Federal Court Cour fédérale

Date: 20200401

Docket: IMM-491-19

Citation: 2020 FC 467

Ottawa, Ontario, April 1, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

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

Applicant

and

SEMERE TESFAYE KETO

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Immigration Appeal Division ("IAD") dismissing the Minister's appeal of an Immigration Division's ("ID") decision, which found the Respondent, Mr. Keto, not inadmissible under subsection 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"), for membership in the Ethiopian organization Ginbot 7 ("G7").

[2] After a judicial review of the first negative IAD decision, in which this Court found the IAD's decision to be unreasonable as it had made new adverse credibility findings without an oral hearing, this case was sent back to the IAD for a redetermination. Now the second IAD decision is before this Court once more on application for judicial review.

[3] For the second IAD proceeding, the Respondent requested to proceed on the written record, and the Applicant requested an oral hearing. The IAD decided to proceed by way of written submissions.

[4] The Applicant, for the Minister, argues that the IAD breached procedural fairness by refusing to proceed by holding an oral hearing, and that the IAD fettered its discretion by assessing the Respondent's credibility.

[5] For the reasons that follow, I find that the IAD did not breach procedural fairness and did not fetter its discretion. This application for judicial review is dismissed.

II. **Facts**

A. *The Respondent and Procedural History*

[6] Mr. Semere Tesfaye Keto (the "Respondent") is a 30-year old citizen of Ethiopia. He came to Canada as a temporary worker in April 2013 and made a refugee claim in July 2014. The basis of his refugee claim was persecution by the government of Ethiopia for his imputed political opinion. The Respondent had worked for his uncle who was a leader in the Bonga

region of Ethiopia for G7. The Respondent was arrested and detained by Ethiopian authorities from May 2009 to April 2010, due to his involvement with his uncle and G7.

[7] In April 2015, the Respondent was interviewed by a Canada Border Services Agency ("CBSA") officer about his involvement with G7. The Respondent stated that he had helped his uncle create pamphlets for G7, assisted in the distribution of the pamphlets, and organized meetings. Later, while in university, the Respondent attended secret meetings with G7 members. During the interview, the Respondent explained that because his uncle was quite busy, he offered to assist his uncle at his office—for three to four hours—from June 2008 to May 2009.

[8] Based on this interview, the CBSA officer issued a section 44 report, stating it to be his opinion that the Respondent was inadmissible to Canada, and referred him for an admissibility hearing.

[9] On July 24, 2015, an admissibility hearing was held, during which the Respondent testified.

[10] It was alleged that the Respondent was inadmissible to Canada pursuant to subsection 34(1)(f) of the *IRPA*, which states that a permanent resident or a foreign national is inadmissible on security grounds for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in instigating the subversion by force of any government. The Applicant alleged that the Respondent was a member of G7, and that G7 instigates the subversion of the Ethiopian government.

[11] I note that for the purposes of determining whether the Respondent was a "member" within the definition of section 34 of the *IRPA*, it was not disputed by the Minister that the Respondent was physically abused when he was detained for almost a year for allegedly taking part in Ginbot 7 activities. Also, the Respondent has never been accused of taking part in violent activities.

[12] After the admissibility hearing, the ID Member issued a favourable decision for the Respondent (the "ID Decision"). The ID found that the Respondent was not inadmissible under subsection 34(1)(f) of the *IRPA*.

[13] The Minister appealed the ID Decision to the IAD. The basis of this appeal was that the ID had ignored various credibility concerns raised by the Minister, and failed to engage in any credibility analysis.

[14] On July 20, 2017, the IAD allowed the Minister's appeal, and found the Respondent inadmissible under subsection 34(1)(f) by (b) of the *IRPA* (the "First IAD Decision"). The IAD made adverse credibility findings against the Respondent.

[15] The Respondent successfully made an application to this Court for a judicial review of the First IAD Decision. In February 2018, Justice Zinn found the First IAD decision to be unreasonable because the IAD Member had made adverse credibility findings based on the documents and transcripts before him, even though the ID had found the Respondent to be credible. The Court stated that 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," (*Keto v Canada (Public Safety and Emergency Preparedness*), 2018 FC 119 (CanLII) [*Keto*] at para 16). The matter was sent back to the IAD for redetermination.

