Federal Court Cour fédérale

Date: 20200520

Docket: IMM-3566-19

Citation: 2020 FC 631

Ottawa, Ontario, May 20, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

MEDHANIE AREGAWI WELDEMARIAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is an Ethiopian citizen and a former employee of the Information Network Security Agency [INSA], an Ethiopian state security and intelligence agency. The Immigration Division [ID] of the Immigration and Refugee Board of Canada [IRB] determined that this employment history made the applicant inadmissible to Canada on security grounds under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. More particularly, the ID found the applicant to be inadmissible because he had been a member of an

organization that had engaged in acts of espionage that were "contrary to Canada's interests," as provided for in paragraph 34(1)(a) of the *IRPA*.

[2] The applicant applies for judicial review of this decision under section 72(1) of the *IRPA*. He does not dispute that he was employed by INSA from 2009 until 2014, that INSA engaged in espionage, or that employment with INSA can constitute membership in an organization for purposes of paragraph 34(1)(f) of the *IRPA*. He contends, however, that the ID's determination that he is inadmissible on security grounds rests on an unreasonably broad interpretation of the phrase "contrary to Canada's interests" in paragraph 34(1)(a) of the *IRPA*.

[3] For the reasons that follow, I agree with the applicant. This application will therefore be allowed and the matter remitted to the ID for redetermination.

[4] The parties have jointly proposed a question for certification under paragraph 74(d) of the *IRPA*. As I will also explain below, while I would amend the wording of their proposed question slightly, I agree with the parties in substance that the question they propose should be certified.

II. BACKGROUND

[5] The applicant was born in Ethiopia in December 1986. Upon graduating in 2009 with a Bachelor of Science in Computer Science from Mekelle University, he was recruited to work as a software developer for INSA.

[6] INSA is an Ethiopian government agency accountable to the Prime Minister. Its mandate is to "protect the national interest" through safeguarding "the country's information and information infrastructures." According to the agency's website, its role is to build "National Cyber Power capable of protecting the national interest" and to provide "technical intelligence pertaining to [the] national interest so as to support decisions and actions of the government." Reports from civil society organizations indicate that, among other things, INSA plays an important role in monitoring the internet and filtering websites available in Ethiopia. Its mandate also includes the use of offensive cyber capabilities. Reports from civil society organizations have documented the targeting of members of the Ethiopian diaspora (especially journalists) with surveillance malware by the Ethiopian government. INSA is alleged to have been the Ethiopian agency engaged in at least some of this activity.

[7] According to the applicant, he worked on a single project while he was employed by INSA – the development of air defense simulation software to be used for training members of the military.

[8] The applicant worked at INSA until June or July 2014. He then left Ethiopia to study for a Masters of Science degree in Computer Science at Linköping University in Sweden from September 2014 until September 2016. He returned to Ethiopia after completing his studies.

[9] The applicant arrived at Toronto Pearson International Airport on February 4, 2017, and made a claim for refugee protection. He alleged that he was at risk of persecution by Ethiopian security forces, which had targeted him after he returned from Sweden.

[10] The applicant's refugee claim was held in abeyance while the Minister inquired into whether the applicant was inadmissible to Canada because of his employment with INSA. It was eventually suspended under section 103(1) of the *IRPA*.

[11] On July 27, 2017, a Canada Border Services Agency officer interviewed the applicant about his background and his employment with INSA. The applicant stated that the only project he worked on there was developing air defense simulation software. The officer asked the applicant about reports that INSA had used spyware to monitor members of the Ethiopian diaspora – especially journalists – and to suppress independent reporting and opposition to the Ethiopian government. The applicant said that he had no knowledge of such activities.

[12] On August 15, 2017, the officer issued a report under section 44(1) of the *IRPA* stating the opinion that the applicant is inadmissible to Canada under paragraph 34(1)(f) of the *IRPA*. Specifically, the report stated that the applicant had been a member of INSA and "INSA is an organization that there are reasonable grounds to believe engages, has engaged or will engage in an act of espionage that is against Canada or that is contrary to Canada's interests," as referred to in paragraph 34(1)(a) of the *IRPA*. The officer also wrote a detailed case review recommending referral to the ID for an admissibility hearing.

[13] The case review included information concerning alleged targeting of Ethiopian journalists with cyber attacks in December 2013 and again in November and December 2014.

[14] Spyware known as Remote Control System [RCS], which is produced by Hacking Team, a company based in Italy, had been sent to journalists working for Ethiopian Satellite Television & Radio (commonly known as ESAT). Founded in 2010, ESAT is an independent satellite television, radio and online news media outlet run by members of the Ethiopian diaspora. It often reports critically on the Ethiopian government and on conditions in Ethiopia. According to an IRB Response to Information Request [RIR] dated April 1, 2016, its headquarters are in Amsterdam but it also has branches in Washington, DC, and London, England. This same RIR stated that while there are ESAT support groups across Canada, there was no indication at that time that any ESAT reporters lived in Canada.

[15] In these attacks, spyware was hidden in innocent-looking attachments to email messages sent to ESAT employees. One of these employees was in Belgium at the time; the others were in the United States. Once it infects an electronic device like a computer, RCS is said to be capable of retrieving data from the computer, monitoring use of the computer (including Skype conversations), recording passwords, and even turning on the computer's camera and microphone. It does not appear that any of the targeting attempts were successful. There was evidence linking the attempts to the Ethiopian government (including leaked correspondence between Hacking Team and its client in Ethiopia after reports of the cyber attacks on ESAT had been made public). There was also circumstantial evidence linking these attacks to INSA in particular.

[16] An Enforcement Supervisor concurred with the officer's recommendation and referred the applicant for an admissibility hearing before the ID under section 44(2) of the *IRPA*.

[17] The ID hearing took place on March 11, 2019.

[18] Documentation before the ID included substantial evidence of Ethiopia's persecution of opposition journalists and its targeting of ESAT in particular but the Minister relied only on the 2013 and 2014 cyber attacks directed at ESAT employees as the foundation for the applicant's inadmissibility.

[19] For reasons dated May 17, 2019, the ID found the applicant to be inadmissible to Canada under paragraph 34(1)(f) of the *IRPA* and issued a deportation order.

III. DECISION UNDER REVIEW

[20] The burden rested on the Minister to establish that there are reasonable grounds to believe that the applicant is inadmissible. As the Supreme Court of Canada explained in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, the "reasonable grounds to believe" standard "requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities [citations omitted]." "In essence," the Court continued, "reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information" (at para 114).

[21] No issue is taken with the ID's understanding of the burden or the standard of proof.

[22] At the ID hearing, the applicant conceded that his employment with INSA is sufficient to constitute "membership in an organization" for purposes of paragraph 34(1)(f) of the *IRPA*.

Consequently, the determinative issues were whether the activities of INSA in question constituted espionage and, if so, whether they were contrary to Canada's interests.

[23] The ID found that there were reasonable grounds to believe that INSA had targeted Ethiopian journalists and political dissidents outside Ethiopia with RCS spyware in 2013 and 2014 (as described above in paragraphs 14 and 15). The ID also found that this activity constituted "espionage" within the meaning of paragraph 34(1)(a) in so far as it was a covert attempt to gather information, relying on *Qu v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 71 at para 48, and *Peer v Canada (Citizenship and Immigration)*, 2010 FC 752 at paras 30-37 (aff'd *Peer v Canada (Citizenship and Immigration)*, 2011 FCA 91). These findings are not contested on this application.

[24] As already noted, only the ID's determination with respect to whether these activities were contrary to the interests of Canada is in issue here.

[25] The ID concluded that INSA's acts of espionage against ESAT were "contrary to Canada's interests" for two reasons. One is that the acts of espionage were directed "against nationals of countries allied to Canada." (Minister's counsel had argued that INSA engaged in cyber espionage "specifically involving individuals who are our allies and living within those countries." This was the sole basis upon which the Minister had contended at the ID hearing that the actions of INSA were "contrary to Canada's interests.")

[26] The ID articulated the second reason for finding that INSA's acts of espionage were contrary to Canada's interests as follows:

> These individuals were members of a media organization that is active in many countries, including Canada. The fundamental freedoms [of] opinion and expression, including freedom of the press and other media of communication are a cornerstone of the *Canadian Charter of Rights and Freedoms*. As such, I am satisfied that the acts of espionage engaged in by the INSA against members of ESAT are contrary to Canada's interests.

[27] The ID derived this understanding of what it means to be contrary to Canada's interests in part from *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559. Counsel for the Minister had not advanced this as a basis for engaging paragraph 34(1)(a) of the *IRPA* but it is developed in the officer's case review.

[28] The ID therefore found that the applicant, having been a member of INSA, an organization that engages, has engaged or will engage in an act of espionage that is against Canada or that is contrary to Canada's interests, as provided for in paragraph 34(1)(a) of the *IRPA*, is inadmissible to Canada.

IV. STANDARD OF REVIEW

[29] The parties agree, as do I, that the ID's decision – including its determination on the central question of statutory interpretation – should be reviewed on a reasonableness standard.

[30] Under *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65, reasonableness is now the presumptive standard of review, subject to specific exceptions "only where required by

a clear indication of legislative intent or by the rule of law" (at para 10). In my view, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review here.

[31] I note that my colleague Justice Brown recently came to the same conclusion in *Crenna v Canada (Citizenship and Immigration)*, 2020 FC 491 at paras 62-65. This is another case turning on the interpretation of paragraph 34(1)(a) of the *IRPA* (in that case, by the Immigration Appeal Division). For the sake of completeness, I also note that this standard of review with respect to determinations under section 34(1) of the *IRPA* was well established pre-*Vavilov*: see *Okomaniuk v Canada (Citizenship and Immigration)*, 2013 FC 473 at para 19, and *Hadian v Canada (Citizenship and Immigration)*, 2016 FC 1182 at para 15.

[32] Reasonableness review "aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (*Vavilov* at para 82).

[33] The exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). Consequently, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96).

[34] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). While deferential review has never meant "blind reverence" for or "blind submission" to statutory decision makers (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 48; *Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 41), in *Vavilov* "the Court re-emphasized that judicial review considers not only the outcome, but also the justification for the result (where reasons are required)" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 29). An assessment of the reasonableness of the decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). The reasonableness standard is meant to ensure that "courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13).

[35] Where, as in the present case, reasons have been given, the inquiry into the reasonableness of the decision must begin there. The focus "must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). A reviewing court must conduct its inquiry into the reasonableness of the decision "by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84, internal quotation marks deleted). The reasons must be read in light of the record as a whole and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-94). They deserve "close attention" and must be read

"holistically and contextually, for the very purpose of understanding the basis on which a decision was made" (*Vavilov* at para 97).

[36] This approach must also be followed when reasonableness is the applicable standard of review on a question of statutory interpretation (*Vavilov* at para 116). The reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct answer is (*ibid.*). Instead, "just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached" (*ibid.*).

[37] The "modern principle" of statutory interpretation is that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27 at para 21; *Bell ExpressVu Limited Partnership v Rex,* 2002 SCC 42 at para 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed 1983), at 87). Legislative intent "can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context" (*Vavilov* at para 118). While an interpretative exercise conducted by an administrative decision maker may look quite different from that of a court, both must apply the modern principle when interpreting statutory provisions (*Vavilov* at para 119). Thus, the administrative decision maker's task "is to interpret the contested provision in a manner that is consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue" (*Vavilov* at para 121).

[38] It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Not every such omission will be fatal to the reasonableness of the interpretation the decision maker adopted. If, however, "it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances" (*Vavilov* at para 122). The critical question is "whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker" (*ibid.*).

V. ANALYSIS

[39] The applicant is alleged to be inadmissible to Canada under paragraph 34(1)(f) of the *IRPA* for having been a member of an organization – namely, INSA – for which there are reasonable grounds to believe it has engaged in espionage within the meaning of paragraph 34(1)(a) of the *IRPA*. As noted, it is the ID's understanding of the latter provision that is the determinative issue in this application.

[40] Paragraph 34(1)(a) of the *IRPA* provides as follows:

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:
(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;	**a)** être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;

… …

[41] For ease of expression, and since the specific acts of espionage relied on by the Minister occurred in the past, I will generally frame the discussion that follows in the past tense. This is on the understanding that the application of grounds of inadmissibility is not so limited: see section 33 of the *IRPA*.

[42] The text of paragraph 34(1)(a) stipulates two requirements for inadmissibility under that provision: (1) that the party in question engaged in an act of espionage; and (2) that this act of espionage was "against Canada" or was "contrary to Canada's interests." Since the applicant's alleged inadmissibility was based on membership under paragraph 34(1)(f), the party in question is, of course, INSA. As I have already noted, the applicant does not challenge the ID's finding that INSA's acts in issue constitute "espionage" for purposes of paragraph 34(1)(a). Since there is no suggestion that these acts were directed "against Canada," the determinative issue is the ID's understanding of what it means for an act of espionage to be "contrary to Canada's interests."

[43] Having regard to the text, context, and purpose of paragraph 34(1)(f) of the *IRPA*, in my view the ID's decision is unreasonable in the following three respects.

[44] First, the ID fails entirely to consider the history and purpose of the provision. That history demonstrates that it was introduced to constrain determinations of inadmissibility on grounds of having engaged in acts of espionage.

[45] The current paragraph 34(1)(a) came into force on June 19, 2013. The version it replaced read as follows:

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:
(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;	**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;
…	…

[46] With the amendment, engaging in acts of espionage and engaging in acts of subversion became distinct grounds of inadmissibility. (Acts of subversion are now dealt with under paragraph 34(1)(b).) As well, where previously both had to be directed against "a democratic government, institution or process as they are understood in Canada," now they are constrained by different requirements. An act of espionage must be directed against Canada or be contrary to Canada's interests. An act of subversion, on the other hand, can make one inadmissible if it is directed against "any government." A comparison of the texts of the current provisions with those they replaced demonstrates that while the scope of subversion as a ground of inadmissibility was expanded (it now suffices for the act of subversion to be directed against "any government" when previously it had to be directed against "a democratic government, institution or process as they are understood in Canada"), the scope of espionage as a ground of inadmissibility was narrowed (when previously it was sufficient if the act of espionage was

directed against "a democratic government, institution or process as they are understood in Canada," now it must be directed against Canada or be "contrary to Canada's interests").

[47] These changes to section 34(1) of the *IRPA* were part of Bill C-43. When the Bill received First Reading on September 24, 2012, the Honourable Jason Kenney (the Minister of Citizenship, Immigration, and Multiculturalism) explained the rationale for the change regarding espionage as follows:

> Allow me to review the provisions of the act. First, with respect to facilitating the admission of *bona fide* visitors and immigrants, the bill seeks to narrow the breadth of the inadmissibility provision for espionage to focus on activities carried out against Canada or that are contrary to the interests of Canada.
>
> Quite frankly, this has the effect of covering those who may have been involved in espionage for close democratic allies of Canada and who may in fact have been gathering intelligence on behalf of Canada against common security threats. We believe that the wording in the Immigration and Refugee Protection Act is unnecessarily broad and that we ought to focus the inadmissibility provision with respect to espionage on those who have been engaged in spying contrary to the interests of Canada.
>
> Canada, Parliament, *House of Commons Debates*, 41st Parl, 1st Sess, Vol 146, No 151 (24 September 2012), at page 10327 (emphasis added)

[48] Given the concern that the former wording of paragraph 34(1)(a) was too wide because it could capture the activities of "those who may have been involved in espionage for close democratic allies of Canada and who may in fact have been gathering intelligence on behalf of Canada against common security threats," it is noteworthy that a report prepared by Reporters Without Borders entitled *Enemies of the Internet 2014*, which the Minister provided to the ID, states the following about the activities of the National Security Agency (NSA) in the

United States and the Government Communications Headquarters (GCHQ) in the United Kingdom:

> The NSA and GCHQ have spied on the communications of millions of citizens including many journalists. They have knowingly introduced security flaws into devices and software used to transmit requests on the Internet. And they have hacked into the very heart of the Internet using programmes such as the NSA's Quantam [*sic*] Insert and GCHQ's Tempora. The Internet was a collective resource that the NSA and GCHQ turned into a weapon in the service of special interests, in the process flouting freedom of information, freedom of expression and the right to privacy.

[49] The report goes on to include the NSA, GCHQ and INSA on the same list of "security agencies that have gone far beyond their core duties by censoring or spying on journalists and other information providers."

[50] On the ID's understanding of the scope of paragraph 34(1)(a), the provision would appear to capture all of these activities – not only those engaged in by INSA but also those engaged in by the NSA or GCHQ. As a result, anyone who worked for any of these organizations (including the latter two, with which Canada cooperates closely on matters of national security) would be inadmissible for having engaged in espionage contrary to Canada's interests. The ID never considers whether its expansive interpretation of paragraph 34(1)(a) is consistent with Parliament's intent to narrow the scope of this ground of inadmissibility. This omission causes me to lose confidence in the outcome reached by the ID.

[51] Second, the ID's analysis rests on an equivocal use of the term "Canada's interests." The ID treats "Canada's interests" as equivalent to "things Canada is interested in" without

considering that there must be some actual nexus to Canada for paragraph 34(1)(a) to be engaged.

[52] For example, the ID states that "fundamental freedoms [of] opinion and expression, including freedom of the press and other media of communication are a cornerstone of the *Canadian Charter of Rights and Freedoms*." This is indisputable. However, the ID fails to explain how this is relevant to the actions of INSA.

[53] The *Charter* neither applies to INSA nor does it protect the journalists INSA targeted in 2013 and 2014. The ID does observe that ESAT is "active in Canada" but makes no findings concerning any impact INSA's actions may have had on these activities. Without at least some explanation of how those activities were affected, if at all, by INSA's targeting of individuals in other countries, this is too tenuous a basis to reasonably support a finding that INSA's actions were contrary to Canada's interests.

[54] The *Charter* firmly entrenches "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" in Canada (although even these fundamental freedoms are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"). Undoubtedly, Canada is "interested in" freedom of opinion and freedom of expression (including freedom of the press) not only domestically but also internationally in the sense of being "concerned about" or "committed to promoting and protecting" these freedoms everywhere. As well, its position on such matters internationally is presumably shaped, at least in part, by the values that underlie the *Charter* and

the democratic principles and practices to which Canada is committed. But even if all this is the case, an attempt by a party that is not subject to the *Charter* to limit the exercise of these freedoms by individuals who are outside Canada and who have no other connection to Canada cannot reasonably be said to be "contrary to Canada's interests" in the sense intended by paragraph 34(1)(a) of the *IRPA*. Put another way, the actions of INSA may very well be contrary to Canada's values but this alone does not entail that they are also contrary to Canada's interests in a way that engages paragraph 34(1)(a) of the *IRPA*. It was unreasonable for the ID to conclude otherwise.

[55] The ID's failure to consider the need for a nexus to Canada for paragraph 34(1)(a) to be engaged also led it to rely erroneously on *Agraira*.

[56] The member writes:

> While the case before me deals with inadmissibility pursuant to paragraph 34(1)(a) of the *IRPA*, rather than the relief provisions set forth in paragraph 42.1, I find that the principles set out by the Supreme Court of Canada (SCC) in *Agraira* [footnote omitted] with regard to the meaning of the expression "contrary to the national interest" are helpful in defining "Canada's interests" for the purpose of assessing inadmissibility under paragraph 34(1)(a).

[57] The member then quotes at length from paragraph 65 of *Agraira*, including the following:

> There is no dispute between the parties that the term "national interest" refers to matters which are of concern to Canada and to Canadians. There is no doubt that public safety and national security are matters which are of concern to Canada and to Canadians. It is equally clear, however, that more than just public safety and national security are of concern to Canada and to Canadians. For example, the plain meaning of the term "national interest" would also include the preservation of the values that underlie the *Canadian Charter of Rights and Freedoms* and the

> democratic character of the Canadian federation, and in particular the protection of the equal rights of every person to whom its laws and its Constitution apply. The plain words of the provision therefore favour a broader reading of the term "national interest" than the one suggested by the respondent and by the Federal Court of Appeal, which would limit its meaning to the protection of public safety and national security.

[58] As noted, the member considered this "helpful" in defining "Canada's interests" for the purpose of assessing inadmissibility under paragraph 34(1)(a). Even if one sets aside the question of whether it is appropriate to interpret a test serving one purpose – namely, to determine inadmissibility – by using another test that serves an entirely different purpose – namely, whether to exempt someone from a ground of inadmissibility – the ID's reliance on *Agraira* is misplaced.

[59] Contrary to what the ID suggests, *Agraira* concerned the interpretation of section 34(2) of the *IRPA*, not section 42.1. Section 34(2) was repealed and replaced by section 42.1 as part of Bill C-43. I point this out because there is an instructive difference in the wording of the two provisions.

[60] In simple terms, section 42.1 frames the test for Ministerial relief from certain grounds of inadmissibility (including section 34) as whether a foreign national can satisfy the Minister that it is "not contrary to the national interest" to declare that the foreign national is not inadmissible for that reason.

[61] Section 34(2), on the other hand, was framed with specific reference to the person's presence in Canada. It stated:

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.	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.

[62] The two provisions arguably raise the same question – section 42.1 more abstractly, section 34(2) more concretely – because, other things being equal, for a person to be not inadmissible is for that person to be permitted to be present in Canada. It is against the backdrop of this nexus to Canada – in the plain wording of section 34(2), through a person's presence in the country – that one must understand the Court's reference in *Agraira* to "the values that underlie the *Canadian Charter of Rights and Freedoms* and the democratic character of the Canadian federation, and in particular the protection of the equal rights of every person to whom its laws and its Constitution apply" (at para 65). Doing so demonstrates that the Supreme Court of Canada did not make the elementary error of giving Canadian law in general, or the *Charter* in particular, extraterritorial effect: see *R v Terry*, [1996] 2 SCR 207 at paras 14-20, and *R v Hape*, [2007] 2 SCR 292, 2007 SCC 26, at paras 48-49. On the other hand, it is much less clear that the ID did not make this error (even ignoring the fact that the *Charter* does not apply to INSA in any event).

[63] In my view, the ID's reliance on *Agraira* in the present case is simply question-begging given the absence of any nexus between INSA's espionage activities and Canada. In contrast, an example of such a nexus may be found in *Karaboneye v Canada (Public Safety and Emergency Preparedness)*, 2014 CanLII 99224 (CA IRB), another decision of the ID.

[64] The ID member does not mention *Karaboneye* in her reasons but it is discussed at some length in the officer's case review as providing support for the conclusion that the applicant is inadmissible under paragraph 34(1)(a) (although the officer refers to it incorrectly as a decision of this Court). A copy of the decision was also included in the Minister's brief of documents.

[65] Ms. Karaboneye was found inadmissible to Canada for having engaged in an act of espionage that was contrary to Canada's interests. She was a national of Rwanda who had come to Canada to study. The particular act of espionage on which the finding of inadmissibility was based was gathering information in Canada on behalf of the Rwandan Patriotic Front regarding another Rwandan woman who was a student at Laval University in Quebec City. Obviously, there is no such nexus to Canada in the present case. Notably, in *Karaboneye*, the ID relied expressly on paragraph 65 of *Agraira* in determining that the act of espionage in issue there was contrary to Canada's interests. This makes sense given that the woman on whom Ms. Karaboneye was spying was entitled to the protections of Canadian law while she was in Canada. Even if *Agraira* could be instructive in the circumstances of that case, the circumstances of the present case are entirely different.

[66] Finally in this regard, the Citizenship and Immigration Canada [CIC] Operational Manual ENF2/OP 18 – Evaluating Inadmissibility, states the following:

> Espionage "against Canada" means espionage activities conducted by a foreign state or organization in Canada and/or abroad against any Canadian public or private sector entity on behalf of a foreign government. It may also include activities of a foreign non-state organization against the Government of Canada, but does not include acts of industrial spying between private entities where no government is involved.

> The following is a non-exhaustive list of activities that may constitute espionage that is "contrary to Canada's interests":
>
> - Espionage activity committed inside or outside Canada that would have a negative impact on the safety, security or prosperity of Canada. Prosperity of Canada includes but is not limited to the following factors: financial, economic, social, and cultural.
>
> - The espionage activity does not need to be against the state. It could be against Canadian commercial or other private interests.
>
> - The use of Canadian territory to carry out espionage activities may be contrary to Canada's national security and public safety and therefore contrary to Canada's interests.
>
> - Espionage activity directed against Canada's allies may also be contrary to Canada's interests.
>
> *Note: These guidelines are intended to be dynamic as the concept of what is contrary to Canada's interests may evolve or change over time.*

[67] The ID notes that the parties both relied on this part of the manual but does not otherwise discuss it. I will address the last of the bullet points below. What the ID fails to appreciate with respect to the other three is that they are helpful illustrations of circumstances with a specific nexus to Canada apart from being things in which Canada simply takes an interest. At the very least, these examples should have called for a closer examination by the ID of the expansive view it adopted of what is contrary to Canada's interests. Once again, the failure to do so causes me to lose confidence in the outcome reached by the ID.

[68] Third, the ID fails to explain the nexus between the actions of INSA in question and Canada's national security.

[69] I respectfully adopt the reasoning of my colleague Justice Grammond in *Mason v Canada (Citizenship and Immigration)*, 2019 FC 1251, where he concluded that a nexus with national security is required to bring a matter within the scope of section 34(1) of the *IRPA*. (The specific issue in *Mason* was the scope of paragraph 34(1)(e) of the *IRPA*.) If anything else is needed to demonstrate this, I would simply note that the Legislative Summary of Bill C-43 produced by the Library of Parliament (Publication No. 41-1-C43E – 30 July 2012/Revised 3 October 2012), describes section 34 of the *IRPA* as making "a person inadmissible to Canada for reasons of national security" (at p. 3). One might have thought this much was obvious given the types of acts listed under section 34(1) and given that the provision has always had the heading "Security."

[70] The sole nexus the ID found to Canada's security was that INSA had "engaged in espionage against nationals of countries allied to Canada."

[71] I am unable to discern the evidence in the record that establishes that the individuals targeted by INSA in December 2013 or in November and December 2014 were nationals of the United States or Belgium, as opposed to residents of those countries. One newspaper report from February 12, 2014, describes some of "the targets of recent cyber attacks" as having been US citizens and others as having "lived in the United States or other Western countries for years." The article discusses several different cyber attacks and it is unclear which is the case for the two targets of the December 2013 cyber attacks in particular (which were the only ones of those that the Minister relied on here that had occurred when the article was written). With respect to the cyber attacks in November and December 2014, the report from The Citizen Lab

that documents them speaks only of “US-based Ethiopian journalists” as having been the targets. A July 12, 2015, newspaper report describes the targets of those attacks in the same terms. There does not appear to be any information in the record about their nationality apart from being Ethiopian. The respondent’s Memorandum of Fact and Law on this application refers to ESAT’s targets simply as “residents” of allied countries.

[72] In any event, even if the individuals who were targeted were nationals of their respective countries of residence, the ID offers no explanation of how a foreign agency targeting them for surveillance in another country engages Canada’s national security. While this could engage the national security interests of the countries in which they were resident, without further explanation, it does not follow from this that Canada’s national security interests are also engaged.

[73] The ID relies on the decision of Justice O’Reilly in *Sumaida v Canada (Citizenship and Immigration)*, 2018 FC 256, to support the conclusion that INSA’s actions were contrary to Canada’s interests. That application for judicial review concerned a decision that Mr. Sumaida was ineligible to submit an application for humanitarian and compassionate [H&C] relief under section 25(1) of the *IRPA* because he was found to be inadmissible under paragraph 34(1)(f) of the Act. Specifically, an officer with Citizenship and Immigration Canada had found that Mr. Sumaida had been a member of the Iraqi secret police (the Mukhabarat), an organization that engages in espionage contrary to Canada’s interests. Among other things, Mr. Sumaida had admitted to informing on opponents of Saddam Hussein while he was living in the United Kingdom. The officer rejected the H&C application because section 25(1) expressly

excludes anyone who is inadmissible under section 34 of the Act from seeking relief under it. The application for judicial review turned on the reasonableness of the finding of membership and the determination that the Mukhabarat engaged in espionage: see *Sumaida* at paras 7-9. The issue of whether Mr. Sumaida's espionage activities (or those of the Mukhabarat more generally) were contrary to Canada's interests does not appear to have been raised on judicial review and it was not addressed by Justice O'Reilly. Consequently, contrary to what the ID thought, this decision does not lend any support to its decision.

[74] As the CIC manual states, espionage activity directed against Canada's allies may also be contrary to Canada's interests. The targeting of an ally can easily be understood as engaging Canada's national security. But INSA was not targeting the United States or Belgium. It was targeting private individuals who were in the United States and Belgium. It is something else entirely to suggest that Canada's national security interests are engaged simply by the targeting of individuals who are nationals or residents of one of its allies, as opposed to the targeting of the ally itself. At the very least, a reasonable explanation of the nexus between this and Canada's national security interests must be provided for the decision to withstand review. None was provided here. As a result, the decision lacks justification, transparency, and intelligibility.

VI. CERTIFIED QUESTION

[75] The parties have jointly proposed the following question for certification under paragraph 74(d) of the *IRPA*:

> Is a person inadmissible to Canada pursuant to s. 34(1)(f) of the *Immigration and Refugee Protection Act* for being a member of an organization for which there are reasonable grounds to believe has

> engaged in, engages in, or will engage in acts of espionage that are "contrary to Canada's interests" within the meaning of s. 34(1)(a) of the Act if the organization's espionage activities take place outside Canada and target foreign nationals in a manner that is contrary to the democratic values of Canadian society and the *Canadian Charter of Rights and Freedoms*, including the fundamental freedoms guaranteed by section 2 of the *Charter*?

[76] Under paragraph 74(d) of the *IRPA*, an appeal may be brought to the Federal Court of Appeal in respect of a decision on an application for judicial review under that Act only if, in rendering judgment, the judge certifies that "a serious question of general importance is involved" and states the question. This prerequisite has been interpreted to mean that a question warrants certification only if it "is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance." Further, the question cannot be in the nature of a reference or turn on the unique facts of the case or the judge's reasons: see *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46; *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 16; and *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36.

[77] I agree with the parties in substance that their jointly proposed question meets the test for certification. I would amend the wording of their question slightly, in part to better capture the ID's reliance on paragraph 65 of *Agraira* and the fact that the ID invokes only section 2(b) of the *Charter* and not section 2 as a whole. Thus, I would state the serious question of general importance set out below.

VII. CONCLUSION

[78] For these reasons, the application for judicial review is allowed, the decision of the Immigration Division dated May 17, 2019, is set aside, and the matter is remitted to the Immigration Division for redetermination by a different decision maker.

[79] Pursuant to paragraph 74(d) of the *IRPA*, the following serious question of general importance is stated:

> Is a person inadmissible to Canada pursuant to paragraph 34(1)(f) of the *Immigration and Refugee Protection Act* for being a member of an organization with respect to which there are reasonable grounds to believe it has engaged in, engages in, or will engage in acts of espionage that are "contrary to Canada's interests" within the meaning of paragraph 34(1)(a) of the Act if the organization's espionage activities take place outside Canada and target foreign nationals in a manner that is contrary to the values that underlie the *Canadian Charter of Rights and Freedoms* and the democratic character of Canada, including the fundamental freedoms guaranteed by section 2(b) of the *Charter*?

JUDGMENT IN IMM-3566-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.

2. The decision of the Immigration Division dated May 17, 2019, is set aside and the matter is remitted for redetermination by a different decision maker.

3. The following serious question of general importance is stated pursuant to paragraph 74(d) of the *Immigration and Refugee Protection Act*:

> Is a person inadmissible to Canada pursuant to paragraph 34(1)(f) of the *Immigration and Refugee Protection Act* for being a member of an organization with respect to which there are reasonable grounds to believe it has engaged in, engages in, or will engage in acts of espionage that are "contrary to Canada's interests" within the meaning of paragraph 34(1)(a) of the Act if the organization's espionage activities take place outside Canada and target foreign nationals in a manner that is contrary to the values that underlie the *Canadian Charter of Rights and Freedoms* and the democratic character of Canada, including the fundamental freedoms guaranteed by section 2(b) of the *Charter*?

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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