Federal Court  Cour fédérale

Date: 20230324

Docket: IMM-9650-21

Citation: 2023 FC 407

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 24, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

GAHUNGU, SYLVESTRE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Sylvestre Gahungu, is challenging by judicial review the decision of the Immigration Division [ID] to recognize him as inadmissible and to issue a deportation order against him. Leave for the application for judicial review was granted under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The applicant is a 63-year-old citizen of Burundi who arrived in Canada from a port of entry in the United States on April 20, 2019. His claim for refugee protection is still pending, as the Minister wrote a report under subsection 44(1) of the Act finding him inadmissible, which was referred to the ID for investigation.

[3] The Minister stated that he had reasonable grounds to believe that Mr. Gahungu was a member of an organization that there are reasonable grounds to believe has engaged in or instigated the subversion by force of a government. Section 34 of the IRPA allows inadmissibility in these circumstances. The ID agreed.

I. Facts

[4] Mr. Gahungu had a career in Burundi's armed forces. Over the years, he rose through the ranks, starting as a second lieutenant when he began his military training in 1981 and retiring as a colonel in 2015.

[5] He stated that he spent most of his time during those years as part of the staff in the country's capital, Bujumbura, where he was assigned to administrative tasks in human resources and communications.

[6] I read the transcripts of the interviews with a Canada Border Services Agency investigator and of the two sessions before the ID. Mr. Gahungu was vague about his military service despite repeated attempts to obtain clarification. In addition, despite rising in rank, he testified that his duties remained the same, but always as part of the staff.

[7] The Minister argues that there were several coups d'état in Burundi during the applicant's years of service. Moreover, a few years after the country gained independence, in 1966, the Burundi armed forces carried out a coup. Ten years later, another coup brought Colonel Bagaza to power. The 1987, 1993 and 1996 coups are relevant to our case. In 1987, when the applicant joined the armed forces, Major Buyoya became president. In June 1993, Melchior Ndadaye was elected as the country's president. A month later, an attempted coup failed, but a new attempt succeeded in October of the same year, with the president-elect, the minister of home affairs and the president of the National Assembly, among others, being murdered. Another coup, in 1996, ousted President Ntibantunganya when he sought refuge in the American Embassy amid growing rumours of a putsch and spreading inter-ethnic violence. Again, a military man became the head of the country.

[8] There is no doubt that the applicant was a member of the armed forces. He himself frequently mentioned coups in his testimony and under examination. His defence in respect of the alleged subversion of the government by the armed forces, of which he was a member, lies elsewhere.

II. Decision under review

[9] Although the applicant disputed that the evidence showed that Burundi's armed forces were responsible for the coups over the years, the ID was of the view that the applicant was a member of the Burundi armed forces of which there were reasonable grounds to believe that they had engaged in or instigated subversion by force of the Burundian government. The applicant's argument was, essentially, that elements of the armed forces, not the armed forces as an entity,

took power in 1993 and that the president's departure in 1996 made it necessary to appoint an acting president. As for the events of 1987, the evidence was not clear, convincing and cogent that the armed forces, rather than rebellious members of the armed forces, had committed the alleged acts.

[10] The ID reminds us that the standard of proof in civil matters is not the balance of probabilities, but reasonable grounds to believe: this standard requires something more than mere suspicion, but less than the standard applicable in civil matters (*Mugesera v Canada (Minister of Citizenship and Immigration*), 2005 SCC 40, [2005] 2 SCR 100 [*Mugesera*]).

[11] The ID reviewed the three incidents described as coups.

A. *1987*

[12] While President Bagaza was out of the country, a military junta made Major Pierre Buyoya president of the country. The applicant testified that the senior military officers supported Buyoya and that there was no resistance. The ID concluded that the coups in 1966 and 1976 demonstrated the armed forces' stranglehold on Burundi and their control of the coercive power there: this was sufficient to suggest that force would be used where necessary. This meant that the government of Bagaza (also a member of the military) was brought down, and a new president was instated unilaterally. This constituted a subversion by force of the government in September 1987. Reasonable grounds were present.

B. *1993*

[13] After Melchior Ndadaye was elected on June 1, 1993, a first attempt to subvert the government by coup failed shortly thereafter; a second attempt in October 1993 was successful, however, with several political figures, including the president-elect and other senior officials being assassinated.

[14] The ID referred to the final report of the Commission d'enquête sur les violations des droits de l'homme au Burundi depuis le 21 octobre 1993 [the International Commission of Inquiry on human rights in Burundi] (Certified Tribunal Record, Exhibit C-12). The ID gave this report a great deal of weight because of the quality of the investigation and the involvement of independent experts from the International Federation of Human Rights, the World Organisation Against Torture and Human Rights Watch.

[15] The report concludes that active or passive complicity of the majority of the armed forces in the coup was [TRANSLATION] "clear".

[16] The ID cited two other sources of information: (1) the International Commission of Inquiry to establish the facts relating to the assassination of the President of Burundi on October 21,1993, and the massacres that followed, this commission having been established by the United Nations Security Council, and its August 1996 report (Certified Tribunal Record, Exhibit C-13); and (2) the book *L'Afrique des grands lacs en crise, Rwanda, Burundi, 1988–1994*, by Filip Reyntjens. According to the United Nations report, the coup was planned and executed by high-ranking officers of the Burundian military. Several units were involved.

[17] The ID noted that the International Commission of Inquiry on human rights in Burundi (Exhibit C-12) had found a high level of organization and coordination on the part of the armed forces:

> [TRANSLATION]
> When the standoff around the palace was first developing and the "evacuation" of President Ndadaye followed, participants in the military coup took over the city. The main arteries were occupied, as well as the radio and television; around 5 a.m., telephone service was cut (except for numbers in the 23 area code, which were only cut off in the afternoon). The mutineers went looking for several FRODEBU leaders. They did not encounter any true resistance. Thus, the commandos responsible for the protection of the President of the National Assembly, Pontien Karibwami, and police officers guarding the Minister of Home Affairs, Juvénal Ndayikeza, put up no resistance against the participants in the military coup. Between 1 a.m. and 2 a.m., Major Rumbete and Major Busokoza, who were suspects in the July 2-3 coup attempt, were released from the prison in Mpimba. During that day, other soldiers held in connection with that matter were also freed (Lieutenant Colonel Ningaba in Rumonge, Commander Ntakiyica in Muramvya, First Sergeant Major Simbananiye in Bubanza). Once again, these releases went ahead without the slightest opposition. (C-12, p. 125)

[18] According to the ID, F. Reyntjens's book and the United Nations report made similar findings. Paragraph 61 of the decision under review states as follows:

> The United Nations report and the book by Filip Reyntjens also report a high level of organization and coordination in the implementation of the coup and describe roadblocks, coordinated arrests of influential members of the government, the cut-off of telecommunications, the taking of the headquarters and the air base, and the control of radio and television (C-11, pp. 79-80; C-13, pp. 317-319).

[19] According to the ID, the evidence from the two independent commissions of inquiry that investigated the events exhaustively by dealing directly with primary sources provided

reasonable grounds to believe that the armed forces had engaged in or instigated subversion by force of the government.

C. *1996*

[20] After the military took power on July 25, 1996, Pierre Buyoya became president again. According to the ID, both the Constitution and the National Assembly were suspended, and political parties were banned.

[21] The ID rejected the argument that Buyoya simply filled a position left empty by the president, who had taken refuge at the United States Embassy. According to the ID, the documentary evidence confirms that the events of July 1996 were a coup. Even the leaders of the central and eastern African countries had condemned the coup and imposed sanctions on Burundi. The Constitution provided that, in the event of a vacancy in the position of president, the National Assembly would appoint the president: the suspension of the Constitution and of the National Assembly by the new leaders who had imposed themselves by force prevented the transfer of power according to the rules set out in the country's laws.

[22] According to the ID, the coup that had taken place less than three years earlier meant that there was a reasonably perceived potential for the use of coercion by violent means, as illustrated by the 1993 assassinations. Even the applicant (then the claimant) had repeatedly referred to the events of July 1996 as constituting a coup. There were reasonable grounds to believe.

[23] The ID concluded without hesitation that the applicant was a member of the armed forces, especially since he had admitted being a member of the Burundian armed forces from 1981 to 2015. Both his membership in the armed forces and the reasonable grounds to believe that the military had engaged in or instigated subversion by force of the government were sufficient to find the applicant inadmissible.

[24] Finally, the applicant relied on a defence of duress: he could not leave the armed forces without risk of reprisals. Applying the decision of the Supreme Court of Canada in *R v Ryan*, 2013 SCC 3, [2013] 1 SCR 14 [*Ryan*], the ID was not satisfied that there was duress. *Ryan* describes the elements of the defence of duress as follows:

> [81] The defence of duress, in its statutory and common law forms, is largely the same. The two forms share the following common elements:
>
> • There must be an explicit or implicit threat of present or future death or bodily harm. This threat can be directed at the accused or a third party.
>
> • The accused must reasonably believe that the threat will be carried out.
>
> • There is no safe avenue of escape. This element is evaluated on a modified objective standard.
>
> • A close temporal connection between the threat and the harm threatened.
>
> • Proportionality between the harm threatened and the harm inflicted by the accused. The harm caused by the accused must be equal to or no greater than the harm threatened. This is also evaluated on a modified objective standard.
>
> • The accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

[25] The ID concluded that the applicant had not established these elements. The ID's determination is summarized in paragraph 81 of its decision:

> [81] The panel is of the opinion that the person concerned did not demonstrate that his situation permitted him to use the defence of duress according to the criteria in *Ryan*. Although the person concerned testified that he did not express his opposition to the coups for fear of facing a risk of death, he did not state that he was forced to remain within this organization and therefore to continue supporting its activities, due to threats of death or bodily harm. He testified that resigning without justification would have rendered him [translation] "an element to be killed." However, he admitted that he had never seen a soldier resign. The panel recognizes that it is reasonable to believe that the person concerned might have faced retribution if he had resigned while stating his opposition to the actions of his organization. However, as suggested by the Minister's counsel, this disclosure of his true reasons was not obligatory. Indeed, other reasons could have been given to allow him to leave the organization without a problem, if such was his wish. Furthermore, the person concerned stated that resigning without a reason would have put him at risk of imprisonment. This consequence does not constitute a threat of death or bodily harm. Moreover, it is worth noting that the person concerned testified that he remained in the army because it was his career, not out of fear. Lastly, the person concerned left the FAB in 2015 when he retired, not at the first opportunity that arose to separate himself from this organization, which he acknowledges has committed reprehensible acts.

III. Argument and analysis

[26] As stated at the outset, the applicant essentially alleges in his defence that he had an administrative career in the armed forces and that the actions leading to the subversion of

governments during his years of service as an officer rising in rank were the work of elements of the military. He was not a member of any fighting units.

[27] The applicant's written arguments do, of course, speak of coups, but he alleges that these coups can be attributed only to certain officers.

[28] It is common ground that the appropriate standard on judicial review is reasonableness. The Court shares this view, one that is unanimously confirmed by the case law (*Niyungeko v Canada (Citizenship and Immigration)*, 2019 FC 820 [*Niyungeko*] at para 8). As for the facts to be established before the ID, since the applicant has acknowledged his membership in the armed forces, it was sufficient to establish reasonable grounds to believe that the military had instigated the subversion by force of the government, meaning that while the strict standard of balance of probabilities did not have to be met, something more than mere suspicion was required. The ID was correct to speak in these terms.

[29] The relevant provisions are found in section 34 of the IRPA:

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	f) être membre d'une organisation dont il y a des motifs raisonnables de croire

engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

[30] The applicant bears a relatively heavy burden when having to demonstrate that a decision is not reasonable when the decision maker merely had to be satisfied that there are reasonable grounds to believe that the organization of which the applicant is a member had engaged in or instigated subversion by force of the government. As was said earlier, there is no doubt that Mr. Gahungu was a member of the armed forces at the time of the subversions by force of Burundi's governments in 1987, 1993 and 1996. But the applicant stated that the subversions or coups could not be attributed to the military as an entity.

[31] In this case, the applicant blamed the coups on certain factions of the military, and the ID reviewed the evidence available on each of the coups orchestrated during the applicant's career.

[32] The decision maker had reasonable grounds to believe that the military had established a military junta in 1987 because of the senior officers who made up the junta and the fact that, even according to the applicant, the military had offered no resistance. In other words, senior officers oversaw and led the coup, and junior members followed. The ID noted that the military had exercised the coercive power for twenty years and that the 1987 action demonstrated that force would have been exercised if there had been resistance.

[33] The applicant does not find the evidence to be clear, convincing and cogent. But this is not the standard. In other words, the applicant does not simply have to demonstrate that it is unreasonable that the military was the instigator. Rather, the onus is on the applicant to

demonstrate that, on the basis of the evidence provided, it was not reasonable to have reasonable grounds to believe. Clear, convincing and cogent evidence leads to a balance of probabilities, which is the standard in civil matters. This is not the standard the ID was bound to.

[34] An illustration of the confusion between the civil standard and reasonable grounds to believe can be found in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 FCR 344 at paragraphs 87, 88 and 89:

> [87] Mr. Mahjoub submits that each fact alleged by the ministers in the security certificate must be proven on the balance of probabilities and then holistically assessed as to whether the facts so proven constitute reasonable grounds to believe.
>
> [88] The Federal Court did not accept this submission (2013 FC 1092, at paragraphs 41–44) and neither do I. Each fact alleged that establishes inadmissibility need only be proven on a standard of "reasonable grounds to believe". This follows from *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 [*Mugesera*], at paragraphs 114–116, and *Charkaoui I*, above, at paragraph 39.
>
> [89] The reasonable grounds to believe standard "requires the judge to consider whether 'there is an objective basis [for the belief] … which is based on compelling and credible information'": *Charkaoui I*, at paragraph 39, citing *Mugesera*, above, at paragraph 114. This is "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities": *Mugesera*, at paragraph 114. If the "preponderance of the evidence" is contrary to the version of the facts alleged by the Minister, the security certificate cannot be upheld as reasonable: *Jaballah (Re)*, 2010 FC 79, [2011] 2 F.C.R. 145, at paragraph 45; *Almrei (Re)*, above. The Federal Court followed this jurisprudence and applied the substantive standards prescribed by it.

[35] Rather, sufficiently clear, convincing and cogent evidence is the standard required in civil matters (*F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41 at para 46; *Canada (Attorney*

General) v Fairmont Hotels Inc., 2016 SCC 56, [2016] 2 SCR 720 at para 36). That is not what leads to reasonable and probable grounds to believe (*Mugesera*, above). The ID needed reasonable grounds to believe that the military was the instigator, and in light of this determination, the applicant had to demonstrate that these reasonable grounds were unreasonable. To do so, he had to establish that the decision was not justified, transparent and intelligible in relation to the relevant factual and legal constraints (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 at paras 99 and 100).

[36] It follows, of course, that the applicant's argument for clear, convincing and cogent evidence misses the mark in having the decision found unreasonable. The applicant has not discharged his burden.

[37] There was ample evidence from independent, serious and responsible sources for the 1993 subversion of the government. The International Commission of Inquiry on human rights in Burundi and the International Commission of Inquiry to establish the facts relating to the assassination of the President of Burundi on October 21,1993 (United Nations Security Council), provided ample grounds to satisfy the required standard. I note that, in *Niyungeko*, this Court also concluded that the government of Burundi had been subverted by force in 1993.

[38] Certainly, the fact that the government was subverted in 1987 and 1993, while the applicant was a member of the armed forces, is sufficient to meet the requirements of section 34 of the IRPA. In 1996, the president-elect was replaced after seeking refuge in the United States Embassy. The applicant alleges that this was merely a matter of filling a vacant position. He

acknowledges that the army reappointed Major Buyoya as president. However, as the ID noted, one wonders why the Constitution was suspended (the Constitution specifically provided for the mode of replacement) and the National Assembly failed to sit. In accordance with the Constitution, merely filling the vacant position of president should have been done by a vote of the National Assembly. The documentary evidence speaks of a coup in 1996. The same documentary evidence indicates that leaders from central and eastern African countries not only condemned the coup but also imposed sanctions on Burundi.

[39] In my view, the ID had reason to believe that the army established a president of its choosing (Decision at para 71), especially since the president-elect had not even officially resigned from office according to the documentary evidence available to the ID. In addition, the ID was satisfied that, given the circumstances of the years of military interventions, there was a "reasonably perceived potential for the use of coercion by violent means" (*Oremade v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1077 at para 27) in 1996.

[40] It is not impossible that, given the insurgency in the country and the inter-ethnic massacres, the armed forces did in fact want to replace the president who had fled without being driven out by the armed forces. Was this a case of subversion by force of the incumbent government? The suspension of the Constitution and the National Assembly, and the dissolution of political parties, against the backdrop of repeated coups, were, according to the applicant, nothing more than a military intervention.

[41] Indeed, the evidence is rather sparse. On both sides. More substantiated evidence by the applicant may have led to a different outcome. Better evidence from the respondent would have had the advantage of eliminating any grey areas. However, all that is necessary to meet the required standard is a demonstration of reasonable grounds to believe that the army had engaged in the subversion by force of the government. The applicant bears the onus of showing that the challenged decision is unreasonable. Installing a new president, Major Buyoya, in very violent circumstances while the president-elect had taken refuge in a foreign embassy is evidence that may give rise to reasonable grounds to believe. But what is more significant is that the applicant was unable to demonstrate that the ID, on the basis of the evidence before it, unreasonably concluded that it had reasonable grounds to believe under the IRPA. Here again, the applicant has failed to discharge his burden.

[42] Finally, the applicant alleged duress. According to his testimony, it would have been [TRANSLATION] “dangerous to disassociate himself from a successful coup” because “the instigators [had] the power to harm anyone who oppose[d] them” (Memorandum of Fact and Law at para 31). The applicant has not referred to any authorities to support such a general statement. He even suggests that, although he joined the military of his own free will, he did not remain in it of his own free will; therefore, he was not a voluntary member of the armed forces. This is rather astonishing given his 34-year career, during which the applicant reached the rank of colonel.

[43] Moreover, this argument is the same argument as the one rejected by the ID after careful consideration. The ID reveals that the applicant never showed his disagreement with the coups,

be it in word or in deed: instead, he testified that he stayed in the armed forces because it was his career. Although he had never seen a member of the military resign, he stated that anyone who did would be [TRANSLATION] “an element to kill”. There was nothing to support such a statement over such a long period of time.

[44] The ID considered that the defence of duress should satisfy the conditions set out in *Ryan*. The applicant does not dispute this.

[45] The ID concluded that these conditions were not met. I reproduced paragraph 81 of the ID’s decision in paragraph 25 of these reasons. It speaks for itself.

[46] In no way did the applicant attempt to demonstrate that this examination of the concept of duress was unreasonable. As noted earlier, the applicant did not explain how he was coerced, which would have allowed him to meet the legal test. Wanting to protect one’s career is understandable, but it is not a reason that can shield someone from the wording of section 34 of the IRPA. Mr. Gahungu was a fully-fledged member of Burundi’s armed forces at a time when the latter engaged in the subversion by force of the incumbent government. He stayed in his position and reached the rank of colonel after a 34-year career in the service of the armed forces. Duress has simply not been established.

IV. Conclusion

[47] The essential elements for a finding of inadmissibility under section 34 of the IRPA are present. The administrative tribunal had to be satisfied that Mr. Gahungu was a member of the

armed forces of Burundi. This was accepted and conceded. This meant that, by the very words of section 34 of the IRPA, the ID merely had to have reasonable grounds to believe that this organization had engaged in or instigated the subversion by force of the Burundian government. As held in *Canada (Minister of Employment and Immigration) v Chiarelli*, 1992 CanLII 87 (SCC), [1992] 1 SCR 711, and wholly endorsed in *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, 2005 2 SCR 539 at paragraph 46, "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country" (p 733). Subject to the *Canadian Charter of Rights and Freedoms*, Parliament may determine who may not remain in the country. Section 34 of the IRPA is the manifestation of a decision by elected officials to establish parameters to that effect, making these persons inadmissible.

[48] On judicial review, the applicant had the burden of demonstrating that it was unreasonable for the ID to have these reasonable grounds to believe. The evidence on which the ID could rely was abundant, and the applicant failed to discharge his burden.

[49] The suggestion of any kind of duress was not conclusive because the applicant did not indicate against which test his conduct should have been measured. The ID stated that it was applying the conditions set out in *Ryan*, and it concluded that these were not met. The applicant failed to establish that the ID's substantiated analysis was not reasonable.

[50] Accordingly, the application for judicial review is dismissed. This case turns on its own facts. As agreed by the parties, there are no questions to be certified under section 74 of the IRPA.

[51] The style of cause should mention the Minister of Citizenship and Immigration. The style of cause is hereby amended.

JUDGMENT in IMM-9650-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

3. The style of cause is amended to replace the "Minister of Immigration, Refugees and Citizenship" with the "Minister of Citizenship and Immigration".

"Yvan Roy"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9650-21
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PLACE OF HEARING:	MATTER HEARD BY VIDEOCONFERENCE
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