Federal Court  Cour fédérale

Date: 20200511

Docket: IMM-3421-19

Citation: 2020 FC 607

Ottawa, Ontario, May 11, 2020

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ERMIAS GELAYE GAGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Ermias Gelaye Gaga (the "Applicant") seeks judicial review of the Deportation Order made by the Immigration and Refugee Board, Immigration Division (the "ID"), pursuant to paragraph 229(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations").

[2] The Applicant is a citizen of Ethiopia. He worked as a cyber media analyst with the Information Network Security Agency ("INSA"). He arrived in Canada on October 2, 2017 as the holder of a temporary resident visa.

[3] On November 8, 2017, the Applicant applied for refugee protection based on his fears of persecution resulting from his resistance to performing certain activities while employed with INSA.

[4] The Applicant was interviewed by an officer of the Canada Border Services Agency (the "Officer"), relative to his refugee claim, on March 22, 2018. Subsequently, the Officer prepared a report pursuant to subsection 44 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the "Act"). The Officer recommended that the Applicant be referred to the ID for an admissibility hearing.

[5] In its decision, the ID found that the Applicant was a member of INSA and that INSA is an organization that has engaged in espionage, contrary to Canada's interests. It noted that INSA had spied on Ethiopian citizens residing in countries allied to Canada, including the United States. It found that the Applicant is inadmissible to Canada, pursuant to paragraphs 34(1)(a) and 34(1)(f) of the Act.

[6] The ID found that actions against Canada's allies may be contrary to Canada's interests. It adopted the interpretation of "national interests", as discussed in *Agraira v. Canada (Minister*

of Public Safety and Emergency Preparedness), [2013] 2 S.C.R. 559, that is "matters which are of concern to Canada and to Canadians."

[7] The ID found that Canada's interests include upholding Canadian values that underlie the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "Charter"), and that Canadian values include privacy. It concluded that spying on Ethiopians, who reside in countries that are Canada's allies, was contrary to Canada's interests.

[8] The Applicant now challenges the ID's finding that he was a "member" of INSA, since he had no personal knowledge of or involvement in the alleged acts of espionage.

[9] The Applicant also argues that the ID erred in finding that INSA is an organization that is involved in espionage and that it did not consider all the evidence in making that finding. He also submits that the ID erred in failing to consider that INSA contains "sub-groups" and that acts of espionage were conducted by an isolated group of employees acting beyond their authority.

[10] The Minister of Citizenship and Immigration (the "Respondent") submits that the decision of the ID is reasonable and supported by the evidence.

[11] The decision in question raises a question of mixed fact and law, and is reviewable on the standard of reasonableness; see the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[12] In *Vavilov, supra*, the Supreme Court of Canada confirmed the content of the standard of reasonableness, as set out in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[13] According to the decision in *Dunsmuir, supra*, the standard of reasonableness requires that a decision be justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[14] The Applicant is contesting two factual findings, that is his status as a "member" of INSA and the status of INSA as an organization involved in espionage contrary to Canada's interests.

[15] According to the decision in *Ugbazghi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 694, the word "member" should be broadly interpreted.

[16] In submissions before the ID, the Applicant admitted that he was employed by INSA but said that he was never engaged in espionage activities.

[17] According to the decision in *Kanagendren v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 86, the application of subsection 34(1) of the Act does not require complicity or a significant contribution by an individual to the activities of an organization to justify the finding of inadmissibility.

[18] In *Khan v. Canada (Minster of Citizenship and Immigration)*, 2017 FC 397, the Court found that if a person admits to membership in an organization such admission applies to

"membership" for all purposes, including determining inadmissibility pursuant to subsection 34(1).

[19] In light of the evidence before the ID, including the testimony of the Applicant and the relevant jurisprudence, the ID's finding that the Applicant is a "member" of INSA is reasonable and meets the test in *Dunsmuir, supra*.

[20] However, in my opinion, the ultimate finding of inadmissibility fails to meet the applicable standard of review. It appears that the ID simply adopted the reasoning of the Officer who prepared the subsection 44(1) report that referred the Applicant for an admissibility hearing. Paragraphs 2 to 11 on page 15 and paragraphs 1 to 5 on page 16 of the ID's decision appear to be taken directly from the report prepared by the Officer.

[21] Although the ID referred to the decision in *Agraira, supra* it did not give its own reasons as to why the actions taken by INSA, a non-Canadian actor, against non-Canadians outside Canada, engaged and breached the Charter.

[22] Adoption of the reasons by another decision maker without showing clear engagement with the issues does not meet the requirements of justification, transparency and intelligibility, per the decision in *Dunsmuir, supra* and endorsed by the decision in *Vavilov, supra*.

[23] In the result, the application for judicial review will be allowed, the decision of the ID will be set aside and the matter remitted to a different member of the ID.

[24] The Respondent proposed the following question for certification:

> Is a person admissible 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 of 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?

[25] The test for certifying a question, pursuant to subsection 74(d) of the Act, is set out in *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 and was recently confirmed in *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, [2018] 3 F.C.R. 674. The test for certification requires a serious question that raises issues of broad significance or general importance and that is dispositive of an appeal.

[26] In this case, I am not satisfied that the disposition of this application for judicial review gives rise to a certified question and no question will be certified.

JUDGMENT in IMM-3421-19

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Immigration and Refugee Board, Immigration Division is set aside and the matter remitted to a different member of the Immigration and Refugee Board, Immigration Division for redetermination.

There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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