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Docket: IMM-5011-08

Citation: 2009 FC 723

Ottawa, Ontario, July 15, 2009

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

MICHEL CADET

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and Facts

[1] Michel Cadet, a 40-year-old Haitian citizen, has applied for judicial review of a decision by a member of the Refugee Protection Division (the panel), dated October 1, 2008, which rejected his refugee protection claim on the ground that he was excluded under the terms of paragraphs 1F(*a*) and 1F(*c*) of the *Convention*. The panel limited its decision to the exclusion and therefore did not address the question of whether Mr. Cadet had a well-founded fear of persecution by his former SWAT unit or by the Chimères Lavalas, supporters of President Aristide.

[2] Section F of Article 1 of the *Convention*, which is set out in a Schedule to the *Immigration and Refugee Protection Act* (*IRPA*), reads:

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.

F. 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.

[3] The panel's decision that the applicant is excluded is based on the following facts:

(1) According to his Personal Information Form (PIF), Mr. Cadet joined the Haitian National Police (HNP) voluntarily in 1995 and left it in 2002. In 1996, he joined the *Groupe d'Intervention de la Police Nationale d'Haïti* (the HNP SWAT unit). On June 17, 2001, he was promoted to the rank of Police Officer IV, and in August 2001, he became one of the HNP SWAT unit's six team leaders. The organization's mission is to engage in high-risk activities, such as dealing with drug trafficking and hostage-taking. According to Mr. Cadet, his team was specialized in hostage situations.

(2) During the night of October 28, 2002, the applicant was in charge of three other SWAT unit officers and allegedly ordered them to barricade a roadway. They then stopped and arrested four individuals who claimed to be working for President Aristide. Two days later, they learned that the individuals had been released by order of the President, who had been in power since February 2001. Aristide was first elected President in February 1990, was exiled for three years following the 1991 coup, and briefly returned to power in 1994-95 before being replaced by René Préval in 1996.

(3) According to Mr. Cadet, his problems stem from the October 28, 2002, incident: (1) On November 2, 2002, the Central Zone police superintendent to whom the team had allegedly handed over the arrested men was abducted; and (2) the next day, the applicant and his team apparently saw armed men in front of their barracks, including one of the four individuals they had arrested. Since they had no means of standing up to the men, the team decided to quit the SWAT unit and never returned to work. Mr. Cadet claims that he hid and joined the resistance.

(4) On November 6, 2002, officers from the SWAT unit allegedly came to his home looking for him. Since he was not there, they wanted to know where he was hiding.

(5) On August 15, 2004, after President Aristide had left, as the applicant was trying to return to the capital in a Jeep, he was allegedly severely beaten and left for dead by a group of Chimères Lavalas. Among them, he allegedly recognized one of the individuals arrested on

October 28, 2002. Thanks to some people and to his parents, who happened to be passing by, he was saved.

(6) On August 28, 2004, the same group of Chimères, who had learned that the applicant was still alive, allegedly went to his home in Cap Vert. Not finding him there, they apparently battered and raped his sister. She then left the country for the Dominican Republic. The applicant fled Haiti in early 2005 and ultimately arrived in the United States in 2006. There, he claimed but was denied asylum.

(7) Finally, on March 28, 2007, Mr. Cadet arrived in Canada and immediately claimed refugee protection.

Minister's Intervention

[4] On September 27, 2007, a representative of the Minister of Public Safety and Emergency Preparedness (the Minister), in accordance with paragraph 170(*e*) of the *Immigration and Refugee Protection Act* (*IRPA*), filed a notice of intervention alleging that (1) the claimant "stated that he worked as a police officer for the Haitian national police from 1995 to 2003; the claimant also allegedly held the position of SWAT Team Leader on the Haitian national police response team"; and (2) "there is significant documentary evidence of human rights abuses committed by the Haitian national police during the period in question." The Minister submitted that "there are serious reasons to believe that Michel Cadet may have committed acts referred to in articles 1F(*a*) and 1F(*c*) of the *Convention* . . . ." Counsel for the Minister was present at the hearing before the panel, cross-examined Mr. Cadet and made submissions.

[5] The Minister's intervention is based on the following documentary evidence:

(1) U.S. Department of State *Country Reports on Human Rights Practices* in Haiti, for the years 1995 to 2003 (Exhibits M-2 to M-10).

(2) Human Rights Watch (HRW) reports – 1997 (Exhibit M-13); HRW-1998 (Exhibit M-14); HRW-2003 (Exhibit M-15); HRW-2002 (Exhibit M-16); HRW-2001 (Exhibit M-17); HRW-2000 (Exhibit M-18).

(3) Amnesty International (AI) reports for the years 1996 to 2003 (Exhibits M-19 to M-27). Other AI reports (Exhibits M-28, M-29 and M-30).

(4) Various reports: Exhibits M-11, M-12, and M-31 to M-41.

Panel's Decision

[6] As we shall see, Mr. Cadet's credibility is at the core of the panel's decision. The panel began its analysis by writing:

> Having heard this case and read the submissions, the panel notes that the claimant did not deny that the police forces in Haiti were guilty of crimes or acts referred to in articles 1(F)(a) and (c) of the Convention. However, he denied that he was directly or indirectly involved in such acts by the police forces.
>
> Accordingly, using the standard of proof required, can the panel conclude from the evidence that the claimant is guilty of acts referred to in articles 1(F)(a) and (c) of the Convention? [Emphasis added.]

[7] With respect to the matter of credibility, the panel stated:

- "When a claimant swears that facts are true, there is a presumption that they are true unless there are valid reasons to doubt their truthfulness."

- "An important indicator of a witness's credibility is the consistency of his or her account."

- "In addition, credibility and the probative value of testimony must be assessed according to what is generally known of the conditions and laws in the claimant's country of origin, as well as the experiences of others in similar situations in that country."

[8] According to the panel, "some parts of the claimant's testimony gave particular cause for concern . . . ".

[9] In support of this finding, the panel noted as follows:

(1) There was a contradiction regarding when Mr. Cadet allegedly left the HNP (and the SWAT unit): November 2002 or November 2003.

(2) His testimony was not consistent with his PIF when he stated that he never took part in major or high-risk operations in his country after August 2001, whereas he had written in his PIF that he took part in an operation in 2002. The panel found that Mr. Cadet's testimony that his SWAT team did not take part in operations was implausible for the following reasons: (1) his testimony implied that the SWAT unit, a highly specialized

and costly police force, "was totally useless in his country"; and (2) "how can the panel believe that for the entire period that he was a member of this group, no hostage situations occurred in Haiti, when the panel is aware of the situation in the country in that regard? To ask the question is to answer it."

(3) The panel did not believe Mr. Cadet's testimony that he was "entirely unaware of the police actions in Haiti, because, as he said, they were not allowed to share information with each other; later, however, he contradicted himself on that point." The panel added the following comment:

> Nonetheless, it is very hard to believe that a specialized unit such as the claimant's would not be able or allowed to share relevant information, if only to ensure their effectiveness and their safety.

(4) Mr. Cadet appears to have changed his testimony regarding police blunders in Haiti. He "began by stating that he had never been told about them, but later amended his account to say that he had only heard about them on the radio." The panel added:

> At one point, he went so far as to state not only that he had never witnessed arrests by the SWAT team members but also that when people shot at them, they stopped all their activities.

(5) The panel did not believe Mr. Cadet when he said that certain members of the SWAT unit were the agents of his persecution. It reasoned as follows:

> Lastly, his entire testimony was based on the fact that his unit comprised professionals and that they fulfilled their duties correctly and with moderation. If that were the case, how can one explain his fear of those same people in his country of origin? How can one explain the fact that this same group of professionals apparently took no steps to ensure the claimant's

> protection in his country of origin? How can one explain that, in response to a question, he replied that he did not resign from his job because he needed the salary to survive, instead of justifying his failure to resign by saying that he had no reason to do so?
>
> Justifying keeping his job for economic reasons would certainly have helped establish his credibility, but denying everything in the manner in which the claimant did so undermines his credibility to such an extent that it is impossible for the panel to give him the benefit of the doubt.

