Federal Court  Cour fédérale

Date: 20220203

Docket: IMM-3920-21

Citation: 2022 FC 137

Ottawa, Ontario, February 3, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

JANVIER BIGIRIMFUFUA

Respondent

JUDGMENT AND REASONS

[1] The Minister of Public Safety and Emergency Preparedness seeks judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada [IRB] dated May 27, 2021. In the decision, the IAD concluded Janvier Bigirimfufua was not a person described in paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Although he was represented before the IAD, Mr. Bigirimfufua did not respond to this application and did not participate in the proceeding.

[2] I agree with the Minister that the IAD's decision must be set aside. The Minister alleged before the IAD that the Immigration Division [ID] of the IRB had erred in finding that Mr. Bigirimfufua was not inadmissible to Canada on grounds of organized criminality under paragraph 37(1)(*a*) of the *IRPA*. The IAD in its decision addressed the question of whether Mr. Bigirimfufua was a member of a criminal organization. However, it did not address whether Mr. Bigirimfufua had engaged in activity that is part of a pattern of organized criminal activity. The Federal Court of Appeal has confirmed that membership in a criminal organization and engaging in activity that is part of a pattern of organized criminal activity are "discrete, but overlapping grounds on which a person may be inadmissible for 'organized criminality'" under paragraph 37(1)(*a*): *Canada (Minister of Citizenship and Immigration) v Thanaratnam*, 2005 FCA 122 at para 30.

[3] Where both grounds within paragraph 37(1)(*a*) are at issue, it is an error to conclude that a person is inadmissible simply because they are not a member of a criminal organization: *Thanaratnam* at paras 28–30. While *Thanaratnam* was addressing a failure by this Court to address the second part of paragraph 37(1)(*a*), I agree with the Minister that it is equally a reviewable error for the IAD to fail to address the second part of the paragraph: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 108–110, 112, 127–128.

[4] I am satisfied in the present case that the second part of paragraph 37(1)(*a*) was at issue in the appeal before the IAD.

[5] The IAD stated in its decision that the Minister had "filed the appeal on the basis that the ID Member erred in her conclusion that the Respondent was not a member of" the criminal organization in question [emphasis added]. Had the Minister indeed cast their appeal as being limited to the question of membership, then it would not have been an error for the IAD not to have addressed the second part of paragraph 37(1)(*a*).

[6] The Court was somewhat hampered in its assessment of the IAD's statement by the fact that neither the certified tribunal record [CTR] prepared by the IAD nor the Minister's record contained (i) written submissions to either the ID or IAD; (ii) a transcript of the hearing before the IAD; or (iii) a complete recording of the hearing before the IAD. With respect to point (iii) in particular, the recording of the hearing in the CTR ended before closing submissions, which would have allowed the Court to understand what was put before the IAD and to consider other portions of the hearing in context. After this concern was identified at the hearing of this application, I granted leave to file a supplementary record.

[7] The Minister filed a supplementary record that included a supplementary CTR provided by the IAD. The supplementary CTR included written submissions to the ID from the Minister and Mr. Bigirimfufua, which were before the IAD. It also included a statement from a Case Management Officer with the IAD that the oral submissions portion of the hearing was not recorded due to an administrative error.

[8] The Minister's notice of appeal to the IAD is somewhat equivocal. While it alleges the ID erred by finding Mr. Bigirimfufua was not inadmissible to Canada pursuant to

paragraph 37(1)(*a*) of the *IRPA*, it did not raise specific allegations with respect to the "engaging in activity" part of the paragraph.

[9] However, based on the recording in the CTR, notably the passages identified by the Minister, and the written submissions to the ID that were put before the IAD, I am satisfied that the second part of paragraph 37(1)(*a*) was a live issue that was before the IAD. In particular, after the close of evidence and before hearing final submissions, the IAD member asked the Minister's representative to confirm that he was "going to deal with the issue of membership […] and engaging in a pattern of criminality" [emphasis added]. The Minister's representative confirmed this was correct and noted that he would be relying in part on the written submissions made to the ID, which were before the IAD. Those submissions address both parts of paragraph 37(1)(*a*), as did the ID's decision.

[10] This discussion echoed a similar exchange earlier in the proceedings. Near the outset of the matter, after addressing preliminary issues but before evidence was called, the IAD member again confirmed with the Minister's representative that the issues included whether Mr. Bigirimfufua was a member of the group (which was conceded to be a criminal organization), "and whether he engaged in a pattern of criminal activity" [emphasis added]. Again, the Minister's representative confirmed this was correct. Although the final submissions of the parties might have changed this, in the absence of any evidence to this effect, I cannot conclude that the Minister's submissions involved a withdrawal or concession in respect of the second part of paragraph 37(1)(*a*).

[11] I therefore conclude that the IAD erred in asserting in its decision that the Minister's appeal was based only on the conclusion that Mr. Bigirimfufua was not a member of a criminal organization. I agree with the Minister that the IAD's decision very clearly did not address whether Mr. Bigirimfufua engaged in activity that is part of a pattern of organized criminal activity, which was one of the two issues before it. This was a material error that rendered the decision unreasonable: *Thanaratnam* at paras 28–30; *Vavilov* at paras 100, 108–110, 112, 127–128.

[12] The application for judicial review is therefore allowed. The decision of the IAD dated May 27, 2021 is set aside and the Minister's appeal is referred back to the IAD for redetermination by a differently constituted panel.

[13] The Minister did not propose a question for certification. None arises in the matter.

JUDGMENT IN IMM-3920-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The decision of the Immigration Appeal Division dated May 27, 2021 is set aside, and the Minister's appeal is referred back to the Immigration Appeal Division for redetermination by a differently constituted panel.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3920-21
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v JANVIER BIGIRIMFUFUA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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APPEARANCES:

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