Federal Court  Cour fédérale

Date: 20160513

Docket: IMM-2817-15

Citation: 2016 FC 531

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 13, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

EUGÈNE MWALUMBA MATA MAZIMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (the "Act"), the applicant is challenging an immigration officer's (Officer) decision dated June 1, 2015, confirming what was determined by another officer on March 31, 2014, refusing to grant

him permanent resident status on the grounds that he is inadmissible under paragraph 35(1)(*a*) of the Act, which stipulates that, in particular, committing one of the offences listed under sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c. 24, carries such inadmissibility.

[2] More specifically, the Officer expressed satisfaction that there were serious grounds for considering that the applicant, between 2001 and 2004, while he was employed by the Chief of the Defence Staff of the Democratic Republic of Congo Armed Forces (FARDC), Admiral Baudoin Liwanga Mata Nyamunyobo (Admiral Liwanga), had voluntarily contributed, significantly and consciously, with intent in committing international crimes with the FAC Defence Staff and Admiral Liwanga.

[3] The applicant maintains that the Officer's decision is tainted with violations of the rules of procedural fairness that apparently hindered his right to present a "full answer and defence" and that, in any event, it is based on an erroneous reading of *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*], which, ruled on after the initial decision refusing his application for permanent residence had been rendered, served as justification for a reconsideration of said application, which is before the Court in this case.

[4] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[5] The applicant is from the Democratic Republic of the Congo (DRC). Between 2001 and 2007, he held various positions within his country's government apparatus. In particular, in 2001, when he completed his university studies, through Admiral Liwanga, who is one of his cousins and was the then-Chief of Defence Staff of the Congo Armed Forces (FAC), he obtained the position of head of IT services for the Defence Staff. He also became the secretary to Admiral Liwanga. In 2004, in the wake of Admiral Liwanga's dismissal, he also resigned from his duties. He was hired by the Department of Foreign Affairs in Kinshasa, for the position of manager of technology innovation studies.

[6] It has been established that between 2001 and 2005, civil war was raging in the DRC, which is recognized as being marked by brutal violence and violations of human rights committed by both rebel factions and FAC troops.

[7] At the end of the civil war and following the legislative and presidential elections held in 2006, the applicant was reassigned to the Embassy of the DRC in Algeria. In July 2007, some time after he took up his duties, the Embassy administrator began to suspect that he belonged to an opposition party for the Refoundation of the Congo. The applicant later learned that his repatriation was required for him to return to intelligence services. His precarious situation within his government eroded a step further when his half brother physically assaulted a relative of President Joseph Kabila during the 62nd session of the General Assembly of the United Nations in New York in fall 2007.

[8] The applicant then decided to leave Algeria together with his spouse and his two children. In late November 2007, the family came to Canada, where they claimed refugee protection under sections 96 and 97 of the Act. On April 8, 2011, the Refugee Protection Division (RPD) of the Immigration and Refugee Board found that the claim for refugee protection for the spouse and two children was well-founded. However, the RPD denied the applicant's claim, based on its finding that there are serious reasons for considering that he was complicit in crimes against humanity or war crimes committed by FAC factions and that he is therefore excluded, under section 98 of the Act and section F of Article 1 of the *United Nations Convention relating to the Status of Refugees* (the Convention), from the definition of a refugee and of a person in need of protection for the purposes of the Act.

[9] The applicant was then authorized by the Court to challenge the RPD's decision. At about the same time, on behalf of herself and her spouse, the applicant's spouse filed an application for permanent residence. On June 6, 2012, the Court dismissed the applicant's application for judicial review on its merits, holding that even if the RPD had no direct evidence, it was not unreasonable for it "to conclude that the applicant had put his shoulder to the wheel and knowingly participated in the crimes against humanity and war crimes committed by the FAC in the course of its military operations" (*Mata Mazima v. Canada (Citizenship and Immigration)*, 2012 FC 698, at paragraph 33, 412 FTR 277 [*Mata Mazima*]).

[10] Subject to a deportation order, in the month following the Court's decision, the applicant requested a pre-removal risk assessment. That application was rejected on October 12, 2012. The applicant did not apply for a judicial review.

[11] On November 29, 2012, the application for permanent residence filed by the applicant's spouse was approved in principle. However, on March 31, 2014, said application was rejected with respect to the applicant, as he was found to be inadmissible under paragraph 35(1)(*a*) of the Act. The officer who rendered the decision then agreed to reconsider his decision in light of *Ezokola*. The file was eventually transferred to the Officer who, in reconsidering said decision, also concluded, as already outlined, that the applicant was inadmissible and that he could therefore not be granted permanent resident status as set out in subsection 21(1) of the Act.

[12] Recalling that the RPD found that the applicant had not directly committed crimes against humanity but that he had instead been an accomplice to them, the Officer found that it was then necessary to determine [TRANSLATION] "whether the applicant had voluntarily contributed, significantly and consciously, in the crime or criminal purpose of the group who allegedly committed such crimes." To this end, she analyzed the record based on the six factors identified in *Ezokola*, namely: (i) the size and nature of the organization; (ii) the part of the organization with which the claimant was most directly concerned; (iii) the claimant's duties and activities within the organization; (iv) the claimant's position or rank in the organization; (v) the length of time the claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and (vi) the method by which the claimant was recruited and claimant's opportunity to leave the organization.

[13] For the purposes of this analysis, under section 15 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), the Officer felt bound by the findings of fact that led the RPD to conclude that the applicant is described in section F of Article 1 of the Convention, on the basis that he committed a war crime or a crime against humanity.

[14] The Officer came to the following conclusions:

a) The organization that at one point employed the applicant—the FAC—was found guilty at that time, together with militias working for the Government, of multiple human rights violations in the form of arbitrary arrests, tortures, extrajudicial executions, rapes and ethnic cleansing;

b) More specifically, the applicant was working for the FAC Defence Staff and its Chief, Admiral Liwanga, thus there were serious reasons to consider "that he agreed to the alliances between the FAC and the militias and he lent his approval to the warlords who committed the crimes, crimes described in Article 7 of the Rome Statute."

c) In light of the findings of fact made by the RPD regarding the duties he carried out within the FAC Defence Staff, even though the applicant was only a civilian employee, he was responsible for the IT network within that organization; as such, his task consisted of creating a local network linking the Defence Staff with other FAC departments across the country on an IT level;

d) Although, again according to the RPD's findings of fact, the applicant had been aware of the atrocities committed by the secret service, certain battalions and the rebels and, therefore, aware of certain excesses of Congolese troops, he nevertheless continued to work for the Defence Staff for three years, and although he ended up quitting his position within that organization, it was not out of moral or ideological reasons but rather because he won a competition for a position with the Department of Foreign Affairs; and

e) The applicant voluntarily chose to work for the FAC Defence Staff and, more specifically, for Admiral Liwanga, and to remain in that position for several years, all the

> while knowing that atrocities were committed by the FAC, of which Admiral Liwanga was the supreme leader during that period.

[15] After analyzing these factors, the Officer said that she was satisfied that the duties that the applicant was carrying out at the time with the FAC Defence Staff and Admiral Liwanga, enabling information relevant to different FAC departments to be sent via the IT system for which he was responsible, were sufficiently significant to conclude that he was a knowing, voluntary accomplice to the criminal purpose of the FAC and, more specifically, of the Defence Staff and Admiral Liwanga.

[16] As I have already mentioned, the applicant believes that he was deprived of the right to present a "full and complete defence" before the Officer, mainly by the denial to communicate documents that the Officer ultimately took into consideration but which were not already on the record when the application for permanent residence was initially considered. He also maintains that, in addition to containing errors of fact, the Officer's analysis is not consistent with the findings in *Ezokola*.

III. Analysis

A. *There was no breach of the rules of procedural fairness.*

[17] It is well established that the appropriate standard of review that must be examined by the Court for issues of procedural fairness is correctness (*Gonzalez Gonzalez v. Canada (Public*

Safety and Emergency Preparedness), 2013 FC 153, at paragraph 46; *Lopez Arteaga v. Canada (Citizenship and Immigration)*, 2013 FC 778, at paragraph 19, 436 FTR 281).

