Federal Court  Cour fédérale

Date: 20140502

Docket: IMM-5930-13

Citation: 2014 FC 416

Ottawa, Ontario, May 2, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

U.S.A.

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, the Minister of Citizenship and Immigration, seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision of the Immigration Appeal Division decision (the IAD). The IAD determined that the respondent was not inadmissible to Canada under section 34 of *IRPA*, as there was insufficient evidence to show the organization he was an admitted member of what

was an organization attempting to subvert a government by force or one that has engaged, engages or will engage in terrorism (contrary to sections 34(1)(b), (c), (f) of *IRPA*).

[2] To protect the respondent's right to a fair refugee determination, a confidentiality order is in place in this matter. This decision contains no confidential information.

II. The Facts

[3] The respondent U.S.A, a Nigerian citizen, made a claim for refugee protection immediately upon entering Canada in April 2010. The respondent admitted membership in the Movement for the Actualization of the Sovereign State of Biafra (MASSOB). The file was referred to the Immigration Division (ID) of the Immigration and Refugee Protection Board for an inadmissibility determination. The ID needed to determine whether the respondent was inadmissible to Canada on security grounds, due to his admitted membership in an organization which, potentially, there are reasonable grounds to believe engages, has engaged or will engage in terrorism or subversion by force of government (sections 34(1)(b), (c), and (f) of *IRPA*).

[4] In June 2012, a Board member of the ID performed an analysis of both subversion by force of government (s.34(1)(b), *IRPA*) and terrorism (s.34(1)(c), *IRPA*). The Member determined that there was insufficient evidence to show MASSOB was engaged in either of these activities.

[5] The Minister appealed the decision to the IAD, which conducted a *de novo* analysis and determined in October 2013 that there was insufficient evidence to show MASSOB engaged in

terrorism or subversion by force of government. This IAD finding is the decision under review in the present proceedings.

[6] MASSOB is a separatist movement. Its goal is to establish an independent Biafran state in south-eastern Nigeria. The organization was formed in 1999 by Chief Ralph Uwazurkie, who set out to accomplish sedition through non-violent means. It is composed primarily of ethnically Igbo people.

[7] The non-violent approach was chosen by Chief Uwazurkie as a response to the Biafran state's violent loss in the Nigerian/Biafran civil war in the late 60s. Between 1967 and 1970, the Igbo people attempted to establish, by use of force, the Republic of Biafra. The civil war was bloody and divisive. MASSOB has set out to improve the position of the Igbo people through non-violent civil disobedience, with the end goal being the creation of an independent Biafra. Such civil disobedience includes stay-at-home protests and marches.

[8] The dispute between Nigeria and MASSOB has not been peaceful. It appears that over the years, Chief Uwazurkie may have lost control over some elements of the organization, and both the Nigerian government and many MASSOB members (some forming independent splinter groups, some striking out while within MASSOB) have resorted to violence against the populace and government. MASSOB publicly denounces these violent splinter groups.

III. Contested decision

[9] The potentially subversive or terrorist activities the Member considered were:

1) MASSOB's seizure of oil tankers to redistribute the oil to the eastern part of Nigeria as a protest of high oil prices in the region and in an attempt to change government policy;

2) violent attacks on census takers during a MASSOB-backed attempt to encourage self-identifying Biafrans from taking the census;

3) attacks on police stations; and

4) MASSOB's vigilante clashes with a motor-park organization MASSOB believed was extorting citizens (NARTO, an unidentified acronym in the record), which resulted in a "shoot on sight" order by the Nigerian government for both MASSOB and NARTO members in the region.

[10] The Member limited her analysis to the issue of subversion by force of government. No attempt was made to conduct a separate analysis on the issue of terrorism based on the rationale that the applicant had focused its arguments on the issue of subversion by force.

[11] With respect to the issue of subversion, the Member's analysis dealt primarily with MASSOB's seizure of tanker trucks for which it admitted responsibility. The Member concluded that the evidence on use of force was speculative and that MASSOB's actions were to effect change by civil disobedience to provide a more equitable distribution of oil without any intention to subvert the authority of the Nigerian government.

IV. Issues

[12] The relevant issues in these proceedings are the following:

1) What is the standard of review?

2) Did the Member fail to properly consider whether MASSOB had engaged in terrorism?

3) Did the Member adopt the wrong test of subversion by force?

4) Was the Member's finding that MASSOB had not engaged in force by the seizure of tanker trucks an erroneous finding of fact made without regard for the material before it?

5) Was the Member's conclusion that by seizing the tanker trucks MASSOB was engaging in civil disobedience not intended to subvert the Nigerian government by force reasonable?

V. Standard of review

[13] Both the applicant and the respondent argued a reasonableness standard of review, which is supported by recent case law (*B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146 at para 23; *P.S. v Canada (Citizenship and Immigration)*, 2014 FC 168 at para 5). That standard of review is applicable here, as both issues are questions of fact or mixed fact and law.

VI. Relevant legislation

Immigration and Refugee Protection Act SC 2001, c 27	***Loi sur l'immigration et la protection des réfugiés LC 2001, ch 27***
Rules of Interpretation	Interprétation
33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	33. Les faits - actes ou omissions - mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
Security	Sécurité
34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
[…]	[…]
(b) engaging in or instigating the subversion by force of any government;	b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(c) engaging in terrorism;	c) se livrer au terrorisme;
[…]	[…]
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

VII. Analysis

A. *Statutory requirements and standard of proof*

[14] Section 33 of *IRPA* requires that the applicant establish the facts that constitute inadmissibility under section 34 "for which there are reasonable grounds to believe that they have occurred, are occurring or may occur". The Member therefore had to be satisfied on a balance of probabilities that the respondent had met the standard of proof of providing "reasonable grounds to believe" that the applicant had engaged in acts referred to in section 34.

[15] In regards to standards of proof, none of the accepted legal thresholds or standards of proof, including the requirement to establish reasonable grounds to believe, should be confused with the threshold of satisfying a decision-maker on a conclusion of fact. The latter requires a demonstration that on the basis of the admissible evidence, it is more likely than not that the fact occurred - in effect, a finding on a balance of probabilities. The question, then, is once a conclusion has been arrived at in regard to the facts, whether those facts meet the standard of reasonable grounds to believe that the impugned acts occurred.

[16] In the case at hand, during oral submissions, the most controversial aspect of the proceedings was the question of how best to define the standard of "reasonable grounds to believe" that the impugned conduct had occurred.

[17] This standard has been acknowledged as a low threshold, and one that is significantly lower than the criminal threshold of "beyond a reasonable doubt" or the civil threshold of a "balance of probabilities".

[18] In *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 [*Mugesera*] at paragraph 114, the Supreme Court described the same standard in a matter involving crimes against humanity as follows:

> The first issue raised by section 19 (1) (j) of the Immigration Act is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agreed, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.) at paragraph 60. In essence, reasonable grounds would exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship and Immigration)*, (2009), 9 Imm. L.TR. (3d) 61 (F.C.T.D.) (*Sabour)*.
>
> [My emphasis]

[19] In the case at hand, the applicant referred repeatedly to the standard to be met as that of "something more than mere suspicion". The respondent referred to the test as "an objective basis for the belief which is based on compelling and credible information". The applicant argued that these constitute the same standard, but I disagree.

[20] In my view, the statutory wording "reasonable grounds to believe" imports a standard of proof which lies between more than mere suspicion and a balance of probabilities. This is how the Court in *Mugesera* described it: "[the] standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities." The applicant is attempting to apply the lowest end of this range by reference to a standard "of something more than a mere suspicion." which can be distinguished from the

highest possible threshold referred to by the Court in *Mugesera* as lying just below the balance of probabilities. I interpret the Court's reasons in *Mugesera* as establishing a threshold which would represent a middle ground between the two extremes of what might possibly constitute reasonable grounds to believe a fact.

