Federal Courts Reports | Recueil des décisions des Cours fédérales

EDITOR'S NOTE: This document is subject to editorial revision before its reproduction in final form in the *Federal Courts Reports*.

IMM-8150-22

2023 FC 422

Mohammad Yosuf Wardak (*Applicant*)

v.

Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: WARDAK V. CANADA (CITIZENSHIP AND IMMIGRATION)

Federal Court, Brown J.—By videoconference, March 14; Ottawa, March 27, 2023.

Citizenship and Immigration — Exclusion and Removal — Inadmissible Persons — Application for judicial review of exclusion determination by Refugee Appeal Division (RAD), affirming Refugee Protection Division (RPD) decision, which found applicant neither Convention refugee nor person in need of protection on basis there were serious reasons for considering applicant complicit in crimes against humanity — Applicant joined Afghan military in 1986 as cadet in Presidential Guard Brigade (PG) during Marxist regime installed by Soviet Union — Was involved in training new recruits for PG, Special Guard (SG) — Both PG, SG umbrella organizations within security forces of Afghanistan's Marxist state at that time, known as K/W — Applicant left military after fall of Marxist regime in 1992 — In 2001, after NATO ousted Taliban, applicant joined Afghan National Security Forces as instructor — In 2018, given increasing security threats from Taliban, applicant became military representative for Afghanistan, moved to Belgium with family — They eventually made their way into Canada — RPD found applicant was excluded from Canada on basis of his involvement in Afghan military (particularly his service with PG, SG) during Soviet-installed Marxist regime between 1986 and 1992 — Applicant therefore facing removal — RAD upheld that decision — Found RPD correct in finding applicant made significant contribution to accomplishment of K/W's criminal purpose — Whether RAD's decision reasonable — United Nations Convention Relating to the Status of Refugees, Art. 1F(a) stating that Refugee Convention "shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a … crime against humanity" — Immigration and Refugee Protection Act, s. 98 building on this principle — Criminal liability under Convention, Art. 1F(a) not limited to direct perpetrators — Supreme Court of Canada's decision in Ezokola v. Canada (Citizenship and Immigration) establishing three-part test for complicity requiring complicity to be voluntary, significant, knowing — Determinations of RAD on this point resulting from its weighing, assessing evidence, inferences therefrom — Both Supreme Court, Federal Court of Appeal have decided that Federal Court on judicial review should not reweigh, reassess or second-guess RAD in this respect unless there are exceptional circumstances — No exceptional circumstances applicable in this case — RPD, which heard applicant's testimony, found there were discrepancies, inconsistencies, evasive responses from applicant, which undermined his testimony relating to his knowledge of connection between, role of PG, SG, K/W — Both RPD, RAD preferred objective country condition evidence on activities of various entities examined over applicant's testimony — RAD was perfectly reasonable in coming to that conclusion — In this respect, applicant

was asking Court to reweigh, reassess, second-guess determinations of RAD, RPD — RAD reasonably applied constraining law to evidence before it — Considered objective country condition evidence, record, and found it was organizational policy of K/W to commit war crimes, crimes against humanity — Determining applicant's complicity was another issue that involved weighing, assessing evidence, inferences against constraining law —However, in this case, it was unnecessary for Court to do this given lack of exceptional circumstances — RAD reasonably found applicant's voluntarily contributed to PG, SG, that his participation was knowing — Was also reasonable for RAD to find that both PG, SG implicated in policy of human rights abuses, crimes against humanity — Both RPD, RAD reasonably found "serious reasons for considering" applicant was complicit in crimes against humanity — Regarding applicant's potential removal from Canada, no procedural unfairness, breach of natural justice found in present matter — Applicant excluded because of his work between 1986 to 1992 — Application dismissed.

This was an application for judicial review of an exclusion determination by the Refugee Appeal Division (RAD) (Exclusion Order), affirming a decision of the Refugee Protection Division (RPD), which found that the applicant was neither a Convention refugee nor a person in need of protection on the basis there were serious reasons for considering the applicant was complicit in crimes against humanity.

The applicant joined the Afghan military in 1986 when he was 16, as a cadet in the Presidential Guard Brigade (PG) during the Marxist regime installed by the Soviet Union after its invasion of Afghanistan. From 1987 to 1992, the applicant was involved in training new recruits for the PG and the Special Guard (SG). The applicant left the military with the rank of Major after the fall of the Marxist regime in 1992 because of the uncertain political and security situation. He was 22. Afghanistan eventually became governed by the Taliban in 1996. In 2001, after NATO ousted the Taliban, the applicant joined the Afghan National Security Forces (ANSF). He continued thereafter to work with the ANSF as an instructor providing basic training to soldiers. In 2018, due to increasing security threats to government officials and direct threats to his family from the Taliban, he obtained the position of military representative for Afghanistan and moved his family to Belgium. Despite their relocation, the worsening security situation gave rise to speculation the applicant would be called back to Afghanistan. Given this, the applicant and his family left for the U.S. in November 2019 on previously obtained visas. The same month, he and his family crossed the border into Canada and applied for refugee status.

The RPD allowed the refugee claims of the applicant's spouse and children due to a serious possibility they would be persecuted if they were returned to Afghanistan. They are allowed to stay in Canada. However, the RPD found the applicant was excluded from Canada's refugee regime because of the existence of serious reasons for considering he was complicit in crimes against humanity during his involvement in the Afghan military during the Soviet-installed Marxist regime between 1986 and 1992.

Both PG and SG were umbrella organisations within the security forces of Afghanistan's Marxist state at that time, known as "K/W". Ultimately, the RAD found the RPD correctly excluded the applicant from making a Canadian refugee claim because there were serious reasons for considering he was complicit in crimes against humanity during his service with the PG and SG, both of which supported K/W through their various activities. The RAD found the abuse, torture and extra-judicial executions carried about by K/W were part of K/W's standard operating procedure and, as such, constituted a policy. In short, the RAD found the RPD correct in finding the applicant made a significant contribution to the accomplishment of the K/W's criminal purpose, beyond mere association or passive acquiescence, because he was responsible for training officers and soldiers who carried out crimes against humanity.

