

Federal Court



Cour fédérale

Date: 20200818

Docket: IMM-3490-19

Citation: 2020 FC 833

Ottawa, Ontario, August 18, 2020

PRESENT: Mr. Justice James W. O'Reilly

BETWEEN:

ABEL NAHUSENAY YIHDEGO

Applicant

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr Abel Nahusenay Yihdego, a citizen of Ethiopia, arrived in Canada in 2017 as a temporary resident. He was employed in Ethiopia for several years as a protocol analyst and network engineer with a government agency called the Information Network Security Agency (INSA), a body charged with managing key aspects of Ethiopia's national cyber security operations.

[2] Soon after his arrival in Canada, Mr Yihdego made a claim for refugee protection alleging persecution from his former employers based on his refusal to join INSA's decryption department. He believed the department was involved in espionage, an activity to which he did not want to contribute.

[3] Before Mr Yihdego's refugee claim was considered, a panel of the Immigration Division (ID), found him to be inadmissible to Canada for being a member of an organization reasonably believed to engage in espionage contrary to Canada's interests. In particular, the ID found that INSA covertly monitored members of the Ethiopian diaspora residing in the United States. It considered that activity to be against Canada's interests because it was directed at a close Canadian ally, contrary to the values of the *Canadian Charter of Rights and Freedoms*, and incompatible with Canada's democratic character.

[4] Mr Yihdego's main submission is that the ID's conclusion that INSA's espionage activities were contrary to Canada's interests was unreasonable. He asks me to quash the ID's decision and order another panel to reconsider the issue of his inadmissibility to Canada.

[5] I agree with Mr Yihdego and will therefore grant this application for judicial review. In doing so, I am following the approach adopted by Justice John Norris in *Weldemariam v Canada (MPSEP)*, 2020 FC 631.

[6] While Mr Yihdego also argued that the ID's decision was unreasonable in a number of other respects, I need not deal with those.

II. Background

[7] Mr Yihdego was employed at INSA as a protocol analyst and network engineer from 2011 to 2014. He claims that he was pressured to join INSA's decryption unit and, when he refused, his superiors threatened and harassed him. He took steps to avoid further pressure, taking education programs outside Ethiopia. In 2014, he resigned from his position at INSA and began graduate studies in Italy.

[8] On his return to Ethiopia in 2017, he claims to have been detained by security services based on his political opinions and membership in a political party. He says his former boss at INSA again pressured him to join the decryption department.

[9] Fearing further mistreatment, Mr Yihdego fled to Canada and entered on a temporary resident visa. A few months later, he sought refugee protection.

[10] Based on an interview with Mr Yihdego and documentary evidence relating to his background, an immigration officer prepared a report alleging that Mr Yihdego was inadmissible to Canada on security grounds under s 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] (see Annex for provisions cited).

[11] Mr Yihdego's file was then referred to the ID for a hearing on the issue of inadmissibility.

III. The ID's Decision

[12] The ID began by noting that the standard of proof required for a finding of inadmissibility is reasonable grounds to believe, which is an objective threshold, based on credible evidence, that lies between mere suspicion and a balance of probabilities (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114).

[13] The burden of proof fell on the Minister to satisfy the ID that there were reasonable grounds to believe that Mr Yihdego was inadmissible to Canada as a member of an organization engaged in an act of espionage against Canada or contrary to Canada's interests (s 34(1)(a),(f)). This inquiry involves determining the nature of the acts allegedly carried out by the organization and whether the person was a member of the organization (*Al Yamani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1457 at para 10).

[14] The ID cited some of the general propositions about membership that are referred to in the case law:

- In the area of public safety and national security, the concept of membership is broad (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at para 27).
- Membership extends to persons who simply belonged to the organization (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (FCA) at para 25).
- There must at least be evidence of an institutional link with, or knowing participation in, the group's activities (*Sinnaiah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1576 at para 6).

- Membership can be inferred from actions that materially support the organization's objectives (*Sumaida v Canada (Citizenship and Immigration)*, 2018 FC 256 at para 17).

[15] The ID noted the duration of Mr Yihdego's employment with INSA (nearly 3 years), as well as the nature of his duties, and concluded that Mr Yihdego was a member of INSA. He had voluntarily joined the organization, was aware of the involvement of the organization in espionage, had nevertheless remained an employee, had a close relationship with other employees, had been offered a promotion, and was trained in DPI, technology that can be used to intercept communications.

[16] The ID went on to conclude that INSA was an organization involved in espionage contrary to Canada's interests. It proceeded from a definition of "espionage" that includes obtaining secret or confidential information without permission, and involves "surreptitious or covert information gathering" (*Sumaida*, above at para 21).

[17] The documentary evidence showed that INSA has used surveillance software, malware, and Deep Packet Inspection (DPI) as means of intercepting private communications and monitoring Ethiopian citizens and journalists. This amounted, according to the ID, to cyber espionage.

[18] The ID relied on the Supreme Court of Canada's decision in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 65, 78, to define the term "Canada's interests." There, the Court was interpreting a slightly different term, "national interest". It found that Canada's national interest included public safety and national security, as well as the values underlying the *Canadian Charter of Rights and Freedoms*, and democratic principles, such as

equality and the rule of law. Further, the concept of national interest includes the numerous objectives of the IRPA.

[19] The ID also referred to the Minister's Immigration Enforcement Manual (ENF 2/OP 18: Evaluating Inadmissibility) which, in listing activities amounting to espionage contrary to Canada's interests, includes activity directed against Canada's allies.

[20] The ID found that INSA's activities were contrary to Canada's interests. First, INSA targeted members of the Ethiopian diaspora residing in the United States, an important Canadian ally (citing *Sumaida*, above at paras 12-13). INSA's principal targets included journalists, human rights activists, and political dissidents. The ID noted that INSA's actions were contrary to US interests and had been specifically criticized by the US State Department.

[21] Second, the ID found that INSA's espionage was inconsistent with *Charter* values, Canada's democratic character, and Canada's commitment to equality and the rule of law. It concluded that INSA's activities infringed the fundamental rights of individuals, including privacy rights, and the freedoms of expression, association, and the press.

[22] The ID rejected Mr Yihdego's argument that INSA's actions were a legitimate response to concerns about insurgents, terrorists, and subversives. Even if that were so, stated the ID, INSA's activities would still amount to espionage contrary to Canada's interests (citing *Peer v Canada (Minister of Citizenship and Immigration)*, 2010 FC 752 at para 40, 2011 FCA 91 at paras 2-3).

IV. Was the ID's decision unreasonable?

[23] Mr Yihdego's main argument is that the ID erred in its definition of "Canada's interests".

[24] In particular, Mr Yihdego argues that the ID incorrectly held that *Charter* values should figure in the analysis of "Canada's interests". While Mr Yihdego submits that this issue, as a matter of legal interpretation, should be addressed on a correctness standard, that submission was made before the Supreme Court of Canada rendered its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. There, the Court held that a standard of reasonableness presumptively applies to administrative decision-making (at para 25). Accordingly, the question is whether the ID's conclusion on this issue was unreasonable.

[25] In my view, the ID's conclusion that Charter values should be considered was unreasonable.

[26] As noted by Justice Norris in *Weldemariam*, the Charter does not apply to INSA or to the journalists who were targeted by it. In short, while INSA's actions may have been contrary to Canadian values, that is not enough to suggest that Canada's national security was imperiled (at para 54). The upshot of the ID's conclusion on this point is that conduct that could be characterized as "un-Canadian" – contrary to Charter values or democratic principles – is against Canada's interests. I agree with Justice Norris that a more tangible connection to Canada's national security is required for a finding of inadmissibility.

[27] In addition, as in *Weldemariam*, the ID found that INSA had engaged in espionage against an important Canadian ally. In fact, however, the evidence did not show that the United States, or citizens of that country, were the targets of INSA's activities. Further, even if citizens of the United States had been targeted, it is not clear how Canada's national security interests would be affected. In the absence of an explanation by the ID, its conclusion was unreasonable.

[28] The ID's finding that engaging in espionage against a Canadian ally was contrary to Canada's interests was purportedly based on *Sumaida*, above, at paras 12-13. There, an immigration officer had found Mr Sumaida to be inadmissible to Canada as a member of an organization involved in espionage contrary to Canada's interests; that conclusion was upheld on judicial review. On the facts, Mr Sumaida had personally conducted espionage in the United Kingdom, which was described as "an important Canadian ally". While the officer had found Mr Sumaida's activities to be contrary to Canada's interests, the main issue on judicial review whether the officer had reasonably found Mr Sumaida to be a member of the Mukhabarat, the Iraqi secret police.

[29] Here, the ID noted that *Sumaida* contained a "tacit or implied" acceptance that espionage directed against a Canadian ally was against Canada's interests. In fact, no conclusion can be drawn from *Sumaida* on this point as the issue was not argued on judicial review.

[30] Therefore, the ID's analysis of Canada's interests was unreasonable.

V. Conclusion and Disposition

[31] The ID's conclusion was unreasonable. Therefore, I must allow this application for judicial review.

[32] The parties proposed a question of general importance for certification. The question was recently stated by Justice Norris in *Weldermariam*, and I agree that the same question should be stated here:

Is a person inadmissible to Canada pursuant to paragraph 34(1)(f) of the *Immigration and Refugee Protection Act* for being a member of an organization with respect to which there are reasonable grounds to believe it has engaged in, engages in, or will engage in acts of espionage that are “contrary to Canada’s interests” within the meaning of s 34(1)(a) of the Act if the organization’s espionage activities take place outside Canada and target foreign nationals in a manner that is contrary to the values that underlie the *Canadian Charter of Rights and Freedoms* and the democratic character of Canada, including the fundamental freedoms guaranteed by section 2(b) of the *Charter*?

JUDGMENT IN IMM-3490-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The matter is returned to another panel of the ID for redetermination.
3. The following serious question of general importance is stated:

Is a person inadmissible to Canada pursuant to paragraph 34(1)(f) of the *Immigration and Refugee Protection Act* for being a member of an organization with respect to which there are reasonable grounds to believe it has engaged in, engages in, or will engage in acts of espionage that are “contrary to Canada’s interests” within the meaning of s 34(1)(a) of the Act if the organization’s espionage activities take place outside Canada and target foreign nationals in a manner that is contrary to the values that underlie the *Canadian Charter of Rights and Freedoms* and the democratic character of Canada, including the fundamental freedoms guaranteed by section 2(b) of the *Charter*?

"James W. O'Reilly"

Judge

ANNEX

<i>Immigration and Refugee Protection Act, SC 2001, c 27</i>	<i>Loi sur l'immigration et la protection des réfugiés (LC 2001, ch 27)</i>
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 :
a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;	a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
(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;
(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;	b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(c) engaging in terrorism;	c) se livrer au terrorisme;
(d) being a danger to the security of Canada;	d) constituer un danger pour la sécurité du Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(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), (b.1) 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), b.1) ou c).

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3490-19

STYLE OF CAUSE: ABEL NAHUSENAY YIHDEGO v MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 26, 2020

JUDGMENT AND REASONS: O'REILLY J.

DATED: AUGUST 18, 2020

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