Federal Court Cour fédérale

Date: 20181127

Dockets: IMM-5603-17
IMM-5604-17

Citation: 2018 FC 1187

Ottawa, Ontario, November 27, 2018

PRESENT: The Honourable Mr. Justice Roy

Docket: IMM-5603-17

BETWEEN:

ABDIAZIIZ MOHAMED ALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-5604-17

AND BETWEEN:

ABDIAZIIZ MOHAMED ALI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] These are two judicial review applications that are closely related; both are made pursuant to s. 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA]. In Court File No. IMM-5603-17, the applicant seeks to challenge the decision of the Immigration Division [ID] of December 11, 2017 that found Mr. Ali to be inadmissible to Canada on grounds of security. In file Court File No. IMM-5604-17, the applicant seeks to challenge the decision of a Minister's Delegate who concluded that the claim for refugee status is ineligible because Mr. Ali has been determined to be inadmissible on grounds of security. As the facts relevant to both cases are the same, this judgment and reasons will apply to both files and a copy thereof shall be filed in Court Files Nos. IMM-5603-17 and IMM-5604-17. As will be seen, issues relevant exclusively to either one of the two cases have been segregated.

I. Facts

[2] Mr. Ali is a young Ethiopian. Now aged 22, he arrived in Canada on July 13, 2015 when he was barely 19 years old. He claimed that he left Ethiopia to escape persecution by Ethiopian authorities. He comes from the ethnically Somali region of Ogaden, in Ethiopia, on the border between Ethiopia and Somalia. He initiated a refugee claim.

[3] According to the Basis of Claim Form of August 7, 2016, the applicant was arrested in August 2013 by the Ethiopian authorities, being suspected of involvement in an Ogaden National Liberation Front (ONLF) attack; he says that he was beaten while detained and he was held in deplorable conditions for almost eight months. In the personal narrative, he discloses that his

father now deceased was a well-known local member of the ONLF. He organized meetings and was the designated person for the solicitation of financial support from the local civilian population. An older half-brother is also a fighting member of ONLF.

[4] Following his father's death, his father's friends and his uncles visited him at the grocery store he operated on behalf of his mother and they talked to the applicant about the ONLF. The applicant states that "(t)hey encouraged me to get involved with the resistance movement, and said that one way I could do that was by collecting money at my store from people living in nearby villages." He evidently agreed and he collected money for the ONLF, as well as other goods (food, cigarettes), from residents of nearby villages. He states that a member of the ONLF would come to the store and pick up the money.

[5] The collection on behalf of the ONLF started when the applicant was 16 (probably in 2012) and lasted until he was arrested in August 2013. It seems that he collected approximately $900/month, not an insignificant sum in an impoverished area of Ethiopia. The applicant declares that he "was happy to help the ONLF in this way, since my family and I had suffered mistreatment at the hands of the Ethiopian forces" (narrative, Basis of Claim, para 11).

[6] The applicant was released from custody in March 2014, but he continued to be harassed by the authorities. He decided to leave Ethiopia in June. With the assistance of a smuggler, he left from Addis Ababa for Sudan. Together with 35 other people, he was taken to Libya. He stayed in Libya for about six months to gather money to board a ship leaving for Italy. Rescued by the Italian coast guard, he landed in Italy where he was originally detained. From Italy,

Mr. Ali travelled to Norway with a view to plan his journey to Canada. He arrived in Toronto on July 13, 2015.

[7] The claim for refugee status did not progress since he was notified that his claim was suspended pending a determination of his admissibility to Canada.

[8] That led to the decision of the ID which is challenged in the judicial review application that bears the Court File No. IMM-5603-17.

II. The ID decision in IMM-5603-17

[9] The Minister being of the opinion that a report by an officer (May 16, 2016) was well-founded, he referred the matter to the ID for an admissibility hearing, pursuant to s. 44 of the IRPA. Following an admissibility hearing, a decision was rendered on December 11, 2017.

[10] The allegation concerning Mr. Ali is that he is inadmissible to Canada on security grounds. More precisely, he is alleged to be a member of an organization engaged in subversion and in terrorism in Ethiopia. It is paragraphs 34(1)(b), (c) and (f) of IRPA that find application:

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;

(c) engaging in terrorism	**c)** se livrer au terrorisme**;**
…	[…]
…	[…]
(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).

Mr. Ali is alleged to be member of the ONLF, an organization that engages, has engaged or will engage in terrorism and that instigates, engages, has engaged or will engage in the subversion by force of the government of Ethiopia.

[11] It is important to note that the standard of proof in inadmissibility proceedings is that of s. 33 of IRPA. It suffices that the facts on which the decision maker relies in order to constitute a particular inadmissibility ground be found on the basis of reasonable grounds to believe that they have occurred, are occurring or may occur (s. 33 of IRPA). This is a standard that requires more than mere suspicions, but less than the standard in civil cases, that of the balance of probabilities. In *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 [*Chiau*], the standard is translated into "a *bona fide* belief in a serious possibility based on credible evidence" (para 60). The ID relied on the description of the test found in *Mugesera* "reasonable grounds will exist when there is an objective basis for the belief which is based on compelling and credible information" (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 [*Mugesera*], para 114).

[12] Given the standard of proof, the ID was satisfied that the applicant is a member of an organization that there are reasonable grounds to believe engages, has engaged in subversion and in terrorism. That is all that is needed.

A. Subversion

[13] On subversion by force of a government, the ID notes that the courts have given a definition. The controlling authority is *Najafi v Canada (Public Safety and Emergency Preparedness)*, [2015] 4 FCR 162, 2014 FCA 262 [*Najafi*]. The Court gave the words in paragraph 34(1)(b) "subversion by force of any government" their unambiguous meaning; they "should not be construed as encompassing only the use of force that is not legitimate or lawful pursuant to international law" (*Najafi*, supra, para 89).

[14] The ID relied on significant information, including some emanating from the ONLF claiming having killed 3000 Ethiopian troops. The ID rejected the applicant's contention that the ONLF is merely "seeking "to have the people of Ogaden decide their future, not overthrow the Ethiopian government"" (ID decision, para 32). It cites among other pieces of information used to establish the reasonable grounds to believe a document published by the ONLF, referred to as its Political Programme, which calls for the inevitable removal from the homeland of the so-called "colonial military forces". The ID decision notes many examples of evidence, going all the way to November 2016, of announcements made by the ONLF of ambushes and other military-like actions. Thus, the ID concludes:

> [36] This Panel, therefore, finds that the ONLF's continued and sustained operations against Ethiopian troops are acts that qualify it as an organization engaged in the subversion by force of a

> government. Their aim is to take over the Ogaden region and to overthrow the Ethiopian government control in that area and they are attempting to accomplish it with subversive and violent means and tactics. Therefore, there are grounds to believe that the ONLF is an organization described in 34(1)(b).

B. Terrorism

[15] Similarly, the ID found ample evidence that the activities of the ONLF satisfied the definition of what constitutes terrorism. It referred particularly to *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*]. In *Suresh*, the Court found that the term "terrorism" is not so unsettled that it cannot set the proper boundaries of legal adjudication. It concluded on that issue in the following fashion:

> 98. In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that "terrorism" in s. 19 of the Act includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism. The issue here is whether the term as used in the *Immigration Act* is sufficiently certain to be workable, fair and constitutional. We believe that it is.
>
> [My emphasis.]

[16] Relying on that definition, and noting other international instruments together with the Criminal Code of Canada, the ID proceeded to find in the evidence before it what it called "clear accounts of activities undertaken by the ONLF that qualify as terrorism" (ID decision, para 42).

Those included abductions, beatings, and summary executions against civilians in their custody. Oil workers were seen as targets of interest, including Chinese technicians. The ID found the information received from internationally-based human rights groups such as Human Rights Watch to be reliable (*Mahjoub v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, [2007] 4 FCR 247, paras 72-73). It concluded:

> [46] Based on such reports, it is therefore the position of this Panel that attacking oil exploration sites where local and foreign workers are employed and causing the death and displacement of large groups of people are clearly terrorist acts intended to cause death or serious bodily injury to civilians and their purpose is to compel the government of Ethiopia to rescind its control over the Ogaden region. Therefore, I am satisfied, on reasonable grounds, that the ONLF is an organization referred to in 34(1)(c) of the IRPA for having engaged in terrorism.

[17] In effect, the ID was satisfied that civilians have been targeted by attacks. Is included in these attacks one having taken place in 2007 against oil workers by a group led by one Mohamed Omar Osman. Not only is the ID of the view that there are no splinter groups operating outside of the ONLF, such that the Osman group attack ought not to be attributed to the ONLF, but the signature of a “peace deal” in 2010, to which Osman would not have adhered, is largely a red-herring as the said “peace deal” never held. The numerous ONLF communiqués since 2011 show that armed and political conflicts continued (ID decision, para 90). Indeed, the ID drew the inference that Mr. Ali was collecting money for the Osman group as part of the ONLF because he testified before the ID that he was under the impression that Osman was a leader of the ONLF at the time he was collecting for the ONLF. I repeat. It suffices that there be reasonable grounds to believe for the facts to be established.

C. Mr. Ali's membership in the ONLF

[18] There is no need to establish formal membership to satisfy the requirements of paragraph 34(1)(f) of the IRPA. The controlling authority is *Poshteh v Canada (Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 FCR 487 [*Poshteh*], another decision of the Federal Court of Appeal that is binding on the ID and this Court. The Court of Appeal found that the word "member" ought to continue to be interpreted broadly (*Poshteh*, supra, para 29). There are similarities between *Poshteh* and the case at bar. In both cases, the person alleged to be a member is under 18 years of age. Their fathers, who passed away when they were still very young, were members of the organization. In the case of Mr. Poshteh he distributed propaganda leaflets in Tehran once or twice per month, for a period of about two years while Mr. Ali collected money and goods for a period of about a year. Both, it appears, ceased their activities after being arrested by the authorities. In fact, Mr. Poshteh argued that "(h)e did not recruit members or raise funds" (para 35) in an attempt to suggest a diminished role. Nevertheless, the Court of Appeal found that the ID had reasons to support a conclusion of membership.

[19] Here, the ID found that the involvement in collecting funds and goods for the ONLF was significant. The applicant was encouraged to get involved with the resistance movement and follow in his father's footsteps. In his claim for refugee status, he spoke of the perception that he was "a member of the ONLF or that at the very least, he was a supporter of this organization" (ID decision, para 62). Mr. Ali is said to have grown up in an environment where there was loyalty to the ONLF and contribution to its operation (father and brother). He felt he had to support in view of the abuse suffered by his family and his people; in fact he suffered himself at

the hands of the authorities as goods were stolen from him by Ethiopian soldiers. During his testimony before the ID, "he eventually and reluctantly admitted that he actually did know about it [knowledge of the armed conflict between the ONLF and the Ethiopian government] when he was in Ethiopia from "the little things that I heard from the news, from the radio"" (ID decision, para 67). As noted by the decision maker, Mr. Ali would know first-hand about the insurgency of the ONLF because, on his own evidence, his brother had joined the armed movement years before.

[20] The ID summed up on the membership of Mr. Ali by writing:

> [68] Moreover, as Minister's counsel argued, it is generally implied that where there are peace negotiations, it is because there is conflict to be resolved. Why else would the ONLF be negotiating for peace? Therefore, <u>there is strong evidence, on reasonable grounds, that Mr. Ali knew that the ONLF was in conflict with the government, and contrary to his claim that the money he collected went to support peace negotiations, the money went to support the overall operations of the ONLF</u>, whether it was for peaceful purposes or otherwise. Having said that, however, section 34(1)(*f*) does <u>not require active participation</u> in or knowing support of terrorism or subversion of force of a government,[52] <u>only that the person be a member of the organization</u>.
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> [Footnote omitted and my emphasis.]

[21] Age is a consideration to be taken into account when deciding if someone is a member of an organization within the meaning of paragraph 34(1)(f) of the IRPA (*Poshteh*, supra). The ID finds that Mr. Ali had the requisite knowledge and mental capacity to understand the nature and effect of what he was doing. Not only did he grow up in an environment where he was aware of the goals and purposes of the ONLF, but he was operating the family midsize store and was entrusted to collect funds and goods for the benefit of the ONLF. He indicated in an interview

with an official and at the hearing before the ID that he was not coerced into giving support to the ONLF: he believed in the cause, said the ID, and "wanted his people to be free from the oppressive control of the Ethiopian government" (ID decision, para 79).

D. Ministerial Relief

[22] The IRPA provides that Ministerial relief may be granted if someone is found to be inadmissible in circumstances where section 34 is considered. The applicant contended that section 42.1, which allows for the Ministerial relief, has become discretionary and restrictive, thus limiting the safety valve it should be. This is compared to s. 42.1's predecessor, ss. 34(2) which was repealed in 2013 (2013, C. 16, s. 13). In the view of the applicant, the restriction would not allow the Minister to consider the merits of an argument according to which the membership was innocent.

[23] The ID was not convinced that the scope of s. 42.1 was significantly reduced. In *Najafi* (supra), the Court of Appeal considered the new s. 42.1 and old ss. 34(2) in its comments about Ministerial relief (paras 80 and 81), the existence of which would counterbalance the scope of the definition of membership given by the jurisprudence. No narrowing of the provisions was noticed. In *Maqsudi v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1184, this Court did not see in s. 42.1 an undue restriction to access to the relief. It felt bound by *Najafi*. The Court (para 49) referred to paragraphs 80 and 81 in *Najafi* at length. I would do the same for the sake of clarity:

> [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.

The same comment was made in *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86, [2016] 1 FCR 428 (para 26). (See also *Nassereddine v Canada (Citizenship and Immigration)*, 2014 FC 85, [2015] 2 FCR 63 [*Nassereddine*] at paras 21, 74, 75).

[24] At any rate says the ID, Mr. Ali is not an innocent member: he knew and understood the goals and functioning of the ONLF, yet he supported it. His membership was established.

E. Temporal Connection

[25] This time, the argument was that the ONLF transformed itself into a political organization with the peace agreement of 2010. The tribunal disposed of the argument quickly. There is no evidence that the ONLF transformed itself after 2010. The conflict remained ongoing through 2017 (date of the ID decision). The ONLF's own communiqués show that the conflict is ongoing (ID decision, para 90). Furthermore, the ID concluded that there is no temporal connection between the membership and the acts of terrorism or subversion. Support for the finding is found in *Yamani v Canada (Public Safety and Emergency Preparedness)*, 2006 FC

1457 where it is said that “there is no temporal component to the analysis in s. 34(1)(f)” (para 11). The same conclusion was reached in Gebreab v Canada (Public Safety and Emergency Preparedness), 2010 FCA 274:

> [3] Consequently, the appeal will be dismissed and the certified question will be answered as follows:
>
> > It is not a requirement for inadmissibility under s. 34(1)(f) of the IRPA that the dates of an individual’s membership in the organization correspond with the dates on which that organization committed acts of terrorism or subversion by force.

F. Charter Violation

[26] Mr. Ali sought to argue that section 7 of the *Charter* (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]) is engaged in the early stages of the determination of inadmissibility. The argument is that inadmissibility causes the ineligibility to make a refugee claim (the applicant challenges the ineligibility finding in IMM-5604-17), which results in the pre-removal risk assessment [PRRA] that can take place only on narrowed grounds. Moreover, travel restrictions exist, there is a lack of access to employment and education and a person carries the social stigma of being found to be a member of a terrorist (or subversive) organization. These are the direct result of the inadmissibility proceedings before the ID. The right to life, liberty and security of the person is affected at the early stage; the right not to be deprived of those rights is said to be in contravention of the principles of fundamental justice well before someone is removed from Canada.

[27] The ID finds that s. 7 of the *Charter* must be shown to be engaged through a finding of inadmissibility where the life, liberty or security of the person would somehow be compromised. The ID relies on two cases: *B010* and *Stables.* The Supreme Court of Canada, in *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704 [*B010*], said unambiguously that s. 7 "is not engaged at the stage of determining admissibility to Canada …" (para 75). The same point of view was expressed in *Stables v Canada (Citizenship and Immigration)*, 2011 FC 1319, [2013] 3 FCR 240 [*Stables*] at paragraphs 39 and 40. On the basis of these authorities, as well as those cited in those cases, the ID considered that section 7 of the *Charter* is not engaged.

[28] At any rate, relying on *Stables* at paragraph 56, the ID also found that the process is not inconsistent with the principles of fundamental justice. I note that Mr. Stables was challenging the constitutionality of s. 37 of the IRPA (member in a criminal organization). It did not appear that the constitutionality of any provision was in issue before the ID in the instant case.

III. The ID decision in IMM-5604-17

[29] In the decision in IMM-5604-17, dated December 18, 2017, the claim for protection was found, through the application of paragraphs 104(1)(b) and 101(1)(f), to be ineligible to be referred to the Refugee Protection Division [RPD]. The decision is very short. Indeed it speaks of a Notification of Ineligibility. That is so because the claimant, Mr. Ali, had been determined to be inadmissible on the ground of security. The Notification simply states that "(c)onsequently, you are ineligible to have your claim for refugee protection heard by the Refugee Protection Division of the Immigration and Refugee Board of Canada (s. 104(1)(b) for s. 101(1)(f))".

IV. Arguments on inadmissibility

[30] The applicant raises basically two issues in his judicial review application with respect to inadmissibility. The inadmissibility finding is challenged as the ID erred in finding that Mr. Ali was a member of an organization engaged in the subversion by force of any government and in terrorism. It was an error to conclude that the organization had engaged in terrorism. The ID also erred in law in refusing to consider that Mr. Ali's rights under s. 7 of the *Charter* are engaged at an early stage, thus failing to interpret ss. 34(1) of the IRPA in a way consistent with the principles of fundamental justice and Canada's international human rights obligations.

A. Inadmissibility

[31] The applicant contends that the ID wrongly concluded that he was a member of the ONLF. He also argues that he cannot be a member of an organization engaged in terrorism because he did not know that the ONLF had engaged in the targeting of civilians or that one of its objectives included overthrowing the Ethiopian government in his region of Ogaden. He was at best an innocent member.

[32] The applicant also argues that s. 7 of the *Charter* is engaged and that the ID has an obligation to interpret the term "member" in such a way that it does not violate s. 7 because "any interpretation broad enough to capture his limited connections to the ONLF would be inconsistent with s. 7" (Further Memorandum of Fact and Law, para 55).

B. Membership

[33] The applicant did not discuss the standard of review, but stated that the findings of fact leading to the conclusion that Mr. Ali was a member of the ONLF were unreasonable.

[34] The notion of membership cannot be as broad as found by the ID because it then becomes meaningless (*Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957 at para 118). Support for a terrorist organization will not suffice. Referring to *Nassereddine* (supra), the applicant states that the nature of the involvement in the organization, the length of time of the involvement and the commitment to the organization are to be considered. His involvement is presented as so limited that there is no evidence he knowingly supported terrorist activities. His support was not sufficient.

[35] Another unreasonable finding of fact is said to be the comment made by the ID that Mr. Ali was raised in an environment where support for the ONLF was present and conductive to an awareness of the organization's goals and purpose.

[36] In the view of the applicant, the ID should have found him to be an innocent member in view of the narrower scope of the Ministerial relief provision (s. 42.1) of the IRPA. That determination should not have to wait for the Ministerial relief now found at s. 42.1.The applicant claims "that Mr. Ali did not know that the ONLF had engaged in the targeting of civilians" (Further Memorandum of Fact and Law, para. 91) or that one of its objectives was the

overthrow of the Ethiopian government in Ogaden. The evidence of Mr. Ali is sufficient for a finding that he was an innocent member.

[37] In that same vein, it is argued that the applicant did not knowingly participate in the organization's terrorist activities in that the evidence concerning such activities relates to a splinter group (the Osman group). Here, the argument appears centered on the burden of proof that is claimed to be transferred by the ID onto the applicant. It was not for the applicant to disprove the limit to the group responsible for the attack on civilians. As he puts it, "(t)he onus is on the Minister to provide evidence that Mr. Ali was connected to an organization that committed terrorist acts and that his purpose in contributing to that group was to enhance their ability to commit the acts " (Further Memorandum of Fact and Law, para 95). The association with a splinter group is only coming from Mr. Ali's testimony that he knew that Osman was the leader of the ONLF. That, in the view of the applicant, is not determinative.

[38] As is to be expected, the respondent takes a different view. The Minister reviewed in details the applicant's evidence which tends to present the applicant's involvement as more limited and innocent, as time goes on, from the Basis of Claim to an interview with an officer in April 2016 to the hearing before the ID. To put it another way, the applicant was more effusive about his involvement when he was trying to convince that he ought to have been found to be a refugee. The "objective" evidence before the ID included the following taken from the Respondent's Further Memorandum of Fact and Law, at paragraph 4:

> …
>
> (h) The Applicant named Mohamed Osman as an ONLF leader and when confronted with the fact that Osman advocated armed struggle he responded that he was informed by the

elders that Osman favoured peaceful negotiations (AR, p. 305);

(i) The ONLF has attacked and killed civilians at an oil installation; summarily executed civilian government officials; and executed civilians it perceives to be government collaborators (AR, pp. 95-97);

(j) An ONLF communique accuses oil companies of funding the Ethiopian regime and that the Ethiopian army and associated entities and therefore are considered legitimate military targets (AR. P. 153, 155);

(k) The ONLF is a nationalist movement that seeks self-determination for ethnic Somalis in Ethiopia which was founded in 1984. It engages in ambushes and guerilla style raids against the Ethiopian army, the kidnaping of foreign workers presumed to be government agents and bombings in the Ethiopian capital. It also took responsibility for an attack on an oil field where it killed Somali and Chinese workers justifying its violence by saying that the violence had not been without warning (AR, pp. 191-193);

(l) The ONLF's killing of the oil workers has been widely reported (AR, pp. 195, 197, 204);

(m) The ONLF will use any means necessary, including violence to achieve its goal of self-determination (AR, p. 204);

(n) The ONLF consists of 8,000 fighters armed with automatic weapons and some RPGs. They hold the rural hinterlands and resort to hit and run tactics against the government. There is a disagreement in the leadership with Chairman Mohamed Osman favouring aid from Eritrea (AR, pp. 197-199); and

(o) A spokesperson for the Osman group of the ONLF, which claimed responsibility for the 2007 killings of oil workers stated that the ONLF does not contain factions (AR, p. 232).

[39] Being governed by the standard of reasonableness, the Court owes the decision maker a great deal of deference. The inadmissibility finding was reasonable.

[40] Subversion by force of any government does not require that it be shown that the force used was illegitimate at the ID stage. Such consideration is relevant at the Ministerial relief stage of the process.

[41] Relying on the definition of "terrorism" in the Supreme Court of Canada decision in *Suresh* (supra, para 98), the respondent argues that the ID reasonably found enough evidence that the ONLF sanctions terrorist acts: the Osman group is not distinct and separate from the ONLF. The respondent relies on four paragraphs of *Nassereddine*, which I reproduce:

> [44] In my view, it cannot be that an applicant who admits to membership in a terrorist group may then escape inadmissibility simply by asserting that he or she is a humanitarian who operated within a non-violent faction of that terrorist organization absent documentary or other evidence to support this assertion. The existence of the faction, its distinct identity and its operations must be objectively established. If an applicant is unable to establish this, then he or she may still seek the potential relief available pursuant to subsection 42.1(2) (formerly subsection 34(2).
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> [45] In *Ugbazghi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 694, the applicant therein was found to be a member of the Eritrean Liberation Front (ELF), an organization potentially engaged in terrorism. Her application for permanent residency was refused on the grounds that she was found to be inadmissible pursuant to subsection 34(1)(f). Initially, she stated that she was a member of the ELF. She later submitted that she was not a member of the ELF, but was a member of an ELF support group. Justice Dawson dismissed the application for judicial review. She noted that the applicant provided no evidence confirming the existence of such a separate support group. Further, the applicant's own evidence showed that the support group completely identified with and worked to further the goals and activities of the ELFF, it did not support a finding that the group was entirely separate and distinct from the ELF.
>
> [46] Justice Dawson noted that in any case it is always possible to say that a number of factors support a membership finding and that a number of factors point away from membership. The weighing of these factors is within the expertise of the officer

> (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 36 [*Poshteh*]). Justice Dawson found that:
>
> > [47] Without doubt, subsection 34(1) of the Act is intended to cast a wide net in order to capture a broad range of conduct that is inimical to Canada's interests. Parliament's intent is further reflected in section 33 of the Act, which requires that the facts that constitute inadmissibility include facts that "there are reasonable grounds to believe" occurred. Thus, the test for inadmissibility is whether "there are reasonable grounds to believe" that a foreign national was a member of an organization that "there are reasonable grounds to believe" engages, has engaged, or will engage in acts of terrorism. This is a relatively low evidentiary threshold. It is because of the very broad range of conduct that gives rise to inadmissibility that the Minister is given discretion, in subsection 34(2) of the Act, to grant relief against inadmissibility
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> [47] In the matter before me, the Applicant in his testimony consistently asserted that his work with Amal was in its civil defence department. However, he provided no other evidence as to the existence of the civil defence department, its objectives and goals, how it operated, under what leadership it operated or how it was distinct from Amal's military branch. Given this, and the absence of any documentary or other evidence that supported the Applicant's submission, the IRB did not err by failing to consider the role of Amal's "civil wing" in the context of the Applicant's section 34 inadmissibility hearing. And, in any event, the test for inadmissibility as described in *Ugbazghi*, above, was met based on the Applicant's admission of membership in Amal.

[42] The applicant had to show that the conclusion that he is a member of the ONLF was unreasonable in view of the broad and unrestricted interpretation that has been given to the term by the courts. Membership may be established if material support, such as providing funds, is shown, even though such acts are not directly linked to violence (*Suresh v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 28, at para 84). In *Poshteh* (supra), the distribution of pamphlets by someone who was never a formal member of an organization and did not even

raise funds for the organization or recruit members was ruled sufficient by the ID; the finding was ruled to be reasonable by this Court as well as by the Federal Court of Appeal. Given the young age of Mr. Poshteh, the Court of Appeal also provided guidance by finding that the *onus* is on the applicant to offer evidence in support of a contention that the knowledge and mental capacity were deficient, noting that the presumption of likelihood of knowledge and capacity is stronger when a minor person is closer to 18 years of age. The ID's finding was reasonable.

C. Is s. 7 of the Charter engaged?

[43] The applicant seems to take issue with the meaning given by the case law to the term "member" as it should not be given an interpretation that would capture the limited connections with an organization in a case like the present one. In a word, the definition is too broad if it is to be given a liberal and unrestricted interpretation. The common law definition is tempered if Ministerial relief is generous: it is not the case anymore, now that s. 41.2 has replaced ss. 34(2) of the IRPA.

[44] It appears that the applicant contends that the mere standing as a person inadmissible to Canada is sufficient to engage s. 7. That, he says, imposes a severe psychological stress. Furthermore, being inadmissible deprives him of the full-blown refugee process as his protection against removal will come in the form of a PRRA where only the s. 97 grounds will be considered. He is not allowed to obtain permanent residency status in Canada if he is inadmissible and he will not be permitted to visit his family in Kenya. He can be "refouled" to Ethiopia at any time.

[45] This, argues the applicant, results in the violation of “substantive principles of fundamental justice”. He identifies two such principles.

[46] According to the applicant, there is a principle of non-refoulement which is a principle of fundamental justice because it constitutes the most fundamental right afforded to refugees: “Denying Mr. Ali legal protection against *refoulement* is contrary to his rights under international law” (Further Memorandum of Fact and Law, para 64). Surprisingly, the applicant cites paragraph 104 of the Supreme Court decision in *Németh v Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281 [*Németh*], an extradition case, which states that the principle of non-refoulement may not even have acquired the status of *jus cogens* at international law, as it continues to be controversial among international law scholars.

[47] In order to make the principle of non-refoulement a principle of fundamental justice, the applicant claims that it is a legal principle found in international instruments as well as municipal law. It is also said to be “vital to our societal notion of justice” being a cornerstone of refuge protection.

[48] It is important to note that the applicant relies on two cases for his proposition that the principle of non-refoulement has attained the level of principle of fundamental justice in Canadian constitutional law: *Németh*, an extradition case that did not find that the principle has even reached the level of the *jus cogens* and *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 [*Canadian Foundation*], the

case that found that s. 43 of the Criminal Code (correction of child by force) did not violate s. 7 of the *Charter*.

[49] The applicant was invited repeatedly to explain, with a measure of precision, how the principle can be a principle of fundamental justice. We are left with the analysis by the majority of the three principles of fundamental justice in the *Canadian Foundation* case which are alleged to apply somehow in our case: independent procedural rights of children, the best interests of the child and vagueness and overbreadth.

[50] As I understand it, the applicant relies on the analysis by the Chief Justice, on behalf of the majority, who provided a framework to determine whether a legal principle can become a principle of fundamental justice:

> (a) It must be a legal principle. Not only it provides some meaningful content, but it avoids the adjudication of policy matters;
>
> (b) There must be sufficient consensus that the alleged principle is vital or fundamental to our notion of justice in society. The Court adds that "(t)he principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice" (para 8);
>
> (c) The legal principle must be precise enough that once applied it yields predictable results.

In order to gauge how fundamental principle must be to qualify, the Chief Justice cites as examples the need for a guilty mind (*mens rea*) and the need for reasonably clear laws.

[51] The Supreme Court refused to see in the best interests of the child a principle of fundamental justice in spite of its recognition in domestic law and international law. The applicant did not explain why it should be otherwise with the principle of non-refoulement.

[52] The other substantive principle of fundamental justice advanced by the applicant is that the severity of the effects of an admissibility decision is grossly disproportionate in light of the purpose of paragraphs 34(1)(f). Here again, the Court sought repeatedly clarification as to the "catastrophic impact of the inadmissibility findings" (Further Memorandum of Fact and Law, para 74), such that the effects are grossly disproportionate in the case of Mr. Ali because we are in the earlier stage of a process that could lead to removal. To put it bluntly, he is not about to be removed. So what are the catastrophic effects that are so grossly disproportionate that the Constitution can be successfully invoked? As Sopinka J. put it in *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, at page 591, "broad as to be no more than vague generalizations about what our society considers to be ethical or moral" do not qualify as principles of fundamental justice because, in the words of Chief Justice McLachlin in *Canadian Foundation*, that "would transform s. 7 into a vehicle for policy adjudication" (para 9). While acknowledging that the purpose of paragraph 34(1)(f) is the protection of national security, not a meaningless interest, there is no articulation offered by the applicant as to why a declaration that Mr. Ali is inadmissible, in view of that determination being early in the process, constitutes gross disproportionality.

[53] In the view of the applicant, the ID was wrong to refuse to engage on s. 7 of the *Charter* at this early stage. The ID noted that the Supreme Court in *B010* said that "s. 7 of the *Charter* is not engaged at the stage of determining admissibility to Canada" (para 75). For the applicant, this constitutes merely an *obiter* that would not justify the refusal to discuss further the allegation.

