Federal Court  Cour fédérale

Date: 20110809

Docket: IMM-6860-10

Citation: 2011 FC 982

Ottawa, Ontario, August 9, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HASHIM KHAN

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 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 29 October 2010 (Decision), which granted the Respondent's application for Convention refugee status pursuant to section 96 of the Act.

BACKGROUND

[2] The Respondent is a citizen of Afghanistan. From 1985 to 1992, he was employed by the Khadimat-e Atal'at-e Dowlati and the Wazarat-e Amaniat-e Dowlati (the KhAD), which was the state security service during the former Communist regime in Afghanistan. The Respondent claims that he worked as a driver for Directorate I which, as far as he knew, was in charge of dispatching consular officials and ambassadors to deal with international matters. He claims that he sought out this job as the only way to avoid joining the military while still supporting his family. He obtained the job through a friend and by paying a bribe. As a condition of his employment, he was required to become a member of the Hezbi Democratic Khalqi Afghanistan (PDPA), a branch of the Communist People's Democratic Party of Afghanistan.

[3] The Minister alleges that, in addition to being a driver, the Respondent was also a KhAD informer and a personal bodyguard. The KhAD is known to have committed crimes against humanity involving torture, rape and murder. The Minister argues that the Respondent's employment with the KhAD made him complicit in such crimes and that he should, therefore, be excluded from refugee protection under Article 1F(*a*) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (the Convention).

[4] The Respondent claims that, in 1988, the KhAD conducted a raid in his neighbourhood in Kabul and arrested one of his neighbours and the neighbour's son. Nabi (N), another of the neighbour's sons and a Mujahedeen commander in Panjshir Province, accused the Respondent of informing on the family. Five years later, when the Communist regime fell and the Mujahedeen

took power in Afghanistan, N became very powerful in the government. He sought out the Respondent to avenge the arrest of his father and brother. The Respondent was away from home at the time and his father refused to divulge his whereabouts. N killed the father and bombed the house. The Respondent subsequently fled Kabul. He and his wife resettled in an Afghan village where N was unlikely to go. They continued to live there without incident until 2003.

[5] In 2003, N kidnapped the Respondent's cousin in an effort to force the Respondent to give himself up. Fearing that N would kill him, the Respondent refused to surrender. In retaliation, the cousin's father told the neighbours that the Respondent had been an informant for the Communists while employed with the KhAD. The villagers invaded the Respondent's house but he escaped through a back window and fled the country.

[6] The Respondent filed claims for refugee protection in four countries; all were unsuccessful. In the fifth country, the United States, the Respondent's claim was successful at the first instance. However, the Department of Homeland Security appealed the decision and was successful in having the case remanded to an immigration judge to address contradictions in the testimony and determine whether Mr. Khan was barred from asylum as a persecutor of others. Fearing that he would be sent back to Afghanistan, the Respondent fled to Canada. He arrived on 11 March 2007 and made a claim for refugee protection on 13 March 2007, based on a well-founded fear of persecution by reason of his membership in a particular social group and imputed political opinion through his work with the KhAD. He also claims that he will face a risk to his life and a risk of torture if he is returned to Afghanistan.

[7] The Respondent appeared before the RPD on 10 December 2009 and 30 March 2010. He was represented by counsel and an interpreter was present. The Minister of Public Safety participated in the hearing, arguing that there were serious reasons for the RPD to consider that Mr. Khan had committed crimes against humanity and, therefore, should be excluded from refugee protection by virtue of Article 1F(*a*) of the Convention. The RPD did not accept the Minister's arguments. It found that the Respondent was a Convention refugee. This is the Decision under review.

DECISION UNDER REVIEW

Exclusion

[8] The RPD noted that the onus was on the Minister to establish that there are serious reasons for considering that the Respondent had committed crimes against humanity. The standard of proof required is "reasonable grounds to believe," which is lower than a balance of probabilities but higher than mere suspicion, and which applies only to questions of fact.

[9] Neither party disputed that the KhAD was involved in crimes against humanity, as that term is defined in Article 7 of the *Rome Statute*. Nonetheless, the RPD carried out the four-part test established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Mugesera*, 2005 SCC 40, to confirm that finding. Based on the evidence, the RPD found that the KhAD had committed proscribed acts, or crimes, and that those crimes were committed in a systematic or widespread fashion, against a civilian population. The RPD also found that the KhAD was an organization principally directed to a limited brutal purpose. This gave rise to a rebuttable

presumption that the Respondent had both personal and knowing participation as well as a shared common purpose, these being the essential elements required for a finding of complicity. See *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, [1992] FCJ No 109 (QL) (FCA) at paragraphs 15-18. Therefore, the remaining issue was whether the Respondent had provided sufficient credible evidence to rebut that presumption.

[10] The RPD noted that membership in the organization alone does not automatically result in exclusion. Much depends on the existence of a link between the person's membership in the group and his sharing in the organization's purpose of achieving its goals through brutality and violence against civilians. See *Savundaranayaga v Canada (Minister of Citizenship and Immigration)*, 2009 FC 31 [*Savundaranayaga*] at paragraph 32ff.