Analysis

(a) Standard of Review

[10] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), the Supreme Court of Canada changed the analysis of the applicable standard of review by eliminating the "patent unreasonableness" standard. As a result, there are now only two standards of review: correctness and reasonableness.

[11] *Dunsmuir* also instructs us that it is not always necessary to conduct an exhaustive analysis where, as here, the existing case law has already satisfactorily determined the appropriate standard of review.

[12] In *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, Justice Décary wrote as follows concerning the applicable standard of review:

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

> are erroneous. (On the standard of review, see *Shrestha v. The Minister of Citizenship and Immigration*, [2002] F.C.J. No. 1154, 2002 FCT 886, Lemieux J. at paras. 10, 11 and 12.) [Emphasis added.]

(b) Certain Principles

(1) Standard of proof

[13] Article 1F of the Convention states that "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 humanity . . .".

[14] Decisions by the Supreme Court of Canada and the Federal Court of Appeal have defined the meaning of "serious reasons for considering." I will quote paragraphs 114 and 115 of the decision of the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 (*Mugesera*) with respect to the evidentiary standard:

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

> **115** In imposing this standard in the *Immigration Act* in respect of war crimes and crimes against humanity, Parliament has made clear that these most serious crimes deserve extraordinary condemnation. As a result, no person will be admissible to Canada if there are reasonable grounds to believe that he or she has committed a

> crime against humanity, even if the crime is not made out on a higher standard of proof. [Emphasis added.]

[15] To this I would add the remarks of Justice Robertson, then a member of the Federal Court of Appeal, in *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (*Moreno*):

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

(2) Burden of proof

[16] It is settled law that the burden of proof is on the Minister, since he is the one who is alleging that Mr. Cadet is excluded.

(3) Mr. Cadet's credibility: a question of fact

[17] The panel's finding that Mr. Cadet was not credible with respect to certain important elements of his testimony is a finding of fact to which a reviewing court must show great deference, since such a court is not entitled to revisit the facts or weigh the evidence anew. Only where the evidence viewed reasonably is incapable of supporting the panel's findings can the court intervene (see *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 (*CUPE*), at paragraph 85). In *Mugesera*, above, the Supreme Court of Canada set aside the decision of the Federal Court of Appeal, stating as follows:

> **36** In the case at bar, we find that the FCA exceeded the scope of its judicial review function when it engaged in a broad-ranging review and reassessment of the IAD's findings of fact. It set aside those findings and made its own evaluation of the evidence even though it had not been demonstrated that the IAD had made a reviewable error on the applicable standard of reasonableness. Based on its own improper findings of fact, it then made errors of law in respect of legal issues which should have been decided on a standard of correctness.
>
> . . .
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> **38** On questions of fact, the reviewing court can intervene only if it considers that the IAD "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (*Federal Court Act*, s. 18.1(4)(*d*)). The IAD is entitled to base its decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances: s. 69.4(3) of the *Immigration Act*. Its findings are entitled to great deference by the reviewing court. Indeed, the FCA itself has held that the standard of review as regards issues of credibility and relevance of evidence is patent unreasonableness: *Aguebor v. Minister of Employment & Immigration* (1993), 160 N.R. 315, at para. 4. [Emphasis added.]

[18] Another clarification is worth making. It stems from the recent decision of the Supreme Court of Canada in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (*Khosa*), where Justice Binnie, on behalf of the majority, expressed the opinion that paragraph 18.1(4)(*d*) of the *Federal Courts Act*, which applies to the judicial review of decisions by federal boards, commissions or other tribunals, does not establish a standard of review, but rather provides

legislative guidance as to the "degree of deference" to be shown to a board's findings of fact.

Justice Binnie wrote:

> **46** More generally, it is clear from s. 18.1(4)(*d*) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*.

[19] In *Khosa*, Justice Binnie revisited and expanded on the discussion of the importance of reasons, a discussion which Justice L'Heureux-Dubé had begun in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*) and to which Justices Bastarache and LeBel had returned in *Dunsmuir*.