[54] As I understand it, the applicant wants to raise the principle of non-refoulement to the level of a principle of fundamental justice and the gross disproportionality, which has received recognition as a principle of fundamental justice (but in a particular context, at least at this stage in the development of our law), between national security and the "catastrophic impact of an inadmissibility finding"; those being in his view principles of fundamental justice, yet these principles would be applied well before "refoulement" might be an issue. Here again, precision is lacking. Assuming that the principle of non-refoulement is a principle of fundamental justice, how is it relevant where refoulement is yet to be considered? Refoulement, if any, would occur much later in the process. Moreover the applicant identifies a number of irritants, some of which are obviously more significant than others, which apparently are part of the catastrophic impact of our early finding of inadmissibility. He identifies these as the availability of a restricted PRRA, perhaps at one end of the spectrum to "a life in limbo without the protection of permanent residence in Canada or the liberty to leave the country to visit his family. The stigma of being branded a threat to national security due to involvement in terrorism is another immediate and personal effect of the inadmissibility finding" (Further Memorandum of Fact and Law, para 78).

[55] The respondent counters that the challenge is premature. The relevant time for a consideration of s. 7 of the *Charter* is at the time of removal. That would be at the latest at the stage of a pre-removal risk assessment.

[56] The respondent argues that it is the whole process leading to a removal that must be considered in relation to s. 7 of the *Charter*. The ID's jurisdiction is limited to making a determination as to the right to enter Canada because he is inadmissible on the basis of some ground provided for in the IRPA. That finding can be overturned by the Minister who could, pursuant to s. 42.1 of the IRPA, provide relief; if relief is granted, the inadmissibility finding will be lifted. There would then be the availability of a PRRA. That process has been ruled to be consistent with the principles of fundamental justice by de Montigny J., then of this Court (*Stables v Canada (Citizenship and Immigration)*, 2011 FC 1319, [2013] 3 FCR 240 [*Stables*]).

[57] At any rate, the principle of non-refoulement at international law is far from being as absolute as is advanced by the applicant. The UN Refugee Convention does not guarantee an absolute right of non-refoulement. The prohibition of expulsion or return (refoulement) is qualified:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community at that country.

United Nations Convention Relating to the Status of Refugee, 28 July 1051, [1969] Can TS No 6

Nevertheless, the person in need of protection can resort to subsection 112(3) and paragraph 114(1)(b) of the IRPA.

V. Analysis

A. Membership in ONLF

[58] Generally speaking, the case on the membership of Mr. Ali in an organization engaged in the subversion by force of any government or engaged in terrorism has been argued as if the matter is a akin to a criminal trial where the Crown must prove every essential element of the offence beyond a reasonable doubt. This is of course not the case as the facts that constitute inadmissibility "include facts for which there are reasonable grounds to believe they have occurred, are occurring or may occur" (s. 33 of the IRPA). That means that the decision maker does not have to be satisfied even on a balance of probabilities, the standard applicable in civil proceedings. As the Supreme Court repeated in *Canada (Attorney General) v Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 SCR 720 [*Fairmont*], the evidence that will satisfy that standard "must always be sufficient by clear, convincing and cogent" (quoting from *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, *Fairmont* at para 36). That is not the standard to which the ID is held. The test of s. 33 of the IRPA must not be ignored. It is not to be given lip service: once articulated it must be followed. The ID was right to apply it. It merely requires that there be "a *bona fide* belief in a serious possibility based on credible evidence" (*Chiau*, supra, at para 60); "reasonable grounds will exist when there is an objective basis for the belief which is based on

compelling and credible information” (*Mugesera*, supra, at para 114).This is a far cry from the criminal standard of “beyond a reasonable doubt” or even the civil law standard.

[59] The applicant focuses his effort in the Memorandum of Fact and Law and at the hearing on the term “member”. The notion is not defined in the IRPA and he argues that he is not the member that has been defined in the case law.

[60] The controlling authority continues to be the Federal Court of Appeal decision rendered by Rothstein J.A. in *Poshteh*. The Court of Appeal notes that the standard is that of reasonable grounds to believe the person is a member which, given the ID’s expertise in fact-findings, requires great deference (para 21).That must also be the approach taken here.

[61] The Court of Appeal considers that the term must be given an unrestricted and broad interpretation. The Court endorses the rationale for such an interpretation given in *Canada (Minister of Citizenship and Immigration) v Singh* (1998) 151 FTR 101:

> [52] The provisions deal with subversion and terrorism. The context in immigration legislation is public safety and national security, the most serious concerns of government. It is trite to say that terrorist organizations do not issue membership cards. There is no formal test for membership and members are not therefore easily identifiable. The Minister of Citizenship and Immigration may, if not detrimental to the national interest, exclude an individual from the operation of subparagraph 19(1)(f)(iii)(B). I think it is obvious that Parliament intended the term "member" to be given an unrestricted and broad interpretation. …

[62] As noted earlier in these reasons, there are clear similarities between the facts in *Poshteh* and the case at bar. It is the activities that will result in a conclusion that Mr. Ali was a member

of the organization. However, the level of integration in the organization is not a pre-requisite (para 31). After an examination which he qualified as “somewhat probing”, Rothstein J.A. concluded that he could not find the ID decision to be unreasonable. I reach the same conclusion in this case.

[63] The *Poshteh* Court went on to examine the impact the age of a person may have on the ability to be a member. The Court finds that “there would be a presumption that the closer the minor is to 18 years of age, the greater will be the likelihood that the minor possesses the requisite knowledge or mental capacity” (para 51). The Court concludes:

> [56] The Immigration Division found that Mr. Poshteh continued his activity with the MEK until he was 17 years and 11 months. Where a minor of that age knows of the violent activity of the organization, becomes involved of his own volition, continues for over two years and leaves only after he is arrested, it cannot be said that it is unreasonable for the Immigration Division not to accept his arguments based on his status as a minor and to find him to be a member of the terrorist organization.

[64] Before leaving the examination of *Poshteh*, it is appropriate to note that the Court found that s. 7 of the *Charter* did not find application at the ID stage. It is the deprivation of one of the three interests (life, liberty and security of the person) that must be shown not to be in accordance with the principles of fundamental justice. The new finding of inadmissibility does not engage s. 7 of the *Charter*:

> [63] Here, all that is being determined is whether Mr. Poshteh is inadmissible to Canada on the grounds of his membership in a terrorist organization. The authorities are to the effect that a finding of inadmissibility does not engage an individual's section 7 Charter rights. (See, for example, *Barrera v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 2420 (FCA), [1993] 2

> F.C. 3 (C.A.).) A number of proceedings may yet take place before he reaches the stage at which his deportation from Canada may occur. For example, Mr. Poshteh may invoke subsection 34(2) to try to satisfy the Minister that his presence in Canada is not detrimental to the national interest. Therefore, fundamental justice in section 7 of the Charter is not of application in the determination to be made under paragraph 34(1)(f) of the Act.

[65] I have conducted my own somewhat probing examination of the record before the ID, including the transcript of the hearing before the decision maker. At its highest, the view taken by the applicant is no more than a disagreement with the conclusions reached by the ID.

[66] The required reasonable grounds to believe may have come from the personal narrative of Mr. Ali in his Basis of Claim form of August 7, 2016, shortly after arriving in Canada from Norway. In it, he declares:

- His father was a well-known local member of the ONLF designated to solicit financial support from the local population. He says that he organized meetings on behalf of the ONLF;
- His half-brother was also a member who left the village to fight with the ONLF;
- At the age of 16 he started running the grocery store;
- The organization to which the applicant’s father belonged wanted to liberate Ogaden from Ethiopian rule and to defend against the oppression of the Ethiopian government. He accused the Ethiopian authorities of imprisonment, torture, disappearances, looting, rape and murder;

- After his father passed away, the father's friends and uncles began visiting him at the grocery store to talk to him about the ONLF. They encouraged the applicant to get involved with the resistance movement: one way could be to collect money at the store from people in nearby villages. He continued collecting even after the police looted goods transported to his store, in 2012, claiming that he was supplying the ONLF;

- The applicant stated in his personal narrative that he started collecting for the ONLF when he was 16. In his interview of April 17, 2016, he confirmed that no one forced him. He continued until his 8 month detention, starting in August 2013. Released in March 2014, he decided to leave Ethiopian in June 2014.

[67] We are not dealing here with any kind of contact with an organization that would render anyone to be considered to be a member of an organization on an unrestricted and broad definition of the word (*Toronto Coalition to Stop the War v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957, [2012] 1 FCR 413). We are not here speaking of merely donating financial support. It was open to the ID to find on reasonable grounds that the applicant wanted to get involved with the organization. He knew about its goals and purpose and accepted to take up the role once held by his father, a member of the ONLF, to collect for the organization. He knew full well that his brother was fighting with the ONLF and he continued his involvement with the organization even after he was the victim of looting because he was respected of supplying the ONLF.

[68] I repeat. The Court's role is not to substitute its view of what constitutes membership. It is for the ID to be satisfied on reasonable grounds to believe, not beyond a reasonable doubt or on the civil standard of balance of probabilities, that there is membership in the circumstances of a particular case. Rather, the Court's role is to control the legality of the decision by considering if the outcome reached is an acceptable, possible outcome based on the facts and the law and whether there was justification, transparency and intelligibility within the decision-making process. As Binnie J. said for a majority in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*]:

> [59] Reasonableness is a single standard that takes its colour from the context. One of the objectives of Dunsmuir was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (Dunsmuir, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

There was ample information on this record for the ID to conclude there were reasonable grounds to believe in membership. In the words of *Mugesera* (supra), there is an objective basis for the belief which comes from the applicant himself. The criteria the applicant would advocate do not detract from that determination: the nature of the involvement, the period of time and the commitment to the organization (*Nassereddine*). They point to membership in the organization by Mr. Ali. It was reasonable for the ID to have the required reasonable grounds to believe.

[69] In effect, the applicant sought to minimize the nature of his association in his testimony before the ID. He was just providing space for a collection box in his store; his activities lasted only a year (in fact, they lasted until he was detained for eight months); he was only 15-16 years of age (he stated in his narrative that he started collecting when he was 16; he turned 16 on January 12, 1996, and he continued collecting until March 2013, when he was 17); his level of commitment was suggested as being low (although he continued his activities after being looted by the police in 2012 for being suspected of supplying the ONLF). On the contrary, there was evidence that the applicant was happy to help the ONLF because of the mistreatment suffered at the hands of the Ethiopian government and its forces. As he put it in a port of entry interview on July 13, 2015, "(t)he Somalian people in that region did not support the Ethiopian government". When asked what is the ONLF, the applicant answered: "The Ogaden National Liberation Front. They supported breaking away from Ethiopia".

