Federal Court  Cour fédérale

Date: 20201208

Docket: IMM-7321-19

Citation: 2020 FC 1124

Montréal, Québec, December 8, 2020

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

KHITAM S. S. KHUDEISH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Ms. Khitam Khudeish, the Applicant, seeks judicial review of the decision rendered by the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD] on November 14, 2019, which reversed a decision of the Refugee Protection Division [RPD] accepting Ms. Khudeish's claim for refugee protection.

[2] The RAD allowed the appeal and substituted the RPD's decision with its own. It found that given the evidence, there were serious reasons for considering that Ms. Khudeish should be excluded under section 98 of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [the *Immigration Act*], which incorporates Article 1(F) of the *Convention Relating to the Status of Refugees*, 28 July 1951, Can TS 1969 No 6 [the Refugee Convention]. Consequently, the RAD found that Ms. Khudeish is neither a Convention refugee nor a person in need of protection.

[3] For the reasons set out below, Ms. Khudeish's Application for judicial review [the Application] should be dismissed.

II. Relevant Background

[4] Ms. Khudeish is a stateless Palestinian (Applicant's Memorandum at para 3). In 1948, her family was displaced from Haifa to Baghdad, Iraq, where she was born and lived until 2006. In 2006, she fled to Jordan after what she describes as a years-long pattern of religious persecution, which killed or injured multiple members of her family.

[5] In May 2016, Ms. Khudeish arrived to Canada with her daughter, both holding a valid visitor visa issued by the Canadian authorities in Pretoria, South Africa. Ms. Khudeish's husband was then the Palestinian ambassador to Angola.

[6] In September 2016, Ms. Khudeish and her daughter claimed refugee protection in Canada, based on their religious and political opinions and their fear of persecution in Iraq.

[7] Central to the assessment of her claim is the fact that from 1984 to 2006, Ms. Khudeish worked for the Palestinian Liberation Organisation [PLO] in Baghdad.

[8] In her Basis of Claim Form, Ms. Khudeish indicated that she was educated in Iraq as an accountant and worked for the "PLO social services" from January 1984 to August 2006 (Certified Tribunal Record [CTR] at page 93). Her file before the RPD included a letter from the Embassy of the State of Palestine dated October 29, 2016, certifying that Ms. Khudeish worked at the Embassy in Iraq from 1984 to 2006 under the job title "Responsible on Palestine Martyr's Families Foundation."

[9] On November 4, 2016, the RPD notified Citizenship and Immigration Canada that it believed Article 1(F)(a)of the Refugee Convention may apply to Ms. Khudeish's claim (CTR at page 51). The RPD highlighted the fact that she worked for the PLO from January 1984 to August 2006, a period that included the first "intifada" and the Lebanese civil war (CTR at pages 481-82). The Minister did not intervene, and the issues related to the Minister's intervention, which were at play before the RAD, are not before the Court.

[10] Before the RPD heard the claim, in January 2018, Ms. Khudeish amended her Basis of Claim Form to explain discrepancies between the information she provided on her refugee and visa applications and, more importantly for this Application, to provide additional information on her work for the PLO.

[11] In said amendment, Ms. Khudeish added, regarding her work at the PLO: “My work at PLO was at the department of Palestine Marty’s [sic] Family, this department gave welfare/social assistant [sic] to families of deceased. It was an administrative part-time position. I worked only 10 days out of a month, I would receive a list of names of people to receive financial help, I would distribute the funds and check people’s names off the list who had appeared and received the money, these were usually older women, mainly widows” (CTR at page 124).

[12] At the hearing, the RPD member questioned Ms. Khudeish on her work for the PLO. She provided what can be described as evolving descriptions. She first indicated that her duties included investigating whether prospective aid recipients had financial needs. Subsequently, she stated that her duties were limited to verifying names on a list of prospective aid recipients.

[13] On January 15, 2018, at the conclusion of the hearing, the RPD rendered its decision (CTR at pages 85 and following) and allowed Ms. Khudeish’s claim for protection.

[14] Regarding Ms. Khudeish’s credibility, the RPD noted that “it was not perfect” (CTR at page 450). The RPD found that Ms. Khudeish had not been totally forthcoming about her work, and that she misrepresented herself in her visa application. In regards to the explanation she provided regarding her visa application, the RPD indicated: “So I am not sure I believe your testimony about that being a mistake. But, despite these concerns with regard to your credibility, I am satisfied that there is sufficient credible evidence to support [my] conclusions” (CTR at pages 450).

[15] The RPD dedicated five short paragraphs of its analysis to the exclusion issue (under article 1(F) of the Convention and section 98 of the Immigration Act). It found Ms. Khudeish evasive about the details of her work and outlined discrepancies between her testimony and the information contained in the letter from the Embassy of Iraq of October 2016. Ultimately relying on the letter, the RPD found that the payments Ms. Khudeish made in her role were most likely to the families of martyrs – not the families of people who needed social welfare. However, the RPD added that, even if that was the case, the act of providing such payments would not engage the exclusion clause, and that it had no evidence or information suggesting that the Foundation was involved in human rights abuses.

[16] The RPD made no mention of the framework set out by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration*), 2013 SCC 40 [*Ezokola*], and no explicit mention of the relevant factors that determine whether or not the exclusion applies. The RPD granted the protection sought.

III. The RAD Decision

[17] Although the Minister did not intervene in the RPD proceedings, he appealed the RPD decision before the RAD. In his Notice of Appeal (CTR at pages 34 and following), the Minister raised the issues of credibility and exclusion under article 1(F) of the Refugee Convention. The Minister relied on section 110(5) of the Immigration Act to submit new documentary evidence in the form of four open source articles on the PLO's programs (CTR at pages 6, 11).

[18] Before the RAD, the Minister submitted first that the RPD failed to inform him of possible integrity issues, thereby depriving him of the opportunity to intervene, and second that the RPD erred, as it did not conduct an exclusion assessment or apply the correct legal test to determine whether the exclusion under article 1(F) of the Refugee Convention applied.

[19] The Minister confirmed that he was not requesting a hearing before the RAD. He asked that the appeal be allowed, and that the file be sent back to the RPD for re-determination. If the RAD were unable to do so without a hearing, the Minister confirmed that he would attend a hearing to question Ms. Khudeish and make further submissions.

[20] In response, per subsection 110(5) of the Immigration Act, Ms. Khudeish adduced an additional letter from the Embassy of Palestine in Iraq dated March 25, 2018, as well as a written statement (CTR at page 6). This new letter sought to clarify the previous letter of October 2016: it states that Ms. Khudeish's job was "not clarified, accurate as she worked in the Social Work institution" and that she was never in a decision-making position, nor did she participate in any decisions of the institution. The letter states that "her work was limited only of receiving lists of names of widows or people who needed essential social assistance or people who were waiting for their turn to receive the benefits" (CTR at page 565).

[21] In her written statement, sworn on April 18, 2018, Ms. Khudeish addressed the inconsistencies raised by the RPD regarding her visa application, as well as the finding of evasiveness regarding her description of her duties. She affirmed having referred to the "martyr's foundation" at the request of her counsel and to match the content of the first letter from the

Embassy in Iraq. She also outlined the answers she provided to the Canada Border Services Agency [CBSA] during an interview in March of 2018 regarding the nature of her work and her dedication to peace and helping the poor. The transcript of the CBSA interview was not before the RAD, which had access neither to evidence of its occurrence nor to its content. The CTR contains no information related to it. I will thus not consider it.

[22] Before the RAD, Ms. Khudeish argued that the RPD did not err given the evidence before it and that its analysis was sufficient and in keeping with the test set out by the Supreme Court of Canada in *Ezokola* – although the member did not cite the decision. She also submitted that if the RAD concluded that the RPD failed to undertake a proper exclusion analysis, given the evidence before it, the RAD could substitute its own reasons and undertake this analysis.

[23] Ms. Khudeish also confirmed to the RAD that she was not asking for a hearing (under subsection 110(6) of the Immigration Act), unless the RAD deemed one appropriate.

[24] The RAD accepted the new evidence submitted by both parties.

[25] In its decision, it first concluded that the RPD had not breached the principles of natural justice by not informing the Minister of the amendment to the Basis of Claim Form.

[26] Regarding the issue of exclusion under section 98 of the Immigration Act and Article 1(F) of the Refugee Convention, the RAD found that the RPD's analysis was an insufficient assessment of Ms. Khudeish's potential complicity in criminal activity. The RAD referred to

Ezokola to outline that complicity arises out of contribution and that the RPD failed to explain how Ms. Khudeish actions did not meet the three requirements of a voluntary, significant and knowing contribution to an organisation's criminal activity or purpose.

[27] The RAD agreed with Ms. Khudeish that it had the jurisdiction to finalise the decision based on the evidence available on record. It proceeded to examine each of the *Ezokola* factors sequentially.

[28] Regarding the preliminary step of identifying the organisation and its criminal purpose, the RAD relied on item 2.24 of the National Documentation Package [NDP] for Palestine (dated 21 December 2017), i.e. a report from intelligence authorities in the United Kingdom, and on a press article on the PLO's relationship to the funding of terrorism (CTR at pages 10-11, and accompanying notes). The RAD found, on a balance of probabilities, that the Palestine Martyrs' Families Foundation was created by the PLO to fulfill the criminal purpose of incentivising acts of terrorism against Israelis.

[29] The RAD then proceeded to consider the factors of the complicity analysis as set out in *Ezokola.* As mentioned, the test requires that the individual's contribution to the criminal purpose be (1) voluntary, (2) significant, and (3) knowing (*Ezokola* at paras 84-90).

[30] The RAD first concluded that Ms. Khudeish had worked for the organisation voluntarily for 22 years.

[31] In assessing whether Ms. Khudeish made a significant contribution to the organisation's purpose, the RAD noted that she was not a credible witness and that the job description she provided varied from her testimony at the RPD hearing, her Basis of Claim Form, her written statement filed before the RAD, and her memorandum. The RAD relied on decisions of our Court for the proposition that "admissions against interest" are believable (*Rathinasigngam v Canada (Citizenship and Immigration*), 2006 FC 988 at para 50; *Andeel v Canada (Citizenship and Immigration)*, 2003 FC 1085 at para 17). It thus found, on balance of probabilities, that Ms. Khudeish worked for the Palestine Martyrs' Families Foundation for 22 years and that she had some responsibility in investigating the recipients of payments and issuing the payments. The RAD concluded that Ms. Khudeish had made a significant contribution to the PLO's criminal purpose by issuing the sums of payments and facilitating payments to family members of terrorists.

[32] The RAD afforded little evidentiary weight to the letters from the Embassy in Iraq. It found that the first one gave no details on Ms. Khudeish's duties, and that the second one, which states that she worked for the PLO's Social Work institution, did not persuasively contradict the purpose and mandate of the PLO as established by the new evidence adduced by the Minister.

[33] The RAD also found that Ms. Khudeish's contribution was significant because she worked for the PLO during the first (1987-1993) and second (2000-2005) intifadas. Relying mainly on the documentary evidence before the RPD, and also on the Minister's new evidence, the RAD noted that during the first intifada, the PLO's main purpose was to use armed struggle to create a Palestinian state, and that the Fatah nationalist movement constituted the largest of the

various factions of the PLO (CTR at page 16). The RAD also noted that the Fatah's objective during the second intifada period was the removal of the Israeli military and of settlers from the West Bank, that it was employing suicide bombings within Israel, and that in 2003, Canada declared it a terrorist entity (CTR at pages 16-17).

[34] Referring to the teachings of the Supreme Court at paragraph 87 of *Ezokola*, the RAD found that Ms. Khudeish's contribution was not that of mere association or passive acquiescence. Even if she did not have a management role, the RAD found that her contribution was significant because her work directly concerned the foundation's objective, which was to issue payments to the families of individuals who committed unlawful killings and acts of violence, which in turn incites further acts of martyrdom. The RAD therefore deemed that Ms. Khudeish's contribution to the foundation's objectives was significant.

[35] The RAD noted that Ms. Khudeish maintained that she did not know why payments were issued to the families whose names appeared on the list, that she understood her work to be of a social work nature, and that she had no role in decision-making. The RAD also noted that, as per her memorandum, she knew that she had to cross names off a list and that the payments she made would assist people in need. The RAD mentioned the evidence to the effect that Palestinians who gave their life to kill Israelis were referred to as martyrs by the PLO and that the nature of the PLO's programs was well-known among the Palestinian community, both in Palestine and internationally.

[36] The RAD thus found, on a balance of probabilities, that Ms. Khudeish was aware of the criminal purpose of the PLO, as the relevant program had existed for over 50 years, 22 of which she spent working for the PLO.

[37] The RAD therefore found that Ms. Khudeish meets the requirements for exclusion under Article 1(F) of the Refugee Convention, as incorporated into Canadian law by section 98 of the Immigration Act. The RAD found that, given the evidence, there were serious reasons for considering that Ms. Khudeish should be excluded for being complicit in crimes against humanity, as she had contributed to a program that funds terrorism. The RAD thus excluded her and determined she was neither a Convention refugee nor a person in need of protection.

IV. Questions before the Court

[38] The Court must confirm the applicable standard of review and, given the parties' submissions, determine if the RAD (1) breached procedural fairness by (a) not examining if it needed to hold a hearing under subsection 110(6) of the Immigration Act or (b) by making credibility findings that were never made by the RPD without an oral hearing; and (2) erred in its application of the *Ezokola* complicity test.

V. Discussion

A. *Procedural Fairness*

(1) Assessment of procedural fairness

[39] The standard to apply to issues of procedural fairness has been the subject of much debate in recent years.

[40] In *Canadian Pacific Railway Company v Canada (Attorney General*, 2018 FCA 69 at paras 55-56 [*Canadian Pacific*], the Federal Court of Appeal has indicated that:

> Attempting to shoehorn the question of procedural fairness into a standard of review analysis is also, at the end of the day, an unprofitable exercise. Procedural review and substantive review serve different objectives in administrative law. While there is overlap, the former focuses on the nature of the rights involved and the consequences for affected parties, while the latter focuses on the relationship between the court and the administrative decision maker. Further, certain procedural matters do not lend themselves to a standard of review analysis at all, such as when bias is alleged. As Suresh demonstrates the distinction between substantive and procedural review and the ability of a court to tailor remedies appropriate to each is a useful tool in the judicial toolbox, and, in my view, there are no compelling reasons why it should be jettisoned.
>
> No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an a priori decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice – was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference [emphasis added].

[41] See for further discussion Bergeron v Canada (Attorney General), 2015 FCA 160 at paras 67-72 and *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at paras 10-14).

(2) Hearing under subsection 110(6) of the Immigration Act

(a) *Each Party's Position*

[42] Ms. Khudeish submits that a hearing was required in light of the new evidence she submitted, particularly pointing to the March 2018 letter from the Embassy in Iraq. She argues that this letter raised a serious issue regarding her own credibility, since it amended the previous letter from the Embassy. She further submits that this credibility issue was central to the RAD decision. Ms. Khudeish points out that the RPD found her to be a credible witness, as it reinforces her submissions that the RAD made credibility findings from the new evidence she introduced.

[43] Ms. Khudeish also submits that the RAD relied on the Minister's new evidence, i.e. the open source documents discussing certain funding activities of the PLO, to make negative credibility findings. She argues that the new evidence was determinative of the credibility issues, which should have triggered the requirement of a hearing under subsection 110(6) of the Immigration Act. She submits that the RAD should at least have addressed why it did not hold a hearing. She stresses that the RAD completely failed to independently apply the relevant provisions of the Immigration Act and determine whether the Minister's and her own new documentary evidence triggered subsection 110(6) of the Immigration Act. In failing to do so, the RAD omitted a key and necessary aspect of the analysis.

[44] Ms. Khudeish argues that an oral hearing was undoubtedly required to address four critical issues, all of which she argues engaged her credibility (and which she describes at page 19 of her memorandum). She relies on *Canadian Pacific* cited above.

[45] The Minister responds that the issues raised by the RAD arose from the record and the new evidence, such that the member was not required to hold a hearing. These issues arose from the contradictions between the Applicant's versions of events as recorded in her statements, her amended statement, and the transcript of the RPD hearing. The Minister further argues that the member has discretion not to hold a hearing even if the factors are met.

(b) *Analysis*

[46] The statutory regime of the Immigration Act contemplates an appeal to the RAD of a decision of the RPD on questions of law, fact, and mixed fact and law. Per subsection 110(3), the RAD is required to proceed without a hearing, on the basis of the record that was before the RPD. The parties have limited rights to present new evidence under subsection 110(4) and to benefit from an oral hearing under subsection 110(6) (*Nuriddinova v Canada (Citizenship and Immigration)*, 2019 FC 1093 [*Nuriddinova*]).

[47] The *possibility* of an oral hearing is an exception. Subsection 110(6) of the Immigration Act outlines the conjunctive conditions that must be met for a hearing to be held. However, as the Minister submits, even if the conditions are met, the RAD retains discretion not to hold a hearing. Subsection 110(6) states:

> The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3):
>
> a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
>
> b) that is central to the decision with respect to the refugee protection claim; and
>
> c) that if accepted, would justify allowing or rejecting the refugee protection claim.

[48] In this case, although new evidence was adduced by both parties, Ms. Khudeish has not convinced me that it raised any serious issues with respect to her credibility.

[49] First, and contrary to her position at the hearing before the Court, the RPD did not confirm that Ms. Khudeish was a credible witness. Indeed, the RPD clearly *did* raise concerns regarding her credibility (see e.g. page 450 of the CTR, discussed above).

[50] Furthermore, the new evidence adduced by the Minister before the RAD pertained to the activities of the PLO in regards to its criminal purpose, and did not engage Ms. Khudeish's credibility. This evidence remained uncontradicted, and Ms. Khudeish, although she submitted new evidence before the RAD, did not submit any documentary evidence to address this issue.

[51] The RAD did find that Ms. Khudeish was not a credible witness (see e.g. paras 67-74 of the RAD decision (pages 17-18 of the CTR), where the RAD rejects her testimony on key issues), which is not an unreasonable position in light of the fact that she provided inconsistent, evolving descriptions of her duties before the RPD. The RAD thus considered the various

versions Ms. Khudeish offered of her duties at the PLO, including the one she outlined in her written memorandum submitted to the RAD, and given the inconsistencies, the RAD retained the elements that constituted “admissions against interest”. Our Court has confirmed in *Rathinasigngam* (at para 50) that the RAD could do so, and the record shows that Ms. Khudeish’s descriptions did include the elements selected by the RAD.

[52] Neither letters from the Embassy of the State of Palestine in Iraq engaged credibility issues for the RAD. The RAD examined the two letters sequentially and afforded them little evidentiary weight, thus not triggering any credibility issues.

[53] Ms. Khudeish submitted no authorities to support her proposition that the RAD should have specifically addressed, in its decision, why it exercised its discretion not to hold an oral hearing. Recent case law of our Court states otherwise (see e.g. *Smith v Canada (Citizenship and Immigration*), 2019 FC 1472 at para 46 [*Smith*]).

[54] Considering that (1) no credibility issues arose from the new evidence; (2) the parties did not request an oral hearing but in fact confirmed to the RAD that they did not require one; and (3) our Court confirmed in *Smith* that there is no obligation for the RAD to deny a hearing; I find that subsection 110(6) of the Immigration Act was not engaged and that the RAD had no obligation to deny a hearing.

(3) Hearing to assess credibility findings

(a) *Each Party's Position*

[55] Ms. Khudeish submits that the RAD also breached procedural fairness by making credibility findings that were not made by the RPD, without holding an oral hearing. Ms. Khudeish notes the RAD stated that it "does not find [her] to be a credible witness," which she alleges is starkly different from the RPD's credibility assessment. She argues that the RAD can and must hold a hearing before reaching different credibility findings, even when the circumstances of subsection 110(6) of the Immigration Act are not at play.

[56] The Minister submits that the RAD is entitled to make credibility findings when credibility was at issue before the RPD, as it was in this case.

(b) *Analysis*

[57] Ms. Khudeish outlined at the hearing that the argument I just laid out is different from the one described in the previous section, pertaining to an oral hearing under subsection 110(6) of the Immigration Act.

[58] As I mentioned earlier, and contrary to Ms. Khudeish's assertion, credibility was at play before the RPD. While the RAD cannot raise a new issue without notice to the parties, it is entitled to make independent findings of credibility regarding an appellant where credibility was

at issue before the RPD and where the findings arise from the evidentiary record (*Nuriddinova*). In this case, the RAD could thus make independent credibility findings.

[59] Ms. Khudeish essentially submits, as confirmed by her counsel at the hearing, that she wants the Court to create an obligation for the RAD to hold a hearing in these circumstances, even though the Immigration Act creates no such exception to the general principle that the RAD proceeds without a hearing. To support that suggestion, she ostensibly relies on broader principles of procedural fairness.

[60] I see no reason to do so, and I will therefore decline her invitation.

B. *Exclusion under section 98; Assessment of the Ezokola Factors*

(1) Each Party's Position

[61] Ms. Khudeish first submits that the RPD did not err by conducting a summary assessment of the *Ezokola* exclusion factors, as the Minister had not intervened and as the RPD's role does not extend to independently researching and investigating a case. That, she submits, would be the role of the Minister when he intervenes.

[62] Subsidiarily, Ms. Khudeish argues that the RAD erred in its application of the *Ezokola* factors, in that it lacked a reasonable basis to conclude that the PLO had a criminal purpose, did not explain how her duties amounted to the level of a *significant* contribution, and did not have the evidentiary basis to find that the widows and orphans who received the payments were

"family members of terrorists" who committed unlawful violent acts and killings. Ms. Khudeish submits that the RAD's reliance on the "common design" concept of paragraph 87 of the *Ezokola* decision was misplaced, and resulted in an erroneous finding of a significant contribution.

[63] The Minister responds that the RAD's findings regarding the nature of the Fund are consistent with those of the RPD, and that the member reasonably rejected the Applicant's description of the purpose of her work. The Minister also submits that sufficient evidence was available to establish the nexus between the Applicant's contribution and the organisation's purpose.

(2) Analysis

(a) *Standard of review*

[64] The analytical framework for judicial review of an administrative decision is based on a presumption that the standard of reasonableness applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). Respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 53). These legal questions are not in play here.

[65] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on “an internally coherent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85).

[66] It is this Court’s responsibility to see if the decision is reasonable in terms of both the outcome and the process (*Vavilov* at para 83). This approach requires this Court to assess whether the RAD’s determination is justified, transparent, and intelligible and whether the decision falls within a range of possible, acceptable outcomes that are defensible on the facts and law (*Vavilov* at para 86; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[67] On judicial review, our Court must respect the administrative decision maker’s privileged position in assessing the evidence. As the Supreme Court has confirmed in *Vavilov*, “[A]bsent exceptional circumstances, a reviewing court will not interfere with [these] factual findings” (at para 125).

(b) *Exclusion under section 98*

[68] Section 98 of the Immigration Act provides that a person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection. The person is thus “excluded” from protection.

[69] In turn, article 1(F) of the Refugee Convention states that:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> c) He has been guilty of acts contrary to the purposes and principles of the United Nations [emphasis added].

[70] It is not necessary for the individual to have personally engaged in criminal activity. The individual can be excluded under the article if they contribute to the criminal purpose of an organisation. The Supreme Court of Canada set out the test for exclusion on this basis in *Ezokola*. The test requires that the individual's contribution to the criminal purpose be (1) voluntary, (2) significant, and (3) knowing (at paras 84-90). The Court provides the following as further guidance at paragraph 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.

[71] A significant contribution is less than an essential contribution (*Ezokola* at paras 55-56), but goes beyond mere association. The Court states: "For our purposes, we simply note that joint criminal enterprise, even in its broadest form, does not capture individuals merely based on rank or association within an organization or an institution. It requires that the accused have made, at a minimum, a significant contribution to the group's crime or criminal purpose, made with some form of subjective awareness (whether it be intent, knowledge, or recklessness) of the crime or criminal purpose. In other words, this form of liability, while broad, requires more than a nexus between the accused and the group that committed the crimes. There must be a link between the accused's conduct and the criminal conduct of the group" (at para 67 [references omitted]).

[72] The Court adds that: "In our view, mere association becomes culpable complicity for the purposes of art. 1F(a) when an individual makes a significant contribution to the crime or criminal purpose of a group. As Lord Brown J.S.C. said in J.S., to establish the requisite link

between the individual and the group's criminal conduct, the accused's contribution does not have to be 'directed to specific identifiable crimes' but can 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.' […] Given that contributions of almost every nature to a group could be characterized as furthering its criminal purpose, the degree of the contribution must be carefully assessed. The requirement of a significant contribution is critical to prevent an unreasonable extension of the notion of criminal participation in international criminal law" (at paras 87-88 [references omitted]).

[73] While the test encompasses a broad range of actions, the requirement of a *significant* contribution ensures that not all individuals who are part of an organisation can be excluded under article 1(F).

[74] On the last criterion (that the contribution be knowing), the Court gives the following guidance: "To be complicit in crimes [the individual] must be aware of the [organisation's] crime or criminal purpose and aware that his or her conduct will assist in the furtherance of the crime or criminal purpose. In our view, this approach is consistent with the *mens rea* requirement under art. 30 of the *Rome Statute*. Article 30(1) explains that 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with <u>intent</u> and <u>knowledge</u>.' Article 30(2)(a) explains that a person has intent where he 'means to engage in the conduct.' With respect to consequences, art. 30(2)(b) requires that the individual 'means to cause that consequence or is aware that it will occur in the ordinary course of events.' Knowledge is defined in art. 30(3) as 'awareness that a circumstance

exists or a consequence will occur in the ordinary course of events'" (at paras 89-90 [references omitted]).

[75] In *Ezokola*, the Court also states: "In contrast, where the group is identified as one with a limited and brutal purpose, the link between the contribution and the criminal purpose will be easier to establish. In such circumstances, a decision maker may more readily infer that the accused had knowledge of the group's criminal purpose and that his conduct contributed to that purpose." (at para 94 [emphasis added]; see also *Sarwary v Canada (Citizenship and Immigration)*, 2018 FC 437 at para 44 and *Canada (Citizenship and Immigration) v Kljajic*, 2020 FC 570 at paras 173-197).

[76] The RAD reasonably conclude that the PLO had a criminal purpose based on the evidence that was presented. Ms. Khudeish did not contradict this evidence with documentary evidence. The RAD's finding that the Palestine Martyrs' Families Foundation was created by the PLO to fulfill the criminal purpose of incentivising acts of terrorism against Israelis is supported by the evidentiary record.

[77] There is no question that Ms. Khudeish's employment was voluntary, and she did not argue otherwise.

[78] The RAD did explain which of Ms. Khudeish's duties it retained amongst the different versions she presented, and, as mentioned above, the jurisprudence from the Court confirmed it was open to the RAD to proceed as it did. The RAD referred to the evidentiary record to find that

the widows and orphans who received the payments were “family members of terrorists” who committed unlawful violent acts and killings. Given the nature of Ms. Khudeish’s duties and the nature of the payments, it was not unreasonable for the RAD to find they amounted to the level of a *significant* contribution to the criminal purpose of the organisation.

[79] Finally, the RAD reasonably applied the factors laid out by the Supreme Court in *Ezokola* to find that Ms. Khudeish made a knowing contribution to the PLO. The RAD focussed on the nature of the organisation, i.e. the Palestine Martyrs’ Families Foundation, which the RAD found had a single purpose, which was of a criminal nature. The RAD also noted that the relevant programs had existed for many decades, and that Ms. Khudeish had been employed by the organisation for 22 years. These three factors are included in the list provided at paragraph 91 of *Ezokola.*

[80] I have therefore not been convinced the decision of the RAD is unreasonable. The decision is based on “an internally coherent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). The Applicant has not convinced me that the determination is unreasonable in terms of either the outcome or the process.

JUDGMENT IN IMM-7321-19

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;

2. No question is certified;

3. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7321-19
STYLE OF CAUSE:	KHITAM S.S. KHUDEISH AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTREAL (BY WAY OF VIDEOCONFERENCE)
DATE OF HEARING:	NOVEMBER 4, 2020
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	DECEMBER 8, 2020

APPEARANCES:

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Ms. Alexandra Pullano	FOR THE RESPONDENT

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