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Docket: IMM-4374-06

Citation: 2007 FC 286

2007 FC 286 (CanLII)

Vancouver, British Columbia, March 14, 2007

PRESENT: The Honourable Mr. Justice Teitelbaum

BETWEEN:

ERNESTO JESUS PONCE VIVAR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), for judicial review of a decision the Immigration Division of the Immigration and Refugee Board (Board), dated July 21, 2006, wherein the Board held that the Applicant, Mr. Vivar, was inadmissible pursuant to subsection 35(1) of the IRPA.

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I. Background

[2] In June 2004, Mr. Vivar applied for refugee status in Canada. On April 15, 2005, the Minister's delegate referred the matter for an admissibility hearing. Mr. Vivar's refugee application was placed on hold pending the results of the admissibility hearing.

[3] Mr. Vivar was declared inadmissible by the Board for allegedly having committed an act outside Canada that constitutes an offence referred to in sections 4 through 7 of the *Crimes Against Humanity and War Crimes Act*, (S.C. 2000, c. 24) contrary to subsection 35(1) of the IRPA. It was accepted by the Board that Mr. Vivar did not personally commit human rights violations, but rather that he was complicit in these crimes.

[4] Mr. Vivar was a member of the Republican Guard in Peru between 1974 and 1985 and describes himself as a "career military man". He has risen through the ranks and, in 1982, was in charge of approximately 40 men that were responsible for the exterior security of the El Fronton prison which housed suspected terrorists. In 1983, for two to three months, Mr. Vivar was enlisted in the Llapan Atic - an elite counterinsurgency battalion - in what is referred to as an "Emergency Zone". An Emergency Zone is essentially a geographical area under political-military control where the Peruvian government suspended many civil rights. During this period, Mr. Vivar's unit was responsible for security and detention of individuals, occasionally being required to track down suspected terrorists. Mr. Vivar, on one occasion, arrested and detained a suspected terrorist and transferred him to the custody of the Commander of the Republican Guard. Mr. Vivar understood that this prisoner was likely to be interrogated. During the time in question, the Civil Guard, the

Republican Guard and the Investigative Police all reported to the commanding officer of the army under the same chain of command.

[5] Mr. Vivar was aware that it was common practice, i.e. about 30-40% of the time, to torture suspected terrorists although it must be noted that Mr. Vivar referred to these acts as "strong interrogations." Mr. Vivar was also of the opinion that what occurred to the man he had taken prisoner was not his responsibility once he was no longer in Mr. Vivar's custody.

[6] In 1984, Mr. Vivar, having developed a nervous disorder, was temporarily transferred to a water treatment facility near the Colombian border. However, in October 1985, Mr. Vivar was ordered to help assist in putting down a prison riot at Lurigancho detention facility. Several prisoners were burned to death during this riot. Subsequently, Mr. Vivar returned to his duties at the water treatment plant until the government informed him he was retired.

[7] The Board first determined that the acts committed were crimes against humanity. It was established, via the documentary evidence, that extensive human rights violations occurred in the Emergency Zones during the period between 1981 and 1985, by the Peruvian authorities, often as a result of the government attempting to quell insurrections from the group known as the Shining Path. The Board found that human rights abuses were committed by the Peruvian government. The human rights violations included torture, arbitrary arrest, execution of prisoners and enforced disappearances. The Board also noted that the prison conditions of the time may also have constituted torture. These findings are not in dispute in this judicial review.

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[8] The second issue the Board had to determine was the Applicant's role in the above human rights abuses. The Board accepted that Mr. Vivar was credible and that the organization in which he was a member did not commit human rights abuses to the same extent as other branches of the government. However, the Board did determine that the Applicant was aware of the events that transpired during his time in his military service and was therefore complicit in crimes against humanity.

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[9] The Board placed considerable weight in reaching their conclusion on the following facts:

a) Mr. Vivar voluntarily joined the Republican Guard and he did not retire of his own free will. Retirement was forced upon him. When Mr. Vivar joined the Republican Guard, the shining Path did not officially exist.

b) Mr. Vivar had attended several years of officer training while a member of the Republican Guard, rising to the rank of lieutenant, and was not merely a low level soldier. This was also evidenced by his role in the elite anti-subversive units that were active in the Emergency Zones.

c) The Republican Guard worked closely with the other Peruvian authorities during the time in question.

d) Mr. Vivar was aware that suspected terrorists were mistreated and systemically tortured. This included the person that Mr. Vivar had personally arrested and delivered to the Civilian Guard.

