Federal Court  Cour fédérale

Date: 20120625

Docket: IMM-5905-11

Citation: 2012 FC 802

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, June 25, 2012

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

EVA MANUELA MIGUEL

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), for judicial review of a decision by an immigration officer in which she refused the applicant's application for permanent residence on the ground that she is inadmissible under paragraph 34(1)(*f*) of the IRPA.

FACTS

[2] The applicant, an Angolan citizen, states that between 1998 and 2000 she was a supporter of the Front for the Liberation of the Enclave of Cabinda (FLEC), a political organization that fights for Cabinda's independence.

[3] She alleges the following facts in support of her application.

[4] In 1998, at the age of 23, she attended a first information meeting organized by the FLEC and obtained a supporter card so that she could attend a second meeting.

[5] In September 2000, while studying law, the applicant attended a second meeting for the purpose of organizing a demonstration for Cabinda's independence. Shortly before this meeting, she agreed to photocopy pamphlets at her workplace to distribute them at the demonstration. However, the meeting was interrupted by Angolan soldiers, who attacked the people who were present and killed some of them. As a result, the demonstration never took place.

[6] Fearing the Angolan soldiers, the applicant fled to Canada with the help of a false passport in October 2000 and filed a refugee claim. A year later, the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada granted her refugee status.

[7] Shortly thereafter, in October 2001, she filed an application for permanent residence as a protected person. Ten years later, the immigration officer refused her application on the ground that she is inadmissible because she was a member of the FLEC, an organization that there are reasonable grounds to believe engages in terrorism.

OFFICER'S DECISION

[8] In her decision, the officer considered the nature of the organization. She stated that the goal of the organization is to obtain Cabinda's independence and that this separatist organization is composed of a number of factions. The officer also noted that the FLEC and its factions support themselves primarily by hostage taking, smuggling and extortion. She gave a number of examples where FLEC members had attacked petroleum industry workers, a military barracks, a national campaign vaccination vehicle, Togolese soccer players and Chinese miners. She also pointed out that the organization was accused of recruiting very young children to make them child soldiers. Relying on the definition of "terrorism" in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, the officer concluded that the FLEC is an organization described in paragraph 34(1)(*f)* of the IRPA.

[9] Next, the officer determined that were reasonable grounds to believe that the applicant was inadmissible. Relying on the definition of "member of an organization" in *Kashif Omer v Canada (Minister of Citizenship and Immigration)*, 2007 FC 478, 157 ACWS (3d) 601, she found that the applicant was a member of the FLEC. The officer noted that the applicant is in favour of Cabinda's independence, never concealed her separatist ideas, stated that she was a supporter of the FLEC

from 1998 to the day she left Angola, actively contributed by photocopying pamphlets, participated in a number of meetings, including the last one whose purpose was to organize a demonstration, and admitted to the officer and the Canadian Security Intelligence Service (CSIS) that she knew about the acts of violence perpetrated by the FLEC.

ISSUES

(1) Did the immigration officer err in finding that the FLEC is an organization described in paragraph 34(1)(*c)* of the IRPA?

(2) Did the immigration officer err in determining that the applicant was a member of an organization described in paragraph 34(1)(*f)* of the IRPA?

STANDARD OF REVIEW

[10] The question of whether an organization is described in paragraph 34(1)(*c)* of the IRPA is reviewed on a reasonableness standard (*Kanendra v Canada (Minister of Citizenship and Immigration)*, 2005 FC 923, 47 Imm LR (3d) 265). This standard of review also applies to the question of whether the applicant was a member of an organization described in paragraph 34(1)(*f)* (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 FCR 487).

ANALYSIS

1. Did the immigration officer err in finding that the FLEC is an organization described in paragraph 34(1)(*c)* of the IRPA?

[11] The definition of terrorism as adopted in *Suresh*, above, has been followed in a number of Federal Court decisions: see *Kashif Omer*, above, *Fuentes v Canada (Minister of Citizenship and Immigration)*, [2003] 4 FC 249, 2003 FCT 379, and *Ali v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1174, [2005] 1 FCR 485. According to this definition, the word "terrorism" 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." Accordingly, the issue is whether the officer's decision that there are reasonable grounds to believe that the FLEC is an organization that engages, has engaged or will engage in terrorism, is reasonable. The "reasonable grounds to believe" standard is not evidence on a balance of probabilities but requires more than vague suspicions.

