Federal Court  Cour fédérale

Date: 20171206

Docket: IMM-2194-17

Citation: 2017 FC 1112

Toronto, Ontario, December 6, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

KHALED SABER ABDELHAMED ZAHW

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Court finds that the Immigration Division [ID] failed to conclude if and how the Egyptian military was engaged in an act of force that intended to overthrow a government by force (*Shandi (Re)*, [1991] F.C.J. No. 1319 (QL) [*Shandi*]). The Immigration and Refugee Board of Canada [IRB or Board] has to study the evidence on the record as a whole, in addition to comprehensive, fulsome Country Condition Evidence emanating from the Board. In its reasons,

the ID cited the Federal Court of Appeal's decision in *Najafi v Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 262 [*Najafi*], indicating that "subversion by force of a government" means "using force with a goal of overthrowing any government", but that the term "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" (*Najafi*, above, at para 12). The evidence, as discussed in the ID reasons, was also generalized, not specific to the Applicant's involvement in the military given the unit in which he worked, and lacked information which caused the ID to fail to assess the goal of the Egyptian military in the 2013 events.

II. Nature of the Matter

[2] This is an application for judicial review filed pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] of a decision of the ID of the Board dated April 24, 2017 in which the ID found that the Applicant is inadmissible under paragraph 34(1)(f) of the IRPA. The ID made a Deportation Order against the Applicant pursuant to paragraph 229(1)(a) of the Immigration and Refugee Protection Regulations, SOR/2002-227 [IRPR].

III. Facts

[3] The Applicant, aged 51, is a citizen of Egypt.

[4] The Applicant was an officer of the Egyptian military. He began his career in 1989 as a First Lieutenant and later retired in January 2015, at the rank of Brigadier General.

[5] During the Applicant's employment with the Egyptian military, the President of Egypt, Mr. Mohamed Morsi, was removed from office in the July 2013 events by the Defense Minister General Abdul Fatah al-Sisi, opposition leader Mohamed ElBaradei, the Grand Imam Ahmed el-Tayeb, and Coptic Pope Tawadros II.

[6] On July 21, 2015, the Applicant and his wife arrived in Canada on a visitor visa and on November 24, 2015, the Applicant filed a claim for refugee protection, currently suspended.

[7] On February 3, 2016, a report was made, pursuant to subsection 44(1) of the IRPA, which found the Applicant to be inadmissible on security grounds for being a member of an organization on which there are reasonable grounds to believe that he had engaged in subversion by force of the government of Egypt as prescribed by paragraphs 34(1)(b) and 34(1)(f) of the IRPA. The Applicant was referred to the ID for an admissibility hearing.

IV. Decision

[8] On April 24, 2017, having considered all the evidence, the ID found that there are reasonable grounds to believe that the Applicant is inadmissible to Canada pursuant to paragraph 34(1)(f) for 34(1)(b) of the IRPA, which is the decision under review in this application for judicial review. As a result of that decision, the Applicant was made subject to a deportation order.

[9] In its analysis, the ID had to establish two elements in order to find the Applicant inadmissible under paragraph 34(1)(f) for 34(1)(b): (i) he has to be a member of the Egyptian military and (ii) that organization must have engaged in or instigated subversion by force of the Egyptian government.

[10] The ID was satisfied that the Applicant was a member of the Egyptian military, based on the totality of all documentary evidence, sworn testimony and concessions on behalf of the Applicant. The ID therefore concluded that it was not necessary to analyze the Applicant's membership, as there was no dispute that the Applicant was an active member of the Egyptian military. The ID noted that the Applicant graduated as an Engineer in 1989, and was, therefore, responsible for handling the military's communication network.

[11] The Applicant claimed that he did not participate in any acts of violence or subversion against the government. Nonetheless, the ID indicated in its analysis that paragraph 34(1)(f) of the IRPA does not require active participation in subversion by force of any government, only that the person be a member of the organization.

[12] Both the Applicant and his counsel contested the fact that a military coup had taken place in Egypt in July 2013. For the purpose of the admissibility hearing, the ID indicated that it was not its role to determine whether or not a coup d'état had actually taken place in Egypt.

[13] After a careful review of the documentary evidence on file, the ID came to the conclusion that "it was nonetheless the use of military force that led to the overthrow of a legitimately

voted-in government, replacing the elected president, Mr. Morsi, with the leader of the military, General al-Sisi" (ID's Reasons and Decision, para 32).

> Therefore, it is this Panel's findings that it was the intentions and direct actions of the military that have forced a change of regime and that there are reasonable grounds to believe that subversion by force by the Egyptian military has taken place.
>
> (ID's Reasons and Decision, para 33.)

V. Issues

[14] This matter raises the following issues:

1. Did the ID err by concluding that the Egyptian military had instigated the subversion by force of the Egyptian government in 2013, based on all the evidence before the Board?
2. Was it reasonable for the ID to find that it did not have to determine whether a coup d'état took place in Egypt in July 2013?
3. Were the ID's factual findings reasonable?

[15] The Court finds that the applicable standard of review for the above mentioned issues is that of reasonableness. Whether a person is a member of an organization pursuant to paragraph 34(1)(f) of the IRPA is a question of mixed fact and law and this Court must show deference to the impugned decision unless it is determined that the decision does not fall within a range of possible acceptable outcomes which are defensible in respect of the facts and the law (*Khan v Canada (Citizenship and Immigration)*, 2017 FC 397 at paras 15-16; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

VI. Relevant Provisions

[16] Section 33 of the IRPA states:

Inadmissibility	**Interdictions de territoire**
Rules of interpretation	**Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	33 Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

[17] Paragraphs 34(1)(b) and 34(1)(f) of the IRPA state that the following individuals are inadmissible to Canada:

Security	**Sécurité**
34 (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
…	[…]
(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;
…	[…]
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

VII. Submissions of the Parties

A. *Submissions of the Applicant*

[18] According to the Applicant, the ID erred by determining that the Egyptian military had engaged in subversion by force of the government of Egypt. The ID erroneously noted in its reasons that a new administration was led by General al-Sisi following the removal of the president of Egypt, Mr. Morsi, from office on July 3, 2013. In fact, there was evidence before the Board that there were large protests against the government of Mr. Morsi and there was broad public consensus that led to the ultimate removal of the president from power in 2013.

> The overthrow of President Morsi may seem like a military coup. But to all intents and purposes it is not. The call for Morsi's ousting was made by millions of Egyptians who went out on the streets for four days in a row, raising Egyptian flags and chanting one word directed at him: "Erhal", meaning, "leave, depart". Without the presence of those millions on the streets and their determination to get rid of Mohamed Morsi and his Muslim Brotherhood, the military would certainly not have intervened.
>
> [Emphasis added.]
>
> (Applicant's Record, The Guardian (July 4, 2013), This is not a coup, but the will of Egypt's people, p 230.)

[19] In *Eyakwe v Canada (Citizenship and Immigration)*, 2011 FC 409 at para 30, the Federal Court agreed with the ID that "the most common definition for subversion is the changing of a government or instigation thereof through the use of force, violence or criminal means". In the case at bar, the Applicant argues that there was no evidence before the Board showing that the Egyptian military overthrew the government through violent or criminal means. The evidence

rather indicates that it was the large group of civilian protesters which justified President Morsi's downfall.

[20] In the same order of ideas, the Applicant submits that the subsection 44(1) report was issued based on the following information: "the Egyptian military carried out **a coup** against the democratically elected government of Egypt on 03 July 2013". Given this factual allegation in the subsection 44(1) report, the ID had to determine whether a coup d'état actually took place. According to the Merriam-Webster Dictionary, a coup d'état is defined as "the violent overthrow or alteration of an existing government by a small group". Subversion is also defined as the "systematic attempt to overthrow or undermine a government or political system by persons working secretly from within". Therefore, the ID had to determine whether the allegation in the report was well-founded, as it was required by the Board to determine whether the Egyptian military was involved in the overthrow of the Egyptian government (an act of subversion), which is by definition a coup.

[21] Finally, the Applicant submits that the ID erred in its factual findings concerning the July 2013 events in Egypt. Specifically, the ID erred by indicating in its reasons that General al-Sisi took over the presidency, thus becoming the new unelected President of Egypt, following the removal of President Morsi from office through military means. There was also no evidence before the ID indicating that General al-Sisi was in fact the unelected president of Egypt. According to the Applicant, such findings contradict the documentary evidence before the ID:

> Under a "road map" for a post-Morsi government devised by a meeting of civilian, political and religious leaders, the general said, the Constitution would be suspended, the chief justice of the Supreme Constitutional Court, Adli Mansour, would become

> acting president, and plans would be expedited for new parliamentary and presidential elections under an interim government.
>
> [Emphasis added.]
>
> (Applicant's Record, The New York Times (July 3, 2013), Army Ousts Egypt's President; Morsi Is Taken Into Military Custody, p 68.)

The Applicant argues that erroneous findings on important facts are sufficient to set aside the decision, because it has impacted the primary determination as to whether the Egyptian army engaged in subversion by force of the government of Egypt.

B. *Submissions of the Respondent*

[22] The Respondent, on the other hand, argues that the ID's conclusion on inadmissibility under paragraph 34(1)(f) is reasonable. The evidence supports the ID's finding that the Egyptian military engaged in subversion of the democratically elected government. The Applicant was also a member of the Egyptian military and his membership was not contested.

[23] According to the Merriam-Webster Dictionary and the Oxford English Dictionary, the Respondent submits that "subversion" is defined as a systematic attempt to overthrow or undermine a government or political system by persons working secretly from within. In Al Yamani, "subversion" is also given the following definition:

> [S]ubversion [is] not limited to the actual act but to be engaged in these activities the words envisage participation by one who assists or facilitates the objective as one who commits the *actus reus*. Any act that is intended to contribute to the process of overthrowing a government is a subversive act.

(*Al Yamani v Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 317 (QL) at para 13 [*Al Yamani*])

[24] Unlike what the Applicant argues, the Respondent submits that the ID did not need to decide whether the Egyptian military engaged in a coup d'état. For the purpose of the admissibility hearing, the ID had to decide whether the organization to which the Applicant belonged engaged in subversion. According to the Respondent, the fact that the subsection 44(1) report described the events as a coup d'état does not make the ID's decision to focus on the requirements of the IRPA, under paragraphs 34(1)(f) and 34(1)(b), unreasonable. Moreover, the Respondent argues that the report was intended for the minister's delegate, who then decided to refer the matter to the ID for an admissibility hearing. Consequently, the subsection 44(2) report makes no mention of a coup d'état, as the ID simply had to determine whether the Applicant is inadmissible under paragraph 34(1)(f) of the IRPA for the admissibility hearing.

[25] Finally, the Respondent disagrees with the Applicant's argument about alleged factual errors by the ID. Even if they were true, the Respondent argues that the ID's decision would still remain reasonable. Whether the head of the armed forces assumed power after the overthrow of the Egyptian government or whether the Chief Justice of the Egyptian Supreme Court was sworn-in as president was not the issue by which to come to the conclusion that there was subversion by force by the Egyptian military and that the Applicant's membership in the armed forces made him inadmissible under paragraph 34(1)(f) of the IRPA.

VIII. Analysis

[26] For the following reasons, the application for judicial review is granted.

A. *Did the ID err by concluding that the Egyptian military had instigated the subversion by force of the Egyptian government in 2013, based on the evidence before the Board?*

[27] Based on the evidence before the ID, the Court finds the decision to be unreasonable. The documentary evidence before the Board could not conclude that there was subversion by force by the Egyptian military of the Egyptian government. In fact, the ID did not specify any country condition reports recognized as reliable and trustworthy. Instead, the evidence relied on by the ID mainly consists of articles and newspapers such as “The New York Times” and “The Guardian” on the events of July 2013. The evidence does not show that there are reasonable grounds to believe that the Egyptian military, at the time, met the definition of an organization seeking “the subversion by force of any government” within the meaning of paragraph 34(1)(b) of the IRPA.

[28] The evidence as a whole has to be studied in depth. The expertise of the evidence was not considered significantly enough with respect to the documents that were provided by the Applicant for analysis. Even if brief, the specialized decision maker of the ID must take into consideration the expertise demonstrated in reliable documents. Through the specialization of the ID, the member of the Board must also evaluate and weigh the evidence with regard to the government in place. The acts to be considered consist of that which the government in place did as reported by international monitoring groups, in addition to the background country conditions that prevailed as evidence before the panel.

[29] What decision will eventually be rendered by the ID will have to take into consideration the intricacies of the evidence as clearly outlined in the context as a whole before the panel.

[30] Furthermore, while the Applicant admitted to being a member of the Egyptian military from 1989 to 2015, the Board made an erroneous finding of inadmissibility under paragraph 34(1)(f) of the IRPA. By making two separate and independent determinations, the Board failed to establish a nexus between the Applicant's membership in the organization and the organization's involvement in the removal of President Morsi from office in 2013 (*El Werfalli v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 612 at para 59 [*El Werfalli*]).

> In order for a finding of inadmissibility to be made under paragraph 34(1)(f) for 34(1)(b) against Mr. Zahw, two elements must be established: he must be a member of the Egyptian military, and, that organization must have engaged in or instigated the subversion by force of the Egyptian government.
>
> (ID's Reasons and Decision, para 13.)

Paragraph 34(1)(f) "is a single provision requiring regard for all its elements in an integrated manner" (*El Werfalli*, above, at para 60).

[31] The issue before the Board was not whether the Applicant had engaged in, or instigated, subversion by force of the government of Egypt, but whether there were reasonable grounds to believe that the Egyptian military had done so with regard to the Applicant's membership in that organization.

> In order, then, to determine whether an applicant was or is a member of an organization described in ss. 34(1)(a), (b) or (c), an assessment of their participation in the organization **must** be undertaken.
>
> [Emphasis added.]
>
> (*Kanendra v Canada (Minister of Citizenship and Immigration)*, 2005 FC 923 at para 24.)

Although the evidence on record is not clear whether the events of June/July 2013 constitute a coup d'état, with the intention of overthrowing the government of Egypt by force, the ID still failed to make an assessment of the Applicant's membership in the Egyptian military.

> As previously stated, Mr. Zahw has conceded to the fact of his membership in the Egyptian military, it is, therefore, unnecessary for this Panel to engage in lengthy analysis on this point except to say that it is clear from the evidence that Mr. Zahw viewed himself as a member and was actively involved in the activities of this organization. The Panel is satisfied that far more than reasonable grounds exist to establish that Mr. Zahw was a member of the Egyptian military given the totality of all documentary evidence, sworn testimony and concessions on behalf of Mr. Zahw.
>
> (ID's Reasons and Decision, para 19.)

