Federal Court  Cour fédérale

**Date: 20190617**

**Docket: IMM-1469-18**

**Citation: 2019 FC 820**

**Toronto, Ontario, June 17, 2019**

**PRESENT: Mr. Justice Diner**

**BETWEEN:**

**VINCENT NIYUNGEKO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**Table of Contents**



## I. Overview

[1] This is an application for judicial review of the decision of the Immigration Division of the Immigration and Refugee Board, which found that the Applicant is inadmissible first by reason of his membership in an organization that engaged in subversion by force, and second by being complicit in the commission of crimes against humanity. Based on the following reasons, the application for judicial review is allowed in part, as the second ground of inadmissibility cannot stand.

## II. Background

[2] The Applicant, a citizen of Burundi, was a career soldier and officer in the Burundian army [Army] during many of the years between 1973 and 2013. He served in high-ranking positions, including as the Army's "Chef d'état major" (or "Chief of General Staff"), and more recently, as the Minister of Defence. In 2017, he sought refugee protection in Canada. However, the Canada Border Services Agency [CBSA] intervened with allegations that Mr. Niyungeko is inadmissible to Canada under paragraphs 34(l)(f) for the purposes of paragraph 34(l)(b), and paragraph 35(l)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. CBSA and the Immigration Division [Board] issued two deportation orders. This halted the refugee process.

[3] On March 5, 2018, the Board upheld the inadmissibility findings and resulting two deportation orders, finding that the Applicant was inadmissible under both alleged grounds [Decision]. That Decision is now under review.

## III. Decision under Review

[4] Before the Board, the Applicant made several admissions, including that:

- from 1973-1976, he was a Second Lieutenant and responsible for artillery courses at a military school in the Ukraine;
- from 1985-1990, he was a Major of a unit at Camp Mwaro;
- from 1991-1993, he was a Major and an instructor at an Internal Command Staff Course;

- from 1993-1994, he was a Major and a special advisor to the Deputy Minister of Defense;
- from 1996-2002, he was appointed “Chef d’état major”, and thus responsible for the supervision of staff services and the coordination of actions of military regions, serving under the direction of the Minister of Defense, and implementing the directives issued by the Minister;
- from 2002-2005, he was appointed as Burundi’s Minister of Defence, becoming responsible for the implementation of the government’s defense policy;
- from 2009-2013, he was named Military attaché to Burundi’s Permanent Mission to the United Nations in New York, where he was in charge of monitoring peacekeeping operations of Burundian soldiers and police.

[5] With respect to the first alleged ground of inadmissibility, the Board relied on the admissions above to conclude that the Applicant is a member of the Army. The Board further found that there were reasonable grounds to believe that the Army engaged in the subversion by force of Burundi’s government in the context of four coups d’état that occurred in 1976, 1987, 1993 and 1996 respectively. Thus, the Applicant was inadmissible under IRPA’s paragraph 34(1)(f) for the purposes of paragraph 34(1)(b).

[6] Regarding the second ground of inadmissibility (based on crimes against humanity), the Board found that there were reasonable grounds to believe that the Applicant was complicit in the commission of crimes against humanity under paragraph 35(1)(a) of IRPA by the Army

against the civilian population during the 1998-1999 period when the Applicant was “Chef d’état major”.

[7] Further details relied upon by the Board are provided in the analysis section under each of the respective issues raised by the Applicant in challenging its findings that he was
(i) a member of an organization that engaged in or instigated subversion by force, and/or
(ii) complicit in crimes against humanity.

## IV. Standard of Review and Standard of Proof

[8] A decision regarding inadmissibility involves questions of mixed fact and law and is therefore subject to review by this Court on the standard of reasonableness, whether looking at issues raised in this matter under (i) paragraph 34(1)(f) for the purposes of paragraph 34(1)(b) (see *Saleheen v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 145 at para 24, and *Alam v Canada (Citizenship and Immigration)*, 2018 FC 922 at para 11 [*Alam*]), or
(ii) paragraph 35(1)(b) (see *Sekularac v Canada (Citizenship and Immigration)*, 2018 FC 381 at para 13, and *Al Khayyat v Canada (Citizenship and Immigration)*, 2017 FC 175 at para 18 [*Al Khayyat*]).

[9] The facts giving rise to inadmissibility must be established on the standard of “reasonable grounds to believe” (IRPA, section 33; *Alam* at para 12; *Mugesera v Canada (Citizenship and Immigration)*, 2005 SCC 40 at para 116 [*Mugesera*]).

[10] According to *Mugesera*, the 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" (at para 114). Despite *Mugesera* being decided on the basis of the previous immigration legislation, the principles underlying the inadmissibility provisions, including the standard of proof, remain applicable: *Khan v Canada (Citizenship and Immigration)*, 2017 FC 397 at paras 25 and 47.

[11] I also note that the question before the Court is not whether there were reasonable grounds to believe the Applicant was inadmissible pursuant to sections 34 and 35 of IRPA, but rather whether the Board's conclusion that there were reasonable grounds to believe the Applicant inadmissible was itself reasonable (*Alam* at para 14).

## V. Relevant Provisions

[12] Before turning to the reasonability of the Board's findings, it is worthwhile to set out the legislative provisions in question:

| **Rules of interpretation** | **Interprétation** |
|---|---|
| 33 The 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, are occurring or may occur. | 33 Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir. |

| | |
|---|---|
| **Security** | **Sécurité** |
| 34 (1) A permanent resident or a foreign national is inadmissible on security grounds for | 34 (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants : |
| … | … |
| (b) engaging in or instigating the subversion by force of any government; | b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force; |
| … | … |
| (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c). | f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c). |
| **Human or international rights violations** | **Atteinte aux droits humains ou internationaux** |
| 35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for | 35 (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants : |
| (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; |

## VI. Parties' Positions and Analysis

### A. *Did the Board err in finding that the Applicant was a member of an organization that engaged in or instigated subversion by force?*

[13] Under paragraphs 34(1)(f) and 34(1)(b), two elements must be established for the Board to make an inadmissibility finding: (i) the Applicant must be a member of the impugned organization (in this case, the Army), and (ii) that organization must have engaged in or instigated the subversion by force of any government (in this case, the Burundian government) (*Gacho v Canada (Citizenship and Immigration)*, 2016 FC 794 [*Gacho*] at paras 22–26, 38).

[14] The Applicant agrees with the finding that the Army is an organization within the meaning of paragraph 34(1)(f) of IRPA and that the Applicant was a member of that organization. Therefore, the question to be determined is whether the Board reasonably found that there were reasonable grounds to believe that the Army "engaged in" or "instigated" the subversion by force of the Burundian government.

[15] After reviewing the evidence, including all transcripts of the three hearing dates, I agree with the Respondent that it was open to the Board to find reasonable grounds to believe that during at least one of the coups d'état in Burundi between 1976 and 1996 (namely that of 1993), the Applicant served as a member of the Army when it engaged in or instigated subversion by force – although this Court has stated that membership is without temporal constraints (*Gacho* at para 26).

[16] While the Applicant alleges errors in the Board's assessment of each of the four coups d'état of 1976, 1987, 1993, and 1996, my review focuses on the assessment of the reasonableness of the Board's analysis of the 1993 coup d'état for two reasons. First, the Respondent emphasized in its Further Memorandum of Fact and Law that the "1993 and 1996 coups clearly showed that they were both achieved by force – a fact acknowledged by the Applicant". Second, the Board's inadmissibility finding on subversion by force will be upheld even if I find that the Board's assessment is reasonable with respect to only one of the four coup d'états. A brief focus on the factual findings underlying 1993's coup follows.

(a) *The Coup d'État of 1993*

[17] With respect to the coup d'état of 1993, the Board's key findings were as follows:

> [30] In June 1993, Buyoya's defeat during the general election ushered Melchior N'Dadaye, a Hutu, into power with 60% of the vote. However, he was assassinated one month later, during an attempted coup.
>
> [31] There is no consensus as to who engaged in or instigated the coup. Some international authorities blame sub-groups within the army and others blame the army, as an organization as a whole.
>
> [32] The same holds true for those who indicate that the coup was carried out by [translation] "certain officers," or a "breakaway wing," or an "extremist section" of the army, or even "high-ranking officers in the hierarchy of the [Burundi Army]."
>
> [33] In contrast, the conclusions of the international commission of inquiry into human rights violations since October 21, 1993, describe the coup as an [translation] "attempted coup that appeared to be the work of a small group of low-ranking officers but, in reality, the majority of the military hierarchy and armed forces were involved in the crime or made no attempt to oppose it."
>
> [34] In light of that, it seems reasonable to me to believe that no matter which protagonists were responsible for the coup, the army as an organization remains implicated in the act from the time

> when certain identified factions were integral parts of the army, and that the coup was endorsed by the highest-ranking officers within the organization. Once again, the reasoning for the coups in 1976 and 1987 apply.
>
> [Source: Decision, Immigration and Refugee Board Published Translation, *X (Re)*, 2018 CanLII 125222 (CA IRB)]
>
> [Emphasis added, footnotes omitted]

(b) *Parties' Positions on Issue A (Subversion by Force)*

[18] The Applicant makes two arguments regarding the conclusion that the Army, as an organization, "endorsed" the coup at its highest levels, no matter who the protagonists were. First, he argues that the Board failed to find that the Army, as an organization, engaged in or instigated the coup d'état in 1993, because it expressly acknowledged that some sources lacked consensus on whether it was the Army, as an organization, – or rather dissident and rogue members – that were responsible for the coup.

[19] In arriving at its conclusion, the Applicant also asserts that the Board wrongly relied on jurisprudence dating from 2007-2010, all of which concern the Pakistani Muttahida Quami Movement [MQM] organization (*Jalil v Canada (Citizenship and Immigration)*, 2007 FC 568; *Rizwan v Canada (Citizenship and Immigration)*, 2010 FC 781; and *Uddin Jilani v Canada (Citizenship and Immigration)*, 2008 FC 758). Accordingly, these cases related to different contexts, namely certain terrorist activities committed by an organization which had internal dissent, which the Applicant contends make them inapplicable to the instant case. Here, the Applicant summits that rogue elements were responsible for the coups, that they were not acting

on behalf of the Army and were by definition acting unlawfully and outside of the Army‘s chain of command.

[20] Second, the Applicant argues that the Board diluted the legislation’s requirement by finding the Army, as an organization, to be a “tributary” of the coup:

> […] [R]egarding the 1993 incidents, she found that the army was a ‘tributary’ of the coup because the coup was ‘endorsed’ by some high ranking officers of the organization. (Applicant’s Further Memorandum of Fact and Law at para 26)

[21] In making its findings, the Applicant contends the Board failed to satisfy the two basic requirements of paragraphs 34(1)(f) and (b), which is that the impugned organization (i) engaged in or instigated subversion (ii) by force.

[22] In addition, the Applicant argues that the Board erred in law in reversing the burden of proof by relying on an absence of evidence that the Army opposed or resisted the coup, ultimately concluding the Army endorsed it. Rather, it was the Minister‘s burden to prove that the Army, as an organization, was the author of the acts of subversion in question. It was not for the Applicant to prove that the Army opposed or resisted the coup. This was particularly problematic, according to the Applicant, in light of the fact that the Board acknowledged that the coups were perpetrated by factions within the Army.

[23] Responding to the Applicant’s arguments, the Respondent counters that first, the Board properly relied upon documentary evidence showing that the coup d’état of 1993 was achieved by force, and reasonably attributed it to the Army, as an organization. The Respondent asserts

that there is no question that the Army is an organization as it is an entity with an organizational structure, leadership and a hierarchy, noting that the Board appropriately relied on *Thanaratnam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 349 at paragraph 31. It also notes that "membership" in paragraph 34(l)(f) has consistently been given an unrestricted and broad interpretation, citing various cases including *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, at paras 26–32.

[24] Second, the Respondent notes there is no question of the Applicant's membership in the Army, and/or his significant positions. It contends that a military coup satisfies the broad definition of subversion by force provided in the jurisprudence (for instance, in *Najafi v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 876 at para 48 and *Oremade v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1077 [*Oremade*]).

[25] The Respondent asserts that the Board properly concluded that the Army was engaged in various acts of force that intended to overthrow a government, engaging in an analysis of the required elements, namely whether the acts amounted to subversion by force and whether the Army engaged in or instigated these acts of subversion. The MQM cases which held that being a member of an ostensibly peaceful section that has not severed its ties with a violent sister organization, wing or section brings a person within the parameters of membership with the entire organization, were just cited by analogy. That principal would apply whether the organization is a terrorist organization such as MQM, or a state army, as in this case.

[26] Lastly, the Respondent rejects the Applicant's argument that the Board erred in reversing the burden of proof, given that the Board clearly found that the Army, as an organization, engaged in or instigated at least some of the coups, which by definition are subversion by force against the government.

(c) *Analysis of Issue A (Subversion by Force)*

[27] I find that the Respondent's arguments are persuasive. With respect the factual backdrop and evidence, the Board based its analysis on key documents in the record from reliable, internationally recognized organizations, including the *International Commission of Inquiry into Human Rights violations since October 21, 1993* (or *Burundi: rapport de la Commission internationale d'enquête sur les violations des droits de l'homme depuis le 21 octobre 1993*, (International Federation for Human Rights, 1994) at 176; CTR Vol II at p 269) [Commission Report]. Contributors to this Commission Report include the International Federation for Human Rights, Human Rights Watch and Africa Watch (CTR, Vol II at p 251).

[28] While the Board noted the contradictory nature of the documentary evidence and the fact that some sources had attributed responsibility for the coup d'état to certain officers, a breakaway wing, or even an extremist section of the Army, the Board ultimately found that the majority of the military hierarchy and Army were involved in the coups in question, and otherwise took no initiative to oppose them.

[29] Therefore, I find that the Board properly relied on documentary evidence on the record, namely the Commission Report by international monitoring groups, addressed the contradictions,

and chose to give more weight to the evidence from the Commission Report over the other sources. It was entitled to do so (*Alam* at para 24).

[30] Furthermore, I do not agree with the Applicant's contention that the Board diluted the requirement of "engaging in or instigating subversion by force" by finding the Army to be "a 'tributary' of the coup because the coup was 'endorsed' by some high ranking officers of the organization". Here, I find that the Applicant takes certain liberties with the translation: the Board found that the coup was endorsed by "highest ranking officers within the organization", not that it was endorsed by "some high ranking officers of the organization" (Applicant's Memorandum of Fact and Law, para 26), when it stated "l'armée en tant qu'organisation demeure tributaire de l'acte du moment où les quelques factions identifiées étaient des parties intégrantes de l'année et que le coup, ait été avalisé par des officiers des plus hautes instances de la hiérarchie de l'organisation" [TRANSLATION] "the army as an organization remains implicated in the act from the time when certain identified factions were integral parts of the army, and that the coup was endorsed by the highest-ranking officers within the organization" (see context in the Decision at paras 30–34 reproduced above in these Reasons at para 17).

[31] In addition, while the Board's use of the word "tributaire" could be ambiguous, I read it as meaning that the Army, as an organization, is implicated in or imputed with responsibility for the coup due to the involvement of high-ranking officers. In any event, even if adopting the translation as provided by the Applicant in paragraph 26 of his Memorandum of Fact and Law as reproduced above, I would still find the outcome to have been open to the Board, based on its observations about the involvement the highest-ranking officers within the organization, and

having given weight to the findings of the Commission Report. After all, the Board noted that in the 1993 coup, the democratically elected president Melchoir Ndadaye was assassinated, and that the Applicant himself acknowledged the coup was achieved by force.

[32] Direct complicity is not required by paragraph 34(1)(f) of IRPA (*Alam* at para 34). Furthermore, the jurisprudence has clearly established that the breadth of paragraphs 34(1)(f) and 34(1)(b) was considered, debated, and approved by Parliament: see *Najafi v Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 262 at paras 78–79 [*Najafi*] (and for a more detailed analysis on *Najafi*'s interpretation of subversion by force, refer to paragraphs 40–49 of my decision in *Maqsudi v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1184).

[33] Ultimately, while Parliament did not define the concept of subversion in the inadmissibility section of IRPA, the courts have interpreted it broadly, and in line with its ordinary dictionary meaning, including with reference to the French text. As Justice Gauthier found in *Najafi*:

> [65] As noted by the Division, the word "subversion" is not defined in the Act, and there is no universally adopted definition of the term. The *Black's Law Dictionary*'s definition to which the Division refers at paragraph 27 (particularly, the words "the act or process of overthrowing … the government") is very much in line with the ordinary meaning of the French text (« actes visant au renversement d'un gouvernement »). Although in certain contexts, the word "subversion" may well be understood to refer to illicit acts or acts done for an improper purpose, the words used in the French text do not convey any such connotation. I am satisfied that the shared meaning of the two texts does not ordinarily include any reference to the legality or legitimacy of such acts.

[34] As to the meaning of subversion by force, I am bound by both IRPA and the jurisprudence that has interpreted it, including from the Federal Court of Appeal.

[35] I find that it was open to the Board, relying on the objective evidence in the record, and in line with the legislation (and cases relied on such as *Oremade*), to find that the definition of coup d'état necessarily involves the use of force, including acts of coercion or compulsion by violent means, which included the events of 1993, and as such, that the 1993 coup d'état met the requirements of the definition of "subversion by force".

[36] It should be noted that the Board in this case also found that the Army instigated the July 1996 coup when President Ntibantunganya was overthrown and the Defence Minister of the time demanded that President Buyoya take over by force. The Applicant contests the factual and legal basis for this subversion finding as well given the nature of the events, and his position at the time. However, as I have already found the Board's findings to be reasonable with respect to the 1993 coup, there is no need to further examine the 1996 coup.

(d) *Conclusion on Issue A (Subversion by force)*

[37] To conclude on the first issue, I am satisfied that both requisite elements for a finding of inadmissibility made under IRPA's paragraph 34(1)(f) for the purposes of 34(1)(b), were open to the Board, namely that (i) the Applicant was a member of an organization – the Army which (ii) engaged in or instigated the subversion by force of the Burundian government with respect to the 1993 coup.

[38] As the factual findings were reasonable in light of the evidence, and meet the legal test prescribed by the law, the first ground of inadmissibility found against the Applicant falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. While I will not intervene in the first inadmissibility finding under IRPA's subsection 34(1) regarding subversion by force, the same cannot be said for the second ground of inadmissibility found by the Board.

B. *Did the Board err in finding the Applicant inadmissible for being complicit in crimes against humanity?*

[39] For the reasons that follow, I find that the Board's conclusions cannot stand with respect to paragraph 35(1)(a) inadmissibility, declaring the Applicant to have been complicit in crimes against humanity committed by members of the Army.

[40] Before examining complicity in light of the Supreme Court's decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*], I will briefly summarize the Board's findings on this second ground of inadmissibility.

(a) *Board's Findings on Issue B (Complicity in crimes against humanity)*

[41] The Board noted that to make a positive finding that the Army committed crimes against humanity, three elements first had to be established: (a) the Army committed one of the proscribed acts listed in sections 4 through 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24; (b) that act was committed as part of a widespread or systematic attack; and (c) the attack was directed against a civilian population or an identifiable group.

[42] The Board found that the documentary evidence sufficiently supported acts of abuse, torture and killings that were attributable to the Army during the Applicant's 40-year career. The acts are prescribed in subsection 6(3) of the *Crimes Against Humanity and War Crimes Act*. Relying on "various Amnesty International reports", the Board wrote that for the period of 1998-99 alone, while the Applicant served in his role as "Chef d'état major", numerous incidents and attacks took place, both of larger and smaller proportions, including extra-judicial executions, massacres, torture and rape (the Board enumerated 10 such examples in paragraph 61 of its Decision).

[43] Second, having concluded that the Army committed multiple acts of murder, torture and rape, satisfying element (a) of the paragraph 35(1)(a) evaluation criteria, the Board went on to find that the other requisite elements of section 35 had been met, namely that (b) the acts were committed as part of an "attack", constituting a course of conduct involving the commission of acts of violence, as defined by *Mugesera*. The Board also found the attacks to be "widespread", given their frequency, significant scale, numerous victims, and commission by groups of soldiers (the Board found it unnecessary to determine whether the attacks were "systematic", given their "widespread" determination).

[44] Finally, the Board found that the acts were (c) directed against a civilian population, as the victims of the murder, torture and rape were civilians. The Board therefore concluded that there were reasonable grounds to believe that the Army committed acts constituting crimes against humanity particularly during the 1998 to 1999 period when the Applicant served as "Chef d'état major".

[45] Having made these findings, the Board then went on to consider whether the Applicant was complicit in the crimes against humanity committed by the Army. Identifying *Ezokola* as the key case, the Board identified the following "requisite elements" in determining whether the Applicant made a "significant and knowing contribution" to the Army's crime or criminal purpose (at para 74 of the Decision):

> • **the size and nature of the organization**; knowing that the size of the organization is inversely proportional to the likelihood that the [Applicant] knew of and participated in the criminal purpose;
>
> • **the part of the organization with which the [Applicant] was most directly concerned**;
>
> • **the [Applicant's] rank in the organization**;
>
> • **the individual's duties and activities within the organization**; knowing that this factor goes to the heart of the individual's day-to-day participation in the activities of the organization. The panel should consider the link between the duties and activities of the individual and the crimes and criminal purposes of the organization (para. 96);
>
> • **the length of time the [Applicant] was in the organization (particularly after acquiring knowledge of the group's crime or criminal purpose)**; knowing that the longer an individual belongs to the organization, the more likely it is that they were aware of the organization's crimes or criminal purpose. A lengthy period of involvement may also increase the significance of an individual's contribution to the organization's crime or criminal purpose;
>
> • **the method by which the [Applicant] was recruited and the [Applicant's] opportunity to leave the organization**; knowing that these factors impact the voluntariness requirement and may not be satisfied if an individual was coerced into joining, supporting, or remaining in the organization.
>
> [Emphasis in original]

[46] Applying these elements to the facts, the Board concluded that the Applicant was complicit with the Army when it committed its crimes against humanity, thus determining the Applicant inadmissible pursuant to paragraph 35(1)(a).

[47] I will begin my analysis of whether the Board's findings on this ground were reasonable with a closer review of complicity in light of the leading case, *Ezokola.*

(b) *The Concept of "Complicity" in Canadian Immigration Law post-Ezokola*

[48] Individuals may be complicit in international crimes without a link to a particular crime, but there must be a link between the individuals and the criminal purpose of the group. Such a link is established where there are serious reasons for considering that an individual has voluntarily made a significant and knowing contribution to a group's crime or criminal purpose (*Ezokola* at para 8).

[49] This standard for complicity replaced the former legal test wherein an individual could have been found guilty by mere association (*Ezokola* at paras 80–82). Thus, for the purposes of Canadian immigration law, individuals are not personally liable for crimes committed by a group simply because they are associated with that group, or because they passively acquiesced to the group's criminal purpose. Rather, the test regarding complicity under paragraph 35(1)(a) of IRPA requires that there be serious reasons for considering that an individual has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose (*Ezokola* at para 84).

[50] The burden is on the Minister to establish that an applicant committed acts supporting a finding of inadmissibility pursuant to section 35 of IRPA (*Al Khayyat* at para 27). However, this burden of proof resting on the Minister is comparatively modest, namely reasonable grounds to believe, which is a less onerous standard than a balance of probabilities (*Jelaca v Canada (Citizenship and Immigration)*, 2018 FC 887 at para 26).

(c) *Positions of the Parties on Issue B (Complicity in crimes against humanity)*

[51] The Applicant notes that to be found complicit in international crimes (namely crimes against humanity or war crimes) committed by other members of an organization with which an individual was associated, there must be reasonable grounds to believe that the person concerned "voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose" (*Ezokola* at para 84). While the Board correctly stated the test, the Applicant submits that it misapplied it in favour of the defunct notion of "complicity by association" which pre-dated *Ezokola* (as described above).

[52] The Applicant argues that Board's core finding of fact was simply wrong, and simply not in line with his testimony. The Applicant did not say, as the Board alleges, that he gave orders to his commanders to "take the necessary measures to achieve the army's objectives" of preventing the enemy from gaining territory or causing damage in their zones, and acting on those instructions, the troops then committed murder, rape, and torture as necessary measures in furtherance of these objectives.

[53] Rather, the transcript portion cited by the Board for that proposition quotes the Applicant as saying that he directed his regional commanders to "take the measures necessary to re-establish the flow of electricity, re-establish the lines and then guard them and prohibit any external action seeking to re-destroy them". The Applicant observes that there is neither any allegation nor evidence that any crimes were committed in furtherance of this directive.

[54] Ultimately, the Applicant submits the Board relied on the Applicant's membership in the Army, and therefore his association with that group, erroneously relying on the former, pre-*Ezokola* legal test of "guilt by association" (*Ezokola* at paras 80–82). The Applicant further submits that this flawed application affected the Board's assessment of the "voluntariness component": the Board considered whether the Applicant voluntarily contributed to the Army, rather than assessing whether he voluntarily contributed to its crimes or criminal purpose.

[55] The Respondent counters that the Board was allowed to, and properly considered, whether the Applicant voluntarily occupied positions of authority within the Army at the time of the commission of the crimes. The Respondent, going through the various positions of authority that the Applicant voluntarily occupied, contends that the Applicant made a knowing and significant contribution to crimes committed by the Army against Burundian civilians, government and its officials, reasonably meeting the requirements set out in *Ezokola.*

[56] The Respondent notes that these findings on complicity, given the Applicant's senior roles, are consistent with both the law and the evidence presented: complicity does not require personal participation but only contribution, directly or through the role in the organization's

crimes or criminal purpose, pointing to the Applicant's role as "Chef d'état major" during the 1998-1999 period when atrocities were well documented. The Board reasonably found that the Army committed crimes against humanity, after assessing the attacks against the definition provided by the Supreme Court in *Mugesera* (as having been committed as part of a widespread or systematic attack against a civilian population), and relating their gravity to findings in cases such as *Sarwary v Canada (Citizenship and Immigration)*, 2018 FC 437, where similar findings were upheld in less egregious circumstances.

(d) *Analysis of Issue B (Complicity in crimes against humanity)*

[57] The Applicant's arguments are persuasive, and in their totality are convincing that the Board both overstated the Applicant's testimony, and then failed to apply those facts to the test. While the Board correctly stated the legal test for complicity in crimes against humanity – namely whether the Applicant had voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose (Decision at para 73) – the Board went on to make findings suggesting an application of the defunct notion of complicity by association, which was rejected in *Ezokola*.

[58] Indeed, there are several places in the Decision in which the Board relied on the Applicant's simple membership in the Army – and therefore on the defunct notion of complicity by association – in support of its complicity finding, including:

1. stating its mandate was to determine whether, because of his membership in the Burundian army, there were reasonable grounds to believe that the Applicant was complicit in crimes against humanity committed by the Army. Next, the Board

stated that it would define the "contribution" of the Applicant as being "the duties he performed" within the Army during his career, with an emphasis in its analysis on his duties as "Chef d'état major", from 1996 to 2002 (Decision at paras 75–76);

2. framing the issue as being whether the Applicant, "[c]onsidering that he is a member" of the Army, was complicit in the commission of crimes against humanity (Decision at p 28, heading after para 72);
3. describing the issue as being whether the Applicant was inadmissible under paragraph 35(1)(a) of IRPA because of his "involvement" in Army (Decision at para 6(2));
4. stating that the Applicant was inadmissible for complicity because he is a "member" of the Army, and the question as being whether the Applicant was complicit in its commission of the crimes considering that "he is a member" of the Army (Decision at paras 54, 55(2)).

[59] Given these four examples reproduced above, it is not clear whether the Board understood and applied the correct legal test when it mattered (*Talipoglu v Canada (Citizenship and Immigration)*, 2014 FC 172 at para 31, citing *Optiz v Wrzesnewskyj*, 2012 SCC 55 at para 88).

[60] In addition to these weaknesses, there is also the Board's factual finding noted by the Applicant above, in which the alleged order was to "take any necessary measures" to achieve the Army's objectives – neither an accurate representation of what the Applicant testified to, nor a

call to arms to "make a significant and knowing contribution to the organization's crime or criminal purpose".

[61] Ultimately, the Board, in making its determination, appeared not to have assessed whether the Applicant made a significant and knowing contribution to a group's crime or criminal purpose, or whether the Applicant simply made a significant and knowing contribution to the Army – which would have been natural given his senior positions.

[62] Importantly, the Applicant appears from the evidence to have a notable reputation both inside and outside of his country as a positive agent of change and peace, and was promoted throughout his career on a bi-partisan basis by both Hutu and Tutsi officials and governments, as well as supported by the international community, for his various roles which included: being appointed as special advisor to the Deputy Minister of Defense on issues of international human rights law; as an "*agent pacificateur*" (a pacifier); as "Chef d'état major" after international pressure on the Burundian government to appoint a non-sectarian, non-aligned officer to that position; and subsequently, as Military Attaché to Burundi's Permanent Mission to the UN in New York. Indeed, despite his publicly known identification as a Tutsi within Burundi's power structure that has at times been dominated by the Hutu ethnic group, the Applicant managed to win bi-partisan support within a country racked by internecine conflict.

[63] The evidence from the Applicant was consistent in his efforts to instill a respect for the compliance with international human rights law and norms, particularly in times of internal

conflict which plagued much of his time during his tenure with the Army, and later as Minister of Defence.

[64] Certainly, there is no denying that the reports relied upon by the Board provide details of the crimes committed by the Army. Moreover, there is no denying that crimes were committed in the many years of conflict or that the Applicant was the "Chef d'état major" during the time that some of these crimes were committed, and during which many civilians were killed.

[65] However, in *Ezokola*, the Supreme Court warns at paragraphs 74 and 81 that we must guard against "a complicity analysis that would exclude individuals from refugee protection on the basis of mere membership or failure to dissociate from a multifaceted organization which is committing war crimes" and against "high-ranking officials from being forced to abandon their legitimate duties during times of conflict and national instability in order to maintain their ability to claim asylum."

(e) *Conclusion on Issue B (Complicity in crimes against humanity)*

[66] Considered in its totality, it is not clear that the Board followed *Ezokola* in its interpretation of the law "when it mattered", both ascribing overly broad and out-of-context statements to the Applicant, as well as then unreasonably applying the facts to the law. Accordingly, this portion of the Decision will be set aside.

## VII. Conclusion

[67] Having found that the Board reasonably concluded that the Applicant was a member of an organization that engaged in or instigated subversion by force under IRPA paragraphs 34(1)(f) and 34(1)(b), but did not for the paragraph 35( l )(a) finding of complicity in crimes against humanity, the application for judicial review will be allowed in part. Neither party raised a question for certification. I agree that none arises.

**JUDGMENT in IMM-1469-18**

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

1. This application for judicial review is allowed in part.
2. The Board's inadmissibility finding pursuant to IRPA paragraph 34(1)(f) and 34(1)(b) with respect to subversion by force is reasonable and therefore stands.
3. The Board's inadmissibility finding pursuant to IRPA's paragraph 35(1)(a) with respect to crimes against humanity is unreasonable, and cannot be sustained; as such, assuming the Respondent still wishes to pursue this ground, the matter shall be returned to the Board for redetermination on this ground in accordance with these Reasons.
4. No questions for certification were argued, and none arise.
5. There is no award as to costs.

"Alan S. Diner"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-1469-18 |
| **STYLE OF CAUSE:** | VINCENT NIYUNGEKO V THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 22, 2018 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | JUNE 17, 2019 |

**APPEARANCES:**

| | |
|---|---|
| Jared Will | FOR THE APPLICANT |
| Melissa Mathieu | FOR THE RESPONDENT |

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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |