Federal Court  Cour fédérale

Date: 20140210

Docket: IMM-1870-13

Citation: 2014 FC 137

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, February 10, 2014

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

BUANA TSHIMANGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Buana Tshimanga (Mr. Tshimanga) filed this application for judicial review, under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision of the Immigration Division of the Immigration and Refugee Board [ID], dated

February 21, 2013, in which he was found to be inadmissible under paragraphs 34(1)(*b*) and (*f*) of the IRPA.

[2] For the following reasons, the Court dismisses this application for judicial review.

II. Facts

[3] Mr. Tshimanga is a citizen of the Democratic Republic of Congo [the DRC]. He arrived in Canada in September 1999 and filed a refugee claim here. He was given refugee status in December 1999 and became a permanent resident on August 15, 2000.

[4] In December 2000, Mr. Tshimanga became a Member of the Canada section of the Mouvement pour la libération du Congo [Movement for the Liberation of Congo, MLC].

[5] On June 11, 2006, Mr. Tshimanga lost his refugee status under section 108 of the IRPA as he had returned to his country of origin on several occasions and had held a number of positions in the government there.

[6] On September 25, 2006, Mr. Tshimanga was the subject of a first report issued under subsection 44(1) and paragraph 35(1)(*a*) of the IRPA, finding him inadmissible. The report was withdrawn on September 14, 2007, without an admissibility hearing being held (see Exhibit A of the affidavit of Dominique Toillon) and without the Minister of Citizenship and Immigration

[MCI] explaining the reasons for the withdrawal (see the applicant's record at page 295, para 3.10).

[7] On March 13, 2012, a report against Mr. Tshimanga was prepared under subsection 44(1) and paragraph 35(1)(*a*) of the IRPA.

[8] On March 15, 2012, another report was prepared regarding Mr. Tshimanga, under subsection 44(1) and paragraphs 34(1)(*f*) and 34(1)(*b*) of the IRPA.

[9] On April 5, 2012, the Canada Border Services Agency [CBSA] referred both reports for an admissibility hearing before the ID. These reports led to the ID's decision dated February 21, 2013 (the decision), which is the subject of this judicial review.

III. Legislation

[10] The statutory provisions applicable in this case are reproduced in the Annex to this judgment.

IV. Issues and standard of review

A. Issues

[11] Mr. Tshimanga submits that his application for judicial review raises the following issues:

(1) Should the ID have sanctioned the CBSA's failure to respect the principles of fundamental justice and its abuse of process with respect to the applicant?

(2) Did the ID err in finding that the applicant was a member of an organization aiming to subvert the government by force?

(3) Did the ID exceed its jurisdiction in criticizing the applicant for the MLC's commission of acts of violence and abuses?

[12] The respondent submits that this application for judicial review raises only one issue:

(1) Is the ID's decision reasonable?

[13] The Court finds that this application for judicial review actually raises the following two issues:

(1) Did the ID violate the principles of natural justice?

(2) Is the ID's decision reasonable?

B. Standard of review

[14] The decision in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57 [*Dunsmuir*], explains that a fresh standard of review analysis is not necessary if previous case law has already satisfactorily settled on a standard of review.

[15] Previous case law has determined that the standard of review applicable to the issue of whether a person is a member of an organization referred to in paragraph 34(1)(*f*) of the IRPA is that of reasonableness (see *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, at paras 21 to 24, and *Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 623, at para 21 [*Gutierrez*]). The same applies when it comes to determining whether there are reasonable grounds to believe that organizations have engaged, are engaging or will engage in acts of terrorism (see *Gutierrez*, above, at para 21).

[16] It is also firmly established in the case law that questions of procedural fairness must be analysed on a standard of correctness (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53, *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, and *Gutierrez*, above, at para 23).

[17] With respect to the standard of proof applicable to an analysis regarding paragraph 34(1)(*f*) of the IRPA, section 33 of the same act prescribes that the facts that constitute inadmissibility include facts arising from omissions and include facts "for which there are reasonable grounds to believe that they have occurred, are occurring or may occur". This standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. Reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information (see *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114 [*Mugesera*], and *Karakachian v Canada (Minister of Citizenship and Immigration)*, 2009 FC 948

at para 32 [*Karakachian*]). This standard of proof applies only to questions of fact (see *Mugesera*, above, at para 116).

V. Parties' claims

A. Mr. Tshimanga's arguments

Violations of the principles of natural justice

[18] Mr. Tshimanga submits that, under section 6 of the *Immigration Division Rules*, SOR/2002-229 [IDR], the MCI first had to make a written application to the ID to reinstate his request for an admissibility hearing before referring the two reports, dated March 13, 2012, and March 15, 2012, respectively, to the Immigration and Refugee Board, given that he had withdrawn his first request for an admissibility hearing. He argues that both the first report and the two subsequent reports dated March 13 and 15, 2012, concerned the same facts. Mr. Tshimanga claims that the MCI's procedural error deprived him of the opportunity to submit his arguments before the ID and to challenge the referrals.

[19] In the supplementary memorandum he filed on November 12, 2013, Mr. Tshimanga states that the two March 2012 reports were [TRANSLATION] "successive proceedings based on

the same facts as the first report, dated September 25, 2006", even though they provide a different ground for inadmissibility.

[20] According to Mr. Tshimanga, the ID was therefore referred an admissibility hearing that the Minister had applied for five (5) years earlier but withdrawn on September 14, 2007, after substantive evidence had been accepted by the panel. Mr. Tshimanga notes that the purpose of subsections 6(1) and (2) of the IDR is to prevent a person being the subject of more than one report on the basis of the same facts.

[21] Mr. Tshimanga claims that the ID should have ensured that the Minister's representative complied with the procedure under subsections 6(1) and 6(2) before agreeing to an admissibility hearing and reinstating the Minister's request. According to Mr. Tshimanga's submissions, the ID's failure to comply with the procedure under section 6 of the IDR constitutes a failure to observe the principles of natural justice. In his supplementary memorandum, Mr. Tshimanga submits that the ID could not decline jurisdiction and should have disposed of his argument that there had been an abuse of process in the proceeding.

[22] Relying on *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, Mr. Tshimanga submits that the concept of abuse of process can apply in this case.

[23] Mr. Tshimanga characterizes the Minister's proceeding against him as oppressive and vexatious. In his eyes, the proceeding constitutes an abuse of process that should be sanctioned through a stay of proceedings, which is what the ID should have done.

[24] In his supplementary memorandum, Mr. Tshimanga also states that the proceeding under paragraph 34(1)(*f*) was instituted late, namely, 10 years after Canadian authorities supported him in his efforts to participate in the Dialogue inter-congolais [Inter-Congolese Dialogue].

[25] Mr. Tshimanga also submits that the delays between when the allegations against him arose and the start of the proceedings instituted against him are unreasonable to the point of being oppressive. He relies on *Beltran v Canada (Minister of Citizenship and Immigration)*, 2011 FC 516, where the Court concluded that allowing an admissibility hearing to continue would be an abuse of process. In that case, Canadian authorities had been aware of the applicant's membership in the organization in question for over 20 years.

[26] Mr. Tshimanga emphasizes that, in his case, all facts had been known for over 10 years and that he had not contributed to the delay through dilatory or other proceedings. He submits that, consequently, he should not become a victim of bureaucratic indolence. He refers here to the comments made by Justice Tremblay-Lamer at paragraph 56 of *Canada (Minister of Citizenship and Immigration) v Parekh*, 2010 FC 692:

> **56**. In these circumstances I find that the delays which have marred these proceedings are inordinate and indeed unconscionable. Nothing in the circumstances of the case justified them. They are not the consequence of the complexity of the case or of any dilatory tactics employed by the Defendants, but of bureaucratic indolence and failure to give the matter the attention it deserved given the rights and interests at stake.

[27] He adds that he has always acted in good faith and that he has never hidden anything from Canadian authorities, who have been aware of all the facts for a long time.

[28] Mr. Tshimanga also claims that he was entrapped by the Canadian government, which, he alleges, encouraged him to become a member of the MLC, and then found him inadmissible to Canada because of his being a member of that same organization. He also submits that the Canadian government encouraged the effort to restore democracy in the DRC in which the MLC was involved. Indeed, he points out that the Canadian government provided him with a travel document for refugees so that he could attend and participate in the Inter-Congolese Dialogue fully aware that he had become a member of MLC-Canada. In short, he argues that Canada is criticizing his efforts to reach the same objectives as the Canadian government was pursuing, namely, to restore democracy in the Democratic Republic of Congo.

