Presentation made by Justice Michel M.J. Shore:

Canadian Bar Association – Quebec Immigration Lawyers' Section (CBA-AQAADI)

Protecting refugees – February 9, 2007

Translation from the French original version

Ladies and gentlemen,

I invite you to imagine the following situation involving three historical characters - three archetypes.

Suddenly, each of you awakens, you find yourselves to be judges; you are hearing three judicial review cases, three cases involving individuals who have claimed refugee status in Canada under the relevant Convention; these three claims, which were dismissed at first instance, are being heard by the Federal Court.

The case of Socrates, the case of Julius Caesar and the case of Joan of Arc.

Why these cases in particular? It is because you are all familiar with their PIFs, their personal information forms, their affidavits and their testimony. Their conduct, their actions and their statements are archived in historical documents and inscribed on monuments.

In the light of your knowledge of history, you are also aware of the conditions in the countries from which each of the applicants originates; thus, the country conditions are essential for our understanding. That is to say that each gallery of portraits of each of the applicants, each

encyclopedia of references, each dictionary of references and even each piece of background music in itself makes up the unique world of each of the applicants; don't forget that you have absorbed their cases entirely through historical osmosis.

Together, we are in a position to judge the three individuals or, rather, their conduct, their actions and their own statements during their testimony and the evidence itself will become the judge of each, its own case. It is the evidence itself, and not we, who will judge their cases on the basis of what they have said and by their actions.

You may be surprised, but, why should you be? We know from the principles of relativity that space and time are relative, as proven by Einstein; this was confirmed by tests performed by our astronauts during space flights. The theory of relativity is a reality.

This means, therefore, that, on some distant planet, there is a possibility that we might see the trial of the septuagenarian **SOCRATES** as it unfolded in 399 B.C. You will ask how this could happen. Well, my friends, it's easy! Since light travels at a certain speed, the inhabitants of that planet have observed the trial of Socrates at this very time, in real time, in the same way as the light from a star that was extinguished thousands of years ago, reaches, the planet, Earth, during the night as it shines down on us. In the same way, the trial of Socrates in Athens travels through time and space. That trial is winding up and the sentence is about to be imposed. The inhabitants of that planet save Socrates at the very moment when he is about to drink from the poisoned chalice. This poisoned drink will give effect to his death sentence but the healers and doctors on that planet give him an antidote, at once, so that he will remain alive and, my dear

friends, together, we as judges will hear the application for judicial review of Socrates. His case is based on his political opinions, which emerge from his philosophy. His dialectic method of seeking the truth forms the basis of his examination of his conscience. “Without a search for intrinsic truth, why keep on living?” For Socrates, the unexamined life is not worth living. Thus, the questions asked by Socrates caused problems for the establishment of Athens, as his trial demonstrated at that time.

Despite the appearance and the perception that democracy held sway in Greece at that period, it was far from meeting a standard that would be acceptable today. That ancient society was divided between the aristocratic elite and the people who had always worked as slaves. The words of Abraham Lincoln that introduced a new political perception did not cross time and space retroactively.

In Athens, only a part of society was allowed to vote. The other part lost out – no democracy for a very large segment of the population. Democracy existed for some but not for others. Democracy was not achieved. It was a partial democracy for those who represented the establishment and the elite. The majority of ordinary mortals did not participate in this democracy.

The judges of Socrates were only men, some of them just and conscientious and others, at best, ignorant and, at worst, corrupt individuals who could be bought with bribes or influence.

Our second applicant, **JULIUS CAESAR**, born into an aristocratic family some 100 years before Christ, was not satisfied to hold power over Rome with two other heads of state, as part of a triumvirate. For him, it was not sufficient to be one leader amongst three, joining with the General, Pompey, and the banker, Crassus, to wield power in Rome. At the age of 40, in a state of depression, Caesar felt that his life was simply a personal failure. In his depression, he decided that his idol, Alexander of Macedonia, who had conquered all the city-states of Greece, as well, as the whole of the known world, was not merely his hero, but, also, became his model. Thus, initially, his ambition was to conquer Rome with all its principalities or divisions and to expand his world to the east, west, north and south of Rome. Caesar made it his duty to subdue the whole known world. He imposed the *pax Romana*, rule of Rome, his notion of subdued peace, in his own way and became Emperor. Caesar would be recognized by everyone and his image was carved on monuments in all known countries to ensure that his person would dominate every aspect of the lives of each citizen and of each foreigner conquered by him for Rome.

Caesar was possessed by both noble and less than noble ideas and he was also possessed by noble and less than noble women, motivated more by his political passion than by his ardent love. As Cleopatra saw it, his paradox consisted of the fact that he was prepared to do anything to anyone in order to become the sole totalitarian sovereign. Although, he sometimes acted as an enlightened and benevolent despot, he was nevertheless a despot; and in order to become the Emperor-despot or dictator, the means did justify the ends; and the ends did justify the means, as the assassination of his rival, Pompey, demonstrated. This is why, in the context of this

application for judicial review, we have the duty to consider the application of the exclusion clause in his case.

When he was gravely wounded by his adopted son, Brutus, and several members of the Roman Senate, the establishment took the law, the trial and the sentencing of Julius Caesar into their own hands. The establishment in Rome did not want Caesar to change the Republic into an Empire through his own boundless ambition.

In 44 B.C., his life was saved by healers and doctors from a distant planet who had witnessed the attempted assassination against him.

On a far flung planet in time and space, more than fourteen hundred years later, in 1431, **JOAN OF ARC** was saved by several promising surgeons. After convalescing, she applied to the Federal Court for judicial review.

Joan of Arc, a peasant girl who became a political figure at the age of 17, was burned to death, at the age of 19, and was later revived to return to us. Her life was devoted to her country and, her goal was to make it clear to the invaders, that every country is entitled to live in peace and security within its borders. For two years, this young woman, who was called to be a leader, fought to save her country and to ensure that the Crown was returned to its legitimate monarch, Charles VII, whom she also planned to have crowned.

As a result of her religious convictions and her understanding of history, which provided her inspiration, she lived her life in France devoted to her beliefs and her conscience. This is the basis on which the judicial review process is to be conducted. Joan of Arc was ostracized because she dared to behave in a way which was unusual for women. She decided to take the destiny of her country into her own hands.

For this reason, she was convicted as a witch in her day and burned at a stake also for having worn men's clothing, even though she did so in order to defeat an enemy who intended to invade her country.

It is our privilege to hear the echoes of the testimony at the trial of Joan of Arc and the witch-hunt that followed. For this reason, we, as judges have a duty to consider the case law of today, to determine whether her case should be re-heard by a different panel.

As to Socrates' judicial review application, the statements of Justice Luc J. Martineau in *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, [2006] F.C.J. No. 439 (QL), clearly summarize the state of the law respecting government protection as a response to the Trial Court, which found that Socrates could obtain protection in a city state other than Athens:

> [27] In order to determine whether a refugee protection claimant has discharged his burden of proof, the Board must undertake **a proper analysis of the situation in the country and the particular reasons** why the protection…
>
> [28] No state which professes democratic values or asserts its respect for human rights can guarantee the protection of each of its nationals at all times. Therefore, it will not suffice for the applicant to show that his government was not always able to protect persons in his position (*Villafranca, supra*, at

paragraph 7)… The Board may in the circumstances determine that the protection provided by the state is adequate, with reference to standards defined in international instruments, and what the citizens of a democratic country may legitimately expect in such cases. In my opinion, this is a question of fact which does not have to be answered in absolute terms. **Each case is *sui generis*.** For example, one must look not only at the protection existing at the federal level, but also at the state level. **Before examining the question of protection, the Board must of course be clear as to the nature of the fear of persecution or risk alleged by the applicant.** When, as in this case, the applicant fears the persecution of a person who is not an agent of the state, the Board must *inter alia* examine the motivation of the persecuting agent and his ability to go after the applicant locally or throughout the country, which may raise the question of the existence of internal refuge and its reasonableness (at least in connection with the analysis conducted under section 96 of the Act).

[29] Accordingly, when the government is not the persecuting agent, and even when it is a democratic state, it is still open to an applicant to adduce evidence showing clearly and convincingly that it is unable or does not really wish to protect its nationals in certain types of situation: see *Annan v. Canada (Minister of Citizenship and Immigration*, [1995] 3 F.C. 25 (F.C.T.D.); *Cuffy v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1316 (F.C.T.D.) (QL); *Elcock v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1438 (F.C.T.D.) (QL); *M.D.H.D. v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 446 (F.C.T.D.) (QL). It should be borne in mind that most countries might be prepared to try to provide protection, although an objective assessment could establish that they are not in fact able to do so in practice. **Further, the fact that the applicant must place his life at risk in seeking ineffective state protection, simply in order to establish such ineffectiveness, seems to be contrary to the purpose of international protection** (*Ward, supra,* at paragraph 48).

[30] At the same time, *Kadenko, supra*, indicates that it cannot be automatically found that a state is unable to protect one of its nationals when he has sought police protection and certain police officers refused to intervene to help him. Once it is established that a country … has judicial and political institutions capable of protecting its nationals, from the refusal of certain police officers to intervene, it cannot be *ipso facto* inferred that the state is unable to do so. It is on this account that the Federal Court of Appeal mentioned in *obiter* that the burden of proof on the claimant is to some extent directly proportional to the "degree of democracy" of the national's country. The degree of democracy is not necessarily the same from one country to another. Therefore, it would be an error of law to adopt a "systemic" approach as to the protection offered to the nationals of a given country. This is what is likely to happen when the reasons for dismissal given by the Board are too general and may apply equally to another country or another claimant (*Renteria et al. v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 160).

[31] Whether the issue be the best interest of the democratic state in question and of civil society in general, or the individual interest of the victim or perpetrator of an alleged criminal offence, the payment of a monetary or other benefit of any kind to a police or law officer is illegal. Of course, if corruption is widespread it may ultimately lead to undermining the trust individuals may have in government institutions, including the judicial system. As the Supreme Court has noted, "democracy in any real sense of the word cannot exist without the rule of law" (*Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, at paragraph 67). Due process of law and equality before the law are the vital strength of any democracy and create a legitimate expectation in individuals that the state will do what is necessary to go after criminals and bring them to justice, and if necessary to stamp out corruption. The independence and impartiality of the judiciary and its components are not negotiable. These are fundamental values in any country which claims to be a true democracy. Therefore, the degree to which a state tolerates corruption in the political or judicial apparatus correspondingly diminishes its degree of democracy. That being said, I do not have to decide here whether the documentary evidence established, as the applicant vigorously claimed, such a degree of corruption that it can be said it was not unreasonable in the circumstances for the applicant not to approach the police of his country before seeking international protection. **Due to its special expertise and its knowledge of the general conditions prevailing in a given country, the Board is in a much better position than this Court to answer such a question. Nevertheless, the Court must still be able to understand the Board's reasoning.**

[32] … the main flaw of the impugned decision results from a complete lack of analysis of the applicant's personal situation. It is not sufficient for the Board to indicate in its decision that it considered all the documentary evidence. A mere reference in the decision to the National Document Package …, which contains an impressive number of documents, is not sufficient in the circumstances. The Board's hasty findings and its many omissions in terms of evidence make its decision unreasonable in the circumstances. Further, because of the laconic nature of the reasons for dismissal contained in the decision, it cannot stand up to somewhat probing examination. For example, although the Board held that section 96 of the Act did not apply in the case at bar, it is not clear from reading its reasons that it actually analyzed the personal risk the applicant would face if he were returned to … in terms of each of the specific tests and of the burden of proof applicable under section 97 of the Act: see *Li, supra*; *Kandiah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, [2005] F.C.J. No. 275 (F.C.) (QL).

[33] **In assessing the applicant's personal situation, as his credibility was not questioned in the impugned decision, we must accept the particular facts leading to his departure** … (*Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302, at paragraph 5 (F.C.A.)). Therefore, the Board could not simply state that if the claimant's appeal to the police were made in

vain, he could have appealed to the CNDH and the CEDH, two organizations concerned with human rights. It is not the role of those organizations to protect the victims of criminal offences; that is the duty of the police: see *Balogh v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 809, at paragraph 44, [2002] F.C.J. No. 1080 (F.C.T.D.) (QL); *N.K. v. Canada (Solicitor General)* (1995), 107 F.T.R. 25, at paragraphs 44-45 (F.C.T.D.).

...

[35] **The Board's role was to make findings of fact and arrive at a reasonable finding based on the evidence, even if conflicting. In this case, it is clear that the Board completely disregarded relevant evidence.** The Board cannot, without giving reasonable grounds, ignore or dismiss the content of a document dealing expressly with state protection in a given region (*Renteria et al., supra*). For example, …: *State Protection (December 2003 - March 2005), supra*, though it was filed at the hearing, was not mentioned in the decision. This document, which originates with the Board's Research Directorate, presents an overall and quite detailed view of the protective machinery available … and its dubious effectiveness. Taken in isolation, certain passages from the document appear to show that there is some desire by the present government to improve the situation, while other passages suggest that protective measures are ineffective, at least in certain cases. The same applies to a host of other relevant documents which were part of the National Documentation Package … that were not considered by the Board. It is clear that in the instant case the Board undertook a superficial, if not highly selective, analysis of the documentary evidence.

[36] I do not have to decide here whether (the country) is capable of protecting its nationals. I do not have to substitute my judgment for that of the Board and make specific findings of fact on the evidence as a whole. Suffice it to note here that the Board simply chose arbitrarily to disregard or not deal with relevant evidence which could have supported the applicant's arguments, and in the circumstances this makes its decision reviewable: see *Tufino v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1690, at paragraphs 2-3; *A.Q. v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 677, at paragraphs 17-18, [2004] F.C.J. No. 834 (F.C.) (QL); *Castro v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1165, at paragraphs 30-34, [2005] F.C.J. No. 1923 (F.C.) (QL).

ISSUE

Did the tribunal or the Board err in finding that Socrates did not discharge his onus of proof to establish that the city-state of Athens could not protect him adequately?

STANDARD OF JUDICIAL REVIEW

The standard of judicial review as to the ability of a State to provide protection to an applicant has been considered on a number of occasions by this Court. According to one line of thought, formerly this wa a question of fact that was to be weighed according to the standard of patent unreasonableness (*Nawaz v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1255, [2003] F.C.J. No. 1584 (QL), at paragraph 19; *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1449, [2004] F.C.J. No. 1755 (QL), at paragraph 9). It would now be according to the standard of unreasonableness.

According to another line of thought, formerly the appropriate standard was that of reasonableness *simpliciter*. (*Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232 (QL), at paragraph 11; *Danquah v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 832, [2003] F.C.J. No. 1063 (QL), at paragraph 11; *Machedon v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1104, [2004] F.C.J. No. 1331 (QL), at paragraph 70). It would now be according to a standard of reasonableness.

In *Chaves*, *supra*, following a pragmatic and functional analysis to determine the applicable standard of review, Justice Danièle Tremblay-Lamer found that it was a mixed question of fact and law and that the appropriate standard was that of reasonableness *simpliciter*. In this case, the Court adopts this analysis and will follow that standard for the purposes of this case. A decision will accordingly be found to be unreasonable to the extent that it is not supported by any ground of law or of fact capable of withstanding such a sustained review.

(*Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.)*, [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116 (QL), at paragraph 56).

ANALYSIS

Socrates essentially argued that the Board erred on a specific point when it expressed the view that he, Socrates, had not discharged his onus of establishing that the city-state of Athens could not protect him adequately.

Socrates maintained that the Board incorrectly analysed the question of the city-state's protection, in the sense that he actually requested the protection of the city-state of Athens, but without success. Furthermore, Socrates contended that the Board did not take into account his documentary evidence, which clearly showed that city-states outside Athens could not protect him adequately. Finally, he submitted that he discharged his onus by adducing clear and convincing evidence of the city-state's inability to protect him.

Justice Gérard Vincent La Forest, writing on behalf of the Supreme Court of Canada, held in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at paragraphs 49, 50 and 52, that it must be presumed that the State is capable of protecting its citizens in the absence of a complete breakdown of the government apparatus. The danger that this presumption will receive an overly broad application is mitigated by the possibility of offering clear and convincing evidence of the inability of a State to provide protection. To rebut the presumption of a State's ability to protect its nationals, an applicant may offer the Board the testimony of witnesses who

find themselves in a situation, similar to his or her own. This party may also rely on the documentary evidence in the record and refer to his or her own experience.

In the present case, the Board failed, in its reasons, to analyse the documentary evidence which was submitted to it. As the evidence suggests, Athens posed a threat to Socrates as did every other city state surrounding Athens.

Finally, in determining the degree of adequate protection that was available in the vicinity of Athens and to which Socrates could have fled and filed a complaint outside that city; by requiring Socrates to exhaust all of his remedies outside Athens, the Board rendered an unreasonable decision in the sense that it failed to take into account the fact that Socrates' situation had worsened. Moreover, the finding in his regard is contrary to the principle set out by this Court in *Shimokawa v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 445, [2006] F.C.J. No. 555 (QL), at paragraph 21, to the effect that "...refugee claimants are not expected to be courageous or foolhardy. It is only incumbent upon them to seek protection if it is seen as being reasonably forthcoming. If refugee claimants provide clear and convincing evidence that contacting authorities would be useless or would make things worse, **they are** not required to take further steps". (See also: *Ward, supra*, at paragraph 28.) This error, accordingly, warrants the intervention of this Court to the extent that this determination could not withstand a sustained review.

CONCLUSION

For these reasons, the application for judicial review made by Socrates is granted and his case referred for hearing by a different panel.

♦ ♦ ♦

With respect to the application for judicial review made by Julius Caesar, we find the following:

The decision of the Board, is reasonable, in finding that the position and the responsibility of Julius Caesar within his government enabled the Board to assert that he was aware of the crimes committed by his generals, is reasonable. Furthermore, the shared common purpose that may be inferred from his deliberate association with his allies, who supported him as Leader, is sufficient to find that he was an accomplice through association.

Thus, in *Omar v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 861, [2004] F.C.J. No. 1061 (QL), at paragraph 9, Justice Yvon Pinard found that even the ambassador of a foreign country, because of his or her close association with the government that appointed him or her to the position of ambassador to a foreign country, could be found guilty through association of crimes committed by the government in power in the country, he or she represents, even though the ambassador lives abroad throughout the period during which crimes are committed:

> [9] In this case, the evidence clearly indicates that the … regime is engaged in the repression of human rights, the persecution and intimidation of the civilian population as well as in government corruption. The IRB found that the applicant was complicit

> in the … regime based on the confidential duties entrusted to him by the government at a time when the regime was engaged in activities characterized as crimes against humanity and activities against the purposes and principles of the United Nations. In effect, the applicant had been ambassador to Paris since 1997, occupying the highest office in the most important post outside …. Apart from this office, the applicant represented his country before the European Union and … countries. He testified that he had knowledge of the crimes in which his government was engaged. The applicant who, because of his position in Paris, represented the party in power as well as the Djiboutian government, never tried to disengage himself from these crimes. The evidence indicates that since his recruitment … in 1988, the applicant has always demonstrated his ongoing, active and confident support to the regime. Under the circumstances, therefore, it is my opinion that the IRB assessed the situation reasonably well and that it correctly applied the exclusion clause against the applicant. Despite the skilful arguments of Mr. Bertrand, counsel for the applicants, the panel's finding regarding the applicant's exclusion must also be upheld.