[11] The RPD found that, as the only evidence of the Respondent's involvement in the KhAD was his own testimony, it was essential to the claim that his testimony be credible. Ultimately, the RPD found that it was. The Respondent testified in a thoughtful and believable manner. His evidence was forthcoming, and the details of his 25-year story had remained consistent throughout his immigration proceedings, both in Canada and in the US. The medical reports that he submitted restate his accounts of the events that caused him to flee Afghanistan. Although he lacked corroborating evidence, the circumstances surrounding his flight from Afghanistan and his efforts to seek refuge elsewhere satisfied the RPD that there was no good reason to believe that the Respondent's account was untrue.

[12] The RPD accepted as credible the Respondent's testimony that he was simply a driver for a political officer in Directorate 1, which he believed to be involved in intelligence and Afghan missions abroad. The RPD was not satisfied that the directorate that employed the Respondent was the same Directorate 1 that Amnesty International had identified as notorious for its human rights violations because the identification of directorates by number has been questioned in the documentary evidence. His job "consisted of ensuring his boss got to where he needed to be." He was neither an informer nor an officer with the KhAD. Like all employees of the regime, he was required to sign an agreement to inform on others about arms, military evasion and anti-government opinions, but he informed on no one. He was required to join the PDPA to secure his job. He did not leave his job voluntarily because he was afraid that, if he went back to his farm, he could be recruited by the Mujahedeen. While he knew that the KhAD was involved in atrocities, he was unaware of the full nature and extent of them. The RPD stated:

> [the Respondent's] knowledge did not rise above the level of "street level" and he believed … that such atrocities were not being committed by [Directorate 1]. On the basis of the above, I am satisfied that such an involvement does not support the conclusion that the [Respondent] had personal and knowing participation and a shared common purpose.

The RPD was satisfied that "the types of tasks attributed to the [Respondent] as a driver for the person he served could not be characterized as advancing such crimes [against humanity] in a small way."

[13] The Minister relied on the Respondent's testimony from the US asylum proceedings where he appeared to have indicated, in the early stages of testifying, that he was an informer and that he

had carried a gun. The Minister argued that this proved that he was not just a driver but also a bodyguard for the political officer. However, the RPD noted that, in those same proceedings, the Respondent clearly attempted to clarify what, to his mind, was a misunderstanding. He stated that he did not inform on people, even though “on paper” he was required to do so in order to keep his job.

[14] The RPD accepted the Respondent’s clarification for the following reasons. He is uneducated and had received no legal advice, although he had made “many efforts” to secure a lawyer. Both the prosecutor and the judge in the US proceedings commented that there were problems with the interpreters provided. The uncertified transcript of those proceedings was unreliable, littered as it was with numerous “indiscernible” notations, and therefore could not satisfy the RPD that the Respondent’s single reference to carrying a gun was a meaningful one.

[15] The RPD noted that the US proceedings constituted the only evidence that the Minister could provide to show that the Respondent’s involvement with the KhAD was sufficient to support a finding that he had the requisite personal and knowing participation as well as a shared common purpose and therefore was complicit in the KhAD’s crimes against humanity. That evidence, in the RPD’s view, was not persuasive. The RPD was not satisfied that the Respondent should be excluded under Article 1F(*a*) of the Convention.

Inclusion

[16] The RPD determined that the Respondent fears for his life at the hands of N and of the villagers who believe that he was an informer for the KhAD and that those fears remain well-founded seven years after his flight from Afghanistan. Although the arrest of N's father and brother occurred over 20 years ago, N's persistent pursuit of the Respondent, punctuated by remarkably long periods of inactivity, demonstrates N's "clear animus for revenge … [during the] 15 years prior to the [Respondent's] fleeing Afghanistan." The RPD concluded that there was more than a reasonable chance that, if he were to return to Afghanistan, the Respondent would be faced with N's desire for revenge based on the Respondent's imputed political beliefs and the allegation that he informed against N's family as well as the vengeful acts of those who opposed the Communist regime in Afghanistan. For these same reasons, the RPD found that the Respondent would face a risk to life from N and N's allies were he to return to Afghanistan.

[17] The RPD further found, based on the documentary evidence, that the state would not be able to protect the Respondent in Afghanistan. Both the US Department of State and the UN Secretary General reported that the security situation in that country had worsened significantly in the previous year. The government had a limited ability to deliver basic services to the population. Armed conflict had spread to one-third of the country, and there was no indication that the situation would improve. The RPD found that the question of internal flight alternative (IFA) was not germane to this case because, if the Respondent were to return to Afghanistan, he would likely seek the support of his family, thereby revealing his location to his uncle, who still may wish to harm

him. The Respondent would also face threats from those who may discover that he was a former employee for the KhAD, which would put him at risk throughout the entire country.

[18] In light of the Respondent's well-founded fear and the absence of both state protection and an IFA, the RPD found that he was a Convention refugee.

ISSUES

[19] The Applicant raises the following issues:

i. Whether the RPD misconstrued the law of complicity as it applies to an organization with a limited, brutal purpose; and

ii. Whether the RPD erred in finding that the Respondent was not excluded from refugee protection pursuant to Article 1F(*a*) of the Convention.

STATUTORY PROVISIONS

[20] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their	*a*) soit se trouve hors de tout pays

countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
Exclusion — Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
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.	**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.

[21] The following provision of Article 1 of the Convention is applicable in these proceedings:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**F.** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(*a*) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments	*a*) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments

drawn up to make provision in respect of such crimes ….	internationaux élaborés pour prévoir des dispositions relatives à ces crimes ….

STANDARD OF REVIEW

[22] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[23] The Applicant argues that the RPD misconstrued the law of complicity and that it erred in finding that the Respondent was not excluded from refugee protection pursuant to Article 1F(*a*). In determining the standard of review, I concur with the reasoning of Justice François Lemieux in *Shrestha v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 887 at paragraphs 10-12, recognizing at the same time that the Supreme Court of Canada in *Dunsmuir* collapsed the standards of patent unreasonableness and reasonableness *simpliciter* into a single reasonableness standard. Justice Lemieux observed:

> If the tribunal's decision turns on whether the Applicant knew the nature of the activities of the UPF, his participation in the organization, his leadership role, and his financial contribution to the Party, these are finding of fact. In accordance with paragraph 18.1(4)(*d*) of the *Federal Court Act*, the Court will not intervene unless the tribunal based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without

> regard for the material before it, and this is equivalent to a patently unreasonable conclusion.
> In *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 at page 844, L'Heureux-Dubé J. for the Supreme Court of Canada wrote at paragraph 85:
>
> > We must remember that the standard of review on the factual findings of an administrative tribunal is an extremely deferent one ... Courts must not revisit the facts or weigh the evidence. Only where the evidence viewed reasonably is incapable of supporting the tribunal's findings will a fact finding be patently unreasonable. An example is the allegation in this case, viz. that there is no evidence at all for a significant element of the tribunal's decision ...
>
> I agree with the Applicant's counsel if the tribunal misinterpreted the meaning of the exclusionary clause of Article 1F(a) correctness is the standard and if it misapplied the correct interpretation to the facts of the case the standard of review is reasonableness *simpliciter*.

[24] I would add that, where the Decision applies legal principles to the facts – that is, in issues of mixed fact and law – the appropriate standard of review, again, is reasonableness. See *Canada (Minister of Public Safety and Emergency Preparedness) v Muro*, 2008 FC 566 at paragraph 30; and *Savundaranayaga*, above, at paragraphs 25-26.

[25] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

The RPD's Complicity Analysis Was in Error

[26] The Applicant argues that there are serious reasons for considering that the Respondent was complicit in crimes against humanity committed by the KhAD and therefore should be excluded under Article 1F(*a*). The KhAD has been identified as an organization with a limited brutal purpose. The Respondent admitted that he was aware that the KhAD was notorious for murdering civilians. Regardless, the Respondent voluntarily joined the organization to avoid military service, worked for seven years as an officer's driver, promised to inform on those who possessed weapons or failed to report for military service, and dissociated himself from the organization only after the fall of the Communist regime.

[27] The Applicant submits that the Respondent presented one version of events to US immigration authorities and a different version to Canadian authorities. In the US immigration proceedings, the Respondent admitted that he was an informer for the KhAD. In the Canadian proceedings, however, he denied being an informer; he said that, in the US proceedings, he meant to say that he was required to report on civilians if he happened to come across information of interest to the KhAD but that he never actually acted on his duty to inform on others. The RPD therefore

was mistaken in finding that the Respondent's testimony in the Canadian and in the US proceedings was basically the same.

[28] The Applicant submits that the RPD's complicity analysis was in error. Even if it was reasonable for the RPD to accept that the Respondent never informed on anyone, this does not negate his complicity. Reporting was a requirement of his employment and, when he agreed to report on others, he was aware that the KhAD arrested those who were reported and was notorious for killing those whom it arrested.

[29] This Court has stated that a person is complicit in the activities of an organization if he contributes to the organization directly or indirectly, remotely or immediately, while being aware of the activities of the organization or if he makes these activities possible. See *Bazargan v Canada (Minister of Citizenship and Immigration)* (1996), 205 NR 282 [1996] FCJ No 1209 (QL)(FCA) at paragraph 11. The Applicant argues that the Respondent was complicit in the furtherance of KhAD activities by virtue of his employment with that organization. Although he was aware that the KhAD committed crimes against humanity, he did not dissociate from the organization until his employment was terminated when the Communist government fell.

[30] The RPD erred in finding that, because the Respondent's knowledge of the crimes committed by the KhAD did not rise above "street-level" knowledge but was instead "common knowledge," it was appropriate to conclude that he had successfully rebutted the presumption that he had personal and knowing participation and a shared common purpose. The Applicant contends that this restrictive interpretation on the degree of knowledge required to demonstrate complicity is

not supported by Federal Court jurisprudence. Justice Max Teitelbaum in *Shakarabi v Canada (Minister of Citizenship and Immigration)* (1998), 145 FTR 297, [1998] FCJ No 444 (QL) (FC) at paragraph 25 stated:

> It is much too simple to say that one is unaware of barbaric actions of an organization in order to try to distance oneself from these barbaric actions. If, as in the present case, an individual lives and works in a country where persons around him are disappearing and where one hears of persons arrested and tortured, it appears to me, to be totally unbelievable that one would not have knowledge of what is taking place. I believe that the Board came to the correct conclusion on the evidence before it. [emphasis added]

Similarly, the Federal Court of Appeal in *Oberlander v Canada (Attorney General)*, 2009 FCA 330 [*Oberlander FCA*], made no distinction between "common knowledge" and knowledge of specific crimes. That court held that the appellant could not have been unaware of the function of his unit, which he knew executed civilians although he himself had never witnessed such atrocities.