[29] Mr. Tshimanga further submits that the ID also violated procedural fairness by making its decision on the basis of evidence that was unrelated to the subject of the hearing, despite the Member assuring his counsel of the contrary after his counsel raised objections regarding this matter at the hearing.

Reasonableness of the decision

[30] First, Mr. Tshimanga clarified the statement contained in paragraph 18 of the ID's decision. He stated that the ID had said that he had claimed not to know that the MLC, from its inception, aimed to overthrow the government by force. Mr. Tshimanga submits that, on the contrary, he had told the ID that he had only agreed to become a member of the MLC-Canada because the MLC had renounced overthrowing the existing government by armed force when it signed the Lusaka Agreement [the Agreement], in July 1999.

[31] Mr. Tshimanga feels that the ID had before it clear evidence and documents establishing this radical change in MLC policy. He refers the Court to the MLC's statutes according to which this organization transformed into a political party in December 2005, and, more specifically, to Document I-21 drafted by the MLC-Canada, which reflects the MLC's commitment to respecting fundamental human rights and individual freedoms (see the applicant's record, page 59). In his supplementary memorandum, Mr. Tshimanga points out that the ID failed to take into account the change in policy of the MLC, which had renounced subverting the Congolese government by force. According to Mr. Tshimanga, this omission is an error in law that is reviewable by this Court.

[32] He also criticizes the ID for failing to define the expression "subversion by force" used in paragraph 34(1)(*b*) of the IRPA and submits that the ID's decision does not include any definition or analysis of this paragraph (see the applicant's supplementary memorandum at para 5.4).

[33] Mr. Tshimanga also argues that the ID refused to apply the principle set out in *Karakachian*, above, according to which the passage of time might be material in applying paragraph 34(1)(*f*) when an organization has renounced the objective it was criticized for. He submits that the ID's refusal to do so was a mistake. Mr. Tshimanga advances that the signing of the Agreement demonstrates that the MLC had renounced its objective of subverting the Congolese government by force. He submits that the ID should not have focussed on the human rights violations the MLC might have committed from 2000 to 2003. He alleges that, pursuant to

Karakachian, the ID should have restricted its analysis to whether or not the MLC had renounced its objective of overthrowing the government since, in his opinion, the only allegation made against him was to have been a member of an organization that aimed to subvert a government by force.

[34] By relying on the facts alleged previously, Mr. Tshimanga argues that the Member exceeded his jurisdiction by accepting evidence according to which the MLC had committed abuses, including human rights violations, even though the Minister had never raised these facts. Mr. Tshimanga submits that these allegations fall under the ground for inadmissibility provided at paragraph 35(1)(*a*) of the IRPA.

[35] Mr. Tshimanga questions the reference to the "commission of numerous abuses by the armed wing of the MLC" in the decision since the ID did not ask itself whether these abuses had been committed for the purpose, or with the intention, of subverting the government of the DRC. He alleges that these acts and the fighting involving the MLC concerned an area that was not under the control of the DRC and where there were no members of the Congolese government's army.

[36] He also states that the Agreement provided for a schedule for training the new Congolese army that was to be formed from the MLC's armed forces, among others. According to Mr. Tshimanga, the continuation of armed combat did not affect the MLC's renunciation of its objective to overthrow the Congolese government by force and that a distinction had to be made

therefore between this renunciation and an express renunciation of all violence (see the applicant's supplementary memorandum at para 5.9).

[37] Mr. Tshimanga criticizes the ID for its failure to consider the only issue relevant in this case, that is, whether or not the MLC had renounced its intention to overthrow the Congolese government by force during the period in question. He points out that at paragraph 26 of the decision, the Member states that intent is not a relevant issue for the purposes of paragraph 34(1)(*f*). The applicant argues that this statement is a mistake since this provision cannot be read in isolation and must be associated with paragraph 34(1)(*b*), which requires proof of intent.

[38] Mr. Tshimanga notes that the ID did not consider the evidence he filed to establish the Canadian government's support of the MLC's participation in the Inter-Congolese Dialogue and refers to *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, emphasizing that this factor is at the very heart of his position.

[39] He also submits, in his supplementary memorandum, that the ID exceeded its jurisdiction by making its decision on the basis of evidence that is unrelated to the allegation covered by paragraphs 34(1)(*b*) and 34(1)(*f*). He alleges that this evidence includes allegations of crimes against humanity and war crimes allegedly committed by the MLC in 2002–2003 and has no connection with the allegation of subversion by force.

[40] Mr. Tshimanga argues, moreover, that he was entrapped, since the ID did consider certain documents to support its decision, despite the ID's assurances to the contrary. Counsel for the applicant objected to the introduction of this evidence at the hearing.

[41] Lastly, Mr. Tshimanga argues that the ID erred in relying on *Ishaku v Canada (Minister of Citizenship and Immigration)*, 2011 FC 44 [*Ishaku*], as this case dealt with complicity in crimes against humanity committed by the MLC and not with whether or not this organization had renounced overthrowing the government by force during the 2000 to 2003 period.

B. The respondent's arguments

Violations of the principles of natural justice

[42] The respondent refutes Mr. Tshimanga's contention that the issuance of a second report was an abuse of process and that the ID should consequently have ordered a stay of proceedings in order to sanction this abuse. He submits, first, that Mr. Tshimanga did not raise this argument before the ID or request that a stay of proceedings be ordered. In support of this argument, he refers the Court to the hearing transcript. The respondent also points out that Mr. Tshimanga is now barred from raising this argument given that he failed to do so on time.

[43] Second, the respondent argues that the two reports prepared in March 2012 do not rely on the same facts. The first report, of 2006, concerned the applicant's participation in crimes against humanity committed by the MLC between 2000 and 2003. The second report, dated March 13, 2012, focuses rather on the applicant's involvement in crimes against humanity committed by the

government of the DRC as a result of the key positions he occupied in this government between July 2003 and the end of 2006. The respondent submits that the reports describe discrete events and cover different periods. Consequently, the Minister was not obliged to apply for the reinstatement of his initial request before requesting that his second investigation report be referred.

[44] The respondent refers to *Sheremetov v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 373, in which the Court considered the scope of sections 5 and 6 of the IDR. He pointed out that there had been no hearing on the second report before the panel, since, at the hearing, the Minister's representative admitted that he could not meet his burden. Mr. Tshimanga therefore did not suffer any prejudice, since the hearing never dealt with his inadmissibility under paragraph 35(1)(*a*) of the IRPA.

[45] The respondent refutes Mr. Tshimanga's argument that an unreasonable amount of time had passed before the second report dated March 13, 2012, was submitted. He alleges that unreasonable delay is not relevant since the admissibility hearing did not deal with the March 13, 2012, report but with the report dated March 15, 2012. However, the respondent did not make any submissions to counter Mr. Tshimanga's argument that the time passed before the third report dated March 15, 2012, the subject of the admissibility hearing, was issued had been unreasonable given that all the facts had been known for over 10 years (see the applicant's supplementary memorandum at para 12).

[46] The respondent reminds the Court that the ID considered and rejected Mr. Tshimanga's argument that he had been entrapped by the Canadian government. The ID found that this argument could be raised with the Minister in relation to an application made under subsection 34(2) of the IRPA. Furthermore, the respondent submits that the evidence filed by Mr. Tshimanga does not suggest that the Canadian government entrapped him by suggesting that he become a member of the MLC. On the contrary, Mr. Tshimanga became a member voluntarily and consciously, and the Canadian government had no involvement in influencing his decision of whether or not to campaign as part of the MLC.

[47] The respondent rejects Mr. Tshimanga's allegation that the ID exceeded its jurisdiction. He points out that the ID disposed of these objections and notes that it had proposed to counsel for Mr. Tshimanga to make submissions in this regard a little later during the hearing; counsel for Mr. Tshimanga, however, had not made any arguments or raised any objections regarding the admissibility of this evidence in his submissions. The respondent submits that Mr. Tshimanga is therefore barred from making this argument, given that he did not raise it on time.

[48] The respondent submits, moreover, that all the evidence presented was admissible and had to be reviewed by the ID since it contained a general picture of the DRC and the MLC during the years referred to in the inadmissibility reports. The respondent notes that the exhibits deemed as being inadmissible by Mr. Tshimanga remain admissible since they establish the commission of crimes against humanity and the use of force by the MLC, despite its signing the Agreement in which it renounced the use of force.

Reasonableness of the decision

[49] The respondent is of the view that the ID's decision is reasonable, reasoned and intelligible since there are reasonable grounds to believe that Mr. Tshimanga was a member of an organization (the MLC) that intended to overthrow the DRC's government by force.

[50] The respondent argues that the expression "by force" in paragraph 34(1)(*b*) of the IRPA includes coercion or compulsion by violent means, coercion or compulsion by threats to use violent means and a reasonably perceived potential for the use of coercion by violent means (see *Oremade v Canada (Minister of Citizenship and Immigration)*,2005 FC 1077 at para 27 [*Oremade*]). The term "subversion", according to the respondent, has been defined in the case law as meaning ". . . accomplishing change by illicit means or for improper purposes related to an organization", and he refers to the decisions in *Qu v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 399 at para 12, and *Suleyman v Canada (Minister of Citizenship and Immigration)*, 2008 FC 780 at para 63. The respondent submits that the ID was not obliged to define the expression "subversion by force" used in paragraph 34(1)(*b*) since the existing case law has already clarified the meaning of this term.

[51] The respondent refers to article 3 of the statutes of the MLC and points out that, when Mr. Tshimanga became a member in December 2000, the organization defined itself as a [TRANSLATION] "political-military movement that aims to overthrow the dictatorial regime". The movement stated that it wished to [TRANSLATION] "eradicate dictatorship in all its forms" (article 6) and that the established means to achieve this included armed conflict, to which end

the MLC had an armed branch (article 7) (see the respondent's record, page 9, para 33, and Exhibit B of the affidavit of Dominique Toillon).

[52] The respondent also recalls the comments made by Jean-Pierre Bemba, the co-founder and leader of the MLC, during a radio interview he granted in October 2002, during which he spoke of fighting, armed combat for a good cause, the liberation of their country and the fact that the MLC had advanced on several towns since it was founded in June 1999 (see Exhibit C of the affidavit of Dominique Toillon).

[53] The respondent refutes Mr. Tshimanga's claim that the MLC had renounced overthrowing the government of the DRC using arms in adhering to the Agreement. In *Ishaku*, above, the Court concluded that the MLC committed several violent and unlawful acts in order to overthrow the dictatorship of President Kabila between 2000 and 2003 (see paras 65 to 67 of the decision). The respondent also submits that paragraph 34(1)(*f*) of the IRPA does not require membership in the organization in question to have been contemporaneous with the period during which the violent or unlawful acts can be attributed to the group in question. He refers to *Gebreab v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1213 [*Gebreab*], in support of this claim. It was therefore reasonable for the ID to conclude that the MLC is an organization that there are reasonable grounds to believe that instigates, has instigated or will instigate, or that engages, has engaged or will engage, in acts of subversion of a government by force.

[54] The respondent submits that the ID did not have to consider whether the MLC intended to change its mission in signing the Agreement, but that it had to determine whether, based on the facts, this organization was still aiming to overthrow the government by force despite its adherence to the Agreement. He argues that, contrary to Mr. Tshimanga's submissions, there is no evidence establishing that the MLC's expressly renounced the use of force to achieve its objectives.

[55] The respondent therefore concludes that the ID's decision was reasonable and asks the Court to dismiss this application for judicial review.

VI. Analysis

1. Did the ID violate the rules of natural justice?

[56] The Court concludes that the rules of natural justice were not violated in the matter at bar, for the following reasons:

[57] Mr. Tshimanga alleges that section 6 of the IDR obliged the MCI to make a written application to the ID to reinstate his request for an admissibility hearing, given that he had withdrawn its previous request. This provision reads as follows:

> **6.** (1) The Minister may make a written application to the Division to reinstate a request for an admissibility hearing that was withdrawn.
>
> Factors

> (2) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice or if it is otherwise in the interests of justice to allow the application.

[58] The Court rejects Mr. Tshimanga's contention, sharing rather the opinion of the respondent that the MCI did not have to apply for a written authorization before referring his reports dated March 12 and 15, 2012, for two reasons.

[59] First, it must be noted that the reports rely on discrete events and cover different periods; the ID was therefore not dealing with an application for the reinstatement of a previous request for an admissibility hearing, but new admissibility hearings. Moreover, the Court must point out that the second report filed under paragraph 35(1)(*a*) had not been the subject of a previous admissibility hearing before the ID.

[60] Mr. Tshimanga also claims that the ID should have disposed of his argument that there had been an abuse of process. The Court agrees with the respondent's position according to which Mr. Tshimanga did not raise this argument before the ID or request that a stay of proceedings be ordered.

[61] Mr. Tshimanga alleges that the ID failed to consider several pieces of evidence, which he describes as encouragement from the Canadian government to support the efforts in which the MLC was involved. He alleges that the Canadian government is criticizing him for his own efforts to participate in reaching the objectives it shared with him, namely, to restore democracy in the DRC. The Court finds this argument to be without merit because even if Canada did support the conclusion of an agreement, Mr. Tshimanga cannot claim that Canada accepted, to

the extent of ignoring, the unlawful means employed by the MLC to restore democracy in the Democratic Republic of Congo.

[62] The Court also rejects that the time elapsed between the commission of the alleged acts and the filing of the reports is unreasonable. Admittedly, 10 years passed between the filing of the second report and the commission of the acts attributed to the applicant, namely, his participation in a movement that advocated the overthrow of a government by force. The Court does not find this delay to be unreasonable in the matter at bar, for the following reasons. Having reviewed all the documents filed before the ID to establish that the MLC committed acts of violence, the Court notes that some of the documentary evidence dates to 2008. These documents were therefore not available at the time of the first request, which was withdrawn, in 2007, before an admissibility hearing was held. Moreover, Mr. Tshimanga did not file any evidence to suggest that the delay incurred was attributable to negligence on the part of the respondent, as in *Parekh*, on which he relies. Lastly, one must also consider the test set out in *Blencoe*, above, to determine when a delay becomes unreasonable. The Court explains as follows at paragraph 115:

> I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute.

[63] As hearing fairness does not seem to have been compromised here, Mr. Tshimanga had to provide evidence to establish the prejudice he personally suffered as a result of this delay. He has failed to meet this burden.

[64] Lastly, regarding Mr. Tshimanga's argument that the ID violated procedural fairness, by relying on evidence that was unrelated to the subject of the hearing even though the Member assured counsel for Mr. Tshimanga to the contrary, we will deal with this at paragraph 75 of this decision.

[65] It is the Court's view that the principles of natural justice were not violated.

2. Was the ID's decision reasonable?

[66] The Court is of the opinion that the ID's decision was reasonable, for the following reasons.

[67] Justice De Montigny, in *Karakachian*, above, at paragraph 33, recalled this Court's role in the matter at bar:

> **33.** . . . the role of this Court is not to determine whether the ARF is or was a terrorist organization, nor even whether there were reasonable grounds to believe that the applicant falls within paragraph 34(1)(*f*), or, on a balance of probabilities, also falls within subsection 16(1) of the Act. The only question that the Court must decide is whether the officer could reasonably come to the conclusion she reached, based on the evidence before her: *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 122, at paragraphs 32-33; *Mendoza v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 934, at paragraph 25.

[68] The Court must therefore inquire into the qualities that make a decision reasonable, which are concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It must determine whether the decision falls within a range

of possible, acceptable outcomes which are defensible in respect of the facts and law (see *Dunsmuir*, above, at para 47).

[69] The Court cannot accept Mr. Tshimanga's argument that the decision was unreasonable on the ground that the ID did not define the expressions used in paragraph 34(1)(*b*). This omission does not taint the decision as the definition is clearly established in the case law and the Member applied it correctly.

[70] Mr. Tshimanga claims to have filed clear evidence documenting the radical transformation in MLC policy. He suggests that the organization had expressly abandoned its former political objectives and, as a result, had renounced overthrowing the government of the DRC by force, during the time he was a member. He relies on the new statutes adopted by the MLC in 2005 and a document by the MLC-Canada, which mentions the MLC's commitment to respecting fundamental human rights.

[71] Unfortunately, it must be noted that, notwithstanding its signing and adhering to the Agreement that called for the laying down of arms, the MLC participated in many battles on the ground after signing the Agreement. The ID found in fact that the armed wing of the MLC committed numerous acts of violence after signing the Agreement (see the applicant's record, page 16, para 23). Even if, therefore, the MLC had held out the possibility of its renouncing the use of force and violence, it did not respect its commitment. Mr. Tshimanga can therefore not claim that the MLC had "expressly given up any form of violence" (see *Karakachian*, above, at para 48). The same is true of the MLC-Canada document, which refers to the alleged

commitment of the MLC to respecting fundamental human rights. Actions speak louder than words. The Court also wishes to emphasize that the amendment of the MLC's statutes, in 2005, came well after the applicant was a member and particularly after the commission of the alleged acts of violence during the period covered by the reports.

[72] The Court also notes that, contrary to Mr. Tshimanga's claims, the decision in *Ishaku*, above, deals with the MLC's objective to subvert the government of the DRC by force. In fact, at paragraph 65, the decision states that, from 2000 to the end of 2003, the MLC's primary objective was to overthrow the dictatorship of President Kabila and to take power and that it committed acts of violence to achieve this objective.

[73] Mr. Tshimanga submits that the ID should not have focused on the possible human rights violations committed by the MLC between 2000 and 2003 since the allegation against him is limited to his membership in an organization that aimed to overthrow the government by force. In the Court's view, the following would be a more correct version of the allegation against Mr. Tshimanga, namely, that he was a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in the subversion by force of a government, pursuant to paragraph 34(1)(*f*) of the IRPA.

[74] Mr. Tshimanga admits that he was a member of the MLC; he also does not deny that the MLC may have committed human rights violations between 2000 and 2003 while he was a member. The acts of violence in question should not be considered solely for the purpose of the analysis under subsection 35(1) of the IRPA, as Mr. Tshimanga suggests. On the contrary, the

Court finds that it was reasonable for the ID to consider this part of the evidence for the purpose of its analysis under paragraphs 34(1)(*b*) and (*f*). The evidence establishes that the armed wing of the MLC committed reprehensible acts, with the statutes of the MLC continuing to provide for the [TRANSLATION] "eradicat[ion of] dictatorship in all its forms", and all the while not renouncing armed struggle.

[75] The Court cannot accept Mr. Tshimanga's argument that the ID exceeded its jurisdiction by considering evidence establishing the perpetration of these acts despite the objections of counsel for Mr. Tshimanga to it doing so, for the following reason. A reading of the hearing transcript does not suggest, contrary to Mr. Tshimanga's contention, that he was entrapped. In fact, at page 1041, it is clear that counsel for Mr. Tshimanga objected, but it is also obvious that the Member considered this objection as he noted the following in reply at page 1043:

> [TRANSLATION]
> I don't think so, but we'll see whether her submissions refer to what you fear she is referring to in a roundabout way; that will be determined on the basis of the allegation before me and of the periods that were mentioned in their, in their description, which allowed you to prepare, even though the description, it's not the description that will establish everything; it's the evidence that will arise from the te- from the testimony and from the evidence before me. The allegation is very specific with regard to subverting a government by force. There are no allegations of human rights violations for the period in question, for this particular allegation, I agree with you but I think that with regard to, as I've said, and I repeat, with regard to determining Mr. Tshimanga's state of mind when he chose the MLC, it is important to know what he knew and when he learnt what he knew.

[76] Under paragraph 34(1)(*f*), the MCI's burden is limited to establishing that Mr. Tshimanga was a member of an organization, in this case, the MLC, whose goal was to subvert the government by force, nothing more.

[77] The Court agrees with the analysis of Justice Snider in *Gebreab*, above, who writes as follows at paragraph 27:

> By finding that the EPRP is not an "organization" because, at the time of Mr. Gebreab's Membership, it did not engage in acts of terrorism or subversion, the Board would, in effect, eliminate the words "they have occurred" from s. 33 and the words "has engaged" from s. 34(1)(f).

[78] Hence, regardless of any change in the means taken to reach the MLC's objective, the MLC did indeed commit acts designed to overthrow the government of the DRC by force, and this is the crux of the matter.

[79] Lastly, the Court must also reject Mr. Tshimanga's argument that the ID, at paragraph 26 of its decision, stated that intent was not a relevant issue under paragraph 34(1)(*f*), given that this sentence is taken out of context. A reading of the decision reveals that the ID was referring to whether or not it was necessary to demonstrate that Mr. Tshimanga intended to overthrow the Congolese government (see paragraph 19 of the decision); however, the reference to intent under paragraph 34(1)(*b*) is concerned with the MLC's intention to overthrow the government.

