Federal Court  Cour fédérale

Date: 20241202

Docket: IMM-16419-23

Citation: 2024 FC 1939

Ottawa, Ontario, December 2, 2024

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JACKELINE MEJIA RAMIREZ
CESAR MAURICIO RODRIGUEZ GOMEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision (the "Decision") by a Senior Immigration Officer (the "Officer") refusing the Applicants' applications for permanent residence. The Officer determined that the Applicants were inadmissible pursuant to sections

34(1)(f) for (b.1) and 42(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "IRPA").

II. Background

[2] The Applicants, Jackeline Mejia Ramirez (the "Primary Applicant") and Cesar Mauricio Rodriguez Gomez (the "Associate Applicant"), are both Colombian citizens that worked for the Departamento Administrativo de Seguridad ("DAS"), the Colombian Department of Security, from September 2000 to February 2009 and from December 1996 to November 2004, respectively.

[3] In 2018, the Applicants, along with their minor daughter, entered Canada and made a claim for protection. In October of 2019, the Refugee Protection Division ("RPD") found the Applicants to be persons in need of protection. Shortly afterwards, the Applicants applied for permanent resident status.

[4] After reviewing the Applicants' application, a Senior Immigration Officer had concerns that the Applicants may be inadmissible to Canada pursuant to section 34(1)(f) for (b.1) of the *IRPA* for having been members of the DAS in Colombia. A procedural fairness letter was sent to the Applicants on July 11, 2023, advising them of the Officer's concerns and providing the Applicants an opportunity to respond.

[5] On August 10, 2023, the Applicants, through their counsel, submitted a response.

[6] On December 12, 2023, the Officer refused the applications.

III. The Decision

[7] The Officer found that both the Applicants were inadmissible under section 34(1)(f) for (b.1). Additionally, by virtue of the inadmissibility under section 34(1)(f) for (b.1), the Officer found the Primary Applicant inadmissible under section 42(1)(a) and the Associate Applicant inadmissible under section 42(1)(b).

[8] The Decision acknowledged the Applicants' counsel's response to the procedural fairness letter, and noted that "a substantial portion of the Applicant's responding submissions consist of questioning the IRCC mandate to assess the applicant's inadmissibility." The Officer did not accept their line of reasoning that it is an abuse of process for Immigration, Refugees and Citizenship Canada ("IRCC") to now raise inadmissibility concerns when the Immigration and Refugee Board ("IRB") did not raise any concerns when it determined the family were persons in need of protection. The Officer emphasized that inadmissibility under section 34 does not affect protected persons status and assessed the Applicants inadmissibility under section 34(1)(f) for (b.1).

[9] For assessing whether the Applicants met the criteria under section 34(1)(f), the threshold applied was whether there are reasonable grounds to believe that the applicant was a member of an organization that engaged in acts of subversion against a democratic government and democratic institutions and processes, as defined under section 34(1)(b.1). The Officer used the following interpretations from the jurisprudence:

A. An organization, including an organization under section 34(1)(f) of the *IRPA*, is an entity consisting of certain characteristics including, but not limited to: an identity, leadership, hierarchy, and an organizational structure. None of these characteristics are essential (*Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 at para 38).

B. Membership is not defined in the *IRPA*, but the Federal Court of Appeal has said it is to be given an unrestricted and broad interpretation (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at para 27). Further, there is no temporal link to membership (*Yamani v Canada (Public Safety and Emergency Preparedness)*, 2006 FC 1457 at para 12).

C. Subversion is not defined in the *IRPA*, but unlike "subversion by force" in section 34(1)(b) of the *IRPA*, "subversion" in section 34(1)(b.1) is unqualified and therefore includes subversive conduct that does not involve actual use or threat of violence. "Subversion" connotes accomplishing change by illicit means or for improper purposes related to an organization (*Qu v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 399 [*Qu*] at para 12). Subversion requires two elements: (1) a clandestine or deceptive element; and (2) an element of undermining from within (*Al Yamani v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 433 [*Al Yamani*] at para 85).

D. The following part of section 34(1)(b.1): "against a democratic government, institution or process as they are understood in Canada" must be interpreted

> broadly, to include not only the political institutions and processes of a state, but also any "structured group of individuals established in accordance with democratic principles who are engaged in lawful activities in Canada of a political, religious, social or economic nature" (*Qu* at paras 32-33, 45, 50).

[10] The Officer determined that based on the Applicants' own declarations with respect to their employment, the Applicants were members of the Colombian DAS, and that the only relevant question was whether DAS engaged in acts of subversion against a democratic government and democratic institutions and processes, as defined under section 34(1)(b.1).