[10] Consequently, a deportation order was issued against the Applicant.

II. Legislative Scheme

[11] *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, s. 6, and *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 35:

6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada

(a) genocide,

(b) a crime against humanity, or

(c) a war crime,

is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.

6. (1) Quiconque commet à l'étranger une des infractions ci-après, avant ou après l'entrée en vigueur du présent article, est coupable d'un acte criminel et peut être poursuivi pour cette infraction aux termes de l'article 8 :

a) génocide;

b) crime contre l'humanité;

c) crime de guerre.

Immigration and Refugee Protection Act, 2001, c. 27

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights

35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :

a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;

b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de

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violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*; or

(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

Exception

(2) Paragraphs (1)(b) and (c) do not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;

c) être, sauf s'agissant du résident permanent, une personne dont l'entrée ou le séjour au Canada est limité au titre d'une décision, d'une résolution ou d'une mesure d'une organisation internationale d'États ou une association d'États dont le Canada est membre et qui impose des sanctions à l'égard d'un pays contre lequel le Canada a imposé — ou s'est engagé à imposer — des sanctions de concert avec cette organisation ou association.

Exception

(2) Les faits visés aux alinéas (1)b) et c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

III. Issues

[12] The issues are as follows:

1. Did the Board err in applying the incorrect test for "complicity" in crimes against humanity?

2. Did the Board err by treating all Peruvian authorities as members of the same organization, resulting in the Board determining that the Applicant had knowledge of the crimes against humanity stemming from branches of the military in which he was not a member?

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IV. Analysis

A. *Issue 1*

(1) Standard of review for applying the definition of "complicity"

[13] It is agreed by the parties that the standard of review on this issue - a question of law - is correctness.

[14] However, if the Board did apply the correct test, then the question becomes one of mixed law and fact and is to be reviewed on a standard of reasonableness as explained by Mr. Justice Nadon in *Au v. Canada (Minister of Citizenship and Immigration)* (2001), 202 F.T.R. 57, 2001 FCT 243.

(2) Decision if the Board applied the correct definition of "complicity"

[15] The Applicant argues that the Board misapplied the test for complicity. It is argued that instead of using the case of *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.), for guidance, the Board erroneously used the definition of complicity set out in the International Criminal Tribunal for the former Yugoslavia decision in *Prosecutor v. Miroslav Kvocka et al*. (2001), Case No. IT-98-30. Additionally, it is argued by the Applicant that the Board

did not consider the nature of the conflict or if the Applicant possessed a common purpose with those who committed the crimes against humanity.

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[16] With respect to the Applicant, I find that the Board did in fact properly rely on *Ramirez.* On page 5 of their decision, the Board specifically says:

> I applied the elements of membership and complicity, as explained in *Ramirez v. Canada*, *(Minister of Employment and Immigration)*, [1992] 2 F.C.306 (C.A.), what is the nature of the organization involved; what is the method of the enrolment and is there a possibility to leave; what personal knowledge of the organization has the person concerned; and what has been his role and involvement in the organization.

[17] Also, the Board makes reference to the applicable "case law" and refers to *Ramirez* in footnotes 4 and 8 of its decision. While I accept that merely mentioning a case name is not proof that it was applied properly, I would find that the Board's reasons, when read as a whole, clearly demonstrate that *Ramirez* was followed.

[18] Madam Justice Reed in *Penate v. Canada* (*Minister of Employment and Immigration*), [1994] 2 F.C. 79 (T.D.), summarized the state of Canadian law on complicity at paras. 5-6:

> The *Ramirez*, *Moreno*, and *Sivakumar* cases all deal with the degree or type of participation which will constitute complicity. Those cases have established that mere membership in an organization which from time to time commits international offences is not normally sufficient to bring one into the category of an accomplice. At the same time, if the organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may indeed meet the requirements of personal and knowing participation. The cases also establish that mere presence at the scene of an offence, for example, as a bystander with no intrinsic connection with the persecuting group

> will not amount to personal involvement. Physical presence together with other factors may however qualify as a personal and knowing participation.
>
> As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them from occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with safety for himself) but who lends his active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist. I note that the situation envisaged by this jurisprudence is not one in which isolated incidents of international offences have occurred but where the commission of such offences is a continuous and regular part of the operation.

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In the case of *Ramirez*, at paragraph 38 it was accepted that Mr. Ramirez:

> …was aware of a very large number of interrogations carried out by the military, on what may have been as much as a twice-weekly basis (following some 130-10 military engagements) during his 20 months of active service. He could never be classed as a simple on-looker, but was on all occasions a participating and knowing member of a military force, one of whose common objectives was the torture of prisoners to extract information. This was one of the things his army did, regularly and repeatedly, as he admitted. He was a part of the operation, even if he personally was in no sense a "cheering section." In other words, his presence at this number of incidents of persecution, coupled with his sharing in the common purpose of the military forces, clearly constitutes complicity. We need not define, for purposes of this case, the moment at which complicity may be said to have been established, because this case is not to my mind near the borderline.

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[19] I am satisfied the facts of the present case are at least analogous to *Ramirez*. Mr. Vivar, by his own admission, was aware of a large number of "strong interrogations" during his tenure with the Republican Guard. A tenure, I might add, that went on for approximately 11 years - unlike the 20 months of service provided by Mr. Ramirez. I accept that Mr. Vivar was not a "cheering section"; however, by providing a prisoner to the people that conduct torture, it is reasonable to say that Mr. Vivar was sharing a common purpose and was no mere on-looker.

[20] It has been determined that six factors must be considered when determining if an applicant has been complicit in crimes against humanity (see: *Ali. v. Canada* (*Solicitor General*) (2005), 279 F.T.R. 296, 2005 FC 1306):

(1) the nature of the organization;
(2) the method of recruitment;
(3) the position/rank in the organization;
(4) knowledge of the organization's atrocities;
(5) the length of time in the organization; and,
(6) the opportunity to leave the organization.

I will address each in turn.

(1) <u>The nature of the organization</u>

[21] The Board accepted that the Republican Guard was not the worst offender amongst the Peruvian authorities; however, the Board did not doubt they had indeed committed crimes against humanity during the period in question. If an organization has a limited, brutal purpose, personal and knowing participation in a shared common purpose to commit excludable crimes may be assumed by membership alone. If the Republican Guard does not have a limited, brutal purpose, complicity must be established by Mr. Vivar's personal and knowing participation in the Republican

Guard’s crimes. That participation and Mr. Vivar's shared common purpose with the Republican Guard is analyzed below.

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(2) The method of recruitment

[22] As mentioned, the Applicant volunteered for service for 11 years. This also included volunteering for the Llapan Atic – the elite anti-subversive unit.

(3) The position/rank in the organization

[23] I am satisfied that the command of approximately 40 men, combined with officer training, higher pay and a gradual increase in responsibilities, allows the inference to be made that the Applicant was no mere foot soldier.

(4) Knowledge of the organization's atrocities

[24] This was admitted by the Applicant in his testimony. The Republican Guard was in charge of prison security and transfers of prisoners and it is not contested that the Applicant knew that these prisoners were often subjected to human rights abuses. The Applicant testified that it was “common knowledge” that prisoners were tortured and that these “strong interrogations” included electrical shock and sleep deprivation. The Applicant also testified that “[a]ll of the individuals who were arrested were interrogated. Whatever happened to them afterwards, they were interrogated.”

(5) The length of time in the organization

[25] As mentioned, the Applicant was in the Republican Guard for approximately 11 years and did not leave voluntarily. It is well established that an individual who is part of a group that is committing crimes against humanity must withdraw or protest at the first reasonable opportunity. See: *Valère v. Canada (Minister of Citizenship and Immigration)* (2005), 273 F.T.R. 33, 2005 FC 524.

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(6) The opportunity to leave the organization

[26] The Applicant has not presented any evidence that he made significant efforts to leave the organization. During cross-examination the Applicant said "Even though I was not in agreement with those procedures [referring to torture], but what could I have done?" The answer is, of course, to attempt to leave the offending organization.

[27] I also note that the Applicant was transferred to a water treatment plant for a year and a half and returned to the Republic Guard, knowing full well their involvement in human rights abuses. These are not acts of disassociation or actions of a man wishing to exit an organization.

[28] The documentary evidence before the Board was that the Applicant would face three months in prison for desertion, although the oral testimony suggested that longer periods of incarceration could be administered. To echo the words of the Federal Court of Appeal in *Ramirez,* the punishment for desertion - a term of imprisonment - was much less than the torture facing the victims of the military forces to which the Applicant was connected.

[29] In conclusion, I would suggest that none of the above factors assist the Applicant in arguing that he was not complicit in crimes against humanity.

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[30] Although I agree with the Applicant that the Board did not use the exact expression "common purpose" in their reasons, it is clear that the Board properly applied the *Ramirez* test in determining the role of the Applicant within the organization and if he had a common purpose. The Applicant has not provided any case law to suggest that the exact nomenclature of "common purpose" must be used and, in my opinion, to require this exact wording would elevate form over substance.

[31] Further, the finding that a person holds a position of importance within the group that has committed the crimes against humanity may serve to support a finding of complicity and common purpose. In *Sivakumar v. Canada* (*Minister of Employment and Immigration*), [1994] 1 F.C. 433 (C.A.), [1993] F.C.J. No. 1145, at paragraphs 10-13, it was held that an inference can be drawn that the closer to a leadership position a person is within the organization, the more likely it is they were aware of the crimes and shared a common purpose. I would suggest the same can be said for Mr. Vivar. Given his four years of officer training, his command over approximately 40 men, and his testimony that he was paid better than his underlings, the Board's findings that the Applicant was in a position to know are reasonable. *Sivakumar* therefore allows the inference to be drawn that there was a common purpose.

[32] Even if it were accepted that Mr. Vivar was not a high-ranking officer, it is trite that even a person in a low-ranking position may be found to have shared a common purpose with the organization if he continues in the organization after becoming aware that international offenses are being committed by those involved in it and does not take the earliest opportunity to leave the organization. See: *Gutierrez v. Canada* (*Minister of Employment and Immigration*) (1994), 84 F.T.R 227, 30 Imm. L.R. (2d) 106, at paragraph 30.

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[33] It should also be remembered that the burden of proof which must be met when establishing a common purpose is less than the balance of probabilities. See: *Januario v. Canada* (*Minister of Citizenship and Immigration*), 2002 FCT 527. This standard of proof is clearly met on the present facts.

[34] As for the argument that the Board improperly relied on *Kvocka*, I am of the opinion this is a non issue. This portion of the Board's decision occurs after the Board had conducted their *Ramirez* analysis and, in any event, *Kvocka* was recently cited by the Federal Court of Appeal in *Zazai v. Canada* (*Minister of Citizenship and Immigration*) (2005), 259 D.L.R. (4th) 281, 2005 FCA 303, at paragraph 16, during their analysis in determining an applicant's complicity. In my opinion, a Board cannot be faulted for following Federal Court of Appeal guidance.

[35] I do not accept the Applicant's submissions that the existence of this passage from *Kvocka* in the Board's reasons implies that the Board applied the wrong test. I do not think that the Board's reasons are so broad that they would catch “mere members” of the organization who have no *mens rea* in contravention of the guidance of *Ramirez*. In my opinion, the Board is quite clear from their

analysis under the headings of "Method of recruitment and possibility to leave", the "Knowledge of the organization", and the heading which is dispositive of this argument, "Involvement and personal implication of Ponce Vivar," that the Board was considering more than just the acts of the organization. They were considering the acts of the Applicant. Under the latter of the three headings, the Board expressly says, "When making a determination that someone has committed a crime against humanity, more is necessary than mere benign membership in an organization that has, from time to time, committed crimes against humanity." In my opinion, the Board has correctly understood the test and has not found that mere membership will automatically equate to complicity, as the Applicant argues.

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[36] Recently, Mr. Justice Barnes considered this issue and determined that "[a]t the end of the day, it is not a person's membership status that is important. Rather it is the nature and scope of one's activity in support of an organization engaged in criminal behavior that is the measure of his complicity." See: *J.A.O. v. Canada* (*Minister of Citizenship and Immigration*) (2006), 146 A.C.W.S. (3d) 132, 2006 FC 178 at paragraph 28.

[37] While each "complicity" case must turn on its own facts, on this set of circumstances I am of the opinion that the Board properly understood the nature of the conflict and the actions of the Applicant, and their reasoning stands up to a somewhat probing analysis.

B. *Issue 2*

(1) <u>Standard of review on whether or not the Board erred by finding the Republican Guard to be a member of a group that committed crimes against humanity</u>

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[38] Inadmissibility under 35(1) has been considered previously by this Court and the applicable standard of review is reasonableness, as it is a mixed question of fact and law. See: *Nezam v. Canada* (*Minister of Citizenship and Immigration*) (2005), 272 F.T.R. 9, 2005 FC 446, and *Andeel v. Canada* (*Minister of Citizenship and Immigration*) (2003), 240 F.T.R. 1, 1 2003 FC 1085.

(2) <u>Decision on whether or not the Board erred by finding the Republican Guard to be a member of a group that committed the crimes against humanity:</u>

[39] The Applicant argues that the Board erred by finding that the acts of the Republican Guard overlapped with the more heinous acts of the Civil Guard and the Investigation Police and erred by treating them all as one group.

[40] Additionally, the Applicant argues that the Board erred by interchanging the terms "National Guard" for "Republican Guard", which, according to the documentary evidence, are separate entities. I will deal with this issue first.

[41] In my opinion, the use of the term "National Guard" stems from the finding that the Republican Guard is a branch of the National Police. It does appear that the Board may have conflated the respective names of the organizations in the course of their reasons. However, it is abundantly clear from the reasons, and a reading of the transcripts, that all parties concerned were discussing Mr. Vivar's role in the Republican Guard and not the National Guard. This is highlighted by the fact that the Board was aware that the Applicant took a position in the elite anti-subversive group of the Republican Guard and began their complicity analysis with the sentences: "Ponce

Vivar became a member of the Republican Guards in 1974, following the family tradition", and "Ponce Vivar remained in the Republican Guards for 11 years…".

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[42] This is not grounds to grant judicial review.

[43] As mentioned, the Board accepted that the Republican Guard may have been the lesser of the evils that plagued Peru during the time in question. However, this does not entirely absolve them from culpability. The Board was clear that Mr. Vivar worked in the prison system for years and knew of the abuses. Also, around 1983, the Civil Guard was in effective control of the Emergency Zone in which Mr. Vivar was stationed and the Civil Guard had *de facto* control over the Republican Guard. The Applicant testified orally, at page 21 of the hearing transcripts, that "…when the Republican Guard arrived to the emergency zone, we would be under the disposition of the colonel of the army. ..." The Applicant also testified at page 23 of the hearing transcripts that his Republican Guard commander "…will report directly to the colonel, army colonel." Also, at page 26 of the second day's transcripts, when asked "…did the Republican Guard fall under the command of the army within the emergency zone?", the Applicant responded, "Exactly. He was the one who gave the orders to our commander and the commander passed those orders to us."

[44] It was also elicited through cross-examination that the Republican Guard was part of the coalition in the Emergency Zone.

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[45] I find that it was reasonable for the Board to have determined that, in these Emergency Zones, the chain of command and boundaries between the organizations was blurred and were close to forming a "coalition" as it was referred to by the Applicant in his testimony.

[46] Also, the Applicant volunteered for the Llapan Atic and was specifically sent into an Emergency Zone, where Lurigancho prison was, in 1985. The documentary evidence showed that torture, rape and murder were commonplace.

[47] It was for these reasons the Board found reasonable grounds to believe that the Applicant had knowledge of the crimes against humanity as a result of his role in the Republican Guard and of his role in the Llapan Atic. I do not find the Board acted unreasonably by finding that the oppressive organizations were closely related, if not the same, for the purposes of their actions in the Emergency Zones. The Board's reasons are based on the evidence and survive a somewhat probing analysis.

[48] If I am wrong on this point, I am of the opinion it still would not amount to a reviewable error, as, even if we accept that these organizations were all discrete groups in the Emergency Zone, the Applicant personally handed a person over to be "strongly interrogated." This prisoner was, according to the Applicant's testimony, denied food and detained on a Peruvian army base. It is clear from the decision in *Bazargan v. Canada* (*Minister of Citizenship and Immigration*) (1996), 205 N.R. 282 (F.C.A.), that personal and knowing participation in crimes against humanity does not require formal membership in an organization engaged in those activities. In *M. v. Canada*

(*Minister of Citizenship and Immigration*) (2002), 221 F.T.R. 195, 2002 FCT 833, Madam Justice Dawson dismissed a judicial review on the basis that it was implausible that the Applicant knew of ongoing torture and did not resign. In the present case, the issue is not even as a question of plausible deniability. The Applicant admits to having knowledge of the torture, estimating that 30-40% of prisoners were tortured. It is for this reason that I do not accept the Applicant's role to have been passive acquiescence as explained in *Moreno v. Canada* (*Minister of Employment and Immigration*), [1994] 1 F.C. 298 (C.A.). It is no excuse to say that the torture was committed by a group, other than the group the Applicant was a member of, if the Applicant is the one handing over people to the group that commits the crimes against humanity.

[49] The application for judicial review is dismissed. No question was submitted for certification and none will be certified.

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JUDGMENT

THIS COURT ADJUDGES that the application for judicial review is dismissed.

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"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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