Thalayasingam Sivakumar (Appellant)
v.
Minister of Employment and Immigration (Respondent)
Indexed as: Sivakumar v. Canada (Minister of Employment and Immigration) (CA.)

Court of Appeal, Mahoney, Linden J.C.A. and Henry D.J.-Toronto, October 4; Ottawa, November 4, 1993.

Citizenship and immigration-Status in Canada-Convention refugees-Convention refugee claim denied on basis of U.N. Convention on status of refugees, Art. 1(F)(a) on ground claimant had committed crimes against humanity-Complicity in international crimes-Definition of crimes against humanity-Standard of proof in Convention. Art.1(F)(a) (serious reason for considering person has committed crime against humanity) requiring more than suspicion or conjecture, but less than proof an balance of probabilities-Association with organization responsible for international crimes may constitute complicity in case of personal and knowing participation and toleration of crimes, especially where person in position of leadership or command within organization.

Even though the appellant, a Tamil from Sri Lanka, was found to have a well-founded fear of persecution at the hands of the Sri Lankan government, the Refugee Division decided to exclude him on the basis of section 1(F)(a) of the United Nations Convention relating to the Status of Refugees as someone who had committed crimes against humanity. The issue on this appeal was whether the appellant was property held responsible for crimes against humanity alleged to have been committed by the Liberation Tigers of Tamil Eelam (LTTE)even though he was not personally involved in the actual commission of the criminal acts.

Held, the appeal should be dismissed.

Section 1(F)(a) of the Convention provides that the Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed crimes against humanity, and the definition of Convention refugee in section 2 of the Immigration Act excludes any person to whom the Convention does not apply pursuant to section 1(F)(a) thereof.

Although it was not established that the appellant had personally committed crimes against humanity, he was responsible for crimes against humanity committed by the Liberation Tigers of Tamil Eelam (LTTE) because of his leadership position within that organization and his continuing participation in it.

Recent cases in the Federal Court have established that there could be liability for such crimes as an accomplice, even though one had not personally done the acts amounting to the crime. This was essentially a factual question that could be answered only on a case-by-case basis. And there could be complicity through association. The case for an individual's complicity in international crimes committed by his organization is stronger if the member holds a position of importance within the organization. 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 them. And remaining in a leadership position with the knowledge that the organization was responsible for crimes against humanity may constitute complicity.

Although crimes against humanity usually involve state action or policy, it can no longer he said that individuals without connection co the state, especially those involved in paramilitary or armed revolutionary movements, can be immune from the reach of international law.

The standard of proof in section 1(F)(a) of the Convention is whether the Crown has demonstrated that there were serious reasons for considering that the claimant has committed crimes against humanity. This requires something more than mere suspicion or conjecture, but something less than proof on a balance of probabilities.

The evidence demonstrated that the appellant was not merely a member of the LTTE, but that he held several positions of leadership within the organization. Given that, an inference could be drawn that he knew of the crimes committed by the LTTE and shared the organization's purpose in committing those crimes.

The Refugee Division's reasons were deficient because of the absence of factual Findings of acts committed by the LTTE as well as the appellant's knowledge of the acts and shared purpose with the LTTE, and the lack of findings in relation to whether those acts were crimes

against humanity. However, given the voluminous documentary evidence and the appellant's own testimony as to his knowledge of the crimes against humanity committed by the LTTE, coupled with the appellant's position of importance within the LTTE and his failure to withdraw front the LTTE when he had ample opportunities to do so, there were serious reasons for considering that the appellant was an accomplice in the crimes against humanity committed by the LTTE. The evidence was such that no property instructed tribunal could reach a different conclusion. Nor was it possible to conclude other than that the killings constituted crimes against humanity.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Agreement for the Prosecution and punishment of the major War Criminals of the European Axis, August 8, 1945, 82 U.N.T.S. 279, Art. 6.
Immigration Act. R.S.C., 1985, c. 1-2, s. 2 (as am, by R.S.C., 1985 (4th Supp.), c. 28, s. 1), 19(as am, idem (3rd Supp.), c. 30. S. 31.
United Nations Convention Relating to the Status of Refugees, July 28, 1951, (1969) Can. T.S. No. 6. Art. 1(F)(a).