[11] Based on the evidence, the Officer concluded that the DAS's activities constitute subversion of democratic institutions and processes pursuant to section 34(1)(b.1) of the *IRPA*. The evidence showed that the DAS engaged in illegal activities, with their operations targeting human rights defenders, political opposition leaders, journalists, the judicial branch, international bodies, and high-level Government officials. Illegal activities included wiretapping of phones and internet lines, surveillance, harassment and threats, theft of information and break-ins into offices and homes. DAS has also been linked to paramilitaries, gathering information on persons under their protection, and bringing false charges against human rights defenders.

[12] The Officer concluded that the Applicants were inadmissible for having been employed by the DAS, an organization that is believed on reasonable grounds to have been engaged in acts of subversion, during the period of time when the organization was committing those acts.

IV. Issues

[13] The two issues are:

A. Was there a breach of procedural fairness?

B. Was the Decision reasonable?

V. Relevant Legislation

[14] The relevant sections of the *IRPA* are reproduced in Appendix A.

VI. Analysis

[15] The standard of review with respect to the Officer's substantive findings is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25). The standard of review with respect to the Applicants' procedural rights is correctness or a standard with the same import (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-35 and 54-55, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79).

[16] As a preliminary issue, I will address a new argument raised by the Applicants during the hearing. Without citing any case law or legislation, the Applicants assert that immigration officers do not have the authority nor the expertise to find persons inadmissible. There is no basis for this assertion. Immigration officers have a "high degree of expertise" in matters under the

IRPA, including section 34(1) (*Rahaman v Canada (Citizenship and Immigration)*, 2019 FC 947 at para 9). There no meaningful difference between the authority and expertise of immigration officers of IRCC and the Immigration Division ("ID") of the IRB with respect to inadmissibility decisions. The Applicants' argument in this regard is a misapprehension of the roles and mandates of the IRB and IRCC within Canada's immigration and refugee system.

[17] For greater clarity, while the ID may conduct inadmissibility hearings for foreign nationals or permanent residents believed to be inadmissible to Canada under the law, this is often done at the request of the Canada Border Services Agency ("CBSA") or IRCC through what is known as a "s. 44 report" (*IRPA*, s. 44(1)(2)). There was no section 44 report referred to the ID in this case, so the ID was not given the authority to hold a hearing. The inadmissibility finding was within the authority of the Officer.

A. *Was there a breach of procedural fairness?*

[18] The Applicants assert that the Officer breached procedural fairness in two main ways. First, the Officer erred in finding the Applicants inadmissible under section 42(1)(a) and (b) and failing to give them the opportunity to respond to this section. Second, the Officer erred by not providing the Applicants with an interview or a response to their submissions in response to the procedural fairness letter.

[19] First, the Respondent concedes that the Officer erred in finding the Applicants inadmissible under section 42(1)(b) in addition to the initial inadmissibility finding of section 34(1)(f) for (b.1). The Officer acknowledged in their Decision that the Applicants were protected

persons and that the inadmissibility finding would not affect their protected persons status. This is true and remains the case. Consequently section 42 cannot apply to the Applicants.

[20] However, I agree with the Respondent that this error alone should not form the basis for sending this matter back for redetermination, as the Applicants were both individually inadmissible under section 34(1)(f). Accordingly, the Officer's error with respect to section 42(1)(b) has limited bearing on the inadmissibility of the Applicants, and consequently, the refusal of their applications (Canada (Attorney General) v McBain, 2017 FCA 204 at paras 9-10).

[21] Second, the Officer did not breach procedural fairness by not responding to the Applicants' letter or not providing the Applicants with an interview. There is no requirement that the Officer must provide a response and/or an interview to applicants. Having read the letter from the Applicants' counsel responding to the procedural fairness letter, I note that they did not address the concerns raised by the Officer. While this was a strategic choice made by counsel, having rejected the opportunity to respond to the concerns raised, they cannot now say they were deprived of procedural fairness.

[22] Furthermore, there is no requirement that an officer hold an interview, but rather a recommendation in the guidelines. The manual referred to by the Applicants, IP 10 Refusal of National Security Cases/Processing of National Interest Requests, says "where it appears that information may render the applicant inadmissible on national security grounds, the applicant

should be invited by letter to attend an interview with CIC," [emphasis added] but notes that where an interview is not practical, the disclosure may be done in writing.

[23] Procedural fairness requires that the applicant know their case and have a full opportunity to participate in the process and respond to the concerns. I am satisfied that, with the exception of the Officer's findings on section 42(1), which I have addressed above, the requirements of procedural fairness were met in this case.

