Federal Court  Cour fédérale

Date: 20090917

Docket: IMM-361-09

Citation: 2009 FC 924

Montréal, Quebec, September 17, 2009

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

Alexis NDIBWAMI
Marie Chantal KAMBABAZI
Audace Rafiki MUHOZA
Lucien UWAYO
Brian KWIZERA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) of a decision by an immigration officer at the Canadian High Commission in London dated December 1, 2008, refusing the principal applicant's application for permanent residence because he is inadmissible to Canada given the senior position he held in the government of Rwanda.

Factual background

[2] The applicant was born in Rwanda but became a British citizen in 2005. The applicant lived in Quebec, more specifically in Sherbrooke, from November 1982 to March 1988, while taking his PhD in organic chemistry.

[3] Following his return to Rwanda, the applicant worked from September 1989 to June 1993 in the *Ministère de l'Enseignement supérieur et de la recherche scientifique* (Department of Higher Education and Scientific Research) (Minesupres) as the Director General of Science and Technology Research.

[4] After resigning from this position, the applicant worked as chief external consultant with Minesupres from July 1993 to July 1994. As part of a project financed by the United Nations, he took over for two Canadian consultants who had spent three years developing the first phase of the said project and the applicant specified that the United Nations insisted that the set-up phase of the project be led by a team of Rwandese nationals.

[5] In April 1994, the applicant left Kigali, his place of residence, for Gisenyi, the village where he was born, to escape the war that was starting in Kigali. On July 15, 1994, the applicant crossed the border and travelled to the city of Goma in Zaire. In December 1994, the applicant and his spouse then left Zaire for Nairobi in Kenya. On February 27, 1995, the applicant left Kenya for Malawi, where he lived until April 1999, when he went to England to claim refugee protection.

[6] The applicant's refugee protection claim was refused in England. However, given the particular circumstances of his situation, the Home Office authorized him to stay there in July 1999. The applicant obtained permanent residence in July 2003 and became a British citizen in 2005.

[7] On February 11, 2002, the applicant filed an application for permanent residence in Canada for himself and his family members with the Canadian High Commission in London. At the time his application was filed, he was married and had three children; afterwards, a fourth child was born in England while his file was being processed.

[8] On March 25, 2003, the applicant and his spouse were invited to an interview at the Canadian High Commission in London regarding their selection under the skilled worker category. During this interview, they were informed that they had obtained the pass mark required for this category and that they had to wait for the results of their background check for the file to move forward.

[9] In 2005, 2007 and 2008, the applicant filed additional information in the form of various documents and questionnaires with the Canadian High Commission in London as part of the application process.

[10] On November 11, 2008, the applicant received a letter from immigration officer Anne Vanden Bosch (the officer), indicating her intention to refuse the applicant's immigration application because he was allegedly inadmissible under paragraph 35(1)(*b*) of the Act. The letter

dated November 11 called the applicant to an interview on November 25, 2008. The officer rendered her decision on December 1, 2008.

Impugned decision

[11] The officer found that the applicant was subject to paragraph 35(1)(*b*) of the Act, which provides that a permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*, 2000, c. 24. Consequently, the applicant was inadmissible and his application was refused.

[12] More specifically, the applicant held a senior position in the government of Rwanda from 1990 to 1993 when he was Director General in the Rwandan Minesupres. In the opinion of the Minister, the government of Rwanda committed systematic human rights violations during this period. The officer reached this finding and gave reasons for this in her letter of November 11, 2008, and during the interview with the applicant on November 25, 2008. The officer noted during the interview that she had considered the applicant's submissions, but that the applicant's resignation from Minesupres in 1993 and his subsequent role as a consultant had not changed her finding on the matter.

Issues

[13] The applicant raised three issues:

1. Were the reasons given for the immigration officer's finding that the applicant was a senior official in the government of Rwanda as defined in section 16 of the Regulations adequate and is the decision the result of a meaningful analysis of the position held by the applicant?
2. Did the immigration officer give the applicant the opportunity to respond to her allegations contained in the letter of November 11, 2008? If not, is this a reviewable error of law?
3. Did the immigration officer commit an error of law by not giving the applicant the opportunity to rely on the exception set out in subsection 35(2) of the Act?

Relevant legislation

[14] The relevant legislative provisions can be found in Annex A.

