Federal Court of Appeal | Cour d'appel fédérale

Date: 20141107

Docket: A-281-13

Citation: 2014 FCA 262

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
NEAR J.A.

BETWEEN:

BEHZAD NAJAFI

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Toronto, Ontario, on April 1, 2014.

Judgment delivered at Ottawa, Ontario, on November 7, 2014.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: PELLETIER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] This is an appeal from the judgment of Gleason J. (the judge) of the Federal Court dismissing Mr. Najafi's application for judicial review of the decision of the Immigration Division of the Immigration and Refugee Board (the Division) that found him inadmissible pursuant to paragraphs 34(1)(*b*) and (*f*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). In its decision, the Division found that there were reasonable grounds to believe that Mr. Najafi was or had been a member of the Kurdish Democratic Party of Iran

(KDPI) and that the KDPI had engaged in or instigated the subversion by force of the Iranian government.

[2] The judge certified the following question 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*, S.C. 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?

[3] In this appeal, Mr. Najafi also argues, as he did before the Division and the judge, that paragraph 34(1)(*f*) of the IRPA has to be construed and read down to avoid a violation of his freedom of association (section 2(d) of the *Canadian Charter of Rights and Freedoms* (the Charter)).

[4] For the reasons that follow, I propose that this appeal be dismissed.

I. Facts

[5] Mr. Najafi is a citizen of Iran of Kurdish ethnicity. He arrived in Canada in 1999 and made a refugee claim that was accepted. He thus has refugee status. However, he does not have permanent resident status in Canada. Indeed, on March 5, 2010, a report under subsection 44(1) of the IRPA was issued regarding Mr. Najafi. On March 2, 2011, this report was referred to the Division in order to have Mr. Najafi declared inadmissible due to his involvement with the KDPI.

[6] The Minister of Public Safety and Emergency Preparedness (the Minister) has never alleged that Mr. Najafi was personally involved in any act of violence, including an act to subvert the government by force. The issues before the Division were whether Mr. Najafi had been a member of the KDPI and whether such organization falls within the scope of paragraphs 34(1)(*f*) and (*b*) of the IRPA.

[7] During the inadmissibility proceedings, Mr. Najafi, in addition to his testimony, provided evidence from a senior member of the KDPI in Canada, from a journalist well versed in the activities of the KDPI, and from two international law experts on the legality of the use of force in international law in the context of an oppressed people seeking self-determination.

II. The decision of the Immigration Division of the Immigration and Refugee Board

[8] First, the Division concluded that there were reasonable grounds to believe that Mr. Najafi was a *de facto* member of the KDPI within the broad meaning of the term "member" in paragraph 34(1)(*f*) of the IRPA. Although this conclusion is not being challenged on appeal, I note that the Division relied on Mr. Najafi's association with the KDPI both in Iran and subsequently in Canada. Mr. Najafi relies on this conclusion to argue that subsection 2(d) of the Charter must be considered in construing this provision. Had the Division based its findings solely on his participation in Iran, the Charter would not have applied.

[9] With respect to the KDPI, the Division stated that there is evidence (i) that the KDPI is an international organization with many chapters in various countries including Canada, (ii) that membership in the KDPI in Canada would automatically make a person a member of the KDPI

in Iran too, and (iii) that applicants for KDPI party membership in Canada must be approved by the KDPI in Kurdistan (paragraph 24 of the decision).

[10] The Division rejected the argument that the KDPI had two rival factions or one separate political organization distinct from the military wing. The Division found that in fact the KDPI operated under a unified common structure comprised of sections that are complementary, but functionally distinct, and that the activities of its military wing may be imputed to the organization as a whole and to each member of the organization for the purpose of an inquiry under paragraph 34(1)(*f*) (paragraph 15 of the decision).

[11] Second, the Division reviewed the concept of "subversion by force of any government". It noted that the word "subversion" is not defined in the IRPA, reviewed the jurisprudence of this Court and of the Federal Court, and considered definitions from dictionaries such as *Black's Law Dictionary*, 6th edition (paragraphs 27 to 31 of the decision).

[12] The Division then expressed the view that "subversion by force of a government" may be distinguished by its specific objective from the broader concept of use of force against the state. It specifically involves using force with the goal of overthrowing the government, either in some part of its territory or in the entire country. The Division was also satisfied that the words "any government" include even a despotic regime, and that the government's actions, however oppressive, are not relevant to the analysis (paragraph 32 of the decision).

[13] In view of the above, the Division concluded at paragraph 32 of its decision that:

> While there may be other possible interpretations, I find that the jurisprudence indicates that using force with the goal of overthrowing any government amounts to subversion by force.

In making this decision, the Division rejected Mr. Najafi's argument that "subversion by force of any government" must necessarily refer to the unlawful use of force and that legitimate uses of force in international conflicts such as those set out in the affidavits of his legal experts should not fall within the definition. It found that analysis of the legitimacy or legality of the armed struggle is not called for in the context of an inadmissibility hearing – although it may be very relevant to an application for a ministerial exemption pursuant to subsection 34(2) (now 42.1(1) of the IRPA) (paragraph 33 of the decision).

[14] Thirdly, the Division proceeded to determine whether the KDPI's objective had been to overthrow the government of Iran. It found that the KDPI advocated and participated in the overthrow of the Shah of Iran and that, later on, the KDPI's long-term objective of establishing a democratic socialist society within a federal Iran included the replacement of what the KDPI described as the "theocratic dictatorship" of the "reactionary and bloodthirsty regime of [the] Islamic Republic" with a new democratic federal system: the Federal Republic of Iran (paragraphs 34 to 36 of the decision).

[15] The Division then reviewed the KDPI's methods. After acknowledging that there was considerable evidence that the KDPI's use of force had largely been in self-defence, it found that the KDPI nonetheless deliberately used armed force to try to overthrow the Iranian government and that this was part of its strategic repertoire. This was certainly true in the 1967-1968 period, during which it was engaged in an unsuccessful armed uprising against the Shah of Iran. In 1973,

the KDPI "committed itself formally to armed struggle". The Division then noted that the KDPI's armed conflict with the Iranian government was at its height in 1982 and 1983, during which it was driven out of population centres and forced into guerrilla warfare in the mountains, although it temporarily recaptured the town of Bukan in September 1983 (paragraphs 37 to 41 of the decision).

[16] The Division further noted that from the mid 1980s to early 1990s KDPI forces were in control of the countryside with support from the Kurdish population while the Iranian forces held the cities. It found that the KDPI did attack Iranian forces within areas under KDPI control prior to the KDPI mid-1990s withdrawal of its armed forces from the Iranian territory (paragraphs 41 to 42 of the decision).

[17] The Division concluded that overall the evidence provided by both parties was sufficient to meet the low threshold of establishing reasonable grounds to believe that the KDPI has engaged in or instigated the subversion by force of a government (paragraph 43 of the decision).

[18] The Division rejected Mr. Najafi's argument that the KDPI had expressly given up any form of violence, stating that the KDPI still maintains a military wing that trains in war tactics. It also held that after the alleged renunciation of violence, there was some evidence of continued KDPI guerrilla attacks within Iran. Thus, even if one were to accept that there was an exception where "a violent organization has transformed itself into a legitimate political party and has expressly given up any form of violence", this exception would not apply to the KDPI in this case (paragraphs 11 to 13 of the decision).

[19] The Division rejected Mr. Najafi's argument that paragraph 34(1)(*f*) should not be read to include a lawful organization in Canada that has not engaged in unlawful activities outside of Canada because this would constitute a violation of his constitutional right to freedom of association (section 2(d) of the Charter). The Division found that Mr. Najafi can continue to live in Canada and participate freely in the KDPI if he wishes, and he can apply for a ministerial exemption pursuant to subsection 34(2) of the IRPA. Thus, it held that it cannot be assumed that holding Mr. Najafi inadmissible on the basis of paragraph 34(1)(*f*) of the IRPA would have "any significant negative legal consequences for him, let alone any sufficient to constitute a breach of his Charter rights" (paragraphs 16 to 18 of the decision).

III. The Federal Court decision

[20] The judge summarizes her findings at paragraph 7 of her reasons, reported under the neutral citation 2013 FC 876 (the Reasons) as follows:

> 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) Paragraph 34(1)(*b*) and International law

[21] In Part III of her reasons, starting at paragraph 52, the judge deals with Mr. Najafi's argument that "subversion by force of any government" (paragraph 34(1)(*b*) of the IRPA) cannot

be construed as including the KDPI's use of force against the Iranian government because it was legitimate to use such force under international law.

[22] After summarizing Mr. Najafi's expert evidence (paragraphs 54 and 55 of the Reasons), the judge ruled that she had to determine three issues, namely:

i) What standard of review is applicable?

ii) Did the Division commit a reviewable error in failing to consider international law; and

iii) If so, does international law mandate the interpretation Mr. Najafi advances?

[23] In respect of the first issue, the judge acknowledged that the most recent decisions of the Supreme Court of Canada would normally mandate that deference be afforded to the Division's interpretation of its home statute or one closely related to its function. She then considered that a long line of authority shows that determining whether the actions of an individual or an organization fall within the scope of paragraph 34(1)(*b*) is a question of mixed fact and law and that the two requirements (the factual and legal interpretation of the words "subversion by force of any government") are not to be uncoupled (paragraph 59 of the Reasons). Furthermore, she notes the similarity between the question before her and the one before this Court in *B010 v. Canada (Citizenship and Immigration)*, 2013 FCA 87 [*B010*] (paragraphs 58 to 60 of the Reasons).

[24] The judge concluded from this analysis that the Division's finding regarding the applicability of paragraph 34(1)(*b*) is to be reviewed on the reasonableness standard. However, the judge expressly held that the selection of the standard of review is not determinative. She

found that the Division's interpretation of paragraph 34(1)(*b*) is not just reasonable, it is also correct (paragraph 61 of the Reasons).

[25] Turning to the second issue under this heading – did the Division err in not considering international law – the judge found that the context shows 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)" (paragraph 68 of the Reasons).

[26] The judge based this conclusion on her analysis of the wording of the paragraph in the context of the section as a whole, including the legislative history (paragraphs 64 to 67). She also found support for her interpretation of paragraph 34(1)(*b*) in the case law and in the fact that the presumption that the legislator intended to comply with international law cannot be used to override clear provisions of a statute. Therefore, in her view, the Division did not err in declining to consult international law to construe paragraph 34(1)(*b*) (paragraphs 69-73).

