# Oremade v. Canada (Minister of Citizenship and Immigration), 2005 FC 1077 (CanLII)

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IMM-8656-04

2005 FC 1077

**Solomon Oremade** (*Applicant*)

*v.*

**The Minister of Citizenship and Immigration** (*Respondent*)

Indexed as: Oremade v. Canada (Minister of Citizenship and Immigration) (F.C.)

Federal Court, Phelan J.--Ottawa, April 14; August 9, 2005.

Citizenship and Immigration -- Exclusion and Removal -- Inadmissible Persons -- Judicial review of decision of Immigration Appeal Division (IAD) of Immigration and Refugee Board overturning Immigration Division's determination applicant not inadmissible to Canada under Immigration and Refugee Protection Act (IRPA), s. 34(1)(b) -- Applicant, former Nigerian army officer, found inadmissible on basis engaged in or instigated subversion of government "by force" contrary to IRPA, s. 34(1)(b) -- Applicant had agreed to take part in proposed coup, lead 50 armed soldiers to airport -- Coup aborted -- Applicant insisting plan was for bloodless coup -- No evidence of intention to use force -- Immigration Division holding applicant involved in "instigating" but not in "engaging in the subversion of a government" -- Various types of prohibited conduct implying acts carried out knowingly and with intent to do so when reading s. 34(1) as a whole -- Intention to subvert by force critical to applicability of s. 34(1)(b) given context in which words "by force" appear -- "By force" including coercion or compulsion by violent means, coercion or compulsion by threats to use violent means, reasonably perceived potential for use of coercion by violent means -- Use of force in subversion must be intended means by which to overthrow the government -- Questions certified as to meaning of "subversion by force", intention required by s. 34(1)(b).

Construction of Statutes -- Meaning of "subversion by force" in Immigration and Refugee Protection Act, s. 34(1)(b) -- Clearly intended to have broad sweep to exclude certain individuals from admission into Canada -- Broad purposive interpretation not leading to unreasonable result since s. 34(2) giving Minister responsibility to assess whether person might be threat, inadmissible to Canada -- Reading words in entire context and in grammatical, ordinary sense, including within ambit of s. 34(1) persons having no intention of committing offence not serving purpose of provision or being consistent with plain wording.

This was an application for judicial review of the decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB) overturning a prior determination by the Immigration Division that the applicant was not inadmissible under paragraph 34(1)(*b*) of the *Immigration and Refugee Protection Act*. The

applicant is a former Nigerian army officer involved in the planning of a coup, which never took place. The IAD found him to be inadmissible on the basis that he engaged in or instigated the subversion "by force" of a government, contrary to paragraph 34(1)(*b*) of the IRPA. The applicant had agreed to take part in a proposed coup to overthrow the government in Nigeria in March 1995 by donning an army lieutenant's uniform and leading a group of 50 armed soldiers in the seizure of the Lagos International Airport. When the plotters were betrayed, the coup was aborted. The applicant insisted that the plan was for a bloodless coup and argued that, based on past examples of coups in Nigeria, it was reasonable to believe that this could succeed. He stated that there was no evidence of any intended use of force and did not instigate or encourage any subversion. The Immigration Division held that the applicant was involved in "instigating" but not in "engaging in the subversion of a government". The IAD concluded that the intention to have a bloodless coup was irrelevant for purposes of paragraph 34(1)(*b*). It also found that the planned use of 50 armed soldiers provided a reasonable ground to believe that the applicant was engaging in or instigating the subversion by force of the government in power. The issue was whether, for purposes of paragraph 34(1)(*b*) of the IRPA, the permanent resident or foreign national must have the intention of actually using force in subverting a government.

*Held*, the application should be allowed.

Paragraph 34(1)(*b*) was clearly intended to have a broad sweep to exclude certain individuals from admission to Canada. However, subsection 34(2) limits its broad and potentially undesirable application by giving the Minister the responsibility to assess whether a person who falls within paragraph 34(1)(*b*) might be a threat to Canada or might otherwise be inadmissible. Therefore, a broad purposive interpretation does not lead to an unreasonable or ludicrous result.

