Federal Court  Cour fédérale

Date: 20221201

Docket: IMM-9094-21

Citation: 2022 FC 1661

Ottawa, Ontario, December 1, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Yousef MM FARAAUN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This matter is rooted in the complex post-Gaddafi political landscape in Libya, of which the Applicant, Yousef Faraaun, is a citizen. He claimed refugee protection in Canada alleging persecution because of his membership in the new Libyan National Army [LNA] based in Tripoli, as opposed to the LNA led by General Haftar in Benghazi that resulted after an alleged split in 2014.

[2] The Immigration Division [ID] of the Immigration and Refugee Board of Canada [IRB] found the Applicant inadmissible [Decision]. The ID concluded that the Applicant is a member of an organization engaged in subversion by force of a government (i.e. the LNA under General Haftar), pursuant to paragraph 34(1)(f), by paragraphs 34(1)(b) and (b.1), of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The ID was not persuaded that there was more than one LNA. A deportation order issued and was attached to the Decision.

[3] The Applicant seeks judicial review of the Decision. At issue before the Court is the reasonableness of the Decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25. The Applicant must persuade the Court that it should intervene here because the Decision lacks the indicators of reasonableness - justification, intelligibility and transparency: *Vavilov*, above at paras 99-100.

[4] There also is a preliminary issue regarding the admissibility of the affidavit of Yoshiko Ishida [Ishida Affidavit], submitted on behalf of the Applicant.

[5] I am not persuaded that the Applicant has met his onus. For the more detailed reasons below, this judicial review application is dismissed. I deal first with the admissibility issue regarding the Ishida Affidavit, followed by the reasonableness of the Decision.

[6] Relevant legislative provisions are reproduced in Annex “A” to these reasons.

II. Background

[7] A brief summary is warranted of political leadership in Libya after the fall of the Gaddafi regime, following civil war, as disclosed by the parties' records.

[8] Upon the ouster and demise of the Libyan leader in October 2011, the regular army disintegrated and numerous militia or revolutionary armed groups arose in its stead. Other security forces loyal to Gaddafi were scattered. The security sector in Libya is characterized by fragmentation, "factionalization" and shifting alliances.

[9] The National Transition Council [NTC] was established in November 2011 as an interim government. In July 2012, Libyans elected the General National Congress [GNC] that replaced the NTC. The elections created a political deadlock between "Islamists" associated with the GNC and "nationalists" associated with the House of Representatives [HoR]. A third government backed by the United Nations, the Government of National Accord [GNA], eventually was formed to try to bridge political divisions.

[10] The LNA came to prominence in 2014 under General Haftar who attempted a coup in February, through a video appearance while in uniform announcing suspension of the GNC. The effort fizzled out. In May 2014, however, General Haftar led the LNA in "Operation Dignity," launching a military offensive in Benghazi to rid the country of Islamists and to undermine their political allies in Tripoli, the GNC. The LNA was aligned then with the HoR, which officially recognized General Haftar as the LNA commander in March 2015.

[11] In his Basis of Claim narrative, the Applicant describes enlisting in the "Border, Oil Fields, and Strategic Facilities Guards" [BOSFG] unit of the "new" LNA in an administrative role in the "Media/Ceremony" department in Tripoli. He further describes that the NTC formed the Ministries of Defence and Interior to build a new LNA that brought together former Gaddafi army officers, moderate rebel fighters, and civilian recruits, like the Applicant.

[12] Between 2013 and 2017, the Applicant studied English language in Canada towards qualifying as an officer and was supported financially by the LNA in his studies, both with respect to tuition and salary (until October 2015 when payments stopped because of the civil war and lack of funding). The Applicant returned twice to Libya, where he married his spouse in 2014 and visited with family in 2015. Two applications to have his spouse accompany him to Canada as a visitor were rejected.

[13] The Applicant claimed refugee protection in Canada in July 2018, fearing persecution at the hands of Islamist militias because of his LNA involvement and alleging that Islamist militia detained and hit him at a checkpoint during a return stay in Libya in 2015.

III. Analysis

[14] In addition to the preliminary admissibility issue, the Court also must consider, under the reasonableness rubric, the more granular issues of whether the ID erred in finding that: the Applicant was a member of the Haftar-led LNA; and the GNC and the GNA fall within the meaning of "government" in paragraph 34(1)(b) of the *IRPA*. As I explain below, I am satisfied that the ID did not treat these issues unreasonably.

A. *Admissibility of Ishida Affidavit*

[15] I agree with the Respondent that the Ishida Affidavit is inadmissible because it seeks to introduce material that was not before decision maker.

[16] The affiant, Yoshiko Ishida is a legal assistant for the Applicant's counsel. The exhibits attached to the affidavit comprise United Nations reports on the current security and political situation in Libya.

[17] Contrary to the Applicant's submissions, I am not convinced that the Ishida Affidavit falls within the background exception to the admissibility of new evidence on judicial review as described by the Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 20

[18] The general evidentiary proposition on judicial review is that "evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court": *Access Copyright*, above at para 19. The background exception, as discussed in paragraph 20 of the *Access Copyright* decision, emphasizes the care the reviewing court must take when assessing the proffered evidence not to stray from the general rule into the realm of fact finding that is the sole purview of the decision maker.

[19] That the source of the reports is reputable or that the reports show the continued evolution of the LNA after the ID hearing and the issuance of the Decision does not assist the Applicant, in my view. I find that they go the merits of the matter before the ID, and further, the request to admit them is tantamount, in my view, to a request that the Court stray into fact finding which is not its role on judicial review. To do so, would risk offending "the demarcation of roles between this Court as a judicial review court, and the Board as a fact-finder and merits-decider": *Access Copyright*, above at para 23.

B. *Finding that Applicant was member of LNA led by General Haftar*

[20] I am not persuaded that the ID's finding the Applicant is inadmissible to Canada was unreasonable in the circumstances.

[21] The ID determined that there were reasonable grounds to believe the Applicant was a member of an organization, namely the LNA led by General Haftar, that has engaged in subversion by force of a government and thus he was inadmissible to Canada pursuant to paragraph 34(1)(f), by paragraphs 34(1)(b) and (b.1) of the *IRPA*.

[22] For his part, the Applicant asserts that he was never a member of the Haftar-led LNA, following the alleged bifurcation in 2014 that included the Applicant's BOSFG unit and that resulted in two command structures, but rather he only ever was a member of the new LNA based in Tripoli. The Applicant further argues that in any event, the Haftar-led LNA did not engage in subversion by force because there are no governments in Libya that meet the definition in either paragraph 34(1)(b) or 34(1)(b.1) of the *IRPA*.

[23] In its Decision, the ID notes that the "reasonable grounds to believe" standard "requires something more than a mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities," citing *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 (at para 114). The ID acknowledges that reasonable grounds exist where there is an objective basis for the belief which is based on compelling and credible information. (See *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 89.)

[24] Further, the ID notes that the terms "organization," "membership" and "subversion by force of any government" are not defined in the *IRPA*; they all are to be given a broad interpretation according to applicable jurisprudence.

[25] The Applicant argues that he does not dispute the definitions of membership and organization adopted by the ID but rather, he submits, they were applied incorrectly. Contrary to the Applicant's submission, I find the Applicant did not point to evidence in the certified tribunal record that the ID misapprehended or failed to take into account in determining the Applicant's membership in a single LNA. In fact, the Applicant admits in his written submissions that he did not provide evidence of separate LNA units, including the BOSFG.

[26] Following its review of the documentary evidence, the ID found "no compelling credible evidence establishing that more than one LNA exists in Libya" or more specifically, "no distinct identity, objectives, goals or operations have been objectively established through the evidence provided." Further, the ID acknowledged that "a bifurcation of the government took place in mid-2014 at or near the time of *Operation Dignity*", but was not satisfied that the "GNC and

HoR [had] security groups both identified as the LNA." As noted by Justice Strickland, "[t]he existence of the faction, its distinct identity and its operations must be objectively established": *Nassereddine v Canada (Citizenship and Immigration)*, 2014 FC 85 at para 44.

[27] The ID also noted that, during an interview with the Canada Border Services Agency in May 2019, the Applicant confirmed he had not resigned from the LNA.

[28] Bearing in mind that it is not the Court's role to reassess and reweigh the evidence considered by the decision maker, I find the ID's conclusions that the Applicant was a member of the LNA and that the LNA was a single entity were not unreasonable in the circumstances: *Vavilov*, above at paras 125-126. The ID's reasons are clear and permit the Court to understand why the ID reached the conclusions it did on these issues. Simply put, based on the record before the ID, the reasons "add up," in my view: *Vavilov*, above at para 104.

C. *Finding that GNC and GNA are encompassed in meaning of "government"*

[29] I am not persuaded that the ID's interpretation of "government" in paragraph 34(1)(b) of the *IRPA* as including the GNC, HoR and GNA was unreasonable.

[30] After considering the definitions of "subversion" and "by force" disclosed in the applicable jurisprudence, the ID found that the military offensive launched by General Haftar against Islamists in Benghazi in May 2014 under the name Operation Dignity marked the start of a civil war in Libya and was aimed at overthrowing the GNC government in Tripoli that General

Haftar accused of supporting Islamist militias. The ID found that in the circumstances there were reasonable grounds to believe that the LNA engaged in subversion by force of a government.

[31] The Applicant argues that Libya is a failed state with no government in control of Libya's territory. Further, Parliament could not have intended to include "any government" in paragraph 34(1)(b) of the *IRPA*, even one that does not control its territory, because that could include a city government or a tribal government or council.

[32] The Applicant asserts that an important element of the term "government" is that it is in fact in control of the territory and he relies on the decision in *Najafi v Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 262 [*Najafi*] at paras 65-71, for this proposition. In my view, however, the Federal Court of Appeal did not state in *Najafi* that the term "government" means the entity in issue must have control over the entirety of a state or territory. Instead, the Court noted three things that are worth mentioning about this provision as it relates to the case before me.

[33] First, the Federal Court of Appeal found that "the words of paragraph 34(1)(b), ('any government'), … are clear and unambiguous[; t]he words 'subversion by force of **any government**' do not on their face, imply a qualification of any kind with respect to the government in question": *Najafi*, above at para 70 [emphasis in original].

[34] Second, the Federal Court of Appeal observed, "that Parliament intended the expression 'subversion by force of any government' in paragraph 34(1)(b) to have a broad application": *Najafi*, above at para 78.

[35] Third, Justice Gauthier, speaking for the Federal Court of Appeal, qualified the above interpretation by noting that "when I state that Parliament intended for the provision to be applied broadly, I am referring to the inadmissibility stage" in light of the "Minister's ability to exempt any foreign national caught by this broad language," including those who are "members of organizations whose admission to Canada would not be detrimental or contrary to national interest": *Najafi*, above at paras 80-81.

[36] Justice Walker of this Court recently confirmed the broad interpretation given to "government" in *Najafi* when noting that, "the nature of a government being overthrown, whether democratically elected, oppressive or illegitimate, is irrelevant to the determination of whether an organization engaged in the subversion by force of that government for purposes of paragraph 34(1)(b) of the *IRPA*": *Zahw v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 934 at para 56.

[37] In addition, I find that reliance on the *Black's Law Dictionary* definition of "government" is not of assistance here as it does not support the interpretation advocated by the Applicant. Whether looking at the 10th or 11th edition, I note the definition also is broad and includes: "[a]n organization through which a body of people exercises political authority; … [i]n this sense, the

term refers collectively to the political organs of a country, regardless of their function or level, and regardless of the subject matter they deal with."

[38] In any event, I find that the Applicant essentially repeats the arguments made before ID. Judicial review is not an appeal, however, and a reasonableness review is not about whether the decision maker was correct, bearing in mind that in some circumstances, but not those here, a level of incorrectness can point to unreasonableness.

[39] Again, the Applicant requests that the Court reassess and reweigh the evidence considered by the ID in reaching the conclusion that the GNC (and also the GNA) is a government which the LNA sought to subvert by force, which is not the role of a reviewing court: *Vavilov*, above at para 125. I find that the ID's rationale permits the reviewing court "to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn": *Vavilov*, above at para 97, citing *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para 11.

IV. Conclusion

[40] For the above reasons, I conclude that the Applicant has not met his onus of demonstrating that the Decision lacks the hallmarks of justification, transparency and intelligibility, and hence, is unreasonable. I therefore dismiss this judicial review application.

[41] Neither party proposed a question for certification and I find that none arises in the circumstances.

JUDGMENT in IMM-9094-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is dismissed.

2. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act* (S.C. 2001, c. 27)**
***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**

Inadmissibility	**Interdictions de territoire**
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 :
…	…
(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;
…	…
(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

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