Federal Court  Cour fédérale

Date: 20230313

Docket: IMM-8393-21

Citation: 2023 FC 307

Ottawa, Ontario, March 13, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

BASHIR FOUAD ABDELSALAM HARARA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Bashir Fouad Abdelsalam Harara [Applicant] seeks judicial review of the Immigration Division's [ID] November 8, 2021 decision finding the Applicant inadmissible to Canada for reasons of security pursuant to paragraphs 34(1)(b), (c), and (f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [Decision].

[2] The application for judicial review is dismissed.

II. Background

[3] The Applicant was born in Gaza, Palestine. In 1981, he graduated from medical school in Egypt. In or about October 1983, the Applicant began working as a doctor with the Palestinian Red Crescent Society [RCS] in Yemen. In 1986, he joined the Palestinian Liberation Army [PLA] for medical missions in Africa at the rank of captain. After several months, the Applicant resigned from the PLA and resumed his work with the RCS in Yemen. In 1990, the Applicant left the RCS and began working with the Yemeni Ministry of Health until 1993. In 1994, he registered with the PLA at his previous rank in order to return to Gaza. The Applicant subsequently joined the Palestinian Military Medical Services [MMS] of the Palestinian Authority [PA] until his retirement in April 2008 at the rank of Brigadier General. In July 2018, the Applicant departed Gaza and sought refugee protection in Canada.

[4] On August 6, 2019, a Canada Border Services Agency [CBSA] hearings officer [Officer] interviewed the Applicant regarding his admissibility to Canada. On October 15, 2019, the Officer issued a report pursuant to subsection 44(1) of *IRPA* stating that the Applicant was inadmissible to Canada under paragraph 34(1)(f) of *IRPA* for his membership in the Palestinian Liberation Organization [PLO]. Upon reviewing the report, the Minister of Public Safety and Emergency Preparedness [Minister] referred the matter to the ID for an admissibility hearing under subsection 44(2) of *IRPA*. The admissibility hearing was held on December 15, 2020.

III. The Decision

[5] On November 8, 2021, the ID found the Applicant inadmissible to Canada pursuant to paragraph 34(1)(f) of *IRPA* for acts described under paragraphs 34(1)(b) and (c) of *IRPA*. Namely, the ID found reasonable grounds to believe that the Applicant was a member of the PLO, an organization that engaged in terrorism and subversion by force of the governments of Jordan, Lebanon, and Israel. A summary of the ID's main findings are set forth below.

A. *Membership in the PLO*

[6] The ID reviewed the legal principles surrounding the term "member", noting that it is to be given a broad interpretation and could be established by "informal participation" or "membership by association" for the purpose of section 34 of *IRPA* (*TK v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 327 at para 98 [*TK*]). The ID applied the proposition that an applicant's acknowledgement of membership is sufficient to establish membership under this provision (*Saleh v Canada (Citizenship and Immigration)*, 2010 FC 303 at para 17 [*Saleh*]).

[7] The ID first found reasonable grounds to believe that the PLA is an internal organ of the PLO, as illustrated by the documentary evidence of both parties. The Applicant failed to establish any distinctions between the two entities. The ID then found reasonable grounds to believe that the Applicant was a member of the PLO in both 1986 and 1994 for the purposes of paragraph 34(1)(f) of *IRPA* based on the Applicant's admissions. During his interview with the CBSA Officer, the Applicant repeatedly acknowledged that he joined the PLO, first with the "medical services" in 1986, and then with "Palestinian national security" in 1994. The ID noted

that the Applicant's own testimony was that "the medical crews were part of the military administration". While the Applicant denied these statements before the ID, instead testifying that the "medical services" were part of the PLA, the ID found the Applicant's first testimony more credible and gave it more weight. The ID also reiterated that regardless of whether the "medical services" were affiliated with the PLA or the PLO, the PLA is an internal organ of the PLO and, accordingly, belonging in the PLA constituted membership in the PLO.

B. *Terrorism and Subversion*

[8] The ID found that the PLO is an "organization" for the purpose of section 34 of *IRPA* and that there were reasonable grounds to believe that the PLO, including its constituent organs and factions, engaged in terrorism. The documentary evidence illustrated that the organization engaged in numerous attacks that were intended to cause death or serious bodily injury to civilians, satisfying the definition of "terrorism" established in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (at para 98).

[9] The ID also found that there were reasonable grounds to believe that the PLO, including its constituent organs and factions, committed violent acts with the intention of overthrowing the governments of Jordan, Lebanon, and Israel. Accordingly, this satisfied the criteria of "subversion by force of any government" in paragraph 34(1)(b) of *IRPA.*

C. *Defense of Necessity*

[10] The ID found that the Applicant did not establish that he faced either clear and imminent peril, or had a lack of reasonable alternatives to joining the PLO (*R v Latimer*, 2001 SCC 1 at paras 29-31 [*Latimer*]; *Canada (Public Safety and Emergency Preparedness) v Aly*, 2018 FC 1140 at para 13 [*Aly*]; *Canada (Minister of Citizenship and Immigration) v Seifert*, 2007 FC 1165 at para 182 [*Seifert*]).

IV. Issues and Standard of Review

[11] After reviewing the parties' submissions, the issues are:

1. Was there a breach of procedural fairness?
2. Was the Decision reasonable?
    a. Did the ID err in concluding that the PLA is an internal organ of the PLO?
    b. Did the ID err in concluding that the Applicant was a member of the PLO?
    c. Did the ID err in concluding that the Applicant failed to establish the defense of necessity?

[12] The standard of review for issues of procedural fairness is essentially correctness (*Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 at para 54 [*CP Railway*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). The Court has no margin of appreciation or deference on questions of procedural fairness. Rather, when evaluating whether there has been a breach of procedural fairness, a reviewing court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances (*CP Railway* at para 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 837-41).

[13] The merits of the Decision are reviewable on the presumptive standard of reasonableness. This case does not engage one of the exceptions set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Therefore, the presumption of reasonableness is not rebutted (at paras 16-17).

[14] A reasonableness review requires the Court to consider both the outcome of the decision and the underlying rationale to assess whether the decision, as a whole, bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at paras 15, 99). The reviewing court must refrain from reweighing evidence before that decision-maker (*Vavilov* at para 125). A decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). The party challenging the decision bears the burden of showing that the decision is unreasonable (*Vavilov* at para 100).

V. Analysis

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

(1) Applicant's Position

[15] The interpretation at the ID hearing was not precise, continuous, competent, impartial, and contemporaneous (*Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at para 4 [*Mohammadian*]). It also fell below the requisite standard as set out in the Immigration and Refugee Board's Interpreter Handbook. These errors affected the Applicant's ability to answer questions that were material to the ID's findings. While the

Applicant raised these concerns at the ID hearing, it was not the Applicant's responsibility to safeguard his own right to procedural fairness.

[16] Further, the hearing was conducted under a hybrid language format that alternated between the use of the interpreter during parts of the hearing and the Applicant's testimony in English at other times. This lack of uniformity impeded the Applicant's ability to advance evidence. The Applicant cites six excerpts in support of this position.

(2) Respondent's Position

[17] The Applicant has failed to provide any evidence of a translation error that undermines the linguistic understanding between the parties and the ID, particularly given his admitted "reasonable English ability". Further, the Applicant does not indicate where any alleged translation error resulted in the ID making an erroneous finding of a material nature. Contrary to the Applicant's assertion, he did not directly raise any interpretation issues before the ID, such that there could have been a change of interpreter or a translation audit.

[18] Further, the excerpts cited by the Applicant do not demonstrate an actual translation error as it relates to what he said in Arabic and what was provided by the interpreter in English. Again, the Applicant has failed to show that there was any failure of linguistic understanding or that there was any issue that resulted in a material error in the Decision.

(3) Conclusion

[19] I find that the Applicant has not provided sufficient evidence that the translation was not "precise, continuous, competent, impartial and contemporaneous" (*Mohammadian* at para 4). Accordingly, the Applicant has not demonstrated a breach of procedural fairness.

[20] Having reviewed the Applicant's submissions, I agree with the Respondent that he does not advance any actual translation error or failure of linguistic understanding. If the Applicant claims that the interpreter did not properly translate his responses, he should have raised this concern earlier and explained that there were misunderstandings between the Applicant and the interpreter (*Mohammadian* at para 13). Further, the excerpts highlighted by the Applicant indicate that the Applicant answered most questions in English, illustrating that he understood the questions being posed to him. In other words, the excerpts simply demonstrate that there was a "hybrid" process employed, based on the Applicant's own approach, not that there were any misunderstandings or errors in translation.

[21] The excerpts also indicate that it was the ID who intervened multiple times to ensure the adequacy of the interpretation. The ID repeatedly suggested that it would be to the Applicant's benefit to respond only in Arabic, illustrating that the ID attempted to protect the Applicant's right to procedural fairness. Despite this suggestion, the Applicant continued to speak English.

B. *Was the Decision reasonable?*

[22] For the reasons that follow, I conclude that the Decision was reasonable.

(1) Did the ID err in concluding that the PLA is an internal organ of the PLO?

(a) *Applicant's Position*

[23] The ID did not exercise caution in equating one part of an organization with the PLO as a whole (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 30). Namely, the ID only considered whether the PLA was a separate organization from the PLO, and failed to consider the evidence regarding the Applicant's membership in the RCS and the MMS, which are separate organizations. While the Applicant was required to register with the PLA to work for the RCS and the MMS, this was insufficient to find that the Applicant was a member of the PLO. In arriving at this conclusion, the ID interpreted the term "member" under paragraph 34(1)(f) of *IRPA* in an overbroad manner.

(b) *Respondent's Position*

[24] The ID reasonably concluded that the PLA is the PLO's military branch, and accordingly, an internal organ of the PLO. The Applicant's own evidence was that the MMS was part of the PLA. While the Applicant referenced an article in support of the independent nature of the MMS within Palestine's health care system, there is no mention of its independent nature within the PLA.

[25] The onus rests on the Applicant to objectively establish "the existence of the faction, its distinct identity and its operations" from the organization (*Nassereddine v Canada (Citizenship and Immigration)*, 2014 FC 85 at para 44 [*Nassereddine*]). The Applicant failed to meet this

onus in demonstrating that the PLA, or its MMS, is separate from the PLO. The Applicant's employment with the RCS was not relevant to the ID's determination.

(c) *Conclusion*

[26] Section 33 of *IRPA* requires only "reasonable grounds to believe" that circumstances giving rise to inadmissibility are present.

[27] The ID analyzed the Applicant's time with the MMS. In addition to the Applicant's initial statement to the CBSA Officer that he joined the PLO to work for the "medical crews", the transcript of the ID hearing also illustrates that the Applicant stated that he was "[p]art of the MMS, which is a part of the PLA." As noted by the Respondent, the article submitted by the Applicant did not mention the independent nature of the MMS within the PLA. Rather, the article referred to the MMS as an "independent body" to the health care system. Having found that the PLA is the military branch of the PLO, it was reasonable for the ID to similarly find that the Applicant's involvement with the MMS, a part of the PLA, constituted membership in the PLO.

[28] As for the Applicant's submissions concerning the RCS, I agree with the Respondent that the ID noted that the Applicant "consistently distinguished the [RCS] from the 'medical services' group he also joined, and the Minister has not argued that his involvement with the [RCS] constituted membership in the PLO." I see no error in the ID's approach, and I agree with the Respondent that the Applicant's association or involvement with the RCS has no bearing on the overall assessment of whether the Applicant was a member of the PLO.

(2) Did the ID err in concluding that the Applicant was a member of the PLO?

(a) *Applicant's Position*

[29] The term "member" must have some meaning and restriction (*TK* at para 117). Namely, the ID unreasonably applied *Saleh* by relying only on the Applicant's admission of membership to conclude that he was a member of the PLO. The Applicant contested his admission of membership in the PLO, as he worked as a doctor under the separate organizations of the RCS and the MMS. Where the issue is contested, the criteria of membership must be applied (*TK* at para 105). Concerns over the Applicant's credibility do not amount to evidence of membership (*Krishnamoorthy v Canada (Citizenship and Immigration)*, 2011 FC 1342 at para 30 [*Krishnamoorthy*]).

[30] Had the ID applied the appropriate criteria of membership, it would have found insufficient evidence to conclude that the Applicant is a member of the PLO. Rather, his work as a doctor with the RCS and MMS was humanitarian, which stands in stark contrast to the terrorist objectives of the PLO.

(b) *Respondent's Position*

[31] The concept of membership under paragraph 34(1)(f) of *IRPA* is to be broadly interpreted. There is no particular test for membership, though the Court has outlined factors for consideration, such as an individual's nature of involvement with, and the length of time associated to, an organization.

[32] The ID is entitled to weigh the evidence, assess credibility, and prefer the documentary evidence over the individual's testimony in admissibility proceedings (*Gebreab v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1213 at para 32 [*Gebreab*]; *Intisar v Canada (Citizenship and Immigration)*, 2018 FC 1128 at paras 22-23 [*Intisar*]; *Nassereddine* at paras 43-44).

[33] Further, the standard of proof in admissibility proceedings is relatively low (*Ugbazghi v Canada (Citizenship and Immigration)*, 2008 FC 694 at para 47). Those who meet this test may still seek Ministerial relief pursuant to section 42.1 of *IRPA*.

[34] It is unnecessary to apply membership criteria where membership was acknowledged, as occurred in this case. *Krishnamoorthy* is distinguishable because it involved minor inconsistencies in the applicant's statements (at paras 9, 30). Here, the Applicant's admission constituted the central question before the ID.

[35] As noted above, the Applicant's submissions respecting the RCS are neither applicable nor determinative to any issue.

[36] Finally, the Applicant does not take issue with the ID's finding that the PLO is an organization that has engaged in terrorism and subversion.

(c) *Conclusion*

[37] Recent jurisprudence, including *Intisar*, states that "the jurisprudential guidance surrounding the criteria to be taken into account, in assessing whether a person is a member of an organization, applies to circumstances where the person has not admitted to membership" (at para 23, emphasis added; *Nassereddine* at paras 57-59).

[38] In the case at bar, the Applicant admitted his membership in both the PLA and the PLO during the CBSA interview. As stated in *Gebreab*:

> [32] …It is fully within the Board's discretion in admissibility hearings to admit and weigh evidence (*Sittampalam*, above, at paras. 45-49). After considering the evidence on the EPRP over the relevant time period, the Board concluded that "the EPRP was a single, continuously-existent political organization from the [1970s] through the time of your membership in the 1980s and beyond". Having reached this finding, it follows that Mr. Gebreab, an admitted member of the organization, was a member of an organization that there are reasonable grounds to believe has engaged in acts of terrorism referred to in s. 34(1)(b) and (c) of *IRPA*.
>
> [Emphasis added.]

[39] If the ID found a discrepancy in the Applicant's testimony during the admissibility hearing, it is fully within their discretion to assign greater weight to the Applicant's prior CBSA interview.

[40] The jurisprudence also establishes that membership does not require active participation. Rather "if one is a 'member' then he or she is a 'member' for the purposes of paragraph 34(1)(f) with all of the implications that that membership carries with it and with relief, if warranted, lying in the discretion of a Minister of the Crown under subsection 34(2) of IRPA and not in the discretion of Immigration Officers or this Court" (*Saleh* at para 19).

[41] In summary, in light of this Court's jurisprudence and the record, I find that the ID's conclusion that the Applicant was a member of the PLO reasonable.

(3) Did the ID err in concluding that the Applicant failed to establish the defense of necessity?

(a) *Applicant's Position*

[42] The ID erred in its analysis of a clear and imminent peril by importing a narrow definition of genuine danger that required an immediate bodily threat to oneself and immediate acute suffering. The ID should have applied the expanded meaning of imminent peril, as the former requirement violates the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*] (*R v Ruzic*, 2001 SCC 24 at paras 86, 90 [*Ruzic*]).

[43] The ID also failed to apply the modified objective test to the first two elements of the necessity defense. As a result, the ID did not consider the Applicant's personal experience and perception of the surrounding facts. Namely, the ID showed no sensitivity to the PLO being an umbrella organization that touches on every aspect of life for Palestinian citizens or that the Applicant's career as a doctor to support his family was required to unfold within the constraints of this umbrella organization. Rather, the ID analyzed the situation from the perspective of a Canadian citizen.

[44] Lastly, the ID erred in relying on *Seifert* to conclude that an alternative economic objective is incompatible with the defense of necessity, as the facts of that case are distinct from

the case at bar (at para 182). In the context of a reasonable legal alternative, courts have considered economic factors, including an applicant's lack of work authorization and the likelihood of finding employment elsewhere, in affirming the defense of necessity (*Aly*).

(b) *Respondent's Position*

[45] The Applicant's submissions are without merit and the ID's findings were reasonable. The ID's analysis is not deficient simply because it does not cite the jurisprudence to the extent that the Applicant feels necessary. The Applicant essentially asks this Court to reweigh the evidence. The ID recognized the Applicant's evidence related to his alleged impoverishment, but did not find it persuasive. The Applicant did not provide a sufficient explanation as to why he was unable to seek out alternate employment from the PLA as a physician or otherwise. It was not for the ID to fill in the blanks.

(c) *Conclusion*

[46] I see no error in the ID's analysis. The Applicant failed to satisfy the ID why he could not have searched for other employment at the time he enrolled in the PLO. For instance, he provided no explanation as to why he would been unable to return to Yemen if he refused to join the PLA in Tunisia. Further, he did not describe the threat he would have faced had he refused to join the PLO. For these reasons, the ID found that the Applicant did not join the PLO out of necessity (*Latimer*).

[47] While the Applicant relies on *Aly*, it is distinguishable from the case at hand in that the respondent demonstrated that he faced imminent peril of being returned to Egypt, where he feared detention, arrest, and torture (at paras 14, 37). The same cannot be said here.

[48] The Applicant further relies on *Ruzic* to submit that limiting the requirement to show immediate threats of death or bodily harm as a defense of necessity violates the *Charter*, given that the Supreme Court of Canada found just that as it relates to the defence of duress. In reviewing the inter-relatedness of the modified objective standards of the defences of necessity and duress, the Supreme Court of Canada in *R v Wong*, 2018 SCC 25 [*Wong*] recently stated the following:

> [88] In *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3 (S.C.C.), at para. 32, the Court applied a modified objective test to elements of the defence of necessity. It described the standard as one that "involves an objective evaluation, but ... takes into account the situation and characteristics of the particular accused person" (para. 32). A similar standard has been applied in relation to the defence of duress: in *R. v. Ruzic* (S.C.C.), at para. 61, the Court drew on *Latimer* and applied an "objective-subjective standard" to assess the gravity of threats in respect of that defence. It explained that in applying this standard, "courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics" (para. 61).

[49] However, *Ruzic* can be distinguished from the present matter because the ID was not faced with any evidence of harm, imminent or otherwise. Further, *Latimer* and *Wong* instruct that one must undertake an objective evaluation while taking into account the situation and circumstances of the person in question. In the present matter, the ID’s reasons demonstrate that it did just that.

[50] For these reasons, the ID's finding that the Applicant failed to establish a defense of necessity was reasonable.

VI. Conclusion

[51] The application for judicial review is dismissed. The ID did not breach the Applicant's right to procedural fairness and the Decision was reasonable.

[52] The parties did not raise a question for certification and I agree that none arises.

JUDGMENT in IMM-8393-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8393-21
STYLE OF CAUSE:	BASHIR FOUAD ABDELSALAM HARARA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 30, 2022
JUDGMENT AND REASONS:	FAVEL J.
DATED:	MARCH 13, 2023

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