Federal Court  Cour fédérale

Date: 20240726

Docket: IMM-4258-21

Citation: 2024 FC 1187

Toronto, Ontario, July 26, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

TAREK ALSEDIK BENTAHER

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In this judicial review, Mr. Bentaher challenges his exclusion from refugee protection based on the determination that he voluntarily made a knowing and significant contribution to crimes against humanity committed against illegal migrants by Libyan security authorities. He argues that recklessness is not a sufficient foundation for this determination. The Respondent disagrees, arguing that the decision to exclude him is reasonable.

[2] As explained below, I find that the exclusion decision is unreasonable because it lacks responsive justification and, therefore, Mr. Bentaher's judicial review application will be granted.

II. Factual Background

[3] The Applicant Tarek Alsedik Bentaher is a citizen of Libya who served in the Libyan military for more than 20 years, including the navy, during Gaddafi's regime. He reached the rank of Colonel. While in this role, Mr. Bentaher was responsible between 2008 and 2011 for supervising radar and communications at the Tripoli naval base and directing Libyan ships to intercept migrant vessels off the coast of Libya and transfer illegal migrants over to members of the Libyan security authorities on land.

[4] During the revolution in 2011 that led to Gaddafi's overthrow, Mr. Bentaher went into hiding and supported the revolution. After the revolution and before leaving Libya, he resumed his naval duties for a couple of years.

[5] Mr. Bentaher was accepted into a doctoral program in Canada and came here with his family in 2013. They claimed refugee protection in 2016, fearing retribution at the hands of Gaddafi supporters who were targeting officers who supported the revolution.

[6] The Minister of Public Safety and Emergency Preparedness [Minister] intervened before the Refugee Protection Division [RPD] and Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, arguing that Mr. Bentaher should be excluded from protection

under Articles 1F(a) and 1F(c) of the *United Nations Convention Relating to the Status of Refugees* [*Convention*].

[7] The RPD accepted the claims of the Mr. Bentaher's family but determined that he was excluded from protection under Article 1F(a) of the *Convention*. The RPD found there were serious reasons for considering that, during his time with the Libyan navy, Mr. Bentaher voluntarily made a significant and knowing contribution to the criminal acts committed against illegal migrants by the Libyan authorities of the Gaddafi regime.

[8] The RAD initially issued two decisions dismissing the appeal. Consequently, the Federal Court granted Mr. Bentaher's first judicial review application on consent. On the redetermination, the RAD dismissed the appeal again [Decision], finding that Mr. Bentaher is excluded from protection by reason of the combined effect of Article 1F(a) of the *Convention* and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. See Annex "A" for relevant legislative provisions.

[9] The RAD determined that there was insufficient evidence (i.e. a single 2009 Human Rights Watch report) to find that the navy was committing crimes against humanity. There was evidence, however, to find that security authorities on land were doing so in respect of migrants.

[10] The RAD thus concluded that there were serious reasons for considering that Mr. Bentaher voluntarily made a knowing and significant contribution to crimes against humanity

committed by security authorities reporting to the Ministry of the Interior, including the Department for Combatting Illegal Migration.

[11] In particular, the RAD found that Mr. Bentaher's supervisory role between 2008 and 2011—the duties of which were not in dispute—was sufficient to exclude him from refugee protection. During this time, migrants were subjected to serious and violent mistreatment by the navy and the army on land, including beatings and torture.

III. Issue and Review Standard

[12] Although the parties proposed two issues (excluding the standard of review), in my view they can be combined into a single determinative issue of whether the RAD's finding, that recklessness satisfies the knowledge or "knowing" component of the test for complicity in international crimes, is reasonable in light of the applicable test adopted by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]. If the RAD unreasonably construed the applicable test (i.e. an error of law), it simply cannot have been reasonably applied, as suggested by the Respondent's formulation of the issues.

[13] I find there are no circumstances here that displace the presumptive reasonableness review standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 17, 25.

[14] A decision may be found unreasonable if the party challenging the decision shows that the decision maker's analysis is not justified, transparent and intelligible in relation to the applicable factual and legal constraints: *Vavilov*, above at paras 85, 99-100, 125-126.

[15] A decision maker's failure to account for a party's central submissions or arguments meaningfully, or to reflect the stakes at issue, can render a decision unreasonable: *Vavilov*, above at paras 127, 133.

