Federal Court  Cour fédérale

Date: 20090612

Docket: IMM-1639-07

Citation: 2009 FC 629

Ottawa, Ontario, June 12, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MOHAMMED BEN AR ZRIG

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (the Act) of a decision by Immigration Officer Nicole Léveillé (Officer Léveillé), dated March 29, 2007. The Officer refused to grant the applicant permanent resident status following his application for permanent residence (APR) for humanitarian considerations.

[2] On July 24, 2008, the respondent filed a motion for the withdrawal of an admission, seeking leave from the Court to withdraw an admission contained in his memorandum dated June 21, 2007, at paragraph 20(b) and the heading between paragraphs 25 and 26, to the effect that [TRANSLATION]

"the applicant was not informed by CIC [Citizenship and Immigration Canada] of Ms. Dostie's positive decision before Ms. Léveillé rendered her decision". The respondent would also like to withdraw the admission in his further memorandum dated December 17, 2007, at paragraph 15(b) and the heading between paragraphs 25 and 26, to the effect that [TRANSLATION] "the applicant was not formally informed by CIC of Ms. Dostie's positive decision before Ms. Léveillé rendered her decision". Finally, he wishes to withdraw his oral admission to the same effect made during the hearing before this Court on April 29, 2008.

FACTUAL BACKGROUND

[3] The applicant, a citizen of Tunisia, was a member of the ITM/Ennahda, a movement directed to a limited, brutal purpose. He was sentenced *in absentia* to 21 years in prison in Tunisia for his involvement. When he arrived in Canada on May 2, 1992, he made a claim for refugee status. His spouse and three children arrived six months later, and their claims for refugee status were successful.

[4] His claim before the Immigration and Refugee Board (IRB) was rejected on June 30, 1994, on the grounds that he was excluded from the definition of refugee under section F of Article 1 of the *Convention Relating to the Status of Refugees* (the Convention). On July 6, 1995, Mr. Justice Pinard of this Court allowed the application for judicial review and referred the matter to the IRB for a new hearing.

[5] On January 27, 2000, the IRB again rejected the claim, finding that the fear of persecution was well-founded, but that the applicant was excluded under paragraphs 1F(*b*) and 1F(*c*) because he had committed, as an accomplice, serious non-political crimes: the use of Molotov cocktails; throwing acid in people's faces; physical attacks; automobile fires; threatening letters; conspiracy to assassinate leading persons in the Tunisian government; attempted arson; bombing attacks at Sousse and Monastir on August 2, 1987; arson at Bab Souika in February 1991 causing death; bombing attacks in France in 1986; weapons trafficking in 1987 and conspiracy to overthrow the government of former President Habib Bourguiba.

[6] The applicant filed an application for judicial review of this negative decision, and the application was dismissed on September 24, 2001. The Court certified certain questions, and the applicant appealed the decision.

[7] On April 7, 2003, the Federal Court of Appeal dismissed the applicant's appeal (*Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] 3 F.C. 761).

[8] On November 29, 2001, the applicant applied for a visa exemption on humanitarian and compassionate grounds under subsection 114(2) of the former *Immigration Act*, R.S.C. (1985), c. 1-2, in which he invoked risks of return.

[9] On June 23, 2004, the applicant received a letter informing him that his application for permanent residence as a dependent of his spouse had been rejected because there were reasonable

grounds to believe that he was a person described in paragraph 34(1)(*f*) of the Act, namely, that he was inadmissible on grounds of security because he was a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorism, an act covered by paragraph 34(1)(*c*) of the Act.

[10] On July 29, 2005, the application for a permanent resident visa exemption was approved at the first stage (humanitarian and compassionate grounds) by Immigration Officer Hélène Dostie (Officer Dostie).

[11] The applicant contacted Jamel Jani, assistant to Federal Member of Parliament Meili Faille, Bloc Québécois shadow minister of Citizenship and Immigration, to obtain more information about his file. Following an access to information request submitted in September 2006, documents were sent to the applicant on December 20, 2006, including Officer Dostie's Notes to File explaining that the applicant's application had been approved at the first stage of the process.

IMPUGNED DECISION

[12] The impugned decision that is the subject of this application for judicial review is the decision rendered on March 29, 2007, by Officer Léveillé. It was the second stage of the decision process described in section 25 of the Act, which involved determining whether the applicant met all the requirements of the Act.

[13] The Officer noted that the decision process for a permanent residence application filed within Canada on humanitarian and compassionate grounds (HC application) involved two steps. She stated that humanitarian and compassionate considerations were considered first to determine whether the applicant may be exempt from the requirement to obtain a permanent resident visa before coming to Canada. According to Officer Léveillé's letter, the applicant was informed that his application for an exemption had been approved on July 29, 2005.

[14] However, Officer Léveillé emphasized the importance of the second stage of the process, i.e., the applicant's obligation to respect all the other legislative requirements of the Act. She determined that the applicant did not respect these requirements because he was inadmissible for serious crimes under paragraph 36(1)(*c*) and on grounds of security under paragraph 34(1)(*f*). The officer stated that her decision was based on the findings and observations of the Federal Court of Appeal, which upheld the IRB's findings that the applicant had committed a series of crimes in Tunisia as a member of the IMT/Ennahda.

[15] She therefore rejected his application for permanent residence.

ISSUES

[16] This application for judicial review raises the following issues:

a) Did Officer Léveillé have the jurisdiction to render the impugned decision?

b) Was it open to Officer Nicole Léveillé to invoke paragraph 36(1)(*c*) of the Act in the absence of a prior finding by the Immigration and Refugee Board (IRB) regarding the applicability of this provision to the applicant's case?

c) Has there been a breach of procedural fairness because the applicant did not have the opportunity to make submissions on the applicability of paragraph 36(1)(*c*) of the Act under subsection 34(2)?

RELEVANT LEGISLATION

[17] The provisions applicable to this case are found at Appendix A at the end of this document.

ANALYSIS

[18] During the hearing of this case on April 7, 2009, the applicant consented to the motion for withdrawal after learning during the same hearing of the admission by counsel for the respondent that Officer Dostie had never sent the applicant the decision dated July 29, 2005. Accordingly, the Court allowed the respondent's motion.

a) Did Officer Nicole Léveillé have the jurisdiction to render the impugned decision?

[19] Discretionary decisions must be made within the bounds of the jurisdiction conferred by the Act, and the courts must give considerable deference to decision-makers when reviewing that discretion and determining the scope of the decision-maker's jurisdiction (*Williams v. Canada*

(Minister of Citizenship and Immigration), [1997] 2 F.C. 646 (C.A.). The standard of correctness applies to questions of law.

[20] The applicant invokes Operational Bulletin 021 (see further docket and memorandum resulting from the order dated August 26, 2008) at page 214, which states the following:

> In cases involving inadmissibilities A34, A35, A37, A36(1) and A38, and where, in the officer's initial assessment, the H&C considerations might justify an exemption, the entire case should be forwarded to the Director of Case Review at NHQ. The officer should not provide a formal assessment or opinion, but should make a note in FOSS that the case is being sent to the delegated decision-maker at NHQ.

[21] The respondent cites an excerpt from further down in the same Bulletin and argues that officers have the authority to render a negative decision:

> Officers have the delegated authority to render a negative decision on any application, regardless of the inadmissibility, if they are of the opinion that there are insufficient H&C grounds. Thus, if the officer has reason to believe that a serious inadmissibility exists, including those involving security (A34), human and international rights violations (A35), and organized criminality (A37), officers should refuse the application if they are of the opinion that insufficient H&C grounds exist.

[22] The respondent notes that, according to Officer Léveillé, the latter paragraph applied to the applicant, therefore she had jurisdiction to render the impugned decision. However, the applicant notes that the decision does not mention whether she was of the opinion that insufficient H&C grounds existed, which goes against Officer Dostie’s decision, in which she found that humanitarian and compassionate grounds existed. Furthermore, Officer Dostie’s decision has not been challenged before this Court.

[23] The applicant claims that Officer Léveillé did not have the authority to reject the applicant's application, citing Operational Bulletin 021, which states the following: "If the officer is of the opinion that the H&C considerations might justify an exemption, but he or she **does not** have the delegated authority to grant the exemption, the case should be forwarded to the Director of Case Review, NHQ, for assessment." The impugned decision was under the jurisdiction of the Director of Case Review, and Officer Léveillé's reasons make no mention of whether she was of the opinion that the H&C considerations were insufficient.

[24] Operational Bulletin 021 is a set of guidelines or procedural instructions arising from the Minister's authority to delegate. Because the respondent admits that the decision was made under Operational Bulletin 021, the Court must bear in mind the powers delegated under this instrument as well as previous decisions in reviewing this decision.

[25] According to the applicant, the Court must consider section 6 of the Act, which sets out the scope of the Minister's delegation power. The applicant argues that he made submissions relating to subsection 34(2) of the Act, explaining that his presence would not be detrimental to the national interest, and that those submissions were referred to in Officer Dostie's decision (see page 13, volume 1, Tribunal Record), in which the following was noted with respect to the applicant: [TRANSLATION] "Neither he nor his family has abused Canada's protection or the freedom that they have found here, and they have always shown a deep respect for Canadian institutions." Officer

Léveillé therefore lacked jurisdiction to render a decision on this because such allegations had to be considered by the Minister himself, as set out in subsection 34(2) of the Act.

[26] Thus, in delegating his discretionary power under section 25 of the Act, it is not open to the Minister to segment it as he pleases, and he may not limit the power of his delegate by imposing on officers a duty to "refuse the application if they are of the opinion that insufficient H&C grounds exist". The respondent's directive denies the applicant the benefit of the Act, particularly subsection 34(2) of the Act.

[27] The applicant claims that *Moiseev v. Canada (Minister of Citizenship and Immigration),* 2008 FC 88, (2007) 323 F.T.R. 164, cited by the respondent, does not apply to this situation, in which an H&C application has been filed or allegedly filed under section 25 of the Act, as this application is addressed directly to the Minister. Clearly, the Minister may delegate certain powers under section 25, but he may not so limit or segment a discretionary power as to make it, in essence, a non-discretionary power.

[28] By taking over the file and failing to forward it to the Director of Case Review, Officer Léveillé engaged in a reassessment of whether humanitarian and compassionate considerations existed, since, according to the Operational Bulletin, officers "should refuse the application if they are of the opinion that insufficient H&C grounds exist". Officer Léveillé's decision could therefore only be rendered if she revisited Officer Dostie's decision with respect to the existence of sufficient H&C grounds to justify granting the exemption.

[29] The respondent submits that it is clear from a reading of section 25 that the Minister may grant permanent resident status to an inadmissible person, but he may also, at his discretion, refuse to do so, which is what occurred in this case. In his subsection 25(1) application, the applicant never specifically asked the Minister to grant him permanent resident status despite the inadmissibilities in question, and in fact has never admitted to falling under paragraphs 34(1)(*f*) and 36(1)(*c*) of the Act.

[30] In this case, Officer Léveillé found that [TRANSLATION] "despite the weight of the humanitarian and compassionate considerations", she was forced to conclude that the applicant was inadmissible to Canada under paragraphs 36(1)(*c*) and 34(1)(*f*) of the Act. According to Officer Léveillé, the humanitarian and compassionate considerations raised by the applicant were insufficient to justify granting permanent resident status, therefore his file did not need to be forwarded to the Director of Case Review at NHQ.

[31] The respondent submits that the CIC's operational bulletins and guidelines are not regulations. They do not have force of law and do not create any substantive rights or legitimate expectations (*Legault v. Canada*, 2002 FCA 125, [2002] 4 F.C. 358 at p. 372; *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247 (C.A.) at pp. 256-257; *Sahota v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 123, 164 A.C.W.S. (3d) 682 at para. 20). Even if Officer Léveillé had not followed the directive at issue, it would not have been open to this Court to invalidate her decision on that basis. However, the decision must comply with

the Act and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), which it does.

[32] The respondent submits that the applicant is confusing the H&C grounds that exempted him from having to apply for an immigrant visa from outside Canada with the H&C grounds that were insufficient to justify granting him permanent resident status in Canada, in light of the inadmissibilities that apply to him. Officer Léveillé had to consider the H&C grounds invoked by the applicant in a different context. Officer Dostie's decision is *res judicata* only in regard to the existence of H&C grounds that justify granting the applicant an exemption from the requirement to obtain an immigrant visa abroad, which meant that his permanent residence application could be processed in Canada. Officer Dostie's decision is therefore not *res judicata* for Officer Léveillé with respect to the impugned decision. The H&C grounds sufficient to justify a foreigner's requirement to apply for permanent residence from abroad are not necessarily sufficient to justify granting him permanent resident status in Canada, despite the inadmissibilities that apply to him (*Mpula v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 456, 160 A.C.W.S. (3d) 334 at paras. 31 and 36).

[33] The respondent agrees with the applicant's argument that Officer Léveillé did not have jurisdiction to grant the applicant relief from his inadmissibility under paragraph 34(1)(*f*) of the Act, but the applicant has never asked the Minister of Public Safety and Emergency Preparedness (see paragraph 4(2)(*d*) of the Act) to grant the applicant relief from the inadmissibility under

subsection 34(2) of the Act (since under subsection 6(3), the determination referred to in subsection 34(2) must be made by the Minister himself).

[34] Moreover, the applicant did not ask the Minister of Citizenship and Immigration, in his application under subsection 25(1) of the Act, to grant him permanent resident status in Canada, after granting him relief from inadmissibility pursuant to paragraph 36(1)(*c*) of the Act, under paragraph 36(3)(*c*) of the same Act. Nor did the applicant ask the Minister of Citizenship and Immigration to forward, pursuant to subsection 34(2) of the Act, a request to the Minister of Public Safety and Emergency Preparedness for relief from the inadmissibility to which he is subject under paragraph 34(1)(*f*) of the Act. It was therefore incumbent on the applicant to apply to the appropriate minister for relief from the inadmissibilities to which he was subject. He is responsible for his own failure to do so.

[35] The Court is of the view that Officer Léveillé did not exceed her jurisdiction by rendering a decision at the second stage. As pointed out by the respondent, the decision-maker is not bound by Operational Bulletin 021 in this case, as it involves the Minister’s delegated powers. The case law clearly establishes that policy guidelines are merely administrative documents that do not create legitimate expectations or substantive rights (*Oberlander v. Canada (Attorney General)*, 2004 FCA 213, [2005] 1 F.C.R. 3 at para. 30; *Byer v. Canada*, 2002 FC 518, 114 A.C.W.S. (3d) 417).

[36] Furthermore, a Minister's delegate must assess an H&C application in light of all relevant factors, and the Court called upon to review the decision of a delegate must uphold it even if the

assessment of relevant factors could have been done differently (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 54-56, 68, 73-75; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at paras. 34-38).

[37] In this case, Officer Léveillé considered and analyzed all the H&C grounds raised by the applicant before finding that none justified an exemption from the applicability of the Act. To the extent that section 25 of the Act confers a discretionary power on the Minister, the Court does not see how Officer Léveillé's decision could be considered unreasonable just because she could have given a different weight to the grounds alleged to justify the H&C application. Officer Léveillé considered the decision in which the Federal Court of Appeal found that the applicant was inadmissible, and rendered her decision despite the weight of the H&C considerations (see page 6, volume 1, Tribunal Record).

b) Was it open to Officer Nicole Léveillé to invoke paragraph 36(1)(c) *of the Act in the absence of a prior finding by the Immigration and Refugee Board (IRB) regarding the applicability of this provision to the applicant's case?*

[38] This is a question of mixed fact and law, to be reviewed on the standard of reasonableness (*Dunsmuir v. Nouveau-Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 164 and 166).

[39] The applicant points out that in her decision, Officer Léveillé did not mention that, in her opinion, the H&C considerations were insufficient, and notes that contrary to paragraph 34(1)(*f*) of the Act, he is not the subject of a section 44 report based on section 36. The applicant's report on

inadmissibility, prepared on June 15, 2004, pursuant to section 44 of the Act, does not state that he is inadmissible under paragraph 36(1)(*c*) of the Act, therefore the decision-maker in this case could not invoke this provision to refuse to grant the applicant permanent resident status under subsection 25(1) of the Act.

[40] It was not open to the Officer to find that the facts reviewed by the IRB and the Federal Court of Appeal constituted aiding and abetting within the meaning of sections 21 and 22 of the *Criminal Code*, R.S., 1985, c. C-46, to the effect that the applicant was a party to offences committed by the Ennahda movement. The Federal Court of Appeal noted in its reasons that the issue is one that requires debate. The Officer thus committed an error of law.

[41] The applicant invokes section 14 of the Regulations, dealing with paragraph 34(1)(*c*), and submits that the Regulations do not contain, in Part 3 on Inadmissibility, a similar provision for the purposes of paragraph 36(1)(*c*) of the Act. The applicant submits that it was not open to the Officer to circumvent the Regulations to come to a finding that the applicant had committed [TRANSLATION] "a series of crimes" in Tunisia and that [TRANSLATION] "these constituted serious crimes within the meaning of subsection 36(1)(*c*) of the IRPA". Officer Léveillé could therefore not rely on the decision of the Federal Court of Appear upholding the IRB decision, in which the applicant was found to be subject to paragraph 1F(*b*) of the Convention because he had committed serious non-political crimes.

[42] The applicant refers to the transitional provisions in Part 20 of the Regulations and notes that there is no equivalent to the inadmissibility clauses under the former Act that could be transferred under the new Act. Section 339 of the Regulations comes closest, but inadmissibility cases are not mentioned. The distinction made by Officer Dostie in her notes thus becomes more meaningful: [TRANSLATION] ". . . the IRPA does not provide an exception for persons seeking an exemption from the requirement for a permanent resident visa beyond legislative requirements, including those related to security and criminality checks, the second stage of the process."

[43] The respondent submits that if the Court were to accept the applicant's argument, Canadian immigration officers abroad would not be able to reject permanent residence applications under paragraph 36(1)(*c*) of the Act, because on his understanding, section 44 can only be applicable to a permanent resident or foreigner located in Canada. In other words, an immigration officer may not refuse to grant an immigrant visa to somebody who is outside of the country, under paragraph 36(1)(*c*), based on the authority provided in subsection 11(1) of the Act.

[44] Preparation of the report described in section 44 constitutes the first stage of a process that could result in the issue of a removal order against the person in question. The decision in this case, rendered under subsection 25(1), is related to an application for permanent resident status and does not constitute a removal order. Officer Léveillé did not make a finding that the applicant was inadmissible from Canada under paragraph 36(1)(*c*) for the purpose of his removal from Canada. The decision-making authority granted to the Minister under subsection 25(1) of the Act is clear, and it was not the intent of Parliament to involve the Immigration Division before the Minister

could invoke inadmissibility. The Minister, and not exclusively the Immigration Division, is therefore authorized by the Act to decide whether the person may be an inadmissible person (*Figueroa v. Canada (Minister of Citizenship and Immigration)* (2000), 181 F.T.R. 242, 96 A.C.W.S. (3d) 844 at para. 10, aff'd 2001 FCA 112, 212 F.T.R. 318 at para. 8; *Ali v. Canada (Minister of Citizenship and Immigration)* (1995), 93 F.T.R. 297, 53 A.C.W.S. (3d) 834 at para. 11).

[45] Based on the reasons of the IRB and Federal Court of Appeal, Officer Léveillé could have reasonable grounds to believe that the applicant had committed "outside Canada" at least one "offence that if committed in Canada would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least ten years". The respondent submits that this is the same burden of proof as that required for the application of paragraphs 1F(*b*) and 1F(*c*) of the Convention. Moreover, the Officer could be certain that conspiring to assassinate people or to commit arson constituted an offence in Tunisia, and the applicant has not challenged this.

[46] The respondent cites paragraph 465(1)(*a*) of the *Criminal Code*, noting that the Federal Court of Appeal found that it was not unreasonable for the IRB to find that it had serious grounds to believe that the applicant had committed, among others, the offence of conspiring to assassinate leading figures of the Government of Tunisia in 1990, 1991 and 1992. The respondent also cites sections 433 and 434 of the *Criminal Code*, noting that the Federal Court of Appeal found that it was not unreasonable for the IRB to find that it had reasonable grounds to believe that the applicant had committed, among others, the offence of setting automobiles on fire in 1987 and 1990, as well as arson at Bab Souika (Tunisia) in February, causing death. Under the *Criminal Code*, these

offences are punishable by a term of imprisonment of at least 14 years in the case of setting automobiles on fire and imprisonment for life for the arson at Bab Souika.

[47] The applicant's argument that the Regulations do not contain, for the purposes of applying paragraph 36(1)(*c*), a provision similar to section 14 of the Regulations is irrelevant, as Officer Léveillé did not write that she was bound by the Federal Court of Appeal's reasons. She simply relied on that decision. For the purpose of a decision under subsection 25(1) of the Act, the Minister may rely on findings of fact by the IRB, and all the more so when, as in this case, they are upheld by the Federal Court of Appeal (*Yassin v. Canada (Minister of Citizenship and Immigration)*, 2002 FC 1029, 117 A.C.W.S. (3d) 605 at para. 24; *Figueroa*, Federal Court of Appeal decision cited above at paras. 10 to 13).

[48] The respondent draws a parallel by explaining that this Court has decided, with respect to paragraph 15(*b*) of the Regulations, which involves the application of paragraph 35(1)(*a*) of the Act and is drafted like section 14 of the same Regulations, that a decision-maker under the Act, whether the IRB or an immigration officer, must accept as conclusive earlier findings made by the IRB with respect to the applicability of paragraph 1F(*a*) of the Convention (*Syed v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1163, 300 F.T.R. 132 at paras. 24 to 26).

[49] Similarly, in *Legault v. Canada (Secretary of State)* (1997), 219 N.R. 376, 74 A.C.W.S. (3d) 649, cited with approval in *Kiani v. Canada (Minister of Citizenship and Immigration)* (1998), 233 N.R. 170, 83 A.C.W.S. (3d) 822, the Federal Court of Appeal decided that an umpire could rely

solely on an indictment by a United States court and an arrest warrant issued by this Court to find that there were reasonable grounds to believe that the applicant had committed serious crimes abroad and that he was therefore covered by subparagraph 19(1)(*c.1*)(ii) of the *Immigration Act*, R.S.C. (1985), c. I-2 (now paragraph 36(1)(*c*) of the Act). Here Officer Léveillé was entitled to rely on the final decision of a Canadian court, in this case the Federal Court of Appeal, that it was not unreasonable for the Refugee Division to find that it had reasonable grounds to believe that the applicant had committed serious non-political crimes abroad within the meaning of paragraph 1F(*b*) of the Convention.

[50] Finally, the respondent points out that the applicant has presented no new evidence that was not before the Federal Court of Appeal and that he has made no attempt to demonstrate that he did not commit the offences identified by Officer Léveillé on the basis of the Federal Court of Appeal decision dated April 7, 2003. Officer Léveillé found that the judgment and reasons of the Federal Court of Appeal constituted credible evidence, and her decision to rely on that case, which fell squarely within her discretion in this case, was perfectly legal (*Legault*, above at para. 10).

[51] As stated above, a delegate of the Minister must assess and H&C application in light of all the relevant factors, and a Court called upon to review the decision of a delegate must uphold it even if the assessment of relevant factors could have been done differently (*Baker*, above, at paras. 54-56, 68, 73-75; *Suresh*, above, at paras. 34-38).

[52] As stated by the respondent, this is not about a removal order, but rather an application for permanent residence, which is based on a discretionary decision with respect to H&C considerations. In this case, Officer Léveillé considered and analyzed all the H&C grounds invoked by the applicant before finding that none justified an exemption from the requirements of the Act.

[53] To the extent that section 25 of the Act grants the Minister a discretionary power, it was reasonable for Officer Léveillé to take into account the Federal Court of Appeal's decision, given that it involved the same applicant and the same factual background. It was also reasonable for the applicant to expect Officer Léveillé to mention the same grounds as the Federal Court of Appeal. The considerable weight that the Officer gave to the reasons in the Federal Court of Appeal justifies her conclusion.

c) Has there been a breach of procedural fairness because the applicant did not have the opportunity to make submissions on the applicability of paragraph 36(1)(c) *of the Act under subsection 34(2)?*

[54] As stated above, issues of procedural fairness must always be reviewed according to the standard of correctness (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at para. 46).

[55] The applicant states that he could not have suspected that the officer would find that acts committed by the ITM/Ennahda would be considered offences he had committed within the

meaning of subsection 36(1) of the Act, and he submits that he did not have the opportunity to make representations on this issue. The applicant relies on *Moiseev*, cited above at para. 28:

> […] The jurisprudence is quite clear that the duty of fairness is not breached if the applicant had an opportunity to respond to the concerns raised in the visa officer's mind: see, for example, *Au*, above; *Zheng v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1397 (F.C.) (QL).

[56] According to the applicant, the respondent is attempting to do here what it did not do before the Federal Court of Appeal, since according to the Federal Court of Appeal decision, the issue of the applicability of paragraph 36(1)(*c*) requires a debate. Accordingly, the officer could not cite the provisions in paragraph 36(1)(*c*) without at least hearing submissions on this issue before making her decision.

[57] The applicant claims that he should have been notified before the decision was rendered that Officer Léveillé was planning to apply paragraph 36(1)(*c*) of the Act. The officer did not fulfil her duty of fairness by failing to notify him of her intention to consider the applicability of paragraph 36(1)(*c*), thereby depriving the applicant of the benefit of the Act.

[58] The respondent submits that the Minister respected procedural fairness in applying paragraph 36(1)(*c*). CIC notified the applicant, despite the fact that it was not obligatory to do so, that another decision would or could be issued, given the provisions of the Act dealing with security and criminality. In her reasons, disclosed to the applicant on December 20, 2006, Officer Dostie specified not only that her decision constituted the first stage of the decision process under section 25 of the Act, but also that the issue of legislative requirements "related to security and

criminality checks", which clearly indicated that the applicant's application for permanent residence could be refused on grounds of serious crime under paragraph 36(1)(*c*) of the Act.

[59] In any case, neither the Minister nor Officers Dostie or Léveillé were required to notify the applicant of the possible application of paragraph 36(1)(*c*) (*Suleyman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 780, 330 F.T.R. 205 at paras. 38 to 42).

[60] In *Johnson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 2, [2008] F.C.J. No. 10 (QL), this Court established that "there is no requirement for notice of an officer's concerns where these arise directly from the Act and Regulations that the officer is bound to follow in his or her assessment of the applicant" (*Parmar v. Canada (Minister of Citizenship and Immigration)* (1997), 139 F.T.R. 203, 75 A.C.W.S. (3d) 923 (F.C.T.D.) at para. 36).

[61] In this case, on April 7, 2003, a majority of the Court of Appeal upheld the applicant's inadmissibility under paragraph 1F(*b*) and stated that there was no need to deal with the issues related to the applicability of paragraph 1F(*c*). This decision was not appealed to the Supreme Court of Canada.

[62] The applicant therefore knew as of that date that the Court of Appeal had found that it was not unreasonable for the IRB to have found that it had serious grounds to believe that he had committed serious non-political crimes before arriving in Canada in 1992.

[63] The evidence shows that on December 20, 2006, the applicant was aware of Officer Dostie's decision (July 29, 2005), in which she informed him that his file would be subject to a second-stage review, namely, security and criminality checks.

[64] He could have applied for an exemption under subsection 34(2) and attempted to persuade the Minister that his presence in Canada would not be detrimental to the national interest. Officer Léveillé's decision was rendered on March 29, 2007. The applicant did nothing during this period and it is not open to him now to argue that he was unaware of his inadmissibility.

[65] The Court finds that Officer Léveillé's decision cannot be characterized as unreasonable in light of the particular circumstances of this case.

[66] The applicant proposed the following questions for certification by the Court:

> [TRANSLATION]
>
> Q1. When an H&C review has been accepted by a first officer, who finds that the applicant is subject to risks that constitute unusual and undeserved or disproportionate hardship in the circumstances, and **the applicant is inadmissible to Canada under subsection 34(1) of the IRPA**, is it open to the Minister to delegate to a second officer the task of reviewing the file and rendering a decision on whether the applicant's presence in Canada would be detrimental to the national interest, in light of subsection 69(3) of the IRPA?
>
> Q2. Given the delegation of authority contained in "Operational Bulletin 021", dated June 22, 2006, or any other delegation stipulating that ***"officers do not have the delegated authority to grant exemptions with respect to the following inadmissibilities - Criminality -A36(1)"***, is it open to an officer to render a decision about an applicant who is inadmissible under A36(1) and to reject

> him without a specific delegated authority if another officer has accepted an H&C application on the basis that the applicant is subject to risks that constitute unusual and undeserved or disproportionate hardship in the circumstances?
>
> Q3. Given the fairness measures set out in the **"Operational Bulletin 021"** or other applicable directives or guidelines, - such as IP-5 section 11.1 in this case -, stipulating that officers must apply procedural fairness in making their decisions, if an officer decides to rely on a ground of inadmissibility that has not resulted in a specific inadmissibility order, and if that ground could result in the rejection of an application for permanent residence that can be processed in Canada following a positive H&C decision, **is it open to the officer to render a decision in the case without expressly informing the applicant** or, in the alternative, does the applicant have a right to be informed of this fact and to have the opportunity to make submissions before a decision is rendered?
>
> [Emphasis in the original.]

[67] The respondent objects to these questions for the following reasons:

[68] Question no. 1: the respondent points out that the applicant refers to subsection 69(3) at the end of the first question. The Court notes that this is an error, and that the applicant intended to refer to subsection 34(2). Given that Officer Léveillé did not render a decision under subsection 34(2), the Court is of the view that it would not be appropriate to certify the first question.

[69] Question no. 2: the Court agrees with the respondent that Officer Léveillé did not require a specific delegation of authority to render the impugned decision.

[70] Question no. 3: in light of paragraphs 61 to 64 of these reasons, the Court is of the view that it is not necessary to certify this question.

[71] In reviewing the questions proposed by the applicant, the Court also considered the comments of the Federal Court of Appeal in the recent decision *Valera v. Canada (Minister of Citizenship and Immigration*), 2009 FCA 145, [2009] F.C.J. No. 549 (QL) with respect to the role of the judge in deciding whether to certify a question.

JUDGMENT

THE COURT ORDERS that:

1. The respondent's motion for the withdrawal of an admission be allowed in accordance with the terms of the re-reamended draft order attached as a schedule to the respondent's further reply, dated November 25, 2008 (document number 34); and

2. The application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

Certified true translation
Francie Gow, BCL, LLB

SCHEDULE A

Immigration and Refugee Protection Act, 2001, c. 27

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

(2) The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act.

(2) Ils ne peuvent être délivrés à l'étranger dont le répondant ne se conforme pas aux exigences applicables au parrainage.

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

25. (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

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.

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in

a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression

Canada;

(b) engaging in or instigating the subversion by force of any government;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(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).

(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.

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act; or

s'entend au Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

(2) 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.

35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants:

a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;

b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la Loi sur les crimes contre l'humanité et les crimes de guerre;

(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

c) être, sauf s'agissant du résident permanent, une personne dont l'entrée ou le séjour au Canada est limité au titre d'une décision, d'une résolution ou d'une mesure d'une organisation internationale d'États ou une association d'États dont le Canada est membre et qui impose des sanctions à l'égard d'un pays contre lequel le Canada a imposé — ou s'est engagé à imposer — des sanctions de concert avec cette organisation ou association.

(2) Paragraphs (1)(b) and (c) do not apply in the case 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) Les faits visés aux alinéas (1)b) et c) 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.

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

(2) A foreign national is inadmissible on grounds of criminality for

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

(3) The following provisions govern subsections (1) and (2):

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou de réhabilitation — sauf cas de révocation ou de nullité — au titre de la Loi sur le casier judiciaire;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à

resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

d) la preuve du fait visé à l'alinéa (1)c) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

(e) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the Contraventions Act or an offence under the Young Offenders Act.

e) l'interdiction de territoire ne peut être fondée sur une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ni sur une infraction à la Loi sur les jeunes contrevenants.

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.

(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

Immigration and Refugee Protection Regulations, SOR/2002-227

14. For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 34(1)(c) of the Act, if either the following determination or decision has been rendered, the findings of fact set out in that determination or decision shall be considered as conclusive findings of fact:

(a) a determination by the Board, based on findings that the foreign national or permanent resident has engaged in terrorism, that the foreign national or permanent resident is a person referred to in section F of Article 1 of the Refugee Convention; or

(b) a decision by a Canadian court under the Criminal Code concerning the foreign national or permanent resident and the commission of a terrorism offence.

14. Les décisions ci-après ont, quant aux faits, force de chose jugée pour le constat de l'interdiction de territoire d'un étranger ou d'un résident permanent au titre de l'alinéa 34(1)c) de la Loi :

a) toute décision de la Commission, fondée sur les conclusions que l'intéressé a participé à des actes terroristes, qu'il est visé par la section F de l'article premier de la Convention sur les réfugiés;

b) toute décision rendue en vertu du Code criminel par un tribunal canadien à l'égard de l'intéressé concernant une infraction de terrorisme.

15. For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 35(1)(a) of the Act, if any of the following decisions or the following determination has been rendered, the findings of fact set out in that decision or determination shall be considered as conclusive findings of fact:

(a) a decision concerning the foreign national or permanent resident that is made by any international criminal tribunal that is established by resolution of the Security Council of the United Nations, or the International Criminal Court as defined in the Crimes Against Humanity and War Crimes Act;

(b) a determination by the Board, based on findings that the foreign national or permanent resident has committed a war crime or a crime against humanity, that the foreign national or permanent resident is a person referred to in

15. Les décisions ci-après ont, quant aux faits, force de chose jugée pour le constat de l'interdiction de territoire d'un étranger ou d'un résident permanent au titre de l'alinéa 35(1)a) de la Loi :

a) toute décision rendue à l'égard de l'intéressé par tout tribunal pénal international établi par résolution du Conseil de sécurité des Nations Unies ou par la Cour pénale internationale au sens de la Loi sur les crimes contre l'humanité et les crimes de guerre;

b) toute décision de la Commission, fondée sur les conclusions que l'intéressé a commis un crime de guerre ou un crime contre l'humanité, qu'il est visé par la section F de l'article premier de la Convention sur les réfugiés;

section F of Article 1 of the Refugee Convention; or

(c) a decision by a Canadian court under the Criminal Code or the Crimes Against Humanity and War Crimes Act concerning the foreign national or permanent resident and a war crime or crime against humanity committed outside Canada.

c) toute décision rendue en vertu du Code criminel ou de la Loi sur les crimes contre l'humanité et les crimes de guerre par un tribunal canadien à l'égard de l'intéressé concernant un crime de guerre ou un crime contre l'humanité commis à l'extérieur du Canada.

17. For the purposes of paragraph 36(3)(c) of the Act, the prescribed period is five years

17. Pour l'application de l'alinéa 36(3)c) de la Loi, le délai réglementaire est de cinq ans à compter :

(a) after the completion of an imposed sentence, in the case of matters referred to in paragraphs 36(1)(b) and (2)(b) of the Act, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the Contraventions Act or an offence under the Young Offenders Act; and

a) dans le cas des faits visés aux alinéas 36(1)b) ou (2)b) de la Loi, du moment où la peine imposée a été purgée, pourvu que la personne n'ait pas été déclarée coupable d'une infraction subséquente autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur les jeunes contrevenants;

(b) after committing an offence, in the case of matters referred to in paragraphs 36(1)(c) and (2)(c) of the Act, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the Contraventions Act or an offence under the Young Offenders Act.

b) dans le cas des faits visés aux alinéas 36(1)c) ou (2)c) de la Loi, du moment de la commission de l'infraction, pourvu que la personne n'ait pas été déclarée coupable d'une infraction subséquente autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur les jeunes contrevenants.

18. (1) For the purposes of paragraph 36(3)(c) of the Act, the class of persons deemed to have been rehabilitated is a prescribed class.

18. (1) Pour l'application de l'alinéa 36(3)c) de la Loi, la catégorie des personnes présumées réadaptées est une catégorie réglementaire.

(2) The following persons are members of the class of persons deemed to have been rehabilitated:

(2) Font partie de la catégorie des personnes présumées réadaptées les personnes suivantes :

(a) persons who have been convicted outside Canada of no more than one offence that, if committed in Canada, would constitute an

a) la personne déclarée coupable, à l'extérieur du Canada, d'au plus une infraction qui, commise au Canada, constituerait une infraction à une loi

indictable offence under an Act of Parliament, if all of the following conditions apply, namely,

(i) the offence is punishable in Canada by a maximum term of imprisonment of less than 10 years,

(ii) at least 10 years have elapsed since the day after the completion of the imposed sentence,

(iii) the person has not been convicted in Canada of an indictable offence under an Act of Parliament,

(iv) the person has not been convicted in Canada of any summary conviction offence within the last 10 years under an Act of Parliament or of more than one summary conviction offence before the last 10 years, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(v) the person has not within the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(vi) the person has not before the last 10 years been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence under an Act of Parliament, and

(vii) the person has not committed an act described in paragraph 36(2)(c) of the Act;

(b) persons convicted outside Canada of two or more offences that, if committed in Canada, would constitute summary conviction offences

fédérale punissable par mise en accusation si les conditions suivantes sont réunies :

(i) l'infraction est punissable au Canada d'un emprisonnement maximal de moins de dix ans,

(ii) au moins dix ans se sont écoulés depuis le moment où la peine imposée a été purgée,

(iii) la personne n'a pas été déclarée coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation,

(iv) elle n'a pas été déclarée coupable au Canada d'une infraction à une loi fédérale punissable par procédure sommaire dans les dix dernières années ou de plus d'une telle infraction avant les dix dernières années, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur le système de justice pénale pour les adolescents,

(v) elle n'a pas, dans les dix dernières années, été déclarée coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur le système de justice pénale pour les adolescents,

(vi) elle n'a pas, avant les dix dernières années, été déclarée coupable, à l'extérieur du Canada, de plus d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par procédure sommaire,

(vii) elle n'a pas commis l'infraction visée à l'alinéa 36(2)c) de la Loi;

b) la personne déclarée coupable, à l'extérieur du Canada, de deux infractions ou plus qui, commises au Canada, constitueraient des

under any Act of Parliament, if all of the following conditions apply, namely,

infractions à une loi fédérale punissables par procédure sommaire si les conditions suivantes sont réunies :

(i) at least five years have elapsed since the day after the completion of the imposed sentences,

(i) au moins cinq ans se sont écoulés depuis le moment où les peines imposées ont été purgées,

(ii) the person has not been convicted in Canada of an indictable offence under an Act of Parliament,

(ii) la personne n'a pas été déclarée coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation,

(iii) the person has not within the last five years been convicted in Canada of an offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(iii) elle n'a pas, dans les cinq dernières années, été déclarée coupable au Canada d'une infraction à une loi fédérale, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur le système de justice pénale pour les adolescents,

(iv) the person has not within the last five years been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(iv) elle n'a pas, dans les cinq dernières années, été déclarée coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur le système de justice pénale pour les adolescents,

(v) the person has not before the last five years been convicted in Canada of more than one summary conviction offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(v) elle n'a pas, avant les cinq dernières années, été déclarée coupable au Canada de plus d'une infraction à une loi fédérale punissable par procédure sommaire, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur le système de justice pénale pour les adolescents,

(vi) the person has not been convicted of an offence referred to in paragraph 36(2)(b) of the Act that, if committed in Canada, would constitute an indictable offence, and

(vi) elle n'a pas été déclarée coupable d'une infraction visée à l'alinéa 36(2)b) de la Loi qui, commise au Canada, constituerait une infraction punissable par mise en accusation,

(vii) the person has not committed an act described in paragraph 36(2)(c) of the Act; and

(vii) elle n'a pas commis l'infraction visée à l'alinéa 36(2)c) de la Loi;

(c) persons who have committed no more than one act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, if all of the following conditions apply, namely,

c) la personne qui a commis, à l'extérieur du Canada, au plus une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation si les conditions suivantes sont réunies :

(i) the offence is punishable in Canada by a maximum term of imprisonment of less than 10 years,

(i) l'infraction est punissable au Canada d'un emprisonnement maximal de moins de dix ans,

(ii) at least 10 years have elapsed since the day after the commission of the offence,

(ii) au moins dix ans se sont écoulés depuis le moment de la commission de l'infraction,

(iii) the person has not been convicted in Canada of an indictable offence under an Act of Parliament,

(iii) la personne n'a pas été déclarée coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation,

(iv) the person has not been convicted in Canada of any summary conviction offence within the last 10 years under an Act of Parliament or of more than one summary conviction offence before the last 10 years, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(iv) elle n'a pas été déclarée coupable au Canada d'une infraction à une loi fédérale punissable par procédure sommaire dans les dix dernières années ou de plus d'une telle infraction avant les dix dernières années, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur le système de justice pénale pour les adolescents,

(v) the person has not within the last 10 years been convicted outside of Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(v) elle n'a pas, dans les dix dernières années, été déclarée coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur le système de justice pénale pour les adolescents,

(vi) the person has not before the last 10 years been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence under an Act of Parliament, and

(vi) elle n'a pas, avant les dix dernières années, été déclarée coupable, à l'extérieur du Canada, de plus d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par procédure sommaire,

(vii) the person has not been convicted outside of Canada of an offence that, if committed in

(vii) elle n'a pas été déclarée coupable, à l'extérieur du Canada, d'une infraction qui,

Canada, would constitute an indictable offence under an Act of Parliament.

commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation.

339. A determination made in Canada before the coming into force of this section that a person is not a Convention refugee is deemed to be a claim for refugee protection rejected by the Board.

339. Est assimilée au rejet d'une demande d'asile par la Commission la décision rendue au Canada avant l'entrée en vigueur du présent article selon laquelle une personne n'est pas un réfugié au sens de la Convention.

Criminal Code, R.S., 1985, c. C-46

21. (1) Every one is a party to an offence who

21. (1) Participent à une infraction :

(a) actually commits it;

a) quiconque la commet réellement;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

b) quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre;

(c) abets any person in committing it.

c) quiconque encourage quelqu'un à la commettre.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

(2) Quand deux ou plusieurs personnes forment ensemble le projet de poursuivre une fin illégale et de s'y entraider et que l'une d'entre elles commet une infraction en réalisant cette fin commune, chacune d'elles qui savait ou devait savoir que la réalisation de l'intention commune aurait pour conséquence probable la perpétration de l'infraction, participe à cette infraction.

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

22. (1) Lorsqu'une personne conseille à une autre personne de participer à une infraction et que cette dernière y participe subséquemment, la personne qui a conseillé participe à cette infraction, même si l'infraction a été commise d'une manière différente de celle qui avait été conseillée.

(2) Every one who counsels another person to be a party to an offence is a party to every offence

(2) Quiconque conseille à une autre personne de participer à une infraction participe à chaque

that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

infraction que l'autre commet en conséquence du conseil et qui, d'après ce que savait ou aurait dû savoir celui qui a conseillé, était susceptible d'être commise en conséquence du conseil.

(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

(3) Pour l'application de la présente loi, « conseiller » s'entend d'amener et d'inciter, et « conseil » s'entend de l'encouragement visant à amener ou à inciter.

433. Every person who intentionally or recklessly causes damage by fire or explosion to property, whether or not that person owns the property, is guilty of an indictable offence and liable to imprisonment for life where

433. Est coupable d'un acte criminel et passible de l'emprisonnement à perpétuité toute personne qui, intentionnellement ou sans se soucier des conséquences de son acte, cause par le feu ou par une explosion un dommage à un bien, que ce bien lui appartienne ou non, dans les cas suivants :

(a) the person knows that or is reckless with respect to whether the property is inhabited or occupied; or

a) elle sait que celui-ci est habité ou occupé, ou ne s'en soucie pas;

(b) the fire or explosion causes bodily harm to another person.

b) le feu ou l'explosion cause des lésions corporelles à autrui.

434. Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

434. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans quiconque, intentionnellement ou sans se soucier des conséquences de son acte, cause par le feu ou par une explosion un dommage à un bien qui ne lui appartient pas en entier.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1639-07
STYLE OF CAUSE:	**MOHAMMED BEN AR ZRIG and MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	April 7, 2009
REASONS FOR JUDGMENT AND JUDGMENT BY:	The Honourable Mr. Justice Beaudry
DATED:	June 12, 2009

APPEARANCES:

Michel Le Brun	FOR THE APPLICANT
Zoé Richard Normand Lemyre	FOR THE RESPONDENT

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