Subsection 34(1) is intended to prevent persons who willingly commit specific acts from being admitted to Canada, including espionage, subversion and terrorism. Reading the provision as a whole, the various types of prohibited conduct imply that they are carried out knowingly and with intent to do so. Furthermore, the phrase "engaging in or instigating the subversion by force" must be read in that context. It would not serve the purpose of the provision or be consistent with its plain wording to include within the ambit of subsection 34(1) persons who had no intention of committing the offending act.

Paragraph 34(1)(*a*) prohibits subversion against a democratic government whereas paragraph 34(1)(*b*) prohibits subversion by force against any type of government. Given the context in which the words "by force" appear, the intention to subvert by force, rather than by some other means, is critical to the applicability of paragraph 34(1)(*b*). "By force" includes coercion or compulsion by violent means, coercion or compulsion by threats to use violent means and reasonably perceived potential for the use of coercion by violent means. To establish the grounds under paragraph 34(1)(*b*), force, as broadly defined, must not necessarily be the exclusive element in the subversion. The use of force in the subversion must be the intended means by which to overthrow the government. In fulfilling the Board's duty to weigh all the subjective and objective evidence relating to the impugned act, subjective intent is a relevant but not exclusive element to be considered. It is appropriate to presume that persons know or ought to have known and to have intended the natural consequence of their actions. It was difficult to discern whether the IAD held that the applicant's intention was irrelevant for purposes of paragraph 34(1)(*b*) or whether the plea of innocent intention was irrelevant because of all the other objective evidence of what was planned and how the actions would be perceived.

The following questions were certified: (1) for the purposes of IRPA, paragraph 34(1)(*b*), does "subversion by force" mean the actual use of physical compulsion or does it also include the threat or reasonable possibility of physical compulsion?; (2) does paragraph 34(1)(*b*) require an actual intention to use force in the subversion of any government?

statutes and regulations judicially

considered

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 34(1),(2), 44(1).

*Interpretation Act*, R.S.C., 1985, c. I-21 , s. 12.

cases judicially considered

applied:

*Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (S.C.C.), [1998] 1 S.C.R. 27; (1998), 36 O.R. (3d) 418; 154 D.L.R. (4th) 193; 50 C.B.R. (3d) 163; 33 C.C.E.L. (2d) 173; 221 N.R. 241; 106 O.A.C. 1.

authors cited

Driedger, Elmer. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

APPLICATION for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (IRB) ([2004] I.A.D.D. No. 478 (QL)) overturning a determination by the Immigration Division of the IRB that the applicant was not inadmissible to Canada. Application allowed.

appearances:

*Russell Kaplan* for applicant.

*Lynn Marchildon* for respondent.

solicitors of record:

*Russell Kaplan*, Ottawa, for applicant.

*Deputy Attorney General of Canada* for respondent.

The following are the reasons for order rendered in English by

Phelan J.:

INTRODUCTION

[1]The applicant, Solomon Oremade (Oremade) is a former Nigerian army officer involved in the planning of a coup, a coup which never took place. He has been found to be inadmissible on the basis that he engaged in or instigated the subversion "by force" of a government, contrary to paragraph 34(1)(*b*) of the *Immigration and Refugee Protection Act* [S.C. 2001, c. 27] (the IRPA). This is the judicial review of the decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB) [*Canada (Minister of Citizenship and Immigration) v. Oremade*, [2004] I.A.D.D. No. 478 (QL)]. In that decision, the IAD overturned a prior determination in favour of Oremade rendered by the Immigration Division of the IRB.

[2]A central issue in this judicial review is whether, for purposes of paragraph 34(1)(*b*) of the IRPA, the permanent resident or foreign national has to have the intention of actually using force in subverting a government.

[3]The basic facts relied upon by the IAD were set out in a report prepared by an immigration officer pursuant to subsection 44(1) of the IRPA. These facts are described in the following paragraphs.

BACKGROUND

[4]In 1994, individuals who were plotting to overthrow the then Nigerian government approached Oremade at a Christmas party. Oremade agreed to take part in the proposed coup and the planning to stage the coup took place from December 1994 until February 1995. During the months of January and February, the coup plotters met at Oremade's house on several occasions. It was finally determined that the coup should occur March 11, 1995.

[5]As an ex-military officer, Oremade's planned role in the coup was to don an army lieutenant's uniform and lead a group of 50 armed soldiers to the Lagos International Airport on March 11, 1995. Oremade and his men were to seize and secure the airport, ensuring that no planes were allowed to take off. (The applicant described their

function as one of ensuring that no vandalism took place at the airport.) To the date of the aborted coup, Oremade never met any of the soldiers he was to lead.

[6]On March 9, 1995--two days before the scheduled coup--the plotters were betrayed and the majority arrested. Oremade, however, managed to escape and made his way to Germany. Had the coup succeeded, Oremade says that he was to have been appointed Governor of Lagos State.

[7]The applicant insisted throughout his case that the plan was for a bloodless coup. He argued that it was reasonable to believe that a bloodless coup would succeed based on past examples of coups in Nigeria in 1983 and 1986. It was expected that when the coup was announced, the Government would step down because it had no popular support.

[8]The applicant argued before the Immigration Division that there was no evidence of any intended use of force, and that he did not instigate or encourage any subversion since he was recruited by others. He also argued that the Nigerian government was a despotic government and that use of the phrase "any government" in paragraph 34(1)(*b*) of IRPA could not have been intended to be interpreted so broadly as to include a despotic government.

[9]The Immigration Division held that Oremade was involved in "instigating" but not in "engaging in the subversion of a government". The Division accepted Oremade's evidence that the coup was planned to be bloodless and therefore was not "subversion by force".

[10]The IAD, in overturning the Division's decision noted that counsel for Oremade conceded that his client was instigating the subversion of the Nigerian government, given Oremade's own admission that he participated in several meetings to plan the overthrow. However, the applicant based his case on the grounds that there never was any intention to use "force" to subvert the Nigerian government.

[11]The applicant takes exception most particularly to the IAD's conclusions [at paragraph 31]:

The fact that the alleged coup was intended to be "bloodless" and that this intention may have been plausible given the history of prior similar coups is, in my view, irrelevant. Similarly, I find that the allegation that no resistance was expected is also immaterial. The respondent's stated objective was to interrupt all lines of communication by "seizing" the airport. This was crucial to paralyze the regime in power that was to be overthrown. As the respondent's admitted plan included achieving this objective through the use of fifty armed soldiers, I find that there are reasonable grounds to believe that he was engaging in or instigating the subversion by force of the government in power.

[12]From this, the applicant argues that the IAD erred in law in concluding that intention to actually use force is irrelevant for purposes of paragraph 34(1)(*b*).

[13]The IAD concluded that the planned use of 50 armed soldiers provided a reasonable ground to believe that the applicant was engaging in or instigating the subversion by force of the government in power. The IAD also found the applicant's explanation of protecting the airport from vandalism to be implausible.

DETERMINATION

[14]With respect to the standard of review, the parties are in general agreement that if the issue is one of whether intent to use force is a requirement of IRPA paragraph 34(1)(*b*), it is a question of law for which correctness is the standard; if the issue is the application of the facts to the law, the standard is reasonableness. I concur.

[15]For purposes of analysing the issue of whether "intent" is a relevant consideration under subsection 34(1), it is important to note counsel's concession at the IAD that the applicant was "engaging in or instigating subversion". The concession has removed from consideration by the IAD and this Court the issue of whether an unattempted coup still constitutes being engaged in the subversion of a government.

[16]The applicant contends that because of the breadth of the applicability of subsection 34(1), and particularly of paragraph (*b*), the interpretation of the term "force" must be narrow. I take this to mean that the section should be read so as to ensure that only those persons who truly are intended to be caught by the provision--presumably

those with an actual and admitted intent to use force--are excluded from admission to Canada.

[17]There is no doubt that paragraph 34(1)(*b*), had it been in force at the relevant times, could have had potentially startling impact on historical, and even contemporary figures. Arguably such revered and diverse figures as George Washington, Eamon De Valera, Menachem Begin and Nelson Mandela might be deemed inadmissible to Canada. With respect, the sweep of paragraph 34(1)(*b*) is not particularly relevant to this applicant.

[18]Parliament clearly intended that the provision have the broad sweep described. The limiting factor on such broad and potentially undesirable application is subsection 34(2), which gives to the Minister the responsibility to assess whether a person who falls within paragraph 34(1)(*b*) might be a threat to Canada or might otherwise be inadmissible. Therefore, a broad purposive interpretation does not lead to an unreasonable or ludicrous result.

[19]The Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (S.C.C.), [1998] 1 S.C.R. 27, at paragraph 21 outlined the current approach to statutory interpretation [citing Driedger on the *Construction of Statutes*, 2nd ed., 1983, at page 87]:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[20]The same principle is provided in section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21:

**12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[21]In my view, subsection 34(1) is intended to prevent persons who willingly commit certain specific acts from being admitted to Canada. These include acts of espionage, acts of subversion, terrorism, and acts of violence.

[22]Reading the provision as a whole, the various types of prohibited conduct imply that they are carried out knowingly and with intent to do so. For example, a person coerced or mislead into a prohibited act would not be the type of person who would necessarily be a threat to Canada.

[23]Furthermore, the phrase "engaging in or instigating the subversion by force" must be read in this context. It would not serve the purpose of the provision or be consistent with its plain wording to include within the ambit of subsection 34(1), those people who had no intention of committing the offending act.

[24]Paragraph 34(1)(*b*) is also to be compared with paragraph 34(1)(*a*). In paragraph (*a*) any act of subversion against a democratic government is prohibited, whereas paragraph (*b*) applies no matter what type of government is involved, so long as the subversion is by force. The critical element is force--something not likely to occur unless there is an intention to use such means to subvert the particular government.

[25]Given the context in which the words "by force" appear, the intention to subvert by force, rather than by some other means, is critical to the applicability of paragraph 34(1)(*b*).

[26]However, this intent to subvert by force is not to be measured solely from the subjective perspective of the applicant. It may well be that there was a hope or expectation that the coup would be bloodless but it is also reasonable for persons on the street to assume upon seeing armed soldiers occupying lands and buildings that force could or would be used if thought necessary.

[27]I agree with the IAD's conclusion that the term "by force" is not simply the equivalent of "by violence". "By force" includes coercion or compulsion by violent means, coercion or compulsion by threats to use violent means, and, I would add, reasonably perceived potential for the use of coercion by violent means.

[28]In order to establish the grounds under paragraph 34(1)(*b*), force, as broadly defined, must be an element, but not necessarily the exclusive element, in the subversion.

[29]With great respect, I cannot agree with the IAD that the person's intent or the manner in which the subversion

is carried out can be irrelevant. The use of force in the subversion must be more than an accident--it must be the intended means by which to affect the overthrow of the government.

[30]It is the Board's function to weigh all the subjective and objective evidence related to the impugned act. Subjective intent is but one element albeit, a relevant one. In assessing all of the evidence of intent, it is appropriate to presume that a person knows or ought to have known and to have intended the natural consequence of their action.

[31]In considering the IAD's conclusion, it is difficult to discern whether it held that the applicant's intention (and presumably that of the other plotters as well) was irrelevant for purposes of paragraph 34(1)(*b*), or whether that plea of innocent intention was irrelevant because of all the other objective evidence of what was planned and how the actions would be perceived.

[32]Given my conclusion as to the applicable law, I will make no comment on the plausibility assessment made by the IAD. This is an appropriate case to have the matter redetermined by a different panel.

[33]Having received submissions from the parties as to a question for certification, I will certify the following questions:

1. For purposes of paragraph 34(1)(*b*) of the IRPA, does the phrase "subversion by force" mean the actual use of physical compulsion or does it also include the threat or reasonable possibility of physical compulsion?

2. Does paragraph 34(1)(*b*) of the IRPA require the permanent resident or foreign national to have an actual intention to use force in the subversion of any government?

[34]For these reasons, the decision of the IAD will be quashed and the matter remitted to the IAD to be decided by a differently constituted panel.