Federal Court  Cour fédérale

Date: 20170214

Docket: IMM-1352-16

Citation: 2017 FC 182

Ottawa, Ontario, February 14, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

FUAD MUNGWANA ALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Fuad Mungwana Ali [the Applicant], pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by an Immigration Officer, dated March 8, 2016, in which the Applicant's application for permanent residency [PR] status as a refugee (protected person) was rejected on the grounds of inadmissibility, pursuant to paragraphs 34(1)(f) and (c) of the *IRPA* [the

Decision]. Leave was granted on August 22, 2016. A motion under section 87 was addressed in an Order by Justice Noël dated November 10, 2016; redacted materials are contained in the Certified Tribunal Record [CTR].

II. Facts

A. *Procedural History*

[2] A brief summary of this Applicant's history with Citizenship and Immigration Canada [CIC] will ground the current matter before the Court. The Applicant arrived in Canada in 1998 and made his refugee claim shortly afterwards; he was found to be a Convention refugee in November, 1999. He made his application for PR status as a protected person in May, 2000 and received first stage approval, but security concerns led to a delay in the second stage process.

[3] In May 2002, a secret brief was sent by the Canadian Security Intelligence Service [CSIS] to the Director of the Security Review Division of CIC's Case Management Branch containing information about the Islamic Party of Kenya [IPK] and the Applicant's involvement with IPK. This brief concluded that the Applicant was a member of the IPK and that the IPK was a terrorist organization. The Applicant was interviewed in 2001, 2004, December 2006 and again in May 2009.

[4] The file, including the 2002 CSIS report, was reviewed by a Canadian Border Services Agency [CBSA] officer (note, not a CIC officer) in 2007, who concluded there was insufficient

evidence to proceed under paragraph 34(1)(f) of *IRPA*. The file was returned to CIC for further processing of the Applicant's PR application.

[5] In December 2008, the Immigration Intelligence division of CIC determined there was sufficient evidence to find the Applicant inadmissible. This finding followed receipt by CBSA of a second secret report from CSIS, dated November 10, 2008, which once again concluded the Applicant was a member of a terrorist organization, namely, the IPK. CBSA, in turn, performed an analysis and came to the same conclusion: the Applicant was inadmissible under paragraph 34(1)(f) of the *IRPA*. The CBSA so informed CIC by letter dated December 18, 2008; CBSA sent CIC both the 2002 and 2008 CSIS reports with this letter.

[6] The Applicant was again interviewed in May 2009; he received a letter from CIC prior to his interview, dated May 13, 2009, advising him that the purpose of this interview would be to discuss concerns regarding his inadmissibility as a member of the IPK. On June 18, 2009, CIC concluded its security review and determined the Applicant was inadmissible under paragraphs 34(1)(f) and (c) of the *IRPA*, finding there were reasonable grounds to believe that the IPK is a group that has, is or will engage in acts of terrorism under paragraph 34(1)(c) of the *IRPA*, defining "terrorism" as it was defined by the Supreme Court of Canada at paragraph 98 of its decision in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*] and finding that the Applicant had been a member of IPK. The determination noted the Applicant had also applied for Ministerial relief.

[7] By letter dated June 18, 2009, CIC invited the Applicant to make submissions for Ministerial relief under what was then subsection 34(2) of the *IRPA*. CIC informed the Applicant that any such Ministerial relief would be from paragraphs 34(1)(f) and (c) of the *IRPA*, i.e., the membership in a terrorist organization provisions. The Applicant acknowledged receipt of this letter and responded with his submissions.

[8] CIC subsequently notified the Applicant of its June 18, 2009 decision by letter dated April 27, 2010, which informed the Applicant that he had been found inadmissible due to membership in a terrorist organization under paragraphs 34(1)(f) and (c) of the *IRPA*. The Applicant asked for assistance from his Member of Parliament [MP]; CIC sent the April 27, 2010 letter to the MP as a result. The Applicant did not seek judicial review of the June 18, 2009 decision, nor did he ask to see a copy of CIC's reasons and supporting material.

[9] Presumably because the *IRPA* was amended in 2013, the file was once again considered by CIC. In this connection, CIC sent the Applicant a Procedural Fairness Letter [PFL] in January 2016. The Applicant's application for Ministerial relief was still pending at that time. The PFL advised him of his potential inadmissibility. It stated: "[I]information available suggests that CIC may have to refuse your application for permanent residence as it appears you may be inadmissible to Canada as per section 34(1)" of the *IRPA*. It also advised him that "[I]n Canada, the IPK has been deemed to be an organization that has committed terrorism, and that some members may be found inadmissible to Canada".

[10] The PFL invited him to provide updated submissions. Once again, he did.

