Federal Court Cour fédérale

Date: 20130816

Docket: IMM-3103-12

Citation: 2013 FC 876

Ottawa, Ontario, August 16, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

BEHZAD NAJAFI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of Iran of Kurdish ethnicity. He came to Canada in 1999 and made a refugee claim that was accepted. However, he did not obtain permanent resident status because the respondent sought a declaration of his inadmissibility under section 34 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act].

[2] More specifically, on March 5, 2010, the respondent issued a report under subsection 44(1) of the Act and on March 2, 2011 referred the report to the Immigration Division of the Immigration and Refugee Board [the Division], seeking to have the applicant declared inadmissible due to his

involvement with the Kurdish Democratic Party of Iran [the KDPI]. The respondent claimed that there were reasonable grounds to believe that Mr. Najafi was a member of the KDPI and that the KDPI had engaged in the "subversion by force" of the Iranian government such that he was inadmissible to Canada by virtue of paragraphs 34(1)(b) and (f) of the IRPA.

[3] In a decision dated March 8, 2012, the Division agreed with the respondent and determined that Mr. Najafi was inadmissible, concluding there were reasonable grounds to believe that he was or had been a member of the KDPI and that the KDPI had engaged in subversion by force of two different governments in Iran. The Division therefore ruled that Mr. Najafi is inadmissible to Canada and issued a deportation order.

[4] In this application for judicial review, Mr. Najafi argues that the Division's decision should be set aside for any one of the following three reasons:

i. The Division erred in basing its interpretation of the term "membership" in paragraph 34(1)(f) of the IRPA in part on Mr. Najafi's involvement with the KDPI in Canada. He argues that in so doing the Division infringed his rights to freedom of association and freedom of expression guaranteed by sections 2(d) and 2(b) of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*] because the KDPI is a legal organization in Canada;

ii. The Division erred in its interpretation of the term "subversion by force" in paragraph 34(1)(b) of the IRPA because the applicant claims that the acts of aggression committed by the KDPI against the Iranian government were authorized

by international law as a justifiable use of force by a repressed people in furtherance of its right to self-determination. Mr. Najafi argues that the IRPA must be interpreted in accordance with international law and, accordingly, that basing an inadmissibility determination on a use of force that is recognized as legitimate under international law is incorrect; and

iii. The Division erred in finding that Mr. Najafi was a member of the KDPI because the evidence establishes that he had only minimal involvement with the organization and was never actually a formal member of it.

[5] The applicant submits that the correctness standard of review applies to the first two above errors and that the reasonableness standard applies to the final alleged error.

[6] The respondent, on the other hand, argues that the reasonableness standard of review applies to each of the errors alleged and that the Board's interpretation of the terms "member" and "subversion by force" were reasonable, as was its determination that the applicant was sufficiently connected to the KDPI to be found to be a "member" of the organization within the meaning of section 34 of the IRPA. More specifically, the respondent asserts that the Division's dismissal of the applicant's *Charter* claims was reasonable, that there was no need for the Division to have resort to international law to interpret section 34 of the IRPA, that in any event, international law principles do not sanction the use of force by the KDPI and that there was a reasonable basis for the Division's factual conclusions regarding the applicant's membership in the KDPI.

[7] For the reasons that follow, I have determined that the Division's decision should be upheld because it correctly determined that the applicant's *Charter* rights were not infringed, reasonably determined that he was or had been a member of the KDPI and reasonably held that the KDPI had engaged in "subversion by force" of the Iranian governments. Insofar as concerns the applicant's invocation of international law, I do not believe that the Division erred in finding there was no need to resort to international law or to depart from the settled interpretation of section 34 of the IRPA. Thus, for the reasons below, this application will be dismissed.

I. The Statutory Context

[8] Because the applicant's *Charter* argument relies in part on the effect of an inadmissibility finding under the Act and because the respondent's position on the inapplicability of international law rests on the wording of section 34 of the Act, it is necessary to review the provisions in the Act that are relevant to Mr. Najafi's claim. Central in this regard is section 34, which sets out the basis upon which an individual may be found inadmissible due to membership in an organization that has engaged in subversion by force of a government. At all times relevant to this application, it provided:

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 or an act of subversion against a democratic government, institution or process as they are understood in Canada;	a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
	b) être l'instigateur ou l'auteur

(b) engaging in or instigating the subversion by force of any government;	d'actes visant au renversement d'un gouvernement par la force;
(c) engaging in terrorism;	c) se livrer au terrorisme;
(d) being a danger to the security of Canada;	d) constituer un danger pour la sécurité du Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(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) 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) ou c).
Exception	Exception
(2) Paragraphs (1)(b) and (c) do not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(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 préjudiciable à l'intérêt national.

[9] Section 34 is but one of the bases upon which individuals may be found to be inadmissible to Canada; other similar provisions include section 35, which renders those complicit in human or international rights violations inadmissible, and sections 36 and 37, which render inadmissible those who have engaged in serious criminality or who are involved in organized criminality. As Justice de Montigny noted in *Stables v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1319 at para 14 [*Stables*], "The inadmissibility provisions of IRPA (s. 34, 35 and 37) aim to protect the

safety of Canadian society by facilitating the removal of permanent residents or foreign nationals who constitute a risk to society on the basis of their conduct."

[10] In Mr. Najafi's case, the inadmissibility finding did not make him subject to immediate deportation from Canada. Because he has been granted refugee status, Mr. Najafi cannot be deported to Iran unless and until the respondent Minister (or one of his delegates) issues an Opinion under subsection 115(2) of the IRPA, to the effect that Mr. Najafi "should not be allowed to remain in Canada" in light of "the nature and severity of [the] acts [he] committed" or in light of the "danger" his continued presence in Canada would pose to "the security of Canada" when balanced with the risk he might face if returned to Iran.

[11] That said, the inadmissibility determination is not without impact on Mr. Najafi. In this regard, he is not entitled to obtain permanent residency on the same basis as other Convention refugees, but, rather, must instead seek a ministerial exemption to obtain permanent resident status in Canada. A ministerial exemption may be sought either through a humanitarian and compassionate [H&C] application under section 25 of the Act or through an application for ministerial relief under subsection 34(2) of the Act. (After the June 19, 2013 amendments, the ministerial relief provision is contained in subsection 42.1(1) of the IRPA.) The parties concur that the average processing time for an H&C application is currently approximately 32 to 40 months and that ministerial relief applications take on average 5 to 8 years to be processed. Mr. Najafi has no right to obtain ministerial relief under either section 25 or subsection 42.1(1) of the IRPA, but the Minister is bound to exercise his discretion under these provisions in accordance with *Charter* values, as is more fully discussed below.

[12] As a protected person without permanent residence status, Mr. Najafi cannot apply for citizenship or sponsor other family members for permanent residency (see the IRPA, s 13). His rights to work, study and enter and leave Canada are also different from those of a permanent resident. In order to work or study, he must apply for a permit (see *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], ss 206, 212). If entitled to work, he will have a social insurance number beginning with a "9" (and be easily identifiable as lacking permanent resident status or citizenship), and if entitled to study, Mr. Najafi may be required to pay international student fees. In order to travel as a protected person, Mr. Najafi must obtain a travel document and an authorization to re-enter Canada from Citizenship and Immigration Canada (see the IRPA, s 52(1); Regulations at para 39(c)).[1]

[13] Thus, while the inadmissibility determination will not automatically result in Mr. Najafi's deportation, it does nonetheless negatively impact him.

II. The *Charter* Claims

[14] With this background in mind, it is now possible to turn to the first issue, namely, the claim that the Division's decision violates Mr. Najafi's *Charter* rights.

A. Basis of the Claims

[15] As noted, Mr. Najafi asserts that the decision violates both his freedom of expression and freedom of association because the above-described consequences flow solely from his association with the KDPI. He notes that the KDPI is not a terrorist or criminal organization but, rather, is a perfectly legal group in Canada. This fact is not disputed by the respondent.

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[1] Copies of the sections from the Act and Regulations mentioned are attached as an appendix to this decision.

