A-400-95

MONTRÉAL, QUEBEC, THE 18TH DAY OF SEPTEMBER 1996.

CORAM: **THE HONOURABLE MR. JUSTICE MARCEAU**
THE HONOURABLE MR. JUSTICE DÉCARY
THE HONOURABLE DEPUTY JUSTICE CHEVALIER

BETWEEN: MINISTER OF CITIZENSHIP
AND IMMIGRATION,

Appellant,

AND:

MOHAMMAD HASSAN BAZARGAN,

Respondent.

J U D G M E N T

The appeal is allowed, the impugned decision is set aside and the application for judicial review of the Board's decision of July 28, 1992 is dismissed.

signed: Louis Marceau
J.A.

Certified true translation

A. Poirier

A-400-95

CORAM: MARCEAU J.A.
DÉCARY J.A.
CHEVALIER D.J.A.

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION,

Appellant,

AND:

MOHAMMAD HASSAN BAZARGAN,

Respondent.

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Montréal
on Wednesday, September 18, 1996.)

DÉCARY J.A.

The Immigration and Refugee Board (Convention Refugee Determination Division) (hereinafter "the Board") found that the respondent was a refugee within the meaning of subsection 2(1) of the *Immigration Act*. The Board further found that because of the positions the respondent had held in Iran under Shah Reza's rule, there were serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations and that, in light of Article 1F(c) of the *United Nations Convention Relating to the Status of Refugees*[1] ("the Convention"), he therefore could not avail himself of the protection conferred by the Convention.

[1] 1. . . .
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
. . .
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

The second part of the decision, that is, the part concerning what is known as the exclusion clause, was challenged by an application for judicial review made to the Trial Division of this Court, which allowed the application. Hence the appeal to us.

The facts are relatively simple and largely undisputed, which is unusual in a case of this nature. The respondent joined the Iranian national police in 1960 and pursued his career there until 1980. Between 1960 and 1977, he climbed the ranks of the military hierarchy and became a colonel. From 1974 to 1977, he worked in Tehran as the officer in charge of liaison between the police forces and SAVAK.[2] SAVAK, from which he had received some of his training, was an internal security agency under the Shah's personal authority. During that period, the respondent was in charge of the network for exchanging classified information between the police forces and SAVAK; it has been established that he was appointed to that position within the Iranian police because of his knowledge of intelligence, espionage and counterespionage. In 1977, the respondent, whom the Shah was about to make a general, became the chief of the police forces in Hormozgan province, which is strategically located in southwestern Iran on the Persian Gulf; he held that position until the fall of the monarchist regime in 1979. According to his own testimony, as chief of the police forces for the said province he collaborated with the head of SAVAK for the province. It has been established that the respondent was never a member of SAVAK.

The documentary evidence shows that SAVAK was a brutal, violent instrument of repression that terrorized all levels of Iranian society at the time. The Board also mentioned the [TRANSLATION] "notoriousness of SAVAK's human rights violations" and the motions judge herself noted that "there is no doubt that Savak is an organization that deprived other people of their rights or restricted those rights, thereby violating the purposes and principles of the United Nations".

[2] Acronym for a term rendered in English by "National Intelligence and Security Organization".

Essentially, the Board decided that there were serious reasons for considering that, because of his role as the liaison officer with SAVAK and the knowledge of SAVAK's activities that, in its view, he could not have failed to have, the respondent was an accomplice to those activities. The motions judge expressed disagreement with the Board's decision: in her view, complicity assumes membership in the organization, and the respondent was not a member of SAVAK.

In our view, the motions judge was wrong to intervene. Her interpretation of exclusion clause 1F is inconsistent with what this Court held in *Ramirez v. Canada (Minister of Employment and Immigration)*[3], *Moreno v. Canada (Minister of Employment and Immigration)*[4] and *Sivakumar v. Canada (Minister of Employment and Immigration)*.[5]

From what MacKay J. said in *Gutierrez et al. v. Minister of Employment and Immigration*,[6] the motions judge derived the principle that there cannot be complicity in the commission of an international offence unless the following three conditions are met: (1) membership in an organization that commits such offences as a continuous and regular part of its operation; (2) personal and knowing participation; and (3) failure to disassociate from the organization at the earliest safe opportunity.

We do not think that such an interpretation is possible in light of the context in which MacKay J.'s remarks were made and, in any event, it would give this Court's judgments in *Ramirez*, *Moreno* and *Sivakumar* a scope that they do not and cannot have.

[3] [1992] 2 F.C. 306 (C.A.).

[4] [1994] 1 F.C. 298 (C.A.).

[5] [1994] 1 F.C. 433 (C.A.).

[6] (1994), 84 F.T.R. 227 (T.D.).

First of all, those three cases involved claimants who were members of the implicated organization. The issue of the complicity of a non-member therefore did not arise.

Moreover, in light of MacGuigan J.A.'s comments in *Ramirez*,[7] it is clear that the Court expressly refused to make formal membership in an organization a condition for the exclusion clause to apply. At p. 320 of his reasons, MacGuigan J.A. took care to specify that it was

> undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts.

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

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

[7] *Supra*, note 3.

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.

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"[8] — that there are serious reasons for considering that the respondent is guilty. In the case at bar, the Board concluded as follows:[9]

> [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.

These inferences and this conclusion are based on the evidence and are reasonable. This Court has noted on many occasions that the Board is a specialized tribunal that has complete jurisdiction to draw the inferences that can reasonably be drawn.[10] In the case at bar, the motions judge was all the more wrong to intervene given that the Board's inferences were accompanied by devastating observations on the credibility of that part of the respondent's testimony in which he argued that he had no knowledge of SAVAK's activities.

Accordingly, the appeal will be allowed, the motions judge's decision set aside and the application for judicial review of the Board's decision of July 28, 1992 dismissed.

signed: Robert Décary
J.A.

[8] *Ramirez, supra*, note 3, at p. 314.

[9] A.B., at p. 71.

[10] See *Aguebor v. Minister of Employment and Immigration* (1993), 160 N.R. 315 (C.A.).

Certified true translation

A. Poirier

Federal Court of Appeal

Court No. A-400-95

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION,

Appellant,

- and -

MOHAMMAD HASSAN BAZARGAN,

Respondent.

REASONS FOR JUDGMENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.: A-400-95

APPEAL FROM THE JUDGMENT OF THE TRIAL DIVISION RENDERED ON MAY 30, 1995 IN FILE NO. A-51-93

STYLE OF CAUSE: MINISTER OF CITIZENSHIP AND IMMIGRATION

AND:

MOHAMMAD HASSAN BAZARGAN

PLACE OF HEARING: Montréal, Quebec

DATES OF HEARING: September 16 and 18, 1996

REASONS FOR JUDGMENT OF THE COURT (THE HONOURABLE MR. JUSTICE MARCEAU, THE HONOURABLE MR. JUSTICE DÉCARY AND THE HONOURABLE DEPUTY JUSTICE CHEVALIER)

DELIVERED FROM THE BENCH BY: the Honourable Mr. Justice Décary

Dated: September 18, 1996

APPEARANCES:

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Denis Buron	for the Respondent

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