[20] Justice Binnie addressed the importance of an administrative tribunal's reasons in the following terms:

> **63** The *Dunsmuir* majority held:
>
> > A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]
>
> *Dunsmuir* thus reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision maker to the applicant, to the public and to a reviewing court. Although the *Dunsmuir* majority refers with approval to the proposition that an appropriate degree of deference "requires of the courts 'not submission but a respectful attention to the reasons offered or which could be offered in support of a decision'" (para. 48 (emphasis added)), I do not think the reference to reasons which "could be offered" (but were not) should be taken as diluting the importance of giving proper reasons

> for an administrative decision, as stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43. *Baker* itself was concerned with an application on "humanitarian and compassionate grounds" for relief from a removal order. [Emphasis added.]

[21] Justice Binnie continued his analysis as follows:

> **65** In terms of transparent and intelligible reasons, the majority considered each of the *Ribic* factors. It rightly observed that the factors are not exhaustive and that the weight to be attributed to them will vary from case to case (para. 12). The majority reviewed the evidence and decided that, in the circumstances of this case, most of the factors did not militate strongly for or against relief. Acknowledging the findings of the criminal courts on the seriousness of the offence and possibility of rehabilitation (the first and second of the *Ribic* factors), it found that the offence of which the respondent was convicted was serious and that the prospects of rehabilitation were difficult to assess (para. 23).
>
> **66** The weight to be given to the respondent's evidence of remorse and his prospects for rehabilitation depended on an assessment of his evidence in light of all the circumstances of the case. The IAD has a mandate different from that of the criminal courts. Khosa did not testify at his criminal trial, but he did before the IAD. The issue before the IAD was not the potential for rehabilitation for purposes of sentencing, but rather whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal order. The IAD was required to reach its own conclusions based on its own appreciation of the evidence. It did so.

[22] I would conclude my comments on this point by citing the remarks made by Justice Décary at paragraph 4 of his reasons in *Aguebor v. Canada (Minister of Employment and Immigration* (1993), 160 N.R. 315 (F.C.A.) (*Aguebor*):

> **4** There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In *Giron*, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, *Giron* in no way reduces the burden that rests on an appellant, of showing

> that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case, the appellant has not discharged this burden. [Emphasis added.]

(4) The concept of complicity

[23] The Federal Court of Appeal has dealt several times with the interpretation to be given to the words "committed a . . . crime against humanity, as defined in the international instruments". Its key decisions are (1) *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (*Ramirez*); (2) *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (*Moreno*); and (3) *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (*Sivakumar*); to which I would add *Bazargan v. Canada (Minister of Citizenship and Immigration)* (1996), 205 N.R. 282 (*Bazargan*) and *Harb*, above.

[24] *Sivakumar* involved an individual who was a member of the Liberation Tigers of Tamil Eelam (LTTE) and held important positions within the military organization: he became an LTTE military commander. In the opinion of Justice Linden, the question was "who is responsible for war crimes or crimes against humanity", and he provided the following summary of the conditions under which such responsibility attaches:

1. "It is clear that if someone personally commits physical acts that amount to a war crime or a crime against humanity, that person is responsible."

2. A person can "commit" such a crime as an accomplice, even though the person has not personally done the acts amounting to the crime. To cite Justice MacGuigan in *Ramirez*, the starting point for complicity in an international crime is "personal and knowing

participation", a question of fact that must be answered on a case-by-case basis, though certain general principles are accepted:

(a) "It is evident that mere by-standers or on-lookers are not accomplices."

(b) "However, a person who aids in or encourages the commission of a crime, or a person who willingly stands guard while it is being committed, is usually responsible. Again, this will depend on the facts in each case." Justice Linden cited *Ramirez* as an example of a person who "had enlisted in the army voluntarily and had witnessed the torture and killing of many prisoners" and thus, there existed in that case "a shared common purpose and the knowledge that all the parties in question may have of it."

(c) "Those involved in planning or conspiring to commit a crime, even though not personally present at the scene", are responsible as well.

(d) "Additionally, a commander may be responsible for international crimes committed by those under his command, but only if there is knowledge or reason to know about them." The source of this principle is section 6 of the *Charter of the International Military Tribunal* (the London Charter) which states:

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

[25] Justice Linden then discussed "[a]nother type of complicity, particularly relevant to this case", namely "complicity through association" in which "individuals may be rendered responsible for the acts of others because of their close association with the principal actors." He wrote as follows, at page 440:

> This is not a case merely of being "known by the company one keeps." Nor is it a case of mere membership in an organization making one responsible for all the international crimes that organization commits (see *Ramirez*, at page 317). Neither of these by themselves is normally enough, unless the particular goal of the organization is the commission of international crimes. It should be noted, however, as MacGuigan J.A. observed: "someone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts" (*Ramirez, supra*, at page 317).
> [Emphasis added.]

[26] In *Sivakumar*, Justice Linden further explored the principle that "[t]he 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." He wrote:

> 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. Mr. Justice Robertson noted this point in *Moreno*, *supra*, when he stated [at page 324]:

> [T]he closer a person is involved in the decision-making process and the less he or she does to thwart the commission of inhumane acts, the more likely criminal responsibility will attach.
>
> [Emphasis added.]

[27] He summarized the concept of complicity by association in the following terms:

> 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.

[28] The people in *Ramirez*, *Moreno* and *Sivakumar* were members of the organization that had committed crimes against humanity. In *Bazargan*, Justice Décary, writing for the Federal Court of Appeal, applied the concept of complicity to a situation of a non-member who was associated with SAVAK. Mr. Bazargan joined the Iranian National Police in 1960 and was a member until 1980. He was responsible for liaison between the National Police and SAVAK.

[29] With respect to SAVAK, Justice Décary wrote as follows at paragraph 4 of his reasons:

> **4** 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".
> [Emphasis added.]

[30] The evidence in *Bazargan* showed that he had never been a member of SAVAK, but was in charge of the network for exchanging classified information between the police forces and SAVAK, and was appointed to that position because of his knowledge of intelligence, espionage and counter-espionage. The evidence also showed that in 1977, Mr. Barzagan, whom the Shah was about to make a general, became the chief of the police forces of an Iranian province strategically located on the Persian Gulf, and held that position until the fall of the monarchy in 1979. In this capacity, he cooperated with the head of SAVAK for that province. As Justice Décary wrote, the Convention Refugee Determination Division determined 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", Mr. Bazargan "was an accomplice to those activities." However, "[t]he 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."

[31] In his analysis of whether the *Ramirez* principles apply to a non-member, Justice Décary cited Justice MacGuigan's clarification from that case, namely that it is

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

And, at paragraph 10, Justice Décary wrote:

> It is true that among "the particular facts" of the case with which MacGuigan J.A. went on to deal in his reasons was the fact that Ramirez was actually an active member of the organization that committed the atrocities (the Salvadoran army) and the fact that he was very late in showing remorse, but those were facts that helped determine whether the condition of personal and knowing participation had been

> met; they were not additional conditions. Membership in the organization will, of course, lessen the burden of proof resting on the Minister because it will make it easier to find that there was "personal and knowing participation". However, it is important not to turn what is actually a mere factual presumption into a legal condition. [Emphasis added.]

[32] At paragraph 11 of his reasons, Justice Décary explained his understanding of the concept of personal and knowing participation, and I quote:

> **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. [Emphasis added.]

[33] At paragraph 12, he repeated, “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’ – that there are serious reasons for considering that the respondent is guilty.” He then quoted the decision of the Convention Refugee Determination Division:

> [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.

[34] Justice Décary concluded his reasons with the following remarks:

> **13** 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. 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. [Footnote omitted.]

(c) Conclusions

[35] For the reasons set out below, it is my opinion that this Court is justified in intervening in this case, and that this application for judicial review must accordingly be allowed.

[36] With respect to paragraphs 1F(*a*) and 1F(*c*) of the Convention, which was signed in Geneva on July 21, 1951, and under which a person is excluded from refugee status where there are serious reasons to consider that he has committed a crime against humanity, Canadian courts have identified certain fundamental principles that I have listed, including the essential requirement of personal and knowing participation, which ensures that *mens rea* is an essential element of the crime.

[37] Upon reading the panel's reasons, it is clear that the panel

(a) Relied primarily on the applicant's PIF for certain basic facts.

(b) Summarized the Minister's intervention to the effect that Mr. Cadet must be excluded because the Minister "states that there are serious reasons for considering that the claimant <u>may have committed acts</u> referred to in articles 1F(*a*) and 1F(*c*) of the Convention" for the following reasons:

1. The claimant "stated that he worked as a police officer for the Haitian National Police from 1995 to 2003; the claimant also allegedly held the position of SWAT team leader on the Haitian National Police response team."

2. There is significant documentary evidence of human rights abuses committed by the Haitian National Police during the period in question.

(c) Provided the following analysis:

(1) "Having heard this case and read the submissions, the panel notes that the claimant <u>did not deny</u> that the police forces in Haiti were guilty . . . . However, he denied that he was directly or indirectly involved in such acts by the police forces."

(2) Framed the question as follows: "[C]an the panel conclude from the evidence that the claimant <u>is guilty of acts</u> referred to in articles 1(F)(*a*) and (*c*) of the Convention?"

(3) Referred to the indicators of the credibility of a narrative, explained its concerns stemming from contradictions and implausibilities, and found that the claimant lacks credibility.

[38] I would note that the panel's reasons made no mention and provided no analysis of (a) the concept of complicity or complicity by association; and (b) the documentary evidence adduced by the Minister as proof that the Haitian "police forces" (without specifying which forces are involved) committed crimes against humanity. Moreover, the panel's reasons did not discuss the applicant's testimony concerning the Minister's documentary evidence.

[39] In my view, several reasons warrant the Court's intervention.

[40] First, the panel erred in law with regard to the burden of proof. I rely in this regard on *La Hoz v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 762 (*La Hoz*), a decision of my colleague Justice Blanchard. The circumstances surrounding that case are very similar to those before me. The claimant was excluded on the basis that he took part in human rights violations committed by the Peruvian army, of which he was a member. The panel found that he was not credible. There was no evidence before the panel that the claimant had been directly involved in the commission of a crime against humanity. In *La Hoz*, my colleague wrote as follows at paragraph 21 of his reasons:

> **21** In my view, the Board's decision to exclude the male applicant from application of the Convention <u>cannot be upheld</u> because it found he lacked

> credibility. The burden, however, is on the Crown to establish that there are "serious reasons for considering" that the male applicant committed acts described in section 1F. In this case, the Board seems to have concluded that the male applicant should be excluded because he did not provide convincing evidence that he did not commit these acts. This burden is not on the male applicant. The Board's reasoning on this matter is erroneous and warrants the intervention of this Court, since it erred in law. [Emphasis added.]

[41] The panel erred in law a second time when it failed to discuss in any way the principles that lead to a person being responsible for crimes against humanity:

(1) Why is Mr. Cadet responsible? Is he an accomplice? Complicit by association? We do not know;

(2) The panel did not decide the issue of whether the HNP was an organization that had a limited and brutal purpose; in my view, the panel was required to do so, given the principle that mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion, but that, where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership in that organization may necessarily involve personal and knowing participation in acts of persecution. It must be recalled that Mr. Cadet did not deny that certain HNP officers might have been responsible for crimes against humanity, but that he never admitted to participating in such crimes. He always denied that the SWAT unit took part in such crimes. Having examined all the documentary evidence published by the U.S. Department of State, Human Rights Watch and Amnesty International, I noted a few references to the SWAT unit but no accusations that the unit committed crimes against humanity; and

(3) The panel established no connection, in either the testimonial evidence or the documentary evidence, between the applicant and an incident or operation where crimes against humanity were allegedly committed. In other words, the panel did not mention any evidence showing Mr. Cadet's responsibility. It needed to do so. I quote the words of my colleague Justice O'Reilly in *Saftarov v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1009, at paragraph 14:

> **14** Accusing someone of crimes against humanity is a serious matter. Some evidence of knowing participation in serious crimes is required. Alternatively, an inference of involvement can be drawn from proof of membership in an organization primarily dedicated to human rights abuses. However, neither is present in this case. [Emphasis added.]

[42] Just as important, in another context, are the remarks made by Justice Binnie in *Khosa*, above, at paragraph 63, on the importance of providing adequate reasons for an administrative decision. In my opinion, the reasons given by the panel in this case do not meet the *Khosa* requirements.

[43] For the purposes of complicity by association, the person's rank within the organization with which he is associated is an important factor. The panel simply noted that the applicant was a SWAT team leader (there were six such leaders) but did not analyse Mr. Cadet's rank (Police Officer IV) which, according to Mr. Cadet's testimony, is that of an ordinary police officer (Panel's Record (PR), page 724) – a rank that is not high, considering the levels in the hierarchy above Police Officer IV: police inspector, senior inspector, divisional inspector, police superintendent, senior police superintendent, divisional superintendent - HQ, inspector general and

finally HNP director general. Moreover, the panel made no reference to Mr. Cadet's testimony regarding the duty of a "team leader" to carry out operations when the SWAT unit superintendent so orders: [TRANSLATION] "He gives me the order to carry out the operation." (PR, page 725).

[44] The errors in law that I have identified are enough to set aside the panel's decision. However, I cannot disregard another aspect of the panel's decision that I find troubling: the panel's finding that Mr. Cadet was not credible. Such a finding is entitled to great deference under section 18.1(4)(*d*) of the *Federal Courts Act* (see *Khosa*) and under the case law (see *Dunsmuir*). However, as the Supreme Court of Canada held in *CUPE*, only where the evidence viewed reasonably is incapable of supporting the panel's findings can this Court intervene. Moreover, in *Aguebor*, Justice Décary wrote that the Court cannot intervene unless the inferences drawn by the panel are unreasonable.

[45] In my opinion, several of the panel's findings are unreasonable, having regard to the applicant's testimony, which finds some support in documentary evidence that the panel seems to have disregarded. The following are examples:

(1) At paragraph 35 of its reasons, the panel finds that the applicant had no reason to fear certain members of the SWAT unit. The applicant and the documentary evidence explain why the applicant was justified in fearing them. The documentary evidence shows that, in 2001 and 2002, President Aristide politicized the HNP. (See US Department of State report for 2001: PR, page 305; US Department of State report for 2002: PR, page 323; HRW report

for 2002: PR, page 402; AI report for 2002: PR, page 445; and the applicant's testimony: PR, pages 745, 769-772, and 796.)

(2) At paragraphs 31 to 34 of its reasons, the panel discusses at length the applicant's testimony and his unawareness of "the police actions in Haiti" and the "mistakes of the police forces in Haiti", apparently forgetting its finding, at the very beginning of its reasons, that the applicant did not deny that "the police forces in Haiti were guilty of crimes against humanity". In any event, a reasonable and full reading of the transcript of his testimony shows that the panel misinterpreted the evidence when it found that there were contradictions or implausibilities.

- At pages 744-745 of the PR, the applicant testified, on cross-examination, that he had never heard mention of police blunders in the SWAT team. Later on, he answered that he heard on the radio that there were instances of overzealousness by some members of the HNP because they were not as well trained as the SWAT unit members. The cross-examination on this point resumes at PR, page 758; in response to a question by counsel for the Minister, as to whether there were mistakes, Mr. Cadet spontaneously answered, "I heard on the radio that there were instances of overzealousness," which, he later specified, meant that a police officer might have shot at people without being ordered to do so (PR, page 758).

- The applicant never testified that if SWAT unit members were shot at, they would stop all activities. On the contrary, he testified that if SWAT unit members were shot at, they would [TRANSLATION] "put a stop to" that shooting (PR, pages 774 to 779).

[46] The panel either disregarded the evidence or did not take into account the applicant's explanations when it found, at paragraph 27, that the applicant testified that he never participated in major or high-risk operations (PR, pages 815 to 818).

[47] In my opinion, the above-mentioned errors made by the panel in assessing the evidence in support of its finding that the applicant was not credible are sufficient to set aside that finding.

[48] For all these reasons, the decision of the panel must be set aside.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is allowed, the decision of the panel dated October 1, 2008, excluding the applicant, is set aside, and the applicant's refugee claim is referred back for redetermination by a differently-constituted panel of the Refugee Protection Division. No question was proposed for certification.

"François Lemieux"

____
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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