

# Eliminating Guilt by Association: Reviewing the Limits of *Ezokola* in Canadian Refugee Law Complicity Decision-Making (2013–2020)

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Résumé de l'article

Une question récurrente en matière de droit canadien et international des réfugiés est de savoir quand exclure des individus de la protection des réfugiés en raison de liens avec des crimes internationaux. La section 1F(a) de la Convention de 1951, relative au statut des réfugiés, exclut de la protection les personnes qui ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, comme défini par le droit international. Le concept principal est celui de la « complicité » : quel est le degré d'implication ou de liens avec de tels crimes qui tiendraient une personne moralement coupable, de sorte qu'elle soit exclue de la protection des réfugiés ?

En 2013, dans l'affaire *Ezokola*, la Cour suprême du Canada a créé un nouveau critère de complicité afin de briser le cycle de tendances qui excluent des demandeurs d'asile sur la base de la culpabilité par association. La Cour a déterminé que l'exclusion de la protection des réfugiés n'est justifiée que lorsque l'individu a contribué volontairement, consciemment, et considérablement aux crimes ou aux objectifs criminels du groupe en question.

Cet article évalue dans quelle mesure le droit canadien des réfugiés a effectivement pu rejeter les conclusions fondées sur la culpabilité par association dans le cadre de l'article 1F(a) de la Convention de 1951 relative au statut des réfugiés, au cours des dix ans depuis la décision *Ezokola*.

Notre analyse suggère que, bien que la décision *Ezokola* ait eu un impact positif, certains aspects du cadre analytique de la décision *Ezokola* ne sont pas toujours clairs ou bien appliqués. Finalement, davantage de direction sera nécessaire pour atteindre l'objectif de la décision *Ezokola* d'éliminer les décisions d'exclusion fondées sur la culpabilité par association.

# Eliminating Guilt by Association: Reviewing the Limits of *Ezokola* in Canadian Refugee Law Complicity Decision-Making (2013–2020)

*Aneta Bajic, Chun He, and Andrew Koltun*

A RECURRING QUESTION in Canadian and international refugee law has been when to exclude individuals from refugee protection based on their connection to international crimes. Article 1F(a) of the 1951 Refugee Convention excludes from protection those who have committed a crime against peace, a war crime, or a crime against humanity as defined under international law. The central concept is that of “complicity”: what level of involvement or connection with such crimes makes a person morally culpable, such that they should be excluded from refugee protection?

In 2013, the Supreme Court of Canada in *Ezokola* created a new test for complicity to break free from past patterns of excluding claimants based on guilt by association. The Court determined that exclusion from refugee protection is warranted only where the individual made a voluntary, knowing, and significant contribution to the crimes or criminal purposes of the group in question.

This paper evaluates the degree to which Canadian refugee law has made a definitive break with findings that amount to guilt by association for the purposes of Article 1F(a) of the 1951 Refugee Convention in the ten years since the *Ezokola* decision.

Our analysis suggests that, while the *Ezokola* decision had a positive impact, aspects of *Ezokola*'s analytical framework are unclear and inconsistently applied. Ultimately, further guidance is

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En 2013, dans l'affaire *Ezokola*, la Cour suprême du Canada a créé un nouveau critère de complicité afin de briser le cycle de tendances qui excluent des demandeurs d'asile sur la base de la culpabilité par association. La Cour a déterminé que l'exclusion de la protection des réfugiés n'est justifiée que lorsque l'individu a contribué volontairement, consciemment, et considérablement aux crimes ou aux objectifs criminels du groupe en question.

Cet article évalue dans quelle mesure le droit canadien des réfugiés a effectivement pu rejeter les conclusions fondées sur la culpabilité par association dans le cadre de l'article 1F(a) de la Convention de 1951 relative au statut des réfugiés, au cours des dix ans depuis la décision *Ezokola*.

required if we are to fully realize *Ezokola's* objective of eliminating exclusion findings that amount to guilt by association.

Notre analyse suggère que, bien que la décision *Ezokola* ait eu un impact positif, certains aspects du cadre analytique de la décision *Ezokola* ne sont pas toujours clairs ou bien appliqués. Finalement, davantage de direction sera nécessaire pour atteindre l'objectif de la décision *Ezokola* d'éliminer les décisions d'exclusion fondées sur la culpabilité par association.

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# Eliminating Guilt by Association: Reviewing the Limits of *Ezokola* in Canadian Refugee Law Complicity Decision-Making (2013–2020)

Aneta Bajic, Chun He, & Andrew Koltun\*

## I. INTRODUCTION

The appropriate approach used to determine when individuals ought to be excluded from refugee protection based on their connection to international crimes is a recurring question in Canadian and international refugee law. Article 1F(a) of the *Convention Relating to the Status of Refugees* excludes from protection those who have committed a crime against peace, a war crime, or a crime against humanity, as defined under international law.<sup>1</sup> Complicity is a central concept in this discussion; specifically, what level of involvement or connection with such crimes makes a person morally culpable, such that they should be excluded from refugee protection?<sup>2</sup> Since these crimes are most often committed by groups or organizations, rather than by an individual acting alone, assessing complicity is unavoidable.<sup>3</sup>

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- 1 *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 at 156 (signed by Canada on 4 June 1969) [1951 Refugee Convention].
- 2 For a discussion on the purpose of Article 1F(a), see James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 567–86.
- 3 *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at paras 5–8 [*Ezokola*].

Prior to 2013, Canada's complicity framework was largely informed by the 1992 Federal Court of Appeal decision in *Ramirez v Canada (Employment and Immigration)*.<sup>4</sup> This framework resulted in a pattern of excluding individuals from refugee protection on the basis of guilt or complicity by association.<sup>5</sup> So long as an individual was sufficiently associated with an organization that committed an international crime enumerated in Article 1F(a), the individual would likely be deemed complicit in those crimes. The individual would therefore be excluded from refugee protection, regardless of whether they took part in or contributed to the crimes in question.<sup>6</sup>

In 2013, the Supreme Court of Canada updated Canada's complicity framework in *Ezokola* and determined that the *Ramirez* approach improperly led to findings of guilt by association. The Court determined that a reformulated test was required to properly determine the level of contribution required for an individual to be complicit for the purposes of Article 1F(a).<sup>7</sup> This landmark decision parted ways with the approach adopted in *Ramirez* by creating a new complicity test based on an individual's actual contribution to the crimes in question.<sup>8</sup> Under the *Ezokola* test, exclusion from refugee protection is warranted only where the individual has made a voluntary, knowing, and significant contribution to a group's crimes or criminal purposes.<sup>9</sup>

This paper examines the degree to which Canadian refugee law has made a definitive break with findings that amount to guilt by association for the purposes of Article 1F(a) of the 1951 Refugee Convention following the *Ezokola* decision. We reviewed every published tribunal and court decision that applied the *Ezokola* test since its release in July 2013 until November 2020.<sup>10</sup> Our analysis suggests that, while the *Ezokola* decision

4 1992 CanLII 8540 (FCA) [*Ramirez*].

5 *Ezokola*, *supra* note 3 at para 9.

6 See Jennifer Bond, Nathan Benson & Jared Porter, "Guilt by Association: *Ezokola*'s Unfinished Business in Canadian Refugee Law" (2020) 39:1 Refugee Survey Q 1 at 5; *Ezokola*, *supra* note 3 at para 9.

7 *Ibid* at paras 2-3, 84-85.

8 *Ibid* at paras 8-9.

9 *Ibid*. For a discussion on the shift from the *Ramirez* test to the *Ezokola* test, see Bond, Benson & Porter, *supra* note 6 at 4-6. See also Joseph Rikhof, "Update on Exclusion and Inadmissibility Jurisprudence: New Developments Since the Decisions of the Supreme Court of Canada in *Ezokola* and *Febles*" (2017) Canadian Association for Refugee & Forced Migration Studies, Working Paper No 2017/2 at 6-14.

10 As a party to the 1951 Refugee Convention, Canada created its own laws to reflect Article 1F(a) in the *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 35(1), 98 [IRPA]. Section 98 of IRPA references Article 1F(a). Section 35(1)(a) of IRPA reflects the principle of Article 1F(a) but applies to all classes of immigrants, and not just refugees. The Federal

has had a positive impact, certain aspects of *Ezokola*'s analytical framework are unclear, and further guidance is required if we are to realize *Ezokola*'s objective and make a definitive break with exclusion findings based on guilt by association.

This paper analyzes the interpretation and application of the *Ezokola* test's three main elements: voluntariness, significance, and knowledge, in relation to an individual's contributions to the crimes or criminal purpose of an organization found to have committed international crimes.<sup>11</sup> We identify gaps and inconsistencies in each element that affect the complicity analysis.

### A. The *Ezokola* Framework

In *Ezokola*, the Supreme Court of Canada grappled with whether a refugee claimant ought to be excluded from Canadian refugee protection due to their civil service with the government of the Democratic Republic of Congo, which was found to have engaged in various crimes against humanity.<sup>12</sup> The Court departed from the "personal and knowing participation" test from *Ramirez* and refined the test for complicity as: "[t]o 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."<sup>13</sup>

The Supreme Court also listed six factors to "serve as a guide in assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose":<sup>14</sup>

- (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;

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Court of Appeal stated that s 35(1)(a) is the domestic inadmissibility provision which parallels Article 1F(a) of the 1951 Refugee Convention (see e.g. *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 19). This paper reviewed exclusion decisions under Article 1F(a), and sections 35(1) and 98 of *IRPA*, as these provisions can involve applying the *Ezokola* complicity test.

11 We use this term to encompass war crimes, crimes against humanity, and crimes against peace, as set out in Article 1F(a) of the 1951 Refugee Convention. Although our paper aims to focus on refugee law, we chose to also review and analyze decisions that applied *Ezokola* in the immigration law context for the widest possible dataset. This paper therefore includes some discussion of *Ezokola*'s complicity test applied in the immigration law context.

12 *Ezokola*, *supra* note 3 at paras 11–18.

13 *Ibid* at para 84.

14 *Ibid* at para 91.



- (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.<sup>15</sup>

The Supreme Court was careful to note that “[w]hen relying on these factors for guidance, the focus must always remain on the individual's contribution to the crime or criminal purpose.”<sup>16</sup> In other words, the factors should not replace the framework, but rather aid in its application. The Court further emphasized that the assessment of the factors will be highly contextual, and while certain factors may carry significant weight in a particular case, “[u]ltimately...the factors will be weighed with one key purpose in mind: to determine whether there was a voluntary, significant, and knowing contribution to a crime or criminal purpose.”<sup>17</sup> The Court emphasized that the new contribution-based approach to complicity replaced the prior framework of guilt by association and passive acquiescence.<sup>18</sup>

Relying on international legal sources, the Supreme Court confirmed that passive membership in or mere association with an organization is not enough to rise to the level of complicity.<sup>19</sup> Rather, “there must be a link between the individuals and the *criminal purpose* of the group....”<sup>20</sup> In other words, the individual must have voluntarily made a contribution (voluntarily joining the group itself is not enough), have made a significant contribution (not just any contribution), and knew that their “*conduct* [would] assist in the furtherance of the crime or criminal purpose” (not just general knowledge of the existence of crimes).<sup>21</sup>

This emphasis on an individual's contribution aligns the Canadian complicity framework more closely with international criminal law, where mere membership in a criminal organization has not been accepted as a form of liability since the Nuremberg trials following World War II.<sup>22</sup>

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15 *Ibid.*

16 *Ibid.* at para 92.

17 *Ibid.*

18 *Ibid.* at para 81.

19 *Ibid.* at paras 68, 77.

20 *Ibid.* at para 8 [emphasis in original].

21 *Ibid.* at paras 86–89 [emphasis in original].

22 Robert J Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020) at 739–41.

While the *Ezokola* decision restrained the boundaries of complicity for Article 1F(a) exclusion, recent scholarship argues that *Ezokola* did not provide tools to address complex situations where asylum seekers cannot be neatly categorized solely as victims or perpetrators.<sup>23</sup> As DeFalco identifies, atrocities are complex, large-scale processes of violence which can be cyclical, and lead victimized groups to subsequently commit their own atrocities. Perpetrators can become victims themselves.<sup>24</sup>

Whether the *Ezokola* test may be applied in a manner that adequately accommodates for hybrid perpetrator-victim identities of the individuals tangentially involved with crimes against humanity is an important question. However, this question is beyond the scope of this paper as we instead provide a case review and analysis of how courts have applied the *Ezokola* test and how effectively it has decreased guilt by association findings. Our review's conclusion is that guilt by association findings continue to occur despite the progress and guidance *Ezokola* provides.

## B. Methodology

This paper discusses trends identified in 71 relevant reported decisions published between the release of *Ezokola* on July 19, 2013, to November 30, 2020. By November 2020, our case identification was complete, and we began analyzing our dataset for observable trends. Decisions we identified as relevant to our analysis came from a review of all reported decisions on CanLII and Westlaw that cited Article 1F(a) of the *Refugee Convention*, or sections 35(1)(a) or 98 of the *IRPA*, and the *Ezokola* decision.

The 71 relevant reported decisions included 38 Federal Court decisions and 33 tribunal decisions at the Immigration and Refugee Board of Canada.<sup>25</sup> We also considered one unreported decision.<sup>26</sup> Of the 38 Federal

23 Randle C DeFalco, "Ignoring Complex Identities: Canada's Continuing Post-*Ezokola* Overzealous Application of Article 1F(a) of the Refugee Convention" (2023) 11:1 Can J Human Rights 1 at 16.

24 *Ibid* at 21.

25 The Immigration and Refugee Board is comprised of four tribunals or "Divisions": the Refugee Protection Division, with appeals directed to the Refugee Appeal Division; and the Immigration Division, with appeals directed to the Immigration Appeal Division.

26 The single unreported decision was a decision from the Refugee Protection Division obtained from the claimant's counsel, which was the subject of a subsequent reported Federal Court decision. This was done because we felt it was necessary to dig deeper into the reasons of the Refugee Protection Division. These two decisions are discussed below in our section on the Defence of Duress analysis. See *Re Hammed* (1 April 2019), MB2-06122 at para 40 (Refugee Protection Division) [*Hammed RPD*]; see also *Canada (Citizenship and Immigration) v Hammed*, 2020 FC 130 [*Hammed*].

Court decisions, 25 applications for judicial review were dismissed and 13 applications for judicial review were granted. Of the 33 tribunal-level decisions, 14 decisions resulted in an exclusion or inadmissibility finding, 18 found the individual(s) not excluded or inadmissible, and one decision sent an exclusion decision back to the Refugee Protection Division for redetermination.

We first reviewed each decision briefly to deduce its relevance; specifically, we reviewed the decision to determine whether the *Ezokola* test was applied or whether *Ezokola* was merely cited. We then created a chart to lay out the following factors: which statutory provision was applied in the decision; a brief overview of the facts; a brief overview of the analysis; the outcome of the decision (e.g. was the individual ultimately excluded, was it sent back for redetermination); and whether the decision-maker, in our opinion, properly applied the *Ezokola* test.

If we found that the decision warranted further analysis and review, we drafted a separate, more detailed document (which we called the Case Review Tool) which outlined: a review of which factors of the *Ezokola* test were considered and how they were applied, and which factors were found to be the most significant. The Case Review Tool also explicitly focused on whether inferences were made to the limited brutal purpose of the organization; whether there was an overreliance on one aspect of the factors (e.g. an individual's profile or seniority); whether a contribution was established through an individual's acquiescence or tolerance; whether there was a failure to distinguish contributions to the group and contributions to the crime; and whether significant contributions were distinguished from insignificant contributions. We then drafted this paper based on the identified gaps and inconsistencies highlighted by the Case Review Tool's findings.

## II. VOLUNTARY CONTRIBUTION

The first element of the *Ezokola* test assesses whether the contribution to the crime or criminal purpose was “voluntarily made.”<sup>27</sup> The Supreme Court of Canada noted the possibility of situations where “an individual... [has] no realistic choice but to participate,” and accordingly notes that the defence of duress is captured under the voluntariness element of the test.<sup>28</sup> The Court suggested that the sixth factor of the test—the

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27 *Supra* note 3 at para 86.

28 *Ibid.*

method of recruitment by the organization and the opportunity to leave the organization—“directly impact[s]” the voluntariness assessment.<sup>29</sup> The Court stated that the voluntariness requirement: “may not be satisfied if an individual was coerced into joining, supporting, or remaining in the organization....The Board may wish to consider whether the individual’s specific circumstances (*i.e.* location, financial resources, and social networks) would have eased or impeded exit.”<sup>30</sup>

We observed three patterns in the jurisprudence’s voluntariness analysis, which may have led to findings that amount to guilt by association. First, some decisions did not make an express distinction between voluntarily contributing to the group and voluntarily contributing to the furtherance of the group’s crimes or criminal purpose.<sup>31</sup> We saw this pattern occur especially in cases where the person concerned claimed to have joined a group to engage in meaningful public service, such as a police force, but was nevertheless captured as having contributed to the furtherance of crimes committed by those groups, often based on the widespread nature of the crimes.

Second, there is a lack of clarity and consistency in applying the defence of duress.<sup>32</sup> There is also a complete absence of an analytical framework for coercion, which falls short of duress, despite case law that suggests such coercion can negate the voluntariness element of the *Ezokola* test.

Third, none of the decisions considered an individual’s financial or economic factors; specifically, whether their lack of options or financial resources might weigh against a voluntariness finding. Of the decisions reviewed, financial or economic factors were only considered as factors which weighed in favour of a voluntariness finding if an individual received remuneration or other benefits and their contribution was voluntary.

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29 *Ibid* at para 99.

30 *Ibid*.

31 See e.g. *Talpur v Canada (Citizenship and Immigration)*, 2016 FC 822 [*Talpur*]; *Yorkes v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 47569 (Immigration Appeal Division) [*Yorkes*]; *X (Re)*, 2018 CanLII 145577 (Refugee Protection Division) [*X Re 145577*]; *Canada (Citizenship and Immigration) v Verbanov*, 2017 FC 1015 [*Verbanov I*].

32 *Moya v Canada (Citizenship and Immigration)*, 2014 FC 996 [*Moya*]; *Massroua v Canada (Citizenship and Immigration)*, 2019 FC 1542 [*Massroua*]; *Al Khayyat v Canada (Citizenship and Immigration)*, 2017 FC 175 [*Al Khayyat*]; *X (Re)*, 2018 CanLII 139838 [*X Re 139838*]; *Hammed*, *supra* note 26; *Hammed RPD*, *supra* note 26 at para 40; *Canada (Citizenship and Immigration) v Kljajic*, 2020 FC 570 [*Kljajic*].

## A. Distinguishing Between Voluntary Contribution to the Organization Versus Voluntary Contribution to the Crime

The *Ezokola* decision emphasized that exclusion from refugee protection under Article 1F(a) requires a nexus between the individual's membership and contribution to the crimes or criminal purpose of the organization. As a result, our interpretation is that an *Ezokola* analysis requires a distinction between whether there was a voluntary, knowing, or significant contribution to the crime, rather than a contribution (or mere membership) to the organization itself.<sup>33</sup> The Supreme Court of Canada specifically noted that the previous approach to complicity “inappropriately shifted its focus towards the criminal activities of the group and away from the individual's contribution to that criminal activity.”<sup>34</sup> This distinction is, therefore, vital to making a clean break from guilt by association findings.

Our case law review suggests that some decisions did not make this express distinction when analyzing the voluntariness element. They did not assess whether a claimant's voluntary participation and duties furthered the organization's crimes or criminal purpose.<sup>35</sup> Instead, the analysis often focused on whether a claimant left their organization at the earliest opportunity—a question which may be relevant to the voluntariness assessment but should not be determinative nor substituted for the proper analysis.

Further, some decisions found that a claimant voluntarily contributed to the crimes or criminal purpose of the group in instances where only their voluntary membership was established.<sup>36</sup> Our analysis suggests that this equivocating arises not from a gap in the analytical framework set out in *Ezokola*, but rather from an inconsistent application of the principles articulated in the decision. This, and other cases discussed below, illustrate the risks of focusing exclusively on the six guiding factors set out in *Ezokola* without verifying that each element of the contribution-based test for complicity is met.

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33 See e.g. *Ezokola*, *supra* note 3 (“...here we are concerned with general participation in a group's criminal activity. We must determine when that participation becomes a culpable contribution” at para 41); see also *ibid* (“[i]n our view, the Federal Court's approach in this case brings appropriate restraint to the test for complicity that 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” at para 79).

34 *Ezokola*, *supra* note 3 at para 79.

35 *Yorkes*, *supra* note 31; *Talpur*, *supra* note 31; *X Re 145577*, *supra* note 31.

36 *Yorkes*, *supra* note 31; *Talpur*, *supra* note 31.

One recurring fact scenario involved individuals who served domestic law enforcement agencies that were later deemed to have committed war crimes or crimes against humanity.<sup>37</sup> Often, these were large organizations with public service mandates which had segments or units that committed crimes that warranted exclusion from refugee protection. In such cases, analyzing the connection between the individual and the crimes in question was crucial to assessing complicity to avoid findings that amount to guilt by association.

For example, in *Verbanov I*, the applicant, Mr. Verbanov, was a Moldovan citizen who was employed as a police officer in Moldova for approximately four years before becoming a Canadian permanent resident.<sup>38</sup> Mr. Verbanov's main duty was to repress pickpocketing on public transit and central areas in the country's capital city, and Mr. Verbanov did not carry a weapon or handcuffs.<sup>39</sup> The Immigration Appeal Division did not accept the argument that the crimes committed by the police force were widespread or that Mr. Verbanov contributed to those crimes, because doing so would "effectively render all police officers inadmissible if they come from a country...with corruption, abuse, and acts of retaliation against the civilian population."<sup>40</sup> On judicial review, the Federal Court sent the matter back for redetermination, finding that the Immigration Appeal Division had not considered whether Mr. Verbanov was aware of the crimes perpetrated by the Moldovan police, noting that he joined voluntarily and made no efforts to disassociate himself from the group.<sup>41</sup>

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37 *Talpur*, *supra* note 31; *Verbanov I*, *supra* note 31; *X Re 145577*, *supra* note 31; *Ali v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 698 [*Ali*].

38 *Verbanov I*, *supra* note 31 at paras 5–7.

39 *Ibid* at paras 6–7.

40 *Verbanov I*, *supra* note 31 at para 15.

41 *Ibid* at para 36. In fact, it was later uncovered in another Federal Court decision that Mr. Verbanov did not necessarily join the organization voluntarily, as joining the police force was required to compensate the government for funding Mr. Verbanov's education (see *Verbanov v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 324 at para 14 [*Verbanov II*]). The redetermination of the decision discussed above was also judicially reviewed and is discussed below in our "Knowledge" and "Significance" sections, because the Federal Court's decision was based on the Immigration Appeal Division's unreasonable finding that Mr. Verbanov made a knowing and significant contribution that ultimately, in the Federal Court's words, amounted to guilt by association (see *ibid* at para 35). The matter was again sent for redetermination and again judicially reviewed, but the final judicial review did not deal with the matter of complicity. Rather, the issue concerned whether the Moldovan police actually committed crimes against humanity (see *Canada (Public Safety and Emergency Preparedness) v Verbanov*, 2021 FC 507).

In *Talpur*, an immigration officer denied the applicant's permanent residence application after determining there were reasonable grounds to believe that the principal applicant's husband, Mr. Jamali, was complicit in crimes against humanity that occurred during his career as a police officer in Pakistan.<sup>42</sup> Mr. Jamali's duties involved "patrol, investigation, preparation of interrogations, and supervision of the preliminary investigation of cases."<sup>43</sup> The Federal Court accepted the reasoning that "while the entire force is not directly responsible for these crimes, those working 'in an operational way on a day-to-day basis, including investigating officers, inspectors and their management' will inherently be more closely linked to the crimes than others," and that individuals in investigative and operational roles are more likely to be complicit.<sup>44</sup> We note here that this reasoning is somewhat conflicting with the reasoning denounced in the *Verbanov I* decision.<sup>45</sup> The Federal Court also accepted the immigration officer's reasoning that there was no evidence that Mr. Jamali was forced into this employment or that he was obligated to stay.<sup>46</sup> There was no assessment mentioned by the Court in this decision concerning Mr. Jamali's individual contribution to the crimes or criminal purpose of the police force.

In one Refugee Protection Division decision, the claimant disclosed that he voluntarily joined the police at a young age because of his desire to help people.<sup>47</sup> Based on this disclosure, the tribunal found that the voluntary contribution element of the *Ezokola* test was met.<sup>48</sup> In terms of the substantial crimes committed by members within the police force, the tribunal found that the claimant's high rank would have allowed him to stop the crimes, though the claimant testified that he neither had knowledge of the crimes in question nor direct supervision over the officers who committed the crimes.<sup>49</sup> In the absence of a more detailed examination of the connection between the claimant's role and duties, and the crimes in question, this

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42 *Supra* note 31 at paras 2–3.

43 *Ibid* at para 3.

44 *Ibid* at paras 8, 12, 28, 37.

45 Tribunals and the Federal Court are not bound by the precedents set by each other. However, the fact that this reasoning was upheld in one decision (*i.e.* first *Verbanov* Immigration Division and Immigration Appeal Division decisions), and not in another (*i.e.* *Talpur*), demonstrates the inconsistent application of the *Ezokola* test—particularly with respect to analyzing an individual's contribution to, or membership with, an organization versus their contribution to the crimes or criminal purpose of that organization.

46 *Talpur*, *supra* note 31 at para 32.

47 *Xe Re 145577*, *supra* note 31 at para 36.

48 *Ibid* at paras 35–39.

49 *Ibid* at para 56.

appears to be a clear case where voluntary participation in the organization was treated as a voluntary contribution to its crimes or criminal purposes—precisely the type of reasoning rejected in *Ezokola*.

In *Ali*, the applicant, Mr. Ali, argued at the Federal Court that the Immigration Division failed to make an important distinction—the Immigration Division conflated the “contribution to the legitimate law enforcement function of the police with contribution to its alleged crime or criminal purpose”—in the inadmissibility decision.<sup>50</sup> The Federal Court found that, “[i]n the case of a multifaceted organization such as a police force or military, there must be an assessment of whether the person significantly contributed to the crimes or criminal purpose of the group and not just to the organization itself.”<sup>51</sup> The Federal Court also accepted that the Immigration Division did not engage with this distinction in that case.<sup>52</sup>

However, the Federal Court concluded that the Immigration Division’s voluntariness analysis “must be read in the context of the overall decision, including in particular its analysis and conclusions that the Applicant made a significant and knowing contribution to the crimes and criminal purpose...” and accepted the Immigration Division’s finding as reasonable.<sup>53</sup> The voluntariness element was made out through factors such as “his recruitment, tenure, advancement, retention, involvement, and participation...which raised the vision of a shared purpose with, and commitment to, the organization.”<sup>54</sup> The Federal Court, however, did not comment further on the distinction between the legitimate and illegitimate purposes of the organization.

In our view, the failure to make the distinction between a voluntary contribution to an organization versus a voluntary contribution to a crime can have major impacts on those who have served in police forces in particular. Whereas a police force is meant to serve a public good, and some sector of the organization has engaged in crimes against humanity, a police officer who is a member of the force but in a different sector may be captured as complicit, regardless of their specific contribution. There is no doubt that there are instances where an individual’s duties in an organization relate closely to its crimes or criminal purposes. In such cases, their voluntary participation in that role may be sufficient to establish a voluntary

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50 *Ali*, *supra* note 37 at paras 31–32.

51 *Ibid* at para 31.

52 *Ibid* at para 52.

53 *Ibid*.

54 *Ibid* at para 51.



contribution. However, further guidance may help avoid further findings that unreasonably equate voluntary participation in an organization's legitimate activities to a voluntary contribution to that organization's crimes.

As noted in *Ezokola*—even in small organizations with a limited and brutal purpose—“the individual's conduct and role within the organization must still be carefully assessed, on an individualized basis, to determine whether the contribution was voluntarily made and had a significant impact on the crime or criminal purpose of the group.”<sup>55</sup>

## B. Duress and Coercion

The Supreme Court of Canada in *Ezokola* specifically notes that the “voluntariness requirement captures the defence of duress which is well recognized in customary international criminal law, as well as in art. 31(1)(d) of the *Rome Statute*....”<sup>56</sup> The Court also noted that the voluntariness requirement “may not be satisfied if an individual was coerced into joining, supporting, or remaining in the organization.”<sup>57</sup> However, the Court did not articulate a test for duress or endorse any of the several available tests.<sup>58</sup>

Two issues arise in connection with these closely related concepts of duress and coercion. First, there is an absence of guidance on a correct test for duress in the Article 1F(a) complicity context. Second, there is a lack of guidance on how to assess coercion that falls short of duress, despite case law that indicates that sufficient coercion may negate a finding of voluntariness.

### 1. *The Defence of Duress*

Several different tests for duress exist in Canadian and international law, and there is limited guidance on which one to apply in the complicity context. While *Ezokola* did mention the defence of duress as defined in the *Rome Statute*, decisions applying the *Ezokola* test have more commonly applied the leading Canadian criminal law case on duress, *R v Ryan*.<sup>59</sup> There is also a third test, set out in *Ramirez*, which is no longer commonly applied

55 *Supra* note 3 at para 94. See also *R (JS (Sri Lanka)) v Secretary of State for the Home Department*, [2010] UKSC 15 at para 55, Lord Kerr (concurring) [*JS Sri Lanka*].

56 *Supra* note 3 at para 86, citing *Rome Statute of the International Criminal Court*, UNGA, 2187 UNTS 38544 (1998), Article 31(1)(d) [*Rome Statute*].

57 *Ezokola*, *supra* note 3 at para 99.

58 We note the defence of duress was not raised by the person concerned in *Ezokola*.

59 2013 SCC 3 [*Ryan*].

in Canadian refugee law, but is occasionally referenced.<sup>60</sup> This lack of a clear and consistent framework in assessing duress blurs the case to be met—parties to a proceeding may be left guessing which factors of the defence may be applied. The difference between the available tests is not merely semantic.

Article 31(1)(d) of the *Rome Statute*, mentioned in the *Ezokola* decision, states that the defence arises where there is “a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.”<sup>61</sup> The elements of duress from *Ryan* are as follows:

- an explicit or implicit threat of death or bodily harm proffered against the accused or a third person. the threat may be of future harm...;
- the accused reasonably believed that the threat would be carried out;
- the non-existence of a safe avenue of escape, evaluated on a modified objective standard;
- a close temporal connection between the threat and the harm threatened;
- proportionality between the harm threatened and the harm inflicted by the accused...; [and]
- the accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.<sup>62</sup>

Professor Jennifer Bond noted key differences between the articulation of the defence in the *Rome Statute* and in *Ryan*, including:

- *Ryan* specifies that “an accused cannot benefit from the defence of duress if she participated in a conspiracy or criminal association knowing that such participation ‘came with a risk of coercion and/

60 The *Ramirez* test is based on international law and outlines three elements required to make out the defence: (a) a grave and imminent peril; (b) that the peril is not the making of the person in peril; and (c) that the harm inflicted must not be in excess of the harm threatened (see *Ramirez*, *supra* note 4 at para 327–28).

61 *Supra* note 56.

62 *Ryan*, *supra* note 59 at para 55. These elements are also codified in the *Criminal Code*, RSC 1985, c C-46, s 17.

or threats to compel [her] to commit an offence,” while the *Rome Statute* does not contain a comparable requirement;<sup>63</sup> and

- The *Rome Statute* requires the threat inciting the duress to be imminent, while the Supreme Court has found such a requirement to be unconstitutional because it would “exclude threats of future harm to the accused or to third parties.”<sup>64</sup> Instead, the focus in Canadian criminal law is whether the individual had a safe avenue of escape.<sup>65</sup>

These differences are substantial in the context of Article 1F(a) because participation in the organization is at the heart of the analysis. Further, an imminence requirement like in the *Rome Statute*’s version of the defence could be problematic in the complicity context, since it is often ongoing participation and contributions to an organization that is at issue. If an imminent threat was required throughout the entirety of the individual’s participation, the threshold to make out the defence becomes high.

In *Al Khayyat*, the Federal Court held that decision-makers should not limit the duress analysis to the criteria outlined in *Ryan*.<sup>66</sup> The Federal Court also endorsed the ability to consider coercion falling short of duress.<sup>67</sup> The Immigration Division in that case rejected the claimant’s defence of duress because he was only under the threat of deportation, while *Ryan* only addressed threats of death and bodily harm to self or another, and not the fear of being deported.<sup>68</sup> Consequently, the defence did not succeed, and the applicant was excluded. The Federal Court found the decision was unreasonable because there was no consideration as to whether the claimant’s voluntariness could be negated by coercion that does not rise to the level of duress.<sup>69</sup> The Court further commented that “[i]t is unclear why the [Immigration Division] would reference *Ryan* when considering the defence of duress, rather than customary international law or Article

63 *Ryan*, *supra* note 59 at para 75; Jennifer Bond, “The Defence of Duress in Canadian Refugee Law” (2016) 41:2 *Queen’s LJ* 409 at 431.

64 *R v Ruzic*, 2001 SCC 24 at para 90.

65 Bond, *supra* note 63 at 432. Other differences include the standard used to assess a safe avenue of escape (*ibid* at 431–32; see also *Ryan*, *supra* note 59 at paras 65, 70–74) and the individual’s intent to cause harm is contemplated by the *Rome Statute* but not in Canadian criminal law (see Bond, *supra* note 63 at 431). Furthermore, the *Rome Statute* does not distinguish between the defence of duress and the defence of necessity, but they are distinguished in *Ryan* as targeting “different types of situations” (see *ibid* at 432; see also *Ryan*, *supra* note 59 at para 74).

66 *Supra* note 32 at para 56.

67 *Ibid* at para 60.

68 *Ibid* at para 55.

69 *Ibid* at paras 56–57, 60.

31(1)(d) of the *Rome Statute*.<sup>70</sup> The *Al Khayyat* decision seems to endorse the view that international legal principles regarding the defence of duress are more appropriate in complicity cases than the Canadian common law test outlined in *Ryan*.

In contrast, in *X Re 139838*, which was decided after *Al Khayyat*, the Refugee Appeal Division followed the *Ryan* test, and its decision was upheld on judicial review.<sup>71</sup> The claimant, Mr. Massroua, raised the defence of duress in relation to his work as a mechanic for the terrorist group ISIS.<sup>72</sup> The Refugee Appeal Division's main considerations for duress included: "the extent of the threats made against the Applicant; whether the Applicant acted to avoid this threat; and whether the Applicant had a safe avenue of escape."<sup>73</sup> The Refugee Appeal Division cited that the *Ezokola* voluntariness requirement applies customary international law and Article 31(1)(d) of the *Rome Statute*, as well as guidance from *Al Khayyat*.<sup>74</sup> However, when analyzing the threat made against Mr. Massroua, the Refugee Appeal Division found that ISIS neither physically harmed the appellant nor made explicit threats against the appellant.<sup>75</sup> The Refugee Appellant Division found this analysis to be sufficient in finding whether the appellant "continued to work with ISIS on the belief that there existed an implied threat of death or bodily harm from ISIS if he did not comply."<sup>76</sup>

Thus, although the decision cited the international guidelines for duress, its analysis was more akin to the factors from *Ryan* for two reasons. First, the Refugee Appeal Division considered whether there was an explicit or implicit threat, rather than an imminent threat as per Article 31(1)(d) of the *Rome Statute*.<sup>77</sup> Second, the Refugee Appeal Division placed an emphasis on the appellant's availability of a safe avenue of escape, which is not contemplated by the *Rome Statute* but is specified in the *Ryan* factors.<sup>78</sup> On judicial review, the Federal Court noted that Mr. Massroua was never harmed or subject to threats from the group and did not show resistance in working for the group, and that Mr. Massroua fled only because of the threat from an enemy group.<sup>79</sup>

70 *Ibid* at para 56.

71 *X Re 139838*, *supra* note 32, aff'd 2019 FC 1542.

72 *Ibid* at paras 43, 61, 72–75.

73 *Massroua*, *supra* note 32 at para 44.

74 *X Re 139838*, *supra* note 32 at paras 77–78.

75 *Ibid* at para 80.

76 *Ibid* at para 82.

77 *Ibid* at paras 80–82.

78 *Ibid* at paras 79, 83.

79 *Massroua*, *supra* note 32 at para 45.

In *Hammed*, an even later decision, it appears that the Refugee Protection Division did not clearly apply any of the recognized tests for the defence of duress.<sup>80</sup> However, the claimant's defence succeeded at the Refugee Protection Division, and the claimant was not excluded. The Federal Court accepted the Refugee Protection Division's reasoning and upheld the decision because the Refugee Protection Division explained that it accepted Mr. Hammed's testimony of working under duress or authority.<sup>81</sup> There was no question that the claimant had voluntarily enrolled in the Nigerian army as a public relations officer, so the issues revolved around whether or not Mr. Hammed had voluntarily contributed to the army's crimes.<sup>82</sup>

In this case, the claimant's primary responsibilities involved communicating press releases to the public.<sup>83</sup> The only factor regarding the defence of duress that the Refugee Protection Division seemed to address was whether the claimant had an opportunity to leave, similar to the "safe avenue of escape" element from *Ryan*. The Refugee Protection Division accepted the claimant's testimony explaining that "he could not unilaterally leave the army, because he would have been considered a deserter and could have been sentenced to prison."<sup>84</sup> The Refugee Protection Division did not base their decision on voluntariness, but rather placed weight on finding that the claimant's contribution was not significant because, as a public relations officer, he was always under the direct orders from his superior and he did not have any control over the perpetrators of criminal acts within the organization—reminiscent of the international law defence of superior orders.<sup>85</sup> The Refugee Protection Division allowed Mr. Hammed's claim for refugee protection. The Minister of Public Safety and Emergency Preparedness sought judicial review of the tribunal's finding.<sup>86</sup>

Upon application for judicial review, the Federal Court found that the Refugee Protection Division had adequately addressed the defence.<sup>87</sup> The Court found that the Refugee Protection Division established that Mr. Hammed had knowledge of the human rights abuses being committed by the Nigerian army and had voluntarily joined the army. However, the Refugee Protection Division found that the voluntary contribution was negated

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80 *Hammed*, *supra* note 26 at para 24.

81 *Ibid* at para 23.

82 *Hammed RPD*, *supra* note 26 at para 40.

83 *Ibid* at para 38.

84 *Ibid* at para 44.

85 *Ibid* at paras 38, 41.

86 *Hammed*, *supra* note 26 at paras 1, 4.

87 *Ibid* at para 23.

because a superior's orders were followed, and did not have any direct contribution to the crimes themselves.<sup>88</sup> The Federal Court found that the Refugee Protection Division's consideration of the claimant's opportunity to leave was consistent with *Ezokola* and was sufficient in addressing duress.<sup>89</sup>

In *Kljajic*, a decision following *Hammed*, the Federal Court considered the *Ryan* factors as the proper test in considering duress in the context of Article 1F(a).<sup>90</sup> Alongside the usual factors listed above, the Court also considered, pursuant to *Ryan*, whether the claimant acted under any type of coercion which would rise to the level of moral involuntariness.<sup>91</sup> The Court found that the evidence regarding the applicant's state of mind during their service in the impugned organization did not reflect any fear for the applicant or their family's safety, any coercive measures, moral involuntariness, or any threats, and that the applicant did not suffer any repercussions following the voluntary resignation from the organization.<sup>92</sup> The Court noted that the applicant drove to a bordering country numerous times while working with the organization, to a place where many people sought refuge during the war, which suggested that an available safe avenue of escape to a known place was perceived as being safer than the workplace.<sup>93</sup> Through consideration of these factors described in *Ryan*, the Court ultimately concluded that the applicant was not acting under duress, nor was their complicity morally involuntary.<sup>94</sup>

These decisions demonstrate that there remains confusion regarding the factors that should be considered for duress defences made in the Article 1F(a)-complicity context.<sup>95</sup> In our view, such ambiguity may risk factors being confused and mingled. Clear guidance on what factors to consider or the analysis to be used for the duress defence in the complicity context would serve the interests of justice by helping parties to better know the case to be met.

88 *Ibid* at para 6.

89 *Ibid* at para 23.

90 *Supra* note 32 at para 166. For a discussion on moral involuntariness in terms of the proportionality of the threat and the act, see *Ryan*, *supra* note 59 at paras 54, 70 (“[p]roportionality is a crucial component of the defence of duress because...it derives directly from the principle of moral involuntariness: only an action based on a proportionally grave threat, resisted with normal fortitude, can be considered morally involuntary” at para 54).

91 *Kljajic*, *supra* note 32 at para 244.

92 *Ibid* at paras 244–50.

93 *Ibid* at para 251.

94 *Ibid* at para 252.

95 Note that the Federal Court recently declined to certify a serious question of general importance relating to the different tests of duress applied in complicity jurisprudence (see *Seydi v Canada (Citizenship and Immigration)*, 2022 FC 1336 at paras 34–38).

The following chart illustrates the inconsistent use of duress in the decisions discussed above:

Decision	Provision Considered	Result	Duress test used/factors used	Mentions Imminence?	Cites <i>Ramirez</i> ?
<i>Moya v Canada</i> , 2014 FC 996.	Article 1F(a) of the 1951 Refugee Convention	Excluded	<i>Ryan</i>	No	Yes, but not for duress.
<i>Al Khayyat v Canada (Citizenship and Immigration)</i> , 2017 FC 175.	Section 35(1)(a) of <i>IRPA</i>	Sent for redetermination	Immigration Division considered <i>Ryan</i> but FC says they should have considered international law	Yes, but does not rely on it <sup>96</sup>	Yes, but not for duress.
<i>Massroua v Canada (Citizenship and Immigration)</i> , 2019 FC 1542.	Article 1F(a)	Excluded	Mentions international law but applies <i>Ryan</i>	No	No, and not in the Refugee Protection Division decision either.
<i>Canada (Citizenship and Immigration) v Hammed</i> , 2020 FC 130.	Article 1F(a)	Admitted	<i>Ryan</i> , but mostly relies on defence of superior orders	No	No, and not in the Refugee Protection Division decision.
<i>Canada (Citizenship and Immigration) v Kljajic</i> , 2020 FC 570.	Article 1F(a)	Excluded	<i>Ryan</i>	Not for Article 1F(a)	Yes, but only cites it after stating <i>Ryan</i> factors.

<sup>96</sup> The Federal Court in *Al Khayyat* cited the *Rome Statute*, which requires the imminence of the threat. The Court explains that the Immigration Division considered the *Ryan* factors, and that the Immigration Division noted that the *Ryan* factors require an imminent threat as well. In fact, *Ryan* does not include imminence as a requirement, so this was an error by the Immigration Division. The Court, however, does not explain that this was an error, but rather found that relying on *Ryan* in general was the error. The Court did not address the application of the “imminence” factor (see *Al Khayyat*, *supra* note 32 at para 53).

This visual illustration demonstrates *Ezokola's* guidance does not go far enough as to explain which test for duress decision-makers should use in the complicity context. Further, despite the Federal Court's decision in *Al Khayyat*, the use of the *Ryan* test for duress is still more commonly applied than international law.

Future guidance on assessing duress may involve an entirely new test for duress for the complicity context, because complicity and contribution involve unique issues that may not be adequately addressed by any of the existing tests on their own.<sup>97</sup> In any event, our review suggests a need for further guidance on applying the defence of duress in the Article 1F(a)-complicity context.

## 2. Coercion Which Falls Short of Duress

The *Ezokola* decision states that the two factors that impact the voluntariness requirement the most are: (a) the method by which the refugee claimant was recruited; and (b) the refugee claimant's opportunity to leave the organization.<sup>98</sup> The Supreme Court of Canada notes that the voluntariness "requirement may not be satisfied if an individual was coerced into joining, supporting, or remaining in the organization."<sup>99</sup> This formulation differs from the tests for duress discussed above, and seems to indicate that coercion falling short of duress (or coercion that does not meet the specific criteria for duress) can indicate that a contribution to an impugned group was not voluntary.

Our case review indicates that when coercion is raised by claimants as a defence, it is often unsuccessful.<sup>100</sup> The receipt of material benefits or promotions are cited recurrently as reasons for rejecting the argument. When coercion is raised without the defence of duress, there is no clear or consistent test, or analytical framework, that decision-makers follow in considering coercion.<sup>101</sup>

97 Joseph Rikhof's 2017 Working Paper suggests that the *Ryan* framework is the more advantageous test for the applicant in complicity cases because its narrow framework is easier to meet (see Rikhof, *supra* note 9 at 28, 31).

98 *Supra* note 3 at para 99.

99 *Ibid.*

100 See *X (Re)*, 2018 CanLII 125222 [X Re 125222]; *Jelaca v Canada (Citizenship and Immigration)*, 2018 FC 887 [Jelaca]; *Verbanov v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 47471 at para 71 (Immigration Appeal Division) [*Verbanov IAD*]. For examples of success see *Canada (Public Safety and Emergency Preparedness) v Saherzoy*, 2017 CanLII 23091 (Immigration Appeal Division) [*Saherzoy*]; *Verbanov I*, *supra* note 31.

101 See *X Re 125222*, *supra* note 100 at para 78; *Jelaca*, *supra* note 100 at paras 24–25; *Verbanov IAD*, *supra* note 100 at para 72.



In *X Re 125222*, the person concerned claimed that he was coerced into taking a promotion at the impugned organization after joining voluntarily as a student because he would have been killed if he declined the promotion.<sup>102</sup> The tribunal gave little weight to this claim because there was a lack of evidence demonstrating that the harm feared was imminent and that the threat existed throughout all the years he held the higher position.<sup>103</sup> However, the deciding factor for the tribunal that led to a finding that the person concerned was not coerced into taking a promotion was the receipt of material benefits that were attached to the promotion.<sup>104</sup> It is unclear why this evidence was weighed against an imminent threat, a factor commonly raised in the duress analysis, as demonstrated above. The person concerned additionally did not raise the defence of duress here.

The search for an imminent threat in this decision also differs from the Supreme Court of Canada's formulation of coercion noted above, as *Ezokola* makes no mention of an imminence requirement and states the voluntariness "requirement...may not be satisfied if an individual was coerced into joining, supporting, or remaining in the organization".<sup>105</sup>

A different approach occurred in *Saherzoy*, where the claimant, Mr. Saherzoy, was successful in demonstrating his coercion.<sup>106</sup> Mr. Saherzoy admitted to working for the Afghanistan Intelligence Service (KhAD) as a teenager, where his primary duties were to gather information on fellow students or enemies of the regime, and to share that information with the KhAD.<sup>107</sup> Mr. Saherzoy was recruited by a school teacher to provide information to the KhAD and believed that non-compliance would result in being sent to the front lines of the then ongoing civil war to end up as a casualty.<sup>108</sup> The Immigration Division found these claims to be credible, and also considered the power imbalance between the teacher and Mr. Saherzoy, who was a teenager at the time.<sup>109</sup> The Immigration Division also considered that Mr. Saherzoy took the first opportunity to leave the organization during its downfall. Mr. Saherzoy was smuggled into Germany and had the opportunity to apply for asylum.<sup>110</sup> The Immigration Division

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102 *X Re 125222*, *supra* note 100 at para 78.

103 *Ibid.*

104 *Ibid* at paras 79, 94.

105 *Ezokola*, *supra* note 3 at para 99.

106 *Supra* note 100.

107 *Ibid* at para 3.

108 *Ibid* at para 14.

109 *Ibid.*

110 *Ibid.*

found that Mr. Saherzoy was coerced into working with the KhAD, and was therefore not complicit in the crimes against humanity committed by the KhAD during those years.<sup>111</sup> This decision was upheld by the Immigration Appeal Division upon appeal by the Minister.<sup>112</sup>

As the Supreme Court of Canada's comments in *Ezokola* suggest, many of the cases relating to coercion relate to situations where an individual was either compelled to join the organization or compelled to remain in the organization.<sup>113</sup> In *Jelaca*, the claimant raised the issue of conscription to prove his contribution to the Bosnian Serb Army was not voluntary.<sup>114</sup> Mr. Jelaca argued that he tried to avoid conscription by hiding, but the conditions of the hiding place were poor, he was unemployed, and there was no prospects of employment elsewhere.<sup>115</sup> Mr. Jelaca argued that once conscripted, there was no opportunity to leave.<sup>116</sup> The Minister argued that Mr. Jelaca should have tried harder "to dissociate or physically distance himself" from the army.<sup>117</sup> The voluntariness of the contribution was not addressed directly. The Federal Court found the visa officer's decision that Mr. Jelaca was inadmissible to be reasonable based primarily on the guard duty of a bridge during the siege.<sup>118</sup>

In the *Verbanov* decisions, the Immigration Appeal Division held, with the Federal Court later agreeing, that Mr. Verbanov voluntarily joined and served in the Moldovan police force, despite it having been a requirement in Moldova at the time for students to reimburse the government for funding their education by serving the police force for three years. While Mr. Verbanov claimed to have joined the police force solely for the purpose of fulfilling the conscription requirement, the Immigration Appeal Division concluded that there was insufficient evidence to conclude that Mr. Verbanov could not leave the police force voluntarily before the three-year mandatory service was complete.<sup>119</sup> The Court did not question this finding and stated that Mr. Verbanov "voluntarily became a police officer."<sup>120</sup>

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111 *Ibid* at paras 14–15.

112 *Ibid* at paras 15–16.

113 *Supra* note 3 at para 60.

114 *Supra* note 100 at paras 2–4.

115 *Ibid* at para 24.

116 *Ibid*.

117 *Ibid* at para 25.

118 *Ibid* at paras 27–29.

119 *Verbanov IAD*, *supra* note 100 at para 71.

120 *Verbanov I*, *supra* note 31 at para 36.

These cases illustrate that despite *Ezokola* providing opportunity for coercion falling short of duress to negate the voluntariness element of the test, there is not enough guidance for considering this *de facto* defence, leading to inconsistent approaches. This is a gap in the analytical framework of the complicity test which requires further attention.

### C. Financial/Economic Factors

*Ezokola* addresses the possibility of a claimant's financial resources factoring into the complicity analysis. The Supreme Court of Canada specified that tribunals "may wish to consider whether the individual's specific circumstances (*i.e.* location, financial resources, and social networks) would have eased or impeded exit."<sup>121</sup>

Despite this signal that financial resources may be a relevant factor—either in favour of or against a finding of voluntariness—the jurisprudence indicates that decisions have mainly considered this factor where there is evidence that the claimant had resources available to leave an organization or to avoid recruitment. The absence of resources as a personal circumstance that may negate voluntariness is rarely, if ever, considered.<sup>122</sup>

Financial resources have mainly been considered in connection with the sixth *Ezokola* factor: if and when the claimant had the opportunity to leave the organization, and whether the claimant took that opportunity.

For example, in *X Re 139838*, the appellant's financial resources were instrumental in the Refugee Appeal Division's analysis of when the claimant had the first opportunity to leave. The impugned group—ISIS—sought after the appellant to work for them occasionally as a mechanic. The appellant eventually fled the country after an attempt by an enemy organization to recruit the claimant as a spy.<sup>123</sup> The Refugee Appeal Division concluded that the appellant had prior opportunities to leave since he had his own vehicle, financial resources, and family living in other regions. Further, the appellant testified that there were no road blocks impeding the departure from the region and was never subject to explicit threats from ISIS.<sup>124</sup> The Refugee Appeal Division found that because the appellant had not taken advantage sooner of the available safe avenue of escape, partially because

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121 *Ezokola*, *supra* note 3 at para 99.

122 *X Re 139838*, *supra* note 32; *Talpur*, *supra* note 31; *X (Re)*, 2019 CanLII 129407 (Refugee Protection Division) [*X Re 129407*].

123 *X Re 139838*, *supra* note 32 at paras 4–24.

124 *Ibid* at paras 78, 83.

of financial resources, the appellant continued to contribute voluntarily to furthering the crimes committed by ISIS.<sup>125</sup>

In *X Re 129407*, the claimant argued that membership in the impugned organization was not voluntary because it was “very difficult” to get a job in Haiti, especially while being a student. The claimant stated that “every job is politicized,” implying that any employment that was sought would warrant a complicity analysis.<sup>126</sup> The Refugee Protection Division rejected this argument, finding that remaining with an organization for economic reasons is not enough to negate a voluntary contribution.<sup>127</sup> The claimant’s contribution to the crimes of the organization was mainly established through duties, which included bringing victims to a place where they were ultimately tortured.<sup>128</sup> The Refugee Protection Division concluded that because the claimant had moved provinces within Haiti and continued to work for the organization, the claimant “voluntarily contributed to the torture practiced by his organization” since the opportunity to “redirect his life” was available by moving provinces or moving further away from the organization.<sup>129</sup>

A similar argument regarding the lack of job opportunities occurred in *Talpur*. In this case, the applicant argued that he did not voluntarily contribute to the crimes or criminal purpose of the impugned organization because “he was appointed to the position, and alternative job opportunities are limited.”<sup>130</sup> The Federal Court dismissed this argument due to an insufficiency of evidence.<sup>131</sup>

Our purpose here is not to argue that any of these cases were wrongly decided. Rather, it is to illustrate the absence of a consistent and coherent framework for considering economic factors and access to financial resources in relation to the voluntariness requirement. Both logically, and based on the Supreme Court of Canada’s comments in *Ezokola*, it seems anomalous that economic factors are considered relevant when they weigh in favour of a finding of voluntariness, but irrelevant when they would weigh against such a finding. While *Ezokola* suggests that these factors are relevant in both directions, the current state of the jurisprudence indicates otherwise. Further, there is no consistent or principled framework for considering how the specific circumstances of an individual or their home

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125 *Ibid* at para 84.

126 *X Re 129407*, *supra* note 122 at para 68.

127 *Ibid* at paras 69–70.

128 *Ibid* at para 58.

129 *Ibid* at paras 71–72.

130 *Talpur*, *supra* note 31 at para 5.

131 *Ibid* at para 32.

country's economy might have contributed to the claimant's involvement in an organization that committed international crimes and any resulting contribution to those crimes.

#### **D. Conclusion**

First, it is unclear from some decisions whether the distinction between a voluntary contribution to the impugned group versus a voluntary contribution to the crime was made. This distinction is essential to breaking away from a guilt by association analysis. Second, there are inconsistent approaches to considering duress and coercion in the complicity framework. Though the Supreme Court of Canada indicated that these considerations could go so far as to negate voluntariness, and therefore lead to a finding that an individual was not complicit, the Court did not offer a principled framework for analyzing these defences. Last, despite the Supreme Court of Canada indicating that financial or economic factors could ease or impede exit from an impugned organization, the only decisions that considered these factors were decisions where they weighed in favour of a voluntariness finding, but not where they weighed against. These factors are not technically a gap, nor are the approaches inconsistent, but further guidance is needed to clarify when and in which circumstances financial and economic factors could negate voluntariness.

## VOLUNTARY CONTRIBUTION APPENDIX

No	Case	Held	Issues
1	<i>Al Khayyat v Canada (Citizenship and Immigration)</i> , 2017 FC 175.	Sent for re-determination (originally inadmissible)	FC found that duress should be evaluated using principles from international criminal law rather than <i>Ryan</i> .
2	<i>X (Re)</i> , 2018 CanLII 139838 (Refugee Appeal Division).	Excluded	1. The RPD decision from <i>Massroua</i> , below. Relevant issue is duress. 2. Financial resources: material benefits contributed to finding of voluntariness.
3	<i>Massroua v Canada (Citizenship and Immigration)</i> , 2019 FC 1542.	Excluded	Duress: used factors from <i>Ryan</i> despite guidance from <i>Al Khayyat</i> , above.
4	<i>Canada (Citizenship and Immigration) v Hammed</i> , 2020 FC 130.	Admitted	Duress: Defence was made out, also considered working under authority. Upheld at the Federal Court.
5	<i>Canada (Citizenship and Immigration) v Kljajic</i> , 2020 FC 570.	Inadmissible	Duress: applied <i>Ryan</i> factors.
6	<i>X (Re)</i> , 2018 CanLII 125222 (Immigration Division).	Inadmissible	Coercion: Tribunal found there was no imminent threat, though defence of duress was not brought.
7	<i>Canada (Public Safety and Emergency Preparedness) v Saherzoy</i> , 2017 CanLII 23091 (Immigration Appeal Division).	Admitted	Coercion: took first opportunity to leave.
8	<i>Verbanov v Canada (Public Safety and Emergency Preparedness)</i> , 2018 CanLII 47471 (Immigration Appeal Division).	Inadmissible	Coercion: conscription.
9	<i>Canada (Citizenship and Immigration) v Verbanov</i> , 2017 FC 1015.	Sent for re-determination, originally inadmissible	Coercion: conscription. Voluntary contribution to crimes not established: public service.
10	<i>Jelaca v Canada (Citizenship and Immigration)</i> , 2018 FC 887.	Inadmissible	Coercion: conscription.

No	Case	Held	Issues
11	<i>Talpur v Canada</i> , 2016 FC 822.	Inadmissible	1. Coercion. 2. Financial resources: lack of resources/job opportunities not convincing.
12	<i>X (Re)</i> , 2019 CanLII 129407 (Refugee Protection Division).	Excluded	Financial resources: applicant argued unemployment in country of origin.
13	<i>Yorkes v Canada (Public Safety and Emergency Preparedness)</i> , 2018 CanLII 47569 (Immigration Appeal Division).	Inadmissible	Voluntary contribution to crimes not established.
14	<i>X (Re)</i> , 2018 CanLII 145577 (Refugee Protection Division).	Excluded	Voluntary contribution to crimes not established: public service.
15	<i>Ali v Canada (Public Safety and Emergency Preparedness)</i> , 2021 FC 698.	Inadmissible	Voluntary contribution to crimes not established: public service.

### III. SIGNIFICANT CONTRIBUTION

Sometimes referred to as the significant contribution test,<sup>132</sup> the *Ezokola* test implies that a significant contribution to the crime or criminal purpose of the group is the driving factor that guides determinations away from findings of guilt by association: “[i]n our view, mere association becomes culpable complicity for the purposes of Article 1F(a) when an individual makes a *significant* contribution to the crime or criminal purpose of a group.”<sup>133</sup> However, our review of the jurisprudence indicates that the “significant contribution” element of the *Ezokola* complicity test is perhaps the most glaring gap and most inconsistently assessed factor that can be overlooked or mentioned only briefly.

The *Ezokola* decision includes little guidance on determining the significance of a contribution. The Supreme Court of Canada agreed with a United Kingdom Supreme Court finding that complicity does not require demonstrating a contribution to “specific identifiable crimes,” but rather

<sup>132</sup> Immigration and Refugee Board of Canada, “Interpretation of Convention Refugee and Person in Need of Protection in the Case Law” (31 December 2020) at ch 11.2.5.1, online: <irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef11.aspx#n1112>.

<sup>133</sup> *Ezokola*, *supra* note 3 at para 87 [emphasis in original].

can be based on “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.”<sup>134</sup> However, the Supreme Court of Canada cautioned against an overly broad application of this principle, urging a careful assessment of the degree of the contribution:

Given that contributions of almost every nature to a group could be characterized as furthering its criminal purpose, the degree of the contribution must be carefully assessed. The requirement of a significant contribution is critical to prevent an unreasonable extension of the notion of criminal participation in international criminal law.<sup>135</sup>

Despite the importance placed on assessing the significance of the contribution, *Ezokola* provides little guidance on how to conduct this assessment beyond the six general factors noted above. The Court discusses the international criminal law concepts of common purpose liability and joint criminal enterprise, noting that both require a “significant” contribution, but does not discuss at length how significance ought to be determined.<sup>136</sup>

We found three clear trends within the case law with respect to the significance factor. First, sometimes the significance element is not analyzed at all. Rather, sometimes it is inferred that significance is present after analyzing the knowledge and voluntariness elements of *Ezokola*. Second, decisions often fail to distinguish between contributions that benefit the criminal organization generally from contributions to the crimes or criminal purpose of the organization. Third, there are broad variations of approaches used with respect to the weight given to the rank and length of service factors.

All three trends demonstrate a need for further guidance regarding the significance element. Further, clarity is needed with respect to what kinds of contributions to a “common design”<sup>137</sup> rise to the level of it being significant.

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<sup>134</sup> *Ibid* at paras 87, 94, citing *JS Sri Lanka*, *supra* note 55 at para 38 (cited with approval in *Ezokola*, *supra* note 3 at para 70). For a discussion by the Supreme Court of Canada on the concepts of common purpose liability and joint criminal enterprise from international criminal law see *Ezokola*, *supra* note 3 at paras 52–67. The Court notes that both concepts include a significance requirement, but does not explicitly direct Canadian decision-makers to apply these concepts, nor does the Court extract a test of “significance” from the cited international jurisprudence that Canadian decision-makers should use.

<sup>135</sup> *Ezokola*, *supra* note 3 at para 88.

<sup>136</sup> *Ibid* at paras 64, 67.

<sup>137</sup> *Ibid* at para 87.



## A. Overlooking Significance

A glaring trend found in our case review is that, in some cases, decisions do not address the significance element at all. Rather, decisions conclude that significance is established after expressly analyzing the other elements of *Ezokola*, such as knowledge and voluntariness.<sup>138</sup> In some cases, following a negative credibility finding, there was a subsequent inference that the applicant was hiding or downplaying the extent or nature of their contributions, and thus, the applicant made a significant contribution to the organization.

For example, in *X (Re)*, the Refugee Protection Division analyzed each *Ezokola* factor and concluded that the person's contribution was significant, knowing, and voluntary, but there was no explicit analysis of significance in the decision.<sup>139</sup> There was an analysis of voluntariness and knowledge mainly based on the person's promotions, 24 years of service, testimony admitting knowledge at times, and failure to leave the organization at the first opportunity.<sup>140</sup> The Refugee Protection Division found that the person made a contribution by reviewing their duties, mainly the work of expanding and maintaining "buffer zones" while being responsible for 30 soldiers, which "enabled the [organization] to carry out their operational strategies."<sup>141</sup> However, the Refugee Protection Division never turned its mind to whether those contributions and duties were significant. Without explicitly addressing the significance element, there is a risk that a decision could lead to an impermissible guilt by association finding.

In *Talpur*, even though significance was the central issue before the Federal Court, no specific contributions were cited as being significant.<sup>142</sup> Rather, significance was inferred from the applicant's 12-year career with the police and low rank within the force.<sup>143</sup> Contrary to *Ezokola*, which suggests a rapid advancement in rank or high position may be indicative of an individual's strong support for an organization's criminal purpose, the immigration officer in *Talpur* relied on documentary evidence that suggested that those in the lower ranks of the Pakistan police were more likely to be the individuals

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138 For decisions with no analysis of the significance element that still led to a finding of complicity that are not described in depth in this paper, see *Yorkes*, *supra* note 31; *Verbanov IAD*, *supra* 100; *Betoukoumesou v Canada (Citizenship and Immigration)*, 2014 FC 591; *Jelaca*, *supra* 100; *Musabyimana c Canada (Sécurité publique et Protection civile)*, 2018 FC 50.

139 2018 CanLII 140555 at para 109 (Refugee Protection Division) [*X Re 140555*].

140 *Ibid* at paras 81, 83, 89–105.

141 *Ibid* at paras 108–09.

142 *Talpur*, *supra* note 31 at para 33.

143 *Ibid* at paras 37–38.

directly committing acts of torture and other crimes.<sup>144</sup> The Federal Court affirmed that the immigration officer's findings were reasonable.<sup>145</sup>

In *Singh v Canada (Public Safety and Emergency Preparedness)*, a negative credibility finding played a large role in the Immigration Division's determination that the claimant made a significant contribution.<sup>146</sup> The Immigration Division found that Mr. Singh participated in counter-insurgency operations, but tried to hide it because the consequences of being found inadmissible were understood. Mr. Singh was aware that the documentary evidence and lengthy membership in the organization would be deemed as having contributed significantly to the criminal purpose of the organization and lead to being found inadmissible.<sup>147</sup> The Immigration Division concluded, accordingly, that Mr. Singh made a significant contribution.<sup>148</sup>

Similarly, in *Durango v Canada (Citizenship and Immigration)*, the Federal Court noted that the visa officer's decision failed to make "explicit reference to the term 'significant' when he discussed the applicant's contribution," but found that because the officer determined that "the applicant sought to downplay his role and involvement...such a conclusion implies that the applicant's contribution was significant...."<sup>149</sup> These decisions indicate a trend that significance can be inferred based on credibility, even if there has been no analysis of significance in the reasons. In any event, these decisions leave us wondering the very question *Ezokola* calls for: what was significant about this person's contribution?

## **B. Distinguishing Between Contribution to the Organization and Contribution to Criminal Purpose**

*Ezokola* is clear that culpable complicity arises "when an individual makes a *significant* contribution to the crime or criminal purpose of a group."<sup>150</sup> Some decisions we reviewed failed to distinguish between significant contributions that benefit the organization generally and significant contributions to the crime or criminal purpose of the organization. This trend is similar to our findings with respect to the voluntariness element, discussed above. This trend often results from a failure to consider and distinguish

144 *Ezokola*, *supra* note 3 at para 97; *Talpur*, *supra* note 31 at paras 37, 39.

145 *Talpur*, *supra* note 31 at para 38.

146 2014 CanLII 99217 at para 41 (Immigration Division) [*Singh*].

147 *Ibid.*

148 *Ibid.*

149 2018 FC 146 at para 14.

150 *Supra* note 3 at para 87 [emphasis in original].

the link between the individual's roles or duties within the organization and the link to the crimes or criminal purpose of the organization. While some decisions do carefully consider this nexus, our review found that it was infrequently assessed and to varying degrees.<sup>151</sup>

For example, in *Yousif v Canada (Citizenship and Immigration)*, an immigration officer found that Mr. Yousif was an active member of an elite group of the Iraqi army during a period when war crimes and crimes against humanity were committed, and consequently, found the applicant inadmissible on complicity grounds.<sup>152</sup> Upon application for judicial review, the applicant, Mr. Yousif, argued that a significant contribution was not made to the group's crimes because being only one of the 150,000 members at the time of the involvement should reduce the likelihood that any one person's actions made a significant impact.<sup>153</sup> The Federal Court did not accept this argument, finding that this does not absolve Mr. Yousif's complicity.<sup>154</sup> The Federal Court upheld the immigration officer's decision and found that "[g]iven that [Mr. Yousif] was a member of the most elite group in the Iraqi military during a period of known crimes, this in itself can indicate a contribution to a criminal purpose."<sup>155</sup> In other words, once it is established that someone is a member of an elite group within the impugned organization, it may be appropriate to infer that they made a significant contribution to its criminal purposes. However, in our view, *Ezokola* indicates the opposite:

where the group is identified as one with a limited and brutal purpose, the link between the contribution and the criminal purpose will be easier to establish. In such circumstances, a decision maker may more readily infer that the accused had knowledge of the group's criminal purpose and that his conduct contributed to that purpose. That said, even for groups with a limited and brutal purpose, *the individual's conduct and role within the organization must still be carefully assessed, on an individualized basis, to determine*

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<sup>151</sup> For instances where the decision-maker properly considered whether the individual's contribution crossed the threshold into significance see e.g. *Saherzoy*, *supra* note 100; *Hammed*, *supra* note 26 at paras 6, 22; *Mata Mazima v Canada (Citizenship and Immigration)*, 2016 FC 531 at paras 15, 53.

<sup>152</sup> 2019 FC 128 at paras 12–13 [*Yousif*].

<sup>153</sup> *Ibid* at para 28.

<sup>154</sup> *Ibid*.

<sup>155</sup> *Ibid* at para 27.

*whether the contribution was voluntarily made and had a significant impact on the crime or criminal purpose of the group.*<sup>156</sup>

Although it is not clear from the Federal Court's decision in *Yousif* whether the immigration officer turned their mind to whether the group at issue had a limited and brutal purpose, it also remains unclear from the decision whether there was a careful assessment of Mr. Yousif's conduct and role beyond the finding of membership to an elite group.

In *Nsika v Canada (Public Safety and Emergency Preparedness)*, the Immigration Division concluded that Mr. Mfoutou Nsika made a significant contribution to the crimes or criminal purpose of the Congolese army without explicitly considering the link between the actions and the criminality in question.<sup>157</sup> In the analysis, the Immigration Division highlighted that the person concerned served in the Congolese army for six years, and specific duties were assigned to escort funds between the airport and the central bank.<sup>158</sup> The Immigration Division found that the person concerned was in a position of authority because he was able to assign daily tasks to other members of their unit.<sup>159</sup> The crimes committed by the Congolese army were established through documentary evidence and occurred during the period in which Mr. Mfoutou Nsika was involved; however, we fail to see an explicit analysis regarding the connection between Mr. Mfoutou Nsika's duties and the crimes or criminal purpose in question.<sup>160</sup> In our view, this represents a failure to distinguish between contributions to the organization and contributions to the crimes or criminal purpose of the organization.

Sometimes, however, this trend or pattern is caught at the Federal Court and is sent back for redetermination. In *Verbanov IAD*, Mr. Verbanov worked as a police officer in Moldova and was required to monitor the streets and arrest pickpockets.<sup>161</sup> In the decision under review at the Federal Court, though the significance element was mentioned, there was no actual analysis of significance.<sup>162</sup> Significance seems to have been inferred through a finding that suspects were tortured widespread on a large scale within the Moldovan police force, and Mr. Verbanov was "not simply doing his job by arresting those who broke the law; he put his

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<sup>156</sup> *Supra* note 3 at para 94 [emphasis added].

<sup>157</sup> 2015 CanLII 97782 at para 59 (Immigration Division).

<sup>158</sup> *Ibid* at paras 56–57.

<sup>159</sup> *Ibid* at para 58.

<sup>160</sup> *Ibid* at para 50.

<sup>161</sup> *Supra* note 100 at para 12.

<sup>162</sup> *Verbanov II*, *supra* note 41.

shoulder to the wheel of an entire system that resulted in the commission of crimes against humanity.”<sup>163</sup> The Immigration Appeal Division, citing documentary evidence showing that torture was pervasive and within the force, found that the person concerned “must have contributed” to the practice of torture of the Moldovan police.<sup>164</sup> On judicial review, the Federal Court found that the Immigration Appeal Division erred in finding that the applicant made a significant contribution on the basis of an unreasonable finding with respect to the knowledge component, which was established solely on documentary evidence of the organization’s activities and the widespread practice of torturing suspects.<sup>165</sup>

The Federal Court in this case importantly noted that the Immigration Appeal Division “inappropriately shifted its focus towards the criminal activities of the group and away from the individual’s contribution to that criminal activity,” which resulted in the traditional (and ousted) guilt by association approach.<sup>166</sup> In *Verbanov IAD*, the decision only considered the applicant’s contributions to the group, and separately established the crimes of the group, but never considered whether the applicant contributed, significantly or not, to those crimes. In our view, this point should be at the crux of every *Ezokola* analysis and serve as a guide to maintain focus on an individual’s precise contribution.

In *Habibi v Canada (Citizenship and Immigration)*, the Federal Court concluded that the Refugee Protection Division “failed to fully assess whether Mr. Habibi had *personally* made a significant and knowing contribution....”<sup>167</sup> The decision inferred that Mr. Habibi made significant contributions to an Iranian police force’s crimes based upon the length of service and senior rank.<sup>168</sup> However, the Court held that the assessment “was at best generalized” and essentially found Mr. Habibi “guilty by association.”<sup>169</sup> In that case, there was no specific evidence concerning Mr. Habibi’s involvement with the police force’s crimes that rose to the level of a significant contribution.

163 *Verbanov IAD*, *supra* note 100 at para 97.

164 *Ibid* at para 94.

165 *Ibid* at para 96; *Verbanov II*, *supra* note 41 at paras 37–38.

166 *Ezokola*, *supra* note 3 at para 79, cited in *Verbanov II*, *supra* note 41 at para 38.

167 *Habibi v Canada (Citizenship and Immigration)*, 2016 FC 253 at para 26 [*Habibi*] [emphasis in original].

168 *Ibid* at para 10.

169 *Ibid* at paras 24, 26. Notably, the Federal Court also found that the Refugee Protection Division also incorrectly failed to consider all six *Ezokola* factors for the complicity test (see *ibid* at para 24).

These decisions illustrate a wide range of approaches to analyzing an individual's specific contributions. Further guidance is needed to improve consistency in the approaches taken to identify when an individual's contributions meet the standard to be deemed significant to the crimes or criminal purpose of their affiliate group.

### C. Weighing Rank in Determining Significance

Some decisions have found that a *high* rank is determinative of significance. For example, in *X Re 145577*, the Refugee Protection Division considered that, as a superior officer, the claimant supervised 30–40 individuals, managed operations, such as financial resources, and supplied vehicles and communication tools.<sup>170</sup> The Refugee Protection Division concluded that “given his role, post, duties and the prevalent impunity among high ranking officers...his conduct would have assisted in the furtherance of the crimes.”<sup>171</sup>

Similarly, in *Bajraktari v Canada (Public Safety and Emergency Preparedness)*, Mr. Bajraktari's length of service to the impugned organization and rank as a colonel led the Federal Court to conclude, in accordance with *Ezokola*, that the applicant had “significant support for [the impugned organization's] objectives and greater control over actions.”<sup>172</sup> In addition to the high rank and length of service, the Federal Court placed particular emphasis on the fact that Mr. Bajraktari signed off on orders to send Albanian citizens to internment camps.<sup>173</sup>

In other decisions, a *low* rank has been found to amount to a significant contribution. Though this reasoning is not inherently problematic depending on the facts of each case, *Ezokola* left a gap in the guidance when discussing low rank because it only addressed instances of high-ranking officials. In our view, this led to skewed and inconsistent approaches to analyzing low rank.

In *Talpur*, the Federal Court did not interfere with a finding that Mr. Talpur's lower rank placed “him closer to the perpetration of the crimes,” which led to a finding that the contribution was significant.<sup>174</sup> This finding broadly builds upon the guidance in *Ezokola*, which says nothing about

<sup>170</sup> *Supra* note 31 at paras 45–48.

<sup>171</sup> *Ibid* at para 47.

<sup>172</sup> *Bajraktari v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1136 at paras 18, 20; see also *Ezokola*, *supra* note 3 at paras 97–98.

<sup>173</sup> *Ibid* at para 19.

<sup>174</sup> *Supra* note 31 at paras 13, 38.

a low rank, but explicitly notes that a high rank may place an individual with more effective control over perpetrators of criminal acts, thereby increasing the likelihood of contributing to those acts.<sup>175</sup> In other words, this paragraph of *Ezokola* was used in the opposite sense: instead of a high rank placing an individual with more effective control over perpetrators and increasing the likelihood of complicity, a low rank in *Talpur* placed the applicant closer to the perpetration of the crimes, and nevertheless increased the likelihood of a significant contribution.

In *Yousif*, although the applicant argued that he could not have made a significant contribution to the crimes and criminal purpose of the organization due to his low rank and because he was merely one of 150,000 members of the impugned organization, the Federal Court held that the large nature of the organization “does not absolve his complicity.”<sup>176</sup> The Federal Court agreed with the tribunal that Mr. Yousif made a significant contribution because being a member of an elite group of the Iraqi army during a period of known crimes, which according to the Federal Court, “in itself can indicate a contribution to a criminal purpose.”<sup>177</sup> The only actual mention of Mr. Yousif’s conduct or duties in this decision was in relation to being trained to use a rifle, though Mr. Yousif claimed to be a mechanic.<sup>178</sup>

Without further analysis of the applicant’s duties and contribution, which was not found in *Yousif*, this decision establishes complicity based on a negative credibility finding and a finding of being a member of an elite group. While credibility findings go to the heart of the expertise of the tribunals, it is difficult to ascertain from only reviewing this Federal Court decision how significant this person’s contribution was. This is a relevant example of the complexities of the determination process (in this case, an application for permanent residency on humanitarian and compassionate grounds); however, not all cases can be so clear-cut where credibility concerns and insufficiency of evidence are present.

In some cases, the case law indicates that rank (and length of service) should not be determinative of significance on its own. In *Hammed*, although the applicant, Mr. Hammed, held a high rank as a public relations official in the Nigerian army, the Federal Court concluded that there was

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175 *Supra* note 3 at para 97.

176 *Supra* note 152 at para 28.

177 *Ibid* at para 27.

178 *Ibid* at para 30. Though credibility played a significant role in this decision, there is still a need to establish a link between the applicant’s actions and duties, and the criminal conduct in question (see *Ezokola*, *supra* note 3 at para 94).

no evidence to suggest that a significant contribution was made to the crimes or criminal purpose of the Nigerian army. This was because Mr. Hammed had no control over the broadcasted messages, was under the command of a superior officer, and rank was not indicative of the level of control over the perpetrators of the criminal acts.<sup>179</sup>

In *Habibi*, the Federal Court concluded that the Refugee Protection Division drifted from the standard in *Ezokola* and into guilt by association using “inherently problematic” reasoning that asserted the applicant’s complicity because a high rank was held in a police force that was associated with organizations that committed crimes against humanity.<sup>180</sup> The Federal Court emphasized the importance of a “full and transparent assessment and analysis of the relevancy and weight of the six factors” from *Ezokola*, and the failure to do so “strongly indicates that the [tribunal] did not reasonably or properly consider the six factors and their respective relevance or weight.”<sup>181</sup>

Importantly in the *Verbanov II* decision, the Federal Court found that “the case law on the impact of one’s length of service is not determinative,” and the decision under review essentially found the applicant guilty by association by relying on such.<sup>182</sup> Though some decisions like *Verbanov II* are catching skewed approaches to considering rank and length of service, some decisions, as illustrated above, can endorse this same reasoning and therefore there is no consistent approach to considering these factors. Some decisions properly use these factors in conjunction with a proper analysis of the individual’s duties and contribution, such as in *X Re 145577*, *Hammed*, and *Bajraktari*. However, the current guidance from *Ezokola* allows for broad interpretations of the weight that can be given to rank and length of service, such as in *Talpur*, *Shalabi v Canada (Public Safety and Emergency Preparedness)*,<sup>183</sup> and *Yousif*. In addition, it is important to consider what significance actually means in the face of a low rank and a short length of service, especially if we are to accept that a high rank increases the likelihood of a significant contribution.

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179 *Hammed*, *supra* note 26 at para 63.

180 *Habibi*, *supra* note 167 at paras 23, 26.

181 *Ibid* at para 24.

182 *Verbanov II*, *supra* note 41 at para 36.

183 2016 FC 961.



## D. Conclusion

The inconsistencies in the decisions discussed above in our view demonstrate either a failure to follow guidance already given by the Supreme Court of Canada, or a need for further guidance on how to establish the significance of a contribution to the crimes or criminal purpose in the following questions:

- Is low rank (as seen in *Talpur*) or high rank (as seen in *Yousif*) indicative of a significant contribution?<sup>184</sup>
- Can significance be inferred when knowledge and voluntariness have already been met (as seen in *X Re 140555*)?

In *Ezokola*, the court emphasized that even when the organization is one with a limited and brutal purpose, the specific role and duties of the individual within the organization must be carefully considered.<sup>185</sup> This requirement is at odds with decisions wherein:

- a) there is no analysis of significance;
- b) there is no analysis of rank and length of service linking the actions and duties to the crimes; or
- c) the decision conflates an individual's significant contributions to the organization with a significant contribution to the organization's crimes or criminal purpose.

A proper analysis must assess the roles and duties of the individual and their particular connections to the crimes or criminal purpose. This broad spectrum of approaches that skim over this analysis indicates, at minimum, a need for further clarity from the courts.

### SIGNIFICANT CONTRIBUTION APPENDIX

No	Case	Held	Issues
1	<i>Habibi v Canada (Citizenship and Immigration)</i> , 2016 FC 253.	Sent for re-determination, originally excluded	<ul style="list-style-type: none"> <li>• Significant contribution to crimes versus to organization (hereinafter, "distinction") not established.</li> <li>• High rank not determinative of contribution.</li> </ul>

<sup>184</sup> The discrepancies with rank in the case law will be addressed in more detail below in section IV.

<sup>185</sup> *Supra* note 3 at para 94.

No	Case	Held	Issues
2	<i>Canada (Public Safety and Emergency Preparedness) v Saherzoy</i> , 2017 CanLII 23091 (Immigration Appeal Division).	Admitted	<ul style="list-style-type: none"> <li>Distinction was not established.</li> </ul>
3	<i>Canada (Public Safety and Emergency Preparedness) v Mfoutou Nsika</i> , 2015 CanLII 97782 (Immigration Division).	Excluded	<ul style="list-style-type: none"> <li>Distinction was not established.</li> </ul>
4	<i>Yousif v Canada (Citizenship and Immigration)</i> , 2019 FC 128.	Inadmissible	<ul style="list-style-type: none"> <li>Credibility and distinction not established.</li> <li>Significance inferred from elite membership.</li> <li>Lower rank did not absolve applicant's complicity.</li> </ul>
5	<i>Canada (Citizenship and Immigration) v Hammed</i> , 2020 FC 130.	Admitted	<ul style="list-style-type: none"> <li>Distinction was made.</li> <li>High rank was not significant due to superior orders.</li> </ul>
6	<i>Mata Mazima v Canada (Citizenship and Immigration)</i> , 2016 FC 531.	Inadmissible	<ul style="list-style-type: none"> <li>Distinction was made.</li> </ul>
7	<i>X (Re)</i> , 2018 CanLII 140555 (Refugee Protection Division).	Excluded	<ul style="list-style-type: none"> <li>Significance was not discussed.</li> </ul>
8	<i>Talpur v Canada (Citizenship and Immigration)</i> , 2016 FC 822.	Inadmissible	<ul style="list-style-type: none"> <li>Significance was not made out, although it was mentioned.</li> <li>Lower rank found to place applicant closer to the perpetration of crimes.</li> </ul>
9	<i>Verbanov v Canada (Public Safety and Emergency Preparedness)</i> , 2019 FC 324.	Sent for re-determination, originally inadmissible	<ul style="list-style-type: none"> <li>Significance was not discussed.</li> <li>Length of service was not determinative.</li> </ul>
10	<i>X (Re)</i> , 2018 CanLII 145577 (Refugee Protection Division).	Excluded	<ul style="list-style-type: none"> <li>Significance made out through rank and duties.</li> </ul>
11	<i>Bajraktari v Canada (Public Safety and Emergency Preparedness)</i> , 2016 FC 1136.	Inadmissible	<ul style="list-style-type: none"> <li>Significance made out through rank and duties.</li> </ul>
12	<i>Shalabi v Canada (Public Safety and Emergency Preparedness)</i> , 2016 FC 961.	Inadmissible	<ul style="list-style-type: none"> <li>Lower rank linked applicant to larger system of crimes.</li> </ul>

#### IV. KNOWING CONTRIBUTION

While our view is that further guidance is required in all aspects of assessing the *Ezokola* test, we found that knowledge (*i.e.* knowing contribution) is the least analyzed element across the decisions we reviewed.

While *Ezokola* provided a list of non-exhaustive factors to consider in establishing the knowledge element, it provided limited guidance on how to analyze the six factors to establish knowledge. Consequently, establishing the knowledge element has evolved through the jurisprudence and is established inconsistently through various methods. When discussed, knowledge was most commonly established by the following factors:

- inferences once an individual's credibility is impugned;
- knowledge imputed from the individual's role, rank, or duties within an organization;
- inferences from the widespread nature of the organization's crimes; and
- inferences that if the individual did not know, they were wilfully blind and were nevertheless culpable.

Our case law review suggests that the knowledge assessment is seldom conducted in accordance with the standard set in *Ezokola*, where the analyses of decision-makers must centre on whether the impugned individual knew that their actions furthered the criminal organization's goals. *Ezokola* established the standard as follows: “[t]o be complicit in crimes committed by the government, the official must be aware of the government's crime or criminal purpose and aware that his or her *conduct* will assist in the furtherance of the crime or criminal purpose.”<sup>186</sup> The *Ezokola* test's knowledge component requires individuals to be aware of both: (a) the organization's crime or criminal purpose; and (b) that their “*conduct* will assist in the furtherance of the crime or criminal purpose.”<sup>187</sup> Both prongs are required for an individual to be deemed complicit in crimes committed by an organization.

This distinction was clearly made out, for example, in *Wahiki v Canada (Public Safety and Emergency Preparedness)*.<sup>188</sup> The Immigration Division identified Mr. Wahiki's general knowledge about the crimes committed previously by the Zairian army, but inferred that he lacked specific

<sup>186</sup> *Ezokola*, *supra* note 3 at para 89 [emphasis in original].

<sup>187</sup> *Ibid* at para 89 [emphasis in original].

<sup>188</sup> 2014 CanLII 99220 (Immigration Division).

knowledge on how his conduct would assist in the furtherance of the crime or criminal purpose because he did not directly take part in the crime or criminal purpose of the organization.<sup>189</sup> The Immigration Division was not convinced that Mr. Wahiki knew about the crimes that were facilitated through participation since Mr. Wahiki testified knowing only about previous offences committed by the army.<sup>190</sup>

However, we noticed instances, discussed below, where the essential distinction was not so clear from the analysis, if made at all.

### **A. Seniority and Length of Service as Determinative of Knowledge**

In *Ezokola*, the Supreme Court of Canada opined that “[a] high ranking individual in an organization may be more likely to have knowledge of that organization’s crime or criminal purpose.”<sup>191</sup> While the use of “may” in this sentence indicates permissive rather than mandatory use, decisions have frequently relied on seniority and length of service as the sole, independently sufficient factor to find an applicant possesses knowledge of the organization’s crime or criminal purpose. This line of reasoning, which can ignore other considerations related to an applicant’s specific duties and activities, enables findings of guilt by association by overlooking the analysis into whether an applicant knew *how* their contributions furthered an organization’s criminal purpose.

According to the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)*, the last of four elements of a crime against humanity is that “the person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.”<sup>192</sup> This decision can and has informed knowledge findings under the *Ezokola* test for complicity. *Mugesera* asserts that it is appropriate to infer an individual had knowledge of the crime from the factual matrix, including: the accused’s rank, public knowledge about the attack that rose to a crime against humanity, the scale of the violence, and the historical-political context of the act.<sup>193</sup>

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189 *Ibid* at paras 71–72.

190 *Ibid*.

191 *Supra* note 3 para 97.

192 2005 SCC 40 at para 119 [*Mugesera*].

193 *Ibid* at para 175.

In *Mugesera*, knowledge was made out through a finding that the person concerned was not only well-educated but was also aware of the ethnic tensions and violent state of affairs in the country. As a result, the Court concluded that Mr. Mugesera knew the delivered speech, which explicitly encouraged acts of violence (the act in question), “would have the effect of furthering the attack.”<sup>194</sup> This finding demonstrates that the Court turned its mind to the question of whether the person concerned foresaw that their actions may contribute to the furtherance of crimes.

The question in the complicity context, therefore, is when is it appropriate to infer knowledge from the circumstances of the case, particularly with respect to rank and length of service? Our case review suggests that the framework requires further guidance on this question, as the guidance in *Ezokola* does not go far enough to help focus on an applicant’s knowledge of their contribution rather than their mere membership.

For example, in *Habibi*, the Refugee Protection Division concluded that Mr. Habibi had knowledge based on his rank within the impugned police force.<sup>195</sup> However, upon judicial review, the Federal Court held that the decision had not demonstrated that Mr. Habibi was personally involved and directly supported the crimes that were committed by the organization, and therefore knowledge was not adequately established.<sup>196</sup> The Federal Court sent the matter back for redetermination.

In *Ghazala Asif Khan v Canada (Citizenship and Immigration)*, the decision under review placed significant emphasis on: “the parts of the military in which Mr. Khan had been employed, the human rights abuses and torture perpetrated by those parts of the organization, the very senior nature of the positions held by Mr. Khan, the long period during which he served with the military, and the voluntary nature of that service.”<sup>197</sup> The Federal Court noted, perhaps *in obiter*, that “it would have been preferable for the [immigration officer’s] decision to have specifically addressed some of the other positions of leadership that Mr. Khan had held in the military, together with some of the duties and responsibilities.”<sup>198</sup> This indicates a preference for further analysis and evidence beyond seniority and length of service to determine whether an applicant knew that their contribution

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194 *Ibid* at para 177.

195 *Supra* note 167 at para 10.

196 *Ibid* at para 26.

197 2017 FC 269 at para 54.

198 *Ibid* at para 42.

was knowing. However, the Federal Court upheld the decision and found it to be reasonable in the context.

Despite the cases above, which demonstrate the importance of establishing a link from a high rank or length of service to a knowing contribution, there are still instances of decisions relying on the high rank or length of service as the sole indicator to satisfy the knowledge element. For example, in *Bedi v Canada (Public Safety and Emergency Preparedness)*, Mr. Bedi's credibility was at issue because knowledge was first denied of the crimes against humanity being committed by the impugned organization, and only later acknowledged knowing of some of the atrocities.<sup>199</sup> Based on extensive documentary evidence of the crimes being systemically committed by the organization during the long duration that Mr. Bedi was employed by the organization, and the high-ranking role held at the end of Mr. Bedi's career, the Immigration Division found that Mr. Bedi had knowledge of the crimes.<sup>200</sup>

As mentioned above, in *Talpur*, the decision under review found that the applicant's low rank in the impugned police force gave him greater proximity to the crimes that were committed, which contributed to the finding that he had a knowing contribution.<sup>201</sup> In *X Re 145577*, there appeared to be no evidence that the claimant knew their acts were contributing to the crimes against humanity committed by members of his organization. Notably, the claimant, as a high-ranking police officer, acknowledged his awareness of "[internal] corruption" within the police force, from which the Refugee Protection Division imputed the claimant's knowledge of other wrongful acts of officers within the police force.<sup>202</sup> We note there was no generalized credibility finding in this case. The Refugee Protection Division found that the knowledge element was satisfied due to the claimant's high supervisory rank, inferring that because the claimant held a position as a supervisor, he "would have" been aware of the crimes that were being committed by the supervised employees.<sup>203</sup>

These cases demonstrate three inconsistent interpretations of rank or length of service as an indication of an applicant knowing of their contribution. In *Bedi*, an inference from the rank or length of service as the sole indication of knowledge may have been appropriate due to the negative

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199 2019 FC 1550 at para 9 [*Bedi*].

200 *Ibid* at paras 8, 14.

201 *Talpur*, *supra* note 31 at para 13.

202 *X Re 145577*, *supra* note 31 at paras 51, 56.

203 *Ibid* at paras 56–57.

credibility finding. However, in *X Re 145577*, the same inference was made without a general negative credibility finding. *Talpur* indicates a different approach, contrary to *Ezokola*, where a low rank may be indicative of a higher likelihood that the contribution was knowing.<sup>204</sup> Though the weight given to rank and length of service has not resulted in as much of a glaring gap in the knowledge element as it has in the significance element discussed above, there is still room for improvement and jurisprudential guidance on this point.

## B. When Individuals Ought to Have Known

Similar to how the inconsistent analysis of rank and length of service factors muddled how decisions assessed the knowledge component, another theme emerging from the case law is the inconsistent approaches regarding the acceptability of inferring whether an individual ought to have known (or some variation of the same) that their actions contributed to an organization's crimes against humanity. Inferences into what an individual ought to have known are most often made through documentary evidence demonstrating the widespread nature of the crimes or criminal purpose of the impugned organization, or through a finding of wilful blindness. *Ezokola* did not directly examine this question.<sup>205</sup>

Although it may be appropriate to make these inferences in limited circumstances, they should always be accompanied by other factors or evidence demonstrating knowledge. However, our case review has indicated a trend wherein decisions conclude that an applicant 'ought to have known,' even despite evidence to the contrary. These types of decisions are reminiscent of guilt by association findings, and place a heavy burden on the individual to disprove a finding of complicity.

### 1. Treatment in the Jurisprudence

In *Aazamyar v Canada (Citizenship and Immigration)*, the Federal Court considered an inadmissibility finding established by considering what an individual "ought to have known."<sup>206</sup> The applicant, Mr. Aazamyar, was an officer

<sup>204</sup> *Supra* note 31 at paras 8, 12, 37.

<sup>205</sup> In *Ezokola*, the only comment on when knowledge can be inferred is that when "[t]he size of an organization could help determine the likelihood that the claimant would have known of and participated in the crime or criminal purpose. A smaller organization could increase that likelihood" (see *supra* note 3 at para 94).

<sup>206</sup> 2015 FC 99 at para 40 [*Aazamyar*].

in the Afghan Air Force who trained other pilots and was excluded from refugee protection pursuant to section 98 of IRPA.<sup>207</sup> The Federal Court found that the decision was unreasonable because of the logic applied in the decision was that Mr. Aazamyar “‘knew, or ought to have known, that pilots he trained operated in support of [the Afghan Air Force’s] goal [to] [terrify, maim and kill civilians].”<sup>208</sup> The Court found the decision to be:

troublesome, in that it formed part of the factual matrix by which the Officer assessed the Applicant’s complicity. Although the Officer reached his own conclusion as to the Applicant’s complicity and resultant inadmissibility, this conclusion was informed by the above finding which appears to be very much like the sort of “guilt by association” that was rejected by *Ezokola*.<sup>209</sup>

Similarly, in *Verbanov II*, the Federal Court rejected the Immigration Appeal Division’s inferential knowledge finding by stating:

Neither the size and nature of the police service, nor Mr. Verbanov’s rank in the organization allowed the IAD to infer that he had knowledge of the group’s criminal purpose, and the case law on the impact of one’s length of service is not determinative.<sup>210</sup>

Similarly, in *Sailab v Canada (Public Safety and Emergency Preparedness)*, the Federal Court found that the tribunal’s decision “unreasonably inflated the conclusions of the documentary evidence” by failing to connect the applicant’s particular placements with the departments or locations of the organization that engaged in torture, and failing to determine a “particular timeframe” when the crimes occurred and when the applicant would have become aware of them.<sup>211</sup>

## 2. Statutory Guidance

There is little domestic statutory guidance on when knowledge may be reasonably inferred. Potential sources for guidance such as the *Crimes Against Humanity and War Crimes Act* make no mention of criminal liability for individuals who failed to know that they were committing an offence under the Act, or when an individual should have known they were committing an offence, except for the important distinction for military commanders

<sup>207</sup> *Ibid* at para 3. The exclusion decision occurred before *Ezokola* was released.

<sup>208</sup> *Ibid* at para 39.

<sup>209</sup> *Ibid* at para 40.

<sup>210</sup> *Verbanov II*, *supra* note 41 at para 36 [footnotes omitted].

<sup>211</sup> 2020 FC 773 at paras 13, 16–18.



and superiors.<sup>212</sup> However, our case law research demonstrates that these provisions were not cited for guidance in knowledge assessments.

### 3. *Widespread or Publicized Nature of the Crimes*

Despite the decision in *Aazamyar*, the case law indicates a regular pattern of inferring that an individual ought to have known or had to have known both the impugned organization's criminal purpose and that their employment with the organization furthered that purpose. This inference most often arises based on evidence that illustrates the widespread nature of the crimes in question.

In *X Re 145577*, the Refugee Protection Division assumed that the claimant was aware of the crimes against humanity committed by the police force he worked for, based on documentary evidence illustrating the widespread criminal practices (as well as his high rank), finding that:

[g]iven that the claimant would have known about these specific crimes of torture and extrajudicial killing, let alone the other crimes against humanity going on in the country at the time, he would have been aware that his continued rise through the ranks of the Colombian National Police would assist in the furtherance of these crimes.<sup>213</sup>

Since the claimant confirmed that he knew about some bribery that occurred during their employment within the organization, the tribunal inferred that the claimant would have also known about the other criminal acts (“false positives, sexual violence, forced disappearances and torture”) committed by the organization.<sup>214</sup> In our view, however, there appears to be a lack of explanation regarding how this connection was made.

In *X (Re)*, the Immigration Division found that it would be “inconceivable that Mr. [X] was unaware of the crimes being committed daily by his colleagues,” based on the documentary evidence that demonstrated how widespread and systematic the crimes were.<sup>215</sup> However, in contrast to *X Re 145577*, this inference was supported by the fact that the claimant worked in the unit that was especially responsible for crimes against humanity, making it more likely that the claimant had knowledge of the crimes.<sup>216</sup>

212 SC 2000, c 24, s 5.

213 *X Re 145577*, *supra* note 31 at para 57.

214 *Ibid* at para 56.

215 2019 CanLII 135482 at para 39 (Immigration Division).

216 *Ibid* at para 40.

A similar decision occurred in *Yorkes v Canada (Public Safety and Emergency Preparedness)*, where the Immigration Appeal Division found that the respondent “was or should have been aware of the egregious human rights violations committed,” based on the documentary evidence demonstrating the highly publicized crimes committed by that organization.<sup>217</sup> However, despite the fact that the respondent was merely a cook for the organization, the tribunal found that he served in a particularly criminally active unit, which increased the likelihood of his knowledge.<sup>218</sup>

Similarly, in *X (Re)*, when considering the length of time the applicant spent with the organization, particularly after discovering the criminal purpose, the Refugee Appeal Division found that “[g]iven the widespread level of torture in both regimes, it is more likely than not that the appellant would have known about it at early stages of both times that he worked in prisons in Afghanistan.”<sup>219</sup> It further noted that “[g]iven the prevalence of torture, it is difficult to understand how he could not have seen any sign of torture.”<sup>220</sup> The Refugee Appeal Division also relied on the applicant’s rank to increase the likelihood that the applicant knew of the criminal purpose of the organization, as per the *Ezokola* high-rank factor discussed above.<sup>221</sup> The Refugee Appeal Decision cited the Refugee Protection Division’s negative credibility finding with respect to the applicant’s testimony to justify these inferences.<sup>222</sup>

In *Beltrey v Canada (Public Safety and Emergency Preparedness)*, the Immigration Division concluded that the claimant, Mr. Beltrey, served in the impugned organization and was aware of the acts they committed, based on a combination of: (a) the documentary evidence illustrating the crimes against humanity being committed by the organization; and (b) the duties and location of the claimant’s service during his 23 year-long career in the organization.<sup>223</sup> Thus, it was “completely implausible that Mr. Beltrey was so ignorant of what was going on around him. The panel therefore

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217 *Yorkes*, *supra* note 31 at paras 61, 64.

218 *Ibid* at paras 51, 55–57.

219 2017 CanLII 98894 at para 42 (Refugee Appeal Division) [X Re 98894].

220 *Ibid* at para 44.

221 *Ibid* at para 45; *Ezokola*, *supra* note 3 at para 97.

222 *X Re 98894*, *supra* note 219 at para 50.

223 2017 CanLII 99422 at para 53 (Immigration Division).

draws inferences that [Mr. Beltrey] was aware of the criminal purpose of the [organization] throughout his military career.”<sup>224</sup>

Similarly, in *Verbanov IAD*, the panel concluded that the Mr. Verbanov “could not have been unaware” of the torture committed by the employer, because the practice “seems so widespread and reported by reliable sources—including international courts—that the panel is of the opinion that Mr. Verbanov must have known about it.”<sup>225</sup>

#### 4. Wilful Blindness

Rather than assert what an individual ought to have known, some decisions impute knowledge by finding that the individual was wilfully blind to the crimes or criminal purpose of the organization.<sup>226</sup> These decisions usually cite the Canadian criminal law test for wilful blindness derived from *R v Briscoe*,<sup>227</sup> as well as an immigration decision, *Hadhiri v Canada (Citizenship and Immigration)*,<sup>228</sup> to substitute knowledge with wilful blindness.

In *Massroua*, the tribunal found that the applicant “must have known” that he was working for an organization with a criminal purpose based on subtle happenings during interactions with them, such as:

- being patted down upon arrival;
- phone being taken away while working;
- the types of vehicles that were fixed were indicative of the vehicles used by the organization as per public reports;
- the types of work done on the vehicles, the purposes of which could only be used for military conflict; and
- the dialect of the men who hired him.<sup>229</sup>

The Federal Court agreed with the findings of the Refugee Protection Division and Refugee Appeal Division, and concluded that the applicant was wilfully blind as to who he worked for, most likely because of the large salary that was offered.<sup>230</sup> The Court took guidance from *Hadhiri* to conclude

224 *Ibid* at para 53. The panel held that there was insufficient evidence that Mr. Beltrey made a significant, voluntary, and knowing contribution to the organization’s crimes (see *ibid* at paras 55–56).

225 *Verbanov IAD*, *supra* note 100 at para 75.

226 Some cases utilize wilful blindness in conjunction with a heavy reliance on documentary evidence demonstrating the widespread nature of the crimes, as seen in Section IV.A above.

227 2010 SCC 13 [*Briscoe*].

228 2016 FC 1284 [*Hadhiri*].

229 *Massroua*, *supra* note 32 at paras 32, 37.

230 *Ibid* at para 37.

that “even without wilful blindness, a form of recklessness can support a finding of knowing contribution to an organization.”<sup>231</sup>

In *X (Re)*, the Immigration Division engaged in a lengthy analysis of wilful blindness and concluded that, although the Minister did not establish that the claimant had knowledge of the criminal purpose of the impugned organization, wilful blindness “can substitute for actual knowledge whenever knowledge is a component of *mens rea*.”<sup>232</sup> The Immigration Division considered widespread media reports on the crimes being committed, and that the claimant had family members in the unit responsible for carrying out the crimes. The Immigration Division found that the claimant was wilfully blind towards participating in crimes when the claimant handed victims over to that unit, and deliberately did not inquire about the allegations of torture.<sup>233</sup> The Immigration Division concluded that if the claimant had made further inquiries, he would have known that they were transporting victims to be tortured and was wilfully blind in that respect.<sup>234</sup> The finding that the claimant was wilfully blind thus substituted a finding of knowledge because the claimant would have known if further inquiries were made.<sup>235</sup>

Instead of inferring the knowledge through the notoriety of the criminal acts, the adoption of the criminal law standard of wilful blindness represents a search for a pre-accepted, principle-based approach to inferring the knowledge element of the *Ezokola* test.

### C. Conclusion

In our view, the knowledge element of the complicity test requires further guidance from the courts or Parliament. As indicated above, decisions have taken inconsistent approaches to analyzing knowledge. Whether fact-specific or not, decisions often fail to make the express distinction that the impugned individual knew that their actions furthered a criminal organization’s goals.<sup>236</sup>

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<sup>231</sup> *Ibid.*

<sup>232</sup> 2018 CanLII 152024 at para 58 (Immigration Division) [*X Re 152024*], citing to *Briscoe*, *supra* note 227 at para 21.

<sup>233</sup> *X Re 152024*, *supra* note 232 at paras 59–62.

<sup>234</sup> *Ibid* at para 62.

<sup>235</sup> *Ibid* at paras 58, 62.

<sup>236</sup> *Verbanov* is the only case we found where the failure to establish an individual’s specific knowledge concerning their contributions led to the decision being found to be unreasonable.

Assessing whether someone knows that their actions are furthering the crimes or criminal purpose of a criminal organization should require a multi-step sequential analysis. Our view is that, in analyzing knowledge, the following should be considered in sequential order:

1. Identify specific actions and contributions made by an impugned individual;
2. Establish that those contributions were significant in furthering an organization's criminal purpose; and
3. Establish whether an individual understood that their contributions furthered the organization's criminal purpose.

When personal knowledge is inferred from documentary evidence without a link between the individual's circumstances, contribution, and knowledge, this type of inference risks a return to guilt by association findings. If a decision-maker sets out to infer knowledge from documentary evidence, that evidence should not simply outline the ways in which the organization engages in criminal activity.

#### KNOWING CONTRIBUTION APPENDIX

No	Case	Held	Issues
1	<i>Ghazala Asif Khan v Canada (Citizenship and Immigration)</i> , 2017 FC 269.	Inadmissible	High rank and other factors were used to indicate knowledge.
2	<i>Habibi v Canada (Citizenship and Immigration)</i> , 2016 FC 253.	Sent for re-determination (originally excluded)	High rank and other factors were used to indicate knowledge.
3	<i>Bedi v Canada (Public Safety and Emergency Preparedness)</i> , 2019 FC 1550.	Inadmissible	Only high rank was used to indicate knowledge.
4	<i>X (Re)</i> , 2018 CanLII 145577 (Refugee Protection Division).	Excluded	Only high rank was used to indicate knowledge.
5	<i>Talpur v Canada (Citizenship and Immigration)</i> , 2016 FC 822.	Inadmissible	Only high rank was used to indicate knowledge.
6	<i>Beltrey v Canada (Public Safety and Emergency Preparedness)</i> , 2017 CanLII 99422 (Immigration Division).	Admitted	The widespread nature of crimes was not enough to establish knowledge.

7	<i>Verbanov v Canada (Public Safety and Emergency Preparedness)</i> , 2018 CanLII 47471 (Immigration Appeal Division).	Inadmissible	The widespread nature of crimes was indicative of knowledge.
8	<i>Verbanov v Canada (Public Safety and Emergency Preparedness)</i> , 2019 FC 324.	Sent for re-determination (originally inadmissible)	The widespread nature of crimes was not enough to establish knowledge.
9	<i>X (Re)</i> , 2019 CanLII 135482 (Immigration Division).	Excluded	The widespread nature of crimes and other factors were used to indicate knowledge.
10	<i>Yorkes v Canada (Public Safety and Emergency Preparedness)</i> , 2018 CanLII 47569 (Immigration Appeal Division).	Excluded	The widespread nature of crimes and other factors were used to indicate knowledge.
11	<i>X (Re)</i> , 2017 CanLII 98894 (Refugee Appeal Division).	Excluded	The widespread nature of crimes alone was used to indicate knowledge.
12	<i>Massroua v Canada (Citizenship and Immigration)</i> , 2019 FC 1542.	Excluded	Wilful blindness was used as a substitute for knowledge.
13	<i>X (Re)</i> , 2018 CanLII 152024 (Immigration Division).	Excluded	Wilful blindness was used as a substitute for knowledge.

## V. CONCLUSION

The Supreme Court of Canada's decision in *Ezokola* sought to encourage a more rigorous complicity-intensive analysis in determinations of who ought to be excluded from Canada's refugee protection regime. However, more could be done to realize *Ezokola*'s goals and ensure that only individuals truly complicit with an organization's crimes are excluded from protection or found inadmissible.

The current complicity framework would benefit from an update that takes into consideration the last ten years of jurisprudence in this area, and clarifies the gaps and inconsistencies we have described above.

A clean break from prior jurisprudence is difficult, especially when decision-makers are asked to move away from a bright-line test that led to guilt by association determinations, and move towards a more context-dependant analysis. Accordingly, our review found *Ezokola* was applied in a manner that led to divisions and inconsistencies in the jurisprudence. The summary of our findings is as follows:

- Some decisions we reviewed suffered from the same ailment that decisions suffered prior to *Ezokola*: the lack of a clear distinction between voluntary contributions to a group in general and voluntary contributions that furthered a group's crimes or criminal purpose.
- Due to the varied ways the current complicity framework has been applied, decision-makers would benefit from a refined framework for when and how the factors of duress or coercion should be applied in the complicity-analysis context.
- A discrete significance analysis may still be overlooked in some decisions. Significance is occasionally assumed or inferred from factors such as an individual's high rank. This occurred despite *Ezokola*'s emphasis that an individual's specific contribution must be parsed out and assessed even where an organization has a limited and brutal purpose.
- Since a robust knowledge assessment, consistent with *Ezokola*, requires decision-makers to first identify an individual's specific contributions, the decisions we reviewed indicate that in some instances, knowledge may also be passed over and assumed *vis-à-vis* other findings. A framework for when knowledge can be imputed or inferred would help improve consistency and transparency in assessments for this element of the complicity test.

We recognize that refugee law determinations are highly fact-driven. Cases with similar facts may result in different outcomes despite applying the same laws and analyses. Some may question whether consistency should be desired in *Ezokola*'s complicity determinations since inconsistencies are bound to arise from varying facts. However, our review suggests more detailed reasons may nevertheless improve consistency by bringing further clarity and reliability in the analysis process.

As emphasized by the Supreme Court in *Vavilov*, the reasonableness of a decision is driven by reasons—namely, whether they are justified, transparent, and intelligible.<sup>237</sup> Further, reasonableness review takes its colour from context, as complicity decision-making must ultimately be justified in relation to the relevant factual and legal constraints before it, which includes the guidance from *Ezokola*.<sup>238</sup>

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237 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 83, 99.

238 *Ibid* at paras 89, 99.

Despite the progress made, there is room for further improvement as our review identified inconsistent applications of the complicity test, which may lead to muddiness and confusion.

In *Ezokola*, the Supreme Court found that passive membership in or mere association with an organization is not enough to rise to the level of complicity. Our hope is that this review contributes positively towards this goal as we highlighted potential gaps and areas for further refinement so that Canada's exclusion and inadmissibility laws may truly make a clean break from guilt by association determinations.