

Jennifer Chow, New Westminster, B.C. for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

Mahoney J.A.: This is an appeal from a decision of the Refugee Division [[1990] C.R.D.D. No. 739 (QL)] which found the applicant to be excluded from the definition of Convention refugee by reason of section F(a) of Article 1 of the *United Nations Convention Relating to the Status of Refugees* [[1969] Can. T.S. No. 6] because it found there was serious reason to believe that he had committed a crime against humanity. It proceeded directly to that finding in its reasons and made no finding as to whether, had he not been excluded, his claim had merit. Accordingly, we declined to hear argument as to the well-foundedness of his fear of persecution since, absent pertinent findings of fact, even were the appeal to be allowed we could not declare him to be a Convention refugee.

The Facts

The applicant is a citizen of Nicaragua, born October 24, 1968. He graduated as an accountant and was a bank clerk until drafted into the Patriotic Military Service in April, 1987. After a month's compulsory military training he was posted to a "battalion" of 20 men which was given the task of seeking out Contra forces in a mountainous, densely forested area inhabited by peasants. They patrolled without encountering Contras for the first two weeks. The applicant's evidence as to what then happened follows.[1]*ftnote[1] A.B., Vol. II, at pp. 284 ff. The passages quoted are complete; the dots and dashes are in the transcript.

A. It was exactly on the 15th of May, on the day that I arrived that we arrived at this place and there we found a camp of the counter-revolutionaries. They were in a house, a house belonging to some Nicaraguan peasants, so when the counter-revolutionaries realized that we had arrived . . . our battalion . . . they began to fire upon us and we also then returned fire, because we had to return fire because we had to save our own lives. We were firing during one hour, for one hour"

Q. Did you object to having to fire?

A. Yes. During that hour we realized that in that house there were peasants, including women and children and that's when I objected. I told the commandant that there were women and children of our own blood, from our own land in there and that if we continued to fire upon them that they also would be killed, and that we didn't want them to die and that we didn't want anything to happen to them, but he didn't stop. He told us to keep on firing and that nothing could be done for them, so we continued to fire for half an hour more and when we saw that they were no longer returning fire from the house, the commandant ordered us to inspect the place, and that's when we ran to see if the women and children were still alive, but it was horrible. The women were almost in pieces and the children, too. At that moment, my conscience didn't feel very well, because it was horrible how they ended up . . . our own women and children, our own people, killed by people from their own country, so on the 16th of May"

Q. Just a minute. How many women and children were there?

A. There were three women and six children.

Q. And were there any Contras there?

A. Yes, there were approximately ten counter-revolutionaries who also died because they couldn't keep up the combat, couldn't resist.

After describing their burial, his relevant evidence continued.[2]*ftnote[2] *Ibid.*, at p. 287.

Q. When you objected to firing on the women and children, did it occur to you not to shoot?

A. Yes, at that time I thought about not firing because I didn't want them to die, to be killed, and that's when the commandant said that we couldn't do anything for them, that we should continue to fire, and that's when we fired on them for a period of an hour and a half.

Q. What did he mean that you couldn't do anything for them?

A. Because they were in the house where the counter-revolutionaries were and that we couldn't do anything for them, that we had to continue to fire on the counter-revolutionaries who were in the peasants' home at that place.

On May 16, the battalion engaged in a second and, for the applicant, final action. Shortly thereafter he was given ten days' leave. He arrived at his mother's home May 28, went underground in Managua, left Nicaragua April 15, 1988, and arrived in Canada, via Honduras, Guatemala, Mexico and the United States, on April 28, 1989.

The Decision

The Board's findings of fact were:[3]*ftnote[3] A.B., Vol. III, at p. 521.

The claimant gave evidence that on two occasions he had participated in the killing of people. On the first occasion, he took part in the killing of nineteen Nicaraguans,

including three women and six children. The claimant gave no evidence of feeling hesitation or remorse during the first occasion of his shooting. He noted that he knew there were women and children in the house because of the screams after the first shots were fired. He continued with the others to fire at the building until all were dead. He testified that he felt remorse only after the shooting when he inspected the dead bodies inside the house. On the second occasion, the claimant, following without objection the orders of his commander, shot a fleeing contra-rebel in the back, killing him, without so much as a warning to his victim to stop.[4]*ftnote[4] The applicant's conduct on the second occasion, May 16, was not expressed to be a basis for the conclusion of the Refugee Division. It appears that it was, correctly in my opinion, dismissed as irrelevant to a finding of crime against humanity. That said, its characterization by the tribunal is clearly pejorative and demonstrates a naive appreciation of the reality of both military service and guerrilla warfare which is by no means irrelevant.

The Board then recited Article VI of the London Charter [*Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, August 8, 1945, 82 U.N.T.S. 279], to which I shall return, and concluded:[5]*ftnote[5] *Ibid.*, at p. 523.

Of the crimes listed in Article 1F(a), we find that "crime against humanity" is most applicable to the facts of this case.

This above-mentioned international instrument has explicitly made reference to the murder of civilians as part of its definition of "crime against humanity." The claimant admitted having participated in the killing of nine civilian women and children. This panel therefore finds that the claimant has committed a crime against humanity, namely, the murder of civilians.

The claimant alleged that he has committed this crime against humanity on the orders of a superior, but this will not absolve him of the responsibility for the act. A number of international instruments discuss this subject and all of them affirm the view that an individual charged with a crime could not disavow responsibility by claiming that he had acted pursuant to an order of his government.

. . .[qc]

Based on all the evidence before us, this panel finds that the claimant is excluded from the definition of Convention refugee because there are serious reasons for considering that he has committed a crime against humanity.

I would observe in passing that there is a profound and obviously unappreciated distinction between an order of a military superior and an order of a government.[6]*ftnote[6] *vid. R. v. Finta*, [1994] 1 S.C.R. 701, at pp. 826 ff.

The Legislation and Incorporated Instruments

Distilled for purposes of this proceeding, the definition of "Convention refugee" prescribed by the *Immigration Act*[7]*ftnote[7] R.S.C., 1985, c. I-2, s. 2 (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1). is:

2. . . .

"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

. . .[qc]

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;

Section F of Article 1 provides:

F. 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 provision 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.

Paragraph 150 of the *Handbook on Procedures and Criteria for Determining Refugee Status*[8]*ftnote[8] Office of the United Nations High Commissioner for Refugees, Geneva, September 1979. states that the most comprehensive definition of those crimes is to be found in the London Agreement of August 8, 1945, which provided for the trial and punishment of "major war criminals of the European Axis" by the International Military Tribunal at Nuremberg. It reads:

Article 6

The Tribunal established [by the Governments of the Soviet Union, the United States and the United Kingdom and the Provisional Government of France] for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.

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

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

(b) *War Crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

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

. . .[qc]

Article 8

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

I have considered, as well, the parallel provisions of the January, 1946, Tokyo Proclamation and the 1945 Berlin Control Council Law No. 10. The differences are not, in my view, meaningful for purposes of this appeal.

The Tokyo Proclamation is interesting in that its definition of "War Crimes" is simply "namely, violations of the laws and or customs of war" without illustrations such as the reference to ill-treatment of slave labour and there is no reference to religious grounds in the definition of "Crimes against humanity." I infer that the definitions were to some extent tailor made.

The Issues

Two questions were posed by the applicant.

1. Did the Board err in law in that it failed to consider whether the applicant met the inclusionary requirements of the definition of Convention refugee as contained in subsection 2(1) of the *Immigration Act*?

2. Did the Board err in law in determining that the applicant committed a crime against humanity (a) because it misconstrued the meaning of crime against humanity as contained in Article 1F(a) of the Convention and (b) because it misconstrued the evidence before it?

Neither of these questions has been directly confronted by this Court in the triad of decisions heretofore dealing with the exclusionary elements of the definition. In both *Ramirez v. Canada (Minister of Employment and Immigration)*[9]*ftnote[9] [1992] 2 F.C. 306 (C.A.). and *Sivakumar v. Canada (Minister of Employment and Immigration)*[10]*ftnote[10] [1994] 1 F.C. 433 (C.A.). the claimant had been found by the Refugee Division to have established a well-founded fear of persecution for a Convention reason should he return to his own country. In *Moreno v. Canada (Minister of Employment and Immigration),*[11]*ftnote[11] [1994] 1 F.C. 298 (C.A.). the tribunal had not found it necessary to address that issue having found the exclusion of Article 1F(a) to apply. In none of those cases was there any doubt in the mind of the Court that what had been done to the prisoners or civilians by the military or militia had been a crime or crimes within the contemplation of the exclusion. The question in each was the legal consequence of the extent to which the claimant had been implicated.

Failure to Consider Merits of Claim

The applicant based the argument that a finding on the merits is essential because the quality of persecution which a claimant might suffer if returned must be weighed against the gravity of what had been done to engage the exclusion clause and that the balance was a factor which the Refugee Board was required to take into account in deciding whether or not the exclusion clause ought to be invoked. That argument finds support in commentary if not jurisprudence, for example:[12]*ftnote[12] Guy S. Goodwin-Gill, *The Refugee in International Law*, Clarendon Press, Oxford, 1983, at pp. 61-62. See also Atle Grahl-Madsen, *The Status of Refugees in International Law*, A.W. Sijthoff-Leyden, 1966, Vol. 1, at pp. 297-298 and U.N.H.C.R., Canadian Branch, *Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practice Violence, Paper 5*, Ottawa, 1989.

Article 1F excludes `persons', rather than `refugees' from the benefits of the Convention, suggesting that the issue of a well-founded fear of persecution is irrelevant and need not be examined at all if there are `serious reasons for considering' that an individual comes within its terms. In practice, the claim to be a refugee can rarely be ignored, for a balance must also be struck between the nature of the offence presumed to have been committed and the degree of persecution feared. A person with a well-founded fear of very severe persecution, such as would endanger life or freedom, should only be excluded for the most serious reasons. If the persecution feared is less, then the nature of the crime or crimes in question must be assessed to see whether criminal character in fact outweighs the applicant's character as a bona fide refugee.

That passage appears under the subtitle of "Serious Non-Political Crimes" which are the subject of Article 1F(b), rather than 1F(a), but the commentary is not limited in its terms nor, given the way Article 1F is drafted, could the author apply his reasoning to anything but Article 1F in its entirety. Perusal of the other commentary to which we were referred satisfies me that it, too, finds its entire support in Article 1F(b).

Can crimes committed in the prosecution or suppression of a revolution be characterized as "non-political"? I doubt it. Perhaps the modifier "serious" in Article 1F(b) would make possible the balancing suggested but there is no room for it in

Article 1F(a). The crimes of Article 1F(a) are, by any definition, extremely serious. In so far as the commentary has a message applicable to Article 1F(a), it may be that what has occurred in combat is not to be readily found to be a crime.

In my opinion, the reasoning of this Court in *Rasaratnam v. Canada (Minister of Employment and Immigration)*,[13]*ftnote[13] [1992] 1 F.C. 706 (C.A.). which held the internal flight alternative concept to be inherent to the Convention refugee definition has application here. If a claimant had an internal flight alternative, there is simply no question of that claimant having ceased to be a Convention refugee. If there was an internal flight alternative, the claimant never was a Convention refugee because the expressed unwillingness to return to the country of nationality by reason of fear of persecution was necessarily not well-founded objectively.

I find nothing in the Act that would permit the Refugee Division to weigh the severity of potential persecution against the gravity of the conduct which has led it to conclude that what was done was an Article 1F(a) crime. The exclusion of Article 1F(a) is, by statute, integral to the definition. Whatever merit there might otherwise be to the claim, if the exclusion applies, the claimant simply cannot be a Convention refugee.

In my opinion, there is no error in law in either approach but there is a practical reason for the Refugee Division to deal with all elements of a claim in its decision. If it were to hold without reviewable error that, but for the exclusion, a claim was not well-founded, it would not be necessary, as it was in *Moreno*, for the matter to be referred back for yet another full hearing should a court find that the exclusion had been wrongly invoked. On the other hand, if it were to hold, as it did in *Ramirez* and *Sivakumar*, that the claim was well-founded but for application of the exclusion and, unlike those cases, it were found on appeal to have erred in applying it, this Court could make the necessary declaration without requiring the Refugee Division to deal with it again. Taxpayers might appreciate the economies of that approach.

Error in Applying Exclusion Clause

What happened was plainly not a "crime against peace." While I question the Refugee Division's characterization of what happened as more appropriately a "crime against humanity" than a "war crime", I do not think that material. I see no prejudice to the applicant in this case. If what he admitted to having done was either, the exclusion clause was properly invoked. I likewise see no error discrete to the Refugee Division's findings of fact that would require this question to be dealt with in the two parts it was posed.

In *Ramirez*, the principal issue was complicity as a basis for finding that crimes against humanity had been committed by the claimant. Its relevant teaching is that the words "serious reasons for considering" must be taken as prescribing a lower standard of proof than a balance of probabilities. There is no question as to either complicity or burden of proof in this case. The applicant admitted to having himself taken part.

Sivakumar does discuss what constitutes war crimes and crimes against humanity and what distinguishes the two but that discussion, being directed to the particular facts, is not of much help here. The claimant had been a senior staff officer of a revolutionary, rather than government, militia which had committed numerous crimes against

humanity but he had neither ordered nor been personally present at their commission. I agree with the *dicta* of that decision that the distinction between the crimes is rather dubious in the context of a civil war.

While *Moreno* was also primarily concerned with complicity, it is nevertheless pertinent here. Taking account of the questionable distinction between the crimes in a civil war, it established the following relevant principles:

1. The standard of proof prescribed by the Convention, and defined by *Ramirez*, that is, something less than a balance of probabilities, pertains only to questions of fact.

2. It is a question of law whether the act of killing civilians by military personnel is to be classified as a crime against humanity or a war crime.

3. The legal criteria found in the Act and Convention must be satisfied for an act or omission to be found a crime against humanity or a war crime.

4. The criteria are not satisfied if what is established is that there are "serious reasons for considering" that an act or omission could be classified as a crime against humanity or a war crime; it must be established that, in law, it definitely was.

It is desirable to repeat a paragraph from the tribunal's decision in which, after reciting Article 6 of the London Charter, it said:

The above-mentioned international instrument has explicitly made reference to the murder of civilians as part of its definition of "crimes against humanity." The claimant admitted having participated in the killing of nine civilian women and children. This panel therefore finds that the claimant has committed a crime against humanity, namely, the murder of civilians.

Counsel for the respondent dealt with that as though it was a matter of *res ipsa loquitur*. In my opinion, in the context of a military confrontation and notwithstanding a certainty of civilian casualties, a facile transition from murder to killing and back is indefensible in law.

The acts and omissions contemplated by those who defined the crimes of Article 1F are fully exposed in the record of the Nuremberg trial.[14]*ftnote[14] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945"1 October 1946. The murder and ill-treatment of civilian population in Europe is extensively discussed.[15] *ftnote[15] Official Text in the English Language, Vol. XXII, at pp. 475 ff. No particular quotation is possible. It is a litany of horror. The gist is to be gained by perusal of many pages. Expressing a conclusion no more embracing that the present appeal requires, I am of the opinion that a finding of a war crime or crime against humanity by a private soldier engaged in an action against an armed enemy is not to be reached within the Convention refugee definition. Tragic and appalling as its inevitable result, what the applicant admitted to was participation in a military action that does not reach the concepts of war crime or crime against humanity. It was war, not war crime.

Since what the applicant admitted to having done was neither a war crime nor crime against humanity, the tribunal erred in applying the exclusion clause. That conclusion renders unnecessary consideration of the impact, if any, of *Finta* on Convention refugee definition having particular regard to Article 8 of the London Agreement and parallel provisions in other relevant international instruments.

I would allow the appeal, set aside the decision of the Refugee Division dated October 12, 1990, and remit the matter for a new hearing on the basis that the exclusion of Article 1F(a) does not apply to the applicant.

[lc-.1]Robertson J.A.: I agree.

[lc-.1]* * *s<(qc]

[lc-.1]*The following are the reasons for judgment rendered in English by*

[lc-.1]Létourneau J.A.: I agree with my colleague, for the reasons that he gives, that this appeal ought to be allowed and the matter disposed of as he suggests.

[lc-.1]It is a question of law to determine whether the act of killing civilians by military personnel can constitute a crime against humanity or a war crime as the issue refers to the proper construction to be given to the definition of these crimes. The construction of a provision or statute, i.e. the meaning, scope and definition of the contents and elements of a crime, be it murder, manslaughter, assault, robbery or a war crime or a crime against humanity, is without a doubt a question of law.[16]*ftnote[16] See: *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise* (1956), 1 D.L.R. (2d) 497 (S.C.C.); *D/M.N.R. for Customs and Excise v. G.T.E. Sylvania Canada Ltd.*, [1986] 1 C.T.C. 131 (F.C.A.); *Air Atonabee Ltd. v. Toronto Harbour Commis[ho]sioners* (1991), 135 N.R. 118 (F.C.A.); *R. v. B. (G.)*, [1990] 2 S.C.R. 57, at p. 71; *Sokoloski v. The Queen*, [1977] 2 S.C.R. 523.

[lc-.1]In the present case, I believe the Board misconstrued the very notion of crime against humanity and erred in law in too readily assuming that the essential elements of the crime can consist of the mere killing of innocent civilians by military personnel during an action against an armed enemy. This is where the question of law resides and the error of law lies.

[lc-.1]I am satisfied that in the particular facts and circumstances of this case the applicant was, as a private soldier, engaged in an action against an armed enemy, and that his actual participation in the killing of innocent civilians by his platoon falls short of a crime against humanity. Had the Board properly construed the meaning of crime against humanity, it would have so found.

[lc-.1]However, I do not wish to be understood as saying that the killing of civilians by a private soldier while engaged in an action against an armed enemy can never amount to a crime against humanity or a war crime so as to never give rise to the application of the exclusion found in Article lF(a) of the Convention. Each individual case will depend on its own particular facts and circumstances. It may be that in a given situation, while the death of innocent civilians occurred at the time of, or

during, an action against an armed enemy, such deaths were not the unfortunate and inevitable casualties of war as contended, but rather resulted from intentional, deliberate and unjustifiable acts of killing and slaughtering.