Federal Court  Cour fédérale

Date: 20170213

Docket: IMM-2992-16

Citation: 2017 FC 175

Ottawa, Ontario, February 13, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

QASIM MOHAMMED AL KHAYYAT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Immigration Division of the Immigration and Refugee Board of Canada ("ID"), dated June 27, 2016, which found that the Applicant is inadmissible, pursuant to s 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), for having committed an act outside of Canada that constitutes an offence referred to under ss 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 ("CAHWC Act").

Background

[2] The Applicant, Qasim Mohammed Al Khayyat, is a citizen of Iraq. He claims that in 2003 he was threatened by Shi'a extremists in Iraq on the basis of his membership in the Sunni sect of Islam and his work as an informal Imam. As a result, in July 2003 he fled to the United Arab Emirates ("UAE") where he remained as a temporary resident on a work permit until March 2014.

[3] The Applicant worked as an Imam in the UAE. In November 2004 he was also appointed as a Prompt Manager within the Department of Educational Affairs, part of the government of Sharjah, UAE. In 2009, he was promoted to head of that department and was in charge of private centres where people trained to memorize the Qur'an. After his promotion, he was contacted by the UAE Security Agency ("Security Agency") and asked to provide information about individuals regarding their political and organizational activities, in particular, of any involvement with extremist organizations, including the Muslim Brotherhood. The Applicant claims that he was very uncomfortable with these requests and resigned from his position in November 2012.

[4] However, after his resignation he faced increased pressure from the Security Agency who contacted him by phone requesting information and sought to meet with him. He attended some informal meetings, the last of which was in March 2014, two weeks before he left the UAE. At that meeting he was told that he must cooperate and write reports containing the requested information. He claims he was concerned that if he did not cooperate his work permit in the

UAE would not be renewed and he and his family would be deported to Iraq, where their lives would be at risk. He decided to flee to Canada.

[5] The Applicant filed his Basis of Claim form ("BOC") on April 22, 2014, which included a description of his involvement with the Security Agency. On June 4, 2015 an inadmissibility report was prepared, pursuant to s 44(1) of the IRPA, in which the preparing officer stated his opinion that the Applicant was inadmissible pursuant to s 35(1)(a) of the IRPA as he was complicit in the commission of crimes against humanity perpetrated by officials in the state security department of the UAE, specifically, that he acted as an informant between 2009 and March 2014. Pursuant to s 44(2) of the IRPA, the Applicant was referred by the Minister to the ID for an admissibility hearing. The ID found that the Applicant was inadmissible under s 35(1)(a) of the IRPA for knowingly, voluntarily, and significantly contributing to crimes against humanity perpetrated by the Security Agency. This is the judicial review of that decision.

Decision Under Review

[6] The ID addressed two issues. First, whether the impugned activities of the Security Agency constitute crimes against humanity and, second, whether the Applicant was complicit in those activities.

[7] On the first issue, the ID found that there was ample documentary evidence illustrating that the Security Agency was engaged in human rights abuses, such as torture, physical abuse, and imprisonment, over an extended period of time, including the time period in which the

Applicant acted as an informant. Further, that these abuses were perpetrated upon those found to be extremist Islamists or members of the Muslim Brotherhood. The ID referred to sections of the documentary evidence supporting that finding.

[8] The ID noted that counsel for the Applicant did not deny that the Security Agency is responsible for these abuses but submitted that there are also reports showing that the UAE has provided due process for men accused of espousing extremist ideologies or supporting the Muslim Brotherhood which, in counsel's view, supported the Applicant's genuine belief that non-citizens of the UAE suspected of extremist links would not face human rights abuses. However, upon review of the documentary evidence, the ID found that this argument was not conclusive to support the fact that the targeted individuals were Islamist extremists or members of the Muslim Brotherhood and were not victims of crimes against humanity. Further, that all who had a trial were convicted and sentenced to jail terms, foreign nationals were deported only after they had served their terms.

[9] On the second issue, the ID first addressed whether the Security Agency was an organization with a limited brutal purpose, referencing the Supreme Court of Canada's decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 ("*Ezokola*"), at paragraphs 94 and 95, in that regard. The ID concluded that the documentary evidence supported such a finding, on a balance of probability, as its activities are limited to targeting and monitoring those groups and individuals deemed to be Islamists and/or affiliated with the Muslim Brotherhood.

[10] The ID next considered whether there were serious reasons for considering that the Applicant voluntarily made a significant and knowing contribution to the commission of crimes against humanity, noting the six factors set out in *Ezokola* (at paras 91 and 92) and that the focus must always remain on the individual's contribution to the crime or criminal purpose.

[11] The ID acknowledged that the Applicant was never employed by the Security Agency but noted that he had testified that he was asked for information by three Security Agency officers and provided information as to whether someone was a good person, or, if he did not know them. Further, he testified that he feared deportation from the UAE and this is why he cooperated. The pressure increased after 2012 and that is why, in the beginning of 2014, he identified Mr. Ahmadad Youssouf Mmadi as a member of the Muslim Brotherhood. The ID noted the Applicant's submission that the evidence did not establish that any individual, including Mr. Mmadi, was subject to ill treatment as a result of his actions. However, the ID found that the evidence led to the belief that, in reporting Mr. Mmadi as a member of the Muslim Brotherhood, there were serious reasons for considering that the Applicant voluntarily made a significant and knowing contribution to the Security Agency's crime or criminal purpose.

[12] As to voluntariness, the ID did not find persuasive the Applicant's argument that he provided information and reported Mr. Mmadi to the Security Agency as he feared deportation to Iraq, where he feared persecution, and that he was pressured to attend meetings. The ID found that this pressure did not constitute the defence of duress as defined by the Supreme Court of Canada in *R v Ryan*, 2013 SCC 3 ("*Ryan*"), which requires an explicit or implicit threat of death or bodily harm profferred against the Applicant. The fact that the Applicant maintained his

collaboration for five years before leaving the country supported that finding. The ID found that the Applicant made a voluntary contribution to the organization's crimes.

[13] As to whether the contribution was significant, the ID referenced paragraph 87 of *Ezokola*. It noted the Applicant's submission that he did not make a significant contribution to the Security Agency's crime or criminal purpose because no credible evidence established that Mr. Mmadi or anyone else in the UAE was detained, arrested or otherwise abused as a result of the Applicant's actions, and, a letter provided by Mr. Mmadi stated that he had not been persecuted, arrested or deported from the UAE. However, the ID found that by identifying Mr. Mmadi as a member of the Muslim Brotherhood, the Applicant furthered the criminal purpose of the Security Agency in that, without informants, the Security Agency would not have a steady stream of victims. The ID gave the letter from Mr. Mmadi little weight on the basis that it was not a sworn declaration and that it was third party information that had not been subject to cross-examination. Further, that it was not provided to the Applicant for the purpose of his admissibility hearing and, in fact, the Applicant testified that Mr. Mmadi wrote the letter believing that it was for the purpose of assisting Mr. Mmadi in obtaining a Canadian visa. The ID concluded that by identifying a potential victim, the Applicant made a significant contribution to the organization's crimes.

[14] As to whether the Applicant knowingly contributed to the crime, the ID referenced paragraphs 89 and 90 of *Ezokola* which it found to be consistent with the *mens rea* requirement of article 30(1) of the Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9, July 17, 1998 ("*Rome Statute*"). The ID noted the Applicant's argument that he did not

make a knowing contribution to the crimes of the Security Agency because, when he provided the information, he did not believe that Mr. Mmadi would suffer any human rights abuses as he was not a leader of the Muslim Brotherhood and that the information would only lead to Mr. Mmadi not being appointed as an Imam or, at worst, being deported. The ID disagreed, noting that the Applicant testified that he knew that people were beaten if detained by UAE authorities, that this was common knowledge in the UAE, and, that the Applicant was aware of the arrest and trial of 70 Muslim Brotherhood leaders who were UAE citizens who were persecuted. The ID also noted that the documentary evidence did not indicate that detainees or Muslim Brotherhood members would simply face deportation or that only leaders of the organization would be tortured. The ID found that the Applicant's belief was at best willfully blind, his action was reckless in nature and that he knew of the potential consequences when he informed the Security Agency that Mr. Mmadi was a member of the Muslim Brotherhood. By identifying Mr. Mmadi as a member of the Muslim Brotherhood, the Applicant assisted the Security Agency in the furtherance of their crimes.

[15] The ID found that the Applicant was described in s 35(1)(a) of the IRPA and, as such, was inadmissible and it issued a deportation order against him.

Legislation

Immigration and Refugee Protection Act, SC 2001, c 27

33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe	33 Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou

that they have occurred, are occurring or may occur.	peuvent survenir.
…	…
35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	35 (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(a) 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;	a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;
…	…

Crimes Against Humanity and War Crimes Act, SC 2000, c 24

6 (1) Every person who, either before or after the coming into force of this section, commits outside Canada	6 (1) Quiconque commet à l'étranger une des infractions ci-après, avant ou après l'entrée en vigueur du présent article, est coupable d'un acte criminel et peut être poursuivi pour cette infraction aux termes de l'article 8 :
(a) genocide,	a) génocide;
(b) a crime against humanity, or	b) crime contre l'humanité;
(c) a war crime,	c) crime de guerre.
is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.	
…	…
(3) The definitions in this subsection apply in this	(3) Les définitions qui suivent s'appliquent au présent article.

section.

crime against humanity	**crime contre l'humanité**
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 in the place of its commission.	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 vigueur à ce moment et dans ce lieu.

Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9, July 17, 1998

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

   (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

   (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature

of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Issue

[16] In my view, the determinative issue in this application for judicial review is whether the ID erred in its application of the *Ezokola* test in finding that the Applicant is inadmissible.

Standard of Review

[17] The Applicant submits that errors of law are reviewed on the standard of correctness and, where an error of law is made, no deference is owed and the decision must be set aside (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 44; *Federal Courts Act*, RSC 1985, c F-7, s 18.1(4)(f)). Further, that an individual's inadmissibility to Canada is a question of mixed fact and law and is reviewable on the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47 and 50; *Khasria v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 773 at para 16 ("*Khasria*")). The Respondent agrees that the determination of whether a foreign national is inadmissible pursuant to s 35(1)(a) of the IRPA is a question of mixed fact and law which is reviewable on the standard of reasonableness (*Gebremedhin v Canada (Citizenship and Immigration)*, 2013 FC 380).

[18] I also agree that the standard of review applicable to a determination of whether a person is inadmissible under s 35(1)(a) of the IRPA is a question of mixed fact and law that is reviewable on the standard of reasonableness (*Khasria* at para 16; *Talpur v Canada (Citizenship and Immigration)*, 2016 FC 822 at para 16 ("*Talpur*")). This Court has also previously held that the reasonableness standard applies to the ID's finding with respect to whether an applicant is complicit in crimes against humanity (*Parra v Canada (Citizenship and Immigration)*, 2016 FC

364 at para 17; *Shalabi v Canada (Public Safety and Emergency preparedness)*, 2016 FC 961 at paras 20-21 ("*Shalabi*")).

Did the ID err in its application of the *Ezokola* test in finding that the Applicant is inadmissible?

A. Burden and standard of proof

Applicant's Position

[19] The Applicant submits that an error of law arises as the ID incorrectly shifted the burden of proof to him, but it is the Minister that bears the burden of proving that an applicant is inadmissible (*Sidamonidze v Canada (Citizenship and Immigration)*, 2015 FC 681 at para 13; *Ezokola* at para 29). The ID stated that the Applicant had failed to provide "conclusive evidence that Mr. Mmadi was never detained or arrested" (reasons at para 49) and had failed to provide "conclusive" evidence that individuals targeted by the Security Agency were Islamist extremists or members of the Muslim Brotherhood (reasons at para 23). This illustrates that the ID improperly shifted the burden of proof to the Applicant.

[20] Further, the standard of proof that is applicable to s 35(1)(a) of the IRPA is "reasonable grounds to believe" pursuant to s 33 of the IRPA (*Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (FCA) ("*Ramirez*"); *Chiau v Canada (Citizenship and Immigration)*, [1998] 2 FC 642 (FCTD) at para 28 ("*Chiau*"); *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114). While the ID stated the correct

standard as being that of "reasonable grounds to believe", its reliance on a "conclusive evidence" standard is an error in law. On these errors alone the decision cannot stand.

Respondent's Position

[21] The Respondent submits that the ID articulated the correct test to be applied in finding that the Applicant was inadmissible, including the fact that the burden rests with the Minister. The ID also correctly addressed the standard of proof. The ID's use of the word "conclusive" at paragraph 49 must be understood in light of paragraphs 47 to 49 and, in the absence of probative and persuasive evidence to rebut the Minister's case, the burden of proof was satisfied. Similarly, the ID's use of the word "conclusive" at paragraph 23 must be read in conjunction with the extensive discussion of the issue which the ID considered and rejected. The Respondent submits that the ID's use of the term "conclusive" can, at best, be seen as not the best choice of words.

Analysis

[22] Pursuant to s 35(1)(a) of the IRPA, a permanent resident or 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 ss 4 to 7 of the CAHWC Act.

[23] In *Ezokola* the Supreme Court of Canada identified the test for complicity in the commission of crimes against humanity, in the context of exclusion from refugee protection pursuant to Article 1F(a) of the United Nations Convention Relating to the Status of Refugees,

Can TS 1969 No 6 (“Refugee Convention”). The Supreme Court of Canada stated that complicity arises where there are serious reasons for considering that an individual has voluntarily made a significant and knowing contribution to a group’s crime or criminal purpose. Subsequently, the Federal Court of Appeal in *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at paragraphs 15-22 (“*Kanagendren*”), in considering whether *Ezokola* changes the legal test for assessing membership in terrorist organizations under s 34(1)(f) of the IRPA, noted that s 35(1)(a) of the IRPA is the domestic inadmissibility provision that parallels Article 1F(a) and that complicity is relevant to the s 35(1) analysis whereas the language of s 34(1)(f) does not contemplate a complicity analysis.

[24] Subsequently, in *Concepcion v Canada (Citizenship and Immigration)*, 2016 FC 544, Justice O’Reilly noted that the Federal Court of Appeal in *Kanagendren* specifically distinguishes s 34(1)(f) from s 35(1)(a) and its statement that s 35(1)(a) is the domestic inadmissibility provision that parallels Article 1F(a). Accordingly, he concluded that the Supreme Court of Canada’s analysis would also apply in the case before him which concerned a finding by a visa officer that the applicant therein was inadmissible to Canada, pursuant to s 35(1)(a), for having committed crimes against humanity when he served as a radio operator in the Philippine Army. Accordingly, that the test for inadmissibility under s 35(1)(a) requires serious reasons for considering that a person has voluntarily made a significant and knowing contribution to an offence contrary to the CAHWC Act, or to a group’s criminal purpose. The evidence must show, at least, that the person made a significant contribution to a crime or the organization’s criminal purpose, not just a contribution to the organization (at para 17; see also *Talpur* at para 20).

[25] Also in *Ezokola*, citing the Federal Court of Appeal's decision in *Ramirez*, the Supreme Court of Canada affirmed that the evidentiary burden for establishing that an individual is complicit in the commission of a crime falls on the Minister, as the party seeking the applicant's exclusion (*Ezokola* at para 29; *Ramirez* at p 314).

[26] And, s 33 of the IRPA states that the facts that constitute inadmissibility under ss 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

[27] Accordingly, the Applicant correctly asserts that the evidentiary burden of proving inadmissibility under s 35(1)(a) of the IRPA fell on the Minister and that the legal standard of proof was that of reasonable grounds to believe that the Applicant voluntarily made a knowing and significant contribution to crimes against humanity committed by the Security Agency (*Ezokola* at paras 29 and 84; *Talpur* at para 21; IRPA, s 33).

[28] As to the Applicant's assertion that the ID erroneously shifted the burden of proof onto him, in support of this the Applicant partially references paragraph 49 of the ID's decision, noting that it states that the Applicant failed to provide "conclusive evidence that Mr. Mmadi was never detained or arrested". However, in my view, this misconstrues the reasons as, read in context, the ID was simply stating its conclusion with respect to the letter from Mr. Mmadi and why it was giving this letter little weight. The entirety of that paragraph reads:

> [49] For all those reasons, I consider this letter not to be conclusive evidence that Mr. Mmadi was never detained or arrested and tortured by the said Agency officers after the PC

> [Applicant] identified him as a member of the Muslim Brotherhood.

[29] In this context, the ID's use of the word "conclusive" does not suggest that the ID was shifting the burden of proof to the Applicant. Rather, in my view, the ID was merely stating that the letter, for the reasons it had previously given, was insufficient proof of the particular fact of whether or not Mr. Mmadi was detained, arrested or tortured by the Security Agency as a result of the Applicant's admitted identification of him as a member of the Muslim Brotherhood. I agree with the Respondent that the ID's use of the word "conclusive" is perhaps not the best choice of words, but, read in context, it cannot be construed as signalling a shift in the burden of proof.

[30] As to the ID's use of the word "conclusive" in paragraph 23 of its reasons, it is again necessary to view this in context. In the preceding paragraph the ID acknowledged the Applicant's submission that there are reports contained in the documentary evidence which indicate that the UAE has provided due process to men accused of espousing extremist ideologies or supporting the Muslim Brotherhood which, in the view of counsel for the Applicant, supported the Applicant's genuinely held belief that non-citizens of the UAE suspected of extremist links would not face human rights abuses. The ID then stated:

> [23] After reviewing that section and all the documentary evidence, I found that counsel for the PC's argument is not conclusive to support the fact that the targeted individuals were Islamist extremists or members of the Muslim Brotherhood, and were not victims of torture or other crimes against humanity perpetrated by the UAE Security Agency.

[31] I would first note that the ID was considering whether the actions of the Security Agency constitute crimes against humanity. The ID found that the documentary evidence submitted by the Minister established this. Thus, the Minister met the burden of proof in this regard. This was not contested by the Applicant who, instead, submitted that there was also evidence supporting his view that non-citizens would not face human rights abuses. The ID rejected that submission and found the argument of the Applicant's counsel not to be conclusive.

[32] I would also note, upon review of the documentary evidence relied upon by the Applicant, that it does not establish – conclusively or otherwise – that non-citizens of the UAE would not be subject to human rights abuses. The only reference to foreign nationals being that those sentenced to a term of imprisonment for their affiliation with the Muslim Brotherhood were ordered deported only after they had completed their prison terms.

[33] Finally, I would note that in its conclusion the ID stated that "…the Minister has provided compelling, credible and corroborated evidence that provides serious reasons for considering that the UAE State Security Agency committed crimes against humanity during the time that the PC, Mr. Al Khayyat, was collaborating with them".

[34] Based on the foregoing, I am of the view that the ID properly identified the burden of proving inadmissibility as being on the Minister and did not erroneously shift the burden to the Applicant.

[35] Similarly, I do not agree with the Applicant's submission that the ID committed an error of law by its reliance on a "conclusive evidence" standard of proof. The ID at paragraphs 18 and 19 of its reasons explicitly described the requisite standard of proof, being that of reasonable grounds to believe. It noted s 33 of the IRPA and described this standard as it has been articulated in *Chiau*. The Applicant takes issue with the ID's application of the standard of proof based on the same portions of the decision that have been addressed above. Again, those reasons do not demonstrate that the ID did not apply the correct standard of proof. No error of law arises.

B. The *Ezokola* factors

Applicant's Position

[36] In his written submissions, the Applicant submits that *Ezokola* actually identified two tests for inadmissibility, the tri-partite test that an individual must make a voluntary, significant, and knowing contribution, and a six part test. The Applicant submits that while the ID correctly identifies these two tests, it erred in their application.

[37] Further, that the ID acknowledged that the Applicant is a citizen of Iraq with no permanent status in the UAE, was not employed by the Security Agency and was pressured into providing information, yet it still found that he made a voluntary, significant and knowing contribution and failed to explain why his conduct met the *actus reus* and *mens rea* elements for complicity.

[38] The Applicant disagrees with the Respondent's submission that the ID did not examine some of the six factors in its decision because they are immaterial. The Applicant states that the ID did not make that finding. Further, that the ID unreasonably applied the six factor test as the Applicant's affiliation with the Security Agency from 2009 to 2014 was peripheral in nature. In particular, he was not involved on a daily basis, was not tasked with formal duties and was not assigned any rank within the Security Agency. The ID failed to explain why these factors do not weigh in favour of the Applicant.

Respondent's Position

[39] The Respondent submits that it is obvious that not all of the six factors outlined in *Ezokola* are applicable and that the ID cannot be faulted for not going through each factor formally. The assessment of these factors is highly contextual and, depending on the particular case, certain factors may go a "long way" in establishing complicity and, by extension, some may be immaterial (*Ezokola* at paras 92-93). Further, the factors suggested in *Ezokola* pertain to individuals who are avowed members of an organization but disclaim complicity in the organization's criminal purpose, they have limited application to complicit individuals working outside of the organization. When read closely, it is evident that the purpose of most of the listed factors is to assist in probing the issue of knowledge of the group's criminal purpose, which the ID found the Applicant possessed based on his own evidence. The Applicant erroneously attempts to elevate the factors to preconditions for establishing complicity (*Ezokola* at paras 91-93).

[40] Further, the Applicant's submission that his activities were peripheral to the workings of the Security Agency is not based on fact. The Applicant worked within a UAE religious institution at a high level and acted as an informant over several years with knowledge of the types of abuses committed by the Security Agency, this is not peripheral.

Analysis

[41] The Supreme Court of Canada in *Ezokola* purposefully considered and set out the test for complicity, being whether there are serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose (at paras 29 and 84), the significant contribution test, thereby rejecting the former legal test wherein an individual could have been found guilty by mere association.

[42] This was the sole test. As such, the Applicant mischaracterizes the six factors set out in *Ezokola* by describing them as constituting a second test for complicity. When appearing before me, the Applicant acknowledged that the factors are not preconditions for establishing complicity.

[43] In my view, it is clear that the six factors are intended to serve as a guide when applying the significant contribution test to the facts of the case, a point made by the Supreme Court of Canada several times in *Ezokola*:

> 91 Whether there are serious reasons for considering that an individual has committed international crimes will depend on the facts of each case. Accordingly, to determine whether an individual's conduct meets the *actus reus* and *mens rea* for complicity, several factors may be of assistance. The following list

combines the factors considered by courts in Canada and the U.K., as well as by the ICC. **It should serve as a guide in assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose:**

(i) the size and nature of the organization;

(ii) the part of the organization with which the refugee claimant was most directly concerned;

(iii) the refugee claimant's duties and activities within the organization;

(iv) the refugee claimant's position or rank in the organization;

(v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and

(vi) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.

See *Ryivuze*, at para. 38; *J.S.*, at para. 30; and *Mbarushimana*, Decision on the Confirmation of Charges, at para. 284.

92 **When relying on these factors for guidance, the focus must always remain on the individual's contribution to the crime or criminal purpose. Not only are the factors listed above diverse, they will also have to be applied to diverse circumstances encompassing different social and historical contexts. Refugee claimants come from many countries and appear before the Board with their own life experiences and backgrounds in their respective countries of origin. Thus, the assessment of the factors developed in our jurisprudence, the decisions of the courts of other countries, and the international community will necessarily be highly contextual. Depending on the facts of a particular case, certain factors will go "a long way" in establishing the requisite elements of complicity. Ultimately, however, the factors will be weighed with one key purpose in mind: to determine whether there was a voluntary, significant, and knowing contribution to a crime or criminal purpose.**

93 **In the present case, it will be for the Board to determine which factors are significant, based on the application before it. To provide guidance to the Board in making this determination, it may be of assistance to briefly elaborate on each of the factors listed above.**

> …
>
> 100 **We reiterate that the factors discussed above should be relied on only for guidance.** We agree with Lord Kerr J.S.C.'s statement in *J.S.*, at para. 55:
>
> > ... they are not necessarily exhaustive of the matters to be taken into account, nor will each of the factors be inevitably significant in every case. One needs, I believe, to concentrate on the actual role played by the particular person, taking all material aspects of that role into account so as to decide whether the required degree of participation is established.
>
> **A full contextual analysis would necessarily include any viable defences, including, but certainly not limited to, the defence of duress, discussed above.**
>
> [emphasis added]

[44] Accordingly, in my view, it was not an error for the ID not to have explicitly and individually addressed each of the six factors in its decision. They are intended for guidance and several of them had little application in the factual matrix of the matter that was before it. For example, as acknowledged by the ID, the Applicant was not a member of the Security Agency. Therefore, a consideration of his duties and activities within, or his position or rank in, that organization would have had little relevance.

[45] Further, in *Canada (Citizenship and Immigration) v Badriyah*, 2016 FC 1002, Justice Roussel held that the "RPD is not required to outline precisely how the *Ezokola* factors were applied to the facts of the case and that it is sufficient that factual findings reasonably support a decision-maker's conclusion" (at para 27). And, in *Pacheco Moya v Canada (Citizenship and Immigration)*, 2014 FC 996, the Refugee Protection Division ("RPD") had applied *Ezokola* to exclude the applicant from refugee protection pursuant to Article 1F(a) of the

Refugee Convention on the basis that he was an agent of the Shining Path in Peru, a terrorist organization. In that case, the RPD in its reasons noted that the length of time the applicant was in the organization and the method by which he was recruited were not relevant factors since the applicant was not a member. The applicant was still found to have voluntarily made a significant and knowing contribution to the organization's criminal activities and was excluded on that basis and this Court subsequently dismissed an application for judicial review of the RPD's decision.

[46] However, in my view, even if the six factors had limited application based on the facts of the matter before it, the ID was still required to conduct a full contextual analysis based on those facts when applying the significant contribution test.

C. Voluntary contribution to the crime or criminal purpose

Applicant's Position

[47] The Applicant submits that in *Ezokola* the Supreme Court of Canada set out the requirements for voluntariness, which captures the defence of duress. However, duress and voluntariness are not one and the same. Coercion that does not rise to the level of duress may still negate voluntariness (*Ezokola* at paras 86 and 99).

[48] In this regard, the Applicant testified that he was pressured to provide information in order to avoid removal to Iraq, where he fears kidnapping, death and torture. While acknowledging this fear, the ID found that the Applicant made a voluntary contribution. In its reasons the ID stated that "the pressure or threat suffered by the PC [Applicant] does not

constitute a defence of duress" as he did not face any "implicit threat of death or bodily harm" and "given the above", the ID concluded that the Applicant made a voluntary contribution to the organization's crimes. The Applicant submits that the language "given the above" demonstrates that, for the ID, lack of duress was determinative of the issue of voluntariness. Further, in its examination of voluntariness, the ID did not weigh the factors identified in *Ezokola*, including the method of recruitment and opportunity to leave.

[49] The Applicant also submits, however, that the Court cannot know why the ID did not highlight certain aspects of the Applicant's travel history. It was improper for the Respondent to raise matters, such as the Applicant's Schengen visa and travel to Italy, in in its memorandum thereby supplementing the findings of the ID. Nor is it the Court's role to provide reasons that were not given, to guess what findings might have been made or to speculate as to what the decision-maker might have been thinking (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11 ("*Komolafe*")).

Respondent's Position

[50] The Respondent submits that the Applicant is misconstruing the nature of the voluntariness element of complicity. There is an inherent contradiction in taking the position, on the one hand, that the Applicant was coerced into providing information while, on the other hand, that what he was doing was in connection with legitimate security screening. For duress or coercion to be legally relevant to the complicity analysis, it must be tied to the participation in the group's criminal purpose (*Ezokola* at para 92).

[51] The Respondent submits that being "uncomfortable" with cooperating does not rise even close to the level required to prove duress. Further, the Applicant had multiple opportunities to leave the UAE to flee to countries other than Iraq. Instead of travelling to another country using his Shengen visa (which allowed him to enter most European countries), or his United States visa, or to Turkey where some of his family resides, he chose to remain in the UAE and continue acting as an informant for the Security Agency for approximately five years. This militates strongly against any notion of coercion or duress in providing information to the Security Agency as the Supreme Court of Canada in *Ezokola* specifically noted opportunity to leave as material to the concept of voluntariness (at para 86).

[52] The Respondent notes that, in his sworn testimony the Applicant stated that he did not feel at risk when he travelled to Italy for two weeks in 2013. This too contradicts any notion that he was an informant under duress.

[53] As stated in *Ezokola*, the voluntariness requirement captures the defence of duress which is well recognized in customary international law, as well as in article 31(1)(d) of the *Rome Statute*. Accordingly, the ID did not err in its discussion of duress. The ID cited the Supreme Court of Canada's decision in *Ryan*, which set out the common law requirement to prove duress being that an applicant must prove he acted under a threat of imminent death or serious bodily harm, and that he did not intend to cause a greater harm than the one sought to be avoided (at paras 55 and 70). The Respondent submits that this is comparable to the test set out in the *Rome Statute*, endorsed by the Supreme Court in *Ezokola*, and that the ID did not err in this regard. The Applicant was never under a threat of imminent death or serious bodily harm

and, even if this was his fate upon deportation to Iraq, the Applicant had other countries to which he could flee. Thus, his contribution was voluntary.

Analysis

[54] In *Ezokola* the Supreme Court of Canada stated the following with respect to the assessment of voluntariness:

> (1) *Voluntary Contribution to the Crime or Criminal Purpose*
>
> 86 It goes without saying that the contribution to the crime or criminal purpose must be voluntarily made. While this element is not in issue in this case, it is easy to foresee cases where an individual would otherwise be complicit in war crimes but had no realistic choice but to participate in the crime. To assess the voluntariness of a contribution, decision makers should, for example, consider the method of recruitment by the organization and any opportunity to leave the organization. The voluntariness requirement captures the defence of duress which is well recognized in customary international criminal law, as well as in art. 31(1)(d) of the Rome Statute: Cassese's International Criminal Law, pp. 215-16.
>
> …
>
> 99 *The method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.* As mentioned, these two factors directly impact the voluntariness requirement. This requirement may not be satisfied if an individual was coerced into joining, supporting, or remaining in the organization. Similarly, an individual's involvement with an organization may not be voluntary if he or she did not have the opportunity to leave, especially after acquiring knowledge of its crime or criminal purpose. The Board may wish to consider whether the individual's specific circumstances (i.e. location, financial resources, and social networks) would have eased or impeded exit.
>
> 100 We reiterate that the factors discussed above should be relied on only for guidance. We agree with Lord Kerr J.S.C.'s statement in *J.S.*, at para. 55:

> . . . they are not necessarily exhaustive of the matters to be taken into account, nor will each of the factors be inevitably significant in every case. One needs, I believe, to concentrate on the actual role played by the particular person, taking all material aspects of that role into account so as to decide whether the required degree of participation is established.
>
> A full contextual analysis would necessarily include any viable defences, including, but certainly not limited to, the defence of duress, discussed above.

[55] In this matter the ID's voluntariness analysis was brief. It quoted paragraph 86 of *Ezokola* and noted that counsel for the Applicant had submitted that the Applicant provided information to the Security Agency because he feared being deported to Iraq, and was pressured into attending meetings with members of the Security Agency, which indicated that the Applicant did not provide a voluntary contribution. The ID then stated that the evidence clearly indicated that the pressure or threat suffered by the Applicant did not constitute a defence of duress as defined in *Ryan*. Fearing deportation or being pressured is not an explicit or implicit threat of death or bodily harm, which finding was supported by the fact that the Applicant had maintained his collaboration for five years before leaving the country.

[56] While the ID's limited reasons do acknowledge paragraph 86 of *Ezokola*, its assessment of voluntariness was comprised only of its finding that the evidence failed to constitute the defence of duress as defined in *Ryan*. It is unclear why the ID would reference *Ryan* when considering the defence of duress, rather than customary international law or article 31(1)(d) of the *Rome Statute*. More significantly, in *Ezokola* the Supreme Court of Canada found that voluntariness "captures" the defence of duress, and further that a full contextual analysis would

"necessarily include" any viable defences, including but not limited to, the defence of duress (*Ezokola* at para 100), which suggests that the assessment of voluntariness that it identified was not limited to that defence. As well, to assess the voluntariness of a contribution, other considerations such as the method of recruitment by the organization and any opportunity to leave the organization, should be considered (*Ezokola* at para 99). More importantly, these considerations were cited by way of example and were not exhaustive. In my view, the ID was required to conduct a full contextual factual analysis in the context of the Applicant's circumstances and to assess voluntariness based on that analysis.

[57] In the result, I agree with the Applicant that the ID's voluntariness assessment was unreasonable as the ID's reasons suggest that it considered only whether the Applicant met the defence of duress as set out in *Ryan* when assessing the Applicant's contribution to the Security Agency's crime or criminal purpose.

[58] I would also note that the Respondent's submissions are based on an analysis of the evidence and other considerations that are simply not addressed in the ID's voluntariness assessment. The Respondent submits that based on the evidence, in particular, the Applicant's ability to leave Iraq, that even if the ID erred in its voluntariness analysis the outcome is inevitable. I agree that the Applicant's ability to leave the UAE, and thereby sever his ties with the Security Agency at an earlier date, would have been relevant to the ID's complicity analysis (*Ezokola* at paras 86 and 99; *Ndikumasabo v Canada (Citizenship and Immigration)*, 2014 FC 955 at para 34; *Shalabi* at para 51). However, the problem is that it did not conduct that analysis and it is not the role of the Respondent, or this Court, to assess the evidence on the record and

make a conclusion as to whether or not the Applicant's contribution was voluntary. This was the role of the ID.

[59] As stated by Justice Rennie in *Komolafe*:

> [11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[60] In my view, the ID's assessment of the voluntariness factor was unreasonable as it failed to conduct a full contextual analysis of whether the Applicant was coerced into providing information to the Security Agency and limited its assessment to whether he established the *Ryan* defence of duress. A full contextual analysis would have included consideration of the credibility of his evidence that, if he stopped cooperating, he would be deported to Iraq where his life would be at risk. Further, whether the evidence concerning his ability to leave the UAE prior to fleeing to Canada mitigated his claim that he involuntarily acted as an informant.

[61] Given this conclusion it is not necessary to address the other issues raised by the Applicant, the application for judicial review must be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the ID is set aside and the matter is remitted for redetermination by a different panel;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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