[16] Further, an administrative decision may be found unreasonable if the decision maker strays from binding precedent (i.e. an applicable legal constraint) without a reasonable explanation: *Browne v Canada (Citizenship and Immigration)*, 2022 FC 514 at para 7, citing *Vavilov*, above at paras 105, 111-112.

IV. Analysis

[17] My analysis briefly describes the test for culpable complicity by association set out in *Ezokola*, followed by a consideration of the concepts of *stare decisis* and comity, and capped off with a discussion of why, in my view, the RAD unreasonably misconstrued the *Ezokola* test.

A. *Ezokola Test for Complicity by Association*

[18] *Ezokola* holds (at para 29) "that an individual will be excluded from refugee protection under art. 1F(a) for complicity in international 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." What is at issue before me is not so much the test itself but rather what constitutes "knowing" and whether the RAD reasonably determined that recklessness satisfies the "knowing" (or *mens rea*) component of the test based on jurisprudence of this Court that suggests it includes recklessness. I find that the RAD's determination in this regard was unreasonable.

B. *Stare Decisis and Comity*

[19] I continue my analysis of the issue presently before this Court with the principle that "an administrative decision-maker is bound to follow applicable precedents originating from any court, let alone a court of appeal [or, as here, the Supreme Court of Canada]; the doctrine of stare decisis calls for no less": *Bank of Montreal v Li*, 2020 FCA 22 [*BMO*] at para 37, citing *Tan v Canada (Attorney General)*, 2018 FCA 186 [*Tan*] at para 22.

[20] Further, the Supreme Court of Canada teaches that "[t]he principle of judicial comity — that judges treat fellow judges' decisions with courtesy and consideration" — when overlaid with *stare decisis*, means that prior decisions of the same court should be followed (i.e. the principle of horizontal *stare decisis*), except in three narrow circumstances. Known as the *Spruce Mills* criteria, these disjunctive considerations comprise: (1) the rationale of an earlier decision has been undermined by subsequent appellate decisions; (2) the earlier decision was reached *per incuriam* ("through carelessness" or "by inadvertence"); or (3) the earlier decision was not fully considered, e.g. taken in exigent circumstances: *R v Sullivan*, 2022 SCC 19 at para 75, citing *Hansard Spruce Mills Limited (Re)*, 1954 CanLII 253 (BCSC).

[21] I add that horizontal *stare decisis* can be thought of as a variation of the concept of "vertical *stare decisis* — the idea that other courts are bound to follow precedent set by higher judicial authority" on the same issue: *Sullivan*, above at para 59.

[22] As the Federal Court of Appeal guides, and consistent with the second and third *Spruce Mills* criteria, "precedents may sometimes be revisited and… the doctrine of *stare decisis* is not inflexible": *BMO*, above at para 38. Further, "with the perspective of time, fresh arguments, and hindsight, decisions may not have been correctly decided": *Tan*, above at para 27.

[23] Courts and administrative decision makers alike may consider whether there are compelling reasons to depart from earlier jurisprudence: *Tan*, above at para 31. Attributing the following sentiment to Lord Denning, *Tan* observes (at para 27), that "[t]he doctrine of precedent does not compel [us] to follow the wrong path until [we] fall over the edge of a cliff."

[24] In short, justification is required to depart from an earlier decision of a different judge of the same court on the same issue; to do otherwise is an error of law: *Canada v Bowker*, 2023 FCA 133 at para 37. Justification includes that the earlier decision is manifestly wrong or can be distinguished: *Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210 at para 27.

C. *The RAD Unreasonably Construed the Ezokola Test*

[25] So where do the above principles leave us? They form the foundation for my determination that the RAD here unreasonably construed the *Ezokola* test and failed to provide

responsive justification to Mr. Bentaher's arguments on appeal from the RPD decision challenging the finding that recklessness alone is sufficient to give rise to culpable complicity (i.e. to meet the "knowing" part of the test).

[26] I find that the RAD was categorical in holding that "…'full awareness' is not required to establish a 'knowing' contribution within the meaning of the *Ezokola* analysis[… because] Mr. Bentaher at the very least **recklessly** made a significant contribution to the crimes or criminal purposes carried out by the members of the Libyan security authorities" (paras 70-71 of the Decision, with emphasis added). In reaching this conclusion, the RAD relied on this Court's decision in *Hadhiri v Canada (Citizenship and Immigration),* 2016 FC 1284 [*Hadhiri*] at paras 41-43.

[27] *Hadhiri* concludes (at para 43) that the applicant's argument relying on paragraph 60 of *Ezokola* – that recklessness likely is insufficient in international law to establish criminal intent – failed. In arriving at this conclusion, *Hadhiri* observes (at para 36) that, "… it is at least permissible to hold, when the RAD's decision is reviewed on a standard of reasonableness, that there was a form of recklessness supporting a finding of knowing, although secondary, contribution to the abuses committed by the Ministry of the Interior[; …] pursuant to *Ezokola,* it is permissible to find individuals guilty of complicity under international law if they have knowingly **or recklessly** made a significant contribution to a crime or criminal purpose of the group to which they are associated (*Ezokola,* at paragraph 68)."

[28] In my view, *Hadhir*i misconstrued *Ezokola*. I arrive at this conclusion unaware of the precise arguments and evidence presented to and considered by this Court in *Hadhiri* in a different factual context. In other words, I take a fresh look at this issue based on the record and arguments before the Court in the present matter.

[29] When confronted with Mr. Bentaher's arguments that *Hadhiri* was incorrectly decided, the RAD defaulted to *Hadhiri*. While usually it would not be unreasonable for the RAD to consider itself bound by this Court's jurisprudence, this is not one of those occasions in my view.

[30] The RAD should have grappled with Mr. Bentaher's arguments with resort to *Ezokola* itself, the penultimate binding decision here. I determine that the failure to do so has resulted in an unreasonable lack of responsive justification (*Vavilov*, above at paras 127-128), warranting the Court's intervention.

[31] Mr. Bentaher has brought the Court's attention in this judicial review to a recent RAD decision where the RAD panel did just that: *X (Re)*, 2023 CanLII 26206 (CA IRB) at paras 100-107 [*X (Re) 2023*]. These paragraphs from *X (Re) 2023* are reproduced in Annex "B" below. See also *X (Re)*, 2024 CanLII 37493 at paras 144-157 decided by the same RAD panel as in the 2023 decision of the same name.

[32] While *X (Re) 2023* is not binding on this Court, I find that, for similar reasons, the binding precedent and legal constraint in the present matter is *Ezokola* itself which examines in some detail the point at which mere association becomes culpable complicity. Indeed, *Ezokola*

defines this task early (at para 4): “It is the task of this Court to determine what **degree of knowledge** and participation in a criminal activity justifies excluding secondary actors from refugee protection” [emphasis added].

[33] The Supreme Court begins its analysis (at para 52) with the broadest modes of commission under current international criminal law. It reviews first (at paras 54-61) the principle of “common purpose” under paragraph 25(3)(d) of the *Rome Statute of the International Criminal Court*, UN Doc A/CONF.183/9, July 17, 1998 [*Rome Statute*], followed by a consideration of “joint criminal enterprise” (at paras 62-67). The Supreme Court notes (at para 65), three forms of joint criminal enterprise, with the *mens rea* for each varying, and only the third form, JCE III, involving recklessness. The Supreme Court further notes (at para 66) that commentators suggest “JCE III will not play a role at the ICC, largely because of the recklessness component.”

[34] Having reviewed the concepts of common purpose and joint criminal enterprise, the Supreme Court then offers a summary of complicity under international law (at para 68) that refers to recklessness. Bearing in mind that it purposefully started with the broadest modes of commission under current international criminal law, this is not the end of the Supreme Court’s analysis.

[35] The Supreme Court next examines comparatively the law and decisions of other national courts (at paras 69-77), notably the United Kingdom and the United States of America.

[36] The Supreme Court then turns to the Canadian approach to criminal participation (starting at para 78), and criticizes (at paras 79-80) the Federal Court of Appeal's approach as overextended when the latter observed that "a senior official may be complicit in the government's crimes 'by remaining in his or her position without protest and continuing to defend the interests of his or her government while being aware of the crimes'."

[37] The Supreme Court firmly rejects (at paras 80-81) exclusions based on complicity determinations, such as that made by the Federal Court of Appeal, involving "mere awareness that other members of the government have committed illegal acts" where the individual has not committed any guilty acts and does not have any criminal knowledge or intent. The Supreme Court rationalizes that "[o]therwise, high-ranking officials might be forced to abandon their legitimate duties during times of conflict and national instability in order to maintain their ability to claim asylum." The Supreme Court finds (at para 83) that rank(alone)-based complicity by association or passive acquiescence represents a departure from international criminal law and fundamental criminal law principles. I note that rank remains a factor, among others, that can be considered under the clarified or refined Canadian test for complicity.

[38] The Supreme Court then engages (at paras 84-90) in refining the Canadian test by clarifying the three key components, i.e. voluntary, significant and knowing contribution. Unlike its clarifications for voluntary and significant contributions, the Supreme Court refers only to the *Rome Statute*, specifically article 30, in holding (at paras 89-90) that "[t]o be complicit in crimes committed by the government, the official must be aware of the government's crime or criminal purpose and aware that his or her *conduct* **will** assist in the furtherance of the crime or criminal

purpose" [bold emphasis added]. Recklessness simply is not included in the Supreme Court's clarification of the "knowing" component of the Canadian test for complicity. This is consistent with Article 30 of the *Rome Statute* which is reproduced in Annex "A." The meanings of "knowledge," "know," and "knowingly" described in Article 30 do not implicate recklessness.

[39] Recognizing the fact-dependent nature of the exercise, the Supreme Court then provides additional guidance (at paras 91-100) on how to apply the test it just clarified, one that does not include recklessness.

[40] When viewed holistically, I find that *Ezokola* cannot be said to stand for the proposition that the "knowing contribution" in the Canadian test for complicity includes recklessness, regardless of what the Supreme Court observed, arguably in *obiter*, about one of three forms of the international principle of joint criminal enterprise. In these reasons, *obiter* is meant in the sense described in *R v Henry*, 2005 SCC 76 at para 57.

V. Conclusion

[41] These are my reasons for departing from *Hadhiri*, and the line of cases that follow or cite it for the proposition that "knowing" includes recklessness in the test for complicity in Canada, and why I conclude that the decision here of the RAD is unreasonable for lack of responsive justification. It thus will be set aside, with the matter remitted to a different panel for reconsideration.

[42] Neither party proposed a question for certification, and none arises in the circumstances.

JUDGMENT in IMM-4258-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is granted.
2. The decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada dated June 2, 2021 is set aside, with the matter remitted to a different panel for reconsideration.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27.**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27.**

Exclusion — Refugee Convention **98** 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.	**Exclusion par application de la Convention sur les réfugiés** **98** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.
Evidence that may be presented **110 (4)** On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**Éléments de preuve admissibles** **110** (4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.
SCHEDULE (Subsection 2(1)) Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees **E** This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country. **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;	**ANNEXE** (paragraphe 2(1)) Sections E et F de l'article premier de la Convention des Nations Unies relative au statut des réfugiés **E** Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays. **F** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser : **a)** Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes; **b)** Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.	**c)** Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

***Rome Statute of the International Criminal Court*, UN Doc A/CONF.183/9, July 17, 1998, art 30.**
***Statut de Rome de la Cour pénale internationale*, Doc NU A/CONF.183/9, 17 juillet 1998, art 30.**

Article 25 **Individual criminal responsibility** … 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: … (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; …	**Article 25** **Responsabilité pénale individuelle** … 3. Aux termes du présent Statut, une personne est pénalement responsable et peut être punie pour un crime relevant de la compétence de la Cour si : … d) Elle contribue de toute autre manière à la commission ou à la tentative de commission d'un tel crime par un groupe de personnes agissant de concert. Cette contribution doit être intentionnelle et, selon le cas : i) Viser à faciliter l'activité criminelle ou le dessein criminel du groupe, si cette activité ou ce dessein comporte l'exécution d'un crime relevant de la compétence de la Cour ; ou ii) Être faite en pleine connaissance de l'intention du groupe de commettre ce crime ; …
Article 30 **Mental element** 1. Unless otherwise provided, 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 intent and knowledge.	**Article 30** **Élément psychologique** 1. Sauf disposition contraire, nul n'est pénalement responsable et ne peut être puni à raison d'un crime relevant de la compétence de la Cour que si l'élément matériel du crime est commis avec intention et connaissance.

2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.	2. Il y a intention au sens du présent article lorsque : a) Relativement à un comportement, une personne entend adopter ce comportement ; b) Relativement à une conséquence, une personne entend causer cette conséquence ou est consciente que celle-ci adviendra dans le cours normal des événements. 3. Il y a connaissance, au sens du présent article, lorsqu'une personne est consciente qu'une circonstance existe ou qu'une conséquence adviendra dans le cours normal des événements. « Connaître » et « en connaissance de cause » s'interprètent en conséquence.

Annex "B": *X (Re)*, 2023 CanLII 26206 (CA IRB) at paras 100-107

[100] The RPD found that it was sufficient to find that the Associate Appellant was reckless as to whether his actions would have significantly contributed to crimes against humanity of murder and torture. The Minister underlines the holding of the SCC to the effect that "recklessness" is an acceptable subjective awareness linking the Associate Appellant to those crimes, so therefore the RPD's finding is correct. The Associate Appellant submits that, according to the test of *Ezokola*, knowledge remains an important factor in determining complicity.

[101] I agree with the Associate Appellant on this issue. The Minister refers to paragraph 68 of the *Ezokola* Judgement to support his position that recklessness is sufficient in the context of exclusion under article 1Fa) of the Convention. However, I note that this paragraph is located under the heading "Summary of Complicity Under International Law", and constitutes a preliminary finding, as opposed to the finding regarding the *mens rea* test finally adopted by the SCC at paragraphs 89-90 of the Judgement:

> To be complicit in crimes committed by the government, the official must be aware of the government'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 intent and knowledge". 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".

[102] As noted by the Supreme Court of Canada (SCC), the International Criminal Court most likely rejected recklessness as being insufficient to meet the threshold of article 30 of the Rome Statute. When summarising the doctrine of the third form of Joint Criminal Enterprise (JCE III) elaborated by the International Criminal Tribunal for the former Yugoslavia and for Rwanda (ICTY and ICTR or *ad hoc* Tribunals), the SCC mainly relied on the *Tadić* and *Brđanin* Appeals Judgements. As pointed out in *Ezokola*, JCE III, according to the *ad hoc* tribunals, requires a finding that the accused shared the intent of the participants to the common plan. Only then can the *mens rea* of recklessness regarding the foreseeable crimes, namely those that were not part of the common plan, be applied. JCE III is a form of principle liability, not an accessory. In my view, this is very important, as the accessory doctrine of aiding and abetting, that could allow for the *mens rea* of recklessness in international customary law, requires a higher level of contribution to the crimes or to the common plan to result in criminal liability. Such contribution must have a "substantial" effect over the crimes or common plan, as opposed to only be significant.

[103] The *actus reus* of "significant contribution" combined to a *mens rea* of "recklessness", divorced from any finding of intent to participate in the common criminal purpose, as a form of participation in an international crime, was considered insufficient to result in criminal liability by the *ad hoc* tribunals. Responding to concerns raised by the *Brđanin* Defence Team, the ICTY Appeals Chamber reiterated, in the excerpt cited by the SCC in *Ezokola*, that a finding of intent to participate in the common plan is necessary for the significant contribution to result in a criminal liability, in order to avoid guilt by association. This interpretation concurs with the one of the Refugee Convention by the UNHRC's recommendation requiring that a substantial contribution of the asylum claimant to the international crimes be established with his or her knowledge that his or her act or omission would facilitate the criminal conduct in the context of an article 1F(a) analysis. This corresponds to the material and mental elements of aiding and abetting, not the ones of JCE III.

[104] In short, the common Appeals Chambers of the ICTY and ICTR teach us that, for recklessness to be accepted as *mens rea* standard, the Minister needs to prove that the Appellant intended to participate in the furtherance of the common purpose. It follows that the RPD erred in applying the recklessness standard to the instant case without a finding that the Associate Appellant shared the intent to participate in the furtherance of the common plan, namely the imposition of apartheid, or that his alleged contribution had a substantial effect over crimes against humanity of murder and torture.

[105] The SCC requires that the Canadian jurisprudence and legislation be construed in such a way that it is not in conflict with Canada's international obligations. In my view, the analysis of the SCC elaborated in paragraphs 62 to 68 of the *Ezokola* judgement constitutes a summary of the different modes of liability recognized by the *ad hoc* tribunals to determine whether guilt by association was an accepted form of liability in international customary law: its conclusion is not operative or meant to be directly applied to the 1F(a) cases. Paragraphs 84 to 90 contain the operative findings of the SCC, that rejects the application of recklessness as a *mens rea* in application of article 30 of the Rome Statute.

[106] I believe that the Federal Court in *Hadhiri* misconstrued *Ezokola*. Indeed, it considered that paragraph 68 of *Ezokola* permitted "to find individuals guilty of complicity under international law if they have knowingly or recklessly made a significant contribution to a crime or criminal purpose of the group to which they are associated." This interpretation is misleading as it fails to reflect international customary law standards.

[107] I therefore conclude that the RPD erred when it found that recklessness was sufficient to meet the mental requirement for participation in international customary law and, therefore, that the Associate Appellant recklessly participated in the crimes against humanity of murder and torture or in furthering the illegal common purpose.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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