Federal Court  Cour fédérale

Date: 20150429

Docket: IMM-5676-14

Citation: 2015 FC 545

Ottawa, Ontario, April 29, 2015

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

SABOUNE KALAKALA MOUSSA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application by Saboune Kalakala Moussa [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA] for judicial review of the decision of the Immigration Division [ID] of the Immigration and Refugee Board, dated July 4, 2014, where the ID concluded that the Applicant was a person inadmissible to Canada

because he is described in paragraph 34(1)(*f*) of IRPA in reference to paragraphs 34(1)(*b*) and (*c*) of IRPA.

II. Facts

[2] The Applicant was born on March 3, 1976 in Sudan. He has no permanent status in Canada.

[3] The Applicant became a member of the Justice and Equality Movement [JEM] in March 2007 and remained a member until May 2008.

[4] The Applicant arrived in Canada on October 27, 2008. He claimed asylum on November 4, 2008.

[5] The Applicant was detained for identity reasons after an interview with Citizenship and Immigration Canada [CIC]. He was subsequently released. The refugee hearing was scheduled for March 20 and 21, 2013.

[6] On March 7, 2013, the Minister issued a report under section 44 of IRPA against the Applicant. The Minister believed that the Applicant was inadmissible to Canada under paragraph 34(1)(*f*) of IRPA with reference to paragraphs 34(1)(*b*) and (*c*) of IRPA because of his membership to Justice and Equality Movement – Khalil [JEM-Khalil].

[7] On March 18, 2013, the Applicant's refugee hearing was suspended until further notice.

[8] The admissibility hearing was held before the ID on March 18 and 19, 2014. On July 4, 2014, the ID signed a deportation order against the Applicant and rendered a decision concluding that the Applicant was a person inadmissible to Canada because he is described in paragraph 34(1)(*f*) of IRPA in reference to paragraphs 34(1)(*b*) and (*c*) of IRPA. This is the decision under review.

III. Impugned Decision

[9] The ID analysed the three following issues in its reasons:

1. Is the JEM an organization that engages, has engaged or will engage or instigates the subversion by force of any government for the purposes of paragraph 34(1)(*b*) of IRPA?

2. Is the JEM an organization that engages, has engaged or will engage in terrorism for the purposes of paragraph 34(1)(*c*) of IRPA?

3. Is the Applicant a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraphs 34(1)(*b*) and 34(1)(*c*) of IRPA and consequently inadmissible to Canada pursuant to paragraph 34(1)(*f*) of IRPA?

[10] Before analysing the three issues above, the ID wrote that the applicable standard of proof in this case is that of "reasonable grounds to believe" as confirmed by the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100.

[11] With regards to the first issue, both parties agreed that the JEM is led by Khalil Ibrahim. Both parties further agreed that there exist various groups, splinter groups, identifying themselves as the JEM. The documentation provided by the parties makes it clear when there is a reference to a splinter group and to the mainstream JEM. With regards to the Applicant, the documents filed in support of his case refer to the generic term of the "JEM". Therefore, the ID found that when the documents refer to the JEM, they are only referring to the organization led by Khalil Ibrahim, the mainstream JEM (JEM-Khalil), and not to any of the splinter groups.

[12] In assessing the JEM, the ID wrote that it is "a structured organization that has an identity, leadership, a loose hierarchy and operates in small, semi-autonomous units. Its cells or sections operate under the same leadership and ideology", where the ideology is defined in the *Black Book: Imbalance of Power and Wealth in the Sudan* [*Black Book*] (Applicant's Record [AR] page 29 at para 77).

[13] After evaluating the totality of the evidence, the ID concluded "that there exist reasonable grounds to believe that the mainstream JEM, led by Khalil Ibrahim, is an organization for the purposes of section 34 of IRPA, as it enters into the definition of "organization" according to the broad interpretation set down in the jurisprudence of *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326" (AR page 29 at para 79).

[14] The ID then enumerated a series of acts that are attributable to the mainstream JEM, led by Khalil Ibrahim. Those acts pertain to attacks on government military organizations since 2003, cutting roads connecting key towns in February 2004, and an attack on the city of

Omdurman on May 10, 2008. The ID determined that these acts are "sufficient to trigger the application of paragraph 34(1)(b) of IRPA as constituting "subversion" by the organization" (AR page 33 at para 86). The ID thus concluded that "there exist reasonable grounds to believe that the JEM, led by Khalil Ibrahim, is an organization that has engaged, engages and will engage in subversion by force" (*Sittampalam*, above).