[16] On May 31, 2018, the Respondent requested the IAD hearing to proceed on the basis of the written record. The Applicant objected to this request, arguing that proceeding by written submissions would preclude the IAD panel from assessing credibility.

[17] On July 12, 2018, the IAD directed that the appeal was to proceed by way of written submissions. The IAD gave no reasons for this direction.

[18] On January 7, 2019, the IAD dismissed the Applicant's appeal (the "Second IAD Decision").

B. *Decision Under Review: the Second IAD Decision*

[19] In coming to a decision, the IAD reviewed the Respondent's refugee claim documents, the transcript of the CBSA interview, and the Respondent's oral testimony at the ID hearing. The IAD found that the Respondent's involvement with G7 was peripheral to his focus of providing administrative assistance to his uncle, rather than to G7. The IAD found that G7 was established in May 2008, the Respondent assisted his uncle from June 2008 to May 2009, and the Ethiopian government outlawed G7 as a terrorist organization in May 2011. Thus, the Respondent worked with his uncle during the initial establishment of G7, and had stopped working with his uncle for about two years by the time the organization was outlawed. The

Respondent confirmed that he was not involved with G7 while attending university, but that he did attend opposition party meetings.

[20] With regard to the Respondent's political views, the IAD noted that the Respondent stated that he is not a member of a political organization, but listens to various opinions. Issues of particular interest to the Respondent included education, health, transportation, community development, and human rights. The Respondent had stated during the CBSA interview that he did not agree with the use of violence for political parties to gain control, but recognized that many African political parties do use violence to achieve election wins. The IAD noted the Respondent's testimony that he never became a member of G7 or any other political party, and that he believed G7 to be a good organization that supported human rights and democracy.

[21] The IAD noted the Respondent's statement that he attended various meetings while in university because he was interested in discovering why the government labelled various opposition parties as violent, and wanted to share ideas and identify which party was a good fit for him.

[22] The IAD found the Respondent's statements to be "reflective of a young individual who is civic minded, who is concerned about the political situation in his country, and who is trying to find his place within it". The IAD found no evidence that the Respondent's assistance to his uncle or his participation at meetings in university represented anything more than an interest in politics, and that the Respondent did not have a strong degree of commitment to G7 and its objectives.

[23] On the issue of credibility, the IAD noted that the ID hearing had been an oral hearing, and that the ID Member found the Respondent's evidence to be credible. The IAD also found that the Respondent's evidence was consistent through various proceedings, and that the ID Member had made sound inferences and conclusions based on evidence provided by the Respondent.

[24] The IAD concluded that the ID did not err in assessing the evidence before it, and that the Respondent was not a member of G7.

III. **Issues and Standard of Review**

[25] The issues on this application for judicial review are:

A. Did the IAD violate the Applicant's right to procedural fairness by refusing to hold an oral hearing?

B. Did the IAD essentially fetter its discretion by assessing the Respondent's credibility?

[26] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], issues of procedural fairness were reviewable on a correctness standard *(Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 72). In *Vavilov* at paragraph 23, the Supreme Court writes:

> Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[27] A reading of paragraphs 76 to 77 in *Vavilov* reveals the Supreme Court's acknowledgement that the "requirements of the duty of procedural fairness in a given case…will impact how a court conducts reasonableness review." In my view, this is instructive for a reviewing court to first determine whether a duty of procedural fairness exists, and in light of the procedural fairness requirements (if applicable), apply the presumption of the reasonableness standard on the overall decision. In *Vavilov*, the duty of procedural fairness concerned whether reasons for the administrative decision was required and provided (*Vavilov* at para 78). Having found that reasons were both required and provided in this case, the Supreme Court moves onto its discussion on whether the decision is substantively reasonable. The following excerpt is also helpful, where the duty of procedural fairness is distinguished from the reasonableness analysis (*Vavilov* at para 81):

> […] The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

[28] The correctness standard continues to apply to the issue of procedural fairness in the case at bar.

[29] On the issue of fettering of discretion, regardless of the standard of review, if the IAD has fettered its discretion that would constitute a reviewable error under either standard of review and would require that the decision be set aside (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 (CanLII) at paras 20-27; *Gordon v Canada (Attorney General)*, 2016 FC 643 (CanLII) at paras 25-28). The same applies post-*Vavilov*.

IV. Relevant Provisions

[30] Subsections 34(1)(b) and 34(1)(f) of the *IRPA* read as follows:

Security **34 (1)** A permanent resident or a foreign national is inadmissible on security grounds for	**Sécurité** **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;
[…]	[…]
(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).

[31] Section 25(1) of the *Immigration Appeal Division Rules*, SOR/2002-230 ("*IADR*") allows the IAD to proceed in writing, and reads as follows:

Proceeding in writing	**Procédures sur pièces**
25 (1) Instead of holding a hearing, the Division may require the parties to proceed in writing if this would not be unfair to any party and there is no need for the oral testimony of a witness.	**25 (1)** La Section peut, au lieu de tenir une audience, exiger que les parties procèdent par écrit, à condition que cette façon de faire ne cause pas d'injustice et qu'il ne soit pas nécessaire d'entendre des témoins.

V. **Analysis**

A. *Applicant's Submissions*

[32] The Applicant submits that the IAD breached procedural fairness by refusing to proceed by way of holding an oral hearing. The Applicant's argument is that the ID Member did not conduct any credibility analysis, and as a result of the IAD's refusal to grant the oral hearing, the Applicant was prevented from challenging the implicit credibility findings in the ID decision. The Applicant argues that the IAD's procedural choice denied the Applicant's substantive appeal rights under section 63(5) of the *IRPA*, under which the Minister has a right to appeal to the IAD against a decision of the ID in an admissibility hearing.

[33] The Applicant refers to *Keto* at paragraphs 16 and 20, where Justice Zinn highlights the importance of a tribunal hearing witness testimony firsthand when making new adverse credibility findings. The Applicant submits that in requesting for an oral hearing, the Applicant

had operated on the reasonable expectation that there would be an oral hearing to allow the IAD to assess the Respondent's credibility on critical evidence.

[34] Moreover, the Applicant maintains being entitled to present the Respondent's evidence to the IAD to challenge the ID's implicit credibility findings. In particular, the Applicant alleges that the Respondent provided inconsistent prior statements when the Respondent testified that he was not fully aware of the contents of the flyers he helped to create and distribute; and that there was a contradiction between the Respondent's early statements during the CBSA interview about his attendance at secret meetings of G7, and later statements made at the ID hearing.

[35] By proceeding on written submissions, the Applicant submits that the IAD essentially fettered its discretion by foreclosing any possibility of it coming to another conclusion on the credibility of the Respondent's evidence.

[36] Furthermore, the Applicant submits that the lack of reasons provided by the IAD in making the determination to proceed by written submissions was procedurally unfair and unreasonable. The Applicant argues it was prejudiced by the result and the decision to proceed in writing amounted to a denial of the Minister's right of participation in the decision making process at the IAD.

B. *Respondent's Submissions*

[37] The Respondent submits that the IAD did not violate procedural fairness by not holding an oral hearing. The Respondent posits that the entire record was before the ID, before the IAD

during the first hearing, and again before the IAD during the second hearing. During the second hearing, the IAD made credibility findings in favour of the Respondent.

[38] In light of the IAD's own credibility findings, the Respondent argues that the Applicant's submissions are not based on procedural fairness since the Applicant had the same opportunity as the Respondent to provide arguments now contained in the record. The Applicant had the opportunity to challenge and make submissions with respect to its concerns on the Respondent's credibility in their written submission to the IAD.

[39] The Respondent submits that his statements and evidence were well known, and had been tested through interviews and cross-examination, and assessed by the IAD. As such, the IAD's decision to proceed by way of written submissions did not impinge on the Applicant's reasonable expectations that the Respondent's credibility would be assessed by the IAD.

[40] The Respondent takes issues with the reply letter submitted by the Minister to request an oral hearing for the second IAD proceeding. The Respondent submits that much of the letter mischaracterizes what was held in the first judicial review, and that the letter was non-specific as to the specific credibility concerns that the Minister wanted to challenge. There were no substantive requests as to why the Minister had requested an oral proceeding to be held.

[41] Moreover, the Respondent considers the Applicant's argument on fettering of discretion to be without merit, and submits that the IAD considered all aspects of the Respondent's evidence, including submissions from the Applicant and nevertheless concluded that the

Respondent was credible. The IAD did not fetter its own discretion as it made a decision based on the evidence before it.

C. *Analysis*

[42] In my view, the IAD did not violate procedural fairness by refusing to hold an oral hearing nor did the IAD fetter its discretion. Under subsection 175(1)(c) of the *IRPA*, the IAD is entitled to receive and base a decision on evidence adduced in the proceedings that it considers credible. Subject to the principles of procedural fairness, the IAD is the master of its own procedure *(Yiu v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 480 (CanLII) at para 18).

[43] What the Applicant alleges is that the Minister held a reasonable expectation that there would be an oral hearing after the *Keto* decision. The Applicant relies on Justice Zinn's comments on the circumstances required to deviate from the ID's credibility findings to support its argument that the only way for the Minister to challenge the credibility of the evidence would be by way of an oral hearing. However, the Applicant appears to have misconstrued the findings in *Keto*, and I am not persuaded that the Applicant held any reasonable expectations as it outlines in its submissions.

[44] The conclusion in *Keto* was that the IAD had erred by making new adverse credibility findings without an oral testimony—nowhere in the decision does the Court conclude or order that the initial credibility assessments made by the ID had to be re-assessed. The Court was

simply emphasizing that when the IAD wishes to make different—and especially adverse—credibility findings, it is dangerous to do so only based on a written record.

[45] As the Respondent noted, the Court's finding was not that the IAD could not deviate. However, the IAD must have very strong reasons to draw adverse credibility findings on the basis of the written record alone. Furthermore, the Court had pointed out that it was unreasonable for the IAD to have misstated the facts to justify adverse credibility findings.

[46] The IAD properly exercised its discretion to base the decision on the written record in coming to favourable credibility findings for the Respondent, as the ID had done.

[47] Moreover, the Applicant already had the opportunity to make submissions on the credibility of the evidence that it seeks to challenge, when the Applicant examined the Respondent at the ID hearing. It is noteworthy that presently, two expert tribunals—the ID and IAD—have had opportunities to make credibility findings, and I am not persuaded by the Applicant's argument that the Minister is aggrieved of being "clearly prejudiced by the result."

[48] Furthermore, I note that the Applicant did not oppose proceeding by way of written submissions during the first IAD appeal. If the Applicant did in fact have issues with the implicit credibility findings in the ID Decision and had wished to challenge them through an oral proceeding, I find it dubious as to why the Applicant had not raised objections to proceeding by way of written submissions at that particular time.

[49] The IAD did not fetter its discretion by refusing to proceed by way of written submissions. The Applicant already had a chance to make oral submissions and examine the Respondent's credibility during the ID hearing (in addition to the opportunity awarded to the Minister during the CBSA hearing). Additionally, there was no need for the oral testimony of a witness since the Respondent had already been orally examined, and there were no new witnesses being summoned for the second IAD hearing. Thus, under subsection 25(1) of the *IADR*, the IAD did not fetter its discretion by requiring the parties to proceed in writing and by assessing the Respondent's credibility.

[50] Also, challenges to credibility are not restricted to an oral hearing. In this case, as the Minister was already presented with two opportunities to examine the Respondent's credibility, the Minister was open to make credibility challenges in their written submissions as well.

[51] On a final note, I agree with the Respondent that the lack of reasons for the IAD's decision to proceed by written submissions was proportional to the Minister's request for an oral hearing—there was a lack of specificity and substance in the request. Also, the Minister does not have a right to an oral hearing simply by virtue of having made the request: it has to be justified. The Minister could have availed himself to the other opportunities available, for example through additional CBSA interviews, or even a pre-hearing conference before the second IAD hearing. However, the Minister simply chose not to pursue them.

[52] In my view, the IAD's decision is reasonable and there was no breach of procedural fairness.

VI. **Certified Question**

[53] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[54] The IAD did not breach the Applicant's right to procedural fairness by refusing to proceed by way of an oral hearing, nor did it fetter its discretion in its decision to do so. The IAD, properly within its discretion, determined that proceeding by way of written submissions was sufficient. The Applicant already had the opportunity to examine the Respondent and challenge his credibility, and did not have a reasonable expectation that an oral hearing would be held in the IAD redetermination.

[55] This application for judicial review is dismissed.

VIII. **Costs**

[56] The Respondent takes the position that this is a frivolous and vexatious application, and therefore requests legal costs against the Applicant of $5000.00.

[57] However, no special reasons have been shown in this case to award costs against the Applicant.

[58] Therefore, no costs are awarded.

JUDGMENT IN IMM-491-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question to certify.
3. No costs are awarded.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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