

Federal Court



Cour fédérale

Date: 20230309

Docket: IMM-7477-21

Citation: 2023 FC 324

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 9, 2023

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

OMAR IBRAHIM MOHAMED

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Omar Ibrahim Mohamed, is an Eritrean citizen born in 1956. In 1982, he moved to Saudi Arabia to escape the war between Eritrea and Ethiopia. He obtained a membership card from the Eritrean Liberation Front [ELF] to prove to the Saudi authorities that he was a citizen of Eritrea and to avoid deportation from the country. He never took part in ELF

activities. However, in 2006, Mr. Mohamed became a member of the Eritrean National Salvation Front [ENSF]; he attended ENSF meetings two to three times a week when he was not required to travel for work. Mr. Mohamed claims that he was never aware of the violent actions perpetrated by the ENSF, and that he joined the group because the ENSF fought for free and democratic elections in Eritrea and change through dialogue, not violence.

[2] Mr. Mohamed arrived in Canada and claimed refugee protection in May 2017. On May 29, 2018, the Minister of Public Safety and Emergency Preparedness [Minister] referred to the Immigration Division [ID] two inadmissibility reports against Mr. Mohamed, one relating to paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], referring to paragraph 34(1)(b), and the other relating to paragraph 34(1)(f), referring to paragraph 34(1)(c) of the Act. In both reports, Mr. Mohamed's inadmissibility was based on his alleged membership in the ELF and the ENSF.

[3] Paragraphs 34(1)(b), 34(1)(b.1), 34(1)(c) and 34(1)(f) of the Act provide, respectively:

34 (1) A permanent resident or a foreign national is inadmissible on security grounds for	34 (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
...	...
(b) engaging in or instigating the subversion by force of any government;	b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(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;

...

(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).

[4] On September 28, 2021, the ID found Mr. Mohamed to be inadmissible and issued a removal order against him [Decision]. The ID rejected the Minister's claim that the applicant was a member of the ELF, finding that he only took the membership card as an identity document to remain in Saudi Arabia, but it did conclude that Mr. Mohamed was a member of the ENSF between 2006 and 2017 and that there are reasonable grounds to believe that the ENSF is an organization that instigated or committed acts aimed at subversion of the government of Eritrea by force (paragraph 34(1)(b) of the Act) and that has engaged in terrorism (paragraph 34(1)(c) of the Act). Mr. Mohamed applied for judicial review of the Decision pursuant to subsection 72(1) of the Act.

[5] For the reasons that follow, I find that the ID's Decision is not unreasonable. The application for judicial review is therefore dismissed.

II. Impugned ID Decision

[6] Before the ID, Mr. Mohamed did not contest the arguments presented by the Minister concerning the legal definitions of the terms "terrorism" and "subversion" according to which the ELF and the ENSF are organizations engaged in terrorism and which are instigators or perpetrators of acts aimed at the subversion of the government of Eritrea by force, nor did he

question the reliability and veracity of the Minister's documents. Rather, Mr. Mohamed challenged his factual membership in the ELF and the ENSF; Mr. Mohamed specifically argued that he should not be considered a member of the ENSF since he was never aware of the violent actions perpetrated by the organization. To his knowledge, the ENSF was striving to bring peace to Eritrea through dialogue, and he had no intention of participating in an organization involved in an armed struggle.

[7] However, the ID agreed with the Minister's statement that there were reasonable grounds to believe that the applicant was a member of the ENSF:

The tribunal finds that the Minister has satisfied his burden of proving that on reasonable grounds to believe, Mr. Mohamed was a member of the ENSF from 2006 until 2017. He only ended his membership with the ENSF in 2017 when he left Saudi Arabia. Mr. Mohamed attended meetings every 2 or 3 weeks, when he was not travelling for work. He would speak at meetings organized by the leaders. His membership in the ENSF is demonstrated by his voluntary and active participation in the organization over a period of some 11 years. This is different from the situation with the ELF when he was compelled to protect his life and avoid deportation to a war zone, and where he had a clear purpose for a period of only 6 months, to have a valid identity document for the Saudi authorities.

[Decision at para 36.]

[8] As for Mr. Mohamed's allegation that he did not know that the ENSF was engaged in an armed struggle, the ID concluded that because of his 11 years as a member of the ENSF, where he maintained continuous contact with the leaders of the organization, Mr. Mohamed should have known the nature of its activities. In this regard, the ID took into account the evidence presented by the Minister, indicating that the ENSF participated in several attacks against military targets in 2009 and 2011, in which Eritrean government soldiers were killed. The ENSF

also acknowledged vandalizing machines and destroying trucks that were parked in a government distribution depot in 2015. The organization later claimed that its armed units targeted foreign companies that had agreements with the Eritrean government. The independent Eritrean press also reported that the ENSF destroyed a security patrol vehicle using a rocket-propelled grenade launcher near the Bisha mining project in 2015.

[9] The ID concluded that the above examples were sufficient to constitute reasonable grounds to believe that the ENSF engaged in both terrorism and subversion by force. Regarding the test for terrorism under paragraph 34(1)(c) of the Act, the ID determined that attacks on government facilities where civilians also work, such as foreign workers, were examples of terrorist acts. In addition, the organization intended to cause death or serious bodily injury, especially when it used a grenade launcher for one of its attacks. Regarding the subversion of a government by force, provided for in paragraph 34(1)(b) of the Act, the ID noted that the ENSF has a military wing that has been fighting the Eritrean government for many years. The ENSF is part of the Eritrean Democratic Alliance [EDA] with seven other member organizations that have agreed to unify their military wings under one command, coordinating their military campaigns against the Eritrean government. The ID found that armed attacks against Eritrean military targets met the definition of “by force”, i.e. “reasonably perceived potential for the use of coercion by violent means” (*Oremade v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1077 at para 27). It also noted that the “subversion by force” of a government has been consistently defined by case law as implying “accomplishing change by illicit means or for improper purposes related to an organization” (*Erbil v Canada (Citizenship and Immigration)*,

2008 FC 780 at para 63; *Qu v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 399 at para 12; *Shandi (Re)*, [1991] FCJ No 1319, 51 FTR 252).

[10] The ID concluded that the ENSF's intention to instigate or engage in the subversion by force of the Eritrean government has been clearly demonstrated by the planned coordination and execution of armed attacks on government facilities. The organization's intention was to achieve change through illicit and violent means and to contribute to the subversion of government. The ID then determined that the Minister met the burden of proving that the ENSF is an organization for the purposes of paragraphs 34(1)(c) and (b) of the Act. Since the ID acknowledged that Mr. Mohamed was a member of the ENSF, it concluded that the applicant fell within paragraph 34(1)(f) of the Act.

III. Issues

[11] The issues raised by this application for judicial review are the following:

- A. Preliminary issue: Is the applicant entitled to challenge the ID's findings that the ENSF is an organization that has engaged in terrorism and has instigated or committed acts aimed at subverting the Eritrean government by force?
- B. Is the ID's determination of the terrorist nature of the ENSF's actions reasonable?
- C. Is the ID's conclusion as to the subversive nature of the acts alleged against ENSF reasonable?

IV. Standard of review

[12] The parties agree that the applicable standard of review is that of reasonableness when assessing the merits of the ID's decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17 [*Vavilov*]; *Bigirimana v Canada (Citizenship and Immigration)*, 2021 FC 1156 at paras 16–17; *Saleheen v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 145 at para 24).

V. Analysis

A. *Preliminary issue: Is the applicant entitled to challenge the ID's findings that the ENSF is an organization that has engaged in terrorism and has instigated or committed acts aimed at subverting the Eritrean government by force?*

[13] Mr. Mohamed concedes that before the ID, he had not submitted any arguments regarding the characterization of the ENSF's actions, namely whether it was an organization that engaged in terrorism or sought to subvert the Eritrean government by force. Therefore, the preliminary issue is whether I should, on this judicial review, hear Mr. Mohamed on this issue. Mr. Mohamed argued that his argument is not a novel argument because he invoked the pre-existing state of law that was before the ID. In the alternative, Mr. Mohamed claimed that if he fails to convince me that this is not a new argument, the Court will always have the opportunity to assess whether the ID had a duty to raise the elements in question despite the absence of argument in this regard at first instance.

[14] The Minister submitted that the Court should therefore not rule on Mr. Mohamed's arguments concerning these issues, which could and should be presented before the specialized

tribunal in this matter (*Ouimet v Canada (Attorney General)*, 2021 FCA 200 at para 22 [*Ouimet*]). He argued that the reasons of an administrative tribunal must be reviewed in light of the argument before it (*Zamor v Canada (Citizenship and Immigration)*, 2021 FC 672 at para 7 [*Zamor*]), and that Mr. Mohamed's position before the Court is unfair to the administrative tribunal, which was unable to rule on the arguments he is now making.

[15] Regarding the terrorist nature of the ENSF, Mr. Mohamed simply repeated the ID's conclusion to claim that its reasoning was contrary to the principles set out in *Fuentes v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 379 (CanLII), [2003] 4 FC 249 [*Fuentes*] and *Perez Villegas v Canada (Citizenship and Immigration)*, 2011 FC 105 [*Perez Villegas*]. Mr. Mohamed argued that these decisions are highly relevant because they show that a decision-maker cannot assume that acts committed by an armed organization were directed against civilians without evidence that they were intentionally targeted or killed. In addition, when organizations target government buildings, the evidence must allow the decision-maker to know the circumstances of the attacks before it can conclude whether the attacks in question targeted civilians (*Fuentes* at para 77; *Perez Villegas* at para 55). Mr. Mohamed claimed that in this case, there is no evidence that civilians were targeted, killed or seriously injured, or that they were even present at the scene. In addition, Mr. Mohamed relied on *Foissal v Canada (Citizenship and Immigration)*, 2021 FC 404 [*Foissal*], to support his argument that the evidence must allow the decision maker to link the actions of members of an organization to the specific intent of that organization, taking into account several factors, and that a "a person or organization only engages in terrorism, within the meaning of section 34 of the Act, if they have the specific intent to cause death or serious injury." Mr. Mohamed argued that in determining the terrorist nature of

an organization's actions, the decision-maker must explain how those actions were intended to cause injury to civilians (*Fuentes* at para 56), and that to infer the organization's intention, the ID "had to at least refer to political speeches, plans or . . . codes that demonstrate the organization's intention to kill or seriously injure citizens" (*Foisal* at para 22).

[16] Also, regarding the subversive nature of the ENSF, and contrary to the Minister's submissions, Mr. Mohamed simply recalled the current state of the law, including the principle of "undermining from within" referred to in *Al Yamani v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17119 (FC), [2000] 3 FC 433 [*Al Yamani*]. Mr. Mohamed alleged that, since no Court decision contradicts this definition of "subversion", *Al Yamani* remains applicable in this case given the facts in the record, and there was no reason for the ID to distance itself from it. By ignoring that decision, the ID therefore rendered an unreasonable decision within the meaning of *Vavilov*.

[17] The relief that the Court may grant on judicial review is essentially discretionary, and I have the discretion to hear Mr. Mohamed on these arguments. However, as a general rule, in the context of an application for judicial review, this discretion should not be exercised for the benefit of the applicant where an issue (or ground) in dispute could have been raised before the administrative tribunal, but it was not (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–26 [*Alberta Teachers*]).

[18] I agree with Mr. Mohamed that in line with the ID's inquisitorial nature, it may be required to consider issues and grounds not raised by the parties and that the Court is indeed free

to consider whether the ID erred in not raising an issue as a ground of inadmissibility, even if the parties did not raise it themselves (*Opina Velasquez v Canada (Citizenship and Immigration)*, 2013 FC 273 at paras 14 to 15; *Ahmad v Canada (Citizenship and Immigration)*, 2021 FC 214 at paras 51 to 52; *Canada (Citizenship and Immigration) v Nwobi*, 2014 FC 520 at paras 13 to 20). However, I do not see how these decisions, including *Alberta Teachers'*, are of any assistance to him.

[19] In this case, the issues concern the legal definitions of the concepts of “terrorism” and “subversion by force of any government”, and their determination in the context of this case requires a review of the evidence that can support them. These are not issues or grounds not taken into account by the ID, but rather a new argument on the ID’s assessment of these same issues or grounds. The issues or grounds—that is, membership in these organizations and whether there are reasonable grounds to believe that these organizations fall under subsection 34(1)—were raised, analyzed and determined by the ID. Mr. Mohamed simply wants to add, for the first time, his point of view on this analysis with new case law and a new argument.

[20] Mr. Mohamed raised interesting arguments; however, he never voiced these arguments before the ID, so the ID had no reason to dwell on the analysis as it is now argued before me by Mr. Mohamed. This is a new argument that was not before the ID. In essence, Mr. Mohamed is trying to do before me what he should have done before the ID: challenge, in fact and in law, the allegation that there are reasonable grounds to believe that the ENSF is an organization that has engaged in terrorism or has sought to subvert the Eritrean government by force. In my opinion, it

would be inappropriate to consider it (*Zamor v Canada (Citizenship and Immigration)*, 2021 FC 672 at para 7; *Ouimet* at para 22).

[21] Since Mr. Mohamed has not been able to convince me that this is not a new argument, the alternative issue is that I must nevertheless determine whether the ID had a duty to raise the elements in question despite the absence of argument in this regard at first instance. If I were to accept Mr. Mohamed's statutory interpretation of what constitutes terrorism, his arguments would require a review of the evidence to determine whether a particular threshold has been met. However, it is for the ID to speak on the evidence it relied on to conclude that the acts of the organization were intended to kill or seriously injure civilians, the manner in which they were perpetrated, who exactly committed them, if the organization approved or favoured killings or attacks, and if civilians were killed or seriously injured, accidentally or intentionally (*Perez Villegas* at para 57). In this case, the ID did not conduct such a specific examination of the evidence because the argument, as now formulated by Mr. Mohamed, was not made by him at that time. I can hardly blame the ID for not addressing a legal argument concerning a ground of inadmissibility before it, or for not considering the evidence in light of such a legal argument, when the argument itself was never raised before it. It is certainly not up to the ID to guess the argument that Mr. Mohamed had to make, or to raise all the different forms of legal analysis that might be raised in relation to a issue before it, and to draw conclusions on that point.

[22] Mr. Mohamed also pointed to several pieces of evidence submitted by the Minister regarding the speeches of the leaders of the ENSF as well as the acts committed by the organization. He argued that this evidence does not show that the ENSF killed, injured or

targeted civilians. Even the evidence relied upon by the ID in finding that ENSF targeted civilians using a grenade launcher against a government facility where civilians worked does not mention any casualties and does not describe who was present at the facility at the time of the attack. What Mr. Mohamed is asking me here is to assess the evidence from the point of view of the legal argument he is now advancing, namely that the actions of the ENSF do not constitute, in fact or in law, terrorism; he asks me to conduct such a review of the evidence without being able to know the ID's opinion. Ultimately, Mr. Mohamed did not convince me of the appropriateness of such an examination, in a context in which Parliament entrusted the ID with the task of deciding these issues, which correspond to its area of expertise and specialized duties (*Alberta Teachers* at paras 24–25).

[23] The situation is the same with regard to Mr. Mohamed's arguments as to the subversive nature of the acts alleged against ENSF. Mr. Mohamed relies in particular on *Al Yamani* at paragraph 54 to argue that an act of subversion must be committed from within the country concerned, and that in the present case, since ENSF is located in Ethiopia, not in the territory of Eritrea, the organization cannot be considered to be performing acts of subversion against the Eritrean government. It can possibly be argued that the notion of subversion requires that the alleged acts occur within the country of the government sought to be overthrown, or that the evidence necessary to establish that ENSF only carried out its activities from outside Eritrea has not been identified by the ID. But, once again, these arguments were not presented before the ID, and since their analysis requires the assessment of the evidence on the record, I am not prepared to substitute my assessment for that which the ID did not have the opportunity to render.

[24] In these circumstances, I am not satisfied that Mr. Mohamed should be allowed to submit a new argument concerning grounds of inadmissibility that were squarely dealt with by the ID, and that could have been presented, but were not, at that time. The ID did the work it had to do with the arguments before it. Moreover, I am not satisfied that the ID's determination of the terrorist nature of the ENSF's actions or that its conclusion as to the subversive nature of the actions alleged against the ENSF was unreasonable.

VI. Conclusion

[25] For these reasons, the application for judicial review is dismissed.

JUDGMENT in IMM-7477-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. There are no questions for certification.

“Peter G. Pamel”

Judge

Certified true translation
Janna Balkwill

FEDERAL COURT
SOLICITORS OF RECORD

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