Federal Court  Cour fédérale

Date: 20150708

Docket: IMM-1949-14

Citation: 2015 FC 832

Ottawa, Ontario, July 8, 2015

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MENGHSTEAB ARAIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for the judicial review of a decision made by an officer at Citizenship and Immigration Canada [the "decision-maker"] on February 5, 2014. The judicial review application is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The decision under review found the applicant to be a person that is inadmissible on security grounds. More specifically, he is a foreign national about whom there are reasonable grounds to believe that he is inadmissible for, in the words of paragraph 34(1)(f) of the IRPA, "(f) being a member of an organization that … has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c)". Paragraph (c) refers to "engaging in terrorism".

[3] Unfortunately, the file is rather obscure on a number of fronts. First, it is less than clear why it took ten years to get to this point. Second, the way in which this matter has been handled has been less than transparent. In the end, I conclude that this has to be returned for redetermination.

I. Chronology

[4] Given the circumstances of this case, a chronology of events might prove useful:

- the applicant was born in 1953. He was born in Eritrea which, at the time, had been federated to Ethiopia through the intervention of the United Nations. Prior to 1952, Eritrea had been governed by Italy and Great Britain;
- Ethiopia revoked the autonomy conferred on Eritrea; a group known as Eritrea Liberation Front [ELF] emerged in 1962;
- the applicant acknowledges having been involved with ELF, which he calls a "movement" in his affidavit of August 6, 2014. The so-called "movement" sought independence for Eritrea from Ethiopia.

- in 1973, the applicant left Eritrea after having been detained for three months for a failure to abide by a curfew twice. It appears that the applicant's public support for independence manifested itself through participation in two demonstrations;
- the applicant travelled to Washington, D.C., in June 1973;
- he attended school in Oklahoma in 1974-1975;
- he moved to Houston, Texas in 1975;
- from 1975 to 1999, the applicant was a member of a group called ELF. He was the chairperson of what he claims comprised five to ten people whose activities were the distribution of leaflets and the collection of donations in order to provide support to refugees in Sudan. The group, the applicant claims, had no connection to the ELF active in Eritrea;
- the applicant became "involved" with another group, the Eritrean Revolutionary Democratic Front [ERDF]; it would appear that the ERDF split from the ELF in 1977;
- the applicant crossed the border at Fort Erie, Ontario, on October 6, 2003 and claimed refugee status upon arrival. Such status was obtained on May 7, 2004;
- an application for permanent residence was made thereafter. It was approved in principle on March 29, 2005 with background checks to follow;
- a letter summoning the claimant to an interview was sent on December 15, 2008. The record shows some activity within the Canada Border Services Agency [CBSA] during the summer of 2006; the applicant was interviewed by the Canadian Security Intelligence Service;

- on January 14, 2009, an interview was conducted by an officer of Citizenship and Immigration Canada [CIC];
- on January 20, 2009, a letter sent by the officer of CIC invited the applicant's submissions in order to benefit from an exemption from the ground of inadmissibility. The letter, to say the least, is confusing. Not only does the letter speak of "relief under paragraphs A34(1)(c) and A34(1)(f)", which provides no such relief, but it comes from an officer of CIC who refers to the Minister of Public Safety and Emergency Preparedness who would consider the relief, yet the matter would be dealt with by "our National Headquarters". Nowhere can we read what findings, if any, had been made under subsection 34(1) of the IRPA;
- on that same day, January 20, 2009, the said officer of CIC communicated internally that he had determined that the applicant was inadmissible under paragraphs 34(1)(f) and 34(1)(e). That determination was not communicated to the applicant;
- the applicant presented submissions with a view to obtaining an exemption on February 5, 2009. These submissions were transmitted to CBSA on February 12, 2009;
- on January 17, 2013, some four years later, an immigration processing agent responded to the applicant's query about the status of his immigration file. There was no news to communicate. To this day, there has not been a decision rendered concerning the request for an exemption;
- on May 16, 2013, CIC issued an Operational Bulletin announcing a change from the process that called for the holding of applications for permanent residence

where a decision must be made on inadmissibility on security grounds (like the applicant's case) until the Minister of Public Safety and Emergency Preparedness has made a decision on an exemption request. The process announced that the automatic hold does not continue until a decision on ministerial relief has been made;

- on February 5, 2014, the decision subject to judicial review herein was rendered by a CIC officer other than the one who handled the case until 2009.