[31] The Applicant also argues that there was evidence before the RPD that, during the Communist regime, the KhAD had created a climate of terror in Afghanistan and was notorious for torturing and executing civilians. The Respondent was aware of the serious human rights violations committed by the KhAD but was wilfully blind to them. It was unreasonable for the Refugee Division to conclude that the Respondent rebutted the presumption of complicity in this case.

The Respondent

The RPD's Complicity Analysis Was Not in Error

[32] The Respondent submits that the RPD undertook the proper analysis and reached a reasonable finding that he had successfully rebutted the presumption that he had a personal and knowing participation as well as a shared common purpose with respect to the KhAD and that, in consequence, he was not complicit in the crimes against humanity committed by that organization. In reaching its Decision, the RPD relied on the testimonial evidence provided by the Respondent, which it found to be credible.

[33] The Respondent argues that the RPD recognized that membership in an organization that has a limited brutal purpose does not automatically result in exclusion. Rather, "it creates a rebuttal [*sic*] presumption of complicity or of the two criteria for complicity—a personal and knowing participation and a sharing of a common purpose." See *Savundaranayaga*, above, at paragraph 41. The RPD acknowledged that the presumption arose in the instant case and that, therefore, the onus was on the Respondent to adduce sufficient credible evidence to demonstrate that he was not complicit because he did not have a personal and knowing participation and a shared common purpose with respect to the KhAD. The RPD then looked to the Respondent's evidence—which consisted primarily of his testimony—to ascertain whether it was sufficient and credible. The RPD found that it was. The Respondent submits that there is nothing in the record to suggest that the RPD erred in its analysis.

The RPD's Credibility Findings Were Reasonable

[34] The Respondent submits that the RPD's credibility analysis was reasonable. It carefully reviewed all of the evidence before it. Where there were inconsistencies in the Respondent's evidence, the RPD carefully analysed the Respondent's explanations in light of the documentary evidence and then provided detailed reasons for accepting those explanations. The RPD's treatment of the Respondent's testimony in the US immigration proceedings was transparent, justifiable and comprehensible. Based on this thorough analysis, the RPD concluded: "Overall, I found the [Respondent] credible." The RPD accepted the Respondent's testimony that he had never informed on others, did not carry a gun and, in short, was nothing more than a driver for the KhAD. As a driver, the types of task he carried out could not be characterized as advancing crimes against humanity, even in a small way.

[35] The Applicant suggests that the Respondent first denied that he was a KhAD informer at his refugee hearing in Canada. That is not true. The transcript of the US immigration proceedings makes it clear that the Respondent denied being an informer in those proceedings. He stated: "Apparently there is some misunderstanding. I did not say that I did inform on people…. [T]hey made me sign a paper to report on any person that is hiding from us or obtaining weapons. But I was not involved in the reporting of anyone …."

[36] The Applicant also compares the instant case to *Oberlander* which, in the Respondent's view, should be distinguished on its facts. The organization in *Oberlander* was described by Justice Michael Phelan of the Federal Court as "a mobile killing unit of innocent civilians." See *Oberlander*

v Canada (Attorney General), 2008 FC 1200 [*Oberlander*]. This was its only function, and the claimant in that case lived, ate, travelled and worked full-time with the unit. In the instant case, the RPD found that the Respondent, although aware that the KhAD was involved in such activities, has what amounted to "common knowledge." He was unaware of the full nature and extent of such activities and saw no sign that the person for whom he worked was involved in such activities.

[37] The Applicant disputes the RPD's finding. It contends that, even if the Respondent's knowledge of KhAD crimes did not rise above "street knowledge," this does not rebut the presumption. However, the Respondent points out that the RPD never stated that this fact alone rebutted any presumption; it was simply a factor in the RPD's careful and detailed Decision. Moreover, the Respondent relies on *Canada (Minister of Citizenship and Immigration) v Mohsen* (2000), 188 FTR 145, [2000] FCJ No 1285 [*Mohsen*], to argue that the RPD is entitled to take that factor into account. In that case, Justice Frederick Gibson observed at paragraph 6:

> The CRDD determined that the KhAD was an organization "... directed to a brutal and limited purpose". That being said, it examined whether the respondent was "wilfully blind" in accepting employment with the KhAD and concluded that he was not. I am satisfied that this conclusion was reasonably open. The respondent was determined only to have "street level knowledge" of the KhAD and of its activities. The evidence before the CRDD clearly established that he did not share its limited brutal purpose. To the contrary, he had, at great risk to himself, deserted the army because he wanted to have no part in the killing of Afghani civilians. Having deserted the military, he was left with precious few alternatives in Afghanistan if he wished to pursue his obligations to his family. In the result, reluctantly, albeit voluntarily, he joined the KhAD where he performed only administrative tasks. Both his tasks and his physical locations were remote from the sites at which the KhAD performed its brutal acts. Finally, while it could not be said that he left the KhAD at the first opportunity available to him, the options open to him, so long as he continued in his commitment to his family, and thus to remaining in Afghanistan, were nil. Given the

> considerations that led him to join the organization, his level of knowledge and the nature of his duties, the fact that he did not leave the organization until the government of which the organization was a part fell, was a reasonable one.

