Federal Court  Cour fédérale

Date: 20210915

Docket: IMM-2339-20

Citation: 2021 FC 949

Ottawa, Ontario, September 15, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MOHAMMED NAJMALDIN ABDULLAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Mohammed Najmaldin Abdullah, seeks judicial review of the February 19, 2020 decision of the Immigration Division (the "ID") of the Immigration and Refugee Board (the "IRB"), finding him inadmissible to Canada for being a member of an organization that there are reasonable grounds to believe has engaged in government subversion by force, pursuant to paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC

2001, c 27 (the "*IRPA*"). The ID found that the Applicant was a member of the Kurdish Democratic Party (the "KDP") from 2012 until 2018, and that the KDP engaged in subversion by force of the Iraqi government until 2003.

[2] The Applicant submits that the jurisprudence has recognized an exception to the irrelevance of a temporal connection between membership and an organization's activities where the organization has transformed and no longer perpetrates subversion. In light of that jurisprudence, the Applicant argues that the ID erred by failing to take into account the fundamental transformation in the nature and activities of the KDP after the fall of Saddam Hussein's regime in 2003.

[3] In my view, the ID's decision is unreasonable. I accept that the exception claimed by the Applicant exists, and that the ID failed to consider it. I therefore grant this application for judicial review.

II. Facts

A. *The Applicant*

[4] The Applicant, born 1983, is a citizen of Iraq. He began working as an accountant for the Kurdish Regional Government ("KRG") police force in 2012, which required him to join the KDP for his employment. During that time, the Applicant attended mandatory meetings involving KDP members at work every 3-5 months. Additionally, 1000 dinars (equivalent to

almost 1 Canadian dollar) was deducted monthly from his salary and may have been for KDP membership dues.

[5] The Applicant asserts he never identified personally as a member of the KDP, and he never promoted the KDP or recruited members.

[6] The Applicant arrived in Canada on July 13, 2018. Shortly after arriving in Canada, he made a claim for refugee protection.

[7] On March 25, 2019, a Canada Border Services Agency ("CBSA") officer filed a report pursuant to subsection 44(1) of the *IRPA*, finding there were reasonable grounds to believe that the Applicant was inadmissible to Canada under subsection 34(1)(f) of the *IRPA*. On March 26, 2019, a delegate of the Minister of Public Safety and Emergency Preparedness found the report was well-founded and referred it to the ID for an admissibility hearing pursuant to subsection 44(2) of the *IRPA*.

B. *Decision Under Review*

[8] In a decision dated February 19, 2019, the ID found that the Applicant was inadmissible to Canada under subsection 34(1)(f) of the *IRPA*. The ID found that there were reasonable grounds to believe that the Applicant was a formal member of the KDP, and that the KDP has engaged in the subversion by force of the Iraqi government.

[9] The ID accepted that the Applicant's membership with the KDP was required for his job with the KRG, but it held that the Applicant's membership was voluntary and not obtained under duress. Having found that formal membership was established, the ID determined that it was not necessary to conduct a further assessment of the nature of the membership.

[10] Citing *Gebreab v Canada (Public Safety and Emergency Preparedness)*, 2010 FCA 274 ("*Gebreab*"), and *Alam v Canada (Citizenship and Immigration)*, 2018 FC 922 ("*Alam*"), the ID held that inadmissibility does not require that the period of membership coincide with the alleged acts of subversion, particularly when the alleged acts precede the period of membership.

[11] The ID found that the actions of the KDP through the 1980s to the early 2000s constituted acts of subversion by force:

> [26] The evidence indicates that in the 1980s, 1990s, and 2000s, Kurdish forces, which included those of the KDP, used military force to seize control of cities in the northern area of Iraq from the Iraqi government. They pushed Iraqi military forces out of the cities, killed representatives of the ruling Baath party, burned government offices, and in 2003 engaged in combat against the Iraqi military in a campaign to overthrow the government of Saddam Hussein. The purpose of these intentional acts of force was to oust the Iraqi government from its position of control over the governance of predominantly Kurdish populated areas of Iraq, which the Kurdish people and political parties, including the KDP, claim should be governed autonomously. I find that these acts do constitute acts of subversion by force against the government of Iraq as contemplated in paragraph 34(1)(b) of the *IRPA*.

III. Preliminary Issue: Style of Cause

[12] The Applicant requests that the style of cause be amended to name the Minister of Citizenship and Immigration as the Respondent instead of the Minister of Public Safety and Emergency Preparedness. The Applicant notes he is challenging a decision of the ID, which is a division of the IRB, and therefore asserts the Minister of Citizenship and Immigration is the appropriate Respondent.

[13] The Respondent does not make submissions regarding the Applicant's request.

[14] I agree with the Applicant. The style of cause is hereby amended. Under section 4 of the *IRPA*, the Minister of Citizenship and Immigration is responsible for the ID's decision.

IV. Issue and Standard of Review

[15] The sole issue is whether the ID erred by failing to consider the fundamental transformation in the nature and activities of the KDP after the fall of Saddam Hussein's regime in 2003.

[16] It is common ground between the parties that the applicable standard of review for the above issue is reasonableness.

[17] I agree. The ID's determination of whether an individual is inadmissible under subsection 34(1)(f) of the *IRPA* is reviewed upon the reasonableness standard (*Islam v Canada*

(Public Safety and Emergency Preparedness), 2021 FC 108 at para 11, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at para 30).

[18] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[19] For a decision to be unreasonable, an applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing the evidence that was before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

V. Analysis

[20] Under subsection 34(1)(f) of the *IRPA*, members of organizations that engage in espionage, subversion, or terrorism are inadmissible to Canada on security grounds:

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 :
(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;
(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).

[21] Under subsection 42.1(1) of the *IRPA*, the Minister may provide relief by declaring that certain matters caught by the broad wording of subsection 34(1) do not constitute inadmissibility if the Minister is satisfied that it is not contrary to the national interest:

Exception — application to Minister	**Exception — demande au ministre**
42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.	42.1 (1) Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.

[22] The Applicant accepts that for an individual to be inadmissible under subsection 34(1)(f) of the *IRPA*, the dates of an individual's membership in the organization need not correspond with the dates on which that organization committed acts of terrorism or subversion by force (*Gebreab* at para 3; *Alam* at paras 30-32). Rather, he argues there is an exception to that principle where there has been a transformation in the nature of an organization, such that it no longer engages in acts of terrorism or subversion. The Applicant submits that exception is established in *El Werfalli v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 612 ("*El Werfalli*") at paras 58-60; *Chwah v Canada (Citizenship and Immigration)*, 2009 FC 1036 ("*Chwah*") at para 24; and *Karakachian v Canada (Citizenship and Immigration)*, 2009 FC 948 ("*Karakachian*") at para 48.

[23] The Applicant submits that the ID decision is unreasonable because the ID failed to consider how the KDP underwent such a transformation after 2003. In particular, the Applicant stated in his Further Memorandum of Argument:

> [25] In this case, all of the subversion activities relied on by the ID Member pre-date the fundamental transformation in the nature and activities of the KDP. Post the fall of Saddam Hussein in 2003, the KDP is*[sic]* no longer is a political party with a precarious governing status in the Iraqi state, looking to overthrow the national Iraqi government. Instead, the KDP co-governs an autonomous region as part of a federal structure recognized in the 2005 Iraqi constitution. The KDP is no longer governing a de-facto state and trying to overthrow the Iraqi government, but instead is governing a recognized region that is part of the federal Iraqi structure. These developments were part of the evidence before the Member […]

[24] For the reasons that follow, I find the ID's decision is unreasonable.

[25] Generally, there is no temporal component to the analysis of whether an organization meets the criteria under subsection 34(1) of *IRPA*. As recognized by this Court in *Yamani v Canada (Public Safety and Emergency Preparedness)*, 2006 FC 1457:

> [11] Quite simply, and contrary to the arguments made by Mr. Al Yamani, there is no temporal component to the analysis in s. 34(1)(f). If there are reasonable grounds to believe that an organization engages today in acts of terrorism, engaged in acts of terrorism in the past or will engage in acts of terrorism in the future, the organization meets the test set out in s. 34(1)(f). There is no need for the Board to examine whether the organization has stopped its terrorist acts or whether there was a period of time when it did not carry out any terrorist acts.

[26] It therefore falls upon an application under section 42.1 of the *IRPA* to correct the harsh results that may flow from the broad wording of subsection 34(1)(f) (*Zahw v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 934 at para 55).

[27] Subsection 34(1)(f) of the *IRPA* may not apply, however, to an organization that has undergone a fundamental change in circumstances, such as one that "has transformed itself into a legitimate political party and has expressly given up any form of violence" (*Karakachian* at para 48).

[28] Such a result is what occurred in *Chwah*. In that case, the applicant had been a member of the Lebanese Forces political party since 1992. The Lebanese Forces are a political party and former Christian militia that played a role in Lebanon's civil war from 1975 to 1990, but the movement transformed itself into a political party in 1990 (*Chwah* at paras 2-3). Justice Boivin (as he then was) held in *Chwah* that the visa officer erred in finding the applicant was inadmissible for his membership in the Lebanese Forces, as the organization underwent a transformation prior to the applicant joining:

> [24] The Court is of the opinion that the officer erred by failing to assess the organization's role prior to 1990 and its role after 1990. This is an organization which underwent a transformation in 1990 after the civil war when the Christian militia was disbanded. The evidence in the record shows that the applicant joined the ranks of the Lebanese Forces in 1992, after this transformation, and thus after the dissolution of the Christian militia. It is also worth noting that the transformation of this organization happened in the form of seeking representation in the Lebanese parliament as a political party. This fact is not addressed in the officer's assessment.

[29] Likewise, in *El Werfalli*, Justice Mandamin held that it was unreasonable to find that the applicant was inadmissible under subsection 34(1)(f) of the *IRPA* for his membership in an organization that began engaging in prohibited activities after the applicant was no longer a member (*El Werfalli* at para 62).

[30] In my view, the principle that an organization may not meet the definition under subsection 34(1)(f) of the *IRPA* due to a fundamental change in circumstances accords with the Federal Court of Appeal's decision in *Gebreab*.

[31] The certified question upon appeal in *Gebreab* was:

> Is a foreign national inadmissible to Canada, pursuant to s. 34(1)(f)of IRPA, where there is clear and convincing evidence that the organization disavowed and ceased its engagement in acts of subversion or terrorism as contemplated by s. 34(1)(b) and (c) prior to the foreign national's membership in the organization?

[32] The Federal Court of Appeal upheld the decision below in *Gebreab* and answered the certified question as follows:

> It is not a requirement for inadmissibility under s. 34(1)(f) of the IRPA that the dates of an individual's membership in the organization correspond with the dates on which that organization committed acts of terrorism or subversion by force.

[33] If the certified question in *Gebreab* was answered entirely in the positive, I may be persuaded that *Gebreab* precludes the existence of an exception under subsection 34(1)(f) of the *IRPA* due to a fundamental change in circumstances. However, the Federal Court of Appeal only affirmed that a temporal connection between an organization's acts of violence and an individual's membership is not a requirement for inadmissibility under subsection 34(1)(f). This answer does not contemplate future members of an organization where that organization has

undergone a fundamental change in circumstances, as was contemplated in *Karakachian* and *Chwah*.

[34] I therefore find the ID's decision is unreasonable, as it is not justified in relation to the relevant facts and law (*Vavilov* at para 85). The ID failed to consider the fundamental transformation in the nature and activities of the KDP after the fall of Saddam Hussein's government in 2003. As noted by the Applicant, all of the activities relied upon by the ID Member to demonstrate subversion pre-dated 2003. Further, the ID did not consider that the jurisprudence has recognized an exception to the irrelevance of a temporal connection to the analysis under subsection 34(1)(f) of the *IRPA*.

VI. Conclusion

[35] I find the ID's decision is unreasonable. I therefore grant this application for judicial review.

[36] The parties have not proposed a question for certification, and I agree that none arises.

JUDGMENT in IMM-2339-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The style of cause is hereby amended to list the proper name for the Respondent, the Minister of Citizenship and Immigration, effective immediately.

3. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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