Federal Court  Cour fédérale

Date: 20240625

Docket: IMM-4857-21

Citation: 2024 FC 988

Ottawa, Ontario, June 25, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

BAKIL ESMAIL AHMED SALEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Bakil Esmail Ahmed Saleh [the Applicant] is a citizen of Yemen who seeks judicial review of the July 5, 2021 decision of a Senior Immigration Officer [Officer] holding that he is inadmissible to Canada under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for being a member of an organization engaged in acts referred to in paragraphs 34(1)(b) and (c) of the IRPA.

[2] The Application is granted. My reasons follow.

II. Background

[3] The Applicant was a member of the Al Hirak Lil Slemi Lel Janoubi movement [Al Hirak Movement or Southern Movement] from 2009 to 2014.

[4] The Certified Tribunal Record [CTR] includes an analysis of open source evidence relating to the Al Hirak Movement indicating the movement became radicalized between 2009 and 2010. There is no evidence to demonstrate the Applicant directly participated in any violent acts.

[5] The CTR also includes the Canada Border Services Agency's [CBSA] National Security Screening Division [NSSD] assessment. The existence of the NSSD assessment was not disclosed to the Applicant until he received the CTR.

[6] The Applicant entered Canada in 2014 and initiated a claim for refugee protection. The application was suspended by the CBSA pending a determination as to whether the Applicant was a member of an organization as described under paragraph 34(1)(f) of the IRPA. The Minister of Public Safety and Emergency Preparedness subsequently withdrew its intervention on the 34(1)(f) ground and the Applicant's refugee claim was ultimately allowed in November 2015.

[7] On December 11, 2015, the Applicant initiated an application for permanent residence with Immigration, Refugees and Citizenship Canada [IRCC]. On May 17, 2021, he was sent a procedural fairness letter inviting him to make submissions regarding an allegation pursuant to paragraph 34(1)(f) of the IPRA that he was a member of an organization that has engaged in acts referred to in paragraphs 34(1)(b) and (c) of the IRPA. The Applicant provided submissions and argued, amongst other things, that the issue had already been decided during his refugee status determination and was therefore *res judicata*.

[8] On July 5, 2021, an Officer issued a decision denying the Applicant's permanent residence application, finding him inadmissible to Canada. It is that decision that underlies the present Application for Judicial Review.

III. Decision under Review

[9] In determining the Applicant to be inadmissible under section 34(1)(f) of the IRPA, the Officer concluded that the Southern Movement met the definition of an organization, that the Applicant was a member of the organization, and that the organization engaged in the subversion by force of the Yemini government and engaged in terrorist activities.

[10] In considering the *res judicata* argument, the Officer acknowledged the criteria to be considered where the doctrine arises – (1) whether the parties are the same, (2) whether the prior decision was final, and (3) whether the issue is the same (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 [*Danyluk*]). The Officer found that the 34(1)(f) issue was not *res judicata.* The Officer acknowledged the issue had been raised in determining the question of refugee status, but

found the matter was never referred to a hearing. The CBSA's decision not to refer the matter was not a determination of the underlying issue, and therefore IRCC was not bound by the CBSA's decision not to refer the case to the Immigration Division [ID]. It was therefore appropriate to determine the issue in the context of the permanent residence application.

IV. Issues and Standard of Review

A. *Issues*

[11] This Application raises the following issues:

A. Did the Officer unreasonably conclude that:

i. the issue of inadmissibility was not *res judicata*;

ii. the Al Hirak Movement was an organization under the meaning of paragraph 34(1)(f) of the IRPA; and

iii. the Al Hirak Movement was an organization that engaged in terrorism?

B. Did the Officer breach their duty of fairness by failing to disclose the NSSD assessment to the Applicant?

B. *Standard of Review*

[12] Reasonableness, the presumptive standard of review, is to be adopted in reviewing the Officer's decision, including the Officer's determination that the *res judicata* doctrine does not arise (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17, 23-25; *Aqeel v Canada (Citizenship and Immigration),* 2023 FC 1606 at para 7 [*Aqeel*]; *Ahmed v*

Canada (Citizenship and Immigration), 2020 FC 791 at para 25 [*Ahmed*]). The question of procedural fairness is determined on a standard equivalent to correctness (*Velimirovic v Canada (Citizenship and Immigration),* 2019 FC 1156 at para 13; *Ahmed* at para 24).

V. Analysis

A. *The doctrine of res judicata is of no application*

[13] In *Ahmed,* Justice Elizabeth Heneghan considered the issue of *res judicata* in very similar circumstances:

> [36] I agree with the Respondents that the doctrine of *res judicata* has no application to the within proceeding.
>
> [37] According to the decision in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, the doctrine of *res judicata* require a party to establish three elements as follows:
>
> 1. that the same question has been decided;
>
> 2. the decision was final;
>
> 3. and the parties in both proceedings are the same.
>
> [38] The Applicant does not, and cannot, establish the first element.
>
> [39] In the first place, issues before the RPD, in respect of the Applicant's claim for refugee status, are not the same as those raised in the Applicant's application for permanent residence.
>
> [40] The Board, through the RPD, is mandated to consider questions of risk, as referenced in the Act, when dealing with a claim for protection. The Board, through the ID, is mandated to consider other factors, again outlined in the Act, when deciding upon an application for permanent residence.
>
> [41] According to the decision in *Ratnasingam v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1096, a finding by the RPD, about Convention refugee status, is

> not binding upon the Minister of Citizenship and Immigration when deciding upon an application for permanent residence.
>
> […]
>
> [44] In my opinion, the clear meaning of subsection 21(2) of the Act is that a finding about "protected person" status by the RPD does not preclude another division of the Board or a delegate of the Minister of Citizenship and Immigration to consider the issue of admissibility, pursuant to subsection 34(1) of the Act.
>
> [45] In any event, the "decision" of the CBSA Hearings Officer to withdraw the request for an admissibility hearing is not a "final decision."

[14] The Officer's decision is consistent with *Ahmed*. While the Applicant takes issue with *Ahmed* and argues that CBSA and IRCC should not be allowed to pursue the Applicant twice on identical facts, the facts simply do not accord with the Applicant's position. Inadmissibility was not decided in determining the refugee claim.

[15] The question of inadmissibility was admittedly raised in both proceedings. However, I find little merit in the Applicant's argument that the decision to withdraw the admissibility report prior to that issue being heard and decided by the ID is the equivalent of a decision on the merits and a final decision. This position is advanced without any jurisprudential support.

[16] The *Danyluk* test requires a <u>final</u> prior decision. It is not disputed that the tribunal responsible for rendering a final decision in the context of the Applicant's protection claim was never seized with the issue. In the absence of a final decision, the doctrine is not engaged.

[17] The Officer's conclusion that the doctrine of *res judicata* does not apply in this instance is reasonable.

B. *The decision is unreasonable*

[18] However, I am satisfied that the Officer's conclusion that the Al Hirak Movement is an organization within the meaning of paragraph 34(1)(f) is unreasonable.

[19] In *Aqeel*, I considered a 34(1)(f) determination in relation to the same Al Hirak or Southern Movement. The evidence before the Officer on the issue of "organization" and the Officer's analysis of that issue are markedly similar, if not identical. Thus, my conclusion is also the same:

> [16] I am satisfied that the Officer reasonably and accurately interpreted the applicable law and the meaning of "organization" for the purposes of paragraph 34(1)(f) of the IRPA, and the Applicant does not argue otherwise. However, I am not convinced the Officer's finding that the Southern movement is an organization is justified.
>
> [17] In concluding that the various factions within the Southern Movement umbrella share a common identity and meet the definition of an "organization," the Officer relied upon the October 16, 2018 Response to Information Request [2018 RIR] (YEM106178 at Certified Tribunal Record [CTR] pages 25-32 in French and CTR pages 196-202 in English) and stated:
>
> > While some sources consider the movement to be an umbrella group that is decentralized, amorphous, or a loose coalition, it appears that the various factions of the Southern Movement are united in their opposition to the current administration and in their desire to restore the independence of southern Yemen, and therefore have an identity in this respect. It also seems that the Movement is represented by a list of known and identifiable leaders characterized by a certain hierarchy and that

> it therefore has a basic organizational structure. I am of the opinion that the Southern Movement (Southern Peaceful Movement/Al-Hirak Al-Janoubi) meets the definition of the term "organization" as defined in case law. (CTR page 18, footnote omitted)

[18] The Officer concludes the Southern Movement is an "organization" based on two factors. The first is that the decentralized, amorphous, or loose coalition of various factions all share the common goal of restoring the independence of Southern Yemen. The second is that the movement is represented by a list of known and identifiable leaders characterized by a certain hierarchy.

[19] I have some concern with the Officer's reliance on the common goal of independence shared among factions to then conclude a shared and common identity is established. There is no chain of analysis linking the common goal shared by disparate groups with the subsequent conclusion that there is a shared identity – the Officer's conclusion is not explained or justified.

[20] I similarly question whether the Officer's reliance on evidence that the movement was represented by a list of identifiable leaders was reasonable in the circumstances.

[21] The Officer does not specifically cite any documentary evidence to support the conclusion that the Southern Movement is led by an identifiable leadership. However, it appears the Officer relies upon the 2018 RIR. The 2018 RIR identifies the leadership and structure of the Southern Movement, but this information postdates the Applicant's period of membership, 2007 - 2014, a membership period with which the Officer did not take issue.

[22] The country documentation evidence discloses an evolution in the movement of the disparate groups rallying in favour of independence or secession starting in 2007. In responding to the PFL, the Applicant cites documentary evidence to the effect that there was disagreement among these disparate groups with respect to the means of achieving the shared goal (Response to PFL at CTR pages 169-172). The CTR further discloses that it was in 2017 with the establishment of the inclusive Southern Transitional Council, in April of that year, that one faction came to dominate (CTR 211 and 314). The leadership group reported in the 2018 RIR may result from these 2017 events.

> [23] Notably, the CTR also includes the June 28, 2013 RIR addressing the Southern Movement [2013 RIR] (YEM104475 at CTR pages 156-161). The 2013 RIR is cited in the Officer's decision but is not referenced in the "organization" portion of the Officer's analysis. Many of the sources describing the movement as "decentralised" or sharing any common leadership cited in the 2018 RIR do not appear in the 2013 RIR.
>
> [24] The Officer's conclusion that the Southern Movement satisfied the definition of an "organization" relied heavily upon finding that the movement was represented by a list of known and identifiable leaders characterized by a certain hierarchy. Faced with contradictory evidence on the issue of organization, the Officer was required to engage in a consideration of the Southern Movement's evolving nature and to determine the more focused question of whether the movement was an organization during the period of the Applicant's involvement from 2007-2014.
>
> [25] The principle that membership is without temporal restrictions (*Yamani* at paras 12 and 13) is distinguishable from a circumstance where no organization existed at the time of an individual's involvement in a movement. In my view, temporality is of relevance when considering the question of whether or not a movement falls within the broad meaning of "organization" for the purpose of paragraph 34(1)(f) of the IRPA. Had the Officer engaged with the evidence the Applicant cited and relied upon in arguing the Southern Movement was not an organization, the Officer may well have concluded the Southern Movement was not an "organization" during the period of the Applicant's involvement (2007 - 2014). The failure to do so renders the decision unreasonable.

[20] My finding that the Officer unreasonably concluded that the Southern Movement was an organization during the period of the Applicant's involvement is determinative of the Application. I need not address the remaining issues.

VI. Certified Question

[21] The Applicant has proposed the following question for certification:

> Is a decision under the security provisions of the *Immigration and Refugee Protection Act* ("IRPA") by an Officer authorized under the IRPA to make such decisions final and subject to the *res judicata* principle?

[22] Subsection 74(d) of the IRPA provides that, subject to section 87.01 of the IRPA, an appeal of an Application to the Federal Court of Appeal may be made only where the judge certifies a serious question of general importance and states the question.

[23] A serious question is one that is dispositive of the appeal, transcends the interests of the parties, and raises an issue of broad significance or general importance: *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36 [*Lewis*]. The question must have been "raised and dealt with in the decision below" (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 12; *Canada (Citizenship and Immigration) v Kassab*, 2020 FCA 10 at para 72; *Lewis* at para 36.

[24] The Applicant has not demonstrated that the proposed question engages an issue of broad significance or general importance. The *Danyluk* test is settled law. The effect of the Officer's decision is not to call into question the finality of decisions made by authorized decision makers under the IRPA, but rather to reiterate that a procedural decision does not equate to a final decision on the merits of an issue by the tribunal authorized to make that decision.

[25] Accordingly, I decline to certify the question proposed by the Applicant.

VII. Conclusion

[26] For the above reasons, the Application is granted. I decline to certify any question of general importance, having found that none arises.

JUDGMENT IN IMM-4857-21

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. The matter is returned for redetermination by a different decision maker.

3. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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