

Federal Court



Cour fédérale

Date: 20211029

Docket: IMM-3337-20

Citation: 2021 FC 1156

[ENGLISH TRANSLATION]

Toronto, Ontario, October 29, 2021

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

CHRISTOPHE BIGIRIMANA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Christophe Bigirimana is seeking the judicial review of a deportation order made against him under paragraphs 34(1)(b) and 34(1)(f) of the *Immigration and Refugee Protection Act* (IRPA) by the Immigration Division (ID), on the ground that he was a member of the Movement for Solidarity and Democracy (MSD), a political party in Burundi. The ID also concluded that

the MSD, through an armed branch called RED-Tabara, engaged in or instigated the subversion by force of the Burundi government. As a result, the ID member concluded that the applicant was inadmissible to Canada under paragraphs 34(1)(b) and 34(1)(f) of the IRPA. However, I do not believe this conclusion was reasonable, for the reasons that follow.

II. General Background

[2] The applicant is a citizen of Burundi. He arrived in Canada near the end of 2017 and filed a refugee protection claim, in which he declared he was a member of the MSD between 2009 and 2017.

[3] The applicant went on to state that he had held an official position with the MSD between 2009 and 2014, namely as an MSD representative at the Bujumbura mayor's office.

[4] In an interview with the Canada Border Services Agency ("CBSA"), almost a year after his arrival in Canada, the applicant recanted about the duration of his affiliation with the MSD, indicating that he never officially cancelled his membership card or resigned, but that his involvement with the party ended in 2014, during demonstrations against the third mandate of the government and the exile of the party leader, Alexis Sinduhije.

[5] In response to another question during the same interview, the applicant stated that the MSD did not have an armed branch and that, although he had heard about RED-Tabara, he did not know there was any link with the MSD.

[6] Despite his testimony, the officers' reports under subsections 44(1) and 44(2) of the IRPA establish that the applicant is inadmissible.

[7] The ID member therefore held a hearing to determine the applicant's admissibility, which led to the impugned decision.

III. Decision under Review

[8] The ID acknowledged that it had to determine, first, whether there were reasonable grounds to believe that the applicant was or had been a member of the MSD or RED-Tabara and, second, whether there were reasonable grounds to believe that these organizations had been, were, or would be the instigators or authors of acts designed to subvert a government by force. It also recognized that the "reasonable grounds to believe" constituted a serious possibility based on credible and trustworthy evidence.

[9] With regard to the first question, the ID found that there was no doubt that the applicant was a member of the MSD from 2009 to 2017, even though he was not officially active in the party during this period. In reaching this conclusion, the ID noted the applicant's incoherent responses with regard to his membership and the unlikely explanations he provided. The ID also noted that the documentary evidence suggested that the violent acts to subvert the government, attributed directly to the MSD, had begun in 2014.

[10] With regard to the second question, the ID found that the documentary evidence on file reported several violent acts or threats of violent acts that could be considered illegal attacks for

the purpose of subverting the government. The member found that [TRANSLATION] “the MSD, or some of its members, and RED-Tabara, according to various sources, were responsible for several of these violent acts and calls to armed resistance to subvert the government in place.”

[11] In support of its findings on the MSD, the ID referred to a report on Burundi by the Office of the Commissioner General for Refugees and Stateless Persons, which cites news articles about professional armed patrols composed of members of the radicalized opposition, including the MSD, circulating in protesters’ neighbourhoods. It also refers to an event that occurred on March 8, 2014, when members of the MSD were violently dispersed by the police during a protest. Later that day, two police officers were taken hostage at the party’s headquarters by young party members, who demanded the release of the people arrested that day. Finally, the ID referred to documents on record that, in its opinion, reported on threats of violence by the party’s President and Secretary General.

[12] As for the link between the MSD and the militant group RED-Tabara, which the documentation shows was involved in political assassinations and several armed conflicts with the Burundi military, the ID relies on two sources. First, it cites a university article that clearly explains that although an unknown person was declared leader of RED-Tabara, all Burundians consider that RED-Tabara is the armed branch of the MSD and that the true leader is Alexis Sinduhije. The article acknowledges that there is still some mystery, but the evidence indicates that RED-Tabara is active in the MSD’s strongholds. Moreover, the ID cited a report that states that although he publicly denied his involvement, “sources” have linked Sinduhije and other members and former members of the MSD to RED-Tabara.

[13] Lastly, the ID also commented on the applicant's credibility, as he denied even hearing about RED-Tabara until he arrived in Canada. The member deemed this statement to be very unlikely, considering the organization's existence since 2014 or 2015, a German radio report in 2016 and a communiqué by the [TRANSLATION] "Secretary General of RED-Tabara" (but, I will note, it was signed by the Secretary General of the MSD, not RED-Tabara). The ID interpreted the applicant's alleged ignorance of the existence of RED-Tabara as an attempt to deny his own knowledge of the link between the two organizations.