[27] The judge also went further and found that even if she were wrong concerning how international law was to be handled, Mr. Najafi did not establish that international law recognizes the use of force in furtherance of self-determination in the manner suggested (paragraphs 74–79 of the Reasons). Among other things, the judge ruled that Mr. Najafi does not fall within the definition of "combatant" as he never performed a "continuous combat function". She also found that in light of section 25 (the ministerial exemption based on humanitarian and compassionate considerations) and subsection 34(2) of the IRPA, Canada could not be found in contravention of

its international obligations simply because Mr. Najafi was found inadmissible under subsection 34(1) of the IRPA (paragraphs 74 to 79 of the Reasons).

(ii) Section 2(d) of the Charter

[28] In paragraphs 23 to 51 of her reasons, the judge analysed Mr. Najafi's submission that the Division's interpretation violates right to freedom of association under section 2(d) of the Charter and, thus, offends the presumption that Parliament intended the IRPA to operate in accordance with the Charter.

[29] The Division construed paragraph 34(1)(*f*) without reference to this presumption of compliance with the Charter because, in its view, the matter did not engage a constitutional right.

[30] On this issue, the judge applied the standard of correctness, and rejected the Minister's argument that the reasonableness standard set out by the Supreme Court of Canada in *Doré v. Le Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 applied [*Doré*]. In her view, the deferential standard of reasonableness does not apply when the Division is called upon to make substantive findings on Charter rights, which is what happened here. The judge further noted that the role of the Division is entirely different from that of the Minister under subsection 34(2). In her view, it is only in the latter case – when the Minister is exercising his statutory discretion – that the decision will be reviewable under the reasonableness standard for compliance with the Charter in accordance with *Doré* (paragraphs 32 and 36 of her Reasons).

[31] In respect of the merits of Mr. Najafi's argument, the judge relied on *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, and *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, to reject the Minister's argument that section 2(d) was not engaged at all because this matter only involved the removal of legislated benefits (see paragraph 11 of the Reasons, in which the judge describes the impact of the Division's decision on Mr. Najafi).

[32] The judge agreed with the Minister that the decision of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 [*Suresh*] offers much guidance in respect of Mr. Najafi's submissions in this case. She first noted that in *Suresh*, the Supreme Court of Canada held that freedom of association does not extend to protect the act of joining or belonging to an organization that engages in violence. In her view, the Supreme Court of Canada also gave short shrift to Mr. Suresh's argument that all his activities in Canada were perfectly legal. Finally, she relied on the following passage of *Suresh*, which dealt with section 19 (the predecessor to section 34):

> 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.

[33] The judge then reviewed the most relevant Federal Court decisions since *Suresh*. Having acknowledged Mr. Najafi's argument that these cases, as well as *Suresh*, are distinguishable on their facts, the judge nevertheless found that all of these cases support the principle that section 2(d) of the Charter does not protect membership in organizations that use violence. All agree that the KDPI engaged in violence many years as part of its campaign to overthrow two different regimes in Iran.

[34] Having satisfied herself that there would be no violation of Mr. Najafi's constitutional rights, the judge notes that it was unnecessary to go on to discuss the rationale offered by the Division.

IV. Legislation

[35] At the relevant time, the sections of the IRPA of interest read as follows:

3. (1) The objectives of this Act with respect to immigration are	**3.** (1) En matière d'immigration, la présente loi a pour objet :
(h) to protect public health and safety and to maintain the security of Canadian society;	h) de protéger la santé et la sécurité publiques et de garantir la sécurité de la société canadienne;
(3) This Act is to be construed and applied in a manner that	(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
(d) ensures that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination and of the equality of English and French	d) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la Charte canadienne des droits et libertés, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et,

as the official languages of Canada;	d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada;
(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.
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;
(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).

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect 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.
[Repealed, 2013, c. 16, s. 13]	[Abrogé, 2013, ch. 16, art. 13]
(as mentioned earlier, section 34(2) was repealed and a new version enacted in subsection 42.1(1) of the IRPA in June 2013).	(Tel que déjà mentionné, le paragraphe 34(2) a été abrogé et une nouvelle version adoptée au paragraphe 42.1(1) de la LIPR en juin 2013).

V. The Issues

[36] The judge certified the question set out in paragraph 2 above. Mr. Najafi states in the conclusion of his memorandum (at paragraph 116) that this question should be answered in the affirmative. However, in his memorandum (see paragraphs 2 to 5, 54 and 92 to 114) and, at the hearing before us, he never addressed the question as formulated by the judge.

[37] Mr. Najafi reformulates the substantive questions to be reviewed on appeal as follows:

> Did the Court err in its assessment of the Division's failure to apply international law principles to its interpretation of "subversion by force" in section 34(1)*(b)* of the IRPA?
>
> Did the Court err in its assessment of the Appellant's arguments on subversion by force of any government?

[38] Also, Mr. Najafi raises the following question in his memorandum:

> Did the Applications judge err in law by finding that the Tribunal decision did not breach the Appellant's section 2(d) right to freedom of association under the Charter?

However, as I explain in paragraphs 99 and 100 below, my focus will be on the interpretation of paragraph 34(1)(*f*) of the IRPA.

[39] Mr. Najafi does not challenge any of the Division's factual findings. Indeed, Mr. Najafi relies on the Division's finding that he was a member of the KDPI to support his submission on the issues referred to above, particularly his argument based on section 2(d) of the Charter.

VI. Analysis

A. *The Certified Question and paragraph 34(1)(*b*) of the IRPA*

(1) Preliminary comments

[40] It is trite law that the threshold for certifying a question is: is there "a serious question of general importance which would be dispositive of an appeal", (*Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 at paragraph 11).

[41] It is worth reproducing again the question certified by the judge:

> Do Canada's international law obligations require the Immigration Division, in interpreting paragraph 34(1)(*b*) of the *Immigration and Refugee Protection Act*, S.C. 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?

[42] At paragraph 90 of the Reasons, the judge states very clearly that the question she was willing to certify concerns the interplay of the right alleged to exist under international law and the interpretation to be afforded to paragraph 34(1)(*b*) of the IRPA. However, if one takes the

certified question literally, it is evident that international law does not require any exclusion, for it normally has no direct application in the domestic law of Canada. Moreover, this would not constitute a serious question, given that the role of international law in the interpretation of statutes i.e., the interplay between the two) has been discussed in several decisions of the Supreme Court of Canada and of this Court, including decisions dealing specifically with the IRPA. The established principles are of general application. Thus, they do apply to the interpretation of paragraph 34(1)(*b*) of the IRPA.

[43] These principles are summarized in *Ruth Sullivan, Sullivan on the Construction of Statutes* (5th ed. 2008), chapter 20 ("*Construction of Statutes, 2008*"). As noted by the author at page 537, international law is generally used as an aid in interpreting domestic legislation. Both parties agree that the presumption that the legislator intended to comply with Canada's international law obligations is rebuttable.

[44] This may well explain why, as mentioned earlier, Mr. Najafi reformulated the questions to be answered in respect of paragraph 34(1)(*b*) (see paragraph 37 above).

[45] That said, the judge's intent becomes clear when one considers her comments in context - both the Division and the judge concluded that the presumption referred to above was rebutted without the need to consider and assess the content of international law because of the clear and unambiguous wording of paragraph 34(1)(*b*).

[46] From this, I understand that the question to be answered by this Court is:

> Can paragraph 34(1)(*b*) of the IRPA be interpreted to exclude from its ambit the alleged right to use force in an attempt to subvert a certain type of government in furtherance of an oppressed people's claimed right to self-determination assuming that such right is recognized under Protocol I of the Geneva Conventions of 1949?

B. *The international law in issue: preliminary comments*

[47] In this case, the only relevant international human rights instrument to which Canada is a signatory, within the meaning of paragraph 3(3)(*f*) of the IRPA, is the *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, ratified by Canada in 1990 ("Protocol I").

[48] It is well known that the Geneva Conventions to which Protocol I relates and Protocol I itself are intended to protect the civilian population during an armed conflict as defined therein as well as the rights and obligations of "combatants" within the meaning of Protocol I and the Geneva Conventions. Thus, these instruments generally deal with what is often referred to in international law as *jus in bello* (conduct of war) as opposed to *jus ad bellum* (the right to wage war).

[49] The international law issue that is relevant in this appeal is not whether international law recognizes the right of oppressed peoples to self-determination. That concept is not disputed. It was considered in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

[50] Rather, the focus is on whether force can be used to achieve external self-determination against colonial domination, or alien occupation and racist regimes. As acknowledged during the

hearing, Mr. Najafi's experts do not rely on an alleged customary rule of international law in that respect. In fact, in his affidavit, René Provost, at paragraph 34, clearly states that:

> 34. The manner by which a people can arrive at and express a choice under its right to external self-determination is not clearly stipulated by international law.

[51] Mr. Najafi's position appears to be that in this very narrow set of circumstances, the legality of an oppressed people's use of force to exercise the right to self-determination is positively affirmed in binding treaties. Mr. Najafi's experts point only to Protocol I in support of this assertion (see for example René Provost's affidavit at paragraph 41). The argument is that the use of force (*i.e.*, violence) by the KPDI is therefore legitimate, and as such, cannot fall within the ambit of "subversion by force of any government" within the meaning of paragraph 34(1)(*b*).

[52] I do not understand Mr. Najafi to say that Protocol I or the Geneva Conventions contain any provision dealing specifically with the right of combatants to be granted entry to the signatories' territories. Neither Protocol I nor the Geneva Conventions requires the signatories to grant any type of immigration status to these combatants or anybody else in their countries. As a matter of fact, there is no such provision.

[53] Hence, nobody actually argues that by setting out an inadmissibility provision such as paragraph 34(1)(*b*) in the IRPA, Canada would be in violation of Protocol I or the Geneva Conventions.

[54] This is in contrast to the 1951 *Convention relating to the Status of Refugees* (the Refugee Convention) which expressly deals with the grant of a specific status – refugee status. As mentioned, Mr. Najafi still has refugee status, despite the fact that he was found to be inadmissible. It is worth reiterating that inadmissibility should not be confused with removal; these are two distinct concepts. It is not disputed that Mr. Najafi cannot be removed without additional substantive steps being taken in accordance with the provisions in the IRPA meant to ensure protection against "refoulement" as set out in the Refugee Convention.

C. *The standard of review*

[55] In this appeal, this Court's role is to assess whether the judge chose the appropriate standard of review for each of the questions before her and whether she applied them properly (*Agraira v. Canada (Public Safety and Emergency Preparedness*, 2013 SCC 36 at paragraphs 45 to 47 [*Agraira*]).

[56] Turning now to the standard chosen by the judge, I agree with her analysis that there is no basis, in the present context, for ousting the presumption that deference should be afforded to the Division's interpretation of its home statute (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paragraph 34, *Agraira* at paragraph 50, *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 20 to 21, 33). This is especially so when one considers that the issue here is not whether the Division improperly interpreted an international instrument or a rule of customary international law. Rather, it is whether it erred in concluding that the legitimacy of the use of force is not an issue to be considered because of the clear and unambiguous language of paragraph 34(1)(*b*) of the IRPA.

[57] This means that to determine if the judge applied the standard appropriately, I must assess whether on the appropriate contextual and purposive analysis of paragraph 34(1)(*b*), the interpretation adopted by the Division is within the range of possible, acceptable outcomes.

D. *Interpretation of paragraph 34(1)(*b*)*

[58] Before embarking on my analysis of the Division's interpretation of paragraph 34(1)(*b*), I will deal briefly with two arguments put forth by Mr. Najafi.

[59] First, at the hearing, Mr. Najafi submitted that, as a matter of principle, neither the Division nor the judge could conclude that the presumption of compliance was ousted before examining his expert evidence on the legitimacy of the KDPI's use of force. Second, he argued that again, as a matter of principle, to oust the presumption referred to above, the legislator must expressly state that its international obligations should be disregarded (memorandum of fact and law, paragraph 93).

[60] With respect to the first question, it is clear that like any decision-maker tasked with statutory interpretation, the Division must apply the Driedger modern approach to statutory interpretation (*Construction of Statutes*, 2nd Edition, 1983 at page 87):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[61] International law may be an important part of the legal context, but it is only one of many factors and presumptions that are considered in applying this modern approach. In my view,

relevant international law, like other relevant elements of the legal context, should ideally be taken into account before concluding whether or not a text is clear or ambiguous. I note that this is also the view expressed in *Construction of Statutes*, 2008 at page 547 but as mentioned by the author, many courts still consider ambiguity a prerequisite.

[62] That said, the modern approach is contextual. There is therefore no single way to apply it. Indeed, there may be cases where the other factors of the relevant context are so strongly in favour of a particular interpretation that international law could only have little to no impact. In such cases, a decision-maker may not be required to go through the exercise of assessing the evidence before it, particularly when what is argued is not really a direct violation of an international instrument to which Canada is a signatory, or does not involve a particularly well established rule of customary international law.

[63] Moreover, recently, the Supreme Court of Canada in *Németh v. Canda (Justice)*, 2010 SCC 56, [2010] 3 S.C. R. 281 [*Németh*], made the point that section 115 of the IRPA, read in the context of the statute as a whole, was clear, before it reviewed the extent of Canada's obligations under the Refugee Convention. Thereafter, having reviewed the Refugee Convention and concluded that it provided for more than what was reflected by the meaning it earlier ascribed to section 115, the Court simply said that the clear meaning of the section must be given effect as the presumption of compliance with international law is rebuttable (paragraphs 31, 34 and 35).

[64] Turning to Mr. Najafi's second argument, I cannot agree that the legislator must expressly state in the provision at issue that its international obligations should be overcome. If it

were so, the Supreme Court of Canada could not have reached the conclusion that it did in *Németh* that section 115 of the IRPA does not address removal by extradition when it was acknowledged that the ordinary meaning of the words used in the section, "removed from Canada", could include extradition as a form of removal. Thus, the matter is not one of principle. Rather, it is simply a question of properly applying the contextual approach, taking into consideration the words of paragraph 34(1)(*b*) (in French and English) and reading them in their entire context harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. In assessing the reasonableness of the Division's interpretation, I will now proceed in this way.

[65] As noted by the Division, the word "subversion" is not defined in the Act, and there is no universally adopted definition of the term. The *Black's Law Dictionary*'s definition to which the Division refers at paragraph 27 (particularly, the words "the act or process of overthrowing … the government") is very much in line with the ordinary meaning of the French text («actes visant au renversement d'un gouvernement »). Although in certain contexts, the word "subversion" may well be understood to refer to illicit acts or acts done for an improper purpose, the words used in the French text do not convey any such connotation. I am satisfied that the shared meaning of the two texts does not ordinarily include any reference to the legality or legitimacy of such acts.

[66] I note that the word "subversion" is used only in the English version of paragraph 34(1)(*b*), while it is used in both the English and French versions of paragraph 34(1)(*a*). This may or may not signal a different meaning, but it is not my purpose to properly construe

paragraph 34(1)(*a*) in this appeal. I will only note that in *Qu v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 71, rev'd in 2001 FCA 399, the application judge was dealing with a predecessor of paragraph 34(1)(*a*), and this Court never had to deal with the meaning of "subversion" on appeal.

[67] In the provision at issue here, the word "subversion" must be read in the context of the expression "subversion by force of any government" (in French: "actes visant au renversement d'un gouvernement par la force"), whereas in paragraph 34(1)(*a*), it is used in reference to "an act of subversion against a democratic government".

[68] While Mr. Najafi has attempted to frame the debate around the interpretation in terms of the words "subversion by force" in paragraph 34(1)(*b)*, and the legitimacy of the use of the force in certain contexts mentioned above under international law, it is apparent from the expert evidence he relies on that a key question is the legitimacy of the government against which such use of force is directed.

[69] The notion of an oppressed people's right of self-determination to use force on which he relies, is directly linked to the "illegitimacy" of the government being opposed because of colonial domination or alien occupation and racism.

[70] This is why the judge put as much emphasis as she did on the immediate context of paragraph 34(1)(*b)*. The interpretative question raised by these facts is whether the word "government" is limited to "democratically elected government" or some other formula

designating a government whose legitimacy is not in issue, or whether it applies to any government, even it is oppressive and racist. When one considers the words of paragraph 34(1)(*b*), ("any government"), they are clear and unambiguous. The words "subversion by force of **any government**" do not on their face, imply a qualification of any kind with respect to the government in question.

[71] Although the IRPA has many objectives listed in section 3(1), Parliament indicated an intent to prioritize security (paragraph 3(1)*h*)) when it enacted paragraph 34(1)(*b*). Indeed, this paragraph provides specifically that a person is inadmissible on security grounds. Thus, the focus of the provision under review is on the right of the government to control its frontier and to deny entry to persons who may be a threat to its security.

[72] Turning now to the legislative evolution of this specific ground of inadmissibility, the first such provision was included in the *Immigration Act*, S.C. 1919, c. 25, (paragraph 3(6)(*n*)), referred to "persons who believed in or advocated the overthrow by force or violence of the Government of Canada or of constituted law and authority, or who disbelieved in or are opposed to organized government", (in French: «les personnes qui croient au renversement ou qui préconisent le renversement, par la force ou la violence du gouvernement du Canada ou de la loi ou de l'autorité constituée, ou qui ne croient pas à un gouvernement organisé et s'y opposent…»).

[73] It was in 1952 that the word "subversion" was first used in the *Immigration Act*, S.C. 1952, c. 42. Paragraph 5(*m*) included "persons who have engaged in or advocated or … are

likely to engage in or advocate subversion by force or other means of democratic government…" (the French text however, still referred to « le renversement, par la force ou autrement, du régime, des institutions ou des méthodes démocratiques… ». A new paragraph, 5(*n*), was also included to prohibit the entry of "persons … likely to engage in espionage, sabotage or any subversive activity directed against Canada or detrimental to the security of Canada" (in French: « les personnes qui … sont susceptibles de se livrer à l'espionnage, au sabotage ou à tout autre activité subversive dirigée contre le Canada ou préjudiciable à sa sécurité »). These provisions were carried forward in the 1970 Revised Statutes of Canada.

[74] The 1976-77 amendments to the *Immigration Act* (S.C. 1976-77, c. 52) moved the relevant prohibited class provisions to section 19, dealing with inadmissible classes. Paragraph 19(1)(*f*) still refers to "subversion by force of any government", while the French text refers to « renversement d'un gouvernement par la force ». The words "espionage, sabotage or any subversive activity" were changed and the class was moved to paragraph 19(*e*), which applied to acts of espionage or subversion against democratic governments (in French: « des actes d'espionage ou de subversion contre des institutions démocratiques »). In 1992 (S.C. 1992, c. 49) the provisions were all moved to paragraph 19(1)(*e*), with no changes to the words referred to above.

[75] With the adoption of the new *Immigration Refugee Protection Act* (IRPA, S.C. 2001 c. 27), the inadmissibility classes based on security grounds were moved to section 34, which is the version of the provisions on which the Division relied (see paragraph 34 above).

[76] I note that in the various incarnations of the prohibited or inadmissible classes, there were many other changes, but they are not relevant to the present issue.

[77] It is also worth mentioning that as of 1927 (1927 Revised Statutes of Canada), the various iterations of the relevant provisions included the possibility of obtaining a ministerial exemption. The provision regarding the ministerial exemption only expressly refers to the need to ensure that such exemption is not contrary to public interest as of 1952 (S.C. 1952, c. 42, paragraph 9(*c*)). "[C]ontrary to public interest" became "detrimental to the national interest" in 1992 (S.C. 1992, c. 49, paragraph 19(1)(*f*) *in fine*).

[78] There is little material of interest in the legislative history of paragraph 34(1)(*b*).This source is to be given less weight in any event. That said, the judge could refer to the material she describes at paragraph 67 of the Reasons, as it simply confirms what one gathers from the legislative evolution – that Parliament intended the expression "subversion by force of any government" in paragraph 34(1)(*b*) to have a broad application.

[79] The comments made and the ultimate rejection of a motion to replace the words "of any government" with "democratically elected government" in paragraph 34(1)(*b*) before the Standing Committee on Citizenship and Immigration and the comments made in the House of Commons during the debate at the third reading, confirm that Parliament was very much alive to arguments like those advanced by Mr. Najafi when it adopted the provision.

[80] Obviously, when I state that Parliament intended for the provision to be applied broadly, I am referring to the inadmissibility stage, for, as noted by the Supreme Court of Canada in *Suresh*, albeit in a different context, the legislator always intended that the Minister have the ability to exempt any foreign national caught by this broad language, after considering the objectives set out in subsection 34(2). This is done by way of an application. (As discussed above, subsection 34(2) is now subsection 42.1(1). Per subsection 42.1(2), it can now also be granted on the Minister's own initiative).

[81] This mechanism can be used to protect innocent members of an organization but also members of organizations whose admission to Canada would not be detrimental or contrary to national interest because of the organization's activities in Canada and the legitimacy of the use of force to subvert a government abroad.

[82] It is obvious that in the latter case in particular, the resolution of international law issues may be complex. This supports the argument that the Minister is better equipped to deal with such issues in the context of an application for ministerial exemption. An example of such reasoning is provided by the *Geneva Conventions Act*, R.S.C., 1985, c. G-3, section 9, which allows the Minister of Foreign Affairs to issue a certificate stating that a state of war or of international or non-international armed conflict existed between states or within a state.

[83] At this stage of my analysis, I find that the language of paragraph 34(1)(*b*) is clear.

[84] As in *Németh*, I will now consider the international law principle put forth by Mr. Najafi in support of his view that paragraph 34(1)(*b*) should be construed as follows:

> Subversion by force means using force to overthrow a government but does not include force used by lawful combatants protected by Protocol I.

[85] In *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*], at paragraph 12, the Supreme Court of Canada reiterated that international conventions must be construed in accordance with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, Can. T. S. 1980 No. 37, which are similar to our own general principles of statutory interpretation.

[86] The evidence of Mr. Najafi's experts in this respect appears to be somewhat incomplete. For example, they do not explain how they construed the following paragraphs of the Preamble to Protocol I and what effect they gave to its Article 4.

> Preamble:
>
> *Expressing* their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,
>
> *Reaffirming* further that the provisions of the Geneva Conventions of 12 August1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict
>
> Article 4:
>
> The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

[87] I also note that the view of these experts is at odds with the view expressed by Heather Wilson in her book entitled: *International Law and the Use of Force by National Liberation Movements* (Book of Authorities, Volume 4, Tab 52). In her conclusions at page 135, she states that to contend unequivocally that Protocol I reflects a change in international law giving international liberation movements the authority to use force legitimately would be an overstatement.

[88] That said, as the Division did not comment on this evidence, I am prepared to assume, without deciding, that the legal effect of Protocol I is as stated in the affidavits of Mr. Najafi's experts. This will ensure that I complete my review of the overall legal context to Mr. Najafi's greatest advantage.

[89] Even if I adopt this approach, I cannot conclude from the overall legal context that paragraph 34(1)(*b*) should be construed as encompassing only the use of force that is not legitimate or lawful pursuant to international law.

[90] Like the Division, I find that legality or legitimacy may well be an issue that the Minister can consider under subsection 34(2) of the IRPA, but it is not one that is relevant to the application of paragraph 34(1)(*b*). Thus, the Division's interpretation is clearly reasonable. I would answer the certified question, as formulated by the judge or reformulated at paragraph 46, in the negative.

[91] In reaching this conclusion, I considered Mr. Najafi's argument that the Division's interpretation might capture a member of the Canadian Armed Forces within the ambit of paragraph 34(1)(*b*) of the IRPA. This hypothetical was meant to illustrate the "absurdity" of the Division's interpretation. In my experience, one can usually concoct a dubious example designed to show that a particular provision is overbroad and cannot have been intended. However, courts must consider that the Act will be administered in a reasonable way. It strains credulity to suppose that an inadmissibility report would be issued in respect of a member of the Canadian Armed Forces based on his or her actions as a Canadian soldier.

E. *Paragraph 34(1)(*f*) and section 2(d) of the Charter*

(a) *Notice of Constitutional Question*

[92] Prior to the hearing, the parties debated as to whether or not Mr. Najafi was required to serve a notice of constitutional question pursuant to section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, in order to raise his argument based on section 2(d) of the Charter.

[93] Despite the fact that he believes that it was not necessary to send such a notice, Mr. Najafi did so in an abundance of caution. However, both parties asked the Court to clarify the issue.

[94] In a letter to the Court dated March 31, 2014, Mr. Najafi's counsel made it absolutely clear that his position had been consistent from the outset, and that what Mr. Najafi claims is that "the provision must be interpreted so as to not infringe the Appellant's right to associate

protected by subsection 2(d) of the Charter. This requires the Court to exclude from the scope of subsection 34(1) memberships in organizations that are legal in Canada and that do not support illegal activities committed outside of Canada". Mr. Najafi's counsel stated that he was relying on the presumption of compliance with constitutional law, which he says is sufficient to enable the Division and this Court to read down paragraph 34(1)(*f*) so as to exclude organizations such as the KDPI.

[95] Again, at the hearing and at the request of the panel, Mr. Najafi made it abundantly clear that he had chosen not to argue that paragraph 34(1)(f) is invalid, inapplicable or inoperable on constitutional grounds and that therefore, section 57 of the *Federal Courts Act*, should not apply.

[96] I agree. In such a case, no notice of constitutional question is required.

[97] That said, it is important to note that although reading down can be used as an interpretive technique or as a constitutional remedy, the distinction between the two is important in the context of Charter cases. When one relies on the presumption of compliance with the Charter to narrow the interpretation of a provision, the issue of whether that language, without the exclusion, might be justifiable under section 1 does not arise. However, when reading down is used as a remedy in the context of a constitutional challenge to the validity of a provision, its validity is first assessed and the need to read down words does not arise unless and until any possible defence based on section 1 has been tried and failed (*Construction of Statutes*, 2008 at pages 465 to 466).

(b) *Reading down paragraph 34(1)(*f*)*

[98] The judge never had to determine the standard of review applicable to the proper interpretation of the word "organization" in paragraph 34(1)(*f*) as she never got to that question, having concluded that the matter did not involve a violation of any Charter right.

[99] With the benefit of Mr. Najafi's clarifications as to his arguments, (see paragraphs 94 and 95 above), there is no need to deal with the judge's finding that the matter did not involve Charter violation, if in any event, paragraph 34(1)(*f*) of the IRPA cannot be read down so as to exclude organizations such as the KDPI, simply as a matter of interpretation, rather than as a remedy.

[100] I will thus first determine whether, using the Driedger modern approach to statutory interpretation (and paragraph 3(3)(d) of the IRPA), the Division could reasonably construe the word "organization" used in paragraph 34(1)(*f*) as excluding the KDPI in the absence of a constitutional challenge to the validity of this provision.

[101] The Division construed paragraph 34(1)(f) in accordance with a long line of jurisprudence, including this Court's decision in *Gebreab v. Canada (Public Safety and Emergency Preparedness)*, 2010 FCA 274, that no temporal connection is required between the membership and the acts referred to in paragraphs 34(1)(*a*), (*b*) and (*c*) of the IRPA. It also construed it as applicable to activities carried out by the organization outside of Canada even if its activities in Canada were legal.

[102] Mr. Najafi does not challenge that this is a reasonable interpretation when applied to an organization to which section 2(d) of the Charter would not apply. However, he argues that this is not so if membership in an organization protected by the Charter is involved. He also adds that subversion by force by any organization would have to be excluded, even when it is not so excluded, where the person has himself or herself engaged in such acts under paragraph 34(1)(*b*).

[103] At the hearing, Mr. Najafi's counsel proposed that the word "organization" should simply be construed as follows:

> An organization other than an organization operating in Canada whose activities are lawful in Canada.

[104] In my view, this is too wide. It would offend the holding of the Supreme Court of Canada in *Suresh*.

[105] In *Suresh*, it was argued that the organization at issue never engaged in any unlawful activities in Canada. Still, the Supreme Court of Canada found that section 2(d) does not protect the right to associate with an organization which engages in violence or terrorism abroad while the person is a member.

[106] Turning now to the interpretation of paragraph 34(1)(*f*), I find it relevant that in *Suresh*, the Supreme Court of Canada noted that the inadmissibility provision (in that case, section 19 of the *Immigration Act*, R.S.C. 1985, c. I-2, dealing with membership in an organization engaged in terrorism) must be read with the section providing for a ministerial exemption (the predecessor of subsection 34(2) of the IRPA), as it evidences the legislator's intention to allow for a

balancing of Charter values with other Canadian fundamental values, such as national interest, national security and the protection of the safety of the Canadian society (*Suresh*, at paragraphs 109 to 110). This is especially so since *Agraira* and *Doré* made it abundantly clear that the Minister's decision in respect of an exemption under subsection 34(2) must involve such a balancing of Charter rights and values with the important objectives set out in that subsection.

[107] Having considered the words of paragraph 34(1)(*f*) read in their entire context, which includes subsection 34(2), in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the provision, and the Act, as well as considering the intention of Parliament to comply with the Charter, I conclude that the Division could not reasonably construe the word "organization" as excluding an organization operating in Canada, whose activities are lawful in Canada and which did not engage abroad in any illicit activities of the kind set out in paragraphs 34(1)(*b*) while the person was a member. To do so would involve rewriting the provision to such an extent that it cannot be done in the absence of a constitutional challenge. In *Febles*, at paragraph 67, the Supreme Court of Canada made it clear that "where Parliament's intent for a statutory interpretation is clear and there is no ambiguity, the Charter cannot be used as an interpretative tool to give the legislation a meaning which Parliament did not intend".

[108] Given that paragraph 34(1)(*f*) of the IRPA has a wider meaning than what Mr. Najafi contends, if Mr. Najafi considered this meaning to violate section 2(d) of the Charter, he should have called for a declaration that this paragraph violates section 2(d) and, thus, is invalid. Had he

done so and had he succeeded in establishing a section 2(d) violation, flexible remedies might have been available. But this is not the case before us.

VII. Conclusion

[109] In view of the foregoing, I propose to dismiss this appeal and to answer the certified question, as formulated by the judge or as reformulated in paragraph 46 above, in the negative.

"Johanne Gauthier"

J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
D.J. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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