(See also: *Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 139, [2006] F.C.J. No. 187 (QL), on the subject of a leader of a political party that formed the government.)

Recently, Justice Simon Noël reached a similar conclusion in *Chowdhury*, *supra*, concerning a leader of a political party that formed the government:

> [23] **My role is not to decide whether the Applicant in fact personally and knowingly participated in the brutal acts of the AL party, but rather whether it was reasonable for the RPD to reach such conclusion…**
>
> [24] The RDP also determined that the Applicant failed to dissociate and to stay in the AL party. The alleged opposition of the Applicant's ward against the violence of the AL party was found to be incredible. There is therefore no reason to question the finding of fact that the Applicant failed to dissociate. [Emphasis added.]

NATURE OF PROCEEDINGS

This is an application for judicial review made under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), against a decision dated May 15, 2007 of

the Board according to which Julius Caesar is not a refugee within the meaning of the Geneva Convention (the Convention) respecting refugees (section 96 of the Act) or a person in need of protection (subsection 97(1) of the Act) since he is subject to an exclusion set out in article 1Fa) of the Convention.

IMPUGNED DECISION

Having found that there are serious reasons to believe that Julius Caesar was responsible for and an accomplice to crimes against humanity, the Board dismissed his refugee claim and excluded him from the benefits of Convention refugee status and of a person in need of protection under article 1F*a*) of the Convention.

ISSUE

Is it reasonable to exclude Julius Caesar under paragraph F*a*) of article 1 of the Convention on the ground of complicity in crimes against humanity?

LEGISLATION

Under article 1F of the *Convention Relating to the Status of Refugees*, Schedule I of the Act:

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	*a*) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au

international instruments drawn up to make provision in respect of such crimes;	sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
(*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	*b*) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
(*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.	*c*) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

STANDARD OF REVIEW

Whether Julius Caesar is excluded from the category of refugees pursuant to article 1F of the Convention is a mixed question of fact and law and the appropriate standard of review is that of reasonableness. This Court may therefore intervene only if the decision of the Board was unreasonable. (*Shrestha v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 887, [2002] F.C.J. No. 1154 (QL), at paragraph 12; *Valère v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 524, [2005] F.C.J. No. 643 (QL); *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, [2003] F.C.J. No. 108 (QL), at paragraph 14; *Chowdhury*, *supra*, at paragraph 13).

ANALYSIS

Julius Caesar alleged that the Board erred primarily in respect of two points:

(1) In finding that Julius Caesar was an accomplice through association in crimes against humanity committed by the government of Rome. Furthermore, Julius Caesar submitted that the Board misinterpreted the tests developed in the case law concerning his responsibility and his complicity through association, in particular with respect to the evidence of personal and knowing participation in crimes against humanity and a shared common purpose.

(2) The finding, that Julius Caesar participated, personally, and, knowingly, in crimes committed by the army of Rome; however, Julius Caesar submitted that the Board erred in not identifying the crimes in which he took part directly or indirectly.

This Court does not agree with these allegations. It appears from the decision of the Board that it carefully examined the applicable principles in matters of responsibility, complicity and complicity through association and properly applied the tests to the facts of the case.

Evidentiary standard

In *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, [1992] F.C.J. No. 109 (QL), and *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298, [1993] F.C.J. No. 912 (QL), the Federal Court of Appeal held that the Minister must observe the evidentiary standard referred to in the words “serious reasons for considering” in paragraph 1F*a*) of the Convention. This standard falls, well below, that required in a criminal law context (“beyond a reasonable doubt”) or a civil law context (“on a balance of

probabilities"). In this regard, Justice Allen M. Linden stated in *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433, [1993] F.C.J. No. 1145 (QL), that the evidentiary standard provided for in article 1F of the Convention is not very different from that provided for in paragraph 19(1)(*j*) of the former *Immigration Act* ("persons who there are reasonable grounds to believe"). (See also: *Chiau v. Canada (Minister of Citizenship and Immigration)*, [1998] 2 F.C. 642, [1998] F.C.J. No. 131 (QL), at paragraph 27, affirmed: [2001] 2 F.C. 297, [2001] F.C.J. No. 2043 (QL).)

APPLICATION OF EXCLUSION CLAUSE TO APPLICANT

Applicable standard of proof

Paragraph 1 F(*a*) of the Convention reads as follows:

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 drawn up to make provision in respect of such crimes	*a*) Qu'elles ont commis un crime contre la paix, un crime de guerre ou **un crime contre l'humanité**, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

[Emphasis added.]

In *Ramirez*, *supra*, and *Moreno*, *supra*, the Federal Court of Appeal also held that the standard of proof provided for in article 1F of the Geneva Convention ("serious reasons for considering") did not differ from that provided for in paragraph 9(1)(*j*) of the Act ("persons who

there are reasonable grounds to believe"). (In the Act, the standard of proof applying to inadmissibility is now provided for in section 33 and the phrase used is: "reasonable grounds to believe").

According to the Federal Court of Appeal, in both cases, this **standard of proof is less demanding than is the standard** on a balance of probabilities, used in civil cases.

In *The Status of Refugees in International Law*, Leyden: Sithoff, 1966, at pages 289-290, Atle Grahl-Madsen stated the following concerning the standard of evidence required:

> The words 'serious reasons for considering' make it clear that it is not a condition for the application of article 1F*b*) that the person concerned has been convicted or formally charged or indicted of a crime. **The person's own confession**, the testimonies of other persons, or other trustworthy information may suffice. [Emphasis added.]

In the present case, Julius Caesar admitted to the Board and in the submissions which he filed at the Court; that he was aware of the crimes and violence perpetrated by the army and the government of Rome against the civilian population.

The government of Rome committed crimes against humanity

As indicated by the Board, the documentary evidence shows that the armed forces of the government of Rome engaged in the commission of serious crimes and violations of human rights against the civilian population.

Murder and torture

The involvement of mercenary armed forces in Rome, **under the authority of the government** of Rome, in murders was confirmed in the documentary evidence. This evidence reveals that members of the general population have been gratuitously murdered, that slaves have been forcefully displaced, that there have been killings of women and children by the sword, torture and starvation of the civilian population and, more specifically, that minority groups have suffered torture and starvation.

Also, the documentary evidence filed by the respondent showed that there were child soldiers in Rome, forced to serve in the army, and, that there were numerous plots fuelled by conspiracies in which the army participated in serious crimes against humanity and also initiated in committing them.

Furthermore, the documentary evidence clearly demonstrates that, generally speaking, the government of Rome engaged in the repression of minority groups, massacres of the civilian population and in government corruption and, in addition, it did not take any serious steps to prevent these acts committed by its army, which was led by several of its allies.

Julius Caesar was responsible for and an accomplice through association in crimes against humanity

The law recognizes the existence of the concept of complicity through association, according to which an individual who has not personally committed crimes against humanity, may, nevertheless, be held liable for such crimes as a result of his close and wilful association

with an entity that commits acts of persecution and his personal knowledge of the commission of such crimes. (*Sivakumar, supra*, at paragraph 9).

In addition, the responsibility of accomplices was provided for in article 6 of the *Charter of the International Military Tribunal*:

Leaders, organizers, 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 performed by any persons in execution of such plan.	Les dirigeants, organisateurs, provocateurs ou complices qui ont pris part à l'élaboration ou à l'exécution d'un plan concerté ou d'un complot pour commettre l'un quelconque des crimes ci-dessus définis sont responsables de tous les actes accomplis par toutes personnes en exécution de ce plan.

The essential element for complicity to be found is the "personal and knowing participation" of the individual. This is the necessary *mens rea*. In *Ramirez*, *supra*, the Federal Court of Appeal explained the test of complicity in the following words:

> [26] … complicity rests … on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it...

After having analysed the principles established in the trilogy of *Ramirez, Moreno* and *Sivakumar, supra*, Justice Barbara J. Reed in *Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79, thus, summarized the case law applying to complicity:

> [5] The *Ramirez, Moreno*, and *Sivakumar* cases all deal with the degree or type of participation which will constitute complicity. Those cases have established that mere membership in an organization which from time to time commits international offences is not normally sufficient to bring one into the category of an accomplice. At the same time, if the organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere

> membership may indeed meet the requirements of personal and knowing participation. The cases also establish that mere presence at the scene of an offence, for example, as a bystander with no intrinsic connection with the persecuting group will not amount to personal involvement. Physical presence together with other factors may however qualify as a personal and knowing participation.
>
> [6] As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that **activities are being committed by the group and who neither takes steps to prevent them from occurring** (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with safety for himself) but who lends his active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist. I note that the situation envisaged by this jurisprudence is not one in which isolated incidents of international offences have occurred but where the commission of such offences is a continuous and regular part of the operation. [Emphasis added.]

When is complicity an issue through the association of a claimant for refugee protection; it is the nature of the crimes alleged against the organization with which he is alleged to have associated that results in his or her exclusion. (*Harb*, *supra*, at paragraph 11).

Finally, at paragraph 18 of *Harb, supra*, the Federal Court of Appeal quoted with approval the following passage from *Bazargan v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1209 (QL), where it was pointed out that complicity through association may be construed even though the individual who is subject to an exclusion clause was, in fact, not ever a member of such an organization.

As the Federal Court of Appeal reiterated in *Bazargan*, *supra*, it is not necessary to adduce evidence of membership in an organization dedicated to limited and brutal ends in order to find that there was complicity through association. It is sufficient to show, as was amply done

in that case, that international offences form a regular part of the operations of the organization with which the individual is “associated”.

Furthermore, contrary to the argument made by Julius Caesar, the Board did not have to link Julius Caesar **directly** to the crimes committed by the army of Rome in order to find that he was an accomplice through association. A knowledge of the crimes committed by the government of Rome, and the shared common purpose that may be inferred from Julius Caesar’s deliberate association with this government, which he even led, are sufficient, in and of themselves, for a finding of complicity through association.

Complicity through association was described in *Bazargan*, *supra*:

> [11] In our view, it goes without saying that "personal and knowing participation" can be direct or indirect and does not require formal membership in the organization that is ultimately engaged in the condemned activities. It is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organization. At p. 318 [of *Ramirez*], MacGuigan J.A. said that "[a]t bottom, complicity rests . . . on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it". Those who become involved in an operation that is not theirs, but that they know will probably lead to the commission of an international offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation.

Factors establishing complicity in crimes against humanity

In the light of the evidence and the applicable principles of law, the decision in the Board’s finding that Julius Caesar was excluded from the possibility of being declared to be a refugee or a person in need of protection as a result of article 1F*a*) of the Convention is reasonable.

Determining whether Julius Caesar is responsible, and an accomplice, in crimes committed by the government is essentially a question of fact that requires an assessment of his personal situation (*Sivakumar*, *supra*, at paragraph 2). In this regard, the Federal Court of Appeal listed six factors that should be considered in order to determine whether an individual is an accomplice in crimes against humanity:

(1) nature of the organization;
(2) method of recruitment;
(3) position or rank within the organization;
(4) knowledge of the atrocities committed by the organization;
(5) length of time in the organization; and
(6) opportunity to leave the organization.

In view of these factors, the responsibility and complicity of Julius Caesar are confirmed.

Nature of the organization

If an organization has a brutal and limited purpose, personal and knowing participation in the shared goal of committing crimes, resulting in exclusion may be presumed solely from membership in the organization. In the present case, the Board did not maintain that the government of Rome or its armed forces were organizations with brutal and limited goals; therefore, responsibility and complicity must be established by evidence of the personal and knowing involvement of Julius Caesar in the crimes committed.

Method of recruitment

Julius Caesar entered public service in Rome. Later, he obtained civilian and military positions that led to his leadership of Rome. In no way, was he forced to join or to remain in the hierarchical structure of Rome.

Position or rank within the organization

The Board noted in its decision that Julius Caesar held a high position within the administrative hierarchy of the government of Rome and that his rapid rise within the government demonstrated that it was an important factor in the pursuit of his objectives; objectives, which he also considered to be those, of Rome. Indeed, the evidence, also, demonstrated that the position held by Julius Caesar was directly dependent on the highest authorities in Rome until the penultimate stage of his life. (See also: *Sungu v. Canada (Minister of Citizenship and Immigration)*, 2002 CFTD 1207, [2002] F.C.J. No. 1639 (QL), at paragraph 44.)

