

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

RACHIDI EKANZA EZOKOLA

Appellant
(Respondent)

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
(Appellant)

- and -

**THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, AMNESTY
INTERNATIONAL, THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE
AND INTERNATIONAL HUMAN RIGHTS PROGRAM AT THE UNIVERSITY OF
TORONTO FACULTY OF LAW, THE CANADIAN COUNCIL FOR REFUGEES, THE
CANADIAN CIVIL LIBERTIES ASSOCIATION AND THE CANADIAN
ASSOCIATION OF REFUGEE LAWYERS**

INTERVENERS

**FACTUM OF THE INTERVENER,
THE CANADIAN COUNCIL FOR REFUGEES**

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FACTUM OF THE INTERVENER, THE CANADIAN COUNCIL FOR REFUGEES

PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. Refugee producing situations are inherently complex. They involve the victimization of the persecuted and the crimes of persecutors, but they also entangle many people who fall between these stark polarities. One of the great challenges of refugee status determination, and of this appeal, lies in determining who should be excluded from refugee status by virtue of their participation in international crimes. The 1951 *Convention Relating to the Status of Refugees*¹ (the Refugee Convention) has a human rights object and purpose.² As such, exclusions from it must be interpreted narrowly.³ However, the Canadian approach to the Refugee Convention's exclusion clauses has evolved in a manner that is overly broad, is inconsistent with the practices of other countries, and is out of step with their intended ambit. The result is that people who have committed no crime are exposed to removal to persecution. The Canadian Council for Refugees (the "CCR") calls upon this Honourable Court to bring refugee exclusions in Canada into line with the Convention's purpose and with developments elsewhere.
2. The CCR relies on the summary of the facts in the Appellant's Factum.

PART II – QUESTION IN ISSUE

3. The CCR agrees with the Appellant that the sole question in issue in this appeal relates to the correct legal standard for culpable 'complicity' in the international crimes referred to in Article 1F(a) of the Refugee Convention.

PART III - ARGUMENT

A. Introduction

4. Article 1F(a) of the Refugee Convention states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that... he has committed a crime against peace, a

¹ *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, as incorporated into the *Immigration and Refugee Protection Act*, RSC 2001, c. 27, Schedule A [Appellant's Authorities, Tab 1].

² See the Preamble to the Refugee Convention; *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689 at 733 [Appellant's Authorities, Tab 10]; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para. 46 [Appellant's Authorities, Tab 14].

³ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 SCR 321, at para. 18 [Intervener CCR's Authorities, Tab 23].

war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.⁴

5. The following principles must be taken into account in interpreting Article 1F(a) of the Refugee Convention: the clause is an exception to a human rights provision and thus it must be read narrowly;⁵ the setting for this interpretation is refugee law, not criminal law; punishing criminals is not an object or purpose of refugee law; the low standard of proof is crafted to ensure that persecutors will not be given protection and thus the other parts of the clause should be read restrictively. Interpreting the place of a ‘complicity’ element in this article requires an analysis of the provision as a whole, and ‘...in the light of its object and purpose.’⁶
6. This Court has recognized that refugee status decision-making engages interests that are protected by section 7 of the *Charter*.⁷
7. In its application for leave to intervene in this matter, the CCR set out a framework for analysis for Article 1F(a). A comprehensive test building on this framework has five elements. The decision maker must:
 - a) Bear in mind that the ‘**serious reasons for considering**’ standard requires **unambiguous and reliable evidence** of individual acts or omissions;
 - b) Identify the **war crime, crime against peace or crime against humanity** being considered and **the international instrument** that sets out that crime;
 - c) Determine whether the individual bears **responsibility** for the crime either as a principal or secondary actor, noting that:
 - a. membership in an organization will never on its own be sufficient to establish individual responsibility;
 - b. individual responsibility as a secondary actor requires that the individual **intentionally and knowingly make a substantial and direct contribution to the criminal acts** that constitute war crimes, crimes against peace or crimes against humanity.
 - d) Identify the **physical and mental elements** of the crime in question and ensure that those elements are present;
 - e) Analyze possible **defenses** because if a defense is plausibly available, there cannot be serious reasons for considering a crime has been committed.

⁴ *Immigration and Refugee Protection Act*, RSC 2001, c. 27, Schedule A.

⁵ *Zurich*, note 3 *supra*.

⁶ VCTL 1155 UNTS 331, Article 31 [Respondent’s Authorities, Tab 5].

⁷ *Singh v. Canada (MEI)*, [1985] 1 SCR 177 [Intervener CCR’s Authorities, Tab 22].

B. The CCR Test Elaborated

B.1 “Serious reasons for considering”

8. As in all areas of law, it is crucial to apply the applicable evidentiary standard – in this case, the “serious reasons for considering” standard – correctly to ensure accuracy in decision-making. When an erroneously low standard of proof is incorporated in criminal law, innocent people are convicted. When an improperly low standard is applied to refugee claimants, they are wrongfully exposed to a risk of persecution.
9. The Canadian jurisprudence⁸ on the “serious reasons for considering” standard is sharply inconsistent with that of other jurisdictions and the UNHCR recommendations which state that “the standard of proof should be high enough to ensure that *bona fide* refugees are not excluded erroneously. Hence, the ‘balance of probabilities’ is too low a threshold.”⁹
10. Recently, the U.K. Supreme Court in *Al-Sirri* concurred with the position of the UNHCR, providing that: (1) the “serious reasons” standard is “stronger” than the reasonable grounds standard used elsewhere; (2) the evidence from which those reasons are derived must be “clear and credible” or “strong”; (3) “considering” is stronger than “suspecting” and is also stronger than “believing”; and (4) that the decision-maker need not be satisfied beyond a reasonable doubt. Finally, moving somewhat beyond the UNHCR’s position, the UKSC noted that “the reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is...”¹⁰

⁸ In *Ramirez v. Canada (MEI)*, [1992] 2 FC 306 (FCA) at para. 5, [Appellant’s Authorities, Tab 30] the Federal Court of Appeal concluded that “serious reasons for considering” involved a lower standard of proof than the civil standard of a balance of probabilities. In *Moreno v. Canada (MEI)*, (1993) 107 DLR (4th) 424 (FCA), at para. 16, [Appellant’s Authorities, Tab 29] this interpretation of the standard was, if anything, lowered further, as the court noted that the standard is “well below that required in criminal law...or civil law.” This understanding of the “serious reasons for considering” standard as equating to something decidedly lower than the balance of probabilities standard has taken root in subsequent Canadian jurisprudence: see i.e. *Florian v. Canada (MCI)*, (2002) 220 FTR 37, at para. 15 [Intervener CCR’s Authorities, Tab 8].

⁹ UN High Commissioner for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, at para. 107, [emphasis added] [Respondent’s Authorities Tab 94].

¹⁰ *Al-Sirri (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); DD (Afghanistan) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54 at para. 75 [Intervener CCR’s Authorities, Tab 7].

11. This approach to the evidentiary standard means that factual findings on exclusion issues must be based on reliable evidentiary sources and *not* on speculative inferences. Disbelieving testimony cannot be the sole basis for exclusion.¹¹

B.2 International Instruments

12. The identification of the specific international crime for which the refugee claimant is believed to be individually responsible is a crucial first step in an Article 1F(a) analysis. Once the crime is articulated, the decision maker must identify which international instrument enumerates it as a war crime, a crime against peace or a crime against humanity. Some claimants have been excluded for involvement in acts that would not be considered international crimes, or, more frequently, on the basis of unspecified serious human rights abuses.¹²

13. The Convention's drafters deliberately framed Article 1F(a) to ensure that refugee law would keep pace with the development of international criminal law.¹³ Article 1F(a) must be read in tandem with settled international criminal law; it is not appropriate given the human rights objectives of the Refugee Convention to rely on aspects of international criminal law that are still contested. If the law is not settled, the serious reasons for considering standard cannot be met. Refugee decision making does not provide an adequate procedural setting for developing and refining international criminal law concepts. Refugee law must follow rather than lead these developments.

¹¹ In the unreported case TA1-01371, 16 January 2004 [**Intervener CCR's Authorities, Tab 21**] the Tribunal disbelieved the claimant's testimony that he refused to fight with the Angolan army after being rounded up as a teenager. On the basis of documentary evidence that many children were forced into combat, the tribunal did not believe his account of resistance and thus found him complicit in the actions of the army.

¹² For example, in *Re(X)*, TA1-01371, 16 January 2004 (see note 11 supra) an IRB board member stated (at 9): "Based on documentary evidence, however, the panel finds, that there are serious reasons to consider that the claimant engaged in human rights violations along with the rest of the military. The claimant was thus complicit in crimes against humanity." See also *Martinez De Quijano v. Canada (MCI)*, 2007 FC 910 at para. 19 [**Intervener CCR's Authorities, Tab 11**]. It is possible that an appropriate crime could have been identified in these cases, but the analysis was not done.

¹³ See A Grahl-Madsen, *The Status of Refugees in International Law* (1966) at 276 [**Intervener CCR's Authorities, Tab 25**]; N. Robinson *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) at 66 [**Intervener CCR's Authorities, Tab 26**]. This politically neutral formation represented a compromise between the German delegate who opposed the adoption of the Charter of the International Military Tribunal, and the majority of delegates who wanted a strong stand against the sheltering of war criminals. See exchanges at the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons July 13, 14 and 17, 1951: A/CONF.2/SR.19, statement of Mr. von Trutzschler of FR Germany [**Intervener CCR's Authorities, Tab 2**]; A/CONF.2/SR.21, statement of Mr. Herment of Belgium [**Intervener CCR's Authorities, Tab 3**]; A/CONF.2/SR.24, see Statement of Mr. von Trutzschler of FR Germany [**Intervener CCR's Authorities, Tab 4**]. See also committee on the Status of Refugees and Stateless Persons doc from 30 Jan 1950, E/AC.32/SR.5, statement of Mr. Rain, at para 73 [**Intervener CCR's Authorities, Tab 1**].

14. There is an array of international instruments defining war crimes, crimes against peace and crimes against humanity with which decision makers must be familiar.¹⁴ Not all human rights abuses, therefore, fit within Article 1F(a), however egregious they may be.¹⁵

B.3 Individual Responsibility

15. An individual commits an international crime either as the principal perpetrator or as a secondary actor. A person who is not the direct perpetrator of a crime can still be individually criminally responsible—and the modes of individual criminal responsibility¹⁶ as a secondary actor are at the heart of this appeal.

16. In a 2011 ruling of the Special Tribunal for Lebanon, the late President Cassese outlined the objective and subjective elements of secondary liability (in this case ‘aiding and abetting’) under international criminal law. The objective element is assistance or support that has ‘*substantial effect*’ on the perpetration of the crime; and the subjective element comprises *knowledge* the principal perpetrator will use the assistance to commit the crime and *intent* to help or encourage the crime.¹⁷

17. Cassese’s analysis closely tracks the descriptions of secondary liability in the Rome Statute, which focuses on ‘aiding’, ‘abetting’ and ‘assisting’,¹⁸ and on intentional contribution to a group criminal activity (with the aim of furthering criminal activity or knowledge of the group’s intent to commit an international crime).

18. Thus in applying Article 1F(a), secondary responsibility should apply to those who intentionally and knowingly make a substantial and direct contribution to war crimes, crimes against peace or crimes against humanity.

¹⁴ The *Rome Statute of the International Criminal Court A/CONF. 183/9*, 17 July 1998, as amended [**Appellant’s Authorities, Tab 2**] provides the most recent and comprehensive enumeration of war crimes and crimes against humanity. Crimes against peace are defined as crimes of aggression at international law. See Articles 7 & 8.

¹⁵ It is also important to note in this context that ‘terrorism’ in a general sense is not an international criminal act. See S Aiken, “Manufacturing ‘Terrorists’: Refugees, National Security and Canadian Law” (2000) 19 *Refuge* 54 [**Intervener CCR’s Authorities, Tab 24**]; A Kaushal and C Dauvergne “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23(1) *Intl J. Refugee L* 54 at 78 [**Appellant’s Authorities, Tab 156**].

¹⁶ The Rome Statute of the International Criminal Court, *supra*, note 14, which the CCR agrees has become the leading statement regarding individual responsibility for international criminal acts, does not use the term ‘complicity’, and focuses instead on individual responsibility (Rome Statute, Article 25(3)).

¹⁷ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL-11-01/I/AC/R176 bis at paras 225-7 [Special Tribunal for Lebanon], [**Appellant’s Authorities, Tab 110**].

¹⁸ Article 25(3)(c).

19. This test will avoid exclusion of refugee claimants who lack agency in respect of a crime,¹⁹ and as well as the pitfalls of a so-called “guilt-by-association” analysis.²⁰ In determining the individual criminal responsibility, membership in or association with an organization will never, without more, be sufficient to constitute commission of a crime. This point has recently been emphasized by the Supreme Courts of the United Kingdom and New Zealand and has been highlighted as a key reason for those courts to criticize the Canadian jurisprudence.²¹
20. This formulation fits with leading international refugee law authorities as well. The Supreme Court of the United Kingdom addressed the question of the extent of individual responsibility in 2010. Lord Brown summarized the Court’s response:
- Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him *voluntarily* to have contributed *in a significant way* to the organization’s ability to pursue its purpose in committing war crimes, *aware that his assistance will in fact further that purpose*.²²
21. The New Zealand Supreme Court in a similar case, also emphasized the importance of the Rome Statute and the need to consider whether an individual has ‘contributed significantly’ to the commission of an international crime in assessing 1F(a) exclusions.²³ Likewise, in the United States, it is a well-established principle that guilt-by-association is not an acceptable way of determining that someone is a persecutor and therefore barred from refugee status.²⁴

¹⁹ Examples of individuals excluded by this doctrine include a woman who took food, medication and weapons to the Salvadoran FMLN rebels, and also arranged meetings (*Aguilar v. Canada (MCI)*, (2000) 190 FTR 212—[**Intervener CCR’s Authorities, Tab 5**]; a man who had been a leader of one of 500 youth wings of the Bangladeshi Awami League (*Chowdhury* [2003] 194 F.T.R. 15 [**Appellant’s Authorities, Tab 45**]). This finding was overturned by the Federal Court on judicial review, but see the later case of the same name [2006] (*MCI*) 2006 FC 139, where exclusion was upheld on the same facts); a Sri Lankan man who worked as a journalist for a newspaper that published LTTE propaganda, who had authored stories he was directed to by LTTE members (*Murugamoorthy v. Canada (MPSEP)* 2008 FC 985-[**Appellant’s Authorities, Tab 61**]; and a Ugandan typist who worked for fifteen months for that country’s Internal Security Organization (*Mutumba v Canada (Minister of Citizenship and Immigration)* 2009 FC 1-[**Intervener CCR’s Authorities, Tab 15**]). The claimant was ultimately arrested by the ISO for leaking information to the media about the death in custody of a rebel.

²⁰ As has essentially happened in numerous Canadian cases – see *Osagie v. Canada (MCI)*, (2000) 186 FTR 143 [**Intervener CCR’s Authorities, Tab 16**]—private excluded because he was a member of the Nigeria military and billeted near detention centre; *Osayande v. Canada(MCI)* 2002 FCT 368 (CanLII)[**Intervener CCR’s Authorities, Tab 17**] —cook or regular soldier in Nigerian army; *Allel v. Canada(MCI)* 2002 FC 370 [**Intervener CCR’s Authorities, Tab 6**]—chauffeur for Algerian police; *Khan v. Canada (MCI)* (2003) 231 FTR 33 [**Intervener CCR’s Authorities, Tab 10**] —member of Afghan Air Force; *Fabela v. MCI* 2005 FC 1028 [**Appellant’s Authorities, Tab 47**]—member of Mexican Federal Judicial Police. In *Fabela*, the court stated: “It is now widely recognized that a person can be held liable for such crimes as an accomplice, even though the person has not personally perpetrated the acts himself or herself. The tolerance of such crimes is sufficient to be held liable”, at para 19.

²¹ *R (JS) v. Secretary of State for the Home Department* [2010] UKSC 15at 42-44 and 55 [**Appellant’s Authorities, Tab 87**]; at *Attorney-General (Minister of Immigration) v. Tamil X* [2010] NZSC 107 paras 58-70 [**Appellant’s Authorities, Tab 103**].

²² *R (JS) supra note 21*, at para 38, emphasis added.

²³ *Tamil X*, supra note 21, at para 70.

²⁴ *Gao v. Atty General* 500 F.3d 93, (2nd Circuit 2007)-[**Appellant’s Authorities, Tab 106**].

22. The problematic international criminal law doctrine known as the ‘third’ or ‘extended’ form of joint criminal enterprise should not be used in exclusions under Article 1(F)(a). It is not a settled mode of commission and is not ‘defined in an international instrument’ as required by Article 1(F)(a), and was not included in the authoritative Rome Statute.²⁵

B.4 Physical and Mental Elements of a Crime

23. Article 1F(a) requires that there be serious reasons for considering that the individual ‘*has committed*’ a listed crime. This requirement engages the analytic framework of the criminal law, so that the decision maker must find evidence for both the *actus reus* and the *mens rea* for the crime in question. This applies in cases of direct perpetration and cases involving allegations of secondary liability.

24. This core principle of criminal law is the reason why mere membership in a group cannot lead to exclusion. Both the *actus reus* and the requisite *mens rea* must correlate to the crimes alleged to have been committed by an organization, rather than to its general operations. Where an individual lacks knowledge that his/her actions will assist the perpetrator in the commission of a crime, the subjective intent prerequisite to a finding of liability has not been made out. While it is not necessary that the individual know the specific crime to be committed, the essential point is that the *mens rea* component of secondary liability may only be established where an individual intentionally provides assistance to an individual or organization *with the knowledge* that this assistance will be used (or is likely to be used) to commit a crime.²⁶

25. There has been an unfortunate tendency, however, for decision-makers in Canada to exclude refugee claimants without recourse to *any* analysis of these essential components of Article

²⁵ William, A., Schabas, *An Introduction to the International Criminal Court*, 4th edn (2011) discusses the relationship between the Rome Statute and customary law at 93 [Respondent’s Authorities, Tab 150]. See also *R (JS) v. Secretary of State for the Home Department*, supra, note 21, at para 9, “...the ICC Statute, ratified as it now is by more than 100 States and standing as now surely it does as the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes.” Lead judgment per Lord Brown. At its ‘best’ extended joint criminal enterprise doctrine would be encompassed in the CCR’s test; see Joseph Rikhof, “Complicity in International Criminal Law and Canadian Refugee Law: A Comparison” (2006) 4 *Journal of International Criminal Justice* 702 at 709 [Appellant’s Authorities, Tab 157], “The participation in the enterprise must be significant, meaning an act or omission that makes an enterprise efficient or effective; e.g. a participation that enables the system to run more smoothly or without disruption.”

²⁶ Special Tribunal for Lebanon decision, supra note 17 at para. 227.

1F(a).²⁷ Any test for complicity must entrench an approach that directs the decision maker's analysis to: i) the *acts* of the refugee claimant; ii) the *intent* that animates such acts; and iii) the connection of the two to the crimes in question. Examples like the one cited above, have arisen with disturbing frequency.

B.5 Defences

26. Finally, the decision maker must consider whether any defenses are available on the facts. If a defense plausibly exists, there cannot be serious reasons for considering that the individual has committed an international crime. The traditional defenses to Article 1F(a) exclusion are: superior orders, duress, mental incapacity (including immaturity), self-defense and defense of others.²⁸

C. The need for a new test

27. Article 1F(a) exclusion decisions are made by bureaucratic decision makers, most of whom are not required to have legal training.²⁹ Our search of publicly available decisions relating to Article 1F(a) located 363 decisions, 298 of which considered the question of complicity. The predominance of secondary liability questions, and the decision making setting mean that it is imperative to have a workable and easily understood test. The CCR's test meets this standard.

28. The UNHCR guidelines for interpreting Article 1F(a) stress the need for 'great caution' in applying the exclusion clauses and for '...a full assessment of the individual circumstances of the case.'³⁰ The guidelines also state that having been a member of a repressive government or an

²⁷ A clear example of this arises in the case of Re(X), TB0-10297, May 24, 2012, unreported, [**Intervener CCR's Authorities, Tab 20**], which was recently heard by the Immigration and Refugee Board (IRB) involving facts somewhat similar to those that arise in the case at bar. (Note: the name of the refugee claimant has not been reproduced at the claimant's request, as he is fearful that the public disclosure of his name could endanger either him or his family). X was, it is no exaggeration to say, a desk clerk with diplomatic credentials. He worked in an embassy, processing application forms for visitor visas. He did not have final decision-making authority over who was granted a visa. Nevertheless, the IRB found that X was complicit in the crimes of his state and rejected his refugee claim on the basis of Article 1F(a) of the Convention. In arriving at this conclusion, the presiding member stated (at para. 24): "...[I]t is not only the fact of working for an organization that gives rise to complicity, but rather knowingly contributing to these activities in any manner whatsoever may also give rise to complicity."

²⁸ UNHCR Background Note, *supra* note 8 at 25-27.

²⁹ Members of the Refugee Protection Division of the IRB unlike members of the Refugee Appeal Division and Immigration Appeal Division, are not subject to a statutory requirement that at least 10% of them be lawyers with at least five years' experience. See IRPA, as amended, ss.153(1) and 153(4).

³⁰ *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR HCR/GIP/03/05 4 September 2003 at para 2 [**Respondent's Authorities, Tab 95**].

organization involved in unlawful violence ‘...does not in itself entail liability for excludable acts.’³¹

29. Many of the leading Canadian cases on Article 1F(a) date from the early 1990s. The test set out by the Federal Court of Appeal in *Ramirez* focuses on “personal and knowing participation in persecutorial acts.”³² A confusing layer of case law since *Ramirez* has resulted in unwieldy doctrine culminating in the proposition of ‘complicity by association’—a concept which is contrary to the intention of the framers of the exclusion clauses, inconsistent with international criminal law and inimical with the humanitarian purposes of the Convention itself.³³ Similarly, some cases have gone so far as to query whether national governments may be considered organizations with a ‘limited and brutal purpose’, a position that is patently illogical.³⁴ Adopting a wholly new test at this point in time is the best way to address the myriad interrelated errors in reasoning which have arisen, and to signal a clear new direction.

30. The Federal Court of Appeal judgment in this appeal has already been applied in a series of rulings that would not meet the CCR’s proposed test because they rely on ‘complicity by association’,³⁵ including one particularly problematic judgment asserting that membership in certain organizations raises a ‘rebuttable presumption of complicity.’³⁶

D. Consequences of Exclusion

31. When someone is excluded from refugee protection in Canada, they almost certainly face removal, potentially to persecution, with little recourse. Excluded persons are, almost by definition, “inadmissible” to Canada under immigration law, meaning that virtually all other avenues for obtaining any kind of status in the country are foreclosed.³⁷

³¹ *Ibid* at para 19.

³² *Ramirez v. Canada (MEI)*, *supra*, note 8, at para. 15.

³³ See the Federal Court of Appeal decision in the case at bar, at para 58 [Appellant’s Authorities, volume 1, page 165]

³⁴ *Thomas v. Canada (MCI)* (2007) 317 FTR 6 [Appellant’s Authorities, Tab 74]; *Re X*, 2006 CanLII 62401 (IRB) [Intervener CCR’s Authorities, Tab 19]. While overturned on judicial review, this was the recent finding of the IRB in *Rutayisire v. Canada*, 2010 FC 1168 (CanLII), [Appellant’s Authorities, Tab 69].

³⁵ *Castro v. Canada (MCI)* 2011 FC 1190 [Appellant’s Authorities, Tab 75]; *Mupenzi v. Canada (MCI)* 2012 FC 1304 [Intervener CCR’s Authorities, Tab 14]; *Kuruparan v. Canada (MCI)* 2012 FC 745 [Appellant’s Authorities, Tab 54]; *Multani v. Canada (MCI)* (2102)403 FTR 148 [Appellant’s Authorities, Tab 60]; *Jasarevski v. Canada (MCI)* 2012 FC 1145 [Intervener CCR’s Authorities, Tab 9]–, *Priyashantha v. Canada (MCI)*, 2012 FC 1340 [Intervener CCR’s Authorities, Tab 18]

³⁶ *MCI v. Duroseau* 2012 FC 342 [Intervener CCR’s Authorities, Tab 13]

³⁷ See s.14 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The proposed *Faster Removal of Foreign Criminals Bill* would align Article 1F(a) exclusion even more rigidly with inadmissibility; See Bill C-43 of 2011-12, *An Act to Amend the Immigration and Refugee Protection Act*.

32. In the CCR's experience, overly broad readings of Article 1F(a) also have other far-reaching practical consequences. When one family member is unfairly excluded, typically a father, other members of the family face the invidious choice of remaining safe in Canada but permanently separated, or returning to a risk of persecution. Or, in another variation, when only one member of a family has been able to afford the financial and human risks involved in coming to Canada, unjust exclusion means that remaining family members cannot be protected from persecution via family sponsorship. Individuals excluded under Article 1(F)(a) have on the basis of this exclusion alone been publically named as war criminals by the Canada Border Services Agency.

PART IV – COSTS

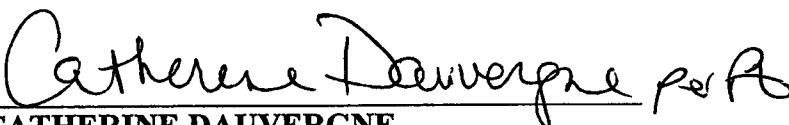
33. The CCR seeks no costs and respectfully requests that none be awarded against it.

PART V – ORDER SOUGHT

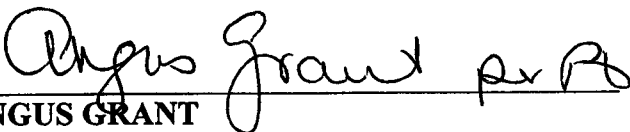
34. The CCR takes no position on the disposition of the appeal but respectfully requests that it be determined in light of the submissions set out above. The CCR requests leave to be heard in oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

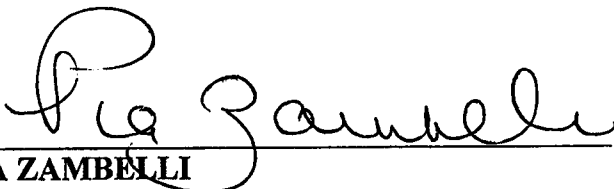
DATED this 17th day of December, 2012.



CATHERINE DAUVERGNE



ANGUS GRANT



PIA ZAMBELLI

Counsel for the intervener, the Canadian Council for Refugees

PART VI – TABLE OF AUTHORITIES

INTERNATIONAL MATERIALS	CITED AT PARAGRAPH(S)
<i>1969 Vienna Convention on the Law of Treaties</i> 1155 UNTS 331	5
<i>Rome Statute of the International Criminal Court</i> A/CONF. 183/9, 17 July 1998 (as amended)	14,15
<i>United Nations Convention Relating to the Status of Refugees</i> , 28 July 1951, 189 UNTS 150	1
<i>Travaux préparatoires</i> (Refugee Convention) :Ad Hoc Committee on Statelessness and Related Problems, First Session, held 18 January 1950, E/AC.32/SR.5, at para 73	13
<i>Travaux préparatoires</i> (Refugee Convention): UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting held July 13, 1951, A/CONF.2/SR.19, statement of Mr. von Trutzschler of FR Germany	13
<i>Travaux préparatoires</i> (Refugee Convention): UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty First Meeting held July 14, 1951, A/CONF.2/SR.21, statement of Mr. Herment of Belgium	13
<i>Travaux préparatoires</i> (Refugee Convention): UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting held July 17, 1951, A/CONF.2/SR.24, statement of Mr. von Trutzschler of FR Germany	13

Table of Authorities

CASES	CITED AT PARAGRAPH(S)
<i>Aguilar v. Canada (MCI)</i> , (2000) 190 FTR 212	19
<i>Allel v. Canada (MCI)</i> , 2002 FC 370	19
<i>Al-Sirri (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)</i> ; <i>DD (Afghanistan) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)</i> , [2012] UKSC 54	10
<i>Attorney-General (Minister of Immigration) v. Tamil X</i> , [2010] NZSC 107	19,20
<i>Canada (Attorney General) v. Ward</i> , [1993] 2 S.C.R. 689	1
<i>Castro v. Canada (MCI)</i> , 2011 FC 1190	30
<i>Chowdhury v. Canada (MCI)</i> , [2003] 194 F.T.R. 15	19
<i>Chowdhury v. Canada (MCI)</i> , 2006 FC 139	19
<i>Fabela v. Canada (MCI)</i> , 277 FTR 20	19
<i>Florian v. Canada (MCI)</i> , (2002) 220 FTR 37	9
<i>Gao v. Atty General</i> 500 F.3d 93, (2 nd Circuit 2007)	21
<i>Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging</i> STL-11-01/I/AC/R176b	16,17,24
<i>Jasarevski v. Canada (MCI)</i> , 2012 FC 1145	30
<i>Kathiripillai</i> , (2011) 398 FTR 178	30
<i>Khan v. Canada (MCI)</i> , 231 FTR 33	19
<i>Kuruparan v. Canada (MCI)</i> , 2012 FC 745	30
<i>Martinez De Quijano v. Canada (MCI)</i> , 2007 FC 910	12
<i>Mazima v. Canada (MCI)</i> , 2012 FC 698	30
<i>MCI v. Duroseau</i> , 2012 FC 342	30
<i>Moreno v. Canada (MCI)</i> , (1993) 107 DLR (4th) 424 (FCA)	9
<i>Multani v. Canada (MCI)</i> , (2012) 403 FTR 148	30

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CASES	PARAGRAPH(S)
<i>Mupenzi v. Canada (MCI)</i> , 2012 FC 1304	30
<i>Murugamoorthy v. Canada (MCI)</i> , 2008 FC 985	19
<i>Mutumba v. Canada (MCI)</i> , 2009 FC 19	19
<i>Nsika v. Canada (MCI)</i> , 2012 FC 1026	30
<i>Osagie v. Canada (MCI)</i> , 186 FTR 143	19,20
<i>Osayande v. Canada (MCI)</i> , 2002 FCT 368	20
<i>Pushpanathan v. Canada (Minister of Citizenship and Immigration)</i> , [1998] 1 SCR 982	1
<i>Priyashantha v. Canada (MCI)</i> , 2012 FC 1340	30
<i>R (JS) v. Secretary of State for the Home Department</i> , [2010] UKSC 15	19,20,22
<i>Re (X)</i> , 2006 CanLII 62402 (IRB)	29
<i>Re (X) TBO-1097(Immigration and Refugee Board)</i> : unreported	25
Re(X), TA1-01371, 16 January 2004 IRB, unreported	11,12
<i>Ramirez v. Canada (MEI)</i> , [1992] 2 FC 306 (FCA)	9,29
<i>Rutayisire v. Canada (Citizenship and Immigration)</i> , 2010 FC 1168	29
<i>Singh v. Minister of Employment and Immigration</i> , [1985] 1 SCR 177	6
<i>Thomas v. Canada (MCI)</i> , (2007) 317 FTR 6	29
<i>Zurich Insurance Co. v. Ontario (Human Rights Commission)</i> , [1992] 2 SCR 321	1,5

Table of Authorities

SECONDARY SOURCES	CITED AT PARAGRAPH(S)
Aiken, Sharryn J. "Manufacturing 'Terrorists': Refugee National Security and Canadian Law", (2001) 19:3 <i>Refuge</i>	14
Grahl-Madsen, A. <i>The Status of Refugees in International Law</i> (1966)	13
Kaushal, Asha and Catherine Dauvergne. 'The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions' (2011) 23:1 <i>IJRL</i>	14
Robinson, N. <i>Convention relating to the Status of Refugees: Its History, Contents and Interpretation</i> (1953)	13
Rikhof, Joseph. "Complicity in International Criminal Law and Canadian Refugee Law: A Comparison" <i>JICJ</i> 4 (2006) 702-722	22
Schabas, William A. <i>An Introduction to the International Criminal Court</i> , 4 th edn (2011) at 93	22
UNHCR, <i>Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees</i> , UNHCR HCR/GIP/03/05 4 September 2003	28
<i>UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees</i> , UNHCR HCR/GIP/03/05 4 September 2003	9,20

PART VII – STATUTES AND REGULATIONS

<i>Immigration and Refugee Protection Act</i> (S.C. 2001, c. 27)	<i>Loi sur l'immigration et la protection des réfugiés</i> (L.C. 2001, ch. 27)
<p>96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.</p>	<p>96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :</p> <p>a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;</p> <p>b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.</p>
<p>97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally</p> <p>(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or</p> <p>(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if</p> <p>(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,</p> <p>(ii) the risk would be faced by the person in every part of that country</p>	<p>97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :</p> <p>a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;</p> <p>b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :</p> <p>(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,</p> <p>(ii) elle y est exposée en tout lieu de ce pays alors que d'autres</p>

<p>and is not faced generally by other individuals in or from that country,</p> <p>(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and</p> <p>(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.</p> <p>(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.</p>	<p>personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,</p> <p>(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,</p> <p>(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.</p> <p>(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.</p>
<p>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.</p>	<p>98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.</p>
<p>153. (1) The Chairperson and members of the Refugee Appeal Division and Immigration Appeal Division</p> <p>...</p> <p>(4) The Deputy Chairperson of the Immigration Appeal Division and a majority of the Assistant Deputy Chairpersons of that Division and at least 10 per cent of the members of the Divisions referred to in subsection (1) must be members of at least five years standing at the bar of a province or notaries of at least five years standing at the Chambre des notaires du Québec.</p>	<p>153. (1) Pour ce qui est du président et des commissaires de la Section d'appel des réfugiés et de la Section d'appel de l'immigration</p> <p>...</p> <p>(4) Le vice-président de la Section d'appel de l'immigration, la majorité des vice-présidents adjoints de cette section et au moins dix pour cent des commissaires visés au paragraphe (1) sont obligatoirement inscrits, depuis au moins cinq ans, au barreau d'une province ou membres de la Chambre des notaires du Québec.</p>

<p>SCHEDULE</p> <p>(Subsection 2(1))</p> <p>SECTIONS E AND F OF ARTICLE 1 OF THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES</p> <p>[...]</p> <p>F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:</p> <p>(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;</p> <p>(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;</p> <p>(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.</p>	<p>ANNEXE</p> <p>(paragraphe 2(1))</p> <p>SECTIONS E ET F DE L'ARTICLE PREMIER DE LA CONVENTION DES NATIONS UNIES RELATIVE AU STATUT DES RÉFUGIÉS</p> <p>[...]</p> <p>F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :</p> <p>a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;</p> <p>b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;</p> <p>c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.</p>
<p><i>Immigration and Refugee Protection Regulations (SOR/2002-227)</i></p> <p>14. For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 34(1)(c) of the Act, if either the following determination or decision has been rendered, the findings of fact set out in that determination or decision shall be considered as conclusive findings of fact:</p> <p>(a) a determination by the Board, based on findings that the foreign national or permanent resident has engaged in terrorism, that the foreign national or</p>	<p><i>Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)</i></p> <p>14. Les décisions ci-après ont, quant aux faits, force de chose jugée pour le constat de l'interdiction de territoire d'un étranger ou d'un résident permanent au titre de l'alinéa 34(1)c) de la Loi :</p> <p>a) toute décision de la Commission, fondée sur les conclusions que l'intéressé a participé à des actes terroristes, qu'il est visé par la section F</p>

<p>permanent resident is a person referred to in section F of Article 1 of the Refugee Convention; or</p> <p>(b) a decision by a Canadian court under the <i>Criminal Code</i> concerning the foreign national or permanent resident and the commission of a terrorism offence.</p>	<p>de l'article premier de la Convention sur les réfugiés;</p> <p>b) toute décision rendue en vertu du <i>Code criminel</i> par un tribunal canadien à l'égard de l'intéressé concernant une infraction de terrorisme.</p>
<p><i>Canadian Charter of Rights and Freedoms</i> PART I OF THE CONSTITUTION ACT, 1982</p> <p>Life, liberty and security of person</p> <p>7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.</p>	<p><i>Charte canadienne des droits et libertés</i> PARTIE I DE LA LOI CONSTITUTIONNELLE DE 1982</p> <p>Vie, liberté et sécurité</p> <p>7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.</p>