B. *Was it reasonable for the ID to find that it did not have to determine whether a coup d'état took place in Egypt in July 2013?*

[32] At the risk of repeating itself, the Court finds that the ID had to determine whether the 2013 events were a military coup, based on the objective evidence in the record. In fact, there is an important distinction to be made between a coup d'état and a military intervention. On one hand, evidence in the record shows that:

> Without the presence of those millions on the streets and their determination to get rid of Mohamed Morsi and his Muslim Brotherhood, the military would certainly not have intervened.
>
> [Emphasis added.]
>
> (Applicant's Record, The Guardian (July 4, 2013), *This is not a coup, but the will of Egypt's people*, p 230.)
>
> Dec. 4 – More than 100,000 protesters march on the presidential palace, demanding the cancellation of the referendum and the writing of a new constitution. The next day, Islamists attack an anti-Morsi sit-in, sparking street battles that leave at least 10 dead.
>
> […]

> Jan. 25, 2013 – Hundreds of thousands hold protests against Morsi on the second anniversary of the start of the revolt against Mubarak, and clashes erupt in many places.
>
> Feb.-March – Protests rage in Port Said and other cities for weeks, with dozens more dying in clashes.
>
> […]
>
> July 1 – Huge demonstrations continue, and Egypt's powerful military gives the president and the opposition 48 hours to resolve their disputes, or it will impose its own solution
>
> July 2 – Military officials disclose main details of the army's plan if no agreement is reached: replacing Morsi with an interim administration, canceling the Islamist-based constitution and calling elections in a year. Morsi delivers a late-night speech in which he pledges to defend his legitimacy and vows not to step down.
>
> (CTR, The Daily Star (August 15, 2013), *Timeline of key events in Egypt's uprising and unrest*, p 74.)

It is recalled that the Morsi government declared itself to have immunity from judicial review (also, p 74 of the Daily Star of August 15, 2013), following the violent protests which erupted and only, thereafter, did the military attempted to create order.

[33] The Court finds that the ID failed to conclude if and how the Egyptian military was engaged in an act of force that intended to overthrow a government by force (*Shandi*, above). The IRB has to study the evidence on the record as a whole, in addition to country condition evidence emanating from the Board. In its reasons, the ID cited the Federal Court of Appeal's decision in *Najafi*, above, indicating that "subversion by force of a government" means "using force with a goal of overthrowing any government", but that the term "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" (*Najafi*, above, at para 12). The evidence on record was also generalized, not specific to the Applicant's involvement in the military given the unit in which he worked, and lacked information which caused the ID to fail to assess the goal of the Egyptian military in the 2013 events.

C. *Were the ID's factual findings reasonable?*

[34] Based on the evidence before the ID, it was unreasonable for the Board to make the conclusive findings that it did in respect to the military, for the evidence itself demonstrates the opposite; it was rather the serious unrest in the streets which could not be controlled by the government that led to the unseating of President Morsi.

> July 3 – Egypt's military chief announces that Morsi has been deposed, to be replaced by the chief justice of the Supreme Constitutional Court until new presidential elections. No time frame is given. Muslim Brotherhood leaders are arrested. Tens of thousands of Morsi supporters remain camped out in two mass sit-ins in Cairo's streets.
>
> July 4 – Supreme Constitutional Court Chief Justice Adly Mansour is sworn in as Egypt's interim president.
>
> (CTR, The Daily Star (August 15, 2013), *Timeline of key events in Egypt's uprising and unrest*, p 74.)

[35] Reference is made to a clear understanding of what inadmissibility must entail (*Perez Villegas v Canada (Citizenship and Immigration)*, 2011 FC 105 at para 51): "As stated above, any finding of inadmissibility "should be carried out with prudence, and established with the utmost clarity" (see *Daud* above, at paragraph 8)". Also, in *Muhenda v Canada (Citizenship and Immigration)*, 2015 FC 854 at para 35, the Court found that the officer's decision was

“unreasonable because in one key respect it contradicts the evidence that was before her and in other respects is purely speculative”.

[36] For these reasons, the Court cannot conclude that that the decision rendered “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, above, at para 47).

IX. Conclusion

[37] For the reasons mentioned above, the application for judicial review is granted.

JUDGMENT in IMM-2194-17

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the file be remitted to the ID for assessment anew by a different panel. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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