The Board held in particular that the work of Julius Caesar made it possible for Rome to take control of the wealth of the whole known world, thus contributing to the maintenance and smooth operation of the government in Rome.

In *Sivakumar*, *supra*, Justice Linden thus described the link between the rank or position of a member of an organization and the complicity of this member:

> [10] 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…

Furthermore, in *Sivakumar*, *supra*, the principles supporting “complicity through association” were set out as follows:

> [9] ... 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.
>
> [10] 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.... 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.... In such circumstances, an important factor to consider is evidence that the individual protested against the crime or tried to stop its commission or attempted to withdraw from the organization ...
>
> ...
>
> [13] ... 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.

Justice Edmond Blanchard stated, in *Sungu, supra*, that “personal and knowing participation may be direct or indirect”:

> [33] ... It is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in any way or making them possible, whether from within or from outside the organization. Those who become involved in an operation that is not theirs, but that they know will probably lead to the commission of an international offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation.

The decision of the Board in finding that, on the basis of the position and responsibility held by Julius Caesar within the government of Rome, it was reasonably warranted to infer that he had knowledge of the crimes committed by the government of Rome. Furthermore, the shared common purpose, inferred from the wilful association of Julius Caesar, together with that of his allies, was sufficient for a finding of complicity through association.

These cases can be distinguished from *Sungu*, *Valère*, *supra*, and *Mankoto v. Canada (Minister of Citizenship and Immigration)*, 2005 CF 294, [2005] F.C.J. No. 365 (QL), on which Julius Caesar relied, since the cases involved individuals who did not hold high office within the organization.

It is important to note that Julius Caesar wilfully concealed conspiracies that he himself had initiated for the use of the government of Rome, precisely not to be associated with the crimes committed by the government of Rome. Indeed, when he arrived in Canada, he indicated in his Personal Information Form (PIF), only the non-military positions he had held.

Knowledge of the atrocities committed by the organization

The Board stated in its decision that Julius Caesar was aware of the crimes and human rights abuses committed by the authorities in power in Rome. Moreover, Julius Caesar admitted to being aware of the crimes committed systematically and repeatedly against the civilian population and minority groups.

However, as appears in the decision of the Board, Julius Caesar sought constantly to minimize the extent of the crimes committed or to justify his actions and those of Rome with respect to certain groups in the civilian population by asserting that these actions were designed to protect other entities in the population, notably the patricians.

Given the case law and the interpretation given to the test of personal and knowing participation, it is not necessary to link Julius Caesar directly to the crimes committed by any section of the army or the government of Rome; it is sufficient to adduce evidence, of **Julius**

Caesar's knowledge of the commission of these crimes and the continuation of his wilful association in full knowledge with the principal perpetrators of these crimes.

Length of time in the organization

Julius Caesar held positions, first as head of the civil government and later, within the army, as general.

Opportunity to leave the organization

The Board noted in its decision that, despite his knowledge of the crimes committed by the government of Rome, Julius Caesar failed to dissociate himself from that government. Indeed, when the Board questioned him in regard to the reasons as to why he had continued to work for that government despite his knowledge of the crimes it committed, Julius Caesar replied that there was no other position available for him in Rome. Finally, it is apparent that Julius Caesar could have dissociated himself from the machinery of government by resigning in complete safety and it was primarily due to his own choice that he decided to continue to lead the government of Rome because of the riches and privileges accorded to him, (including the use of a better chariot with the best available horses that Rome had to offer him).

In this context, in *Kaburundi v. Canada (Minister of Citizenship and Immigration)*, 2006 CF 361, [2006] F.C.J. No. 427 (QL), Justice Michel Beaudry made the following comments:

[TRANSLATION]

[32] It is relevant to note that the applicant did not dispute the veracity of the crimes the government is alleged to have committed.... Nor did he deny being aware of the commission of these crimes when he was working for the government. To obtain confirmation of this, we merely need to read the applicant's personal information form.

[33] It is patently indisputable that the applicant himself did not commit any massacres or acts of violence against the civilian population. However, it was not unreasonable on the part of the panel to find that he was an accomplice through association as a result of his voluntary involvement in the activities of the government, his rise within the ministry of foreign affairs ...was prey to violence of abominable atrocity and the fact that he withdrew only when he came to fear for his own safety. **Given the magnitude of the violence perpetrated by the government forces (established by the documentary evidence in the record) against members of the civilian population, the economic constraint referred to by the applicant to justify remaining in his job is not particularly impressive.**

[34] In *Harb, supra*, Justice Décary stated at paragraph 11: …It is not the nature of the crimes with which the appellant was charged that led to his exclusion, but that of the crimes alleged against the organizations with which he was supposed to be associated. Once those organizations commit crimes against humanity and the appellant meets the requirements for membership in the group, knowledge, participation or complicity required by the case law…. the exclusion applies even if the specific acts committed by the appellant himself are not, as such, crimes against humanity.…

[35] Despite the considerable efforts made by the applicant to minimize the importance of his functions, the fact that his financial work helped to maintain and ensure the smooth operation of the government machinery ..., including the operation of its diplomatic missions abroad and continuation of the financial assistance provided by the European Union. [Emphasis added.]

In short, given his knowledge of the crimes perpetrated by Rome during the period in question, when he worked within the civil government in the areas of planning and development and in reconstruction as the Economic Consul for Development, the Board properly found that

Julius Caesar was, at all times, during his voluntary association within Rome, an accomplice in crimes against humanity, committed by Rome.

Therefore, the Board did not express an opinion as to the grounds for Julius Caesar's application for asylum, in accordance with the decision in *Kaburundi*, *supra*, where Justice Beaudry stated the following at paragraphs 44 and 45:

> [TRANSLATION]
>
> [44] **In *Gonzalez v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 646 (C.A.),** Justice Mahoney stated at paragraph 12:
>
> > In my opinion, there is nothing in the Act that would permit the Refugee Protection Division to assess the severity of the potential persecution in light of the seriousness of the offence that led it to the finding that there was a crime referred to in article 1F*a*). The exclusion in article 1F*a*) is an integral part of the definition in the Act. Whatever may otherwise be the justification for his claim, the applicant cannot in any way be a Convention refugee if exclusion applies.
>
> [45] Thus, I find that the panel did not err in law in failing to consider the question of the applicant's inclusion after determining that he was excluded under article 1F(*a*) of the Convention. [Emphasis added.]

CONCLUSION

For the reasons hereinabove, this Court dismisses the application for judicial review.

♦ ♦ ♦

The applicant, Joan of Arc, asked of this Court to grant her application for judicial review and to return to the Board the matter to be reheard by a differently constituted panel.

In support of her submissions, Joan of Arc referred the Court to excerpts from the following cases:

Joan of Arc is a cultured young woman, as per *Ali v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1392 (QL):

> [4] I do not agree with this reasoning since it means if she is returned …, the only way she can avoid being persecuted is to refuse to go to school. Education is a basic human right ...

Since Joan of Arc was an educated person, she wished to ensure that she learned the truth for herself.

> [10] … also adopted Professor Hathaway's description of the law in *Salibian, supra* at 174 and 175, when he quotes from Professor Hathaway, as follows:
>
> > ... In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. **If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee.** [Emphasis added.]

As indicated in *Reynoso v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 117 (QL), which contains the following comments:

> [5] ... **In the case of *Attorney General of Canada v. Ward*, [1993] 2 S.C.R. 689, at pp. 739 and 744, Mr. Justice La Forest, for the unanimous Court, gave one of three categories of ingredients of "particular social group" as**

being this: "(1) groups defined by an innate or unchangeable characteristic". The other two categories include former or present voluntary association and are irrelevant to the present case.

[6] **The applicant's group is a small number of former fellow municipal employees terrified and terrorized by what they know about the ruthless, criminal mayor. Unless or until those people, including the applicant suffer feeble mindedness, as from Alzheimer's disease, they could not, and cannot shake that terrible knowledge which they all shared and which the survivors still share. It puts them all in awful jeopardy from the thugs ("body guards") of the mayor, at least as long as he holds municipal office and wields State power, whether or not being "audited" by another organ of State. The applicant's group, then, is clearly "defined by an innate or unchangeable characteristic". To be sure that characteristic of this group is not ancestry or racial origin. They all acquired it later in life. If only they could persuade their tormentors that they have all just truly forgotten what they know, they would be delighted - thankful, indeed, to do so. They all "know too much" and live in the fear and objective risk of "liquidation". It is surely an unchangeable characteristic.** [Emphasis added.]

...

[8] ... The knowledge herein was of the proof of blackmail, fraud and theft on the part of a ruthless, State-office holding criminal who had the power to manipulate and direct official organs of the municipality such as the police.

[9] In fact and in law, the applicant was at all material times a member of a small but genuine "particular [persecuted] social group". What then is the purpose of witness protection programs, in other countries? The CRDD erred in law in this regard.

...

[11] ...

> Political opinion as a basis for a well-founded fear of persecution has been defined quite simply as persecution of persons on the ground "that they are alleged or known to hold opinions contrary to or critical of the policies of the government or ruling party"; see Grahl-Madsen [*The Status of Refugees in International Law*, (1966)], at p. 220. The persecution stems from the desire to put down any dissent viewed as a threat to the persecutors. Grahl-Madsen's definition assumes that the persecutor from whom the claimant is fleeing is always the government or ruling party, or at least some party having parallel interests to those of the government. As noted earlier, however, international refugee protection extends to situations where the state is not an accomplice to the persecution, but

> is unable to protect the claimant. In such cases, it is possible that a claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political viewpoint, perceived or real. The more general interpretation of political opinion suggested by Goodwin-Gill [The Refugee in International Law (1983)], at p. 31, i.e. "any opinion on any matter in which the machinery of state, government, and policy may be engaged", reflects more care in embracing situations of this kind.
>
> Two refinements must be added to the definition of this category. First, the political opinion at issue need not have been expressed outright. In many cases, the claimant is not even given the opportunity to articulate his or her beliefs, but these can be perceived from his or her actions. In such situations, the political opinion that constitutes the basis for the claimant's well-founded fear of persecution is said to be imputed to the claimant. The absence of expression in words may make it more difficult for the claimant to establish the relationship between that opinion and the feared persecution, but it does not preclude protection of the claimant.
>
> Second, the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs. The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to other bases of persecution.

[13] ... **In Mexico City, the applicant was watched and beset by the malicious mayor's thugs. She was nearly run down by one of them at the wheel of an automobile, perhaps with the intention of causing a fatal "accident", or at least, then, to keep her terrified. She is a mother and she looks after her child. How, it was asked, could they find you among the 20 million other inhabitants of Mexico City? They obviously followed my mother who came to visit me, she justly answered. In finding the capital city to be her IFA, the CRDD had to have ignored the two incidents above mentioned and to have considered the other 20 million inhabitants to form some sort of protective insulation around the applicant. This is a much different IFA from that of Columbo for Tamils, or the vast sub-continent of India for certain Sikhs. This applicant is specifically targeted by her resourceful persecutor. She is one of a small group, infinitely small compared with, say, the vast numbers of Tamils or Sikhs mentioned above. She is in such plight, specifically targeted, but not specifically guarded by the State. She cannot really rely on State protection only the "insulating factor of a big city". This seems not to be a case of someone**

> **fleeting and being of no further interest to the persecutors. The applicant's persecutor will always be after her until he is locked up, suffers memory loss, or is convinced that she has suffered memory loss. The CRDD dealt only with Mexico City as providing an IFA, perhaps the rest of the country could have been analyzed and considered, but the CRDD focussed only on the city.** [Emphasis added.]

As was stated in *Yang v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1463 (QL):

> [9] In my view, the Board should have found … to be partly a religion and partly a particular social group. It is clearly not a political opinion.
>
> [10] The jurisprudence has not as yet clearly defined the meaning of "religion" under the *Immigration Act* ("the Act"). James C. Hathaway in *The Law of Refugee Status*, at page 145, under the sub-title 5.3 Religion writes that "Religion" is defined in international law as follows:
>
> > 5.3 Religion
> >
> > Religion as defined in international law consists of two elements. First, individuals have the right to hold or not to hold any form of theistic, non-theistic, or atheistic belief. This decision is entirely personal: neither the state nor its official or unofficial agents may interfere with an individual's right to adhere to or to refuse a belief system, nor with a decision to change one's beliefs. Second, an individual's right to religion implies the ability to live in accordance with a chosen belief, including participation in or abstention from formal worship and other religious acts, expression of views, and the ordering of personal behaviour.
>
> [11] He concludes at page 148:
>
> > Alternatively, however, a claim is also established where an individual is allowed to adopt or exercise a belief system, but other serious human rights For example, in Abdul Rashid the Immigration Appeal Board looked to evidence of the socio-economic victimization of the Ahmadi claimant to substantiate his claim to refugee status, and in Jorge Marcal Baltazar the Board was willing to consider evidence of religiously inspired interference with the claimant's livelihood. Any form of anticipated harm within the scope of persecution suffices, so long as it is linked to a decision to hold or exercise a particular form of belief. [My emphasis.]
>
> [12] The *Handbook on Procedures and Criteria for Determining Refugee Status* provides as follows under the title "Religion", at page 18:

(c) Religion

71. The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.

72. Persecution for "reason of religion" may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.

73. Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground.

[13] In his book *Immigration Law and Practice*, Lorne Waldman interprets his concept of religion at par. 8.268:

> 8.268 In addition, the concept of religion should be broadly interpreted to allow for claims based on a person's religious beliefs, even if those are not part of an organized religion. This can even be extended to cover cases where a person's religious beliefs are such that he or she rejects religion altogether. If a person is persecuted by reason of such a belief, than there will be a sufficient nexus to the claim. This position was adopted by the Australian High Court in the case of *Okere v. Minister for Immigration and Multicultural Affairs*, where the court accepted a claim based on religion where the person was not persecuted because of his participating in a specific religion, but rather because of his refusal to do so. [My emphasis.]

[14] In his volume 1 entitled *Discrimination and the Law*, Justice Walter Surma Tarnopolsky offers in chapter 6 his answer to the following question:

> 6.1 What Is Religion, Religious Beliefs, Religious Creed or Creed?
>
> None of the human rights statutes in Canada defines these terms. On the whole, courts both in Canada and the United Kingdom have avoided definitions even when discussing such important constitutional issues as "freedom of religion". The matter has been given considerably more attention by American courts both because of the First Amendment protection of religion and prohibition of the establishment of religion, and because of anti-discrimination legislation purporting to prohibit discrimination on grounds of religion. Before turning to judicial definitions in these three jurisdictions, it would be useful to start, as most courts do, with dictionary definitions.

Turning first to American ones, *Webster's Third New International Dictionary* (Springfield, Mass.: G. & C. Merriman Co., 1968) provides the following:

> 1. The personal commitment to and serving of God or a god with worship or devotion conducted in accordance with divine commands esp. as found in accepted sacred teachers, a way of life recognized as incumbent on the believers, and typically the relating of oneself to an organized body of believers ... .
>
> 3.(a) One of the systems of faith and worship: a religious faith ...
>
> (b) The body of institutionalized expressions of sacred beliefs, observances and social practices found within a given cultural context ...

[15] The *Canadian Encyclopedia*, Year 2000 Edition, defines "Religion" as follows:

> Religion/Latin, religio, "respect for what is sacred"/may be defined as the relationship between human beings and their transcendent source of value. In practice it may involve various forms of communication with a higher power, such as prayers, rituals at critical stages in life, meditation or "possession" by spiritual agencies. Religious, though differing greatly in detail, usually share most of the following characteristics: a sense of the holy or the sacred (often manifested in the form of gods, or a personal God); a system of beliefs; a community of believers or participants; ritual (which may include standard forms of invocation, sacraments or rites of initiation); and a moral code.

[16] The document referred to by the Board (Response to Information Request) is that … "is different from other Falun Gong techniques in having a higher objective of cultivation and practice towards enlightenment. It is complete with its own system of principles and empirical techniques".

[17] The Board also refers to a statement of the applicant in her Personal Information Form:

> I recognised the true meaning of my life and got my spiritual encouragement by practising Falun Gong. It enriched my cultural life and improved my health as well. Since I started practising Falun Gong, I have changed a lot. The principles of practicing is (sic) Truth -- Compassion -- Forbearance or Tolerance. Truth means to tell the truth. Compassion means to do good deeds for people and to be a kind person. Forbearance or tolerance means to endure the humiliation that normal people can not endure. As a Falun Gong practitioner and as a Chinese Citizen, I believe the principle of treating people nicely. I obey the laws and regulations. I try to do good deeds for people and I try to be useful to the country and society and to be helpful to other people.

...

[20] In the Amnesty International -- Report -- ASA 17/11/00, entitled "People's Republic of China, the Crackdown on Falun Gong and Other So-Called "Heretical Organizations", under the sub-title The Crackdown on "Heretical Organizations" it appears that the Government of China dealt with Falun Gong under the Bureau of Religious Affairs:

> The government banned Falun Gong on 22 July 1999 and launched a massive propaganda campaign to denounce its practice and the motivation of its leaders, in particular Li Hongzhi. Since then, the government's accusations against the group have been repeatedly publicized by the state media and government officials. At a news conference on 4 November 1999, for example, Ye Xiaowen, Director of the Bureau of Religious Affairs of the State Council (government), said that "Falun Gong had brainwashed and bilked [double-crossed] followers, caused more than 1,400 deaths, and threatened both social and political stability". Further emphasizing that Falun Gong was a political threat, he added: "any threat to the people and to society is a threat to the Communist Party and the government".

[21] The answer by the applicant to a question posed by her solicitor at the Board hearing is telling:

> Q. Now, when you were there, did they tell you anything else about the practice, or what you should do, or what might happen to you or to others?
>
> A. And they want us to learn that Falun Gong is a cult, is an illegal organization. They want us to know about all these things. You cannot continue to practice Falun Gong. If you continue, then you'll be get arrested. If you secretly do it at home, if we found out, so then we're going to punish your family members, saying they didn't report to the government. Then they'll be punished too.

[22] Moreover, documentary evidence is to the effect that … is derived from … two traditional … religions …. More importantly, both the persecutor and the victim in this instance consider … to be a cult or at least a form of religion.

[23] My opinion is that … could also be considered as a particular social group. In *Ward* [*supra*], at page 739, La Forest J. identified three possible categories of a "particular social group":

> (1) groups defined by an innate or unchangeable characteristic;
>
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

> [24] … would fall under the second category. The members voluntarily associate themselves for reasons so fundamental to their human dignity that they should not be forced to forsake the association. The Board excluded the applicant from the definition as it concluded that forcing the applicant to disavow her attachment to … would not involve giving up something fundamental to her human dignity.

CONCLUSION

For all these reasons, the application of Joan of Arc for judicial review is allowed.

♦ ♦ ♦

Now that we have done our duty, you can see that history is not the past if we are in the process of reliving it; and the Federal Court continues to do so in its work.