Analysis

Standard of review

[15] The applicant claimed that in *Yassin v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1029, 117 A.C.W.S. (3d) 605 and in *Holway v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 309, 146 A.C.W.S. (3d) 697, it was decided that the question of whether an applicant is a senior official is a question of mixed fact and law and that reasonableness *simpliciter* is the applicable standard of review. The respondent cited *Yahie v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1319, 337 F.T.R. 59 at paragraph 22 to support this claim.

[16] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada found that there is a single standard of reasonableness from now on. Consequently, the standard of reasonableness applies to the decision of the officer who must determine whether the applicant was subject to paragraph 35(1)(*b*) of the Act as a senior official.

[17] A decision is reasonable when the analysis is concerned " . . . with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at paragraph 47).

[18] Regarding the second issue, questions of procedural fairness in the context of decisions made by immigration officers are to be reviewed on the standard of correctness, as decided in *Lak v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 350, 156 A.C.W.S. (3d) 904 (see also *Yahie*, at paragraph 18).

[19] Similarly, regarding the third issue, questions of law are subject to the correctness standard of review.

1. Were the reasons given for the immigration officer's finding that the applicant was a senior official in the government of Rwanda as defined in section 16 of the Regulations adequate and is the decision the result of a meaningful analysis of the position held by the applicant?

[20] The applicant claimed that the officer had a duty to conduct a meaningful analysis of his position in the hierarchy of the government with respect to his responsibilities in order to decide whether he was a senior member of the public service as cited by paragraph 16(*d*) of the

Immigration and Refugee Protection Regulations, SOR/2002-227 (the Regulations) (*Yahie*, at paragraphs 34-35) and, according to the applicant, the decision of December 1 did not show any analysis.

[21] The letter of November 11, 2008, addressed to the applicant by the officer states only that he had been Director General in Minesupres and that, because of this, he held a position in the top half of the organization. According to the applicant, the officer indicated that he had to report to high-ranking superiors and did not specify how this made him a senior official in the Rwandan government. Therefore, according to the applicant, the officer did not carry out any analysis of his position in the hierarchy of the government with respect to his responsibilities.

[22] The applicant referred to the Enforcement Manual, Chapter ENF 18 (Chapter ENF 18), published by Citizenship and Immigration Canada (CIC), which addresses war crimes and crimes against humanity. The applicant admitted that the manuals published by CIC do not have the authority of law to be binding on immigration officers but maintained that the officer did not respect the directives listed in section 8 of Chapter ENF 18.

[23] Furthermore, the applicant claimed that no analysis was carried out in order to establish whether his duties enabled him to exert significant influence on the exercise of government power or enabled him to benefit from his position, as defined in section 16 of the Regulations. The applicant maintained that the officer's analysis should have addressed the influence he could have had on the exercise of power by the government of Rwanda in committing human rights abuses because of his position as a senior official.

[24] The applicant believed that this analysis was all the more important because there was no allegation that he had personally committed or participated in committing any crimes against humanity. The analysis must therefore make it possible to find that the applicant held a position so senior in the hierarchy that he would be complicit in abusive actions committed by the government.

[25] In particular, section 8.4 of Chapter ENF 18 specifies with respect to officers who must make decisions in accordance with paragraph 35(1)(*b*) of the Act that there is a " . . . need for careful and thorough consideration of all relevant information." According to the applicant, the officer did not carefully and thoroughly consider all relevant information before finding that the applicant was subject to paragraph 35(1)(*b*) of the Act. Therefore, the officer failed to comply with the directives given in Chapter ENF 18 and the applicant submitted that these are errors of law that warrant the Court's intervention.

[26] For his part, the respondent pointed out that paragraph 35(1)(*b*) of the Act applies when the government in question has been designated by the Minister as a regime that has engaged in terrorism, systematic or gross human rights violations or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*. Section 16 of the Regulations defines the expression "prescribed senior official in the service of a government" for the purposes of paragraph 35(1)(*b*) of the Act.

[27] The list of regimes that have been designated can be found in section 8.1 of Chapter ENF 18, published by CIC. On April 27, 1998, the Minister of Citizenship and Immigration

designated the government of Rwanda as a regime that committed crimes against humanity and a genocide from October 1990 to April 1994 and from April 1994 to July 1994.

[28] The respondent added that paragraph 35(1)(*b*) of the Act is an absolute liability provision and that complicity or knowledge is irrelevant to the question of inadmissibility (*Zaheri v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 446, 250 F.T.R. 41; *Nezam v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 446, 272 F.T.R. 9; *Hamidi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 333, 289 F.T.R. 110; *Ismail v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 987, 150 A.C.W.S. (3d) 890).

[29] After weighing the parties' arguments, I am of the opinion that the finding made by the officer regarding the applicant's inadmissibility is reasonable. Section 16 of the Regulations lists the classes of people who are prescribed senior officials and, according to settled case law, when a person is listed in one of paragraphs (*a*) to (*g*), the person is considered to be a prescribed senior official (*Canada (Minister of Citizenship and Immigration) v. Adam*, [2001] 2 F.C. 337, 266 N.R. 92 (F.C.A.)). The Court had the opportunity to interpret the concept of prescribed senior official in the context of paragraph 35(1)(*b*) of the Act in *Lutfi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1391, 143 A.C.W.S. (3d) 738. Relying on *Adams*, Justice Harrington noted the following at paragraph 8:

> The question is whether he (Mr. Lutfi) has the status of a prescribed senior official. If he does, any personal lack of blameworthiness is simply not relevant.

[30] In this case, the applicant's position is listed in paragraph (*d*) of section 16 of the Regulations because he was a senior official. In fact, the organization chart filed in evidence

undeniably demonstrates that a single person separated the applicant from the minister and as a result there is no doubt that the applicant held an important position in the top half of the organization.

[31] Another important and determinative fact in the record is mentioned by the officer in her letter of November 11, 2008, and refers to the roles played by the applicant's colleagues with whom he worked closely. In fact, it appears that these individuals were implicated in the Rwandan genocide:

> I note that the colleagues with whom you worked closely, namely: Christophe Ndangali; Jean de Dieu Kamuhanda; Daniel Mbangula; and Ignace Hakizamungu were implicated in the Rwandan genocide.

[32] More specifically, the evidence in the record demonstrates, namely, that Christophe Ndangali held the position of secretary general from 1989 to 1992, that is, a position situated between that of the minister and the applicant; that Daniel Mbangula held the position of minister from 1992 to 1993; and that Jean de Dieu Kamuhanda was director from 1992 to 1993, a position situated between that of the minister and the applicant.

[33] I am therefore of the opinion that the officer correctly followed section 8.2 of Chapter ENF 18 in arriving at the finding that the applicant was a senior official and that, given the facts in this case, she did not have to establish evidence of the responsibilities attached to the position and the type of work actually done or the types of decisions made, as the applicant argued during the hearing.

[34] In fact, section 8.2 of Chapter ENF 18 reads as follows:

> In addition to the evidence required, it must be established that the position the person holds or held is a senior one. In order to establish that the person's position was senior, the position should be related to the hierarchy in which the functionary operates. Copies of organization charts can be located from […]. If it can be demonstrated that the position is in the top half of the organization, the position can be considered senior.
>
> This can be further established by evidence of the responsibilities attached to the position and the type of work actually done or the types of decisions made (if not by applicant then by holders of similar positions). (Emphasis added)
>
> Outre la preuve nécessaire, on doit établir que le poste est de rang supérieur. A cette fin, on doit situer le poste dans la hiérarchie où le fonctionnaire travaille. […]. Si l'on peut prouver que le poste est de la moitié supérieure de l'organisation, on peut considérer qu'il est un poste de rang supérieur. Un autre moyen de l'établir est celui des preuves de responsabilités liées au poste et du type de travail effectué ou des types de décisions prises (à défaut d'être prises par le demandeur, par les titulaires de postes analogues). (Nous soulignons)

[35] It should be specified that Chapter ENF 18 does not impose any legal duty on the officer. The legal duty imposed on an officer flows from paragraph 35(1)(*b*) of the Act and not from Chapter ENF 18, the purpose of which is to issue directives.

[36] That being said, the wording of section 8.2 of Chapter ENF 18 sets out a procedure for the officer to establish whether the person is a senior official and, as a result, is subject to section 16 of the Regulations. Accordingly, if the evidence in the record makes it possible for the officer to find that the position is at a senior level in the hierarchy and that it is situated in the top half of the organization, it follows that this person is presumed to have held a position listed in section 16 of the Regulations and thus having been able to exert significant influence on the exercise of government power. In this case, there is no basis for pursuing the analysis of responsibilities

attached to the position and paragraph 35(1)(*b*) of the Act will apply. However, if the evidence in the record does not make it possible for the officer to establish that the position is senior because the supporting evidence in the record makes it difficult to situate it in the top half of the hierarchy (see *Lutfi*, above), Chapter ENF 18 provides that the officer can try to further establish that the person held a senior position by examining the evidence of the responsibilities attached to the position and the type of work actually done or the decisions made. This second step offers, as Chapter ENF 18 specifies, a way that this can be further established and makes it possible to supplement the first step if the evidence in the record proves inconclusive. The French version of section 8.2 of Chapter ENF 18 is just as meaningful, specifying "Un autre moyen . . . ".

[37] Therefore, I find that the officer demonstrated diligence by taking the necessary measures to verify the applicant's rank and determine the people who were his superiors in the hierarchy and who were his work colleagues. More specifically, given that the organization chart demonstrates that the applicant held a very high-ranking position within Minesupres' hierarchy, that a single person separated the applicant from the minister and that it appears that the applicant's colleagues who worked at Minesupres were implicated in the Rwandan genocide, the officer reasonably found that the applicant held a senior position as a senior member of the public service as mentioned in section 16 of the Regulations and that, as a result, paragraph 35(1)(*b*) of the Act, which establishes an absolute presumption (*Hussein v. Canada* (M.C.I.), 2009 FC 759, [2009] F.C.J. No. 930 (QL)), applied.

2. Did the immigration officer give the applicant the opportunity to respond to her allegations contained in the letter of November 11, 2008? If not, is this a reviewable error of law?

[38] Section 8.3 of Chapter ENF 18 indicates that the applicant must be given the opportunity to demonstrate that his or her position is not senior as described in section 16 of the Regulations or that he or she did not or could not exert significant influence on his or her government's decisions or policies. The applicant submitted that Chapter ENF 18 therefore sets out a rule of procedural fairness that the officer had to respect, and that he was never given the opportunity to respond to the officer's allegations.

[39] The respondent claimed that the principles of procedural fairness were respected in this case. The applicant knew that the officer was interested in the nature of his position and his duties within the Rwandan government because of the letters he had received (*Yahie,* at paragraph 29; *Holway,* at paragraph 43).

[40] The sequence of events was as follows: on November 11, 2008, the officer sent a letter to the applicant with accompanying reasons specifically indicating that she intended to refuse the application because he is inadmissible under paragraph 35(1)(*b*) of the Act. In this letter of November 11, the officer referred to an interview scheduled for November 25. The applicant had to have suspected the officer's concerns before November 11. In fact, it is evident in light of the requests for additional information that the officer was interested in the positions held by the applicant in Rwanda between 1990 and 1994. The applicant was informed of the reasons for his exclusion on November 11, and the letter mentioned that a meeting would be held on November 25, 2008, during which he would be given the opportunity to explain himself. In fact, the officer ended her letter of November 11 as follows: "an interview has been scheduled for you at this office at 12 noon on Tuesday 25 November 2008, to provide you with an opportunity to address my

concerns." The question then becomes whether the applicant was given the opportunity during the interview to demonstrate that his position was not senior.

[41] The officer's notes found in the Computer Assisted Immigration Processing System (CAIPS) and the applicant's affidavit show that the November 25 interview took place.

[42] These two documents also show that the applicant was given the opportunity to explain himself, but that he limited his explanations and questions to the year 1993-1994. He should have tried to explain his role within Minesupres between the years 1990 and 1993. He did not. The record shows that the applicant remained silent on his activities and role during the period between 1990 and 1993. During the interview, the officer indicated to the applicant that the fact that he left Minesupres in 1993 to become a consultant would likely not make a difference in the decision. In fact, the officer had in front of her a record that was clear, to say the least, with respect to the senior position the applicant held in Minesupres between 1990 and 1993 and the role of his immediate colleagues implicated in the Rwandan genocide. Thus, in the interview in which the officer's concerns were mentioned, the applicant had every opportunity to respond to the concerns raised by the officer. I reject the submission that the interview was one-sided.

[43] In short, I am of the opinion that the applicant was given the opportunity to respond to the officer's allegations contained in the November 11, 2008 letter during the interview of November 25, 2008.

3. Did the immigration officer commit an error of law by not giving the applicant the opportunity to rely on the exception set out in subsection 35(2) of the Act?

[44] Subsection 35(2) of the Act gives the applicant the opportunity to satisfy the Minister that his presence in Canada would not be detrimental to the national interest. Although the officer did not have any discretion to grant the applicant relief from subsection 35(2) of the Act (*Mahzooz v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 926, 120 A.C.W.S. (3d) 108, the applicant claimed that the officer should have informed him of this opportunity.

[45] The applicant added that in her letter of November 11, 2008, the officer cited the text of paragraph 35(1)(*b*) of the Act but failed to inform him of the content of subsection 35(2) of the Act. The applicant argued at the hearing that the officer, by referring to paragraph 35(1)(*b*) of the Act, should also have referred to subsection 35(2) of the Act and that this was a breach of procedural fairness and the rules of natural justice.

[46] The case law is consistent that there is no duty on an officer to inform the applicant of the possibility of making an application for exemption to the Minister (*Zaheri,* at paragraph 67; *Holway*, at paragraph 43).

[47] In *Parmar v. Canada (M.C.I.)*, (1997), 139 F.T.R. 203, 75 A.C.W.S. (3d) 923 at paragraph 36 and recently restated in *Johnson v. Canada (M.C.I.)*, 2008 FC 2, 163 A.C.W.S. (3d) 439 at paragraph 34, this Court noted that " . . . there is no requirement for notice of an officer's concerns where these arise directly from the Act and Regulations that the officer is bound to follow in his or her assessment of the applicant."

[48] I am of the opinion that there was no breach of the duty of fairness in this case.

[49] For these reasons, the application for judicial review is dismissed. The parties did not propose any question for certification and this application does not give rise to any.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question is certified.

"Richard Boivin"
Judge

Certified true translation
Janine Anderson, Translator

ANNEX A

Relevant Legislation

Immigration and Refugee Protection Act, S.C. 2001, c. 27:

Human or international rights violations **35.** (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	Atteinte aux droits humains ou internationaux **35.** (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act; or	b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la Loi sur les crimes contre l'humanité et les crimes de guerre;
Exception (2) Paragraphs (1)(b) and (c) do not apply in the case 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.	Exception (2) Les faits visés aux alinéas (1)b) et c) 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 and Refugee Protection Regulations, SOR/2002-227:

Application of par. 35(1)(b) of the Act	Application de l'alinéa 35(1)b) de la Loi
16. For the purposes of paragraph 35(1)(b) of the Act, a prescribed senior official in the service of a government is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position, and includes	**16.** Pour l'application de l'alinéa 35(1)b) de la Loi, occupent un poste de rang supérieur au sein d'une administration les personnes qui, du fait de leurs actuelles ou anciennes fonctions, sont ou étaient en mesure d'influencer sensiblement l'exercice du pouvoir par leur gouvernement ou en tirent ou auraient pu en tirer certains avantages, notamment :
(a) heads of state or government;	a) le chef d'État ou le chef du gouvernement;
(b) members of the cabinet or governing council;	b) les membres du cabinet ou du conseil exécutif;
(c) senior advisors to persons described in paragraph (a) or (b);	c) les principaux conseillers des personnes visées aux alinéas a) et b);
(d) senior members of the public service;	d) les hauts fonctionnaires;
(e) senior members of the military and of the intelligence and internal security services;	e) les responsables des forces armées et des services de renseignement ou de sécurité intérieure;
(f) ambassadors and senior diplomatic officials; and	f) les ambassadeurs et les membres du service diplomatique de haut rang;
(g) members of the judiciary.	g) les juges.

Enforcement Manual ENF 18: War Crimes and Crimes Against Humanity:

8. Procedure: Establishing inadmissibility under A35(1)(b)

8.1. Designation of regimes
A person cannot be described in A35(1)(b) unless the government concerned has been designated by the Minister of PSEP as a regime that has been involved in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity* and *War Crimes Act.*

Note: For a listing of governments that have been designated, see http://www.cbsaasfc.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html#app4

The Modern War Crimes (RZTW) and the Intelligence Coordination Research (RZI) sections of the Canada Border Services Agency, NHQ, have the responsibility for researching the human rights records of regimes and providing a recommendation to the Minister that a particular government should be designated. This recommendation is provided in consultation with CIC's International Region and Foreign Affairs Canada. The following are among the factors that will be considered in deciding whether a regime should be designated:

• condemnation by other countries and organizations;

• the overall position of the Canadian government, including whether a refugee claim by a senior member of the government would undermine Canada's strong position on human rights;

• the nature of the human rights violations; and

• immigration concerns such as the number of persons coming from that specific country and whether there might be a concern for the protection of Canadian society.

8. Procédure : Établissement de l'interdiction de territoire en vertu de L 35(1)*b*)

8.1. Régimes désignés
Une personne ne peut être visée par L 35(1)*b*) sauf si le gouvernement concerné a été désigné par le ministre de la Sécurité publique et de la Protection civile en tant que régime s'étant livré au terrorisme, à des violations systématiques ou graves des droits humains, à un génocide, à des crimes de guerre ou à des crimes contre l'humanité au sens des paragraphes 6(3) à (5) de la *Loi sur les crimes contre l'humanité et les crimes de guerre.*

Note : Vous trouverez une liste des régimes désignés à l'adresse http: http://www.cbsaasfc.gc.ca/security-securite/wc-cg/wc-cg2006-fra.html#app4

L'Unité des crimes de guerre contemporains (RZTW) et l'Unité de coordination du renseignement et recherche (RZI) de l'Agence des services frontaliers du Canada (ASFC), à l'administration centrale (AC), ont la tâche d'examiner le dossier des régimes en matière de droits de la personne et de formuler une recommandation concernant la désignation d'un gouvernement à l'intention du ministre. Cette recommandation pourrait être établie en consultation avec la Région internationale de Citoyenneté et Immigration Canada (CIC) et Affaires étrangères Canada. Les facteurs suivants figurent parmi ceux qui sont examinés pour décider si un régime sera désigné :

• condamnation par d'autres pays et organisations;

• position globale du gouvernement du Canada, y compris la possibilité que la demande du statut de réfugié présentée par un haut fonctionnaire compromette la position ferme du Canada à l'égard des droits de la personne;

• la nature des violations des droits de la personne; et

Where visa offices have information that would support the designation of a particular regime based on the above requirements, they are invited to submit a request to RZTW.

• les préoccupations en matière d'immigration, notamment en ce qui a trait au nombre de personnes provenant d'un certain pays et à la possibilité que la société canadienne soit menacée.

Si les bureaux des visas ont des renseignements à l'appui de la désignation d'un régime particulier d'après les exigences qui précèdent, elles sont invitées à présenter une demande à RZTW.

8.2. Requirements to establish inadmissibility

Persons who are described in A35(1)(b) may be broken down into three categories, each with its own evidentiary requirements, as set out in the following table:

8.2. Critères pour établir l'interdiction de territoire

Les personnes décrites à L 35(1)*b*) peuvent être réparties en trois catégories, chacune avec ses preuves exigées, comme on le constate au tableau qui suit :

Category	**Evidence Required**	**Notes**
1. Persons described in R16(a), R16(b), R16(f) ambassadors only, and R16(g)	• Designation of regime • Proof of position held	A person in this group is presumed to be or to have been able to exert significant influence on the exercise of that government's power. This is a non-rebuttable presumption which has been upheld by the Federal Court of Appeal. In other words, the fact that a person is or was an official in this category is determinative of the allegation. Aside from the designation and proof that the person holds or held such a position, no further evidence is required to establish inadmissibility.
2. Persons described in R16(c), R16(d), R16(e), and R16(f) senior diplomatic officials	• Designation of regime • Proof of position held • Proof that position is senior (see the note following this table)	In addition to the evidence required, it must be established that the position the person holds or held is a senior one. In order to establish that the person's position was senior, the position should be related to the hierarchy in which the functionary operates. Copies of organization charts can be located from the *Europa World Year Book, Encyclopedia of the Third World, Country Reports on Human Rights Practices* (U.S. Department of State) and the Modern War Crimes System (MWCS) database. If it can be demonstrated that the position is in the top half of the organization, the position can be considered senior. This can be further established by evidence of the responsibilities attached to the position and the type

		of work actually done or the types of decisions made (if not by the applicant then by holders of similar positions).
3. Persons not described in R16	• Designation of regime • Proof that the person could exercise significant influence or was able to benefit from the position	In addition to the designation of the regime, it must be established that the person, although not holding a formal position, is or was able to exercise significant influence on the actions or policies of the regime or was able to benefit from the position. A person who assists in either promoting or sustaining a government designated by the Minister can be characterized as having significant influence over its policies or actions. The concept of significant influence is not limited to persons who made final decisions on behalf of the regime; it also applies to persons who assisted in the formulation of these policies, e.g., by providing advice, as well as persons responsible for carrying them out. If a person conducts activities which directly or indirectly allow the regime to implement its policies, the test for significant influence is met. The phrase "government power" in R16 is not limited to powers exercised by central agencies or departments but can also refer to entities that exercise power at the local level. Once it is established that the person exerted significant influence or benefited, the extent or degree of this influence or benefit is not relevant to the finding of inadmissibility; however, they are factors that could be considered by the Minister when deciding whether authorizing the person to enter Canada would not be detrimental to the national interest.

Catégorie	**Preuve requise**	**Remarques**
1. Personnes visées au R16*a*), *b*), *f)* (ambassadeurs seulement) et *g*)	• Régime désigné • Preuve du poste occupé	Une personne de ce groupe est présumée être capable ou avoir été capable d'exercer une influence importante sur l'exercice du pouvoir par ce gouvernement. C'est une présomption irréfutable maintenue par la Cour d'appel fédérale. En d'autres termes, le fait que la personne occupe ou occupait un poste supérieur de cette catégorie détermine la présomption. En plus de la désignation et de la preuve que la personne occupe ou occupait ce poste, aucune autre preuve n'est requise pour établir l'interdiction de territoire.
2. Personnes visées au	• Régime désigné	Outre la preuve nécessaire, on doit établir que le poste

R16*c*), *d*), *e*) et *f)* *(*diplomates de haut rang)	• Preuve du poste occupé • Preuve d'un poste de rang supérieur (voir la note à la fin du tableau)	est de rang supérieur. À cette fin, on doit situer le poste dans la hiérarchie où le fonctionnaire travaille. On peut trouver des exemplaires d'organigrammes dans des ouvrages comme *Europa World Year Book*, *Encyclopedia of the Third World*, *Country Reports on Human Rights Practices* (du département d'État des É.-U.) et les bases de données du Système des crimes de guerre contemporains (SCGC). Si l'on peut prouver que le poste est dans la moitié supérieure de l'organisation, on peut considérer qu'il est un poste de rang supérieur. Un autre moyen de l'établir est celui des preuves de responsabilités liées au poste et du type de travail effectué ou des types de décisions prises (à défaut d'être prises par le demandeur, par les titulaires de postes analogues).
3. Personnes non visées au R16	• Régime désigné • Preuve que la personne était en mesure d'influencer sensiblement l'exercice du pouvoir ou a pu tirer des avantages de son poste	En plus de la désignation du régime, on doit établir que la personne, même si elle n'occupait pas un poste officiel, est ou était en mesure d'influer sensiblement sur les actions et politiques du régime ou a pu en tirer certains avantages. La personne qui favorise ou qui soutient un gouvernement désigné par le ministre peut être considérée comme influant sensiblement les actes ou les politiques de ce gouvernement. La notion d'influence sensible ne se limite pas aux personnes prenant les décisions finales au nom du régime, mais s'applique aussi à celles qui ont participé à la formulation de ces politiques, par exemple par des conseils, ainsi qu'aux personnes chargées de les mettre en application. Si une personne exerce des activités qui permettent directement ou indirectement au régime de mettre en oeuvre ses politiques, la preuve d'une influence sensible est établie. Le terme «exercice du pouvoir par leur gouvernement» au R16 ne se limite pas aux pouvoirs exercés par les organismes centraux ou les ministères, mais peut également s'entendre des entités qui exercent le pouvoir à l'échelon local. Lorsqu'on a établi que la personne exerçait une influence sensible ou tirait certains avantages, l'ampleur ou la mesure de cette influence ou de ses avantages n'est pas pertinente pour l'établissement de l'interdiction de territoire; toutefois, certains facteurs doivent être pris en compte par le ministre pour décider si l'entrée de cette personne au Canada serait préjudiciable à l'intérêt national.

Note: There is no definition of "senior" in the *Immigration and Refugee Protection Act* and

Note : Il n'y a pas de définition de « supérieur » dans la *Loi sur l'immigration et la protection des*

no case law from the Federal Court. However, in considering this issue in relation to a military position, a tribunal of the Immigration Appeal Division determined that:

"A senior member of the military would be a person occupying a high position in the military and would be a person of more advanced standing and often of comparatively long service. Advanced standing would be reflected in the responsibilities given to the person and the positions occupied by the person's immediate superiors." [T99-14995, May 11, 2001]

8.3. Opportunity for person to be heard

If an officer is contemplating the refusal of a person under A35(1)(b), the applicant must be given an opportunity to demonstrate that their position is not senior as described in R16 (category 2) or that they did not or could not exert significant influence on their government's actions, decisions, or policies (category 3). This can be done by mail or by personal interview. In either case, the officer should provide the applicant with copies of all unclassified documents that will be considered in assessing admissibility.

8.4. Consultation with RZTW

Officers should be aware of the sensitive nature of A35(1)(b) and the need for careful and thorough consideration of all relevant information. It is not intended that officers should cast the net so widely that all employees of a designated regime are considered inadmissible.

Before considering the refusal of an applicant whose position is not listed in R16, officers are requested to consult with RZTW.

CIC officers must seek guidance from RZTW on these types of cases, if the officers believe that an applicant may be inadmissible pursuant

réfugiés et aucune jurisprudence de la Cour fédérale. Toutefois, en étudiant le problème relativement à un poste militaire, un tribunal de la Section d'appel de l'immigration concluait :

« Une personne de rang supérieur de l'armée serait une personne occupant un poste élevé dans les forces armées et une personne de rang plus avancé et souvent, avec des états de service comparativement longs. Une situation élevée se traduirait par les responsabilités données à cette personne et les postes occupés par les supérieurs immédiats de celles-ci. » [T99-14995, 11 mai 2001]

8.3. Occasion pour une personne d'être entendue

Si l'agent envisage de refuser une demande en vertu de L35(1)*b*), le demandeur doit avoir la possibilité de prouver qu'il n'occupe ou n'occupait pas des fonctions de rang élevé visées à l'article R16 (catégorie 2) et qu'il n'a pas ou ne pouvait pas influencer sensiblement les actions, décisions ou politiques de son gouvernement (catégorie 3). On peut le faire par la poste ou par interview personnelle. Dans l'un ou l'autre cas, l'agent doit fournir au demandeur des exemplaires des documents non protégés dont il sera tenu compte dans l'établissement de l'admissibilité.

8.4. Consultation de RZTW

Les agents doivent être conscients de la nature délicate de ce qui touche L 35(1)*b*) et de la nécessité d'une évaluation soignée et approfondie de tous les renseignements pertinents. L'intention n'est pas que les agents emploient des critères si généraux que tous les employés de régimes désignés soient considérés comme interdits de territoire.

Avant d'envisager le refus d'un demandeur dont le poste n'est pas visé au R 16, on demande aux agents de consulter RZTW.

Les agents de CIC doivent consulter RZTW s'ils croient que le demandeur pourait être interdit de

to A35(1)(b).

Note: In all refused cases, a copy of the refusal letter should be faxed to RZTW in order that a lookout can be placed in EII.

Note: For samples of refusal letters under A35(1)(b), refer to Appendix D.

territoire aux termes de L35(1)*b)*.

Note : Dans tous les cas de refus, on doit expédier par télécopieur un exemplaire de la lettre de refus à RZTW afin qu'un signalement soit placé à l'IRREL.

Note : On trouvera des exemples de lettres de refus en application de L 35(1)*b*) à l'Appendice D.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-361-09
STYLE OF CAUSE:	Alexis NDIBWAMI et al v. The Minister of Citizenship and Immigration
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 10, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	BOIVIN J.
DATED:	September 17, 2009

APPEARANCES:

Jacques Beauchemin	FOR THE APPLICANTS
Michel Pépin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jacques Beauchemin Counsel	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT