Federal Court  Cour fédérale

Date: 20221031

Docket: IMM-1638-21

Citation: 2022 FC 1489

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 31, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

VALÉRIE BÉKÉ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant's application for permanent residence was denied on the ground of inadmissibility under paragraphs 34(1)(c) and 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act or IRPA]. The applicant is now seeking judicial review of this decision after being granted leave to do so under section 72 of the Act.

[2] The application for judicial review must be allowed. Here is why.

I. Facts

[3] The applicant is a citizen of Côte d'Ivoire. Between 1995 and 2002, thus between ages 12 and 19, she was a member of the Fédération estudiantine et scolaire de la Côte d'Ivoire (FESCI).

[4] In May 2012, the applicant left her country for Canada on a temporary resident visa. In July 2016, she claimed refugee protection, fearing that she would be persecuted for her pro-Gbagbo political activism, Gbagbo being Laurent Gbagbo. However, the decision under review does not deal with what would have been a turbulent period in Côte d'Ivoire, involving Mr. Gbagbo, among others. The Refugee Protection Division (RPD) allowed the applicant's claim in a decision dated May 31, 2018.

[5] On July 20, 2018, the applicant filed an application for permanent residence as a protected person. Her application was approved at the admissibility stage on January 13, 2020.

[6] On August 17, 2020, the applicant was sent a request for further information on her activities and role in FESCI. The applicant replied on August 23, 2020. She stated that as a member of this organization, she attended meetings and supported the organization's activities. She stated that she had been FESCI's financial secretary over the last two years as a member and tracked office expenses and revenues, in addition to taking care of general administration.

[7] On September 18, 2020, a so-called procedural fairness letter was sent to the applicant notifying her of her possible inadmissibility under paragraphs 34(1)(f) and 34(1)(c) of the IRPA because of her membership in FESCI. This gave her an opportunity to try to address the concerns of the administrative decision maker. The applicant replied to the procedural fairness letter, providing a sworn statement from her and her spouse, in addition to various documents to support her position.

II. Impugned decision

[8] On October 27, 2020, the senior immigration officer, who is the administrative decision maker, rejected the applicant's application for permanent residence, finding that the applicant was inadmissible under paragraph 34(1)(f) of the IRPA because of her membership in FESCI, an organization that there were reasonable grounds to believe had engaged in terrorism (paragraph 34(1)(c) of the IRPA).

[9] It seems that the senior immigration officer's main concern was that FESCI, an organization that supported the [TRANSLATION] "Gbagbo government" in Côte d'Ivoire, [TRANSLATION] "engaged in acts of great violence and intimidation against the population and members of the opposition parties" (Decision, p 2/8).

[10] The officer first stated that the evidentiary standard applicable to section 34 of the IRPA was that of [TRANSLATION] "reasonable grounds to believe" and that there was no need to address the issue of complicity. It was understood that being a member of an organization engaging in terrorism is sufficient, without having to participate in terrorism directly or as an accomplice. In addition, according to the officer, the concept of reasonable grounds to believe

lies between mere suspicion and the balance of probabilities, the civil standard. The officer then identified the important terms in this case, relying on *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*], to define terrorism.

[11] In fact, the administrative decision maker uses the *Suresh* definition of "terrorism" twice in the short decision under review. In *Suresh*, the Supreme Court did not attempt to define the term exhaustively, "a notoriously difficult endeavour" (*Suresh*, para 93). Instead, the court chose to consider the term "terrorism" in the Act as including:

> ... any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".
>
> (*Suresh*, para 98.)

The decision maker therefore used what he described as a [TRANSLATION] "definition" to measure whether the applicant's activities satisfied paragraphs 34(1)(c) and 34(1)(f) of the Act.

[12] The officer referred to the documentary evidence from objective sources considered to be reliable to conclude that FESCI had committed acts of intimidation and violence against the civilian population for many years and had tried to compel the Ivorian government and the United Nations to do or to abstain from doing certain acts. The officer cited a 2006 report from Human Rights Watch, an April 2000 report from the UK Home Office and a 2004 report on Côte d'Ivoire from the US State Department (Country Report on Human Rights Practices) to conclude

that he had reasonable grounds to believe that FESCI was an organization engaging in acts of terrorism within the meaning of *Suresh*.

[13] The officer then examined the applicant's membership status, explaining that the courts have interpreted this term liberally. He applied criteria such as the length of involvement, the nature and duration of activities and the degree of involvement.

[14] In response to the procedural fairness letter, the applicant stated that membership in FESCI was the lot of all students and that she was a member by default. She pointed out her very young age.

[15] The officer, however, found that FESCI was underground in 1995, having been banned by the government between 1990 and 1997. The applicant did not clarify this matter. The officer also relied on the objective evidence to note that there were other student associations at the time and that FESCI had intimidated students over their choice of student association. Although the officer acknowledged that the applicant was young at the time of her membership in FESCI, he stressed that she was financial secretary from 2000 to 2002, between the ages of 17 and 19, and that she never said that she had been compelled to hold this position.

[16] In her response to the procedural fairness letter, the applicant also contended that she wanted to help improve living conditions at school by helping with administration. She stated that she very rarely attended meetings and never participated in the violence attributed to FESCI.

The applicant added that she never had to follow the dress code apart from the required school uniform.

[17] The officer noted that the applicant's letter replying to the IRCC's request for information and the letter replying to the procedural fairness letter differed in some respects, including in the description of her role. For example, in the first letter, the applicant stated that she wore the organization's clothing and invited others to join, which contradicted what she said in her reply to the procedural fairness letter. The wearing of clothing and other promotional items showed public commitment and member support of FESCI the activities. The applicant's argument that she was a victim of FESCI and was a member without her consent was not supported by her actions, and the applicant did not provide any explanation for this. The officer found that, instead, the applicant [TRANSLATION] "[went] back on her statements and [tried] to downplay her role in FESCI" (Officer's Decision, p 7/8).

[18] The officer then noted that FESCI had influence across the country and forced businesses around schools to pay [TRANSLATION] "taxes". The financial secretaries of FESCI sections were responsible for keeping a list of merchants in their respective territories and of the [TRANSLATION] "taxes" they owed. They then had to collect the money on a monthly or weekly basis.

[19] Lastly, the applicant claimed that she never participated in any acts of violence and that she did not endorse the violence promoted by FESCI. However, the officer noted that section 34 of the IRPA does not require an analysis of complicity in inadmissibility cases.

[20] The officer concluded that, considering the applicant's various statements and the RPD's reasons, the applicant was actually a highly involved activist because of her cumulative roles in supporting pro-Gbagbo movements, including FESCI. Her activism, role and activities, in addition to her involvement as a simple member and as financial secretary, led to the officer's conclusion that the applicant was a member, as defined in *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 FCR 487 [*Poshteh*].

[21] With respect to the alleged terrorism, I begin by noting that the documentary evidence on which the decision maker appears to have relied postdates the applicant's membership in the student organization. In addition, with respect to several of the reports cited specifically by the senior immigration officer, it is not clear how the described acts might meet the definition of terrorism that the officer had chosen to use. For example, the 2006 Human Rights Watch report cited by the officer mentions acts of intimidation, including torture and rape, but in 2005. The US State Department's 2004 Country Reports on Human Rights Practices for Côte d'Ivoire includes incidents during the year where two magistrates were assaulted to prevent a ceremony from being held. In addition, a refusal to demands to pay certain amounts from scholarships given to students led to attacks on student union leaders. But there are no details. Vandalism followed. But this did not take place until 2004, after the applicant left FESCI.

[22] Additionally, for the time when the applicant was a FESCI member, the evidence used by the senior immigration officer refers exclusively to vandalism, demonstrations and student strikes. While this may be violence, it does not resemble what is defined in *Suresh*, namely an "act intended to cause death or serious bodily injury to a civilian".

[23] It is on the basis of this evidence that the decision maker reached the conclusion that FESCI [TRANSLATION] "engaged in acts of great violence and intimidation against the population and members of the opposition parties". This seemed enough for the decision maker to conclude that FESCI is an [TRANSLATION] "organization that has engaged in acts of terrorism as defined in *Suresh*" (Decision, p 5/8). No explanation is given to establish a correlation between the definition reproduced in this short decision and the actions of which FESCI is accused.

[24] As the decision maker was satisfied that the applicant was a member of FESCI and that the organization had committed acts of terrorism within the meaning of *Suresh*, he then addressed the issue of whether the applicant was [TRANSLATION] "a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraphs (a), (b) or (c)" (Decision, p 5/8).

[25] But the officer performed an analysis whose purpose is not clear. He noted that the applicant had described herself as being from a politicized family: she was an activist and she joined FESCI at age 12. The senior immigration officer contended that she stayed in the organization and rose in rank between ages 17 and 19. This led to the decision maker finding as follows:

> [TRANSLATION]
>
> Thus, the claim that Ms. Béké was a victim of FESCI and an unconsenting member is not supported by the applicant's behaviour as an activist. Ms. Béké gave no explanation for these contradictions or explained why she gave diverging statements about the same items. I accordingly draw a negative inference from this.
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> (Decision, p 7/8.)

I admit to not really understanding why a negative inference was drawn when the [TRANSLATION] "contradictions" were merely attempts to downplay her role within the organization after a "procedural fairness letter", as it is known, had alerted her to concerns about her possible inadmissibility. It must be remembered that the applicant had been granted refugee status in Canada because of her political activism: for that, she had emphasized certain elements, elements she downplayed when confronted with inadmissibility. In my view, the so-called diverging statements are rather marginal when it comes to the question that the decision maker was seeking to answer. In any event, the applicant does not dispute that she was a member of FESCI between 1995 and June 2002. The issue lies elsewhere.

[26] No attempt was made to determine whether there were reasonable grounds to believe that the organization engages, has engaged or will engage in acts of terrorism in relation to a person who left the organization in 2002. I conclude that the decision maker was satisfied that the applicant was a member in the organization and that the acts carried out by the organization fell under the definition of terrorism. The officer did not distinguish at all between grounds to believe that the organization engages, has engaged or will engage in terrorism.

III. Arguments and analysis

[27] The applicant has challenged the decision to find her inadmissible. These are the relevant provisions of the IRPA:

Security	**Sécurité**
34 (1) A permanent resident or a foreign national is	**34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants :

inadmissible on security grounds for	
. . .	. . .
(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), (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).

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.

The applicant is alleged to have been a member of the Fédération estudiantine et scolaire de la Côte d'Ivoire between 1995 and 2002. According to the officer, this organization has been engaged in acts of great violence and intimidation against the population and members of the opposition parties, which is sufficient for paragraphs 34(1)(c) and (f) of the IRPA to apply.

[28] The applicant's membership in FESCI between 1995 and 2002 is not being disputed here. While this may have been the case before, at the hearing before this Court, the applicant readily conceded that she had been a member of FESCI. In addition, she also does not challenge the fact

that complicity in acts that meet the definition of "terrorism" must be demonstrated under section 34: being a member of an organization that engages in terrorism is sufficient. Her argument is elsewhere. It is established that the applicant left the organization in June 2002. The applicant's challenge is based on the definition of terrorism and what she calls a [TRANSLATION] "personalized temporal analysis", which she alleges the administrative decision maker failed to perform to determine whether there were reasonable grounds to believe that the organization would engage in terrorism after the applicant had left FESCI.

[29] The definition of "terrorism" to which the officer refers is that given in *Suresh*. I have reproduced paragraph 98 of this judgment in its entirety:

> [98] In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that "terrorism" in s. 19 of the Act includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism. The issue here is whether the term as used in the *Immigration Act* is sufficiently certain to be workable, fair and constitutional. We believe that it is.
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> [Emphasis added.]

As can be seen, it is the specific intention to cause death or seriously injure that makes an act terrorist in nature, insofar as the purpose of the act is to intimidate a population or compel a government or international organization to do or not to do something. But leading up to the purpose of the action, which is intimidation or coercion, the alleged act has to be intended to

cause death or seriously injure. The senior officer repeatedly spoke in terms of [TRANSLATION] "acts of violence against the civilian population or [attempts] to compel the Ivorian government and the United Nations (UN) to do or to abstain from doing certain acts" (Decision, p 3/8). Not all acts of violence are acts of terrorism, in the same way as any act intended to cause death or seriously injure can be carried out without the purpose of intimidation or coercion. Both are needed: an act intended to cause death or seriously injure, and the purpose of this act has to be to intimidate the population or to compel a government or international organization.

[30] I note in passing that the definition of "terrorist activity" in section 83.01 of the *Criminal Code*, RSC 1985, c C-46, does not depart from these fundamental elements.

[31] The senior officer cites the following documentary evidence:

(a) In a 2006 report, Human Rights Watch reported on FESCI's activities in 2005, which involved torture and rape. There is no doubt that such acts inflict serious injury. However, these acts took place well after 2002.

(b) The senior officer includes several paragraphs from an April 2000 report by the UK Home Office. The cited paragraphs do not contain any mention of acts intended to cause death or seriously injure. Instead, they entail vandalism, student strikes, mischief and looting. There is no doubt that the school year was disrupted, since there was an attempt to keep examinations from being held and student residences were closed, as were some elementary and secondary

schools. The excerpts cited from the UK Home Office report indicate that students sought a reform of the education system, improvements to residences and conditions to promote education, including subsidies.

(c) The officer also referred to a 2004 report by the US State Department. I have reproduced the two paragraphs that were cited:

> Youth groups who supported President Gbagbo conducted several attacks during the year. . . . FESCI students assaulted magistrates on the premises of the Palais de Justice in Abidjan to disrupt the presentation ceremony of the new president of the Appellate Court nominated by the Ministry of Justice, who was a member of RDR. Two magistrates were severely beaten . . .
>
> On June 7, during the payment of students' scholarships on the University of Cocody campus, members of FESCI demanded that members of National Trade Union of Health Science Students (SYNESS) pay $28–47 (15,000-25,000 CFA francs) from their scholarships to FESCI. When they refused, the members of FESCI responsible for collecting dues violently attacked the leaders of SYNESS. FESCI members then ransacked the rooms of the health science students, blocked their access to the schools and hospitals for training, and threatened to kill SYNESS leaders if they protested. On June 14, the Secretary General of SYNESS wrote a letter to the Government and to various foreign Embassies, requesting protection during the payment of scholarships and compensation for the physical and material damages; however, no further action was taken by year's end.

Not only did these acts take place after 2002, but the report does not describe the reported assaults and injuries, if any.

[32] Aside from the excerpts cited from the three reports, the officer noted that the acts of intimidation and violence attributed to FESCI were committed over several years. To justify his assertion, the officer spoke of

> [TRANSLATION]
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> acts of serious violence against:
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> • students in their choice of association;
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> • the civilian population, to compel them to support FESCI's cause;
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> • politicians and judges, to compel them to acquiesce to FESCI's demands;
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> • the media who were critical of FESCI's acts; and
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> • UN staff and facilities.
>
> (Decision, p 3/8.)

In fact, without saying so, the officer derived this list from a decision of the Immigration Division in the case of a certain Yao Serge Theodore Koffi, namely, paragraph 16 of that decision. This paragraph is reproduced in paragraph 8 of this Court's decision on judicial review (*Koffi v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 970 [*Koffi*]). I have reproduced paragraph 16 as it appears in this Court's decision:

> [TRANSLATION]
>
> [16] Following an analysis of the documentary evidence in the record, a clear image of the acts attributed to FESCI emerges. In order to advance its political and social aims, FESCI has for years committed acts of intimidation towards the civilian population and attempted to compel the Ivorian government and the United Nations (UN) to act or to refrain from acting. These violent acts targeted the following, among others:
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> - students, to restrict their rights to freedom of association;
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> - the civilian population, to compel it to support its cause;
>
> - politicians, to compel them to acquiesce to FESCI's demands;
>
> - media that were too critical of FESCI's positions and actions;

> - judicial officials who attempted to hold FESCI's members to account; and
>
> - UN staff and facilities.
>
> We are talking about killings, beatings, lynchings, rapes, threats, etc. For example, physically assaulting students from a different student association, an attempted lynching of a minister, the kidnapping of a student from a different student association, threats against and beating media representatives with sticks, the rape of a student from a different student association, beatings of judges, and attacking a police station. Even the organization's statues provide for the use of [TRANSLATION] "any form of action that it fells to be opportune, necessary and effective in achieving its aims". In addition, during his testimony at a hearing on June 5, 2018, FESCI's co-founder and first secretary general, Mr. Ahipeaud, called as a witness by Mr. Koffi, reluctantly acknowledged that there had been [TRANSLATION] "*complicated events*" and [TRANSLATION] "*extremely difficult situations*" of [TRANSLATION] "*generalized fear*" with regard to private militias. He ultimately admitted that there had been some violent acts on the part of certain elements of FESCI, but not on the part of its leaders.
>
> [Footnotes omitted.]
>
> (Certified Tribunal Record at pp 10–11 [CTR])
>
> [Emphasis added. [TRANSLATION] marker and italics reproduced from this Court's decision.]

[33] Two observations here. First, even though the senior immigration officer in this case added the following paragraph to his list, which is presented between quotation marks and implies that the words are those of this Court, it is questionable that this is actually the case. What follows is said paragraph as it appears in the decision under review, immediately after the five-point list reproduced at paragraph 32 of these reasons:

> [TRANSLATION]
>
> Mentioned are killings, beatings, lynchings, rapes, threats . . . physically assaulting students from a different student association, threats against and beating media representatives with sticks, the

> rape of a student from a different student association, beatings of judges, and attacking a police station.
>
> Reference: Reasons for Decision – *Serge Yao KOFFI v Canada* – 2019 FC 970

As can be seen when one compares this with paragraph 16 of the Immigration Division's decision in *Koffi*, reproduced at paragraph 32, above, this somewhat truncated excerpt seems to come from the Immigration Division's reasons. It does not come from this Court as the respondent seems to believe. Instead, these are the words of the Immigration Division. More importantly, this excerpt from the Immigration Division does not give a sense of the time of these acts or give sources for the claims.

[34] Second, a reading this Court's decision in *Koffi* reveals that the issue was Mr. Koffi's inadmissibility because of his membership in FESCI between 1998 and 2008. Mr. Koffi challenged the documentary evidence before the Immigration Division. Justice LeBlanc, then of this Court, therefore reviewed the documentary evidence. However, this evidence covered events that had all occurred after 2002, generally around 2005, 2006 or 2007. In Koffi's case, there was therefore a correlation between Koffi's membership in FESCI and the acts that were committed. This suggests that, since the senior immigration officer was relying on the Immigration Division's decision in *Koffi*, what he was referring to were acts attributed to FESCI that are not contemporary to Ms. Béké's membership in FESCI but that were contemporary to Mr. Koffi's membership. Ms. Béké said that she left FESCI well before the acts of 2005, 2006 and 2007. Mr. Koffi was a member during those years.

[35] Looked at closely, the senior officer's reliance on *Koffi* is invalid if one is seeking to clarify the nature of the acts of terrorism committed before 2002. Whether one refers to paragraphs 8 or 66 of *Koffi*, as the respondent did before this Court, the fact remains that these events postdate 2002 or their date is unknown, or they cannot meet the requirement of an act intended to cause death or seriously injure. With all due respect, it is difficult to see what can be drawn from paragraph 66, which is described as a "brief overview of the other reports produced by the respondent before the ID" and lists the acts attributed to FESCI. In any event, the senior immigration officer did not refer to paragraph 66 of *Koffi*, nor was he inspired by it.

[36] The three sources cited in the decision under review (Human Rights Watch (2006), UK Home Office (2000) and Country Conditions (2004) by the US Department of State) also are of no use to the respondent. The reference to the Human Rights Watch report only concerns 2005. The UK Home Office does not report any acts intended to cause death or seriously injure for the purpose of intimidating the population or compelling the government to do or abstain from doing any act. As indicated earlier, both components of the definition have to be met. Vandalism, and even violence, is not enough to transform civil disobedience into an act of terrorism. With respect to the US State Department's Country Report on Human Rights Practices (2004), the best the senior officer could to was to reproduce two paragraphs separated by several pages. They are reproduced in full in paragraph 31 of these reasons. Not only did these events occur after 2002, but it appears that the acts did not meet the threshold of having seriously injured people. Assaulting magistrates during a ceremony at a courthouse to disrupt that ceremony falls below the standard. The paragraph notes that two judges "were severely beaten", without stating whether injuries were caused or how serious the injuries were. The second paragraph is hardly

better, talking of an attempt to extort by student members of FESCI, who violently attacked leaders of another association. Again, nothing is said about injuries, if any.

[37] Another example of misapprehension by the administrative decision maker, who confuses the act that constitutes the crime (act intended to cause or seriously injure) and the intended purpose (intimidate or compel the government), is found at the very end of the decision:

> [TRANSLATION]
>
> FESCI had a grip on the entire country. FESCI also affected the lives of merchants near secondary schools and universities by holding them to ransom, terrorizing them and forcing them to pay "taxes". The HRW report *The Best School* mentions:
>
> > Merchants operating on or in close proximity to the university campus, university residences, and even high schools told Human Rights Watch that they are required to pay "taxes" to FESCI for the privilege of operating. Such "taxes" include an initial setup fee of 15,000 to 25,000 francs (West African CFA francs, about US$30 to $50), followed by periodic payments that are fixed in relation to the size of the operation in question.
>
> Human Rights Watch interviewed two former members of FESCI . . . Both of them described a well-organized collections system where the "financial secretary" of an individual section of FESCI keeps a list of merchants under FESCI control in their territory and the "taxes" due. The financial secretary then collects the money on a monthly or weekly basis, though this does not rule out impromptu attempts to collect the money off schedule if money is needed. (Reference: HRW – *The Best School* – pages 53-54)

As is easy to see, the decision maker has replaced what is required for there to be "terrorism" in the legal sense of the term with extortion. But extortion is not an act that is intended to cause death or seriously injure.

[38] When examining the decision under review, one can see that the senior officer has confused the two components of the definition of "terrorism" found in *Suresh*. More than once, the administrative decision maker stated that [TRANSLATION] "as the evidence from public and objective sources describes, FESCI, an organization that supported the Gbagbo government, engaged in acts of great violence and intimidation against the population and members of the opposition parties" (Decision, p 5/8). This immediately led the administrative decision maker to conclude in the following paragraph that there were grounds to believe that FESCI is an organization that had engaged in acts of terrorism within the meaning of *Suresh*. He should still have established that these acts of great violence had been intended to cause death or seriously injure.

[39] As the applicant submits, this cannot be true for the period when she was a member of FESCI. The evidence that the administrative decision maker relied on cannot support this assertion. In addition, the equivalence between the use of violence and an act intended to cause death or seriously injure does not hold water. I agree with my colleague Justice Grammond, who wrote as follows in *Foisal v Canada (Citizenship and Immigration)*, 2021 FC 404 [*Foisal*]:

> [17] Even if the ID had made it clear that it was using the test for specific intent to cause death or serious injury, this would not have cured the flaws in its decision. It is not enough for the ID to state the required degree of fault correctly if, in fact, it applies a different test. To the extent that the ID based its reasoning on the presumption that there is an equivalence between the use of violence and the intent to cause death or serious injury, I am of the view that its analysis is unreasonable. Violence cannot be indiscriminately confused with causing death or serious injury: *M.N.* at paragraph 11; *Islam 2019* at paragraph 23; *Islam 2021* at paragraph 20. This intellectual shortcut amounts, in effect, to a lowering of the fault requirement.
>
> [Emphasis added.]

That is what happened in the case at hand. This could have been enough to dispose of the judicial review. But there is more.

[40] It brings us to the argument presented by the applicant. She does not deny her membership in FESCI. However, she states that while she was a member, FESCI was not guilty of engaging in terrorism within the meaning of paragraph 34(1)(c) of the Act. The evidence on which the administrative decision maker relied regarding the years when the applicant was a FESCI member does not support the terrorism finding.

[41] Paragraph 34(1)(f) of the Act, which establishes that being a member of an organization that engages in terrorism is an essential element, mentions three distinct periods for which reasonable grounds to believe that an organization has engaged in terrorism are possible: the past, the present and the future. Presumably Parliament wanted anyone who associates with an organization that there are reasonable grounds to believe engages in terrorism to be inadmissible. The message is clear: don’t join such an organization. The same applies to cases where there are reasonable grounds to believe that the organization engaged in terrorism at the time of membership in said organization. The situation is somewhat different when it comes to the future.

[42] If there was no evidence of present or past terrorist acts, the senior officer should still have considered whether—at the time of the applicant's membership in the organization—there had been reasonable grounds to believe that the organization would engage in terrorism in the future. This Court’s decision in *El Werfalli v Canada (Public Safety and Emergency*

Preparedness), 2013 FC 612, [2014] 4 FCR 673 [*El Werfalli*]; *Mahjoub (Re)*, 2013 FC 1092, and *Chowdhury v Canada (Citizenship and Immigration)*, 2017 FC 189 [*Chowdhury (2017)*], all recognize this temporal aspect in respect of the future. In *El Werfalli*, Justice Mandamin clearly explained why this must be:

> [62] The difficulty arising from the Board's interpretation of paragraph 34(1)(*f*) is to associate individuals with future terrorism retroactively to the period of their membership, without any regard to honest and lawful participation at the time of the membership. In effect, any permanent resident or foreign national who is a member of any organization, by this interpretation of paragraph 34(1)(*f*), has a Sword of Damocles suspended indefinitely over his or her head should the organization they once had been a member become engaged in terrorist activities in the future.

[43] In a decision regarding another Chowdhury, the Court held that at issue was whether the inadmissibility finding had involved an analysis of the reasonable grounds to believe that the organization would engage in terrorism at the time of membership (*Chowdhury v Canada (Citizenship and Immigration)*, 2022 FC 311 [*Chowdhury (2022)*]). The absence of such an analysis was fatal. This, in my opinion, is the serious shortcoming here.

[44] In this case, the administrative decision maker completely failed to consider the existence of grounds, as late as in 2002, to believe that FESCI would engage in terrorism in the future. Like Justice McHaffie in *Chowdhury (2022)*, at paragraph 29, I conclude that by not distinguishing between before 2002 and after 2002, the administrative decision maker did not even consider whether there were reasonable grounds to believe in 2002 that the organization would engage in terrorism.

[45] As stated above, the evidence cited for before 2002 could not justify a conclusion that acts of terrorism had been committed when the *Suresh* standard requires the act to have been intended to cause death or seriously injure. The senior officer had to explain why there were reasonable grounds to believe in future acts of terrorism, after June 2002, that could result in paragraph 34(1)(f) of the Act being applicable. In *Chowdhury (2017)*, Justice Southcott stated as follows:

> [20] To be clear, this does not mean that a member of an organization cannot be subject to inadmissibility under s. 34(1)(f) as a result of terrorist acts committed by an organization after the cessation of his or her membership. However, such inadmissibility would require an analysis as to whether, at the time of membership, there were reasonable grounds to believe that the organization would in the future engage in terrorist activities.

In my view, this is a concise statement of the law applicable to our case.

IV. Conclusion

[46] All are agreed that this matter should be dealt with against a standard of reasonableness. The decision under review is not reasonable. A reasonable decision is one that bears the hallmarks of justification, transparency and intelligibility, and is justified in relation to the relevant factual and legal constraints (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*] at para 99). Of course, one of the legal constraints is compliance with the definition of "terrorism". The majority in *Vavilov* declared that "[i]t is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide" (at para 111). And the Supreme Court added that "where the governing statute specifies a standard that is well known in law and in the

jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard".

[47] Of course, "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov*, at para 84). A serious shortcoming is needed for a reviewing court to intervene (*Vavilov*, at para 100). The reasons "are the primary mechanism by which administrative decision makers show that their decisions are reasonable" (*Vavilov*, at para 81). Thus, the "reasons should demonstrate that the decision conforms to the relevant legal and factual constraints that bear on the decision maker and the issue at hand" (*Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900 [*Canada Post Corp.*] at para 30).

[48] The decision under review is flawed in three regards. This makes the decision by the senior immigration officer unreasonable within the meaning of administrative law.

[49] First, the decision does not meet the definition of terrorism in that the definition requires evidence of acts intended to cause death or seriously injure. This is an essential legal constraint. As the applicant has demonstrated, the evidence of such acts for before 2002 is absent (UK Home Office) and for after 2002, very vague (Human Rights Watch (2006) and US Department of State (2004)). Instead, there is confusion, with the senior officer equating vandalism, extortion, intimidation and violence in general with the intent to cause death or seriously injure.

As in *Foisal* (at para 17), I am of the view that this is an unreasonable decision because it changes the requirement.

[50] As just mentioned, the case that FESCI engaged in terrorism before 2002 was not provided. The senior officer therefore should have analyzed whether, at the time of Ms. Béké's membership in FESCI, there had been "reasonable grounds to believe that the organization would in the future engage in terrorist activities" (*Chowdhury (2017)*, at para 20). No such analysis was carried out. As the Supreme Court stated in *Canada Post Corp*., a "reviewing court may conclude that a decision is unreasonable where the decision maker failed to take into account the evidence and submissions before them at first instance. The 'evidentiary record and the general factual matrix' act as constraints on the reasonableness of a decision, and must be taken into account" (at para 61). Here, the only evidence of acts before 2002 does not make these acts relevant. Again, the existence of reasonable grounds at the time of the applicant's membership should have been established. The lack of this analysis makes the decision unreasonable (*Chowdhury (2022)*, at para 21). In fact, it makes it unintelligible.

[51] Third, the decision under review also does not meet the need for internally coherent reasoning. By emphasizing in his reasons the purpose of intimidating the population and compelling the government to do or abstain from doing any act, the administrative decision-made a leap of logic by stating that he was satisfied that it was sufficient for the organization to engage in acts of great violence and intimidation. This may have resulted in acts of vandalism or extortion being equated with acts of terrorism, even though they may not have been intended to cause death or seriously injure. The senior officer stated that FESCI engaged in acts of violence

and intimidation, and went on to say that [TRANSLATION] "in view of the above, I have reasonable grounds to believe that FESCI is an organization that has engaged in acts of terrorism as defined in *Suresh*" (Decision, p 5/8). With respect, it is impossible to follow and understand the reasoning that led to reasonable grounds to believe. Terrorism entails acts intended to cause death or seriously injure insofar as the purpose of these acts is to intimidate the population or compel a government. Intimidation or coercion is not terrorism, and the acts of violence must have these specific characteristics and a motivation. Moreover, there was no analysis of the grounds whatsoever. As stated by authors R.A. MacDonald and D. Lametti, cited in *Vavilov* at paragraph 102, "[r]easons that 'simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion' will rarely assist a reviewing court in understanding the rationale underlying a decision and 'are no substitute for statements of fact, analysis, inference and judgment'". Not only does the decision under review lack the appropriate analysis and inferences, but it also unfortunately blurs the distinction between the act and the purpose of the act. This makes the decision unintelligible, non-transparent and unjustified.

[52] Before concluding, I would like to say a few words about *Gebreab v Canada (Public Safety and Emergency Preparedness)*, 2010 FCA 274 [*Gebreab*], which the respondent sought to rely on.

[53] In that case, there was only one issue before this Court (2009 FC 1213): was Mr. Gebreab a member of an organization or were there two separate organizations? Our Court correctly distinguished between membership in an organization and reasonable grounds to believe that the organization engages, has engaged or will engage in terrorism (at para 22). The Court only

examined membership, in that it asked “whether there were two separate and different organizations that shared the same name” (at para 29). As is explicitly stated in paragraph 23, “the determination of whether the organization in question engages, has engaged, or will engage in acts of terrorism is independent of the claimant’s membership”. The only issue was whether Mr. Gebreab was a member of an organization, the temporal component of the acts being engaged on examination of the reasonable grounds.

[54] In that case, the administrative decision maker had found that Mr. Gebreab had been a member of a single continuous organization. The Federal Court of Appeal upheld this Court’s decision, which had refused to intervene in what was an entirely factual decision by the administrative decision maker.

[55] The temporal component is irrelevant in respect of membership. That is the point of *Gebreab*, as simply stated by the Federal Court of Appeal. Whether there are reasonable grounds to believe that the organization engages, has engaged or will engage in terrorism is another matter. It is at this second stage that the temporal component is engaged.

[56] In *Gebreab*, the terrorist acts had taken place in the past. In our case, the decision maker had to establish grounds to believe in future terrorist acts, a very different proposition. *Gebreab* is of no use to the respondent. As explained previously, the senior immigration officer failed to establish these grounds, and his decision is therefore unreasonable.

V. Disposition

[57] As a result, the application for judicial review must be allowed. The case is therefore returned to another immigration officer for reconsideration.

[58] The parties have agreed that no question should be certified under section 74 of the Act. The Court agrees.

JUDGMENT in IMM-1638-21

THIS COURT'S JUDGMENT IS THAT:

1. The application for judicial review is allowed;

2. The matter is returned to another immigration officer for reconsideration; and

3. No question of general importance is certified under section 74 of the IRPA.

"Yvan Roy"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1638-21
STYLE OF CAUSE:	VALÉRIE BÉKÉ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MATTER HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 12, 2022
JUDGMENT AND REASONS:	ROY J.
DATED:	OCTOBER 31, 2022

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