[38] The Respondent submits that the arguments raised by the Applicant reflect a disagreement with the result, rather than the decision-making process itself. The Decision was reasonable.

The Applicant's Reply

[39] The Applicant submits that the Respondent's attempt to distinguish the instant case from the Federal Court of Appeal's decision in *Oberlander FCA*, above, is without merit. Whether or not the organization at issue in *Oberlander* was more brutal than the KhAD is irrelevant to the argument that there is a difference between common knowledge and knowledge of specific crimes committed by an organization.

The Applicant's Further Memorandum

[40] The Respondent admitted that he worked for Directorate 1 in the Wazir Akbar Khan location in Kabul. The 1991 Amnesty International Report reveals that Directorate 1 was responsible for the surveillance, arrest and imprisonment of ordinary citizens of Kabul suspected of anti-government activities. Although torture took place in all KhAD directorates, five such directorates engaged in the systematic use of torture, including Directorate 1.

[41] Further, the UNHCR report relied upon by the Respondent to support his position that he had only street-level knowledge about the atrocities committed by the KhAD confirms that one of the locations used by the KhAD for torturing prisoners was the Wazir Akbar Khan branch, where the Respondent had been stationed.

[42] The above-noted reports, the Respondent's acknowledgement that the KhAD was notorious for murdering civilians, and his voluntary joining in the organization based on a signed promise to act as an informer establish that the Respondent's contention that he possessed only "street-level" or "common" knowledge of KhAD activities is a self-serving claim fabricated to avoid exclusion under the Convention.

The Respondent's Further Memorandum

[43] The Respondent submits that while it is arguable that his work location was not far removed from sites where torture had taken place, the RPD reasonably found that his responsibilities as a driver were far removed from the commission of atrocities.

[44] A review of the jurisprudence indicates that a refugee claimant is not complicit where he does not knowingly contribute to the proscribed activities or make them possible from within or without the organization. See *Harb v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39. *Zadeh v Canada (Minister of Citizenship and Immigration)* (1995), 90 FTR 210, [1995] FCJ No 94 (QL), appears to be simply a driver case. However, the claimant in that case worked as a part-time bodyguard and occasionally had personal knowledge of what his boss was doing and who was

going to be seized. In the instant case, the Respondent was removed from the decision-making process and knew little.

[45] Culpability attaches to claimants who have committed acts that have furthered the goals of the organization or who have enjoyed a position of responsibility in the organization. See, for example, *Bazargan v Canada (Minister of Citizenship and Immigration)* (1996), 205 NR 282, [1996] FCJ No 1209 (QL) (TD); *Penate v Canada (Minister of Employment and Immigration)* (1993), [1994] 2 FC 79, [1993] FCJ No 1292 (QL) (TD); *Sivakumar v Canada (Minister of Employment and Immigration)* (1993), [1994] 1 FC 433, [1993] FCJ No 1145 [*Sivakumar*] (QL) (FCA); *Ali v Canada (Solicitor General)*, 2005 FC 1306 at paragraph 33; *Zazai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 303.

ANALYSIS

[46] There are several steps to the Applicant's argument:

a. The RPD's conclusion that the Respondent did not have the *mens rea* for complicity because he only had a "street-level" knowledge of the atrocities committed by the KhAD was wrong in law. Common knowledge suffices to satisfy the applicable test;

b. Even if a more specific level of knowledge is required to satisfy the *mens rea* for complicity, the Respondent had this specific level of knowledge and it was unreasonable, on the facts, for the RPD to find otherwise;

c. Even if the Respondent's evidence is accepted that he did not report or inform on anyone, he served the KhAD at least indirectly and remotely and this is sufficient to establish a shared common purpose.

[47] In my view, the Applicant has not correctly stated the basis of the Decision. The RPD characterized the issue before it as follows:

> Has the claimant provided sufficient credible evidence to rebut the presumption of personal and knowing participation and a shared common purpose?

[48] The RPD then sets out to answer this question as follows:

a. The Court in *Savundaranayaga* [*v Canada (MCI)* 2009 FC 31 at para 32 and on] stressed the fact that the presumption in question is rebuttable. Mandamin J. stated:

> Membership in an organization that has a limited brutal purpose does not automatically result in exclusion by itself. Rather, it creates a rebuttable presumption of complicity or of the two criteria for complicity - a personal and knowing participation and a sharing of a common purpose.

b. In setting aside the Board's decision in *Savundaranayaga*, Mandamin J. noted that the Board failed to go further once it was satisfied that the claimants were members of a limited brutal purpose organization. The Court stated that the Board should have gone further and should have specifically linked the person's membership in a group, with a sharing of the organization's common purpose of achieving its goals through brutality and violence against civilians.

c. To do that one needs to consider: the nature of the membership; how such membership gives rise to the presumption of complicity; and, how the finding of membership supports the conclusion that the claimant has personal and knowing participation and a shared common purpose.

[49] The RPD then made factual determinations about the role the Respondent had played in the KhAD and concluded that he had simply acted as a driver in a particular directorate of the KhAD. These factual findings are not challenged by the Applicant in this application.

[50] After making factual determinations as to the actual role the Applicant had played in the KhAD, the RPD then asked itself following question:

> Is the claimant's role as a driver the kind of involvement with the KhAD from which it can be inferred that he shares the KhAD's common purpose?

[51] The RPD then answers this question as follows:

> 78. For the reasons set out below, I am satisfied that the claimant's involvement in the organization, specifically, his role as a driver in the particular Directorate he worked for, was not such that one could infer a shared common purpose with KhAD.
>
> 79. Applying the analysis suggested by Mandamin, J. above, I find that there is insufficient evidence to link what the claimant did - as a driver - that would suggest a sharing of the KhAD's common purpose of achieving goals through brutality and violence against civilians.
>
> 80. As to the nature of the claimant's membership, I am satisfied that the claimant was only a driver with the KhAD - he was neither a commissioned nor non-commissioned officer who could have been charged with the types of duties more typically identifiable with such crimes. Nor was he a paid agent or informer as has been described in the new UN Report. There was a specific directorate established to deal with same and very specific screening and training for such officers. The claimant received no special training. Moreover, he was not specifically recruited for the position - rather he sought out the position and had to pay his friend to get the opportunity in order to avoid service in the military.
>
> 81. The claimant testified about a typical day in his life as a driver, much of which included driving his boss to various events or meetings, driving his family places, hanging out at the drivers'

lounge with other drivers while awaiting further instructions. The account is plausible.

82. I find overall that his role as a driver was minor and that generally, it consisted of ensuring his boss got to where he needed. He testified that when he was not driving his boss he was in the drivers [*sic*] lounge with other drivers. His role was minor - he drove for an officer who was not, to his knowledge directly involved in human rights violations.

83. While the claimant remained in this position for a relatively long time and only left in 1992 because the Communist government lost power to the Mujahedeen, he only did so as a way to avoid being conscripted into the military while still supporting his family, and a way to avoid being recruited by the Mujahedeen during the time prior to them taking control of the government in 1992.

84. Although he had knowledge that there were atrocities committed by the KhAD, such knowledge did not rise above the level of "street-level" and he believed, as he was told beforehand, that such atrocities were not being committed by his directorate.

85. On the basis of the above, I am satisfied that such an involvement does not support the conclusion that the claimant had personal and knowing participation and a shared common purpose.

86. As noted by the claimant's counsel, the caselaw indicates that guilt through complicity has only been inferred in situations where the actions or presence of such persons alleged to have been involved advanced such crimes - even in a small way. Based on my findings as to the claimant's role I am satisfied that the types of tasks attributed to the claimant as a driver for the person he served could not be characterized as advancing such crimes in a small way. A review of some of the caselaw assists in setting out the types of cases where claimants are excluded, or not, for their roles in organizations.

87. Some of the cases noted where the claimants were excluded are: *Bazargan*, where the claimant, an Iranian national, acted as a liaison between the police forces and SAVAK; *Penate*, where the claimant was a career soldier who commanded counter-insurgency operations and was found to have known that atrocities were being committed and did not disassociate

himself from the military; and, *Petrol*, where the excluded applicant was a member of the apparatus/machinery of the Russian Ministry of the Interior and the FSB whose objectives were often achieved through the commission of human rights abuses and violations of international law - he was found to have used his gun, arrested and detained individuals.

88. The cases cited in [*sic*] by the Minister which, were claimed to be similar to the claimant's situation, in that they were all cases involving the KhAD include: *Zadeh*, where the claimant was also driver for the KhAD but was, in addition, a bodyguard and was found to have had personal knowledge of what his boss' involvement in such crimes and personal knowledge of people to be arrested; and *Zazai*, where the excluded claimant entered the KhAD as a lieutenant and rose to the level of Captain, attended training sessions and personally provided names of those who did not cooperate.

89. Claimant's counsel cites the case of *Moshe* as having a more similar fact situation to the claimant than *Zadeh*. In that case the claimant similarly joined the KhAD because he did not want to fight in the military. He got a job in the Logistics department and eventually achieved the rank of 2nd lieutenant. Like the claimant, he remained there until 1992 performing administrative tasks and removed from sites where the brutal acts were being performed. The court in that case upheld the CRDD's (now RPD) determination not to exclude the claimant from refugee protection.

90. While the case before me is in some respects similar to *Zadeh*, I find it distinguishable both because the claimant in that case was a bodyguard in addition to being a driver and drove for a person who was himself involved in the atrocities and human rights abuses for which the claimant had personal knowledge and yet did nothing to disassociate himself. The claimant's knowledge here can be better characterized as "common knowledge" and as noted above, I am not satisfied that there are serious reasons for considering that the claimant had the role of bodyguard as alleged.

91. Minister's counsel has also alleged that there are serious reasons for considering that the claimant's actions as an informer for the KhAD, or from his duty to inform, made him an aider in the case of an informer and an abettor in the case of the latter and thus result in the claimant being excludable under Article 1 F(a). As I am not satisfied that there are serious

> reasons for considering that the claimant was an informer, I am unable to conclude that the claimant was guilty of aiding and abetting as alleged.
>
> 92. As a result of the foregoing, I am not satisfied that there are serious reasons for considering that the claimant is guilty of those crimes for which he should be excluded under Section 1 F(a) all of the Refugee Convention.

[52] As can be seen from these reasons, the issue of complicity (whether the Respondent shares the KhAD's common purpose) is not reducible to the issue of whether "common knowledge," or "street knowledge" *per se*, is sufficient *mens rea* to establish complicity. In paragraph 84 of the Decision, the RPD is simply making a finding that the Respondent's knowledge did not rise above the "street-level." The RPD looks at the Respondent's overall "involvement in the organization," including his level of knowledge of the atrocities committed by the KhAD, in order to determine whether he "shares the KhAD's common purpose." This determination involves assessing what he did as well as what he knew.

[53] I do not think this Decision says, as the Applicant alleges, that common or "street-level" knowledge means that the *mens rea* for complicity is not there. The Decision simply makes a finding about the Respondent's level of knowledge which is then assessed along with other factors to determine whether he shares the KhAD's common purpose.

[54] It is possible to take issue with the RPD's findings concerning the Respondent's level of knowledge and the extent to which the Respondent's actual activities exhibit a shared common purpose. In my view, however, these are primarily questions of fact and the application of legal principles (does the Respondent's involvement with the KhAD lead to an inference that he shares

the KhAD's common purpose?) to the facts as found by the RPD. In my view, this process attracts a reasonableness standard of review. See *Taylor v Canada (Attorney General)*, 2001 FCT 1247 at paragraph 32. Reading the Decision as a whole, I believe that the RPD's findings and conclusions were reasonably open to it. Hence, I do not think I can interfere.

[55] I am essentially in agreement with the arguments and discussion of the authorities produced by the Respondent on the issues before me.

[56] The RPD was aware that the burden was on the Minister to establish that there are serious reasons for considering that the Respondent has committed the alleged crimes against humanity and that "serious reasons for considering" or "reasonable grounds to believe" is a standard lower than a balance of probabilities but more than conjecture or suspicion.

[57] There was no dispute that the KhAD was involved in crimes against humanity. The RPD accepted the Minister's position that the KhAD was an organization with a "limited brutal purpose."

[58] The RPD was also well aware of the rebuttable presumption of complicity that arises where someone is a member of an organization with a limited brutal purpose.

> "If … the organization is found to be a limited brutal purpose organization, then a rebuttable presumption arises that the claimant had both personal and knowing participation in a shared common purpose.

[59] The RPD also clearly understood the analysis to be undertaken regarding complicity:

> The five factor approach only applies, however, if the organization is not principally directed to a limited brutal purpose. Where it is so

> directed, mere membership in the organization may be sufficient. In effect, a presumption of complicity arises which may result in a finding of complicity in the absence of any further evidence other than membership. Thus, a personal and knowing participation and a shared common purpose is presumed unless the claimant is able to rebut the presumption.

[60] The RPD was well aware of the presumption, and correctly set out the question that had to be answered:

> Has the claimant provided sufficient credible evidence to rebut the presumption of personal and knowing participation and a shared common purpose?

[61] In my view, there is nothing in the record to suggest that the RPD misconstrued the law in this case or made findings regarding complicity that were not reasonably open to it.

[62] I also agree with the Respondent that the RPD's finding that the Respondent was not complicit in crimes against humanity was reasonable.

[63] The RPD found that the Respondent was no more than a driver with the KhAD. It found that he was not an officer or an informer. It found that overall his role as a driver was minor, driving his boss and his family around and hanging out in the drivers' lounge with other drivers. To the Respondent's knowledge, his boss was not directly involved in human rights violations.

[64] The RPD found that the Respondent remained in his job until 1992 only to avoid being conscripted into the military while supporting his family and to avoid being recruited by the Mujahedeen.

[65] With respect to the Respondent's knowledge, the RPD found that:

> Although he had knowledge that there were atrocities committed by the KhAD, such knowledge did not rise about the level of "street level" and he believed, as he was told beforehand, that such atrocities were not committed by his directorate.

[66] Based upon the facts as found, the RPD considered whether it can be inferred from his role as a driver that the Respondent shared the KhAD's common purpose.

[67] Applying the analysis suggested by Justice Leonard Mandamin in *Savundaranayaga*, above, the RPD found that there was insufficient evidence to link what the Respondent did as a driver to a sharing of the KhAD's "common purpose of achieving its goals through brutality and violence against civilians."

[68] The Applicant says that "even if the Respondent did not report anyone to KhAD, this does not negate his complicity with that organization." The Applicant says it is enough that reporting was a requirement of the job because anyone who "contributes directly or indirectly, remotely or immediately, while being aware of the activities of the organization … makes these activities possible."

[69] The RPD was quite aware of the law regarding complicity and how complicity can encompass a person who advances crimes against humanity even in a small way. The RPD concluded, however, that the Respondent did not advance crimes against humanity. I agree with the Respondent that this conclusion was reasonably open to the RPD.