[14] For all these reasons, the ID declared that the applicant was a member of the MSD and that, considering the ties between this party and RED-Tabara, he was ineligible under paragraphs 34(1)(b) and 34(1)(f) of the IRPA. As a result, the ID issued a deportation order against him.

IV. Issues and standard of review

[15] The applicant submits that only one question should be considered: was it unreasonable for the ID to conclude that the applicant was a member of an organization that engaged in or instigated the subversion by force of a government?

[16] An inadmissibility determination under paragraphs 34(1)(b) and 34(1)(f) raises questions of fact and of law and is subject to review in this Court on the standard of reasonableness (see *Saleheen v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 145, at paragraph 24 and *Alam v Canada (Citizenship and Immigration)*, 2018 FC 922, at paragraph 11 [*Alam*]).

[17] The facts leading to a finding of inadmissibility must be established under the standard of “reasonable grounds to believe” (IRPA, section 33; *Niyungeko v Canada (Citizenship and Immigration)*, 2019 FC 820, at paragraph 9 [*Niyungeko*]; *Alam*, at paragraph 12; *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at paragraph 116 [*Mugesera*]). Although *Mugesera* was based on previous immigration legislation, the underlying principles regarding inadmissibility, including the standard of proof, continue to apply: *Niyungeko*, at paragraph 10; *Khan v Canada (Citizenship and Immigration)*, 2017 FC 397, at paragraphs 25 and 47. In a judicial review, the Court must review the previous decision on the reasonableness standard (*Abdullah v Canada (Citizenship and Immigration)*, 2021 FC 949 at paragraph 17).

[18] This standard of review consists of determining whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 99 [*Vavilov*]. Both the rationale and the outcome must be reasonable: *Vavilov*, at paragraph 83.

V. Analysis

[19] According to paragraphs 34(1)(b) and 34(1)(f), two elements must be established in order for the ID to make a finding of inadmissibility: (i) the applicant is a member of the impugned organization (in this case, the MSD and RED-Tabara) and (ii) this organization engages in or instigates the subversion by force of a government (in this case, the Burundi government): *Gacho v Canada (Citizenship and Immigration)*, 2016 FC 794 [*Gacho*], at paragraphs 22 to 26 and 38).

[20] The applicant submits that the required elements were not established, since the member ignored key evidence by making a link between these two organizations, a link that does not truly exist, and as a result, the tribunal erred by finding that he was a member of an organization that rendered him inadmissible under section 34 of the IRPA.

[21] The respondent, however, affirms that the ID decision was reasonable and that it considered all of the documentary and testimonial evidence in reaching its conclusion. The respondent's opinion is that the ID had reasonable grounds to find that the applicant lacked credibility, that he was a member of the MSD, that the MSD had elected to use force to try and subvert the government, and that the link between the MSD and RED-Tabara was shown by the documentation.

[22] While I acknowledge that the ID is better placed to make credibility findings, which I will not modify, and that it was reasonable to conclude that the applicant was a member of the MSD, I cannot agree with the respondent that the ID's two other conclusions were reasonable.

[23] I am not convinced that the ID decision was reasonable, for two reasons. First, the member did not refer to certain evidence that contradicted the conclusions he reached. Second, and this second reason results from the first, there is a lack of critical evidence in the member's finding that there were reasonable grounds to believe that the MSD had chosen to use force to attempt to subvert the government and that the link between the MSD and RED-Tabara was shown by the documentation. Therefore, neither the finding nor the assessment of the evidence to

reach this finding can be described as sufficiently justified or intelligible in relation to the relevant factual and legal constraints of the case.

[24] As for MSD's alleged willingness to resort to violence and subversion, when the sources cited are considered in context, this is merely speculation and suspicion, except for the single event when the brutal dispersion by police of party members degenerated to violence and led to dozens of arrests.

[25] Outside the involvement of young members, it is far from clear that the event could reasonably be considered as an act of the party itself, as opposed to a mere (but still reprehensible) outcome of a series of violent events, perpetrated by individuals, that seems to have been plotted by the police. The source cited by the ID in support of its position, read in its context, describes the event in a section that reports that 2013 and 2014 were highlighted by targeted and sustained violence and oppression against the MSD by the government and its supporters.

[26] Moreover, the ID considered the statements by the party's President and Secretary General to be threats of armed violence (Exhibits C-26, C-29, C-24). When read in context, I feel that, although they indeed refer to potential violence, considering the context of violence in the streets at the time, it is misleading to qualify these statements as threats; they could also be considered as calls for a peaceful process. With no indication that the party directed or approved the actions of its members, or that similar events occurred on other occasions, it is unreasonable to conclude that the MSD chose to resort to violence.

[27] On the contrary, the ID relies mainly on the acts of the alleged militant branch of the MSD, RED-Tabara, to reach this conclusion, a link that was not sufficiently confirmed by the evidence mentioned.

[28] The Federal Court of Appeal gave a clear warning when it stated the following:

...great caution must be exercised when finding membership in one organization to be a proxy for membership in another. Particularly in the context of nationalist or liberation movements, the mere sharing of goals and coordination of political activities may well not justify this type of analysis.

(Kanagendren v Canada (Citizenship and Immigration), 2015 FCA 86, at paragraph 30 [Kanagendren])

[29] In *Kanagendren*, the ID and the Federal Court of Appeal found that membership in an organization (Tamil National Alliance) was equivalent to membership in another (Liberation Tigers of Tamil Eelam), but on the basis of evidence that was sufficiently thorough and convincing to link the two organizations and the involvement of the person in question in both. This conclusion led to the inference that there were reasonable grounds to support the finding that one influenced the other: *Kanagendren* at paragraphs 32 to 34.

[30] On the contrary, in the present case, and as the applicant submitted, the links between the MSD and RED-Tabara are far from being this well established and seem to be limited to general suspicions, the geographic location of activities and the involvement of certain MDS members in RED-Tabara activities. Indeed, some sources cited by the ID admit that representatives of the two organizations have explicitly denied any connection between them.

[31] I would also note that other than the negative credibility findings noted above, there is no evidence that confirms or even hints that the applicant participated actively in MSD's activities after 2014 and, even less so, that he supported or participated in violent acts led by its members or RED-Tabara. In fact, the ID seems to have mixed up the Secretary General of the MSD with a member of RED-Tabara when it came to this particular conclusion regarding the applicant's credibility.

[32] I do not deny that there may be links between these organizations (the MSD and RED-Tabara) and that membership in one could, at some point, be considered as the equivalent of membership in the other, which would meet the inadmissibility criteria under section 34 of the IRPA.

[33] However, in this case, it was not possible for the ID to reasonably reach this conclusion while showing the care noted by the Court of Appeal in *Kanagendren*. Concluding otherwise would reduce the burden of proof with regard to findings of inadmissibility, which could have serious repercussions on individual freedoms, to a point where it becomes too lax. A finding of inadmissibility is very important for an applicant, as indicated in the case law regarding prudence:

This is particularly true when the applicant was already granted refugee status and would face persecution if returned to his country of nationality. Where the analysis and decision are reasonable, this Court will not interfere. However, findings of inadmissibility "should be carried out with prudence, and established with the utmost clarity"....

(*Perez Villegas v Canada (Citizenship and Immigration)*, 2011 FC 105, at paragraph 41, citing *Daud v Canada (Citizenship and Immigration)*, 2008 FC 701, at paragraph 8)

[34] In this case, the prudence and justification needed were lacking. For this reason, I conclude that the ID decision was unreasonable.

VI. Certified Question

[35] At the end of the hearing, the applicant asked that the following question be certified:

[TRANSLATION]
Should membership in an organization not require an unequivocal hierarchical and/or operational link between two distinct organizations to determine whether a person is inadmissible?

A certified question must be dispositive of the appeal (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paragraph 36). However, considering the reasoning above, the proposed question does not meet this criterion. As a result, I will not certify it.

VII. Conclusion

[36] The ID made a fatal error. It ignored essential evidence in order to render its finding with regard to the link between the MSD and RED-Tabara, which led it to declare that the applicant was a member of an organization that engaged in the subversion by force of the Burundi government and, as a result, was inadmissible under paragraphs 34(1)(b) and 34(1)(f) of the IRPA. Considering this error and the explanations given above, I allow the judicial review and return the matter to a different decision-maker.

JUDGMENT in IMM-3337-20

THIS COURT DECLARES the following:

1. This application for judicial review is allowed.
2. This case is returned to another Member for re-examination.
3. A question was submitted for certification but did not meet the applicable criteria.
4. No costs are awarded.

“Alan S. Diner”

Judge

Certified true translation
Michael Palles

APPENDIX A: RELEVANT PROVISIONS

Immigration and Refugee Protection Act:

Inadmissibility

Rules of Interpretation

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.

Security

34 (1) A permanent resident or a foreign national is inadmissible on security grounds for

...

(b) engaging in or instigating the subversion by force of any government;

...

(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).

Interdictions de territoire

Interprétation

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.

Sécurité

34 (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

...

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

...

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).

FEDERAL COURT
SOLICITORS OF RECORD

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