[21] A standard or onus of proof is necessarily a threshold, and not a range. Thus, standards such as the "balance of probabilities" and "proof beyond a reasonable doubt" are minimum thresholds which must be overcome in order to succeed in establishing civil liability or criminal conduct. The degree to which a factual conclusion exceeds such a threshold is irrelevant. Exceeding these thresholds by any degree meets the onus.

[22] The standard of "reasonable grounds to believe" is novel by traditional legal standards because beliefs are very open ended measures which, by definition, do not need to be founded on rationally established facts. Requiring the belief to be "reasonable" brings the standard into the factually-bound legal world. However, this standard still leaves a range of circumstances that could arguably constitute a reasonable belief. I conclude that this explains why the Supreme Court chose to express the test in a more concrete and detailed fashion, with the intention of fixing the meaning of the standard by reference to elements of its composition that are familiar in the juristic world.

[23] The Court in *Mugesera* described the need for information (evidence) that on an objective basis (as measured by the reasonable person assessing the probative value of the evidence) can be considered compelling (persuasive) and credible (reliable as to its source). This standard is entirely different from that of establishing "more than a mere suspicion". It is also the

meaning that the Supreme Court has indicated should be ascribed to the statutory standard of "reasonable grounds to believe," and which I am bound to apply.

[24] The respondent also argued that the test should include the term "corroborated". This was the third element of the standard as it was stated in the *Sabour* decision, i.e. "compelling, credible and corroborated information", to which case the Supreme Court made reference above. However, the Court clearly did not include the term "corroborated" when adopting the test from *Sabour*. To add the requirement of corroboration would set too high a standard, such as where there exists credible and compelling evidence of torture from an individual, which cannot be corroborated by other sources. Indeed, by requiring corroboration, the court would be imposing a standard higher than that required in criminal law to convict someone beyond a reasonable doubt. As stated by David Paciocco and Lee Stuesser in *The Law of Evidence*, 6th ed (Toronto: Irwin Law Inc. 2011) at 522 in regards to corroboration of evidence:

> Strict corroboration rules are becoming less common and much less technical than they once were. They are being repealed and in some cases replaced by other rules that are intended to provide guidance to triers of fact.

B. *Engaging in Terrorism – IRPA Section 34(1)(c)*

[25] Terrorism has been defined under section 34 of *IRPA* as including "'[1] any act intended to cause death or serious bodily injury [2] to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict [3] when the purpose of such act, by its nature or context, is to intimidate a population, or to compel the government or international organization to do or abstain from doing any act" (*Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at para 98) [my bracketing].

[26] The applicant submits that the Board failed to consider whether MASSOB engaged in terrorism. Given the almost complete absence of any reference to terrorism, not to mention any analysis of the issue, I must agree with this submission.

[27] The failure to consider the applicant's arguments on terrorism appears to have arisen as a result of a misapprehension by the Member of the Minister's arguments as focusing on paragraph 34(1)(*b*) of the *IRPA*, which concerns subversion by force, to the exclusion of any arguments regarding paragraph 34(1)(*c*), which concerns terrorism. At paragraph 11 of the decision, the Member states: "The appellant Minister's arguments focused on paragraph 34(1)(*c*), whether the MASSOB engaged in or instigated subversion by force."

[28] Nowhere in the decision does the Member state the test or analyze any facts in relation to the arguments put forward by the Minister regarding terrorism. I agree that the passing reference to the word "terrorism" in the Member's reasons was insufficient to suggest that the issue had been considered in any meaningful fashion whatsoever.

[29] This is particularly the case because references to terrorism in the decision were made in conjunction with references to subversion by force of the government. This would appear to indicate that the Member considered both issues as subject to the same test. This is far from the case inasmuch as terrorism requires proof of conduct intended to cause death or serious bodily injury for the purpose of the intimidation of civilians or persons not involved in hostilities, or to compel conduct by governmental agencies.

[30] In light of the fact that the appeal before the Member was based on the written arguments of the parties, it is irrefutable that the Minister advanced separate and distinct submissions in regard to the issue of terrorism, particularly in the form of evidence describing a beating administered to a senior Methodist church cleric who was accused of providing information to the joint army and police team that it was claimed had attacked MASSOB headquarters.

[31] The respondent argues that the fact that this evidence, which was reiterated in various sources, referred to suspected members of MASSOB was sufficient to permit the Member to ignore the incident. However, the reasoning provided by the cleric in the documentary evidence clearly connects the matter to MASSOB in a manner which would appear to meet the definition of terrorism. The Member was required to come to a decision on the reliability of this evidence, given that if accepted, it would form the basis for a conclusion that MASSOB engaged in acts of terrorism.

[32] There was also reference in the evidence to incidents of violence causing injury to persons conducting a census on behalf of the Nigerian government. The evidence before the Member included a denial by MASSOB that they were involved in this conduct. Nevertheless, no analysis of this evidence was undertaken, although it raised the *prima facie* issue of possible terrorist acts committed by MASSOB.

[33] It is not for this Court to carry out the necessary analysis, make findings of fact and supply the reasons that might have been given by the Member had she addressed these issues (see *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11).

[34] Inasmuch as a finding that MASSOB had engaged in a terrorist act within the meaning of paragraph 34(1)(*c*) would render the respondent inadmissible under the *IRPA*, the decision must be set aside in respect of its conclusions on terrorism and sent back before a different member for determination.

C. *Engaging in or Instituting the Subversion by Force of Any Government – IRPA paragraph 34(1)(b)*

[35] *IRPA* does not define either "subversion" or "terrorism". However, the courts have provided guidance with respect to the definition of both terms.

[36] Subversion by force of a government has been defined as "accomplishing change by illicit means" and as "[any] act that is intended to contribute to the process of overthrowing a government, or most commonly as the use or encouragement of force, violence or criminal means with the goal of overthrowing a government, either in part of its territory or in the entire country" (*Maleki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 131 at para 8; *Eyakwe v Canada (Minister of Citizenship And Immigration)*, 2011 FC 409 at paras 7 and 30; *Suleyman v Canada (Minister of Citizenship and Immigration)*, 2008 FC 780 at para 63).

[37] "By force" has been understood to mean "reasonably perceived potential for the use of coercion by violent means" (*Oremade v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1077 [*Oremade #1*] at para 27; *Oremade v Canada (Minister of Citizenship and Immigration*) 2006 FC 1189 at para 4). Intention may also be demonstrated based upon a presumption that "a person knows or ought to have known and to have intended the natural consequences of their action [sic]" (*Oremade #1*, *supra* at para 30).

(1) Did the Member adopt the wrong test to determine the issue of subversion by force?

[38] The applicant argues that the Member misstated the issue before her by framing it as whether there was a serious possibility that MASSOB had become a subversive organization, referring to the Member's statement at paragraph 15 of her reasons as follows:

> The relevant context for analysis of the MASSOB's relationship to the cited events is that the MASSOB began as a non-violent, non-military organization. Given that context, there must be credible evidence that indicates a serious possibility or a degree of probability that the MASSOB, at some point, altered its original position and became a terrorist or subversive organization.

[39] Were I to conclude that this statement formed the basis of the Member's decision, I would agree that it improperly frames the issue for consideration. However, a careful analysis of the Member's reasons indicates that her decision was based upon a conclusion that the evidence did not support a finding that MASSOB had engaged in subversion by force, and that its intention was not to overthrow the Nigerian government, both issues which I consider below.

(2) Was the Member's finding that MASSOB had not engaged in force by the seizure of tanker trucks an erroneous finding of fact made without regard for the material before it?

[40] As indicated in the Statement of Facts, the issue of subversion by force turned mainly on the incident involving the seizure of oil tankers. Unlike the other incidents, MASSOB accepted responsibility for this conduct. The Member's reasons concerning the tanker truck incident are stated at paragraph 16, which contains a number of issues that are of concern to the Court.

[41] Firstly, the Member based her decision on a patently unreasonable conclusion of fact when she indicated that "the use of or threats to use force remains in the realm of speculation."

During his oral arguments, the respondent conceded that the evidence that described the seizing of tanker trucks as a "forceful interception" of petroleum tankers under the direction of MASSOB was unchallenged. He based his argument instead on the lack of intention on the part of MASSOB to overthrow the Nigerian government by these acts.

[42] Even if actual force was not used, the seizing of tanker trucks could not be described as anything other than giving rise to a "reasonably perceived potential for the use of coercion by violent means".

(3) Was the Member's conclusion that by seizing tanker trucks, MASSOB was engaging in civil disobedience not intended to subvert the Nigerian government by force unreasonable?

[43] I also conclude that the Member's conclusion that MASSOB's actions were not intended to subvert the government by force, but rather were "more in keeping with an act of civil disobedience" as unreasonable to the point of not falling within a range of reasonable acceptable outcomes. On no account can one find the conduct of seizing tanker trucks by force, which is normally described as "hijacking", to be an act of civil disobedience. Had members of MASSOB blocked the entry of the trucks by passively placing themselves or other objects in their way, an argument could certainly be made that these were acts of civil disobedience. The fact that the contents of the tankers were distributed amongst the population is further proof that MASSOB's conduct constituted the unlawful use of force to take possession of property not belonging to it.

[44] The Member's description of this conduct as a "threat" (apostrophized in her reasons) "to interfere with economic activity…more in keeping with civil disobedience" is equally unreasonable. This description reflects the type of conduct intended to overthrow a government.

[45] Ultimately, if one reads the Member's reasons carefully, her conclusion is that seizure of the trucks was not subversion. She describes this conduct as civil disobedience by stating that MASSOB's intention was to address inequities and imbalances in the price of oil to Biafra in comparison with the rest of the country, and not to overthrow the government.

[46] I set out the relevant passages from paragraph 16 of the Member's decision relating to the intention underlying the interception of the tanker trucks as follows:

> There are documentary references to the MASSOB's stated intention to intercept oil tankers. The documented intention was to coerce the federal government to redress imbalance in the distribution of petroleum products in the country because of perceived inequity due to non-availability of fuel in the MASSOB region at the government approved price. Reports indicate that the MASSOB vowed to resist all opposition to it seizure until the inequity and imbalance was redressed.
>
> […]
>
> Furthermore, taking into consideration the complex economic and political environment in Nigeria and the Biafran region in particular, the vow to intercept tankers is not reasonably equivalent to the use of coercion to overthrow the government of Nigeria.
>
> […]
>
> In the absence of more reliable and consistent reporting about the seizure of tankers, the available evidence is not sufficient to show reasonable grounds to believe that there were actions by the MASSOB intended to subvert the government.
>
> [My emphasis]

[47] There is evidence of statements by MASSOB that its purpose in forcefully seizing the tanker trucks was to address inequities of supply and pricing of an essential commodity by taking over its distribution. The obvious consequence of this conduct, however, was to subvert the authority of the Nigerian government in a confrontational and damaging manner, which had the

effect of undermining the legitimacy of the central government. This consequence flows directly from MASSOB's seizure of control of a fundamental aspect of the Nigerian economy in a manner that challenges the government's authority to ensure that the country's economy is not disrupted by unlawful means, which the seizing of tanker trucks carrying an essential commodity most assuredly represents.

[48] As was noted by Justice Phelan of this Court in *Oremade #1*, *supra*, at para 30, one is presumed to intend the results of one's actions. Taking control of the supply system of oil in a region of a country represents an overt act intended to subvert the government. The Member's decision concluding the contrary was clearly unreasonable.

[49] Accordingly, the appeal is allowed and the decision of the IAD is set aside. Given the conclusion that seizing the tankers by force constituted the engaging in subversion by force under paragraph 34(1)(*b*) of the *IRPA*, the matter is returned to the IAD with a direction to allow the appeal of the appellant Minister.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, and the matter is returned to the IAD with a direction to allow the appeal of the appellant Minister.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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