The issue was whether the RAD's decision was reasonable.

Held, the application should be dismissed.

Article 1F(a) of the 1969 *United Nations Convention Relating to the Status of Refugees* states

among other things that the Refugee Convention “shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a … crime against humanity” Section 98 of the *Immigration and Refugee Protection Act* builds on this principle stating that those in respect of whom there are serious reasons for considering committed crimes against humanity are not Convention refugees or persons in need of protection. Criminal liability under Article 1F(a) of the Convention is not limited to direct perpetrators. Complicity is the main point of contention in applying Article 1F(a). The Supreme Court of Canada’s decision in *Ezokola v. Canada (Citizenship and Immigration)* establishes a three-part test for complicity requiring complicity to be voluntary, significant and knowing.

The applicant submitted the RAD erred in finding the PG and SG were organizations that took part in and followed a pattern of crimes against humanity. He submitted the RAD found no direct evidence that the PG or SG participated in those acts. In the applicant’s view, the RAD conflated evidence directed towards the K/W and determined that anyone or any group associated with the K/W is guilty by mere association of crimes against humanity. The RAD’s findings in these respects were either entirely findings of fact or very heavily factually suffused findings. The determinations of the RAD on this point were arrived at as a result of its weighing and assessing the evidence and inferences therefrom. Both the Supreme Court and the Federal Court of Appeal have decided that the Federal Court on judicial review should not reweigh, reassess or second-guess the RAD in this respect unless there are exceptional circumstances. There were no exceptional circumstances applicable in this case. The RPD, which heard testimony from the applicant, found there were discrepancies, inconsistencies and evasive responses from him, which undermined his testimony related to his knowledge of the connection between and the role of the PG, SG and the K/W, which was a limited brutal purpose organization controlled by the Soviet KGB to maintain the Marxist regime at all costs.Both the RPD and RAD found the discrepancies, inconsistences and evasive responses of the applicant of such concern they preferred the objective country condition evidence on the activities of the various entities examined over the applicant’s testimony. The RAD was perfectly reasonable in coming to that conclusion. In addition, in this respect, the applicant was asking the Court to reweigh, reassess and second-guess the RAD’s and to an extent the RPD’s determinations, which formed no part of the Court’s role on judicial review except in exceptional circumstances, which did not apply in this case. The RAD did not err in deciding PG and SG were organizations with a policy to commit crimes against humanity.The RAD reasonably applied constraining law to the evidence before it. The RAD considered the objective country condition evidence and record and found it was the organizational policy of K/W to commit war crimes and crimes against humanity.

Determining the complicity of the applicant was another issue that was a matter of weighing and assessing the evidence and inferences against constraining law, or at best, a very heavily factually suffused determination to be made in light of constraining law. In this case, it was unnecessary for the Court to reweigh, reassess or second-guess the RAD’s findings, particularly given the lack of exceptional circumstances.

The RAD reasonably found the applicant voluntarily contributed to the PG and SG and that his participation was knowing, points the applicant did not dispute or challenge.

The RAD analyzed and found the applicant’s participation was significant. It was reasonable for the RAD to find that both the PG and SG were integral parts of the Soviet Union imposed Marxist government’s security forces, and therefore both were implicated in their policy of human rights abuses and crimes against humanity. This proceeding required a finding on the evidence that there were “serious reasons for considering” the applicant was complicit in crimes against humanity. Both the RPD and RAD reasonably found that the applicant was complicit. Also, there was no merit to the applicant’s argument that neither the PG nor SG had a policy of committing crimes against humanity. The reverse was the case here since both were found to have had such a policy.

Regarding his potential removal from Canada, the applicant submitted that if he were returned to Afghanistan, he might face more than a mere possibility of persecution including death at the hands of the Taliban given his work with allied groups during the War on Terror (2001-2018) and his work

for the Soviet Union imposed Marxist government (1986 and 1992), which formed the basis of the Exclusion Order in this case. He asked that greater procedural protection be given to him in this respect. However, there was no procedural unfairness nor breach of natural justice in this case. Furthermore, the applicant submitted that if he were to be found excluded from refugee protection on the basis of crimes against humanity, he would be ineligible for relief by way of Humanitarian and Compassionate consideration by the respondent or for a pre-removal risk assessment. While the applicant was found not to have been personally involved in any crimes against humanity, he was excluded because of his work between 1986 and 1992. There was no doubt the applicant served the NATO supported Afghan government for almost 20 years, between 2001 and 2019. And yet the applicant's support of the NATO-supported Afghan government could not be considered because it was not in issue in this case. No determination or comment was made on this matter. This was a case for judicial restraint because the issue of what, if any, relief the applicant could now obtain was a matter appropriately left in the hands of the respondent and his colleagues acting under relevant legislation.

STATUTES AND REGULATIONS CITED

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 42, 98.

TREATIES AND OTHER INSTRUMENTS CITED

Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. I-3854, [2002] Can. T.S. No. 13, Art. 7.

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Art. 1F(a).

CASES CITED

APPLIED:

Ezokola v. Canada (Citizenship and Immigration), 2013 SCC 40, [2013] 2 S.C.R. 678; *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Doyle v. Canada (Attorney General),* 2021 FCA 237.

DISTINGUISHED:

Canada (Public Safety and Emergency Preparedness) v. Verbanov, 2021 FC 507, [2021] 3 F.C.R. 437.

CONSIDERED:

X(Re), 2022 CanLII 145336 (I.R.B.); *Canada (Minister of Citizenship and Immigration) v. Zamora*, [2007] I.D.D. No. 3 (QL); *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100; *Khakimov v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 18; *Maldonado v. Minister of Employment and Immigration*, [1980] 2 F.C. 302 C.A.).

APPLICATION for judicial review of an exclusion determination by the Refugee Appeal Division (*X(Re)*, 2022 CanLII 145336 (I.R.B.)), affirming a decision of the Refugee Protection Division, which found that the applicant is neither a Convention refugee nor a person in need of protection on the basis there were serious reasons for considering the applicant was complicit in crimes against humanity. Application dismissed.

APPEARANCES

Paul Dineen for applicant.

Rachel Hepburn Craig for respondent.

SOLICITORS OF RECORD

Chapnick & Associates, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

BROWN J.:

I. Nature of the matter

[1] This is an application for judicial review of an exclusion determination by the Refugee Appeal Division (RAD) [*X(Re)*, 2022 CanLII 145336 (I.R.B.)] (Exclusion Order), dated August 4, 2022, affirming a decision of the Refugee Protection Division (RPD), which found that the Applicant is neither a Convention refugee nor a person in need of protection due to its finding of the existence of serious reasons for considering the Applicant was complicit in crimes against humanity.

II. Facts

[2] The Applicant is a 53-year-old man who is a citizen of Afghanistan.

[3] The Applicant joined the Afghan military in 1986 when he was 16, as a cadet in the Presidential Guard Brigade (PG) during the Marxist regime installed by the Soviet Union after its invasion of Afghanistan. From 1987 to 1992, the Applicant was involved in training new recruits for the PG and the Special Guard (SG). The Applicant left the military with the rank of Major after the fall of the Marxist regime in 1992 because of the uncertain political and security situation. He was 22.

[4] Afghanistan eventually became governed by the Taliban in 1996.

[5] In 2001, after NATO [North Atlantic Treaty Organization] ousted the Taliban, the Applicant joined the Afghan National Security Forces (ANSF). He continued thereafter to work with the ANSF, as an instructor providing basic training to soldiers.

[6] In 2018, due to increasing security threats to government officials and direct threats to his family from the Taliban, he obtained the position of military representative for Afghanistan and moved his family to Belgium.

[7] Despite their relocation, the worsening security situation gave rise to speculation the Applicant would be called back to Afghanistan. Given this, the Applicant and his family left for the U.S. in November 2019 on previously obtained visas. The same month, he and his family crossed the border into Canada and applied for refugee status.

[8] Importantly, the RPD allowed the refugee claims of the Applicant's spouse and children due to a serious possibility they would be persecuted if they were returned to Afghanistan. They may stay in Canada.

[9] However, the RPD found the Applicant was excluded from Canada's refugee regime because of the existence of serious reasons for considering he was complicit in crimes against humanity during his involvement in the Afghan military during the Soviet-installed Marxist regime between 1986 and 1992.

[10] The Applicant therefore faces removal by Canada and return to Afghanistan if the Exclusion Order made by the RPD and upheld by the RAD is maintained.

III. Decision under review

[11] Through the rest of these Reasons, I will refer to the Presidential Guard and Special Guard of the Marxist government in place between 1986 and 1992, as "PG" and "SG". Both PG and SG were umbrella organisations under Afghanistan's then Marxist state's security forces. I will refer to these state security forces as "K/W".

[12] Ultimately, the RAD found the RPD correctly excluded the Applicant from making a Canadian refugee claim because there are serious reasons for considering he was complicit in crimes against humanity during his service with the PG and SG, both of which supported K/W through their various activities.

[13] Notably, the RAD found the Applicant was not directly involved in any crimes against humanity. Also notably, no one suggests the Applicant in his work as a trainer taught methods of committing crimes against humanity such as torture or execution.

A. *Organization policy to commit war crimes and crimes against humanity*

[14] Given discrepancies, inconsistences and evasive responses by the Applicant in his testimony and evidence, the RAD affirmed the RPD was correct in relying on the objective country condition evidence regarding the PG, SG and K/W rather than the Applicant's testimony and evidence.

[15] The RAD found the abuse, torture and extra-judicial executions carried about by K/W were part of K/W's standard operating procedure and, as such, constituted a policy. The RAD further determined there are serious reasons for considering the SG was created to serve the K/W to carry out the purpose of the organization and, therefore, SG is implicated in the human rights abuses and crimes against humanity committed by the Marxist state. In the RAD's view, to the extent that the SG was carrying out that purpose, SG was promoting the same policy as K/W.

B. *PG's organizational status as "non-operational"*

[16] The RAD wholly rejected the Applicant's argument that the listing of the PG as a *"non-divisional" unit* of the K/W made it equivalent to a *non-operational support unit*, which the United Nations High Commissioner for Refugees (UNHCR) does not link to human rights violations. The RAD found no objective support for this proposition. In the RAD's view, the Applicant's submissions in this respect constituted a misrepresentation of the objective evidence leading to illogical conclusions that are out of context.

Specifically, the RAD noted alongside the list of “non-divisional” units were a number of armoured, mechanised, paratroop, artillery and commando brigades. The RAD found it unlikely such large groupings of soldiers with such nomenclature are “non-operational” simply because they are not part of one of the named divisions and, therefore, are listed as “non-divisional”.

[17] The RAD further found the UNCHR also listed a number of non-operational support units that include administration, propaganda, personnel and telecommunications. What is not included, the RAD notes, is the training of soldiers and officers. In this manner, the RAD rejected the Applicant’s assertion that non-divisional and non-operational units have the same meaning. As a result, the RAD found that the PG was an operational unit created to carry out offensive and defensive operations to protect the regime against insurrection by whatever means necessary, making it an integral part of the K/W.

C. *SG’s role and mission*

[18] The RAD similarly rejects the Applicant’s assertion that he joined the SG due to its non-divisional, i.e. non-operational, nature. The RAD considered this pure speculation.

[19] The RAD also rejected his argument that the SG did not take part in crimes against humanity or war crimes because it was not their policy. In the RAD’s view, the SG was part of the K/W and duty bound to further the brutal policy of the Marxist organization, thus making it SG policy as well.

[20] Furthermore, upon assessing a large volume of open-source information provided by the U.N., the Council of the European Union, Human Rights Watch, Amnesty International, various non-governmental organizations, academic journals and media detailing human rights violations committed by the members of the PG and SG, the RAD found there were serious reasons for considering that SG committed war crimes and human rights violations and crimes against humanity.

[21] The RAD also pointed to the Applicant’s concession that he was generally aware the SG might be abusing human rights, but did not know any specific or particular cases.

[22] Regardless, the RAD’s independent review determined that the PG and SG were important, operational components of the K/W and their guilt in crimes against humanity stem not from mere affiliation or association, but from active participation under the state security organization K/W’s policy of committing crimes against humanity.

D. *Complicity*

(1) Voluntariness

[23] In applying the contribution-based approach to complicity from *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678, the RAD affirmed the RPD’s finding that the Applicant’s contribution was voluntary.

[24] The Applicant does not dispute this finding.

(2) Knowledge

[25] Similarly, the RAD determined it was not likely that high-ranking officers, such as the Applicant (a Major) would not have knowledge of the human rights abuses going on around them. Specifically, the RAD cited to a U.N. report stating that the brutal methods employed by the K/W were well known both within and outside Afghanistan. In the RAD's view, then, it is inconceivable anyone working for these services, i.e., PG and SG, was unaware of the serious human rights violations taking place. The RAD concluded the RPD was correct in finding serious reasons for considering that the Applicant was aware of, or willfully blind to the human rights abuses and crimes against humanity perpetrated by the K/W in furtherance of the Marxist organization's brutal purposes.

[26] The Applicant did not challenge this finding.

(3) Signification contribution

[27] The RAD references the Immigration Division's (ID) decision in *Canada (Minister of Citizenship and Immigration) v. Zamora*, [2007] I.D.D. No. 3 (QL), where the ID found a trainer (like the Applicant) had contributed to and supported the state's criminal agenda, including crimes against humanity, of the state [at paragraph 71]:

> …. The soldiers that he trained were, by his action, rendered fit to join the ranks and fulfil the military program that, as we have seen, included crimes against humanity. Even by training new recruits, therefore, Mr. Zamora contributed to and supported that criminal agenda, thereby acting in cause common to the direction of the senior officers and government.

[28] The RAD rejected the Applicant's submission the Minister's case relies on the imputation the Applicant was training his cadets in a manner contrary to international law. The RAD noted the content of the training was not in issue because no one suggested the Applicant was teaching methods of crimes against humanity such as torture or execution. Rather, the RAD found there are serious reasons for considering many of those cadets would go on to use their training to defend against insurgents and commit war crimes and crimes against humanity in the course of their military duties. In the RAD's view, therefore, the Applicant's contribution may have been indirect, but it was significant in the state security services carrying out their mandate.

[29] To summarize, the RAD found the RPD correct in finding the Applicant made a significant contribution to the accomplishment of the K/W's criminal purpose, beyond mere association or passive acquiescence, because he was responsible for training officers and soldiers who carried out crimes against humanity.

IV. Issues

[30] The Applicant submits the following issues:

(1) What is the scope of the law surrounding crimes against humanity?

(2) Did the RAD err in finding that the Presidential Guard Brigade, Special/National Guard and ANA [Afghan National Army] did take part in the K/W's Human Rights Violations?

(3) Was the Applicant Complicit in Crimes Against Humanity?

(4) Was the RAD decision reasonable?

[31] The Respondent submits the following:

(1) Did the RAD err in its understanding of the role of the PG and SG within the K/W, or by finding the Applicant guilty by association because of his membership in the PG and SG?

(2) Was the finding that the Applicant was complicit in crimes against humanity reasonable?

(3) Is a state or organizational policy a required element for a finding of complicity in war crimes or crimes against humanity?

[32] The issue is whether the RAD's decision is reasonable.

V. Standard of Review

[33] The applicable standard of review is reasonableness. In *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*), the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard [at paragraphs 31–33]:

> 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> A reviewing court should consider whether the decision as a whole is reasonable: "… what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "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" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). [Emphasis added.]

[34] That said, the Supreme Court of Canada in *Vavilov* makes it clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional

circumstances". No such circumstances exist in the case at bar. The Supreme Court of Canada instructs as follows [at paragraph 125]:

> It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53. [Emphasis added.]

[35] In addition, the Federal Court of Appeal recently determined in *Doyle v. Canada (Attorney General)*, 2021 FCA 237 [*Doyle*], that the role of this Court is not to reweigh and reassess and second-guess the evidence [at paragraphs 3–4]:

> In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation. [Emphasis added.]

VI. Analysis

A. *Background*

[36] Before I consider the parties' submissions, I will outline the law surrounding Article 1F(a) of the Refugee Convention [*United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6], which states among other things that the Refugee Convention "shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a … crime against humanity":

> ARTICLE 1
>
> …
>
> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

[37] Section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) builds on this principle: those in respect of whom there are serious reasons for considering committed crimes against humanity are not Convention refugees or persons in need of protection:

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

[38] As the Respondent notes, the Supreme Court of Canada held in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, that a criminal act only rises to the level of a crime against humanity where there is proof of [at paragraph 119]:

> 1. An enumerated proscribed act [is] committed…;
>
> 2. …as part of a widespread or systematic attack;
>
> 3. …directed against any civilian population or [any] identifiable group [of persons]; and
>
> 4. The [individual] … knew of the attack or … took the risk that [their] act comprised … part of [it].

[39] Moreover, criminal liability under Article 1F(a) is not limited to direct perpetrators. Complicity is the main point of contention in applying Article 1F(a). The Supreme Court of Canada's decision in *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678, establishes a three part test for complicity requiring complicity to be voluntary, significant and knowing [at paragraphs 84–91]:

> J. *The Canadian Test for Complicity Refined*
>
> In light of the foregoing reasons, it has become necessary to clarify the test for complicity under art. 1F(a). To exclude a claimant from the definition of "refugee" by virtue of art. 1F(a), there must be serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose.
>
> We will address these key components of the contribution-based test for complicity in turn. In our view, they ensure that decision makers do not overextend the concept of complicity to capture individuals based on mere association or passive acquiescence.
>
> (1) Voluntary Contribution to the Crime or Criminal Purpose
>
> It goes without saying that the contribution to the crime or criminal purpose must be voluntarily made. While this element is not in issue in this case, it is easy to foresee cases where an individual would otherwise be complicit in war crimes but had no realistic choice but to participate in the crime. To assess the voluntariness of a contribution, decision makers should, for example, consider the method of recruitment by the organization and any opportunity to leave the organization. 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: Cassese's International Criminal Law, at pp. 215-16.
>
> (2) Significant Contribution to the Group's Crime or Criminal Purpose
>
> In our view, mere association becomes culpable complicity for the purposes of art. 1F(a) when an individual makes a significant contribution to the crime or criminal purpose of a group. As Lord Brown J.S.C. said in J.S., to establish the requisite link between the individual and the group's criminal conduct, the accused's contribution does not have to be "directed to specific identifiable crimes" but can be directed to "wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever

means are necessary including the commission of war crimes": para. 38. This approach to art. 1F(a) is consistent with international criminal law's recognition of collective and indirect participation in crimes discussed above, as well as s. 21(2) of the Canadian Criminal Code, R.S.C. 1985, c. C-46, which attaches criminal liability based on assistance in carrying out a common unlawful purpose.

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.

(3) Knowing Contribution to the Crime or Criminal Purpose

To 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.

In our view, this approach is consistent with the mens rea requirement under art. 30 of the Rome Statute. Article 30(1) explains that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge". Article 30(2)(a) explains that a person has intent where he "means to engage in the conduct". With respect to consequences, art. 30(2)(b) requires that the individual "means to cause that consequence or is aware that it will occur in the ordinary course of events". Knowledge is defined in art. 30(3) as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events". [Emphasis by Lebel and Fish JJ.]

(4) Applying the Test

Whether there are serious reasons for considering that an individual has committed international crimes will depend on the facts of each case. Accordingly, to determine whether an individual's conduct meets the *actus reus* and *mens rea* for complicity, several factors may be of assistance. The following list combines the factors considered by courts in Canada and the U.K., as well as by the ICC. It should serve as a guide in assessing whether an individual has voluntarily made a significant and knowing contribution to a crime or criminal purpose:

(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.

See *Ryivuze*, at para. 38; *J.S.*, at para. 30; and *Mbarushimana*, Decision on the Confirmation of Charges, at para. 284. [Emphasis added.]

B. *Parties' submissions & analysis*

(1) Did PG and SG take part in crimes against humanity?

[40] The Applicant submits the RAD erred in finding the PG and SG were organizations that took part in and followed a pattern of crimes against humanity. The Applicant submits the RAD found no direct evidence that the PG or SG participated in those acts. In the Applicant's view, the RAD conflated evidence directed towards the K/W and determined that anyone or any group associated with the K/W is guilty by mere association of crimes against humanity. Specifically, the Applicant submits that there is no objective evidence that either the PG or SG had a policy or followed a pattern to commit crimes against humanity. Moreover, the Applicant reiterates that these units are considered non-divisional, specifically noting that they were created and used to enforce discipline and balance to the various sections of the military. On this point, the Applicant submits the RAD failed to consider the entirety of the list provided in the UNHCR's Report regarding non-operational support units. The Applicant notes that encompassed in the list was those that were "cadre/personnel", which is in reference to those that train personnel.

[41] The RAD's findings in these respects are, and with respect, either entirely findings of fact or very heavily factually suffused findings. The RAD's determinations in this respect are arrived at as a result of its weighing and assessing the evidence and inferences therefrom. As noted above, both the Supreme Court of Canada in *Vavilov* and the Federal Court of Appeal in *Doyle* had decided this Court on judicial review should not reweigh, reassess or second-guess the RAD in this respect unless there are exceptional circumstances. There are no exceptional circumstances applicable in this case. That said, I will refer to such findings.

[42] The Applicant also submits his testimony should have been accepted, rather than the objective country condition evidence that was relied upon by both the RPD and the RAD. The Applicant submits the Applicant's testimony was forthcoming and accurate and nothing in the Respondent's package nor in the RAD's reasoning suggests otherwise. With respect, I disagree with this aspect of the Applicant's submission because it is without merit. The RPD, which heard testimony from the Applicant, found there were discrepancies, inconsistencies and evasive responses from him, which undermined "his testimony related to his knowledge of the connection between and the role of the PG, SG and the K/W, which was a limited brutal purpose organization controlled by the Soviet KGB to maintain the Marxist regime at all costs." The RAD [at paragraph 13] on its independent appeal likewise noted the less than forthright testimony about the PG and SG, and echoed "the RPD's impression that Mr. W was not entirely forthright in his testimony on the operations of these entities. In my view, it is not surprising that Mr. W was hesitant to admit knowing more about the unsavoury activities described in the objective evidence."

[43] Both the RPD and RAD found his discrepancies, inconsistences and evasive responses of such concern they preferred the objective country condition evidence on the activities of the various entities examined to his testimony. The RAD was perfectly reasonable in coming to that conclusion. Indeed it is well known that such findings fall within the heartland of the expertise of the RPD, which the RAD found correct after its independent review. I am not persuaded of any reviewable error in the RAD's assessment in this respect. Constraining law in this regard is summarized in *Khakimov v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 18, at paragraph 23:

> ….To begin with, the RPD has broad discretion to prefer certain evidence over other evidence and to determine the weight to be assigned to the evidence it accepts: *Medarovik*

v Canada (Minister of Citizenship and Immigration), 2002 FCT 61 at para 16; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867 at para 68. The Federal Court of Appeal has stated that findings of fact and determinations of credibility fall within the heartland of the expertise of the RPD: *Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238 (FCA) [*Giron*]. The RPD is recognized to have expertise in assessing refugee claims and is authorized by statute to apply its specialized knowledge: *Chen v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 805 at para 10. And see *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 at para 24 (FCA), where the Federal Court of Appeal said that the RPD:

> … is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence.

[44] In addition, in this respect the Applicant asks the Court to reweigh, reassess and second-guess the RAD's and to an extent the RPD's determinations, which as the Federal Court of Appeal put it, forms no part of the Court's role on judicial review except in exceptional circumstances which do not apply in this case.

[45] The Applicant also submits that per *Maldonado v. Minister of Employment and Immigration*, [1980] 2 F.C. 302 (C.A.), where the Respondent has offered no evidence that contradicts the Applicant's statement that he was not involved in fighting and played a "ceremonial" role, his submission should be believed.

[46] With respect, that presumption is obviously rebutted and does not apply further, given the findings re lack of forthrightness by the RAD and the discrepancies, inconsistencies and evasive responses found by the RPD.

[47] The Applicant submits the RAD erred in deciding PG was an organization with a policy to commit crimes against humanity, and submits the RAD erred. The Applicant makes similar submissions in relation to the role and activities of the SG, citing a general lack of evidence establishing a policy or pattern of abuse.

[48] With respect, I am unable to accept these submissions. In my respectful view the RAD reasonably applied constraining law to the evidence before it.

[49] The RAD considered the objective country condition evidence and record and found it was the organizational policy of K/W to commit war crimes and crimes against humanity. Importantly, the RAD rejected the Applicant's argument that the PG was simply a non-operational or support only unit, and determined the SG's role was more than improving discipline within the K/W. On this issue, with respect, the dispute was between "non-operational" units referred to in a UNHCR article, and an opinion paper of Dr. Antonio Giustozzi relied upon by the Applicant. Upon independent review of both, the RAD reasonably found the PG and SG were not encompassed in UNHCR list. It is not the role of the Court to reweigh or reassess the facts underlying these findings, and I decline to accept the Applicant's invitation to do so.

[50] The RAD [at paragraph 27] specifically also found the role of the SG went beyond "discipline" to include political control, and the prevention of insubordination and mutiny.

(2) Complicity

[51] Determining the complicity of the Applicant is another issue that is a matter of weighing and assessing the evidence and inferences against constraining law, or at best, a very heavily factually suffused determination again to be made in light of constraining law. I am not persuaded to engage in reweighing, reassessing or second-guessing the RAD's findings particularly where there are no exceptional circumstances.

(a) Was his contribution voluntary?

[52] That said, the RAD in my view reasonably found the Applicant's contribution to the PG and SG were voluntary, a point the Applicant did not dispute.

(b) Was his participation knowing?

[53] The RAD also reasonably found the Applicant's participation in these organizations was his having knowledge—another point the Applicant did not challenge. Notably the RAD ruled [at paragraphs 35–39]:

> The RPD found it was not credible that Mr. W would not have been aware of the notoriety throughout the country of the fact that the K/W was freely engaging in committing human rights abuses in the name of the regime. The RPD noted Mr. W [trained recruits] near the K/W detention centre in Kabul, home of the Directorate responsible for elimination of anti-government groups and for dozens of extra-judicial executions following the March 1990 coup attempt. The Panel doubted Mr. W's claim of being unaware of ongoing abuses given his proximity to those abuses.
>
> The AM does not challenge this finding and I agree that it is not likely that a high-ranking officer such as Mr. W would not have knowledge of the human rights abuses going on around him. The UN report says that the brutal methods employed by K/W were well-known both within Afghanistan and outside, so that it is inconceivable that anyone working for these services, regardless of the level they worked at, was unaware of the serious human rights violations that were taking place.
>
> K/W agents employed torture methods that were positively medieval: hot-irons, genital mutilation, fingernail extraction, electric shocks, cigarette burns, drowning, rape, sleep deprivation, suspension from hooks in the ceiling among others. All available means, however cruel, were permitted in the battle to preserve the Marxist regime.
>
> It is estimated that up to 50,000 Afghans died, mostly tortured to death by security services. Both officers and non-commissioned officers could not function within the K/W if they were unwilling to take part in the systematic human rights violations by these organizations, suggesting that all of them were active in the macabre sections of the K/W involved in those violations.
>
> The RPD was correct to find serious reasons for considering that Mr. W was aware of, or wilfully blind to the human rights abuses perpetrated by the K/W in furtherance of the organization's brutal purpose.

(c) *Was his participation significant?*

[54] Notably, and again as instructed by the Supreme Court of Canada in *Ezokola*, the RAD analyzed and found the Applicant's participation was significant. The RAD having independently reviewed the record concluded [at paragraphs 40–44]:

> The RPD considered whether Mr. W's contribution to the K/W's brutal purpose was significant and determined that his actions in [training soldiers] provided an important source of support to the ongoing realization of the K/W's purpose to preserve and ensure the continuation of a brutal regime at any cost. The Panel found serious reasons for considering the [training of officers and soldiers] to defend against coup attempts provided a significant contribution to the accomplishment of the K/W's brutal purpose.
>
> The Federal Court has weighed in on the argument of being only a [trainer] and therefore isolated from the human rights violations of the brutal purpose organization. In *Zamora*, the FC found that the applicant [trained soldiers] who were "rendered fit to join the ranks and fulfill military program which included crimes against humanity"; and "even by [training new recruits], he contributed to that criminal agenda, thereby acting in cause common to the direction of the senior officers and government."
>
> Another objective source described new K/W officer recruits having their loyalty and fighting spirit put to the test by requiring them to spy on their families, arrest and torture friends and acquaintances and eliminate real or alleged enemies of the Marxist regime.
>
> The AM asserts that the Minister's case relies on the imputation that Mr. S was [training his cadets] in a manner that is contrary to international law. I disagree that the content of the [training] was an issue because no one is suggesting that Mr. W was [teaching methods of torture or execution]. However, there are serious reasons for considering that many of those cadets would go on to use [their training] to defend against insurgents and commit war crimes and crimes against humanity in the course of their military duties. The K/W was notorious for its' mistreatment of civilians it perceived to oppose the regime, and there are serious reasons for considering that Mr. W [trained] many of the perpetrators of these crimes. His contribution may have been indirect, but I determine that it was significant in aiding the K/W to carry out its' mandate.
>
> I determine that the RPD was correct that Mr. W made a significant contribution to the accomplishment of the K/W's criminal purpose, beyond mere association or passive acquiescence, because he was responsible for [training officers and soldiers] who carried out crimes against humanity.

[55] In these circumstances, I have concluded it was reasonable for the RAD to find that both the PG and SG were integral parts of the Soviet Union imposed Marxist government's security forces, and therefore both were implicated in their policy of human rights abuses and crimes against humanity.

[56] I reject the Applicant's assertion that he could not be complicit if the PG or SG did not directly commit crimes against humanity or have such a policy. Whether the Applicant directly committed crimes against humanity is not the issue or the test for this proceeding. This proceeding requires a finding on the evidence there are "serious reasons for considering" the Applicant was complicit in crimes against humanity. Both the RPD and RAD reasonably found that the Applicant was complicit.

[57] There is also no merit to the Applicant's argument that neither the PG nor SG had a policy of committing crimes against humanity. The reverse is the case: both were found to have had such a policy. Here, the Applicant invites the Court to conduct a wholesale reweighing and reassessment of the evidence and testimony including that of the Applicant, which as already noted falls outside the Court's role on judicial review.

[58] More generally, the Applicant submits this Court's decision in *Canada (Public Safety and Emergency Preparedness) v. Verbanov*, 2021 FC 507, [2021] 3 F.C.R. 437 (*Verbanov*) by my colleague Justice Grammond, decides that the *Rome Statute of the*

International Criminal Court, 17 July 1998, 2187 U.N.T.S. I-38544, [2002] Can. T.S. No. 13 (Rome Statute), which came into force July 17, 1998, applies to this case. He makes this submission in part because the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, explicitly refers to the Rome Statute for the definition of crimes against humanity, [art. 7 of the Rome Statute] and incorporates the Rome Statute into Canadian law.

[59] In particular, the Applicant submits the Rome Statute's establishment of a policy requirement for crimes against humanity requires application in this case. As per Article 7 of the Rome Statute, one must be part of an organization that has a policy to commit crimes against humanity. In the Applicant's view, the Respondent must, therefore, prove that either the PG or SG followed a pattern of human rights abuse.

[60] There is no merit to this submission for several reasons.

[61] First, and as already noted, the RAD in fact did assess and conclude there was such a policy in place in terms of the PG, the SG and K/W. While the Applicant disagrees with these findings, he may not submit no determination was made on whether such a policy was in place. Specifically, on this critical issue, the RAD found it was the organizational policy of K/W, PG and SG to commit crimes against humanity. The RAD concluded, after independent review of the "plentiful" evidence including that of abuse, torture and extra-judicial executions [at paragraphs 15–17]:

> The RM contends that there is no question that the limited brutal purpose organization known as the K/W had a policy to commit crimes against humanity and war crimes because its' goal was to eliminate anti-government activity through any means necessary including committing such crimes. I have reviewed the plentiful evidence of the abuse, torture and extra-judicial executions carried out by the K/W during those years and I agree with the Minister that it is clear that such tactics were part of the standard operating procedure of the K/W organization and so constitute a policy.
>
> The AM argues that the organizations that Mr. W belonged to specifically, being the PG and SG did not have such a policy. The issue here is to what extent the PG and SG were part of the K/W and connected to furthering the overall brutal policy of the K/W. The objective evidence indicates that the importance of the K/W Secret Police was especially highlighted in 1988, when the newly created SG, consisting of the best troops and the best equipment, was put under the control of the intelligence service. Early in 1989, the 30,000-member strength of the K/W Secret Police was further boosted by the formation of the SG.
>
> I determine that there are serious reasons for considering that certainly the SG was created to serve the K/W to carry out the purpose of that brutal organization and is therefore implicated in K/W's human rights abuses. In my view, to the extent that the SG was carrying out that purpose, it was promoting the same policy as the K/W, the organization that it was a part of and directed by.

[62] Secondly, I am not persuaded the Rome Statute governs the situation at hand based on jurisprudence to date. The Rome Statute came into effect in 1998. While the Rome Statute was applied in *Verbanov*, *Verbanov* involved activities taking place between 2007 and 2011, well *after* the Rome Statute came into effect and was incorporated into Canadian law. In contrast, the activities of the Applicant in this case took place between 1987 and 1992, 10 or 15 years *before* both the Rome Statute and *Crimes Against Humanity and War Crimes Act* came into effect. I do not see *Verbanov* as requiring the Rome Statute to apply retroactively or retrospectively: see for example paragraph 26:

> It is worth noting that the *Crimes against Humanity Act* does not invalidate the four-prong test that was set out in *Mugesera*, insofar as it complies with current international law. This is evidenced by the test still being used in recent decisions on inadmissibility pursuant to paragraph 35(1)(a) of IRPA: see, e.g., *Niyungeko v. Canada (Citizenship and Immigration),* 2019 FC 820; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 436, [2009] 1 F.C.R. 605. Yet, with respect to conduct taking place after 1998, any discrepancies between prior customary law and the Rome Statute must be resolved in favour of the latter. [Emphasis added.]

[63] Third, the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 (*Mugesera*) [cited above] stated a crime could constitute a crime against humanity even though it is not committed pursuant to a policy. The facts in *Mugesera* took place in 1992, also well *before* the coming into force of the Rome Statute*.* As noted and in any event I have upheld the reasonableness of the RAD's findings that the entities in this case has in place policies of crimes against humanity.

(3) Potential removal from Canada

[64] The Court acknowledges the Applicant's submissions that if he is returned to Afghanistan, he might face more than a mere possibility of persecution including death at the hands of the Taliban given his work with allied groups during the War on Terror in Afghanistan between 2001 and 2018, and also because of his work for the Soviet Union imposed Marxist government between 1986 and 1992 which form the basis of the Exclusion Order in this case.

[65] He asks that greater procedural protection be given to him in this respect. But and with respect, I am unable to find any procedural unfairness nor breach of natural justice in this case.

[66] The Applicant further submits that if he is found excluded from refugee protection on the basis of crimes against humanity he is ineligible for relief by way of Humanitarian and Compassionate consideration by the Minister or his delegate, or for a Pre-Removal Risk Assessment by the Minister's department, or other consideration such as under section 42 of IRPA.

[67] The Respondent argues this issue should not be considered, saying:

> On March 16th, this Honourable Court issued an Oral Direction, as follows:
>
> "The Court wishes to know if the Applicant is eligible for consideration for relief by way of PRRA, H&C, national interest or otherwise in the event his application is not successful."
>
> The Minister's position is that this question should not factor into the Court's consideration of whether the Refugee Appeal Division's ("RAD") determination is reasonable. As the Court is aware, the underlying application for leave and judicial review is a review of the reasonableness of the RAD's decision on the Article 1F(a) finding. Therefore, consideration of any removal proceedings or avenues available to the Applicant are not relevant to the underlying decision at issue, and are premature at this time.
>
> Having said that, and in light of the Court's Oral Direction, if the Applicant's judicial review is dismissed, his exclusion from refugee protection pursuant to Article 1F(a) of the refugee Convention pursuant to s. 98 of the Immigration and Refugee Protection Act ("Act") will only allow for a few temporary measures:

• Temporary Resident Permit (TRP): if the judicial review is dismissed, the applicant would be subject to a 12-month bar from applying for a TRP, but would be eligible at the end of 12 month period, to apply for a TRP to obtain temporary status in Canada.

• Restricted Pre-Removal Risk Assessment (PRRA): under paragraph 112(3)(c) of the Act, the application is limited to consideration on the basis of only the following section 97 grounds: danger of torture, risk to life, or risk of cruel and unusual treatment. A positive decision on his application would only result in a reviewable stay of removal rather than protected person status (i.e., it does not confer permanent residence status). In this manner, Canada is able to respect the spirit of the Refugee Convention, which excludes those who are not deserving of protection, while also upholding the principle of non-refoulement.

• A request for a deferral of removal may also be made if/when the Applicant is scheduled for removal. As part of that process, the Applicant would have the opportunity to raise any issues/concerns that may exist with respect to removal at that time.

For further clarity, an Article 1F(a) exclusion makes the Applicant ineligible for Permanent Residence status via a public policy consideration or a Humanitarian & Compassionate ("H&C") application. There are currently no public policy grounds pursuant to subsection 25.2(1) of the IRPA, which would allow for such a consideration on the facts of this case. Furthermore, since June 20, 2013, no exemption pursuant to sections 34, 35, or 37 of the IRPA, may granted for H&C applications.

Similarly, if excluded under Article 1F(a), the Applicant would not be eligible to request the Public Safety "Ministerial Relief" (i.e., a Declaration of Relief Under Subsection 42.1(1): Travellers - Guide to Applying for a Declaration of Relief Under Subsection 42.1(1) of the Immigration and Refugee Protection Act (cbsa-asfc.gc.ca). And, a Temporary Stay of Removal ("TSR") does not apply to individuals excluded under Article 1F(a).

[68] The Applicant raised this issue in this matter. While I have decided there was no procedural unfairness, this issue is still relevant because it was put in issue. I therefore make the following observations.

[69] On the one hand this Court has found the RAD made a reasonable decision in upholding as correct the RPD's determination there are "serious reasons for considering" the Applicant was complicit in crimes against humanity in his work for the PG and SG in Afghanistan between 1986 and 1992 when the Soviet Union's imposed Marxist government was in power.

[70] Notably, however, the RAD found the Applicant was not personally involved in any crimes against humanity. In addition, no one suggests the Applicant taught methods of committing crimes against humanity such as torture or execution in his work for the PG or SG.

[71] Notably also, after NATO (of which Canada is a founding member) defeated the Taliban government (which replaced the Marxist state), the Applicant worked for the Afghan National Security Forces training its soldiers, and then as a military representative, from 2001 until 2019 when the Applicant and his family left Afghanistan eventually settling in Canada.

[72] It is well known that the Taliban returned to rule Afghanistan in 2020. It is common knowledge that many thousands from Afghanistan have been given refuge by Canada, including the Applicant's wife and children who were granted refugee status by

the RPD, because they face more than a mere possibility of persecution should they return to Afghanistan.

[73] The Applicant however is excluded because of his work between 1986 and 1992.

[74] There is no doubt the Applicant served the NATO supported Afghan government for almost 20 years, between 2001 and 2019.

[75] And yet I am unable to consider his support of the NATO supported Afghan government because it is not in issue in this case.

[76] I decline to make any determination or comment on this matter. This is a case for judicial restraint because the issue of what, if any, relief the Applicant may now obtain is a matter appropriately left in the hands of the Minister of Immigration, Refugees and Citizenship and his colleagues acting under relevant legislation.

VII. Conclusion

[77] Given the foregoing, this application will be dismissed.

VIII. Certified Question

[78] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-8150-22

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified, and there is no Order as to costs.