Federal Court Cour fédérale

Date: 20151211

Docket: IMM-1292-15

Citation: 2015 FC 1377

Ottawa, Ontario, December 11, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NK

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Minister of Public Safety and Emergency Preparedness [Minister], dated February 20, 2015 [Decision], which refused the Applicant's application for Ministerial relief from inadmissibility pursuant to s 34(2) of the Act.

II. BACKGROUND

[2] The Applicant is a national of Pakistan. He made a refugee claim after arriving in Canada in May 1997 and was found by the Refugee Protection Division [RPD] to be a Convention refugee in February 1999. The Applicant applied that same month for permanent residence.

[3] The Applicant was found inadmissible under s 34(1)(f) of the Act as a member of the Mohajir Quami Movement [MQM], an organization that there are reasonable grounds to believe engages, has engaged, or will engage in acts of terrorism.

[4] The RPD and the Federal Court have recognized that the MQM has engaged in acts of terrorism outside of Canada. In 1992, the organization split into the Altaf and Haqiqi [MQM-H] factions, both retaining the same objective of furthering the rights of the Mohajir community. The MQM/MQM-H has been held responsible for incidents of kidnapping, torture, murder and terrorism in Pakistan.

[5] The Immigration and Refugee Board [IRB] found in June 2006 that the Applicant did not come under s 34(1)(f) of the Act. The Minister successfully appealed this decision to the Immigration Appeal Division [IAD] in October 2007. A subsequent appeal by the Applicant for judicial review of that decision was dismissed in August 2008.

[6] The Applicant applied for Ministerial relief from inadmissibility under the former s 34(2) of the Act in February 2006. In May 2012, the Minister denied the application for relief. With the

consent of the Minister, this decision was quashed and the matter was returned for reconsideration.

[7] On July 22, 2014, the Applicant's application for permanent residence, initiated fifteen years prior, was refused. An application for judicial review of this decision was recently dismissed by Justice Diner, permitting the RPD's finding on s 34(1)(f) inadmissibility to stand: *NK v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1040.

[8] At the centre of this judicial review is the Minister's Decision of February 20, 2015, which declined to grant Ministerial relief to the Applicant.

III. DECISION UNDER REVIEW

[9] The Minister's Decision followed recommendations issued by Canada Border Services Agency [CBSA] on October 8, 2014. These recommendations surveyed and assessed the Applicant's biographical information and involvement with the MQM. The CBSA ultimately recommended that the Minister deny relief to the Applicant. The Minister's response followed this recommendation and, as a result, the Applicant was not relieved from inadmissibility under s 34(1)(f) of the Act.

[10] The CBSA reasons relied on by the Minister engaged in a review and consideration of information and evidence from a variety of sources, including the Applicant.

[11] The Applicant's involvement with the MQM spanned approximately 11 years, from 1986 to 1997, with the majority of his participation and membership occurring in Karachi. Beginning in 1986, the Applicant became associated with the MQM, volunteering his skills and participating in activities such as typing, canvassing, attending meetings and distributing information.

[12] The Minister found that, throughout his time as a member, the Applicant had been faced with multiple instances in which he needed to form conscious decisions to continue his membership in the MQM and, later, the MQM-H faction. Examples cited of such occasions include: the Applicant's choice to move to the MQM-H following the splitting of the MQM; his continued donations upon moving to Saudi Arabia; and his ongoing membership upon returning to Pakistan, despite strong and repeated objections from his family.

[13] These choices and the Applicant's continued participation in spite of the threats, torture and arrest that he experienced reveal, according to the Minister, a pattern of commitment to the organization and its associated goals. The Applicant's declarations of remorse were considered, but did not displace this pattern.

[14] The Decision acknowledges that the Applicant indicated that he was unaware that the MQM/MQM-H was involved in terrorism. However, his admitting to an awareness of fighting within the organization, his level of education, his total time living in Karachi and the warnings from his family regarding political involvement led the Minister to conclude that the Applicant was aware that MQM had committed acts of terrorism.

[15] In terms of national security and public safety considerations, the Minister noted that the Applicant submitted that he is of no threat or risk to Canada. He has no Canadian criminal record and received a background check conducted by the British Government prior to being employed at the British Deputy High Commission in Karachi. However, the Minister decided this lack of threat was not determinative. In this regard, the Minister relied upon the Supreme Court of Canada's decision in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*].

[16] The Applicant expressed concerns about remaining in a "limbo" state as a refugee in Canada, and alleged that this was not consistent with the purposes of the Act. The Decision's response to this concern is as follows:

> In this respect, while the [Act] and related regulations do exempt protected persons from some inadmissibilities when they are applying for permanent residence, they are not exempt from an inadmissibility under subsection 34, 35 or 37. The legislative scheme Parliament established thus recognizes that some Convention refugees, inadmissible on serious grounds, may never acquire permanent resident status.

[17] The Minister also acknowledged the Applicant's submissions that his support of the MQM/MQM-H does not equate to support for terrorism. In addition, neither organization has been listed as a terrorist organization by Canada.

[18] The Minister noted that the fact that MQM/MQM-H may have legitimate political goals, and undertake legitimate political activities, must be weighed against the predominant considerations in this case of national security and public safety. Furthermore, organizations that use terrorism are inconsistent with Canadian values.

[19] The Minister concluded that the Applicant knowingly belonged, and remained committed, to a terrorist organization for an extended period of time. His involvement in Canadian society, including his employment, political engagement and family connections in Canada, were considered, but did not change this fact.

IV. ISSUES

[20] The Applicant raises the following issues relating to the legal test employed by the Minister:

1. Did the Minister err by equating an exception with exceptional circumstances?
2. Did the Minister turn a predominant consideration into an exclusive consideration?
3. Did the Minister err by equating violence with terrorism?
4. Is the Minister constrained by the listing of terrorist entities under the *Anti-Terrorism Act*, SC 2001, c 41 and/or the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001-360?

[21] The following issues are raised in relation to the reasonableness of the finding of inadmissibility:

5. Is the Decision consistent or inconsistent with Canadian values?
6. Is a refugee determination by the Refugee Protection Division of the Immigration and Refugee Board of Canada without an exclusion finding *res judicata* for the Minister?
7. Must the Minister take into account a possible Court ruling that the legal foundation for inadmissibility of the Applicant no longer exists?
8. Do the Act and *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] allow for permanent status in Canada without permanent resident status?

V. STANDARD OF REVIEW

[22] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira*, above, at para 48.

[23] The first group of issues address whether the proper legal test was applied and are reviewable on a standard of correctness: *Diaby v Canada (Minister of Citizenship and Immigration)*, 2014 FC 742 at para 36; *Guxholli v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1267 at paras 17-18; *Awolope v Canada (Minister of Citizenship and Immigration)*, 2010 FC 540 at para 30.

[24] The second group of issues will be reviewed on a reasonableness standard.

[25] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above,

at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[26] The following provisions of the Act are applicable in this proceeding:

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:
[…]	[…]
(c) engaging in terrorism;	(c) se livrer au terrorisme;
[…]	[…]
(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).

[27] The following provision, present in the Act in 2006, is relevant in this proceeding:

Exception	**Exception**
34. (2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfied the Minister that their	34. (2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement

presence in Canada would not be detrimental to the national interest.	préjudiciable à l'intérêt national.

VII. ARGUMENT

A. *Applicant*

(1) The Legal Test for Ministerial Relief

[28] The Applicant submits that the Minister mistakenly equates an exception to inadmissibility (Ministerial relief) with something that was intended to be exceptional. This notion, previously endorsed by the Federal Court, has been overruled by the Supreme Court of Canada as being too restrictive, and as one that fails to give adequate consideration to other objectives of the Act (*Agraira*, above, at para 78).

[29] By limiting his discretion to exceptional situations, the Minister is misreading *Agraira* and the Act, as well as unlawfully fettering his discretion.

[30] In terms of public safety and national security, the Applicant says the Minister turns a "predominant" consideration into an "exclusive" one. He says the reasoning in this case is equivalent to saying that, while other considerations exist, the fact that the Applicant was not innocent or coerced predominates. Given the positive factors in this case, which the Applicant says are in all respects substantial, it is hard to imagine, other than innocence or coercion, what would allow a positive decision consistent with the approach the Minister took in this case.

[31] The Applicant says that a predominant consideration ought to mean one that is given more weight than others, not one that inevitably "tips the scale" towards public safety and national security. It is not the case that other considerations should only prevail in exceptional circumstances.

[32] The Applicant also says that the Decision mistakes knowledge of violence with knowledge of terrorism when the two are not one and the same. A terrorist activity requires an intention to intimidate the public. There is nothing in the Decision that speaks to an awareness of, or participation in, any act of terrorism on the part of the Applicant. It is therefore not reasonable to conclude, as the Minister did, that the Applicant was aware of terrorism: *Criminal Code*, RSC 1985, c C-46, s 83.01(1)(b)(ii).

[33] The Applicant submits that Canada (and more specifically, the Minister) has never listed the MQM as a terrorist organization. The Applicant contends that the Minister relies on old information in regards to the MQM (predating 1997), and that the Minister should be constrained by the Government of Canada's online Public Safety Listing. The Government cannot say that it is not aware of terrorist acts by the MQM(H), but the Applicant is.

[34] Referencing the third preamble of the Universal Declaration of Human Rights [Declaration], the Applicant submits that it is perverse to deny Ministerial relief to a person who feels compelled to have recourse, as a last resort, to rebellion against tyranny and oppression in a country which does not protect human rights by the rule of law. The Applicant contends that the

Minister emphasizes national security and public safety over the Declaration and, more broadly, over Canadian values.

[35] The Applicant argues that where a person is a member of an organization that engages in terrorism, he cannot be prosecuted for terrorist acts if he did not make a significant and knowing contribution to terrorism. See *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*].

[36] The Applicant references findings of the RPD, relied on by the Minister in the Decision, which note that there is frequent, brutal violence between separate factions of the MQM and that Karachi has a violent climate. Noting that he was not excluded from refugee protection, the Applicant contends that the issue of significant and knowing contribution to terrorism is *res judicata* and that, for the purposes of Ministerial relief, the Minister had to accept that the Applicant did not make a significant and knowing contribution to any act of terrorism, and furthermore, that he was not complicit by association or passively acquiescent in terrorism.

(2) The Finding of Inadmissibility

[37] Citing recent jurisprudence from the Federal Court and the Federal Court of Appeal, the Applicant submits that the test for admissibility under s 34(1)(f) of the Act has not been changed by the Supreme Court of Canada's decisions in *Ezokola*, above: *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 [*Kanagendren*]; *Nassereddine v Canada (Minister of Citizenship and Immigration)*, 2014 FC 85.

[38] However, the matter is not entirely settled. Counsel for the applicant in *Kanagendren* has indicated that she will be seeking leave to appeal the Federal Court of Appeal's decision. In the event that the Supreme Court of Canada overturns the decision in *Kanagendren* and answers the certified question in the opposite manner, deciding that *Ezokola* does indeed alter the existing legal test for assessing membership in terrorist organizations under s 34(1)(f) of the Act, the Applicant's remedy in this case would be further Ministerial relief. The Applicant submits that it was an error for the Minister to decide this application prior to the final determination of *Kanagendren*.

[39] The Applicant also says that by virtue of the current legislative scheme under the Act, there are only two situations that Convention refugees can face: they can either be granted permanent residence or removed from Canada. There is no third alternative whereby a Convention refugee remains in limbo in Canada.

[40] The Applicant submits that the Minister's position that the current legislative scheme establishes that some inadmissible Convention refugees may never acquire permanent residence status, and will remain in a legal limbo of sorts, is not contemplated by the Act and has no jurisprudential support. The Applicant contends that, in the matter at hand, the Minister's reading is startling and inconsistent with the legislation. It suggests that a person can remain in Canada permanently without permanent residence. The Applicant says that this position blurs the distinction between those for whom Ministerial relief is available and those for whom it is not. If someone like the Applicant can stay in Canada indefinitely without permanent residence status, then so too could someone who is not even eligible for Ministerial relief.

[41] The Applicant requests that the Decision of the Minister be set aside under former s 34(2) of the Act, and that his application be returned for reconsideration.

B. *Respondent*

[42] The Respondent submits that the Applicant is not automatically entitled to Ministerial relief or permanent residence status because he is a refugee. The Minister reasonably held, in a Decision that was made in accordance with relevant legislation and recent jurisprudence, that the Applicant's involvement with a terrorist organization out-weighed any factors in his favour: *Agraira*, above; *Kanagendren*, above.

(1) The Legal Test for Ministerial Relief

[43] The Respondent submits that the Minister applied the correct legal test. The Decision appropriately followed the *Agraira* decision, and Ministerial relief is not meant to review an inadmissibility finding and is a discretionary authority, intended to be exceptional.

[44] The Respondent does not contest that a distinction between an exception and exceptional circumstances exists. However, the use of the word "exceptional" does not constitute an error, and the Minister properly employed the higher threshold test of exceptional circumstances, as former s 34(2) of the Act granted the Minister the ability to bestow exceptional relief in the face of an inadmissibility finding: *Omer v Canada (Minister of Citizenship and Immigration)*, 2015 FC 494 at para 13 [*Omer*].

[45] The Respondent submits that the Applicant's argument that the Minister exclusively considered national security and public safety is contradicted by the reasons which demonstrate that non-security factors such as positive reference letters, employment, volunteer and charitable activities and contribution to the community were all weighed. These factors simply did not overcome the evidence that granting relief would be detrimental to national interests.

[46] The Respondent further argues that the Applicant's argument regarding MQM's status as a terrorist organization is irrelevant, as this was a finding of the IAD and as such is not open to challenge.

[47] The Respondent acknowledges that complicity is not a requirement for a finding of inadmissibility under s 34(1)(f) of the Act. However, the Minister found that it was reasonable to conclude, based on the Applicant's education, years of MQM involvement, residence in Karachi and warnings he received regarding involvement, that he was aware of acts of terrorism committed by the MQM.

[48] As regards the Declaration, the Respondent contends that while it may guarantee a right to participate in rebellion against a government, it does not provide a right to participate or belong to a terrorist organization.

(2) The Finding of Inadmissibility

[49] The Respondent submits that the Applicant continues to be a refugee with temporary residence status and, despite what the Applicant might allege, the argument that the operation of

the law does not allow this result does not follow as it is the law that leads to this outcome. Refugees are not automatically granted permanent residence status.

[50] The Applicant's current status as a refugee, permitted to remain in Canada, is a result of steps carried out in accordance with the legislation. The Applicant was granted refugee protection in 1999, was found to be inadmissible under s 34(1)(f) of the Act by the IAD and was denied Ministerial relief under s 34(2). The Respondent points out that while it may be unusual for a refugee to be found inadmissible under s 34(1)(f), it is not unlawful. Decisions dealing with similar fact scenarios have upheld findings of inadmissibility: *Najafi v Canada (Minister of Public Safety and Emergency Preparedness),* 2014 FCA 262 [*Najafi*]; *Canada (Minister of Public Safety and Emergency Preparedness) v Khalil*, 2014 FCA 213 [*Khalil*].

[51] The Respondent also submits that it was not an error for the Minister to decide the present application, and apply current jurisprudence, rather than waiting for a final determination in *Kanagendren.*

C. *Applicant's Reply*

(1) The Legal Test for Ministerial Relief

[52] The Applicant replies to the Respondent's use of *Omer*, above, by contending that the case and the matter at hand address different issues and, as such, Madam Justice Mactavish's ruling does not provide appropriate guidance. The mere use of "exception" in one sentence in a Court judgment on a matter not argued and not decided leaves the issue open for this Court to decide.

[53] Again referencing comments made by the Supreme Court of Canada about public safety, national security and Canadian national interest in *Agraira*, the Applicant submits that the Minister simply paid lip service to the decision and used national security and public safety as exclusive considerations. Further, the Respondent's submission that other matters were considered does not address the Applicant's position. The Applicant maintains that while the Decision may repeat some of the words used in *Agraira*, it ignores its substance.

[54] The Applicant submits that it was improper to find that he knew of the terrorism of the MQM when no acts of terrorism were identified by the Minister. To say to the Applicant "you knew" without saying what he knew is not transparent, justifiable or intelligible: *Dunsmuir*, above.

[55] As regards the Respondent's comment that the Declaration does not guarantee the right to participate in, or belong to, a terrorist organization, the issue to be addressed in this proceeding is the denial of Ministerial relief and not inadmissibility. This is not something that should be denied because of a last resort recourse to rebellion against tyranny and oppression.

[56] The Applicant points out that the Respondent's submission that the Applicant is inadmissible does not address the Applicant's position that relief was denied using reasoning that rejected, or failed to acknowledge, the Declaration.

[57] Similarly, the Applicant indicates that the Respondent fails to address the Applicant's position regarding the absence of exclusion and resulting *res judicata* in the Decision.

(2) The Finding of Inadmissibility

[58] A reversal of the decision in *Kanagendren* by the Supreme Court of Canada could result in a significant impact on the present case, as the Applicant could potentially re-apply for Ministerial relief.

[59] Finally, the issue of whether the legislation contemplates a class of persons who remain in Canada permanently as temporary residents remains to be determined in this case, and the scheme of the Act must be regarded in its entirety.

D. *Respondent's Reply*

(1) The Legal Test for Ministerial Relief

[60] The Respondent says that the Applicant's allegation that the Minister applied a test with a higher burden than that prescribed in *Agraira* is only supported by his complaint that the Minister characterised s 34(2) relief as "exceptional." This term has been used consistently throughout the jurisprudence: *Ali v Canada (Minister of Citizenship and Immigration),* 2004 FC 1174 at para 43 [*Ali*]; *Mohammed v Canada (Minister of Citizenship and Immigration*), 2006 FC 1412 at paras 13-14; *Miller v Canada (Solicitor General)*, 2006 FC 912 at para 39.

[61] *Agraira* only clarifies that factors beyond national security and public safety are relevant considerations in the context of an application for Ministerial relief. The Decision, which references numerous factors including the Applicant's charitable activities in Canada, his family

support, his employment and the hardship his immigration status has caused, does not support the Applicant's position that the Minister only paid lip service to factors other than national security and public safety. This complaint is essentially a complaint about the weight granted to other factors.

[62] The IAD's conclusion that MQM was a terrorist organization is final, and even if it was open to review, the Court has determined that there is no requirement for an organization to be listed for the purpose of determining admissibility under s 34(1)(f): *Karakachian v Canada (Citizenship and Immigration)*, 2009 FC 948 at para 40 [*Karakachian*].

(2) The Finding of Inadmissibility

[63] The Respondent says the Declaration does not protect a right to rebel against "tyranny and oppression," such that Ministerial relief should not be denied. Not only is this contention hypothetical, the Applicant's position is legally incorrect, as the Federal Court of Appeal has rejected the argument that individuals who are members of groups that exercise an argued right of international law to utilise violence as a means of subverting an oppressive regime are excluded from the ambit of s 34(1)(f): *Najafi*, above.

[64] The RPD did not consider whether the Applicant was excluded as a member of a terrorist group, therefore, no finding in this respect exists which could bind the Minister. However, even if exclusion had been considered, it still would not be determinative of admissibility, as an individual's eligibility for Convention status is a fundamentally different issue than whether the individual should be exempted from inadmissibility pursuant to s 34(2): *Kanyamibwa v Canada*

(Minister of Public Safety and Emergency Preparedness), 2010 FC 66 at paras 74-83 [*Kanyamibwa*].

[65] Not only was there no duty for the Minister to wait for a potential future ruling in *Kanagendren*, above, but it is speculation to suggest that such a decision would be directly relevant to the Decision under review.

[66] Were the Court to accept the Applicant's submission that the Act does not permit refugees to remain in Canada without permanent resident status, it would result in absurdity. His dissatisfaction is insufficient to render the Decision unreasonable.

VIII. ANALYSIS

[67] The Applicant raises a number of grounds for review which are best dealt with in sequence.

A. *Exceptional*

[68] The Applicant complains that the Minister makes the mistake of "equating an exception to inadmissibility, which Ministerial relief is, with exceptional, which Ministerial relief is not meant to be." He concedes that the Minister does not focus exclusively on national security and public safety but, by treating Ministerial relief as exceptional, he says the Minister "fails to give adequate consideration to the other objectives of the Immigration and Refugee Protection Act."

[69] The Applicant appears to be suggesting that, instead of applying *Agraira* as directed by the Supreme Court of Canada, the Minister has imported into his treatment of the relevant factors some kind of "exceptional" gloss.

[70] In my view, the Applicant has taken the word "exceptional" as it appears in the Decision out of context and is attempting to give it an impact which the Decision, when read as a whole, does not support. The word appears at the end of page 2 of the Decision in the sentence "Ministerial relief is not meant to review an inadmissibility finding and is a discretionary authority, intended to be exceptional." This sentence appears in a two-paragraph section of the Decision entitled "Ministerial Relief – Legal Test" in which the Minister cites *Agraira* and acknowledges what that decision requires of him. The Minister also confirms at page 10 of the Decision that "Mr. Khan's application for Ministerial relief has been reconsidered in a manner consistent with the guidance of the subsequent decision by the Supreme Court of Canada in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36…." So the Minister is well aware that he must apply *Agraira*. The word "exceptional" has to be read in its immediate context under "Ministerial Relief – Legal Test" as well as in the context of the Decision as a whole.

[71] In its immediate context, it seems clear to me that the Minister intends to distinguish Ministerial relief from other forms of relief such as "a review of humanitarian and compassionate factors" or "a review of an admissibility finding," which it is clearly not. The intent is to say that discretionary Ministerial relief has its own purpose and criteria, which are set out by the Supreme Court of Canada in *Agraira*.

[72] When read in the context of the Decision as a whole, and not taking the words of the Minister about applying *Agraira* at face value, it is clear that the Minister does in fact follow the Supreme Court of Canada jurisprudence. There is no indication that the Minister imports some kind of “exceptional” test to deal with the relevant factors.

[73] I can see no reviewable error on this point.

B. *Predominant and Exclusive*

[74] A related complaint by the Applicant is that the Minister makes a predominant consideration (national security and public safety) into an exclusive consideration. It is true that the Minister does conclude that all of the other evidence and factors adduced in favour of the Applicant:

> … do not overcome the evidence that it would be detrimental to the national interest to grant relief to Mr. Khan, an individual who knowingly belonged to a terrorist organization for an extended period of time, while demonstrating sustained commitment in light of various opportunities, and at times encouragement, to leave.

[75] Once again, however, a reading of the Decision as a whole reveals that other factors are acknowledged, discussed and weighed in the balance required of the Minister in exercising his discretion. The Applicant’s complaint, in my view, is nothing more than a disagreement with this weighing process. He thinks the result should have favoured him. As the jurisprudence of this Court has made clear on many occasions, the Court is not here to re-weigh evidence and substitute its own conclusions for these of a decision-maker. See *Khosa*, above, at paras 59 and 61; Kanthasamy v Canada (Minister of Citizenship and Immigration), 2014 FCA 113 at para 99.

Different conclusions were possible on these facts, but Parliament has made it clear that it is the Minister's discretion to make the decision and, as *Dunsmuir* makes clear, as long as it does not fall outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" then there can be no reviewable error. In my view, the Decision reveals that the Minister does, indeed, assess and weigh other factors in accordance with *Agraira* and reaches a conclusion that, although disappointing for the Applicant, does not fall outside the range of possible, acceptable outcomes.

C. *Knowledge of Terrorism*

[76] The Applicant complains that the Minister misunderstands the meaning of terrorism and unreasonably concludes that the Applicant was aware of acts of terrorism when no acts of terrorism are even identified. The Applicant also says that, in dealing with this factor, the Minister is constrained by listings made by the Governor-in-Council under the *Anti-Terrorism Act* and recommendation by this Minister, and Canada has never listed the MQM as a terrorist organization.

[77] In deciding this issue, Applicant's counsel conceded before me that the Minister is entitled to draw inferences from the evidence before him, but they must be reasonable inferences.

[78] The Decision devotes a considerable amount of discussion to this issue and reaches the following conclusions as to the Applicant's knowledge:

> Mr. Khan states that he was unaware of MQM/MQM-H involvement in terrorism. However, the CBSA is of the opinion that the information provided by Mr. Khan leads to a different

> conclusion. Mr. Khan, by his own statements, was aware that the MQM-A and MQM-H were involved in factional fighting. Given this, as well as Mr. Khan's level of education, his period of residence in Karachi, his continued involvement over 11 years, and the warnings he received from his family pertaining to political involvement, it is reasonable to conclude that he was aware of acts of terrorism committed by the MQM/MQM-H.

[79] As the Respondent points out, the Applicant is leaving out of account several crucial factors in considering this ground for review:

a) The Minister was not required to identify specific acts of terrorism committed by the MQM. The IAD has already established that the MQM committed terrorist acts as part of the Applicant's admissibility hearing. In fact, the IAD identified various acts of terrorism; and,

b) The Minister's exercise of discretion under s 34(2) does not come into play until it has already been decided that the Applicant is inadmissible because he has been a member of a terrorist organization, and the Minister was mandated to consider whether notwithstanding the Applicant's membership in a terrorist organization, it would be detrimental to national interest to allow the Applicant to remain in Canada. See *Ali*, above, at para 42.

[80] In exercising his discretion in this context, the Minister carefully examined the Applicant's assertion that he was unaware of MQM's acts of terrorism and came to the conclusion referred to above. The listing issue is beside the point because the IAD has already ruled that MQM is a terrorist organization and this has not been overruled on review. In addition, this Court has confirmed that listing is not required for the purposes of determining admissibility under s 34(1)(f). See *Karakachian*, above, at para 40.

[81] There was no direct evidence of the Applicant's knowledge of terrorism before the Minister but, as the Applicant concedes, the Minister was entitled to draw inferences. In doing

this, I cannot say that his conclusions fall outside of the range posited in *Dunsmuir*, above. Consequently, I can find no reviewable error on this ground.

D. *The Universal Declaration of Human Rights*

[82] The Applicant makes detailed and able arguments on this issue:

> 43. The Universal Declaration of Human Rights provides:
>
> > "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,"
>
> The Universal Declaration of Human Rights then accepts that, where human rights are not protected by the rule of law, a person can reasonably be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.
>
> …
>
> 45. The Minister acknowledges the evidence of the applicant that "his situation should be evaluated against the backdrop of repression at the hands of the government" but then decides national security and public safety must predominate. The applicant contends that it is misreading considerations of public safety and national security to reason that they predominate over the Universal Declaration of Human Rights and the recognition in that Declaration that, where human rights are not protected by the rule of law, a person can reasonably be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.
>
> 46. All violence, even in rebellion against the most repressive tyranny, may well generate alarm. However, that is not the same as saying that all violence is terrorism. The distinction between the alarm generated by violence and terrorism is intent. With terrorism, there is an intent to alarm or intimidate or frighten. It is not just a consequence of an intent to rebel against tyranny. The Minister fails to appreciate and apply this distinction.

[83] Notwithstanding these able arguments, there are no facts to support the Applicant's position. The Minister exercised his discretion in the context of an IAD decision that had found the Applicant to be a member of a terrorist organization that committed terrorist acts, and the Federal Court of Appeal has rejected the argument that organizations that utilize violence to oppose or overthrow an oppressive regime are excluded from the ambit of s 34(1)(f). See *Najafi*, above.

[84] Consequently, I see no reviewable error on this ground.

E. *Non-Exclusion*

[85] The Applicant argues that the RPD accepted him as a refugee and the Minister did not intervene or challenge the decision in Federal Court. The Applicant now says that the RPD decision, which did not find him inadmissible, is *res judicata* for the purposes of Ministerial relief, and this includes "an absence of an exclusion finding" which means, as per *Ezokola*, that the Applicant did not make a significant and knowing contribution to any act of terrorism, and was not complicit by association or passively acquiescent in terrorism. The Applicant says that the Minister cannot defer to a decision of the IAD and, at the same time, ignore a decision of the RPD.

[86] It is difficult to see how the RPD decision could be *res judicata* with regards to the Applicant's complicity in terrorism when that issue was not even addressed. The exclusion issue was decided by the IAD. Also, *Kanyamibwa*, above, has already thoroughly addressed this issue:

> [83] Even assuming, for the sake of the argument, that the RPD did finally determine that the Applicant was not complicit in crimes against humanity, it would not be the end of the matter. It must be remembered that this case is about the denial of ministerial relief to the Applicant pursuant to s. 35(2) of the *IRPA*, and not the inadmissibility finding under s. 35(1) of the *IRPA*. As such, the question of whether issue estoppel prevented the Minister from making an inadmissibility finding against the Applicant due to the RPD's findings relating to exclusion is immaterial. Had the Applicant wished to challenge the finding that he was inadmissible to Canada pursuant to s. 35(1)(b) of the *IRPA*, he should have done so. His attempt to challenge this finding through his judicial review application of the Minister's decision to deny him relief pursuant to s. 35(2) of the *IRPA* amounts to a collateral attack of the inadmissibility finding; as such, it is improper and must not be permitted by the Court.

[87] I can find no reviewable error on this ground.

F. *The Scheme of the Act*

[88] The Applicant argues that the legislative scheme of the Act does not allow for an indefinite legal limbo for refugees who, like himself, have been found inadmissible. He says that if he is allowed to stay in Canada the Minister "is not allowed to fashion, through denial of permanent residence of a person permanently in Canada, a third form of status which has no statutory or regulatory recognition."

[89] The Applicant placed these arguments before the Minister who answered them in the Decision as follows:

> With respect to Mr. Khan's concerns related to remaining in an indefinite state of "limbo" as a refugee, which he argues is contrary to the objectives of the IRPA, to date Canada has respected its primary international obligation respecting the principle of non-refoulement. Becoming a permanent resident, however, is subject

> to meeting other statutory requirements found in Canadian law. In this respect, while the IRPA and related regulations do exempt protected persons from some inadmissibilities when they are applying for permanent residence, they are not exempt from an inadmissibility under subsection 34, 35 or 37. The legislative scheme Parliament established thus recognizes that some Convention refugees, inadmissible on serious grounds, may never acquire permanent resident status.

[90] The Applicant cites no authority that supports his argument on this issue and merely argues that the Act does not have, as a third objective, the maintenance of indefinite limbo. In my view, there is nothing in the wording or scheme of the Act to support this argument or to suggest that the Minister was wrong in his interpretation of the legislation. There is simply no provision in the Act or the Regulations that prevents or prohibits temporary resident status for refugees found inadmissible. The Applicant's present status is a direct result of the application of the legislation to his situation, and it seems obvious to me that the scheme of the Act that has led to this result must have been contemplated by Parliament. Otherwise, Parliament would have specifically dealt with the issue if any other result had been intended.

[91] The Applicant appears to be arguing that the Minister was obliged to make a decision in the Applicant's favour because the Applicant has refugee status. But ss 34(2) and 21(2) obviously indicate the contrary. Nothing in the Act or the jurisprudence suggests that this must occur. The Applicant is expressing no more than an opinion that this ought to be the case. Obviously, others, including Parliament and the Minister disagree. The jurisprudence tells us that a refugee is eligible for permanent resident status if he or she is not inadmissible. See, for example, *Haj Khalil v Canada*, 2007 FC 923 at para 186.

[92] The Court also made the following clear in *Kanyamibwa*, above, at para 88:

> The decision of the Minister to deny relief to the Applicant pursuant to s. 35(2) of the *IRPA* cannot be equated to the course of action condemned by Justice Pinard in *Thambiturai*, above. It is true that the Minister, as suggested by counsel for the Applicant, could have applied to vacate the Applicant's refugee status pursuant to s. 109 of the *IRPA*. But that would have worked to the prejudice of the Applicant, as it is a lot better and of less consequence to be inadmissible and to be denied an exemption from that inadmissibility than to lose refugee status. I agree with counsel for the Respondent that the Minister should be free to decide that the nature or severity of the acts purportedly committed by an individual are not such that he or she should not be considered as a Convention refugee, but that he or she should nevertheless be inadmissible and barred from becoming a permanent resident. This is much different and in no way comparable to the conduct of the respondent in *Thambiturai*, and the Applicant has failed to demonstrate that the Minister's decision in the present case was tantamount to an abuse of the judicial system.

[93] It seems to me, then, that the legislation and the jurisprudence of this Court are clear in that they indicate precisely the opposite of what the Applicant argues on this point, and support the Minister. Consequently, I see no reviewable error on this issue.

G. *Kanagendren*

[94] Finally, the Applicant argues that the Minister should not have relied upon the Federal Court of Appeal in *Kanagendren*, above, and should have delayed making a decision until it is determined whether that case will be appealed to the Supreme Court of Canada.

[95] Once again, the Applicant cites no authority to support his position on this issue. Presumably, the Applicant feels that an appeal could change the test of admissibility. The

Applicant conceded in oral submissions that there is no requirement in law for the Minister to wait, but characterizes the failure to do so as a "procedural error."

[96] The law is clear that there is no duty on a decision-maker to wait for future decisions before deciding a pending application (see *Betoukoumesou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 591 at para 18) so it is difficult to see how the Minister's decision not to wait can constitute some kind of "procedural error."

[97] It may be that, if an appeal in *Kanagendren* is allowed at some time in the future, then the Supreme Court of Canada may decide whether the existing test for assessing membership in a terrorist organization under s 34(1)(f) was changed by *Ezokola*, and this could be relevant and the Applicant's inadmissibility status, which was decided by the IAD and is not under review here. It is possible to speculate that, perhaps, a change in the test under s 34(1)(f) could have been taken into account by the Minister under s 34(2), but at the time of the Decision, and even now, this remains a matter of mere speculation. We have no idea whether leave to the Supreme Court of Canada will be granted, or what it will decide if it is granted. I see no legal or procedural error in the Minister's decision to proceed with his Decision under s 34(2).

[98] I see nothing to stop the Applicant from re-applying, if the law does change in some material way.

IX. Conclusion

[99] The Applicant has been in Canada for some time and feels that his conduct here clearly indicates that he is not a threat to national security and deserves permanent residence. I can see why he is disappointed. It seems to me that a positive decision would not have been unreasonable. However, that does not make the Minister's Decision unreasonable. See *Khosa,* above, at para 59; *Khalil*, above, at para 36. Parliament has entrusted the Minister with the discretion to make decisions under s 34(2) and, in the absence of a reviewable error, it is not for the Court to try and second guess the Minister. I can find no such error in this application.

X. Certification

[100] The Applicant has proposed two questions for certification:

> 1) Is the absence of an organization from the list of terrorist entities under *Criminal Code* section 83.05 consistent with denial of Ministerial relief under the *Immigration and Refugee Protection Act* former section 34(2) on the basis that the applicant for relief was aware of the terrorist activity of the organization?
>
> 2) Does the *Immigration and Refugee Protection Act* allow permanent status in Canada which is not permanent resident status?

[101] In order to be certified, a question must (1) be dispositive of the appeal and (2) transcend the immediate interests of the parties to the litigation to contemplate issues of broad significance or general importance. See *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at para 9.

[102] For reasons given, I have already indicated why question 1 does not arise on the facts of this case and, even if it did, the jurisprudence is clear that there is no requirement that an organization be listed for the purpose of determining admissibility under s 34(1)(f). See *Karakachian*, above.

[103] As regards question 2, I have already indicated that the scheme of the Act and the jurisprudence of the Court make it clear that refugee protection (which is not, as the question suggests, permanent residence status) does not necessarily lead to permanent residence status and why what the Applicant calls a "limbo" situation as a refugee is possible under the Act. The Applicant cites no authority or convincing argument to suggest that this matter needs the consideration of the Court of Appeal.

[104] Consequently, I decline to certify either question.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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