[80] The Court is of the opinion that it was reasonable for the ID to conclude, on the basis of the evidence before it, that Mr. Tshimanga was inadmissible, since it established reasonable grounds to believe that the subversion by force of the government had "occurred, [was] occurring or [might] occur" (see section 33 of the IRPA). As in *Karakachian*, above, at paragraph 32, the ID had an objective basis, namely, compelling and credible information, for its belief. But in contrast to *Karakachian*, in the matter at bar, the Court cannot make the distinction

desired by Mr. Tshimanga since the evidence presented before the Member clearly established the role of and the abuses committed by the MLC, which perfectly satisfy the tests set out by this Court with regard to the enforcement of paragraph 34(1)(*f*).

[81] In light of the above, it is the Court's view that Mr. Tshimanga has not presented any evidence that would allow it to intervene in order to set aside the decision issued by the ID.

JUDGMENT

THE COURT

1. Dismisses this application for judicial review; and

2. Notes that there is no question of general interest to certify.

"André F.J. Scott"

Judge

Certified true translation
Johanna Kratz, Translator

ANNEX

***Immigration and Refugee Protection Act*, SC 2001, c 27**

DIVISION 4
INADMISSIBILITY

Rules of interpretation

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.

Security

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

(*b*) engaging in or instigating the subversion by force of any government;

(*c*) engaging in terrorism;

(*d*) being a danger to the security of Canada;

(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(*f*) being a Member of an organization that there are reasonable grounds to believe engages, has engaged or will

SECTION 4
INTERDICTIONS DE TERRITOIRE

Interprétation

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.

Sécurité

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

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

engage in acts referred to in paragraph (a), (b) or (c).

Exception

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

acte visé aux alinéas a), b) ou c).

Exception

(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

***Immigration Division Rules*, SOR/2002-229**

Withdrawing a Request by the Minister for an Admissibility Hearing

Abuse of process

5. (1) Withdrawal of a request for an admissibility hearing is an abuse of process if withdrawal would likely have a negative effect on the integrity of the Division. If no substantive evidence has been accepted in the proceedings, withdrawal of a request is not an abuse of process.

Withdrawal if no evidence has been accepted

(2) If no substantive evidence has been accepted in the proceedings, the Minister may withdraw a request by notifying the Division orally at a proceeding or in writing. If the Minister notifies in writing, the Minister must provide a copy of the notice to the other party.

Retrait de la demande du ministre de procéder à une enquête

Abus de procédure

5. (1) Il y a abus de procédure si le retrait de la demande du ministre de procéder à une enquête aurait vraisemblablement un effet néfaste sur l'intégrité de la Section. Il n'y a pas abus de procédure si aucun élément de preuve de fond n'a été accepté dans le cadre de l'affaire.

Retrait dans le cas où aucun élément de preuve de fond n'a été accepté

(2) Dans le cas où aucun élément de preuve de fond n'a été accepté dans le cadre de l'affaire, le ministre peut retirer sa demande en avisant la Section soit oralement lors d'une procédure, soit par écrit. S'il le fait par écrit, il transmet une copie de l'avis à l'autre partie.

Withdrawal if evidence has been accepted

(3) If substantive evidence has been accepted in the proceedings, the Minister must make a written application to the Division in order to withdraw a request.

Reinstating a Request by the Minister for an Admissibility Hearing

Application for reinstatement of withdrawn request

6. (1) The Minister may make a written application to the Division to reinstate a request for an admissibility hearing that was withdrawn.

Factors

(2) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice or if it is otherwise in the interests of justice to allow the application. Rétablissement de la demande du ministre de procéder à une enquête

Retrait dans le cas où des éléments de preuve de fond ont été acceptés

(3) Dans le cas où des éléments de preuve de fond ont été acceptés dans le cadre de l'affaire, le ministre, pour retirer sa demande, en fait la demande par écrit à la Section.

Demande de rétablissement d'une demande d'enquête retirée

6. (1) Le ministre peut demander par écrit à la Section de rétablir la demande de procéder à une enquête qu'il a faite et ensuite retirée.

Éléments à considérer

(2) La Section accueille la demande soit sur preuve du manquement à un principe de justice naturelle, soit s'il est par ailleurs dans l'intérêt de la justice de le faire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1870-13
STYLE OF CAUSE:	BUANA TSHIMANGA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 11, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	SCOTT J.
DATED:	FEBRUARY 10, 2014

APPEARANCES:

Jacques Beauchemin	FOR THE APPLICANT
Émilie Tremblay Michel Pépin	FOR THE RESPONDENT

SOLICITOR OF RECORD:

BEAUCHEMIN, BRISSON Advocates Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT