Federal Court  Cour fédérale

Date: 20230330

Docket: IMM-9091-21

Citation: 2023 FC 447

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 30, 2023

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

GRETTA NSIMBA ROSE DIAKENDA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Greta Nsimba Rose Diakenda, a citizen of the Democratic Republic of the Congo, arrived in Canada on July 18, 2019, with her four children. In a decision made on November 4, 2021, the Immigration Division [ID] determined that Ms. Diakenda was a member of the Bundu Dia Mayala/Bundu Dia Kongo [BDM/BDK]. The ID determined that the

BDM/BDK is an organization that has engaged in or instigated the subversion by force of a government, pursuant to paragraphs 34(1)(f) and 34(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The ID declared the applicant inadmissible to Canada.

[2] The applicant is seeking judicial review of the ID decision by raising the issue of whether it was unreasonable for the ID to conclude that the applicant was a member of such an organization. She argues that the ID erred in its interpretation of the evidence and therefore unreasonably concluded that she was a member of the BDM/BDK.

[3] The respondent argues that the applicant's admission of her membership with the BDM in her refugee protection claim, at her interview at the port of entry, and at her interview seven months later with another Canada Border Services Agency [CBSA] officer are sufficient to support the ID's conclusion that there were reasonable grounds to believe that she was a member of the BDM/BDK and that the decision is reasonable.

[4] I will allow the application for the following reasons. As detailed below, I am of the view that, in considering the issue of membership, the ID was required to address the applicant's defence of duress. The fact that the ID did not do so renders the decision unreasonable.

II. Background

[5] Ms. Diakenda, born on June 22, 1983, fled the Democratic Republic of the Congo [DRC] with her children in January 2018. They arrived in Canada on July 18, 2019. She has four children, born in 2003, 2008, 2010 and 2013, who have been granted refugee status.

[6] The BDM and the BDK engage in secessionist political activities and include a religious component. The applicant's husband died from police gunfire at a BDM/BDK meeting.

[7] The applicant worked as a nurse until her husband's death. At that time, she started an association for the defence of rights of women and children. She alleges that her activities as part of the association, including organizing a peaceful march, drew the attention of a government agency and the police, who subsequently detained her for a few days. She left the country with her children after escaping from detention.

[8] In her Basis of Claim Form [BOC Form], she stated that she was a member of the BDM from 2013 to 2018. Similarly, during her interview on July 22, 2019, at the port of entry, the applicant stated that she was affiliated with the BDM, though she did not use the word "member". In a subsequent interview by another CBSA officer, held on February 7, 2020, the applicant confirmed her membership with the BDM, stating that she was not a member of the political party but a devotee of the religious branch. Finally, she attached an unsigned membership card from the BDM to her refugee protection claim.

[9] Following the interview on February 7, 2020, the CBSA officer prepared a report on inadmissibility under subsection 44(1) of the IRPA.

[10] At the hearing before the ID, the applicant denied her membership with the BDM and stated that her husband had registered her against her will. She reported that she had attended the BDM church three times, but only under threat of retaliation from her husband.

III. Decision under review

[11] The ID examined whether there are reasonable grounds to believe that Ms. Diakenda is or has been a member of an organization that is or has engaged in or instigated the subversion by force of any government (paragraphs 34(1)(f) and 34(1)(b) of the IRPA) or that has engaged in an act of subversion against a democratic government, institution or process within the meaning of paragraphs 34(1)(f) and 34(1)(b.1) of the IRPA.

[12] The ID first concluded that Ms. Diakenda was a member of the BDM from February 2013 to January 2018 based on the following:

A. She stated that she was a member in Schedule A of her refugee protection claim

B. She submitted her unsigned membership card

C. She had not previously expressed her disagreement with the organization or invoked the defence of duress in interviews with CBSA officers

[13] In concluding that the applicant was a member of the BDM, the ID acknowledged but rejected the applicant's explanation. She testified that her participation was limited to attending three meetings at the BDM church under threat of violence. She stated that she was not aware of the contents of the membership form, which had been completed by her husband, and that her membership declaration had been provided for the sake of transparency. The ID refused to consider the defence of duress and concluded that the applicant had been a member of the BDM within the meaning of paragraph 34(1)(f) of the IRPA.

[14] The ID then assessed the documentary evidence to establish whether the BDK and the BDM constituted a single organization and whether there were reasonable grounds to believe that the organization is or has engaged in or instigated the subversion by force of a government within the meaning of paragraph 34(1)(b) of the IRPA. The insurrectionary and violent acts by the BDK demonstrated that the BDM/BDK had instigated the subversion of the government by force. The ID also concluded that the religious and political branches cannot be separated. However, the ID rejected the allegation concerning paragraph 34(1)(b.1), establishing that the government of President Joseph Kabila could not be recognized as democratic, which is one of the criteria in paragraph 34(1)(b.1).

IV. Preliminary issue

[15] The respondent requests that the style of cause be amended to replace the Minister of Citizenship and Immigration with the Minister of Public Safety and Emergency Preparedness, noting that that is the Minister responsible for the administration of the IRPA as it relates to

inadmissibility on grounds of security (subsection 4(2) of the IRPA; paragraph 5(2)(b) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22).

[16] The style of cause is therefore amended.

V. Standard of review

[17] The applicable standard of review is that of reasonableness. A reasonable decision is justified, transparent and intelligible and falls within a range of possible outcomes defensible in respect of the facts and law(*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]).

VI. Analysis

[18] The applicant alleges that the ID made several errors in its review of her membership with the BDM/BDK, but I am of the view that the determinative issue is the assessment of the defence of duress. The applicant alleges that the ID erred in ignoring and failing to consider whether she met the conditions for establishing the defence of duress (*R v Ryan*, 2013 SCC 3 at para 55 [*Ryan*]).

[19] It is well established that, for the purposes of paragraph 34(1)(f) of the IRPA, “member” is to be given an unrestricted and broad interpretation (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 27, 29).

[20] With respect to membership, the nature of the person's involvement in the organization, the length of time involved, and the degree of the person's commitment to the organization's goals and objectives should be considered (*B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146 at paras 27–29 [*B074*]). However, the case law has also held that, when membership is admitted, any necessity for an institutional link is established by the applicant's admitted membership, without the need for a more detailed analysis (*Khan v Canada (Citizenship and Immigration)*, 2017 FC 397 at para 34; see also *Wasta Ismael v Canada (Citizenship and Immigration)*, 2022 FC 1520 at para 42, where Justice Avvy Yao-Yao Go recognizes the risk of a rigid approach to admission and how ignoring the factors identified in *B074* can be problematic as different cultural-linguistic backgrounds may shape vocabulary).

[21] The case law also recognizes that an applicant can claim duress in this context (*Canada (Public Safety and Emergency Preparedness) v Gaytan*, 2021 FCA 163; *Ibrahim v Canada (Citizenship and Immigration)*, 2022 FC 1299 at paras 47–65).

[22] In concluding that the applicant was a member of the BDM/BDK, the ID addressed the applicant's allegation of duress—her membership with the BDM was not voluntary but acquired under duress due to threats of retaliation from her late husband. The ID acknowledged the potential relevance of a defence of duress and detailed the requirements to be met to establish it (*Ryan* at para 55).

[23] However, the ID rejected the explanation of duress without considering whether the criteria set out in *Ryan* had been established. In fact, the ID found that the applicant's testimony

was not credible. The ID noted that the defence of duress was first raised at the hearing before it, even though the applicant had previously had two opportunities to do so—before the CBSA officers and in her BOC Form. In finding that the testimony pertaining to the defence of duress was not credible, the ID assessed the statements made by the applicant during the hearing and before the CBSA officers, including the timeline of her departure from the DRC.

[24] In establishing that the defence of duress was first raised at the hearing, the ID appears to have misinterpreted the applicant's response at the second interview with the CBSA officer. In summarizing the applicant's explanations of her attendance at the BDM church with her husband, the ID wrote "that she had gone with him to the BDM church for [translation] 'the influence' that this might have". However, the transcript of the interview on February 7, 2020, indicates that the applicant explained: [TRANSLATION] "I was there for the church and for my husband's influence. I have to go with him to his church, so I was with him, but I never took part in political meetings with him".

[25] Although the defence of duress was not explicitly raised during this interview with CBSA, the applicant suggested that her participation in the BDM church may have been forced and not voluntary. However, citing only part of the applicant's explanation regarding her presence at the BDM church, the ID did not acknowledge or address the applicant's statement that her presence was mandatory: [TRANSLATION] "I have to go with him to his church". In the absence of an explanation from the ID, I am led to conclude that the ID misinterpreted the evidence in this regard.

[26] Considering the ID's misinterpretation combined with the emphasis placed on the conclusion that the defence of duress had been raised for the first time before the ID, the panel's reasoning undermines the reasonableness of its conclusion that it did not need to address the criteria set out in *Ryan*. This in turn undermines the reasonableness of the conclusion that the applicant was a member of the BMD/BDK for the purposes of section 34 of the IRPA. Even if the outcome of the decision could be reasonable, it is not open to the reviewing court to disregard the flawed basis for a decision (*Vavilov* at para 96).

[27] I am of the view that the ID's rejection of the defence of duress based on the applicant's credibility without considering the exchange in the second interview in its proper context or applying the criteria set out in *Ryan* was unreasonable. In reaching this conclusion, it was not necessary for me to rule on the admission of membership and the applicability of the criteria identified in *B074* in this case.

VII. Conclusion

[28] The application for judicial review is allowed. There is no question of general importance to be certified.

JUDGMENT in IMM-9091-21

THIS COURT'S JUDGMENT IS as follows:

1. The application is allowed.
2. The matter is referred back for redetermination by another decision maker.
3. The respondent in the style of cause is amended and replaced by the Minister of Public Safety and Emergency Preparedness.
4. No question is certified.

"Patrick Gleeson"
Judge

Certified true translation
Margarita Gorbounova

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9091-21
STYLE OF CAUSE:	GRETTA NSIMBA ROSE DIAKENDA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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