Federal Court  Cour fédérale

Date: 20160719

Docket: IMM-195-16

Citation: 2016 FC 820

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 19, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ABDEL KUDY CACHA COLLAS

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] As is too often the situation in cases in which the government claims that people are inadmissible under section 34 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), this case is nebulous and the facts on which it relies were established inadequately.

[2] Mr. Cacha Collas filed an application for judicial review of the decision by the Immigration Appeal Division (IAD), which had itself reversed the Immigration Division's (ID) decision. The application for judicial review was made under section 72 of the Act.

[3] The ID concluded that the government had not established reasonable grounds to believe that Mr. Cacha Collas had engaged in terrorism and that he had been a member of an organization that had engaged in terrorism. The IAD came to a diametrically opposed conclusion, which is the conclusion of which the applicant is seeking a judicial review.

I. Facts

[4] I find that the simplest way to present the facts in this case is based on the facts that the government tried to present before the ID, which constitute the Crown's theory at its height whether the elements available had all been admissible and which, had they been received in evidence, allegedly would have sufficed to establish reasonable grounds to believe, in order to arrive at the facts that were presented before the IAD. As will be seen, those facts are clearly different from what the government believed could be used and the residue is far from that initially submitted by the government. The question that must then be resolved is whether these facts suffice, in a reasonable manner, to establish reasonable grounds to believe.

[5] The ID rendered its decision on May 29, 2013, in which certain key facts were established, which are not in dispute.

[6] The applicant is a citizen of Peru and was born on December 14, 1968. He lived in the District of Huaura, where he was a farmer. On July 24, 1993, while he was in the Province of Huara to, as he stated, buy avocado plants, he allegedly got caught in a raid by the army and police. The exact circumstances of his interception are unclear. It seems that he was arrested and beaten, apparently to the point of unconsciousness, and allegedly ended up in a different, unknown location. It seems that the applicant had signed a purported 100-page document in which he admitted that "he was guilty." Tried before a military tribunal less than three weeks later, i.e. on August 13, 1993, he was convicted of treason. It is understood that the only evidence presented before the domestic court that specializes in terrorism cases was the written statement that he had signed. Following his treason conviction, he was sentenced to life in prison.

[7] It would appear that the conviction for treason is related to activities led by Mr. Cacha Collas in connection with his alleged membership in the Shining Path (Sendero Luminoso) Peruvian terrorist organization. It is undisputed that this well-known organization is a terrorist organization within the meaning of section 34 of the Act. However, what is pointedly disputed is whether Mr. Cacha Collas is a member of this organization and, even more, his involvement in criminal offences.

[8] Before the ID, the government relied on the conviction recorded against Mr. Cacha Collas. As indicated at the outset, if such a conviction was appropriate, one can infer that it would have allegedly been difficult to contest the presence of reasonable grounds to

believe in membership in a terrorist organization. At the very least, this would be an important element to consider.

[9] The government also put forward a document involving Mr. Cacha Collas, which was allegedly raised ten years later (on February 3, 2004) to implicate the applicant and other persons in acts of sabotage against a factory, assassinating a police general, and transporting explosives. The document was allegedly a Peruvian judgment. This involvement by the applicant was somewhat odd because he had been released from his prison sentence on July 8, 2001, on humanitarian and compassionate grounds related to his state of health. Moreover, it is understood that this document does not target the applicant. It instead seems that he is mentioned in the narrative involving other persons accused of participating in terrorist acts that were allegedly committed by and on behalf of Shining Path.

[10] That statement is even more bizarre given that most of the indicted were acquitted given that the evidence against them had been obtained under torture. It was unclear just how the respondent allegedly hoped to make use of this document. As we shall see further on, the IAD disposed of it.

[11] The ID had to conclude that the statement made by the applicant had been obtained under torture and the ID therefore had to dismiss the conviction for treason that, consequently, can no longer support the reasonable grounds to believe in any membership in a terrorist group. The government also claimed that it was able to find support for two pieces of evidence. It falls back to a book that was allegedly written by a certain Colonel Benedicto Jiminez, which states at

page 181 of the document that Mr. Cacha Collas was in possession of numerous documents at the time of his arrest, which linked him to the Shining Path organization. The contents of these documents are unknown and the government claims that the author is credible because he was allegedly in charge of the National Anti-Terrorism Directorate in Peru. Lastly, there was an article in the *La Republica* newspaper dated August 14, 1993, which mentioned Mr. Cacha Collas. The ID examined the three relevant pieces of evidence submitted by the government. Whereas the government claimed that the torture allegedly took place after Mr. Cacha Collas was convicted, it was relatively satisfied by the testimony deemed credible, repeated numerous times, that the torture allegedly took place when the incriminating statement was recorded, long before the military tribunal conviction.