[15] With regards to the second issue, the ID determined that the rebel attacks that took place in Sudan on October 4 and December 25 and 26, 2003, constitute acts of terrorism as defined in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 at paragraph 98. The ID thus found that "the Minister met his burden of proving that there exist reasonable grounds to believe that the JEM led by Khalil Ibrahim, is an organization that engages, has engaged or will engage in acts of terrorism under paragraph 34(1)(c)" of IRPA (AR page 35 at para 96).

[16] With regards to the third issue pertaining to the question of the Applicant's membership to the JEM, the ID concluded that the Applicant was a member of the JEM for the following reasons:

1. He testified before the ID that he had joined the JEM voluntarily and remained a member until May 2008;

2. He was aware that the aims and objectives of the JEM were to overthrow the government of Sudan;

3. Although he did not read the *Black Book* before joining the JEM, he was aware that the JEM's goal was waging war and that the JEM had been fighting since 2003 (AR page 36 at para 98).

[17] The ID also stated that it had no reason to believe that the Applicant financially contributed to the JEM, that his activities were limited to collecting information from the displaced persons in camps regarding their situation, that he sometimes helped translate, that he was enlightening others, that he attended a few secret meetings, and that he knew the JEM as having the same leader and did not know the goals of the splinter groups (AR page 36 at para 99).

[18] The ID rejected the Applicant's argument to the effect that he worked for a civilian section of the JEM, since there is no proof that any civilian section worked independently of the mainstream JEM. The ID accepted the Respondent's argument that the mainstream JEM is a single organization, with each sections sharing Khalil Ibrahim as their leader along with sharing the same ideology as set down in the *Black Book*. Moreover, the ID also wrote that the Applicant had a membership card stating JEM as the organization.

[19] The ID also rejected the Applicant's argument to the effect that the ID should follow the *obiter dicta* comment made in *Joseph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1101 [*Joseph*], stating that *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*] is applicable in assessing inadmissibility under paragraph 34(1)(*f*) of IRPA. The ID stated that only the determination of whether the Applicant

was a member of the JEM is relevant and not the determination of the nature of his participation in the JEM. The ID concluded that the evidence is clear that the Applicant was a member of the JEM, led by Khalil Ibrahim, from March 2007 to May 2008.

[20] The ID therefore concluded that the Applicant is a person inadmissible to Canada because he is described in paragraph 34(1)(*f*) of IRPA in reference to paragraphs 34(1)(*b*) and (*c*) of IRPA.

IV. Parties' Submissions

[21] The Applicant's submits that this Court should interpret paragraph 34(1)(*f*) of IRPA in light of the Supreme Court of Canada decision *Ezokola*, above, which redefined the notion of complicity in international crimes referred to under section 98 of IRPA. The Applicant further argues that IRPA must be read as a whole and in conformity with Canada's international obligations. The Applicant therefore submits that the interpretation of subsection 34(1) must be such that "those who are found "inadmissible" are only those who may be subject to a de facto exclusion from refugee protection" under section 96 of IRPA (AR page 646 at para 53).

[22] In reply, the Respondent submits that the notion of complicity, discussed in *Ezokola*, above, differs from the grounds of inadmissibility. The Respondent relies on *Hagos v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1214 [*Hagos*] to argue that the different language used under paragraphs 34(1)(*f*) and 35(1)(*a*) of IRPA, where the latter is concerned with the notion of complicity with one's action, is such that there is nothing in the language of

paragraph 34(a)(*f*) that contemplates an analysis of complicity. The Respondent further submits that in *Ezokola*, above, the Supreme Court was concerned with the interpretation of Article 1F(a) of the *1951 Convention relating to the Status of Refugees* [the *Convention*], incorporated into domestic law by section 98 of IRPA. Paragraph 34(1)(*f*) of IRPA, on the other hand, is a domestic inadmissibility provision. The notion of complicity and the notion of membership are therefore assessed in differing contexts. The Respondent also relies on this Court decision in *Nassereddine v Canada (Minister of Citizenship and Immigration)*, 2014 FC 85 [*Nassereddine*], where it was found that the existence of paragraph 34(1)(*c*) of IRPA, under which inadmissibility arises from "engaging in terrorism", removes the need for complicity under a paragraph 34(1)(*f*) of IRPA analysis, which is only concerned with membership. The Respondent also states that paragraph 34(1)(*f*) was given a broad interpretation in Canadian jurisprudence. Lastly, the Respondent submits that there is Ministerial relief available for inadmissibility based on membership but not for inadmissibility based on complicity.

V. Issue

[23] In light of the Federal Court of Appeal decision in *Kanagendren v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 86 [*Kanagendren FCA*], I frame the issue as follows:

1. Did the ID err in finding that the Applicant is a person inadmissible to Canada as described under paragraph 34(1)(*f*) of IRPA?

VI. Standard of Review

[24] The issue stated above is to be reviewed on the reasonableness standard (*Najafi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 876 at para 82 [*Najafi*]; *Flores Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1045 at para 36; *Nassereddine*, above, at para 20). As such, this Court shall only intervene if it concludes that the decision is unreasonable and falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47).

VII. Preliminary Comments

[25] The Applicant raised the arguments that paragraph 34(1)(*f*) of IRPA must be read with IRPA as a coherent whole and that the inadmissibility provisions in IRPA that also lead to an ineligibility to seek refugee protection must be interpreted in a way that ensures that they do not lead to a *de facto* exclusion in a situation where there would be no exclusion under the *1951 Convention relating to the Status of Refugees* [the *Convention*]. These arguments were however not raised before the ID. They will therefore not be considered in this judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22 to 26).

[26] At the hearing before this Court, the Applicant's counsel listed several facts related to what happened in this matter prior to the Minister's issuance of a section 44 of IRPA report on March 7, 2013. The Applicant mentioned that the Minister initially intervened before the

Refugee Board on the grounds of identity and exclusion under 1F(A) of the *Convention*, that a hearing of five days took place, that a *de novo* hearing was subsequently ordered, that a preparatory hearing took place on February 13, 2013, and finally that a section 44 report was issued on March 7, 2013. The Applicant did not, however, provide an adequate explanation as to why these facts were relevant to the present judicial review. The main argument presented by the Applicant's counsel based on these facts at the hearing pertained to the lack of credibility of the Minister in changing its approach in this matter, namely from addressing questions of identity and exclusion under 1F(A) to addressing inadmissibility under subsection 34(1) of IRPA. The Applicant's counsel also added that before the issuance of the section 44 report, the Minister was focused on two irreconcilable issues, namely the Applicant's identity and his exclusion under 1F(A). These facts, as discussed by counsel, are irrelevant to the present judicial review, which concerns the reasonableness of the ID decision in relation to paragraph 34(1)(*f*) of IRPA. They will therefore not be taken into account.

[27] Also pertinent to point out, under section 42.1 of IRPA, a Ministerial relief is available for inadmissibility based on membership. The Applicant, in his situation, can apply for such a relief.

VIII. Analysis

A. *Did the ID err in finding that the Applicant is a person inadmissible to Canada as described under paragraph 34(1)(f) of IRPA?*

[28] Paragraph 34(1)(*f*) of IRPA states that a "permanent resident or a foreign national is inadmissible on security grounds for […] being a member of an organization that there are

reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraphs (a), (b), (b.1) or (c)".

[29] In this judicial review, it is not contested that the JEM is an organization that engages, has engaged or will engage or instigates the subversion by force of any government for the purposes of paragraph 34(1)(*b*) of IRPA or that the JEM led by Khalil Ibrahim, is an organization that engages, has engaged or will engage in acts of terrorism under paragraph 34(1)(*c*) of IRPA. Only the question of membership under paragraph 34(1)(*f*) of IRPA is to be reviewed.

[30] This Court and the Federal Court of Appeal have consistently held that the concept of membership must be interpreted broadly (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at para 36, referred to in *Kanagendran v Canada (Minister of Citizenship and Immigration et al*, 2014 FC 384 at para 9, [*Kanagendran FC*] and *Nassereddine*, above at para 49).

[31] In the case at bar, the ID concluded that the Applicant was a member of the JEM for the following reasons: he testified before the ID that he had joined the JEM voluntarily and remained a member until May 2008, he stated to have a membership card confirming his membership to the JEM, he was aware that the aims and objectives of the JEM were to overthrow the government of Sudan, that although he did not read the *Black Book* before joining the JEM, he was aware that the JEM's goal was waging war and that the JEM had been fighting since 2003. The ID added that the Applicant had participated in the collection of information from the

displaced persons in camps, that he helped translate, that he was enlightening others and that he attended a few secret meetings. Given the Applicant's action and admitted membership to the JEM, the ID reasonably concluded that he was a member under paragraph 34(1)(*f*) of IRPA (*Nasserddine*, above at para 60). The ID's findings were supported by the record before it and there was ample "reasonable grounds to believe" that the facts of the Applicant's case gave rise to his inadmissibility (*Kanagendren FCA*, above at para 37).

[32] As for the Applicant's argument that he worked for a civilian section of the JEM, the ID reasonably concluded that there was no such evidence to support this assertion (*Nasserddine*, above at para 44). There is no need for this Court to intervene.

IX. Conclusion

[33] The ID reasonably concluded that was ample "reasonable grounds to believe" that the facts of the Applicant's case gave rise to his inadmissibility. The intervention of this Court is not warranted.

[34] The parties were invited to submit questions for certification, but none were proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to be certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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