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[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, March 20, 2013

PRESENT: CHIEF JUSTICE CRAMPTON

BETWEEN:

"MR. MJS"

Applicant

and

DEPARTMENT OF CITIZENSHIP AND IMMIGRATION

Respondent

PUBLIC REASONS FOR JUDGMENT AND JUDGMENT

(Confidential reasons for judgment and judgment issued on February 13, 2013)

[1] The applicant, Mr. MJS, is a citizen [of an African country] and [a member of his country's ethnic minority]. He submits that he fears being imprisoned, tortured or killed should he be forced to return [to his country].

[2] The Refugee Protection Division [the Panel] found that Mr. MJS was excluded from refugee protection under section 98 of the *Immigration and Refugee Protection Act*, SC 2001,

c 27 [the Act], and Article 1F(a) of the United Nations Convention Relating to the Status of Refugees, T.S. 1969 No. 6, Art. 1F.

[3] Mr. MJS submits that the Panel made three errors in its decision, as follows:

i. The Panel applied the wrong test to determine whether he was complicit in crimes against humanity and in war crimes committed by [a rebel group [the Group]] [in his country] between 1998 and 2005;

ii. The Panel failed to establish or identify a link between him and the specific crimes committed by [the Group];

iii. The Panel's analysis of the evidence and the complicity criteria from the case law was not reasonable.

[4] I disagree. For the following reasons, this application for judicial review will be dismissed.

I. FACTUAL BACKGROUND

[5] Mr. MJS alleges that in September 1998, [a government agency] [the Agency] ([his country's] secret service) tasked a group of young people [of the same ethnic group as that of the government] to join [the Group] in order to spy on it for the [. . .] government in power at the time. Mr. MJS joined [the Group] at the beginning of 1999, but submits that, from the beginning, he was in fact a double agent who worked for [the Agency] until November 2003, that is, until the ceasefire agreement.

[6] In November 2001, after he completed his [. . .] studies, Mr. MJS was appointed to [an important position]. Following the 2005 elections, [the Group] formed a government, and

Mr. MJS resigned from his duties [. . .] as he believed that he had been promised a better position by the president of the Party, Mr. [. . .]. After Mr. [. . .] informed him that he had to be patient for such a position, Mr. MJS criticized the government and the President, [Mr. . . .].

[7] On the same day, Mr. MJS was arrested. He was charged with insulting his country's president. He was detained for several weeks, during which he claims to have been beaten and threatened with death.

[8] In January 2006, Mr. MJS started working as a volunteer for a non-governmental human rights organization.

[9] In January 2007, Mr. MJS resumed his duties as a [. . .]. Shortly afterwards, he refused a request from the Minister of Justice of [. . .].

[10] In May 2007, Mr. MJS was again arrested, detained and tortured after writing a letter to the country's president in which he denounced certain human rights violations. A few weeks later, the charges were withdrawn, and Mr. MJS was released.

[11] In December 2007, when he was intending to go to [. . .] to monitor the elections, Mr. MJS was told that he was not authorized to leave the country. Shortly afterwards, having found out that he was going to be arrested, he fled his country [for another African country]. In January 2008, [members of his family] were killed. [His relatives] who survived fled to [a third African country].

[12] Mr. MJS arrived in Canada in February 2008 and applied for refugee protection a few days later.

II. BURDEN AND STANDARD OF PROOF

[13] The onus of proving that Mr. MJS should be excluded from protection under the Act rests on the Minister. The Minister must establish that there are "serious reasons for considering", within the meaning of section 33 of the Act, that Mr. MJS has "committed" a crime leading to his exclusion. This standard of proof applies solely to questions of facts and requires something more than mere suspicion, but less than proof on a balance of probabilities (*Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433, at para 18 [*Sivakumar*]; *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at paras 114-116 [*Mugesera*]; *Oberlander v Canada (Attorney General)*, 2009 FCA 330, at para 20 [*Oberlander*]). The Minister's belief must essentially have an objective basis supported by compelling and credible information (*Mugesera*, above, at para 117).