II. The decision

[5] A determination was made in January 2009 that there were reasons to believe this applicant engages, has engaged or will engage in terrorism. That determination was made on the basis of the applicant being a member of the ELF from 1969 to 1973. After listing information obtained from the applicant at the time he sought and obtained refugee status in this country and also during the interview conducted in January 2009, the CIC officer concluded that the applicant is inadmissible because of his membership in the ELF starting in 1969. The documentation on file does not provide the reasons for that conclusion, but it seemed to have been derived from the information gathered.

[6] The decision under review came five years later. It was evidently rendered in application of the new policy which does not require that inadmissibility findings under subsection 34(1) of the IRPA be held in abeyance automatically until the Minister of Public Safety and Emergency Preparedness has made a decision concerning an exception to a declaration of inadmissibility

finding under subsection 34(2) (I note that subsection 34(2) was repealed in 2013 and was replaced by section 42.1 of the IRPA).

[7] It does not appear that the decision-maker met with the applicant. Rather, the decision letter speaks in terms of a review of the material available as of January 2009. The decision letter concluded that the application for permanent residence is denied. Paragraph 34(1)(f) of the IRPA is invoked.

[8] A document, entitled "Review & Conclusion", dated September 26, 2013, constitutes the justification for the decision. The CIC officer relies solely on the information gathered by others. The conclusion that the applicant was a member of the ELF comes from the Personal Information Form filled out in October 2003. The decision-maker notes that the applicant's family was active in the ELF, yet he does not even allude to the January 2009 interview of the applicant which stresses that the applicant's father, who was involved with the ELF, had separated from the applicant's mother and they did not have much contact; the applicant claimed that his father remarried and started a new family.

[9] The Review & Conclusion continues by stating that the applicant said that his youth membership included attending secret meetings, distributing written materials, fundraising and recruiting other young people. The document goes on to conclude that, "[a]s a result he was detained without charge for 3 months." That rather ominous description is not consistent with the notes taken of the interview of January 2009 during which the applicant contends that he was detained for having violated a curfew; actually, the applicant claimed that his detention was not

because of his involvement with the ELF. In fact his claim is to the effect that he did not hold an office in the ELF: he joined a student group that supported the ELF, as was the case of most of the population in Eritrea. Furthermore, the applicant contends that he did not distribute leaflets in Eritrea as this was illegal. Actually, the use of the word "included" would not be appropriate in that there were no other activities in support of the ELF, although the applicant recognizes that he knew during the period of 1969 to 1973 that, in the words of the interviewer in January 2009, "the ELF had an armed struggle inside Eritrea and there were freedom fighters." Although the applicant states that he never used violence, he seems to have been more equivocal about his knowledge of the use of violence by the ELF, answering "I don't know" to the question "[d]id the ELF use violence when you were involved?", but responding "I don't know of the ELF using violence – never heard of violence" to the question "[w]ere you ever involved in violent activities on behalf of the ELF?".