[12] Colonel Benedicto Jiminez's book did not carry a lot of weight in the eyes of the ID. It is alleged that the book is available on the Internet and that it is [TRANSLATION] "difficult to follow." As such, it constantly refers to aliases or nicknames that seem to be used by different people for the same surname. The author of said novel was convicted twice for defamation. Lastly, in most of the cases these same protagonists mentioned in the book were acquitted of the terrorism offences because their statements had been given under torture.

[13] According to the Immigration Division, [TRANSLATION] "without that incriminating statement, there is no link between Mr. Cacha Collas and the Shining Path organization, nor evidence of any terrorist acts committed by him. Newspaper articles, more specifically, Exhibit C-19, do not suffice to meet the criteria for membership in a terrorist organization based on reasonable grounds to believe."

[14] The cascade of evidence is significantly diminished if the applicant's conviction in Peru is tainted by such a serious and important defect as that of a statement obtained by torture.

[15] The record does not state what evidence against the applicant in Peru had resulted in the conviction. His conviction allegedly depended on the statement.

[16] That decision was the subject of an appeal before the Immigration Appeal Board (IAB). The IAB rendered its decision last November 20.

II. The decision for which judicial review is requested

[17] As noted, the government's position was at its best when it claimed that the incriminating statement leading to the conviction in Peru served as evidence of Mr. Cacha Collas' participation in a terrorist organization. Once that evidence was excluded because it was presumably obtained by torture, the government must look elsewhere for the source of reasonable grounds to believe.

[18] The government therefore tried to use a judgment that had allegedly been rendered on February 3, 2004, by the Specialized Anti-Terrorism National Tribunal in Peru, a judgment that had it impose sentences on individuals charged with terrorism. Mr. Cacha Collas had already left Peru after he was released in 2001, after serving almost nine years of a life sentence in prison; however, his name was mentioned twice, and there is a reference to his statement regarding his participation. Nonetheless, it indeed appears that it is the same statement obtained by torture that reappeared. What is more, all except one of the accused were acquitted. That leads the IAD to conclude that the same outcome should be reserved for that judgment as that for this

incriminating statement (IAD decision, paragraph 27). The IAD thus excluded both the statement and the reference thereto in a subsequent judgment to which the applicant was not a party.

[19] Another attempt to improve his case was for the government to seek to draw inferences in relation to a former spouse who allegedly tried to file a complaint about threats that the applicant uttered against her. It was claimed that the alleged acts of intimidation by Mr. Cacha Collas apparently resulted from the ex-spouse's threat to denounce him as a terrorist. The IAD again concluded here that it should not retain this element put forth by the government, insofar as the complaint was allegedly withdrawn and given that this spouse was unavailable for cross-examination.

[20] It was thus up to the government to establish the basis of reasonable grounds to believe two elements: the article published in the *La Republica* newspaper and Colonel Jiminez's book.

[21] The *La Republica* newspaper article is dated August 14, 1993. In inflammatory terms, it details the terrorist actions of 21 individuals, 9 of whom had been divulged to the press the previous day. Of those 9 individuals, Mr. Cacha Collas was photographed and identified, clearly wearing a prisoner's uniform.

[22] By all indications, the article stemmed from police information. From the outset, a summary of the crimes committed is presented as having been confirmed by [translation] "the spokesperson for the National Anti-terrorism Directorate." The conviction for the murder of 3 Japanese agricultural specialists [TRANSLATION] "is conclusive." According to one source, the

detainees are also responsible for the death of [TRANSLATION] “eight police officers.” The article states [TRANSLATION] “is charged” in the death of two engineers and one agricultural technician. The newspaper reports what was received from the authorities who made a spectacle of the 9 individuals considered to be the most serious terrorists since the article states that “they will be subjected to a summary judgment before a military tribunal, their faces covered, and they would be charged with treason against the homeland, an offence that carries a life sentence.”

[23] This finding that the article in the *La Republica* is merely a clip on a press conference held shortly before, and probably the day before, is confirmed by the fact that another article, published the same day but in another newspaper, *El Comercio*, states more or less the same.

[24] The IAD lent credence to that article. In response to Mr. Cacha Collas’ criticism whereby the article was written the day after his conviction, he counters that the article is written in the future tense: “will be subjected to a summary judgment . . . and would be charged with treason against the homeland.” The IAD considers it to be a factual story.

[25] As regards Colonel Jiminez’s book, the IAD also lends it a certain probative value. This finding has been accepted despite the fact that in the section that is relevant to our case, the book lists a hodgepodge of pseudonyms to the effect that it is difficult to determine who allegedly did what. Moreover, the book is presented in story format, without really supplying any information sources. It is a story from the perspective of someone who believes he knows, not someone seeking to demonstrate.

[26] The author seems quick to accuse since the evidence indicates that he was found guilty of defamation twice (1-year conditional sentence of imprisonment in 2012, and a 3-year conditional imprisonment and 30,000 soles in civil damages to the victim). The IAD excluded this hardship, mentioning that there is no defamation connected to the book itself.

[27] What is rather surprising is the IAD's statement whereby an acquittal on terrorism-related charges, because an accused has been tortured, in the case of an individual mentioned in the book, does not necessarily mean that he was not a member of said organization.

[28] In fact, the IAD worded its decision not by emphasizing the newspaper article and the book passage, but rather by impugning the applicant's credibility. The purpose of undermining the applicant's credibility is to demonstrate that he is not believed when he says that he did not participate in terrorist acts or belong to a terrorist organization.

[29] The IAD must seek to examine the credibility of Mr. Cacha Collas on a number of different fronts:

a) a complaint filed in 2006 with the Inter-American Commission on Human Rights (IACHR) allegedly contained erroneous or, at the very least, exaggerated facts about Mr. Cacha Collas' state of health; moreover, the IAD had serious concerns about the issue of the applicant's health;

b) the IAD wishes to hold against Mr. Cacha Collas that he testified before it about the circumstances of his arrest and whether or not he was allegedly a target in the raid;

c) in his Personal Information Form used to explore personal information for the purposes of a claim for refugee protection, Mr. Cacha Collas states that he was visited by President Fujimori, from Peru, in August 1993. The person who accompanied the President allegedly wanted Mr. Cacha Collas to help clarify an attack on the Japanese workers. Apparently without questioning Mr. Cacha Collas, the IAD concluded [TRANSLATION] "that it is not conceivable that the President of Peru would visit a person who had been arrested in an entirely arbitrary manner and who had no ties to any terrorist activity." That assertion is ambiguous. Is the IAD saying that the situation was so insignificant that the President of the country would not pay a visit and that, therefore, the applicant was exaggerating? Or is the IAD implying that the President only visited because he knows that the applicant is guilty?

d) The IAD is bothered by the fact that Mr. Cacha Collas had not obtained [TRANSLATION] "his court records" from Peru. However, the IAD does not seem concerned that the Canadian government did not obtain them either when it wanted to declare a Peruvian national inadmissible for his terrorist actions. The IAD is even holding against the applicant the fact that he did not try to appeal his conviction, nor have it quashed.

[30] Thus, the IAD arrived at its ultimate conclusion. The applicant is generally not credible. It also seeks support on the two single elements of documentary evidence: the newspaper article and pages from a book. It does not accept the circumstances around the taking of the photo that accompanied the August 14, 1993 *La Republica* article; it does not seem to accept that he was

forced to participate in the press conference organized by the police forces. It does not believe him when he says that he does not know the two other people photographed with him. It believes that the article is factual. The pages from the book confirm participation in a terrorist organization.

[31] Despite the fact that it agrees that the confessions were allegedly obtained by torture, the IAD does not believe in random arrests nor that Mr. Cacha Collas was not involved in terrorist activities. We were never given an explanation. Having found a lack of general credibility without actually explaining the reason behind the lack of credibility, and its resulting inferences, the IAD considered the newspaper article and the passages in Colonel Jiminez's book to be credible and that the applicant's general lack of credibility constitutes reasonable grounds to believe that he was a member of the Shining Path, a terrorist organization.

III. Issues and standard of review

[32] The Court finds that two issues are raised:

a) Did the IAD reverse the burden of proof?

b) Were the assessments of the evidence and the applicant's credibility a reviewable error?

[33] As it is said, a reviewable error is a standard of review. In this case, the reasonableness standard applies to determine inadmissibility for security reasons (*Mirmahaleh v Canada (Citizenship and Immigration)*, 2015 FC 1085).

[34] Note that under the standard of review, the Court must decide whether it is reasonable to conclude that there were reasonable grounds to believe that the applicant is a member of an organization engaging in terrorism. In so doing, the exercise must not be transformed into a search, on a preponderance of evidence, of membership in a terrorist organization. Instead, it involves determining whether there are reasonable grounds to believe within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, on the understanding that reasonableness is related to justification of the decision, transparency and intelligibility of the decision-making process.

IV. Arguments and analysis

[35] In my opinion, the IAD's decision is not reasonable within the meaning of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

A. *Reverse onus*

[36] The first issue can be quickly resolved. The IAD did not unduly reverse the burden of proof.

[37] If I understand clearly, the applicant's argument is the claim that given that the IAD acknowledged that the applicant likely endured torture, it could allegedly not state in the same breath that this does not imply innocence. For the applicant, this implies that the IAD requires him to prove his innocence.

[38] Unfortunately, the syllogism proposed by the applicant is defective. In fact, it is true that obtaining admissions through illegal means, such as torture, renders the confessions inadmissible. In any case, a statement that is not willing and voluntary is inadmissible in Anglo-Saxon inspired law. But this does not infer innocence; this does not prevent proving otherwise (obviously subject to a decision that to pursue a case would then constitute an abuse of process). The burden is not transferred to the person to demonstrate his innocence as long as the government must have reasonable grounds to believe in membership in a terrorist organization.

[39] The applicant confused exclusion of evidence and burden. Quite simply, the excluded evidence cannot be used in rendering the decision. But the IAD had to have reasonable grounds to believe, without the ability to use, or even consider, the purported confessions. When the evidence obtained by torture is excluded, are there reasonable grounds to believe?

[40] For this reason, the IAD had to examine the remaining evidence to find reasonable grounds therein. To do so, it assessed the applicant's credibility for any relevant purpose and retained the *La Republica* article and the passages from Colonel Jiminez's book.

[41] It is understandable why the applicant is uncomfortable. The facts used as a basis for the IAD to declare that it has reasonable grounds to believe seem quite flimsy. It may seem that the burden was placed on the applicant to establish his innocence because the information retained is so tenuous.

B. *Is the decision reasonable?*

[42] The respondent acknowledges in its memorandum of facts and law that the IAD only justified the reasons to believe related to paragraph 34(1)(*f*). Thus, the allegation is no longer that the applicant engaged in terrorism acts (paragraph 34(1)(*c*)), but rather that he allegedly belonged to an organization described in paragraph *f*. These paragraphs read as follows:

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 :
. . .	[…]
(c) engaging in terrorism;	c) se livrer au terrorisme;
. . .	[…]
(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).	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).

[43] Since it is recognized that the Shining Path is an organization described in paragraph 34(1)(*f*), what remains is only to determine whether the applicant is a member. Section 33 of the Act ensures that this membership does not need to be established based on a civil burden of proof, that is, on a balance of probabilities. Reasonable grounds to believe in membership in a terrorist organization is sufficient:

33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and,	33 Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire,

unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

[44] Canadian case law has firmly established that reasonable grounds to believe lie between mere suspicion and the standard applicable in civil matters of proof. Thus, in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100, the Court endorses the Federal Court of Appeal decision in *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 [*Chiau*], whereby the reasonable grounds to believe lie between mere suspicion and the standard applicable in civil matters of proof on the balance of probabilities. *Chiau* refers to reasonable grounds to believe as being "a bona fide belief in a serious possibility based on credible evidence" (paragraph 60). The Supreme Court repeated the same notion to some extent when it ruled that "in essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information."

[45] It may be useful to compare reasonable grounds to suspect with reasonable grounds to believe to shed light on the notion of reasonable grounds to believe. An interesting articulation of the difference can be found in *George v Rockett*, [1990] HCA 26, (1990) 170 CLR 104, a decision by the High Court of Australia. The Court had to articulate the difference since both tests are found within the same section of the law:

> 13. In considering the sufficiency of a sworn complaint to show reasonable grounds for the suspicion and belief to which s.679 refers, it is necessary to bear in mind that suspicion and belief are different states of mind (*Homes v. Thorpe* (1925) SASR 286, at p 291; *Seven Seas Publishing Pty. Ltd. v. Sullivan*

(1968) NZLR 663, at p 666) and the section prescribes distinct subject matters of suspicion on the one hand and belief on the other. The justice must be satisfied that there there [*sic*] are reasonable grounds for suspecting that "there is in any house, vessel, vehicle, aircraft, or place - Anything" and that there are reasonable grounds for believing that the thing "will ... afford evidence as to the commission of any offence".

14. Suspicion, as Lord Devlin said in *Hussien v. Chong Fook Kam* (1970) AC 942, at p 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In Queensland *Bacon Pty. Ltd. v. Rees* (1966) 115 CLR 266, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, "was unable to pay (its) debts as they became due" as that phrase was used in s.95(4) of the Bankruptcy Act 1924 (Cth). Kitto J. said (at p 303):

> "A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s.(4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes - a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors."

The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may,

> depending on the circumstances, leave something to surmise or conjecture.

[46] If the suspicion is characterized by conjecture, where evidence is lacking, reasonable suspicion is more than a reason to consider or examine the possibility of the existence of the suspected fact. Reasonable grounds to believe stem from objective circumstances and are based on compelling and credible information. The key question is to determine whether it was reasonable to consider the information retained as credible and compelling, with an objective basis.

[47] What, then, is the basis of the reasonable grounds to believe invoked by the IAD? The respondent aptly tried to reverse the order issued by the IAD, which had decided to base its decision on the applicant's lack of credibility to then incidentally mention the *La Republica* article and Colonel Jiminez's book. But the question then arises at the outset: general lack of credibility in relation to what? And do the two documents have an objective basis for believing in the credible and compelling information?

[48] A government that avails itself of section 34 of the Act must be able to demonstrate that reasonable grounds to believe exist. To do so, as we have seen, there must exist objective pieces of evidence, with an objective basis, supporting the reasonable grounds to believe. In this case, the IAD believed that the applicant had endured torture to the extent that the confessions were excluded; in spite of this, it is telling us not to believe the applicant's claim that he was not a member of a terrorist organization. But why? Because the complaint filed with the Inter-American Commission on Human Rights addresses health problems that the IAD considers

exaggerated? How does this determine membership in a terrorist group? Was the applicant not released from a life prison sentence after nearly 9 years of incarceration, on health-related humanitarian and compassionate grounds?

[49] We criticize the applicant for his story at the time of his arrest. But was this not because the IAD suspected, yet did not prove, that the applicant must have clearly been at fault for something if he had been caught in the raid that way? The same can be said about the incident involving President Fujimori. Not only was the applicant not confronted by the IAD, but the inference drawn might well be that the President does not visit people who are not guilty who could not help him solve the murders of three Japanese nationals.

[50] And what about the blame placed on the applicant for not having obtained the court records in Peru and not having tried to prove his innocence like the others, even though he left Peru nearly 15 years earlier? When questioned about efforts made by the government, through its Embassy in Lima, to obtain official documents, counsel for the respondent candidly conceded that no such effort had been made. The applicant was criticized for something that the government, who wanted to have someone declared inadmissible, also did not do.

[51] In the absence of evidence of membership in a terrorist organization, how can the applicant’s credibility establish such membership? If, as the IAD claims, the applicant’s credibility may have been lacking on certain aspects, how could this have been useful for the purposes of believing he belonged to a terrorist organization, with no objective evidence in this regard? The absence of articulation on the use of a lack of credibility on certain peripheral

aspects is a serious infringement on reasonableness, which is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." (*Dunsmuir*, above, at paragraph 47)

[52] One can therefore quite easily comprehend why the respondent inversed the proposal before this Court, by trying to establish reasonable grounds to believe at the outset, using the *La Republica* article and Colonel Jiminez's book. The IAD relied on the lack of credibility supported by two instruments. The respondent did the opposite and proposed the two instruments. The problem with these two elements of documentary evidence is that they prove little. The explanation as to why they are credible and compelling is unclear.

[53] First, there is the *La Republica* article dated August 14, 1993. The respondent, like the IAD, claims that the reporting is factual. Merely reading the article shows that it is factual reporting, precisely because the newspaper factually reports what was announced at the press conference organized by the police authorities. The story is about the press conference and the story provides no evidence of the facts and charges divulged by the police. It was not facts that were reported, but rather it was the story that was provided by the authorities. That article did not establish the facts in a reasonable manner: it established that a press conference was likely held on August 13, 1993, during which the individuals presented as terrorists belonging to a [TRANSLATION] "ruthless, seditious gang" were paraded around while a [TRANSLATION] "spokesperson for the National Anti-terrorism Directorate" confirmed a series of serious crimes.

[54] I admit that I was taken aback by the IAD's response to that argument to the effect that the article carried little probative weight since it had been written the day after Mr. Cacha Collas' conviction. To contradict that argument, the IAD noted a sentence in the article that mentions the summary judgment to be rendered. It should therefore be understood that the IAD apparently questioned the fact that the conviction took place the day before the article was published (paragraphs 30-31). The disconcerting aspect is that not only is it not clear how this assertion changes anything about the weight of the article and apparently rendered it "factual," but in its decision the IAD had stated a few paragraphs above that it was not contested that [TRANSLATION] "on August 13, 1993, a military tribunal found the respondent guilty of treason" (paragraph 9). The article published on August 14, 1993, therefore allegedly appeared the day after the applicant's conviction. He was paraded before journalists who recounted what the authorities said were crimes for which the convictions had to be recorded. Since the parties did not offer any argument about the possibility that the article constituted the fruit of the poisoned tree if the applicant's conviction resulted from torture, my reasons in no way address this. I am satisfied in finding that to rely on such an article because it is allegedly factual is unreasonable: this is not the case. It does not establish membership in a terrorist organization; at most it repeats the allegations made by Peruvian authorities.

[55] Thus, the only reasons cited to retain that article were manifestly unfounded, even in the event that the applicant was allegedly convicted. The article merely reports statements by the police authorities and does not attest to the authenticity of the alleged actions. If it is acknowledged that the *La Republica*, like *El Comercio* as well, merely reported what the police said, the probative weight of those statements is in itself minimal. Recall, too, that the

information that forms the basis of the reasonable grounds to believe must be compelling and credible.

[56] Colonel Jiminez's book is hardly any better. No one could determine the value of the information presented therein. Not only is it difficult to understand who did what, among other things, due to the pseudonyms used that may refer to different people, but the book is written in such a way that it is impossible to know what is or is not true.

[57] Nothing is known about the book. At the hearing, it was confirmed that not even the publication date is known. The government seems to have filed the document, no more. According to the ID, it came from the Internet, which might imply that we could find it by searching the Internet. It is not known what information sources enabled its author to make these affirmations. Moreover, not even the author's identity is corroborated. No information is available about that document, so there is no way of knowing how it could be credible. Moreover, could it be that the sources of the stories presented are statements made under torture, since that seems to have been fairly common if one considers the February 3, 2004 judicial decision as evidence, in which only one of the many accused was convicted?

[58] But there is more. The IAD excluded the criminal convictions for defamation against the author of the work, if indeed he is the author, under the pretext that the convictions are not related to the book cited. With all due respect, that is not the issue. The convictions for defamation emphasize the author's propensity to be somewhat quick to accuse. The defamation need not relate to the book itself. It is definitely relevant when one must consider charges listed

in a book, charges that are not supported by evidence or demonstration. Thus, the book is difficult to follow, its origin was not demonstrated and its author was convicted of defamation. With no explanation as to why that work could be used in an inadmissibility matter for security reasons, it is difficult to see how this could invoke features of reasonableness if the reasonable grounds to believe must be taken from compelling and credible information. However, nothing is known about the book.

[59] As mentioned, the IAD first found its reasonable grounds to believe in its conclusion that the applicant is generally not credible. No explanation was provided as to how this transformed into reasonable grounds to believe something. Although this lack of credibility merely dismisses the applicant's evidence, then the IAD should have only used the *La Republica* article and the Internet document to satisfy the existence of reasonable grounds to believe that the applicant belonged to a terrorist group. However, the *La Republica* article proves nothing apart from that a press conference was held on or around August 13, 1993, during which the applicant was paraded around. This was not factual reporting in the sense that the facts reported can be accepted as coming from an independent, credible source. The information therein is neither compelling, nor credible. As regards the work found on the Internet, it is impossible to understand how writings with an unknown source, date, and author (apart from what the book says about its author), or sources of information, can be trustworthy, especially since the person who is depicted as the author is allegedly the same person who was sued twice for defamation and convicted on both accounts, resulting in conditional sentences. Such problems could not reasonably be swept under the carpet by saying that the article is factual and that the defamation does not relate to the document found on the Internet.

[60] Essentially, the IAD did not believe the applicant and two documents were found which mention the applicant. In my opinion, this corresponds to suspicion, which, as Lord Devlin stated, "is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" By definition, this does not constitute reasonable grounds to believe.

[61] The application for judicial review must therefore be allowed. The appeal of the ID's decision must be referred back to the IAD to be re-addressed by a differently constituted panel.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The case is referred back to the IAD for a new determination by a different panel than the one that heard the appeal of the ID's decision. The parties proposed no serious question of general importance. There is no such question to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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