Date: 20080620

Docket: IMM-3382-07

Citation: 2008 FC 780

Ottawa, Ontario, June 20, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

SULEYMAN ERBIL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Erbil Suleyman applied for permanent residence in Canada as a member of the Convention refugee abroad class. A visa officer at the Canadian Embassy in Tokyo determined that he was inadmissible to Canada under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act* because of Mr. Suleyman's past involvement with the Kurdistan Workers' Party (or "PKK") in Turkey.

[2] Mr. Suleyman now seeks judicial review of the visa officer's decision, asserting that the officer erred in rendering an inadmissibility decision without first affording him the opportunity to seek Ministerial relief pursuant to subsection 34(2) of *IRPA*.

[3] The visa officer further erred, Mr. Suleyman says, in failing to advise him that consideration was being given to finding him to be inadmissible under subsection 34(1) of *IRPA*, and in failing to disclose extrinsic evidence relied upon in arriving at the decision under review.

[4] Mr. Suleyman says that the visa officer also erred in failing to properly consider the fact that he had been recognized as a Convention refugee by the Office of the United Nations High Commission for Refugees.

[5] Finally, Mr. Suleyman says that the visa officer erred in law by mis-interpreting the term "subversion by force".

[6] For the reasons that follow, I am not persuaded that the visa officer erred as alleged. As a consequence, the application for judicial review will be dismissed.

Background

[7] Mr. Suleyman is a citizen of Turkey, who currently resides in Japan. He acknowledges that while he was in Turkey, he assisted the PKK in a variety of ways: by providing medicine, clothing and food to PKK members, by providing assistance and transportation to wounded PKK members, by acting as a courier for the PKK, by working for PKK causes and by engaging in propaganda activities.

[8] While denying having been an active participant, Mr. Suleyman also admits to having been present during a fight between PKK guerrillas and the Turkish military, which resulted in the death of four Turkish military personnel.

[9] Although Mr. Suleyman was recognized as a Convention refugee by the UNHCR, his claim for refugee protection in Japan was subsequently refused. He then applied for permanent residence in Canada as a member of the Convention refugee abroad class. Mr. Suleyman disclosed his involvement with the PKK in his application, stating that while he was not a member of the party, he had voluntarily assisted and supported it.

[10] Following an interview with a visa officer, the officer determined that Mr. Suleyman was inadmissible to Canada on the basis that he was a member of an organization for which there are reasonable grounds to believe has engaged in the subversion by force of a government. It is this decision that forms the subject matter of this application for judicial review.

Legislative Framework

[11] The visa officer's inadmissibility finding was made under the provisions of section 34 of the *Immigration and Refugee Protection Act*, the relevant portions of which provide that:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
(a) engaging in an act of espionage or an act of subversion against a democratic	*a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute

government, institution or process as they are understood in Canada;	institution démocratique, au sens où cette expression s'entend au Canada;
(b) engaging in or instigating the subversion by force of any government;	*b*) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
…	…
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).	*f*) être membre d'une organisation don=t il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).
(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[12] In making a finding under section 34 of the Act, a visa officer is also guided by section 33 of *IRPA*, which provides that:

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

Standard of Review

[13] Mr. Suleyman's first four issues all involve questions of procedural fairness. As the Federal Court of Appeal observed in see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at paragraphs 52 and 53, the pragmatic and functional analysis (since replaced by the "standard of review analysis") does not apply where judicial review is sought based upon an alleged denial of procedural fairness. Rather, the task for the Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances.

[14] I do not understand this to have changed as a consequence of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9: see Justice Binnie's concurring decision at paragraph 129, where he confirmed a reviewing court has the final say in relation to questions of procedural fairness. See *Dunsmuir*, at paragraph 151, and *Canada (Attorney General) v. Clegg*, 2008 FCA 189 at paragraph 19.

[15] Insofar as Mr. Suleyman's application relates to the visa officer's understanding of the term "subversion by force", the outcome of this application would not change, whether the standard of reasonableness or correctness is applied. To the extent that Mr. Suleyman's argument relates to the sufficiency of the visa officer's reasons, this engages a question of procedural fairness, and is thus reviewable in the manner discussed in the preceding paragraph.

Analysis

[16] Mr. Suleyman has raised a number of issues on this application. While there is considerable overlap between the issues, as there was in the submissions made by counsel, I will endeavour to deal with each of the issues separately, in the order in which they were addressed by counsel.

[17] Before turning to address these issues, however, it should be noted that while Mr. Suleyman denied having been a member of the PKK at his interview with the visa officer, no issue has been taken with the officer's membership finding before this Court. This is understandable, given the extent of Mr. Suleyman's admitted involvement with the PKK, and the broad and unrestricted meaning to be given to the word "member" as it is used in paragraph 34(1)(f) of *IRPA*: see *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 121 at paragraphs 27 and 28.

No "Window of Opportunity" Provided for an Application for Ministerial Relief

[18] Mr. Suleyman notes that the visa officer's finding that he was inadmissible to Canada was communicated to him at the same time that the officer advised him that his application for permanent residence was being refused.

[19] According to Mr. Suleyman, since the opportunity to seek Ministerial relief in accordance with subsection 34(2) of *IRPA* only arises *after* there has been a determination that an applicant falls within subsection 34(1), there has to be a delay or, as he puts it, a "window of opportunity", between the finding of inadmissibility and the refusal of the application for permanent residence, in order to allow applicants to seek such relief.

[20] In the absence of such a window of opportunity, Mr. Suleyman says that the possibility of an applicant being able to apply for Ministerial relief prior to the refusal of the application for permanent residence would necessarily be foreclosed.

[21] In support of this argument, Mr. Suleyman points to a provision in the CIC Immigration Manual, which provides that "The application for entry into Canada should be held in abeyance while the Minister [of Public Safety and Emergency Preparedness] considers the matter of relief". According to Mr. Suleyman, this provision created the legitimate expectation that his application for permanent residence would be held in abeyance until he had an opportunity to seek Ministerial relief. The failure to allow him such an opportunity amounts, he says, to a denial of procedural fairness.

[22] Mr. Suleyman does concede that nothing would have prevented him from applying for Ministerial relief under subsection 34(2) after he received the visa officer's decision refusing his application for permanent residence. He also concedes that this option still remains open to him. However, Mr. Suleyman argues that this is not a desirable alternative, as it would require the filing of a fresh application, with all of the attendant delays in processing that this would entail.

[23] I do not agree with Mr. Suleyman's interpretation of the process to be followed under section 34 of *IRPA*.

[24] As I noted in *Ali v. Canada (Minister of Citizenship and Immigration)*¸ 2004 FC 1174, there are two discrete components to section 34 of *IRPA*. Subsection 34(1) involves a determination being made by a visa officer as to whether there are reasonable grounds for believing, amongst other things, that an applicant is a member of one of the classes of organizations described in the subsection.

[25] In contrast, subsection 34(2) contemplates that a different decision-maker, namely the Minister himself, consider whether the admission to Canada of a foreign national such as Mr. Suleyman would be detrimental to the national interest.

[26] Nothing in the statute contemplates that an applicant has to be given an opportunity to seek Ministerial relief before a decision can be made under subsection 34(1). Moreover, the jurisprudence of this Court has clearly determined that it is not unfair to have the visa officer's determination made before an application for Ministerial relief is dealt with.

[27] By way of example, in *Hassanzadeh v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1121, the applicant argued that there was no jurisdiction to proceed with a subsection 34(1) inadmissibility determination, in the situation where a subsection 34(2) application had already been filed with the Minister. That argument was rejected by Justice Mosley, who found that there was nothing procedurally unfair in having the inadmissibility determination precede the Minister's consideration of the exemption request.

[28] In contrast to the situation that presented itself in *Hassanzadeh*, in this case, Mr. Suleyman argues that there is no jurisdiction to proceed with a subsection 34(1) inadmissibility determination in circumstances where no subsection 34(2) application has been filed with the Minister.

[29] As in *Hassanzadeh*, Mr. Suleyman's argument is based upon the premise that a decision by the Minister under subsection 34(2) is an integral part of the inadmissibility determination under subsection 34(1). That argument has already been rejected by this Court in cases such as *Ali*, previously cited, and *Hassanzadeh*.

[30] Moreover, as the Federal Court of Appeal observed in *Poshteh*, previously cited, at paragraph 10, there is no temporal aspect to subsection 34(2) of *IRPA*, and nothing to fetter the discretion of the Minister as to when in the process a Ministerial exemption might be granted.

[31] Furthermore, a review of the relevant provisions of the Immigration Manual does not support Mr. Suleyman's contention that he had the legitimate expectation that a two-step process would be followed, with a window of opportunity being provided to allow him to make application for Ministerial relief, before a decision would be rendered with respect to his application for permanent residence under subsection 34(1).

[32] Read in context, the provision in the Manual relied upon by Mr. Suleyman clearly contemplates applications for entry into Canada being held in abeyance in situations where a request

for Ministerial relief has actually been received prior to a decision being rendered in relation to the application for permanent residence.

[33] Such an interpretation is consistent with the jurisprudence of this Court. In this regard, I refer to *Hassanzadeh*, cited above, where Justice Mosley noted at paragraph 28 of his reasons that while a subsection 34(2) exemption decision would normally follow a determination of inadmissibility under subsection 34(1), such a sequence of events is not mandated by the statute.

[34] Justice Mosley went on to observe that there could be exceptional reasons for seeking Ministerial relief prior to a decision having been rendered with respect to the inadmissibility issue. He then stated that "In most instances, it would be preferable for the evidence to be presented and the fact finding to be conducted by the Board before the Minister considers an application for discretionary relief".

[35] Thus it is clear that the provision in the Immigration Manual relied upon by Mr. Suleyman is intended to address the situation where an application for Ministerial relief was received before a decision had been made with respect to the application for entry into Canada. That is not the case here. As a consequence, the Manual could not have created a legitimate expectation that Mr. Suleyman's application for permanent residence would have been held in abeyance indefinitely, pending the determination of a potential, but as yet unfiled, application for Ministerial relief.

[36] Finally, Mr. Suleyman concedes that he was not entitled to notice as to the availability of the Ministerial relief provisions, given that the availability of this process is evident on the face of the statute: see *Hussenu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 283, at paragraphs 25, 28 and 30.

[37] Surely, if there is no obligation on the respondent to even advise an applicant as to the potential availability of Ministerial relief, the Minister cannot be required to hold a decision on the admissibility issue in abeyance for an indeterminate period of time, on the off-chance that an applicant may, at some point seek, to avail him- or herself of the provisions of subsection 34(2).

Notice of the Statutory Provision in Issue

[38] Mr. Suleyman also argues that the visa officer acted unfairly in failing to give him proper notice that consideration was being given to finding him to be inadmissible pursuant to either section 34(1)(b) or 34(1)(f) of the *Immigration and Refugee Protection Act*.

[39] As I understand Mr. Suleyman's argument, he is not suggesting that he was not aware that his involvement with the PKK was of concern to the visa officer. Indeed, such an argument would have undoubtedly been doomed to failure, given that the documentation relating to his application for permanent residence, including his own application form and the record of his interview with the visa officer contained in the CAIPS notes, all make it abundantly clear that Mr. Suleyman was well aware that this was significant, and was indeed the central preoccupation of the officer considering the application.

[40] Rather, Mr. Suleyman's argument appears to be closely tied to his first issue, in that he says that he should have been made aware that consideration was being given to finding him inadmissible under subsection 34(1), in order to allow him to apply for Ministerial relief under subsection 34(2) before a final decision had been made in this regard.

[41] However, as Justice Dawson recently reiterated in *Johnson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 2, there is no obligation on an officer to give an applicant notice of the officer's concerns where those concerns arise directly from the provisions of the *Immigration and Refugee Protection Act* and Regulations that the officer is bound to follow in assessing the applicant's application. (See also *Ayyalasomayajula v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 320, at paragraph 18, and the cases cited therein).

[42] As was the case in *Johnson*, the visa officer's concerns in this case arose directly from the provisions of the Act. As a result, there was no obligation on the officer to give Mr. Suleyman notice of the officer's concerns.

[43] It is also noteworthy that Mr. Suleyman's affidavit is entirely silent in relation to this issue, and thus there is no evidence to indicate that he was not fully aware that consideration was being given to finding him inadmissible under subsection 34(1) of *Immigration and Refugee Protection Act*. As a consequence, I am not persuaded that Mr. Suleyman was denied procedural fairness in this regard.

Failure to Disclose Extrinsic Evidence

[44] Mr. Suleyman asserts that it was unfair for the visa officer not to have provided him with a copy of an email received by the visa officer from the Canadian Border Services Agency, which he describes as having contained "advice" with respect to his application for permanent residence. Mr. Suleyman further contends that he should also have been afforded the opportunity to make submissions with respect to the email.

[45] In support of his contention that he was denied procedural fairness in this regard, Mr. Suleyman relies on the decision in *Mekonen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1133, which involved another undisclosed CBSA memo received by a visa officer in the context of a section 34(1) admissibility determination.

[46] At paragraph 19 of the *Mekonen* decision, Justice Dawson found that the memo in question in that case:

> [W]as an instrument of advocacy designed, in the words of the Federal Court of Appeal in *Bhagwandass* [*Canada (Minister of Citizenship and Immigration) v. Bhagwandass*, [2001] 3 F.C. 3 (C.A.)] "to have such a degree of influence on the decision maker that advance disclosure is required 'to 'level the playing field'".

[47] However, a review of the *Mekonen* decision reveals that the memo in question in that case was quite different in nature than the document in issue in this case. That is, the CBSA memo in issue in *Mekonen* had open source information about the organization under consideration in that

case appended to it. In addition, the memo contained a recommendation, along with the observation that the information being forwarded to the visa officer "provides evidence to support a determination of inadmissibility".

[48] In this case, the visa officer had evidently already made his decision with respect to Mr. Suleyman's admissibility prior to forwarding the decision to the CBSA for its concurrence. The undisclosed CBSA email in issue here consists of three lines, two of which apologize for the delay in responding, and thank the officer for "keeping [them] in the loop" about the application. The third line simply states "Please proceed with the refusal".

[49] In contrast to the memo in issue in *Mekonen*, the email in issue in this case could by no stretch of the imagination be described as 'an instrument of advocacy', nor could it have had "such a degree of influence on the decision maker that advance disclosure is required to 'level the playing field'". As a consequence, I am not persuaded that the failure to forward a copy of the email to Mr. Suleyman, or to give him an opportunity to respond to it constituted a denial of procedural fairness.

Failure to Properly Address the UNHCR Finding that Mr. Suleyman was a Convention Refugee

[50] Although Mr. Suleyman acknowledges that the visa officer was not bound by the UNHCR's finding that he was a Convention refugee, he says that the visa officer erred by making a finding that was inconsistent with the UNHCR's finding, without providing reasons for his disagreement with that finding.

[51] In particular, Mr. Suleyman argues that by recognizing him as a Convention refugee, the UNHCR implicitly recognized that he was not excluded by virtue of Article 1F of the Refugee Convention, which provides that:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

[52] According to Mr. Suleyman, it is impossible to fall outside the exclusion clause of the Refugee Convention, and still come within paragraph 34(1)(f) of *IRPA* by virtue of paragraph 34(1)(b), given that engaging in, or instigating the subversion by force of any government is a serious non-political crime.

[53] This argument has already been rejected by this Court. That is, in *Omer v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 642, Justice Blais considered the relationship between exclusion under Article 1F of the Refugee Convention and inadmissibility under paragraph 34(1)(f) of the *Immigration and Refugee Act*, observing that the two determinations involved quite different considerations.

[54] In this regard, Justice Blais stated at paragraph 11 of his decision that:

> It should also be noted that, in its decision, the Board found the applicant to be complicit in the actions of the MQM. Counsel for each party also made submissions to this Court with regards to the issue of complicity, which it will not be necessary for this Court to address, since the issue of complicity is irrelevant to a determination under paragraph 34(1)(f) of the Act, which refers strictly to the notion of membership in the organization. **The question of inadmissibility under paragraph 34(1)(f) should thus be distinguished from inadmissibility as a Convention refugee under section 98 of the Act, which relies on article 1F of the *United Nations Convention Relating to the Status of Refugees*, where the ground for inadmissibility is described as having "committed a crime against peace, a war crime, or a crime against humanity" and, absent direct proof as to the involvement of the person in a specific crime, requires a finding of complicity with the organization who committed such crime**. [emphasis added]

[55] A review of the record in this case confirms that the UNHCR considered the issue of Mr. Suleyman's potential exclusion under Article 1F of the *Convention*, concluding that he was not excluded as there was no indication that he had personally assisted in the commission of any of the crimes falling under Article 1F.

[56] In contrast, the visa officer's finding that Mr. Suleyman was inadmissible under paragraph 34(1)(f) of *IRPA* was based upon his membership in the PKK. As was noted at the outset of the analysis, no issue has been taken with respect to the officer's membership finding.

[57] As a consequence, I am not persuaded that there was any inconsistency between the findings of the UNHCR and the visa officer, or that the visa officer erred as alleged in this regard.

Application of the Term "Subversion by Force"

[58] Mr. Suleyman's final argument relates to the visa officer's understanding of the term "subversion by force". There appear to be two different aspects to Mr. Suleyman's argument in this regard.

[59] As I understand Mr. Suleyman's first argument, he contends that the visa officer erred by considering the use of force against the government of Turkey to be necessarily proscribed by paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*. That is, Mr. Suleyman contends that the use of force against some governments may be proper, legitimate and justifiable, as a last resort against tyranny. In the case of the PKK, Mr. Suleyman submits that the activities of the PKK had a rational connection with the organization's political objective of ending human rights abuses inflicted by the Turkish government against its Kurdish minority.

[60] This Court has already rejected this argument in *Oremade v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1486. That is, in *Oremade*, Justice Strayer observed that while paragraph 34(1)(a) of *IRPA* only applies to acts of espionage or subversion against democratic governments, paragraph 34(1)(b), proscribing those who have engaged in subversion "by force of any government" applies, regardless of the kind of government which is the target of the subversion: see *Oremade*, at paragraph 12.

[61] That is, *Oremade* clearly establishes that the subversion by force of *any* government, including a despotic one, is enough for a finding of inadmissibility. The evidence in this case clearly demonstrated that the PKK was engaged in the use of force against the Turkish government. As a consequence, I am not persuaded that the visa officer erred in this regard.

[62] Mr. Suleyman also submits that the visa officer erred in his application of the concept of "subversion by force", by failing to indicate what the officer understood by the term, and by failing to engage in any analysis of the concept.

[63] The term "subversion" has been defined in the jurisprudence as "accomplishing change by illicit means or for improper purposes related to an organization": see *Qu v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 F.C. 3, 2001 FCA 399, at paragraph 12.

[64] In this case, one of the avowed objectives of the PKK is to effect political change in Turkey. Not only is the documentary record replete with references to the illicit means used by the PKK to effect such change, including the use of landmines and the involvement of the organization in human rights abuses, as the visa officer noted, Mr. Suleyman has admitted to personal involvement in an armed guerrilla attack against Turkish military personnel.

[65] While the visa officer's analysis of this issue may not have been as comprehensive as would otherwise have been desired, I am not persuaded that the officer committed a reviewable error in this regard.

Conclusion

[66] For these reasons, the application for judicial review is dismissed.

Certification

[67] Mr. Suleyman proposes a series of questions for certification in this matter. A number of these questions relate to issues that have already been thoroughly canvassed in the jurisprudence, and are thus not suitable for certification. Moreover, the concept of "subversion by force" as the term is used in section 34 of the *Immigration and Refugee Protection Act* has already been defined in the case law, and its application in this particular case does not raise a question of general importance.

[68] As a consequence, I decline to certify the questions proposed by Mr. Suleyman.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and

2. No serious question of general importance is certified.

"Anne Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3382-07
STYLE OF CAUSE:	SULEYMAN ERBIL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	May 20, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Mactavish, J.
DATED:	June 20, 2008

APPEARANCES:

Mr. David Matas	FOR THE APPLICANT
Ms. Sharlene Telles-Langdon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DAVID MATAS Barrister and Solicitor Winnipeg, Manitoba	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT