Federal Court  Cour fédérale

**Date: 20250428**

**Docket: IMM-14864-23**

**Citation: 2025 FC 761**

**Ottawa, Ontario, April 28, 2025**

**PRESENT: Madam Justice McDonald**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**VALENTIN ANTONIO GUEVARA ROBLES**

**Respondent**

**and**

**IMMIGRATION AND REFUGEE LEGAL CLINIC & CANADIAN ASSOCIATION OF REFUGEE LAWYERS**

**Interveners**

## JUDGMENT AND REASONS

[1] On this judicial review, the Applicant, the Minister of Citizenship and Immigration (Minister), seeks review of the Refugee Appeal Division (RAD) decision that the Respondent, Valentin Antonio Guevara-Robles, was not excluded from refugee protection under Article 1F(a) of the *Convention Relating to the Status of Refugees* (Convention). The issue before the RAD was whether the Respondent was complicit in the crimes of the El Salvador military and death squads. The RAD concluded that while the Respondent made significant and knowing contributions to the military crimes, his contribution was not voluntary and therefore he was not complicit in the crimes.

[2] The Minister argues that the RAD findings are not supported by the evidence and the RAD misapplied the legal test for voluntariness. Two parties, the Immigration and Refugee Legal Clinic (IRLC) and the Canadian Association of Refugee Lawyers (CARL) were granted intervener status in this matter and provided submissions on the issue of age considerations in the context of complicity specifically in relation to the diminished moral culpability of minors.

[3] For the reasons that follow, I am dismissing this judicial review. The RAD reasonably applied the factors from *Ezokola v Canada (MCI),* 2013 SCC 40 [*Ezokola*] to the specific circumstances of this case. I also decline to certify the questions proposed by the Minister.

## I. Background

[4] The Respondent is a 50-year-old citizen of El Salvador. When he was 6 years old, his family relocated due to a civil war. By age 15, he started working for a man identified as "William" on "Project 2", a mobile discotheque operated by the El Salvador military to obtain information about suspected Farabundo Martí National Liberation Front (FMNL) guerrillas. The Respondent and others travelled across El Salvador, setting up the discotheque to "keep an eye on people". The Respondent was paid for this work and would relay his observations and information to William, who worked for the El Salvador military.

[5] In 1991, at age 17, the Respondent was captured by guerillas and held for 15 days. During his captivity, he was physically assaulted, shot in the leg, had a finger cut off, had his feet burned and was hit with a bat. He was also deprived of food and water. He believed the guerillas captured him due to leaked information about Project 2. Following his rescue, he required medical attention. In January 1992, with the assistance of his uncle and the permission of his mother, the Respondent left El Salvador for the United States (US).

[6] After spending several years in the US, including a period of incarceration, the Respondent entered Canada in 2022 and made a claim for refugee protection. The Refugee Protection Division (RPD) denied his claim. The Respondent appealed to the RAD where new evidence was filed by both parties and an oral hearing was held.

## II. RAD Decision

[7] Prior to entering Canada, the Respondent spent almost 10 years in the US. The RAD assessed the events in the US and determined that he would not face risk in El Salvador due to those events. The Minister does not challenge this finding.

[8] The RAD assessed the Respondent's claim based on events in El Salvador in the 1980s and 1990s. The RAD found the Respondent's testimony to be credible and sufficient to establish his involvement with Project 2. The RAD held that there were serious reasons for considering that the Salvadoran military and death squads committed the war crimes of murder and engaged in targeted killings. This finding was grounded in the Respondent's evidence and reports providing credible accounts from witnesses, governments, and international bodies of the military murdering civilians.

[9] The RAD applied the three-part contribution-based test from *Ezokola* to assess the Respondent's complicity. *Ezokola* states that individuals can be culpable for international crimes if they are direct perpetrators or complicit in the crimes. To be found complicit in an organization's crime, an individual's contribution must be (1) knowing; (2) significant; and (3) voluntary (*Ezokola* at para 84). Individuals cannot be excluded from refugee protection due to "guilt by association" (*Ezokola* at para 3).

A. *Knowing Contribution*

[10] The RAD found that the Respondent knew he was contributing to the military's war crimes, considering the size and nature of the organization and the length of time the Respondent was involved. Although there was insufficient evidence to establish that the Respondent directly provided information to the death squads, the RAD determined there were "serious reasons for considering [that] information provided by Project 2 to the military was used by death squads".

[11] The RAD explained that the Respondent's approximate 3-year role in Project 2 was significant and found he had knowledge of the military's operations for at least 1 year. The Respondent's age did not negate his knowledge.

B. *Significant Contribution*

[12] In determining that the Respondent's contribution was significant, the RAD found there were serious reasons for considering that the Respondent's duties and activities furthered the commission of the war crime of murder. The Respondent's testimony that a family informed on by Project 2 was killed led to the RAD's finding that he contributed "essential intelligence" to the military.

C. *Voluntary Contribution*

[13] On the voluntary contribution assessment, the RAD found as follows:

> [81] However, I find Mr. Robles' contribution was not made voluntarily. Assessing whether Mr. Robles made a voluntary contribution

> goes beyond considering whether there was duress. The Supreme Court of Canada directs that a contribution is not voluntarily made where the person "had no realistic choice but to participate in the crime." While this captures the defence of duress, it also involves assessing other factors like coercion in joining and remaining in the organization, as well as the person's specific circumstances. The Federal Court confirmed assessing voluntariness goes beyond the defence of duress and involves a full contextual factual analysis in the context of the person's circumstances. Recently, the Federal Court confirmed again that assessing voluntariness requires assessing a person's "ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics. [Footnotes omitted.]

[14] The RAD found that the Respondent had no realistic choice but to participate in Project 2. The RAD held that his involvement was a product of his circumstances, namely his age and environment, and not his commitment to the military's cause, and placed significant weight on the factors of recruitment and opportunity to leave. William exploited the Respondent's age to access places that the military could not. The RAD found that, given the violence of the war and the treatment suspected guerrillas received, the Respondent had no reasonable alternative but to continue working for Project 2. Additionally, he required his mother's permission before fleeing El Salvador. The RAD concluded that the Respondent's "capacity for self direction and protection was not the same as an adult".

[15] The RAD concluded that the Respondent was not complicit in international war crimes because he did not voluntarily contribute to the crimes of the Salvadoran military and death squads.

D. *Subsection 108(4) Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*

[16] Subsection 108(4) of the *IRPA* permits a person to claim refugee protection for reasons that have ceased to exist if there are "compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, treatment or punishment".

[17] The RAD found "both conditions [were] met" to consider the compelling reasons exception in subsection 108(4) of the *IRPA*. The RAD determined on a balance of probabilities that the Respondent experienced past persecution and would have qualified for protection when he left El Salvador. The RAD found that the Respondent was persecuted by the guerrillas because of his perceived or actual political opinion based on his connection to the military. Moreover, the Respondent faced a serious possibility of persecution from the FMNL guerrillas throughout the country and could not have been adequately protected by the state due to the active civil war.

[18] The RAD found that the Respondent's past persecution as a child was a compelling reason for him to not avail himself to El Salvador. The persecution suffered by the Respondent was, according to the RAD, "appalling and atrocious" involving repeated, intense violence for more than two weeks. The RAD found these events were a complete disregard of his dignity and human rights, causing long-term damage. According to the RAD, the fact that he was a child at the time of the persecution aggravated the level of atrocity.

## III. Issues and standard of review

[19] On this judicial review, the Minister raises the following issues:

A. Did the RAD make findings that were speculative and unsupported by the evidence?

B. Did the RAD reasonably apply the test for voluntariness?

C. Do certified questions arise?

[20] The RAD's assessment of an individual's complicity is reviewed on a reasonableness standard (*Canada (Citizenship and Immigration) v Kurt*, 2022 FC 1347 at para 18; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]; *Khudeish v Canada (Citizenship and Immigration)*, 2020 FC 1124 at paras 64-67).

[21] On a reasonableness review, the Court asks "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision". The party challenging the decision bears the burden of showing that it is unreasonable (*Vavilov* at paras 99-100).

## IV. Analysis

### A. *Did the RAD make findings that were speculative and unsupported by the evidence?*

[22] The Minister argues that the RAD's findings are speculative and are not supported by evidence. In particular, the Minister argues that the following conclusions are unsupported by the evidence: (i) the Respondent was brainwashed and guided by the adults in his life and unable to make his own decisions; (ii) he was forced to work for the military; (iii) he was conditioned and had no choice but to provide information to the military; (iv) he was primed for his participation and that the Respondent was a child for the when he worked on Project 2.

[23] The RAD findings on these issues are as follows:

> [83] Mr. Robles' involvement with Project 2 was a product of his circumstances, especially his age and environment. Mr. Robles was six years old when the civil war began in El Salvador. At age 12, he began working for William in a welding shop. After three years, William gave him further responsibilities with Project 2, which included providing information on suspected guerrillas. Mr. Robles was 15 years old. Mr. Robles did not seek out to provide information to the military. He did not do so because of a commitment to the military's cause. Rather, responsibilities were given to him by a person in authority, and only after three years of trust-building and conditioning. I also find that William and the military exploited Mr. Robles' age when choosing him to work for Project 2 because it enabled Mr. Robles to access places the military could not. The adults around Mr. Robles effectively made choices for him because it furthered their goals. Mr. Robles had no realistic choice but to participate in Project 2.
>
> [84] Mr. Robles' age and environment also affected his opportunities to leave Project 2 and his work for William. When I consider Mr. Robles' background and essential characteristics, he had no reasonable alternatives than continuing his work for Project 2. Mr. Robles was living through a violent civil war.

> Around 75,000 people were killed during this time. He was aware of this violence and how the military treated suspected guerrillas. Even after being captured and rescued, he still relied on his uncle and mother to arrange for him to leave the country. He needed his mother's permission to leave the country and required her help to get his documents. His capacity for self-direction and protection was not the same as an adult. Mr. Robles had no realistic choice but to continue his work for Project 2. [Footnotes omitted.]

[24] The assessment of voluntariness is contextual and includes a consideration of relevant defences, such as duress. The factors of recruitment and an opportunity to leave directly impact voluntariness. *Ezokola* at paragraph 99 states that decision makers may consider an individual's specific circumstances—including location, financial resources, and social networks—when evaluating their ability to exit an organization.

[25] I am satisfied that the RAD's findings on these factors are supported by the evidence and the Respondent's oral testimony. The RAD found the Respondent's testimony to be credible. It was reasonable for the RAD to draw inferences from the Respondent's evidence, including his upbringing, the civil war, his age, and the increased responsibilities he was given while working for William. In my view, the conclusions of the RAD are reasonably justified by the evidence.

[26] The Minister argues that the RAD unreasonably focused on the Respondent's age to assess voluntariness. They argue that being young does not mean that the Respondent was at the mercy of the adults and unable to make his own decisions. The Minister relies on cases where minors between the ages of 14 and 17 were found capable of understanding the nature of their involvement with criminal organizations and that their contributions were voluntary (see:

*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 55-56; *Ali v Canada (Citizenship and Immigration)*, 2018 FC 1187 at paras 67 and 69-70; *Gil Luces v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1200 at paras 15 and 24-25; *Pizarro Gutierrez v Canada (Citizenship and Immigration)*, 2013 FC 623 at paras 42-43; *Intisar v Canada (Citizenship and Immigration)*, 2018 FC 1128 at para 10).

[27] The interveners IRLC and CARL submit that age should be a primary factor in the contextual analysis required in the *Ezokola* contribution-based test when analyzing the voluntariness of actions committed by minors. Their submissions highlight Canadian legal norms that recognize the reduced moral blameworthiness and capacity of minors.

[28] I am satisfied that the RAD's approach was consistent with the evidence before them and the guidance in *Ezokola*. The RAD reasonably considered the Respondent's age alongside other circumstances outlined in *Ezokola*. The RAD's reasoning demonstrates it did not rely upon age as a standalone factor to assess the voluntariness of the Respondent's involvement in Project 2. The RAD also had evidence that the Respondent's "capacity for self-direction and protection was not the same as an adult." The RAD reasonably considered the Respondent's age and maturity in concluding that the adults in his life made choices for him and that he had no choice but to participate. On a holistic reading of the RAD's decision, the Respondent's age was an important factor in the analysis, but it was not the only factor considered by the RAD.

[29] The RAD's assessment of the Respondent's voluntariness and the application of the *Ezokola* factors to the Respondent's circumstances demonstrates a rational chain of analysis that

is justified in relation to the evidence and the law. The Minister's submissions essentially ask the Court to re-weigh and re-interpret the evidence submitted before the RAD, which is not the role of this Court on judicial review (*Vavilov* at para 125).

B. *Did the RAD reasonably apply the test for voluntariness?*

[30] The Minister argues that the RAD erred in finding that the Respondent's actions were not voluntary due to him having "no realistic choice". This, according to the Minister, misapplies the test for voluntariness and improperly elevates "no realistic choice" to a legal standard. In support of their argument, the Minister relies upon *R v Ryan*, 2013 SCC 3 at paragraph 23:

> …The rationale underlying duress is that of moral involuntariness, which was entrenched as a principle of fundamental justice in *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at para. 47: "It is a principle of fundamental justice that only voluntary conduct — behaviour that is the product of a free will and controlled body, unhindered by external constraints — should attract the penalty and stigma of criminal liability." …

[31] The RAD states as follows on the voluntariness:

> [81] … Assessing whether Mr. Robles made a voluntary contribution goes beyond considering whether there was duress. The Supreme Court of Canada directs that a contribution is not voluntarily made where the person "had no realistic choice but to participate in the crime" (*Ezokola* at para 86). While this captures the defence of duress, it also involves assessing other factors like coercion in joining and remaining in the organization, as well as the person's specific circumstances (*Ezokola* at paras 86 and 100). The Federal Court confirmed assessing voluntariness goes beyond the defence of duress and involves a full contextual factual analysis in the context of the person's circumstances (*Al Khayyat v Canada (Citizenship and Immigration), 2017 FC 175, at para. 56*). Recently, the Federal Court confirmed again that assessing voluntariness requires assessing a person's "ability to perceive a

> reasonable alternative to committing a crime, with an awareness of his background and essential characteristics" (*Seydi v Canada (Citizenship and Immigration), 2022 FC 1336,* at para 26).

[32] In my view, a contextual reading of the RAD's reasons reveals that it did not create a legal standard of "no realistic choice." Instead, it employed the language from *Ezokola,* which states that involuntary contribution captures, but is not limited to, the defence of duress. *Ezokola* at paragraph 99 suggests that an individual's contribution can be involuntary if they are being "coerced into joining, supporting, or remaining in the organization" which falls short of duress. Put another way, an individual's conduct can be found to be involuntary even in the absence of duress after conducting a contextual analysis and concluding that, based on the *Ezokola* factors, the requisite *actus reus* and *mens rea* for complicity have not been met.

[33] The RAD did not confine its assessment of voluntariness to the "defence of no realistic choice"; it explicitly states that duress involves a full and contextual factual analysis. Accordingly, I do not agree with the Minister's submissions that the RAD effectively created a new standard. The RAD reasonably considered and applied the six (6) enumerated factors from *Ezokola* "…as a guide in assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose" (*Ezokola* at para 91). I am satisfied that the RAD's reasons on the issue of voluntariness are transparent, intelligible and justified and that there is no basis for this Court to interfere with the RAD's findings.

C. *Do certified questions arise?*

[34] The Minister asks to have the following questions certified:

A. Does “no realistic choice” constitute a valid and sufficient legal standard on the basis of which the decision-maker can find that a person did not make a voluntary contribution under the *Ezokola* test?

B. In determining whether the contribution was involuntary, is the decision-maker required to consider whether the elements of existing recognized legal defences have been met?

[35] In their post-hearing submissions, the Minister argues that these questions should be certified “because they deal with the important issue of the interpretation and application of one of the three components of the *Ezokola* test for complicity in the commission of international crimes.”

[36] The Respondent argues that the questions are not appropriate for certification.

[37] The proposed questions must meet the criteria for certification as set out by the Federal Court of Appeal in *Obazughanmwen v Canada (Public Safety and Emergency Preparedness),* 2023 FCA 151 as follows:

> [28] It is well established in the jurisprudence of this Court that a question cannot be certified unless it is serious, dispositive of the appeal and transcends the interests of the parties. It must also have been raised and dealt with by the court below, and it must arise from the case rather than from the judge’s reasons. Finally, and as a corollary of the requirement that it be of general importance pursuant to section 74 of the IRPA, it cannot have been previously settled by the decided case law: see *Liyanagamage v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1637 (QL) at para. 4; *Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178 at para. 36; *Lewis v. Canada (Public*

> *Safety and Emergency Preparedness)*, 2017 FCA 130 at paras. 36, 39 (Lewis).

[38] The Minister's first proposed question is based on the assumption that the RAD applied a "no realistic choice" test to the voluntariness analysis. As noted above, I disagree with this characterization. The RAD applied the appropriate test as articulated in *Ezokola*.

[39] I am not satisfied that the second proposed question arises on the facts of this case. Namely, the RAD did not address "existing recognized legal defences" as the Minister has articulated it in the proposed question.

[40] The proposed questions posed by the Minister are sufficiently settled in the case law and thus cannot be characterized as issues of broad significance or general importance; or do not arise from the case before the RAD. Accordingly, the questions will not be certified.

**JUDGMENT IN IMM-14864-23**

**THIS COURT'S JUDGMENT is that:**

1. This judicial review is dismissed.

2. I decline to certify the questions posed by the Applicant.

"Ann Marie McDonald"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-14864-23 |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION V VALENTIN ANTONIO GUEERA ROBLES |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | NOVEMBER 7, 2024 |
| **JUDGMENT AND REASONS:** | MCDONALD J. |
| **DATED:** | APRIL 28, 2025 |

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