


WORKING PAPER SERIES/DOCUMENTS DE TRAVAIL

The Developing Jurisprudence on Exclusion  
Under Article 1F(a) of the 1951 Convention in  
Selected Western Industrialized States

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# THE DEVELOPING JURISPRUDENCE ON EXCLUSION UNDER ARTICLE 1F(A) OF THE 1951 CONVENTION IN SELECTED WESTERN INDUSTRIALIZED STATES

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## Editor's Note

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# TABLE OF CONTENTS

Introduction .....	2
The Significance of the Exclusion Clauses in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and other Refugee Rights Instruments.....	3
The UNHCR's Recommended Approach to the Exclusion Clauses .....	5
Recent Leading Western Industrialized Superior Courts Jurisprudence on Article 1F(a).....	9
<i>BVerwG</i> , Judgment of 19 November 2013 – <i>BVerwG</i> 10 C 26.12, Federal Administrative Court, or <i>Bundesverwaltungsgericht</i> , Supreme Administrative Court.....	9
Case Summary.....	9
Reasons for Judgement .....	10
<i>Annachamy v. Holder</i> , 686 F. 3d 729 – United States Court of Appeals, 9th Circuit, July 3, 2012 .....	11
Case Summary.....	11
Reasons for Judgement .....	12
<i>R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)</i> [2010] UKSC 15.....	13
Case Summary.....	13
Reasons for the Judgement .....	14
<i>The Attorney-General (Minister of Immigration) v. Tamil X and Refugee Status Appeals Authority</i> , SC 107/2009 [2010] NZSC 107 (27 Aug. 2010).....	15
Case Summary.....	15
Reasons for Judgement .....	15
<i>Ezokola v. Canada</i> (Citizenship and Immigration), 2013, SSC 40. ....	16
Case Summary.....	16
Reasons for Judgement .....	16
Conclusions.....	18

## INTRODUCTION

This article reviews the significance of the Article 1F, the so-called Exclusion Clauses, that are found in a number of international refugee rights instruments and the 1951 Convention relating to the Status of Refugees and its 1967 Protocol<sup>1</sup>. The focus of the article is specifically on Article 1F(a), the exclusion from Convention refugee status of those who have committed a crime against peace, a war crime or a crime against humanity. The importance of the exclusion clause in a world that is wracked by war and generalized violence is entirely self-evident. It may be too obvious a point to make that in a time of escalating and record setting numbers of refugees in the world today the significance of the Exclusion Clauses is not likely to diminish, but, more probably likely to increase. The UNHCR's supervisory role entails a number of functional responsibilities, including, providing guidance to States and refugee law decision-makers on the application and interpretation of international refugee law. The article outlines the UNHCR's stance with respect to the use of the Exclusion Clause in determining who is a Convention refugee, but, also, within its own statute and mandate, who is a statutory or mandate refugee. The various legal principles on exclusion from refugee protection that have been discerned by the UNHCR in its Guidelines are reviewed and considered. The article then considers five leading Article 1F(a) judgements of the Superior or Supreme Courts in Germany, the United Kingdom, New Zealand, the United States of America, and Canada, in an effort to distil the general development of the application and interpretation of the Exclusion Clauses in these countries. It is important to underscore that Western Industrialized States, indeed, likely all States in the world today, draw upon each others judgements respecting international refugee law. The trend in the development of the application and interpretation of Article 1F(a) as evident in these five leading judgements will likely impact, in various ways, the judgements of other jurisdictions on the Exclusion Clauses. The article concludes with some general reflections on the application and interpretation of the Exclusion Clauses into the foreseeable future and argues that there appears to be a convergence in the application and interpretation of Article 1F(a) in Western Industrialized States. This augurs well for greater consistency in deciding the exclusion of those refugee claimants who fall under Article 1F(a).

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<sup>1</sup> *Convention relating to the Status of Refugees*, Geneva, 28 July 1951, in force 22 April 1954, 1989 UNTS 137 and the *Protocol relating to the Status of Refugees*, New York, 31 January 1967, in force 4 October 1967, 19 UNTS 6223m 6257.



# THE SIGNIFICANCE OF THE EXCLUSION CLAUSES IN THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL AND OTHER REFUGEE RIGHTS INSTRUMENTS.

What is the principal role of Article 1F of the *1951 Convention relating to the Status of Refugees* and its 1967 *Protocol*, if not to maintain the integrity of the asylum process? It is quite banal to note that those who persecute others should not be given international protection in the form of Convention refugee status.<sup>2</sup> Indeed, the Exclusion Clauses are a common feature of the regional refugee rights instruments.<sup>3</sup> In fact, serious breaches to international humanitarian law and international criminal law should invoke criminal charges and sanctions whether at the municipal level, through the use of universal jurisdiction, or the international level, through UN Special Courts and/or the International Criminal Court (ICC).<sup>4</sup>

Armed conflict and chronic generalized violence is prevalent throughout the world today. The well-known Uppsala Conflict Data Program has indicated that in 2014 there was one international armed conflict, 26 intrastate conflicts and 13 internationalized intrastate conflicts.<sup>5</sup> The extent of armed conflict is so vast and broad over the last thirty years that it covers more than three quarters of the globe.<sup>6</sup> Another indicator of the extent of war, armed conflicts and extreme violence is the number of armed groups and factions engaged in conflicts in each of the continents:

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<sup>2</sup> Article 1F. 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; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

<sup>3</sup> Article I(5) of the *1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa*; Article 12, Exclusion, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011* on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; Article 1(7) of the Asian-African Legal Consultative Organization (AALCO), "Final Text of the AALCO'S 1966 Bangkok Principles on Status and Treatment of Refugees" as adopted on 24 June 2001, at the AALCO's 40TH Session, New Delhi, India that states: "A person who, prior to his admission into the Country of refuge, has committed a crime against peace, a war crime, or a crime against humanity as defined in international instruments drawn up to make provisions in respect of such crimes or a serious non-political crime outside his country of refuge prior to his admission to that country as a refugee, or has committed acts contrary to the purposes and principles of the United Nations, shall not be a refugee." Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees* ("Bangkok Principles"), 31 December 1966, available at: <http://www.refworld.org/docid/3de5f2d52.html>. [accessed 17 July 2015]

<sup>4</sup> Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law*. (Dordrecht, The Netherlands: Republic of Letters Publishing BV, 2012), Conclusion, pp. 485-494.

<sup>5</sup> Uppsala Universitat, Uppsala Data Conflict Program, Armed Conflicts in 2014, UDCP, <http://www.pcr.uu.se/research/ucdp/>. [accessed July 10, 2015]

<sup>6</sup> Uppsala Universitat, UCDP Conflict Encyclopedia, [http://www.ucdp.uu.se/gpdatabase/search.php#\\_utma=1.1970331471.1390365762.1436581487.1436663630.14&\\_utmb=1.2.10.143.6663630&\\_utmc=1&\\_utmz=1.1436107608.12.9.utmcsr=google|utmccn=\(organic\)|utmcmd=organic|utmctr=\(not%20provided\)&\\_utmvl=&\\_utmk=241745026](http://www.ucdp.uu.se/gpdatabase/search.php#_utma=1.1970331471.1390365762.1436581487.1436663630.14&_utmb=1.2.10.143.6663630&_utmc=1&_utmz=1.1436107608.12.9.utmcsr=google|utmccn=(organic)|utmcmd=organic|utmctr=(not%20provided)&_utmvl=&_utmk=241745026). [accessed July 11, 2015]; Wars in the World, Map, <http://www.warsintheworld.com/?page=static1329446051>. [accessed July 11, 2015]

Africa – 27 countries and between 181 militias-guerrillas, separatist and anarchic groups.

Asia – 16 countries and between 149 militias-guerrillas, separatist and anarchic groups.

Europe – 9 countries and between 75 different militias-guerrillas, separatist and anarchic groups.

Middle East – 8 countries and between 218 different militias-guerrillas, separatist and anarchic groups.

Americas – 5 countries and between 25 drug cartels, militias-guerrillas, separatist and anarchic groups.<sup>7</sup>

This amounts to some 65 countries that are engaged in wars, broadly defined, with some 650 drug cartels, militias-guerrillas, separatist and anarchic groups.<sup>8</sup>

The principal cause of refugees in the world today is undoubtedly armed conflict and in 2014 just three countries accounted for more than half (53%) of the world's refugees: Syrian Arab Republic (3.88 million); Afghanistan (2.59 million); and Somalia (1.11 million).<sup>9</sup> The top ten source countries, which account for 77 percent of the world's refugees in 2014, were:

1. Syrian Arab Republic
2. Afghanistan
3. Somalia
4. Sudan
5. South Sudan
6. Democratic Republic of Congo
7. Myanmar
8. Central African Republic
9. Iraq
10. Eritrea<sup>10</sup>

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<sup>7</sup> Wars in the World, List of Ongoing Conflicts, <http://www.warsintheworld.com/?page=static1258254223>. [accessed July 11, 2015]

<sup>8</sup> Ibid.

<sup>9</sup> UNHCR, Global Trends, Forced Displacement in 2014, *World at War*, 2015., p. 3. <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=556725e69&query=Global%20Trends%202014>. [July 11, 2015]

<sup>10</sup> Ibid., p. 14.

It is evident that all of these countries are currently embroiled in protracted armed conflicts. They are the principal sources of the world's refugees and other forced migrants. It also suggests that the Exclusion Clauses are likely to get more attention, at all instances in the RSD process, in refugee receiving countries than, in the past. Hence, it is reasonable to expect that the Exclusion Clauses will increase in importance and not diminish in importance in years to come.

## THE UNHCR'S RECOMMENDED APPROACH TO THE EXCLUSION CLAUSES

The UNHCR has issued a number of Guidelines with respect to the application and interpretation of the Exclusion Clauses. The UNHCR's Guidelines are not binding but can be persuasive when they are referred to and applied by refugee law decision-makers. They are often cited by counsel in refugee hearings and appeals. The most recent issued *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* were issued on September 4, 2003.<sup>11</sup> The Guidelines summarize the *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (4 September 2003)*.<sup>12</sup> The Guidelines state that they are "intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as the UNHCR staff carrying out refugee status determinations in the field."<sup>13</sup>

The key issues related to the provision of these Guidelines are as follows:

The essential purpose of the Exclusion Clauses is "to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts."<sup>14</sup> The Guidelines unequivocally note that the "Exclusion Clauses must be applied 'scrupulously' to protect the integrity of the institution of asylum, as is recognized by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997."<sup>15</sup> Given the grave consequence of the exclusion clauses for any refugee claimant, the UNHCR states

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<sup>11</sup> *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, Original: English.

<sup>12</sup> *Ibid.*, p. 1.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, p. 2.

<sup>15</sup> *Ibid.*

that they should be applied with “great caution and only after a full assessment of the individual circumstances of the case.”<sup>16</sup> Therefore, the Exclusion Clauses ought to be always applied and interpreted in a restrictive manner.<sup>17</sup>

Moreover, UNHCR notes that the Exclusion Clauses should not be confused with Articles 32, Expulsion, and 33(2), Prohibition of Expulsion or Return (Refoulement), of the *1951 Convention relating to the Status of Refugees*.

Article 32 states, ***The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.***

Article 33(2) states, ***The benefit of the present provision (non-refoulement) may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.***

The UNHCR has underscored that the onus for making the case that the Exclusion Clauses apply in any refugee claim rests with the State.<sup>18</sup>

What happens to those refugee claimants who are excluded from Convention Refugee status? Depending on the nature of the offense the State may be obligated under international law to prosecute or extradite the person concerned. When a person is excluded from refugee status it means that the person “can no longer receive protection or assistance from the Office [of the High Commissioner for Refugees].”<sup>19</sup>

Under Article 1F(a) crimes against humanity includes, for example, “genocide, murder, rape and torture ... must be carried out as part of a widespread or systematic attack directed against the civilian population.”<sup>20</sup> These crimes can be committed in situations of armed conflict as well as in times of peace.

Article 1F(b) does not cover minor crimes. The following factors must be considered when “determining whether the offense is sufficiently serious to be covered under this section of the Exclusion Clauses: the

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., p. 3.

<sup>19</sup> Ibid., p. 4.

<sup>20</sup> Ibid.



nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime.”<sup>21</sup> Serious crimes should be considered non-political when other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed. When the act is clearly disproportionate to the alleged political objective, non-political motives are predominant.<sup>22</sup> Terrorist acts will most certainly fail the predominance test, since they are typically disproportionate to any political objective.

When crimes are capable of affecting international peace, security and peaceful relations between States and include serious and sustained violations of human rights then they would fall within the ambit of Article 1F(c).<sup>23</sup> For cases that involve a terrorist act the correct application of Article 1F(c) would entail an assessment of whether the act has an international impact both in terms of its gravity but also with respect to the implications for international peace and security.<sup>24</sup>

One of the most fundamental principles of criminal liability is that there must be individual responsibility in relation to a crime and there is no exception, of course, in the application of Article 1F. This necessitates that the person in question either committed or made a substantial contribution to the commission of the criminal act. However, the person need not have physically committed the criminal act since having instigated, aided, abetted and participated in a joint criminal enterprise can be sufficient.<sup>25</sup>

With respect to personal responsibility, the UNHCR takes the position that even though a person may have been a senior member of a repressive government or a member of an organization involved in unlawful violence does not in and of itself entail individual liability for excludable acts.<sup>26</sup>

The UNHCR has also taken the position that a proportionality test should be applied when applying Article 1F(b). It is deemed to be a fundamental principle that is found in many fields of international law. What this entails is that “the exclusion clauses must be applied in a manner that is proportionate to their objective, so that the gravity of the offence in question is weighted against the consequences of exclusion.”<sup>27</sup> A

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<sup>21</sup> Ibid., p. 5.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid., p. 6.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid., p. 7.

proportionality test is not normally required in the case of crimes against peace, crimes against humanity, and acts that fall within Article 1F(c), as the acts covered are so heinous. Nonetheless, it may apply to less serious war crimes under Article 1F(a).<sup>28</sup>

It is also important to emphasize that exclusion should not be based on mere membership of a particular organization alone. The UNHCR, nevertheless, points out that “a presumption of individual responsibility may arise where the organization is commonly known as notoriously violent and membership is voluntary.” But, even in these cases it would be necessary to examine the individual’s role and position in the organization, their activities with the organization, their ability to influence its activities and so on.<sup>29</sup>

Exclusion should, of course, follow rigorous procedural safeguards, given the serious consequences for the asylum applicant. It should also be dealt with in the context of regular refugee status determination procedures. And, it is advised that inclusion should be considered before exclusion, although it is acknowledged that there is no rigid formula.<sup>30</sup>

A key principle in the application and interpretation of the exclusion clauses is that the burden of proof rests with the State or when a refugee application is being decided under the UNHCR’s mandate, it would be the UNHCR.<sup>31</sup> However, the burden of proof is reversed when the refugee claimant has been indicted by an international criminal tribunal, or where individual responsibility for actions which give rise to exclusion is presumed.<sup>32</sup>

It goes without saying that in order to satisfy the standard of proof under Article 1F that there must be “clear and credible evidence.”<sup>33</sup> It is important to point out, however, that the criminal standard of proof need not be met. Further, exclusion cannot be based on evidence that cannot be challenged by the person concerned. The UNHCR underscores that, “Secret evidence or evidence considered in camera (where the substance is also concealed) should not be relied upon to exclude.”<sup>34</sup>

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid., p. 8.

<sup>30</sup> Ibid., p. 9.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

## RECENT LEADING WESTERN INDUSTRIALIZED SUPERIOR COURTS JURISPRUDENCE ON ARTICLE 1F(A)

The following five cases will be examined and analyzed to try to discern the broad trends in the development of the jurisprudence on Article 1F(a). The cases are drawn from Germany, the United States, the United Kingdom, New Zealand and Canada.

- ***BVerwG*, Judgment of 19 November 2013 – *BVerwG* 10 C 26.12, Federal Administrative Court, or *Bundesverwaltungsgericht*, Supreme Administrative Court**
- ***Annachamy v. Holder*, 686 F. 3d 729 – United States Court of Appeals, 9th Circuit, July 3, 2012**
- ***R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)* [2010] UKSC 15**
- ***The Attorney-General (Minister of Immigration) v. Tamil X and Refugee Status Appeals Authority*, SC 107/2009 [2010] NZSC 107 (27 Aug. 2010)**
- ***Ezokola v. Canada (Citizenship and Immigration)*, 2013, SSC 40.**

Each of these Superior Court or Supreme Court cases will be summarized, examined and analyzed in turn.

From the presentation of these five Article 1F(a) cases some of the general trends in the development of the application and interpretation of this subsection of the Exclusion Clauses will be discerned and highlighted.

Some concluding thoughts will be drawn from the examination and analysis of these cases.

### ***BVERWG*, JUDGMENT OF 19 NOVEMBER 2013 – *BVERWG* 10 C 26.12, FEDERAL ADMINISTRATIVE COURT, OR *BUNDESVERWALTUNGSGERICHT*, SUPREME ADMINISTRATIVE COURT**

#### CASE SUMMARY

The appellant was 35 year-old Turkish national of Kurdish ethnicity who came to Germany in June 2005 and made a claim for asylum. He asserted that he joined the militant arm of the PKK (Kurdistan Workers' Party) in 1999 and headed a PKK art and culture school. He also appeared as an artist in concerts that were broadcast by a Kurdish television station. From 2003 he continued his artistic work in the M. camp with the PKK and was responsible for culture (music lessons and group leadership).

The appellant's claim for asylum was denied, but, on appeal the Administrative Court ordered that the appellant should be granted refugee status. But, when on appeal to the Higher Administrative Court it denied the claim for asylum but, nonetheless, found that appellant should not be deported. The Higher Administrative Court did so on the grounds that the appellant was excluded from refugee status because of his membership in the PKK between 1999 and 2005 and that he had "otherwise participated in acts by the PKK that were in violation of the aims and principles of the United Nations." This finding was based on the appellant's "significant ideological and propagandistic support for a terrorist organization."

On further appeal to the Supreme Administrative Court of Germany, the court upheld the appeal on the grounds that the Higher Administrative Court could not find that the appellant participated in exclusionary acts without making a finding as to the terrorist acts committed specifically by the PKK when the appellant was a member of that organization.

The Supreme Administrative Court also noted that it would not object to such findings by the Higher Administrative Court, assuming that there had been such actions by the PKK during the period of the appellant's membership and that he did participate in these acts through his significant propaganda activities for the PKK.

## REASONS FOR JUDGEMENT

The German Supreme Administrative Court noted that the Higher Regional Court proceeded on the assumption that the appellant was an active member of the PKK from 1999 to 2005, but it made no findings of fact about terrorist activities by the PKK in which the appellant might have been able to participate during this period.

It further noted that the relevant purposes and principles of the United Nations are set forth in the Preamble and Articles 1 and 2 of the *Charter of the United Nations*, and, furthermore, are anchored in the resolutions of the UN Security Council on antiterrorism measures, among other sources. Accordingly, it reasoned that it follows that "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations" and that "knowingly financing, planning and inciting terrorists' acts" are also contrary to the purposes and principles of the United Nations (see Recital 22 of Directive 2004/83/EC).

The UN Security Council, UN Resolutions 1373 (2001) and 1377 (2001), take as their starting point the principle that international terrorists' acts are, generally speaking and irrespective of any State participation, contrary to the purposes and principles of the United Nations.

Unlike participation in a serious non-political crime, Article 1F(b), acts in support of a terrorist organization need not specifically refer to individual terrorists' actions in order to be included under Section 3 (2), sentence 1 no. 3, in conjunction with sentence 2, of the *Asylum Procedure Act*. The reasons for exclusion do not require attribution under the criteria of criminal law, because it does not presuppose a criminal act within the meaning of participation in specific crimes. (para 15).

The Supreme Administrative Court went on to note that even purely logistical acts of support in advance, if they are of sufficient importance, may fulfil the characterizing circumstances of Section 3 (2) sentence 1 no. 3, in conjunction with sentence 2, of the *Asylum Procedure Act*.

The Supreme Administrative Court also opined that the same applies to serious ideological and propagandistic activities in favour of a terrorist organization. (See also Munster Higher Administrative Court, judgment of 9 March 2011-11 A 1439/07.A – OVGE Mulu 54, 95 , juris at 61 et seq.>; Schleswig Higher Administrative Court, judgment of 1 September 2011-4 LB 11/10. AuAS 2011, 262 <juris at 52>).

## ***ANNACHAMY V. HOLDER*, 686 F. 3D 729 – UNITED STATES COURT OF APPEALS, 9TH CIRCUIT, JULY 3, 2012**

### **CASE SUMMARY**

Satheeskumar Annachamy, a Sri Lankan national, was arrested by the Sri Lankan army on a number of occasions for his alleged involvement with the Liberation Tigers of Tamil Eelam (LTTE). He alleged that he was interrogated and tortured by the Sri Lankan army. He also alleged he was forced to assist the LTTE on a number of occasions. For instance, he was forced to pay them money, and to cook, dig trenches and fill sandbags and help to build fences. He said that if he tried to escape the LTTE, when he was forced to work at their camps, that he feared that he would be shot dead.

The basis of the appellant's appeal was that BIA (Board of Immigration Appeals) erred in applying the material support bar because: (1) the organization he was involved in was engaged in legitimate political violence; and, (2) he provided support under duress.

Annachamy's petition for judicial review to the 9<sup>th</sup> Circuit US District Court of Appeals was denied because it held that the material support bar does not include an implied exception for individuals who assist organizations engaged in legitimate political violence or who provide support under duress.

In short, his petition for judicial review was denied by the 9<sup>th</sup> Circuit District Court because the material bar provisions do not include an implied exception for individuals who assist organizations engaged in legitimate political violence or who provide support under duress. (p. 7841)

#### REASONS FOR JUDGEMENT

The BIA found that the *Immigration and Nationality Act* (INA) barred Annachamy from obtaining asylum or withholding of removal because he had provided material support to a terrorist organization.

"An alien who has engaged in terrorist activities is ineligible for asylum, withholding of removal and withholding under CAT (*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*), but remains eligible for deferral of removal under CAT. See *Haile v. Holder*, 658 F.3d 1122, 1125-26 (9<sup>th</sup> Cir. 2011). We have previously recognized that the INA 'defines 'engag[ing] in terrorist activity' broadly,'" *Khan*, 584 f.3d at 777. (p. 7827)

"The statute [INA] also defines 'terrorist organization' broadly," *Khan*, 584 F.3d at 777. The definition includes organizations designated as a "terrorist organization" by the Secretary of State, in consultation with the appropriate officials, se 8 U.S.C. 1182(a)(3)(B)(vi)(I)-(II) – often referred to as Tier I and Tier II terrorist organizations – and any "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, [terrorist activities]," *id.* 1182(a)(3)(B)(vi)(III) – referred to as Tier III terrorist organizations." (pp. 7828-9)

"Annachamy concedes that he materially assisted the LTTE, and the parties agree that the LTTE qualified as a Tier III organization at the time he assisted it." (p. 7829)



“Annachamy challenged the BIA’s decision on two grounds. First, he argued, that the material support bar does not apply to him because the LTTE was engaged in legitimate political violence; and, second, that the bar does not apply to him because he supported the LTTE under duress.” (p. 7829)

The 9<sup>th</sup> Circuit District US Court of Appeals, on the first point, took the position that the appellant’s argument that he did not assist a “terrorist organization” because “the definition of ‘terrorist activity’ under 1182(a)(3)(B)(iii) incorporates international law, and thus excludes legitimate armed resistance against military targets.” *Id.* at 781. The 9<sup>th</sup> Circuit District Court rejected this argument because the plain language of the INA allowed for no such exception. *See id.* (p. 7829)

The material support bar provides that any alien who “commit(s) an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons (including chemical, biological, or radiological weapons), explosives, or training” to a terrorist organization has engaged in terrorist activity. 8 U.S.C. 1182(a)(3)(B)(iv)(VI). ... We find that Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as ‘freedom fighters,’ and it did not intend to give us discretion to create exceptions for members of organizations to which our Government might be sympathetic.” There is no political offense exception to the material support bar. (p. 7830)

## *R (ON THE APPLICATION OF JS) (SRI LANKA) (RESPONDENT) V SECRETARY OF STATE FOR THE HOME DEPARTMENT (APPELLANT) [2010] UKSC 15*

### CASE SUMMARY

The respondent is a Sri Lankan Tamil who was a member of the LTTE. He joined when he was 10-years-old in 1992. The next year he joined the Intelligence Division of the LTTE and held various positions within the organization. He came to the UK in 2007 and claimed asylum and was excluded from refugee protection on the basis of Article 1F(a). The UK Secretary of State’s decision was based on the authority of *Gurung [2002] UKIAT 04870* (starred). In essence, voluntary membership in an extremist organization amounted to “personal and knowing participation” or at least acquiescence to complicity in the crimes in question.

The respondent's voluntary membership and command responsibility in an organization that was responsible for war crimes and crimes against humanity indicated that there were serious reasons for considering he was fully aware and understood the methods of the LTTE.

The UK Supreme Court unanimously dismissed the appeal but varied the order of the Court of Appeal in the redetermination of the respondent's asylum application.

## REASONS FOR THE JUDGEMENT

The UKSC did not accept that either the LTTE or its Intelligence Division could be said to be "predominantly terrorist in character." Hence, there was no question of "personal and knowing participation" or "complicity."

Following the UKSC's judgement, the *Gurung* decision can no longer be held in the same regard. It is no longer helpful to characterize organizations as exclusively engaged in terrorist activities. It is preferable to focus on determining factors:

- nature and size of the organization and the role of the applicant;
- whether and who proscribed the organization;
- how the applicant was recruited;
- length of time in the organization and when they left;
- position, rank and influence within the organization;
- knowledge of the organization's war crimes;
- what contribution the person had in any war crimes.

*THE ATTORNEY-GENERAL (MINISTER OF IMMIGRATION) v. TAMIL X AND REFUGEE STATUS APPEALS AUTHORITY*, SC 107/2009 [2010] NZSC 107 (27 AUG. 2010)

CASE SUMMARY

The respondent is a Sri Lankan Tamil who worked as the chief engineer on a ship, *Yahata*, that transported arms and explosives for the LTTE. He claimed that he was unaware that the ship belonged to the LTTE or that it carried arms and explosives. When the Indian Navy was attempting to seize the ship it was scuttled to prevent the Indian Navy from apprehending the cargo.

The New Zealand Refugee Status Appeals Authority and the High Court of New Zealand found that the respondent should be excluded under Article 1F(a) because of his complicity in crimes against humanity that had been committed by the LTTE.

The New Zealand Supreme Court unanimously held that there were no serious reasons to consider that Tamil X was complicit for crimes against humanity or that he had committed a serious non-political crime.

REASONS FOR JUDGEMENT

The New Zealand Supreme Court followed closely the reasoning of the *UK Supreme Court in R (JS (Sri Lanka))*. The Supreme Court stated that the decision-makers should apply the approach of “joint criminal liability” in ascertaining whether there were serious reasons for considering whether an applicant had committed an act within Article 1F through being complicity in acts that had been committed by others.

The principle is those who contribute significantly to the commission of an international crime with the stipulated intention, although not the direct perpetrators of the international crimes, are personally responsible for the crime. This is found in Articles 25 and 30 of the *Rome Statute* and is well established in customary international law.

The act of the destruction of the ship, *Yahata*, was to prevent the seizure of the cargo by the Indian authorities who were unsympathetic to the LTTE. This could not rightly be seen as a serious non-political act and, therefore, does not fall under Article 1F(b).

## *EZOKOLA V. CANADA (CITIZENSHIP AND IMMIGRATION)*, 2013, SSC 40.

### CASE SUMMARY

This was an unanimous decision of the Supreme Court of Canada. The judgement was written by LeBel and Fish JJ. (McLachlin CJ and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner JJ. concurring).

Rachidi Ekanza Ezokola, a citizen of the Democratic Republic of Congo (DRC), joined the DRC public service in January 1999 as a financial attache in Kinshasa. By 2007, a mere eight years later, he was leading the Permanent Mission of the DRC at the United Nations in New York.

He resigned his post and fled to Canada in January 2008. He said that he could no longer work for the Government of President Kabila, whom he considered to be corrupt, antidemocratic and violent. He claimed that his resignation would be viewed as treasonous by the DRC Government and that the DRC's intelligence service had harassed, intimidated, and threatened him. For these reasons, he sought refugee protection for himself and his family in Canada.

At the Immigration and Refugee Board of Canada (IRB), he was excluded from refugee protection under Article 1F(a) for being complicit in crimes against humanity. On appeal to the Federal Court Canada, the IRB decision was set aside and a question of general importance was certified to the Federal Court of Appeal. The Federal Court of Appeal reversed the judgement of the Federal Court Canada and, subsequently, the case was brought to the Supreme Court of Canada. This was the first judgement of the Supreme Court of Canada on Article 1F(a) and it replaced the Ramirez test, "personal and knowing participation" with "an individual has *voluntarily made a significant and knowing contribution* to a group's crime or criminal purpose."

### REASONS FOR JUDGEMENT

Two key questions were raised in *Ezokola*:

- (1) *Whether mere association or passive acquiescence are sufficient to establish complicity?*
- (2) *Whether a contribution-based test for complicity should be adopted?*

The central concern that was emphasized in the judgement was that: "*Decision makers should not overextend the concept of complicity to capture individuals based on mere association or passive acquiescence.*"

The key question raised was, “*When does mere association become culpable complicity?*”

In the *Ezokola*, the Supreme Court of Canada ruled that,

“... there must be a link between the individuals and the *criminal purpose of the group*... In the application of art. 1F(a), this link is established where there are serious reasons for considering that an individual has *voluntarily made a significant and knowing contribution* to a group’s crime or criminal purpose.” [paragraph 8]

The Supreme Court of Canada opines that, “In our view, the personal and knowing participation test [*Saul Vincente Ramirez v. Minister of Employment and Immigration*, FCJ no. 109, Canada: Federal Court, 7 Feb. 1992] has, *in some cases, been overextended to capture individuals on the basis of complicity by association*. A change in the test is therefore necessary to bring Canadian law in line with international criminal law, the humanitarian purposes of the Refugee Convention, and fundamental criminal law principles.” [paragraph 9]

“Complicity requires a nexus between the claimant and the crimes committed by the government.” [paragraph 20]

*The significance of a contribution to the perpetration of an international crime will depend on the facts of each case.* This is open for the decision maker to decide in each case. To assist in discerning this the Supreme Court of Canada outlined six factors that ought to be considered when deciding whether the refugee claimant falls under Article 1F(a).

1. The size and nature of the organization.
2. The part of the organization with which the refugee claimant was most directly concerned.
3. The refugee claimant’s duties and activities within the organization.
4. The refugee claimant’s position and rank in the organization.
5. The length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the groups crime or criminal purpose; and,

6. The method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.<sup>35</sup>

What constitutes a "*significant contribution*" in the commission of a war crime or crime against humanity?

This will be, undoubtedly, the area where there will be the most controversy in future judgements in Canada under Article 1F(a).

It is further noted that individuals may be complicit in crimes without possessing the *mens rea* required by the crime. [paragraph 59]

"...knowledge of the group's criminal intentions is sufficient for criminal responsibility, it is therefore not required for the contributor to have the intent to commit any specific crime and not necessary for him or her to satisfy the mental element of the crimes charged." *Mbarushimana* at para 289.

Joint criminal liability, like common purpose liability under Article 25(3)(d), captures "lesser" contributions to a crime than aiding and abetting.

Again, the standard in the international jurisprudence here is "*significant*" contribution to the group's crime or criminal purpose. [paragraph 67]

## CONCLUSIONS

The following concluding reflections can be drawn from the above leading jurisprudence in a number of Western Industrialized States on Article 1F(a):

The United States is clearly the outlier by taking a very strict approach to dealing with those who provide material support to terrorist organizations, even if they are under duress when doing so. This flies in the face of what all other Western Industrialized countries who accept duress as a defense against the Exclusion Clauses.

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<sup>35</sup> *Ezokola v. Canada (Citizenship and Immigration)*, 2013, SSC 40, paragraph 91.



An examination of these five judgements reveals that the judiciaries across these jurisdictions follow each others' judgements and are influenced by them. This is most evident in the common law jurisdictions, save the United States. The UK *JS Sri Lanka* judgement influenced the New Zealand *Tamil X* judgement and both, in turn, influenced the Supreme Court of Canada's judgement in *Ezokola*.

This is further evident in the six factors that are presented as a guide to refugee law decision-makers in deciding whether a person ought to be excluded under Article 1F(a). The seven factors enunciated in the UK Supreme Court's *JS Sri Lanka* judgement, mirrors the six factors provided by the Supreme Court of Canada's judgement in *Ezokola*. Indeed, four of the seven UKSC factors are identical.

It is evident that the international instrument that is used to define what constitutes a war crime or a crime against humanity in jurisdictions around the world is the *1998 Rome Statute of the International Criminal Court*. This is now the common international standard for defining what constitutes a crime against peace, war crime and crime against humanity.

Serious reasons for considering that an applicant falls under Article 1F(a) ought to be based on Articles 25 and 30 of the *Rome Statute* and the well established principles in customary international law; that is, "complicity" is based on the principle, enunciated therein, that *those who contribute significantly to the commission of an international crime with stipulated intention, although not the direct perpetrators of the international crime, are personally responsible for the crime*.

Despite the person's membership in organization that is known for its serious abuse of people's human rights, this is not sufficient to exclude the individual from Convention refugee status. What needs to be demonstrated across all these jurisdictions is that the person made a significant contribution to the commission of the international crime.

The *serious reasons for considering* standard of Article 1F is not the same standard as for criminal law, "beyond a reasonable doubt," but, it is above the "reasonable grounds" standard for a well-found fear of persecution.

The new test for exclusion under Article 1F(a) established by the Supreme Court of Canada, where there are serious reasons for considering that an individual has *voluntarily* made a *significant* and *knowing contribution*

to a group's crime or criminal purpose, leaves a wide area of discretion for the decision maker to determine what constitutes a "*significant contribution*." This is open to the decision maker to determine based on the facts of each case.

The new refined six factor test offered by the Supreme Court of Canada (SCC) is consistent with what has emerged in the jurisprudence on Article 1F(a) previously. This seems to imply that what emerged from past practice and through "judge made law" was not unacceptable or inconsistent with the SCC's new dicta to a *voluntary, significant and knowing contribution* to a group's international crime or criminal purpose.

This raises the obvious question, how far or different is the abandoned "personal and knowing participation" test of *Rameriz* to the newly adopted "significant and knowing contribution" test of *Ezokola*? Has the line between mere association to culpable complicity been distinctly and clearly demarcated? This is an open question that will be answered in the coming years as these cases make their way through the Canadian court system. But, it will likely also be mirrored in other jurisdictions as they deal with their respective case loads dealing with exclusion under Article 1F(a).

The overall trend in the development of the Exclusion Clauses under Article 1F(a) is that there appears to be a convergence in the respective jurisdictions regarding the application and interpretation of Article 1F(a). This augurs well for the possibility of greater consistency in the application and interpretation of the Article 1F(a) of the Exclusion Clauses in Western Industrialized States and, therefore, in the exclusion of refugee applicants who fall within Article 1F(a) of the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol*.