CASES JUDICIALLY CONSIDERED

APPLIED

Ramirez v. Canada (Minister of Employment and Immigration), (1992) 2 F.C. 306; (1992), 89 D.L.R. (4th) 173; 135 N.R. 390 (C.A.); Naredo and Arduengo v. Minister of Employment and Immigration (1990), 37 F.T.R. 161; 11 Imm. L.R. (2d) 92(F.C.T.D.); Flick Trial (trial of Fried-rich Flick and five others), Law Reports of Trials of War Criminals, Vol. IX. p. 1; Justice Trial (trial of Joseph Alstotter and others), Law Reports of Trial of War Criminals. Vol. VI. p. 1.

DISTINGUISHED:

Moreno v. Canada (Minister of Employment and Immigration), (1994) 1 F.C.298 (C.A.); Mitch trial (trial of Erhard Milch). Law Reports for Trials of War Criminals, Vol. VII. P. 27.

REFERRED TO:

Dunlop and Sylvester v. The Queen, (1997) 2. S.C.R. 881; (1979), 27 N.R. 153; Rudolph v. Canada (Minister of Employment and Immigration), (1992) 2 F.C. 653 (C.A.); Reservations to the Convention on Genocide, Advisory Opinion, (1951) LC.5. Rep. 15.

AUTHORS CITED

Bassiouni, M. Cherif, Crimes Against Humanity in International Criminal Law. Dordrecht: Martinus Nijhoff, 1992.
Rikhof, I. "War Crimes, Crimes Against Humanity and Immigration Law" (1993), 19 Imm. L.R. (2d) 18.
United Nations. Office of the United Nations High Commissioner for Refugees, Handbook or Procedures and Criteria for Determining Refugee Status under the 1951 Convention relating to the Status of Refugees. Geneva, 1988.
APPEAL, from the Refugee Division decision (sub nom. K. (Y.P.) (Re), (1991) C.R.D.D. No. 672 (Q.L.)) that the appellant was excluded from the definition of Convention refugee in section 2 of the Immigration Act on the basis of section 1 (F)(a) of the United Nations Convention Relating to

the Status of Refugees as someone who had committed crimes against humanity even though he was found by the Refugee Division to have a well-founded fear of persecution at the hands of the Sri Lankan government on the basis of his political opinion, Appeal dismissed.

COUNSEL:

Lorne waldman and Laura Snowball for appellant.
Harley R. Nott for respondent.

SOLICITORS:

Lorne Waldman, Toronto, for appeliant.
Deputy Attorney General of Canada for respondent.
The following are the reasons for judgment rendered in English by LENDEN J.A: The appellant, Thalayasingam Sivakumar, is a Tamil and a citizen of Sri Lanka. Even though he was found by the Refugee Division decided to have had a well founded fear of persecution at the hands of the Sri Lankan government on the basis of his political opinion,the Refugee Division decided to exclude him on the basis of section F(a) of Article 1 of the United Nations Convention Relating to the Status of Refugees (July 28, 1951, (1969) Can, T.S. No. 6) as someone who had committed crimes against humanity (Re K. (Y.P.). (1991) C.R.D.D. No. 672 (Q.L.)). The issue on this appeal is whether the appellant was properly held responsible for crimes against humanity alleged to have been committed by the Liberation Tigers of Tamil Eelam (LTTE) even though he was not personally involved in the actual commission of the criminal acts.

THE LAW

The definition of Convention refugee is found in subsection 2(1) of the Immigration Act, R.S.C, 1985, c. I-2, as amended by R.S.C, 1985 (4th Supp.), c. 28, s. 1:
2....
"Convention refugee" means any person who
(a)by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i)is outside the country of the person's nationality and is unable, or by reason of that fear, is unwilling lo avail himself of the protection of that country, or

(ii)not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(b)has not ceased to be a Convention refugee by virtue of subsection (2),

but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act.

The portion of section F of Article 1 which is relevant to this appeal states:
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.

The Refugee Division concluded that because of the appellant's leadership position within the LTTE and his continuing participation in the organization, he must by held responsible for crimes against humanity committed by the LTTE. The panel slated:
You are, however, known by the company you heap and an individual such as the claimant, who occupies a position of authority and who continues to participate, regardless of motivatior, must

be held individually accountable for the inhumane actions of his trainees, his subordinates and his movement (Case, at page 601.)

1.COMPLICITY

There has been some recent jurisprudence in this Court on the question of who is responsible for war crimes or crimes against humanity (see Naredo and Arduengo v. Minister of Employment and Immigration (1990), 37 F.T.R. 161 (P.C.T.D.); Ramirez v. Canada (Minister of Employment and Immigration), (1992)2 F.C. 306 (C.A); Rudolph v. Canada (Minister of Employment and Immigration), (1992) 2 F.C.653 (C.A); and Moreno v. Canada (Minister of Employment and Immigration), (1994) 1 F.C. 298 (C.A.)). 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. However, it is also possible to be liable for such crimes-to "commit" them-as an accomplice, even though one has not personally done the acts amounting to the crime (see MacGuigan J.A. in Ramirez, supra). In defining who would be considered an accomplice under section F. MacGuigan J.A. indicated that, although certainly relevant, it would be unwise to rely exclusively on Canadian criminal law concepts of aiding and abetting, since international instruments are not to be interpreted according to the legal system of any one country. He considered, in addition to Canadian law, case law of other countries and texts of learned authors and concluded that the starting point for complicity in an international crime was "personal and knowing participation."

This is essentially a factual question that can be answered only on a case-by-case basis, but certain general principles are accepted. It is evident that mere by-standers or on-lookers are not accomplices. As MacGuigan J.A. stated in Ramirez, supra, at page 317:

In my view, mere on-looking, such as occurs at public executions, where the on-lookers are simply by-slanders with no intrinsic connection with the persecuting group, can never amount to personal involvement, however humanity repugnant it might be.

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. For example, in Ramirez, supra, the claimant had enlisted in the army voluntarily and had witnessed the torture and killing of many prisoners. Due to the circumstances of the claimant's participation in the military, the Court found that he shared the military's purpose in committing these acts and that therefore he was an accomplice rather than an onlooker. A similar conclusion was reached in Naredo, supra, in which the applicants acted as guards during the torturing of prisoners. Muldoon J.'s reasoning in Naredo, supra, is questionable in the light of subsequent jurisprudence since he found that watching torture was as culpable as culpable as committing torture. However, his conclusion that the claimants were accomplices was probably correct on the facts given that the claimants were willing members of the intelligence service of the Chilean police who were part of a learn responsible for the interrogation and torture of prisoners. By way of comparison, in Moreno, supra, the claimant had been conscripted into the Salvadoran army at the age of 16. He was ordered to stand guard outside a cell in which a prisoner was interrogated and brutally tortured. However, the facts disclosed that the claimant was really a by-stander who had no power do intervene in the interrogation, did not share the military's purpose in perpetrating the torture, and deserted from the army as soon as possible. Thus, the claimant was found not to have been an accomplice in this act of torture. (See also Dunlop and Sylvester v. The Queen, (1979) 2 S.C.R. 881, with respect to the domestic law of parties to an offence.)

In Ramirez, supra, MacGuigan J.A. explained the test for complicity in cases of secondary parties, at page 318:

At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all the parties in question may have of it.

Moreover, those involved in planning or conspiring to commit a crime, even though not personally present at the scene, might also be accomplices, depending on the facts of the case. 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. (See Rikhof,

J. "War Crimes, Crimes Against Humanity and Immigration Law" (1993), 19 Imm. L.R. (2d) 18, at page 49.)

Another type of complicity, particularly relevant to this case is complicity through association. In other words, individuals may be rendered responsible for the acts of others because of their close association with the principal actors. 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 onlooker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts" (Ramirez, supra, at page 317).

In my view, the 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. 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 Crimes Against Humanity in International Criminal Law (1992), M. Cherif Bassiouni states, at page 345:

Thus, the closer a person is involved in the decision making process and the less he does to oppose or prevent the decision, or fails to dissociate himself from it, the more likely that person's criminal responsibility will be at stake.

In such circumstances, an important factor to consider is evidence that the individual protested against the crime or tried to stop its commissioner 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.

Of course, as Mr, Justice MacGuigan has written, "law does not function at the level of heroism" (Ramirez, supra, at page 320). Thus, people cannot be required, in order to avoid a charge of complicity by reason of association with the principal actors, to encounter grave risk to life or personal security in order to extricate themselves from a situation or organization. But neither can they act as amoral robots.

This view of leadership within organization constituting a possible basis for complicity in international crimes committed by the organization is supported by Article 6 of the Charter of the International Military Tribunal (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 82 U.N.T.S. 279) which defines crimes against peace, war crimes and crimes against humanity and then 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 perfonned by any persons in execution of such plan.

This principle was applied to those in positions of leadership in Nazi Germany during the Nuremberg Trials, as long as they had some knowledge of the crimes being committed by others within the organization. For example, the trial of Erbard Milch, United States Military Tribunal at Nuremberg, Law Reports of Trials of War Criminals, Vol. VII, page 27, involved an Inspector-General and a Field-Marshal in the German Air Force who was accused of committing war crimes and crimes against humanity in the form of illegal and appalling experiments carried out on German nationals as well as members of armed forces and civilians from countries at war with Germany. Though convicted of another charge, he was acquitted with respect to the experiments on the basis that, while the illegal experiments had been carried out by people under Milch's command, Milch had not personally participated in or instituted the experiments, nor had he any knowledge that the experiments were being carried out.

It should be noted that, in refugee law, if state authorities tolerate acts of persecution by the local population, those acts of persecution by the local population, those acts may be treated as

acts of the state (see, for example, the UNHCR Handbook en Procedures and Criteria for Determining Refugee Status, at page (7). Similarly, if the criminal acts of part of a paramilitary or revolutionary non-state organization are knowingly tolerated by the leaders, those leaders may be equally responsible for those acts. Complicity by reason of one's position of leadership within an organization responsible for international crimes is analogous to the theory of vicarious liability in torts, but the analogy is not altogether apt, since it is clear that, in the context of international crimes, the accused person must have knowledge of the acts constituting the international crimes.

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.

2.CRIMES AGAINST HUMANITY

Another question of law to be addressed in this appeal is what constitutes a crime against humanity. Article 6 of the Charter of the International Military Tribunal defines crimes against humanity as follows:

Article 6

(c)Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

There are certain additional legal requirements commonly accepted as part of the definition of crimes against humanity in the international sphere. Crimes against humanity must generally be committed in a wide-spread, systematic fashion (see, for example, the Flick Trial (trial of Friedrich Flick and five others), United States Military Tribunal at Nuremberg, law Reports of Trials of War Criminals, vol. IX, page 1, and the Justice Trial (trial of Joseph Alstotter and others), United States Military Tribunal at Nuremberg, Law Reports of Trials of War Criminals, Vol. VI, page 1, at pages 37, 47). As one Canadian commentator, Joseph Rikhof, supra, at page 30 has noted:

This requirement does not mean that a crime against humanity cannot be committed against one person, but in order to elevate a domestic crime such as murder or assault to the realm of international law an additional element will have to be found. This element is that the person who has been victimized is a members of a group which has been targeted systematically and in a widespread manner for one of the crimes mentioned...

Another historic requirement of a crime against humanity has been that it be committed against a country's own nationals. This is a feature that helped to distinguish a crime against humanity from a war crime in the past. (See the Flick Trial, supra, as well as the Justice Trial, supra.) While I have some doubt about the continuing advisability of this requirement in the light of the changing conditions of international conflict, writers still voice the view that they "are still generally accepted as essential thresholds lo consider a crime worthy of attention by international law" (Rikhof, supra, at page 31).

There appears to be some dispute among academies and judges as to whether or not state action or policy is a required element of crimes against humanity in order to transform ordinary crimes into international crimes. The cases decided in Canada to date en the issue of crimes against humanity all involved members of the state, in that each of the individuals was a member of a military organization associated with the government (Naredo, supra, Ramirez, supra; Moreno, supre; and Rudolph, supra). One author, Bassiouni, supra, states that the required international element of crimes against humanity is state action or policy (at page 247). Similarly,

the Justice Trial, supra, was quite clear in interpreting Control Council Law No. 10 (basically identical in terms to Article 6 of the Charter of the International Military Tribunal) to mean that there must be a governmental element to crimes against humanity at page 40:
It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual. It is significant that the enactment employs the words against any civilian population' instead of "against any civilian individual'. The provision is directed against offences and inhumane acts and persecutions on political, racial, or religious grounds systematically organised and conducted by or with the approval of government.
Other commentators and courts take a different approach. These developments are discussed extensively by Rikhof, supra, at pages 60 ft. In the Flick Trial, supra, the United States Military Tribunal itself adopted the position that private individuals can commit breaches of international law when it convicted several industrialists of crimes against humanity for the use of slave labour in their factories. This position was also taken in several other decisions of the United States Mililary Tribunal at Nuremberg regarding individual responsibility for war crimes. A similar position was adopted with respect to the commission of genocide, recognized as a crime against humanity, by the International Court of Justice in its advisory opinion on Reservations to the Convention on Genocide. International Court of Justice Reports (1951). Finally, the International Law Commission has determined that individual without connection to the state could indeed commit crimes against humanity (see Rikhof, supra, at page 64). Based on these latter authorities, therefore, it can no longer be said that individuals without any connection to the state, especially those involved in paramilitary or armed revolutionary movements, can be immune from the reach of international criminal law. On the contrary, they are now governed by it.

THE FACTS

Having considered the law with respect to crimes against humanity in the context of section F(a) of Article 1 of the Convention, it is necessary to turn to the facts of this appeal. The panel of the Refugee Division concluded that there were serious reasons for considering that the appellant, by reason of his association with the LTTE, had committed crimes against humanity.
The standard of proof in section F(a) of Article 1 of the Convention is whether the Crown has demonstrated that there are serious reasons for considering that the claimant has committed crimes against humanity. In Ramirez, supra, MacGuigan J.A. stated that serious reasons for considering constitutes an intelligible standard on its own which need not be assimilated to the reasonable grounds standard in section 19 (as am, by R.S.C., 1985 (3rd Supp), c.30, s. 3) of the Immigration Act. This conclusion was echoed by Mr. Justice Robertson in Moreno, supra, although Roberison J.A. indicated that, for practical purposes, there was no difference between the standards. I agree that there is little, if any, difference of meaning between the two formulations of the standard. Both of these standards require something more than suspicion or conjecture, but something less than proof on a balance of probabilities. This shows that the international community was willing to lower the usual standard of proof in order to ensure that war criminals were denied safe havens. When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status.
The evidence demonstrates that the appellant was not merely a member of the LTTE, but that he held several positions of some importance within the LTTE. A brief summary of the detailed evidence indicates that, as a young man, the appellant studied military history and strategy and concluded that armed struggle was the only way for the Tamils to achieve their goals of liberation. He became involved with the LTTE in 1978, shortly after the LTTE was banned by the Sri Lankan government. While he was at university, the appellant used his office as a student leader to promote the LTTE. Becoming frustrated with internal fighting in the LTTE, the appellant left the organization in 1981 to concentrate on his studies. However, the appellant was forced to cut his university studies short and escape to India after being sought by the Sri Lankan authorities because of his lies with the LTTE.

The Sri Lankan government claimed that the appellant participated in a bombing attack on a Sri Lankan police station in 1982, but the appellant denied having anything to do with the attack. The Board made no express finding on this matter and, hence, I ignore it.

The appellant testified that between 1983 and 1985, he was made aware that the LTTE was naming people working against the LTTE as traitors and killing those people as punishment (Case, at pages 113-115). The leader of the LTTE, Prabaharan, discussed these killing with the appellant, who testified that, while he never had any direct connection with these killings, he "accepted" what the leader of the LTTE told him (Case, at page 114).

The appellant remained in India until 1985 when he returned to Sri Lanka. In the intervening years, the appellant had been approached by the LTTE leader. As a result, the appellant rejoined the LTTE as military advisor. He established a Military Research and Study Centre in Madras where he lectured LTTE recruits on guerrilla warfare. The appellant testified that he instructed recruits on proper relations with the civilian population in order to gain popular support and that the recruits were told to observe the Geneva Convention.

In 1985, the appellant took part in negotiations (organized by the Indian government) between the Sri Lankan government and the five main rebel groups. These talks broke down when 40 Tamil civilians were killed by Sri Lankan forces.

In 1986, the appellant returned to Sri Lanka to visit his family. He resigned his position at the LTTE's military training college as a result of a dispute over military strategy with another member of the LTTE, and turned his attention to developing an anti-tank weapon. In 1987, he went back to India to mass-produce this weapon.

The appellant then returned once more to Sri Lanka with instructions to develop a military and intelligence division for the LTTE to gather information, prepare military maps and recruit new members. At that time, he was appointed to the rank of major within the LTTE.

Hostilities between the Sri Lankan and LTTE forces broke out in early 1987, but these were brought to an end by a peace accord signed in July of 1987. This accord allowed the Tamils to form a Tamil police force in the northern and eastern provinces, and the appellant was instructed to convert the military and intelligence centre into a police academy. However, the accord broke down and the police academy was never established.

The appellant testified that, in 1987, one commander of the LTTE, Aruna, went to a prison under their control and shot about forty unarmed members of other rival Tamil groups with a machine gun, after an assassination attempt by another Tamil group on a high-ranking officer of the LTTE. The appellant testified that, when he learned about the killing, he went to Prabaharan to demand public punishment, which he said he would do. However, little was done to Aruna, except that he lost his rank and was detained for a while. The appellant complained again, but nothing further was done. Aruna was later killed in action. Despite this, the appellant remained in the LTTE.

When a military commander in Jaffna died, the appellant was ordered to take charge of the defence of Jaffna Town. The appellant held the town for 15 days before he and his soldiers were driven into the jungle where they carried on guerrilla attacks. Subsequently, the appellant was ordered to return to India because of a dispute between luin and the LTTE's second-in-command. The appellant testified that this dispute arose from his strong conviction that negotiations with Sri Lanka should proceed without pre-condition. Although the appellant participated in peace talks with the Sri Lankan government, the talks were doomed to failure because of the leader of the LTTE's intractable position and confrontational style.

Eventually, the appellant voiced his frustrations with the inability of the LTTE to conduct itself properly in peace talks, and was consequently expelled from the LTTE in December of 1988. The claimant remained underground in India until January of 1989 when he travelled to Canada on a false Malaysian passport via Singapore and the United States.

The evidence clearly shows that the appellant held positions of importance within the LTTE. In particular, the appellant was at various times responsible for the military training of LTTE recruits, for internationally organized peace talks between the LTTE and the Sri Lankan government, for the military command of an LTTE military base, for developing weapons, and, perhaps most importantly, for the intelligence division of the LTTE. It cannot be said that the appellant was a mere member of the LTTE. In fact, he occupied several positions of leadership

within the LTTE including acting as the head of the LTTE's intelligence service. Given the nature of the appellant's important role within the LTTE, an inference can be drawn that he knew of crimes committed by the LTTE and shared the organization's purpose in committing those crimes. The Refugee Division was correct in determining that the appellant's leadership role within the LTTE left the appellant open to a charge of complicity in crimes against humanity alleged to have been committed by the LTTE.

The Refugee Division's reasons are deficient, however, because of the absence of factual findings of acts committed by the LTTE as well as of the appellant's knowledge of the acts and shared purpose with the LTTE, and the lack of findings in relation to whether those acts were crimes against humanity. The Refugee Division simply stated:

Therefore, the panel believes that there are serious reasons for considering that the claimant, in his leadership position, must be held individually responsible for crimes against humanity committed by the LTTE and documented elsewhere in these reasons. (Case, at page 600).

However, the closest the panel came to documenting the LTTE's actions, as well as the appellant's knowledge of and intent to share in the purpose of those acts, and to determining whether those acts constituted crimes against humanity were vague statements about "atrocities" and "abhorrent" tactics committed by all parties to the civil strife in Sri Lanka (Case, at pages 9-10).

The importance of providing findings of fact as to specific crimes against humanity which the refugee claimant is alleged to have committed cannot be underestimated in a case such as this where the Refugee Division determined that the claimant has a well-founded fear of persecution at the hands of the Sri Lankan government. For example, the Amnesty International Report of 1989 indicates that the Sri Lankan government is responsible for arbitrary arrest and detention without charge or trial, "disappearances", torture, death in custody, and extrajudicial killings. Given the seriousness of the possible consequences of the denial of the appellant's claim on the basis of section F(a) of Article 1 of the Convention to the appellant and the relatively low standard of proof required of the Minister, it is crucial that the Refugee Division set out in its reasons those crimes against humanity for which there are serious reasons to consider that a claimant has committed them. In failing to make the required findings of fact, I believe that the Refugee Division can be said to have made an error of law.

In some cases, the inadequacy of the Refugee Division's findings would require the case to be sent back to the Refugee Division for a new determination. However, as MacGuigan J.A. held in Ramirez, supra, this Court may uphold the decision of the Refugee Division, despite the errors committed by the panel, if "on the basis of the correct approach, no properly instructed tribunal could have come to a different conclusion" (pages 323-324). In my opinion, under the standard articulated in Ramirez, supra, it is not necessary to send this matter back to the Refugee Division for a new determination for no properly instructed tribunal could come to any other conclusion than that there were serious reasons for considering that the appellant had committed crimes against humanity.

While it would be inappropriate for this Court to review the record and make findings of fact based on the credibility of the materials and witnesses before the tribunal, that is not necessary in this appeal. It is incontrovertible that the appellant knew about the crimes against humanity committed by the LTTE. The appellant testified before the Refugee Division that he knew that the LTTE was interrogating and killing people deemed to be traitors to the LTTE. (Case, at pages 113-115). The appellant testified that he argued with Prabaharan, the leader of the LTTE, about civilian deaths not being in the interest of the LTTE's cause after the LTTE was accused of civilian deaths (case, at page 123). The appellant also stated that while he never allowed any civilian deaths to occur, he did witness or find out about civilian deaths caused by the LTTE (Case, at page 124). Further, the appellant testified that he was aware of an incident in which a member of the LTTE. Aruna, shot 40 members of rival Tamill groups with a machine gun.

The appellant's testimony must also be placed against the back-drop of the voluminous documentary evidence submitted to the Refugee Division. The various newspaper articles indicate that Tamil militant groups are responsible for wide-spread blood-shed amongst civilians and members of rival groups. In many of these articles, the LTTE are blamed for the violence by spokespeople for the Sri Lankan government. The Amnesty International Reports indicate that

various Tamil groups are responsible for violence against civilians, but are not specific about incidents involving the LTTE. While I accept that the statements of blame by Sri Lankan government officials might be suspect and that newspapers and the human rights reports are somewhat less precise than might be desired, the appellant's own testimony and some of the objective material written about the activities of the LTTE are a sufficient basis from which no tribunal could fail to infer that many of the allegations made against the LTTE, including various incidents in which civilians were killed, are true.

As for the requirement of complicity by way of a shared common purpose. I have already found that the appellant held several positions of importance within the LTTE (including head of the LTTE □s intelligence service) from which it can be inferred that he tolerated the killings as a necessary, though perhaps unpleasant, aspect of reaching the LTTE's goal of Tamil liberation. Although the appellant complained about these deaths and spoke out when they occurred, he did not leave the LTTE even though he had several chances to do so. No evidence was presented that the appellant would have suffered any risk to himself had he chosen to withdraw from the LTTE. The panel's finding that there was no serious possibility that the appellant would be persecuted by the LTTE supports the conclusion that the appellant could have withdrawn from the LTTE and failed to do so. I conclude that the evidence discloses that the appellant failed to withdraw from the LTTE, when he could have easily done so, and instead remained in the organization in his various positions of leadership with the knowledge that the LTTE was killing civilians and members of other Tamil groups. No tribunal could have concluded on this evidence that there were no serious reasons for considering that the appellant was, therefore, a knowing participant and, bench, an accomplice in these killings.

Finally, did these killings constitute crimes against humanity? That is, were the killings part of a systematic attack on a particular group and (subject to my reservations expressed above) were they committed against Sri Lankan nationals? Clearly, no other conclusion is possible other than that the civilians killed by the LTTE were members of groups being systematically attacked by the LTTE in the course of the LTTE's fight for control of the northern portion of Sri Lanka. These groups included both Tamils unsympathetic to the LTTE and the Sinhalese populations. It is also obvious that these groups are all nationals of Sri Lanka, if that is still a requirement.

DECISION

I conclude that, given the appellant's own testimony as to his knowledge of the crimes against humanity committed by the LTTE, coupled with the appellant's position of importance within the LTTE and his failure to withdraw from the LTTE when he had ample opportunities to do so, there are serious reasons for considering that the appellant was an accomplice in crimes against humanity committed by the LTTE. The evidence, both the appellant's testimony and the documentary evidence, is such that no properly instructed tribunal could reach a different conclusion. Accordingly, I would dismiss the appeal.

Mahoney I.A: I agree.

Heney D.J.: I agree.