[12] In this case, the officer identified a number of acts committed by the FLEC between 1992 and 2001 that fall under the definition of terrorism cited above: in 1992, a number of hostage takings of foreign workers, an attack using automatic weapons against workers at Cabinda Gulf Oil Company that killed four people, followed by a second mortar attack against the same company; in 1995, an attack on a military barracks that left ten dead; in 1997, the execution of 42 Angolan

soldiers; and in 2000 an attack on the national vaccination campaign vehicle that left one dead. According to the report [TRANSLATION] "Front for the Liberation of the Enclave of Cabinda", dated October 28, 2011, and published by Jane's World Insurgency and Terrorism:

> FLEC factions have frequently carried out kidnapping for ransom to finance their campaign, smuggling and extortion remain an important means of funding as well. Portuguese and other expatriates working in the oil sector in particular have been targeted. A small diaspora with headquarters in Europe also provide limited lines of funding. (See page 88, Tribunal Record).

[13] According to the list of incidents reported in 1997 in the same report:

> In January, FLEC-R fired three mortars at Sonangol's oil facilities; they missed their target but nearly hit a Chevron oil terminal in Malongo.
>
> In February, FLEC-FAC announced that it would target Western companies in Cabinda if they refused to leave the area. The group also abducted a Malaysian and Filipino (the latter died of dysentery while being held).
>
> In March, FLEC-R announced that it was responsible for the deaths of 42 Angolan soldiers in operations in the Mazengo and Torto-Rico area and between Subantandu and Chimuandi. The group's main leaders were all imprisoned in Kinshasa, Zaïre, for a few days after

> the country's chief of staff heard rumors that the faction was assisting Laurent Kabila. (See page 90, Tribunal Record).

[14] Similarly, the report reveals that on January 8, 2010,

> . . . at least three people were killed and several others were wounded when suspected FLEC-PM militants opened fire on a convoy transporting the Togolese national football team in Cabinda province. The team was traveling through the area to participate in the African Cup of Nations tournament when it was attacked. . . . (See page 91, Tribunal Record).

[15] Later the same year, in November,

> . . . a soldier and a driver – who were part of a force guarding a convoy of Chinese mine workers, contracted by Angola's state oil company Sonangol – were killed when suspected FLEC militants attacked the convoy in an unspecified are of Cabinda region. FLEC-FAC spokesman Nhemba Pirilampo claimed that 12 people had been killed in the attack, but this could not be independently verified. (See page 91, Tribunal Record).

[16] The Human Rights Watch report entitled "Angola: Between War and Peace in Cabinda", dated December 23, 2004, states:

> . . . Until 2001, FLEC took foreign employees of the oil and construction companies hostage, which violates international humanitarian law prohibitions against the taking of hostages and attacks on civilians. FLEC has reportedly also executed persons suspected of collaborating with the FAA in addition to attacking FAA military positions . . . See page 119 , Tribunal Record.

[17] Moreover, according to the article [TRANSLATION] "Cabinda, a media no man's land", dated April 13, 2009:

> [TRANSLATION]
>
> The taking of hostages (French, Portuguese, Polish . . .) in Cabinda usually alerts the Western media and makes them aware of the chaotic situation there. In the preface to his book, [TRANSLATION] *Cabinda, an African Kuwait*, Alban Monday Kouango notes that 'in order to attract media attention . . . , the FLEC often kidnaps Western workers (particularly Portuguese)'. (see page 92, Tribunal Record).

[18] In view of this evidence, it is clear that the officer's finding is reasonable, i.e. that there are reasonable grounds to find that the FLEC is an organization that engages, has engaged or will engage in terrorism.

2. Did the immigration officer err in determining that the applicant was a member of an organization described in paragraph 34(1)(*f)* of the IRPA?

[19] The applicant submits that paragraph 34(1)(*f*) of the IRPA does not apply in this case because the Minister has not discharged his burden of establishing that she was complicit by association in crimes or terrorist acts and because the extent of her involvement with the FLEC was not sufficient to trigger the application of this paragraph. In addition, the applicant takes the position that she never fell within Article 1F of the Convention on refugees and that she never intended to associate with a terrorist organization or to cause harm to anyone. The applicant points out that she simply attended an information meeting in 1998 and a second meeting in 2000 for the purpose of organizing a peaceful demonstration, a demonstration that, moreover, never took place. She was never remunerated by the FLEC, never gave the organization any money and was not active in it.

[20] She was only a "supporter" of the organization, which is different from being a "member of the organization".