[70] The Decision shows that the RPD was fully alive to this issue:

> As noted by the claimant's counsel, the caselaw indicates that guilt through complicity has only been inferred in situations where the actions or presence of such persons alleged to have been involved advanced such crimes - even if in a small way. Based on my findings as to the claimant's role I am satisfied that the types of tasks attributed to the claimant as a driver of the person he served could not be characterized as advancing such crimes in the small ways.

[71] I agree with the Respondent that this conclusion was not unreasonable, as the Respondent did not inform on anyone, regardless of the job requirement, during the seven years he worked as a driver.

[72] Membership in an organization that has a limited brutal purpose does not automatically result in exclusion. Rather, "it creates a rebuttal (*sic*) presumption of complicity or of the two criteria for complicity – a personal and knowing participation and a sharing of a common purpose." See *Savundaranayaga*, above, at paragraph 41. The RPD is obliged to consider the nature of the membership at issue and determine whether it gives rise to a sharing of the organization's common purpose of achieving its goals through brutality and violence against civilians.

[73] The RPD examined the nature of the Respondent's evidence by considering both the Respondent's testimony and the documentary evidence before it. The RPD found that the more recent UN report provided a more comprehensive account of the KhAD's role as an organization. While the RPD felt that the KhAD nevertheless was "principally directed to a limited brutal purpose," it concluded that the report provided new evidence that assisted "in the assessment of the claimant's involvement in the KhAD - specifically, whether he had the kind of involvement with it from which it can be inferred that he shares the KhAD's common purpose." The RPD made it clear

that it is important to examine the structure and function of the organization in question, even one principally directed to a limited brutal purpose, because the organization may well differ from the type in *Oberlander*, namely the *Einsatzkommando 10a*, whose "sole function was as a mobile killing unit of innocent civilians." See *Oberlander FC*, above, at paragraph 49 (emphasis added). In the case of a large organization such as the KhAD, which although principally directed to a limited brutal purpose but engaged in several different functions, a low-level driver will not necessarily share a common purpose.

[74] The degree of knowledge of a claimant was carefully considered by this Court in *Mohsen*, above. There, the claimant was forcefully conscripted into the Afghan army in 1987, deserted because he did not want to kill his own people or be killed by them, did not want to leave the country because he had his family to support, joined the KhAD as the only way to avoid military service or punishment for desertion, and with a friend got a job in the logistics department, eventually achieving the rank of 2nd lieutenant. He bought food for the various departments and stayed in the KhAD until 1992. Justice Gibson held:

> [6] The CRDD determined that the KhAD was an organization "...directed to a brutal and limited purpose". That being said, it examined whether the respondent was "wilfully blind" in accepting employment with the KhAD and concluded that he was not. I am satisfied that this conclusion was reasonably open. The respondent was determined only to have "street level knowledge" of the KhAD and of its activities. The evidence before the CRDD clearly established that he did not share its limited brutal purpose. To the contrary, he had, at great risk to himself, deserted the army because he wanted to have no part in the killing of Afghani civilians. Having deserted the military, he was left with precious few alternatives in Afghanistan if he wished to pursue his obligations to his family. In the result, reluctantly, albeit voluntarily, he joined the KhAD where he performed only administrative tasks. Both his tasks and his physical locations were remote from the sites at which the KhAD performed its brutal acts. Finally, while it could not be said that he

> left the KhAD at the first opportunity available to him, the options open to him, so long as he continued in his commitment to his family, and thus to remaining in Afghanistan, were nil. Given the considerations that led him to join the organization, his level of knowledge and the nature of his duties, the fact that he did not leave the organization until the government of which the organization was a part fell, was a reasonable one.

[75] I agree with the Respondent that it was reasonable for the RPD to distinguish the Respondent's case from those where claimants have had some responsibility in an organization. Where the organization is one directed to a limited brutal purpose, one's position in such an organization is a significant factor. In *Sivakumar*, above, the following excerpt from *Crimes Against Humanity in International Criminal Law* (1992) by M. Cherif Bassiouni was cited (page 345):

> … 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 disassociate himself from it, the more likely the person's criminal responsibility will be at stake.

[76] Two recent decisions of this Court are also, in my view, supportive of the RPD's reasoning and conclusions in this case: *Pourjamaliaghdam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 666; and *Rutayisire v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1168. In *Rutayisire* at paragraph 45, Justice Yvon Pinard acknowledges that a distinction can be made between general knowledge and specific knowledge, and, at paragraph 48, Justice Pinard indicates that there is more to a finding of complicity that knowledge.

Certification

[77] The Applicant has suggested the following question for certification:

> Does complicity in crimes against humanity require anything beyond a common knowledge of the atrocities committed by an organization?

[78] In my view, this question does not arise on the facts of this case and is not determinative. As pointed out in my reasons, the RPD does not say that the Respondent was not complicit because he had only common or street-level knowledge of KhAD atrocities. The RPD makes a finding of fact concerning the level of knowledge possessed by the Respondent (a reasonable finding in my view) and then combines his level of knowledge with other factors (principally the role he played in the KhAD) in order to determine whether, reasonably speaking, he had rebutted the presumption by showing that his total involvement with the KhAD did not suggest that he shared the KhAD's common purpose.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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