III. STANDARD OF REVIEW

[14] The first two issues raised by Mr. MJS concern the test for complicity. These are questions of law. In my opinion, each of these questions is of "central importance to the legal system . . . and outside the . . . specialized area of expertise [of the Panel]" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 55 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 44; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at para 46, [2011] 3 SCR 654 [*Alberta Teachers*]; *Canada (Citizenship and Immigration) v Ekanza Ezokola*, 2011 FCA 224, at para 39 [*Ezokola*]; *Thomas v Canada (Citizenship and Immigration)*, 2007 FC 838, at paras 14-15). The applicable standard is therefore correctness.

[15] The appropriate standard for reviewing the assessment of the evidence and the complicity factors established in the case law is reasonableness since this is a question of mixed fact and law (*Dunsmuir*, above, at para 51; *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2006 FC 139, at para 13; *Rathinasigngam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 988, at para 41).

IV. ANALYSIS

(a)Did the Panel apply the wrong test to determine the complicity of Mr. MJS?

[16] Mr. MJS submits that the complicity test chosen by the Panel is not consistent with the test established in the case law. In short, he argues that the Panel erred when it determined that he was complicit in the crimes against humanity and the war crimes committed by a [military] faction [of the Group] to which he had never belonged, without establishing the degree of his personal and knowing participation in these atrocities.

[17] I disagree.

[18] The legal principles that apply when analysing complicity are well-established in the case law. These principles were summarized at paragraph 18 of the decision in *Kathiripillai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1172 [*Kathiripillai*]:

> i. It is possible to "commit" a crime against humanity as an "accomplice," or through complicity, even though one has not personally engaged in the acts amounting to the crime (*Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, at 314-317 (CA); *Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433, at 438 (CA); *Canada (Minister of Citizenship and Immigration) v Ezokola*, 2011 FCA 224, at para 50).

ii. Mere membership in an organization which is not directed to a limited and brutal purpose, but which from time to time commits international offences, is not normally a sufficient basis upon which to find that a person was complicit in such crimes (*Ramirez*, above, at 317; *Sivakumar*, above, at 440; *Ezokola*, above, at para 52).

iii. Similarly, mere presence at the scene of a crime, and acts or omissions amounting to passive acquiescence, are not a sufficient basis upon which to find that someone has been complicit in the commission of a crime against humanity. A person is not required to incur a risk of similar treatment by intervening to stop such a crime (*Ramirez*, above, at 317; *Sivakumar*, above, at 441; *Ezokola*, above, at para 53; *Moreno v Canada (Minister of Employment and Immigration*), [1994] 1 FC 298, at 322 (CA)).

iv. To be complicit in a crime against humanity committed by others, a person must be shown to have either had "personal and knowing participation" in the crime or to have tolerated the crimes (*Ramirez*, above, at 316-317; *Sivakumar*, above, at 438, 442; *Ezokola*, above, at paras 52-58).

v. Personal participation in a crime does not require physical participation or presence at the scene of the crime, and may be established by demonstrating the existence of a shared common purpose (*Ezokola*, above, at para 53; *Moreno*, above, at 323; *Sivakumar*, above, at 438-439).

vi. A shared common purpose can be established in various ways, including by demonstrating that a person (i) is a member of an organization that committed the crime, (ii) had knowledge of the commission of the crime, (iii) provided active support to the organization, and (iv) neither took steps to prevent the crime from occurring (if that was within the person's power) nor left the group at the earliest opportunity, having regard to that person's own safety (*Penate v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 79, at para 6).

vii. Presence coupled with being an associate of the primary offenders may be sufficient to constitute complicity, depending upon the particular facts in question (*Ramirez*, above, at 317).

viii. It is not the fact of working for an organization that makes an individual an accomplice to the acts committed by that organization, but rather the fact of encouraging or knowingly contributing to its illegal activities in any manner whatsoever, whether from within the organization or from the outside (*Ezokola*, above, at para 55; *Bazargan v Canada (Minister of Citizenship and Immigration)* (1996), 67 ACWS (3d) 132, at para 11 (CA); *Sivakumar*, above, at 438).

ix. A person who aids in or encourages the commission of a crime, or a person who willingly stands guard while it is being committed, will usually be found to have been complicit in the crime (*Sivakumar*, above, at 438).

x. The closer one is to being a leader, as opposed to being an ordinary member, of an organization that has committed a crime against humanity, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime (*Sivakumar*, above, at 440).

xi. Likewise, the closer a person is to being involved in the decision-making process and the less he or she does to prevent the commission of a crime against humanity, the more likely criminal responsibility will attach (*Moreno*, above, at 324; *Ezokola*, above, at para 53).

[19] In addition to the foregoing, the case law has identified the following other factors to be considered when assessing whether a person was complicit in the commission of a crime against humanity:

i. The nature of the organization;

ii. The method of recruitment;

iii. The length of time in the organization;

iv. Opportunity to leave the organization; and

v. Knowledge of the organization's atrocities.

(See *Kathiripillai,* above, at para 19; *Ardila v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1518, at para 11; *Blanco v Canada (Minister of Citizenship and Immigration)*, 2006 FC 623, at paras 16-21; *Ali v Canada (Solicitor General)*, 2005 FC 1306, at para 10; *Rutayisire v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1168, at para 11).

[20] In the case at bar, the Panel clearly recognized, at paragraph 39 of its decision, that "[s]imple association to [the Group] was not enough, a more detailed examination of the claimant's connection to these crimes is required". The Panel also quoted an excerpt from *Bazargan v Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. no 1209 (QL) [*Bazargan*], at paragraph 11, in which the Federal Court of Appeal reiterated, among other things, that "personal and knowing participation" can be direct or indirect and that "[a]t bottom, complicity rests . . . on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it" (see also *Harb v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, at para 18 [*Harb*]).

[21] The Panel then took into account the fact that "no evidence was presented to demonstrate that the claimant had any direct involvement in human rights abuses". However, it also noted that "[i]t is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in any way or making them possible . . .".

[22] The Panel also reiterated that Mr. MJS acknowledged in his testimony that he knew of the human rights violations committed by [the Group]. Earlier in its decision, the Panel found

that "the documentary evidence clearly demonstrates that [the Group] committed crimes against humanity as well as war crimes in the period 1998 to 2005", by, for example, using child soldiers, perpetrating unlawful killings, committing widespread rape and indiscriminate attacks on civilians, and massacring [ethnic minority] civilians. The transcript of the hearing held before the Panel on September 6, 2011, which is in the Certified Panel Record [CPR], confirms, for example, at pages 1212-1214 and 1227-1228, that Mr. MJS, both at the time and later, explicitly acknowledged [the Group's] involvement in these crimes.

[23] Simply because the Panel stated that some of these crimes had also been committed by [another group] does not detract from the Panel's conclusion regarding [the Group's] involvement in these crimes.

[24] After concluding that Mr. MJS's recruitment efforts for [the Group] in the country's capital "performed a valuable and visible contribution to [the Group]", and after considering the other factors listed in paragraph 19, above, the Panel found that Mr. MJS had been complicit in the crimes committed by [the Group].

[25] In my opinion, the Panel's treatment and application of the complicity test was entirely consistent with the case law principles set out in paragraphs 18 and 19, above. As explained in subparagraph 18(v), "personal and knowing participation" can be established by demonstrating the existence of a shared common purpose. In turn, as stated in subparagraph 18(vi), a shared common purpose can be established in various ways, among other things by assessing certain factors. In its analysis, the Panel discussed these factors, and it was on the basis of this analysis that it arrived at its conclusion regarding Mr. MJS's complicity in the crimes committed by [the Group].

[26] It would have been preferable for the Panel to have stated more explicitly that Mr. MJS shared [the Group's] purpose. However, the Panel's discussion of Mr. MJS's recruitment efforts demonstrates that the Panel was of the opinion that Mr. MJS shared this purpose.

[27] I note, moreover, that the evidence confirms that Mr. MJS was an advocate for this organization and that he even explained to individuals he attempted to recruit that the crimes committed by [the Group] could be tolerated in the context of the civil war (CPR, at p 1236). The Panel was therefore not obliged to enter into a more thorough discussion of the relationship between [the Group's] political faction, to which Mr. MJS belonged, and its military faction, which committed the atrocities described above. Having said that, I note that Mr. MJS admitted that those with political power in [the Group] ultimately controlled the fighters (CPR, at p 1219). He also admitted that he knew about the widespread attacks [the Group] was preparing to carry out and about how it funded these activities (CPR, at pp 1263-1264) (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 15, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*]).

(b) Was the Panel obliged to establish or identify a link between Mr. MJS and the specific crimes committed by [the Group]?

[28] Mr. MJS submits that the Panel erred in failing, first, to specify the crimes he is suspected of having been complicit in and, second, to establish a link between him and these crimes. He also states that, at paragraph 41 of its decision, the Panel concluded that it was unnecessary to specify the crimes he is accused of being complicit in.

[29] I disagree.

[30] First, regarding Mr. MJS's last assertion, the Panel did not say that it was unnecessary to specify the crimes in question. It simply noted that Mr. MJS acknowledged that he knew about the crimes referred to above, which had been committed by [the Group]. Earlier in its decision, the Panel found that these crimes involved using child soldiers, perpetrating unlawful killings, committing widespread rape and indiscriminate attacks on civilians, and massacring [ethnic minority] civilians.

[31] Mr. MJS submits that since the Panel recognized that [the Group] was not a limited brutal purpose organization, it was impossible for it to conclude that Mr. MJS had been complicit in all the crimes committed by this group.

[32] In my opinion, given the particular facts of this case, it was entirely acceptable for the Panel to draw this conclusion after (i) emphasizing that Mr. MJS had testified that he knew of the crimes; (ii) determining that he was making a viable and highly useful contribution to [the Group]; and (iii) taking into account the complicity factors set out at paragraph 19, above. As mentioned above, Mr. MJS also acknowledged that he had attempted to convince other [members of his ethnic group] that the crimes committed by [the Group] could be tolerated, that he had defended the movement's use of armed struggle and that he had taught these individuals about the movement's objectives and the valid grounds for its existence (CPR, at p 1236).

[33] Regarding the link between him and the crimes he is accused of, Mr. MJS also alleges that the Panel erred since it failed to establish this link, even though, he added [TRANSLATION] "this [was] one of the major anomalies this Court noted in the Panel's first decision in this matter".

[34] In that decision of this Court, my colleague Justice Noël allowed Mr. MJS's application for judicial review of an initial decision of the Panel, on several grounds. Among other things, he found that the Panel should have analyzed Mr. MJS's degree of participation in the crimes in question in greater depth (*JMS v Canada (Minister of Citizenship and Immigration)*, 2011 FC 208, at para 18 [*JMS*]).

[35] In the matter at bar, the Panel did perform a more in-depth analysis than in the first decision. In short, the Panel found that Mr. JMS's recruitment efforts for [the Group] in the country's capital "performed a valuable and visible contribution to [the Group]". This represents a significant link between Mr. MJS and the committed crimes, one that was never addressed in the Panel's first decision, which Justice Noël set aside.

[36] In light of this analysis, it was not unreasonable for the Panel to reach the conclusion that Mr. MJS was complicit in the crimes committed by [the Group] that were identified by the Panel (*Sumaida v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 66, at para 31; *Harb*, above, at para 11; *Justino v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1138, at para 19 [*Justino*]; *Teganya v Canada (Minister of Citizenship and Immigration)*, 2006 FC 590, at para 24; *Islam v Canada (Citizenship and Immigration)*, 2010 FC 71, at para 39).

[37] The decisions in *Baqri v Canada (Minister of Citizenship and Immigration)*, [2002] 2 FC 85 [*Baqri*], *Sivakumar*, and *Cardenas v Canada (Minister of Employment and Immigration)* (1994), 74 FTR 214 (FCA) [*Cardenas*], can be distinguished on this point. In short, in *Baqri*, the panel did not provide any analysis or explanation from which to understand that the violent acts of the organization in question rose to the level of crimes against humanity (*Baqri*, above, at para 37). This is why this Court found that the Panel's decision did not identify the crimes

referred to in section 98 of the Act and in which the applicant was complicit. In contrast, in the matter at bar, the Panel identified not only the atrocities committed by [the Group], but also specified which were crimes against humanity and which were crimes of war.

[38] Similarly, in *Sivakumar*, above, at paragraphs 31-32, the Federal Court of Appeal found that the Panel's reasons were deficient, among other things because the Panel had not found that the other crimes committed by the organization in question were crimes against humanity.

[39] In *Cardenas*, above, this Court determined that the inference of advance knowledge of the activities of the military faction of the organization in question might have been reasonable if the clear distinction between the military and political factions of this organization had not existed. The Court further noted that the Panel should have endeavoured to carefully detail the criminal acts which it considered the claimant to have committed, rather than to refer only in general terms to shootings and bombings carried out by the military faction of the organization (*Cardenas*, above, at paras 17 and 21-22). In contrast, in the case at bar, Mr. MJS acknowledged that he knew about the atrocities committed by [the Group's] military faction (see, for example, CPR, at pp 1212-1215, 1228 and 1236), and the Panel clearly and precisely identified the crimes referred to in section 98 of the Act and in which it found Mr. MJS to have been complicit.

(c) Is the Panel's analysis of the evidence and the complicity factors reasonable?

[40] Mr. MJS submits that the Panel's analysis was unreasonable in respect to the following complicity factors:

i. The manner in which he was recruited;

ii. His position in [the Group];

iii. His knowledge of the atrocities committed by [the Group];

iv. His opportunity to leave [the Group]; and

v. The length of time he spent with [the Group].

[41] In my opinion, the Panel's analysis of each of these five factors, as well as its overall analysis of the complicity factors, is not unreasonable.

(i) Method of recruitment

[42] Mr. MJS states that nothing in the evidence indicates that he joined [the Group] voluntarily. He alleges that he became a member under duress.

[43] I disagree.

[44] The Panel recognized that Mr. MJS initially participated in [the Group's] activities because he was pressured to do so by [the Agency], which intended to destroy [the Group]. The Panel found, however, that, relatively quickly, Mr. MJS became a willing recruit while continuing to portray himself to [the Agency] as a double agent acting at their behest.

[45] On this note, the Panel notes earlier in its decision that Mr. MJS himself decided to become an "effective" or true member of [the Group] in 1999 without cutting his ties with [the Agency]. This is precisely what Mr. MJS wrote in his amended Personal Information Form [PIF], which he sent to the Chairperson of the Immigration and Refugee Board in August 2008. In his testimony before the Panel, Mr. MJS clarified this point, as follows:

> [TRANSLATION]
> And they promised us certain advantages, so I told myself that I had to exploit the situation and that teaching wasn't such a bad

> thing. I had to do it. I had to: if [the Group] became a political force, I had to have that position.
>
> I'll say it again. I went beyond what [the Agency] told me to do. For sure. At one point, I went beyond what [the Agency] told me to do, for sure, to profit from these advantages. (CPR, at p 1239)

[46] In light of this evidence, the Panel's conclusion regarding this issue is entirely reasonable.

(ii) Position in the organization

[47] Mr. MJS says that he undertook recruitment efforts for [the Group] in order to reconcile [the Group] with the [. . .] minority to which he belongs. He submits that, in this context, the Panel did not explain how his activities made a valuable and visible contribution to [the Group] and its commission of atrocities against [persons belonging to the ethnic minority], especially as the twenty (20) to thirty (30) [members of that ethnic minority] he recruited were going to help [the Group] gain [support from members of the same ethnic group as Mr. MJS] after the peace agreement, rather than perpetrate atrocities against their own people.

[48] Mr. MJS further submits that, given that he was working for [the Group] secretly, it was absurd on the part of the Panel to conclude that his recruitment efforts gave him a certain visibility within the organization.

[49] I disagree.

[50] In paragraph 33 of its decision, the Panel explains that the recruitment of [intellectuals of Mr. MJS's ethnic group] was important to [the Group] since it wanted to show [this minority of the population] that [the Group] was not simply an [ethnic majority] organization. Recruiting

[members of the ethnic minority] therefore provided [the Group] with a way of legitimizing the organization in the eyes of [the ethnic minority]. The Panel also noted that Mr. MJS was responsible for recruiting [members of his own ethnic group] in the country's capital, which provided him with high level of visibility within the organization.

[51] As the respondent notes in his supplementary memorandum of argument, Mr. MJS himself explained, in the following excerpt from his testimony, the importance of his efforts to recruit [members of his ethnic group] for [the Group]:

> [TRANSLATION]
> Well, I'll refer you again to my additional Personal Information Form. The main reason, during the negotiations, the [members of my ethnic group] criticized [the Group] for being mono-ethnic, for having no other vision but to fight [the ethnic minority].
>
> So that, that had political weight because, during the negotiations, the aim was to under-, undermine [the Group's] credibility, and in order for [the Group] to regain its credibility, its movement had to show that no, our go-, our goal is not to fight the [ethnic minority], our goal is to fight injustice.
>
> You can see this because our movement even had members from [the ethnic minority]. So that was, that was the main reason why [the Group] had members belonging to the [ethnic minority]. (CPR, at p 1226)

[52] In light of this evidence and the Panel's explanations, I consider reasonable the Panel's finding regarding the important role played by Mr. MJS in [the Group]. Contrary to Mr. MJS's arguments, the Panel was not obliged to determine whether he held a leadership position in [the Group], or whether he was in the higher ranks of that organization in order to find him complicit in the atrocities committed by [the Group] (*Ishaku v Canada (Citizenship and Immigration)*, 2011 FC 44, at para 62; *Justino*, above, at para 10).

[53] Incidentally, I note that the Panel's observations regarding the role of [members of the ethnic minority] in [the Group] respond to Justice Noël's comments on this matter with regard to the Panel's first decision, which he set aside (*JMS*, above, at para 21). These observations, together with the possibility that [members of the ethnic minority], such as Mr. MJS, hold important positions in [the Group], are properly supported by the testimony of Mr. MJS himself (see, for example, CPR, at pp 1243-1245).

[54] Even though the Panel did not mention Mr. MJS's testimony about the importance of [intellectuals from his ethnic group] in [the Group] in its decision, the Supreme Court of Canada clarified after Justice Noël issued his decision, that when determining whether the decision of a panel is reasonable, the reviewing court may consider the evidence in the CPR (*Newfoundland Nurses*, above, at para 15). The Supreme Court also explained that reasons are adequate when they "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland Nurses*, above, at para 16). In lights of the Panel's observations and the evidence on the record, I find that the Panel's decision regarding this issue was not unreasonable.

[55] After finding that Mr. MJS played an important role in [the Group], and that he held a position of trust in this organization, the Panel mentioned two other factors that strengthened this conclusion, namely (i) Mr. MJS's senior level contacts in the government led by [the Group] after 2003; and (ii) his expectation of a senior government position once this government was formed.

[56] Mr. MJS admits that he had hoped to secure a senior position in the government [the Group] formed after 2003. But he submits that this does not mean that he held an important

position in [the Group] before 2003. He adds that the fact that he was granted an audience with [the Group]'s president after the elections does not imply that he held an important position within this organization: he used his [. . .] business card, which had nothing to do with the organization, to request and obtain this audience.

[57] In my opinion, given all of the circumstances, the Panel's observations on these two points were not unreasonable. In any event, these comments were made after the Panel had drawn its conclusion about the importance of Mr. MJS's role in [the Group], and were made simply to reinforce this conclusion.

(iii) Knowledge of atrocities

[58] Regarding his knowledge of the atrocities, Mr. MJS submits that the Panel was obliged to establish a shared common purpose between him and those who committed the atrocities, failing which the *mens rea* requirement is not satisfied.

[59] As stated in subparagraph 18(iv), above, when determining whether a person was complicit in a crime against humanity committed by others, the key issue is whether the person had "personal and knowing participation" in the crimes or whether he or she tolerated them (my emphasis) (*Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (CA), at pp 316-317; *Sivakumar*, above, at pp 438 and 442; *Ezokola*, above, at paras 52-58).

[60] Personal participation in a crime can be established by demonstrating the existence of a shared common purpose (*Ezokola*, above, at para 53; *Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298 (CA), at p 323; *Sivakumar*, above, at pp 438-439).

[61] In turn, a shared common purpose can be established in various ways, including by demonstrating that a person (i) is a member of an organization that committed the crime, (ii) had knowledge of the commission of the crime, (iii) provided active support to the organization, and (iv) neither took steps to prevent the crime from occurring (if that was within the person's power) nor left the group at the earliest opportunity, having regard to that person's own safety (*Penate v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 79, at para 6).

[62] As mentioned earlier, Mr. MJS testified that he became an "effective" member of [the Group] voluntarily. As the Panel noted at paragraphs 27, 30 and 34 of its decision, Mr. MJS also testified that he knew of the atrocities committed by [the Group]. These observations are properly substantiated in the CPR. In his PIF, for example, he admitted that he

> [TRANSLATION]
> . . . defended [the Group]'s use of armed struggle by teaching the public about the movement's goals and the valid grounds for its existence, by recruiting new members and by collecting membership fees.

[63] Mr. MJS also responded yes to the following questions in his PIF:

> Have you ever . . . [u]sed, planned or advocated the use of armed struggle or violence to reach political, religious or ideological objectives?
>
> Have you ever . . . [b]een associated with a group that used, uses, advocated or advocates the use of armed struggle or violence to reach political, religious or social objectives?

[64] In his testimony, Mr. MJS admitted that knew not only of the crimes committed by [the Group] (see, for example, CPR, at pp 1212-1215), but also of the preparations for these crimes (CPR, at pp 1192 and 1263).

[65] Regarding his support of [the Group], he admitted that he defended the goals of this organization and that he explained to [fellow members of his ethnic group] whom he was attempting to recruit that the crimes committed by [the Group] could be tolerated (CPR, at p 1236).

[66] Mr. MJS also recognizes that the atrocities referred to in the Panel's decision are crimes against humanity (CPR, at pp 1212 and 1228).

[67] Mr. MJS suggests that he could not have had a shared common purpose with [the Group] with regard to the atrocities committed by this organization since he mobilized the international community against these atrocities, condemned the atrocities after [the Group]'s rise to power and refused many favours offered to him by [the Group]. Yet there is very little evidence on the record showing that Mr. MJS made such denunciations during the period he was found to be complicit in the war crimes and crimes against humanity committed by [the Group], that is, between 1999 and 2003. According to his PIF and his own testimony, he made these denunciations after 2005. I recognize that Mr. MJS said in his PIF that he acted as a reference for the organization Human Rights Watch from 2001 to 2003. However, it was reasonable for the Panel not to explicitly discuss this fact in its decision (*Newfoundland Nurses*, above, at para 16; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65, at para 3 [*Driver Iron*]), given that he did not expand on his role as a reference person.

[68] Mr. MJS also states that the evidence on the record demonstrates that he continued to work with the country's secret service to stop the atrocities committed by [the Group]. In my opinion, it was not unreasonable for the Panel to determine implicitly that, even if this was Mr. MJS's ultimate goal, there were serious grounds to believe that Mr. MJS was nonetheless

complicit in the atrocities, in light of all the complicity factors the Panel considered in its decision. The Panel was therefore not obliged to explicitly address this item (*Newfoundland Nurses*, above, at para 16; *Driver Iron*, above).

(iv) Opportunity to leave the organization

[69] With regard to the opportunity to leave [the Group], Mr. MJS submits that there was no way for him to withdraw from the organization without putting his life and the lives of his family in danger. In support of this position, he points out that when he became a member of [the Group], he had to complete a four-page form of personal information that could be used to find him and to take reprisals against him and his family. He also notes that he stated in his PIF that he had no way of withdrawing from [the Group] without putting his life and the lives of his family in danger and that he was made to understand that he would be killed if he tried to leave the organization. He adds that his many efforts to leave the organization were in vain because of how dangerous this was. He also notes that he wrote in his supplementary PIF that most of the members who refused to continue working for [the Group] were kidnapped at their homes, tortured or even killed.

[70] In its decision, the Panel recognized that, generally speaking, dissociating himself from [the Group] or [the Agency] could result in Mr. MJS and the members of his family being harmed. However, the Panel found that after he was appointed [to a certain position], when he could have legitimately left the organization, Mr. MJS secretly remained a member of [the Group]. The Panel further noted that no documentary evidence was presented to establish that other people who had attempted to leave [the Group] or [the Agency] had been threatened or

harmed. In light of the evidence, the Panel found that Mr. MJS did not clearly show that he could not leave [the Group], and that he could have made an effort to leave at any time.

[71] In my opinion, the Panel's decision on this point was not unreasonable. In fact, it is entirely consistent with the evidence showing that Mr. MJS became a member of [the Group] voluntarily and that he hoped to gain an important position once this organization was in power, after the elections. Mr. MJS had to demonstrate that there was imminent physical peril at any time during the period he was a voluntary member of [the Group] (*Oberlander*, above, at para 25). For the reasons set out above, it was not unreasonable for the Panel to conclude that Mr. MJS had not met this burden.

(v) Length of time in the organization

[72] Regarding the time he spent in [the Group], Mr. MJS submits that the Panel erred when it said that Mr. MJS remained in the organization until he left the country in 2008.

[73] In my view, this error is a minor one. I am satisfied that it has no effect on the Panel's finding regarding Mr. MJS's complicity in the atrocities committed by [the Group] from 1999, when Mr. MJS became an "effective" and willing member of the organization, to 2003, [. . .]. Indeed, the Panel correctly identified this period as being from 1999 to 2003 in paragraphs 9 and 27 of its decision.

Conclusion concerning the Panel's analysis of the evidence and the complicity factors

[74] For the reasons set out above, the Panel's analysis of the complicity factors, both individually and as a whole, has a reasonable basis (*Alberta Teachers*, above, at para 53; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, at para 45, [2012] 1 SCR 364 [*Halifax*]). In every instance, and overall, this analysis has a rational basis (*Halifax*, above, at paras 47-48).

[75] In my opinion, the Panel's conclusion that Mr. MJS was complicit in the atrocities committed by [the Group] is within "a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" and was sufficiently justified, transparent and intelligible (*Dunsmuir*, above, at para 47).

[76] Given the particular facts of this case, nothing hinges on the fact that the Panel did not state its conclusion regarding the fact that there are "serious reasons for considering", within the meaning of section 33 of the Act, that Mr. MJS was complicit in the atrocities committed by [the Group]. It was therefore possible for the Panel to state its conclusion on the basis of the complicity factors, which, in the case at bar, reasonably suggest that Mr. MJS was complicit in the crimes committed by [the Group].

V. CONCLUSION

[77] For the foregoing reasons, the Panel

i. did not apply the wrong test to determine whether he was complicit in crimes against humanity and in war crimes committed by [the Group] between 1999 and 2003;

ii. was not obliged to establish or identify a link between Mr. MJS and the specific crimes committed by [the Group];

iii. did not make an unreasonable analysis of any of the complicity criteria in the case law and did not reach an unreasonable conclusion regarding Mr. MJS's complicity in the crimes referred to in section 98 of the Act.

[78] This application for judicial review is therefore dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

"Paul S. Crampton"
Chief Justice

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITOR OF RECORD

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APPEARANCES:

Mr. MJS	FOR THE APPLICANT (ON HIS OWN BEHALF)
Philippe Alma	FOR THE RESPONDENT

SOLICITORS OF RECORD:

	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT