Ottawa, Ontario, the 23rd day of December 1998

Present: The Honourable Mr. Justice Pinard

Between:

EULALIO CABRERA

Applicant

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

The application for judicial review of a decision dated October 15, 1997, by the Convention Refugee Determination Division which determined that the applicant is not a Convention refugee, is dismissed.

YVON PINARD

JUDGE

Certified true translation

M. Iveson

Date: 19981223

Docket: IMM-4657-97

Between:

EULALIO CABRERA

Applicant

- and -

MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR ORDER

PINARD J.:

[1] This is an application for judicial review of a decision of the Convention Refugee Determination Division (the Refugee Division) which determined that the applicant was not a Convention refugee, as defined in subsection 2(1) of the *Immigration Act* (the Act), on the ground that the applicant fell within exclusion clause 1F(a). In the same decision, however, the Refugee Division decided that the applicant"s wife, Mrs. Divas Solis Lesbia Graciela, and the children, Mildre, Rudy and Liseth Cabrera, were Convention refugees.

[2] The applicant argued that the Refugee Division first erred in law by limiting itself to applying section F(a) of Article 1 of the *Convention Relating to the Status of Refugees/1951*, without examining further the soundness of its inclusion in the definition of Convention refugee. In my view, this first argument by the applicant is not well founded. It is true that in *Moreno v. M.E.I.* (September 14, 1993), A-746-91, the Federal Court of Appeal held that when a claim involves the exclusion clause, it is preferable that the Refugee Division make a determination

both on "exclusion" and "inclusion". Subsequently, however, the Court of Appeal specified in *Gonzalez v. Canada (M.E.I.)* , [1994] 3 F.C. 646, at page 657, that the Refugee Division is not required to consider whether a claimant meets the requirements of the definition of Convention refugee when it decides to apply the exclusion clause:

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

[3] Thus, while in certain circumstances it might be desirable for the panel to make a determination on both inclusion and exclusion, in law it is not required to do so. In the instant case, it is important to point out that the context of the dependent refugee claim referred to in *Moreno* is not relevant, as those claims were allowed.

[4] The applicant"s second argument was that the Refugee Division incorrectly assessed the issues related to his intention and complicity. In this regard, it is important to first reproduce the following excerpt from the panel"s decision:

[TRANSLATION]

> . . . Mr. Cabrera served for 17 years in a police force which committed serious crimes against persons. His
> chauffeur and body guard, according to his testimony, for the chiefs of police he served, necessarily gave h
> access to privileged information, contrary to what he claimed. He knew of and saw things which he chose n
> reveal to the Panel.

> He himself stated that a chauffeur had to have special qualities. The Panel is of the view that a person perfo
> this duty for several different chiefs of police during so many years is surely a loyal and discreet man, devo
> employer, who in fact held an important position in an organization which did not respect human rights. It is
> implausible that Mr. Cabrera did not know the truth about the activities of the national police.

> . . . He admitted knowing that these atrocities had been committed by the police.

> In order to find complicity by a claimant in the commission of a crime against humanity, the case law requir
> existence of a shared common purpose and knowledge that all of the parties in question have of it.

> Mr. Cabrera voluntarily joined his country"s national police, he did not do so against his will. He remained w
> for 17 years, during which time the country went through a destructive civil war. He did not voluntarily leave
> police, he was forced to do so following charges of murders. He worked in the capital where, according to
> background information, bodies of people who had been tortured were found daily. He was promoted to th
> position of detective, although he denied this was a promotion. The Panel considers that going from the po
> chauffeur to that of detective constitutes a promotion.

> In view of these facts, how can we find that the claimant did not share the intentions of the organization for
> he worked for 17 years. How can we not interpret the fact that he remained in the service of the national po

> during those years as consent to the torture and killing his colleagues did. He saw the results of their action his own eyes. From the first months of his service, he regularly picked up the bodies and noted their injuries reports.

> The fact that he went to the locations where the bodies were, picked them up, and did so regularly and with objecting is the same, although the context is different, as becoming involved in an operation which he kne probably lead to the continuing commission of similar crimes. Through his work and his knowledge of the a committed by the national police, the claimant became complicit in these acts.

[5] In *Moreno, supra*, the Federal Court of Appeal ruled on the burden of proof applicable to the exclusion clause in question:

> It is universally accepted that the applicability of the exclusion clause does not depend on whether a claima been charged or convicted of the acts set out in the Convention. The Minister's burden is merely to meet th standard of proof embraced by the term "serious reasons for considering". In *Ramirez v. Canada (Minister o Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.), this Court canvassed this aspect of refugee law and concluded that the standard was one well below that required under either the criminal law ("beyond a reas doubt") or the civil law ("on a balance of probabilities" or "preponderance of evidence"). . . .

[6] With regard to complicity, it is settled law that it essentially depends on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it, everything then becoming a question of fact. This is what the Federal Court of Appeal reminds us in *M.E.I. v. Bazargan* (1996), 205 N.R. 282, at pages 287 and 288:

> . . . MacGuigan J.A. said that "[a]t bottom, complicity rests . . . on the existence of a shared common purpo the knowledge that all of the parties in question may have of it". Those who become involved in an operatio not theirs, but that they know will probably lead to the commission of an international offence, lay themselv to the application of the exclusion clause in the same way as those who play a direct part in the operation.

> That being said, everything becomes a question of fact. The Minister does not have to prove the responden He merely has to show " and the burden of proof resting on him is "less than the balance of probabilities" " there are serious reasons for considering that the respondent is guilty. . . .

> . . . This Court has noted on many occasions that the Board is a specialized tribunal that has complete juris to draw the inferences that can reasonably be drawn. . . .

[7] Applying everything the case law teaches us to the facts of the instant case, I consider first that the respondent properly discharged the burden of proof imposed on her, namely to show that there are serious reasons for considering the applicant is guilty of a crime defined in section F(a) of Article 1 of the Convention. Second, the applicant has not satisfied me that the inferences drawn with regard to his complicity by the Refugee Division, which is a specialized tribunal, could not reasonably have been drawn. On the contrary, in my view, the Refugee Division could reasonably have concluded that the three prerequisites to establish complicity, as defined by my colleague Mr. Justice MacKay in *Gutierrez v. M.E.I.* (1994), 84 F.T.R. 227, were met:

> Essentially then, three prerequisites must be established in order to provide complicity in the commission c international offence: (1) membership in an organization which committed international offences as a contir and regular part of its operation, (2) personal and knowing participation, and (3) failure to dissociate from th organization at the earliest safe opportunity.

[8] For all of these reasons, the application for judicial review is dismissed. I agree with counsel for the parties that there is no question here to be certified.

YVON PINARD

JUDGE

OTTAWA, ONTARIO

December 23, 1998

Certified true translation

M. Iveson

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS FOR ORDER OF PINARD J.

DATED DECEMBER 23, 1998

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