B. *Reasonableness*

[24] The Applicants argue that the Decision was unreasonable because the Officer's interpretation of section 34(1)(f) is too broad and is "devoid of any kind of meaningful analysis pertaining to the personal employment, duties etc. of the Applicants." The Applicants also argue that the Officer failed to establish reasonable grounds to believe the DAS engaged in acts of subversion as defined within section 34(1).

[25] The Officer's interpretation and application of the law on the definition of "membership" was reasonable. The case law is clear that membership under section 34(1)(f) is to be interpreted broadly, without having to consider the nature of the participation of the individual involved, and therefore does not require a complicity analysis (*Wasta Ismael v Canada (Citizenship and Immigration)*, 2022 FC 1520 at paras 26-29 citing *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at paras 23-27). I note that, even in the case of *X v Canada (Public Safety and Emergency Preparedness)*, 2022 CanLII 134225 (CA IRB) [*X*], heavily relied upon

by the Applicants, the applicant conceded that he was a member by virtue of his employment (*X* at para 39).

[26] Therefore, the determinative issue is whether the Officer's finding that the DAS was committing acts of subversion as described under section 34(1)(b.1) was reasonable. The evidence of DAS's activities, including wiretapping and illegal surveillance, demonstrates that the activities have a clandestine or deceptive element, thus fulfilling the first element of "subversion". The remaining question is whether the Officer reasonably found that the DAS's activities contained an element of undermining from within.

[27] The Applicants argue that the Officer erred in finding the DAS to be an organization that was engaged in subversion since in the case of *X*, the Officer found that the DAS did not engage in "subversion". Much of the Applicants' memorandum on this argument reproduces paragraphs of that decision. In *X*, the ID found that the DAS's actions cannot constitute subversion since they were: (1) not committed with the intent of overthrowing the government but to maintain the government; and (2) that the DAS's actions were outside the various organizations they undermined.

[28] By reproducing the *X* decision, the Applicants are essentially asking this Court to replace the Decision with the one it prefers. This is not the role of this Court on judicial review. The standard of reasonableness asks whether the decision is transparent, intelligible and justified - and whether it is justified in relation to the relevant factual and legal constraints that bear on the

decision. It does not ask what decision this Court, or another administrative body for that matter, may have otherwise come to (*Vavilov* at para 125).

[29] That being said, I will address the findings in the *X* case as identified above, treating those as the arguments of the Applicants.

[30] The Respondent asserts that the Applicants' propositions are short-sighted and do not take into account the larger picture of what "democratic government, institution or process" means. That is, while the DAS was very much working to maintain the power of one individual, President Uribe, their actions subverted and undermined Colombian democracy. They say this interpretation of subversion was recently endorsed by this Court in *Gakumba v Canada (Citizenship and Immigration)*, 2024 FC 1561 [*Gakumba*].

[31] In *Gakumba*, Justice Strickland upheld a decision of the ID that found that an individual who had been a member of the ruling political party in Rwanda, the Rwandan Patriotic Front ("RPF"), had engaged in subversion per section 34(1)(b.1) and rejected the applicant's argument that the impugned acts were done for maintaining the *status quo*. In particular, the ID found that the RPF's actions resulted in the subversion of democratic processes in Rwanda, including presidential and parliamentary elections and a constitutional referendum (*Gakumba* at paras 10 and 12).

[32] I agree with the ID's finding in *Gakumba* that "maintaining status quo and subverting democratic processes or institutions are not mutually exclusive" [*Gakumba* at para 10]. This

principle is consistent with the wording of section 34(1)(b.1) which refers to "engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada" [emphasis added]. In other words, the acts of subversion "accomplish change for improper purposes in regards to a democratic government, institution or process" [emphasis added]. Whether the "improper purpose" is to maintain the *status quo* or to change it, more broadly, is not necessarily determinative. The question is whether the acts accomplish change or undermine democratic government, institutions, or processes.

[33] This case and the case of *Gakumba* demonstrate how that can occur. The DAS acted like the RPF, by using illegal and anti-democratic means, including harassment and threats, to accomplish significant change within the electoral process by restricting who was able to run for office and imposing undue influence over who citizens voted for. These subversive acts were committed against the electoral process for the improper purpose of maintaining political power through illicit and anti-democratic means (*Gakumba* at para 10). Therefore, I dismiss the Applicants' arguments that the DAS's actions cannot constitute subversion merely because they were not committed with the intent of overthrowing the government but to maintain the government.

[34] I acknowledge that the Court in *Gakumba* did not address whether the actions taken by the ruling party constituted actions taken "from within", and that this was the determinative issue in the *X* case. However, the *X* case did not sufficiently grapple with the broad meaning that should be given to "democratic processes" as the Federal Court of Appeal advised in *Qu*. Rather, the ID said that "one can ascribe a broad meaning to the terms under section 34, but these terms

must still be capable of legal debate and coherent application" (*X* at para 112). I agree, however, the ID appears to only focus on "democratic institutions" without providing details on "democratic processes" and how one subverts a democratic process from within. It was open to the Officer to ascribe a broad meaning to "democratic processes", within reasonable limits, based on case law.

[35] Indeed, that is what the Officer did here, as demonstrated by their reference to the Federal Court of Appeal's discussion of "democratic process" as a way through which "a sovereign people exercise its right to self-government" (*Qu* at para 44 citing *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 at 254). In this light, it was reasonable for the Officer to find that a government agency reporting directly to the President that acts to "neutralize and restrict" voices critical of the President's administration undermines important democratic processes (like electoral processes and public participation and debate) from within government, which is a fundamental institution of the broader democratic process.

[36] As this is what the DAS did, I am satisfied that the Officer's findings were reasonable.

VII. Questions for Certification

[37] Before the hearing of this judicial review, the Respondent proposed the following two questions for certification:

A. Does engaging in an act of “subversion” in s. 34(1)(b.1) of the *IRPA* include acts that undermine or disrupt democratic governments, institutions, or processes, where such acts have a goal of maintaining a specific portion of the government’s power?

B. Does engaging in an act of “subversion” in s. 34(1)(b.1) of the *IRPA* require that subversive acts are committed from within a targeted democratic government, institution, or process, or can the acts be committed by a party outside the specific democratic government, institution or process being subverted?

[38] Notwithstanding the fact that the Respondent proposed these questions, and I found in their favour, I nonetheless find, for the reasons below, that the above questions should be certified and addressed on appeal, should the Applicants choose to appeal this decision.

[39] The Respondent submits that the two questions meet the requirements for certification: each question is a serious question that is dispositive of the appeal, transcends the interests of the parties, and raises an issue of broad significance or general importance (*Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at paras 15 and 35). Furthermore, they assert that this ground of inadmissibility is being used more frequently by IRCC and clarity is being sought on its interpretation.

[40] The Applicants oppose the certified questions on the basis that the facts of this case do not lend themselves to certified questions. However, as a requirement for a certified question is that the question does not turn on the unique facts of the case, and the facts in this case are not in

dispute, this argument has little merit. As apparent from above, the answers to these legal questions are determinative of the appeal.

[41] The questions as posed meet the requirements for certification. They raise issues that are unresolved by the Courts and transcend the interests of the immediate parties, particularly since the Respondent advised that IRCC and this Court will likely see more cases dealing with this ground of inadmissibility. Additionally, the questions are of broad significance and general importance as the questions go to the interpretation of inadmissibility of persons whose presence may constitute a threat to the security and safety of Canada.

VIII. Conclusion

[42] The Applicants have failed to show that the Decision was reached through procedurally unfair mechanisms and that it was unreasonable based on the evidence and law before the Officer. Accordingly, this application for judicial review is dismissed.

[43] The Court certifies the two questions set out in paragraph 37 above.

JUDGMENT in IMM-16419-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The following two questions are certified:

    a. Does engaging in an act of "subversion" in s. 34(1)(b.1) of the *IRPA* include acts that undermine or disrupt democratic governments, institutions, or processes, where such acts have a goal of maintaining a specific portion of the government's power?

    b. Does engaging in an act of "subversion" in s. 34(1)(b.1) of the *IRPA* require that subversive acts are committed from within a targeted democratic government, institution, or process, or can the acts be committed by a party?

"Michael D. Manson"
Judge

APPENDIX A

The relevant provisions of the *IRPA* read as follows:

Rules of interpretation	**Interprétation**
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.
Security	**Sécurité**
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.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;	**b.1)** se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
[…]	[…]
(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).
42 (1) A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if:	**42 (1)** Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants :
(a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or	**a)** l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;
b) they are an accompanying family member of an inadmissible person.	**b)** accompagner, pour un membre de sa famille, un interdit de territoire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-16419-23
STYLE OF CAUSE:	JACKELINE MEJIA RAMIREZ AND CESAR MAURICIO RODRIGUEZ GOMEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 14, 2024
JUDGMENT AND REASONS:	MANSON J.
DATED:	DECEMBER 2, 2024

APPEARANCES:

Adela Crossley	FOR THE APPLICANTS
Judy Michaely	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Crossley Law Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT