Federal Court  Cour fédérale

Date: 20200430

Docket: T-1336-17

Citation: 2020 FC 570

Ottawa, Ontario, April 30, 2020

PRESENT: THE CHIEF JUSTICE

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Plaintiffs

and

CEDO KLJAJIC

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] War can bring out the worst in people. Some do things that they later regret, perhaps deeply so. Others may act in ways that haunt, shame or torment them for the rest of their lives. They may understandably want to hide such things, from others and indeed themselves, as they

endeavour to build a new life for themselves and their progeny, some of whom may have come along well after the distant events.

[2] Yet, as much as compassion for such people can reflect a virtuous aspect of the human spirit, a civilized society cannot turn its back on the victims of distant crimes. Not even after decades of law abiding behaviour and hard working contributions to society by those who may have been complicit in such crimes. The light of the law must be allowed to shine on all of the circumstances surrounding dark deeds that may later be discovered, so that the role of those who may have been involved can be scrutinized for what it was and was not.

[3] In this proceeding, the plaintiff Ministers allege that Mr. Kljajic obtained refugee protection, permanent residence, and ultimately citizenship in this country by concealing his former high-ranking position of Under Secretary of the Ministry of Internal Affairs of the Bosnian Serb Republic [the "**RS MUP**"]. They further allege that he explicitly, and falsely, denied any involvement in the commission of any war crime or crime against humanity.

[4] In addition, they allege that there are reasonable grounds to believe that Mr. Kljajic is inadmissible to Canada on two grounds:

- First, for having been a prescribed senior official in the service of a government that, in the opinion of the Minister, engaged in systematic or gross human rights violations, genocide, war crimes and crimes against humanity, within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act* [the "**CAHWCA**"],

as contemplated by paragraph 35(1)(b) of the *Immigration and Refugee Protection Act* [the "**IRPA**"].

- Second, for having been complicit in the commission of acts outside Canada that constitute an offence referred to in sections 6 and 7 of the CAHWCA, and as contemplated by paragraph 35(1)(a) of the IRPA.

[5] At the time Mr. Kljajic sought refugee status and permanent residence in this country, the Bosnian Serb government was designated as a government described under paragraph 19(1)(l) of the *Immigration Act*, RSC, 1985, c I-2 [the "***Immigration Act***"], i.e., a government generally described above. However, given that the CAHWCA had not yet been enacted, the crimes were defined by reference to subsection 7(3.76) of the *Criminal Code*, RSC, 1985, c C-46 [the "***Criminal Code***"]. For the present purposes, the differences between the latter provision and subsections 6(3) to (5) of the CAHWCA are not material: *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at para 118 ["***Mugesera***"].

[6] Given the above, the plaintiffs seek various declarations against Mr. Kljajic pursuant to sections 10.1(1), 10.2 and 10.5(1) of the version of the *Citizenship Act*, RSC 1985, c C-29 that was in force at the time they served and filed their Statement of Claim [the "***Citizenship Act***"].

[7] For the reasons that follow, those declarations will be granted, with certain modifications. In brief, I have concluded that:

i. Mr. Kljajic became a permanent resident of Canada by false representation or fraud or by knowingly concealing material circumstances with respect to a fact described in section 35 of the IRPA;

ii. Because of having acquired permanent resident status, Mr. Kljajic subsequently obtained citizenship in Canada, and therefore is presumed, pursuant to s. 10.2 of the Citizenship Act, to have obtained his citizenship by false representation or fraud or by knowingly concealing material circumstances with respect to a fact described in section 35 of the IRPA;

iii. Mr. Kljajic is inadmissible to Canada pursuant to paragraph 35(1)(b) of the IRPA, because there are reasonable grounds to believe that he was a prescribed senior official of a government described in that provision (and at paragraph 4 above); and

iv. Mr. Kljajic is inadmissible to Canada pursuant to paragraph 35(1)(a) of the IRPA, because he was complicit in the crimes against humanity that were perpetrated by the RS MUP against non-Serbs during the period that he was the Under Secretary of that organization.

II. **Background**

[8] The following background information was provided in an expert report prepared on behalf of the plaintiffs by Dr. Christian Axboe Nielsen. This particular information was not contested by Mr. Kljajic.

[9] The Socialist Federal Republic of Yugoslavia ["**Yugoslavia**"] was established in 1945, following the Second World War. Throughout its existence of approximately 45 years, it consisted of six republics: Slovenia, Croatia, Bosnia and Herzegovina ["**B&H**" (also sometimes referred to simply as "**Bosnia**")], Serbia, Montenegro and Macedonia.

[10] During the Second World War, several large massacres of the civilian population were perpetrated in Bosnia, including during internal conflicts between the Serb, Croat and Muslim ethnic groups.

[11] Following that war, Yugoslavia was tightly controlled by the Communist Party of Yugoslavia, later known as the League of Communists of Yugoslavia. However, in the wake of the fall of the Berlin Wall in late 1989, the grip of the communists waned. In B&H, this led to multi-party elections in November 1990. Three ethnically defined anti-communist parties – the Serb Democratic Party [the "**SDS**"], the Croat Democratic Union [the "**HDZ**"] and the Muslim Party of Democratic Action [the "**SDA**"] – emerged as the main victors. Shortly afterwards, they reached an agreement to divide various government positions, including those related to policing and security, based on the electoral results.

[12] In principle, the SDS, HDZ and SDA agreed that it was desirable for the ethnic composition of the police in any given municipality to match the ethnic composition of the population of that municipality. Nevertheless, negotiations regarding appointments quickly became protracted and acrimonious.

[13] Policing in the socialist republic of B&H was under the jurisdiction of the Ministry (or Secretariat) of Internal Affairs [the "**SRBiH MUP**"], which had two main branches: the public security service and the state security service. The public security service encompassed the most common types of policing, including criminal investigations and the maintenance of law and public order. The state security service (colloquially known as the "secret police") was responsible for protecting the constitutionally established order from internal and external threats. Leadership and other positions in both branches of the SRBiH MUP were particularly coveted by those who were in charge of the SDS, HDZ and SDA, respectively. This was because of that Ministry's access to arms and electronic surveillance equipment, and the critical role it played in controlling the public.

[14] Over the course of 1991, the political and security situation in B&H continued to deteriorate. Among other things, this was due to (i) the declarations of independence that were made that year by the Republic of Slovenia and the Republic of Croatia, (ii) the adverse impact that those declarations had on relations between the Croat, Muslims and Serbian peoples, and (iii) disputes among the SDS, HDZ and SDA relating to positions in the SRBiH MUP and elsewhere. This led to a parliamentary crisis in October, after Bosnian Muslim and Bosnian Croat deputies voted to become a sovereign state. This was strongly opposed by the Serb deputies, who considered that it was in the best interest of Serbs in B&H to remain with Yugoslavia. Among other things, the Serbs were very concerned because they were an ethnic minority in large areas of B&H, including much of the northern, western and southeastern regions of B&H.

[15] Given the separatist direction that the Muslim and Croat members of the Bosnian Assembly had decided to take, the SDS unilaterally withdrew from the Assembly. In a speech explaining this action, the SDS's President, Radovan Karadzic, told the Muslim members of Assembly that if they continued to pursue a path towards independence, they would be "pursuing a path that leads to hell". He then rhetorically asked whether they realized that "pursuing independence might well lead to their physical extermination": Court Transcript, Vol. 1, at 131 (testimony of Dr. Nielsen).

[16] In the meantime, in September 1991, Mr. Kljajic was appointed to the position of Deputy to the Assistant Minister of the SRBiH MUP, a position which included the position of Chief of Police for B&H. (He had previously held a number of policing positions in the SRBiH, dating back to at least 1979.)

[17] Following a referendum vote by the Bosnian Serbs in November 1991 to remain in Yugoslavia, the SDS quickly took steps to establish a political entity with all of the characteristics of a state, including its own police force. To this end, the SDS issued a document in December 1991, entitled *Instructions for the Organization and Operation of Organs of the Serbian People in [B&H] in Emergency Conditions*, which set out a detailed set of steps to be taken. Those steps included the takeover of SRBiH MUP staff, buildings and equipment, and their integration within what would become the RS MUP. This applied to areas in which the Serbs were a majority ["**Variant A**" areas] as well as to areas in which they were a minority ["**Variant B**" areas], although the approach to be taken in those two types of areas differed in some respects.

[18] In January 1992, the Assembly of the Serb People in Bosnia and Herzegovina [the "**RS Assembly**"] then proclaimed the Serb Republic of Bosnia and Herzegovina [the "**Republic of Srpska**" or "**RS**"]. (The Republic of Srpska is not to be confused with Serbia, one of the original six republics of the former Yugoslavia, which is located immediately to the east of B&H.) The following month, the Bosnian Serbs boycotted a second referendum that resulted in a vote to become independent from Yugoslavia. On March 18, 1992, the President of the Assembly, Momcilo Krajisnik, referred to the need for "ethnic separation on the ground". Shortly afterwards, on March 27, 1992, the RS Assembly proclaimed the *Constitution of the Serb Republic of Bosnia and Herzegovina* and established a National Security Council, chaired by the Republic's President, Radovan Karadzic.

[19] A few days later, on March 31, 1992, and after the SDS had created a parallel policing organization covering many areas of the RS, a new law creating the RS MUP came into force. The next day, the RS MUP proclaimed itself to have sole police jurisdiction throughout the RS. On approximately April 5, Serbs (including Mr. Kljajic) who had refused to comply with orders to continue fulfilling their responsibilities to the SRBiH MUP were fired from that organization, the Bosnian war broke out, and Mr. Kljajic was appointed to the position of Undersecretary for Public Security of the RS MUP.

[20] It appears to be common ground between the parties that Mr. Kljajic held the latter position for at least approximately five months, i.e., from virtually the outbreak of the war in early April 1992 until September of that year. (The plaintiffs maintain that he stayed in that

position until November of that year, when he left Bosnia to become a lawyer in Belgrade. This will be further discussed in part VIII.C.(2)(v) of these reasons below.)

[21] During his time as Under Secretary of the RS MUP, Mr. Kljajic was initially located in Vraca, a suburb of Sarajevo. While he was there, he was, among other things, responsible for the defence of the police academy, where he was located. Sometime in the first half of June 1992, he transferred to Pale, the principal headquarters of the RS MUP, before they were moved to Bijeljina later that month. He remained in the latter location until he left the RS MUP sometime in the fall of 1992.

[22] In February 1995, Mr. Kljajic applied for permanent residence in Canada as a member of the refugee class. In August of that year, his application [the "**PR Application**"] was granted. He then became a Canadian citizen in November 1999.

[23] In June 2016, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia [the "**ICTY**"] sentenced the Minister with whom Mr. Kljajic worked at the RS MUP, Mr. Mico Stanisic, to 22 years imprisonment for having committed "through participation in a joint criminal enterprise (JCE), persecutions as a crime against humanity and murder and torture as violations of the laws or customs of war". (Christian Axboe Nielsen, *Report on the Establishment and Performance of the Ministry of Internal Affairs of Republika Srpska in Bosnia and Herzegovina, 1990-1992* [the "**Nielsen Report**"], at para 233, quoting the ICTY *Case Information Sheet IT-08-91*) On the same date, the Appeals Chamber of the ICTY imposed a

similar sentence, for that same crime plus others, against a person who is alleged to have been one of Mr. Kljajic's direct subordinates, namely, Mr. Stojan Zupljanin.

[24] Given that I will be discussing certain interactions that Mr. Kljajic had with Radovan Karadzic, the President of Republika Srpska during the Bosnian War, I will simply note in passing that Mr. Karadzic was convicted and sentenced by the Trial Chamber of the ICTY to 40 years of imprisonment for genocide, crimes against humanity, and violations of the laws or customs of war.

III. **Relief sought by Plaintiffs**

[25] In their Statement of Claim, the plaintiffs sought five declarations.

[26] The first two concerned the allegations that Mr. Kljajic obtained permanent residence in Canada by false representation or fraud, or by knowingly concealing material circumstances. In this regard the plaintiffs sought declarations, for the purposes of section 10.2 of the *Citizenship Act*, that Mr. Kljajic obtained *permanent resident status* in this manner because, had he been truthful with Canadian immigration officials when he applied for permanent residence in 1995, he would have been found inadmissible:

i. under paragraph 19(1)(l) of the *Immigration Act*, on the grounds that he was a senior member in the service of a government that was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity within the meaning of section 7(3.76) of the *Criminal Code*, as it then was; and

ii. under paragraph 19(1)(j) of the *Immigration Act*, as a person who there are reasonable grounds to believe has committed an act or omission outside Canada that constitutes a war crime or a crime against humanity within the meaning of section 7(3.76) of the *Criminal Code*, as it then was.

[27] In their final submissions, the plaintiffs consolidated the two declarations described above into a single, more streamlined, requested declaration. In this regard, they now request, for the purposes of s. 10.2 of the *Citizenship Act*, a declaration that Mr. Kljajic obtained *permanent resident status* in Canada by false representation or fraud or by knowingly concealing material circumstances, with respect to a fact described in section 35 of the IRPA.

[28] The third declaration sought in the plaintiffs' Statement of Claim also relates to an alleged false representation or fraud or knowing concealment. In particular, the plaintiffs seek a declaration, pursuant to subsection 10.1(1) of the *Citizenship Act*, that Mr. Kljajic obtained *Canadian citizenship* in the manner described in the immediately preceding paragraph.

[29] The fourth and fifth declarations sought by the plaintiffs in their Statement of Claim concern Mr. Kljajic's alleged inadmissibility to Canada under paragraphs 35(1)(a) and (b) of the IRPA, respectively. Specifically, the plaintiffs seek declarations, pursuant to subsection 10.5(1) of the *Citizenship Act*, that Mr. Kljajic is inadmissible:

i. under paragraph 35(1)(a), on grounds of committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the CAHWCA; and

ii. under paragraph 35(1)(b), on grounds of his being a prescribed senior official in the service of a government that, in the opinion of the Minister of Immigration, Refugees and Citizenship Canada, engages in or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the CAHWCA.

IV. **Relevant Legislation**

[30] This proceeding raises issues under the *Citizenship Act*, the IRPA and its predecessor (the *Immigration Act)*, the CAHWCA and the *Criminal Code*.

[31] To determine which legislation applies to which issues, it has been considered to be helpful to distinguish between a defendant's substantive rights and his or her procedural rights: *Canada (Minister of Citizenship and Immigration) v Rogan*, 2011 FC 1007, at paras 17-23 ["***Rogan***"]; *Canada (Minister of Citizenship and Immigration) v Halindintwali*, 2015 FC 390, at paras 24-25 ["***Halindintwali***"].

A. *Mr. Kljajic's substantive rights*

[32] Insofar as Mr. Kljajic's acquisition of Canadian citizenship is concerned, his substantive rights are governed by the citizenship legislation that was in force on November 30, 1999, when he obtained his Canadian citizenship, namely, the *Citizenship Act*, RSC 1985, c C-29, as amended [the "***Citizenship Act, 1985***"]: *Rogan*, above, at para 21. Insofar as his prior acquisition

of permanent resident status is concerned, his substantive rights are governed by the immigration legislation that was in force on August 8, 1995 when he obtained his permanent resident status, namely, the *Immigration Act*, RSC 1985, c I-2, as amended [the "***Immigration Act, 1985***"]: *Rogan*, above, at paras 23 and 247; *Halindintwali*, above, at para 25. Given that one of the relevant provisions of the latter legislation referred to the *Criminal Code*, it is also necessary to consider the version of that enactment that was in force at that time, namely, the *Criminal Code*, RSC, 1985, c C-46, as amended.

[33] For the purposes of this proceeding, the relevant substantive provision of the *Citizenship Act, 1985* is paragraph 5(1)(c), which contemplated a grant of citizenship to any person who, among other things, "has been lawfully admitted to Canada for permanent residence".

[34] Regarding the *Immigration Act, 1985*, there are three substantive provisions that are relevant in this proceeding. The first is subsection 9(3), which stated as follows:

9. (3) Every person shall answer truthfully all questions put to that person by a visa officer and shall produce such documentation as may be required by the visa officer for the purpose of establishing that his admission would not be contrary to this Act or the regulations.	**9.(3)** Toute personne doit répondre franchement aux questions de l'agent des visas et produire toutes les pièces qu'exige celui-ci pour établir que son admission ne contreviendrait pas à la présente loi ni à ses règlements.

[35] The two other provisions of that legislation that are relevant in this proceeding are paragraphs 19(1)(j) and (l), which stated the following:

Inadmissible classes	**Catégories non admissibles**
19(1) No person shall be granted admission who is a member of any of the following classes:	**19. (1)** Les personnes suivantes appartiennent à une catégorie non admissible :
(j) persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 7(3.76) of the Criminal Code and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission	**j)** celles dont on peut penser, pour des motifs raisonnables, qu'elles ont commis, à l'étranger, un fait constituant un crime de guerre ou un crime contre l'humanité au sens du paragraphe 7(3.76) du Code criminel et qui aurait constitué, au Canada, une infraction au droit canadien en son état à l'époque de la perpétration.
(l) persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity within the meaning of subsection 7(3.76) of the Criminal Code, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.	**l)** celles qui, à un rang élevé, font ou ont fait partie ou sont ou ont été au service d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou à des crimes de guerre ou contre l'humanité, au sens du paragraphe 7(3.76) du Code criminel, sauf si elles convainquent le ministre que leur admission ne serait nullement préjudiciable à l'intérêt national.

[36] With respect to the *Criminal Code, 1985*, the relevant provisions are subsections 7(3.76) and 7(3.77). The former defined the terms “conventional international law”, “crime against humanity” and “war crime”. Subsection 7(3.77) provided that, in the definitions of those three

terms, the phrase "'act or omission' includes, for greater certainty, attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission". The full text of subsections 7(3.76) and (3.77) is set forth in Appendix 1 below.

[37] If a person's Canadian citizenship is revoked, it becomes relevant to consider whether the person is inadmissible to Canada on any of the grounds set forth in the IRPA. For the purposes of this proceeding, there are two such grounds, namely those set forth in paragraphs 35(1)(a) and (b), respectively. Pursuant to those provisions, a permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for:

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;	**a)** commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;
(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*;	**b)** occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la Loi sur les crimes contre l'humanité et les crimes de guerre;

[38] Pursuant to s. 33 of the IRPA, "[t]he facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred or are occurring or may occur".

[39] With respect to the CAHWCA, the plaintiffs only seek a declaration in respect of section 6. Subsections 6(1), 6(1.1) and (2) state as follows:

OFFENCES OUTSIDE CANADA	**INFRACTIONS COMMISES À L'ÉTRANGER**
Genocide, etc., committed outside Canada	**Génocide, crime contre l'humanité, etc., commis à l'étranger**
6 (1) Every person who, either before or after the coming into force of this section, commits outside Canada	**6 (1)** Quiconque commet à l'étranger une des infractions ci-après, avant ou après l'entrée en vigueur du présent article, est coupable d'un acte criminel et peut être poursuivi pour cette infraction aux termes de l'article 8 :
(a) genocide,	**a)** génocide;
(b) a crime against humanity, or	**b)** crime contre l'humanité;
(c) a war crime,	**c)** crime de guerre.
is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.	
Conspiracy, attempt, etc.	**Punition de la tentative, de la complicité, etc.**

(1.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.	**(1.1)** Est coupable d'un acte criminel quiconque complote ou tente de commettre une des infractions visées au paragraphe (1), est complice après le fait à son égard ou conseille de la commettre.
Punishment	**Peines**
(2) Every person who commits an offence under subsection (1) or (1.1)	**(2)** Quiconque commet une infraction visée aux paragraphes (1) ou (1.1) :
(a) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence; and	**a)** est condamné à l'emprisonnement à perpétuité, si le meurtre intentionnel est à l'origine de l'infraction;
(b) is liable to imprisonment for life, in any other case	**b)** est passible de l'emprisonnement à perpétuité, dans les autres cas.

[40] For the purposes of the provisions quoted immediately above, definitions of the terms "crime against humanity", "genocide" and "war crime" are set forth in subsection 6(3) of the CAHWCA, which is reproduced at Appendix 1 to these Reasons.

B. *Mr. Kljajic's procedural rights*

[41] The parties to this proceeding submitted that Mr. Kljajic's procedural rights are governed by the version of Canada's citizenship legislation that was in force at the time the plaintiffs

served and filed their Statement of Claim on August 29, 2017 (defined above as the *Citizenship Act*): *Rogan*, above, at para 17; *Halindintwali*, above, at para 24.[1]

[42] However, pursuant to subsection 19.1(2) of Bill C-6, a proceeding that was pending before this Court prior to the day on which subsection 3(2) came into force is to be dealt with and disposed of in accordance with the version of the *Citizenship Act* that was in force immediately before that day. Subsection 3(2) came into force on January 24, 2018. Accordingly, the version of the *Citizenship Act* that applies in this proceeding is the version that was in force on January 23, 2018. Nothing turns on this, as the language of sections 10.1, 10.2 and 10.5 of the *Citizenship Act* did not change between August 29, 2017 and January 23, 2018.

[43] As noted at paragraph 27 above, the first of the revised list of four declarations sought by the plaintiffs is a declaration under section 10.2 of the *Citizenship Act*. That provision states as follows:

Presumption	**Présomption**
10.2 For the purposes of subsections 10(1) and 10.1(1), a person has obtained or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances if the person became a permanent resident, within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, by false	**10.2** Pour l'application des paragraphes 10(1) et 10.1(1), a acquis la citoyenneté ou a été réintégrée dans celle-ci par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels la personne ayant acquis la citoyenneté ou ayant été réintégrée dans celle-ci après être devenue un résident permanent, au sens du paragraphe 2(1) de la *Loi sur*

[1] The provisions in the Citizenship Act regarding the revocation of citizenship are procedural in nature: *Canada (Minister of Citizenship and Immigration) v Odynsky*, 2001 FCT 138, [2001] FCJ No 286, at para 121.

representation or fraud or by knowingly concealing material circumstances and, because of having acquired that status, the person subsequently obtained or resumed citizenship.	*l'immigration et la protection des réfugiés*, par l'un de ces trois moyens.

[44] The second of the declarations now sought by the plaintiffs is under subsection 10.1(1), which states:

Revocation for fraud — declaration of Court	**Révocation pour fraude — déclaration de la Cour**
10.1 (1) Unless a person makes a request under paragraph 10(3.1)(b), the person's citizenship or renunciation of citizenship may be revoked only if the Minister seeks a declaration, in an action that the Minister commences, that the person has obtained, retained, renounced or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances and the Court makes such a declaration	**10.1 (1)** Sauf si une personne fait une demande en vertu de l'alinéa 10(3.1)b), la citoyenneté de la personne ou sa répudiation ne peuvent être révoquées que si, à la demande du ministre, la Cour déclare, dans une action intentée par celui-ci, que l'acquisition, la conservation ou la répudiation de la citoyenneté de la personne ou sa réintégration dans celle-ci est intervenue par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels

[45] I pause to note that, pursuant to subsection 10.2(3), a declaration made under subsection 10.1(1) has the effect of revoking a person's citizenship.

[46] Under subsection 10.1(4), for the purposes of subsection 10.1(1), the Minister need prove only that the person obtained his or her citizenship by false representation or fraud or by knowingly concealing material circumstances.

[47] The third and fourth declarations sought by the plaintiffs are under subsection 10.5(1), which states:

Inadmissibility	**Interdiction de territoire**
10.5 (1) On the request of the Minister of Public Safety and Emergency Preparedness, the Minister shall — in the originating document that commences an action under subsection 10.1(1) on the basis that the person obtained, retained, renounced or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances, with respect to a fact described in section 34, 35 or 37 of the *Immigration and Refugee Protection Act* other than a fact that is also described in paragraph 36(1)(a) or (b) or (2)(a) or (b) of that Act — seek a declaration that the person who is the subject of the action is inadmissible on security grounds, on grounds of violating human or international rights or on grounds of organized criminality under, respectively, subsection 34(1), paragraph 35(1)(a) or (b) or subsection 37(1) of the	**10.5 (1)** À la requête du ministre de la Sécurité publique et de la Protection civile, le ministre demande, dans l'acte introductif d'instance de l'action intentée en vertu du paragraphe 10.1(1) au motif que l'acquisition, la conservation ou la répudiation de la citoyenneté de la personne ou sa réintégration dans celle-ci est intervenue par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels liée à l'un ou l'autre des faits énoncés aux articles 34, 35 ou 37 de la *Loi sur l'immigration et la protection des réfugiés* sauf ceux énoncés aux alinéas 36(1)a) ou b) ou (2)a) ou b) de cette loi, que la personne soit déclarée interdite de territoire pour raison de sécurité, pour atteinte aux droits humains ou internationaux ou pour criminalité organisée au titre, respectivement, du paragraphe 34(1), des alinéas 35(1)a) ou

Immigration and Refugee Protection Act.	b) ou du paragraphe 37(1) de cette loi

[48] I will add in passing that pursuant to subsection 10.5(3), a declaration that a person is inadmissible on one of the grounds referred to in subsection (1) is a removal order against that person under the IRPA. Such an order comes into force when it is made, without the necessity of holding or continuing an examination or an inadmissibility hearing under the IRPA.

V. **Preliminary Issue**

[49] During a pre-trial case management teleconference that took place on December 4, 2019, legal counsel to the parties had a disagreement regarding the manner in which the four witnesses who testified in this proceeding from the Canadian embassy in Belgrade should be sworn-in. In brief, counsel to Mr. Kljajic submitted that those witnesses should be sworn-in in accordance with Serbian law, whereas counsel to the plaintiffs maintained that the witnesses could and should be sworn-in pursuant to sections 52 and 53 of the *Canada Evidence Act*, RSC, 1985, c C-5 [the "**CAE**"].

[50] I agreed with counsel to the plaintiffs and undertook to explain why, in this decision.

[51] Sections 52 and 53 of the CAE state the following:

Application	**Application**
Application of this Part	**Application**

52 This Part extends to the following classes of persons:

52 La présente partie s’applique aux catégories suivantes de personnes :

(a) officers of any of Her Majesty’s diplomatic or consular services while performing their functions in any foreign country, including ambassadors, envoys, ministers, charges d’affaires, counsellors, secretaries, attaches, consuls general, consuls, vice-consuls, pro-consuls, consular agents, acting consuls general, acting consuls, acting vice-consuls and acting consular agents;

a) les fonctionnaires de l’un des services diplomatiques ou consulaires de Sa Majesté, lorsqu’ils exercent leurs fonctions dans tout pays étranger, y compris les ambassadeurs, envoyés, ministres, chargés d’affaires, conseillers, secrétaires, attachés, consuls généraux, consuls, vice-consuls, proconsuls, agents consulaires, consuls généraux suppléants, consuls suppléants, vice-consuls suppléants et agents consulaires suppléants;

(b) officers of the Canadian diplomatic, consular and representative services while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada, including, in addition to the diplomatic and consular officers mentioned in paragraph (a), high commissioners, permanent delegates, acting high commissioners, acting permanent delegates, counsellors and secretaries;

b) les fonctionnaires des services diplomatiques, consulaires et représentatifs du Canada lorsqu’ils exercent leurs fonctions dans tout pays étranger ou dans toute partie du Commonwealth et territoires sous dépendance autre que le Canada, y compris, outre les fonctionnaires diplomatiques et consulaires mentionnés à l’alinéa a), les hauts commissaires, délégués permanents, hauts commissaires suppléants, délégués permanents suppléants, conseillers et secrétaires;

(c) Canadian Government Trade Commissioners and Assistant Canadian Government Trade

c) les délégués commerciaux du gouvernement canadien et les délégués commerciaux adjoints du gouvernement

Commissioners while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada

canadien lorsqu'ils exercent leurs fonctions dans un pays étranger ou dans toute partie du Commonwealth et territoires sous dépendance autre que le Canada;

(d) honorary consular officers of Canada while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada;

d) les fonctionnaires consulaires honoraires lorsqu'ils exercent leurs fonctions dans tout pays étranger ou dans toute partie du Commonwealth et territoires sous dépendance autre que le Canada;

(e) judicial officials in a foreign country in respect of oaths, affidavits, solemn affirmations, declarations or similar documents that the official is authorized to administer, take or receive; and

e) les fonctionnaires judiciaires d'un État étranger autorisés, à des fins internes, à recevoir les serments, les affidavits, les affirmations solennelles, les déclarations ou autres documents semblables;

(f) persons locally engaged and designated by the Deputy Minister of Foreign Affairs or any other person authorized by that Deputy Minister while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada.

f) les employés engagés sur place et désignés par le sous-ministre des Affaires étrangères ou toute autre personne autorisée par lui à procéder à une telle désignation lorsqu'ils exercent leurs fonctions dans tout pays étranger ou dans toute partie du Commonwealth et des territoires sous sa dépendance autre que le Canada.

Oaths and Solemn Affirmations

Serments et affirmations solennelles

Oaths taken abroad

Serments déférés à l'étranger

53 Oaths, affidavits, solemn affirmations or declarations administered, taken or

53 Les serments, affidavits, affirmations solennelles ou déclarations déférés, recueillis

received outside Canada by any person mentioned in section 52 are as valid and effectual and are of the like force and effect to all intents and purposes as if they had been administered, taken or received in Canada by a person authorized to administer, take or receive oaths, affidavits, solemn affirmations or declarations therein that are valid and effectual under this Act.	ou reçus à l'étranger par toute personne mentionnée à l'article 52 sont aussi valides et efficaces et possèdent la même vigueur et le même effet, à toutes fins, que s'ils avaient été déférés, recueillis ou reçus au Canada par une personne autorisée à y déférer, recueillir ou recevoir les serments, affidavits, affirmations solennelles ou déclarations qui sont valides ou efficaces en vertu de la présente loi.

[52] On a plain reading, section 53 of the CAE provides authority for oaths and solemn affirmations to be administered outside Canada by any person mentioned in section 52, while performing their functions in any foreign country. When an oath or a solemn affirmation is administered by such a person in this manner, it is as valid and effectual, and is of like force and effect to all intents and purposes, as if it had been duly and properly administered in Canada.

[53] In this proceeding, the person who administered the oaths of the witnesses who testified from Belgrade was Mr. Francois Lavertue. He holds the title of Consul in Canada's embassy in Belgrade. He performed the oaths in the course of performing his functions at the embassy. Accordingly, he is a person described in section 52, and the oaths he administered were entirely valid and effectual, as described above. I pause to note that those oaths were administered in person, and witnessed by video-conference by everyone who was present in the Ottawa courtroom where the trial took place.

[54] Out of an abundance of caution, the witnesses mentioned above were also sworn-in by video-conference by the Registrar who was present in the courtroom in Ottawa.

[55] Pursuant to Rule 32 of the *Federal Courts Rules*, SOR/98-106, the Court may order that a hearing be conducted in whole or in part by means of a telephone conference call, video-conference or any other form of electronic communication. When I verbally agreed to the parties' requests, on consent, to have some of their witnesses testify from Belgrade, I implicitly gave such an order. That order was also implicitly contemplated by a verbal Direction, dated November 21, 2019, that I issued instructing counsel to provide submissions regarding the applicable law and related requirements for administering the oaths to the witnesses who would be testifying by video-conference from the Canadian embassy in Belgrade.

[56] In response to that Direction, counsel to Mr. Kljajic maintained that Serbian law applied to the administration of oaths in Belgrade. However, no evidence or information was provided regarding the content and requirements of that law.

[57] Quoting this Court's decision in *Farzam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1453, at para 49 ["***Farzam***"], counsel to Mr. Kljajic maintained that it was "imperative that a witness who provides evidence in a jurisdiction other than Canada do so under oath in accordance with our laws, as well as in accordance with local laws". However, *Farzam* is distinguishable on several grounds. First and foremost, it does not appear that the foreign witness had planned to testify at a Canadian embassy. Accordingly, there was no discussion whatsoever of sections 52 and 53 of the CAE. Second, the witness there rejected the

possibility of testifying by video-conference, and proposed instead to testify by telephone. Third, the Court was not satisfied that various "technological barriers" could be overcome. Fourth, the Court noted that several important logistical issues remained unanswered, and it was not satisfied that they could be addressed in the short period that remained before trial. Finally, the Court was concerned that, in the particular circumstances of the case, "[h]olding a teleconference … [could] only add to the length, costs and overall complexity of this proceeding" (*Farzam*, above, at para 48).

[58] In addition, relying on both *Farzam*, above, and *Ramnarine v Canada* (2001), [2002] 1 CTC 2213, 2001 CanLII 795 (TCC) ["***Ramnarine***"], counsel further maintained that the oaths in question should be administered in the presence of a Serbian judge or member of the bar in that country. However, neither of those cases addressed the possibility that the foreign witness in question might be administered an oath or solemn affirmation by an officer of Her Majesty's diplomatic or consular services, while performing their functions, as contemplated by sections 52 and 53 of the CAE. This is a critical difference from the present proceeding.

[59] Counsel to Mr. Kljajic also expressed concern that, in the absence of the weight of the Serbian law applicable to the administration of oaths, the foreign witnesses would not need to be concerned about the potential consequences of saying untruthful things. However, as a practical matter, it was not apparent to me that the potential consequences that the witnesses would perceive themselves to face would be less if they testified from Belgrade than if they were to testify in Canada, and then return to Belgrade before any perjury proceeding could realistically

be scheduled. In both cases, Canadian courts would have subject matter jurisdiction over the witnesses, but face potential challenges in exercising personal jurisdiction over them.

[60] I pause to observe that swearing oaths on the Bible or a similar religious text, as each of the foreign witnesses in this case did, counts for something important. The same is true of solemn affirmations. That is why these procedures continue to be maintained by the Court.

[61] Moreover, in contrast to the situation that prevailed as recently as a few short years ago, this Court now has high quality video-conferencing equipment that permits the Court to properly assess a witness's testimony, including by getting a good sense of the witness's body language and overall demeanor. I certainly found that to be the case in the present proceeding.

[62] In summary, it was not necessary to ensure that the foreign witnesses who testified in this proceeding were administered oaths in accordance with Serbian law or in the presence of someone occupying the position of judge or lawyer in that country. It was sufficient that those witnesses had their oaths administered in the manner contemplated by sections 52 and 53 of the CEA, namely, by a Consul while performing one of his functions at the Canadian embassy in Belgrade. Out of an abundance of caution, each of those witnesses also had a second oath administered via video-conference by the Registrar who was present before me in the courtroom in Ottawa. Given the high quality of the video conference link, I was able to effectively assess the credibility of each witness' testimony.

VI. Expert and Lay Evidence

A. *The Plaintiffs' Witnesses*

[63] In this proceeding, one expert (Dr. Christian Axboe Neilsen) and two lay witnesses (Messrs Brian Casey and Milorad Davidovic) testified on behalf of the plaintiffs.

(1) Dr. Nielsen

[64] Dr. Nielsen was qualified as an expert regarding the history of the police and the security apparatus in the former Yugoslavia, as well as the role and functioning of the police in the RS MUP. In addition to providing extensive testimony, he authored the previously mentioned Nielsen Report.

[65] Dr. Nielsen's professional experience includes having worked in the Leadership Research Team of the Office of the Prosecutor at the ICTY. During his time at the ICTY, he was the analyst chiefly responsible for researching and analyzing the police in the RS. He also testified as an expert witness in, among other proceedings, four trials at the ICTY and one trial in this Court (*Rogan*, above). One of those ICTY proceedings was the joint trial of Mr. Kljajic's immediate superior (Minister Mico Stanisic) and Mr. Kljajic's alleged subordinate, Mr. Stojan Zupljianin. The other ICTY proceeding was the trial of Radovan Karadzic. In *Rogan*, Dr. Nielsen's evidence was extensively embraced in the reasons for judgment provided by Justice Mactavish. His evidence was similarly embraced by the ICTY.

[66] In this current proceeding, Dr. Nielsen testified with respect to the dispersion of majority and minority ethnic populations in B&H, the events that led to the Bosnian War, the power struggle between the principal political parties in B&H prior to the breakout of the war, and the steps that were taken by the Serbs to establish the RS and the RS MUP. In addition, he addressed the types of people who were sought for leadership positions in the RS MUP, the manner in which the SDS and the RS MUP went about establishing control over areas that would become part of the RS, and the various ways in which communications were maintained within the RS MUP over the course of 1992. He also testified with respect to Mr. Kljajic's roles within the SRBiH MUP and the RS MUP, his involvement in the establishment of the RS MUP, his relationships with various leaders within the RS MUP and Radovan Karadzic, the crimes that were committed by the RS MUP and the alleged links between Mr. Kljajic and those crimes.

[67] I found Dr. Nielsen's testimony to be candid and very forthcoming. As with the Nielsen Report, I also found it to be reliable. Unless otherwise indicated in my reasons below, I generally accepted his evidence.

(2) Mr. Brian Casey

[68] Mr. Casey was the second or third ranking person at the Canadian embassy in Belgrade from late 1990 to sometime in 1995. During that period, had the dual roles of Counsellor and Immigration Program Manager. In the former role, he was in charge of the consular program.

[69] As the Immigration Program Manager at the embassy, Mr. Casey was responsible for administering Canada's refugee program in Belgrade. Among his qualifications for that position,

he had an intimate understanding of the *Immigration Act* and the *Regulations*, including the provisions pertaining to inadmissibility in paragraphs 19(1)(j) and (l) of the former enactment. He had a similar understanding of subsections 7(3.76) and 7(3.77) of the *Criminal Code*. Broadly speaking, his testimony focused on the process that was followed at the embassy when treating applications for refugee and permanent resident status in Canada, particularly after June 1993, when the RS was designated as a regime described under paragraph 19(1)(l) of the *Immigration Act*.

[70] As with Dr. Nielsen's evidence, I found Mr. Casey's testimony to be candid, forthcoming and reliable. That testimony primarily related to the plaintiffs' allegation that Mr. Kljajic made false representations and knowingly concealed material circumstances when he completed his PR Application, and that this foreclosed or averted further inquiries with respect to that Application . For the purposes of my assessment of that issue, there were no noteworthy discrepancies between Mr. Casey's evidence and Mr. Kljajic's evidence. This was primarily because Mr. Kljajic ultimately conceded in his final submissions that he made false representations in his PR Application for permanent residence in Canada. In addition, Mr. Casey did not specifically recall Mr. Kljajic's PR Application, so there was not much scope for discrepancies to arise between his testimony and the evidence provided by Mr. Kljajic on that issue.

[71] I will add for the record that Mr. Casey's testimony on a very similar issue in *Rogan* was relied upon by Justice Mactavish in concluding that Mr. Rogan had misrepresented a material

fact and that this had the effect of foreclosing or averting further inquiries by Canadian immigration officials: *Rogan*, above, at para 326.

(3) Mr. Milorad Davidovic

[72] Mr. Davidovic had a long police career with the SRBiH MUP that included being the commander of the police stations in Ilic and Bijeljina. After the elections in 1991, and after he refused to join the SDS, he was released from his duties by his Serb superiors within the SRBiH MUP in Bjeljina. He then transferred to the federal security police in Belgrade, where he held the position of Chief Police Inspector.

[73] Following the outbreak of the war, his duties included being sent to Vraca on three occasions, to assist in assessing and then meeting the RS MUP's needs, including with respect to weapons and other equipment. His testimony focused on those three visits, as well as on the time he later spent Bijeljina, after Mr. Kljajic moved there in June 1992 as part of the transfer of the RS MUP's headquarters to that city. More specifically, Mr. Davidovic's testimony focused on his dealings with Mr. Kljajic, Mr. Kljajic's role and responsibilities within the RS MUP, his perception of Mr. Kljajic's relationship with Minister Stanisic and those below him in the RS MUP's hierarchy, the manner in which senior personnel within the RS MUP maintained communications after the outbreak of the war in April 1992, and Mr. Kljajic's knowledge of crimes that were committed against the Muslim population in the RS.

[74] As with the evidence provided by Dr. Nielsen and Mr. Casey, I found Mr. Davidovic's testimony to be candid, forthcoming and reliable.

B. *The Defendant's Witnesses*

[75] Three lay witnesses testified on behalf of Mr. Kljajic, who also gave evidence on his own behalf.

(1) Mr. Dragomir Andan

[76] Mr. Andan was a police inspector with the SRBiH MUP in Sarajevo prior to the outbreak of the war in April 1992. While he was in that position, he reported to Mr. Kljajic and was responsible for overseeing police operations throughout Eastern Bosnia. Following the capture of his police station in Sarajevo by Muslim forces later that month, Mr. Andan did not have a specific position for several weeks, until he was briefly transferred to Brcko, where he was a police inspector. At the request of Mr. Kljajic, he was then transferred to Bijeljina, where he was responsible for ensuring security and public order, as well as containing the activities of Serbian paramilitary units. In the latter regard, he worked with Mr. Davidovic.

[77] Mr. Andan's testimony was very brief and focused on two things. First, he addressed the reporting structure within the RS MUP, and in particular his perception that police chiefs located at the regional police stations ["**CSBs**"] and others who were below Mr. Kljajic in the RSMUP's hierarchy reported directly to Minister Stanisic. However, he acknowledged that this perception was based on rumours that he heard after he was transferred to the army. As such, that testimony was inadmissible hearsay.

[78] Secondly, Mr. Andan testified that Mr. Kljajic requested him to move to Bijeljina to assist in dismantling the Yellow Wasps and other paramilitary groups, and in preventing attacks against Muslims. However, on cross-examination, Mr. Andan conceded that many arrests and detentions of paramilitary group members were for crimes, such as theft, against Serbs. Mr. Andan added that he received threats from some members of the Yellow Wasps that he had helped to capture, after some of them were released from detention in mid-1992. Ultimately, I did not find Mr. Andan's admissible evidence to be particularly reliable or credible where it was inconsistent with other evidence.

(2) Mr. Radomir Njegus

[79] Mr. Njegus was Minister Stanisic's Chief of Staff from approximately May 1992 until April 1994. His testimony focused on Mr. Kljajic's *de facto* authority within the RS MUP. In particular, Mr. Njegus testified that, in reality, Mr. Kljajic was not capable of doing anything in his position. Mr. Njegus added that Mr. Kljajic did not give any orders, and that those below him in the RS MUP's hierarchy reported directly to Minister Stanisic. He explained that this situation, together with his inability to protect Mr. Andan, the absence of support from the Minister and the fact that Mr. Kljajic did not have a good relationship with the Minister, led Mr. Kljajic to become frustrated to the point that he ultimately quit the RS MUP.

[80] Mr. Njegus further noted that men who had a military obligation and who left the territory of the RS without authorization faced the prospect of sanction, imprisonment, transfer to the army and, he believed, "other disagreeable" consequences: Transcript, Vol. 7, at 19.

[81] On cross-examination, Mr. Njegus was confronted with different testimony that he gave before the ICTY. There, he testified that Minister Stanisic's closest associates from May 1992 until the end of 1992 were his two Under Secretaries, namely, Mr. Kljajic and Mr. Slobodan Skipina. In that regard, he added the following in that proceeding: "Whether we wanted or not, it was not just on paper. That's how things were." (Exhibit 383, at 11302.) He explained: "Under the law, I was directly answerable to Mr. Stanisic. But I have to be very honest and admit that, in factual terms, on a daily basis, I had much more communication with Kljajic …". (Exhibit 383, at 11306.) He further explained that Mr. Stanisic delegated the authority to sign on his behalf to Mr. Kljajic, and that this authority included the power to further delegate to others below him (Mr. Kljajic). (Exhibit 383, at 11336.) He then gave examples of such further delegation, to himself (Mr. Njegus) and to others. He later added that, in any event, "[t]he common practice was that everything issued from our offices in Vrac[a] at the time went out under the name of the minister, not the others, the under-secretary for public security or the chief of administration. You will rarely find any documents signed by chiefs of administrations. Most of the documents were signed [by] Mico Stanisic." (Exhibit 384, at 11383.)

[82] Despite Mr. Njegus' repeated insistence that his testimony before both the ICTY and this Court was truthful and consistent, I do not consider that to be the case. In my view, there are important inconsistencies between Mr. Njegus' testimony in this proceeding and his testimony before the ICTY, as set forth in the two paragraphs immediately above. Moreover, Mr. Njegus' testimony that Mr. Kljajic was incapable of doing anything in his position and did not give any orders was also inconsistent with several other statements he made during the present proceeding. These included his statements that Mr. Kljajic (i) ordered the arrest of someone

named “Batko”, who was a well-known member of a paramilitary unit, (ii) was responsible for disarming a particular paramilitary unit, and (iii) was sent to Belgrade to put a stop to widespread misuse of official documents, such as passports, driver’s licences and vehicle permits.

[83] Considering the foregoing, and the fact that Mr. Njegus repeatedly stated that he could not recall certain things, I did not find Mr. Njegus’ testimony to be candid, forthright, reliable or credible where it was inconsistent with other evidence.

(3) Mr. Dragan Kijac

[84] Mr. Kijac was the Chief of Police in Sarajevo immediately prior to the outbreak of the Bosnian war in April 1992. After the creation of the RS MUP, he was the Chief of National Security at the CSB in Sarajevo, until his appointment as Under Secretary for National Security in August 1992. He held the latter position until November 1995, when he became the Minister of Internal Affairs. In August 1997, he was appointed Vice-President of the RS, and Minister for Local Services.

[85] In his capacity as Chief of National Security in Sarajevo, Mr. Kijac was principally responsible for gathering information from behind enemy lines, to protect the public and state institutions in the RS. He was also responsible for counter-terrorism and “counter-information”.

[86] His testimony focused on the communications difficulties that were experienced within the RS MUP, his perception that Mr. Kljajic did not have much practical authority or responsibility within the RS MUP, his very limited dealings with Mr. Kljajic and his perception

that Mr. Kljajic was not aware of what was happening on the ground during the period that he held the position of Under Secretary within the RS MUP. (He stated that, had he not gone to have coffee with Mr. Kljajic from time to time, Mr. Kljajic would not have been aware of what was happening on the ground.) In addition, Mr. Kijac spoke to the consequences that would likely have been faced by someone who deserted the RS MUP.

[87] On cross-examination, Mr. Kijac was very defensive, to the point of being confrontational. Moreover, when asked about the genocide at Sebrenica, he began by remarking that he did not believe that it was a genocide. He then stated that he did not find out about what happened there until approximately five years later. When asked how this could possibly be true, given that he was the Under Secretary for State Security at the time and given the widespread reporting that occurred about the massacre that took place, he clarified that "there was lots of talks about it, but there were no clear proofs" (Transcript, Vol. 8, at 59). He was then asked whether he had issued false documents for people who were wanted by the ICTY. To his credit, he acknowledged that he had provided false identity documents to a number of people, at the request of "the Military Security and Chief of the Intelligence Service" (Transcript, Vol. 8, at 61).

[88] Considering the foregoing, I did not consider Mr. Kijac's testimony to have been particularly forthcoming or credible where it differed from evidence provided on behalf of the plaintiffs.

[89] I will simply add in passing that, in testimony before the ICTY, Mr. Kijac stated that he had no interest in the affairs of the Public Safety branch of the RS MUP (where Mr. Kljajic worked), because the two branches of the RS MUP were independent. In my view, this undermines the significance of his above-mentioned perceptions with respect to Mr. Kljajic. Although Mr. Kljajic's counsel objected to the admissibility of this transcript based on the fact that it does not have the ICTY's stamp and therefore is of questionable authenticity, I am satisfied that it is authentic and trustworthy, as contemplated by 10.5(5)(c) of the *Citizenship Act*. This is because it is on the ICTY's website. In contrast to purported records of foreign proceedings that need to be certified because they may not be available to one or more other parties to a dispute, this transcript is publicly available online.

(4) Mr. Kljajic

[90] Mr. Kljajic's testimony focused on his work history prior to the Bosnian war, his PR Application, his position and role within the RS MUP, his relationship with Minister Stanisic, his alleged limited awareness of the war crimes and crimes against humanity that were being committed by the RS MUP, and the consequences that he would have faced had he left the RS MUP without official permission. He also discussed his work history in Canada and the absence of any troubles with the law since coming here 25 years ago, as well as the fact that he has several children and grandchildren who all live here.

[91] Where Mr. Kljajic's testimony was inconsistent with the evidence provided by the plaintiffs' witnesses, particularly Dr. Nielsen and Mr. Davidovic, I found the plaintiffs' witnesses to be more candid, forthright, reliable and credible. This was largely due to the fact that I found

Mr. Kljajic's testimony to be internally inconsistent at times, implausible in some respects, and less credible and less believable than conflicting evidence provided by the other witnesses (see, e.g., paragraphs 118-124, 174, 178, 185-212, 216-219, 221-223 and 228-251 below).

VII. Issues

[92] Although the plaintiffs' Statement of Claim seeks four declarations, I consider that there are three principal issues, namely:

i. Did Mr. Kljajic become a permanent resident by false representation or fraud or by knowingly concealing material circumstances, and because of having acquired that status, subsequently obtain Canadian Citizenship?

ii. Is Mr. Kljajic inadmissible to Canada on grounds of violating human or international rights, as set forth in paragraph 35(1)(b) of the IRPA?

iii. Is Mr. Kljajic inadmissible to Canada on grounds of violating human or international rights, as set forth in paragraph 35(1)(a) of the IRPA?

VIII. Assessment

A. *Did Mr. Kljajic become a permanent resident by false representation or fraud or by knowingly concealing material circumstances, and because of having acquired that status, subsequently obtain Canadian Citizenship?*

(1) Applicable Legal Principles

[93] To demonstrate that a person became a permanent resident by false representation or fraud or by knowingly concealing material circumstances, the Minister does not have to

demonstrate that, "but for" the person's deception, his or her application for permanent residence would necessarily have been rejected. The Minister's burden is simply to demonstrate that such deception likely had the effect of foreclosing or averting further inquiries in respect of circumstances that had a material bearing on the assessment of the person's application: *Rogan*, above, at paras 31-32; *Halindintwali*, above, at paras 35-36; *Canada (Minister of Citizenship and Immigration) v Savic*, 2014 FC 523, at paras 51 and 80 ["***Savic***"]; *Canada (Minister of Citizenship and Immigration) v Rubuga*, 2015 FC 1073, at paras 72-73 ["***Rubuga***"].

[94] This burden must be demonstrated on the civil "balance of probabilities" standard of proof. In brief, the Minister must demonstrate that it is more probable than not that the person in question knowingly made false representations, engaged in fraudulent conduct or concealed material circumstances, either in an application for permanent residence or in the related interviews or other communications that took place in connection with that application: *Rogan*, above, at para 27; *Halindintwali*, above, at para 32.

[95] In this regard, the Minister is not required to demonstrate that the person knew that the circumstances were material or that the false representations or fraud concerned matters that were potentially important or significant. The Court must simply find, on the evidence or by reasonable inference, that the person engaged in deception with the intent of misleading those involved in the assessment of his or her application. For this purpose, the element of "knowing concealment of material circumstances" in subsection 10.1(1) does not include innocent misrepresentations. Likewise, the element of "materiality" does not include inadvertent omissions of immaterial information and mere technical transgressions. However, willful

blindness will not be condoned: *Canada (Minister of Citizenship and Immigration) v Odynsky*, 2001 FCT 138, [2001] FCJ No 286 (TD), at paras 158-159, *Rogan*, above, at paras 32-35; *Halindintwali*, above, at para 36*; Savic*, above, at paras 57-78; *Rubuga*, above, at paras 73-74.

[96] For greater certainty, the concealment of material circumstances can occur either through the withholding of material information or through a misleading answer which has the effect of foreclosing or averting further inquiries, and thereby diverting attention away from material circumstances. This is so even if the withheld or misleading information itself does not concern a dispositive or potentially important issue: *Rogan*, above, at para 33; *Halindintwali*, above, at para 36. Likewise, the alleged false representations or fraud do not themselves have to concern a dispositive or potentially important issue.

[97] In assessing whether circumstances that have been concealed rise to the level of being "material", within the meaning of subsection 10.1(1), the Court must consider "the significance [of the circumstances] for the purposes of the decision in question": *Canada (Minister of Citizenship and Immigration) v Schneeberger*, 2003 FC 970, at para 21; *Rubuga*, above, at para 73.

[98] Of course, where the Minister seeks a declaration that a person's false representation, fraud or knowing concealment was with respect to a fact described in one of the sections of the IRPA that are specifically mentioned in section 10.1(1) of the *Citizenship Act*, the Minister must, in addition, "establish on a balance of probabilities that the false representation, fraud, or knowing concealment was with regard to" such a fact: *Rubuga*, above, at paras 33 and 76.

[99] However, where the declaration sought is simply the one that is described in subsection 10.1(1), the Minister need only demonstrate "that the person has obtained, retained, renounced or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances". This is readily apparent not only from the plain meaning of those quoted words, but also from the words in subsection 10.1(4), which state that the Minister "need only prove that the person has obtained …his or her citizenship by false representation or fraud or by knowingly concealing material circumstances". There is no mention in the latter provision of a fact described in any section of the IRPA. Likewise, section 10.2 of the *Citizenship Act*, which creates an important presumption for the purposes of subsections 10(1) and 10.1(1), does not refer to sections 34, 35, or 36 of the IRPA: see paragraph 43 above.

[100] Given the seriousness of the allegations that have been made in this proceeding and the significance of the negative consequences that revocation of Canadian citizenship may have for Mr. Kljajic, it is incumbent upon the Court to scrutinize the evidence that has been adduced with great care: *Rogan*, above, at para 29.

(2) Analysis

[101] The plaintiffs allege that Mr. Kljajic knowingly concealed three important facts from his PR Application: (i) the fact that he resided in Bosnia between April and December 1992; (ii) his police career in the SRBiH MUP between 1979 and April 1992; and (iii) his position as Under Secretary of the RS MUP between April 1992 and December 1992. In addition, the plaintiffs allege that Mr. Kljajic falsely represented that he had worked as a lawyer in Sarajevo between 1980 and 1993, and had briefly worked in the military in 1979 and 1980, when he completed his

obligatory military service as a young man in the former Yugoslavia. For the purposes of this proceeding, it is unnecessary to address these two additional allegations. Finally, the plaintiffs alleged that Mr. Kljajic made a false representation and knowingly concealed material circumstances when he wrote “NO” beside the following question on his PR Application: “In periods of either peace or war, have you ever been involved in the commission of a war crime or crime against humanity, such as: willful killing, torture, attacks upon, enslavement, starvation or other inhumane acts committed against civilians or prisoners of war, or deportation of civilians?”.

[102] In support of their allegation that Mr. Kljajic knowingly concealed the three important facts mentioned at the outset of the paragraph immediately above, the plaintiffs noted that Mr. Kljajic indicated on his PR Application that he read and spoke English “well” and that no one assisted him in preparing his application. He also signed a declaration on the last page of the application stating, among other things, that the information he had provided was “truthful, complete and correct”, and that he understood all of the statements he had been asked to make in that declaration. Those statements also included an undertaking to report any change in the information he had provided, prior to his departure for Canada.

[103] In his final oral submissions, Mr. Kljajic admitted that he had made false representations on his PR application, by failing to disclose his career as a police officer, and in particular, the position that he held in the RS MUP for several months in 1992. However, he maintained that he did not do so with the intention of misleading immigration officials who would be reviewing his application. Rather, he omitted mentioning his history with the police because he was afraid that

he and his family would be harmed by Minister Stanisic or a paramilitary group, such as the Yellow Wasps. Moreover, insofar as the question on his PR Application relating to past involvement in war crimes, etc., is concerned, he sincerely believed (and continues to believe) that he has never been involved in the commission of any such crimes.

[104] I am satisfied on a balance of probabilities that Mr. Kljajic knowingly concealed material circumstances from his PR Application. Those circumstances included (i) the fact that he resided in Bosnia between April and December 1992; (ii) his police career in the SRBiH MUP between 1979 and April 1992; and (iii) his position as Under Secretary of the RS MUP between April 1992 and sometime in the fall of 1992. Mr. Kljajic also knowingly provided false information when he stated that no one assisted him in completing his application. In this regard, he testified in this proceeding that he was indeed assisted by someone who told him that a "legal counsellor" is a "lawyer". (He maintained that he was in fact a "legal counsellor" prior to becoming a lawyer in 1993.) He also knowingly made a false representation when he declared that the information he had provided was "truthful, complete and correct".

[105] The omitted facts described immediately above were material circumstances, within the meaning of paragraph 10.1(1) of the *Citizenship Act*. This is because, had they been disclosed, they would either have led to the screening out of Mr. Kljajic's PR Application, or to further inquiries with respect to his potential involvement in the genocide, war crimes and crimes against humanity that were known to have been perpetrated by the RS MUP between April 1992 and the fall of that year.

[106] For the reasons that I have given in part VIII.C.(2) below, the same is true with respect to the false declaration that Mr. Kljajic made on his PR Application with respect to his prior involvement in the commission of a war crime or a crime against humanity.

[107] The impact that the foregoing omissions and false declarations had on the processing of Mr. Kljajic's PR Application is evident from Mr. Casey's testimony. In brief, he stated that the number of refugee applicants at the Belgrade embassy in 1995 was very large and exceeded the processing ability of staff at the Canadian embassy. Accordingly, to avoid having the processing system for the refugee program "grind to a halt" at the embassy, he and his staff made a conscious decision to focus on applicants who "truly were victims of the conflict", and "to make sure that no possible perpetrators got into the program at all …" (Transcript, Vol. 1, at 50-51). Indeed, staff at the embassy were explicitly instructed by the Minister, in August 1993, to deny visas to all senior members and officials of the RS government (which had been designated in June of that year for the purposes of paragraph 19(1)(l) of the Immigration Act): Exhibits 5 and 6.

[108] As a first step in the triaging of applicants for refugee protection and permanent residence, Mr. Casey and his staff developed a "preliminary questionnaire" in Serbo-Croatian. As he was the only officer who was fluent in that language, he took it upon himself to personally screen the questionnaires. At that stage, if there had been any indication that more investigation might be required in respect of an applicant, "the decision would simply have been not to deal with that particular applicant and that was the end of it" (Transcript, Vol. 1, at 82).

[109] Unfortunately, the questionnaire that Mr. Kljajic completed in advance of submitting his PR Application was not adduced in evidence in this proceeding. It appears that the questionnaires from that period may have been destroyed long ago. However, based on Mr. Casey's evidence, as well as the fact that Mr. Kljajic did not disclose his police work history and his whereabouts during the early months of the war in his PR Application, it is reasonable to infer that Mr. Kljajic did not disclose that information on his questionnaire and that this enabled his application to avoid getting screened out at that stage of the process.

[110] Turning to Mr. Kljajic's PR Application, Mr. Casey testified that, had Mr. Kljajic disclosed the fact that he had been a senior member of the RS, his application would have been referred to Ottawa with an indication that in the opinion of the visa officer he was a person contemplated by paragraph 19(1)(l) of the *Immigration Act*. Mr. Casey explained that, in general, if it was possible that paragraph 19(1)(j) might apply, "a lot more questioning, a lot more examination of evidence" ordinarily would be required (Transcript, Vol. 1, at 66). Given what Mr. Casey had stated earlier in his testimony (mentioned above), I understood this to mean that more inquiries would have been made, if the person's application had not been simply screened out in its entirety.

[111] Considering the foregoing, I am satisfied that Mr. Kljajic's failure to disclose in his PR Application the fact that he held the position of Under Secretary in the RS MUP had the effect of foreclosing further inquiries in respect of a matter that would have had a very important bearing on the assessment of his application. That omission alone constituted the concealment of a material circumstance, within the meaning of paragraph 10.1(1) of the *Citizenship Act*. Having

regard to all of Mr. Casey's evidence discussed above, I have reached the same conclusion with respect to Mr. Kljajic's concealment of (i) his places of residence between April 1992 and the fall of that year, and (ii) his police work history with the SRBiH MUP, especially the positions he held in that organization in the period leading up to the breakout of the Bosnian war.

[112] I consider it reasonable to infer that Mr. Kljajic also knowingly concealed the facts mentioned immediately above in the interview that he had with staff in the embassy prior to departing for Canada. Although Mr. Casey had no recollection of Mr. Kljajic's interview, he testified that one of the principal purposes of the interview was "to determine whether any of the inadmissibility categories appl[ied] …" (Transcript, Vol. 1, at 79).

[113] Notwithstanding the foregoing, it remains necessary to determine whether Mr. Kljajic *intended* to mislead Mr. Casey and his colleagues at the embassy in Belgrade. As noted at paragraph 95 above, the element of "knowingly" concealing material circumstances does not include innocent misrepresentations.

[114] Mr. Kljajic's explanation for failing to disclose the facts described above is that he was afraid that he and his family would be harmed by Minister Stanisic or a paramilitary group, such as the Yellow Wasps. In this regard, Mr. Kljajic testified that when he filled out his PR Application, he did not mention the positions that he had held with the SRBiH MUP and the RS MUP because he was aware that Mr. Vitomir Zepinic, a former senior member of the SRBiH MUP had been "intercepted" by Mr. Stanisic outside the Canadian embassy. He was afraid that

this would also happen to him. He also testified that he was afraid that he would be assassinated, like Mr. Goran Zugic.

[115] During his counsel's final oral submissions, I inquired as to why Mr. Kljajic would have been concerned about being intercepted outside the embassy if he had included the information about his past work history in his PR Application. In brief, given that he apparently was not concerned about being apprehended after submitting the application that excluded that work history, why would it be any different if he had included that work history in his application? One way or another, he would still have found himself in the position of exiting the Canadian embassy.

[116] Counsel replied that Mr. Kljajic believed that someone inside the embassy had likely tipped off Minister Stanisic that Mr. Zepinic was there. Therefore, Mr. Kljajic was afraid that the same thing would happen to him, if he included anything in his application that would provide a link between him and the Minister or the RS MUP (Transcript, Vol. 10, at 96-97 and 100-101). Counsel elaborated that the Minister likely would have been upset that Mr. Kljajic had requested asylum in Canada, instead of remaining in Serbia to serve his country. She maintained that Minister Stanisic would have considered this to be tantamount to desertion (Transcript, Vol. 10, at 99).

[117] There are two distinct problems with these submissions.

[118] First, I do not consider them to be credible or persuasive. There is no evidence whatsoever that anyone in the Canadian embassy ever leaked any information to Minister Stanisic, anyone in his circle, anyone associated with the Yellow Wasps, or anyone else. Mr. Kljajic's suggestion to the contrary is a bald and speculative assertion. Moreover, the suggestion that he would have been considered to be a deserter is inconsistent with Mr. Kljajic's evidence that the letter he was given on behalf of the Minister, dated December 3, 1992, would "protect [him] in case [he was] arrested for being a deserter from the Republika Srpska" (Transcript, Vol. 5, at 65, referring to the letter at Exhibit 128).

[119] In addition, there is no evidence whatsoever that Mr. Stanisic or the Yellow Wasps had any interest in Mr. Kljajic after he was given that letter and then moved to Belgrade. Likewise, there is no evidence that Mr. Kljajic hid from Minister Stanisic or anyone else while he lived for over two years in Belgrade, prior to applying for permanent residence in Canada. Furthermore, Mr. Kljajic's purported fear of Minister Stanisic does not explain his failure to disclose his long police history with the SRBiH MUP, prior to beginning to work with Mr. Stanisic in the RS MUP. Finally, Mr. Kljajic did not explain how Mr. Stanisic, who was a Minister in Bosnia, would be able to quickly get to the Canadian embassy in Belgrade, upon learning that he (Mr. Kljajic) was inside. Although it is possible that Mr. Stanisic might have had allies in Belgrade whom he could have telephoned for that purpose, Mr. Kljajic offered no evidence in that regard, and did not suggest who such allies might be.

[120] And insofar as Messrs. Zepinic and Zugic are concerned, Mr. Kljajic conceded on cross examination that Mr. Zepinic ultimately emigrated to Australia and that Mr. Zugic was not assassinated until 2001, long after Mr. Kljajic submitted his PR Application.

[121] The second principal problem with Mr. Kljajic's submissions is that they do not negate the reasonable inference that he "knowingly" concealed material circumstances related to his PR Application, within the meaning of s. 10.1(1) of the *Citizenship Act*. In brief, even if I were to accept that Mr. Kljajic concealed material circumstances from his PR Application because he was afraid of Mr. Stanisic and the Yellow Wasps, this would not enable me to conclude that such deception was "innocent".

[122] The mental element contemplated by the word "knowing" in s. 10.1 is the concealing of information with the intention to deceive, that is to say, the intention to hide that information from Canadian immigration authorities. According to his own counsel, Mr. Kljajic specifically did not want anyone in the embassy to know about his links to the RS MUP and the SRBiH MUP, because he was concerned that they would alert Minister Stanisic or the Yellow Wasps to his presence at the embassy. In my view, this is very different from innocently forgetting to include material information, providing inaccurate information because of an honest translation error, or omitting information because it was genuinely considered to be inconsequential.

[123] The concealment of important parts of his prior work history, places of work and addresses of residence was specifically made to avoid identifying any link between Mr. Kljajic and both the Minister and the RS MUP. Stated differently, Mr. Kljajic specifically intended to

deceive Canadian immigration authorities as to the existence of those links. Moreover, the concealment of those links had the effect of precluding further questioning regarding those matters. This is a fact that could not have escaped Mr. Kljajic's knowledge, because those matters were objectively very relevant to the processing of his PR Application. They could not reasonably have been apprehended by him to be inconsequential matters.

[124] It follows that Mr. Kljajic's explanation for concealing the disputed information from Mr. Casey and his colleagues at the embassy in Belgrade does not negate the reasonable inference that he "knowingly" withheld those material circumstances from them. Instead, that explanation provides an attempted justification for Mr. Kljajic's actions.

[125] However, Mr. Kljajic did not identify any authority in support of the proposition that the knowing concealment of material circumstances, with the intention to deceive Canadian immigration authorities, can be justified.

[126] While I would not preclude the possibility that knowingly concealing material circumstances, within the meaning of subsection 10.1(1) of the *Citizenship Act*, may be justifiable, there is a very sound reason why this could only be in very exceptional circumstances. Two such circumstances *may* be where an application for permanent residence is completed under circumstances that amount to duress, as that concept has been defined in the jurisprudence (see paragraphs 167-168 below and *Mella v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1587, at para 30), or where the defence of necessity applies: see, e.g., *Canada (Minister of Citizenship and Immigration) v Seifert*, 2007 FC 1165, at para 182

["***Seifert***"]. However, there is no persuasive evidence that Mr. Kljajic's application was completed under such circumstances. Instead, it appears that he completed his PR Application of his own free will. Although he claims to have been afraid that it would have come to the attention of Minister Stanisic if he had not concealed the material circumstances discussed above, there is no evidence that he "face[d] an urgent and imminent danger" or had "no reasonable alternative to breaking the law": *Seifert*, above.

[127] In the absence of a strict limitation on justifying knowing concealment of material circumstances, the integrity of Canada's immigration and citizenship program would be very vulnerable. This is because it is not difficult to conceive of a broad range of potentially understandable justifications for concealing material circumstances that could lead to an application being denied. Such justifications might include a desire to reunite with one's spouse, children or parents in Canada; a desire to escape dangerous or threatening circumstances; or even a desire to escape abject poverty and desolate circumstances. It is readily apparent that the number of persons who might reasonably be tempted to justify false declarations, fraud, or concealment of material circumstances for these types of reasons could be very large indeed. Allowing for the possibility to justify deception for such reasons in applications for refugee protection, permanent residence or citizenship, would seriously undermine the rule of law.

[128] For greater certainty, where refugee protection is sought, an applicant must disclose the basis for his fear of persecution.

(3) Conclusion

[129] In summary, for the reasons I have provided above, I have concluded, on a balance of probabilities, that Mr. Kljajic became a permanent resident in Canada by knowingly concealing material circumstances on his PR Application, and that because of having acquired that status, he subsequently obtained citizenship, as contemplated by section 10.2 of the *Citizenship Act.* Those material circumstances consisted of his position as Under Secretary of the RS MUP, his places of work and his addresses between April 1992 and the fall of that year. They also consisted of Mr. Kljajic's positions in the SRBiH MUP, particularly those in the period immediately before the breakout of the Bosnian war. Those material circumstances concerned facts that are described in s. 35 of the IRPA. I will therefore issue the first two of the four declarations that the plaintiffs have requested.

B. *Is Mr. Kljajic inadmissible on grounds of violating human or international rights, as set forth in paragraph 35(1)(b) of the IRPA?*

(1) Applicable Legal Principles

[130] Pursuant to s. 35(1)(b) of the IRPA, a permanent resident or a foreign national is inadmissible to Canada on grounds of violating human or international rights for "being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of s. 6(3) to (5) of the [CAHWCA]".

[131] The term “prescribed senior official” is defined in s. 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the “R**egulations**”] as being “a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position”. Section 16 then provides a non-exhaustive list of persons who are stated to be included in this definition. Of particular relevance to this application are paragraphs 16(d) and 16(e), which identify “senior members of the public service”, and “senior members of the military and of the intelligence and internal security services”, respectively.

[132] To establish that a permanent resident or foreign national is inadmissible on the basis described above, the evidentiary standard is reasonable grounds to believe: IRPA, s. 33. In brief, the Court must be satisfied that there are reasonable grounds to believe that (i) the government in question is a government described in paragraph 35(1)(a); and (ii) the person in question held a “senior official” position described in s. 16 of the Regulations, including those listed as being deemed to be such an official.

[133] In the case of a position listed in paragraph 16(d) or (e), this means a “senior member” of the public service, the military, the intelligence service, or the internal security service: *Habeeb v Canada (Citizenship and Immigration)*, 2011 FC 253, at paras 12-14 [“***Habeeb***”]. In determining whether someone is or was a “senior member” of one of these organizations, it is necessary to consider the specific position and organization in question, rather than simply considering whether the occupant of a similar position in a similar organization in Canada would be considered to be “senior” here: *Habeeb*, above.

[134] Once it has been determined that a person was a "senior member" of one of the types of organizations listed in paragraphs 16(d) and (e) and described above, paragraph 35(1)(b) renders a permanent resident or foreign national inadmissible on the basis of their status alone. Stated differently, a person who is "a prescribed senior official" as described in that provision and in s. 16 of the Regulations is inadmissible to Canada on that ground alone. No further factual inquiry is required, whether to consider the nature and extent of the person's involvement in crimes, or otherwise: *Canada (Minister of Citizenship and Immigration) v Kassab*, 2020 FCA 10, at paras 27 and 44 ["***Kassab***"]; *Canada (Minister of Citizenship and Immigration) v Adam*, [2001] 2 FC 337, [2001] FCJ No 25 (QL) at paras 7-9; *Sekularac v Canada (Minister of Citizenship and Immigration)*, 2018 FC 381, at para 21. This is because prescribed senior officials are "deemed, by virtue of the position they hold or held in a designated regime, to be or to have been able to exert significant influence on the exercise of their government's power": *Kassab*, above, at para 52 (see also para 28).

[135] Nevertheless, for senior officials who are not specifically listed in s. 16, it must be established that there are reasonable grounds to believe that the person in question "is or was able to exert significant influence on the exercise of government power, or is or was able to benefit from their position".

[136] Mr. Kljajic submits that to the extent that "prescribed senior officials" may be inadmissible merely by virtue of their position in a designated or non-designated government, this is inconsistent with the Supreme Court of Canada's teachings in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 ["***Ezokola***"]. There, the Court rejected the

proposition that “high ranking government officials” should be “exposed to a form of complicity by association”. Instead, it held that for someone to be found to have been complicit in international crimes, there must be “serious reasons for considering that [the] individual has voluntarily made a significant and knowing contribution to a group’s crime or criminal purpose”: *Ezokola*, above, at paras 7-8 and 84.

[137] However, *Ezokola* is distinguishable from the present proceeding. This is because it did not deal with inadmissibility under paragraph 35(1)(b) of the IRPA, but rather with the issue of whether an individual can be excluded from refugee protection under s. 98 of the IRPA, based solely on their position within an organization or a group that has committed certain international or other specified crimes. Section 98 states: “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.” In *Ezokola*, the Court’s focus was on Article 1F of that convention, the *United Nations Convention Relating to the Status of Refugees* [the “**Refugee Convention**”], which excludes from refugee protection persons with respect to whom there are serious reasons for considering that they have committed certain international or other crimes.

[138] Whereas Article 1F is concerned with whether there are serious grounds for considering that a person has committed such crimes , either directly or by complicity, paragraph 35(1)(b) is concerned with whether a person is or was “a prescribed senior official” of a government described in that provision. As noted above, such “senior officials” are deemed to be or to have been able to exert significant influence on the exercise of their government’s power. Accordingly, *Ezokola* has no application to paragraph 35(1)(b): *Al Naib v Canada (Minister of*

Public Safety and Emergency Preparedness), 2016 FC 723, at paras 21-25 ["***Al Naib***"]; *Sherzai v Canada (Minister of Citizenship and Immigration)*, 2016 FC 166, at para 14; see also *Younis v Canada (Citizenship and Immigration)*, 2010 FC 1157, at para 28.

[139] I fully agree with the view expressed in *Al Naib*, and the jurisprudence cited therein, to the effect that the analysis in *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86, at paras 12- 27, applies equally to paragraph 35(1)(b):[2] see also *Kassab*, above, at para 34, where the Court quoted approvingly from *Tareen v Canada (Citizenship and Immigration)*, 2015 FC 1260, at para 40, on this specific point.

[140] Mr. Kljajic also submits that it would not be just and equitable to declare a person inadmissible to Canada without assessing whether the person in fact committed, or was complicit in committing, the crimes referred to in paragraph 35(1)(b). However, it is within Parliament's power to legislate that permanent residents and foreign nationals are inadmissible by virtue of holding a prescribed senior position within a government that has engaged in such crimes. By the express terms of paragraph 35(1)(b) and s. 16 of the Regulations, Parliament has done so.

[141] Mr. Kljajic further maintains that pursuant to section 42.1 of the IRPA, persons who hold positions listed in s. 16 of the Regulations are not automatically inadmissible. That provision permits the Minister to declare that the matters referred to in paragraph 35(1)(b) do not constitute inadmissibility, if a foreign national is able to satisfy the Minister that his or her admission to Canada is not contrary to the national interest. However, s. 42.1 is an exception to paragraph

[2] I recognize that *Kanagendren*, above, dealt with paragraph 34(1)(f), which concerns inadmissibility on security grounds, whereas paragraph 35(1)(b) concerns inadmissibility on grounds of violating human or international rights.

35(1)(b) that operates only where, on application by a foreign national, the Minister makes such a declaration. The same was true of paragraph 19(1)(l) of the *Immigration Act*. There is no evidence that Mr. Kljajic made such an application or received such a declaration pursuant to section 42.1, or indeed pursuant to paragraph 35(1)(b).

[142] Mr. Kljajic submits that this Court can and should conduct the assessment described in section 42.1, because the Minister's powers under that section are limited to foreign nationals who are outside Canada. He maintains that the same was true in respect of paragraph 19(1)(l) of the former *Immigration Act*. Mr. Kljajic insists that in the absence of an ability of the Minister to conduct the assessment contemplated by s. 42.1 in respect of foreign nationals who are already in Canada, the Court has, and had under paragraph 19(1)(l), the discretion to conduct that assessment.

[143] I disagree. There is nothing in the plain language of s. 42.1 or the former paragraph 19(1)(l) that supports Mr. Kljajic's position that those provisions apply only to foreign nationals who are or were outside Canada. If Parliament had intended s. 42.1 and paragraph 19(1)(l) to be limited in that regard, it could have easily stated so. In any event, there is nothing in s. 42.1 or elsewhere in the IRPA, the former *Immigration Act* or the *Citizenship Act* that provides or provided this Court with jurisdiction to take account of national interest considerations in conducting the assessment contemplated by paragraph 10.5(1) of the latter legislation.

(2) Analysis

[144] In June 1993, the RS was designated, for the purposes of paragraph 19(1)(l) of the *Immigration Act* (now paragraph 35(1)(b) of the IRPA), as a regime that, in the opinion of the Minister, is "a government that is or was … engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity within the meaning of subsection 7(3.76) of the *Criminal Code*". That designation was extended in August 1997 and again in September 2004, and covered the period March 27, 1992 until October 1996. This is not contested by Mr. Kljajic.

[145] The evidence also demonstrates that the RS MUP committed crimes against humanity. Once again, this is not contested by Mr. Kljajic. Those crimes included:

- The widespread and systematic arrest of non-Serbian civilians and their detention in "atrocious" conditions;
- Mistreatment, physical, psychological and sexual abuse, torture and murder of detainees;
- Ethnic cleansing/forced displacement of non-Serbian (Muslim and Croat) populations from several regions controlled by the RS MUP;
- Forced eviction of civilians from their homes without compensation, as a prelude to their forced displacement from such regions; and
- Pillage and destruction of property, including destruction of religious and cultural monuments.

(Nielsen Report, at 5, paras 99, 110, 113. See also paragraph 170 below.)

[146] Given the foregoing, the sole issue that remains to be addressed in respect of paragraph 35(1)(b) is whether there are reasonable grounds to believe that Mr. Kljajic was a "senior member" of the public service or of the military or the internal security service of the RS, as contemplated by paragraphs 16(d) and (e), respectively, of the Regulations.

[147] During final oral submissions in this proceeding, Mr. Kljajic's counsel readily acknowledged that Mr. Kljajic held a position listed in s. 16. However, she maintained that the mere fact of holding such a position was not a sufficient basis upon which to conclude that he is inadmissible. As discussed further below, Mr. Kljajic insists that he occupied a position in which he had no real or practical influence within the RS MUP, particularly in respect of any crimes against humanity or war crimes that they may have committed.

[148] For the reasons set forth in paragraph 133-139 above, that understanding of the legislative scheme is erroneous. Once a person is found to have held one of the positions listed in paragraphs 16(a) – (g) of the Regulation, the person is presumed to have been a "prescribed senior official", and is therefore inadmissible to Canada, pursuant to paragraph 35(1)(b) of the IRPA. For greater certainty, in the case of paragraphs 16(d) and (e), once a person is found to have been a "senior" member of the listed organization, no further analysis is required, or indeed permitted.

[149] Given Mr. Kljajic's acknowledgement that he was a "senior member" of the internal security service of the RS government, it is unnecessary to dwell on that issue. It is also unnecessary to assess whether he was a "senior member" of the public service. However, for the

record, the evidence demonstrates that there are indeed reasonable grounds to believe that Mr. Kljajic was in fact a "senior member" of both the military and the internal security service of the RS. That evidence includes the following:

- Mr. Kljajic was the second or third ranking member of the RS MUP, which in turn was the department that was responsible for internal security within the RS and was also the *de facto* military of the RS for several months following the outbreak of the Bosnian war in April 1992 (Nielsen Report, at para 91);
- Mr. Kljajic. was appointed Deputy Commander of the armed forces in the RS, on May 15, 1992 (Exhibit 103, at 6);
- Mr. Kljajic was actively involved in the establishment of the RS MUP, and indeed stated that he would resign from the SRBiH MUP "within seven days" unless a Serb MUP was established (Exhibit 25, at 10; Nielsen Report, at para 46);
- He worked on the structuring and coordination of the RS MUP after it was created (Exhibit 107, at 7, and Exhibit 128) and played an important role in the transfer of its headquarters to Bijeljina in June 1992 (Transcript, Vol. 4, at 21);
- Mr. Kljajic took decisions on behalf of the Minister when he was not present, chaired at least two meetings in his absence (on September 10, 1992 and part of the meeting on November 5, 1992), and was considered to be one of the Minister's closest associates (Nielsen Report, at 4 and para 117; Transcript, Vol. 4, at 49 (Davidovic testimony); Exhibit 383, at 11302 (Njegus testimony before the ICTY));

- Mr. Kljajic was a member of the RS MUP's Cabinet and steering council;
- Dr. Nielsen stated in his report that Mr. Kljajic's "job was without any doubt one of the most senior and responsible posts in the RS MUP" (Nielsen Report, at para 74). In cross-examination, Dr. Nielsen maintained that Mr. Kljajic "not only could, but in fact did exercise [the] authority" that he had under the law that created the RS MUP (Transcript, Vol. 3, at 74);
- Mr. Kljajic was responsible for the defence of the police academy in Vraca, for re-establishing public order and dealing with paramilitary groups in Bijeljina and was assigned briefly to Belgrade to deal with widespread misuse of official documents, such as passports, driver's licences and vehicle permits;
- Mr. Kljajic dealt directly with senior people in Belgrade, including Messrs. Mihajlovic and Davidovic, who provided financial, arms and other assistance to the RS MUP (Nielsen Report, at para 109; Transcript, at Vol. 4, at 23-24 (Davidovic testimony));
- Mr. Kljajic also liaised with his counterpart in the National Security branch of the RS MUP (Slobodan Skipina), for example with respect to the transportation of arms (Nielsen Report, at para 121), and had regular professional communications with Mr. Njegus (Exhibit 383, at 11306, Transcript, Vol. 7, at 52);
- Mr. Kljajic dealt directly with, and was briefed by, regional/municipal police chiefs and others who were below him in the hierarchy, including in Bijeljina (Messrs. Andan and Jesiric), Banja Luka (Mr. Zupljanin), Novi Grad (Mr. Tepavcevic) and Illidza (Mr. Kovac) (Nielsen Report, at paras 111 and 118;

Transcript, Vol. 4, at 17-18 and 25-26, and Vol. 5, at 71; Exhibits 111 and 121);

- Mr. Kljajic authorized Mr. Njegus to sign an order, dated June 15, 1992, to mobilize military conscripts (Exhibit 185; Exhibit 384, at 11378; Transcript, Vol. 7, at 35-41); and
- He was involved in decisions regarding the eviction of Muslims from their homes, their transfer to one or more detention centres, the treatment of detainees, and prisoner exchanges (Nielsen Report, at paras 111-112; Transcript, Vol. 2, at 60-61; Transcript, Vol. 4, at 30-32).

(3) Conclusion

[150] In summary, for the reasons set forth above, there are reasonable grounds to believe that (i) the RS was a government described in s. 35(1)(b) of the IRPA at the time that Mr. Kljajic was the Under Secretary of Public Security of the RS MUP, (ii) the RS MUP was part of both the "military" and the "internal security service" of the RS, as contemplated by s. 16(e) of the Regulations, and (iii) as Under Secretary, Mr. Kljajic was in fact a "senior member" of the RS MUP. Accordingly, I will issue the declaration sought by the plaintiffs in respect of paragraph 35(1)(b).

C. *Is Mr. Kljajic inadmissible on grounds of violating human or international rights, as set forth in paragraph 35(1)(a) of the IRPA?*

[151] Notwithstanding the conclusion reached immediately above, I will proceed to consider whether Mr. Kljajic is also inadmissible under paragraph 35(1)(a), because the plaintiffs have sought a declaration in that regard.

(1) Applicable Legal Principles

(a) *Crimes against humanity*

[152] Pursuant to paragraph 35(1)(a) of the IRPA, permanent residents and foreign nationals are inadmissible on grounds of violating human or international rights for "committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the [CAHWCA]". Sections 4, 5 and 7 of that legislation are not relevant to this proceeding because the declaration sought by the plaintiffs in respect of paragraph 35(1)(a) concerns crimes defined in subsections 6(3) – (5) of the CAHWCA. That said, the plaintiffs' submissions focused solely on one of those crimes, namely, crimes against humanity. The definition of a crime against humanity is set forth in Appendix 1 below.

[153] That definition is highly similar to that which was described in 7(3.76) of the *Criminal Code* in 1995, when Mr. Kljajic applied for permanent residence in this country. (See Appendix 1 below.) As in *Mugesera*, above, at para 118, the differences between the definitions of crimes against humanity, as set forth in section 6 of the CAHWCA and in former subsection 7(3.76) of the *Criminal Code*, respectively, "are not material to the discussion that follows".

[154] As with paragraph 35(1)(b) of the IRPA, the facts that constitute inadmissibility under paragraph 35(1)(a) include facts arising from omissions and facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur: IRPA, s. 33. This *reasonable grounds to believe* standard requires "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities". Such grounds will exist "where there is an objective basis for the belief which is based on compelling and credible information": *Mugesera*, above, at para 114.

[155] However, whether the facts proven on the reasonable grounds to believe standard meet the requirements of a crime against humanity or other crime is a question of law. To resolve that question in the affirmative, the facts proven on the reasonable grounds to believe standard must show that the alleged behaviour did constitute a crime against humanity: *Mugesera*, above, at paras 116-117. Nothing turns on this, because Mr. Kljajic acknowledges that the RS MUP committed crimes against humanity during the time that he was the Under Secretary of that organization. What he takes issue with is the plaintiffs' allegation that he was *complicit* in those crimes.

[156] The *reasonable grounds to believe* standard was included in the precursor to paragraph 35(1)(a) of the IRPA, paragraph 19(1)(j) of the *Immigration Act*, above, which was in force at the times Mr. Kljajic applied for permanent residence and citizenship in this country.

[157] A crime against humanity is committed when each of the following four elements is satisfied:

> 1. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);
>
> 2. The act was committed as part of a widespread or systematic attack;
>
> 3. The attack was directed against any civilian population or any identifiable group of persons; and
>
> 4. The person who committed the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.
>
> *Mugesera*, above, at para 119.

[158] A widespread attack "may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims". However, it need not be carried out pursuant to a specific strategy, policy or plan: *Mugesera*, above, at para 154.

[159] A systematic attack is one that is "thoroughly organised and follow[s] a regular pattern on the basis of a common policy involving substantial public or private resources" and is "carried out pursuant to a … policy or plan". However, the policy need not be an official state policy and the number of victims is not determinative: *Mugesera*, above, at para 155.

[160] Only the attack needs to be widespread or systematic, not the act of the individual in question. Moreover, "[e]ven a single act may constitute a crime against humanity as long as the attack it forms a part of is widespread or systematic and is directed against a civilian population": *Mugesera*, above, at para 156.

[161] Once again, in this proceeding, nothing turns on the above-mentioned legal principles pertaining to the four elements of a crime against humanity, because Mr. Kljajic concedes that the RS MUP perpetrated such crimes during the period that he was a senior member of that organization.

[162] I will simply add in passing that the target populations in the former Yugoslavia, who were identifiable on ethnic and religious grounds, have been described as being a "prototypical example of a civilian population", as contemplated by the definition of a crime against humanity: *Mugesera*, above, at para 162.

(b) *Complicity*

[163] Crimes against humanity can be committed either directly, or by complicity. Indeed, "[c]omplicity is a defining characteristic of crimes in the international context, where some of the world's worst crimes are committed often at a distance, by a multitude of actors": *Ezokola*, above, at para 1.

[164] Individuals may be complicit in international crimes without a link to a particular crime. However, "there must be a link between the individuals and the *criminal purpose* of the group" (emphasis in original). For the purposes of paragraph 35(1)(a), that link is established where there are reasonable grounds to believe that the individual in question "has voluntarily made a significant and knowing contribution to a group's crime or criminal purpose": *Ezokola*, above, at para 8. This can include "wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary…", so long as the individual is "aware

of the government's crime or purpose and aware that his or her *conduct* will assist in the furtherance of the crime or criminal purpose": *Ezokola*, above, at paras 87 and 89 (emphasis in original).

[165] In assessing whether an individual has voluntarily made a significant and knowing contribution to a crime committed by an organization, or to the organization's criminal purpose, the Court should be guided by the following factors:

(i) the size and nature of the organization;

(ii) the part of the organization with which the individual was most directly concerned;

(iii) the individual's duties and activities within the organization;

(iv) the individual's position or rank in the organization;

(v) the length of time the individual was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and

(vi) the method by which the individual was recruited and his or her opportunity to leave the organization.

Ezokola, above, at paragraph 91.

(c) *Duress*

[166] The defence of duress "is available when a person commits an offence while under compulsion of a threat made for the purpose of compelling him or her to commit it": *R v Ryan*, 2013 SCC 3, at para 2 ["***Ryan***"]. In essence, the defence "operates to excuse complicity so that

the complicit individual is exonerated of culpability": *Oberlander v Canada (Attorney General)*, 2009 FCA 330, at para 27 ["***Oberlander***"].

[167] To establish this defence, an individual must establish several elements, namely:

(i) There was an explicit or implicit threat of death or bodily harm proffered against the individual or a third person;

(ii) The individual reasonably believed that the threat would be carried out;

(iii) There was no safe avenue of escape (as determined by reference to a reasonable person similarly situated);

(iv) There was a close temporal connection between the threat and the harm threatened;

(v) The harm threatened was equal to or greater than the harm inflicted by the individual (or by those with whom he was complicit);

(vi) The individual behaved in a manner consistent with what society would expect from a reasonable person similarly situated in that particular circumstance; and

(vii) The individual did not voluntarily put himself or herself in a position where there was a risk of coercion and/or threats by the other members of a conspiracy or association, to compel him or her to commit an offence.

Ryan, above, at paras 55, 65, 73, 75 and 80; *Oberlander*, above, at para 26; *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, [1992] FCJ No 109 (QL), at para 39 (Appeal Division); *Gil Luces v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1200, at paras 21-22; *L'Espérance v Canada (Attorney General)*, 2016 FC 19, at para 17.

[168] It bears underscoring that "[p]roportionality is a crucial component of the defence of duress". This is because "it derives directly from the principle of moral involuntariness: only an action based on a proportionally grave threat, resisted with normal fortitude, can be considered morally involuntary": *Ryan*, above, at para 54. Accordingly, an individual who commits or is complicit in the commission of a crime in the face of a threat or coercion that does not rise to the level of being proportionate to the crime committed, cannot be said to have committed the crime "involuntarily". I will simply add in passing that this would not preclude the individual from raising another available defence: *Ezokola*, above, at para 100.

(2) Analysis

[169] In his final submissions, Mr. Kljajic conceded that the RS MUP had committed crimes against humanity and war crimes: Transcript, Vol. 10, at 14 and 36.

[170] I pause to note that the ICTY has found this to be the case in several different proceedings, including: *Prosecutor v Mico Stanisic and Stojan Zupljanin*, ICTY, Case No IT-08-91-T (27 March 2013), Vol 2, at paras 313, 494, and 512; *Prosecutor v Mico Stanisic and Stojan Zupljanin*, ICTY, Case No IT-08-91-A (30 June 2016), at para 268; and *Prosecutor v Momcilo Krajisnik*, ICTY, Case No IT-00-39-T (27 September 2006), at paras 707-712, 721, 732, 790-794, 803-806, 807-809, 814, 817-818, 827-828, 835, 840.

[171] The plaintiffs alleged that Mr. Kljajic was complicit in those crimes against humanity. Mr. Kljajic categorically denies that allegation.

[172] Accordingly, the focus of the analysis below will be upon whether there are reasonable grounds to believe that Mr. Kljajic voluntarily made a significant and knowing contribution to those crimes. In conducting that analysis, I will address the six factors identified at paragraph 165 above.

(a) *The size and nature of the RS MUP*

[173] Where an organization is large, multi-faceted, and engaged in both legitimate and criminal activities, this can make it more difficult to link a particular person within the organization to its criminal activities: *Ezokola*, above, at para 94.

[174] Mr. Kljajic notes that the RS MUP is a vast, heterogeneous organization that employs thousands of employees in several different departments and sections. He submits that during the time that he was there, a climate of chaos permeated the organization and difficulties with maintaining and establishing communications made it difficult for him to know what was going on in different parts of the organization.

[175] The plaintiffs readily acknowledge that, even in 1992, the RS MUP was a very large organization comprised of thousands of employees. However, they note that the RS MUP was also a *de facto* part of the RS's armed forces and was extensively involved in combat activities between April and September 1992 (Nielsen Report, at paras 85, 91, 98 and 207). In this regard, Minister Stanisic ordered the RS MUP to be organized into "war units", on May 15, 1992 (Exhibit 103). According to the RS MUP's *Draft Annual Report for April-December 1992*, the organization's engagement with "regular [police] tasks" was limited, "especially in the

beginning" (Exhibit 102, at 70).[3] Apparently, it was not until the relocation of the RS MUP's headquarters to Bijeljina, in June 1992, that "organised and planned work on the tasks of crime prevention and detection [were] actually set up and posts filled" (Exhibit 102, at 66). Beginning in April 1992, an average of "1451 police officers" took part in combat activities each day, and, over the period of the report, a total of "more than 14,700 policemen took part in combat activities at the front line" (Exhibit 102, at 55).

[176] The RS MUP's "combat" operations included "activities such as the widespread and systematic arrest or detention of non-Serb civilians, culminating in their physical removal from their places of residence" (Nielsen Report, at para 99). Those operations also played a critical role in the war and in implementing the instructions pertaining to the Variant A and Variant B areas described at paragraph 17 above (Transcript, Vol. 1, at 132-134, and Transcript, Vol. 2 at 49 and 104).

[177] With respect to communications, Dr. Nielsen reported that periods of interrupted communications "were exceptional and workaround solutions were adopted" (Nielsen Report, at para 107). This was corroborated by Mr. Davidovic (Transcript, Vol. 4, at 18 and 26). Dr. Nielsen added that throughout the course of 1992, reports were regularly provided from local and regional police posts to the RS MUP's headquarters; and that "orders, instructions and information were regularly passed down the chain of command" from both the Minister and Mr. Kljajic (Nielsen Report, at para 107). In addition, the draft annual report mentioned at paragraph 175 above states that "[o]n average, 15 telegrams a day were sent to the centres and other organs

[3] That report was described by one senior member of the RS MUP as being "the only ministerial annual report accepted without reservations": Nielsen Report, at footnote 353.

of the Interior from the MUP headquarters (a total of 4170 telegrams have been sent in all lines of work) and an average of 16 telegrams a day were received (a total of 4400 telegrams)". (Exhibit 102, at 78.) Moreover, the Minister ordered that daily reports be provided to RS MUP headquarters (Nielsen Report, at para 116; Transcript, Vol 2, at 66), and there were frequent meetings of senior RS MUP officials (including Mr. Kljajic), including monthly meetings of the RS MUP's steering committee (Nielsen Report, at 5).

[178] Considering the foregoing, I find that there are reasonable grounds to believe that communications within the RS MUP were such that Mr. Kljajic likely was aware, within a matter of days and in any event within a matter of a few weeks, of the crimes against humanity that were being perpetrated by the RS MUP while he was the Under Secretary. Whether he made a voluntary, significant and knowing contribution to those crimes, or to the RS MUP's criminal purpose, is a matter that will be addressed below.

[179] For the purposes of my assessment of "the size and nature of the RS MUP", the evidence discussed above leads me to give this factor a neutral weighting in assessing whether Mr. Kljajic was complicit in the crimes against humanity perpetrated by the RS MUP.

(b) *The part of the RS MUP with which Mr. Kljajic was most directly concerned*

[180] Mr. Kljajic was the head of the branch of the RS MUP that was responsible for public security. That branch was also heavily involved in combat activities during the time that he held

that position. To that end, it was armed with heavy artillery, including tanks, armoured vehicles and rocket launchers.

[181] As previously noted, Mr. Kljajic was also appointed to the position of Deputy Commander of the armed forces of the RS in mid-May 1992. It is noteworthy that the Under Secretary of the other main branch of the RS MUP (the national security branch) was simply appointed to the position of "member" of the senior staff of the armed forces, at that time.

[182] In addition to their involvement in combat activities, parts of the public security branch of the RS MUP were involved in the perpetration of crimes against humanity. This included the arrest of non-Serbian civilians, the operation of hundreds of detention facilities, the interrogation and killing of prisoners at some of those facilities, the transfer of detainees between facilities, and the ethnic cleansing of non-Serbs (which included the looting of and eviction from their homes so that they could be given to Serbian "refugees" arriving from other areas) (Nielsen Report, at 5 and paras 153-156 and 168; Transcript, Vol. 4, at 28-32 and 70-71). More broadly, a culture of impunity existed throughout the RS MUP, including the public security branch, with respect to crimes committed by paramilitary groups and the police against Muslims and Croats (Transcript, Vol. 2, at 83-84 and 91-92). According to Dr. Nielsen, "[t]he available documentation indicates that the RS MUP took few concrete actions to stop paramilitary attacks on non-Serbs in Bosnia and Herzegovina. In many cases, RS MUP units co-operated with the Bosnian Serb paramilitary forces, and this co-operation was condoned by leading officials in the Ministry." (Nielsen Report, at 5. See also para 197.)

[183] In addition, according to Dr. Nielsen: “The police and the military cooperated extensively in the campaign to disarm the non-Serb civilian population. … The pervasive cooperation of the police and the military was a publicly known fact.” (Nielsen Report, at para 101.)

[184] Considering the foregoing, I find that this factor merits a positive weighting in the assessment of whether Mr. Kljajic was complicit in the crimes against humanity that were perpetrated by the RS MUP.

(c) *Mr. Kljajic’s duties and activities within the RS MUP*

[185] Mr. Kljajic maintains that he was a mere “pawn” within the RS MUP, who had no practical power. He asserts that there was never any job description associated with his position, that the position was never legally created, and that it was not a “real” position with any “real” power. More specifically, he insists those below him within the organization reported directly to the Minister, that he did not give any orders and that he had no ability to influence anyone within the government or the RS MUP – particularly those who were committing crimes against humanity. He further asserts that he spent his time in his office dealing with administrative matters related to the defence of the police academy in Vraca and the reigning-in of the paramilitary groups that were operating in Bejiljina. He also maintained that he was not informed about the detention centres that the RS MUP operated during the war.

[186] The evidence demonstrates otherwise.

[187] As noted at paragraph 149 above, Mr. Kljajic was actively involved in the establishment of the RS MUP, its subsequent structuring and coordination, its steering council, and in several important aspects of its functioning. He took decisions on behalf of the Minister when the latter was not present, he chaired at least two meetings in the Minister's absence and he was considered to be one of the Minister's closest associates. By his own admission, he was responsible for the defence of the police academy in Vraca and for establishing public order and dealing with paramilitary groups in Bejiljina, and he travelled to Belgrade in July 1992 to deal with widespread misuse of official documents, such as passports, driver's licences and vehicle permits.

[188] In addition, Mr. Kljajic dealt directly with the President of the RS (Radovan Karadzic) and the Prime Minister of the RS (Branko Deric) (Nielsen Report, at paras 114 and 130; Transcript, Vol. 2 at 84; Transcript, Vol. 4, at 13 and 94-95; Exhibits 113 and 120).

[189] Indeed, President Karadzic thought so highly of Mr. Kljajic that he instructed Mr. Miodrag Simovic, a leading member of the SDS and the Vice-President of the government of B&H, to insist upon the appointment of Mr. Kljajic as Chief of the public security service branch of the RSBiH MUP, before the RS MUP was established. According to Dr. Nielsen, it was not sufficient for President Karadzic that senior police positions where held by people of Serb ethnicity. Those individuals also had to be "a Serb who saw eye to eye with the political interests of the [SDS]" (Transcript, Vol. 1, at 107). To this end, President Karadzic "regarded loyalty to the SDS and the willingness to support the SDS' interests as the primary criteria on governing

his support for specific candidates in the Ministry of Internal Affairs." (Transcript, Vol. 1, at 122).

[190] Mr. Kljajic also had direct dealings with senior Serbian officials in Belgrade, who provided financial support, arms and other assistance to the RS MUP. In addition, he liaised with his counterpart in the National Security branch of the RS MUP (Slobodan Skipina), for example, with respect to the transportation of arms, and he had regular professional communications with Mr. Njegus.

[191] I pause to note that the plaintiffs submitted a transcript of an intercept of a telephone conversation between President Karadzic and someone identified as "Cedo". Mr. Kljajic maintained that he is not the "Cedo" who participated in that conversation. In support of his position, he stated that there were two or three other people named "Cedo" in his office, and that he had shared a tape of that intercept with several others who all agreed with him that the voice of the person speaking with President Karadzic is not his. However, Mr. Kljajic did not identify who those other people named "Cedo" were, and he did not introduce the audio recording of the intercept into evidence. Given his confirmation that he has a copy of that recording (Transcript, Vol. 5, at 76-77), I consider it appropriate to draw an adverse inference that he was in fact the person identified as "Cedo" on the transcript of the intercept. I consider my conclusion in this regard to be supported by the fact that, at the outset of the intercepted conversation, an unidentified person asked for "Mico", and when informed that "Mico" was not present, he agreed to speak with "the other Mico", and was then connected with "Cedo". The unidentified person, who confirmed that he was "Lale", then passed the telephone to President Karadzic, who

proceeded to request a report on the evening's attacks. In turn, "Cedo" reported on the situation in Rajlovac, Ahatovici, Vraca, Dobrinja and Lukavica. It is reasonable to infer that only a very senior person would have been able to provide such a briefing, especially to President Karadzic, and that the "Cedo" in question was Mr. Kljajic. It is also reasonable to infer that the "Cedo" who we know acted in Minister "Mico" Stanisic's place when he was not present, would be the "Cedo" who was referred to as "the other Mico". In one of the more noteworthy exchanges during that telephone conversation, President Karadzic instructed Mr. Kljajic to "[t]ry not to use artillery", but instead to "use infantry weapons, let them go to hell". Mr. Kljajic replied "Exactly … They'll get what they're asking for." (Exhibit 113, at 9.)

[192] It is relevant to note that Dr. Nielsen stated that this intercept reflects that President Karadzic "regarded Mr. Kljajic as someone who could accurately brief him on combat activities, including events where we subsequently came to know through the investigations of the ICTY that crimes were committed" (Transcript, Vol. 2, at 63). Dr. Nielsen added that it was apparent from the original Serbian version of the intercept that "Mr. Kljajic and Mr. Radovan Karadzic not only know each other but speak to each other in a tone of familiarity. And certainly, from Mr. Karadzic's point of view, he is speaking to Mr. Kljajic in the manner that one speaks to a long-term acquaintance and as a friend." (Transcript, Vol. 2, at 63-64.)

[193] Mr. Kljajic also dealt directly with, and was briefed by, regional/municipal police chiefs and others who were below him in the hierarchy.

[194] Turning to his claim that he did not issue any orders, I note that Mr. Kljajic later explained that his management style was to sit down with people and discuss what had to be done (Transcript, Vol. 4, at 122). This would help to explain why there does not appear to be many examples of written orders issued by him. In addition, as mentioned at paragraph 81 above, Mr. Njegus testified that most orders went out under the Minister's signature. This was confirmed by Dr. Nielsen, who testified that "pursuant to conventional practice in the Ministry of Internal Affairs, such instructions or orders issued by Mr. Kljajic personally would, in practice, appear as orders issued by the Minister, Mico Stanisic" (Transcript, Vol. 3, at 54).

[195] In any event, I accept Mr. Davidovic's testimony that Mr. Kljajic routinely gave orders, both orally and in writing. These included orders pertaining to the eviction of Muslims from their homes in Bijeljina, their transfer to the detention camp in Batkovic, and the arrest of members of the Yellow Wasps and other paramilitary groups. In addition, Mr. Kljajic requested Mr. Davidovic to return to the front lines, asked him to leave military equipment in Pale, and appointed him to act in the name of the RS MUP (Transcript, Vol. 4, at 17, 19, 21-22, 30-32, 58, 61 and 71).

[196] I also accept Dr. Nielsen's testimony that "most orders that were issued by Mr. Stanisic, pertaining [to] the policing and Public Security would in the first instance, usually have been proposed and/or discussed with Mr. Kljajic and then subsequently be issued from the Minister with the signature of the Minister and not of Mr. Kljajic" (Transcript, Vol. 3, at 56).

[197] I also note that although Mr. Andan stated that Mr. Kljajic did not give him any orders in Vraca, he testified that he began to receive orders from Mr. Kljajic when he was transferred to Bijeljina, at Mr. Kljajic's request. This included orders to arrest members of the Yellow Wasps and other paramilitary groups. (Transcript, Vol. 6, at 15-16, and 25.)

[198] Indeed, Mr. Njegus credited Mr. Kljajic with disarming the paramilitaries in Bijeljina. And before the ICTY, Mr. Njegus testified that it was Mr. Kljajic who authorized him to sign an order, dated June 15, 1992, to mobilize military conscripts (Exhibit 185; Exhibit 384, at 11378; Transcript, Vol. 7, at 35-41). He also testified there that Minister Stanisic delegated to Mr. Kljajic the authority to sign documents under his name (Exhibit 383, at 11336).

[199] Moreover, Mr. Kljajic requested Mr. Zupljanin to send junior police officers to Vraca for training, and instructed him to inform some more senior officers that they had 24 hours to get to Sarajevo (Exhibit 118, at 3 and 8).

[200] So, it is clear from all of the foregoing that Mr. Kljajic did in fact give orders, appoint personnel to specific positions, and take other important decisions.

[201] Insofar as Mr. Kljajic's reliance on the administrative nature of his position is concerned, this does not negate the significance of his contributions to the crimes that were committed by the RS MUP. In this regard, it bears reiterating that some of "the world's worst crimes are committed often at a distance, by a multitude of actors": *Ezokola*, above, at para 1. I further note that Mr. Kljajic's administrative functions, at least after he arrived in Bijeljina in mid-June 1992,

were at the RS MUP's headquarters, where [TRANSLATION] "its activities were planned" (Transcript, Vol. 6, at 16).

[202] With respect to Mr. Kljajic's knowledge of the RS MUP's detention centres and other crimes against humanity that were perpetrated by that organization, the evidence is once again inconsistent with his assertions.

[203] Mr. Davidovic, who stated that he "spent every day" with Mr. Kljajic while he (Mr. Davidovic) was in Bijeljina for approximately one month in June and July 1992, testified that "it was impossible for [Mr. Kljajic] not to know about" the existence of the camp in Luka, Brcko. He added that when he asked Mr. Kljajic why the police were taking people to a second camp in Batkovic (near Bijeljina), Mr. Kljajic explained that this is where they were taking the Muslims who were being evicted from their homes. (Transcript, Vol. 4, at 16, 27-30.) Mr. Davidovic proceeded to explain that when he initially arrived in Bijeljina and asked Mr. Kljajic where he wanted him to put the approximately 100-150 people who moved there with him (from Pale/Vraca), Mr. Kljajic replied: "Of course in Muslim houses." (Transcript, Vol. 4, at 32.)

[204] In addition, Mr. Kljajic was informed on May 20, 1992 by Mr. Tepavcevic about "inadequate conditions of accommodation, food, hygiene and state of health of detainees" in a third camp, in Butmir, located on the outskirts of Sarajevo. Five days later, he wrote to Mr. Kljajic again about the situation. (Exhibits 111 and 112.)

[205] Mr. Kljajic was also aware of other mistreatment of Muslims. For example, in an intercept of a telephone conversation between Mr. Kljajic and Mr. Zupljanin on May 7, 1992, the latter suggested that Muslims who were trapped in the centre of Sarajevo be kept "really hungry". Mr. Kljajic replied: "Well, that is already about to happen, mate." Mr. Kljajic then agreed to shut off the water there for 10-12 hours. Mr. Kljajic also observed that non-Serbs were "encircled" in Illidza, and that there was "no worse location for them under the skies". (Exhibit 118, at 4-5 and 10.)

[206] More generally, Dr. Nielsen stated: "By mid-July 1992 at the latest, the entire hierarchy of the RS MUP, including [Mr. Kljajic], was well aware that conditions in [detention] facilities were atrocious and that most of the detainees were non-Serbs." (Nielsen Report, at para 153. See also paras 165 and 186.) Dr. Nielsen added that as a result of his attendance at monthly meetings of the RS MUP's steering council, Mr. Kljajic would have had "knowledge of the negative effects of the police and military operations on the non-Serb civilian population". (Nielsen Report, at 5) The evidence provides reasonable grounds to believe that the high level meetings Mr. Kljajic attended include:

- A meeting at Vila Bosanka in Belgrade on July 11, 1992, at which Minister Stanisic and regional police chiefs provided briefings on "the security situation", the RS MUP's work, and "coming tasks". In addition, instructions to be distributed to regional and local police posts were prepared at that meeting. (Exhibit 108.)
- A meeting in Trebinje on August 20, 1992, which concluded with a summary provided by Mr. Kljajic. The third item in that summary stated:

> "Subordination, as the basic principle of the command structure, must be respected at all levels of the MUP organisation, any behaviour to the contrary will result in /disciplinary/ action against those responsible, while orders have to be issued through the competent superior officers." (Exhibit 327, at 28.)

- A meeting on September 9, 1992, at which Minister Stanisic provided an update on the "results" that the RS MUP had been able to achieve. (Exhibit 127.)
- A meeting on November 5, 1992 at which there was a discussion about, among other things, "the increase in criminal activities by individuals and groups", and new "Draft Instructions on urgent, current, periodical and statistical reports" within the RS MUP. (Exhibit 114, at 15 and 17.)
- A second meeting at Vila Bosanka, which Mr. Kljajic mentioned during cross examination. (Transcript, Vol. 5, at 64.)

[207] In addition, as noted at paragraph 195 above, Mr. Kljajic was involved in decisions regarding the eviction of Muslims from their homes, their transfer to detention centres, the treatment of detainees and prisoner exchanges.

[208] Mr. Kljajic also was informed by Mr. Jesiric on April 16, 1992 that fifteen thousand Muslims had escaped from Bijeljina and/or Zvornik to Serbia (Exhibit 121, at 6).

[209] More generally, Minister Stanisic stated in October 1992 that "it has not occurred yet that anyone [sic] of the implementers on the complete territory of Republika Srpska has turned a deaf

ear to any of my orders, issued directly in accordance with the law" (Nielsen Report, at para 230). It bears reiterating that the ICTY convicted Minister Stanisic of committing crimes against humanity through participation in a joint criminal enterprise with other members of the RS leadership.

[210] In any event, Dr. Nielsen testified that, except for urgent matters that may have been issued directly to a regional or municipal police office by the Minister, Mr. Kljajic normally should have been involved in the drafting and implementation of orders. Similarly, "anything that was addressed to Minister Stanisic and which pertained to public security would also and should also have been delivered to Mr. Kljajic as the Under Secretary for Public Security" (Transcript, Vol. 3, at 43).

[211] One such order, dated July 27, 1992, directed that all RS MUP personnel who were being prosecuted for crimes (except for political and verbal offences) were to be removed from the organization and "put at the disposal of" the RS's army. Pursuant to paragraph 6 of that order, Mr. Kljajic was specifically identified as being responsible for its implementation in the Semberija region. (Exhibit 122.) (Based on Dr. Nielsen's evidence, my understanding is that the above-referenced crimes would have primarily been crimes against Serbian citizens.)

[212] I consider that the evidence discussed above, taken in its entirety, provides reasonable grounds to believe that Mr. Kljajic did in fact exercise the duties and responsibilities that one would reasonably expect to be associated with his position. That evidence also provides reasonable grounds to believe that Mr. Kljajic (i) received the daily briefings that Minister

Stanisic ordered be sent to the RS MUP's headquarters, (ii) was aware of, and contributed to, the RS MUP's criminal purpose and certain of its crimes against humanity, and (iii) was aware that his conduct would assist in the furtherance of some of the RS MUP's criminal purposes, and of some of its crimes against humanity: *Ezokola*, above, at paras 87 and 89; *Mata Mazima v Canada (Minister of Citizenship and Immigration)*, 2016 FC 531, at para 52; *Hadhiri v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1284, at para 33 ["***Hadhiri***"]; *Durango v Canada (Minister of Citizenship and Immigration)*, 2018 FC 146, at para 12; *Sarwary v Canada (Minister of Citizenship and Immigration)*, 2018 FC 437, at para 44.

[213] For greater certainty, I underscore that I find the evidence discussed above to be "compelling" and "credible": *Mugesera*, above, at para 114.

[214] Insofar as Mr. Kljajic may not have been aware of some of the crimes against humanity that were perpetrated by the RS MUP while he held the position of Under Secretary of that organization, I find that he is nevertheless complicit in those crimes, because his contribution to the criminal purposes of the RS MUP had a significant element of recklessness: *Ezokola*, at para 68; *Hadhiri*, above, at para 36.

[215] Based on all of the foregoing, I find that this factor merits a strong weighting in favour of finding that there are reasonable grounds to believe that Mr. Kljajic was complicit in the crimes against humanity that were perpetrated by the RS MUP.

(d) *Mr. Kljajic's position and rank within the RS MUP*

[216] Mr. Kljajic readily concedes that he held the second or third ranking position in the RS MUP. He does not dispute that there were likely thousands of people below him in the RS MUP's hierarchy. However, as noted at paragraph 185 above, he maintains that he did not have any "real" functions and that those who appeared below him on the RS MUP's organizational chart reported directly to the Minister.

[217] In this latter regard, he referred to a chart prepared by Dr. Nielsen, which depicted the senior hierarchy of both the public security and the national security branches of the RS MUP, underneath the Minister (Exhibit 11, Annex IV, third diagram). There were no lines connecting Mr. Kljajic to his subordinates. Rather, the lines from his subordinates were linked directly to the Minister. However, Dr. Nielsen explained that when the chart was prepared, he used "the very simple hierarchical diagrams that are templates within the Powerpoint software. And were I doing such a diagram today, I would instead use another software known as 'Analyst's Notebook', where I would have been able to illustrate that … the Minister is at the top but the two under secretaries are between him and the CSBs and SJBs." (The CSBs were regional security services centres, while the SJBs were more local stations.) (Transcript, Vol. 3, at 44.)

[218] In any event, the evidence discussed at paragraph 149 above and in the section immediately above provides reasonable grounds to believe that Mr. Kljajic did in fact exercise the functions and responsibilities that one would reasonably expect would be associated with his high-ranking position in the RS MUP. Those functions and responsibilities included giving

orders and instructions to his subordinates, receiving regular briefings from them, acting in the Minister's place when the latter was not present, liaising directly with senior SDS politicians, interacting with senior officials in Belgrade, and participating in meetings of the RS MUP's leadership.

[219] There is no evidence that Mr. Kljajic took any actions to prevent any of the crimes against humanity that were perpetrated by the RS MUP against people of non-Serb ethnicity, at anytime during his employment with that organization.

[220] Having regard to all of the foregoing, I consider that Mr. Kljajic's position and rank within the RS MUP merits a positive weighting in assessing whether he was complicit in the crimes against humanity that were perpetrated by that organization.

(e) *The length of time Mr. Kljajic was in the RS MUP, particularly after acquiring knowledge of its crimes or criminal purpose*

[221] Mr. Kljajic maintains that he only occupied his position in the RS MUP for five months, i.e., from April 5, 1992 until September 9, 1992, when he resigned at a meeting of senior officials of that organization. He also denies having had any knowledge of the crimes against humanity that were perpetrated by the RS MUP during that period.

[222] With respect to his date of departure from the RS MUP, the minutes of the meeting at which he purportedly resigned do not make any mention of that fact. Mr. Njegus testified that he knew the author of those minutes and that they would have reflected what took place at the

meeting (Transcript, Vol. 7, at 42). In any event, the evidence demonstrates that Mr. Kljajic replaced the Minister for the 50th Session of the Serb Republic Government held on September 10, 1992, that he replaced the Minister for much of another meeting on November 5, 1992, and that he received a letter on behalf of the Minister, dated December 3, 1992, approving his request to be transferred to the Yugoslavian Ministry of the Interior in Belgrade. In addition, internal RS MUP pay records indicate that he was paid each month until November, 1992. Although the words "paid in Bijeljina" were struck out, a check mark was written beside the amount, seeming to indicate that he was in fact paid. I note also that there is a similar checkmark (but no words struck out), in the pay records for October 1992.

[223] In my view, the foregoing evidence provides objective, reasonable grounds to believe that Mr. Kljajic continued to have at least some high level involvement in the RS MUP until at least November 5, 1992, and perhaps even until he received the above-mentioned letter dated December 3, 1992. That said, I acknowledge other evidence suggests that Mr. Kljajic's position may have been eliminated around the time of the meeting at which he claims to have resigned. In an interview with representatives of the Office of the Prosecutor of the ICTY, he stated that after August/September 1992, he was in Belgrade with his family, on stand-by waiting to be called to report for duty with the Yugoslavian Ministry of the Interior (Exhibit 378, at 5).

[224] Turning to the timing of his knowledge of the RS MUP's criminal purpose and the crimes against humanity that it perpetrated, the evidence discussed above, including at paragraphs 149, 177-8, 190-195 and 202-212, provides reasonable grounds to believe that Mr. Kljajic had such knowledge from virtually the outset of Bosnian war.

[225] That evidence is reinforced by Mr. Kljajic's observation, in his 2002 interview with representatives of the ICTY, that "[w]e never thought that a war could happen without causing many victims and casualties …" (Exhibit 381, at 5).

[226] Considering the foregoing, together with Mr. Kljajic's acknowledgment of the fact that the RS MUP committed crimes against humanity during the time that he was its Under Secretary, this factor merits positive weighting in assessing whether there are reasonable grounds to believe that Mr. Kljajic was complicit in those crimes.

(f) *The method by which Mr. Kljajic was recruited and his opportunities to leave the RS MUP*

[227] The evidence demonstrates that Mr. Kljajic voluntarily joined the RS MUP on April 5, 1992, after ignoring a communication that was sent by the (Muslim) head of the SRBiH MUP, requesting all personnel to continue performing the tasks entrusted to them by the latter organization. His enthusiasm for the RS MUP is perhaps best reflected in the fact that, at a meeting of the Serbs in the [SRBiH] MUP held in Banja Luka on February 11, 1992, he stated that he would resign from the SRBiH MUP if a new Serbian MUP was not established "within a week" (Nielsen Report, at paras 44-46).

[228] Mr. Kljajic maintains that he remained with the RS MUP until September 9, 1992, because he was afraid of what would happen to him if he left the organization. However, it is by no means apparent when he began to harbour such fears, if at all.

[229] He claims to have feared Mr. Davidovic, who allegedly threatened him by stating that he knew where his (Mr. Kljajic's) spouse and children lived in Belgrade. However, according to Mr. Kljajic, that exchange took place in July 1992, and arose because Mr. Davidovic was upset about Muslims being evicted from their homes. In other words, Mr. Davidovic was upset because of crimes *being committed* against Muslims, not because he was having difficulty persuading Mr. Kljajic to commit such crimes: *Ryan*, above, at paras 2, 20 and 29-30. Moreover, given that this alleged threat was made in July 1992, this is not evidence that Mr. Kljajic remained in the RS MUP involuntarily during the first three months of the war, when that organization committed crimes against humanity on a widespread basis.

[230] Mr. Kljajic also claims to have been afraid of being "intercepted", like Mr. Vitomir Zepinic. However, Mr. Zepinic was reportedly apprehended in September 1992, again, many months after the RS MUP began to commit crimes against humanity.

[231] In addition, Mr. Kljajic claims to have been afraid of members of the Yellow Wasps whom he had helped to successfully prosecute. In this regard, he testified that Mr. Zugic had been killed by the Yellow Wasps. However, his counsel later conceded that Mr. Zugic was reported to have been assassinated in the year 2000, and that the Yellow Wasps in question were not released from prison until sometime during the summer of 1992. Moreover, they only made their alleged threats in July 1992.

[232] Mr. Kljajic also claims that he was afraid of the consequences of disobeying the Minister's orders, as well as being treated as a "deserter" if he left the RS MUP.

[233] However, he did not state when he began to have reservations about the Minister's orders or when he began to lose his enthusiasm for that organization, after having urged that it be established and then voluntarily joining it at the very outset.

[234] I will pause to note that Mr. Kljajic's claim of being afraid of the consequences of disobeying the Minister's orders are inconsistent with his claim that he did not have any real or practical power or authority. If in fact he obeyed orders, and communicated them down the chain of command, then he did in fact have real, practical, power and authority.

[235] In any event, Mr. Kljajic testified that the consequences of disobeying the Minister's orders would likely have consisted in his transfer to the army, likely on the front lines. However, this does not justify remaining with the RS MUP while it was committing crimes against humanity, including beatings, detention in atrocious conditions and murder of non-Serbs. This is because being transferred to the army is not as severe as those crimes: See authorities cited at paragraphs 167-168 above.

[236] Mr. Kljajic also stated that a second "possible" consequence of leaving the RS MUP would have been that he would have been treated as a "deserter", and imprisoned for up to 15 years. However, he did not provide any evidence of such punishment having been imposed on anyone.

[237] Indeed, Mr. Kijac testified that Mr. Zepinic went to the army, where he was [TRANSLATION] “mobilised like anyone else” (Transcript, Vol. 8, at 32-33). Eventually, he emigrated to Australia (Transcript, Vol. 5, at 59).

[238] Other evidence indicates that many others left the RS MUP, with no apparent adverse consequence: Exhibit 118, at 13.

[239] When Mr. Kijac was asked in direct examination what would have happened to someone in 1992 who did not report to work for five days, he simply replied that the person would have been fired. (Transcript, Vol. 8, at 30.) When questioned about the punishment for being found to have been a deserter, he stated that he didn’t recall, but he thought that a sentence of twenty years might be imposed. He explained that he didn’t think that capital punishment was a possibility.

[240] Whatever Mr. Kljajic’s concerns may have been regarding the consequences that might be associated with leaving the RS MUP, they did not prevent him from attempting to resign at a high-level meeting on September 9, 1992. In his testimony, he explained that he resigned during that meeting after being provoked and getting upset (Transcript, Vol. 4, at 118). Later, he explained that the meeting was the final straw for him, and that he decided to thank the Minister and say that he could no longer work in the conditions in which he found himself (Transcript, Vol. 5, at 6). This was broadly corroborated by Mr. Njegus, who was in attendance at that meeting. Mr. Njegus testified that Mr. Kljajic was frustrated with the lack of support he was receiving from the Minister and others, to the point that he became very upset, lost his self-

control, and quit during the meeting (Transcript, Vol. 7, at 17). Later, in cross-examination, Mr. Njegus explained that Mr. Kljajic had "had enough at this meeting, because he was not in a position to protect Mr. Andan and this is why he decided to leave" (Transcript, Vol. 7, at 49). The minutes of that meeting provide some corroboration for this version of events, as they reflect that a decision was taken to temporarily suspend Mr. Andan at that meeting (Exhibit 127, at 11). However, as noted at paragraph 222 above, those minutes do not mention that Mr. Kljajic resigned or attempted to resign at the meeting.

[241] During final oral submissions, Mr. Kljajic's counsel gave somewhat different explanations for his resignation. Initially, she stated that Mr. Kljajic had resigned because of his [TRANSLATION] "powerlessness in the face of the endless war", the general disregard for the RS MUP's rules, and the recruitment of unqualified people. She explained that he was forced to resign to escape this "imbroglio" (Transcript, Vol. 10 at 73). However, she later submitted that Mr. Kljajic resigned because [TRANSLATION] "he had completed his mission" of protecting the police academy and disarming the paramilitary groups (Transcript, Vol. 10, at 77).

[242] I accept Mr. Kljajic's evidence, corroborated by Mr. Njegus, that he became upset at the meeting on September 9, 1992. I also accept that this was because he was unable to protect Mr. Andan. In addition, I accept that he was by that time becoming generally unhappy, for the reasons stated in the two paragraphs immediately above. This is corroborated by the fact that he ultimately left the RS MUP later that fall, likely after receiving approval of his request "to start work on the territory of SR Yugoslavia for the Ministry of Internal Affairs from 01 January 1993", on December 3, 1992 (Exhibit 128). I consider it reasonable to infer from the foregoing

that he likely communicated his request for a transfer to Belgrade sometime between the meeting on September 9, 1992 and the receipt of the approval of that request.

[243] However, the various reasons that Mr. Kljajic, his counsel and Mr Andan have given for his decision to leave the RS MUP seriously undermine the credibility of his position that he was unable to leave that organization because he was afraid of being transferred to the army or being punished for being a deserter.

[244] In contrast to the mental state contemplated by the jurisprudence regarding duress, the evidence as to Mr. Kljajic's state of mind in the lead-up to his departure from the RS MUP does not reflect even the slightest air of coercion or moral involuntariness: *Ryan*, above, at paras 54 and 70; *Ezokola*, at paras 86 and 99-100. Indeed, that evidence does not suggest any tension whatsoever between a fear for his personal safety (or the safety of family members) and continuing to be complicit in heinous crimes. There is nothing at all to suggest that Mr. Kljajic was concerned, let alone reasonably concerned, about any of those matters: *Ryan*, above, at para 73. There is also nothing at all to suggest that he was acting under any type of coercion, let alone that which rises to the level of establishing moral involuntariness: *Ryan*, above, at paras 54 and 70.

[245] In fact, the intercept of Mr. Kljajic's conversation with Mr. Zupljanin reflects that Mr. Kljajic considered people who did not wish to assist the RS MUP's activities in Sarajevo to be "traitors" (Exhibit 118, at 8 and 13). In that intercept, he specifically instructed Mr. Zupljanin to convey an order on behalf of the Minister and himself (Mr. Kljajic) that the reluctant individuals

had to report to duty in Sarajevo "within 24 hours". Later in that conversation, Mr. Kljajic declined an invitation to go fishing, because he did not "want to be a pussy", by avoiding the call of duty. (Exhibit 118, at 13.)

[246] In addition to the absence of any persuasive testimony or other evidence to support Mr. Kljajic's claim of duress, there is no evidence that he was threatened or coerced by anyone, in any way, any time prior to July 1992, or that he contemplated leaving the RS MUP any time before September 9th of that year: *Rogan*, above, at para 414. In the meantime, the RS MUP was perpetrating heinous crimes against humanity, dating back to April 1992.

[247] The evidence discussed above establishes that Mr. Kljajic likely decided to leave the RS MUP during or soon after the meeting on September 9, 1992, because he was unhappy about various things, none of which concerned the plight of the victims of the crimes against humanity that were being perpetrated by the RS MUP. That evidence also establishes that he ultimately did in fact leave that organization later that fall, likely after he received the approval of his request to be transferred to the Yugoslavian Ministry of the Interior in Belgrade.

[248] I note in passing that Mr. Kljajic's decision to resign from the RS MUP, after becoming upset at a meeting, was consistent with his prior *modus operandi* (in February of 1992) when he stated that he would resign from the SRBiH MUP if a new Bosnian MUP were not established "within seven days".

[249] Mr. Kljajic's claims of fear at the hands of Minister Stanisic are belied by the fact that, according to his own testimony, he did not in fact report to work for the Yugoslavia MUP, as authorized in the approval that he received on December 3, 1992. Instead, he states that he became a lawyer soon after his arrival in Belgrade. He did not claim to have been concerned about any adverse consequences from having done so, instead of reporting to work as contemplated by the authorization that he was given. Nor did he allege that he or any of the members of his family in fact suffered any such consequences, either after he arrived in Belgrade, or beforehand while he was still in Bosnia, after he claims to have resigned from the RS MUP.

[250] Likewise, he was evidently not concerned about being apprehended or suffering adverse consequences, either at the hands of the Minister or others (including the Yellow Wasps), when he returned to Bijeljina at least three times for personal reasons between January 1993 and when he departed for Canada (Transcript, Vol. 5, at 41-42 and 63). There is no evidence that he in fact encountered any problems on any of those occasions.

[251] Similarly, he drove from Bijeljina to Belgrade on multiple occasions in mid-1992, after he moved to Bijeljina (Transcript, Vol. 5, at 63). He evidently was not so concerned about his personal safety back in Bijeljina as to take the opportunity to avail himself of those opportunities to stay in Belgrade, and thereby escape the situation in the RS: *Ryan*, at para 65; *Oberlander v Canada (Attorney General)*, 2018 FC 947, at para 184; *Rogan*, above, at para 415; *Equizabal v Canada (Minister of Employment and Immigration)*, [1994] 3 FC 514, [1994] FCJ No 897 (QL), at para 16 (Appeal Division) ["***Equizabal***"]. This is despite his awareness of the fact that

approximately fifteen thousand Muslims had sought refuge on that side of the border between the RS and Serbia, which suggested that there was a widespread perception that it was safe there, or at least safer than in the RS (Exhibit 121, at 6).

[252] Based on all of evidence discussed above, I find that Mr. Kljajic has not established, on a balance of probabilities, that he acted under duress, as that concept is understood in the jurisprudence: see paragraphs 167-168 above. He has not established that his complicity in the crimes against humanity that were perpetrated by the RS MUP were morally "involuntary".

[253] In brief, Mr. Kljajic has not established on a balance of probabilities that he or any member of his family was subjected to any explicit or implicit threat of death or bodily harm made *for the purpose of compelling him to commit crimes against humanity*. He has also not established that he reasonably believed that any such threat would be carried out. Nor has he demonstrated that there was no safe avenue of escape, especially when he travelled across the Serbian border, like thousands of Muslims did to escape the crimes that were being perpetrated upon them. Moreover, he has not established that there is any proportionality between the crimes that he was complicit in perpetrating and the possibility that he may have been sent to the front lines or imprisoned for "deserting" or for not following orders. Finally, I am satisfied that, at the time he voluntarily joined the RS MUP, he ought to have known that he would be exposed to the very risk of compulsion to obey orders and to remain with the organization, that he now relies upon in asserting this defence: *Ryan*, above, at paras 55, 75 and 80.

[254] Considering that Mr. Kljajic has not established that he acted under duress when he made a significant, knowing and voluntary contribution to the RS MUP's crimes, and considering that he voluntarily (and, indeed, enthusiastically) joined the RS MUP, I find that this sixth assessment factor ("the method by which the individual was recruited and their opportunity to leave the organization") merits a positive weighting in assessing whether Mr. Kljajic was complicit in the crimes against humanity perpetrated by the RS MUP.

(3) Conclusion

[255] For the reasons set forth above, I have given a neutral weighting to the first of the six factors to be considered in the assessment of whether Mr. Kljajic was complicit in the RS MUP's crimes against humanity, and I have given a positive weighting to the five other factors. With this in mind, and considering the evidence as a whole, I conclude that there are reasonable grounds to believe that Mr. Kljajic was complicit in those crimes.

[256] I will therefore grant the declaration that the plaintiffs have sought in this proceeding, in respect of paragraph 35(1)(a) of the IRPA.

[257] Mr. Kljajic submits that this Court should infer from the fact that he has never been prosecuted at the ICTY, despite having been interviewed over the course of several days by representatives of the Office of the Prosecutor there, that he was not complicit in the crimes against humanity that were perpetrated by the RS MUP. However, in contrast to the evidence required to secure a conviction on the criminal standard (beyond a reasonable doubt), the evidence required to support an affirmative finding under paragraph 35(1)(a) is simply that

which provides reasonable grounds to believe that Mr. Kljajic was complicit in those crimes. Therefore, the fact that he has never been prosecuted at the ICTY does not imply that there are no reasonable grounds to believe that he was complicit in the crimes against humanity that were perpetrated by the RS MUP while he was its Under Secretary, between April 1992 and the fall of that year.

[258] I recognize that Mr. Kljajic unsuccessfully attempted to persuade the Minister and others to extract the RS MUP from "combat" activities over the course of the summer of 1992, so that they could focus on their "policing" duties. Dr. Nielsen considers this to be additional evidence that Mr. Kljajic was involved in high level strategic decisions. In any event, a person does not have to agree with all of the ways in which a government ministry effected its crimes against humanity. To find that the person was complicit in such crimes, it will suffice that the person made a voluntary, significant and knowing contribution to the commission of those crimes, or to the criminal purpose of the government or ministry in question: *Ezokola*, above, at paras 8, 87 and 89.

IX. Conclusions

[259] For the reasons set forth in Part VIII.A. above, I have concluded that Mr. Kljajic became a permanent resident of Canada by false representation or fraud or by knowingly concealing material circumstances with respect to a fact described in section 35 of the IRPA. I have also concluded that, because of having acquired his permanent resident status, Mr. Kljajic subsequently obtained citizenship in Canada.

[260] Therefore, pursuant to s. 10.2 of the *Citizenship Act*, Mr. Kljajic is presumed to have obtained his citizenship by false representation or fraud or by knowingly concealing material circumstances with respect to a fact described in section 35 of the IRPA.

[261] For the reasons set forth in Part VIII.B above, I have concluded that Mr. Kljajic is inadmissible to Canada pursuant to paragraph 35(1)(b) of the IRPA. In brief, there are reasonable grounds to believe that Mr. Kljajic was a prescribed senior official of a government, namely the RS government, that engaged in crimes against humanity within the meaning of subsections 6(3) – 6(5) of the CAHWCA.

[262] For the reasons set forth in Part VIII.C above, I have concluded that Mr. Kljajic is inadmissible to Canada pursuant to paragraph 35(1)(a) of the IRPA. In brief, there are reasonable grounds to believe that Mr. Kljajic was complicit in crimes against humanity, as contemplated by section 6 of the CAHWCA, that were perpetrated by the RS MUP against non-Serb civilians.

[263] Given the foregoing, I will issue the declarations sought by the plaintiffs, with certain modifications.

X. Question for Certification

[264] At the end of this proceeding, the parties agreed that the resolution of the three principal issues raised in this proceeding turns largely on the facts, and that therefore no serious question of general importance for certification arises from those facts and issues. I agree. Accordingly, no question will be certified pursuant to s. 10.7 of the *Citizenship* Act.

[265] I will simply add in passing that the plaintiffs qualified their initial position by stating that, should I agree with one of the legal arguments advanced by the defendant, they would want a question certified on that issue. Given that I did not agree with that argument, and given that I do not consider that it involves a serious question of general importance, I agree with the parties' initial positions that no serious question of general importance arises from the issues and facts in this case.

XI. Costs

[266] At both the outset and the end of this proceeding, the parties were requested to attempt to agree on the costs to be paid to the prevailing party. By letters dated February 26, 2020 and February 27, 2020, the plaintiffs and the defendant, respectively, agreed on a global amount of $20,850.00 for legal fees and $6,326.72 for disbursements, for a total of $27,176.72, to be paid to the prevailing party. However, the defendant requested that he be required to pay only one third (1/3) of that amount, in the event that he prevailed in respect of one of the three principal issues in dispute.

[267] Given that I have found in favour of the plaintiffs with respect to each of those three issues, I will be granting an award for the full amount of $27,176.72 in favour of the plaintiffs.

JUDGMENT IN T-1336-17

THIS COURT'S JUDGMENT is that:

1. The declarations sought by the plaintiffs in this proceeding will be granted, with modifications to better reflect the relevant statutory language and the facts that I have found. Accordingly, this Court declares that:

    i. Mr. Kljajic became a permanent resident of Canada, within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* [the "**IRPA**"], by false representation or fraud or by knowingly concealing material circumstances with respect to a fact described in section 35 of the IRPA. Because of having acquired his permanent resident status, Mr. Kljajic subsequently obtained citizenship in Canada;

    ii. Pursuant to subsection 10.1(1) and section 10.2 of the *Citizenship Act*, Mr. Kljajic obtained his citizenship by false representation or fraud or by knowingly concealing material circumstances with respect to a fact described in section 35 of the IRPA;

    iii. Pursuant to subsection 10.5(1) of the *Citizenship Act*, Mr. Kljajic is inadmissible under paragraph 35(1)(b) of the IRPA, on the basis that there are reasonable grounds to believe that he was a prescribed senior official of a government, namely the government of the Republika Srbpska, that in the opinion of the Minister engaged in crimes against humanity within the meaning of subsections 6(3) – 6(5) of the CAHWCA;

iv. Pursuant to subsection 10.5(1), Mr. Kljajic is inadmissible under paragraph 35(1)(a) of the IRPA, on the basis that there are reasonable grounds to believe that he was complicit in crimes against humanity, as contemplated by section 6 of the CAHWCA, that were committed outside Canada against non-Serb civilians by the Ministry of the Interior of the Republika Srbpska.

2. Costs are awarded to the plaintiffs in the amount of $20,850.00 for legal fees and $6,326.72 for disbursements, for a total of $27,176.72.

3. There is no serious question of general importance for certification that arises from the facts and issues in this case**.**

"Paul S. Crampton"
Chief Justice

APPENDIX 1 — Relevant Legislation

Criminal Code, RSC, 1985, c C-46, as it read in 1995 and 1999:

7.(3.76) For the purposes of this section,	7 (3.76) Les définitions qui suivent s'appliquent au présent article
"conventional international law" means	« droit international conventionnel » Conventions, traités et autres ententes internationales en vigueur auxquels le Canada est partie, ou qu'il a accepté d'appliquer dans un conflit armé auquel il participe.
(a) any convention, treaty or other international agreement that is in force and to which Canada is a party, or	
(b) any convention, treaty or other international agreement that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved;	
"crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or	« crime contre l'humanité » Assassinat, extermination, réduction en esclavage, déportation, persécution ou autre fait — acte ou omission — inhumain d'une part, commis contre une population civile ou un groupe identifiable de personnes — qu'il ait ou non constitué une transgression du droit en vigueur à l'époque et au lieu de la perpétration — et d'autre part, soit constituant, à l'époque et dans ce lieu, une transgression du droit

conventional international law or is criminal according to the general principles of law recognized by the community of nations;	international coutumier ou conventionnel, soit ayant un caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations.
"war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.	« crime de guerre » Fait — acte ou omission — commis au cours d'un conflit armé international — qu'il ait ou non constitué une transgression du droit en vigueur à l'époque et au lieu de la perpétration — et constituant, à l'époque et dans ce lieu, une transgression du droit international coutumier ou conventionnel applicable à de tels conflits
(3.77) In the definitions "crime against humanity" and "war crime" in subsection (3.76), "act or omission" includes, for greater certainty, attempting or conspiring to commit, counseling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission.	(3.77) Sont assimilés à un fait, aux définitions de « crime contre l'humanité » et « crime de guerre », au paragraphe 3.76, la tentative, le complot, la complicité après le fait, le conseil, l'aide ou l'encouragement à l'égard du fait.

Crimes Against Humanity and War Crimes Act, SC 2000, c 24, subsection 6(3):

Definitions	*Définitions*
(3) The definitions in this subsection apply in this section.	(3) Les définitions qui suivent s'appliquent au présent article.
crime against humanity means murder, extermination, enslavement, deportation,	**crime contre l'humanité** Meurtre, extermination, réduction en esclavage,

imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. (crime contre l'humanité)

déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu. (crime against humanity)

genocide means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. (génocide)

génocide Fait — acte ou omission — commis dans l'intention de détruire, en tout ou en partie, un groupe identifiable de personnes et constituant, au moment et au lieu de la perpétration, un génocide selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu. (genocide)

war crime means an act or omission committed during an armed conflict that, at the time and in the place of its

crime de guerre Fait — acte ou omission — commis au cours d'un conflit armé et constituant, au moment et au

commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. (crime de guerre)

lieu de la perpétration, un crime de guerre selon le droit international coutumier ou le droit international conventionnel applicables à ces conflits, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu. (war crime)

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v CEDO KLJAJIC
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