Federal Court of Appeal | Cour d'appel fédérale

Date: 20240412

Docket: A-222-20

Citation: 2024 FCA 70

CORAM: **LASKIN J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

ABEL NAHUSENAY YIHDEGO

Respondent

Heard at Toronto, Ontario, on March 19, 2024.

Judgment delivered at Ottawa, Ontario, on April 12, 2024.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: LASKIN J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] Abel Nahusenay Yihdego was found to be inadmissible to Canada pursuant to paragraphs 34(1)(a) and (f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) for being a member of an organization for which there are reasonable grounds to believe had engaged in espionage. These provisions make permanent residents and foreign nationals inadmissible to Canada on security grounds if they are members of an organization for which

there are reasonable grounds to believe engages, has engaged or will engage in espionage "against Canada or that is contrary to Canada's interests".

[2] Mr. Yihdego does not now dispute that he was a member of an organization that has engaged in espionage. The Minister of Public Safety and Emergency Preparedness does not allege that the espionage carried out by the organization in question was "against Canada". The sole issue on this appeal is thus whether the Immigration Division (ID) of the Immigration and Refugee Board reasonably found that the espionage in issue was "contrary to Canada's interests" within the meaning of paragraph 34(1)(a) of *IRPA*. The ID based its finding on an interpretation of paragraph 34(1)(a) that did not require the espionage in issue to have a nexus to Canada's national security or security interests.

[3] In a decision reported as 2020 FC 833, the Federal Court concluded that the ID's interpretation of paragraph 34(1)(a) was unreasonable, and that the phrase "contrary to Canada's interests" requires a nexus to Canada's security interests. Consequently, the Federal Court quashed the ID's decision and remitted Mr. Yihdego's case to the ID for redetermination.

[4] In rendering judgment allowing Mr. Yihdego's application for judicial review, the Court certified the following question:

> 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 paragraph 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 paragraph 2(b) of the Charter?

[5] For the reasons that follow, I find that the Federal Court did not err in finding that the ID's decision was unreasonable, and in concluding that the phrase "contrary to Canada's interests" requires a nexus to Canada's national security or security interests. I am satisfied that the ID failed to have regard to legal constraints imposed on it by international law, in particular the *non-refoulement* provisions of the 1951 *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (*Refugee Convention*), as well as recognized principles of statutory interpretation.

[6] Consequently, I would answer the certified question in the negative, and would dismiss the appeal.

I. Background

[7] Mr. Yihdego is an Ethiopian citizen and a former employee of the Information Network Security Agency (INSA), an Ethiopian state security and intelligence agency, where he was employed as a protocol analyst and network engineer in the years between 2011 and 2014. Mr. Yihdego claims that in the course of employment he was pressured to join INSA's decryption unit and that his superiors threatened and harassed him when he refused to do so.

[8] In an effort to avoid further pressure from his superiors, Mr. Yihdego resigned from INSA in 2014, enrolling in graduate studies outside of Ethiopia. On his return to Ethiopia in

2017, Mr. Yihdego claims that he was detained by security services because of his political opinions and his membership in a political party. Fearing further mistreatment, Mr. Yihdego fled to Canada, entering this country on a temporary resident visa. A few months later, he sought refugee protection in Canada.

[9] Mr. Yihdego's refugee claim was held in abeyance while the Minister inquired into his admissibility to Canada in light of his employment with INSA. The ID then held a hearing with respect to Mr. Yihdego's admissibility.

II. The Immigration Division's Decision

[10] The Minister did not allege that Mr. Yihdego was himself engaged in espionage. In a decision reported as *X (Re)*, 2019 CanLII 132626, the ID nevertheless found that, by virtue of his employment with INSA, Mr. Yihdego was a "member" of that "organization". The ID further found that INSA was an organization that had engaged in cyber espionage, using spyware to target members of the Ethiopian diaspora, as well as a private sector entity known as the Ethiopian Satellite Television (ESAT), in the United States. ESAT is an independent satellite, radio, television and online news outlet run by members of the Ethiopian diaspora in a number of countries, including the United States and Canada.

[11] None of these findings are in dispute in this appeal.

[12] What is in dispute is the ID's finding that the espionage carried out by INSA was "contrary to Canada's interests", as that phrase is used in paragraph 34(1)(a) of *IRPA*.

[13] In finding that INSA's espionage activities were "contrary to Canada's interests", the ID noted that its "activities were directed against Canadian allies", and that they were "unacceptably dismissive of the values underlying the *Canadian Charter of Rights and Freedoms*". The ID further found that INSA's espionage activities "undermined the democratic character of Canada the Canadian federation and the protection of rights conferred": all quotes from para. 120. These findings are the central focus of this appeal.

[14] Based upon this understanding of what could be "contrary to Canada's interests", the ID concluded that Mr. Yihdego was inadmissible to Canada pursuant to paragraphs 34(1)(a) and (f) of *IRPA* for being a member of an organization for which there are reasonable grounds to believe had engaged in espionage.

III. The Federal Court's Decision

[15] The primary focus of Mr. Yihdego's challenge to the ID's decision was its finding that INSA's espionage activities were "contrary to Canada's interests".

[16] In allowing Mr. Yihdego's application for judicial review, the Federal Court adopted the reasoning of the Federal Court in *Weldemariam v. Canada (MPSEP)*, 2020 FC 631 (*Weldemariam FC*). There, the Federal Court found that the ID's inadmissibility finding rested

on an unreasonably broad interpretation of the phrase “contrary to Canada’s interests”, as it appears in paragraph 34(1)(a) of *IRPA*. The Federal Court further found in *Weldemariam FC* that, reasonably interpreted, the phrase “contrary to Canada’s interests” in paragraph 34(1)(a) required a nexus between the espionage actions in issue and Canada’s national security.

[17] In Mr. Yihdego’s case, the Federal Court found that the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, does not apply to INSA or to the targeted journalists, all of whom were outside of Canada. While INSA may have acted in a manner that was contrary to Canadian values, that is not the same thing as imperiling Canada’s national security. The Federal Court concluded that the ID’s finding that INSA engaged in espionage against an important Canadian ally was unreasonable, as no evidence had been adduced to show that either the United States or its citizens were targets. Moreover, even if American citizens had been targeted by INSA, the ID did not explain how this engaged Canada’s national security interests.

IV. The Issue

[18] As noted earlier, the sole issue before this Court is whether the ID’s interpretation of paragraph 34(1)(a) of *IRPA* was reasonable, and whether a nexus to Canada’s national security or security interests is required with respect to “Canada’s interests”, in order to bring an act of espionage within the scope of paragraph 34(1)(a).

V. The Standard of Review

[19] This Court's role in an appeal such as this is to determine whether the Federal Court identified the correct standard of review—correctness or reasonableness—and whether it properly applied that standard: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10-12; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47. This has been described as requiring us to "step into the shoes" of the Federal Court judge, focusing on the administrative decision below.

[20] This Court has previously expressed concerns with respect to the application of the reasonableness standard in the context of questions certified by the Federal Court under the provisions of subsection 74(d) of *IRPA*. This is especially so where, as here, this Court is called upon to answer questions of statutory interpretation that may require a yes or no answer: see e.g. *Canada (Citizenship and Immigration) v. Galindo Camayo*, 2022 FCA 50 at paras. 40-44. See also the dissenting opinion of Justice Côté in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras. 126, 152. Nevertheless, the majority decision in *Mason* affirms that reasonableness is the standard to be applied by reviewing courts in addressing certified questions in the immigration context.

[21] Consequently, I agree with the parties that the Federal Court correctly identified reasonableness as the standard to be applied in reviewing the ID's interpretation of paragraph 34(1)(a) of *IRPA*, specifically the phrase "contrary to Canada's interests" as it appears in that

provision. The question for determination is thus whether the Federal Court properly applied the reasonableness standard in this case.

VI. Analysis

[22] The question certified by the Federal Court in Mr. Yihdego's case is the same question that was certified by the Federal Court in *Weldemariam FC*. The Minister's appeals from the two decisions were heard together, and the arguments advanced by the parties in each case were largely the same.

[23] This Court provided a detailed analysis of the international law and other statutory interpretation issues relating to the interpretation of paragraph 34(1)(a) of *IRPA* in its decision related to Mr. Weldemariam's appeal, which was released contemporaneously with this one (*Canada (MPSEP) v. Weldemariam*, 2024 FCA 69 (*Weldemariam FCA*)). That analysis is equally applicable to Mr. Yihdego's appeal.

[24] Thus, for the reasons given by this Court in *Weldemariam FCA*, I have concluded that there is only one reasonable interpretation of the disputed portion of paragraph 34(1)(a) of *IRPA*. That is, permanent residents or foreign nationals may only be found to be inadmissible to Canada under paragraphs 34(1)(a) and 34(1)(f) of *IRPA* where the espionage in which they are involved—either directly or indirectly—is directed against Canada, or has a nexus to Canada's national security or security interests. It follows that the decision of the ID was unreasonable, and that the Federal Court did not err in setting that decision aside.

[25] The next question is whether Mr. Yihdego's case should be remitted to the ID for redetermination.

[26] As was the situation in Mr. Weldemariam's case, there was no suggestion that any of the targeted ESAT journalists lived in Canada. The evidence before the ID also did not suggest that INSA's acts were directed at Canada as a state, at Canadian companies, at Canadian institutions or at Canadian individuals, including members of the Ethiopian diaspora. Nor was there evidence that INSA's acts implicated Canada's national security or security interests in any way. They were thus beyond the purview of "Canada's interests" within the meaning of paragraph 34(1)(a) of *IRPA*.

[27] Nor was it established that Mr. Yihdego was a member of an organization that was engaged in acts of espionage directed against Canada, or that had a link to Canada's national security or the security of Canada. Consequently, paragraphs 34(1)(a) and 34(1)(f) of *IRPA* do not provide a legal basis for a finding that Mr. Yihdego is inadmissible to Canada. Given that the Minister has not alleged any other basis for Mr. Yihdego's inadmissibility, there is no need to remit this case to the ID for redetermination.

VII. Conclusion

[28] For these reasons, I am satisfied that the Federal Court did not err in finding that the ID's decision was unreasonable. I would answer the question certified by the Federal Court in the negative, and would dismiss the Minister's appeal.

"Anne L. Mactavish"
J.A.

"I agree.
J.B. Laskin"

"I agree.
K.A. Siobhan Monaghan"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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