Federal Court Cour fédérale

Date: 20220425

Docket: IMM-4974-20

Citation: 2022 FC 594

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, April 25, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

JOSEPH BUDIGOMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

[1] Mr. Budigoma was found inadmissible on account of his voluntary, significant and knowing contribution to crimes against humanity committed by a unit of the Burundian Armed Forces [BAF], of which he was the second in command. He is now seeking judicial review of the inadmissibility decision. I dismiss his application because the inadmissibility finding is reasonably based on the evidence before the decision-maker.

I. Background

[2] Mr. Budigoma is a citizen of Burundi. He spent his career in the BAF. He completed his training in 1989 and then climbed the ranks of the military hierarchy. He retired as a colonel in 2015.

[3] In 2017, Mr. Budigoma came to Canada and claimed refugee protection. However, his situation was referred to the Immigration Division [ID] of the Immigration and Refugee Board because it was suspected that he had committed a crime against humanity. On September 23, 2020, the ID found Mr. Budigoma to be inadmissible under paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[4] The ID based its decision on the fact that Mr. Budigoma had been involved in a massacre committed by the BAF in 2002 in the commune of Itaba, in the province of Gitega, Burundi.

[5] According to the ID, the documentary evidence clearly demonstrates that the BAF massacred approximately 170 civilians in the vicinity of Itaba on September 9, 2002. It also shows that at that time, Mr. Budigoma was the second in command of the 4th commando battalion of Ngozi, which was responsible for this massacre. Nevertheless, Mr. Budigoma claimed that on that day, he had remained in the principal town of the commune of Itaba to ensure communications and supplies. Therefore, he alleges that he was unaware that his battalion's soldiers were killing civilians.

[6] The ID found that Mr. Budigoma’s testimony was not credible, given that he was evasive and contradicted by the documentary evidence. More specifically, it considered it implausible that Mr. Budigoma was unaware of what was happening on the day of the massacre. More generally, he could not have been unaware of the numerous crimes against humanity committed by the BAF for decades. The ID concluded that Mr. Budigoma voluntarily and knowingly made a significant contribution to the massacre in Itaba, although he did not directly participate in it.

[7] It should be noted that shortly after the massacre, faced with the growing outrage from the public and the international community, Mr. Budigoma was arrested and charged with various offences, including the murder of the victims. Following a trial that lasted merely two hours, he was acquitted of the murder charges but found guilty of a disciplinary offence. Several human rights NGOs condemned this trial and claimed that justice had not been done. The ID concluded that the outcome of this trial was predetermined.

[8] Mr. Budigoma is now seeking judicial review of the ID’s decision.

II. Analysis

[9] I dismiss the application for judicial review, because the ID’s decision is reasonable. To establish the premises of my analysis, it is useful to recall the legal principles concerning inadmissibility for crimes against humanity.

A. *Legal framework*

[10] Paragraph 35(1)(a) of the Act provides as follows:

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; …

[11] Subsection 6(3) of the *Crimes against Humanity and War Crimes Act*, SC 2000, c 24, defines crime against humanity as "murder ... committed against any civilian population or any identifiable group", provided that the murder constitutes a crime against humanity according to international law. Subsection 6(4) establishes a presumption that the crimes defined in the *Rome Statute of the International Criminal Court*, July 17, 1998, UNTS, vol 2187, No I-3854, constitute crimes according to customary international law. Article 7 of the Rome Statute provides as follows:

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:	**1.** Aux fins du présent Statut, on entend par crime contre l'humanité l'un quelconque des actes ci-après lorsqu'il est commis dans le cadre d'une attaque généralisée ou systématique lancée contre toute population civile et en connaissance de cette attaque :
(a) Murder; …	**a)** Meurtre ; …

[12] Various modes of commission can make a person guilty of a crime against humanity. In addition to the modes recognized by national law, such as direct commission or aiding and abetting, international criminal law recognizes modes adapted to the collective nature of international crimes. In *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*], the Supreme Court of Canada summarized the provisions of the Rome Statute and international case law and concluded that a person commits such a crime if they “knowingly (or, at the very least, recklessly) contribute in a significant way to the crime or criminal purpose of a group” (at paragraph 68). In addition, at paragraph 91, the Court set out a number of factors that should be considered to determine whether a person has made a significant and knowing contribution:

> (i) the size and nature of the organization;
>
> (ii) the part of the organization with which the refugee claimant was most directly concerned;
>
> (iii) the refugee claimant’s duties and activities within the organization;
>
> (iv) the refugee claimant’s position or rank in the organization;
>
> (v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group’s crime or criminal purpose; and
>
> (vi) the method by which the refugee claimant was recruited and the refugee claimant’s opportunity to leave the organization.

[13] Lastly, an inadmissibility proceeding is not a criminal trial. To reach an inadmissibility finding, it is not necessary that the commission of the crime be established beyond a reasonable doubt: see, by analogy, *Ezokola*, at paragraphs 37 to 41. The applicable standard of proof is set out in section 33 of the Act:

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.

B. *Mr. Budigoma's arguments*

[14] Mr. Budigoma submits that the ID's decision is unreasonable because it referred to a refugee camp that did not in fact exist, dismissed his testimony without a valid reason, and misapplied the *Ezokola* test. The ID also reportedly failed to consider his acquittal and the statements of a spokesperson for the BAF following his trial. I reject each of these claims. In substance, they pertain to the ID's findings of fact, to which this Court must show deference.

(1) The non-existent refugee camp

[15] At several points, the ID states that the Itaba massacre took place in a refugee camp. Mr. Budigoma is right to assert that this is a mistake. The massacre took place on three hills around the municipality of Itaba. There is every reason to believe that the ID confused the Itaba massacre with another massacre referred to in the evidence, that of Gatumba, which in fact took place in a refugee camp in 2004.

[16] However, this error is not material. Mr. Budigoma does not dispute that civilians were massacred in Itaba or the fact that his battalion was responsible for this. The precise location of

the massacre has no bearing on its characterization as a crime against humanity or on Mr. Budigoma's knowing and significant contribution to it.

(2) Mr. Budigoma's credibility

[17] Mr. Budigoma also argues that his testimony benefits from a presumption of truthfulness and that the ID should have believed him. However, the presumption of truthfulness can be rebutted. In the case at hand, although the ID apparently accepted that Mr. Budigoma was not physically present at the scene of the massacre, it concluded that it was highly implausible that he was unaware of what was happening on September 9, 2002, given that he was the second in command of the battalion responsible for it. It noted that the operation had been planned for over two weeks. In this context, the ID was not required to believe Mr. Budigoma's assertion that he was in charge of communications and supplies and that he had no idea what was going on. Moreover, in his testimony concerning the day of the massacre, Mr. Budigoma stated, [TRANSLATION] "Since I was not the battalion commander, I was following what was happening on the Motorola radio" (CTR, p 1244). I also note that Amnesty International, after conducting a field investigation, stated that [TRANSLATION] "the civilian population had been deliberately targeted, and most of the victims had been killed at point-blank range" (CTR, p 782).

[18] It is true that immigration decision-makers must be cautious before reaching implausibility findings: *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776; *Al Dya v Canada (Citizenship and Immigration)*, 2020 FC 901. Nevertheless, I find that, in view of the facts noted above, the ID could reasonably make such a finding in the case at hand.

[19] The ID could also rely on Mr. Budigoma's reluctance to admit the facts. In particular, Mr. Budigoma repeatedly stated that his battalion engaged rebels, that there were not supposed to be any civilians left in the region, or that those who remained were used as human shields by the rebels or were their accomplices (CTR, pp 1245–46). However, the documentary evidence concerning the massacre clearly states that the victims were civilians. At the very least, there are reasonable grounds to believe that these individuals were deliberately targeted.

[20] I again point out that to justify an inadmissibility finding, the Minister need only raise reasonable grounds to believe that Mr. Budigoma contributed to a crime against humanity. The ID could find that such grounds existed even without reaching any definitive findings Mr. Budigoma's whereabouts on the day of the massacre.

(3) The *Ezokola* test

[21] Finally, Mr. Budigoma submits that the ID misapplied the *Ezokola* test. On this point, I note that the ID did not find that Mr. Budigoma participated directly in the Itaba massacre, given that he was not at the scene, but that he rather made a significant contribution to it.

[22] The ID analyzed Mr. Budigoma's military career, which spanned more than 30 years. It noted that he enrolled voluntarily and did not demonstrate by credible evidence that he would have been unable to resign. It also noted that he had been promoted several times, both before and after the Itaba massacre and the subsequent sham trial. It concluded that Mr. Budigoma could not have been unaware of the many crimes against humanity the BAF committed during this period. Based on all these factors, the ID concluded that there are reasonable grounds to

believe that Mr. Budigoma made a voluntary, knowing, and significant contribution to the BAF's criminal purpose with respect to the Itaba massacre.

[23] To try to avoid this conclusion, Mr. Budigoma raises three grounds.

[24] First, he submits that the Hutu-dominated regime that has been in power since 2005 would not have promoted him had he been responsible for the massacre of Hutu civilians. However, such an assertion is speculative. The record does not contain specific information on the role of civilian authorities in promotions within the BAF. No one disputes that the army was dominated by Tutsis at the time of the massacre. There is no evidence that this has changed.

[25] Second, Mr. Budigoma does not deny that his trial in Burundi was nothing but a sham and that it failed to identify those actually responsible for the Itaba massacre. However, he concludes from this that he is only a [TRANSLATION] "scapegoat" and that he was somewhat exonerated by the verdict or by subsequent statements from army officials. In my view, nothing can be inferred from these events. It could just as easily be said that this trial was staged to exonerate Mr. Budigoma, who was known to be responsible for the massacre. For the same reasons, it is impossible to give credence to the statements made by an army spokesman to the effect that Mr. Budigoma was not responsible for the Itaba massacre.

[26] Third, Mr. Budigoma relies on *Niyungeko v Canada (Citizenship and Immigration)*, 2019 FC 820. In that case, this Court allowed an application for judicial review of a decision of the ID finding a former chief of staff of the BAF to be inadmissible for crimes against humanity.

My colleague Justice Alan Diner concluded that the ID had relied only on Mr. Niyungeko’s membership in the BAF to attribute all the crimes committed by them to him. However, in the case at hand, Mr. Budigoma is inadmissible for having contributed to a specific crime committed by the battalion of which he was the second in command, and he could not have been unaware of the preparations for and execution of this crime.

[27] In short, the ID did not find Mr. Budigoma guilty by mere association, which would be prohibited by *Ezokola*, or because of his mere membership in the BAF. It analyzed all the relevant circumstances and reached a conclusion reasonably supported by the evidence.

III. Conclusion

[28] For these reasons, the application for judicial review will be dismissed.

JUDGMENT in IMM-4974-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question is certified.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Pacifique Siryuyumusi	FOR THE APPLICANT
Amani Delbani	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Pacifique Siryuyumusi Barrister and solicitor Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT