Federal Court Cour fédérale

**Date: 20240308**

**Docket: IMM-10551-22**

**Citation: 2024 FC 397**

**Ottawa, Ontario, March 8, 2024**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**JUDE UFUOMA AKENE**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] Mr. Jude Ufuoma Akene asks the Court to set aside a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB] dated October 10, 2022, refusing his claim for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The RAD agreed with the Refugee Protection Division [RPD] of the IRB that there were serious reasons for considering that the Applicant was complicit in the commission of crimes against humanity and therefore to exclude him from refugee protection

pursuant to Article 1F(a) of the *Convention Relating to the Status of Refugees* [Refugee Convention] and section 98 of the Act.

[2] For the reasons that follow, this application for judicial review is dismissed. I am not persuaded that the RAD's decision was unreasonable.

## I. Background

[3] The Applicant is a 53-year-old citizen of Nigeria. He departed Nigeria in August 2019, and travelled to Germany and the United States before claiming refugee protection in Canada in September 2019.

[4] The Applicant claimed refugee protection based on threats he received in Nigeria due to his former role as an intelligence security officer with Nigeria's State Security Services [the Department of State Services, SSS or DSS]. Since 1997, he performed various roles over the course of his 22-year career with the SSS, including Technical Officer, Assistant Security Officer (where he also served as the presidential bodyguard), Security Officer, Security and Senior Intelligence Officer, and lastly Principal Intelligence Officer.

[5] According to the Applicant's narrative, he prepared a security report against a drug syndicate in July 2019, which in turn led the SSS to carry out a raid on the syndicate's camp. Shortly thereafter, he received threatening phone calls and messages and was attacked. Despite reporting these incidents to his SSS superiors, they took no action to protect the Applicant and his family.

[6] In April 2021, the RPD determined that the Applicant was excluded from refugee protection, finding serious reasons to believe that he was complicit in crimes against humanity. The Applicant appealed the decision to the RAD.

## II. Decision under Review

[7] In a decision dated October 10, 2022, the RAD confirmed the RPD's finding.

[8] The RAD canvassed the documentary evidence demonstrating that the SSS arrested, detained, and mistreated individuals as part of a widespread or systematic attack against thousands of people in Nigeria. The RAD found that the excessive use of force, arbitrary killings, and other criminal acts by the SSS were committed during the course of an officer's official duties, and were widely reported by the media. It was not, as the Applicant stated, limited to a few "bad eggs."

[9] It is worth reciting the evidence relied on by the RAD in finding that the SSS committed crimes against humanity pursuant to the *Rome Statute of the International Criminal Court* and the principles enunciated by the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40. At paragraph 19 of its decision, the RAD references several "reliable" third-party sources as reproduced below:

> a. Joint Security Task Forces are created by the state. Members of these task forces are drawn from a variety of institutions, including the SSS and DSS. These task forces often act like occupying forces against the civilian population, killing people arbitrarily. They rarely adhere to legally mandated rules of engagement. They are known to use excessive force to arrest, detain, and kill anyone that is at the wrong place at the wrong

time. As mentioned earlier, the SSS is also referred to as the Department of State Services (DSS).

b. Torture remains a subject of major concern. The most frequent perpetrators of torture are operatives of the security and law enforcement agencies, including the SSS. Acts of torture are usually perpetrated before official detention. Torture remains a common tool used to interrogate, intimidate, and punish crime suspects. Acts of torture include indiscriminate arrests, illegal detention, infliction of physical and psychological injuries, extrajudicial killings, and death while in custody, as a result of torture.

c. A source reports that he was tortured, while in SSS custody, by means of beating, electrocution, and exposure of radiation to his testicles to force him to confess to being a militant. He was told by his SSS case officer that their organization is above the laws of the land, and the SSS only listens to the instruction of the President. Anything short of that, including court orders, cannot help him.

d. A lawyer reports that SSS agents have publicly stated that torture is the only way they can get criminal suspects to confess.

e. The SSS has detention centres directly under its control.

f. The Nigerian security forces, including the SSS, exhibit a culture of violence and kill with impunity. They are often responsible for violent deaths whenever they intervene in any violent incident. They do not maintain law and order in violent conflicts. The interventions of security forces result in more, rather than fewer, fatalities. The pattern of killings is systemic. It can therefore be safely argued that these killings have much to do with the general culture of violence and impunity within the security forces, rather than collateral damage.

g. The Minister cites evidence that the acts were committed on a mass scale and involved thousands of victims across Nigeria. In particular, the Nigeria Watch database recorded, between 2006 and 2014, in regard to incidents involving the security forces, including the SSS: 4,569 fatalities in Borno state; 1,784 fatalities in Plateau State; 1,195 fatalities in Lagos State; 1,150 fatalities in Anambra State.

[footnotes omitted]

[10] The RAD addressed the Applicant's submission that the RPD failed to apply the Supreme Court's decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]. The RAD considered the three components of complicity set out in *Ezokola*, namely whether the Applicant made a voluntary, knowing, and significant contribution.

[11] On the voluntariness of the Applicant's contribution, the RAD agreed with the RPD's finding that the evidence shows that the Applicant voluntarily joined and stayed with the SSS for 22 years, actively worked towards promotions, and had intended to retire with the organization until he felt a threat to his safety and departed Nigeria. The RAD found that the Applicant worked in many positions within the SSS, moving up several times, and that he worked in 21 Nigerian states. He also made a significant contribution to the SSS's intelligence. The RAD determined that the Applicant likely knew the SSS's criminal purpose and that his conduct contributed to that purpose considering (i) the extremely high levels of torture and criminal acts by the SSS; (ii) the Applicant's duties and activities; and (iii) the Applicant's length of employment with the SSS.

[12] On the knowingness of the Applicant's contribution, the RAD distinguished *Concepcion v Canada (Citizenship and Immigration)*, 2016 FC 544 [*Concepcion*] and *Niyungeko v Canada (Citizenship and Immigration)*, 2019 FC 820 [*Niyungeko*] from the present case. The RAD held that the applicants in those cases did not have the same level of knowledge as this Applicant and, unlike the decision-makers in those cases, the RPD here did apply the principles set out in *Ezokola*.

[13] The RAD assessed the Applicant's rank and considered his claim that he limited his contribution by stating that he did not deal with suspects beyond arrest, that his promotions were due to time, and that he did not see any signs of nor was involved in torture. The RAD assessed the Applicant's evidence about his activities while serving in the SSS Intelligence Division from 2010 to 2019. It also considered the Applicant's testimony that his promotion was not automatic but based on passing exams which, in the RAD's view, demonstrated the Applicant's valued competence and contribution. The RAD found that based on this evidence, it is clear that the Applicant, being in the third rank of an Intelligence Officer, had significant responsibilities and significantly contributed to the functioning of the Intelligence Division.

[14] The RAD rejected the Applicant's assertion that he had not known the level of abuses committed by the SSS due to media censorship, as presented in the National Documentation Package [NDP] evidence. The RAD found that despite his testimony that information within the SSS was on a "need-to-know basis," his top position and role would have given him access to the most protected information in the country and that he did not need to rely on news reports to have knowledge of the SSS's crimes.

[15] The RAD also found a contradiction between the Applicant's assertion that he was not aware of any criminal conduct or purpose and his oral testimony in which he confirmed that he read newspapers about human rights abuses within the SSS while he was in Nigeria. The RAD concluded that it was not necessary that the Applicant have first-hand knowledge of the SSS's crimes or criminal purpose; it was sufficient that he knew of the crimes or criminal purpose yet still collaborated with the SSS through his employment.

[16] The RAD found that his duties, particularly since at least 2010 onward, involved receiving and executing warrants, conducting surveillance, arresting, and writing intelligence reports. This makes it more likely than not that he would have seen signs of torture or ill-treatment of individuals within the SSS. The fact that he worked in the Intelligence Division for over ten years also increased that likelihood.

[17] On the significance of the Applicant's contribution, the RAD found that there was a significant link between the Applicant's activities (i.e., arresting criminal suspects, gathering intelligence to help with the arrest, and being involved in situations of gunfire) and the SSS's criminal acts or criminal purpose, which were widely documented.

## III. Issue and Standard of Review

[18] The only issue in this application is whether the RAD decision is reasonable.

[19] The parties do not dispute, and I agree, that the applicable standard of review is reasonableness as articulated by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker:" *Vavilov* at para 85; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] at para 8. A decision should only be set aside if there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency:" *Vavilov* at para 100; *Mason* at paras 59-61. Furthermore, the reviewing court "must be satisfied that any shortcomings or flaws relied on by

the party challenging the decision are sufficiently central or significant to render the decision unreasonable:" *Vavilov* at para 100.

## IV. Analysis

[20] Section 98 of the Act provides that a person described in Article 1F(a) of the Refugee Convention is neither a Convention refugee nor a person in need of protection.

[21] Article 1F(a) excludes from refugee protection any person with respect to whom there are serious reasons to consider has committed a crime against humanity. The crime must be committed in a widespread or systematic fashion.

[22] Individuals may also be excluded under Article 1F(a) for being complicit in the commission of a crime against humanity. In *Ezokola*, the Supreme Court set out the test for complicity. The RPD must determine whether an individual voluntarily made a significant and knowing contribution to a crime or criminal purpose of an organization. This ensures that the concept of complicity does not capture individuals based on mere association or passive acquiescence: *Ezokola* at para 53. The test considers several factors, as set out in *Ezokola* at paragraph 91:

> (i) the size and nature of the organization;
>
> (ii) the part of the organization with which the refugee claimant was most directly concerned;
>
> (iii) the refugee claimant's duties and activities within the organization;
>
> (iv) the refugee claimant's position or rank in the organization;

> (v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
>
> (vi) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.

[23] Neither of the parties dispute the RAD's findings with respect to the voluntariness of the Applicant's contribution under *Ezokola*. Instead, the Applicant contests the RAD's findings related to the significance and knowledge of his contribution. I will deal with each in turn.

A. *Significance of contribution*

[24] The Applicant submits that the RAD unreasonably dismissed his assertion that his legitimate activities as a SSS officer did not significantly contribute to human rights abuses. He says that the same activities cited by the RAD to establish a link between his activities and the criminal acts or purpose of the SSS (i.e., arresting criminal suspects, gathering intelligence, and exchanging gunfire) actually constituted the legitimate purpose and operations of the SSS. At the hearing, the Applicant stressed that there is no evidence beyond speculation to suggest that he exceeded the standard activities of a security officer charged with protecting the public.

[25] The Respondent submits that in light of the Applicant's duties and activities, the "significant contribution," as defined in *Ezokola*, is met. According to the Respondent, *Ezokola* at paragraph 56 holds that the contribution need not be substantial or essential—only something other than an infinitesimal contribution.

[26] I agree with the Respondent. The Supreme Court in *Ezokola* at paragraph 87 was clear that the claimant's conduct and activities need not contribute to specific identifiable crimes, but can be directed to "wider concepts of common design." Here, the RAD properly concluded that the nature of the Applicant's tasks furthered the SSS's criminal activities, particularly given the prevalence of its human rights abuses. The RAD supported this conclusion based on the evidence on the record, including both objective evidence about the prevalent use of torture (e.g., a 2005 Human Rights Watch report) and the Applicant's own evidence regarding his tasks and the national scope of the SSS's activity.

[27] The *Ezokola* test requires assessing whether "duties performed by an individual, that are not necessarily in and of themselves criminal, nonetheless amount to a significant contribution" to a group's crimes or criminal purpose: *Canada (Citizenship and Immigration) v Alamri*, 2023 FC 203 at para 28. Thus, even though the Applicant may view his activities as "standard," routine, or even non-criminal, they may nevertheless significantly contribute to the commission of a crime.

[28] The RAD reviewed the objective evidence that the SSS commonly and in widespread fashion used torture when investigating suspects in custody and excessive force when arresting individuals, often indiscriminately. It noted that those acts occurred while the Applicant worked for the SSS. At the same time, the RAD acknowledged that the SSS is not entirely a criminal organization and that it does carry out legitimate activities. However, the RAD reasonably determined that the Applicant's specific responsibilities to facilitate the arrest of and gather intelligence on suspects significantly contributed to the SSS's criminal acts: see *Mugisha v*

*Canada (Citizenship and Immigration)*, 2023 FC 1055 at para 19; *Oworu v Canada (Citizenship and Immigration)*, 2022 FC 1035 at para 35 [*Oworu*].

B. *Knowledge of contribution*

[29] The Applicant submits that there was no evidence that he had personal knowledge, made any direct or indirect contributions, or was in any way involved in the SSS's criminal conduct.

[30] The Applicant also submits that the RAD unreasonably distinguished his case from *Concepcion* and *Niyungeko*. In both of those cases, this Court found that the decision-makers improperly applied the notion of complicity by association, rather than applying the *Ezokola* test. The Applicant argues that the RAD here similarly departed from the test in *Ezokola*, which requires evidence that the individual *knowingly* made a significant contribution to the group's crime or criminal purpose.

[31] The Applicant further submits that, contrary to the RAD's finding, there is nothing to suggest that the applicants in *Concepcion* and *Niyungeko* possessed less knowledge about the crimes or criminal purposes of their respective organizations than the Applicant did here. Rather, the Applicant contends that those applicants had a clearer understanding, especially since the one in *Niyungeko* actually served as a Minister of Defence. Further, the Applicant argues that the RAD ignored his sworn evidence about the intra-departmental restrictions on information sharing and ignored the NDP evidence proffered by the Applicant about the general suppression of information in Nigeria. He cites *Canada (Minister of Citizenship and Immigration) v Kurt*, 2022 FC 1347 [*Kurt*], to say this Court found a decision of the RAD was

unreasonable for using the “guilty by association” notion rather than evidence linking the applicant’s conduct to the organization’s criminal act or purpose.

[32] The Applicant further contends that, pursuant to *Ezokola*, complicity is not established where an individual has not committed a guilty act and has no criminal knowledge or intent. As such, the Applicant’s mere awareness through news stories that other members of the government or SSS committed illegal acts was insufficient to establish complicity. The Applicant contends that he did not know he was furthering the SSS’s criminal purposes.

[33] Additionally, the Applicant argues that numerous findings by the RAD lacked a rational chain of analysis and justification in light of the evidentiary record, namely:

i. The RAD made an unfounded implausibility finding when determining, based solely on the Applicant’s position in the Intelligence Service, that he must have known the SSS’s scale of abuses and did not need to read related news reports to know the true scale. The Applicant argues that his submissions to the RAD and the objective country conditions evidence, which demonstrated the suppression of news coverage on SSS’s abuses, contradicted the RAD’s implausibility finding. The RAD rejected this evidence without explaining why, rendering its decision unreasonable.

ii. The RAD determined that the SSS commits both legitimate and criminal acts but did not point to any specific evidence to support its conclusion that the SSS’s criminal acts are far more prevalent than its legitimate ones.

iii. The RAD found that the Applicant was contradictory in that he did not challenge the RPD's finding that the SSS committed crimes against humanity or argue that the objective evidence incorrectly supported the RPD's findings, yet alleged that he did not learn about the objective documentary evidence but heard the news about illegal acts by individuals within the SSS and government. The Applicant argues that there is no contradiction as he testified that it was only after his departure from Nigeria that he gained greater access to country conditions reports and learned more about the SSS's human rights abuses.

iv. The RAD, without explaining how, found that the Applicant's duties and activities increased the likelihood that he knew the SSS's criminal purpose and that his duties and activities contributed to that purpose.

[34] The Respondent submits that *Concepcion* and *Niyungeko* do not assist the Applicant as determinations of complicity are highly contextual, and the RAD properly noted the factual differences between these cases and the case before it in coming to its own conclusions.

[35] The Respondent argues that on the issue of intention, a complicity finding does not require that claimants possess a specific intention to assist in crimes against humanity. As *Ezokola* holds at paragraph 87, what is required is that the accused significantly contributes to "wider concepts of common design," not specific identifiable crimes. The Respondent submits that the Applicant intended to engage in activities such as arresting criminal suspects, gathering intelligence to help locate and arrest the suspects, and being directly involved in gunfire exchanges. This was sufficient to satisfy the knowledge criterion for complicity.

[36] The Respondent also submits that it was reasonable that the RAD did not believe that the Applicant was unaware of the SSS's use of torture, particularly considering his role within the SSS and the prevalence of the organization's crimes. Citing the Federal Court of Appeal in *Harb v Canada (Citizenship and Immigration)*, 2003 FCA 39, the Respondent argues that the RAD is not required to accept the Applicant's simple denial of knowledge; his actions, namely his lengthy employment with the SSS and the activities he engaged in thereof, are more revealing than his testimony.

[37] On the implausibility findings, the Respondent argues that the RAD reasonably found that the Applicant read about the SSS's human rights abuses in the newspaper while still in Nigeria. Yet, the Applicant contradicted this statement at a second oral hearing before the RPD where he stated that he never heard of any human rights abuses while employed with SSS. The Respondent further argues that the RAD reasonably made the implausibility finding as it relied on evidence demonstrating the prevalence of torture by the SSS and concluded that it is difficult to understand how the Applicant, given his rank, could not have seen any sign of torture.

[38] Furthermore, the Respondent submits that the Applicant's reliance on *Kurt* is misplaced. In *Kurt*, the Respondent claims that the Court held that an individual must have had no realistic choice but to participate in the crime or criminal purpose to avoid a complicity finding. The Respondent argues that there was no evidence here that the Applicant was under any pressure or duress to be employed by the SSS.

[39] I agree with the Respondent that intent to contribute to a crime is not required to be culpable based on complicity. Instead, an individual must be aware of the organization's crime or criminal purpose and aware that their conduct will assist in its furtherance: *Ezokola* at para 89. There must only be an intention to engage in this conduct, and either an intention to cause the crime or an awareness that it will occur in the ordinary course of events: *Ezokola* at para 90.

[40] The RAD found that the Applicant did admit to knowing through reading news articles while in Nigeria that discussed how the SSS was reported for being involved in human rights abuses. Reviewing a transcript of the RPD hearing, the Applicant did not expressly admit to reading those stories during the time he was employed at the SSS. Although the Applicant repeatedly admitted to reading news about the SSS's crimes, he did not specify when he did (i.e., whether it was in Nigeria while he worked at the SSS or after he left the organization). However, as set out below, the Applicant did testify that he heard news about the abuses within the SSS. The RAD's finding of an inconsistency was therefore reasonable.

[41] I agree with the Applicant that the RAD did not provide reasons as to why it rejected his evidence of media censorship within Nigeria. However, the RAD also found that:

> Despite his testimony that "within the SSS, information was on a need-to-know basis", his position and role within the SSS in my view would have given him access to the most protected information in the country and <u>he did not need the news reports to the SSS abuses</u> that were happening there <u>to have that knowledge</u>.
>
> [emphasis added]

[42] Thus, the RAD found that whether or not the government suppressed media coverage of the SSS's abuses was irrelevant as the Applicant ought to have known about them given the information he was privy to as a high-ranked official in the organization.

[43] The RAD also noted that the Applicant confirmed that he heard about illegal acts by individuals within the SSS and government. While the RAD did not supply details of this part of the Applicant's testimony, his inconsistent testimony was a live issue before the RPD panel. The RPD questioned the Applicant on the inconsistency between his previous testimony that there are "bad apples" in the SSS and his testimony that he did not hear about any wrongdoing within the SSS. Given his testimony, the RAD reasonably concluded that the Applicant could have been aware that the SSS committed criminal acts towards individuals whom the Applicant may have arrested or provided intelligence about: see *Oworu* at para 38.

[44] The RAD therefore provided a well-reasoned explanation of how it assessed the contradiction between the prevalence of torture by the SSS and the Applicant's denial of ever having seen or heard signs of torture. As the RPD held, the Applicant's testimony was vague. Faced with this contradiction and an absence of credible evidence of when the Applicant became aware of the SSS's crimes, the RAD relied on the reliable evidence before it to make a determination, including considering the Applicant's rank, role, and length of service: see *Sarwary v Canada (Citizenship and Immigration)*, 2018 FC 437 at paras 45, 49.

[45] Based on the above considerations, the RAD concluded that the Applicant was not a credible witness regarding his testimony of being unknowing, a finding that it availed itself of

with reference to all the evidence. In my view, this credibility assessment falls within the remit of the RAD and the RPD and is entitled to considerable deference: *Khakimov v Canada*, 2017 FC 18 at paras 23-24.

[46] Moreover, though not cited by the parties, this case is similar to *Elve v Canada (Citizenship and Immigration)*, 2020 FC 454, where the applicant argued that the RPD erred in relying on mere conjecture to conclude that the applicant was aware of the atrocities. The Court acknowledged that the Minister's burden requires more than mere suspicion, conjecture, or negative credibility findings, but determined the following at paragraph 47:

> However, there comes a time when there is a clear line between the evidence and a specific conclusion, where there is no other reasonable conclusion. In such situations, when the specific conclusion becomes obvious, it seems to me that inferences are not necessarily unreasonable (*Harb v Canada (Citizenship and Immigration)*, 2003 FCA 39 at paras 26–28 [*Harb*]).

[47] This reasoning equally applies to the case at bar. The RAD found that based on the evidence on the record and the *Ezokola* factors, there is no other reasonable conclusion but to find serious reasons to believe that the Applicant knowingly contributed to the SSS's crimes. In essence, the Applicant is asking the Court to reconsider his evidence on the media censorship and draw its own conclusions, which is not the proper role of a reviewing Court: see *Vavilov* at para 125; *Hadhiri v Canada (Citizenship and Immigration)*, 2016 FC 1284 at para 37.

[48] This is not *Kurt*, which both parties mischaracterize. There, Justice Pamel found, in accordance with *Ezokola*, that complicity should not be found from mere association or passive acquiescence. The Court held the RAD's decision was unreasonable not because it took a guilt-

by-association approach ***per se***, but because it determined that the applicant was not complicit as he had no "supervisory responsibility" over the criminal acts: *Kurt* at paras 29-30. "Supervisory responsibility" is not required for complicity. This issue did not arise here.

[49] Overall, I find the RAD's assessment of the Applicant's knowledge of his contribution is consistent with the test in *Ezokola*. The RAD considered the widespread and continuous nature of the SSS's human rights abuses and the Applicant's senior roles as militating in favour of that knowledge. The Applicant's 22 years of service with the SSS coupled with his heightening responsibilities also increased the likelihood that the Applicant possessed knowledge of the SSS's crimes: see *Khudeish v Canada (Citizenship and Immigration)*, 2020 FC 1124 at para 79.

## V. Conclusion

[50] For these reasons, the Court dismisses this application for judicial review. The Applicant was excluded from refugee protection not because of his mere association with the SSS but because the RAD, in applying the *Ezokola* test, found serious reasons to consider that the Applicant voluntarily and knowingly made a significant contribution to the crimes or criminal purpose of the SSS.

[51] The parties did not propose a question for certification and I agree that none arose.

**JUDGMENT in IMM-10551-22**

**THIS COURT'S JUDGMENT is that** this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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