

Federal Court



Cour fédérale

Date: 20161123

Docket: IMM-1083-16

Citation: 2016 FC 1294

Ottawa, Ontario, November 23, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ABDILLAHI JAMA ISMAIL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Ismail, was born in Somalia in 1966. He has resided in the United Kingdom [UK] since 1989 and is now a citizen of the UK. He is married to a Canadian citizen.

[2] In 2012, he submitted an application for permanent residence in Canada as a member of the Family Class sponsored by his wife. Mr. Ismail indicated in his application that from 1981 to

1985, when he was between fifteen and nineteen years of age, he was a member of the Somalia National Movement [SNM]. The SNM was an insurgent group formed in 1981 that sought the overthrow of the Somali government by armed struggle and other means.

[3] Mr. Ismail was interviewed on two occasions and responded to a procedural fairness letter where he addressed his involvement in the SNM. In January 2016, Mr. Ismail was advised by an Immigration Officer [Officer] with the High Commission of Canada in London that he was found inadmissible for security reasons under paragraphs 34(1)(b) and (f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Specifically, the Officer expressed the opinion that his membership in the SNM constituted membership in a group that engaged in or instigated the subversion by force of a government. Mr. Ismail now seeks judicial review of that decision on the basis that the Officer erred in failing to consider his status as a minor at the time of his membership.

[4] For the reasons that follow, I am of the view that the Officer did not err in determining Mr. Ismail to be inadmissible for security reasons. The application for judicial review is dismissed.

II. Background

[5] In his application, Mr. Ismail stated that he was a member of “a Somali National Movement to overthrow Mohamed Siyais Poarreh, the President of the Somali Republic”. He further stated that as a result of his membership, he was arrested and tortured prior to departing

Somalia for the UK, he held no official position with the SNM and, at the time, was a young student.

[6] Mr. Ismail was interviewed in London in March 2013 where he advised that he joined the SNM after participating in demonstrations against the government at the request of his teachers. He described his role as that of an ordinary person and that he lived with the SNM in a camp for a year “doing propaganda against the government”. He reported that he was not involved in the war. In response to a question regarding his thoughts on the armed struggle against the government, the Officer’s notes indicate that he was aware of the violent activities of the SNM which were aimed at achieving political objectives. He also stated that he was young and did not realize the consequences of his actions.

[7] Mr. Ismail was provided a procedural fairness letter in May 2015, advising that he may be inadmissible due to his SNM membership and inviting him to make representations on the issue. He then travelled to Canada in June 2015 to visit his wife. On entry into Canada he was questioned by the Canada Border Services Agency [CBSA] regarding his involvement with the SNM. In the course of the CBSA questioning, Mr. Ismail advised that he had received military training while a member of the SNM.

[8] In his response to the procedural fairness letter submitted after the CBSA interview, Mr. Ismail stated that during his time of membership the SNM had no weapons and committed no acts of violence. He further stated that he had departed Somalia prior to the commencement of the civil war in 1988 where violence was used to achieve political means.

III. Decision under Review

[9] In his decision, the Officer contrasted Mr. Ismail's statements in response to the procedural fairness letter with the information provided in the two interviews. The Officer concluded that his statements were inconsistent regarding the nature and level of his involvement with the SNM and placed more weight on the information provided during the two interviews. The Officer also noted that the SNM began military action against the government in the early 1980s, information contained in an inadmissibility assessment completed by CBSA in January 2015.

[10] The Officer acknowledged Mr. Ismail's claim that he was a minor when he joined the SNM but concluded that: (1) the SNM goal was the overthrow of the government by any means, including the use of force; (2) Mr. Ismail was a member of the group; and (3) that he was aware of the goals of the SNM. On this basis, the Officer found Mr. Ismail inadmissible.

IV. Standard of Review

[11] The parties submit, and I agree, that the Officer's conclusion that there were reasonable grounds to believe that Mr. Ismail was inadmissible under paragraphs 34(1)(b) and (f) of the IRPA for having been a member of a group that has engaged in or instigated the subversion by force of a government is reviewable by this Court on the standard of reasonableness (*Pizarro Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 623 [*Pizarro Gutierrez*] at paras 21 and 22, *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 [*Poshteh*] at para 24).

V. Legislation

[12] Subsection 34(1) of the IRPA states:

<p>34 (1) A permanent resident or a foreign national is inadmissible on security grounds for</p> <p>(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;</p> <p>(b) engaging in or instigating the subversion by force of any government;</p> <p>(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;</p> <p>(c) engaging in terrorism;</p> <p>(d) being a danger to the security of Canada;</p> <p>(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or</p> <p>(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).</p>	<p>34 (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :</p> <p>a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;</p> <p>b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;</p> <p>b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;</p> <p>c) se livrer au terrorisme;</p> <p>d) constituer un danger pour la sécurité du Canada;</p> <p>e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;</p> <p>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).</p>
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VI. Analysis

A. *Did the Officer err by failing to consider Mr. Ismail's status as a minor at the time he joined SNM?*

[13] Mr. Ismail relies on *Poshteh* to argue that the Officer had a positive duty to consider his status as a minor when considering the question of admissibility under paragraph 34(1)(f) of the

IRPA. He argues that in failing to do so the Officer failed to address the question of whether he possessed the requisite mental capacity to understand the nature and effects of his actions. Mr. Ismail submits that this issue was placed before the Officer when he made reference to: (1) his youth; (2) the fact that his involvement in the SNM was for fun; and (3) the fact that he did not realize the consequences of his actions. I disagree.

[14] In *Poshteh*, the Federal Court of Appeal recognizes that an individual's status as a minor is relevant to the question of inadmissibility under subsection 34(1) of the IRPA. However, the Court of Appeal notes that, where the status as a minor is recognized by the common law, that status does not amount to a blanket exemption. An individual assessment is required. The common law recognition of capacity based on age is viewed on a continuum where the presumption of capacity increases with the age of the minor (*Poshteh* at paras 42 and 43). The Court of Appeal further notes that in the case of a young child (under 12 years of age) there would be a self-evident presumption that they lack the requisite knowledge or mental capacity to understand their actions (*Poshteh* at para 48). This is not the case here. Instead, the presumption that the closer the minor is to eighteen years of age the greater the likelihood that the minor possess the required capacity is engaged (*Poshteh* at para 51).

[15] Contrary to Mr. Ismail's submissions, there was no positive duty on the Officer to address or consider his mental capacity. It is well-established that "...it [is] incumbent on applicants to argue that they did not have the mental capacity to understand the effects of their actions and to provide evidence of that..." (*Pizarro Gutierrez* at para 43).

[16] Mr. Ismail did make reference to his youth and failure to appreciate the consequences of his actions in his evidence, but he did not expressly raise the question of capacity nor did he advance any evidence to support the statements made. Instead, the evidence provided by Mr. Ismail was that he was aware of the goals and objectives of the SNM. While he states otherwise in response to the procedural fairness letter, it was reasonably open to the Officer to prefer the evidence provided in the two interviews over that contained in his response to the procedural fairness letter.

[17] In this case Mr. Ismail was a member of the SNM from the age of fifteen until nineteen. The Officer was entitled to rely on the presumption of capacity and knowledge absent evidence to the contrary. Mr. Ismail provided no evidence to rebut the presumption. There is no evidence that Mr. Ismail's decision to join the SNM was coerced. There is no evidence that his continued membership was coerced. Instead the evidence indicated that he understood the goals and objectives of the SNM while he was a member. The evidence indicates he did not leave the SNM because of a maturing realization of the nature of the organization but rather as a result of his arrest and torture in 1985.

[18] Accordingly, I find that the Officer did not err in concluding that Mr. Ismail is inadmissible of the grounds set out in paragraph 34(1)(f) of the IRPA. The Officer was alive to Mr. Ismail's age at the time he joined the SNM but Mr. Ismail did not argue that mental capacity was an issue or provide evidence rebutting the presumption of capacity.

VII. Conclusion

[19] For the reasons set out above I conclude that the decision falls within the range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[20] The parties have not proposed a question for certification and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1083-16

STYLE OF CAUSE: ABDILLAHI JAMA ISMAIL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 15, 2016

JUDGMENT AND REASONS: GLEESON J.

DATED: NOVEMBER 23, 2016

APPEARANCES:

Dov Maierovitz FOR THE APPLICANT

Kristina Dragaitis FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dov Maierovitz FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of
Canada
Toronto, Ontario