Federal Court  Cour fédérale

Date: 20141203

Docket: IMM-290-14

Citation: 2014 FC 1167

Ottawa, Ontario, December 3, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ABDLWAHID HAQI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Abdlwahid Haqi was found inadmissible to Canada, pursuant to paragraphs 34(1) (*b*) and (*f*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], as the Immigration Division of the Immigration and Refugee Board [Board] had reasonable grounds to believe that he had been a member of the Kurdish Democratic Party of Iran [KDPI], an organization which has engaged in and instigated the subversion by force of the Iranian government.

[2] As this Court was about to issue its reasons it the present file, the Federal Court of Appeal issued its decision in *Najafi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FCA 262 [*Najafi, FCA*] which, as will be seen hereafter, has a significant impact on the applicant's case.

[3] The applicant raises two arguments in his application for judicial review. Firstly, he argues the Board applied a definition of "subversion by force" in an overly broad manner, in that it does not take into account international law and the time of the subversion. Secondly, the applicant argues he does not fall under the scope of the provision and as such, ought not to be found inadmissible. Particularly, he was 12 years old when the KDPI was last militarily active and it has been 20 years since the organization has formally renounced armed struggle. While this Court has upheld a lack of temporal restriction and strict test for changes in an organization, it has done so in cases dealing almost exclusively with terrorist organizations which pre-date the Supreme Court of Canada's decision in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]. Finally, the applicant argues the Minister of Public Safety and Emergency Preparedness's delegates are profiling individuals such as the applicant, in choosing cases to bring before the Board. The Board, so he argues, refused to allow evidence to be called on whether this alleged practice contravened section 15 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 [*Charter*]; it found that even if there was clear and unequivocal evidence of discriminatory practices aggravated by the proceedings held, the Board would act as "little more than an unwilling participant, forced to perpetuate the effects of the discrimination by issuing a deportation order."

[4] The respondent argues, meanwhile, that the Board properly rejected the applicant's interpretation of paragraph 34(1)*(b)*; neither Canadian law nor international law creates a right for organizations to use violent means to overthrow a government. Moreover, even if the applicant's arguments had legal merit, they are not borne out by the facts; the KDPI engaged in a deliberate campaign of violence against successive Iranian governments, and did so, not through acts of self-defence which were restricted to military targets, nor part of armed hostilities between recognized states. The respondent finally asserts the Board did in fact conclude it has jurisdiction to consider section 15 of the *Charter*, however, it found the applicant had failed to establish a breach with respect to the substance or process of the admissibility hearing.

[5] For the reasons discussed below, this application for judicial review will be dismissed.

I. Background

[6] The applicant is a thirty year old citizen of Iran of Kurdish ethnicity.

[7] He became a member of the KDPI in 2006 at the age of 22. The KDPI is one of the oldest Kurdish parties in Iran, and was formed around the time of the founding of the Republic of Mahabad in 1946, when the KDPI took control over Mahabad city, and two neighbouring villages of Iran. In the ensuing decades, the KDPI was involved in military conflict with successive Iranian regimes that invaded the republic and engaged in brutal repression of the Kurdish people. In 1996, the KDPI made a public choice to pursue autonomy by peaceful means and there have been no documented military engagements since that time.

[8] The applicant's activities with the organization consisted of distribution of promotional and educational materials related to the cause of Kurdish independence. He inaugurated and then led a secret cell of the organization in Iran.

[9] He arrived in Canada without a visa on December 26, 2011 and made a refugee protection claim based on his membership in the KDPI which had caught the attention of the Iranian authorities.

[10] In May 17, 2012, a Canada Border Services Agency officer issued a report against the applicant under subsection 44(1) of the IRPA [Section 44 Report] opining that he is inadmissible to Canada on security grounds under paragraph 34(1)(*f*) of the IRPA as a member of an organization that had engaged in subversion by force of any government under paragraph 34(1)(*b*).

[11] On May 25, 2012, a delegate of the Minister of Public Safety and Emergency Preparedness [Minister] reviewed the Section 44 Report under subsection 44(2) of the IRPA. The Minister's delegate determined that the Section 44 Report was well-founded, and consequently referred it to the Board for an admissibility hearing under paragraph 34(1)(*f*).

II. The Admissibility Hearing

[12] On May 24, 2013, at a pre-hearing conference, the applicant applied for an order staying the admissibility hearing on the basis that the Section 44 Report and the decision to refer it to the Board were discriminatory. Applicant's counsel argued he suspects the Minister has advanced a

policy of "differential targeting" through the writing and reference of section 44 reports based on the nationality of the claimant. The Board dismissed the applicant's pre-hearing application, finding that it did not have jurisdiction "to go behind" a section 44 report or referral, citing the Order of *Collins v Canada (Minister of Citizenship and Immigration)*, 2009 16327 (FC) (IMM-2648-08) [*Collins*]. Accordingly, it would be more appropriate for the applicant to challenge the lawfulness of the Section 44 Report or referral by way of judicial review in this Court. The Board however left an open avenue for the applicant to argue that a finding of inadmissibility would result in a breach of his *Charter* rights.

[13] On July 19, 2013, the Board held an oral admissibility hearing, whereby the applicant conceded that he was a long-term member of the KDPI and that, until 1996, the KDPI had engaged in acts of violence in Iran with the specific aim of overthrowing successive Iranian regimes. Nonetheless, the applicant argued that the KDPI is not an organization described in paragraph 34(1)(*b*) because the KDPI did not engage in "subversion by force"—its acts of violence were not "illicit" or "for improper purposes". The KDPI's actions were justified under international laws of "armed conflict" because it acted against only military targets, and in self-defence and/or self-determination on behalf of the "Republic of Mahabad" in an armed conflict between states. Alternatively, the applicant argued that he became a member of the KDPI after it had renounced the use of force.

[14] On October 4, 2013, the Board held a further oral hearing in order to address this Court's judgment in *Najafi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 876 [*Najafi, FC*].

[15] On December 27, 2013, the applicant was found by the Board to be a person described under paragraph 34(1)(*f*) in the decision under review.

III. The Impugned Decision

[16] The Board concluded that there were reasonable grounds to believe that the applicant was a member of an organization that had engaged in and instigated the subversion by force of the Iranian government.

[17] The Board defined subversion under paragraph 34(1)(*b*) to include "accomplishing change by illicit or for improper purposes related to an organization" and "subversion by force" to include "coercion or compulsion by violent means" with the intended aim of overthrowing a government. The motivations of the organization or the government in question are not relevant under this provision.

[18] The Board held that the use of armed struggle within a country is an illicit means—there is no positive right under Canadian or international law to use armed force to pursue political change.

[19] Additionally, the applicant's claim that the KDPI's acts of violence were a justifiable exercise of self-defence and/or self-determination in an armed conflict under international law was not borne out of the evidence. The Board found that the KDPI's acts were not at all in self-defence, and that the KDPI did not restrict itself to attacks on military targets. The Board found that the KDPI also used violence against civilians, including police officers by taking them in

hostage and bombing pipelines. The Board further found that the Republic of Mahabad was never a recognized state, so that the laws of armed conflict, which apply between states, would not apply.

[20] With respect to the temporal component of the provision, the Board held that it is not a requirement for inadmissibility that the dates of an individual's membership coincide with the dates during which the organization committed acts of subversion by force.

[21] Finally, the applicant's claim that the KDPI had renounced violence was not borne out on the evidence. The Board found that the KDPI still maintains an armed militia (the Peshmerga) in Iraq and does not wholly condemn the use of armed struggled.

[22] Having found the applicant inadmissible, the Board issued a deportation order against him.

IV. Issues and Standard of Review

[23] This application for judicial review raises the following issues:

i) Whether the Board erred in concluding that it does not have jurisdiction to determine the lawfulness of the Section 44 Report or Referral.

ii) Whether the Board's interpretation of paragraphs 34(1)(*b*) and 34(1)(*f*) was reasonable.

[24] The applicant argues that the appropriate standard of review in the context of interpreting international law is correctness. In *Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324 (recently affirmed in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68, without a specific standard of review analysis) [*Febles*], the Federal Court of Appeal determined that the presumption of reasonableness was rebutted because the interpretation of an international convention, in that case article 1F(*b*) of the *United Nations Convention relating to the Status of Refugees*, July 28, 1951, [1969] Can. TS No 6 [*Refugee Convention*], must be interpreted as uniformly as possible. In the case at bar, this Court must consider the *Geneva Conventions* and their Additional Protocols, in order to assess the application of international law as it pertains to the right to self-determination and international humanitarian law.

[25] The respondent argues that the standard of review for revising? the Board's interpretation of the inadmissibility provisions is reasonableness, notwithstanding that this is a question of law (*B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87 at paras 64-70 [B010]).

[26] In my view, the task of the Board in the case at bar is akin to that of the Refugee Protection Board [RPD] in *B010* and not that of the RPD in *Febles*. Here, the Board was asked to interpret one of the inadmissibility provisions of the IRPA - not the Refugee Convention as incorporated in the IRPA by way of reference. It may be that the Board needs to rely on extrinsic legal concepts, be they based on international law or not, for interpreting paragraph 34(1)*(b)* of the IRPA, as the Court of Appeal did in *B010* in interpreting paragraph 37 (1)(*b*) of the IRPA. It

does not change the fact that the Board is asked mainly to interpret its home statute and not an international convention as was the case in *Febles*. Therefore, I agree with the respondent that the Federal Court of Appeal has properly determined in *B010* that the proper standard of review applicable to the Board's interpretation of paragraphs 34(1)*(b)* and *(f)* of the IRPA is reasonableness (see also *Najafi, FC* above at paras 59- 60 and *Najafi, FCA* at para 56). The applicant bears the burden of establishing that the Board's decision falls outside "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

[27] Both in his written submissions and at the hearing before the Court, counsel for the applicant put great emphasis on the fact that should this Court give the words "subversion by force" the broad interpretation retained by the Board, paragraph 34(1) *(b)* of the IRPA would cover millions of people, including the Canadian Armed Forces who participated in the mission in Afghanistan.

[28] Given this staggering scope, the applicant argues that it is surprising that admissibility hearings are so rare and he accuses the Minister of profiling and discriminating against his nationality, ethnicity or other prohibited grounds of discrimination. He adds that although the discrimination was originally manifested by the Minister who issued the Section 44 Report, it was perpetuated when the Board dismissed the applicant's application for a stay of the hearing, when such a stay was argued on the basis that the Section 44 Report and the decision to refer it to the Board were discriminatory.

[29] In my view, the applicant's failure to seek judicial review of the officer's Section 44 Report or the Minister's decision to refer the applicant to an admissibility hearing is fatal to the applicant, as the Board did not have jurisdiction to review the legality of either. In her short order rendered in *Collins*, above, Justice Hansen observed that she could not find a legislative, regulatory or jurisprudential support for the proposition that the Board has the jurisdiction to assess the validity or legality of a section 44 report and that the legality of the section 44 report or the Minister's decision to refer it to a hearing could not be attacked indirectly by way of an application for judicial review of the Board's decision, just like the applicant is attempting to do in the present file. Therefore, the Board did not err when it refused to stay the admissibility hearing nor did it err by rejecting the applicant's *Charter* argument.

VI. Reasonableness of the Board's interpretation of paragraphs 34(1)(*b*) and 34(1)(*f*) of the IRPA

A. *Subversion by force*

[30] In my view, no significant distinction can be made between the facts of this case and the facts that were before Justice Gleason in *Najafi, FC*. One of the issues raised in *Najafi, FC* was precisely whether the KDPI could be said to have engaged in the subversion by force of the Government of Iran, within the meaning and scope that Parliament intended to give to paragraph 34(1)(*b)* of the IRPA. In the comprehensive reasons given by Justice Gleason, it was found that the relevant provisions of the IRPA did not suffer any ambiguity and by referring to "any government" in paragraph 34(1)(*b*) of the IRPA, as opposed to a "democratic government", Parliament clearly intended that as long as force was used by the organization, such an organization was meant to include all sorts of regimes, such as non-democratic governments and

governments which oppress their population or part of their population in violation of human rights.

[31] At paragraph 70 of her reasons in *Najafi* FC, Justice Gleason also found that "there was no need for the [Board] 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". In *Najafi, FCA*, Justice Gauthier, writing for the Court, confirmed that the government clearly intended to give paragraph 34(1)(*b*) a broad interpretation and that it did not have to specifically indicate that it intended to overcome its international obligations, particularly when what is argued by the applicant, as in this case, is not a real violation of an international instrument to which Canada is a signatory (*Najafi, FCA* at para 62).

[32] As the decision in *Najafi, FC* was issued by the Court before the Board rendered its decision in the present case, it was reasonable for the Board to rely on it in its finding that the KDPI is an organization that has engaged in the subversion by force of successive Iranian governments.

B. *Temporality of membership*

[33] The applicant argues that he could not be said to have been a member of an organization that engaged in subversion by force because the KDPI had given up armed struggle 10 years prior to his membership. The applicant acknowledges the decision of this Court and that of the Federal Court of Appeal in *Gebreab v Canada (Minister of Public Safety and Emergency*

Preparedness), 2009 FC 1213 and 2010 FCA 274 [*Gebreab*], which adopted an interpretation of section 34 of the IRPA that is not susceptible to temporal qualification or changes within or to an organization. However, the applicant argues that in *Gebreab*, as in most decisions rendered on section 34, the organisation was also found to have engaged in acts of terrorism and as importantly, that the decision pre-dates the Supreme Court's decision in *Ezokola*. The applicant views the Supreme Court's limitation of complicity and guilt by association as having an impact on the notion of membership in an organisation for purposes of admissibility.

[34] However, if we were to distinguish between cases where an organisation is engaged in subversion by force and cases where it is also engaged in acts of terrorism, it would result in amending the plain wording of section 34 of the IRPA, as no such distinction exists. Section 33 and paragraph 34(1)*(f)* are clear on the face of the language: the provisions "include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur" and point to organizations that "[engaged], [have] engaged or will engage in acts referred to in paragraph (*a*), (*b*) [subversion by force], (*b*.1) or (*c*) [terrorism]." The relevant provisions do not support the distinction that the applicant invites the Court to make between organizations that engage in subversion by force alone and those that in addition, engage in acts of terrorism.

[35] Finally, this Court's jurisprudence is consistent: taking into consideration the government's concern for public safety and national security, and in light of the availability of a relief from the application of subsection 34(1) of the IRPA, the term "member" ought to be interpreted broadly (*Canada (Minister of Citizenship and Immigration) v Singh*, (1998) 151 FTR

101 at para 52; *Gebreab* at para 24-25; *B074 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1146 at para 27).

[36] As to the Supreme Court's decision in *Ezokola*, I share the view expressed by Justice Strickland in *Nassereddine v Canada (Minister of Citizenship and Immigration*, 2014 FC 85 [*Nassereddine*], and by Justice Zinn in *Kanazendran v Canada (Minister of Citizenship and Immigration)*, 2014 FC 384, that the decision did not change the test for admissibility pursuant to subsection 34(1)(*f*). In *Ezokola*, the Supreme Court was asked to interpret Article 1F of the *Refugee Convention* in light of the applicable international law. Complicity and membership in an organization are two very distinct concepts and the interpretation of the former, contained in an international convention, cannot be said applicable to the latter, contained in a domestic legislation. We can neither infer from the Supreme Court's desire to bring the Canadian approach in line with international law (and thus restrict the scope of complicity), a need to overturn jurisprudence that has been consistent in interpreting the concept of "membership in an organization".

[37] Although the argument does not appear to have been made before the Federal Court of Appeal in *Najafi, FCA*, the latter decision was rendered post *Ezokola*. The Supreme Court's decision in *Ezokola* had visibly, and I would add rightfully, no impact on the interpretation the Federal Court of Appeal gave to paragraphs 34(1)(*b*) and (*f*) of the IRPA.

[38] In addition and as it was the case in *Nassereddine*, the applicant admitted he had been a member in good standing at the KDPI. Therefore, there is no need to assess the facts of this case

against the factors used to determine an individual's membership in an organization or to assess whether the applicant was complicit of acts of subversion by force, as a means to establish membership. In other words, there is no need for an assessment of complicity, which would be incidental to the overall analysis.

VII. Conclusion

[39] For these reasons, the applicant has not convinced me that the Board's finding that he is inadmissible for having been a member in an organization that has been engaged in and instigated the subversion by force of any government is unreasonable and his application is dismissed.

[40] At the hearing, the applicant proposed the following questions for certification:

(i) Is international law a relevant consideration in assessing the definition of "subversion by force" under paragraph 34(1)(*b*) of the IRPA? If so, is the onus on the Minister to show that alleged "subversive" actions are contrary to international law?

(ii) Was the analysis finding that the KDPI was still a described organization when the applicant joined in 2006 reasonable? (Should the reasoning of the Supreme Court of Canada in *Ezokola* have been taken into consideration in assessing the scope of paragraph 34(1)(*f*)?

(iii) Does the Board have the jurisdiction to consider the impact of discrimination under section 15 of the *Charter*?

[41] However and as indicated before, the decision in *Najafi*, FCA was rendered as this file was under reserve and it properly answers questions i) (expressly) and the second part of question ii) (implicitly).

[42] The first part of question (ii) has been settled by the Federal Court of Appeal in *Gebreab*, which I view as still being good law.

[43] Finally, question (iii) was answered by the Board who found that it did have jurisdiction to consider the impact of discrimination under section 15 of the *Charter*. It simply and rightly found that it did not have jurisdiction to review the officer's decision to issue the Section 44 Report or the Minister's decision to refer the applicant to an admissibility hearing. Therefore, that question is not determinative of the present application, nor would it be determinative of an appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No question of general importance is certified.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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