Court NO. 25173

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

VELUPILLAI PUSHPANATHAN
(PUSHPANATHAN VELUPILLAI)

Appellant,
(Applicant)

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent,
(Respondent)

A062

and

THE CANADIAN COUNCIL FOR REFUGEES

Intervener

FILED
SUPREME COURT OF CANADA
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FACTUM OF THE INTERVENER

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FACTUM OF THE INTERVENER

Part I Statement of Facts

1. The Intervener accepts the facts as stated by the appellant and respondent.

Part II Points in Issue

2. The Intervener accepts the points in issue as stated by the appellant and respondent.

Part III Law and Argument

A. The positions of the Intervener

3. The Intervener adopts all of the positions taken by the appellant in this appeal. As well, the Intervener puts forward four additional positions.

4. Where an act is contrary to the purposes and principles of the United Nations, within the meaning of Article 1F(c) of the Refugee Convention, there is a United Nations instrument which states explicitly that it is contrary to the purposes and principles of the United Nations and that the commission of such an act must be taken into account in deciding whether or not to grant asylum. Yet, there is no such statement of which the Intervener in any United Nations instrument for drug trafficking.

5. The exclusion clause which excludes from the Refugee Convention definition a person who has committed an act contrary to the purposes and principles of the United Nations, within the meaning of Article 1F(c) of the Refugee Convention, is limited to those acts for which there is universal jurisdiction to prosecute at international law.

6. Before the exclusion clause 1F(c) can be applied to deny a person refugee protection, there must be a balancing between the nature of the offence committed and the degree of persecution feared.

7. It is contrary to the scheme of the Immigration Act to interpret drug trafficking as falling within exclusion clause 1F(c) of the Refugee Convention.

B. Explicit Reference

8. Where an act is contrary to the purposes and principles of the United Nations, within the meaning of Article 1F(c) of the Refugee Convention, there is a United Nations instrument which states explicitly that it is contrary to the purposes and principles of the United Nations and that the commission of such an act must be taken into account in deciding whether or not to grant asylum. Yet, there is no such statement in any United Nations instrument of which the Intervener is aware for drug trafficking.

9. The United Nations Declaration on the Protection of All Persons from Enforced Disappearance states that any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the United Nations.

General Assembly Resolution 47/133, 18 December 1992, Article 1(1)

10. The United Nations Declaration on the Protection of All Persons from Enforced Disappearance states further that the fact that there are grounds to believe that a person has participated in acts of enforced disappearance, regardless of the motives, shall be taken into account when the competent authorities of the state decide whether or not to grant asylum.

Article 15

11. The United Nations Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment states that any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity. It is condemned as a denial of the purposes of the United Nations.

General Assembly Resolution 3452(XXX), 9 December 1975, Article 2

12. The 1996 Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism states that the acts methods and practices of

terrorism are contrary to the purposes and principles of the United Nations.

United Nations Document A/51/631 page 15, paragraph 1.

13. The 1996 Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism states further that states should take appropriate measures in conformity with the relevant provisions of national and international law including international standards of human rights before granting refugee status for the purpose of ensuring that the asylum seeker has not participated in terrorist acts, considering in this regard relevant information as to whether the asylum seeker is subject to investigation for or is charged with or has been convicted of offences connected with terrorism.

Paragraph 3.

14. The Intervener submits that the silence of the United Nations instruments on drug trafficking on whether drug trafficking is contrary to the purposes and principles of the United Nations, on whether the commission of drug trafficking offences should be taken into account in the granting of refugee status, contrasted with the explicit statements in other United Nations instruments about other acts, means that drug trafficking is not to be considered contrary to the purposes and principles of the United Nations within Article 1F(c) of the Refugee Convention.

15. *Inclusio unus est exclusio alterus.* The inclusion of reference to the United Nations purposes in United Nations instruments about torture, terrorism and enforced disappearance must mean that there was an intention to exclude the fight against drug trafficking as a United Nations purpose.

16. The United Nations is not shy about stating what its purposes are. When an act violates the purposes of the United Nations, the United Nations is not hesitant to say so. The fact that it has not said so about drug trafficking shows that drug trafficking does not violate the purposes of the United Nations. The silence of the United Nations on this issue is eloquent. That silence is all that needs to be said to allow this appeal.

17. It is for the United Nations to say what its purposes are, not the Government of Canada, nor the Supreme Court of Canada. The request of the Government of Canada to have the Supreme Court of Canada say that drug trafficking is contrary to the United Nations purposes and principles when the United Nations itself has not said so is an attempt by the Government of Canada to run an end run round the United Nations.

18. Canada, as a member of the United Nations, can ask any one of a number of United Nations bodies to pronounce that drug trafficking is contrary to the purposes and principles of the United Nations. Canada has only to introduce a resolution to that effect, or to introduce wording in a resolution on drug trafficking already being considered by the United Nations. The Government of Canada, by asking the Supreme Court of Canada to pronounce that drug trafficking is contrary to the purposes and principles of the United Nations, has come to the wrong forum. It is asking the Supreme Court of Canada to do what it should be asking the United Nations to do.

19. The United Nations is the global community of nations and must function as such to be effective and meaningful. The nations that comprise the United Nations defeat its overall goals if each nation pronounces unilaterally what the United Nations principles and purposes are and acts on those unilateral pronouncements. For the United Nations to function as united nations, a determination of its principles and purposes can only be done collectively and not individually. The determination of United Nations principles and purposes must be done by the United Nations and not by the Supreme Court of Canada. The United Nations ceases to be united if each country proclaims for itself what the principles and purposes of the United Nations are.

C. An International Crime

20. The Intervener submits that, in order for an act of drug trafficking to be contrary to the purposes and principles of the United Nations, the trafficking must amount to an international crime.

21. In the case of Ramirez, the Federal Court of Appeal held that the exclusion clause in the Refugee Convention was intended to preserve "a wide power of exclusion from refugee status where perpetrators of *international crimes* are concerned" (italics added). The reference to international crimes, it is submitted, shows that the Court intended to omit from the ambit of the exclusion clause domestic crimes which do not amount to international crimes.

Ramirez v. M.E.I. (1992) 2 F.C. 306 at 312.

22. The Intervener submits that it is an error in law in deciding that a person fits within the exclusion clause based on length of his sentence. The Intervener submits that, in order for an offence of drug trafficking to fit within the exclusion clause, the offence must be an international crime. It is not enough that the crime carries a high sentence.

23. War crimes and crimes against humanity are examples of universal

jurisdiction offenses. Canada has the power at international law to prosecute war criminals or criminals against humanity found in Canada no matter where the offenses were committed, no matter what the nationality of the perpetrator, no matter what the nationality of the victim.

24. Narcotics trafficking is not, however, a universal jurisdiction criminal offence. Canada cannot, at international law, prosecute a person found in Canada who has trafficked in a narcotic wholly outside of Canada where both the buyer and the seller are non Canadian.

25. Article 1F(c) must be interpreted using the *eiusdem generis* rule. Article 1F(c) more closely resembles 1F(a) than 1F(b), since both 1F(a) and 1F(c) do not qualify the acts that bring the person within the exclusion clause, whereas 1F(c) has the qualification "serious".

26. Mr. Justice Strayer in the Court of Appeal understood Mr. Justice McKeown of the Trial Division to imply that the gravity of the offence in question had a bearing on whether there could be said to be "serious reasons for considering that" the refugee claimant was guilty of acts contrary to the purposes and principles of the United Nations. The Intervener submits that "serious reasons for considering that" refers to the evidence in support of the applicability of the exclusion clause. It does not add content to the exclusion clause.

27. If the reasoning of Mr. Justice Strayer is correct, then the gravity of war crimes, crimes against humanity and crimes against peace would also have a bearing on whether there could be said to be "serious reasons for considering that" the appellant was guilty of acts contrary to the purposes and principles of the United Nations. If the reasoning of Mr. Justice Strayer is correct, then there are some war crimes, crimes against humanity and crimes against peace, of the less grave sort, that would not exclude someone from refugee protection under the Convention.

28. However, the Refugee Convention is clear that every war crime, crime against humanity and crime against peace is covered by the exclusion clause 1F(a) and not just the more serious war crimes, crimes against humanity and crimes against peace. All war crimes, crimes against humanity and crimes against peace are considered to be so serious as to justify exclusion from refugee protection. There is no such thing as a non-serious war crime, crime against humanity or crime against peace.

29. Mr. Justice Strayer was backed into reading the text in a way that is on its face surprising because otherwise his interpretation of the Refugee Convention

would be even more surprising, that even the most minor drug related offence would be contrary to the purposes and principles and of the United Nations. Yet, that is the inevitable logic of his position, since Article 1F(c) has no "serious" qualifier like 1F(b). Article 1F(c) is not restricted to serious acts contrary to the purposes and principles of the United Nations, but includes all acts contrary to the purposes and principles of the United Nations.

30. It is submitted that what the offences in 1F(a) have in common is that they are universal jurisdiction criminal offences. It is this category for which 1F(c) is a general statement. Mr. Justice Strayer in his reasons remarks that it would be unfortunate if the purposes and principles of the United Nations could not be seen to evolve without an amendment of the Charter of the United Nations. The Intervener submits that Article 1F(c) is an attempt to foresee the eventuality of an evolution of the universal jurisdiction offences beyond those accepted immediately after World War II.

31. It is this sense in which the work of the International Law Commission is relevant. Commission of the offence of "illicit traffic in narcotics on a large scale" in the Draft Code of Crimes against the Peace and Security of Mankind would, arguably, be an act contrary to the purposes and principles of the United Nations, but only after the international community had accepted the offence as a universal jurisdiction offence, only after the United Nations adopted the Draft Code of Crimes against the Peace and Security of Mankind, with the proposed the offence of "illicit traffic in narcotics on a large scale" included in the Code.

32. The International Law Commission has produced a draft statute for an International Criminal Court which sets outs crimes within the jurisdiction of the court. One set of crimes is crimes established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

Report of the International Law Commission on the work of its forty sixth session, UN Doc. A/49/355 (1994), Article 20(e)

33. One of the set of crimes established under or pursuant to the treaty provisions listed in the Annex is crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3(1) of the United Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the Convention, are crimes with an international dimension.

Clause 9.

34. Amnesty International has noted that some states have urged that the International Criminal Court should have jurisdiction over the treaty crimes in Article 20(e) of the International Law Commission draft statute but that there is a lack of consensus whether such crimes should be included or whether they all constitute crimes under international law. Amnesty International agrees that the Court should have jurisdiction only over the most serious crimes of concern to the international community as a whole, and that some of the treaty crimes, other than those defined in the Geneva Conventions and Additional Protocol I and the Convention against Torture, may not satisfy this requirement.

"The International Criminal Court, Making the Right Choices, Part I, Defining the crimes and permissible defences and initiating a prosecution", January 1997, AI Index: IOR 40/01/97, page 19.

35. In the case of Kindler, this Court distinguished between a growing, and, in the Court's view welcome, trend to abolish the death penalty and the presence of an international norm prohibiting the death penalty. It is submitted that the same distinction has to be made here, between a trend to make illicit trafficking in a narcotic an international offence, which does exist, and an international norm prohibiting drug trafficking, which does not exist.

Re Kindler and Minister of Justice (1991) 67 C.C.C.(3d) 1 at 11.

36. At the very least, if there is an international offence of drug trafficking, it is an offence of the nature set out by the International Law Commission in its draft statute of the International Criminal Court. First, the offence must be one with an international dimension. Second, the offence must, having regard to the conduct alleged, constitute an exceptionally serious crime of international concern.

37. In this case, the Refugee Division found that conspiracy to traffic in a narcotic was contrary to the purposes and principles of the United Nations without regard to whether the offence the appellant committed was one with an international dimension, without regard to whether the offence, after considering the conduct alleged, constituted an exceptionally serious crime of international concern. Without findings by the Refugee Division both that the offence the appellant committed was one with an international dimension, and that the offence, after considering the conduct alleged, constituted an exceptionally serious crime of international concern, the offence the appellant committed could not possibly exclude him from refugee recognition, even when international law is given its broadest interpretation.

38. It is submitted that Mr. Justice Strayer erred in law in holding that drug trafficking offences may be regarded as acts contrary to the purposes and principles of the United Nations because there are international covenants respecting the curtailment of international drug trafficking. There are many international covenants promulgated under the auspices of the United Nations covering a wide range of subject matter. The fields covered by these many conventions cannot all be regarded as matters which are part of the "purposes and principles of the United Nations" for the purpose of excluding persons from refugee protection pursuant to Article 1(F)(c). To do so would be to take an inordinately expansive reading of that provision and would seriously undermine the protection from persecution available to those in genuine need of it.

Re Q. (X.N.), V93-02727, Immigration and Refugee Board of Canada, Convention Refugee Determination Division, B. Kalvin and I.W. Clague, May 28, 1995

Re B. (B.M.), V95-01058, Immigration and Refugee Board of Canada, Convention Refugee Determination Division, B. Kalvin and E. Robles, May 18, 1995

39. The following is just a sample list of subjects covered by multilateral treaties deposited with the Secretary General of the U.N: obscene publications; health; international trade and development; transport and communications including customs, road traffic, transport by rail, and water transport; education; declaration of the death of missing persons; status of women; freedom of information; commodities; law of the sea; commercial arbitration; outer space; telecommunications; environment; fiscal matters.

See: Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1993 (New York: 1994).

40. There are, for instance, international covenants with respect to environmental protection. Does this make environmental protection a "purpose and principle" of the United Nations so as to render an individual convicted of a domestic environmental offence excludable from the definition of Convention refugee? Similarly, is the regularization of road traffic a "purpose and principle" of the United Nations within the meaning of Article 1(F)(c) simply because it is the subject of no fewer than thirty international conventions and agreements deposited with the Secretary General of the United Nations? It is the position of the Intervener that the answer to both these questions is no.

41. To take another example, the International Covenant on Economic, Social and Cultural Rights under Article 7 recognizes the right of everyone to the enjoyment of just and favourable conditions of work, including fair wages and safe and

healthy working conditions. If the logic of the Court of Appeal is correct, then an employer who has not paid fair wages in his/her country would have acted contrary to the purpose of Article 1(3) of the United Nations Charter (the article of the Charter on which the Court of Appeal relied) and could, legally, be denied protection from a well founded fear of persecution.

42. Because the subject matters of United Nations instruments are so various, the Court of Appeal interpretation of Article 1F(c) has become a licence to allow the Refugee Division to exclude from refugee protection any person who has engaged at any time in his/ her past in any behaviour of which the Refugee Division panel which decides the case disapproves.

43. In one case, A93-80363, a panel of the Refugee Division excluded a person under Article 1F(c) on the ground that the person had been convicted of murder. In another case, A93-81189, a panel of the Refugee Division excluded a person under Article 1F(c) on the ground that the person had been convicted in Canada of attempted murder and assault with a weapon in a domestic dispute. In two other cases, M92-11102 and M95-05557, two panels of the Refugee Division excluded claimants under Article 1F(c) on the ground that there were serious grounds to believe that the claimants were involved in organized crime, although the only offences for which they were convicted were theft under $1,000.00.

44. The breadth of cases in which the Refugee Division has applied Article 1F(c) as it has been interpreted by the Federal Court is itself a persuasive argument against the Federal Court interpretation. Article 1F(c) is, after all, not restricted to criminal convictions. If the Federal Court is correct in its interpretation, then every claimant must have led a blameless life simply in order to avoid exclusion from refugee protection. Yet, that surely cannot be the law.

D. Balancing

45. The Refugee Division in this case never made a refugee determination and therefore was in no position to balance the severity of the offence against the risk of persecution. The panel of the Refugee Division that considered the case of the appellant, it is submitted, erred in law in failing to consider whether the risks associated with exclusion from refugee status outweighed the harm that would be done by allowing the appellant to remain in Canada. The panel, it is submitted, erred in law in failing to consider whether or not to recognize the appellant as a refugee, even if he were otherwise considered guilty of acts contrary to the purposes and principles of the United Nations, on the basis that, for political reasons, the applicant would be threatened with certain death, imprisonment for life, serious body harm or the like upon his eventual return to

Sri Lanka.

46. Mr. Justice McKeown in this case stated that he saw nothing in Article 1F that permits weighing and balancing of the offense and the risk of persecution in the cases under (c). Mr. Justice McKeown reasoned that it is clear that there should be no such weighing and balancing under Article 1F(a) and he could see nothing to differentiate Article 1F(c) from 1F(a). He stated: "It is the intention of the exclusion clauses in Article 1F to exclude certain persons even if genuinely at risk of persecution."

47. Furthermore, Mr. Justice McKeown appeared to be of the view that if balancing was to be done, it would be done at the level of the Appeal Division of the Immigration and Refugee Board and not at the level of the Refugee Division. He stated that there is no reason to provide people in the position of the applicant recourse to the Appeal Division so that there can be a weighing of the offense and the risk of persecution.

48. The Intervener accepts that Article 1F(a) and 1F(c) cannot be differentiated here, but submits that it is by no means clear that there should be no weighing and balancing under Article 1F(a). On the contrary, the Intervener submits that under the Refugee Convention there should be balancing under both Articles 1F(a) and 1F(c).

49. Furthermore, if balancing is to be done, it must be done at the level of the Refugee Division of the Immigration and Refugee Board and not at the level of the Appeal Division. It is the Refugee Division that applies the exclusion clauses, not the Appeal Division, and, it is submitted, balancing is required, for all the exclusion clauses.

50. The Court of Appeal did not refer to this issue. The Intervener submits that the Refugee Division erred in law in not engaging in a balancing exercise, that Mr. Justice McKeown erred in law in his statement on balancing and the Court of Appeal erred in law in not correcting the error of the Trial Division.

51. The Federal Court has ruled that balancing is not to be done under Article 1F(a), 1F(b) and 1F(c).

<u>Van Hung Nguyen v. M.E.I.</u> A-1180-91, January 15, 1993. Leave to the Supreme Court of Canada refused.
<u>Goyal v. M.C.I.</u>, F.C.T.D. IMM-1798-95, McKeown J., May 8, 1996
<u>M.C.I. v. Malouf</u>, F.C.A., A-19-95, November 9, 1995, overturning <u>Malouf v. M.C.I.</u>, F.C.T.D., IMM-2186-94, December 31, 1994.

But see Atef v. M.E.I., F.C.T.D., IMM-4014-94,May 29, 1995, Wetston J.

52. The United Nations High Commissioner for Refugees Handbook provides that it is necessary to strike a balance between the nature of the offence committed and the degree of persecution feared. If a person has a well founded fear of very severe persecution, e.g., persecution endangering life or freedom, a crime must be very grave in order to exclude the person.

Handbook on Procedures and Criteria for Determining Refugee Status, Paragraph 156.

53. Author James Hathaway writes: "The risks associated with exclusion from refugee status must not outweigh the harm that would be done by returning the claimant to face prosecution or punishment. Even though a claimant may be a serious criminal, it is possible that the heinous nature of the persecution anticipated in her state of origin counters the extradition derived logic of her return."

"The Law of Refugee Status" at page 224.

54. Author Atle Grahl-Madsen writes: "If for political reasons, a person is threatened with certain death, imprisonment for life, serious body harm or the like upon his eventual return to his country origin; it would, indeed, seem equitable to recognize him as a refugee, even if he were considered guilty of a truly serious non-political crime".

"The Status of Refugees in International Law", Volume I, page 298.

55. Author Guy Goodwin-Gill writes: "A balance must also be struck between the nature of the offence presumed to have been committed and the degree of persecution feared."

"The Refugee in International Law" pages 61-62.

56. Canada has signed and ratified the Convention against Torture. That Convention commits Canada not to expel or return a person to a state where there are substantial grounds for believing that he/she would be in danger of being subjected to torture.

Article 3(1).

57. Removing a person to a country where there are substantial grounds for

believing that he/she would be in danger of being subjected to torture amounts to cruel and unusual treatment in violation of section 12 of Canadian Charter of Rights and Freedoms and a denial of life, liberty and security of the person not in accordance with the principles of fundamental justice contrary to section 7 of the Canadian Charter of Rights and Freedoms.

Re Kindler and Minister of Justice (1991) 67 C.C.C. (3d) 1 (S.C.C.);
Van Hung Nguyen v. M.E.I. A-1180-91, January 15, 1993 (F.C.A.) at page 12.

58. The United Nations Principles on Prevention of Arbitrary Executions commits Canada not to expel or return a person to a state where there are substantial grounds for believing that he/she would be a victim of arbitrary execution.

Article 5.

59. The United Nations Declaration on the Protection of All Persons from Enforced Disappearance commits Canada not to expel or return a person to another state where there are substantial grounds to believe that he could be in danger forced disappearance.

Article 8(1).

60. Removing a person to a state where there are substantial grounds for believing that he/she would be a victim of arbitrary execution or forced disappearance also amounts to cruel and unusual treatment in violation of section 12 of Canadian Charter of Rights and Freedoms and a denial of life, liberty and security of the person not in accordance with the principles of fundamental justice contrary to section 7 of the Canadian Charter of Rights and Freedoms.

61. Even if a person falls within exclusion clause 1F(a), (b) or (c) that person cannot, by virtue of other international human rights instruments, be removed to a country where the person faces torture, arbitrary execution or forced disappearance. It would be bizarre that a person can be denied refugee protection by application of an exclusion clause without regard to the risk of torture, arbitrary execution or forced disappearance, and yet the person could not be removed by virtue of other international instruments.

62. The international human rights instruments are to be read together as a consistent whole rather than as isolated bits and pieces. Read together with the Convention against Torture, the United Nations Principles on Prevention of Arbitrary Executions, and the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, it makes far more sense to read the Refugee

Convention to include considerations of torture, arbitrary execution or forced disappearance in the application of the exclusion clauses than to save consideration for some later stage after refugee determination is complete.

63. It is a basic principle of both international human rights law and domestic law that there must be effective remedies for the realization of rights. Balancing at the stage of refugee determination when exclusion clauses are invoked would provide an effective remedy for the realization of rights articulated under the Convention against Torture, the United Nations Principles on Prevention of Arbitrary Executions, and the United Nations Declaration on the Protection of All Persons from Enforced Disappearance. Refugee determination is determination by a specialized, independent quasi-judicial tribunal at an oral hearing with the right to counsel and a right to interpretation.

64. Without balancing at the time of refugee determination, on the other hand, there is no effective Canadian remedy for the realization of rights against forcible return articulated under the Convention against Torture, the United Nations Principles on Prevention of Arbitrary Executions, and the United Nations Declaration on the Protection of All Persons from Enforced Disappearance. If balancing cannot be done at the time of refugee determination, there is no determination about the applicability of the Convention against Torture, the United Nations Principles on Prevention of Arbitrary Executions, and the United Nations Declaration on the Protection of All Persons from Enforced Disappearance available to the person concerned elsewhere, offered by a specialized, independent quasi-judicial tribunal at an oral hearing with the right to counsel and right to interpretation.

65. At least one Refugee Division panel has found that using the Convention against Torture as a limiting factor on the scope of Article 1F(c) constitutes balancing whereby the panel balances inclusion against exclusion and concludes that the prospect of torture always outweighs the gravity of the offence committed by the claimant and further concluded that there must be balancing as the only means of respecting the integrity of the legislative scheme as a whole. The Intervener endorses that analysis and submits it also applies to arbitrary execution and enforced disappearance.

CRDD M95-02490, August 28, 1996, Audrey Macklin, Queenie Hum, dissenting, page 10.

E. The Scheme of the Immigration Act

66. The Government of Canada has a legitimate interest in protecting its citizens from persons whose criminal activity in Canada poses a threat to the security of

Canadian residents. This may be viewed as an extension of Canada's duty to protect its nationals.

67. Article 33(2) of the Convention recognizes this fact in reference to refugees by providing for the *refoulement* of a refugee who has been convicted of a particularly serious crime in the country of refuge and is thereby considered to constitute a danger to the community of that country.

68. The issue before this Court is whether it is necessary or legally appropriate to interpret Article 1F(c) to include criminal activity commited in Canada as a means of achieving this objective. The Intervener respectfully submits that it is not.

69. First, the Intervenor adopts the appellant's submission at paragraphs 55-56 of his factum: basic principles of statutory interpretation dictate that, since Article 1F(b) specifically addresses the exclusion of those who have committed serious non-political crimes and limits its application to crimes committed outside the country of refuge, the logical inference is that the drafters did not intend to exclude whose who committed crimes inside the country of refuge by straining the general language of "purposes and principles of the United Nations" under Article 1F(c).

70. Secondly, in the context of the Convention, it would be incongruous to intrepret Article 1F(c) to encompass crimes committed in the country of refuge, thereby excluding claimants from the definition of a refugee, because Article 33(2) proceeds from the assumption that persons who have committed serious crimes in the country of refuge are indeed "refugees" but may nonetheless be refouled.

71. Thirdly, the Intervener submits that is incongruous with the scheme of the Immigration Act to interpret Article F(c) to encompass crimes committed with the country of refuge, namely Canada.

72. In the Federal Court of Appeal's decision in the case at bar, Strayer JA remarked that "it is not clear to me why the Convention should *prima facie* be presumed to extend the extraordinary right of refuge to an alien convicted of committing this offence within our borders".

At page 8.

73. The Intervener submits that the response to Mr. Justice Strayer's point was made by his Hounourable Court in Ward, where La Forest J. stated that it is not appropriate to use the refugee definition to exclude those convicted of a crime

"in the face of an explicit comprehensive structure for the assessement of these potentially inadmissible claimants."

<u>A.G. Can v. Ward</u>, (1993) 103 D.L.R. (4th) 1 (S.C.C.)

74. As this Court acknowledged in <u>Ward</u>, the Immigration Act does address the situation of Convention refugee claimants and refugees who commit serious crimes in Canada, albeit not in the refugee definition itself. Under the present scheme of the Immigration Act, the Minister is authorized to consider whether a person who has committed an offence in Canada punishable by at least ten years constitutes a danger to the Canadian public. A person so deemed by the Minister can be removed from Canada, even to a country where he or she may be persecuted.

Section 19(1)(c)

75. More specifically, the following consequences may flow from a decison by the Minister that a person who has committed an offence described in section 19(1)(c) of the Immigration Act also constitutes a danger to the public:

(i) A refugee claim by that person will be ineligible for referral to the Refugee Division of the Immigration and Refugee Board [section 46.01(e)];
(ii) A refugee claim already referred but not determined can be revoked (sections 46.1, 46.2);
(iii) A refugee (whether landed or not) can be refouled to a country where that person may be persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion (section 53(a).

76. Parliament has deliberately and explicitly delegated to the Minister responsibility for dealing with persons who have a well founded fear of persecution in their country of nationality and who have been convicted of serious crimes in Canada. In a recent decision by the Refugee Division of the Immigration and Refugee Board, it was observed that interpreting Article 1F(c) to include domestic criminal convictions adds nothing practical to the comprehensive scheme described above. In other words, interpreting "acts contrary to the principles and purposes of the United Nations" to include drug trafficking offences in the country of refuge is superfluous in terms of the goal of protecting the Canadian public from dangerous persons:

> "Wholly apart from Article 1F(c), no refugee claimant or refugee (landed or not) who has committed an offence under an Act of Parliament punishable by at least ten years imprisonment can evade the prospect of removal to the country of nationality if the Minister decides that the person constitutes a danger to the Canadian public."

CRDD M95-02490, Febrary 21, 1997 (Macklin, Hum dissenting) at page 15.

77. The Intervener further submits that interpreting "acts contary to the purposes and principles of the United Nations" to include domestic narcotics trafficking is not only superfluous; it also creates inconsistency in the treatment of refugee claimants and refugees who have been convicted for criminal offences in Canada depending on the timing of their offences.

78. The anomaly can be illustrated using the case of a refugee claimant similar to the appellant who has a well founded fear of persecution and has committed a narcotics offence in Canada carrying a potential sentence of more than ten years. If the claimant commits the offence prior to his refugee hearing and Article 1F(c) is intepreted to encompass domestic drug trafficking offences, the claimant will be excluded from the definition of a refugee.

79. According to the jurisprudence from the Federal Court of Appeal, the Refugee Division of the Immigration and Refugee Board is not required to balance the persecution the appellant fears in Sri Lanka against the gravity of his offence or the risk he currently poses to the Canadian public. The fact that he committed an offence deemed to constitute an act "contrary to the purposes and principles " is sufficient to exclude him.

80. Had the claimant committed the same offence after (rather than before) determination of his refugee claim, his claim would have been accepted and the claimant would have been a refugee when he committed the narcotics offence. He would still be subject to *refoulement* under section 53 of the Immigration Act but not unless and until the Minister, exercising her discretion according to law, formed the opinion that he posed a risk to the public in Canada.

81. Section 53 of the Act makes it clear that the fact of conviction is not determinative of whether an indiviudal poses a danger to the Candian public, because the provision requires both that the individual be convicted of section 19(1)(c) offence and that the Minister form the opinion that the individual "constitutes a danger to the public in Canada". This suggests that factors such as rehabilitation and other mitigating circumstances may be taken into account in assessing whether a person presently constitutes a danger to the public in Canada.

82. Section 53 would not apply to a claimant who is convicted of the offence prior to his refugee hearing and comes before the Refugee Division of the Immigration and Refugee Board for determination of his claim, because section 53 only applies to "Convention refugees" not to "Convention refugee claimants".

83. In the result, a person similar to the appellant who commits an offence after a positive determination of his claim will receive the benefit of balancing, whereby the Minister will balance the consequences of *refoulement* against the likelihood that the person constitutes a present danger to the public in Canada. Conversely, a person in the appellant's position can be excluded under Article 1F(c) merely upon proof of his criminal conviction with no balancing whatsover. The only difference between the two cases is the timing of the offence. Yet the Convention refugee claimant is subject to a harsher standard (no balancing under 1F(c) than is the Convention refugee (balancing under section 53).

CRDD M95-02490, *supra* at pages 12-13.

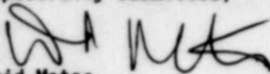
84. The Intervener submits that this difference in treatment is both arbitrary and unfair. There is no valid reason for subjecting persons who commit crimes before determination of their refugee claims to a more onerous standard than persons who commit crimes after deterimination of their claims. This arbitrariness is a direct result of interpreting Article 1F(c) to encompass crimes committed in Canada.

85. In the alternative, if drug trafficking does fall within Article 1F(c) of the Refugee Convention, then, in order to respect the scheme of the Immigration Act, the Refugee Division must balance the danger to the person on return with the risk to the Canadian public, before excluding a claimant from refugee recognition. The Minister, in forming an opinion that a person constitutes a danger to the public in Canada, may, and, arguably, must balance the danger to the person on return with the risk to the Canadian public. It would be anomalous if the Refugee Division, at a different stage of an integrated process, addressing the identical criminal act, could not balance the danger to the person on return with the risk to the Canadian public.

Part IV Nature of the Order Requested

The Intervener requests that the appeal be allowed.

Respectfully submitted,



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September 6, 1997

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