B. *Background*

[11] The Applicant is a 55-year old Muslim and citizen of Kenya. The Applicant joined the Kenya National Union [KANU] youth wing in Mombasa as an active member when he was in high school. In 1978, Daniel Arap Moi [Moi] took over leadership of KANU, resulting in what the Applicant considered an increasingly repressive, corrupt and anti-Muslim government. The Applicant left the KANU youth wing and stayed away from politics.

[12] However, the Applicant was one of the first to join the IPK when it was formed in January 1992. He states: "[I] was one of the first people to join it after Khalid Balala [Balala] began it." Evidence before the CIC officer was that Balala started out as the "uncrowned leader and spokesman" for the IPK. Balala later became IPK's official leader, before being dismissed from the party in the late summer or fall of 1994.

[13] The Applicant freely and on many occasions admitted his membership in the IPK; for example, he repeatedly described himself as an "activist" in the IPK in his written applications for permanent residence dated November 1999, July 2007 and January 2008.

[14] The IPK is described as a "fundamentalist" party whose goal was to articulate the grievances of Muslims in the Coast Province of Kenya. President Moi banned the party in July 1992 for its religious nature. According to the Applicant, the IPK "was never about violence", "no one was armed" and "they used stones to protect themselves". Despite the

violence directed against them, the Applicant alleges, “the IPK remained focused and denounced reciprocity against the violence.”

[15] In 1995, the Applicant was warned by the Kenyan Criminal Investigation Division [CID] that he was being watched. In April 1998, the Applicant says he was forced into a car by CID men, beaten to unconsciousness, questioned, tortured and kept captive. The Applicant escaped and came to Canada later that year with the assistance of a smuggler. He made his refugee claim on the basis of these events and was successful.

III. Decision

[16] On March 8, 2016, an Immigration Officer denied the Applicant’s claim for PR status as a protected person, finding the Applicant inadmissible under 34(1)(f) and (c) of the *IRPA* for being a member of an organization which the Officer had reasonable grounds to believe engages, has engaged or will engage in acts of terrorism. The Officer noted at the outset of the Decision that Canada considers the IPK “to be an organisation [*sic*] that has committed terrorism”. The Officer noted later in the Decision that the IPK has not been listed as a terrorist entity by the Governor in Council, nor is it on the US or UK Home Office or Australian National Security lists of terrorist entities.

[17] Because the Applicant did not dispute his membership in the IPK, the only issue before the Officer was whether he or she had reasonable grounds to believe that the IPK engages, has engaged or will engage in acts of terrorism per paragraph 34(1)(c) of the *IRPA*.

[18] The Officer cited extensively from several reports, news articles and publicly available websites, which "would indicate that the IPK had involved itself in terrorist activities." The Officer ultimately concluded that he or she had reasonable grounds to believe that the IPK engages, has engaged or will engage in terrorist activity:

> The results of my research, corroborated by information in many of reports provided by the applicant as well as information in the file demonstrate that the IPK was involved in politically motivated incidences such as general strikes in Mombasa as well as violent clashes with both security forces and other political entities. The applicant has also admitted that the IPK instigated labour unrest followed by mass demonstrations. The information on file shows that Sheikh Balala had also publicly displayed a willingness to achieve his goals using violent means such as suicide bombers against political opponents or the use of a private army to topple the Moi regime. While it is clear that the Moi government was also culpable in much of the violence that occurred during that time, the IPK, under the leadership of Sheikh Balala, also had a role. The incidences of violence including riots, the destruction of property, including the use of petrol bombs against the IPK enemies, and the threats of violence by Sheikh Balala leads me to believe, on reasonable grounds, that the IPK is an organization that engaged, engages or will engage in terrorist acts. I thererefore [*sic*] find there are reasonable grounds to believe the applicant is inadmissible to Canada under section A34(1)(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorist acts.
>
> **CONCLUSION**
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> Consequently, I am satisfied that Fuadi Mungwana Ali is inadmissible to Canada under Section 34(1)(f) of the *Immigration and Refugee Protection Act* for being a member of an organisation of which there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism under Section 34(1)(c) of the *Immigration and Refugee Protection Act*.
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> [emphasis added]

[19] It is from this decision that the Applicant seeks judicial review.

IV. Issues

[20] This matter raises the following issues:

1) Whether the Officer breached the duty of procedural fairness by relying on extrinsic evidence, namely, 2007 and 2009 admissibility material without specifically notifying the Applicant of these determinations and providing the Applicant with an opportunity to respond?
2) Whether the Officer applied the incorrect definition of "terrorism", in light of the Supreme Court's decision in *Suresh*?
3) Whether the Officer's finding that he or she had reasonable grounds to believe that the IPK is a group that engages, has engaged or will engage in acts of terrorism pursuant to paragraph 34(1)(c) of the *IRPA* is unreasonable?

V. Standard of Review and Legal Framework

[21] The Supreme Court of Canada held in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114, that "reasonable grounds to believe" requires something more than mere suspicion but less than the balance of probabilities:

> The Federal Court of Appeal has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities [citations omitted] in essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible evidence.

[22] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." Findings of inadmissibility under subsection 34(1) of the *IRPA* are reviewed on the reasonableness standard: *Nassereddine v Canada (Citizenship and Immigration)*, 2014 FC 85, Strickland J; *Najafi v Canada (Public Safety and Emergency Preparedness*), 2014 FCA 262 at para 56, aff'g 2013 FC 876. Findings of the terrorist nature of an organization or an individual's membership in a terrorist organization are reviewable on the reasonableness standard: *Mirmahaleh v Canada (Citizenship and Immigration)*, 2015 FC 1085 at para 15, Gascon J.

[23] The case of *Gazi v Canada (Minister of Citizenship and Immigration)*, 2017 FC 94 sets out the applicable authorities:

> [19] In addition, I also wish to note at the outset that Senior Immigration Officers have a recognized and accepted degree of expertise in these matters: *Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 623 at para 21 [*Gutierrez*]:
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> > [21] The Federal Court of Appeal has held that the question of whether a person is a "member" of an organization described in paragraph 34(1)(f) of the IRPA is a question of mixed fact and law reviewable on a standard of reasonableness: *Poshteh*, above. The same applies to determining whether there are reasonable grounds to believe that the organizations in question have engaged, are engaging or will engage in acts of terrorism. In fact, these two aspects are closely related, and both raise questions of mixed fact and law in which immigration officers have a degree of expertise, as our Court has also recognized on a number of occasions: see, inter alia, J*alil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 246 at

> paras 19‑20, [2006] 4 FCR 471 [*Jalil*]; *Daud v Canada (Minister of Citizenship and Immigration)*, 2008 FC 701 at para 6, (available on CanLII) [*Daud*]; *Omer v Canada (Minister of Citizenship and Immigration*), 2007FC 478 at paras 8‑9, 157 ACWS (3d) 601.
>
> [emphasis added]

[20] Moreover, the Federal Court of Appeal said of paragraph 34(1)(b) of *IRPA* that there is a presumption of deference to be afforded to the IAD's interpretation of its home statute: *Najafi* (FCA), above at para 56. I see no reasons why a Senior Immigration Officer acting under paragraph 34(1)(c) of *IRPA* should not be afforded the benefit of the same presumption of deference, and so find.

[21] This Court in *Gutierrez* considered the standard of review in terms of the standard of proof under paragraph 34(1)(f):

> [22] On the other hand, it should be noted that the standard of proof that an immigration officer must apply in the context of sections 34 to 37 of the *IRPA* is that of "reasonable grounds to believe" that the facts stated in those sections have occurred, are occurring or may occur (*IRPA*, s 33). It is settled law that this standard requires more than mere suspicion but is not equivalent to the balance of probabilities required in civil matters: *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114, [2005] 2 SCR 100; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 39, [2007] 1 SCR 350.
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> Accordingly, the role of this Court when reviewing an immigration officer's inadmissibility decision is not to determine whether, in fact, there were reasonable grounds to believe that the individual engaged in or was a member of an organization that engaged in the alleged acts but to consider whether the officer's finding that there were reasonable grounds to believe can itself be regarded as reasonable.

[24] In *Dunsmuir*, above at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[25] The Applicant submits that the Officer's definition of the word "terrorism" is a question of law to be reviewed on the correctness standard: *Harkat v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 122 at para 55, aff'd in part 2014 SCC 37. Questions of procedural fairness are also reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Dunsmuir*, above at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[26] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron*

Inc, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

VI. Relevant Provisions

[27] Section 33 and subsection 34(1) of the *IRPA* state:

Rules of interpretation	**marginale : Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
Security	**Sécurité**
34 (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants :
…	…
(c) engaging in terrorism;	c) se livrer au terrorisme;
…	…
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

[28] Subsection 83.01(1) of the *Criminal Code of Canada*, RSC, 1985, c C-46 [*Criminal Code*] speaks of terrorist activity defined as:

Definitions	**Définitions**
83.01 (1) The following definitions apply in this Part.	**83.01 (1)** Les définitions qui suivent s'appliquent à la présente partie.
…	…

terrorist activity means	***activité terroriste***
…	…
(b) an act or omission, in or outside Canada,	b) soit un acte — action ou omission, commise au Canada ou à l'étranger :
(i) that is committed	(i) d'une part, commis à la fois :
(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and	(A) au nom — exclusivement ou non — d'un but, d'un objectif ou d'une cause de nature politique, religieuse ou idéologique,
(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and	(B) en vue — exclusivement ou non — d'intimider tout ou partie de la population quant à sa sécurité, entre autres sur le plan économique, ou de contraindre une personne, un gouvernement ou une organisation nationale ou internationale à accomplir un acte ou à s'en abstenir, que la personne, la population, le gouvernement ou l'organisation soit ou non au Canada,
(ii) that intentionally	(ii) d'autre part, qui intentionnellement, selon le cas :
(A) causes death or serious bodily harm to a person by the use of violence,	(A) cause des blessures graves à une personne ou la mort de celle-ci, par l'usage de la violence,
(B) endangers a person's life,	(B) met en danger la vie d'une personne,
(C) causes a serious risk to the health or safety of the public or any segment of the public,	(C) compromet gravement la santé ou la sécurité de tout ou partie de la population,
(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or	(D) cause des dommages matériels considérables, que les biens visés soient publics ou privés, dans des circonstances telles qu'il est probable que l'une des situations mentionnées aux divisions (A) à (C) en

	résultera,
(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),	(E) perturbe gravement ou paralyse des services, installations ou systèmes essentiels, publics ou privés, sauf dans le cadre de revendications, de protestations ou de manifestations d'un désaccord ou d'un arrêt de travail qui n'ont pas pour but de provoquer l'une des situations mentionnées aux divisions (A) à (C).
and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law. (activité terroriste)	Sont visés par la présente définition, relativement à un tel acte, le complot, la tentative, la menace, la complicité après le fait et l'encouragement à la perpétration; il est entendu que sont exclus de la présente définition l'acte — action ou omission — commis au cours d'un conflit armé et conforme, au moment et au lieu de la perpétration, au droit international coutumier ou au droit international conventionnel applicable au conflit ainsi que les activités menées par les forces armées d'un État dans l'exercice de leurs fonctions officielles, dans la mesure où ces activités sont régies par d'autres règles de droit international. (terrorist activity)

VII. Analysis

A. *Procedural fairness*

[29] With respect, and notwithstanding counsel's submissions, I am not persuaded the Applicant was treated with procedural unfairness.

[30] In the first place, he had the full CTR produced to him on this application for judicial review. It contains the CBSA's 2007 consideration of initiating a 34(1) report and also CIC's 2009 determination that the Applicant was inadmissible by reasons of 34(1)(f) and (c) of the *IRPA*, the record for which included redacted copies of both the 2002 and 2008 CSIS reports. The very existence of the record confirms that, if the Applicant had sought judicial review of the 2009 decision or asked for his file, he would have received the underlying material – including both redacted CSIS reports and the 2007 CBSA report.

[31] I should also note the 2007 CBSA report was not an admissibility finding, because admissibility findings may only be made by a CIC officer; rather, the CBSA material is an internal record of CBSA's consideration as to whether or not to initiate a 34(1) process with CIC. The CBSA determined such a process should not proceed because there was insufficient evidence at that time.

[32] I am satisfied that the Applicant knew of the CIC inadmissibility decision of June 18, 2009. First, the record contains a copy of CIC's letter to him of April 27, 2010, specifically advising the Applicant that he was inadmissible by reason of paragraphs 34(1)(f) and (c) of the *IRPA*. Second, the record shows he subsequently asked his MP, the late Mr. Jack Layton, to obtain information on his file and that CIC sent Mr. Layton a copy of the April 27, 2010 letter, which I expect was then forwarded to the Applicant in the normal course. Finally, it

is noteworthy that the Applicant did not provide any evidence of non-receipt of the April 27, 2010 letter. In other words, the best evidence as to whether or not he received the 2009 decision – his own – is absent in this case.

[33] It is not clear if the Applicant was provided with a copy of the June 2009 CIC reasons for inadmissibility; Minister's counsel indicated they were not sent to him. That said, he did not ask to see them when he learned of the decision in 2010, nor did he ask to see them at any time since. Nor did he seek judicial review. Instead, it appears the Applicant accepted CIC's inadmissibility decision and focused on seeking Ministerial relief. That option was certainly open to him.

[34] The remaining issue, having accepted the inadmissibility decision as he undoubtedly did, is whether the Applicant may now allege procedural unfairness, seven years later, by reason of his not being provided with information that he could have requested in 2010, but did not, in respect of a decision he could have challenged through an application for leave to commence a judicial review proceeding, but did not.

[35] The 2009 decision is not open to collateral attack in this proceeding.

[36] In these circumstances, in my view there was no procedural unfairness. The Applicant would not have been entitled to see the balance of the Officer's file on the 2009 inadmissibility determination unless he either requested it, which he did not, or unless he sought judicial review, in which case the CTR would have been sent to him as a matter of course. He did not seek judicial review either. There is no obligation on CIC to send information equivalent to a CTR to

those in respect of whom decisions are made. Therefore, unless he asked for his complete file or challenged the June 2009 inadmissibility decision, he would not have seen the CSIS and CBSA material he now says he should have received. The converse is equally true: the true reasons why he did not receive the CSIS and CBSA material was because he neither asked for his complete file nor challenged CIC's inadmissibility finding.

[37] In addition, because the Applicant did not challenge the 2009 decision despite having notice of it, the Officer was entitled to consider and rely on it and, in my view, was equally entitled to rely on the complete underlying file (the CTR).

[38] In addition, in my respectful view, the PFL explicitly summarized and provided the material essence of the CSIS reports of 2002 and 2008, the CBSA conclusion and indeed the 2009 conclusion of CIC itself, namely that "[I]n Canada, the IPK has been deemed to be an organisation [*sic*] that has committed terrorism, and some members may be found inadmissible to Canada." Given this, there was no need to send the CSIS reports which concluded that IPK was considered to be a terrorist organization, because the PFL provided him with participatory rights: the Applicant was notified of the grounds of his potential inadmissibility and invited to make submissions (see *Ardiles v Canada (Minister of Citizenship and Immigration),* 2002 FCT 1323 at paras 29-30, citing *Dasent v Canada (Minister of Citizenship and Immigration),* [1995] 1 FCR 720 at para 23, rev'd (1996), 107 FTR 80 N (FCA)). The Officer was also entitled to rely on the CBSA material because it formed part of the 2009 inadmissibility decision which was a final decision not challenged by the Applicant.

B. *Correctness of definition of terrorism*

[39] The Applicant alleges and I agree that the definition of terrorism is a question of law and therefore reviewable on the correctness standard. In my respectful view, the weight of jurisprudence both of this Court and the Supreme Court of Canada in *Suresh*, supports a finding that the Officer's chosen definition for "terrorism" was correct. This conclusion is also supported by the principles of statutory construction applicable where two laws deal with similar subject matter (i.e., where two statutes are said to be *in pari materia*). Therefore, I do not accept the argument that paragraph 34(1)(c) should be interpreted only with reference to the definition proposed by the Supreme Court in *Suresh*.

[40] In its determination of whether or not the word "terrorism" was unconstitutionally vague, the Supreme Court of Canada in *Suresh* outlined the manner in which "terrorism" is to be defined:

> "*Terrorism*"
>
> 93 The term "terrorism" is found in s. 19 of the Immigration Act, dealing with denial of refugee status upon arrival in Canada. The Minister interpreted s. 19 as applying to terrorist acts post-admission and relied on alleged terrorist associations in Canada in seeking Suresh's deportation under s. 53(1)(b), which refers to a class of persons falling under s. 19. We do not in these reasons seek to define terrorism exhaustively — a notoriously difficult endeavour — but content ourselves with finding that the term provides a sufficient basis for adjudication and hence is not unconstitutionally vague. We share the view of Robertson J.A. that the term is not inherently ambiguous "even if the full meaning . . . must be determined on an incremental basis" (para. 69).
>
> 94 One searches in vain for an authoritative definition of "terrorism". The Immigration Act does not define the term. Further, there is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, "the term is open to politicized manipulation, conjecture, and polemical interpretation": factum of the intervener Canadian Arab Federation ("CAF"), at para. 8; see also W. R. Farrell, The U.S. Government Response to Terrorism:

In Search of an Effective Strategy (1982), at p. 6 ("The term [terrorism] is somewhat 'Humpty Dumpty' — anything we choose it to be"); O. Schachter, "The Extraterritorial Use of Force Against Terrorist Bases" (1989), 11 Houston J. Int'l L. 309, at p. 309 ("[n]o single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multilateral treaty"); G. Levitt, "Is 'Terrorism' Worth Defining?" (1986), 13 Ohio N.U. L. Rev. 97, at p. 97 ("The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail"); C. C. Joyner, "Offshore Maritime Terrorism: International Implications and the Legal Response" (1983), 36 Naval War C. Rev. 16, at p. 20 (terrorism's "exact status under international law remains open to conjecture and polemical interpretation"); and J. B. Bell, A Time of Terror: How Democratic Societies Respond to Revolutionary Violence (1978), at p. x ("The very word [terrorism] becomes a litmus test for dearly held beliefs, so that a brief conversation on terrorist matters with almost anyone reveals a special world view, an interpretation of the nature of man, and a glimpse into a desired future.")

95 Even amongst those who agree on the definition of the term, there is considerable disagreement as to whom the term should be attached: see, e.g., I. M. Porras, "On Terrorism: Reflections on Violence and the Outlaw" (1994), Utah L. Rev. 119, at p. 124 (noting the general view that "terrorism" is poorly defined but stating that "[w]ith 'terrorism' . . . everyone means the same thing. What changes is not the meaning of the word, but rather the groups and activities that each person would include or exclude from the list"); D. Kash, "Abductions of Terrorists in International Airspace and on the High Seas" (1993), 8 Fla. J. Int'l L. 65, at p. 72 ("[A]n act that one state considers terrorism, another may consider as a valid exercise of resistance"). Perhaps the most striking example of the politicized nature of the term is that Nelson Mandela's African National Congress was, during the apartheid era, routinely labelled a terrorist organization, not only by the South African government but by much of the international community.

96 We are not persuaded, however, that the term "terrorism" is so unsettled that it cannot set the proper boundaries of legal adjudication. The recently negotiated International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109, December 9, 1999, approaches the definitional problem in two ways. First, it employs a functional definition in Article 2(1)(a), defining "terrorism" as "[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex". The annex lists nine treaties that are commonly viewed as

relating to terrorist acts, such as the Convention for the Suppression of the Unlawful Seizure of Aircraft, Can. T.S. 1972 No. 23, the Convention on the Physical Protection of Nuclear Material, 18 I.L.M. 1419, and the International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249. Second, the Convention supplements this offence-based list with a stipulative definition of terrorism. Article 2(1)(b) defines "terrorism" as:

> Any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

97 In its submission to this Court, the CAF argued that this Court should adopt a functional definition of terrorism, rather than a stipulative one. The argument is that defining terrorism by reference to specific acts of violence (e.g. "hijacking, hostage taking and terrorist bombing") would minimize politicization of the term (CAF factum, at paras. 11-14). It is true that the functional approach has received strong support from international law scholars and state representatives — support that is evidenced by the numerous international legal instruments that eschew stipulative definitions in favour of prohibitions on specific acts of violence. While we are not unaware of the danger that the term "terrorism" may be manipulated, we are not persuaded that it is necessary or advisable to altogether eschew a stipulative definition of the term in favour of a list that may change over time and that may in the end necessitate distinguishing some (proscribed) acts from other (non-proscribed) acts by reliance on a term like "terrorism". (We note that the CAF, in listing acts, at para. 11, that might be prohibited under a functional definition, lists "terrorist bombing" — a category that clearly would not avoid the necessity of defining "terrorism".)

98 In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that "terrorism" in s. 19 of the Act *includes* any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the

> fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism. The issue here is whether the term as used in the Immigration Act is sufficiently certain to be workable, fair and constitutional. We believe that it is.
>
> [emphasis added]

[41] As may be seen from this discussion and its conclusion respecting the meaning of "terrorism", a term then undefined in Canadian legislation, the Supreme Court had no difficulty determining the essence of its meaning, which it drew from an international convention. Most noteworthy in relation to the Applicant's argument is the Supreme Court's added injunction that: "[P]arliament is not prevented from adopting more detailed or different definitions of terrorism". I am unable to accept the proposition that Parliament may not vary the definition of terrorism from that set out in *Suresh* when the Supreme Court in *Suresh* itself stated the very opposite. Further, even the Supreme Court acknowledged that its definition was not cast in stone: its definition is not exhaustive but rather inclusive, because it is prefaced by the word "includes".

[42] In my respectful view, by enacting section 83.01 of the *Criminal Code*, Parliament did exactly what the Supreme Court allowed it to do: it adopted a more detailed definition of terrorism. I appreciate that section 83.01 of the *Criminal Code* defines "terrorist activity", which expression is not the same as the word "terrorism", which is used in the *IRPA* and considered in *Suresh*. Nevertheless, the contours of each are so over-lapping that any distinction between the two, in my respectful opinion, has no meaningful significance. I take them to be interchangeable.

[43] The issue then becomes whether the definition found in section 83.01 of the *Criminal Code* may be imported into the *IRPA* for the purposes of a finding under paragraphs 34(1)(f) and

(c). In my view, it may. I reach this conclusion following well-established interpretative doctrine of *in pari materia*, applicable to the interpretation of statutes that use the same words and have similar purposes. The Supreme Court of Canada's jurisprudence in this connection is quite clear:

A) *2747-3174 Québec Inc v Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para 160 :

> 160 What Bennion calls the "informed interpretation" approach is called the "modern interpretation rule" by Sullivan and "pragmatic dynamism" by Eskridge. All these approaches reject the former "plain meaning" approach. In view of the many terms now being used to refer to these approaches, I will here use the term "modern approach" to designate a synthesis of the contextual approaches that reject the "plain meaning" approach. According to this "modern approach", consideration must be given at the outset not only to the words themselves but also, inter alia, to the context, the statute's other provisions, provisions of other statutes in *pari materia* and the legislative history in order to correctly identify the legislature's objective. It is only after reading the provisions with all these elements in mind that a definition will be decided on. This "modern" interpretation method has the advantage of bringing out the underlying premises and thus preventing them from going unnoticed, as they would with the "plain meaning" method.

B) *Sharbern Holding Inc v Vancouver Airport Centre Ltd*, 2011 SCC 23 at para 117:

> [117] I acknowledge that the Real Estate Act, unlike the successor and related legislation, did not expressly provide for a rebuttable presumption. Nonetheless, as St. Peter's indicates, the use of the word "deemed" does not always result in a conclusive, non-rebuttable presumption. It is the purpose of the statute that must be examined in order to determine if the presumption is rebuttable. The successor and related legislation in this case can assist with interpreting the purpose of deemed reliance in the Real Estate Act. Lord Mansfield explained this principle in R. v. Loxdale (1758), 1 Burr. 445, 97 E.R. 394, observing that "[w]here there are different statutes in pari materia though made at different times, or even expired, . . . they shall be taken and construed together . . . and as explanatory of each other" (p. 395). Estey J. provided a more modern explanation of this principle, and explained how "sometimes assistance in determining the meaning of [a] statute can be drawn from similar or comparable legislation within the jurisdiction or elsewhere" (Nova, an Alberta Corp. v. Amoco Canada Petroleum Co., [1981] 2 S.C.R. 437, at p. 448).

[emphasis added]

C) *R v Ulybel Enterprises Ltd*, 2001 SCC 56 at para 52:

> 52 If the Court of Appeal's narrow interpretation of s. 72(1) is adopted, an order for sale emanating from the Federal Court would terminate the jurisdiction of the Newfoundland Supreme Court to order forfeiture. As between the Fisheries Act and the grant of admiralty jurisdiction in the Federal Courts Act, such a result does not comply with the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter.
>
> [emphasis added]

[44] In my view, assistance may be drawn from the meaning given to "terrorist activity" in the *Criminal Code* when construing the meaning of "terrorism" in the *IRPA*. Each aims at terrorism and, in this respect, they are both similar and comparable. The *IRPA* considers terrorism from the perspective of those seeking entry to Canada from outside Canada, and those to whom Canada may give permanent resident or other status; the *Criminal Code* defines terrorism by reference to conduct of individuals both in Canada and abroad. Importantly, the definition of terrorist activity in the *Criminal Code* applies equally to conduct *outside* Canada as well as inside Canada. The *Criminal Code's* application to terrorist conduct *outside* Canada supplies a key linkage to Canada's immigration laws; it shows the common purposes of the two provisions. It is appropriate and harmonious to use the definition of terrorist activity set out in section 83.01 of the *Criminal Code* (designed to cover terrorism abroad) to inform the meaning of terrorism abroad in the context of paragraphs 34(1)(f) and (c) of the *IRPA*. Both pieces of legislation have the same object and purpose, either in whole or in part: namely, to address terrorist activity and terrorism abroad. These two enactments should therefore be applied and construed *in pari materia* regarding the definition of terrorism/terrorist activities.

[45] I have conducted the foregoing analysis because the Applicant attempted to distinguish the many authorities of this Court which have come to the same conclusion and upheld CIC's use of the *Criminal Code* definition of terrorist activity as the definition of terrorism in *IRPA*, including: *Pizarro Gutierrez v Canada (Citizenship and Immigration)*, 2013 FC 623 at para 29, Mosley J, cited in *Rayan v Canada (Citizenship and Immigration)*, 2015 FC 1220 at paras 59-63, Kane J and *Ali v Canada*, 2004 FC 1174 at paras 58, 63, Mactavish J.

[46] In summary and in my respectful view, the law is correctly stated as follows:

> [102] In an administrative law case involving the interpretation of s.34 of the IRPA, it is appropriate to consider the *Criminal Code* definition of terrorism: *Soe v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 671.
>
> *Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957, Mosley J.

C. *Whether the Officer's finding that the IPK is a group that has, is, or will engage in terrorist activities pursuant to paragraph 34(1)(c) of the IRPA, was unreasonable?*

[47] The Applicant submits that the Officer unreasonably characterized several of the IPK's acts as terrorism, specifically, its politically motivated strikes, labour unrest and mass demonstrations. The Applicant further submits that the Officer's decision is also unreasonable as a result of its internal inconsistency.

[48] In terms of internal inconsistency, this mainly refers to the Officer's comment at the outset of the reasons that "[I]n Canada, the [IPK] is considered to be an organization that has committed terrorism". In my view, this is an accurate statement. As noted above, both the CBSA and CSIS (in the latter case, as long ago as 2002) were of the view that the IPK was a terrorist

organization, which the Applicant would have known had he requested his file or had he challenged CIC's 2009 inadmissibility decision. Moreover, CIC made that same determination in its decision of June 18, 2009, which found the Applicant inadmissible under 34(1)(f) and (c). In my view, nothing turns on this statement in any event, because the Officer thereafter proceeded to conduct a detailed analysis of the facts after which he or she concluded that there were reasonable grounds to believe that the IPK is an organization that engages, has engaged or will engage in acts of terrorism.

[49] It is the case that the IPK is not listed as a terrorist entity by the Governor in Council; however, the absence of such a listing is not determinative of a decision under paragraphs 34(1)(f) and (c) of the *IRPA*, nor on subsequent judicial review such as this. The decision to list an entity is made by the federal Cabinet and reflects the Cabinet's opinion.

[50] The Applicant argues the Officer acted unreasonably in considering clashes by the IPK with security forces to be terrorist activity or terrorism because civilians were not involved. The Applicant also argues that the Officer further acted unreasonably in considering politically motivated general strikes and mass demonstrations to be terrorism when, in each case, it was simply political activity.

[51] With respect, I disagree. I begin with repeating the Officer's conclusion on the evidence:

> The results of my research, corroborated by information in many of reports provided by the applicant as well as information in the file demonstrate that the IPK was involved in politically motivated incidences such as general strikes in Mombasa as well as violent clashes with both security forces and other political entities. The applicant has also admitted that the IPK instigated labour unrest

> followed by mass demonstrations. The information on file shows that Sheikh Balala had also publicly displayed a willingness to achieve his goals using violent means such as suicide bombers against political opponents or the use of a private army to topple the Moi regime. While it is clear that the Moi government was also culpable in much of the violence that occurred during that time, the IPK, under the leadership of Sheikh Balala, also had a role. The incidences of violence including riots, the destruction of property, including the use of petrol bombs against the IPK enemies, and the threats of violence by Sheikh Balala leads me to believe, on reasonable grounds, that the IPK is an organization that engaged, engages or will engage in terrorist acts. I thererefore [*sic*] find there are reasonable grounds to believe the applicant is inadmissible to Canada under section A34(1)(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorist acts.
>
> [emphasis added]

[52] In my respectful view, these conclusions were open to the Officer on the record in this case which included evidence that:

- Clashes in 1992 between the IPK and the government were "particularly violent, with police stations and public buildings attacked and cars set on fire";
- Demonstrations, strikes and violence continued through 1994 in the coastal region;
- The IPK under Balala became much more radical;
- Balala's supporters, especially the youth, clashed with the security forces and exercised control through threats and violence;
- In the May 1993 general strike led by Balala, IPK posters "warned that 'all those who violate [IPK guidelines] will be considered as enemies … [W]e warn them that the IPK will catch them and set them on fire";
- An IPK poster of the same vintage contained a picture of the President and the caption "[I]f you meet this man, kill him!'";

- Balala issued a fatwa for the killing of a leader of the United Muslims of Africa [UMA], a party which supported the government;
- The IPK youth threw bombs at their opponents in the summer of 1993;
- There were many street battles between the police and IPK supporters who were "trying to get their members elected to parliament on a radical Islamic platform";
- The IPK declared "total war" on the government in July 1992;
- The IPK "fanned" unrest in 1992;
- The IPK attacked police stations and several public buildings and government vehicles were set on fire;
- There was violent unrest in Mombasa in 1992, initiated by IPK, leading to mass demonstrations and attacks on public buildings;
- In 1992-1993, there were "repeated clashes between supporters of the IPK and the … UMA, which was loyal to the government… [T]he unrest included a general strike in Mombasa and the setting on fire of several public buildings as well as homes and offices of the respective other organizations";
- There were riots on the streets of Mombasa in May 1993 following the arrest of Balala and further clashes that September which led to Balala announcing the formation of a military wing of the IPK and issuing death threats to a number of prominent Kenyan politicians; and, finally,
- Balala told journalists that he had "10 trained suicide bombers" who would "eliminate" 10 government leaders.

[53] It is not the Court's role to go through the evidence in more detail, this suffices for present purposes.

[54] I wish to emphasize that all the foregoing information relates to the period *before* Balala left the IPK in the summer or early fall of 1994; the foregoing summary outlines IPK conduct in 1992 and 1993. While there is no temporal component to the definition of terrorism in the *Criminal Code*, nor under paragraphs 34(1)(f) and (c) of the *IRPA*, it should be noted that the Applicant was a self-professed "activist" member of IPK during this very period, in addition to which he was a personal body guard for Balala for one month.

[55] Given what I have just summarized, I am compelled to reject submissions that the Officer's reasons were not supported by the evidence and that it was not open for the Officer to find he or she had reasonable grounds to believe that the IPK was an organization that engages, has engaged or will engage in acts of terrorism. I also reject the submission that the Officer's decision relied on facts which either immediately led up to or occurred after Balala's expulsion from the IPK in 1994. No doubt some of the evidence regarding IPK activity noted by the Officer lies outside Balala's period of leadership, but it must be recalled that there is no temporal limitation in the definition of terrorist activities.

[56] Judicial review, at the end of the day, comes down to a review of the reasons as an organic whole. It is not a treasure hunt for errors. Judicial review, as the Supreme Court in *Dunsmuir* states, is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. In this case, the reasons of the Officer are

transparent and intelligible. With respect, the Officer's decision is supported by the record. In summary, it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. In addition, the Decision is not tainted by procedural unfairness.

VIII. Certified Question

[57] Neither party proposed a question to certify and none arises.

IX. Conclusion

[58] Therefore, judicial review must be dismissed. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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