[18] In this case, the applicant maintains that after he was assured that the application for permanent residence would be reconsidered based on the evidence in the refugee protection claim file, and on that which led to preparing the inadmissibility report, without these being disclosed to her in advance, the Officer relied on the new evidence to render her decision, namely: (i) two decisions by the Special Court for Sierra Leone rendered in 2012 and 2013; (ii) Human Rights Watch Reports for 2002, 2003 and 2005; (iii) the 2006 annual report of the UK Foreign & Commonwealth Office; (iv) a *Courier international* article published in 2008, on the civil war in the DRC; and, (v) various documents from the Embassy of the DRC in Algeria, and various education credentials and diplomas, including a curriculum vitae, sent by the applicant to Canadian authorities.

[19] In so doing, did the Officer violate the rules of procedural fairness? In my view, she did not.

[20] On the one hand, it is well established that the duty of fairness can be met "without always having to furnish all the documents and reports the decision-maker relied on" (*Maghraoui v. Canada (Citizenship and Immigration)*, 2013 FC 883, at paragraph 22, 438 FTR 163 [*Maghraoui*]). In this regard, it may be sufficient that the "applicant be provided with the information on which a decision is based so that the applicant can present his or her version of the facts and correct any errors or misunderstandings" and "to ensure that the

applicant has the opportunity to fully participate in the decision-making process by being informed of information that is not favourable to the applicant and having the opportunity to present his or her point of view" (*Maghraoui*, at paragraph 22).

[21] It is important to reiterate here that the Officer was not required to determine the applicant's guilt or innocence. Her role instead consisted of determining whether the applicant was inadmissible within the meaning of paragraph 35(1)(*a*) of the Act, and of doing so pursuant to section 33 of the Act, based on reasonable grounds to believe that the acts mentioned in said paragraph occurred, are occurring or may occur. Accordingly, as was deemed to be the case for the RPD in *Ezokola*, the exercise of which she had to avail herself cannot be further confused with a penal or criminal trial and based on the obligation to disclose in this type of trial (*Ezokola*, at paragraphs 37-39).

[22] I also reiterate that this proceeding involves reconsideration of a decision declaring the applicant inadmissible, a reconsideration guided by the test established by *Ezokola*, rendered after the initial declaration of inadmissibility, regarding the distinction to be made between complicity by association and culpable complicity required to exclude secondary actors from refugee protection in the commission of a crime against humanity or a war crime. That initial finding of inadmissibility arose from the findings of the RPD, convinced that he was an accomplice in crimes against humanity or war crimes committed by FAC factions, to the effect that the applicant was excluded from the definition of a refugee or a person in need of protection under articles 96 and 97 of the Act. Therefore, when the Officer was reconsidering the initial inadmissibility finding, the applicant was well aware—or should have been well aware—of the

allegations against him. Moreover, the Officer had advised him that her concerns were the same as those that led to the RPD's decision and the inadmissibility finding, and that she relied on the same information as that presented before those two decision-makers.

[23] In short, that reconsideration exercise consisted of reviewing the facts, as revealed before the RPD and the Officer who first made the inadmissibility finding, based on the teachings of the Supreme Court in *Ezokola*. Although the burden still rested on the applicant's shoulders, in these circumstances, it cannot be reasonably argued that this came as a surprise for the applicant and that he was unable to fully participate in the decision-making process.

[24] On the other hand, I cannot conclude that the documents that were not communicated to the applicant constitute extrinsic evidence subject to mandatory pre-trial disclosure. First, the applicant cannot seriously claim that he was unaware of the content of documents that he himself sent to the Canadian authorities, namely, articles, letters and memos from the Embassy of the DRC in Algeria, as well as his diplomas and his curriculum vitae.

[25] As regards the other documents included under the applicant's recriminations, it is well established that publicly available documents do not constitute extrinsic evidence subject to disclosure if they are not novel and do not relate to changes in general conditions in the country of origin, which could impact the disposition of the case (*Holder v. Canada (Citizenship and Immigration)*, 2012 FC 337, at paragraph 28; *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461, at paragraphs 27-28).

[26] In this case, the 2002, 2003 and 2005 Human Rights [Watch] reports are public documents, they are not novel, and the RPD already cited them in paragraph 21 of its reasons. As regards the *Courrier international* article published in 2008 on the DRC war and the UK Foreign & Commonwealth Office 2006 annual report on human rights, they are both publicly accessible, they are not novel, and the evidence does not show that there were changes in general conditions in the DRC, which would allegedly impact the disposition of the case, quite the contrary (Certified Tribunal Record, p. 52-57 and 88-89).

[27] Lastly, in *Ezokola*, the Supreme Court reiterated the importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada's treaty obligations. In this context, it reiterated, "international sources like the recent jurisprudence of international criminal courts are highly relevant to the analysis" (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at paragraph 82, [2005] 2 SCR 100; *Ezokola*, at paragraph 51). There is therefore no doubt that it was entirely appropriate for the Officer to integrate into her analysis a decision made in May 2012 by the international Special Court for Sierra Leone (with reference to a decision by that same Court in September 2013) illustrating certain contribution-based methods of complicity in committing crimes against humanity or war crimes.

[28] However, should the Officer have informed the applicant of this before she rendered her decision, so as to allow him to make appropriate representations on the relevance of that decision? Not in my view, since that case law, relevant, as an interpretive tool for domestic law, for the purposes of the Officer's analysis, falls under the category of "documents" that the

applicant, who was represented by counsel, could have reasonably anticipated and to which he could have reasonably had access (*Mehfooz v. Canada (Citizenship and Immigration)*, 2016 FC 165, at paragraph 13; *Joseph v. Canada (Citizenship and Immigration)*, 2015 FC 904, at paragraph 38).

[29] In short, the applicant did not convince me that he was a victim in this case of a breach of the rules of procedural fairness.

B. *The Officer's decision has qualities that make it reasonable*

[30] As previously indicated, the applicant raises arguments in connection with the very merit of the Officer's decision: first, he claims that she made two important errors of fact that allegedly flawed her entire analysis; second, he maintains that the Officer allegedly erred in her interpretation of *Ezokola* and in her application of the facts in that case.

(1) Errors of fact

[31] On the one hand, the applicant claims that by declaring during her review of the scope and nature of the organization that employed him, that he [TRANSLATION] "worked for the DRC Armed Forces [FAC] and the Department of Defence, then for the Department of Foreign Affairs," the Officer committed an important error of fact since, according to the evidence in the record and the findings of fact drawn by the RPD, he was not employed by the FAC, but rather by the Chief of Defence Staff, a far more necessarily limited entity. He argues that this error is

significant because it [TRANSLATION] "could potentially establish a link between the applicant and the military responsible for international crimes."

[32] This argument cannot be accepted. Indeed, when the Officer's decision is read in its entirety, it is clear that she fully understood that the applicant was carrying out his duties for the FAC Defence Staff and its Chief, Admiral Liwanga. There is no ambiguity in this regard. Moreover, insofar as the Defence Staff is an integral part of [the FAC], and constitutes the supreme governing body thereof, to say that it was wrong to conclude that the applicant "worked for the DRC Armed Forces" defies common sense.

[33] Furthermore, the applicant claims that the Officer erred in setting aside the solemn declaration of a former work colleague within the FAC Defence Staff on the grounds that the document was neither dated nor signed, and that there was no accompanying envelope to establish the date on which it was received or even the country of origin. That document describes the applicant's duties within the FAC Defence Staff.

[34] The applicant believes that this document was in fact signed and dated on the second page. However, that second page did not appear in the Certified Tribunal Record, thereby suggesting that the document before the Officer was incomplete and that it was therefore possible to conclude as she did.

[35] It is well established that when an erroneous finding of fact is attributed to an administrative decision-maker, the Court must only intervene if it is convinced that the finding

was made in a perverse or capricious manner or without regard for the material before the decision-maker (paragraph 18.1(4)(*d*) of the *Federal Courts Act*, RSC, 1985, c. F-7). I find that in light of the material before the Officer, there is no cause to intervene. Regardless, a review of that document revealed that it does not contain anything that, in my opinion, could have physically affected the description of the applicant's duties as disclosed by the Officer's decision and, before her, that of the RPD.

(2) *Ezokola*

[36] The applicant maintains that, in the wake of *Ezokola*, the Officer committed [TRANSLATION] "major errors in the principles of law to enforce." More specifically, he claims that the Officer erred in her identification of the applicable complicity test, failed to specify the mode of participation in the crimes at issue and to determine the guilty intent, and failed to identify the group responsible for the crimes with which he is associated. In other words, he claims that for all intents and purposes, he was determined inadmissible for complicity by association, which *Ezokola* does not permit.

[37] The question of whether the Officer erred in her interpretation of the concept of complicity, as the Supreme Court of Canada redefined in *Ezokola*, constitutes a pure question of law subject to the standard of correctness (*Mata Mazima*, above, at paragraph 17). Moreover, insofar as the Officer correctly interpreted that concept, the question of whether she correctly applied it to the facts in this case involves the deferential reasonableness standard, which means that the Court will only intervene if it is of the opinion that the Officer's finding is beyond the range of possible, acceptable outcomes which are defensible in respect of the facts and law

(*Mata Mazima*, above, at paragraph 18; *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47, [2008] 1 SCR 190).

[38] Paragraph 35(1)(*a*) of the Act stipulates that a permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for "committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act." Under section 4 of that Act, committing a crime against humanity or a war crime constitutes an indictable offence under Canadian domestic law. It defines "crime against humanity" and "war crime" as follows:

(3) The definitions in this subsection apply in this section.	(3) Les définitions qui suivent s'appliquent au présent article.
"crime against humanity" « *crime contre l'humanité* »	« crime contre l'humanité » "*crime against humanity*"
"crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and	« crime contre l'humanité » Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en

in the place of its commission.	vigueur à ce moment et dans ce lieu.
"war crime" « *crime de guerre* »	« crime de guerre » "*war crime*"
"war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.	« crime de guerre » Fait — acte ou omission — commis au cours d'un conflit armé et constituant, au moment et au lieu de la perpétration, un crime de guerre selon le droit international coutumier ou le droit international conventionnel applicables à ces conflits, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

[39] As indicated above, the role of an immigration officer called upon to determine inadmissibility based on paragraph 35(1)(*a*) of the Act is not to determine the guilt or innocence of the foreign national in question, but to be satisfied, based on that set out in section 33 of the Act, that there are reasonable grounds to believe that the acts attributed to the foreign national have occurred, are occurring or may occur.

[40] In *Ezokola*, while bearing in mind that in the international context, some of the world's worst crimes are committed often at a distance, by a multitude of actors and that complicity is a defining characteristic thereof (at paragraph 1), the Supreme Court in fact tightened the concept of complicity by excluding guilt by association from the modes of commission of an international crime that can lead to exclusion from refugee protection (at paragraph 3).

[41] The issue in that case was to determine whether senior public officials can be excluded from the definition of "refugee" for performing official duties for a government that commits international crimes. More specifically, it was the task of that Court to determine the degree of knowledge and participation in a criminal activity that justifies excluding secondary actors committing international crimes from refugee protection. In other words, it had to decide when mere association becomes culpable complicity (at paragraph 4).

[42] The RPD had initially dismissed the claim for refugee protection on the grounds that, based on his official rank, Mr. Ezokola had "personal and knowing awareness" of the crimes committed by his government (at paragraph 19). The Federal Court found that the RPD had erred in assigning responsibility to Mr. Ezokola solely on the basis of his position within the government, absent evidence of a personal nexus between his role and the army or police of the DRC (at paragraph 22). Although the Federal Court of Appeal found the concept of complicity retained by the Federal Court too restrictive, it also excluded the RPD decision on the grounds that it had applied the wrong test for complicity in considering that appellant's "personal and knowing awareness" of crimes committed by its government, instead of his "personal and knowing participation" to those crimes (at paragraph 27).

[43] Following a review of international law and the experiences of certain foreign states related to international crimes, the Supreme Court concluded that an individual will be excluded from refugee protection for complicity in such crimes "if there are serious reasons for considering that he or she voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime" (at paragraphs 29 and 84).

The contribution-based approach to complicity thus replaces the "personal and knowing participation" test developed by the Federal Court of Appeal, and excludes from the range of culpable complicity, complicity by mere association or passive acquiescence (at paragraph 53).

[44] An individual can be complicit without being present at the crime and without physically contributing to the crime if the individual made at least a significant contribution to the group's crime or criminal purpose (at paragraph 77). This contribution to the crimes committed need not be essential or substantial, but to be significant, it must be something other than an infinitesimal contribution (at paragraphs 56-57). Specifically, the contribution does not have to be "directed to specific identifiable crimes." It is sufficient that it be directed to wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes (at paragraph 87).

[45] Again according to *Ezokola*, for knowing participation to exist, the individual must be aware of the organization's international crimes or criminal purpose to which he or she belongs and must at least be aware that his or her conduct will assist in the furtherance of the crime or criminal purpose (at paragraph 89). Individuals may also be complicit in international crimes without possessing the *mens rea* required by the crime itself, knowledge being sufficient to incur liability for contributing to a group of persons acting with a common purpose (at paragraph 59).

[46] Ultimately, there must be a link between the accused's conduct and the criminal conduct of the group, and each case must be assessed based on a non-exhaustive list of factors to determine whether an individual has voluntarily made a significant and knowing contribution to

a crime or criminal purpose, namely, as previously mentioned: (i) the size and nature of the organization; (ii) the part of the organization with which the individual was most directly concerned (iii) the individual's duties within the organization; (iv) his or her position or rank in the organization; (v) the length of time in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and, (vi) the method by which the individual was recruited and his or her opportunity to leave the organization (at paragraphs 57, 67 and 91).

[47] In my opinion, a close reading of the Officer's reasons revealed that she correctly identified the test for complicity defined in *Ezokola*. On page 9 of her reasons (Certified Tribunal Record, p. 11), when she began her analysis, the Officer specified, after recounting the RPD's findings to the effect that the applicant had not directly committed war crimes but that he had instead been an accomplice to them, that it was therefore necessary to [TRANSLATION] "determine whether the applicant voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group who allegedly committed such crimes." After that, she examined the above six factors, set out in *Ezokola*. There is no error in the applicable test identified, nor in the approach taken to determine, under paragraph 35(1)(*a*) of the Act, whether there was culpable complicity on the part of the applicant.

[48] Earlier in her decision, the Officer makes explicit reference, as noted by the applicant, to a contribution-based test for complicity (Certified Tribunal Record, p. 8). However, this is more a poor choice of words, rather than an erroneous understanding of the test for complicity developed in *Ezokola*. Moreover, one need only read the paragraph in its entirety, in which the

Officer identifies the "key components" of said test, to be convinced. She mentions the voluntary contribution to the crime or criminal purpose, the significant contribution to the group's crime or criminal purpose and the knowing contribution to the crime or the criminal purpose. In the following paragraph, the Officer states, after determining that the crimes against humanity had been committed by the FAC Defence Staff and its Chief, Admiral Liwanga, for whom the applicant worked, that it was now necessary to determine whether the applicant "voluntarily made a significant and knowing contribution to the crimes committed in the DRC while he was employed by the Congolese Defence Staff." Once again, this wording of the test is consistent on every point with that in paragraph 91 of *Ezokola*.

[49] The applicant's argument on this point therefore has no merit.

[50] It now remains to be seen whether the Officer's inadmissibility finding based on the test developed in *Ezokola* is reasonable under the circumstances in this case.

[51] I note again that in this regard, the applicant maintains that the Officer's decision is unreasonable insofar as the Officer allegedly failed to specify the mode of participation in the crimes at issue, to determine the guilty intent, and to identify the group responsible for the crimes with which he is associated. As a result, he claims that he was found inadmissible due to complicity by association, which *Ezokola* henceforth defends.

[52] I cannot accept this argument. For her inadmissibility finding, the Officer had to be satisfied that the applicant had voluntarily made a significant and knowing contribution to the

war crimes allegedly committed by certain factions of the FAC, while he was employed by the Congolese Defence Staff. In this regard, it is understood that during that period, the FAC, or at least certain factions thereof, committed crimes against humanity and war crimes in the form of arbitrary arrests, tortures, extrajudicial executions, rapes and ethnic cleansing. It was also established that when he was in charge of computer services in the FAC Defence Staff, the applicant had knowledge of the atrocities committed by certain members of the FAC (*Mata Mazima*, above, at paragraphs 25 and 28).

[53] In light of this and of her analysis of the six factors in *Ezokola*, the Officer concluded that the applicant:

a) voluntarily contributed to committing these crimes on the basis that he freely chose to work for the FAC Defence Staff and, more specifically, for Admiral Liwanga, and to remain in the position for several years, all the while knowing that atrocities were committed by the FAC, of which Admiral Liwanga was the supreme leader during that period, a position that he did not quit out of moral or ideological reasons, but rather because he won a competition for a position with the Department of Foreign Affairs;

b) knowingly contributed on the basis that he was aware of the excesses by certain factions of the FAC during his time with the FAC Defence Staff and Admiral Liwanga, and that the computer system he was in charge of linked the various elements of the FAC across the country on an IT level with the Defence Staff, including Admiral Liwanga; therefore, there were serious reasons for considering that he approved of the alliances between the FAC and militias to commit the war crimes; and

c) significantly contributed, by sending messages, establishing communications systems and providing help to set up a network for information exchange and liaison, all considered to be, by recent international jurisprudence, determining circumstances in establishing complicity in committing crimes against humanity and war crimes.

[54] The applicant failed to convince me that there is reason to intervene in respect of these findings. It is important to reiterate here that the role of the Court is not to decide whether the applicant voluntarily made a significant and knowing contribution to the crimes committed by the FAC or to their criminal purpose. Its role is instead to determine whether it was reasonable for the Officer to arrive at that conclusion (*Mata Mazima*, above, at paragraph 35). In particular, I cannot accept the argument claiming that the Officer failed to identify the mode of participation in the crimes at issue, since she explained in detail how the nature of the applicant's duties within the Defence Staff facilitated the crimes committed by the FAC. In this respect, under section 15 of the Regulations, the Officer could not ignore the RPD's finding, nor that of the Court, to the effect that as the person in charge of a computer network linking the office of the Chief of Defence Staff with other units in the army across the country, the applicant was not a mere spectator; rather, he contributed to the smooth conduct of military operations (*Mata Mazima*, above, at paragraph 33). In my opinion, this is what sets this case apart from *Ezokola*, in which everything alleged against the applicant in that case involved holding senior positions within the DRC government and, as a result, being aware of the atrocities committed by the FAC.

[55] I also cannot accept the argument claiming that the Officer did not express her view on the applicant's *mens rea*, *mens rea* being a component of knowing contribution-based complicity, which was examined in detail by the Officer. Lastly, although the link between the contribution and the criminal purpose will be more remote if the organization in question engages in, as in this case, activities that are both legitimate and criminal, contrary to the applicant's claims, I am satisfied that, in the context of this case, in which the applicant was directly associated with the Defence Staff, i.e., the pulse of the FAC, they constitute a group

identifiable for the analysis required by *Ezokola*. In any event, there is nothing in that decision to suggest, compared to the five others, that this is a determining or even paramount factor. Once again, that analysis, and the weight to be assigned to its various underlying factors, will depend on the circumstances of each case.

[56] In short, I believe that the Officer, who did not need to be convinced beyond a reasonable doubt of the applicant's culpable complicity and who could not ignore the RPD's findings of fact that were deemed reasonable by the Court during judicial review of the RPD's decision, could reasonably conclude as she did in this case. Bear in mind that the finding that was imposed during that judicial review (*Mata Mazima*, above) is as follows:

> [33] By creating and maintaining a computer network to connect the office of the Chief of Staff with the other units of the army throughout the country, the applicant was not a mere spectator; he was contributing to the conduct of the military operations. Even if the panel did not have direct evidence of it, it was not unreasonable to conclude that the applicant had put his shoulder to the wheel and knowingly participated in the crimes against humanity and war crimes committed by the FAC in the course of its military operations.

[57] There is no doubt in my mind that it was open to the Officer, on the basis of the contribution-based complicity test, to determine, based on that finding, with which she agreed, inadmissibility. I therefore do not see cause to intervene.

[58] The application for judicial review will therefore be dismissed. Neither party requested that a question be certified for the Federal Court of Appeal.

JUDGEMENT

THE COURT ORDERS that:

1. The application for judicial review is dismissed;

2. There is no question to be certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	MONTRÉAL, QUEBEC
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