Federal Court  Cour fédérale

Date: 20240306

Docket: IMM-4861-22

Citation: 2024 FC 376

Vancouver, British Columbia, March 6, 2024

PRESENT: Mr. Justice Gascon

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

YASSIN HAJIHASSEN HEMED

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The respondent, Mr. Yassin Hajihassen Hemed, admits he was a member of the Eritrean Liberation Front – Revolutionary Council [ELF-RC] for a short time in 1999–2000. In a decision issued on May 10, 2022 [Decision], the Immigration Appeal Division [IAD] confirmed the Immigration Division [ID]'s earlier finding that Mr. Hemed was not inadmissible to Canada under paragraphs 34(1)(b) and 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. These provisions state that a foreign national is inadmissible on security grounds

for being a member of an organization for which there are reasonable grounds to believe that it engages in or instigates the subversion by force of any government. The IAD determined that there was insufficient evidence establishing reasonable grounds to believe that the ELF-RC engaged in or instigated the subversion by force of a government.

[2] The applicant, the Minister of Public Safety and Emergency Preparedness [Minister], seeks judicial review of the IAD's Decision. The Minister argues that the IAD erred by interpreting paragraphs 34(1)(b) and 34(1)(f) of the IRPA too narrowly. The Minister asserts that the ELF-RC is a member-group of the Eritrean Democratic Alliance [EDA]/Eritrean National Alliance [ENA], a coalition of organizations opposed to the current regime in Eritrea. Other member-groups of this alliance have engaged in or instigated subversion by force and, therefore, the ELF-RC can accordingly be named as an organization described at paragraph 34(1)(b) of the IRPA.

[3] For the following reasons, this application for judicial review will be dismissed. I find that the evidence on the record, or lack thereof, supports the IAD's conclusion that there are no reasonable grounds to believe that the ELF-RC engages in or instigates subversion by force of the government of Eritrea. I am unable to conclude that the IAD's Decision was not responsive to the evidence nor that it relied on an unreasonable interpretation of paragraphs 34(1)(b) or 34(1)(f) of the IRPA. There are no reasons justifying the Court's intervention.

II. Background

A. *The factual context*

[4] In 1962, Ethiopia annexed Eritrea. Organizations committed to Eritrean independence then formed. One of these groups is the Eritrean Liberation Front [ELF], which engaged in armed action and subversion by force against the Ethiopian government.

[5] Over the years, the ELF splintered into several organizations committed to Eritrean independence, but with different views on how to achieve this goal. Two of these organizations include the Eritrean Peoples Liberation Front [EPLF] and the ELF-RC. Mr. Hemed admits he was a member of the ELF-RC in 1999-2000.

[6] The various splinter groups were involved in conflicts and fights against each other. The ELF-RC allied itself with other organizations including the EPLF. The ELF-RC specifically engaged in violent acts in 1977 against another splinter group. Following decades of war, Eritrea achieved independence in 1993. President Afwerki of the EPLF assumed the presidency of Eritrea and remains president to this day.

[7] In 1999, organizations including the ELF-RC united as opposition to the current regime under a coalition known as the Alliance of Eritrean National Forces [AENF], which became the ENA, and eventually the EDA. Over the years, the alliance of organizations grew in sophistication and expanded. Other member-groups of this opposition alliance include the Red Sea Afar Democratic Organization and the Eritrean National Salvation Front. These two groups are known to have engaged in attacks against the Eritrean government over the past 20 years.

[8] In July 2020, the ID issued its decision and reasons following two hearings held in 2019. The ID first found sufficient elements to establish that Mr. Hemed had formal membership in the ELF-RC in 1999-2000. After reviewing the documentary evidence, the ID also made several factual findings regarding the nature of the ELF-RC.

[9] More specifically, the ID determined that the ELF-RC was a splinter group of the ELF, an organization that engaged in acts of subversion by force against the Ethiopian government. According to the ID, while the ELF-RC is a separate entity from the ELF with its own leadership, it also engaged in violent acts in the 1970s, though the violence was primarily directed against rival opposition groups, not the Ethiopian government.

[10] Over the years, the ELF-RC has aligned itself with various armed and rebel forces involved in fighting for Eritrean independence. In October 1977, the ELF-RC and EPLF signed an agreement to establish a joint supreme political leadership and joint committees on military, information, economic, social, and foreign affairs, while both entities retained their organizational independence. In 1992, the ELF-RC became part of the ENPA alliance and in 1999, it became part of the AENF alliance.

[11] The ID determined that there was insufficient evidence to conclude, on the basis of reasonable grounds to believe, that the ELF-RC had the intention to engage, or had engaged or would engage in acts of subversion by force of any government. Consequently, the ID found that the Minister had not met his burden of establishing reasonable grounds to believe that the ELF-RC is an organization captured by 34(1)(b) of the IRPA. Therefore, Mr. Hemed was found not to be a person described under paragraph 34(1)(f) in relation to paragraph 34(1)(b) of the IRPA.

B. *The IAD Decision*

[12] In its Decision, the IAD similarly found no reasonable grounds to believe that the ELF-RC is an organization that engages, has engaged, or will engage or instigate the subversion by force of any government for the purposes of paragraph 34(1)(b) of the IRPA.

[13] According to the IAD, it is true that the ELF engaged in insurgent activities and acts of violence against the Ethiopian government in the 1960s and early 1970s. While the fighting was going on, discontent grew within the ranks of the ELF, as some Eritrean nationalists preferred an armed resistance strategy while others preferred to use non-violent means. The ELF-RC suffered military setbacks and by mid-1978, agreed to establish a joint command with the EPLF, a splinter group created from the ELF. The IAD determined that the evidence relating to the ELF-RC's military setbacks only established that the ELF-RC used force in conflict, not that this force was used against any government. The evidence solely referenced conflict with other nationalist forces committed to the independence of Eritrea.

[14] In the IAD's view, the evidence was insufficient to create a reasonable belief that the ELF-RC intended to subvert a government by force. The IAD noted numerous specific examples of force used against the Ethiopian government by other organizations, including the ELF and the EPLF, but not the ELF-RC. While the evidence established that the ELF-RC had alliances with other organizations at various times, the IAD was not persuaded that it established reasonable grounds to believe that the ELF-RC was itself an organization that engages, has engaged, or will engage or instigate the subversion by force of any government. The IAD notably highlighted post-1999 evidence characterizing the ELF-RC as a Muslim, non-fundamentalist, and non-military group.

C. *The standard of review*

[15] As set out in *Zahw v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 934 at para 33 [*Zahw*], on an application for judicial review like this one, the question before the Court is not whether there were in fact reasonable grounds to believe the foreign national was inadmissible under the IRPA. Rather, it is whether the IAD's conclusion that there were no reasonable grounds to believe the organization, of which the foreign national was a member, engaged in subversive acts against any government is reasonable.

[16] It is well recognized that such findings involve questions of mixed fact and law, and that the standard of review applicable in such cases is reasonableness (*Chowdhury v Canada (Citizenship and Immigration)*, 2022 FC 311 at para 7; *Abdullah v Canada (Citizenship and Immigration)*, 2021 FC 949 at para 17). This is confirmed by the Supreme Court of Canada's landmark decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the Court established a presumption that the standard of reasonableness is the applicable standard in all judicial reviews of the merits of administrative decisions (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 7, 114 [*Mason*]).

[17] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Mason* at para 64). The reviewing court must therefore ask whether the "decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at para 99). Both the

outcome of the decision and its reasoning process must be considered in assessing whether these hallmarks are met (*Vavilov* at paras 15, 95, 136).

[18] Such a review must include a rigorous and robust evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must take a "reasons first" approach and begin its inquiry by examining the reasons provided with "respectful attention," seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Mason* at paras 58, 60; *Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene "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), without "reweighing and reassessing the evidence" before it (*Vavilov* at para 125).

[19] The onus is on the party challenging the decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. The court must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

III. Analysis

[20] For the reasons that follow, I am satisfied that the IAD's reasons are sufficient, engaged appropriately with the evidence, and bear all the hallmarks of a reasonable decision.

A. *Relevant provisions and legal principles*

[21] A finding of inadmissibility under paragraphs 34(1)(b) and 34(1)(f) of the IRPA has three components: 1) there must be an organization; 2) there must be reasonable grounds to believe the organization engages, has engaged, or will engage in, in this case, acts of subversion by force

against any government; and 3) the individual in question must be a member of the organization, regardless of their knowledge of or participation in the subversive acts, or if they were a member at the time the acts were committed (*Yamani v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1457 at paras 11–13; *Zahw* at para 32).

[22] The term "subversion by force" is not defined in the IRPA. In *Oremade v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1077 [*Oremade*], this Court found that "by force" does not require the use of violence. More specifically, Justice Phelan stated:

> [27] I agree with the IAD's conclusion that the term "by force" is not simply the equivalent of "by violence". "By force" includes coercion or compulsion by violent means, coercion or compulsion by threats to use violent means, and, I would add, reasonably perceived potential for the use of coercion by violent means.
>
> *Oremade* at para 27.

[23] Furthermore, in *Najafi v Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 262 [*Najafi*], the Federal Court of Appeal stated that defining subversion as the act or process of overthrowing a government is consistent with a broad application of paragraph 34(1)(b) to determine inadmissibility (*Najafi* at paras 58-91; *Zahw* at para 57).

[24] The term "membership" is also not defined in the IRPA. The courts have interpreted the term broadly. For example, the Federal Court of Appeal in *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 [*Poshteh*], citing *Canada (Minister of Citizenship and Immigration) v Singh* (1998), 151 FTR 101 (FCTD) at paragraph 52, found the term should be "given an unrestricted and broad interpretation" as the provision is intended to protect public safety and national security (*Poshteh* at para 27).

[25] Finally, “organization” is also not defined in the IPRA. In *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 [*Sittampalam*], the Federal Court of Appeal held “organization” should also be given an “unrestricted and broad interpretation” (*Sittampalam* at para 36). The Federal Court of Appeal also found that “[l]ooseness and informality in the structure of a group should not thwart the purpose of the IRPA” (*Sittampalam* at para 39). Along a similar vein, in the recent case *Aqeel v Canada (Citizenship and Immigration)*, 2023 FC 1606, Justice Gleeson disagreed with an immigration officer’s characterization of Yemen’s Southern Movement, which regroups several distinct entities united by a common goal, as an organization.

[26] Reasonable grounds to believe exist where there is an objective basis for the belief and where that objective basis is grounded on compelling and credible evidence, as defined by the Supreme Court in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paras 114–117 [*Mugesera*]. It is a relatively low threshold: higher than a suspicion, but lower than a balance of probabilities (*Mugesera* at para 114).

B. *The IAD Decision is reasonable*

[27] The Minister submits that the IAD committed two errors in its reasons.

[28] First, the Minister maintains that just because the ELF-RC was primarily involved in conflicts against other competing groups does not deny or diminish that there are reasonable grounds to believe that it was also engaged in or instigated the subversion by force of the government. In-fighting between armed revolutionary groups, says the Minister, is not a novel phenomenon and does not preclude the application of paragraph 34(1)(b) of the IRPA.

[29] Second, the Minister argues that, according to the case law, the concept of membership in an organization must be interpreted broadly. Since the EDA coalition includes the ELF-RC, the ELF-RC should therefore also be named as an organization "engaging in or instigating the subversion by force of any government" described at paragraph 34(1)(b) of the IRPA. According to the Minister, since the IAD acknowledged that the ELF-RC is a member of alliances with other organizations, it was an error not to establish that the ELF-RC was itself an organization named at paragraph 34(1)(b). The IAD's analysis was too restrictive and inconsistent with the "broad sweep" to be used when interpreting this provision. In support of its position, the Minister relies on *Damir v Canada (Citizenship and Immigration)*, 2018 FC 48 at paras 1, 4–5 [*Damir*].

[30] With respect, I am not persuaded by the Minister's arguments. The IAD addressed all arguments presented by the Minister, but simply did not accept them.

(1) *The primary involvement in conflicts against competing groups*

[31] I find no merit to the first argument advanced by the Minister.

[32] In my view, the Decision is reasonable, as the IAD thoroughly and comprehensively reviewed all documentary evidence and arguments presented by the Minister. The Minister has not pointed to any documentary evidence that the IAD failed to consider or did not properly consider. As there was no clear evidence of ELF-RC acting against a government, it was open to the IAD to find no reasonable grounds to believe the ELF-RC participated in subversion by force against a government.

[33] The *Damir* decision can be distinguished from the issues currently before the Court. In *Damir*, the question was whether an immigration officer had discretion to grant a visa even

though the applicant was inadmissible. It also involved a situation of membership through duress and specific country conditions. Moreover, the applicant in *Damir* was a member of ELF and EPLF, two groups that were clearly involved in subversion by force of a government.

[34] The Minister claims that just because the ELF-RC was primarily involved in conflicts against other competing groups does not mean that there are no reasonable grounds to believe that it was not also engaged in or instigated the subversion by force of the government. After all, prior to 1993, overthrowing the Ethiopian rule of Eritrea was the "raison d'être" of the ELF-RC. In support of this argument, the Minister emphasizes that the term "subversion by force" does not require the actual use of violence, as noted by Justice Phelan in *Oremade*.

[35] I do not agree. The Minister appears to suggest that the purpose of the ELF-RC on the one hand (i.e., to secure Eritrean independence from involuntary annexation) is necessarily tied to evidence of violent acts committed by the ELF-RC on the other hand. The IAD considered this evidence separately. Indeed, considered separately, the evidence on the record does not support the existence of reasonable grounds to believe that the ELF-RC participated in subversion by force of any government.

[36] I agree with Mr. Hemed that in-fighting between armed revolutionary groups does not necessarily demonstrate an attempt to use force against a government. Stated differently, it is true that a reasonable ground to believe an organization subverted, intended to subvert, or will subvert a government by force does not require that the organization actually engaged in a violent act against a government. While the definition of subversion by force in *Oremade* is broader than this, it does not necessarily mean it has to extend to in-fighting between groups without any more evidence.

[37] Reasonable grounds to believe are met where there is an objective basis for the belief which is based on compelling and credible information (*Mugesera* at para 114). Here, the IAD found no objective basis for the belief that the ELF-RC engaged in a violent act against the Ethiopian (or now Eritrean) government. I do not dispute that compelling and credible evidence of an actual act of violence against a government could provide an objective basis for the belief. The broad definition in *Oremade* indicates that the requisite belief could also be based on credible information other than an example of actual violence against a government.

[38] Here, what was missing was such credible information. In its Decision, the IAD stated that, "[w]hile… the Minister need not demonstrate specific acts of force or violence against a government to establish that ELF-RC meets the definition of the Act, there must be credible evidence…." The IAD further noted that despite the Minister providing evidence "rife with references of specific examples of force used against the Ethiopian government entities by various organizations," he failed to highlight "any reference to planned or actual acts of violence or force against the Ethiopian government by the ELF-RC." I do not agree that, in doing so, the IAD narrowly interpreted "subversion by force" and elevated the threshold required to establish an objective basis for the belief to actual or planned acts of violence.

[39] The IAD found evidence of the ELF-RC committing itself to Eritrean independence, arming itself, allying itself with militarized groups, and committing violent acts against other rival organizations fighting for Eritrean independence from the Ethiopian government. But it did not find sufficient evidence to form an objective basis for the belief that the ELF-RC subverted by force or intended to subvert by force or will engage in subversive acts against any government, as none of its actions targeted a government. This may be a somewhat surprising

outcome considering, as the Minister puts it, the “raison d’être” of the ELF-RC and considering that reasonable grounds to believe is a lower threshold. However, I cannot conclude that this is an unreasonable conclusion in light of the evidence before the IAD.

[40] In my view, as argued by Mr. Hemed, the IAD thoroughly considered the available evidence in coming to its conclusion. For example, the IAD assessed the new evidence submitted by the Minister on appeal but was not convinced that an organization that arms itself automatically does so with the intention of subverting a government by force. The IAD intelligibly articulated the shortcomings in the evidence on the ELF-RC’s involvement in targeting a government. The reasons for the Decision contain clear explanations as to how the IAD reached its conclusion, with specific references to the evidence. The IAD was also aware of the requirement to interpret subversion by force broadly, as it referenced *Oremade* and other relevant jurisprudence in its reasons for the Decision.

[41] While the IAD’s interpretation may perhaps be more restrictive than what the Minister would have preferred, it is justified based on the evidence and intelligibly explained. The IAD engaged with the Minister’s arguments and evidence and its conclusions are justified. In those circumstances, there are no grounds justifying the Court’s intervention.

(2) *The concept of membership in an organization*

[42] Turning to the Minister’s second argument, he seems to suggest that subversive acts committed by separate organizations forming part of an alliance should be attributed to all organizations (and members of the organizations) making up the alliance.

[43] I do not agree that the IAD can be faulted for not having espoused this position advanced by the Minister. The IAD found the ELF-RC allied itself with other organizations over the years, including organizations found to have participated in subversive acts against a government, but was not itself a subversive actor. In order to make that determination, the IAD relied on the evidence before it.

[44] The Minister has not brought any material or convincing arguments to challenge this conclusion.

[45] The question before the Court is whether the IAD's conclusion that there were not reasonable grounds to believe the organization, of which the foreign national was a member, engaged in subversive acts against any government is reasonable. The IAD recognized other members of the alliance engaged in subversion of the government and that the ELF-RC is committed to Eritrean independence and liberation but, in the IAD's opinion, this evidence was insufficient to demonstrate the ELF-RC targeted a government and did not establish the reasonable grounds to believe that it did.

[46] In sum, the Minister is simply expressing his disagreement with the IAD's assessment of the evidence and is asking the Court to reweigh and reassess the IAD's conclusions. However, it is not the role of a reviewing court to do so on judicial review (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55). The Minister's mere disagreement with the IAD's conclusions and weighing of evidence are not grounds justifying the intervention of the Court.

[47] The party challenging an administrative decision must satisfy the reviewing court that "any shortcomings or flaws relied on… are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100). In this case, the IAD's reasoning can be followed without a decisive flaw in rationality or logic. The IAD's reasons provide a transparent and intelligible justification for the Decision (*Vavilov* at paras 81, 136). At paragraph 102 of *Vavilov*, the Supreme Court held that the reviewing court "must be satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived'." In the case of Mr. Hemed, it is easy to trace and to follow the IAD's line of analysis of the situation he was in, and the Decision bears the hallmarks of reasonableness, which are justification, transparency, and intelligibility (*Vavilov* at para 99).

[48] I find no serious deficiency in the Decision that would taint the IAD's analysis and that would cause me "to lose confidence in the outcome reached" by the decision maker (*Vavilov* at para 122).

IV. Conclusion

[49] For all of these reasons, this application for judicial review is dismissed as the Minister has not demonstrated that the IAD's Decision is unreasonable.

[50] There are no questions of general importance to be certified.

JUDGMENT in IMM-4861-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed, without costs.

2. There is no question of general importance to be certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4861-22
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v YASSIN HAJIHASSEN HEMED
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JANUARY 29, 2024
JUDGMENT AND REASONS:	GASCON J.
DATED:	MARCH 6, 2024

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