Federal Court  Cour fédérale

Date: 20240821

Docket: IMM-7707-23

Citation: 2024 FC 1296

Toronto, Ontario, August 21, 2024

PRESENT: The Honourable Mr. Justice A. Grant

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MALEK MAHMOD OMRAN BELHAJ

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] For a brief but volatile period between March and May 2011, Mr. Malek Belhaj worked as a part-time volunteer at a checkpoint in Libya. The checkpoint was run by the Public Guard, which operated under Libya's dictatorial leader Muammar Gaddafi. During this time, Mr. Belhaj [also referred to here as the Respondent] worked near a national hospital, and was tasked with stopping and searching cars passing through the checkpoint. On one occasion, four men were

detained at the checkpoint because they were in possession of weapons and were suspected of being a part of a militia. Mr. Belhaj helped escort the detainees to an engineering academy that was being used as an *ad hoc* military facility.

[2] The Minister alleges that Mr. Belhaj should be excluded from refugee status because his actions in this period establish that he was complicit in the crimes of the Gaddafi regime. Mr. Belhaj asserts that he should not be excluded because his involvement with the Public Guard was brief, his contributions to them were insignificant, and he was unaware of the crimes the group was committing during his involvement with them.

[3] The Refugee Protection Division [RPD] of the Immigration and Refugee Board agreed with the Minister and found Mr. Belhaj to be excluded from refugee protection pursuant to Article 1F(a) of the *Refugee Convention* and section 98 of the *Immigration and Refugee Protection Act* [IRPA]. In arriving at this conclusion, the RPD found it implausible that the Respondent was unaware of the Gaddafi regime's crimes generally, or the Public Guard's crimes specifically. It further found that the Respondent had made a voluntary and significant contribution to the crimes or criminal purpose of the Public Guards and, as such, he should be excluded from refugee protection.

[4] On appeal, the Refugee Appeal Division [RAD] found that the RPD had incorrectly impugned the Respondent's credibility based on impermissible implausibility findings. As it was not clear that the Respondent knew of the Public Guard's crimes, he was improperly excluded from refugee status. Furthermore, the RAD found that the Respondent was at risk in Libya and, as such, it granted both the appeal and his claim for refugee protection.

[5] The Minister seeks judicial review of the RAD's decision. For the reasons that follow, I have concluded that the RAD's decision was unreasonable and as a result, I must grant this application for judicial review.

II. BACKGROUND

A. *Facts*

[6] The Respondent arrived in Canada in 2014, with his wife, on a student visa. Both Mr. Belhaj and his wife made refugee claims in August 2017. The Respondent alleged that he faces persecution in Libya due to his race, as a black Libyan. He additionally alleged he faces persecution due to his perceived political opinion as a supporter of the Gaddafi regime. Mr. Belhaj further claimed that, as a result of his role in the detention of the militia members, he is now on a "wanted list" and would be arrested upon return to Libya.

[7] As noted above, at the start of the Libyan revolution in March 2011, the Respondent joined the pro-Gaddafi Popular Guard [PG] on the suggestion of a friend, as a part-time volunteer. Mr. Belhaj worked in a bakery during the day and was stationed at night to a PG checkpoint in Tajoura, on the outskirts of Tripoli. The Respondent's duties were to stop and search vehicles and passengers for anything (i.e. weapons, documents, materials) that could incite the population, cause problems for the regime, or was "against the intent of the government."

[8] In March 2011, the Respondent and other colleagues at the checkpoint stopped and searched two cars and detained four passengers, as there were weapons in the vehicle and

documents affiliating the passengers with the Misrata-based Al-Halbous militia – an anti-Gaddafi armed group. The Respondent, who was armed, ensured the detainees could not escape, while one of his colleagues handcuffed them as their vehicles were searched. Mr. Belhaj and his supervisor then drove the four detainees to the Tajoura Engineering Academy, which the Respondent described as being used as a "military camp". At the Academy, the supervisor handed over the detainees to others for, according to the Respondent, further questioning. He claims that was the only instance in which anyone was detained during his time as a volunteer with the PG.

