Federal Court  Cour fédérale

Date: 20151020

Docket: IMM-6362-11

Citation: 2015 FC 1184

Toronto, Ontario, October 20, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

AHMAD DAUD MAQSUDI
HAKIMA MAQSUDI
AHMAD SHAHIM MAQSUDI
AHMAD BARI MAQSUDI
AHMAD ALHAM MAQSUDI

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Immigration Division [the Division] of the Immigration and Refugee Board of Canada. While the application for judicial review was filed on September 15, 2011 and the Applicants submitted their memorandum of fact and law on October 18, 2011, it was not until February 24, 2015 that this Court heard the review.

Over this almost four-year period, the legislative and jurisprudential landscape changed considerably, as did the pleadings. As a result, by the time of the hearing and the post-hearing submissions that followed, the Applicants had narrowed the scope of their submissions to a single argument regarding the meaning and application of "subversion" under paragraph 34(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

I. Overview

[2] Mr. Maqsudi [the Principal Applicant], a citizen of Afghanistan, was found to be inadmissible to Canada on the basis of subversion of the former Communist Afghan government under paragraph 34(1)(b) and paragraph 34(1)(f) of the Act and on the basis of war crimes under paragraph 35(1)(a) of the Act. He was therefore found ineligible to claim refugee protection.

[3] Regarding the second of these inadmissibility findings, paragraph 35(1)(a) denies admissibility to foreign nationals who are found to have committed offences described in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24. To be denied refugee protection for participation in such atrocities, the claimant must be complicit in their commission. In *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] at para 36, the Supreme Court held that, to be excluded from refugee protection, complicity in any of the above offences requires the refugee claimant to have made "a voluntary, knowing, and significant contribution to the crime or criminal purpose of a group". This replaced the complicity test that the Division had previously applied to the Principal Applicant, which required only the claimant's "personal and knowing" participation.

[4] In light of *Ezokola*, the Respondent has conceded that the paragraph 35(1)(a) finding can no longer stand. Consequently, only the Division's paragraph 34(1)(b) and paragraph 34(1)(f) findings remain a live issue before me. These two provisions operate to preclude admissibility if the foreign national is a member of an organization which has engaged in or instigated the subversion by force of any government:

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;
[…]	[…]
(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 …(b)….	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 …b)...

[5] The Principal Applicant concedes that, for the purposes of paragraph 34(1)(f), he was a member of the organization at issue in the Division's decision. Therefore, the only question before me is whether that organization, pursuant to paragraph 34(1)(b), engaged in or instigated the subversion by force of the Afghan government of the day, and the reasonableness of the subversion finding is the issue on which this matter hinges.

[6] A review of the facts and the procedural history of this matter are critical to situating the issues raised in this judicial review.

II. Facts

[7] The events that brought Mr. Maqsudi and his family to Canada began nearly three decades prior when the Soviet Union invaded Afghanistan in 1979. Mr. Maqsudi was a university student in Kabul at the time. When he graduated in 1981, he decided to participate in the resistance movement led by Commander Ahmed Shah Massoud rather than face the alternative options – conscription into the Afghan military or emigration from the country. Massoud controlled an area known as the Panjshir Valley and commanded a fighting force of his own. He was also part of a resistance force known as the Shora-E-Nezar, as well as a broad, decentralized group of fighters comprising various ethnic groups and ideological viewpoints known generally as the mujahideen (Certified Tribunal Record [CTR], pp 9-12).

[8] The Principal Applicant states that he did not want a combat role, so Massoud assigned him the role of a radio operator (Application Record [AR], p 46). He travelled with Massoud and helped him transmit and receive messages via long-wave radio, which was Massoud's only means of communication with his commanders aside from personal courier. A double code system was used to ensure secrecy – messages were converted into mathematical codes which were given to Mr. Maqsudi to convert again and transmit over the radio. Messages were decoded using the same process at the receiving end. Mr. Maqsudi alleges that because of these procedures, he did not know the contents of the messages that were sent or received by Massoud, though his associates would occasionally relay their contents (AR, p 47).

[9] The radio operators lived in caves in the mountains of Afghanistan, moving at night to avoid Soviet artillery. The Principal Applicant testifies that while Massoud would leave to go to the fronts where the war was being waged, he would never accompany Massoud on such occasions, as the long-wave radios were too valuable a resource to put in harm's way. Mr. Maqsudi was highly trusted by Massoud and went on trips to the United Kingdom and France to further his technical telecommunications expertise (AR, pp 47-47(a)).

[10] In 1989, the Soviets withdrew, but the fight against the Soviet occupation was replaced by a civil war against the Communist government. In 1992, that regime collapsed and Massoud became the Minister of Defence for the new transitional government. Mr. Maqsudi moved to Kabul and became the Director of the Communications division of the National Security Office (CTR, p 396).

[11] The post-Communist peace, however, was short-lived. In 1992, civil war once again consumed Kabul. One of the factions in this civil war was the Taliban, which eventually seized the capital in 1996. The Principal Applicant followed Massoud's retreat to the Panjshir Valley; from there, Massoud continued to fight the Taliban. During this time, the Principal Applicant assisted by working to rebuild a communications network for Massoud's forces (CTR, p 10).

[12] In March 1997, the Principal Applicant went to Pakistan, where his family had been living, but fled on the advice of his brother, who informed him that the Taliban had been looking for him there. The Applicants made their way from Pakistan to Iran in June 1997. In March 1998, Massoud was invited by the Iranian Government to discuss the protection of the Iranian-

Afghani border. While there, Massoud asked if the Principal Applicant was interested in serving as a diplomat in China on behalf of the pre-Taliban government, as China (like the vast majority of nations at the time) did not recognize the Taliban government. He accepted the position (CTR, pp 397-399).

[13] The Principal Applicant lived in China until September 1999, when he arrived in the Netherlands and claimed refugee status. After coalition forces defeated the Taliban in 2002, the Principal Applicant returned to Afghanistan and was subsequently appointed to serve at the Afghan Embassy in Berlin. In 2007, upon the expiration of his diplomatic term and fearing the deteriorating conditions in Afghanistan and the threat of a resurgent Taliban, the Principal Applicant, his wife, and three sons made their way to Canada where his father, brother, and two sisters were living (CTR, pp 399-402).

[14] Mr. Maqsudi arrived in Canada on April 7, 2007 with his wife and two minor sons and made a refugee claim (CTR, p 4). The Principal Applicants' claim never reached the hearing stage, however, because on August 25, 2011, the Division found Mr. Maqsudi inadmissible to Canada pursuant to paragraphs 34(1)(b), 34(1)(f), and 35(1)(a) of the Act.

III. Procedural History

[15] Given that this judicial review began in 2011 and was not heard until February 25, 2015, much of the legal landscape has changed. This matter was first adjourned to await the outcome of *Agraira v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Agraira*], a case in which the

Principal Applicant had intervened. That decision came out on June 20, 2013. A month later, on July 19, 2013, the Supreme Court ruled in another relevant case, *Ezokola*.

[16] The evolving jurisprudence was accompanied by legislative change. On June 19, 2013, the day before the publication of *Agraira*, the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16 [*Faster Removal Act*] came into effect. Of relevance to this dispute, the *Faster Removal Act* resulted in the replacing of subsection 34(2) of the Act, which gave inadmissible applicants access to ministerial relief, by the current section 42.1, which places a greater emphasis on national interest and security when granting such relief.

[17] Second, the *Faster Removal Act* split paragraph 34(1)(a) into two distinct paragraphs, (a) and (b.1), so that it now reads:

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 :
(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;	a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
(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…

[18] Given time to process these developments and to make further submissions, the parties indicated to the court that they were ready to proceed, and a hearing was scheduled for September 10, 2014. On September 5, 2014, however, the parties sought and received an additional adjournment to await a ruling in *Najafi v Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 462 [*Najafi*]. That appeal was dismissed by the Federal Court of Appeal on November 7, 2014, and on December 18, 2014, the parties indicated to this Court that they were ready to proceed with this judicial review.

IV. Decision under Review

[19] In its decision of August 25, 2011, the Division found that the Principal Applicant was inadmissible on two grounds: under paragraph 34(1)(f), for having been a member of Massoud's organization that, per paragraph 34(1)(b), had engaged in subversion by force of the Communist government from 1978-1992; and under section 35(1)(a), for complicity in war crimes committed by Afghan government forces commanded by Massoud from 1992-1996. The parties consented to a disposition on paragraph 35(1)(a) finding, and therefore that issue is no longer in dispute.

[20] On the remaining issue to be decided by the Court in this matter, the finding of inadmissibility under paragraph 34(1)(b), the Division first canvassed the jurisprudence on the term "subversion", opting for a definition offered in *Qu v Canada*, 2001 FCA 399 at para 12 [*Qu*]: "accomplishing change by illicit means or for improper purposes related to an organization". The Division then concluded that the Principal Applicant was a member of Massoud's organization from 1978-1992 and that they had engaged in subversion by force:

> …the totality of evidence establishes there are reasonable grounds to believe that the mujahedeen forces, including those directly under Massoud, were involved in subversion by force against [the] communist government of Afghanistan. The mujahedeen conducted open warfare but also relied heavily on guerrilla activities in furtherance of the aim of overthrowing the Communist regime and expelling the Soviet army. Such activities are by their nature… clandestine activities. The use of assassinations, raids, cutting off supply lines and communications all involve the clandestine planning, movement of personnel and weapons and the execution of offensive actions. However warranted or justifiable in the circumstance these activities may have been, they fall within the meaning of illicit and clandestine actions aimed at overthrowing a repressive Communist regime that was supported by the Soviet army. (CTR, p 19)

V. Submissions

A. *Applicants' Submissions*

[21] With the passage of time and the changes brought by the *Faster Removal Act*, *Agraira*, *Ezokola*, and *Najafi*, the Applicants have adjusted their submissions significantly, acknowledging that the Primary Applicant was a member of Massoud's organization and that Massoud was attempting to overthrow the Communist government of Afghanistan. Originally, they asserted that the Division had erred in its interpretation of the terms "subversion" and "any government" in paragraph 34(1)(b). This argument played out along several lines: that the words "any government" cannot apply to a "designated regime"; that subversion cannot apply to struggles for self-determination against repressive regimes; that since subversion includes an illicit or illegitimate element, the use of force to overthrow a government can only be illicit or illegitimate if the government in question is *legitimate*; and that subversion cannot involve situations of armed conflict.

[22] In their original submissions the Applicants also argued that paragraph 34(1)(b) could not survive scrutiny under section 7 of the *Canadian Charter of Rights and Freedoms* [*Charter*], and that since the scope of Ministerial Relief under subsection 34(2) had been narrowed by the Federal Court of Appeal's ruling in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 10, a broad interpretation of subversion under paragraph 34(1)(b) was no longer sustainable.

[23] With the passage of time and the release of relevant decisions by the Supreme Court and the Federal Court of Appeal, however, the focus of this 2015 judicial review hearing narrowed to whether subversion could apply to situations of armed conflict. The Applicants maintain that subversion is poorly defined in domestic law, has not been elucidated by case law, and needs definition which, in the absence of domestic sources, may be assisted by international law. Along these lines, the Applicants contend that the Division erred in considering "clandestine tactics" in a state of open armed conflict sufficient to render said conflict subversive.

[24] To assert this claim, the Applicants first review the jurisprudence on paragraph 34(1)(b), noting while several cases looked at various elements of the provision, only one, *Al-Yamani v Canada (Citizenship and Immigration)*, [2000] FCJ No 317 [*Al-Yamani*], examined the concept of subversion in-depth. There, at para 62, Justice Gibson found subversion to contain, at minimum, a "clandestine or deceptive element" and "an element of undermining from within".

[25] The Applicants claim that subsequent decisions, including *Najafi*, have not addressed the concerns in *Al-Yamani* sufficiently, and have never properly defined "subversion", relying

instead on overbroad definitions found in *Re Shandi*, (1992), 51 FTR 252 at 259 (FCTD) [*Shandi*] ("any act that is intended to contribute to the process of overthrowing a government is a subversive act") and *Qu* at para 12 ("subversion connotes accomplishing change by illicit means or for improper purposes"). In the Applicants' view, other cases that have applied paragraph 34(1)(b) subversion have erroneously relied on the overbroad *Qu* and *Shandi* definitions. The Applicants cite cases including *Oremade v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1077; *Suleyman v Canada (Minister of Citizenship and Immigration)*, 2008 FC 780; *Eyakwe v Canada (Minister of Citizenship and Immigration)*, 2011 FC 409; *Maleki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1331; and *Canada (Minister of Citizenship and Immigration) v USA*, 2014 FC 416).

[26] As for *Najafi*, the Applicants argue that the Federal Court of Appeal did not pronounce on the definition of subversion itself, rather focusing on the words "any government", relying on *Shandi* and *Qu* and ignoring the concerns raised in *Al-Yamani*. Similarly, the Applicants argue that subversion requires more definition and precision to avoid internal inconsistencies and absurd outcomes. To conclusively resolve these inconsistencies and to arrive at a proper definition of subversion, the Courts should seek guidance from international law. The Applicants submit that in international law there is little use or elucidation of the word "subversion", but there is substantial explanation of the term "armed conflict", which assists in shedding light on the definition of subversion. In short, "subversion" should end where "armed conflict" begins.

[27] The Applicants offer the definition of "non-international armed conflict" from the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection*

of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609 art 1 [*Protocol II*]:

> [Any conflicts] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol… This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature…

[28] The Applicants argue that since international law has drawn a clear distinction between situations of armed conflict and situations of lesser intensity, Canadian law should as well: subversion should exist only until there is a legally recognized armed conflict, at which point paragraph 34(1)(b) should no longer apply.

[29] The Applicants contend that this is a common-sense interpretation of the term "subversion", since it connotes a clandestine quality that is absent in the context of open, internationally recognized armed conflict. To bolster this interpretation, they argue that, unlike the decision at hand, none of the previous cases on paragraph 34(1)(b) concerned an armed conflict as defined in international law.

[30] In brief, the Applicants submit that confining subversion to situations outside of armed conflict is consistent with (i) international law, (ii) the ordinary meaning of the word "subversion", and (iii) the case law, which has never applied section 34(1)(b) to an armed conflict. There is nothing in the objectives of the Act nor is there any security reason why subversion should not be interpreted thusly.

B. *Respondent's Submissions*

[31] The Respondent asserts that the Division reasonably concluded that Massoud's organization engaged in subversion by force. First, "subversion" is sufficiently defined in the case law. While the *Shandi* and *Qu* definitions were both acceptable, they have been superseded by the decision in *Najafi*, which, at para 65, defines subversion as "the act or process of overthrowing the government". And while *Najafi* may not offer a complete definition of subversion, it is more than adequate to dispose of this application.

[32] In response to the arguments about the overbreadth of paragraph 34(1)(b), the Respondent contends that a plain reading of the statute, along with a review of the parliamentary debates that preceded its adoption, demonstrates that the legislators intended the provision to be large. To define subversion any differently would be engaging in judicial policy-making.

[33] The Respondent further argues that turning to international law to define subversion is inappropriate and unnecessary. Specifically, *Protocol II* does not assist as an interpretive tool to define subversion under Canadian immigration law and does not support the Applicants' position that the definition of subversion should exclude any conflict that would qualify as an armed conflict under international law. Rather, *Protocol II* exists to define the point at which domestic combatants are held to humanitarian legal norms, a field far removed from Canada's immigration and security concerns. *Protocol II* establishes a legal framework under international humanitarian law that simply has no bearing on whether a conflict involves subversion under

Canadian immigration law, where the prerogative is to define who can enter and remain in the country.

[34] Indeed, the Respondent contends that subversion and armed conflict are not mutually exclusive: subversion is a 'goal', while armed conflict is a 'means' of achieving that goal. The Respondent notes that *Najafi* did indeed involve an armed conflict – albeit one under the terms of the *Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 [*Protocol I*], which covers either international armed conflicts or armed conflicts involving a struggle for self-determination, rather than *Protocol II*. However, the Respondent asserts that this distinction is meaningless.

[35] Finally, the Respondent asserts that the Division cannot be faulted for failing to consider the 'armed conflict' arguments being made now since they only became a focus of legal arguments in the years since the hearing.

VI. Standard of Review

[36] Standard of review did not factor significantly into either the written or oral pleadings in this matter. This being a judicial review, however, I feel it necessary to situate this decision on the judicial review spectrum.

[37] The issue in question – the definition and application of paragraphs 34(1)(b) and 34(1)(f) – concerns the interpretation and application of the legal concept of subversion to the facts as

well as the interpretation of the Division's home statute and mixed questions of fact and law. These are matters falling under the rubric of the reasonableness standard of review, as found by *Najafi* at para 56 (see also *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34; *Agraira* at para 50; and *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 89).

[38] Under a reasonableness standard, the Court will only intervene where there is an absence of justification, transparency and intelligibility within the decision-making process and the decision falls outside of the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VII. Analysis

[39] Although I am highly sympathetic to the Principal Applicant's position and recognize the potential absurdity in denying refugee status to an individual on the basis of his efforts to combat organizations that Canada opposed as well, I am nonetheless bound to apply the jurisprudence of our Court of Appeal. *Najafi* clearly constrains my ability to provide the result that the Applicants desire.

[40] A brief review of the underlying facts of *Najafi* is useful, as not only is it the most recent appellate jurisprudence on paragraph 34(1)(b), but there are also factual similarities between this matter and *Najafi* as well.

[41] Mr. Najafi was an Iranian citizen of Kurdish ethnicity and a member of the Kurdish Democratic Party of Iran [KDPI], an organization which had engaged in an unsuccessful armed uprising against the Government of Iran over the course of several decades (*Najafi* at paras 14-16). Mr. Najafi argued that because the use of force was legitimate, in that it advanced his people's right to self-determination in the face of a repressive regime, the KDPI's actions could not fall within the ambit of "subversion by force of any government" described in paragraph 34(1)(b) (*Najafi* at para 51).

[42] In *Najafi*, the Federal Court of Appeal was asked to decide whether, in interpreting the ambit of paragraph 34(1)(b), Canada's ratification of *Protocol I* required the Division to exclude individuals who had attempted to subvert a government in furtherance of an oppressed people's claimed right to self-determination.

[43] Justice Gauthier, writing for a unanimous Court in dismissing this argument, concluded that the clear and unambiguous language of "any government" was not limited to only democratic governments, but also applied to colonial governments, foreign occupations, and oppressive regimes (*Najafi* at paras 69-70).

[44] Justice Gauthier also addressed the definition of "subversion" in her decision. Discussing the Division's conclusion that "the jurisprudence indicates that using force with the goal of overthrowing any government amounts to subversion by force", she wrote at paras 65-66:

> As noted by the [Division], the word "subversion" is not defined in the Act, and there is no universally adopted definition of the term. *The Black's Law Dictionary's* definition to which the [Division] refers at paragraph 27 (particularly, the words "the act or process

> of overthrowing … the government") is very much in line with the ordinary meaning of the French text («actes visant au renversement d'un gouvernement »). Although in certain contexts, the word "subversion" may well be understood to refer to illicit acts or acts done for an improper purpose, the words used in the French text do not convey any such connotation. I am satisfied that the shared meaning of the two texts does not ordinarily include any reference to the legality or legitimacy of such acts.
>
> I note that the word "subversion" is used only in the English version of paragraph 34(1)(b), while it is used in both the English and French versions of paragraph 34(1)(a). This may or may not signal a different meaning, but it is not my purpose to properly construe paragraph 34(1)(a) in this appeal. I will only note that in *Qu v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 71, rev'd in 2001 FCA 399, the application judge was dealing with a predecessor of paragraph 34(1)(a), and this Court never had to deal with the meaning of "subversion" on appeal.

[45] The Federal Court of Appeal's decision in *Najafi* is clear that while the term subversion remains undefined in the legislation and may require further precision in other contexts, for the purposes of paragraph 34(1)(b), it has a broad meaning in line with the French text: "actes visant au renversement d'un gouvernement".

[46] This broad definition supplants the narrower definitions provided in *Qu* and *Al-Yamani*. Applying *Najafi* to Mr. Maqsudi's situation, the Division's findings (along with the undisputed fact that Massoud's organization was engaged in a struggle to overthrow the government) lead to the reasonable conclusion that the Principal Applicant is inadmissible under paragraph 34(1)(b).

[47] I disagree with the assertion that international law, and specifically *Protocol II*, limits the definition of subversion. There is no compelling reason why an international legal document that does not – except perhaps by implication – address the question of subversion should be applied

to define subversion domestically, particularly in the context of Canadian immigration law. *Protocol II* involves the protection of victims of armed conflicts and is not related to immigrant admissibility in any way.

[48] Even if it were possible to make a meaningful distinction between subversion and armed conflict for the purposes of paragraph 34(1)(b), the Applicants must still face the fact that the Division, in *Najafi*, made a clear finding that Mr. Najafi's organization, the KDPI, *had* been engaged in an armed conflict. As summarized by Justice Gauthier at para 15:

> The Division then reviewed the KDPI's methods. After acknowledging that there was considerable evidence that the KDPI's use of force had largely been in self-defence, it found that the KDPI nonetheless deliberately used armed force to try to overthrow the Iranian government and that this was part of its strategic repertoire. This was certainly true in the 1967-1968 period, during which it was engaged in an unsuccessful armed uprising against the Shah of Iran. In 1973, the KDPI "committed itself formally to armed struggle". The Division then noted that the KDPI's armed conflict with the Iranian government was at its height in 1982 and 1983, during which it was driven out of population centres and forced into guerrilla warfare in the mountains, although it temporarily recaptured the town of Bukan in September 1983…

[49] Justice Gauthier also found that Parliament was alive to the possibility that the broad reach of the provision would, in some circumstances, catch those fighting oppressive regimes (*Najafi* at para 79). In order to avoid an injustice, she notes Parliament ensured that there was a Ministerial exemption available to those caught by the provision:

> [80] Obviously, when I state that Parliament intended for the provision to be applied broadly, I am referring to the inadmissibility stage, for, as noted by the Supreme Court of Canada in *Suresh*, albeit in a different context, the legislator always intended that the Minister have the ability to exempt any foreign national caught by this broad language, after considering

> the objectives set out in subsection 34(2). This is done by way of an application. (As discussed above, subsection 34(2) is now subsection 42.1(1). Per subsection 42.1(2), it can now also be granted on the Minister's own initiative).
>
> [81] This mechanism can be used to protect innocent members of an organization but also members of organizations whose admission to Canada would not be detrimental or contrary to national interest because of the organization's activities in Canada and the legitimacy of the use of force to subvert a government abroad.

[50] As described above in this matter, the Applicants originally made submissions concerning the scope of a ministerial relief under subsection 34(2) (the Principal Applicant even intervened before the Supreme Court in *Agraira* on the issue), arguing that limiting the factors that the Minister can consider in issuing relief from paragraph 34(1)(b) to national security and public safety was unjustifiably restrictive. As subsection 42.1(3) makes clear, however, "the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada". Even in light of this legislative clarification, I do not believe that the Principal Applicant is unduly restricted in his access to relief. In applying, Mr. Maqsudi would be able to provide evidence to the Minister that he was assisting by serving on the side of Canada's national security and public safety interests, first against the Communist government and later against the Taliban, both of which were regimes Canada opposed.

[51] In light of the jurisprudence, particularly *Najafi*, I agree with the Respondent that a plain reading of paragraph 34(1)(b) makes it clear that the provision was to be given broad scope. Legislators are presumed to give meaning to their words, and this is supported by the

parliamentary debates cited and relied upon by both the Federal Court and the Federal Court of Appeal in *Najafi*.

[52] The preponderance of the jurisprudence and a plain reading of the legislative provisions raised in this matter lead me to the conclusion that the Division's decision was reasonable.

[53] I am sympathetic to Mr. Maqsudi's situation regarding the reach of subversion given that he was found inadmissible for having resisted the Soviet-backed communist Afghan regime. This is a government which Canada has designated under paragraph 35(1)(b) of the Act on the basis that it has committed gross human rights violations or war crimes. Senior officials of designated governments are inadmissible to Canada (see, for instance, with respect to this former government of Afghanistan, *Holway v Canada (Minister of Citizenship and Immigration)*, 2006 FC 309 at para 29; see more generally regarding designated governments section 8.1 of CIC Operations Manual ENF 18, "War Crimes and Crimes Against Humanity"). There is therefore a Catch-22 quality to the outcome for Mr. Maqsudi vis-à-vis subversion. However, the jurisprudence has clearly established that the breadth of paragraph 34(1)(b) was considered, debated, and approved by Parliament. A broad interpretation of this provision has been upheld in an analogous situation of armed conflict in *Najafi,* an appellate decision that is binding on this court.

[54] Having concluded thus, I am nonetheless hopeful that in evaluating his eventual relief application under section 42.1, the Minister will take into consideration Mr. Maqsudi's participation in a struggle against a regime with a well-documented history of barbarity.

VIII. Certified Question

[55] The Applicants proposed the following question for certification:

> *Does "subversion" in paragraph 34(1)(b) of the Act apply when an organization seeks to overthrow a government during an armed conflict (as defined by Protocol II of the Geneva Conventions of 1949)?*

[56] After a careful review of the Applicants' rationale behind proposing this question, I am in agreement with the Respondent's submissions that it does not meet the two-part test established in *Liyanagamage v Canada (Secretary of State)*, [1994] FCJ No 1637 (CA). The proposed question neither has broad application nor general importance, because the general issues it raises have already been considered and answered by the Federal Court of Appeal in *Najafi*. The Court of Appeal considered the definition of subversion and settled on a broad interpretation, including considering the application of international law. Indeed, the Supreme Court of Canada considered but denied leave to appeal in *Najafi* on April 23, 2015 (*Najafi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 CanLII 20818 (SCC)).

IX. Conclusions

[57] Despite very able representation by Applicants' counsel, I am unable to find that the decision of the Division was unreasonable or that the Member incorrectly interpreted the statute in applying the subversion provision to the Principal Applicant, even if the outcome is one that may be questioned given the circumstances of this case. However, the factors raised in these proceedings will, I assume, be put before the Minister in a relief application, and will provide the

opportunity for Mr. Maqsudi to explain, as he did to this Court, why the subversion found is not contrary to national interest.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. Whereas the test applied by the Division to find the Principal Applicant, Ahmad Daud Maqsudi, complicit in war crimes and crimes against humanity is inconsistent with the 'voluntary, significant and knowing contribution' test for complicity set out by the Supreme Court of Canada in *Ezokola*, this Court grants the application with respect to the finding under paragraph 35(1)(a) of the Act.

2. This Court dismisses the application with respect to the finding under paragraph 34(1)(b) for the reasons set out above.

3. No costs will issue.

4. No question will be certified.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6362-11
STYLE OF CAUSE:	AHMAD DAUD MAQSUDI, HAKIMA MAQSUDI, AHMAD SHAHIM MAQSUDI, AHMAD BARI MAQSUDI, AHMAD ALHAM MAQSUDI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 24, 2015
JUDGMENT AND REASONS:	DINER J.
DATED:	OCTOBER 20, 2015

APPEARANCES:

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