[16] In light of KDPI's legal status, Mr. Najafi claims that his case is distinguishable from all the decided cases where similar *Charter* claims were dismissed because in those cases, unlike his, the applicants were members of a terrorist or criminal organization but the KDPI is neither. (The cases so distinguished by Mr. Najafi are *Stables*; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*]; and *Al Yamani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1457, 304 FTR 222 [*Al Yamani 2*]). He further argues that while it might have been permissible for the Division to premise its inadmissibility determination on his actions in Iran (as the *Charter* does not have extra-territorial reach), the Division's reliance on his involvement with the KDPI in Canada violates his *Charter* rights because the mere fact of his association with the KDPI – a legal organization – has been used by the Division to deprive him of important advantages under the IRPA that other refugees are afforded. He argues that the Division is bound to comply with the *Charter* and that its decision does not do so because his legal association with the KDPI in Canada has been used to ground the inadmissibility finding. He asserts that this erroneous finding is reviewable on the correctness standard.

[17] Mr. Najafi relies principally on the decision of this Court in *Al Yamani v Canada (Solicitor General)*, [1996] 1 FC 174, 103 FTR 105 (TD) [*Al Yamani 1*] in support of this *Charter* argument. In that case, Justice MacKay held that a decision of the Security Intelligence Review Committee and an Order in Council, issued under predecessor legislation to the IRPA, violated that applicant's freedom of association as the deportation order was based solely on Mr. Al Yamani's association with the Popular Front for the Liberation of Palestine [PFLP], an affiliate of the Palestine Liberation Organization.

[18] The provision in issue in that case – paragraphs 19(1)(e) and (g) of the *Immigration Act*, RSC 1985, c I-2 – are somewhat similar to paragraph 34(1)(f) of the IRPA. They provided:

19. (1) No person shall be granted admission who is a member of any of the following classes:	19. (1) Les personnes suivantes appartiennent à une catégorie non admissible:
[…]	[…]
(e) persons who there are reasonable grounds to believe	e) celles dont il y a des motifs raisonnables de croire qu'elles:
[…]	[…]
(iv) are members of an organization that there are reasonable grounds to believe will	(iv) soit sont membres d'une organisation dont il y a des motifs raisonnables de croire qu'elle:
(A) engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,	(A) soit commettra des actes d'espionnage ou de subversion contre des institutions démocratiques, au sens où cette expression s'entend au Canada,
(B) engage in or instigate the subversion by force of any government, or	(B) soit travaillera ou incitera au renversement d'un gouvernement par la force,
(C) engage in terrorism;	(C) soit commettra des actes de terrorisme.
[…]	[…]
(g) persons who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or are likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence;	g) celles dont on peut penser, pour des motifs raisonnables, qu'elles commettront des actes de violence de nature à porter atteinte à la vie ou à la sécurité humaines au Canada, ou qu'elles appartiennent à une organisation susceptible de commettre de tels actes ou qu'elles sont susceptibles de

[…]	prendre part aux activités illégales d'une telle organisation; […]

[19] In finding that the former provision in the *Immigration Act* violated Mr. Al Yamani's freedom of association, Justice MacKay wrote (at para 94):

> […] by providing ultimately for deportation of permanent residents who are members of an organization loosely defined, the statute does infringe on the freedom of permanent residents to associate together in organizations. Often such persons, at least those comparatively new to this country, may maintain association or membership with organizations, associated with their homelands, many of which may have had some historic record of violence but which serve a variety of purposes, as the PFLP was found to do in this case. To expose all permanent residents to the possibility of deportation because of their membership in such organizations, in my view clearly infringes on their freedom of association.

[20] The applicant urges that a similar finding be made in this case. However, as is more fully discussed below, *Al Yamani I* has been overtaken by subsequent jurisprudence of the Supreme Court of Canada and this Court.

B. <u>Analysis</u>

i. Freedom of Expression

[21] Turning, first, to the alleged violation of the right to freedom of expression guaranteed by section 2(b) of the *Charter*, this claim may be disposed of quickly as Mr. Najafi did not advance it before the Division and this, in and of itself, warrants the dismissal of the claim (*Stables* at para 30; *Toussaint v Canada (Labour Relations Board)*, 160 NR 396 at para 6, 42 ACWS (3d) 288 (FCA);

Poirier v Canada (Minister of Veterans Affairs), 58 DLR (4th) 475 at para 16, [1989] 3 FC 233, 96 NR 34 (CA)).

[22] Moreover, even if this were not the case, it is unlikely that Mr. Najafi's activities with the KDPI in Canada (which are the only activities he alleges are deserving of *Charter* protection) would constitute an expressive act to which the *Charter*'s guarantee of freedom of expression could apply. In this regard, in *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, the Supreme Court of Canada defined an expressive activity to which section 2(b) of the *Charter* applies as one that "attempts to convey meaning." It is unlikely that Mr. Najafi's actions with the KDPI in Canada would fall into this category as he testified that the organization was a social and cultural one and that he participated in its activities to meet others of Kurdish ethnicity. It is difficult to see how such actions have any expressive content. Indeed, that is precisely what Justice MacKay determined in *Al Yamani 1*, where he held that section 2(b) of the *Charter* was not engaged by a similar claim.

ii. The Division's Treatment of the Claimed Violation of Freedom of Association

[23] In terms of the alleged violation of his freedom of association, Mr. Najafi did make this claim to the Division, which rejected it. In this regard, the Division held that the inadmissibility finding did not have sufficient negative consequences for Mr. Najafi to constitute a breach of his *Charter* right to freedom of association as guaranteed by section 2(d). The Division reasoned that this was so because it was unlikely that a Danger Opinion would be issued under subsection 115(2) of the Act, given that the evidence indicated that Mr. Najafi had not engaged in any behavior that might give rise to such an opinion. Thus, the Division concluded that it was unlikely that he would be deported. As for any inconvenience associated with his possessing only protected person – as

opposed to permanent resident – status, the Division held that Mr. Najafi could apply for ministerial relief under subsection 34(2) of the IRPA, which could well be granted and, therefore, that one could not assume that the inadmissibility finding would have any significant negative consequences for Mr. Najafi. The Division thus held that premising its inadmissibility determination in part on Mr. Najafi's legal activities in Canada did not violate his freedom of association.

[24] Assessment of whether the Division's decision on this point should be upheld requires, first, determination of the applicable standard of review and second, assessment of the Division's ruling against that standard.

iii. The Standard of Review Applicable to the Division's Charter Determination

[25] As noted, the respondent asserts that the reasonableness standard of review is applicable to the Division's consideration of Mr. Najaifi's *Charter* claim. In support of this argument the respondent relies on the recent decision of the Supreme Court of Canada in *Doré v Barreau de Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], where Justice Abella, writing for the Court, held that the reasonableness standard of review was to be applied to the assessment of Mr. Doré's claim that the decision of the Disciplinary Council of the Barreau du Québec violated his right to freedom of expression. In that case, the Council sanctioned Mr. Doré for writing an intemperate letter to a judge and imposed a 21-day suspension of his ability to practice law. In so deciding, the Council exercised the discretion it was provided under legislation governing the legal profession in Québec, which affords it the duty to govern the profession and impose sanctions as it deems necessary for failure to meet appropriate professional standards.

[26] In her analysis, Justice Abella first noted that the Council, as an administrative decision-maker, was bound to "[…] act consistently with the values underlying the grant of discretion, including *Charter* values" (at para 24). She then considered both the analytical framework to be applied by a reviewing court to the *Charter* breach claimed by Mr. Doré and the standard of review to be used by a court in applying that framework.

[27] In terms of the former, Justice Abella noted that the customary test from *R v Oakes*, [1986] 1 SCR 103 [*Oakes*] for assessing whether a *prima facie Charter* breach is justified under section 1 of the *Charter* (the so-called "*Oakes* test"), does not fit well when what is being reviewed is a discretionary decision as opposed to a claim that legislation violates the *Charter*. The *Oakes* test requires assessment of four criteria to determine if a *prima facie* breach of a guaranteed right is nonetheless allowable as a "reasonable [limit] prescribed by law as can be demonstrably justified in a free and democratic society," and thus permitted by virtue of section 1 of the *Charter*. First, the court must assess whether the law being challenged pursues a valid objective that is sufficiently important (or "pressing and substantial") so as to warrant overriding a *Charter* right. Second, the court must assess whether the impugned law is rationally connected to that valid objective. Third, the court is called upon to assess whether the means adopted by the legislator to address the valid objective impair the rights in question as little as possible. Finally, the law must not have a disproportionately severe effect on those to whom it applies (see *Oakes* at 138-140).

[28] In *Doré*, Justice Abella rejected the foregoing analysis in favour of a less structured approach for discretionary administrative decisions that are alleged to affect an individual's *Charter* rights. She held in this regard that, as opposed to applying the *Oakes* test, an administrative tribunal

is instead required to balance *Charter* values with the statutory objectives enshrined in the statute it is called upon to apply. This, in turn, requires the decision-maker to, first, consider the statutory objectives and, second, assess "how the *Charter* values at issue will best be protected in view of the statutory objectives" (at para 56).

[29] On review of this sort of discretionary decision, Justice Abella held that the reviewing court is to apply the reasonableness standard and assess whether, under that standard, "[…] the decision reflects a proportionate balancing of the *Charter* protections at play … [which] calls for integrating the spirit of s. 1 into judicial review" (at para 57). Under the reasonableness standard, the court is required to assess whether the result reached by the administrative tribunal falls "within a range of reasonable alternatives" or "possible acceptable outcomes" (at para 56).

[30] The respondent argues that the foregoing analysis is applicable to the assessment of the Division's ruling on Mr. Najafi's *Charter* claim. I disagree because I believe the framework set out by Justice Abella in *Doré* applies only to discretionary decisions of administrative tribunals (which must reflect *Charter* values) and not to cases where tribunals are called upon to make substantive rulings on *Charter* rights. I am of this view for two reasons.

[31] First, the language used by Justice Abella in *Doré* consistently states that the types of administrative decisions to which the framework she posits applies are *discretionary* decisions. Thus, there is nothing in that case which would mandate its extension to situations where administrative tribunals are making substantive decisions on a *Charter* claim.

[32] Second, it has long been considered settled law that in situations where, as opposed to making a discretionary decision, an administrative tribunal is instead called upon to rule upon a substantive *Charter* claim (like a claim that legislation is invalid due to its infringement of a *Charter* right), the correctness standard of review is applicable to the judicial review of that decision. This was recognized by Justice Abella in *Doré*, relying on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]: "There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58)" (*Doré* at para 43).

[33] Recently, in *Saskatchewan (Human Rights Tribunal) v Whatcott*, 2013 SCC 11 [*Whatcott*], which was issued after *Doré*, Justice Rothstein, writing for a unanimous Supreme Court, applied a correctness review to the Saskatchewan Human Rights Tribunal's decision that the hate speech provisions in the *Saskatchewan Human Rights Code* did not violate Mr. Whatcott's freedom of expression.

[34] Thus, the *Doré* analysis does not apply to non-discretionary decisions of administrative tribunals where the tribunal adjudicates a *Charter* claim. In those cases, the applicable standard of review is correctness.

[35] Turning, then, to this case, to determine whether the Division made a discretionary decision, regard must be given both to the nature of the Division's decision-making powers under the IRPA and to the type of decision it made in the present case.

[36] In terms of the former, the wording of subsection 34(1) of the Act makes it clear that the Division is not charged with making discretionary decisions but, rather, with adjudicating as a matter of right. If the claimant falls within the statutory definitions, the Division must issue a removal order. It has no discretion in this regard (see the IRPA at para 45(d)). The Division's role is thus entirely different from that of the Minister under subsection 34(2) (now 42.1(1)) of the Act; the Minster, unlike the Division, is exercising a statutory discretion and, thus, his decisions are reviewable under the reasonableness standard for compliance with the *Charter* in accordance with *Doré*, but the Division's decisions are not.

[37] In the second place, Mr. Najafi's claim before the Division called for an adjudication of his *Charter* rights as opposed to an exercise of discretion. He argued that he could not be found to be a "member" of the KDPI, within the meaning of subsection 34(1) of the IRPA, due to his activities in Canada because such a holding would violate his *Charter* rights. This claim is conceptually indistinguishable from a claim that the statutory provisions are invalid as being overly broad: in both cases the argument is the same, namely, that the applicant's *Charter* rights prevent the application of the statutory definition to him. This is not a matter for the Division's discretion – the applicant either possesses the claimed rights or he does not.

[38] Thus, both in light of the nature of the tasks assigned to the Division under the IRPA and in light of the nature of the question it was called upon to decide, the Division's decision in respect of Mr. Najafi's *Charter* claim was not a discretionary one. And it follows from the previous discussion that in light of this conclusion the correctness standard of review applies to this portion of the Division's decision.

iv. Freedom of Association

[39] In terms of the merits of the *Charter* claim, as noted, Mr. Najafi relies principally on *Al Yamani 1* in support of his assertion that the Division's decision violated his freedom of association. The respondent attempts to find a material distinction between the wording of the *Immigration Act* and the IRPA, which I do not find convincing. However, the respondent also argues that *Al Yamani 1* has been overtaken by subsequent case law, notably by the decision of the Supreme Court of Canada in *Suresh* and by Justice Snider's subsequent decision in Mr. Al Yamani's case in *Al Yamani 2*. The respondent further asserts that application of subsection 34(1) of the IRPA to Mr. Najafi does not violate his freedom of association as he was not prevented from joining the KDPI but rather all that flowed from the association was loss of the opportunity to gain permanent residence on the same basis as other refugee claimants. The respondent argues, in reliance on *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 [*Reference Re PSERA*] and *R v Advance Cutting & Coring Ltd*, 2001 SCC 70, [2001] 3 SCR 209 [*Advance Cutting & Coring*], that freedom of association extends only to protecting the right of individuals to join an organization to pursue collectively common goals and that there is nothing in section 34 of the IRPA which prevented Mr. Najafi from joining the KDPI.

[40] I disagree with the last point advanced by the respondent for two reasons. First, the narrow definition of freedom of association offered by the Supreme Court of Canada in *Reference Re PSERA* and *Advance Cutting & Coring* has been abandoned by the Supreme Court in subsequent jurisprudence. Notably, in *Dunmore v Ontario (Attorney General),* 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*], *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health Services*], and *Ontario (Attorney General)*

v Fraser, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*], the Supreme Court held that freedom of association extends not only to the bare right of an individual to join an association and participate in its activities but also to certain of the collective activities of the association itself, like pursuit of labour negotiations on a collective basis. Secondly, the removal of legislated benefits – as opposed to the imposition of a penal sanction for the act of association – may well violate section 2(d) of the *Charter*. Indeed, the violations found in *Dunmore* and *BC Health Services* were premised on a disentitlement to legislative benefits that others were afforded. Thus, the second argument of the respondent is without merit.

[41] The same, however, cannot be said of the respondent's first argument as the respondent is correct in asserting that *Al Yamani 1* has been overtaken by subsequent jurisprudence. In this regard, the Supreme Court of Canada's decision in *Suresh*, in my view, firmly forecloses Mr. Najafi's claim to a violation of his section 2(d) *Charter* rights. In *Suresh*, the Court held, in very clear terms, that freedom of association does not extend to protect the act of joining or belonging to an organization that engages in violence, noting that "[…] s. 2 of the *Charter* does not protect expressive or associational activities that constitute violence" (at para 107).

[42] The Court also dealt with and squarely dismissed a claim similar to that made by Mr. Najafi regarding the legality of his actions in Canada: Mr. Suresh argued that all he had done in Canada was raise funds, which is a perfectly legal activity. The Supreme Court gave short shrift to this argument, finding that constitutional protection was not warranted in light of the violent activities of the organization for which Mr. Suresh raised funds. That organization was the Liberation Tigers of Tamil Eelam [LTTE], which the Canadian Security Intelligence Service had determined to be a

terrorist organization. In addition, the Court noted that any over-breadth in the exclusion provisions, which could be read as extending to those who innocently joined a terrorist organization without knowledge of its activities, was addressed through a provision similar to section 34(2) of the IRPA, under which the Minister, if acting constitutionally, would be prevented from deporting such an individual. The Court stated in this regard (at para 110):

> We believe that it was not the intention of Parliament to include in the s. 19 class of suspect persons those who innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from the s. 19 classes "persons who have satisfied the Minister that their admission would not be detrimental to the national interest". Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.

[43] Following the release of the Supreme Court's decision in *Suresh*, in *Al Yamani 2*, Justice Snider was faced with the adjudication of a judicial review application of Mr. Al Yamani in respect of a subsequent exclusion decision, this time made under section 34(1) of the IRPA. (The matter was heard following the first successful judicial review of the initial decision through Justice MacKay's decision in *Al Yamani 1*, discussed above.)

[44] Before Justice Snider, Mr. Al Yamani made arguments similar to those raised by Mr. Najafi in this case. He asserted that the exclusion finding violated his right to freedom of association (and expression) as well as his right to participate in the Palestinian people's self-determination, arguing

that "[…] the right to self-determination is protected internationally and that there is an internationally recognized right to belong to an organization that asserts self-determination, even where one or more of the organizations within the umbrella organization may be classified as terrorist" (at para 41). Justice Snider found this argument to be foreclosed by *Suresh*, reasoning that Mr. Al Yamani's case was "completely on all fours with the issue before the Supreme Court of Canada in *Suresh*" (at para 43). She thus dismissed Mr. Al Yamani's *Charter* claims.

[45] A very similar ruling was made by Justice de Montigny in *Stables*. There, the applicant was excluded under paragraph 37(1)(a) of the IRPA for organized criminality by reason of his membership in the Hell's Angels. He argued that he had not committed any crimes and that the exclusionary provision violated his freedom of association. He also noted that ministerial relief was increasingly difficult to obtain in the years following *Suresh* and that this provided a basis for distinguishing his situation from the holding in *Suresh*, echoing some of the arguments advanced by Mr. Najafi in this case. Justice de Montigny disagreed, and, based on *Suresh*, held that Mr. Stables' right to freedom of association guaranteed by the *Charter* was not violated by the inadmissibility finding, holding in this regard that "[…] freedom of association has been found to encompass only lawful activities and cannot protect a person who chooses to belong to a criminal organization" (at para 33).

[46] The applicant argues that *Suresh*, *Al Yamani 2* and *Stables* are distinguishable. He asserts that the organizations in those cases were found to have been engaged in terrorism or in criminality but that the KDPI has only engaged in attempts to subvert the Iranian governments of the Shah and Islamic Republic by force. In my view, this is not a meaningful distinction, especially on the facts of

this case. *Suresh* turns not so much on the LTTE being a terrorist organization but, rather, on the fact that it had engaged in violence. And, as concerns freedom of association, the case stands for the proposition that the *Charter* does not extend protection to the right to join or participate in associations that engage in violence.

[47] That the KDPI is such an organization is not disputed. Indeed, the evidence before the Division established that the KDPI had engaged in years of violent actions, including a violent insurrection against the Shah in 1967-1968 and armed struggle with the Iranian government in the 1980s and 1990s.

[48] The notion of "subversion by force" may well include a broader range of activities than engaging in violence to overthrow a regime. In *Oremade v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1077, [2006] 1 FCR 393, Justice Phelan held (at para 27):

> [T]he term 'by force' is not simply the equivalent of 'by violence'. 'By force' includes coercion or compulsion by violent means, coercion or compulsion by threats to use violent means, and … reasonably perceived potential for the use of coercion by violent means.

This expanded definition has been accepted in other cases, which have indicated that the notion that subversion by force includes accomplishing governmental change by illicit or improper means (see e.g. *Suleyman v Canada (Minister of Citizenship and Immigration)*, 2008 FC 780 at paras 62-64, 330 FTR 205 [*Suleyman*]; *Eyakwe v Canada (Minister of Citizenship and Immigration)*, 2011 FC 409 at paras 30-31, 200 ACWS (3d) 1123 [*Eyakwe*]; *Maleki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 131 at para 8, 211 ACWS (3d) 172).

[49] I need not decide in this case whether this broader definition of "subversion by force" might violate some other claimant's section 2(d) *Charter* rights if the association to which he or she belonged was found to come within the scope of the paragraph 34(1)(f) of the IRPA by reason only of having made a threat to use violence or the perception that it might use violence. These issues simply do not arise here because, as noted, the KDPI *did* engage in violent acts as part of its campaign to overthrow two different regimes in Iran. Thus, the holding in *Suresh* applies to the applicant, who was associated with an organization that engaged in violence.

[50] It follows, then, that the Division did not err in finding that the *Charter* did not preclude an exclusion finding based on Mr. Najafi's association with the KDPI in Iran and Canada. This finding is correct but not necessarily for the reasons offered by the Division. As indicated, I have determined there was no violation of Mr. Najafi's *Charter* guarantee of freedom of association because the KDPI is an organization that has engaged in violence and the *Charter* does not extend a constitutional right to belong to or participate in the affairs of organizations that engage in violence.

[51] I make no finding as to whether the rationale offered by the Division for its *Charter* determination is correct. As noted, the Division premised its finding on the conclusion that the impact of the exclusion decision on Mr. Najafi was too minimal to warrant *Charter* protection. This may well be incorrect as the impacts of the decision on Mr. Najafi are not trivial, as noted above. However, whether such negative impacts are sufficiently important to warrant *Charter* protection is more appropriately determined in a case where, unlike here, the issue squarely arises. Thus, I decline to comment on this issue and instead uphold the Division's *Charter* determination for the reasons set out above.

III. The International Law Claims

[52] Turning to the second argument advanced by Mr. Najafi, as indicated, this argument involves the claim that the Division erred in failing to appropriately apply international law principles to its interpretation of "subversion by force" in paragraph 34(1)(b) of the IRPA.

A. *Basis of the Claims*

[53] More specifically, Mr. Najafi asserts that both the common law and subsection 3(3) of the IRPA require that the Act be interpreted in a manner consistent with international law. He argues that international law recognizes the legality of the use of force in pursuit of a people's right to self-determination if they are "non-self-governing, and subject to a racist regime, alien subjugation, foreign domination, and exploitation/oppression/repression" (Applicant's Memorandum of Fact and Law at para 61). Mr. Najafi filed expert evidence with the Division from two international law experts, which supports the argument that the Kurds in Iran meet this definition of a "people" who may legitimately resort to the use of force in pursuit of its right to self-determination.

[54] One of those experts, Professor Craig Forcese, relies on the language of Article 1(4) of *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 (entered into force 7 December 1979, ratified in Canada in 1990) [Additional Protocol I], which states that it applies to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter

of the United Nations.” Professor Forcese argues that peoples using force to pursue self-determination should be considered to be engaged in an internal armed conflict as part of an armed force and thus protected by combatant’s privilege (or combatant immunity) under international law, in light of Article 1(4) of Additional Protocol I.

[55] The other expert, Professor René Provost, argues that “the right of peoples to self-determination is now well entrenched in treaty and customary public international law” and that this right provides, in exceptional circumstances, a legal right to use of force to bring about “external” self-determination (i.e. to create their own state) where the people is being denied the right of self-determination within the state. Professor Provost also suggests that combatant immunity would apply to such individuals and prevent the imposition of criminal sanction against those who participate in an armed struggle in pursuit of self-determination in such circumstances. He submits that a third state which surrendered an individual to be punished for participation in such an armed struggle would also be violating international law.

[56] Assessment of Mr. Najafi’s international law-based argument requires consideration of the following issues: first, what standard of review is applicable to this portion of the Division’s decision; second, did the Division commit a reviewable error in failing to consider international law; and, finally, if so, does international law mandate the interpretation Mr. Najafi advances, namely, that one must exclude from paragraph 34(1)(b) of the IRPA those organizations who legitimately use force in support of a right of self-determination?

B. Standard of Review

[57] In terms of the standard of review, there is a long line of authority which provides that the reasonableness standard is applicable to a decision that an organization falls within paragraphs 34(1)(a),(b), or (c) of the IRPA as such determinations involve matters of mixed fact and law (*Eyakwe* at para 20; *Faridi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 761 at para 16, 168 ACWS (3d) 1038; *Naeem v Canada (Minister of Citizenship and Immigration)*, 2007 FC 123 at para 40, [2007] 4 FCR 658; *Jalil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 246 at para 19, [2006] 4 FCR 471; *Kanendra v Canada (Minister of Citizenship and Immigration)*, 2005 FC 923 at para 12, 47 Imm LR (3d) 265 [*Kanendra*]; *Hussain v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1196 at para 13). The applicant submits that this long line of authority should not be applied in this case as his argument raises a pure question of law and legal issues are subject to review on the correctness standard. He relies on the decision in *Kastrati v Canada (Minister of Citizenship and Immigration*), 2008 FC 1141, 172 ACWS (3d) 180 [*Kastrati*] in support of the proposition that legal determinations are reviewable on the correctness standard.

[58] *Kastrati*, however, has been overruled by several recent cases from the Supreme Court of Canada, which have followed *Dunsmuir*. In *Dunsmuir*, the Court indicated that typically a tribunal's interpretation of its constituent statute falls within the scope of the tribunal's expertise and thus should normally be afforded deference. In the words of Justices LeBel and Bastarache, writing for the majority, "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (at para 54). The Supreme Court has reconfirmed this in several subsequent cases, underscoring that the

reasonableness standard normally should be applied to a tribunal's interpretation of its home statute, except when the question is one of general importance for the legal system as a whole, raises constitutional issues (with the exception for discretionary administrative decisions noted above in *Doré*), or, possibly, involves a question as to the tribunal's jurisdiction or a so-called "true question of *vires*" (*Dunsmuir* at paras 57-59; see also *Whatcott* at para 167; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] 3 SCR 654; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 16, [2011] 3 SCR 471; *Alliance Pipeline Ltd v Smith*, 2011 SCC 7 at para 26, [2011] 1 SCR 160; *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 34, [2011] 1 SCR 3; *Nolan v Kerry (Canada) Inc,* 2009 SCC 39 at para 34, [2009] 2 SCR 678). *Dunsmuir* also indicates that where the previous case law "has already determined in a satisfactory manner" the standard applicable to a particular question, that standard should be applied in subsequent cases without the necessity of resorting to a detailed standard of review analysis (at para 62).

[59] Here, the Division was called upon to determine if the KDPI had engaged in the "subversion by force of any government", within the meaning of paragraph 34(1)(b) of the IRPA. This inquiry involves a factual component – regarding what the KDPI did and stood for – and a legal component – regarding the meaning that should be given to "subversion by force". The long line of authority referred to above indicates that these two inquires are not to be uncoupled from each other to determine the standard of review and that a single standard – that of reasonableness – is applicable. In addition, the legal component of the question involves interpretation of the IRPA, the Division's constituent statute and a matter in respect of which the Division possesses considerable expertise.

The recent decisions from the Supreme Court of Canada, discussed above, indicate that the reasonableness standard should be applied to review of this sort of legal determination.

[60] The standard of review issue in respect of this portion of the Division's decision is very similar to the issue recently canvassed by the Federal Court of Appeal in *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87, 443 NR 1. There, the Court was called upon to review the decision of the Division, interpreting the anti-smuggling provisions contained in paragraph 37(1)(b) of the IRPA. Justice Dawson, writing for the Court, determined that the reasonableness standard applied in light of recent guidance from the Supreme Court of Canada and in light of the fact that the Division was interpreting provisions in the IRPA, as opposed to the international treaties on a related issue. Likewise, here, the Division was called upon to interpret the IRPA and did not interpret international law, as it found it unnecessary to do so as is more fully discussed below.

[61] Thus, the reasonableness standard is to be applied to review of the Division's determination that the KDPI had engaged in subversion by force of the governments of the Shah and Islamic Republic in Iran. I would note, however, that nothing in this case turns on the selection of the standard of review as the Division's determination that the KDPI falls within the scope of paragraph 34(1)(b) of the IRPA is both reasonable and, in my view, correct.

C. The Division's Decision

[62] Having settled the issue of the standard of review applicable to the Division's determination on this point, it is useful to briefly set out the Division's reasoning. In this regard, it commenced by

reviewing several cases from this Court and the Federal Court of Appeal, which define subversion and indicate "that paragraph 34(1)(b) [of the IRPA] applies no matter what type of government is involved, and that Parliament intended it to have this broad sweep" (decision at para 30). Based on this case law, the Division held that, "[…] subversion by force of the government specifically involves using force with the goal of overthrowing [the] government, either in some part of its territory or in the entire country" (decision at para 32). It continued, that it was "[…] satisfied that 'any government' includes even a despotic regime […and that] the government's actions, however oppressive they may be, are not relevant to this analysis" (decision at para 32). The Division then moved on to consider Mr. Najafi's argument based on international law and rejected it, holding that previous jurisprudence of this Court, including notably the decisions in *Suleyman* and *Maleki*, must necessarily result in the rejection of the argument. The Division noted on this point (at para 33):

> The Federal Court's repeated finding that 'subversion by force of any government' applies regardless of the kind of regime subverted indicates that an analysis of the legitimacy or legality of an organization's armed struggle is not called for in the context of an admissibility hearing – although presumably it may be very relevant to an application pursuant to IRPA 34(2).

The Division therefore rejected Mr. Najafi's argument based on international law.

D. Analysis

[63] The foregoing analysis offered by the Division, in my view, is both reasonable and, indeed, correct. The hallmarks of a reasonable decision are that it must be transparent, intelligible and justifiable and that the result reached must fall within the range of results that are acceptable in light of the facts and applicable law (*Dunsmuir* at para 47). Here, the Division's decision on this aspect of Mr. Najafi's claim meets the first of these criteria as the reasons offered are understandable, logical and sufficient to support the conclusions reached. The second criterion is also met because the result

reached is certainly a possible one in light of the wording contained in subsection 34(1) of the IRPA and the case law interpreting that provision. Indeed, as indicated, the result reached is also correct.

[64] In terms of the Act, paragraph 34(1)(b) must be contrasted with the preceding paragraph. At all times relevant to this application, the two provided:

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 or an act of subversion against a democratic government, institution or process as they are understood in Canada;	a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au 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;

[65] Given the difference in wording between the two paragraphs, it is clear that Parliament intended that different criteria apply when force is used to subvert a government. When force is present, paragraph 34(1)(b) of the IRPA stipulates that exclusion will follow if the individual or the organization he or she is a member of uses force to subvert "any" government. In contrast, if force is not present, exclusion will follow only if the government subverted is a democratic one. Parliament therefore clearly intended that paragraph 34(1)(b) of the Act should be given broad sweep to include all sorts of regimes, including those that are non-democratic.[2]

[2] The text of the IRPA reproduced above reflects the wording of the law when this proceeding was initiated. On June 19. 2013, section 34 of the IRPA was amended to merely renumber the relevant provisions.

[66] As the respondent convincingly argues, such intention is evident from the House of Commons debates and the testimony before the Standing Committee on Citizenship and Immigration, when these provisions were discussed. The applicant does not contest the appropriateness of having regard to debates in the House of Commons and Committee testimony in interpreting section 34(1) and the Supreme Court of Canada has recognized the validity of looking to legislative history in statutory interpretation cases for background as to the purpose of legislation (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 35, 154 DLR (4th) 193). As such, the legislative history of section 34 can provide helpful context as to its purpose and scope.

[67] On May 15, 2001, at the Standing Committee on Citizenship and Immigration, a Bloc Québécois [BQ] member sought to secure an amendment to paragraph 34(1)(b) of the Act by replacing the words “any government” with “democratically elected government”, arguing that “people who want to overthrow a dictatorship should sometimes be thanked” (*Standing Committee on Citizenship and Immigration*, Evidence (May 15, 2001): Motion by Ms. Madeleine Dalphond-Guiral). In reply, government members of the Committee and departmental experts indicated that paragraph 34(1)(b) was deliberately intended to have a broad sweep and to render inadmissible those who engage in violence against any type of government. They noted that the desirability of nonetheless allowing such individuals admission to Canada would be decided through the exercise of ministerial discretion under 34(2) in appropriate cases (*Standing Committee on Citizenship and Immigration*, Evidence (15 May 2001): Responses to motion of Ms. Dalphond-Guiral by Mr. Steve Mahoney, Ms. Elizabeth Tromp and Mr. Daniel Therrien). During the House of Commons debate at third reading, the BQ member noted that if paragraph 34(1)(b) had been in force 40 years ago, Nelson Mandela would have been determined inadmissible as a member of an organization that

sought to subvert the South African government because it had on occasion utilized force to accomplish this end (*House of Commons Debates*, 37th Parl, 1st Sess, No 78 (13 June 2001) at 5099 (Madeleine Dalphond-Guiral)).

[68] In light of the debates, it is clear that Parliament was very much alive to the arguments like those advanced by Mr. Najafi when it enacted paragraph 34(1)(b) of the IRPA. The legislator therefore must be taken to have chosen to render individuals inadmissible in the first instance if, amongst other things, they or their organizations engaged in the use of force to subvert any government. This includes despotic or oppressive regimes and even regimes that engaged in widespread human rights abuses, like the former government in South Africa. Someone like Nelson Mandela would be entitled to favourable consideration under paragraph 34(2) of the IRPA but not under subsection 34(1). Thus, it is clear that Parliament intended that the balancing of the soundness of motive for the use of force be a matter for consideration by the Minister under subsection 34(2) of the IRPA and not for the Division under subsection 34(1).

[69] The case law supports this interpretation. As Justice Mactavish noted in *Suleyman*, paragraph 34(1)(b) of the IRPA "proscrib[es] those who have engaged in the subversion 'by force of any government' […] regardless of the kind of government which is the target of the subversion" (at para 60). She thus rejected the applicant's claim that he ought not have been excluded because the Kurdistan Workers Party was entitled to use force as a last resort against the claimed tyranny of the regime in Turkey and its alleged mistreatment of the Kurdish people. As was noted by Justice Mactavish, a similar conclusion was reached by Justice Strayer in *Oremade v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1189, 155 ACWS (3d) 389.

[70] In my view, there was no need for the Division to resort to international law to consider whether this well-settled interpretation of paragraph 34(1)(b) of the IRPA ought to be discarded in the applicant's case in light of the clarity of the provisions in the IRPA. The applicant is correct in noting that the common law presumes that Parliament and provincial legislatures intend to act in accordance with international law and, most particularly, with Canada's international law obligations (*R v Hape*, 2007 SCC 26 at para 53, [2007] 2 SCR 292; *Daniels v White*, [1968] SCR 517 at 541, 2 DLR (3d) 1 [*Daniels*]). Indeed, this presumption is enshrined in paragraph 3(3)(f) of the IRPA, which provides:

3.(3) This Act is to be construed and applied in a manner that	3.(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
[…]	[…]
(f) complies with international human rights instruments to which Canada is signatory.	f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

[71] The presumption that a legislator intends that legislation comply with international law, however, cannot be used to override clear provisions of a statute, which is what the applicant would seek to do in this case. He argues that the words "any government" in paragraph 34(1)(b) of the IRPA cannot actually mean what they say, but, rather mean only some governments, namely, those against whom the use of force is not authorized by international law. In so arguing, Mr. Najafi seeks to have international law fulfill a function that it cannot, namely to take precedence over clear legislative language. In effect, Mr. Najafi argues that his interpretation of international law should

be used in a fashion similar to the *Charter* and render the unambiguous dispositions of the IRPA inoperative in his case.

[72] International law does not function in this fashion in my view as the presumption of compliance with international law is a rebuttable one and may be ousted by clear wording in a statute (*Németh v Canada (Justice)*, 2010 SCC 56 at paras 34-35, [2010] 3 SCR 281 [*Németh*]; *Daniels* at 541; *Pfizer Canada Inc v Canada (Attorney General)*, 2003 FCA 138 at para 20, 24 CPR (4th) 1 [*Pfizer*]). In *Németh*, Justice Cromwell, writing for the Supreme Court of Canada, stated to this effect (at paras 34-35):

> I also accept, of course, that, where possible, statutes should be interpreted in a way which makes their provisions consistent with Canada's international treaty obligations and principles of international law [… however,] [t]he presumption that legislation implements Canada's international obligations is rebuttable.

Even more directly, in *Pfizer*, Justice Strayer indicated (at para 20):

> […] I am of the view that there is no need to resort to these instruments in this case. I base this conclusion on the long-established jurisprudence that while Parliament is presumed not to intend to legislate contrary to international treaties or general principles of international law, this is only a presumption: where the legislation is clear one need not and should not look to international law.

[73] Thus, the Division did not err in declining to consult international law to interpret paragraph 34(1)(b) of the IRPA. It appropriately premised its decision regarding the meaning to be given to "subversion by force" on settled jurisprudence, which leads to the conclusion that the KDPI is an organization that attempted to subvert the governments in Iran by force.

[74] In addition, even if the Division erred in not giving further consideration to Mr. Najafi's international law argument, I do not find that he has established that international law would require the interpretation of the IRPA he advances. In this regard, it is far from certain that international law recognizes a right to use force in furtherance of self-determination in the manner Mr. Najafi suggests.

[75] As a starting point, I note that there is no debate that international law recognizes the right of peoples to self-determination. As both parties submitted, this right is contained in numerous international treaties and was recognized by the Supreme Court of Canada in *Reference re Secession of Québec*, [1998] 2 SCR 217. Nor is the question of whether this right must be exercised within existing national boundaries or whether, in certain circumstances, unilateral secession may be pursued before me. The only issue arising in the present case is whether international law provides the right to *use force* in pursuit of self-determination.

[76] In suggesting that international law does provide this right, and as noted, both of the applicant's international law experts relied on the concept of "combatant's privilege". This principle emanates from Additional Protocol I and provides that those participating in armed conflict (that falls within the bounds of the Protocol and Geneva Conventions) are immunized from the criminal punishment that would normally apply to their actions. Professor Forcese asserts that an individual participating in an armed struggle in pursuit of self-determination may be able to benefit from this criminal immunity if certain criteria are met. Professor Provost states that Canada would be in violation of its international obligations if it were to "give support to the unlawful denial [of the right to self-determination] by [another] state" (Affidavit of René Provost at para 40).

[77] There are three central problems with the applicability of "combatant's privilege" to the applicant. First, even if one accepts that the interpretation of combatant's privilege asserted by Professor Forcese is correct, the applicant would not meet one of the prerequisites identified by the professor in that he did not "perform a continuous combat function" (Affidavit of Craig Forcese at para 43). Second, even if the applicant were to be considered a combatant, which I find unlikely, he would only be protected from criminal sanction, not guaranteed refugee protection. Third, I do not accept that in finding the applicant to be inadmissible under section 34(1), Canada is "giving support to the unlawful denial of the right to self-determination by another state," given the protections provided for in the Act under sections 25 and 34(2). Thus, I do not find the concept of combatant's privilege to be of assistance to the applicant.

[78] Professor Provost constructs an additional argument based on the lack of explicit prohibition of the use of force in pursuit of the right of self-determination in international law. However, it is self-evident that a lack of prohibition of the use of force is not the same as a recognized and established positive right that should inform Canadian domestic law. I would additionally note that the applicability of such a norm to Canada, even if it were clearly established, would be uncertain, as, on at least one occasion, Canada has voted against a United Nations General Assembly Resolution that sought to more explicitly recognize the right of peoples to pursue self-determination (see UN General Assembly Resolution A/RES/37/43, "Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights").

[79] Thus, even if the Division had erred in not considering international law (which it did not), international law principles would not support Mr. Najafi's claim to exclude the KDPI from the purview of paragraph 34(1)(b) of the IRPA.

[80] For these reasons, the Division did not commit a reviewable error in finding that the KDPI was an organization that had engaged in subversion by force of the governments in Iran and therefore falls within the scope of paragraph 34(1)(b) of the IRPA.

IV. The Interpretation of Membership

[81] Mr. Najafi finally argues that the Division made an unreasonable determination in finding him to be a member of the KDPI, given the fact that he was never actually a formal member of the organization and only performed a limited number of activities on its behalf. He testified that while in Iran, he collected medicines and monies for the KDPI and, on a few occasions, delivered pamphlets on its behalf and that while in Canada participated in social and cultural activities. He asserts that this type of activity is so minimal that the Division's membership determination must be set aside. However, he mistakenly identified himself as a member of the KDPI during interviews with immigration authorities, thus demonstrating that he at one point believed he was a formal member of the Party. He does not deny supporting its goals and aims, but indicates that he does not support the use of force in pursuit of them.

[82] There is no dispute that the standard of review applicable to the Division's membership determination is reasonableness (see e.g. *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 21-24, 252 DLR (4th) 316 [*Poshteh*]; *Ismeal v Canada*

(Minister of Public Safety and Emergency Preparedness), 2010 FC 198 at para 15, 185 ACWS (3d) 708 [*Ismeal*]; *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 7 at para 16, 174 ACWS (3d) 809 [*Qureshi*]; *Kanendra* at para 12). In my view, the Division's membership determination was a reasonable one in light of the case law interpreting what types of actions may give rise to a membership finding and in light of the activities in which Mr. Najafi engaged.

[83] Two main propositions from the jurisprudence are relevant here. First, the Division is to be granted considerable deference in terms of its membership finding, as is evidenced by the applicable reasonableness standard of review. Second, the concept of membership has been given a broad interpretation so that various levels and degrees of involvement falling short of formal membership in an organization may give rise to a membership determination under paragraph 34(1)(f) of the IRPA (see *Poshteh* at paras 27 and 28; *Ismeal* at para 20; *Qureshi* at paras 19-25; *Kanendra* at paras 21-23; *Chiau v Canada (Minister of Citizenship and Immigration)* (2000), [2001] 2 FC 297 at paras 56-57, 265 NR 121 (CA)).

[84] This case is similar to *Poshteh*. There, the Federal Court of Appeal upheld a membership finding based solely on the applicant's having distributed propaganda for the proscribed organization. Here, the applicant did that and also admitted to collecting medicines and money for the KDPI. In his Personal Identification Form, filed in support of his claim for refugee protection, he wrote that he "became interested and active in the Kurdish Democratic Party of Iran […] verbally promoting the party's goals and ideology and distributing their monthly publication" and also noted that he solicited funds and medication for the Party. These facts, coupled with the requirement to interpret the notion of membership broadly, afforded the Division a reasonable basis

for concluding that Mr. Najafi was a member of the KDPI. In short, this finding is within the range of possible conclusions open to the Division. Its membership finding is therefore reasonable.

V. Conclusion and Certified Question

[85] Thus, for these reasons, I am dismissing the present application. The Division correctly determined that Mr. Najafi's *Charter* guarantee of freedom of association was not violated by its decision. It also reasonably concluded that the KDPI was an organization that engaged in subversion by force of the governments in Iran and that Mr. Najafi was a member of the KDPI, within the expanded meaning afforded to that term under paragraph 34(1)(f) of the IRPA.

[86] In light of the complexity of the issues in this case, I agreed, on an exceptional basis, to grant counsel's request to make submissions on possible certified questions following the release of draft reasons. Following receipt of a draft of these reasons, counsel for the applicant proposed the following two questions:

1. Is it a breach of section 2(d) of the *Canadian Charter of Rights and Freedoms* ["*Charter*"] to base a finding of inadmissibility on a person's legal activities in support of an organization that is legal in Canada? In assessing the applicability of section 2(d) to this analysis, can violent conduct of organization's activity abroad be considered when there is no link between the organization's activities here in Canada and the violent activity abroad?
2. Is section 34(1)(b) of the *Immigration and Refugee Protection Act* ["*IRPA*"] an express derogation from Canada's obligation to respect the right to self-determination under international law? If not, do Canada's obligations to respect the

> right to self-determination require that section 34(1)(b) be interpreted to exclude persons pursuing this right.

[87] Counsel for the respondent argues that neither of these questions is appropriate for certification as the issues posed have either already been settled by the case law or are not determinative of any appeal.

[88] Subsection 74(d) of the IRPA provides that "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question". The case law establishes three criteria for such a question, namely, that it must transcend the interest of the parties, must concern issues of broad significance or general application and must be determinative of the appeal (*Liyanagamage v Canada (Minister of Citizenship and Immigration)* (1994), 176 NR 4; *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at para 11, 318 NR 365; *Di Bianca v Canada (Minister of Citizenship & Immigration)* 2002 FCT 935 at para 22, 224 FTR 168).

[89] Here, the first group of questions proposed by Mr. Najafi does not raise an issue of general importance or broad significance because they have been settled by the previous case law, notably the decision of the Supreme Court of Canada in *Suresh*. As discussed, in my view, *Suresh* establishes that section 2(d) of the *Charter* does not protect association with an organization that engages in violence, regardless of whether the individual seeking *Charter* protection personally engaged in violent acts and also regardless of whether the violent activities of the organization were

undertaken inside or outside Canada. I, therefore, find that the first group of questions proposed by the applicant is not appropriate for certification under subsection 74(d) of the IRPA.

[90] I am, however, prepared to certify a question concerning the interplay of the right alleged to exist under international law, to use force in furtherance of an oppressed people's right to self-determination, and the interpretation to be afforded to paragraph 34(1)(b) of the IRPA, as this issue has not been squarely addressed in the previous jurisprudence and my conclusions, to a certain extent, do involve extending case law from other types of arguments to apply to Mr. Najafi's international law argument. In addition, this issue may well have implications beyond the applicant's circumstances as the arguments made with respect to the alleged legitimacy of the KDPI's actions could well arise in other contexts. I believe, however, that the applicant's proposed questions on this issue should be modified so as to not presume that there is a right to use force in pursuance of a right to self-determination in the way the applicant asserts and also so as to reflect the standard of review that I have found to be applicable. I have therefore re-worded that question to be certified as follows:

> "Do Canada's international law obligations require the Immigration Division, in interpreting paragraph 34(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, to exclude from inadmissibility those who participate in an organization that uses force in an attempt to subvert a government in furtherance of an oppressed people's claimed right to self-determination?"

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application is dismissed;

2. The following question is certified under subsection 74(d) of the IRPA:

   "Do Canada's international law obligations require the Immigration Division, in interpreting paragraph 34(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, to exclude from inadmissibility those who participate in an organization that uses force in an attempt to subvert a government in furtherance of an oppressed people's claimed right to self-determination?"; and

3. There is no order as to costs.

"Mary J.L. Gleason"

Judge

APPENDIX: Cited Legislation and Regulations

Immigration and Refugee Protection Act, SC 2001, c 27

Application	Interprétation et mise en oeuvre
3.(3) This Act is to be construed and applied in a manner that	3.(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
[…]	[…]
(f) complies with international human rights instruments to which Canada is signatory.	f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.
[…]	[…]
Sponsorship of foreign nationals	Parrainage de l'étranger
13. (1) A Canadian citizen or permanent resident, or a group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province or an unincorporated organization or association under federal or provincial law — or any combination of them — may sponsor a foreign national, subject to the regulations.	13. (1) Tout citoyen canadien, résident permanent ou groupe de citoyens canadiens ou de résidents permanents ou toute personne morale ou association de régime fédéral ou provincial — ou tout groupe de telles de ces personnes ou associations — peut, sous réserve des règlements, parrainer un étranger.
[…]	[…]
Humanitarian and compassionate considerations — request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger
25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent,

applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[…]

[…]

Security

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

(b) engaging in or instigating the subversion by force of any government;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(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) or (c).

Exception

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of

Sécurité

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

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) ou c).

Exception

(2) Ces faits n'emportent pas interdiction de

a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[As of June 19, 2013, section 34 was amended as follows:

[Depuis le 19 juin 2013, l'article 34 a été modifié comme suit :

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;

(b) engaging in or instigating the subversion by force of any government;

(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(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).

(2) [Repealed, 2013, c. 16, s. 13]]

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

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).

(2) [Abrogé, 2013, ch. 16, art. 13]]

Human or international rights violations

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(a) committing an act outside Canada that

Atteinte aux droits humains ou internationaux

35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :

constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act; or

(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

Exception

(2) Paragraphs (1)(b) and (c) do not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

[As of June 19, 2013, section 35 was amended as follows:

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in

a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;

b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la Loi sur les crimes contre l'humanité et les crimes de guerre;

c) être, sauf s'agissant du résident permanent, une personne dont l'entrée ou le séjour au Canada est limité au titre d'une décision, d'une résolution ou d'une mesure d'une organisation internationale d'États ou une association d'États dont le Canada est membre et qui impose des sanctions à l'égard d'un pays contre lequel le Canada a imposé — ou s'est engagé à imposer — des sanctions de concert avec cette organisation ou association.

Exception

(2) Les faits visés aux alinéas (1)b) et c) 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 préjudiciable à l'intérêt national.

[Depuis le 19 juin 2013, l'article 35 a été modifié comme suit :

35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :

a) commettre, hors du Canada, une des

terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*; or

(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

(2) [Repealed, 2013, c. 16, s. 14]]

Serious criminality

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;

b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la Loi sur les crimes contre l'humanité et les crimes de guerre;

c) être, sauf s'agissant du résident permanent, une personne dont l'entrée ou le séjour au Canada est limité au titre d'une décision, d'une résolution ou d'une mesure d'une organisation internationale d'États ou une association d'États dont le Canada est membre et qui impose des sanctions à l'égard d'un pays contre lequel le Canada a imposé — ou s'est engagé à imposer — des sanctions de concert avec cette organisation ou association.

(2) [Abrogé, 2013, ch. 16, art. 14]]

Grande criminalité

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un

Criminality

(2) A foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

Application

(3) The following provisions govern subsections (1) and (2):

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Criminalité

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

Application

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

a) l'infraction punissable par mise en accusation ou par procédure sommaire est

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

(e) inadmissibility under subsections (1) and (2) may not be based on an offence

(i) designated as a contravention under the Contraventions Act,

(ii) for which the permanent resident or foreign national is found guilty under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, or

(iii) for which the permanent resident or foreign national received a youth sentence under the Youth Criminal Justice Act.

Organized criminality

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada,

assimilée à l’infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

b) la déclaration de culpabilité n’emporte pas interdiction de territoire en cas de verdict d’acquittement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la Loi sur le casier judiciaire;

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n’emportent pas interdiction de territoire pour le résident permanent ou l’étranger qui, à l’expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

d) la preuve du fait visé à l’alinéa (1)c) est, s’agissant du résident permanent, fondée sur la prépondérance des probabilités;

e) l’interdiction de territoire ne peut être fondée sur les infractions suivantes :

(i) celles qui sont qualifiées de contraventions en vertu de la Loi sur les contraventions,

(ii) celles dont le résident permanent ou l’étranger est déclaré coupable sous le régime de la Loi sur les jeunes contrevenants, chapitre Y-1 des Lois révisées du Canada (1985),

(iii) celles pour lesquelles le résident permanent ou l’étranger a reçu une peine spécifique en vertu de la Loi sur le système de justice pénale pour les adolescents.

Activités de criminalité organisée

37. (1) Emportent interdiction de territoire

would constitute such an offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

Application

(2) The following provisions govern subsection (1):

(a) subsection (1) does not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest; and

(b) paragraph (1)(a) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

[As of June 19, 2013, section 37 was amended as follows:

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

pour criminalité organisée les faits suivants :

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

Application

(2) Les dispositions suivantes régissent l'application du paragraphe (1) :

a) les faits visés 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 préjudiciable à l'intérêt national;

b) les faits visés à l'alinéa (1)a) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

[Depuis le 19 juin 2013, l'article 37 a été modifié comme suit :

37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

a) être membre d'une organisation dont il y

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

Application

(2) Paragraph (1)(a) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.]

[…]

[As of June 19, 2013, the following section was added:

Exception — application to Minister

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.]

[…]

No return without prescribed authorization

52. (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.

[…]

a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

Application

(2) Les faits visés à l'alinéa (1)a) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.]

[…]

[Depuis le 19 juin 2013, l'article suivant a été ajouté :

Exception — demande au ministre

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.]

[…]

Principle of Non-refoulement

Protection

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

Exceptions

(2) Subsection (1) does not apply in the case of a person

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

Interdiction de retour

52. (1) L'exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l'agent ou dans les autres cas prévus par règlement.

[…]

Principe du non-refoulement

Principe

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

Exclusion

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

Immigration and Refugee Protection Regulations, SOR/2002-227

Entry permitted

39. An officer shall allow the following persons to enter Canada following an examination:

[…]

(c) persons who are in possession of refugee travel papers issued to them by the Minister of Foreign Affairs that are valid for return to Canada.

[…]

Entrée permise

39. L'agent permet, à l'issue d'un contrôle, aux personnes suivantes d'entrer au Canada :

[…]

c) la personne en possession d'un titre de voyage de réfugié que lui a délivré le ministre des Affaires étrangères et qui est valide pour revenir au Canada.

[…]

Issuance of Work Permits

[…]

No other means of support

206. (1) A work permit may be issued under section 200 to a foreign national in Canada who cannot support themself without working, if the foreign national

(a) has made a claim for refugee protection that has been referred to the Refugee Protection Division but has not been determined; or

(b) is subject to an unenforceable removal order.

Exception

(2) Despite subsection (1), a work permit must not be issued to a claimant referred to in subsection 111.1(2) of the Act unless at least 180 days have elapsed since their claim was referred to the Refugee Protection Division.

Applicants in Canada

207. A work permit may be issued under section

Délivrance du permis de travail

[…]

Aucun autre moyen de subsistance

206. (1) Un permis de travail peut être délivré à l'étranger au Canada en vertu de l'article 200 si celui-ci ne peut subvenir à ses besoins autrement qu'en travaillant et si, selon le cas :

a) sa demande d'asile a été déférée à la Section de la protection des réfugiés mais n'a pas encore été réglée;

b) il fait l'objet d'une mesure de renvoi qui n'a pu être exécutée.

Exception

(2) Malgré le paragraphe (1), un permis de travail ne peut être délivré à un demandeur visé au paragraphe 111.1(2) de la Loi que si au moins cent quatre-vingts jours se sont écoulés depuis que sa demande d'asile a été déférée à la Section de la protection des réfugiés.

Demandeur au Canada

200 to a foreign national in Canada who

(a) is a member of the live-in caregiver class set out in Division 3 of Part 6 and meets the requirements of section 113;

(b) is a member of the spouse or common-law partner in Canada class set out in Division 2 of Part 7;

(c) is a protected person within the meaning of subsection 95(2) of the Act;

(d) has applied to become a permanent resident and the Minister has granted them an exemption under subsection 25(1), 25.1(1) or 25.2(1) of the Act; or

(e) is a family member of a person described in any of paragraphs (a) to (d).

[…]

Study permit required

212. A foreign national may not study in Canada unless authorized to do so by a study permit or these Regulations

207. Un permis de travail peut être délivré à l'étranger au Canada, en vertu de l'article 200, dans les cas suivants :

a) l'étranger fait partie de la catégorie des aides familiaux prévue à la section 3 de la partie 6, et il satisfait aux exigences prévues à l'article 113;

b) il fait partie de la catégorie des époux ou conjoints de fait au Canada prévue à la section 2 de la partie 7;

c) il est une personne protégée au sens du paragraphe 95(2) de la Loi;

d) il a demandé le statut de résident permanent et le ministre a levé, aux termes des paragraphes 25(1), 25.1(1) ou 25.2(1) de la Loi, tout ou partie des critères et obligations qui lui sont applicables;

e) il est membre de la famille d'une personne visée à l'un des alinéas a) à d).

[…]

Permis d'études

212. L'étranger ne peut étudier au Canada sans y être autorisé par un permis d'études ou par le présent règlement.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3103-12
STYLE OF CAUSE:	*Behzad Najafi v The Minister of Public Safety and Emergency Preparedness*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 16, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	GLEASON J.
DATED:	August 16, 2013

APPEARANCES:

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