Federal Court Cour fédérale

**Date: 20110609**

**Docket: IMM-3921-10**

**Citation: 2011 FC 666**

**Ottawa, Ontario, June 9, 2011**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**MASOUMEH POURJAMALIAGHDAM**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] Ms. Masoumeh Pourjamaliaghdam, a citizen of Iran, arrived in Canada in 2004. Two years later, she applied for refugee protection on the basis that she feared reprisals in Iran for having served in the government of Shah Mohammad Reza Pahlavi during the 1970s.

[2] The Minister of Public Safety and Emergency Preparedness opposed Ms. Pourjamaliaghdam's application arguing that she was excluded from refugee protection based on serious reasons for considering that she had committed a crime against humanity, or had been guilty of acts contrary to the purposes and principles of the United Nations (*Immigration and Refugee Protection Act* [IRPA], SC 2001, c 27, s 98, incorporating Articles 1F(*a*) and (*c*) of the *United Nations Convention Relating to the Status of Refugees*), July 28, 1951, [1969] Can TS No 6) (see Annex for statutory provisions and international instruments cited). A panel of the Immigration and Refugee Board found that Ms. Pourjamaliaghdam was excluded because there were serious reasons for considering that she had been complicit in crimes against humanity (that is, under Article 1F(*a*) of the Convention).

[3] Ms. Pourjamaliaghdam asks me to overturn the Board's decision on three grounds: (1) the Board applied the wrong legal framework and standard of proof; (2) the Board failed to consider the identity of the victims of the crimes in which she was alleged to be complicit; and (3) the Board made erroneous findings of fact.

[4] I agree in part with Ms. Pourjamaliaghdam on the first point. In my view, while the Board identified the correct legal approach, it made errors in applying it. Therefore, I must allow this application for judicial review and order a new hearing before a different panel. I disagree with Ms. Pourjamaliaghdam's second argument and, for the benefit of the next panel, deal with it briefly. I do not need to address Ms. Pourjamaliaghdam's third argument given that a new hearing is required; the next panel will have to find the facts afresh.

[5] The issues are these:

1. Did the Board apply the wrong legal framework and standard of proof? and
2. Did the Board fail to consider the identity of the victims of the crimes in which she was alleged to be complicit?

II. Factual Background

[6] Beginning in 1973, Ms. Pourjamaliaghdam worked for the army as a telephone receptionist in a military hospital. Around 1976, she began informing on behalf of the Shah's secret police, known as SAVAK. She was asked to make audio tapes of any telephone conversations made to or from the military hospital that were suspicious or overtly critical of the Shah. She performed that role until the revolution of the late 1970s. Thereafter, she says, she went into hiding to avoid repercussions from her association with the Shah's regime. Finally, in 2004 she left Iran for Canada, where her children lived.

III. The Board's Decision

[7] The Board began its analysis of the issue of exclusion by setting out a two-part test. Under the first branch, the Board had to decide whether the organization to which Ms. Pourjamaliaghdam belonged had committed crimes against humanity or acts contrary to the purposes and principles of the United Nations. Under the second branch, the Board had to decide whether Ms. Pourjamaliaghdam had been complicit in those crimes or acts.

[8] Ms. Pourjamaliaghdam conceded that SAVAK had been involved in crimes against humanity. The Board outlined some of them:

- SAVAK controlled the notorious Evin Prison in northern Tehran where thousands of prisoners were kept in deplorable conditions, tortured and executed;

- SAVAK was known, even in the 1970s, to have tortured detainees under interrogation.

[9] Given that it was clear to the Board that SAVAK had committed crimes against humanity, it went on to consider whether Ms. Pourjamaliaghdam had been complicit in those crimes. There was no allegation that she had been directly involved in them in any way.

