Federal Court  Cour fédérale

Date: 20220927

Docket: IMM-3430-21

Citation: 2022 FC 1347

Ottawa, Ontario, September 27, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

KASIM KURT

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*], the Supreme Court of Canada had to consider the dividing line between mere association and culpable complicity in crimes against humanity. Namely, it had to determine when, for the purposes of exclusion from the definition of "Convention refugee" pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], mere association by an individual

seeking refugee protection with an organization that has committed crimes against humanity becomes culpable complicity in such crimes, thereby rendering that individual a person referred to in section F(a) of Article 1 [Article 1F(a)] of the *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [Refugee Convention]. By adopting a contribution-based test or approach for the determination of complicity, the Supreme Court replaced the "personal and knowing participation test" developed by the Federal Court of Appeal in *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, 1992 CanLII 8540 (FCA) [*Ramirez*], a test which had over time become overextended to capture individuals on the basis of complicity by association or passive acquiescence (*Ezokola* at paras 9, 79). In the end, the Supreme Court reformulated the test and held that to be excluded as a refugee by virtue of Article 1F(a), there must be "serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose" (*Ezokola* at para 84).

[2] In a decision dated May 3, 2021, the Refugee Appeal Division [RAD] allowed an appeal of an earlier decision of the Refugee Protection Division [RPD], which had determined that the respondent, Mr. Kasim Kurt, was excluded from refugee protection under section 98 of the Act as a person referred to in Article 1F(a) of the Refugee Convention on the grounds that there were serious reasons for considering that he had voluntarily made a significant and knowing contribution to crimes against humanity. On appeal, the RAD determined that the RPD had "extended Article 1F(*a*) to cases of 'guilt by association,' contrary to principles outlined in [*Ezokola*]", and for the reasons set out in its decision, the RAD found that Mr. Kurt was indeed a Convention refugee and a person in need of protection. The applicant, the Minister of Citizenship

and Immigration [Minister], now seeks judicial review of the RAD's decision. I should mention that the Minister takes no position regarding the inclusion assessment of the RAD, i.e., the elements of the RAD's decision regarding whether Mr. Kurt is a person in need of protection, and limits his objection to the exclusion issue, namely, the RAD's finding regarding the exclusion of Mr. Kurt under Article 1F(a).

[3] For the reasons that follow, I would allow the application for judicial review. In short, I find that although the RAD properly outlined the test for complicity set out by the Supreme Court in *Ezokola*, it artificially restricted the test in its application to the facts of Mr. Kurt's case, thus rendering its decision unreasonable. I make no further finding on any other issue.

II. Background

[4] Mr. Kurt is a 50-year-old citizen of Turkey who made a career in the Turkish gendarmerie [Jandarma]. The Jandarma and the Turkish National Police [National Police] fall under the control of the Turkish Ministry of the Interior. The powers of the National Police are restricted to maintaining public order in cities and towns, while the Jandarma carries out this responsibility in the Turkish countryside, where it maintains a network of police posts.

[5] After graduating from the Jandarma Non-Commissioned Officer Preparatory School in Ankara in 1988, Mr. Kurt worked for the Jandarma until 2013, during which time he held such positions as Unit Commander for the Station Command and Commando Division, Turkish Armed Forces Attaché in Paris, as well as Public Order Crimes Section Chief with the Tunceli Special Operations Battalion and the Manisa Provincial Jandarma Command. During his 24-year

career with the Jandarma, Mr. Kurt continued to advance and develop his skills; for example, he finished commando training and took courses in judicial investigation. He was regularly promoted, received numerous letters of appreciation, was awarded badges and earned a medal. During his testimony before the RPD, Mr. Kurt described every position that he had held during his years with the Jandarma, including the areas in which he was posted, his rank at the time, the tasks and duties undertaken, and his knowledge of crimes being committed by other members. Overall, Mr. Kurt stated that in some of his earlier positions, he witnessed or was aware of mistreatment towards detainees – for example, sleep and food deprivation – but that he never witnessed physical torture. He claims that he was too afraid of punishment or ostracism to intervene. I should also mention that during his testimony, Mr. Kurt walked back the assertions in his Basis of Claim Form that he had ever commanded a unit or taken commando training, explaining that he had only included such positions in his written narrative to impress Canadian authorities; this negatively affected his credibility in the eyes of the RPD.

[6] In February 2013, Mr. Kurt started to work as a security director at the Scientific and Technological Research Council of Turkey [TUBITAK], an organization affiliated with the Turkish Ministry of Science, Industry and Technology. In December 2013, a corruption scandal broke out involving four ministers of the Turkish government. The government considered the investigation that led to the outbreak of the scandal as an attack against the government itself, and according to Mr. Kurt, the Turkish government targeted TUBITAK by dismissing hundreds of employees because TUBITAK had been involved in the investigation. As a result, Mr. Kurt was dismissed from his position as security director in April 2014 and was transferred to a more innocuous position with the Turkish Management Science Institute [TUSSIDE]; his time at

TUSSIDE was a period of mounting psychological pressure for Mr. Kurt as his director informed him that he was under suspicion of holding opinions against the government.

[7] In July 2016, there was a failed coup against the Turkish government, which was thought to have been initiated by leaders linked to the Gulen movement, referred to by the Turkish government as the Fethullahist Terrorist Oganization [FETO]. As a result, Mr. Kurt was dismissed on July 31, 2016, because, as he asserts, the Turkish government suspected that he was a supporting member of FETO on account of his experience with the Jandarma and his dismissal was part of a Gulen-members purge in the government. Mr. Kurt testified that he is in fact not a member of the Gulen movement, and he believes that the Turkish government simply targeted him because of his democratic beliefs and his involvement in the corruption investigation when he worked at TUBITAK.

[8] In his continued quest to better himself, in September 2016, Mr. Kurt began a master's degree at Gebze Technical University, and in January 2017, he started to work at the university canteen. On March 17, 2017, Turkish authorities began harassing Mr. Kurt, looking for him and searching his house, and questioning his wife and friends about his whereabouts. His wife was seemingly permitted to photograph a police report that accused Mr. Kurt of membership in the Gulen movement. Because Mr. Kurt was aware that several of his former colleagues had been arrested and tortured on similar suspicions, and because he feared that he would face the same fate, he went into hiding. After the Turkish government decided to extend, for the fifth time, in October 2017, the state of emergency that had been put in place, Mr. Kurt decided to leave Turkey, in particular as his passport and United States visa were to expire in early 2018. He left

the country irregularly, crossing into Iraq, because he feared that the Turkish government would have issued an exit ban against him. Mr. Kurt flew to the United States and crossed into Canada in January 2018; he claimed refugee protection.

III. The underlying decisions of the Immigration and Refugee Board

[9] Before the RPD, Mr. Kurt claimed that he has a well-founded fear of persecution by the Turkish government based on his perceived political opinion, as a suspected member of FETO. The Minister of Public Safety and Emergency Preparedness [Public Safety Minister] intervened before the RPD pursuant to paragraph 170(e) of the Act and section 29 of the *Refugee Protection Division Rules*, SOR/2012-256, to request that Mr. Kurt be excluded from refugee protection under section 98 of the Act on the grounds that he is a person referred to in Article 1F(a) of the Refugee Convention. The Public Safety Minister did not submit evidence that Mr. Kurt personally committed crimes against humanity, but claimed only that Mr. Kurt may have participated or been an accomplice in the perpetration of crimes by the Jandarma during his tenure with the organization.

[10] Following a four-day hearing, the RPD found, in a decision dated October 21, 2020, that Mr. Kurt was a person referred to in Article 1F(a) of the Refugee Convention and, therefore, was excluded from refugee protection under section 98 of the Act. The RPD determined that the evidence established that the Jandarma had committed crimes against humanity, as defined in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paragraph 119, against members of the Kurdistan Workers' Party [PKK]. Although the evidence did not indicate that all the units of the Jandarma were involved in such atrocities, and although the RPD did not,

by my reading of its decision, go as far as finding that Mr. Kurt was even directly involved in atrocities against the PKK, the RPD did conclude that units of the Jandarma had also committed human rights violations against civilians detained under suspicion of common crimes, including the widespread use of torture, and that such units included the units dedicated to criminal investigation of which Mr. Kurt was a member. Before me, the Minister confirmed that exclusion under Article 1F(a) would apply whether the particular crimes were perpetrated against the PKK or regular civilians suspected of common crimes; ultimately, we are dealing with the inhumane treatment of a civilian population or an identifiable group.

[11] In the end, the RPD found that Mr. Kurt's contribution to crimes against humanity was:

i. voluntary – he had a realistic choice whether to assist the Jandarma in its criminal investigations;

ii. significant – Mr. Kurt participated in the arrest and interrogation of criminal suspects, interrogations which the documentary evidence shows included torture as a standard method of interrogation, and was also involved in commando operations in the Kurdish Province of Mardin, where regular members of the Jandarma participated in joint operations with anti-terrorism units; and

iii. undertaken knowingly – it was unlikely that Mr. Kurt was not aware of the Jandarma's crimes or criminal purpose, and although, on a balance of probabilities, Mr. Kurt did not knowingly contribute to the furtherance of crimes against humanity against the Kurdish population, in the RPD's view, Mr. Kurt still made a knowing contribution to crimes against humanity because he was aware that the Jandarma engaged in torture while conducting criminal investigations so as to discourage involvement with the PKK, and given his duties and responsibilities, he was also aware that his actions would assist the Jandarma in the furtherance of such crimes against humanity.

[12] The determinative issue before the RAD was whether Mr. Kurt was complicit in crimes against humanity committed by the Jandarma. For its part, the RAD accepted Mr. Kurt's new evidence, which included court documents relating to proceedings against him, documents from

the Konya Office of the Chief Public Prosecutor suggesting that he is being investigated on suspicion that he is a supporter of FETO, as well as a letter from his wife explaining how she obtained the court documents and affirming that the police have been to her home regularly looking for Mr. Kurt. However, the RAD denied his request for a hearing because the documents did not raise concerns about his credibility.

[13] The RAD noted the size and nature of the Jandarma – a multifaceted law-enforcement organization that provides legitimate police services to over half of the Turkish population living in 90 percent of the country – and found that there is no evidence that Mr. Kurt was associated with units that committed crimes against humanity; although Mr. Kurt testified that he was aware that detained terrorist suspects were subjected to inhumane treatment, none of the evidence establishes that Mr. Kurt participated in or that he had any command or supervisory responsibilities over this mistreatment. In the end, the RAD found that the RPD based its conclusion on Mr. Kurt's complicity on its interpretation of the evidence according to which torture was a widespread method of interrogation by the Jandarma. The RAD determined that the RPD erred by concluding that Mr. Kurt made a significant and knowing contribution to crimes against humanity perpetrated by other units of the Jandarma because it relied on circumstantial evidence and on guilt by association, contrary to principles established by the Supreme Court in *Ezokola*.

[14] I should also mention that the RAD rendered its decision before the Public Safety Minister was able to signal his intervention in the proceedings before it. Consequently, the Public Safety Minister was not represented during the appeal before the RAD.

IV. Legislation

[15] According to section 98 of the Act, a person referred to in section F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection:

Exclusion — Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
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.	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.

[16] Article 1F(a) of the Refugee Convention excludes from the Convention any person with respect to whom there are serious reasons to consider has committed a crime against humanity:

Article 1	Article premier
Definition of the term "refugee"	**Définition du terme "réfugié"**
. . .	[…]
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(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;	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;
. . .	[…]

[17] Subsection 6(3) of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, implemented into Canadian law the definition of "crimes against humanity" set out by the *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 [Rome Statute]:

crime against humanity means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.	***crime contre l'humanité*** Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

V. Issue and standard of review

[18] The issues in this application for judicial review are whether the RAD erred in its interpretation of "complicity" as defined by the Supreme Court in *Ezokola* and whether the RAD made findings of fact inconsistent with the record. There is consensus that reasonableness is the applicable standard of review in this case (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]; *Hadhiri v Canada (Citizenship and*

Immigration), 2016 FC 1284 at para 14). Therefore, this Court should intervene only if the decision under review does not bear "the hallmarks of reasonableness – justification, transparency and intelligibility" and if the decision is not justified "in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). This Court should adopt a posture of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13).

VI. Preliminary issue

[19] As a preliminary matter, the Minister submits that the style of cause mistakenly refers to the respondent as Kurt Kassim rather than Kasim Kurt. The Court should amend the style of cause to identify the respondent correctly as Kasim Kurt.

VII. Analysis

A. *The Ezokola test*

[20] In rearticulating the Canadian approach to Article 1F(a), the Supreme Court in *Ezokola* made clear that complicity in international crimes arises by contribution, whether the individual's contribution is linked to a particular crime or to the criminal purpose of the group of which he or she is a member; the "contribution does not have to be 'directed to specific identifiable crimes' but can be directed to 'wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes'" (*Ezokola* at para 87, citing *R (JS (Sri Lanka)) v Secretary of State for the Home Department*, [2010] UKSC 15, [2011] 1 AC 184 at para 38 [*JS (Sri Lanka)*]). As

regards the application of Article 1F(a), this link is established 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* at paras 7 and 8). Consequently, the three components for the contribution-based test for complicity include:

i. voluntary contribution to the group's crime or criminal purpose;

ii. significant contribution to the group's crime or criminal purpose; and

iii. knowing contribution to the group's crime or criminal purpose.

[21] Assessing voluntariness requires one to consider whether the individual had no realistic choice but to participate in the crime or criminal purpose, thus excluding, for example, where there exists a defence of duress (*Ezokola* at para 86). Where the contribution to the crime or criminal purpose – the "wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary" – becomes significant is where mere association becomes complicity for the purposes of Article 1F(a) of the Refugee Convention (*Ezokola* at para 87, citing *JS (Sri Lanka)* at para 38). Finally, for there to be complicity in crimes against humanity, the individual must be aware of the organization's crime or criminal purpose and aware that his or her conduct will assist in the furtherance thereof (*Ezokola* at para 89).

[22] As regards what the Supreme Court called the "unique" evidentiary standard of "serious reasons for considering" to which the contribution-based test for complicity is subject, the standard requires the evidence of complicity to rise "above mere suspicion" that an individual has committed war crimes, crimes against humanity or crimes against peace (*Ezokola* at

para 101); the determination of whether that standard has been met is a fact-based exercise, and in order to determine whether an individual's conduct "meets the *actus reus* and *mens rea* for complicity", the Supreme Court has identified a series of non-exhaustive factors to be considered:

> (i) the size and nature of the organization;
>
> (ii) the part of the organization with which the refugee claimant was most directly concerned;
>
> (iii) the refugee claimant's duties and activities within the organization;
>
> (iv) the refugee claimant's position or rank in the organization;
>
> (v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
>
> (vi) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.
>
> [*Ezokola* at para 91.]

B. *The RAD improperly applied the legal standard of complicity set out in Ezokola*

[23] The issue before me is whether the RAD misapplied the test for complicity established by the Supreme Court in *Ezokola*. In its decision, the RAD expressed the test as follows:

> [19] The issue is whether the person made a voluntary, significant, and knowing contribution to the crimes or criminal purpose of the organization. The Court distinguishes between groups which have a limited and brutal purpose, and those which are multifaceted for purposes of determining the relationship between the contribution and the criminal purpose. A "significant contribution test" must be used which includes personal and knowing participation. Crimes against humanity must be assessed in the context of international law and not confined to one domestic legal system. The *mens rea* provision of paragraph 25(3)(*d*) of the Rome Statute requires that a

> contribution be intentional and made for the purpose of furthering the group's criminal activity with knowledge of the intention of the group to commit the crime. Knowledge can be imputed if the group acts with a common criminal purpose without the intent to commit a specific crime.
>
> [20] Participation in a joint criminal enterprise (JCE) is sufficient for exclusion if the person made a significant contribution to the criminal purpose. JCE can be established in three ways: (1) sharing in the intent to commit a particular crime, (2) having knowledge of a system in which ill treatment is practiced, and forming the intent to further the system, or (3) having the intent to contribute to the JCE by participating and furthering its criminal purpose or activity. All three require a significant contribution to the criminal act or purpose made with subjective awareness of the situation.
>
> [21] Mere association or passive acquiescence is not enough to establish complicity. There must be evidence that the individual personally assisted in the criminal enterprise. This cannot be done by means of "guilt by association." The contribution must be substantial. Liability under international criminal law does not attach to omissions unless the person is under a duty to act. Complicity requires control or responsibility over the people committing the crimes. This cannot be imputed simply because the person was aware of the crime, but did not protest. The Supreme Court held that "guild by association" [reproduced as it appears in the RAD decision] violates the principle of individual criminal responsibility. People "can only be liable for their own culpable conduct." Careful attention must be given to the degree of the person's contribution in order to prevent an unreasonable extension of the concept of criminal participation.
>
> [Emphasis added.]

[24] The RAD properly sets out the test by acknowledging that the "issue is whether the person made a voluntary, significant, and knowing contribution to the crimes". However, and even putting aside the reference by the RAD to the "personal and knowing participation" test, which was specifically replaced by the Supreme Court in *Ezokola* with the contribution-based approach – Mr. Kurt concedes before me that the reference by the RAD to that old test was misguided, but he argues that such a reference was not determinative of the decision – the

RAD's reference to the notion of complicity requiring "control or responsibility" over the people committing the crimes is, in my view, an overly restrictive expression of the contribution-based test set out by the Supreme Court and improperly limited the test for complicity.

[25] I should mention that the Supreme Court in *Ezokola* does in fact make reference to the need for "control or responsibility" over individuals committing crimes against humanity. However, it does so in the context of discussing rank-based complicity with knowledge of the atrocities being committed (*Ezokola* at paras 80-82). After reviewing the various approaches to complicity, the Supreme Court concluded that there must be a link between the person and the crime or criminal purpose; simple acquiescence is insufficient. I find that the RAD took the Supreme Court's reference out of context in stating that, as part of the contribution-based approach, complicity requires "control and responsibility" over the people committing the crimes.

[26] Prior to addressing the notion of complicity under international law, the Supreme Court reviewed such concepts as the purpose of the Refugee Convention and Article 1F(a), the role of the RPD, the need to rely on international law to interpret Article 1F(a), and the notion of common purpose under Article 25(3)(d) of the Rome Statute. The Supreme Court then undertook a comparative law analysis of the approach taken to the notion of complicity, and in the end, summarized the international approach to this notion as requiring a link or nexus between the individual and the crime or group's criminal purpose:

> [77] <u>In sum, the foregoing approaches to complicity all require a nexus between the individual and the group's crime or criminal purpose</u>. An individual can be complicit without being present at the crime and without physically contributing to the crime.

> However, the UNHCR has explained, and other state parties have recognized, that to be excluded from the definition of refugee protection, there must be evidence that the individual knowingly made at least a significant contribution to the group's crime or criminal purpose. Passive membership would not be enough …
>
> [Emphasis added.]

[27] The Supreme Court went on to address the concern with the existing Canadian approach to criminal participation having been overextended, often finding criminal fault in omissions, and then indicated that the test for complicity had, in some cases, "inappropriately shifted its focus towards the criminal activities of the group and away from the individual's contribution to that criminal activity" (*Ezokola* at para 79). The Supreme Court then stated:

> [80] As Noël J.A. noted in this case, 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". Nonetheless, the Federal Court of Appeal reasons should not be improperly relied on to find complicity even where the individual has committed no guilty act and has no criminal knowledge or intent, beyond a mere awareness that other members of the government have committed illegal acts.
>
> [81] In our view, it is necessary to rearticulate the Canadian approach to art. 1F(a) to firmly foreclose exclusions based on such broad forms of complicity. Otherwise, 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. Furthermore, a concept of complicity that leaves any room for guilt by association or passive acquiescence violates two fundamental criminal law principles.
>
> [82] It is well established in international criminal law that criminal liability does not attach to omissions unless an individual is under a duty to act: *Cassese's International Criminal Law*, at pp. 180-82. Accordingly, unless an individual has control or responsibility over the individuals committing international crimes, he or she cannot be complicit by simply remaining in his or her position without protest: *Ramirez*, at pp. 319-20. Likewise, guilt by association violates the principle of individual criminal

> responsibility. Individuals can only be liable for their own culpable conduct: van Sliedregt, at p. 17.
>
> [83] Accordingly, the decision of the Federal Court of Appeal should not be taken to leave room for rank-based complicity by association or passive acquiescence. Such a reading would perpetuate a departure from international criminal law and fundamental criminal law principles.
>
> [Emphasis added.]

[28] It seems clear to me that the reference to the "control or responsibility" of the person was only part of the discussion on how the Canadian approach to criminal participation had been overextended, leading up to the reformulation of the test. After addressing the various concepts as it did and outlining the previous problems with the Canadian approach, the Supreme Court proceeded to clarify the test for complicity under Article 1F(a) of the Refugee Convention:

> J. *The Canadian Test for Complicity Refined*
>
> [84] In light of the foregoing reasons, it has become necessary to clarify the test for complicity under art. 1F(a). To exclude a claimant from the definition of "refugee" by virtue of art. 1F(a), there must be serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose.
>
> [85] We will address these key components of the contribution-based test for complicity in turn. In our view, they ensure that decision makers do not overextend the concept of complicity to capture individuals based on mere association or passive acquiescence.

[29] There is no doubt that the Supreme Court in *Ezokola* rejected the guilt-by-association approach to complicity and made clear that a concept of complicity that leaves any room for guilt by association or passive acquiescence cannot stand; individuals can only be liable for their own culpable conduct as "criminal liability does not attach to omissions unless an individual is under

a duty to act" (*Ezokola* at paras 30, 81 and 82). However, it seems to me that whether by omission or commission, culpable conduct as regards crimes against humanity cannot be restricted to situations where the individual had "either control over the person [committing the crime] or supervisory responsibility [over that person]" (RAD decision at para 34); culpable conduct can take many forms, and thus supervisory responsibility is not a requirement for complicity under the contribution-based test outlined by the Supreme Court.

[30] Here, the RAD reviewed the evidence in line with the non-exhaustive factors set out in *Ezokola* to assess whether there were serious reasons for considering that Mr. Kurt had voluntarily made a significant and knowing contribution to the Jandarma's crimes or criminal purpose. The error, as I see it, in the RAD's decision is where the RAD, in making such an assessment, determines that:

> [34] Although the Appellant was aware that some people who had been detained at Mazidagi were subject to inhumane treatment in contravention of international law, he was not involved, nor did he have supervisory responsibility. The detainees in questions [*sic*] were suspected of being terrorists and were subject to special procedures. The Appellant investigated common crimes. The RPD noted examples of torture conducted by members of the [Jandarma] in the province in which the Appellant worked and concluded that he must have known what was going on. First, the Appellant testified that he did not know about these incidents at the time. The RPD did not believe that he could not have been aware of them, but failed to provide adequate reasons why it disbelieved the Appellant. Second, even if this were true, the RPD erred by ignoring the Supreme Court of Canada's instructions not to exclude people because they knew that crimes were being committed, but did not object. In *Ezokola*, the Supreme Court of Canada held that one must have either control over the person or supervisory responsibility in order to impute a joint criminal enterprise. The fact that the Appellant was aware that terrorist suspects were being mistreated, but that he did not protest, has been expressly excluded as being indicative of a significant contribution to crimes against humanity. The panel extended

> Article 1F(*a*) to cases of "guilt by association," contrary to principles outlined in *Ezokola*. As a result of this finding, I do not need to assess counsel's submission that the crimes described do not meet the definition of crimes against humanity.
>
> [Emphasis added.]

[31] Introducing a requirement of control and supervision in the context in which Mr. Kurt purportedly found himself was inappropriate; as conceded by Mr. Kurt before the RAD, the evidence in this case does not disclose any link between his conduct and the commission of a crime by virtue of his rank.

[32] In addition, the RAD seems to suggest that what is being assessed are Mr. Kurt's omissions – his purported failure to act when he should have – when it stated at paragraph 21 of its decision, cited above, that "[l]iability under international criminal law does not attach to omissions unless the person is under a duty to act" and that "[c]omplicity requires control or responsibility over the people committing the crimes." Mr. Kurt himself, in his submissions before me, frames the debate as relating to the assessment of omissions on his part for failing to act. On this issue, I must agree with the Minister; the debate is not limited to any omissions by Mr. Kurt for purportedly not acting when he was aware of crimes against humanity taking place, but rather to his actions or commissions, or his purported general participation in a group's criminal activity and the assessment of whether that participation becomes culpable contribution. The evidence according to the Minister, suggests finding, rightly or wrongly, of Mr. Kurt's actions providing assistance or contributing to the criminal purpose of the Jandarma, thus rendering him complicit in the crimes committed by others. For my part, I must agree that the evidence relates as much to possible omissions to act on the part of Mr. Kurt as it does to Mr. Kurt purportedly contributing to the atrocities committed by others.

[33] Therefore, this is not just a case of omissions as argued by Mr. Kurt, but also of commission. In any event, importing the element of "control and responsibility over those who committed the crimes" (the RAD decision at para 47) as part of the test for complicity is nowhere to be found in the contribution-based approach set out by the Supreme Court in *Ezokola*. My reading of the RAD's decision has me believe that the RAD has improperly imported the "control and supervisory" requirement into the contribution-based test set out in *Ezokola* and applied that requirement to the evidence without distinction. It was wrong to do so.

VIII. Conclusion

[34] The misapplication of the test for complicity is enough to render the RAD decision unreasonable and to set it aside. The Minister also argues that the RAD, in its decision, mischaracterized some of the findings of the RPD and that without these mischaracterizations, its decision may have been different. Given my finding on the RAD's application of the test for complicity set out in *Ezokola*, I need not address the second issue raised by the Minister. I would grant the application for judicial review.

JUDGMENT in IMM-3430-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision dated May 3, 2021, is set aside and this matter is returned for redetermination by a different panel of the RAD.

3. Tthere is no question for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3430-21
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v KASIM KURT
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 24, 2022
JUDGMENT AND REASONS:	PAMEL J
DATED:	SEPTEMBER 27, 2022

APPEARANCES:

Ian Hicks	FOR THE APPLICANT
Charles Steven	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT
Waldman & Associates Toronto, Ontario	FOR THE RESPONDENT