Federal Court  Cour fédérale

Date: 20180205-

Docket: IMM-3393-17

Citation: 2018 FC 119

Ottawa, Ontario, February 5, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SEMERE TESFAYE KETO

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks to set aside a decision of Immigration Appeal Division [the IAD] that found that he is inadmissible to Canada under paragraph 34(1)(f) of *Immigration and Refugee Protection Act*, SC 2001, c 27. The IAD found him to be a member of Ginbot 7, which it determined was a group described in that paragraph.

[2] I find that the IAD mischaracterized some of the evidence and misstated other material facts, such that the decision it reached cannot safely be relied upon, and is thus unreasonable. For that reason, this application will be allowed.

[3] The applicant is a citizen of Ethiopia. He came to Canada in April 2013, and subsequently made an inland refugee claim based on persecution by the government of Ethiopia for imputed political opinion. In April 2015, he was interviewed by an immigration officer regarding his involvement with the political group Ginbot 7. Based on this interview, the officer issued a section 44 report stating it to be his opinion that the applicant was inadmissible to Canada.

[4] A hearing was convened before the Immigration Division [ID] on July 24, 2015, during which the applicant gave oral testimony. The ID found that there were no reasonable grounds to believe that the applicant was inadmissible under paragraph 34(1)(f) of the Act.

[5] The Minister filed an appeal to the IAD. Both parties agreed that the matter did not require another hearing and that the IAD would render a decision based on the appeal record and written submissions. In its decision dated July 20, 2017 the IAD allowed the Minister's appeal and found that the applicant was inadmissible under paragraph 34(1)(f) of the Act.

[6] The IAD found that the ID had made no explicit findings regarding the credibility of the applicant's evidence, and thus inferred that the ID found him to be credible. I agree that it did.

[7] The IAD stated that it would decide the case before it on a *de novo* basis. Since the parties agreed that the appeal would be disposed of "In Chambers" the IAD stated that that any credibility findings it made would be based on the documents in the record.

[8] The IAD found that there were reasonable grounds to believe that Ginbot 7 met the definition of an organization under subsection 34(1) of the Act. That finding is not challenged by the applicant.

[9] The IAD then considered whether the applicant was a member of Ginbot 7. This is the crux of the decision under review.

[10] The IAD observed that it is settled law that "member" as used in subsection 34(1) of the Act must be interpreted broadly. In *B074 v Canada(Minister of Citizenship and Immigration)*, 2013 FC 1146 at paragraphs 28-29, this Court stated that three criteria that should be considered when assessing membership: the nature of the person's involvement in the organization, the length of time involved, and the degree of the person's commitment to the organizations goals and objectives. The Court also noted that where factors suggest non-membership these must be reasonably considered and weighed.

[11] The IAD considered the evidence of the applicant in his Basis of Claim form [BOC], his April 1, 2015, interview by an officer of the Canadian Border Security Agency [CBSA], and his testimony at the ID hearing. It found his BOC showed the applicant's uncle was a member of Ginbot 7, but did not provide clear evidence that the applicant was a member.

[12] The IAD made two findings regarding the CBSA interview. First, that the applicant was careful to repeat that he was not a member of Ginbot 7. Is it not obvious that if one knows that membership is the very issue to be decided, and if one is not a member, that one might express one's lack of membership repeatedly? How does this suggest one is a member? A suspected criminal does not become more likely to actually be the criminal by repeatedly stating that he did not do it, when he did not. Nor does it become more likely that he is lying.

[13] Second, the IAD found that the applicant was "intentionally vague" when asked for details about his activities organizing secret meetings at the university. Assessing intention from a written record is extremely challenging. Here the finding is simply wrong because, as the Minister admits, there was no evidence that the applicant was involved in organizing meetings at the university.

[14] These two findings alone are a sufficient basis to render the IAD's decision unreasonable.

[15] The IAD also made two credibility findings regarding the applicant's hearing before the ID. First, it found his statement that he wasn't sure what his uncle's main duties were was not credible given the acuity of his responses to other questions about the opposition movement. Second, it found that his inability to describe the contents of the flyers he helped design and distribute was not credible given that the government would likely have considered the flyers to be subversive.

[16] The ID, but not the IAD, was in a position to view the demeanour of the witnesses because this appeal proceeded purely on a written record. I agree with the applicant that in these circumstances the IAD should only deviate from the ID's credibility findings when it has strong, persuasive evidence based on the written record that the ID's findings were incorrect.

[17] I find it troubling that the IAD found the applicant's answer to his uncle's activities were insufficient in detail given his "acuity" in responding to other questions. Had the IAD, like the ID, the benefit of hearing oral evidence, it would have had the opportunity to ask follow up questions if it was unsatisfied with the applicant's answer on this issue. The IAD failed to point to any concrete contradictions in the applicant's testimony on this point that would justify departing from the ID's (implied) credibility finding on this issue. As such, I find that the IAD's finding on this issue was not reasonable. This was the second reason the IAD made an adverse credibility finding against the applicant. This reason too is suspect, and supports setting aside the decision.

[18] The third credibility finding rested on the IAD finding that it was not credible that the applicant would not be able to describe <u>in detail</u> the contents of the flyers he formatted and distributed. His description of the content is set out at page 111 of the Certified Tribunal Record. There he describes the leaflets as generally focusing on the following:

- Support Genbate 7 party and chose the right way to democracy and good governance.
- Genbate 7 party is your party that you will exercise freedom of expression, basic human Right and unity for Ethiopian.
- We need freedom of the press and freedom of idea expression. [*sic*]

[19] Again, it is noted that the ID accepted his response when questioned about the contents of the flyer. He explained that he did not write the content; he only formatted it to make it more attractive. When it was suggested to him that he would have read the flyers as the Ginbot 7 were an illegal organization, he responded that he distributed the flyers before Ginbot 7 was an illegal party. The evidence on the record shows that his activities designing and distributing flyers occurred almost entirely before the first government action against Ginbot 7. Accordingly, I find it was unreasonable for the IAD to fail to consider his explanation for why he did not know the detailed contents of the flyer, namely that he did not consider it dangerous to be creating and distributing the flyers at the time he did so, and that the content of the flyer were not his responsibility.

[20] The case under review illustrates the dangers in an appeal body making different credibility findings than the body whose decision it is examining when the appeal proceeds only on the basis of the written record.

[21] For these reasons, the application is allowed. No question was proposed for certification.

JUDGMENT in IMM-3393-17

THIS COURT'S JUDGMENT IS that:

1. The Respondent's name in the style of cause is changed to Minister of Public Safety and Emergency Preparedness;

2. The application is allowed and the decision under review is set aside and the Minister's appeal of the Immigration Decision is referred back to a differently constituted panel of the Immigration Appeal Division; and

3. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3393-17
STYLE OF CAUSE:	SEMERE TESFAYE KETO v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JANUARY 10, 2018
JUDGMENT AND REASONS:	ZINN J.
DATED:	FEBRUARY 5, 2018

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