[10] The Board defined complicity as involving "a common purpose, a personal and knowing participation" in the organization's acts. It includes a person who, being aware of the acts being committed does not try to stop them or to dissociate himself or herself from the organization at the earliest opportunity but, rather, continues to participate actively in the organization. The concept of complicity, therefore, includes an element of *mens rea*, or guilty mind. Where the organization's main objective is to commit crimes against humanity, or it exists to achieve a limited, brutal purpose, mere membership in the organization may be enough to show complicity (citing *Thomas v Canada (Minister of Citizenship and Immigration)*, 2007 FC 838, at paras 22-23). In fact, membership in that type of organization raises a presumption of complicity.

[11] With this statement of general principles, the Board went on to consider whether SAVAK was an organization with a limited, brutal purpose. The Board concluded that SAVAK, as a secret police organization, executed a mandate to suppress all political opposition and defend the security of the state, using all necessary means, including torture, to do so. As such, it was an organization with a limited, brutal purpose during the time Ms. Pourjamaliaghdam worked as an informant. She was presumed, therefore, to be complicit in SAVAK's crimes.

[12] The Board then went on to examine whether Ms. Pourjamaliaghdam could rebut the presumption of complicity. It considered six criteria of complicity as set out in *Ryivuze v Canada (Minister of Citizenship and Immigration)*, 2007 FC 134, as follows:

(a) *The nature of the organization*

[13] SAVAK was an organization with a limited, brutal purpose.

(b) *The method of recruitment*

[14] Ms. Pourjamaliaghdam began working at the hospital as a civilian clerk employed by the army as a telephone receptionist. When she was asked to be an informant, she was told that she had a duty to protect her country. Her role would be to listen to telephone conversations at the hospital and report those who denounced the Shah.

[15] The Board found that Ms. Pourjamaliaghdam had essentially volunteered to become an informant to serve her country.

(c) *Position/rank in the organization*

[16] Ms. Pourjamaliaghdam was employed in a clerical position by the army but, as an informant, was supervised by the Minister of Intelligence. She turned over tapes of conversations to the Chief of Intelligence for SAVAK at her place of employment. She did not know what use was made of them.

(d) *Knowledge of the organization's atrocities*

[17] Ms. Pourjamaliaghdam claimed to be unaware that SAVAK was involved in crimes against humanity, including torture. She did not know about Evin Prison. She did not watch television very much or read newspapers, so she had no knowledge of demonstrations by, or arrests of, those opposing the Shah.

[18] The Board found that SAVAK's actions were widely known and that it was unlikely that Ms. Pourjamaliaghdam was unaware of them. It concluded that she knew what happened to opponents of the Shah and that it was SAVAK that dealt with them.

(e) *The length of time in the organization*

[19] The Board found that Ms. Pourjamaliaghdam had been involved with SAVAK for a considerable period of time – two to three years.

(f) *The opportunity to leave the organization*

[20] The Board found that Ms. Pourjamaliaghdam left SAVAK a year after the revolution, at the request of her husband, who no longer wanted her to work outside the home. She did not make any earlier attempt to dissociate herself from the organization.

[21] Based on the evidence relating to the above six criteria, the Board found that Ms. Pourjamaliaghdam had not rebutted the presumption of complicity arising from her membership in SAVAK. Therefore, it concluded that she was an accomplice to crimes against humanity and excluded from refugee protection under Article 1F(*a*) of the Convention.

IV. Issue One – Did the Board apply the wrong legal framework and standard of proof?

[22] Ms. Pourjamaliaghdam argues that the Canadian approach to Article 1F(*a*), the one adopted by the Board here, should no longer be followed in the light of a recent decision of the Supreme Court of the United Kingdom [UKSC] criticizing it: *R (on the application of JS (Sri Lanka)) v Secretary of State for the Home Department*, [2010] UKSC 15, [2010] All ER (D) 151 (Mar) [*JS*]. In particular, the UKSC held it was an error to find complicity merely on proof of membership in an organization with a limited, brutal purpose. The New Zealand Supreme Court [NZSC] has recently

adopted the same approach as the UKSC: *The Attorney General (Minister of Immigration) v Tamil X and ANOR SC*, [2010] NZSC 107 [*Tamil X*].

[23] Ms. Pourjamaliaghdam submits that this Court should follow the UKSC and NZSC approach, given that those courts were relying on an interpretation of the *Rome Statute of the International Criminal Court*, UN Doc A/CONF 183/9 (1998), which defines crimes against humanity, and which the Board purported to apply here.

[24] Ms. Pourjamaliaghdam also submits that the Board erred in the standard of proof it applied. She maintains that the words "serious reasons for considering" were found both by the UKSC and the NZSC, in the cases cited above, to establish a standard higher than "reasonable grounds to believe", while Canadian courts have found them to be synonymous. The "serious reasons" standard in IRPA derives from the Refugee Convention.

[25] To address Ms. Pourjamaliaghdam's submissions, it is important to understand the decisions rendered by the UKSC and the NZSC and the criticisms those courts made of the Canadian approach. I must also discuss the evolution of the case law in Canada to make clear what the differences between those approaches are.

(a) *The UK and NZ approach*

[26] In *JS*, above, Lord Brown, in the leading judgment of the UKSC, noted that the exclusion clause in Article 1F(*a*) has serious consequences for refugee applicants and must, therefore, "be

interpreted restrictively and used cautiously" (at para 2). In particular, something more than membership in an organization committing crimes against humanity must be shown. The question is, "what more than mere membership . . . must be established before an individual is himself personally to be regarded as a war criminal?" (at para 1).

[27] Lord Brown reviewed the provisions of the *Rome Statute*, UNHCR publications, case law from the International Criminal Tribunal for the former Yugoslavia (ICTY), and previous UK decisions on the application of Article 1F(*a*). He also considered the decision of the Canadian Federal Court of Appeal in *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, [1992] FCJ No 109 (CA) (QL), where the concept of an organization with a "limited, brutal purpose" was born. There, Justice Mark MacGuigan stated that it "seem[ed] apparent, however, that where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts" (at para 16).

[28] Lord Brown suggested, however, that the better approach, rather than be "deflected into first attempting some such sub-categorisation of the organisation", was to focus on the real, determinative factors in deciding whether a person fell within the exclusion (at para 30). He set out the following as being the proper factors to consider:

(i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned;

(ii) whether and, if so, by whom the organisation was proscribed;

(iii) how the asylum-seeker came to be recruited;

(iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it;

(v) his position, rank, standing and influence in the organisation;

(vi) his knowledge of the organisation's war crimes activities; and

(vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.

[29] While Lord Brown thought it best to avoid looking for a presumption of exclusion (as Canadian law seems to promote), he acknowledged that serious reasons to consider involvement in crimes against humanity will "almost certainly" arise in relation to a person who was an active member of an organization devoted exclusively to terrorism (at para 31). Still, he stressed that the nature of the organization is only one of the relevant factors to consider.

[30] Lord Brown then set out what he believed to be the correct test:

> I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose (at para 38).

[31] Regarding the standard of proof, Lord Brown found that the expression "serious reasons for considering" imports a higher standard than "reasonable grounds for suspecting". The word "considering" is roughly equivalent to "believing" (at para 39).

[32] In *Tamil X*, above, Lord McGrath for the NZSC referred to a series of Canadian cases from *Ramirez*, above, to *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40. He then expressed his agreement with the reasoning of Lord Brown in *JS*, above, noting that he (and Lord Hope in a concurring judgment) had "emphasised the importance of the facts of each case and of evidence of actual involvement of the claimant, rather than an assumption of it derived from membership of the organisation perpetrating the crimes" (at para 68). In a statement intended to promote uniformity in the interpretation of international refugee law, Lord McGrath suggested that:

> Refugee status decision-makers should adopt the same approach to the application of joint enterprise liability principles when ascertaining if there are serious reasons to consider that a claimant seeking recognition of refugee status has committed a crime or an act within art 1F through being complicit in such crimes or acts perpetrated by others. That approach fully reflects the principle that those who contribute significantly to the commission of an international crime with the stipulated intention, although not direct perpetrators of it, are personally responsible for the crime. This principle is now expressed in arts 25 and 30 of the Rome Statute and was earlier well established in customary international law. Its application recognises the importance of domestic courts endeavouring to develop and maintain a common approach to the meaning of the language of an international instrument which is given effect as domestic law in numerous jurisdictions of state parties (at para 70).

[33] Regarding the standard of proof, Justice McGrath also found that "serious reasons to consider" involves more than mere suspicion (at para 39). It is interesting to note, however, that in New Zealand the refugee claimant has the responsibility to establish that he or she is not excluded by Article 1F (at para 43).

(b) *Canadian case law on complicity and international crimes*

[34] In the seminal case of *Ramirez*, above, Justice Mark MacGuigan made clear that the burden falls on the party asserting the exclusionary rule – namely, the government – to prove that there are

"serious reasons for considering" that the claimant was complicit in international crimes (*Ramirez*, at para 10). "Serious reasons for considering" creates a standard that is lower than the balance of probabilities and is roughly equivalent to "reasonable grounds to believe" (at para 6).

[35] For exclusion, the government must generally present evidence that there was "personal and knowing participation" in international crimes by the claimant (at para 15). Each case must "be decided in relation to the particular facts" (at para 23).

[36] *Ramirez* made clear that mere membership in an organization known to commit crimes against humanity is generally not sufficient to justify exclusion (at para 16). However, Justice MacGuigan also observed that "where an organization is principally directed to a limited brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts" (at para 16).

[37] Subsequent cases have elaborated on, but have not substantially departed from, these basic ideas.

[38] The case law recognizes that complicity can take two forms. The first involves the actual furthering of international crimes by the claimant (*e.g.* aiding and abetting). The second involves "complicity by association" (*Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433, [1993] FCJ No 1145 (CA) (QL), at para 9). Complicity by association means that "individuals may be rendered responsible for the acts of others because of their close association

with the principal actors" (*Sivakumar*, at para 9; *Teganya v Canada (Minister of Citizenship and Immigration)*, 2006 FC 590 at para 12).

[39] The cases consistently confirm that mere membership in an organization that commits crimes against humanity does not justify exclusion from refugee protection (*Sivakumar*, at para 13; *Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298, [1993] FCJ No 912 (CA)(QL), at para 45; *Thomas*, above, at para 23). Still, the question whether the claimant was a member of an organization known to commit crimes against humanity will often arise in exclusion cases. But the rules relating to members also apply to non-members. It is better, therefore, "to speak in terms of participation in the group's activities than of membership in the group" (*Harb v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, at para 19). Accordingly, the fact that the person was not, strictly speaking, a "member" does not necessarily mean that the person was not complicit in the group's crimes (*Harb*, at para 17).

[40] The further the claimant is from those who direct the organization, the less likely it is that he or she will be found to be complicit in its crimes (*Moreno*, above, at para 53). Similarly, the case for complicity "is stronger if the individual member . . . holds a position of importance in the organization" (*Sivakumar*, at para 10, *Thomas*, at para 26). Again, each case must be decided according to the facts (*Bazargan v Canada (Minister of Citizenship and Immigration)*) (1996), 205 NR 252, 67 ACWS (3d) 132 (FCA), at para 12).

[41] Justice MacGuigan's statement about organizations with a "limited, brutal purpose" has been recognized as an exception to the general rule that membership is not sufficient proof of

complicity (*Sivakumar*, at para 13; *El-Kachi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 403 at para 36). In respect of that kind of organization, proof of membership may be sufficient to find complicity and, therefore, may justify exclusion from refugee protection (*Thomas*, at para 23). Membership in that kind of group creates a rebuttable presumption "which may result in a finding of complicity in the absence of any further evidence other than membership" (*Thomas*, at para 24, citing *Yogo v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 390).

[42] The presumption of complicity is also an exception to the usual burden of proof in exclusion cases. In the "normal course, the Minister bears the onus of establishing the requisite elements of complicity" (*Oberlander v Canada (Attorney General)*, 2009 FCA 330, at para 20). However, where the presumption applies, the burden shifts to the claimant to present evidence of a lack of complicity. The presumption can be rebutted by evidence of a lack of knowledge of the organization's purpose or an absence of direct or indirect involvement in the group's activities (*Oberlander*, at para 18).

[43] The effect of the presumption is to lighten the onus on the Minister. It is easier to conclude that the person knowingly participated in the activities of a group that is singularly devoted to crimes against humanity where the evidence establishes that he or she was a member of that group (*Bazargan*, above, at para 10; *Harb*, above, at para 19).

[44] However, even where the presumption applies, the Board should review the evidence to determine whether the presumption has been rebutted and, in doing so, should consider other

relevant factors (*Thomas*, above, at para 25). Those factors are the ones reviewed by the Board in the case at hand:

1. The Nature of the Organization
2. The Method of Recruitment
3. Position/rank within the Organization
4. Length of Time in the Organization
5. The Opportunity to Leave the Organization
6. Knowledge of the Organization's Atrocities

[45] In summary, in most cases, the burden of proof falls on the Minister to show that there are serious reasons for considering that the claimant was complicit in international crimes. The evidence must show personal and knowing participation in the activities of an organization known to commit crimes against humanity. Proof of membership in the group is usually insufficient to justify exclusion from refugee protection. Each case must be decided in relation to the particular facts. As an exception to the general rules, in some cases, complicity can be presumed on the basis of the claimant's membership in a group with a limited, brutal purpose. In those circumstances, the burden falls to the claimant to present evidence of a lack of knowledge or involvement in the group's crimes. The decision-maker must then consider the remaining evidence and factors in deciding whether the claimant was, indeed, complicit in the commission of international crimes.

(c) *Can the approaches be reconciled?*

[46] Ms. Pourjamaliaghdam argues that the kind of two-step approach the Board applied has been criticized by the highest courts in the United Kingdom and New Zealand, both of which were interpreting the same international instruments that apply to her application, and that this Court should bring Canadian law into line with the approach taken by those courts.

[47] No doubt, as Justice McGrath observed, uniformity in decision-making by refugee law judges and adjudicators is desirable. International legal measures aimed at protecting vulnerable persons should have consistent application and interpretation across states parties. At the same time, it may be unrealistic to expect nations with different legal systems and cultures to achieve identical results.

[48] In my view, the differences between Canadian law and the UKSC and NZSC approach are slight. Regarding the standard of proof, in Canada, "serious grounds to consider" has been found to be close to "reasonable grounds to believe", which corresponds with Lord Brown's articulation of the appropriate standard. The NZSC's approach is the same (at para 39). In fact, Justice McGrath found that the standard is higher than suspicion but "[b]eyond this, it is a mistake to try to paraphrase the straightforward language of the Convention" (at para 39, citing Sedley LJ in *Al-Sirri v Secretary of State for the Home Department*, [2009] EWCA Civ 222, at para 33). This is similar to Justice MacGuigan's statement in *Ramirez* that "‘[s]erious reasons for considering' is the Convention phrase and is intelligible on its own" (at para 6). There is, therefore, no difference between Canadian law, on the one hand, and UK and NZ law, on the other with respect to the applicable standard of proof.

[49] In terms of the analysis of complicity, I agree with the UKSC and NZSC that one should begin with the Rome Statute's definition of individual criminal responsibility. Article 1F(*a*) of the Refugee Convention specifically provides that the definition of a crime against humanity should be taken from "international instruments drawn up to make provision in respect of such crimes", which includes the Rome Statute, particularly Article 25, which states:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> *(a)* Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> *(b)* Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
>
> *(c)* For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission, including providing the means for its commission;
>
> *(d)* In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime.

[50] The Rome Statute does not address membership in a group at all. The closest reference is in subparagraph 3(*d*), which speaks of contributing to crimes committed by a group, either by actually furthering those crimes or with knowledge of the group's intentions. In my view, knowingly contributing to a group's crime is comparable to the *Ramirez*, above, requirement of personal and

knowing participation. In other words, the main thrust of Canadian law on complicity is consistent with the Rome Statute.

[51] The exception noted in *Ramirez,* which grew into a presumption in later cases, is a limited departure from the general proposition that the burden lies on the government to prove exclusion with evidence of knowing participation. As I noted earlier, even Lord Brown recognized that there may be situations where evidence of a claimant's close association with a particularly violent group will speak for itself, justifying a conclusion of complicity on its own. I believe that Justice MacGuigan's observation was of the same nature – in some cases, it will simply be self-evident that the person, being an active member of such a group, was a knowing participant in its crimes.

[52] Accordingly, in most cases, the analysis required by Canadian jurisprudence is virtually identical to that set out by Lord Brown. True, in some cases, the Minister may only have to show membership in a group with a limited, brutal purpose. But those cases are the exception and, even there, the Board will have to consider the remaining evidence and all the relevant factors in deciding whether there are, in fact, serious reasons for considering that the person has committed crimes against humanity.

[53] I would also note that, while the Minister is entitled to persuade the Board that the presumption should apply in a given case, the Board is by no means bound to frame its analysis that way. In fact, unless it is fairly clear that the presumption applies based on evidence of the nature of the group and the person's active membership in it, the better approach would be conduct the usual form of analysis. Otherwise, the Board may end up spending an inordinate amount of time

analyzing what turns out to be a non-issue. As mentioned, membership in an organization that commits crimes is normally not enough to justify exclusion. Therefore, it makes little sense to spend much time considering whether the person was, in fact, a member of such a group. To do so would be to concentrate unduly on a narrow exception to the conventional approach rather than analyzing the real issues. As Justice Robert Décary observed, "it is important not to turn what is actually a mere factual presumption into a legal condition" (*Bazargan*, above, at para 10).

[54] I also agree with Justice Barbara Reed's observation that "[l]abels can block analysis". She went on to state "[i]f one is going to conclude that membership in, or close association with, a group automatically leads to a conclusion of complicity in crimes against humanity . . . the evidence concerning the characterization must be free from doubt" (*Canada (Minister of Citizenship and Immigration) v Hajialikhani*, [1999] 1 FC 181, [1998] FCJ No 1464 (TD) (QL), at para 24).

[55] I do not, however, see any unfairness inherent in the presumption of complicity, or in the evidentiary burden it places on claimants. In those situations where it applies, the evidence capable of rebutting the presumption is likely to be in the claimant's possession in any case.

[56] In conclusion, the Canadian approach, while not identical to that laid out by Lord Brown, is very similar and, in practice, likely to yield the same results. As for the NZSC approach, I would note that it is more generous to refugee claimants to shift the evidentiary burden only on proof of membership in a group dedicated to committing crimes against humanity than to place the burden on all claimants to prove an absence of complicity throughout.

[57] Accordingly, I find there to be no compelling reason to bring Canadian law into precise alignment with the authorities cited by Ms. Pourjamaliaghdam from other jurisdictions.

(d) *Application to this case*

[58] Here, the Board found that Ms. Pourjamaliaghdam should be presumed complicit in the crimes committed by SAVAK given her role as an informant. It then went on to consider whether she had rebutted that presumption with evidence falling under the various relevant categories.

[59] However, the Board did not make any specific finding that Ms. Pourjamaliaghdam was a member of SAVAK. The Board applied the presumption based on the fact that Ms. Pourjamaliaghdam was an informant for the organization. As discussed above, the presumption of complicity is an exception to the general rule that proof of membership is not enough to show complicity in an organization's intentional crimes. Without proof of membership, the presumption has no application.

[60] The word "member" has often been given a broad definition, but it is still important for the evidence to be analyzed to determine whether the person's association with the group is sufficiently close so as to justify a presumption of knowing participation in the group's crimes. Membership, in this context, requires "the existence of an institutional link between the organization and the person, accompanied by more than nominal commitment to the organization's activities" (*Harb*, above, at para 39). Further, I agree with Justice Richard Mosley that "an unrestricted and broad definition is not a license to classify anyone who has had any dealings with a terrorist organization as a member

of the group" (*Toronto Coalition to Stop the War v Canada (Minister of Public Safety and Emergency Preparedness*, 2010 FC 957).

[61] In this case, the Board may well have been persuaded that the evidence relating to Ms. Pourjamaliaghdam's association with SAVAK met the test of "membership". But it made no specific finding on the point. Further, while it reviewed the evidence relating to the various factors to be considered, it did so with an eye to evidence of non-complicity in order to determine whether Ms. Pourjamaliaghdam had rebutted the presumption. This is a different exercise than deciding whether the Minister had made out a case for exclusion based on membership. Its approach amounted to an error of law.

[62] Accordingly, I must grant this application for judicial review on that basis.

V. Issue Two – Did the Board fail to consider the identity of the victims of the crimes in which she was alleged to be complicit?

[63] Ms. Pourjamaliaghdam argues that the evidence showed that the telephone conversations she recorded involved military personnel, not civilians. Since a crime against humanity is defined as a crime against civilians, she maintains that the Board erred in finding that she was complicit in international crimes.

[64] However, this argument was rejected in *Harb*, above. The Federal Court of Appeal stated that "if the organization persecutes the civilian population the fact that the appellant himself

persecuted only the military population does not mean that he will escape the exclusion, if he is an accomplice by association as well" (at para 11).

VI. Conclusion and Disposition

[65] In my view, the Board erred in law by applying the presumption of complicity in the absence of evidence that Ms. Pourjamaliaghdam was a member of SAVAK. I must, therefore, allow this application for judicial review.

[66] Counsel for Ms. Pourjamaliaghdam proposed the following question of general importance for certification:

> In light of the decision of *JS (Sri Lanka) v Secretary of State for the Home Department*, is it an error to presume a person complicit in crimes against humanity based on membership in an organization with a limited and brutal purpose?

[67] Counsel for the Minister opposes certification of the question on the facts of this case, given that the Board considered all of the relevant factors, not just the presumption. However, the Board considered those factors in determining whether the presumption was rebutted. In other words, it was looking for evidence of non-complicity, not evidence supporting the Minister's case for exclusion. It is not clear, therefore, that the Board would have come to the same conclusion if it had not proceeded as it did. Further, in light of my analysis of the case law and my finding that the Board erred by applying the presumption in the absence of a finding of membership, I feel it is appropriate to state the proposed question.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed. The matter is referred back to the Board for a new hearing before a different panel;

2. The following question general importance is stated:

   In light of the decision of *JS (Sri Lanka) v Secretary of State for the Home Department*, is it an error to presume a person complicit in crimes against humanity based on membership in an organization with a limited and brutal purpose?

"James W. O'Reilly"

Judge

Annex

*Immigration and Refugee Protection Act*, SC 2001, c 27

Exclusion — Refugee Convention

**98**. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27

Exclusion par application de la Convention sur les réfugiés

**98**. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

*Article 1 of the United Nations Convention Relating to the Status of Refugees*

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;

…

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

*Article 1 de la Convention des Nations Unies relative au statut des réfugiés*

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.

[…]

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

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3921-10 |
| **STYLE OF CAUSE:** | POURJAMALIAGHDAM v MCI |
| **PLACE OF HEARING:** | Toronto, ON. |
| **DATE OF HEARING:** | January 17, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | O'REILLY J. |
| **DATED:** | June 9, 2011 |

**APPEARANCES:**

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|---|---|
| Micheal Crane | FOR THE APPLICANT |
| David Cranton<br>Greg George | FOR THE RESPONDENT |

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