[9] The Respondent alleged that soon after this event, in May or early June 2011, individuals claiming to be members of the Al-Halbous militia kidnapped him. They told him they had targeted him because of his role in the detention of their colleagues. He was held until August 2011, during which period he was tortured. He escaped with the assistance of a family friend.

B. *RPD Decision*

[10] The RPD assessed the claims for refugee protection and found that the Respondent's wife was a Convention refugee, as she would face a serious possibility of persecution due to her identity as a black Libyan woman. In the same decision, the RPD found that Mr. Belhaj was excluded from refugee protection as a result of Article 1F(a) of the Refugee Convention and section 98 of the IRPA.

[11] In arriving at this conclusion, the RPD questioned the credibility of various elements of the Applicant's testimony. Most notably, the RPD found it implausible that the Respondent did

not know about the torture or other mistreatment of prisoners by the Gaddafi forces until after he left Libya, as he had claimed in his testimony. The RPD also questioned the credibility of certain aspects of the Respondent's account of the night on which he helped detain the militia members – specifically on the question of whether the facility where they transferred the detainees was acting as a military unit, or was simply the civilian engineering academy.

[12] The RPD found that the Respondent's work with the PG from March to May 2011 amounted to a significant and voluntary contribution to the crimes or criminal purpose of the Gaddafi regime. Building on its credibility findings, the RPD also found that the Respondent's contribution was knowing. Even if the Respondent did not know for certain that the people he helped to detain would be tortured or otherwise mistreated, at a minimum he was reckless in not seeking more information about the fate of these individuals. Such recklessness, the RPD continued, is sufficient to support a finding that an individual has knowingly contributed to an organization, pursuant to the decision of the Supreme Court of Canada *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*].

C. *RAD Decision*

[13] The RAD granted the Respondent's appeal. In doing so, the RAD first found that the RPD erred in its credibility analysis, as it was based on impermissible plausibility findings. Noting the jurisprudence establishing that plausibility findings should only be made in the clearest of circumstances, the RAD found that the RPD erred in each of its key findings, all of which related to the Respondent's presumed knowledge of the human rights abuses of the Gaddafi regime generally, and the PG specifically.

[14] On its own assessment of the Respondent's actions during the Libyan Civil War, the RAD applied the factors set out in *Ezokola*, and concluded that the Respondent made neither a knowing nor a significant contribution to the human rights violations of the Public Guard. As a result, the RAD concluded that the Respondent should not be excluded from refugee protection under Article 1F(a) of the Convention.

[15] In arriving at this conclusion, the RAD first acknowledged that the Respondent's service with the PG was voluntary. However, it further noted that the Guard was a large and complex organization, and the Respondent was exposed to a small part of it - that being a locally constituted group operating a checkpoint. The RAD further found the "most sinister parts of the organization did not operate openly" and that the PG's crimes were hidden from the Libyan people.

[16] The RAD further observed that Mr. Belhaj's service in the PG was limited to his volunteering at the checkpoint from March-May 2011, and that he held no rank and had no authority in the organization. It accepted the Respondent's evidence that he volunteered because he thought he would be protecting civilians.

[17] Therefore, while the RAD acknowledged that the Respondent's participation in the PG was voluntary, it concluded that his contribution to the organization's crimes or criminal purpose was neither knowing, nor significant.

[18] On the question of whether the Respondent knew of the human rights abuses of the PG, the RAD reiterated its conclusion that the RPD had erred in its credibility analysis. Absent this

error, the RAD found that there was nothing in the record to support a conclusion that the Respondent was aware of the Public Guard's crimes. The RAD also questioned the RPD's finding on the question of recklessness, with respect to the Respondent's subjective knowledge of the PG's crimes. It cited the Supreme Court's statement in *Ezokola* (at para 66) that "recklessness is likely insufficient" to establish the requisite mental element.

[19] As to the significance of the Respondent's contributions, the RAD returned to his short-term and part-time role with the PG. The RAD noted that individuals were detained on only one occasion in the Respondent's presence, and there was no evidence that the Respondent had either abused the detainees, or witnessed any abuse.

[20] As a result, the RAD found the Respondent was not excluded from refugee status. On the question of inclusion, the RAD found that the Respondent has a well-founded fear of persecution in Libya, based both on his status as a black Libyan, and because of his imputed political belief as a supporter of the Gaddafi regime.

III. ISSUES

[21] The Minister raises the following overarching issues on judicial review:

1. Whether the RAD erred in setting aside the RPD's reasonable finding and conclusion that the Respondent is not credible.

2. Whether the RAD erred in determining that the Respondent is not excluded from refugee protection by operation of Article 1F(a) of the Refugee Convention and s. 98 of the IRPA.

[22] While I generally agree with the Applicant's formulation of the issues that arise on this application for judicial review, I note that in its materials the Applicant repeatedly refers to the reasonableness of the RPD decision. Whether the RPD decision was reasonable, as that term is used in the context of judicial review, is not at issue here because the RPD decision is not the subject of this application for judicial review.

[23] Moreover, it was not the task of the RAD to assess the reasonableness of the RPD decision. The jurisprudence of both this court and the Federal Court of Appeal have firmly established that this is not the applicable standard in respect of the RAD's appellate role: *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93 at para 103 [*Huruglica*]; *Rozas Del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at paras 91-93, 135-136 [*Rozas Del Solar*].

IV. STANDARD OF REVIEW

[24] The parties do not dispute that the standard of review in this case is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. In conducting a reasonableness review, a court "must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). It is a deferential standard, but remains a robust form of review and is not a "rubber-stamping" process or a means of sheltering administrative decision-makers from accountability (*Vavilov* at para 13).

[25] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to that facts and law that constrain a decision-maker"

(*Vavilov* at para 85). To make a determination on reasonableness, a reviewing court asks whether the decision in question bears the "hallmarks of reasonableness" – justification, transparency, and intelligibility – and whether it is justified in relation to the relevant factual and legal matrix (*Vavilov* at para 99).

[26] Reasonableness review is not a "line-by-line treasure hunt for error" (*Vavilov at* para 102). Any flaws or shortcomings relied upon must be sufficiently central or significant, to render the decision unreasonable (*Vavilov* at para 100).

[27] Finally, I reiterate that the central issue on this application for judicial review is the reasonableness of the RAD decision. Whether the RPD decision was reasonable, in the administrative law sense of the term, is not, at least directly, at issue here.

V. ANALYSIS

A. *Applicable Legal Principles*

[28] While several aspects of the Refugee Convention's exclusion clauses have been litigated extensively, two principles have long been established – the evidentiary standard, and the evidentiary burden.

[29] The evidentiary standard associated with Article 1F is unique to the exclusion context, and is embedded in the language of the clause. In Article 1F cases, individuals will be excluded from refugee status when there are ***serious reasons for considering*** that they have committed a crime against peace, a war crime, or a crime against humanity. *Ezokola* confirms that the 'serious

reasons for considering' standard implies something less than the 'proof beyond a reasonable doubt' standard employed in criminal law, but something more than mere suspicion: *Ezokola* at paras 101-102.

[30] The evidentiary burden in exclusion cases falls on the Minister: *Ezokola* at para 29. Putting the evidentiary standard and the burden together, this means that in Article 1F exclusion cases, the Minister must establish that there are serious reasons for considering that a refugee claimant has committed a war crime, a crime against humanity, or crime against peace.

[31] In *Ezokola*, the Supreme Court of Canada provided a course correction in the Canadian law of exclusion under Article 1F(a) of the Refugee Convention. Recognizing that the Canadian jurisprudence had, at times, "been overextended to capture individuals on the basis of complicity by association," the Court introduced a new contribution-based approach to complicity in international crimes: Ezokola at para 9.

[32] Further to *Ezokola*, it is now firmly established that exclusion from refugee protection under Article 1F(a) of the Refugee Convention will only be warranted 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": *Ezokola*, above at paras 8, 84.

[33] Under the *Ezokola* formulation, it is clear that passive acquiescence to, or mere association with, an organization that has committed international crimes is not sufficient to ground a finding of complicity. Rather, there must be a link between the individual and the crimes or the criminal purpose of the group: *Ezokola* at paras 8, 77.

[34] It is also worth noting that this link does not have to be "directed to specific identifiable crimes", but may also relate to "wider concepts of common design": *Ezokola* at para 87, citing *R. (J.S. (Sri Lanka)) v. Secretary of State for the Home Department*, [2010] UKSC 15, [2011] 1 A.C. 184 at para 38. However, where an organization is multifaceted in nature – with both legitimate and criminal purposes – the link between an individual's contribution and the criminal purpose may be more tenuous: *Ezokola* at para 94.

[35] Determining when a person's involvement in an organization will amount to complicity in that organization's international crimes is an inherently difficult task. Evidentiary records are rarely clear or complete, and the gradations of involvement in an organization are virtually infinite. As noted above, organizations that commit international crimes are often amorphous and multifaceted, and will frequently pursue legitimate objectives related to governance, in addition to criminal acts.

[36] Furthermore, as was the case in Libya, international crimes are commonly committed in moments of widespread upheaval when thousands of individuals may find themselves in close proximity – physically, professionally, and politically – to those crimes. As the Court in *Ezokola* noted (at para 88), "[g]iven 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."

[37] To assist decision-makers with these challenges, the Supreme Court in *Ezokola* did two things. First, it provided detailed explanations of the key components of the new test for

complicity: namely that any contribution to a criminal organization must be *voluntary*, *significant*, and *knowing*: *Ezokola* at paras 85-90.

[38] Second, the Court identified a number of factors to help decision-makers determine whether the contribution-based requirements of voluntariness, significance, and knowledge have been met. The factors are as follows: (*Ezokola*, above at para 91):

a) the size and nature of the organization;
b) the part of the organization with which the claimant was most directly concerned;
c) the claimant's duties and activities in the organization;
d) the claimant's position and rank in the organization;
e) the length of time in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
f) the method by which the claimant was recruited and the opportunity to leave.

[39] While these factors may help guide decision-makers, the Court also cautioned that they are not necessarily exhaustive, and they will be applied to "diverse circumstances encompassing different social and historical contexts." For this reason, the court emphasized that the "focus must always remain on the individual's contribution to the crime or criminal purpose": *Ezokola* at para 92.

[40] With this summary of key principles in mind, I turn to an assessment of the RAD decision.

B. *The RAD's Assessment of the RPD's Plausibility Findings*

[41] As noted above, the RAD found that the RPD had erred in respect of three implausibility findings, all of which related to the Respondent's awareness of the Gaddafi regime's abuses. The RPD findings can be summarized as follows:

- It was implausible that the Respondent had not heard even rumours of torture or other mistreatment of prisoners by the Gaddafi forces until after he left Libya and came to Canada in 2014;
- It was implausible that the Respondent would not have heard subsequent instructions from Gaddafi in the period between March and May 2011 to the population to resist the revolutionaries;
- It was implausible that the Respondent was "wholly unaware" between March 2011 and May 2011 that there had been allegations made specifically against the Public Guard, and the regime's security forces more broadly, of unlawful detention and torture of anti-regime protestors and dissidents.

[42] As a general principle, the Minister correctly points out that the RPD may "draw conclusions concerning an applicant's credibility based on implausibilities, common sense and rationality": *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 26.

[43] The Minister submits that the RPD "reasonably found the Respondent's claim of ignorance of any of those crimes implausible given the socio-political context of Libya before and at the time of the events that supposedly precipitated the Respondent's refugee claim." Flowing from this observation, the Minister then argues that the RAD "acted beyond the limits of its lawful authority in setting aside the RPD's credibility findings and conclusions."

[44] While I agree that the RAD's assessment of the RPD's plausibility findings was flawed, I must reiterate here that the *reasonableness* of the RPD decision was not a matter before the RAD, and is similarly not at issue in this application for judicial review. Indeed, the RAD would have erred had it reviewed the RPD decision on the reasonableness standard: *Huruglica* at para 103; *Rozas Del Solar* at paras 122-123, 135.

[45] The issue in this application for judicial review is the reasonableness of the RAD's decision. On this question, the Minister maintains that the RAD's approach to reviewing the RPD's plausibility findings was conceptually flawed. The Minister submits that the RAD appeared to have required direct evidence of the Respondent's knowledge of the state's abuses to sustain the RPD's credibility findings. Such a requirement, the Minister argues, vitiates the possibility of making *any* plausibility finding, which is contrary to the jurisprudence.

[46] In respect of its first plausibility finding, I find that the RAD provided adequate justification to explain why the RPD had erred. As noted above, the RPD found that the Respondent must have known about the Gaddafi regime's history of human rights abuses. The RAD, however, referred to the documentary evidence, and noted that the media was tightly controlled by the Gaddafi regime. As such, the RAD found that it was not implausible that the Respondent would have been unaware of these abuses. This was a reasonable conclusion, rooted in the evidence and based on a rational chain of analysis.

[47] The RAD's findings on the RPD's other plausibility findings were more problematic. For example, the RAD stated:

> I find that the RPD erred in making a plausibility finding. It is plausible that the Appellant was not aware the Public Guard was torturing anti-regime protesters and dissidents. *There is nothing in the record before me that the Appellant was aware of accusations that the Public Guard was torturing dissidents* [emphasis added].

[48] Plausibility findings are predicated on the notion that in some narrow circumstances, an inference may legitimately be drawn with respect to the likelihood of an asserted fact, despite the absence of direct evidence on that fact. This being the case, the question of whether there was anything in the record establishing that the Respondent was aware of the accusations against the Public Guard is immaterial to the legitimacy of the RPD's plausibility finding. The question was not whether there was anything directly in the record on the Respondent's knowledge, but rather, *in the absence* of such evidence, whether the inferences drawn by the RPD were open to it.

[49] As the Minister notes, if there was anything directly in the record on the Respondent's awareness of the allegations against the Libyan regime, there would have been no need for an implausibility finding. To this extent, then, the RAD erred in the latter two of its three plausibility findings.

[50] These errors are sufficiently central to the RAD's exclusion analysis such that judicial intervention is warranted. The errors go directly to the mental element of the crimes in which the Respondent is alleged to be complicit, which is a central pillar of the *Ezokola* framework. Recall that under the contribution-based approach to complicity, individuals may only be excluded from refugee status under Article 1F(a) where they have voluntarily made a significant and *knowing*

contribution to a group's crime or criminal purpose. Absent a reasonable foundation on the question of the Respondent's knowledge, it was impossible for the RAD to engage in its own analysis of the *Ezokola* test.

[51] However, I want to make it clear that my reasoning above should not be taken to mean, or even imply, that the RPD's plausibility findings were appropriately rooted in the documentary evidence. This Court has cautioned on numerous occasions that findings of implausibility should only be made in the "clearest of cases": *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7.

[52] As my colleague Justice McHaffie recently noted in *Al Dya v Canada (Citizenship and Immigration)*, 2020 FC 901 at para 27, "implausibility findings raise particular issues in the context of refugee claims, given the differing political and cultural contexts in which such claims are raised, the subjective nature of such findings, and the potential to import inapplicable Canadian paradigms." I would only add here that imputing knowledge to an individual, in the context of a dictatorial regime that sustained itself, at least in part, through the distortion of information, may be a particularly fraught form of plausibility finding.

[53] While the above analysis is sufficient to dispose of this application for judicial review, I wish to provide some further thoughts on the matter to assist the new RAD panel on redetermination of this matter.

[54] First, absent the RAD's errors on the issue of the Respondent's credibility, I tend to believe that the RAD's independent assessment of the Respondent's involvement in the PG was

largely reasonable – it accurately identified the *Ezokola* framework and, in many respects, it reasonably applied that framework to the Respondent's circumstances.

[55] The work for the RAD in its redetermination of this matter will be to reasonably reassess the RPD's plausibility findings and then to apply this assessment to the exclusion analysis.

[56] Second, in doing so, the RAD will likely have to confront the issue of recklessness under the *Ezokola* framework. This is because an important RPD finding in this matter was that, even if the Respondent did not specifically know what happened to those who he had helped to detain, he was reckless in not seeking out further information as to their fate. The RPD stated:

> After considering the totality of the evidence, I conclude that even if the principal claimant did not know for certain what their fate would be, at a minimum he was reckless in not seeking more information about the fate of the individuals he detained and transferred to the engineering academy. Such recklessness is sufficient, pursuant to *Ezokola*, to support a finding of "knowing contribution" to an organization.

[57] The RAD did not agree with the above finding, noting that the Supreme Court in *Ezokola* stated that, under the *Rome Statute*, recklessness is likely an insufficient basis on which to ground the subjective element of a crime in question: *Ezokola* at para 60.

[58] The question of whether the Supreme Court in *Ezokola* accepted or rejected the concept of recklessness in this aspect of international criminal law has been the subject of some debate, both within this Court, and at the RAD. Consequently, this issue will require careful attention in the RAD's redetermination of this matter.

[59] In *Hadhiri v Canada (Citizenship and Immigration)*, 2016 FC 1284 [*Hadhiri*], this Court upheld a RAD decision in which the tribunal had relied on the principle of recklessness. In arriving at this conclusion, the Court (at para 36) noted 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…".

[60] Very recently, in *Bentaher v Canada (Citizenship and Immigration)*, 2024 FC 1187 [*Bentaher*], my colleague Justice Fuhrer explored this issue, and came to a different conclusion, namely that "*Ezokola* cannot be said to stand for the proposition that the "knowing contribution" in the Canadian test for complicity includes recklessness." I agree with Justice Fuhrer's reasoning in *Bentaher*.

[61] To reformulate that reasoning for present purposes, it seems clear to me that the references in *Ezokola* to recklessness at para 60 and paras 62-68 of its reasons were meant to neither incorporate nor exclude the principle into the Canadian test for complicity. To the extent that the RPD or the RAD found otherwise in this matter, both tribunals erred.

[62] In my view, these references to recklessness were included as a part of the Supreme Court's broader summary of recent international criminal law developments. The first reference, at para 60 of its reasons, indicates that recklessness is likely not a sufficient basis on which to ground liability under Article 25(3)(d) of the *Rome Statute*. Importantly, the Court noted that the text of Article 25(3)(d) "does not refer to conduct that might contribute to a crime or criminal

purpose, and the mental element codified by art. 30 has been held to exclude *dolus eventualis*, that is, the awareness of a mere risk of prohibited consequences": *Ezokola* at para 60.

[63] The subsequent references to recklessness arise in the context of the Supreme Court's discussion of certain modes of liability considered by the International Criminal Tribunal for the former Yugoslavia and for Rwanda [ICTY and ICTR or *ad hoc* Tribunals]. These modes of liability, known as the Joint Criminal Enterprise (or JCE) doctrine, took somewhat different forms at the *ad hoc* Tribunals - and the Court in *Ezokola* acknowledged that in its broadest form, known as JCE III, the doctrine could be construed as including not only *knowing* contributions but also *reckless* contributions to an organization's crimes. The Court also noted, however, that this broadest form of liability is not codified in the *Rome Statute*, and that commentators do not believe that it will play a role at the ICC, "largely because of the recklessness component": *Ezokola* at para. 66.

[64] With this summary of international criminal law principles in mind, the Supreme Court in *Ezokola* proceeded to set out its formulation of a contribution-based approach to complicity in international crimes. In a key section on the question of the knowledge component, the Court stated (at paras 89-90):

> 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".

[65] As Justice Fuhrer concluded in *Bentaher*, the above formulation refers only to the *Rome Statute* provisions on the "knowing" element of the contribution-based test. Importantly, the Supreme Court neither mentioned, nor endorsed, JCE III in this pivotal section of *Ezokola*. As such, it seems clear that the Court did not intend to import these principles, including the principle of recklessness, into the Canadian test for complicity. This conclusion is further supported by the Court's requirement that an individual must be aware that his or her conduct "will" assist in a crime or criminal purpose. To my mind, the use of the term "will" in this context, rather than other terms such as "could" or "may" implies a degree of knowledge that excludes recklessness as a component of the test: see *Bentaher* at para 38.

C. *Conclusion*

[66] As a result of the above, I grant this application for judicial review. The parties did not propose a question for certification, but I have considered whether a question should be certified on the issue of whether recklessness is, or is not, a legitimate consideration under the knowledge component of the *Ezokola* framework. This may be an important issue in future cases. However, because of my findings above, this question would not be determinative of the appeal. As such, no question will be certified.

JUDGMENT in IMM-7707-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.

3. No question is certified for appeal.

"Angus G. Grant"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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