Federal Court of Appeal  Cour d'appel fédérale

Date: 20110715

Docket: A-281-10

Citation: 2011 FCA 224

CORAM: **NOËL J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

Rachidi EKANZA EZOKOLA

Respondent

Heard at Montréal, Quebec, on June 9, 2011.

Judgment delivered at Ottawa, Ontario, on July 15, 2011.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] The Minister of Citizenship and Immigration (the Minister) is appealing a decision by Mainville J., then of the Federal Court (the applications judge), in which he allowed an application for judicial review filed by Rachidi Ekanza Ezokola (the respondent). The applications judge set aside the finding of the Immigration and Refugee Board, Refugee Protection Division (the Panel) that Article 1F(a) of the *United Nations Convention relating to the Status of Refugees* (the Convention) applied to the respondent and that he was therefore not

covered by the refugee protection provisions. He also certified a question of general importance, thereby making this appeal possible.

[2] The applications judge intervened on the ground that the Panel could not have found serious reasons for considering that the respondent had committed crimes against humanity as a result of his diplomatic duties with the Permanent Mission of the Democratic Republic of Congo (DRC) to the United Nations. The applications judge reached this conclusion on the basis of the test that he adopted for complicity by association, namely, that the individual must have personally participated in the crimes alleged, personally conspired to commit them or personally facilitated the commission of those crimes. Applying this test, he found that the facts relied on by the Panel could not have allowed it to ascribe responsibility to the respondent for the crimes alleged (reasons of the applications judge, para. 104), and that the matter should be heard by a different panel in accordance with the test set out in his reasons.

[3] For the following reasons, I am of the view that the appeal should be allowed, as the applications judge applied a test not found in the law of complicity. Like him however, I have come to the conclusion that the matter should be re-examined by another panel, but for different reasons.

RELEVANT FACTS

[4] In January 1999, the respondent was hired as a financial attaché at the Ministry of Finance and assigned to the Ministry of Labour, Employment and Social Welfare. Between

July 1999 and November 2000, the respondent successively occupied the positions of financial attaché and financial adviser at the Ministry of Human Rights. The respondent was then transferred to the Ministry of Foreign Affairs and International Cooperation as a financial adviser to the Minister's office.

[5] In June 2003, following the elimination of the Minister's office where he worked, the respondent joined the administration as office manager in the Ministry of Foreign Affairs and International Cooperation. However, it seems that the respondent did not work much at the time because he was sick (reasons of the Panel, para. 25).

[6] In July 2004, the respondent was assigned to the Permanent Mission of the DRC to the United Nations as second counsellor of embassy. The respondent's duties consisted, among other things, of representing the DRC at the Second Committee (Economic and Financial Committee) and the Fifth Committee (Administrative and Budgetary Committee) of the United Nations. The respondent also represented the DRC at the United Nations Economic and Social Council, as well as acting as a focal point for least developed countries (LDCs). In that capacity, the respondent represented the DRC at the LDC Expert Meeting in Ethiopia and the LDC Ministerial Conference in Benin. The respondent acted as a liaison between the Permanent Mission of the DRC and various United Nations development agencies (*ibid.*, paras. 26, 27).

[7] While on assignment to the United Nations, the respondent led the Permanent Mission of the DRC as acting chargé d'affaires from February 11 to 19, 2007, and from June 16 to 30, 2007.

During one of these periods, he spoke before the Security Council regarding natural resources and conflicts in the DRC (*ibid.*, para. 5).

[8] The respondent submits that the events leading up to his claim for refugee status began during the campaign for the election of the President of the DRC. The DRC's permanent representative to the United Nations was connected with President Joseph Kabila, who was a candidate, while the respondent supported a change in government. The opposition candidate was Jean-Pierre Bemba of the Mouvement de libération du Congo. According to the respondent, the transfer order assigning him to the Permanent Mission of the DRC to the United Nations had been signed by the Minister of Foreign Affairs, a position held at the time within the Congolese transitional government by a member of the Mouvement de libération du Congo (reasons of the applications judge, paras. 11, 12).

[9] The respondent submits that following President Kabila's election, an atmosphere of hostility set in against him in the Permanent Mission. His membership in the Bangala ethnic group made him suspect in the eyes of supporters of President Kabila, given the connection that ethnic group had with Mr. Bemba (*ibid.*, para. 14). In September 2007, the respondent was questioned by two DRC intelligence agents about Mr. Bemba's presence in New York. According to the respondent, the intelligence agents threatened and followed him (*ibid.*, para. 15). On January 4, 2008, the respondent and the ambassador had a [TRANSLATION] "heated discussion" about the organization of the conference on peace, security and development in the provinces of North-Kivu and South-Kivu (reasons of the Panel, para. 13).

[10] On January 11, 2008, the respondent signed a letter of resignation, which he mailed a few days later. The respondent attributes his resignation to his refusal to serve the corrupt, anti-democratic and violent government of President Kabila and alleges that it would be interpreted as an act of treason by the DRC government (reasons of the applications judge, para.17). Following his resignation, he fled with his family to Canada. They arrived in Canada on January 17, 2008. The respondent claimed refugee protection for himself, his wife and their eight children.

LEGISLATION

[11] Section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), states that a person referred to in Article 1F(a) of the Convention is not considered a refugee or a person in need of protection and, therefore, cannot benefit from the protection offered by the Convention and the IRPA:

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.

[12] Article 1F(a) of the Convention, set out in the Schedule to the IRPA, reads as follows:

1. F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**1.** 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;
…	[…]

DECISION OF THE PANEL

[13] The Panel rejected the respondent's claim for refugee protection because it believed that there were serious reasons for considering that he had been complicit in crimes against humanity, and he was therefore a person referred to in Article 1F(a) of the Convention and not entitled to the protection offered by the Convention to refugees and persons in need of protection.

[14] The Panel divided its analysis into two parts. First, it considered whether the government of the DRC had committed crimes against humanity. The Panel concluded that the acts committed by the DRC government constituted crimes against humanity, as defined by the *Rome Statute of the International Criminal Court*, Can. T.S. 2002 No 13 [*Rome Statute*] and by the decisions in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 325; *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1996] 2 F.C. 872 (C.A.) [*Sivakumar II*]; *Gonzalez v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 646 (C.A.); and *Sumaida v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 66 (C.A.) [*Sumaida*]. The Panel also determined that the government of the DRC was not an organization pursuing a limited, brutal purpose (reasons of the Panel, paras. 31, 43).

[15] In the second part of its analysis, the Panel considered whether the applicant was complicit in the acts committed by the government of the DRC. Relying on the decisions of this Court in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.) [*Ramirez*]; *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.) [*Moreno*]; and *Sivakumar II* and on certain decisions of the Federal Court, the Panel noted that for the purposes of Article 1F(a) of the Convention, complicity requires knowledge that acts are being committed and the failure to take steps to prevent them or to disassociate oneself from the group.

[16] Despite the respondent's claims to the contrary, the Panel concluded that he was aware of the violent acts committed by his government, noting in particular that he held [TRANSLATION] "a very high-level position" and that he represented his country abroad (*ibid.*, paras. 50, 51). The Panel also stated that his [TRANSLATION] "meteoric career and his strategic position at the Permanent Mission of the DRC in New York, as well as the fact that his resignation was considered an act of treason, are evidence of a shared vision in accomplishing his government's objectives" and found that [TRANSLATION] "he was aware of the events and had a shared common purpose, which can be deduced from his voluntary association with the Congolese authorities and is sufficient to find him complicit by association" (*ibid.*, paras. 67, 69).

[17] The Panel recognized that the respondent did not personally commit violent acts against civilians and did not point to any instances in which the respondent, in the exercise of his duties, made statements for the purpose of camouflaging or minimizing his government's crimes. It

found, however, that given the importance of the respondent's diplomatic duties, it was sufficient that he knowingly enabled his government to perpetuate itself while doing nothing to disassociate himself (*ibid.*, para. 75).

DECISION OF THE APPLICATIONS JUDGE

[18] The applications judge begins by accepting the Panel's finding that, during the period that he held his position, the respondent had personal knowledge of the crimes against humanity committed by the Congolese government (reasons of the applications judge, para. 50). He notes, however, that according to the Panel's analysis, the respondent did not participate physically or directly in these acts.

[19] The applications judge opens his analysis by distinguishing two types of complicity (*ibid.*, para. 60):

> There are two components in the concept of complicity in crimes against humanity in Canadian jurisprudence: complicity in the traditional sense of Canadian criminal law, and complicity by association. Here, only complicity by association is in issue. Is this truly a particular mode of complicity, and what elements must be present to establish complicity by association? These are the questions that must be addressed.

[20] He continues his analysis by reviewing this Court's decisions on complicity by association. Citing *Ramirez*, he notes that there can be no complicity "without personal and knowing participation" (reasons of the applications judge, para. 62). He also notes, relying on *Moreno*, that mere membership in an organization involved in international offences is not a

sufficient basis on which to invoke Article 1F(a) of the Convention (*ibid.*, para. 64). The applications judge also notes that in *Canada (Minister of Citizenship and Immigration) v. Bazargan* (1996), 205 N.R. 282 (C.A.) [*Bazargan*], Décary J.A. stated that it is contributing to the activities of the group, rather than membership in the group, that establishes complicity by association (*ibid.*, para. 66).

[21] The applications judge then expresses his view that the exclusion clause in Article 1F(a) does not apply because "there must be a personal nexus between the refugee claimant and the crimes alleged, and no such nexus was established in respect of the [respondent]" (*ibid.*, para. 70). In reaching this conclusion, the applications judge relies on certain decisions of the Federal Court, comments by the United Nations High Commissioner for Refugees, the *Rome Statute* and foreign cases (*ibid.*, paras. 71-82).

[22] The applications judge notes that the existence of a personal nexus between the refugee protection claimant and the crimes alleged as a necessary condition for exclusion is the approach adopted in cases issued by the Federal Court (*Aden v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 625 [*Aden*]; *Sungu v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 192 [*Sungu*]; and *Bouasla v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 930 [*Bouasla*]). This is also the approach adopted by the Office of the United Nations High Commissioner for Refugees, according to its *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees.* The decision of the Supreme Court of the United Kingdom in *R (on the application of*

JS) (Sri Lanka) v. Secretary of State for the Home Department, [2010] UKSC 15 [*Sri Lanka*], seems to adopt a similar stance.

[23] Furthermore, the applications judge's reading of articles 25, 28 and 30 of the *Rome Statute* indicates that "criminal responsibility for crimes against humanity requires personal participation in the crime alleged or personal control over the events leading to the crime alleged" (*ibid.*, para. 86). He adds that "the concepts of individual criminal responsibility and effective control over other persons and the mental element described in the *Rome Statute* may and must be used to elucidate what the Canadian case law refers to as complicity by association for the purposes of Article 1F(a)" (*ibid.*, para. 89).

[24] The applications judge concludes with the following statement (*ibid.*, para. 90):

> . . . complicity by association must be understood as being a presumption that is based on a set of facts from which it can be concluded that there are serious reasons for considering that the refugee claimant personally participated in the crimes alleged, personally conspired to commit them, or personally facilitated the commission of those crimes.

[25] Applying this approach, the applications judge expresses the principle that merely working in the public service of a state whose government commits crimes against humanity is not sufficient; there must be a "personal nexus" between the refugee protection claimant and the crimes alleged (*ibid.*, para. 92). According to the applications judge, this conclusion is supported by section 35 of the IRPA, which distinguishes between an individual who has committed a crime against humanity and a senior officer in the service of a government that has committed

such crimes (*ibid.*, paras. 97-100). He adds that there is "no evidence that tends to show direct or indirect personal participation by the [respondent] in the crimes alleged, and there is no evidence of incitement or active support by the [respondent] for those crimes" (*ibid.*, paras. 104-107).

[26] The applications judge therefore concludes that the Panel applied the wrong test for complicity by association. The formal judgment giving effect to this finding reads as follows:

> 1. The application for judicial review is allowed;
>
> 2. The decision of the panel is set aside as it relates to the conclusion that the [respondent] is excluded by operation of Article 1F(a);
>
> 3. The matter is referred back to the Immigration and Refugee Board to be heard by a different panel of the Refugee Protection Division, which will determine it *de novo* in accordance with the provisions of this judgment.

[27] After informing the parties of his decision, the applications judge invited them to propose a serious question of general importance. The Minister proposed the following question:

> [TRANSLATION]
> Does a public servant or diplomat of a country that has committed crimes against humanity, who had knowledge of his country's crimes, who voluntarily associated with that country and who did not disassociate himself at the first opportunity, for no valid reason, possess the required shared intention to be excluded, as an accomplice, from the application of the definition of "refugee" within the meaning of Article 1F of the United Nations Convention relating to the Status of Refugees?

[28] The applications judge chose to reformulate the question:

> For the purposes of exclusion pursuant to paragraph 1Fa) of the United Nations Refugee Convention, is there complicity by association in crimes against humanity from the fact that the refugee claimant was a public servant in a government that committed such crimes, along with the fact that the refugee claimant was aware of these crimes and did not denounce them, when there is no proof of personal participation, whether direct or indirect, of the refugee claimant in these crimes?

MINISTER'S POSITION

[29] The Minister submits first that the certified question is incorrectly formulated, since it implies an absence of personal and knowing participation by the respondent in the crimes committed by the DRC government. According to the Minister, the diplomatic duties exercised by the respondent while he had knowledge of the violent acts committed by his government constituted personal participation that made him an accomplice to the crimes alleged (Minister's Memorandum, para. 41).

[30] Secondly, the Minister submits that the applications judge erred in law in finding that a refugee protection claimant must have effective control over those who commit crimes against humanity in order to be excluded from the provisions of the Convention on the basis of complicity by association under Article 1F(a). The Minister argues that the test established by the applications judge, namely, "personal participation in the crime alleged" and "personal control over the events leading to the crime alleged", or that the refugee protection claimant "personally participated in the crimes alleged, personally conspired to commit them, or personally facilitated the commission of those crimes", reflects an overly rigid approach to the *mens rea* required to establish complicity by association (*ibid.*, para. 70).

[31] The Minister instead submits, in light of the jurisprudence of this Court, that complicity by association requires the existence of a shared common purpose and knowledge of the crimes committed by the organization of which the refugee protection claimant is a member. The failure to take measures to prevent the organization's crimes and the failure to disassociate from them at the first opportunity are key elements in establishing complicity by association (*ibid.*, para. 54).

[32] The Minister also submits that the jurisprudence of this Court reflects the approach adopted by the Supreme Court of the United Kingdom in *Sri Lanka*, cited by the applications judge, and by the Supreme Court of New Zealand in *The Attorney General (Minister of Immigration) v. Tamil X and Anor SC*, [2010] NZSC 107.

[33] Thirdly, the Minister argues that the applications judge erred in his appreciation of the Panel's factual findings on the importance of the duties exercised by the respondent within the DRC government. The Minister notes that although he had knowledge of the violent acts committed by his government, the respondent spoke before the Security Council, represented his country on two United Nations Committees and was given the role of chargé d'affaires in the ambassador's absence. The Minister argues that the applications judge failed to consider, or, at the very least, minimized, the scope of the Panel's factual findings regarding the respondent's duties, particularly the fact that he was representing his country while he had knowledge of the crimes against humanity committed by his government (*ibid.*, para. 80). The Minister submits that the respondent was not a mere public servant.

RESPONDENT'S POSITION

[34] The respondent submits that the applications judge correctly interpreted and applied Article 1F(a) of the Convention. He argues that [TRANSLATION] "a senior official of the state *may* be excluded from the definition of a refugee under Article 1F(a) of the [Convention] if he was an accomplice to the crimes committed by the state of which he is a member. However, one must look at all of the facts of a case to establish a connection between his actions and the commission of the crimes" (Respondent's Memorandum, para. 1).

[35] The respondent submits that the applications judge's interpretation is consistent with the jurisprudence of the Supreme Court of Canada, this Court and the Federal Court. The respondent also submits that Article 1F(a) of the Convention must be interpreted in light of the *Rome Statute*, and that, accordingly, the applications judge was correct in relying on it. The respondent submits that any cases decided prior to the adoption of the *Rome Statute*, or that do not take it into consideration, should be relied upon with caution. The respondent also submits that the applications judge's interpretation is consistent with that of the courts of the United Kingdom, Australia, New Zealand and France.

[36] Contrary to the argument submitted by the Minister, the respondent claims that the applications judge did not minimize his role within the DRC government. According to the respondent, the applications judge simply concluded that the emphasis belonged on the nexus between the crimes committed and the individual in question rather than on the rank occupied by that person within the organization.

[37] During his submissions, counsel for the respondent raised for the first time the argument that the appeal could not be allowed regardless. In his view, the Panel found that there had been complicity by association based on the respondent's "personal and knowing awareness" of his government's crimes, without asking itself whether the evidence established his "personal and knowing participation" in these crimes.

ANALYSIS

The standard of review

[38] In the case of an appeal of a decision dealing with an application for judicial review, the Court must determine whether the applications judge correctly identified and applied the proper standard of review (*Dr Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, para. 43; *Canada (Attorney General) v. Davis*, 2010 FCA 134, para. 3; *Canada (Revenue Agency) v. Telfer*, 2009 FCA 23, para. 18).

[39] The fundamental issue identified by the applications judge is the scope of the concept of complicity by association for the purposes of applying Article 1F(a) of the Convention. As he indicates, this is a question of law subject to the standard of correctness. Once the test has been properly identified, the issue of whether the facts in this case trigger the application of Article 1F(a) is a question of mixed fact and law with respect to which the Panel is entitled to deference (*Canada (Minister of Citizenship and Immigration) v. Zeng*, 2010 FCA 118, para. 11).

The certified question

[40] Before embarking on the analysis, I must comment on the question certified by the applications judge, which I restate once again with emphasis on the last lines:

> For the purposes of exclusion pursuant to paragraph 1Fa) of the United Nations Refugee Convention, is there complicity by association in crimes against humanity from the fact that the refugee claimant was a public servant in a government that committed such crimes, along with the fact that the refugee claimant was aware of these crimes and did not denounce them, when there is no proof of personal participation, whether direct or indirect, of the refugee claimant in these crimes?
>
> [Emphasis added.]

[41] Those final lines are problematic, since they assume that the respondent, by remaining in his position and continuing to defend the regime's interests despite his awareness of the crimes being committed by that regime, could not make himself a direct or indirect participant in those crimes. That, however, is the very issue which is at the heart of this dispute.

[42] The question must also take into account the importance that the Panel attributes to the position held by the respondent within the government (reasons of the Panel, para. 50), which is not called into question by the applications judge (reasons of the applications judge, para. 69) as well as the fact that the respondent remained in his position notwithstanding his knowledge of the crimes committed by his government.

[43] Finally, the question should evoke a possibility rather than a certainty. As Linden J.A. explained in *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 [*Sivakumar I*] (p. 442):

> . . . association with a person or organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. Mere membership in a group responsible for international crimes . . . is not enough . . . (see also *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, para. 45 [*Harb*]).
>
> [Emphasis added.]

The final answer depends on the specific facts of each case (*Ramirez*, p. 320; *Sivakumar I*, p. 438; *Bazargan*, para. 12).

[44] In light of the above, I would reformulate the certified question as follows:

> For the purposes of exclusion pursuant to paragraph 1Fa) of the United Nations Refugee Convention, can complicity by association in crimes against humanity be established by the fact that the refugee claimant was a senior public servant in a government that committed such crimes, along with the fact that the refugee claimant was aware of these crimes and remained in his position without denouncing them?

[45] According to the reasons of the applications judge, the answer to this question would seemingly be no, since in his view one cannot be an accomplice without having personally participated in the crimes alleged, personally conspired to commit them or personally facilitated their commission (reasons of the applications judge, para. 90). With this test in mind, he concludes that applying a "presumption of complicity by association" in the absence of evidence

that the respondent exercised some kind of control over the DRC's security forces or over any component of those forces or over any of their members would be unreasonable (*ibid.*, paras. 106, 107).

[46] In my opinion, the test for complicity established and applied by the applications judge is inconsistent with the jurisprudence of this Court, and must therefore be set aside.

The jurisprudence of the Court of Appeal

[47] Article 1F(a) of the Convention states that a person is excluded from the application of the refugee protection provisions if there are "serious reasons for considering" that he has committed, among other things, a crime against humanity. In *Ramirez*, MacGuigan J.A. specifies that the expression "serious reasons for considering" represents a lower standard of proof than the balance of probabilities (pp. 311, 312; see also *Moreno*, p. 308; *Sumaida*, p. 77).

[48] In *Sivakumar I*, Linden J.A. comments on the reasons for the lower standard of proof established by Article 1F(a) of the Convention (p. 445):

> The standard of proof in section F(a) of Article 1 of the Convention is whether the Crown has demonstrated that there are serious reasons for considering that the claimant has committed crimes against humanity. In *Ramirez, supra*, MacGuigan J.A. stated that serious reasons for considering constitutes an intelligible standard on its own which need not be assimilated to the reasonable grounds standard in section 19 [as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 3] of the *Immigration Act*. This conclusion was echoed by Mr. Justice Robertson in *Moreno, supra*, although Robertson J.A. indicated that, for practical purposes, there was no difference between the standards. I agree that there is little, if any, difference of meaning between the two formulations of the standard. Both of

> these standards require something more than suspicion or conjecture, but something less than proof on a balance of probabilities. This shows that the international community was willing to lower the usual standard of proof in order to ensure that war criminals were denied safe havens. When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status.
>
> [Emphasis added.]

[49] The issue, therefore, is whether the individual in question may claim refugee status in Canada, not whether he or she is criminally responsible. For this purpose, all that is required are "serious reasons for considering" that the individual committed a crime within the meaning of Article 1F(a).

[50] It is also useful to recall, given the reasons of the applications judge (see in particular paragraphs 60 and 90, reproduced at paragraphs 19 and 24 of these reasons), that there is only one form of complicity. As Létourneau J.A. explains in *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 303, 259 D.L.R. (4th) 281, at paragraph 13:

> . . . At common law and under Canadian criminal law, [complicity] was, and still is, a mode of commission of a crime. It refers to the act or omission of a person that helps, or is done for the purpose of helping, the furtherance of a crime. An accomplice is then charged with, and tried for, the crime that was actually committed and that he assisted or furthered. In other words, whether one looks at it from the perspective of our domestic law or of international law, complicity contemplates a contribution to the commission of a crime.
>
> [Emphasis added.]

[51] With this in mind, I will turn to a more in-depth review of this Court's jurisprudence on the scope of the concept of complicity with respect to crimes against humanity, which the applications judge was, in principle, bound to follow.

[52] In *Ramirez*, MacGuigan J.A. states that an individual cannot have committed crimes under Article 1F(a) of the Convention—including crimes against humanity—"without personal and knowing participation" (pp. 316, 317). He adds that mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status. This is not the case, however, where an organization is principally directed to a limited, brutal purpose (p. 317). MacGuigan J.A. adds that members of an organization may, depending on the facts, be considered to be personal and knowing participants. In such cases, "complicity rests . . . on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it" (pp. 317, 318). He also states that it is undesirable to go beyond the criterion of "personal and knowing participation" in persecutorial acts in establishing a general principle; the rest should be decided in relation to the particular facts of each case (p. 320).

[53] In *Moreno*, Robertson J.A. reiterates the idea that mere membership in an organization involved in international offences is not a sufficient basis on which to invoke Article 1F(a) of the Convention, unless the organization is principally directed to a limited, brutal purpose (p. 321). Citing *Ramirez*, Robertson J.A. states that "[a]cts or omissions amounting to passive acquiescence are not a sufficient basis for invoking the exclusion clause"; what must be

established is personal participation, which depends on the existence of a shared common purpose (p. 323). He also states that "the closer a person is involved in the decision-making process and the less he or she does to thwart the commission of inhumane acts, the more likely criminal responsibility will attach" (p. 324).

[54] In *Sivakumar I*, Linden J.A. not only reiterates the "personal and knowing participation" test established in *Ramirez*, but adds the following with respect to complicity by association (p. 442):

> . . . association with a person or organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. . . .
>
> [Emphasis added.]

In so saying, Linden J.A. recognizes that complicity for the purposes of Article 1F(a) of the Convention is a broad concept that is not limited to physical participation in crimes or the exercise of effective control over their commission.

[55] In *Bazargan*, Décary J.A. states that "personal and knowing participation" may be direct or indirect and does not require formal membership in the organization involved in the commission of international offences. He adds that 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 knowingly contributing to these activities in any manner whatsoever,

whether from within the organization or from outside (para. 11). Décary J.A. again notes that everything depends on the particular facts of each case (para. 12).

[56] The subsequent decisions of this Court in *Sumaida* and *Harb* did not modify the principles previously set out regarding Article 1F(a) of the Convention. In *Harb*, Décary J.A. states (para. 11):

> . . . It is not the nature of the crimes with which the appellant was charged that led to his exclusion, but that of the crimes alleged against the organizations with which he was supposed to be associated. Once those organizations have committed crimes against humanity and the appellant meets the requirements for membership in the group, knowledge, participation or complicity imposed by precedent (see *inter alia*, [*Ramirez*]; [*Moreno*]; [*Sivakumar I*]; [*Sumaida*] and [*Bazargan*]), the exclusion applies even if the specific acts committed by the appellant himself are not crimes against humanity as such. . . .

[57] In light of this Court's decisions regarding complicity as it relates to Article 1F(a) of the Convention, I am of the view that the applications judge applied too narrow a test in requiring personal participation by the individual in the crimes alleged, whether by carrying them out personally or facilitating their commission in the manner described. The "personal and knowing participation" test adopted by this Court is broader than that.

[58] The same decisions also compel us to realize that the expression "complicity by association" is fundamentally misleading. It implies that an individual who associates with the perpetrators of international crimes becomes an accomplice to their crimes based on this association alone. However, liability is generated not by the association but rather by personal and knowing

participation in these crimes. In my view, the time has come to drop the term “complicity by association” and henceforth to refer to complicity, period.

The jurisprudence of the Federal Court

[59] In my opinion, the Federal Court cases relied on by the applications judge do not support his approach either. On the one hand, Gibson J.’s decision in *Aden*, which he cites with approval, does not take into account this Court’s decisions in *Moreno* or *Sivakumar I.* As Gibson J. explains at the end of his reasons, they were released too late for counsel to refer to them so that he was unfortunately unable to consider their impact (*Aden*, pp. 634, 635).

[60] On the other hand, Blanchard J.’s decision in *Sungu* and that of Lemieux J. in *Bouasla* both state that the evidence did not support a sufficient shared common purpose to give rise to an exclusion under Article 1F(a) de la Convention. Neither of these judges set out a rule whereby the fact of remaining in one’s position while being fully cognizant of the crimes being committed by the organization cannot be a sufficient basis for an exclusion.

The Rome Statute

[61] The applications judge seems to have drawn inspiration from the *Rome Statute*, which was ratified by Canada in 2000 and which came into force in 2002, to justify an approach that departs from the decisions rendered by this Court prior to the coming into force of that Statute. According to him, criminal responsibility for crimes against humanity under the *Rome Statute* “requires personal participation in the crime alleged or personal control over the events leading

to the crime alleged" (reasons of the applications judge, para. 86). He adds that this "requirement must also be used to clarify the concept of participation through association" (*ibid.*).

[62] In this respect, the applications judge cites articles 25(3) and 30 of the *Rome Statute*:

> **Article 25**
>
> . . .
>
> 3**.** In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> > (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
> >
> > (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
> >
> > (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
> >
> > (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
> >
> > > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

> (ii) Be made in the knowledge of the intention of the group to commit the crime;
>
> . . .
>
> **Article 30**
> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> > (a) In relation to conduct, that person means to engage in the conduct;
> >
> > (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.
>
> [Emphasis added.]

[63] The applications judge is correct in stating that Article 1F(a) of the Convention must be interpreted in light of international instruments such as the *Rome Statute* (*Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, para. 151). However, I do not believe that the criminal responsibility described in the *Rome Statute* is ascribed only in the case of "personal participation in the crime alleged or personal control over the events leading to the crime alleged" (reasons of the applications judge, para. 86).

[64] The language of article 25(3), and in particular the expressions “otherwise assists” and “[i]n any other way” in paragraphs (c) and (d) respectively, clearly indicates that criminal responsibility for international crimes falling under the *Rome Statute* is not limited to personal participation in the crime or personal control over the events. This provision is quite broad on its face and goes beyond the test adopted by the applications judge.

[65] The applications judge also cites article 28 of the *Rome Statute*, which deals with the responsibility of military commanders for the acts of their soldiers. He notes that, as with employers with respect to the wrongful acts of their employees in civil law or at common law, “effective control over other persons” must be exercised for any kind of responsibility to be ascribed (*ibid.*, para. 89).

[66] Article 28 of the *Rome Statute* reads as follows:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> > (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
> >
> > > (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution;
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[67] One can easily understand why military commanders cannot be held responsible in that capacity for the conduct of individuals who are not under their control, or employers with respect to employees who are outside of their control. However, this issue does not arise under article 25(3) of the *Rome Statute*, which covers any individual who orders, solicits, induces, facilitates or in any other way contributes to the commission of a crime against humanity, the sole requirement being that the individual in question have acted knowingly.

[68] In my opinion, the "personal and knowing participation" test established in *Ramirez* is in harmony with the *Rome Statute*. As Lord Brown explains in *Sri Lanka*, the language of the *Rome Statute* is particularly broad, as compared with domestic legislative provisions establishing criminal responsibility for crimes that are, in fact, committed by others (para. 34). According to Lord Brown, only personal knowledge of the crimes and an intention to contribute to their commission is required (para. 37). In my opinion, this is entirely consistent with the "personal and knowing participation" test adopted by MacGuigan J.A. in *Ramirez* and applied by this Court ever since.

Section 35 of the IRPA

[69] The applications judge also refers to the regime set out in section 35 of the IRPA, which provides that individuals who have committed offences under sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 (paragraph 35(1)(*a*)) are inadmissible. He notes that the same inadmissibility is imposed separately on those occupying senior positions—defined by regulation—in a government that has committed such crimes (paragraph 35(1)(*b*)). According to the applications judge, this implies that, for the purposes of section 35, remaining in a position despite the crimes committed by one's government is not alone sufficient to make a senior official an accomplice to these crimes. He adds that the same distinction must be made for the purposes of applying Article 1F(a) of the Convention (reasons of the applications judge, paras. 99, 100).

[70] With respect, this reasoning does not take into account the fact that a person falling under Article 1F(a) of the Convention is automatically inadmissible under paragraph 35(1)(*a*).

Paragraph 35(1)(*b*) merely extends the inadmissibility to senior officials in the service of the government that has committed the crimes, without it being necessary to prove their direct or indirect participation in them. Depending on the circumstances, noting prevents a senior official, who remains in office despite the crimes committed by his or her government, from becoming an accomplice to these crimes and subject to paragraph 35(1)(*a*).

Presumption of participation

[71] Finally, it was not open to the applications judge to find that complicity by association must be understood as being a presumption and that it would be unreasonable to apply that presumption on the basis of the respondent's membership in the DRC government (reasons of the applications judge, paras. 90, 105 to 107). While it is true that membership in an organization pursuing a limited, brutal purpose establishes a presumption of participation in the crimes of that organization, the opposite is true if the organization in question is not pursuing such a purpose, as the Panel concluded with respect to the DRC (*Ramirez*, p. 317; *Moreno*, p. 321; *Sivakumar I*, pp. 440, 442 and *Sumaida*, para. 24). In this case, no presumption arises from the respondent's membership in the DRC government, and the onus was on the Minister to establish, on the applicable standard of proof, his participation in his government's crimes.

[72] I therefore find that the certified question as reformulated must be answered in the affirmative. In my view, a senior official may, 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 committed by this government demonstrate "personal and knowing participation" in these crimes

and be complicit with the government in their commission. It is useful to remember, however, that the final outcome will always depend on the facts particular to each case (*Ramirez*, p. 220; *Bazargan*, para. 12).

[73] The next issue would be whether, given the particular facts of this case, it was reasonable for the Panel to find that the respondent participated personally and knowingly in the crimes of his government.

New error of law

[74] Before addressing this question, counsel for the respondent raised for the first time the argument that, despite the above, the Panel applied the wrong test in deciding the issue. According to counsel, the Panel did not apply the "personal and knowing participation" test, but rather the "personal and knowing awareness" test. In this respect, counsel for the respondent cited the following excerpts of paragraphs 71 and 75 of the Panel's reasons:

> [71] . . . Therefore, it is reasonable to conclude that the [respondent] had a "personal and knowing awareness" in the Congolese government's actions, which is the "element required to establish complicity".
>
> [75] Upon examination of the evidence on file, the [respondent] had "personal and knowing awareness" [*Ramirez*] of the atrocities committed by the Congolese government and army through the duties he carried out. . . .

[75] These passages are troubling, as there is a fundamental difference between "personal and knowing awareness" of the crimes committed by the DRC, an awareness that is no longer

challenged, and "personal and knowing participation" in these crimes as developed by this Court's jurisprudence. The Panel has erred in stating that *Ramirez* establishes a "personal and knowing awareness" test, as this expression appears nowhere in the judgment and seems to confuse "awareness" with "participation". Also, by indicating that "personal and knowing awareness" is [TRANSLATION] "the element required to establish complicity", the Panel displays the same confusion. While personal knowledge of the crimes is one of the elements required for "personal and knowing participation", only participation, so described, if established according to the applicable burden of proof, may support a finding of complicity.

[76] Counsel for the Minister, who was notified of the respondent's argument during the week preceding the hearing, was unable to persuade me that this error is of no consequence. It is true that the Panel, at paragraph 75 of its reasons, found that there were serious reasons for considering that the respondent had "personally and wittingly participated" in the crimes committed by his government. Although this comes sufficiently close to the correct test, I cannot, in light of the language used earlier, rule out the respondent's argument that the Panel was confusing awareness and participation when it made this finding.

[77] The Panel was required to apply the correct test and determine whether the respondent, by remaining in his position while he had knowledge of the crimes committed by his government in the circumstances described above, personally and knowingly participated in the crimes of his government. The knowledge of these crimes is not determinative on its own. Only the respondent's personal and knowing participation in these crimes can support a finding of complicity for the

purposes of Article 1F(a) (*Ramirez*, pp. 317, 318; *Moreno*, p. 323). My reading of the Panel's decision leaves me uncertain as to whether it applied the correct test.

[78] Because of the nature of its duties, the Panel is in the best position to judge whether there is sufficient evidence to support a finding of complicity by the respondent, and deference is owed to it when it carries out this duty according to the correct test. In the circumstances, the matter should be remitted to a differently constituted panel for a new hearing to determine whether, according to the correct test, the respondent was complicit in his government's crimes by virtue of his conduct.

[79] For these reasons, I would answer the certified question as reformulated in the manner set out at paragraph 72 of these reasons, I would allow paragraphs 1 and 2 of the judgment rendered by the applications judge to stand and replace paragraph 3 thereof by the following direction:

> 3. The matter is remitted to the Immigration and Refugee Board to be heard by a different panel of the Refugee Protection Division, which will determine it *de novo* and determine whether the respondent was an accomplice to the crimes committed by the Democratic Republic of Congo in accordance with the personal and knowing participation test.

"Marc Noël"

J.A.

"I agree
M. Nadon J.A."

"I agree
J.D. Denis Pelletier J.A."

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-281-10
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE MAINVILLE OF THE FEDERAL COURT DATED JUNE 17, 2010, DOCKET NO. IMM-5174-09.	
STYLE OF CAUSE:	The Minister of Citizenship and Immigration and Rachidi Ekanza Ezokola
PLACE OF HEARING:	Montréal, Quebec
PLACE OF HEARING:	June 9, 2011
REASONS FOR JUDGMENT OF THE COURT BY:	NOËL J.A.
CONCURRED IN BY:	NADON J.A. PELLETIER J.A.
DATED:	July 15, 2011

APPEARANCES:

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