[10] It remains very much unclear where is the support for the proposition that the applicant "became actively involved in the political activities of the ELF. He was elected "chairman of the Texas State of ELF"." The applicant would have left Eritrea in 1973 and stayed in D.C. for a few months; he then studied in Oklahoma (1974-1975) and then settled in Houston, Texas, in 1975 until his arrival in Canada in 2003. During his years in Texas, the applicant became the chairman of the Eritrean Liberation Front in Houston for a period of time; however the group would have been very small (five to ten people) and its activities were limited to distributing leaflets and receiving small donations. It may be suspected that the applicant's involvement was somewhat more extensive because he confirms attending meetings of the Alliance of Eritrean National Forces in Washington, D.C. in 1998 and a conference organized by the same organization in July

2000. Although there is no denying the interest the applicant continued to have for his country of origin since his departure at 20 years of age, more than 40 years ago, it is very much unclear where is the support for the strong statement that he became actively involved in the political activities of the ELF on the record before this Court.

[11] The decision-maker goes on to examine the origins of the Eritrean Liberation Front and its activities. According to open sources, the ELF would have been guilty of numerous actions between at least 1969 and 1990; there were internal struggles that resulted in splintered groups, to the point that the decision-maker notes that "by 1992 the ELF had virtually disappeared from Eritrean political scene."

[12] It is surprising to read in the paragraph of Review & Conclusion introducing a long string of actions attributed to the ELF, language that is rather cautious:

> Furthermore, between 1969 and 1977, members linked to the ELF were involved in a string of attempted as well as successful aircraft hijackings in Athens, Madrid, Rome, Frankfurt, Makale, Addis Ababa and Karachi. In addition, various open sources have linked the ELF to numerous and varied incidents of terrorist activity beginning from their inception in 1960, until approximately 1990. [Emphasis added]

[13] It is on that basis that the decision-maker reached a conclusion: the Personal Information Form and the January 2009 interview conducted by someone else. However, instead of reaching his own conclusion, the decision-maker states (about the reasonable grounds to believe the applicant is inadmissible, on security grounds, for being a member of an organization that engages or has engaged in terrorism) that he is "not persuaded by the evidence to come to a

different conclusion than that reached on 20 January 2009." As already pointed out, that conclusion was never shared with the applicant.

[14] The decision-maker presents a test which, I am afraid, is not completely accurate. He speaks of:

> Reasonable grounds to believe has been described as a set of facts and circumstances that would satisfy an ordinarily cautious and prudent person.
>
> While partly subjective, it does require objective evidence such as corroboration. The reasonable grounds standard means that there needs to be an objective basis for the belief and that the Immigration officer must be able to satisfy a third party such as an adjudicator or a court that there are indeed reasons to support the belief. The information on which the belief is based should be compelling, credible and corroborated.

Be that as it may, the decision does not articulate how the test is met other than stating that the decision-maker is not persuaded to come to a different conclusion than that reached by someone else some five years earlier.

III. The applicant's position

[15] The applicant made a number of arguments of unequal value: he professes a violation of his right to procedural fairness because he was not notified of the change in policy in May 2013. Furthermore, the applicant claims he had a right to the disclosure of the "determination" made by another officer on January 20, 2009, in spite of the fact that the "determination" does not constitute the decision under review.

[16] The decision made is also said to be unreasonable because of the lack of proper analysis: the contention is that the decision-maker did not define terrorism, nor did he explain his conclusion that the acts constitute terrorism. The applicant contends that the decision-maker ought to have distinguished between various groups that would have been part of the ELF movement and, more generally, the decision-maker made errors concerning the facts.

[17] Finally, the applicant complains of an error of law in the interpretation of paragraph 34(1)(f) in view of the fact that subsection 34(2) has been repealed, to be replaced by section 42.1. The argument is to say that the issue of innocent membership should now be addressed as part of the interpretation of paragraph 34(1)(f), now that section 42.1, which is said to have a narrower scope than subsection 34(2) now repealed, provides for ministerial relief.

IV. Standard of review

[18] It is not disputed, and the Court agrees, that questions of fact and of mixed fact and law, are reviewable on a standard of reasonableness. However, the applicant contends that the issue of the interpretation to be given to paragraph 34(1)(f) of the IRPA requires the standard of review of correctness. He is wrong. Questions of law are presumptively reviewable on a standard of reasonableness where the tribunal interprets "its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], at para 54). The existence of the presumption has been confirmed many times since *Dunsmuir* (see *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895; *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42, [2014] 2 SCR 197; *Alberta (Information and Privacy*

Commissioner) v Alberta Teachers' Association, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers'*).

[19] The presumption has not been displaced by the applicant, which means that the standard of review of reasonableness will apply.

[20] Issues of procedural fairness on the other hand call for a standard of review of correctness: "For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness"." (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79; see also *Sketchley v Canada (Attorney General)*, 2005 FCA 404; *Dunsmuir*, *supra*, at para 129.) An applicant must satisfy a court that a particular duty applies and if so, whether the duty has been violated.

V. Analysis

[21] The issue of the interpretation of paragraph 34(1)(f) of the IRPA can be disposed of quickly. The decision under review does not address this question of law. A judicial review application is for the purpose of reviewing the decision made by the decision-maker. An argument that has not been made before the decision-maker which, by force, has not been disposed of does not have to be considered for the first time on judicial review. Entertaining the argument without the benefit of the views of a tribunal's specialized functions and expertise militates against exercising discretion to hear the case. Furthermore, the determination of the issues is entrusted to the administrative tribunal by Parliament (*Alberta Teachers'*, *supra*). A court reviews a decision when made.

[22] The applicant's argument appears to be that only under subsection 34(2) was it possible for an applicant to argue that the Minister should apply his discretion in favour of someone who was an innocent member of an organization engaged in terrorism. With the repeal of subsection 34(2) and its replacement with section 42.1, which it is argued is narrower in scope, an applicant should be allowed to argue innocent membership under paragraph 34(1)(f). Not only is the argument predicated on the application under subsection 34(2) made six years ago having disappeared with the repeal of subsection 34(2), and an application under section 42.1 not being capable of providing relief in appropriate cases, but it disregards that issues under paragraph 34(1)(f) are properly before the Minister of Citizenship and Immigration while ministerial relief is to be decided by the Minister of Public Safety and Emergency Preparedness (section 4 of the IRPA). In my view, it would be inopportune to consider the issue in those circumstances. As stated by Justice Rothstein in *Alberta Teachers'*:

> [22] The ATA sought judicial review of the adjudicator's decision. Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, e.g., *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, *per* Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies."

Indeed, there is still pending a review under ss 34(2) and the applicant has not argued that such review will not take place. In this case, the judicial review application should be dealt with on a different basis.

[23] The issue of being notified of the change in policy whereby the Minister of Citizenship and Immigration would be faulted for having decided to make his determination under paragraph 34(1)(f) before the Minister of Public Safety and Emergency Preparedness under subsection 34(2) (or section 42.1) is said to constitute a breach of the duty of procedural fairness.

[24] It should be clear that the two decisions, under paragraph 34(1)(f) and subsection 34(2) (or section 42.1), are separate and apart. They are made by different decision-makers and they bring about different considerations. The IRPA does not provide for an order in which they have to be made. Logically, it is argued by some, it may be said that there is no point in making a determination under paragraph 34(1)(f) if a different minister is to conclude that the matter does not constitute inadmissibility as the presence in Canada is not contrary or detrimental to the national interest. Conversely, what is the point of making a decision under subsection 34(2) if the person is not declared inadmissible under subsection 34(1), and paragraph 34(1)(f) in the case at bar. Arguably, the scheme of the Act may leave the impression that a decision under paragraph 34(1)(f) should come first because some may read subsection 34(2) (or section 42.1) as an exception to inadmissibility. For my part, I am not convinced that such is the case any more because Parliament did not speak of subsection 34(2) (or section 42.1) being an exception, but rather in terms of the matter in section 34 not constituting inadmissibility. As the Federal Court of Appeal put it in *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 121, 252 DLR (4th) 335 [*Poshteh*], "There is simply no temporal aspect to subsection 34(2). Nothing in subsection 34(2) appears to fetter the discretion of the Minister as to when he might grant a ministerial exemption" (at para 10). I share the view expressed in *Hassanzadeh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 902, that there is no prescribed order,

contrary perhaps to section 5 of the *Immigration Act* of 1952 (*Immigration Act*, RSC 1952), or section 19 of the *Immigration Act* of 1976 (*Immigration Act*, 1976, SC 1976-77, ch 52). If there is an order it might be that which was followed in this case. Justice MacTavish put it succinctly in *Ali v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1174:

> [42] A subsection 34(2) inquiry is directed at a different issue to that contemplated by subsection 34(1). The issue for the Minister under subsection 34(2) is not the soundness of the officer's determination that there are reasonable grounds for believing that an applicant is a member of a terrorist organization--that determination will have already been made. Rather, the Minister is mandated to consider whether, notwithstanding the applicant's membership in a terrorist organization, it would be detrimental to the national interest to allow the applicant to stay in Canada.
>
> [43] In other words, subsection 34(2) empowers the Minister to grant exceptional relief, in the face of a finding that has already been made by the immigration officer.

[25] What is important is that the flexibility that is inherent in the current scheme does not change the outcome. The Minister of Public Safety and Emergency Preparedness makes his determination independently of that made by the Minister of Citizenship and Immigration. And vice versa. Indeed, the Minister of Citizenship and Immigration may have provided his own relief to a decision made under subsection 34(1) through the discretion granted in him by sections 25 and 25.1 of the IRPA, the so-called humanitarian and compassionate [H&C] relief. The relief under subsection 34(2) (or section 42.1), which is based on the national interest, is different from the H&C relief. As the Supreme Court put it in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559:

> [44] In short, s. 34(2) of the *IRPA* establishes a pathway for relief which is conceptually and procedurally distinct from the relief available under s. 25 or s. 25.1. It should be borne in mind that an applicant who fails to satisfy the Minister that his or her continued presence in Canada would not be detrimental to the

> national interest under s. 34(2) may still bring an application for H&C relief. Whether such an application would be successful is another matter.

I will come back to the availability of the H&C relief.

[26] It follows that there is nothing riding on the order in which these decisions are made. If there is nothing in subsection 34(2) to fetter the discretion of the Minister as to when he may make a decision, as found by the Court of Appeal, it is difficult to see how the Minister of Citizenship and Immigration could himself fetter his discretion where the order in which decisions are made would not matter. In *Canada (Minister of Citizenship and Immigration) v Adam*, [2001] 2 FCR 337, the Federal Court of Appeal found that then section 19 of the then *Immigration Act* required that the ministerial exemption be granted first. As pointed out earlier, such is not the case any more as the Federal Court of Appeal concluded in *Poshteh*, *supra*, that "*Adam* is not authority for the interpretation the Minister places on subsection 34(2)."

[27] It is said that the " "doctrine of legitimate expectations" has been recognized as a discrete category in which participatory rights are protected by the courts as a matter of fairness" (Brown and Evans, in *Judicial Review of Administrative Action in Canada* (Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto, On: Carswell, 2013) (loose-leaf), ch 7 at 1700). Here, the participatory rights of the applicant are not, and cannot, be jeopardized by the order in which discrete decisions are made.

[28] More importantly, the legitimate expectations cannot be ambiguous. The Supreme Court in *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, defined the doctrine in precise terms:

> [68] Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite. See *Mount Sinai Hospital Center*, at paras. 29-30; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 78; and *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking: Brown and Evans, at pp. 7-25 and 7-26.

It has not been established in this case that there was in fact a policy in place that required that the decision made under subsection 34(1) was always made after the decision under subsection 34(2). If there was a practice, for whatever bureaucratic imperative, it was not universal.

[29] I share the view of Justice MacTavish that the alleged change in policy does not result in unfairness. In *Omer v Canada (Citizenship and Immigration)*, 2015 FC 494, my colleague wrote:

> [15] More fundamentally, Ms. Omer has not been able to articulate how CIC's policy change resulted in any unfairness to her. In particular, she has not satisfactorily explained what, if anything, would be different if the Ministerial Relief decision were made before her permanent residence application was decided rather than after. Ms. Omer's application for Ministerial Relief will continue to be processed, and there is nothing in the record before me suggesting that this application will be negatively affected by the fact that a decision has now been made refusing her application for permanent residence.

Like her, I would not completely discount the possibility that a change in policy could rise to the level of affecting the participatory rights of an applicant. This is simply not the case here. There is nothing unfair in the order in which decisions based on different considerations are made. As for the decision before this Court, there was no violation of the doctrine of legitimate expectations.

[30] The other two issues raised by the applicant do, however, constitute reviewable errors that require that the matter be sent back to another decision-maker for a redetermination.

[31] Both issues relate to the decision made on February 5, 2014 and, more precisely, how it is articulated. After having described what the CIC officer considered to be the test that must be met, he simply notes the evidence reviewed and concludes, without more, that "I … am not persuaded by the evidence to come to a different conclusion than that reached on 20 January 2009." There are difficulties with that conclusion.

[32] It is not disputed that the decision rendered in February 2014 was not preceded by the taking of any new evidence by the decision-maker, who decided on the basis of the record assembled by the officer who made a determination in January 2009. The decision-maker did not hear or gather the evidence. He did not hear the applicant, yet he decided. It is not disputed either that the applicant was never made aware of that determination, yet the decision-maker evidently used that determination as a benchmark. The decision-maker took it that he had to be persuaded by the same evidence, which he had not heard, to come to a different conclusion than that reached some five years earlier. How could the applicant participate in a meaningful manner in

the decision-making process leading to the decision of February 2014 if he does not even know of a determination made five years earlier and on which the decision-maker relies as a benchmark?

[33] In *Haghighi v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FCR 407, the requirement to be informed is put thus:

> [37] In my opinion, the duty of fairness requires that inland applicants for H & C landing under subsection 114(2) be fully informed of the content of the PCDO's risk assessment report, and permitted to comment on it, even when the report is based on information that was submitted by or was reasonably available to the applicant. Given the often voluminous, nuanced and inconsistent information available from different sources on country conditions, affording an applicant an opportunity to comment on alleged errors, omissions or other deficiencies in the PCDO's analysis may well avoid erroneous H & C decisions by immigration officers, particularly since these reports are apt to play a crucial role in the final decision. I would only add that an opportunity to draw attention to alleged errors or omissions in the PCDO's report is not an invitation to applicants to reargue their case to the immigration officer.

Here, the only decision that disposes of the matter is the decision rendered in February 2014. It is evident that the decision-maker, who is not the officer who had carriage of the case, put significant weight on the determination made five years earlier. It is the reliance put on that determination that makes it particularly important that the determination of January 2009 be disclosed (*Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49, [2001] 3 FCR 3 [*Bhagwandass*]).

[34] I find myself in agreement with Justice Dawson, as she then was, who concluded in *Mekonen v Canada (Citizenship and Immigration)*, 2007 FC 1133, 66 Imm LR (3d) 222 [*Mekonen*]:

> [4] While the applicants have raised a number of interesting arguments, in my view, one issue is determinative. I find that, on the facts and circumstances of this particular case, the officer breached the duty of fairness that he owed to Mr. Mekonen. The officer did so by failing to provide Mr. Mekonen with copies of documents that the officer had obtained and considered in making his decision, and by failing to afford Mr. Mekonen an opportunity to comment on the information contained within those documents. Additionally, to the extent that the officer found that there were reasonable grounds to believe that the ELF is an organization that there are reasonable grounds to believe is, or was, engaged in terrorism, the officer erred by failing to indicate how he understood and applied the definition of "terrorism".

[35] Ironically, *Mekonen* was concerned with membership in the ELF, as in this case. Although the document that was not disclosed in *Mekonen* was a memorandum prepared by the CBSA, while here it is a determination made by a CIC officer, it is also the content and purpose of the determination that in this case "have such a degree of influence over the decision maker that advance disclosure is required in order to "level the playing field" " (as cited at para 19 of *Mekonen* and taken from *Bhagwandass* at para 22).

[36] It bears repeating that the decision-maker declared that he needed to be persuaded to come to a different opinion than the conclusion reached by the other officer in January 2009. Fairness required that the applicant be provided with the determination before the decision was taken. In *Bhagwandass* the FCA put the following factors as to be considered:

> [22] *Haghighi* also establishes that, in considering whether the duty of fairness requires advance disclosure of an internal Ministry report on which a decision maker will rely in making a

> discretionary decision, the question is not whether the report is or contains extrinsic evidence of facts unknown to the person affected by the decision, but whether the disclosure of the report is required to provide that person with a reasonable opportunity to participate in a meaningful manner in the decision-making process. The factors that may be taken into account in that regard may include the following: (i) the nature and effect of the decision within the statutory scheme, (ii) whether, because of the expertise of the writer of the report or other circumstances, the report is likely to have such a degree of influence on the decision maker that advance disclosure is required to "level the playing field", (iii) the harm likely to arise from a decision based on an incorrect or ill-considered understanding of the relevant circumstances, (iv) the extent to which advance disclosure of the report is likely to avoid the risk of an erroneously based decision, and (v) any costs likely to arise from advance disclosure, including delays in the decision-making process.

In the case at hand, these factors favour disclosure.

[37] But there is more. I am less than convinced the decision-maker applied in this case the test. The circumstances surrounding this case certainly could reasonably justify the suspicions of a decision-maker. After all, this applicant acknowledged activities in Eritrea where he was detained without charges for three months. Barely 20 years old, he ends up in Washington, D.C. and for 26 years he continues political activities in the United States for the independence of Eritrea in the name of ELF. However, it does not appear that he ever had any status in the United States before he crossed the border into Canada in 2003.

[38] Be that as it may, reasonable suspicions are not reasonable grounds to believe that a person has been a member of an organization engaged in terrorism. The difference between suspicion and belief was nicely described by the High Court of Australia in *George v Rockett*, (1990) 93 ALR 483:

> Suspicion, as Lord Devlin said in *Hussein v Chong Fook Kam* [1970] AC 942 at 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown.
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> …
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> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

Thus, it is often said that reasonable grounds to believe is a credibly based probability, a reasonable probability.

[39] The decision-maker in this case stated "[r]easonable grounds to believe has been described as a set of facts and circumstances that would satisfy an ordinarily cautious and prudent person." But, with all due respect, satisfy that reasonable person of what? The decision goes on to say that there needs to be an objective basis for the belief. The decision-maker insists that corroborative evidence be present, seemingly relying on *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 [*Mugesera*].

[40] I should note that the passage relied on in *Mugesera* in support of the requirement for corroboration does not refer to it. Although corroboration would help support the existence of

reasonable grounds, I would not readily conclude that corroboration is required for reasonable grounds to be present. Corroborative evidence comes from an independent source and tends to confirm the witness' testimony such that the corroboration assists in concluding that the witness is telling the truth. Reasonable grounds and corroboration should not be confused. One is a standard to be attained while the other is merely a form of confirmatory evidence. In *Mugesera*, the Court simply stated 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" (at para 114). The articulation presented in *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FCR 297 is in my view more helpful:

> [60] As for whether there were "reasonable grounds" for the officer's belief, I agree with the Trial Judge's definition of "reasonable grounds" (*supra*, at paragraph 27, page 658) as a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes "a *bona fide* belief in a serious possibility based on credible evidence." See *Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.).

[41] In this case, one looks in vain for the articulation by the decision-maker of his "*bona fide*" belief in a serious possibility based on credible evidence or the "objective basis for the belief which is based on compelling and credible information", in the words of the Supreme Court in *Mugesera* (para 114). The reference to a "set of facts and circumstances that would satisfy an ordinarily cautious or prudent person" is not particularly helpful. It is the quality of the evidence that makes reasonable grounds.

[42] Ever since *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the adequacy of reasons is not a stand-alone basis for quashing a decision. What is required of reviewing courts "is a more organic exercise -

the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (para 14). The decision-maker will have to satisfy the reviewing court of the following:

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[43] With respect, the Court is not lacking in paying respectful attention to the decision-maker's reasons. It is rather the reasons that should be supplemented in light of the evidence that are lacking. The lack of articulation makes the decision unreasonable. Perfection is not needed and reasons do not have to be extensive. But there continues to be a need for the reviewing court to determine whether we are within a range of acceptable outcomes.

[44] Other than stating that the applicant was a member of the ELF and that the ELF referred to is the ELF that is alleged to have perpetrated crimes in the 60's, 70's and 90's which may be seen as terrorism, there is no articulation of the reasons why this applicant is believed by this decision-maker to be a member of the organization that actually perpetrated the crimes. The decision does not explain, even in cursory fashion, the nature of the ELF and its many incarnations and factions. It does not seek to articulate why this applicant would be a member, as the notion is described in our law. There is no doubt that the applicant was a sympathizer of

something called ELF; he supported the independence of Eritrea and the ELF supported the independence too. Some individuals referring to themselves as the ELF used violent means to advocate for independence. But the evidence tends to show that the situation was much more fluid. Maybe there are suspicions that he was a member of an organization involved in terrorism. But more is needed to satisfy the standard of reasonableness that there was membership in the organization that perpetrated crimes, in view of the fluidity of the circumstances.

[45] In my view, the decision made in this case does not have the badges of reasonableness that would allow this Court to conclude that there is present the "existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir, supra*, para 47). Here, there is no indication that the CIC officer "sifted through the record and was alive to the appellant's challenge to the credibility of certain documents" as was the case in *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86, at para 36. As I tried to show, it was rather the opposite that transpired in this case.

[46] As a result, this matter must be returned to a different decision-maker for redetermination because the applicant was not provided with the determination, made in January 2009, on which the decision-maker ostensibly relied heavily, and because the decision made in February 2014 is not reasonable in view of the inadequacy of the reasons given (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431). I note that it may be appropriate and prudent to allow the applicant to be heard as part of the redetermination because only those who hear can decide. Although the decision made under paragraph 34(1)(f) is not a formal adjudication, it is a decision that has significant importance for the applicant, with the facts being gathered more than six

years ago. The parties agreed that there is not a serious question of general importance that emerges in this case. I agree.

VI. Redacted passages of the Certified Tribunal Record [CTR]

[47] The respondent Minister in this case moved that some passages from the CTR be redacted in accordance with section 87 of the IRPA because it is alleged that the disclosure of that information could be injurious to national security interests or endanger the security of any person.

[48] The information to be redacted was found at pages 163, 164, 214, 218 and 359 to 361 of the CTR. Subsequent to the motion dated May 12, 2015, the respondent limited its original request by removing proposed redactions at page 218 as well as a segment on page 359.

[49] It is on that limited basis that the Court considered the respondent's request. A hearing in accordance with paragraph 83(1)(c) was held. Following that hearing, a further hearing by conference call was conducted in order to appraise counsel for the applicant of the Court's decision.

[50] The respondent's motion was granted. It should be noted that, having reviewed the material to be redacted, the Court was convinced that the said material would not, and could not, be of assistance to the applicant or the respondent in the case at hand.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter must be returned to a different decision-maker for redetermination. There is no serious question of general importance.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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