[21] The respondent submits that the word "member" is defined broadly, based on the nature and duration of a person's activities within an organization (*Poshteh*, above). The concept of membership has been given a broad and unrestricted interpretation, especially where issues of Canada's national security are involved, and paragraph 34(1)(*f*) of the IRPA does not require active participation (*Tjiueza v Canada*, 2009 FC 1260, [2009] FCJ No 1608 (QL) and *Ismeal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 198, [2010] FCJ No 234 (QL)). Considering the broad interpretation of the concept of "member" that the officer adopted, it was not unreasonable for her to find that the applicant's activities assisted the FLEC in reaching its objectives. I do not agree with this opinion for the following reasons.

[22] The Federal Court has established that "the issue of complicity is irrelevant to a determination under paragraph 34(1)(f) of the Act, which refers strictly to the notion of membership in the organization. The question of inadmissibility under paragraph 34(1)(f) should thus be distinguished from inadmissibility as a Convention refugee under section 98 of the Act, which . . . absent direct proof as to the involvement of the person in a specific crime, requires a finding of complicity with the organization who committed such crime": *Kashif Omer*, above, at paragraph 11.

[23] The issue of whether a "supporter" falls under paragraph 34(1)(*f)* of the IRPA was dealt with by the Court in *Kanendra v Canada (Minister of Citizenship and Immigration)*, 2005 FC 923, 47 Imm LR (3d) 265. Justice Simon Noël answered in the affirmative and stated the following:

> 23 Therefore, the term "member" as it is used in s. 34(1)(f) of IRPA should be given a broad interpretation. The Applicant is concerned that those who are not a threat to the security of Canada, despite their former membership in a s. 34(1)(a), (b) or (c) organization, should not be included in the ambit of s. 34(1)(f) and therefore excluded. However, I note that s. 34(2) effectively exempts them from exclusion. This section provides that those who would otherwise be deemed inadmissible because of certain associations or activities not be so deemed where they can satisfy the Minister that they are not a danger to the security of Canada. This interpretation of the statute was also found to be the case in *Suresh* (S.C.C.), *supra*. Though that case was determined under s. 19 of the old *Immigration Act*, the principle remains the same.
>
> 24 In order, then, to determine whether an applicant was or is a member of an organization described in ss. 34(1)(a), (b) or (c), an assessment of their participation in the organization must be undertaken. . . .

[24] Although the concept of "member" has been given a broad and liberal interpretation, an analysis under paragraph 34(1)(*f)* of the IRPA must be carried out on the basis of the specific facts of each situation.

[25] Thus, in *Ismeal*, above, the Court stated that to be a member of an organization, "[a]n individual need not be an actual card-carrying or formal member of an organization, nor is it necessary that the person concerned to have an obligation to participate in acts of terrorism." However, the facts reveal that the applicant had stated that he was an agitator and supporter of the organization and that, for a period of seven years, he had raised funds for the organization, voluntarily engaged in recruiting other members/supporters, and left the organization only when he was forced to leave the country.

[26] In *Poshteh*, above, the applicant's role in the Mujahedin-e-Khalq (MEK) was to disseminate propaganda, which is an important part of the organization's activities. Although he was not formally enlisted in the MEK, it was not for lack of trying. He desperately wished to enlist in some formal fashion. Although he was denied that permission, he was allowed to engage in an activity for the benefit of the MEK for a period of two years. During that time, he distributed propaganda 24 to 48 times. In fact, he referred to himself as a member before the Immigration Division. Moreover, he shared in the MEK's overriding goal to overthrow the Iranian government.

[27] In *Kashif Omer*, above, the applicant was a member of the All Pakistan Mohajir Students Organisation (APMSO) from 1987 to 1992 at his college in Karachi, Pakistan.. He was the information secretary to the organization from 1989 to 1992. He then joined and worked for the Mothaidda Quami Movement (MQM), a political organization, from 1993 until he left Pakistan in 1998. He even participated in MQM's political activities in Canada as the head of the MQM's Quebec branch. Similarly, in *Naeem v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1069, 375 FTR 150, the applicant was an active member of the APMSO and served as joint

secretary from 1988 to 1990. Subsequently, from 1990 to 1993, he was only a regular member of the APMSO and also attended regular MQM-A meetings and rallies.

[28] In the *X (Re)* decision, 2002 CanLII 52732 (IRB), the claimant had been active in the FLEC FAC and had supported its objective. He voluntarily joined the organization in 1990 and remained involved until he left Angola in August 1999. He was a propagandist and testified that he still was. Furthermore, he provided support and a safe house for FLEC FAC combatants who were coming off active duty and staying in the city. He was also aware of the atrocities committed by the FLEC FAC and knew that they were atrocities.

[29] In *Sepid v Canada (Minister of Citizenship and Immigration)*, 2008 FC 907, [2008] FCJ No 1163 (QL), despite the fact that the applicant had stated he was not a member but only a supporter of the MEK in Iran, the evidence provided sufficient reasonable grounds to support the officer's finding that the applicant was, in fact, a member of the organization. The applicant gave financial and material support to the organization for a number of years. According to the port of entry notes, when he arrived Canada the applicant had admitted to being a member of the MEK since 1991, and his activities with the organization consisted of receiving, copying and distributing video cassettes that encouraged people to join the MEK. In addition, during the inadmissibility interview, the applicant had admitted that his activities with the MEK consisted of recording videotapes and photocopying flyers containing information about the MEK's political agenda and goals and then distributing them. The officer also noted that the applicant had provided financial contributions to the MEK and had committed to that organization that he would go to Iraq to become more educated about the MEK's goals and policy.

[30] In *Farkhondehfall v Canada (Minister of Citizenship and Immigration)*, 2010 FC 471, [2010] FCJ No 974 (QL), the applicant stated in his application for permanent residence that he had been a supporter of the MEK from 1978 to 1981. He added that he had been a member of the Muslim Iranian Students Society, an organization linked to the MEK, when he was in India from 1981 to 1985 and that he had supported this organization between 1985 and 1990. The applicant admitted to the CSIS that he had supported the MEK in Iran by participating in demonstrations, some of which had been violent. He had also attended meetings, sold books and made financial contributions. In addition, the applicant had continued his involvement with the MEK in Canada. At various times, he acknowledged receiving an offer of employment with the MEK in Toronto, participating in MEK demonstrations and meetings, and attending at their offices on occasion. He also acknowledged meeting with fellow MEK supporters in Toronto to view pro-MEK videotapes.

[31] In all these cases, it is apparent that the individual's actions demonstrated his or her substantive participation in the organization's activities from which one could infer connections analogous to those of a formal member.

[32] In this case, the evidence established that the applicant was aware of the violence committed by the FLEC, as she acknowledged to the CSIS. At an interview with the immigration officer on July 26, 2011, she admitted that she had attended a few meetings as a supporter and had photocopied pamphlets containing propaganda for the FLEC three or four times, the last one inviting people to a demonstration that did not take place. The evidence does not show <u>any other activity</u> relating to the organization.

[33] In my opinion, even with a broad and liberal interpretation, this minor, unimportant participation is not in itself sufficient to find that there are reasonable grounds to believe that the applicant was a member of the FLEC.

[34] The officer therefore erred in finding that the applicant was a member of an organization described in subsection 34(1)(*c)* of the IRPA.

[35] I note that the applicant also submits that her life would be in danger in Angola and invokes humanitarian and compassionate grounds. She adds that her removal would violate sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* and international law. However, subsection 34(1)(*f)* of the IRPA did not give the officer jurisdiction to consider this issue. In any event, given my previous finding, there is no reason to respond to this question.

[36] The application for judicial review is allowed and the matter is remitted to a different decision-maker for reconsideration in accordance with these reasons.

[37] The applicant proposed the following question for certification:

> [TRANSLATION]
>
> Can the inadmissibility in section 3 34(1)*(f)* of the *Immigration and Refugee Protection Act* apply to the activities of or membership in an organization that are protected under section 2 of the *Canadian Charter of Rights and Freedoms* and the guaranty of freedom of expression and freedom of association under that section?

[38] This question was not raised either in her memorandum or at the hearing of the application for judicial review. Consequently, the respondent has not had the opportunity to respond to it, and

the Court need not rule on a question that was not raised in the dispute. Accordingly, the Court refuses to certify it.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application for judicial review is allowed. The matter is remitted to another decision-maker for reconsideration in accordance with these reasons.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-5905-11**
STYLE OF CAUSE:	**Eva Manuela Miguel** **v.** **Minister of Citizenship and Immigration**
PLACE OF HEARING:	**Montréal, Quebec**
DATE OF HEARING:	**June 20, 2012**
REASONS FOR JUDGMENT AND JUDGMENT:	**Tremblay-Lamer J.**
DATED:	**June 25, 2012**

APPEARANCES:

Stewart Istvanffy	**FOR THE APPLICANT**
Michel Pépin	**FOR THE RESPONDENT**

SOLICITORS OF RECORD:

Stewart Istvanffy 1450 City Councillors St., Suite 450 Montréal, QC	**FOR THE APPLICANT**
Michel Pépin Department of Justice Canada Deputy Attorney General of Canada Montréal, Quebec	**FOR THE RESPONDENT**