[70] The ID had ample information to infer as it did that the applicant grew up in an environment of ONLF supporters, from his father to his half-brother, both members of the organization, to his father's friends and his uncles who encouraged him to get involved. His father was well known in his community, and it would be surprising if the goals and purpose of the ONLF were not known to someone who has a brother fighting for the ONLF and was approached to get involved. The applicant has not shown either that his age was a consideration to be taken into account to conclude he did have the knowledge and mental capacity. It was reasonable for the ID to conclude that the attempt at discounting the ability of a 16-17 year old fell short.

[71] Similarly, the ID found that the applicant was not an “innocent member” because he was “someone who knew and understood the functioning and the goal of the ONLF and yet fully embarked in supporting this organization, even at the risk of his own well-being” (ID decision, para 88). The applicant refers to paragraph 81 in *Najafi* (supra) for the general proposition that innocent membership is an exception for members who do not know they are contributing to an organization whose objective is to overthrow the government in the region of Ogaden and harming civilians in order to achieve its goal. It is unclear how paragraph 81 of *Najafi* can be of any assistance to the applicant. It reads:

> [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.

The mechanism referred to by the Court of Appeal is paragraph 34(2) of the IRPA which allow for Ministerial relief in cases where a member of an organization is an innocent member or when the admission would not be detrimental to the national interest in view, for instance, of the legitimacy of the use of force. The point, however, is that it is not for the ID to make that determination.

[72] On the other hand, *Najafi* is helpful for the proposition that the exemption provided for in replacement of subsection 34(2) of the IRPA by new s. 42.1 is still available and powerful (at paragraphs 13 and 80). Thus the broad definition given to membership may be tempered in appropriate cases by Ministerial relief.

[73] Be that as it may, the applicant failed in his attempt to suggest he did not know that the ONLF engaged in the targeting of civilians. That contention does not have an air of reality in the circumstances of this case. I have reviewed the documentary evidence before the ID. There is considerable information about the scope of the fighting and the level of casualties, including communiqués issued by the ONLF. One important issue is the view taken by the ONLF that it will not allow exploration of oil and gas on its territory until the region has gained its independence. It is widely reported that in 2007, the ONLF targeted an oilfield where foreign workers operated and the leader of the assault was one Osman.

[74] The applicant suggests that it was the Minister's *onus* to provide evidence that he was also a member of a violent faction led by Osman that committed terrorist acts. By stating at para 48 of its decision that there is "no evidence before this Panel that the ONLF, as the larger organization, ever denounced this attack nor that it distanced itself from this subgroup, particularly following this incident", it is suggested that the ID flipped the *onus* on the applicant.

[75] This must be put in its proper context. At paragraph 46, the ID finds, on the basis of documentary evidence, that "attacking oil exploration sites where local and foreign workers are employed and causing the death and displacement of large groups of people are clearly terrorist acts intended to cause death or serious bodily injury to civilians and their purpose is to compel the government of Ethiopia to rescind its control over the Ogaden region". That may have been enough to dispose of the issue. Nevertheless, the ID attempted to answer the argument put by counsel for Mr. Ali that the Osman group was a splinter faction. The ID goes on to find that the attack against oil workers was done under the banner of the ONLF. The panel notes that the

article relied on by counsel “clearly states that “there are no factions” within the ONLF” (para 48). Mr. Ali never even alluded to the ONLF being factionalized. It is in that context that the ID noted that the ONLF never denounced the attack or takes its distance from the Osman group. The ID did not put any special *onus* on the applicant. It simply reviewed the evidence. Without any counter evidence, that which was available to the ID pointed in the direction of one organization operating in the region. When Mr. Ali was collecting money on behalf of the ONLF, he was thereby collecting money for the Osman Group. I cannot find anything unreasonable in that conclusion.

[76] But the ID went even further. It noted that the Mr. Ali testified before it to the following effect, as presented at paragraphs 40 of the ID decision:

> Q: Mr. Ali, earlier today you were asked if you could name any of the leaders of the ONLF. You were able to name one, Mohamed Osman. When did you first hear – sorry – when did you first hear that he was a leader, one of the leaders of the ONLF?
>
> A: When I was starting collecting the money.
>
> Q: Were you under the impression that he was the leader of the ONLF at the time you were collecting?
>
> A: Yes.

[77] That made the ID quip that “if there are splinter factions within the ONLF, it appears that Mr. Ali was collecting financial contributions and goods in support of the faction that had earlier carried out the 2007 attacks against the civilians and oil field workers” (para 50). In other words, Mr. Ali concedes that he was also collecting for the Osman group in 2012 where he first heard that Mohamed Osman was one of the leaders of the ONLF.

[78] What is much more telling is the ID's conclusion that there were no factions, let alone one that would be non-violent:

> [52] In order to establish the existence of a non-violent faction, its distinct identity, its objectives and goals, and its operations must be objectively distinguished and recognized.[40] In this case, the ONLF is one group that is engaged in a fight against the Ethiopian government with one goal in mind, and that is to take control over the Ogaden region, and their strategy is to use violent tactics to achieve their goal. Indeed, they make no secret of it, and their attacks are liberally announced through their various communiqués.[41] Moreover, the ONLF is considered to be a terrorist organization[42] and a rebel group by the Ethiopian government because of their unrelenting attacks against military installations and other government outposts.
>
> [Footnotes omitted.]

There was no error in law or in fact, let alone one that could satisfy the need for the error to be unreasonable. Even questions of law in the area of expertise of an administrative tribunal must satisfy the reasonableness test of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47 and *Khosa* (supra).

[79] It follows that none of the allegations of unreasonableness around the notion of membership can be sustained on this record.

B. Section 7 of the Charter is engaged and the ID should have considered the substantive principles of fundamental justice

[80] It remains unclear what the ID should have done with the argument that it ought to have interpreted the term "member" in s. 34 of the IRPA in order to avoid an alleged breach of s. 7 of the *Charter*. That is because "any interpretation broad enough to capture his limited connections to the ONLF would be inconsistent with s. 7" (Further Memorandum of Fact and Law, para 55).

That assumes Mr. Ali's connections to the ONLF are limited, which has not been demonstrated, and that s. 7 of the *Charter* can provide some bright line that could not be crossed.

[81] Mr. Ali did not challenge the constitutionality of any provision. He did not invoke the *Doré* framework *(Doré v Barreau du Québec, 2012 SCC 12, [2012] 1 SCR 395 [Doré])* where an administrative decision would be made "in light of constitutional guaranties and the values they reflect" (*Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256, para 52). That has the advantage of applying the *Charter* values to an individual administrative decision in relation to a particular set of facts. As the Court of Appeal re-asserted recently, the standard of review is reasonableness which "involves an assessment of whether the decision reflects a proportionate balancing of the *Charter* protections at play and the relevant statutory mandate" (*Ewert v Canada (Attorney General)*, 2018 FCA 175, at para 11). The applicant is less than loquacious as to how a constitutional argument would be articulated if it is to be dealt with earlier than when his right to life, liberty and security of the person is in jeopardy because he may be removed from Canada.

[82] Without any authority in support, the applicant declares that "(i)f it is established that s. 7 interests are engaged, any deprivation of those rights must be in accordance with the principles of fundamental justice" (Further Memorandum of Fact and Law, para 56). That falls way short of being enlightening. This is at a level of generality such that it is of no assistance to a decision maker. If a litigant does not challenge the constitutionality of provisions, which calls for a standard of review of correctness (*Doré*, supra, para 43), he must then challenge the decision made and the *Doré* framework is to be used as one will examine the decision to see if it reflects a

proportionate balancing between the *Charter* protection and the relevant statutory mandate. It will suffice for the decision to be reasonable. Without a proper articulation, the ID could be forgiven if it did not capture the argument.

[83] The Federal Court of Appeal in *Poshteh* has already found that the determination made by the ID is only whether the person is inadmissible on grounds of membership in a terrorist organization. The same can of course be said of the membership in an organization engaged in the subversion by force of any government. The *Poshteh* Court concluded that "(t)he authorities are to the effect that a finding of inadmissibility does not engage an individual's section 7 Charter rights (authorities omitted). A number of proceedings may yet take place before he reaches the stage at which deportation may occur" (para 63). These were not idle words as the Court of Appeal reached the conclusion in no uncertain words:

> [64] I would answer the certified question in the following manner:
>
> (a) section 7 of the Charter is not engaged in the determination to be made by the Immigration Division under paragraph 34(1)(*f*) of the Act;
>
> …

That conclusion is because the Court concluded that the s. 7 interests are engaged only when at the deportation/removal stage.

[84] The Supreme Court of Canada appears to have reached the same conclusion in *B010* :

> [75] The argument is of no assistance in any event, as s. 7 of the *Charter* is not engaged at the stage of determining admissibility to Canada under s. 37(1). This Court recently held in *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3

> S.C.R. 431, that a determination of exclusion from refugee protection under the *IRPA* did not engage s. 7, because "even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place" (para. 67). It is at this subsequent pre-removal risk assessment stage of the *IRPA*'s refugee protection process that s. 7 is typically engaged. The rationale from *Febles*, which concerned determinations of "exclusion" from refugee status, applies equally to determinations of "inadmissibility" to refugee status under the *IRPA*.

[85] The applicant seeks to distinguish *B010* on the basis that it is *obiter*. That does not account for the reference to *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431 [*Febles*], which itself is a strong statement that "even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place …". In other words, this looks like the considered view of the Supreme Court that in matters of that nature, s. 7 is engaged later. That looks very much like the conclusion of the *Poshteh* Court that noted that an inadmissibility finding under s. 34 of the IRPA is a limited finding. Subsequent proceedings will more clearly give rise to the possibility of engaging s. 7 of the *Charter*. That does not account either for the Supreme Court's decision in *Sellars v The Queen*, [1980] 1 SCR 527.

[86] In that case, the issue was whether a warning to the jury was necessary in the case of uncorroborated testimony for an offence of accessory after the fact; the evidentiary rule already existed for an accomplice. The *Sellars* Court noted an *obiter*, being defined as "the Court has thus ruled on the point, although it was not absolutely necessary to do so in order to dispose of the appeal" (p. 529), in a case decided by the Supreme Court two years earlier (*Paradis v The Queen*, [1978] 1 SCR 264). That *obiter* in an earlier case is deserving of respect. The *Sellars*

Court cited the Chief Justice of Ontario who said in *Ottawa v Nepean Township* et al., [1943] 3 DLR 802, at page 804 that "(w)hat was there said may be *obiter*, but it was the considered opinion of the Supreme Court of Canada, and we should respect it and follow it, even if we are not strictly bound by it". It followed the earlier *obiter.* I would have thought that the view expressed in *B010* and *Poshteh* was the considered opinion of those courts. It may deserve more respect than simply being dismissed as mere *obiter*.

[87] The rationale behind decisions like *B010* and *Poshteh*, and also *Najafi* and *Febles*, is that the process leading to inadmissibility and removal from Canada is at best partially completed before the ID. There are other avenues that are available, including the Ministerial relief (*Najafi*) and the PRRA, to protect innocent members or people deserving of protection, where s. 7 of the *Charter* would be engaged. As the case law developed, it is when removal from Canada is at hand that the life, liberty and security interests of a person are said to be considered. In that case, it is the removal that triggers the application of s. 7.

[88] The ID found that s. 7 is not engaged because Mr. Ali's life, liberty or security of the person are not compromised through a finding of inadmissibility (ID decision, para 99). It relied on the case law of *B010* and *Poshteh*, to conclude that other processes exist, when the issue might be a live one, before removal takes place. In other words, it is the threat of removal that triggers the application of s. 7. It is there that if the trigger is the removal, there are other steps where the s. 7 issue should be raised more appropriately. But what about if the argument is that life, liberty and security of the person are violated earlier than at the removal stage? That is where the applicant sought to situate his argument. The fact that he would be branded a person

inadmissible, even if he is not close to being removed from Canada deprives him of, at least, his right to security of the person.

[89] With the greatest of respect, the ID decision does not address the issue raised by the applicant before it. In Mr. Ali's submission before the ID his argument was that his security interest is engaged before removal because of the psychological stress he faces early on and other consequences that flow from his inadmissibility as found at that early stage. He claims that *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791, and *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307[*Blencoe*] as authorities for that proposition.

[90] It seems that the ID was addressing a different issue in concluding that it has been determined conclusively in *B010*, *Poshteh*, and *Stables* that s. 7 is not engaged. These cases speak of the removal being the trigger; Mr. Ali's argument is of a different nature. The better illustration that a different issue is dealt with in the case law referred to by the ID comes from paragraph 56 in *Stables*, cited by the ID in support of its conclusion that the s. 7 argument did not have to be considered at this stage. At paragraph 42, de Montigny J. remarked that "the Applicant has raised no argument that his life, liberty or security is in danger if he is returned to Scotland, and he has declined the offer to file an application for a Pre-Removal Risk Assessment". Paragraph 56 must therefore be read as confirming that the process leading to removal as being consistent with s. 7 of the *Charter* is the sole issue decided in that case :

> [56] I agree with the Respondent that when considered as a whole, the process by which an applicant could face a finding of inadmissibility <u>and consequent enforcement of a removal order</u>,

> reveals that the process is consistent with the principles of fundamental justice:
>
> - The Applicant is afforded the opportunity to advance submissions why a s. 44 report should not be prepared or referred to the Immigration Division for assessment;
> - The Applicant is afforded with a hearing before the Immigration Division on the merits of the inadmissibility allegation (s. 45 *IRPA*). The Immigration Division process affords the Applicant a hearing, before an impartial arbiter, a decision on the facts and the law, and the right to know and answer the case against him, the very things that fundamental justice would require in the circumstances;
> - Prior to removal, the Applicant is afforded an opportunity to apply for PRRA to assess any alleged risks in his or her country of origin (s. 112 *IRPA*);
> - Should the PRRA determine that the Applicant is a person in need of protection, his or her removal cannot proceed unless he or she is found to be a danger to the public (s. 115(2) *IRPA*);
> - Each of the above processes is subject to this Court's oversight by way of judicial review.
>
> [My emphasis.]

To put it simply, Mr. Ali sought to raise a new issue, not squarely addressed by the case law presented as dispositive of the issue.

[91] It may be less than clear that the applicant has a winning proposition to offer. In order to prevail, he will have to determine what the framework applicable is. The legislation itself is not challenged which would seem to lead presumably to the *Doré/Loyola/Trinity Western University* framework (*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*Trinity Western University*]). He then has to convince that the s. 7 of the *Charter* is engaged even at the

early stage long before removal by reason of inadmissibility. Once it has been shown that one of the three interests is in play, the applicant will have to show that the deprivation of the right has not been in accordance with our principles of fundamental justice.

[92] From what has been argued before this Court, the applicant must first satisfy the decision maker that the security of the person is affected. Thus in *Stables*, the Court reminded the parties that the "Supreme Court made it clear in Blencoe, above, (at paragraph 82), that "[…] only serious psychological incursions resulting from state interference with an individual interest of fundamental importance" will qualify as a violation of security of the person. There is no such evidence in the case at bar" (para 42). This kind of evidence may be lacking in the instant case too. Indeed, *Stables* was at a stage much closer to removal than what we have at this stage, yet the very basic principle of Canadian immigration law played evidently a significant role in considering the availability and breadth of constitutional guarantees:

> [41] Such a finding is consistent with the basic constitutional foundation of Canadian immigration law, to wit, that only Canadian citizens have the absolute right to enter and remain in Canada. Non-citizens do not have an unqualified right to enter or remain in Canada, and their ability to do so is strictly dependant on their satisfaction of the admissibility criteria decided by Parliament.

[93] Mr. Ali must then satisfy the decision maker that he was deprived of the right of the security of the person and that he was deprived in violation of principles of fundamental justice (*Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*], at para 55). As has been stated numerous times since *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, "the principles of fundamental justice are to be found in the basic tenets of our legal system" (p. 503).

[94] Our Court of Appeal reminded us just three years ago of what the principles of fundamental justice are not and what is needed to satisfy the stringent requirements. In *Erasmo v Canada (Attorney General)*, 2015 FCA 129, Stratas J.A. states propositions that have not been overtaken:

> [45] The principles of fundamental justice are not collections of principles of unfairness or "vague generalizations about what our society considers to be ethical or moral": *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at paragraphs 112 (*per* Gonthier and Binnie JJ., for the majority) and 224 (*per* Arbour J., dissenting). They do not lie in the realm of general public policy: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at page 503, 24 D.L.R. (4th) 536. Nor are they "empty vessel[s] to be filled with whatever meaning we might wish from time to time": *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at page 394, 38 D.L.R. (4th) 161 (*per* McIntyre J.).
>
> [46] Instead, the principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, above at page 503, cited with approval in *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, 132 D.L.R. (4th) 56 at paragraph 39; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paragraph 23; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, 17 C.R. (7th) 87 at paragraph 89; and many others. They are "principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice": *R. v. D.B.*, above at paragraphs 46, 61, 67-68, 125, 131 and 138; *R. v. Malmo-Levine*; *R. v. Caine*, above at paragraphs 112-13; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at paragraph 139. They are "the shared assumptions upon which our system of justice is grounded" that "find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 at paragraph 8.
>
> [47] The principles of fundamental justice can invalidate any legislation or actions taken under legislation. In other words, they can trump the principle of Parliamentary supremacy, a principle that has rested at the core of Anglo-Canadian constitutional arrangements for over four centuries. For this reason, only the most important, basic values rooted in our time-honoured practices and understandings can possibly qualify as principles of fundamental

> justice. Unfairness in the colloquial sense, freestanding policy views, or generalized views of what is proper – all matters in the eye of the beholder – cannot qualify as principles of fundamental justice, nor can they perform any part in their discernment or application. Matters such as those are the proper preserve of the politicians we elect.

[95] Here, the applicant offers two principles of fundamental justice: the right to protection against refoulement and the gross disproportionality. Presumably, the disproportion is between the restriction to the security of the person and the object of the measure. As the Supreme Court put it in *Carter*, "(t)he inquiry into gross disproportionality compares the law's purpose, "taken at face value" with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law" (para 89). I note that the constitutionality of the statute was raised in *Carter*, which was not the case here.

[96] The other principle of fundamental justice proposed by the applicant (the principle of non-refoulement) is said to meet the criteria for recognition found in *Canadian Foundation for Children* (supra). It bears repeating that *Canadian Foundation for Children* did not recognize a principle as significant as the best interests of the child as being a principle of fundamental:

> 12. To conclude, "the best interests of the child" is a legal principle that carries great power in many contexts. However, it is not a principle of fundamental justice.

If the principle of non-refoulement remains controversial among international law scholars, it may be difficult to convince that it has attained the level of a principle that is vital and fundamental to our societal notion of justice and that is viewed by society as essential to the administration of justice, or par with the need for *mens rea* and reasonably clear laws.

[97] Finally, it is unclear how s. 7 of the *Charter* is to be considered in this case. The constitutionality of provisions of the IRPA is not challenged. It does not appear that the *Doré* framework was contemplated. The applicant will have to provide clarity, which was clearly lacking up to now, as to what is the remedy sought and the legal framework that should govern the analysis. If not *Doré/Loyola/Trinity Western University*, then what? Such a fundamental issue cannot be left hanging. It is incumbent on the applicant to hang his hat, somewhere. In my view, he has avoided doing so up to now. Confusion cannot be the right policy in matters of that nature. Clarity has been lacking.

[98] The point of the matter is not for the Court to resolve these issues, and perhaps others, but rather to remind the parties of the issues that should be addressed with clarity. However, it is for the ID to decide on the constitutional issue raised before it (*Stables*, supra, para 28). It is not an acceptable outcome to refuse to address an issue on the basis of case law which addresses a different issue. As such, the decision is not reasonable. Mr. Ali's complaint is that "(t)he member dismissed these submissions without engaging with them" (Further Memorandum of Fact and Law, para 75). It is on that narrow point that the Court finds in favour of Mr. Ali, without expressing a view on the issues as framed by the applicant other than suggesting that they be addressed with clarity by the parties.

[99] The applicant sought that the matter be referred back for determination in accordance with such directions as it considers appropriate. In my view, only the issue of the application of s. 7 of the *Charter* must be sent back because the ID dismissed the submissions without engaging with them. This file is quite extensive and intricate, and the panel that heard the case is by now

familiar with the facts and the arguments. The Court would not order that the issue necessarily be determined by a differently composed panel as this does not constitute a redetermination and there is a not insignificant advantage for the administration of justice, as well as for the parties, in resorting to a decision maker already familiar with the matter.

VI. Arguments and analysis on ineligibility

[100] As for the finding that Mr. Ali's refugee claim has become ineligible because of Mr. Ali's inadmissibility, the applicant argues that he was not given an opportunity to be heard and that the finding constitutes an unreasonable exercise of discretion by the officer.

A. Arguments

[101] The chronology of events is the following. The ID decision was made on December 11, 2017. The notice according to which the refugee claim has become ineligible to be heard was given one week later, on December 18. The application for leave to seek judicial review of the ID decision came nine days later, on December 27, 2017. The applicant seeks judicial review of the "decision" to issue the notice (IMM-5604-17).

[102] In the parallel application (IMM-5604-17), the applicant states that he intends to file for Ministerial relief, under s. 42.1 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA]. The applicant complains that he was never given an opportunity to comment on the prematurity of the decision rendered by an officer who declared the applicant ineligible to have

his claim heard by the RPD since he has been declared inadmissible to Canada. His right to procedural fairness was violated argues the applicant.

[103] It was also unreasonable and premature to make the ineligibility determination as there is no final decision on Mr. Ali's inadmissibility in view of the judicial review application about the ID decision, the availability of Ministerial relief pursuant to s. 42.1 of IRPA and another judicial review application if Ministerial relief is not granted. The IRPA must be understood as implying that ineligibility can be found only once inadmissibility has been finally determined. Lastly, the interpretation to be given must strive to find an interpretation that will ensure conformity with Canada's international rights obligations which, it is argued in this case, includes the requirement to provide access to the refugee determination process.

[104] The applicant contends that the decision is premature because it should not come until all of his possible recourses have expired.

[105] The Minister takes the position that discretion not to issue the notice of termination does not exist once inadmissibility has been found by the ID. For the Minister, the matter has been fully addressed in *Tjiueza v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1247, [2010] 4 FCR 523 [*Tjiueza*] and *Haqi v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 256 [*Haqi*]. Furthermore, given that there is no discretion, there is no breach of procedural fairness as no participatory rights are offended in the circumstances.

B. Analysis

[106] The applicant sought to find support in *Handasamy Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1389, 48 Imm LR (4th) 268 [*Handasamy*]. It is not possible to see why. In fact, he cites only the first sentence of paragraph 43 in *Handasamy* which is authority for the proposition that if an applicant is successful in his challenge to the ID decision that he is inadmissible, the notice of ineligible claim before the RPD cannot stand and, therefore, becomes unreasonable. *Handasamy* did not deal with the scope, if any, of the Officer's discretion under s. 104 of the IRPA. I quote in its entirety paragraph 43 from *Handasamy*:

> [43] The Officer's decision to issue the notice and terminate the Applicant's refugee claim pursuant to section 104 of the *IRPA* cannot be justified and, consequently it was not reasonable because it was premised upon a faulty and unreasonable determination of inadmissibility by the ID. It is unnecessary to address the parties' arguments as to the scope of the Officer's discretion under section 104 of the *IRPA* or whether the Officer should have waited until after the applications for judicial review and for Ministerial relief were resolved before terminating the Applicant's refugee claim.

[107] In this case, the Court has found that the judicial review about the inadmissibility of the applicant for being a member of an organization engaged in subversion and terrorism failed. However, whether or not s. 7 of the *Charter* is engaged remains an outstanding issue that will have to be resolved. Now that the applicant signals that he will seek Ministerial relief pursuant to s. 42.1 of the IRPA, the applicant continues to argue that the discretion was wrongly exercised by the officer to issue a notification that the refugee claim is ineligible on December 18, 2017. As a matter of fact, at the time the notice was given, there was no judicial review application, nor an application for Ministerial relief. Obviously, the applicant suggests that the officer has

significant discretion in order to suspend the notice of ineligible claim, including as to when the notification ought to be issued.

[108] The admissibility hearing before the ID shall result in one of four possible outcomes pursuant to s. 45 of the IRPA. One of the findings is that the foreign national is not admissible (para 45(d))

[109] One of the grounds of ineligibility to be referred to the RPD is where "the claimant as been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c)" (para 101(1)(f) of the IRPA. Inadmissibility on security grounds carries ineligibility to make a claim for refugee protection.

[110] By operation of paragraph 103(1)(a) of the IRPA, it may very well be that the inadmissibility of the applicant is once again suspended now that the matter must be returned for the determination of whether s. 7 of the *Charter* is engaged. The issue raised in file IMM-5604-17 may therefore be moot (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342). Nevertheless the matter was fully argued and it will again be raised. Comments may well serve a useful purpose.

[111] The scheme of the Act appears to be rather straight forward. The proceedings before the RPD in respect of a claim for refugee protection are suspended "on notice by an officer that (a) the matter has been referred to the Immigration Division to determine whether the claimant is

inadmissible on grounds of security …" (para 103(1)(a) of the IRPA). It appears to be normal that there be another notice that the claim for refugee protection has become ineligible once the ID has made its determination that the person seeking refugee status is inadmissible (para 101(1)(f)). Pursuant to s. 42.1, the security matter (s. 34) may not constitute inadmissibility if Ministerial relief is granted. But, for the time being, the applicant is inadmissible. The law so operates.

[112] The Court of Appeal decision in *Haqi* dealt very specifically with the situation that presents itself in this case. A judge of this Court had found (*Haqi v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1246, [2015] 3 FCR 612 [*Haqi*]) that the officer had no discretion not to terminate the refugee proceedings, following in the footsteps of *Tjiueza* (supra). In my view, the matter has been decided by the Federal Court of Appeal in *Haqi*.

[113] In *Haqi*, once was decided the admissibility issue (inadmissible for membership in an organization having engaged in subversion) on December 27, 2013, the notice of ineligible claim was issued a few days later, on January 7, 2014. As in this case, there was no application for Ministerial relief (*Haqi*, FC, paras 90 and 91).

[114] The arguments made in *Haqi*, on facts quite similar to those relevant to the issue here, are just about identical to those made in this case: the interpretation given to s. 34 of the IRPA requires that the officer have discretion before terminating a refugee claim; fairness requires that an opportunity be offered to make submissions; the remedies available to claimants have been limited, including alleged restrictions on the availability of Ministerial relief under s. 42.1 (*Haqi*,

FC, paras 62-63). It followed, according to Mr. Haqi, "that an applicant in his situation faces years of uncertain status, as well as inability to travel or to sponsor family members, all in direct contravention of Canada's obligations under the *Refugee Convention*. Mr. Haqi asserts that this situation causes him stress and violates his rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11)" (*Haqi*, FC, para 64). Finally, as in this case, the constitutionality of s. 104 was not challenged; rather it seems that the argument was that the legislation had to be interpreted in order to avoid infringing *Charter* rights.

[115] Mactavish J., in *Haqi*, followed the reasoning in *Tjiueza* of de Montigny J., then of this Court, to find that there is no discretion in an officer acting pursuant to s. 104. She reviewed carefully the reasoning in *Tjiueza*, quoting at length the essential passages from the decision. In the view of my two colleagues, the statutory scheme (s. 100 to s. 104 of the IRPA) as well as the language of s.104 itself lead to only one conclusion: that the officer does not have a discretion as to whether or not to issue a notice of ineligible claim. De Montigny J. determined that there was no need to address arguments about the scope of an inexistent discretion or the fairness of a process that does not call for discretion on this officer's part.

[116] There would have been no reason for this Court to decline to follow clearly articulated decisions in *Tjiueza* and *Haqi*. In fact, Mactavish J. reviewed carefully the law of judicial comity in following de Montigny J. in the findings he reached.

[117] De Montigny J. had stated a certified question in *Tjiueza*, but it seems that no appeal was taken (*Haqi*, FC, para 46). Nevertheless, not only is this Court not declining to follow the precedents in *Haqi* and *Tjiueza*, but the Court endorses fully the reasoning in the two cases. I wish to add, as did Mactavish J. in her final observations, that the use of the word "may" in the English version of s. 104 does not find its equivalent in the French version of the section. As the *Interpretation Act* (R.S.C., 1985, c. I-21) states at the French version of section 11, the use of the present tense ("indicatif présent") expresses an imperative ("une obligation"). That corresponds to the language used in the French version of s. 104 of the IRPA, which is consistent with the scheme of the Act that calls for notices to the RPD for suspending its proceedings or for lifting the suspension. Merely relying on the word "may" will fall short. Instead, the construction of the scheme as performed in the two cases leads to only one conclusion.

[118] But there is much more. The Federal Court of Appeal dealt with the issue in *Haqi* (2015 FCA 256); the certified question which brought the matter before the Court of Appeal read as follows:

> After a Refugee Protection Division proceeding has been suspended under paragraph 103(1)(a) of the *Immigration and Refugee Protection Act* pending the outcome of an Immigration Division hearing into a refugee claimant's admissibility, if the Immigration Division determines that the claimant is inadmissible for security reasons under section 34(1)(f) of *IRPA*, does a CBSA officer have any discretion under subsection 104(1)(b) of *IRPA* to not determine the claim's eligibility and to not notify the Refugee Protection Division of the officer's decision on eligibility?

It cannot be doubted that the matter was squarely before the Court of Appeal. The Court dismissed the appeal "essentially for the reasons given by the judge" (para 3). The reasons given by the Court of Appeal remain interesting. They are short and are reproduced hereafter:

> [4] Contrary to the appellant's position, we agree with the Judge that neither the decision of the Supreme Court in *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678, nor the enactment of the Protecting Canada's Immigration System Act, S.C. 2012, c. 17 [the Act] had any impact on section 104 of IRPA. Moreover, we conclude that the interpretation of de Montigny J. in *Tjiueza v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1247 [*Tjiueza*] is not inconsistent with the *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, or with Canada's international obligations under the Refugee Convention.
>
> [5] The appellant applied for Ministerial relief for inadmissibility under subsection 42(1) (sic) of the IRPA after the decision was rendered by the Judge. We reject his argument that his application for Ministerial relief has any bearing on the operation of section 104. The fact that it is a human actor, the officer, who takes notice of facts and communicates the legal consequence imposed by the Act to the affected party and to the Refugee Protection Division does not make that person a decision-maker with discretion.
>
> [My emphasis.]

[119] A decision of the Court of Appeal is evidently binding on this Court. As the Court of Appeal stated recently in *Tan v Canada (Attorney General)*, 2018 FCA 186 [*Tan*] stare decisis applies vertically as well as horizontally:

> [24] Decisions of a panel of this Court are decisions of the Court as a whole. When a panel of appellate judges speak, they do so not for themselves, but for the court. This is reflected in the principle of horizontal *stare decisis*, which dictates that decisions of a panel of an appellate court bind future panels of the court.

[120] The only justification offered by the applicant to depart from *Haqi* is that the decision is not dispositive of the issue at bar. He attempts to posit the issue as being now when a decision can lawfully be made, not if it can be made. There is no discretion not to issue the notice, seems to concede the applicant, but there is a discretion somehow to suspend indefinitely the issuance

of the notice. The applicant is silent as to what the circumstances would be for delaying and why in this case the issuance of the notice would prove to be unreasonable.

[121] This is at any rate a distinction without a difference. If the officer does not have discretion about the notice of ineligible claim, that can only mean that once the conditions are met the notice is to be issued. This is unambiguously the conclusion expressed by the Court of Appeal at paragraph 5. Indeed, it is difficult to see how the discretion which does not exist could have taken into account an application for Ministerial relief that had not been made when the notice was given.

[122] The effect of the applicant's argument is that there would be a discretion to suspend the Refugee Protection Division proceedings indefinitely (*Haqi*, FC, para 92) because the notice should not issue until Ministerial relief, which has not even been applied for in this case, has been dealt with, presumably including until judicial proceedings with respect to Ministerial relief have been completed. This is evidently not what was contemplated by the scheme of the Act. More importantly, the matter was addressed squarely by the Court of Appeal where it noted that an "application for Ministerial relief has any bearing on the operation of section 104" (para 5). The Court of Appeal had the benefit of extensive reasons for judgment in *Tjiueza* and *Haqi*, including the comments of Mactavish J. in *Haqi* about s. 42.1. It cannot be argued that the decision was rendered per *incuriam*.

[123] In *Tan*, the five judge panel identified the situation where a three member panel could depart from a previous decision:

> [31] The first arises when the panel is satisfied that the decision was "manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed" (*Miller v. Canada (Attorney General)*, 2002 FCA 370 at para. 10, 220 D.L.R. (4th) 149 [*Miller*]. The second arises when the decision has been overtaken by subsequent Supreme Court jurisprudence. The third arises where there are compelling reasons to do so and correctness prevails over certainty (*J.P. v. Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 262 at para. 72, [2014] 4 F.C.R. 371 (J.P.)).[1]

A lower court is bound to follow the clear decision of its Court of Appeal, even more so than a panel of a Court of Appeal follows a prior decision of another panel of the same Court. Two decisions of this Court confirmed unequivocally by the Federal Court of Appeal make it compelling that the officer did not err when he gave notice that "pursuant to s. 104(1)(b) for s. 101(1)(f) of the IRPA, Mr. Ali's claim for refugee protection is ineligible to be heard by the Refugee Protection Division".

[124] It should be noted that the respondent stated the following in its Further Memorandum of Fact and Law, at paragraph 25:

> Should the Applicant be successful on his <u>Ministerial relief</u> application, he will be able to apply for landing. If the ID's decision is set aside, the ineligibility decision upon which it is based will also be set aside. If the ID on a determination finds the Applicant is not described and therefore not inadmissible, the Officer would, pursuant to s. 103(2) of the IRPA, give the RPD notice that the claim must continue. In any event, prior to removal, the Applicant is entitled to have his risk assessed and seek to remain in Canada by way of a PRRA application or stay of removal.
>
> [My emphasis.]

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1 See also *DN (Rwanda) v Secretary of State for the Home Department*, [2018] 3 All ER 772, England and Wales Court of Appeal, per Arden L.J. now of the Supreme Court of the United Kingdom.

[125] As a result, the judicial review application in file number IMM-5604-17 is dismissed.

VII. Question to be certified

[126] In further submissions, Mr. Ali suggested that questions be certified for consideration by the Court of Appeal, pursuant to s. 74 of the IRPA. The suggestions were opposed by the respondent.

[127] In file IMM-5063-17, the applicant raises these issues. The definition of “membership” at common law ought to be less broad and unrestricted in view of the reading the applicant gives to s. 42.1 of the IRPA which replaces subsection 34(2). Then, the applicant would like for the Court of Appeal to decide on whether or not s. 7 of the *Charter* is engaged at the early stage of admissibility proceedings, before the process has reached the Ministerial relief stage or the pre-removal risk assessment.

[128] In file IMM-5064-17, this time the applicant raises three questions. There are:

1. Does a refugee claimant whose claim has been suspended pursuant to s. 103(1)(a) IRPA have any participatory rights in respect of the decision to terminate his or her refugee claim pursuant to s. 104(1)(b) and to give notice to the Refugee Protection Division to that effect? If so, does it violate procedural fairness to terminate the claim *in absenstia* and without notice?

2. Is an officer required to give notice to the RPD under s. 104(1)(b) IRPA while an application for judicial review of the Immigration Division’s finding that the claimant is inadmissible for any of the reasons set out in s. 101(1)(f) IRPA is pending?

3. Is an officer required to give notice to the RPD under s. 104(1)(b) IRPA while an application Ministerial Relief under s. 42.1 IRPA is either pending or not yet available in respect of the inadmissibility that rendered s. 101(1)(f) IRPA applicable?

[129] S. 74 of the IRPA requires that there is a serious question of general importance that emerges from the matter dealt with. The provision has been interpreted by the Court of Appeal and the test for certification is strict.

[130] Recently, the Court of Appeal reiterated the limitations inherent in a system where the decision in the Federal Court "is intended to be final, with no right of appeal except in one circumstance, namely, where the judge certifies that a serious question of general importance is involved and the judge states that question" (*Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 FCR 129, [*Varela*] at para 22). In *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 FCR 229, Gleason J.A. reminded yet again that the certified question must emerge from the case itself. A certified question is not to be confused with a reference to the Court of Appeal. In *Liyanagamage v Canada),* [1994] 176 N.R. 4, Décary J.A. said on behalf of the Court:

> **[4]** In order to be certified pursuant to s. 83(1), a question must be one which, in the opinion of the motions judge, transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application (see the useful analysis of the concept of "importance" by Catzman, J., in **Rankin v. McLeod, Young, Weir Ltd. et al.** (1986), 57 O.R.(2d) 569 (H.C.), but it must also be one that is determinative of the appeal. The certification process contemplated by s. 83 of the **Immigration Act** is neither to be equated with the reference process established by s. 18.3 of the **Federal Court Act**, nor is it to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case.
>
> [Bold in original and my emphasis.]

[131] The Court of Appeal is consistent. It refused the question certified by this Court in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22. The issue in the case relates to the failure to cooperate in one's removal, which may result in extensive detention reviewed on a monthly basis. That would certainly appear to be a question of general importance. However, neither party proposed a question for certification. It is the application judge who certified a question and the Court of Appeal found that it did not have jurisdiction to entertain the appeal in spite of having heard the case on its merits. Laskin J.A. wrote:

> [46] This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).
>
> [My emphasis.]

The Court concluded that, given the facts, this may well have turned out to be a reference more than an appeal.

[132] The fact that the applicant would raise five questions is itself worth noting. In *Varela* (supra), Pelletier J.A. commented thus:

> [28] In the same way, it is worth noting that section 74 speaks of "a" serious question of general importance, not of "one or more" serious questions of general importance. While I would not

> preclude the possibility that a single case might raise more than one question of general importance, this would be the exception rather than the rule. A serious question is one that is dispositive of the appeal: see *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 318 N.R. 365 (*Zazai*), and the cases cited therein at paragraph 11. There are a limited number of such questions in any appeal.
>
> [29] Additionally, a serious question of general importance arises from the issues in the case and not from the judge's reasons. The judge, who has heard the case and has had the benefit of the best arguments of counsel on behalf of both parties, should be in a position to identify whether such a question arises on the facts of the case, without circulating draft reasons to counsel. Such a practice lends itself, as it did in this case, to a "laundry list" of questions, which may or may not meet the statutory test. In this case, none of them did.

[133] In case IMM-5603-17, the decision is sent back because the ID erroneously concluded that it did not have to decide whether s. 7 of the *Charter* is engaged. As such, the decision is unreasonable. Given the result, there is therefore no appeal to a successful judicial review application.

[134] As for file IMM-5604-17, I agree with counsel for the respondent that the matter has been dealt with by the Court of Appeal. The *Haqi* Court found that the notice is given by operation of law, which "does not make that person a decision-maker with discretion" (para 5).

[135] The first question assumes a discretion that does not exist. The second and third questions are a variation of the same theme: is the officer required to give the notice? In one case, the question asks if it is required to give notice while a judicial review application is pending. In the other, the same question is asked, but this time while an application of Ministerial relief is pending or not yet available.

[136] Concerning the first question, the fact that there is no discretion disposes of the issue since there is a Court of Appeal decision binding on this Court. For the Court of Appeal to reverse itself as was seen in *Tan*, special circumstances must be present. None of the circumstances in which consideration could be given to such a reversal (*Tan*, supra, para 31) is even alluded to by the applicant, let alone convincingly articulated.

[137] The other two questions also assume a discretion that has been ruled not to exist, such that the notice can remain suspended for extensive periods of time. But there is more. These two questions are in the nature of a reference or seeking a declaratory judgment. First, the notice in this case was issued before there was a judicial review application or an application for Ministerial relief: the facts of the case do not give rise to the questions, a fundamental requirement. The answer to the questions could not be determinative of the appeal because the facts do not correspond to the question to be answered. The questions do not arise from the case itself. Second, the questions themselves do not lead to a final determination of the case. How should the discretion, if it existed, be exercised for it to be reasonably exercised on the facts of this case? With no such application pending in this Court or before the Minister, the questions can only be hypothetical. These are clearly in the nature of questions fit for a reference, being open ended and calling for the examination of various scenarios.

[138] Finally, with respect to the last question, it refers specifically to the Ministerial relief under s. 42.1. It presents two scenarios: one when there is already an application for relief and one when the relief is not yet available (we don’t know why). The question has already been

answered directly in *Haqi* where the Court unambiguously rejects the argument “that his application for Ministerial relief has any bearing on the operation of section 104”.

[139] The Court respectfully declines to certify questions which have been dealt with recently by the Court of Appeal or may be in the nature of a reference which cannot be determinative of the case before the Court on its facts.

JUDGMENT in IMM-5603-17 and IMM-5604-17

THIS COURT'S JUDGMENT is that:

1. The judicial review application in case IMM-5603-17 is granted. The matter of whether or not s. 7 of the *Charter* is engaged at the stage of the admissibility hearing before the Immigration Division must be determined by the Immigration Division.
2. The judicial review application in case IMM-5604-17 is dismissed.
3. There is no serious question of general importance that arises on the facts of the IMM-5604-17.
4. A copy of the reasons for judgment and judgment will be filed in each of the Court files bearing the numbers IMM-5603-17 and IMM 5604-17. This constitutes the judgment of this Court in each one.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM 5603-17
STYLE OF CAUSE:	ABDIAZIIZ MOHAMED ALI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-5604-17
STYLE OF CAUSE	ABDIAZIIZ MOHAMED ALI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 12, 2018
JUDGMENT AND REASONS:	ROY J.
DATED:	NOVEMBER 27, 2018

APPEARANCES:

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