Federal Court  Cour fédérale

Date: 20230113

Docket: IMM-6999-21

Citation: 2023 FC 58

Ottawa, Ontario, January 13, 2023

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ALEMAYEHU HAILE DAMTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, who was born in Ethiopia, served with the Ethiopian Air Force [EAF] where he attained the rank of lieutenant colonel. In a decision dated September 27, 2021, the Immigration Division [ID] found him to be a prescribed senior official in the service of a government that engages, or engaged in, systematic or gross human rights violations and

therefore inadmissible pursuant to paragraph 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Damte applies under section 72 of the IRPA for judicial review of the ID's decision. He submits the ID erred in finding paragraph 35(1)(b) was applicable in his circumstances and that the ID ignored evidence relating to his role within the EAF. The Respondent argues the ID reasonably considered and applied settled jurisprudence relating to the interpretation and application of paragraph 35(1)(b).

[3] For the reasons that follow, I am not persuaded that the ID committed any error warranting the Court's intervention.

II. Relevant legislation

[4] Before providing a brief summary of the background circumstances and the ID's decision, it will be helpful to set out the directly applicable statutory and regulatory provisions.

[5] Subsection 35(1) of the IRPA states:

Human or international rights violations	**Atteinte aux droits humains ou internationaux**
35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35 (1)** Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
[…]	[…]

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*;	**b)** occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la Loi sur les crimes contre l'humanité et les crimes de guerre ;
[…]	[…]

[6] Section 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] describes the term "prescribed senior official" for the purposes of paragraph 35(1)(b) as follows:

Application of paragraph 35(1)(b) of the Act	**Application de l'alinéa 35(1)b) de la Loi**
16 For the purposes of paragraph 35(1)(b) of the Act, a prescribed senior official is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position, and includes	**16** Pour l'application de l'alinéa 35(1)b) de la Loi, occupent un poste de rang supérieur les personnes qui, du fait de leurs fonctions — actuelles ou anciennes —, sont ou étaient en mesure d'influencer sensiblement l'exercice du pouvoir par leur gouvernement ou en tirent ou auraient pu en tirer certains avantages, notamment :
[…]	[…]
	e) les responsables des forces armées et des

(e) senior members of the military and of the intelligence and internal security services;	services de renseignement ou de sécurité intérieure ;
[…]	[…]

III. Background

[7] On November 21, 2003, the Minister of Public Safety and Emergency Preparedness designated the Government of Ethiopia under Mengistu Haile Mariam [Mengistu Regime] from September 12, 1974 to May 21, 1991 as a regime involved in terrorism, systemic or gross human rights violations, or genocide, a war crime, or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24.

[8] The Applicant served in the EAF as a fighter pilot between 1969 and 1991, holding various positions throughout his career. He attained the rank of lieutenant colonel in 1988. The Applicant was imprisoned after the Mengistu Regime's collapse in 1991. He subsequently travelled to the United Kingdom where he was granted protected status in England as a Convention refugee in 2003. He was later granted citizenship in the United Kingdom.

[9] In 2015, the Applicant married a Canadian citizen. His spouse applied to sponsor him for permanent residence in 2016 as a member of the family class. The Applicant travelled to Canada frequently between 2015 and 2018.

[10] In September 2019, the Applicant attended an admissibility interview [2019 Interview] in England. The Immigration Officer conducting the interview sought details regarding the Applicant's service with the EAF. The officer advised him that he might be inadmissible to Canada because he indicated he was a high-ranking EAF member during a designated regime. On November 1, 2019, the application for permanent resident status was refused on the basis that the Applicant was inadmissible; however, the decision was not communicated to the Applicant at that time.

[11] On January 1, 2020, the Applicant attempted to enter Canada from the United States. He was examined by a Canada Border Services Agency [CBSA] Officer and asked about his service with the EAF [CBSA Interview]. The officer prepared a report pursuant to subsection 44(1) IRPA, alleging the Applicant was inadmissible per paragraph 35(1)(b). A Minister's Delegate [MD] then examined the Applicant [the MD Interview]. The MD found the section 44 report was well-founded and advised the Applicant he would face an admissibility hearing before the ID.

[12] In correspondence dated January 10, 2020, the Applicant was notified that his permanent resident application had been refused. He applied for leave and for judicial review of that decision. The parties subsequently agreed the permanent residence application would be re-determined by a different officer and the judicial review application was discontinued.

[13] The hearing before the ID proceeded on March 3, 2021.

IV. Decision under review

[14] In holding that the Applicant was inadmissible under paragraph 35(1)(b) IRPA, the ID found, that the Applicant was a senior member of the military (paragraph 16(e) IRPR) based on the rank he attained in the EAF, which provided reasonable grounds to believe he was a prescribed senior official in the Mengistu Regime.

[15] In reaching this conclusion, the ID noted the "reasonable grounds to believe" standard of proof applied to the question of admissibility and that it was the Minister's burden to demonstrate the Applicant was inadmissible.

[16] The ID first found the Applicant to be a foreign national and that the Mengistu Regime had been designated for the purposes of paragraph 35(1)(b) of IRPA. The ID then turned to the question of whether there were reasonable grounds to believe the Applicant is a prescribed senior official of the regime, being a senior member of the Ethiopian military. In considering this question, the ID applied, and relied upon the "top half test," a test that the ID noted is set out in the Respondent's enforcement policy manual 18 [ENF 18] (see Certified Tribunal Record [CTR] pages 158-160) and has been repeatedly approved by this Court.

[17] The top half test provides that where it is established a person's position falls within the top half of an organization's hierarchy an individual may be found to be a prescribed senior official for the purposes of paragraph 35(1)(b) of the IRPA without further inquiry (*Canada (Citizenship and Immigration) v Kassab*, 2020 FCA 10 at paras 29, 32 and 62 [*Kassab*]). The ID noted that evidence relating to an applicant's responsibilities, type of work done and decisions made within a regime may provide a further means by which to assess the seniority of a position.

However, where the position falls within the top half of a regime organization's hierarchy, there is no requirement to analyze such evidence (*Barac v Canada (Citizenship and Immigration)*, 2017 FC 566 at para 23 [*Barac*]). The ID found that for the purposes of paragraph 16(e) of the IRPR the Applicant's rank within the hierarchy of the organization is determinative. Finally, the ID held that in this instance the organizational hierarchy considered was properly that of the military force in which the Applicant had served, the EAF, and not the Ethiopian military as a whole.

[18] In applying the top half test, the ID held the Applicant's CBSA Interview conducted at the time of his attempt to enter Canada on January 1, 2020 provided the most reliable evidence regarding his rank and the structure of the EAF. The ID noted that at the time of the CBSA Interview the Applicant was aware that his military service might render him inadmissible, having received notice to this effect during the 2019 Interview, and that he had therefore had adequate time to respond to this concern.

[19] The ID also considered but placed limited weight on:

A. the Applicant's statements made during the 2019 Interview, because the Applicant had not been provided prior notice of the Officer's admissibility concerns;

B. the MD Interview conducted on the same day as the CBSA Interview, because the portion of that interview relating to the position of the Applicant's rank within the EAF hierarchy had not been transcribed;

C. the Applicant's testimony before the ID and the information contained in a background statement by the Applicant, on the basis that the information provided was inconsistent with or contradicted information provided in the course of the CBSA Interview, seemed to downplay the Applicant's understanding of the EAF rank structure and focused on the Applicant's responsibilities in various positions as opposed to the EAF's hierarchy; and

D. the Applicant's corroborative evidence, because that evidence did not relate to the time period in question, gave unclear explanations of the Ethiopian military structure, did not cite its sources and failed to explain the EAF hierarchy.

[20] The ID specifically relied on the Applicant's statements that he attained the rank of lieutenant colonel and the chart of ranks within the EAF he produced during the CBSA Interview. The chart indicated there were four ranks above and 13 ranks below the rank of lieutenant colonel within the EAF. On this basis, the ID concluded the Applicant was within the "top half" of the EAF organizational hierarchy. The ID therefore found that the Applicant was a senior member of the Ethiopian military and in turn a prescribed senior official in the designated Mengistu Regime.

V. Issues and Standard of Review

[21] The Applicant and Respondent have framed the issues in slightly different terms but generally agree that the issues raised broadly engage questions of whether it was reasonable for the ID to rely on the "top half" test in concluding the Applicant is a prescribed senior official

within the Mengistu Regime, and whether the ID reasonably applied that test in light of the evidence. I have framed the issues as follows:

A. Was it reasonable for the ID to rely solely on the "top half" test to determine that the Applicant was a senior member of the military per paragraph 16(e) of the IRPR?

B. Did the ID reasonably assess the evidence?

[22] The parties submit and I agree that the ID's decision is reviewable on a reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 15 [*Vavilov*]). A reasonable decision is transparent, intelligible and justified in relation to the facts and law. A reasonable decision is based on "an internally coherent and rational chain of analysis," the outcome must not only be justifiable but must also be justified by the reasons provided (*Vavilov* at paras 85-86).

VI. Analysis

A. *Did the ID reasonably rely on the "top half" test?*

[23] The Applicant argues that applying the "top half" test, which is derived solely from a policy manual, to determine whether an individual is a senior member of the military amounts to a fettering of the ID's discretion and is an unreasonable interpretation of paragraph 35(1)(b) of the IRPA and paragraph 16(e) of the IRPR. The Applicant submits that Parliament intended a decision maker to consider aspects beyond rank or seniority – for example an individual's responsibilities and associated levels of influence. Failure to engage in this broader contextual

analysis, the Applicant argues, results in an unreasonably wide inadmissibility net being cast. In this instance, the Applicant argues the "top half" test captures every commissioned officer within the Ethiopian Army, a result which could not have been intended by Parliament.

[24] In reviewing an administrative decision maker's interpretation of statutes, the Court must recognize that a range of reasonable interpretations may be available to the decision maker, that the administrative decision maker may have a better appreciation of the range of reasonable interpretations than a reviewing court, and finally that the administrative decision maker has been given the responsibility for interpreting the legislation (*Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at paras 16, 18 and 20 [*Mason*] citing *Vavilov* at para 116). The Court's role is not to engage in its own interpretation of the legislative provision but rather to focus on whether the administrative decision maker's interpretation is reasonable (*Vavilov* at paras 115-124).

[25] In adopting the top half test and concluding that the Applicant's rank was determinative without more, the ID cited and relied upon the jurisprudence of this Court (*Younis v Canada (Citizenship and Immigration)*, 2010 FC 1157; *Habeeb v Canada (Citizenship and Immigration)*, 2011 FC 253; *Al-Ani v Canada (Citizenship and Immigration)*, 2016 FC 30; *Mirosavljevic v Canada (Citizenship and Immigration)*, 2016 FC 439 [*Mirosavljevic*]; *Barac*; *Sekularac v Canada (Citizenship and Immigration)*, 2018 FC 381).

[26] The ID also relied upon the recent decision of the Federal Court of Appeal in *Kassab* where the interpretation of paragraph 35(1)(b) of the IRPA and section 16 of the IRPR was considered.

[27] The issue in *Kassab* was whether a visa officer had reasonably interpreted paragraph 35(1)(b) of the IRPA and paragraph 16(d) of the IRPR in concluding the Applicant to be a "senior member of the public service" in Iraq and therefore inadmissible based solely on the position the Applicant held within the regime hierarchy. Relying on its earlier decision in *Canada (Minister of Citizenship and Immigration) v Adam*, [2001] 2 FC 337 (FCA), and after considering the text, context and purpose of the legislation, the Court of Appeal found the visa officer's interpretation was one that the legislation could reasonably bear (*Kassab* at paras 25-29 and 62).

[28] The ID's finding that section 16 of the IRPR is focused on an individual's position within a regime's organizational hierarchy, not the degree of influence or benefit attached to that position was reasonable and consistent with *Kassab*. The ID acknowledged but rejected the Applicant's argument that evidence relating to length of service and responsibilities within the EAF had to be considered. The ID reasonably concluded that such evidence would only be pertinent in the event that there was insufficient credible evidence of the EAF rank structure or hierarchy and the Applicant's place within that structure.

[29] The Applicant's reliance on *Hamidi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 33 [*Hamidi*] and other decisions of this Court to support the view that a broader

contextual analysis is required is misplaced. In *Hamidi*, for example, the Court held that whether a particular military rank qualifies for inclusion under paragraph 16(e) of the IRPR will depend on the facts related to the particular military regime (para 26). However, it did so in a context where the officer failed to obtain evidence that could establish the organizational hierarchy of the military force. In the absence of such evidence, the Court held it was unreasonable for the decision maker to assume the rank of colonel was a senior rank. While the Court faulted the decision maker for not attempting to obtain more information on the hierarchy of the military force, the Court did not suggest an analysis of the individual's responsibilities and level of influence was required.

[30] The ID also acknowledged the Applicant's argument that the top half test casts a broad net. However, as recognized in *Kassab*, the net cast is intentionally broad to avoid the evidentiary challenges of having to establish a particular person's influence or benefit within a designated regime (para 51). The potentially broad application of paragraph 35(1)(b) is mitigated, at least in part, by section 42.1 of the IRPA, which provides the Minister with the discretion to declare that matters referred to in paragraph 35(1)(b) do not constitute inadmissibility where such a declaration is not contrary to the national interest (*Kassab* at paras 55-57).

[31] The Applicant argues that the top half test might be overly broad in some circumstances. I am prepared to accept this might be the case and that a different demarcation point might be reasonable in some circumstances. However, in this instance, the Applicant's rank falls well within the top half of the EAF rank structure – the rank of lieutenant colonel is fifth from the top

of what the ID found to be a hierarchy of 18 ranks. The Applicant undoubtedly held a position well within the top half of the EAF rank structure. It is appropriate to assume that the structure is pyramidal with fewer persons holding higher ranks in the hierarchy than those holding the lower ranks (*Mirosavljevic* at para 24).

[32] The Applicant argues the French language version of paragraph 16(e) translates the English phrase “senior members of the military” to “les responsables des forces armées”. The Applicant submits the term “responsables” indicates individual responsibilities are to be considered and are more significant to the analysis than an individual’s position in the organization hierarchy. The Applicant submits the ID’s failure to consider and address this issue renders the decision unreasonable. I disagree.

[33] As the Respondent notes, this argument was not advanced before the ID and therefore is not properly before the Court on judicial review. As I have set out above, it is not for the Court to engage in a *de novo* exercise of statutory interpretation on judicial review. In any event, I am not persuaded that the term “responsables” conveys a narrower meaning than “senior” as is suggested by the Applicant. In the absence of evidence to the contrary, it is reasonable to assume that those who hold senior positions in an organization are responsible for the organization and vice versa, those responsible for an organization are senior members. The terms can be read harmoniously and consistently with the text, context and purpose of the legislation.

[34] Nor did the ID fetter its discretion by relying on and adopting the top half test. Although the ID acknowledged that the test originates in policy, the ID does not conclude it is obligated to

adopt and apply the test. Instead, the ID adopted and applied the top half test after engaging in a review of the jurisprudence and the principles reflected in the jurisprudence.

[35] The ID's interpretation of paragraph 35(1)(b) of the IRPA and paragraph 16(e) of the IRPR was reasonable, as was the ID's reliance on the "top half" test.

B. *Did the ID reasonably assess the evidence?*

[36] The Applicant submits the ID unreasonably ignored the Applicant's testimony that his role within the EAF was entirely to provide training. The Applicant also argues the ID disregarded his evidence that contradicted the finding that rank is linked to seniority.

[37] I am satisfied that the ID's assessment of the evidence was reasonable. The ID identified the sources of evidence before it and explained its reasons for giving greater weight to the evidence provided in the course of the CBSA Interview. The rank attained by the Applicant was not in dispute nor was the EAF rank structure as reported by the Applicant in the course of the CBSA Interview in issue. As I have concluded above, the ID reasonably held that evidence relating to actual responsibilities, influence or benefits was only pertinent if the evidence was insufficient to establish the Applicant held a senior position within the EAF rank hierarchy.

[38] The Applicant has also argued that the ID failed to grapple with the grave consequences of its inadmissibility decision to the extent required by *Vavilov.* I disagree. The Applicant's submission on the impact of an inadmissibility finding were limited to the distress the Applicant and his wife would experience should he be denied permanent residence status. The submissions

do not disclose consequences that are beyond those inherent to an inadmissibility finding under paragraph 35(1)(b). I am also of the view that the consequences of inadmissibility are of little relevance in the context of paragraph 35(1)(b), which states "a permanent resident or foreign national is inadmissible" in the circumstances then described. Having found the Applicant to be a senior member of the military, the ID was required to find the Applicant inadmissible, a consideration of the consequences of this finding would not change that result.

VII. Certified Question

[39] The Applicant proposes the following question for certification:

> Can it reasonably be found that Parliament intended "senior member of the military" to be defined using a test that considers solely whether the individual falls within the "top half" test of military ranks alone, within the meaning of paragraph 35(1)(b) of the *Immigration and Refugee Protection Act*, and section 16 of the *Regulations*?

[40] The Federal Court of Appeal set out the test for certification in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paragraph 46:

> The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).

[41] The Applicant argues that in *Kassab* the Court of Appeal declined to answer whether the top half test is the appropriate test to be used in determining whether an individual is a prescribed senior official in a designated regime. The Applicant submits that the application of the top half test is dipositive in this instance and that the proposed question raises an issue of general importance.

[42] The Respondent argues the proposed question does not raise an issue of general importance but instead challenges an issue of settled law, the top half test having been repeatedly endorsed by this Court. I agree. The question proposed seeks to answer whether a decision maker can reasonably rely solely on the "top half" test. The jurisprudence is settled and consistent in this regard. No question of general importance arises.

[43] The potential question identified in *Kassab* was whether "the 'top half' test (as opposed, for example to a 'top third' or 'top quarter' test) appropriately demarcates or fixes in every case the limits of 'senior members of the public service'" (*Kassab* at para 71). This question has not been proposed but even if it were, it does not raise an issue that was dispositive of the Application. The Applicant unquestionably held a position well within the top half of the EAF rank hierarchy and the reasonableness of the ID's reliance on a 50% demarcation point was not argued.

[44] The test for certification of the proposed question has not been not satisfied.

VIII. Conclusion

[45] The ID’s finding that the Applicant was a senior member of the Ethiopian military and a prescribed senior official of the Mengistu Regime was reasonable. The Application is therefore dismissed and no question of general importance is certified.

JUDGMENT IN IMM-6999-21

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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