Federal Court Cour fédérale

Date: 20130606

Docket: IMM-334-11

Citation: 2013 FC 612

Ottawa, Ontario, June 6, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

MOUSBAH WANIS EL WERFALLI

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. El Werfalli, applies for judicial review of a decision by the Immigration Refugee Board (the Board) which found the applicant inadmissible to Canada because he is a person described in paragraph 34(1)(f) of the *Immigration and Refugee Protection Act* (the *IRPA*), namely, for "being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorism." As a result of

that decision, Mr. El Werfalli was made subject to a deportation order issued on December 24, 2010.

[2] Mr. Werfalli submits he has done nothing wrong and yet the Board found him inadmissible for being a member in a terrorist organization. He submits this finding is unfair and unjust. I agree with Mr. Werfalli. This case turns on the proper interpretation of paragraph 34(1)(f) of the *IRPA* which precludes an inadmissibility finding on the facts in this case.

[3] Mr. El Werfalli is 44 years old and a citizen of Libya. He attended medical school at Al-Arab Medical University. He fled from Libya in 1993 because he feared reprisals over his political activism on human rights violations by the Gaddafi regime. He found employment as a medical doctor and medical clinic administrator for the Bosnian branch of Al-Haramain, a Saudi charitable foundation. He left in early 1996 because of organizational downsizing and came to Canada where he made a successful refugee claim. Mr. Werfalli became a permanent resident in September 1999 and applied for citizenship in 2001. His Bosnian wife and their two children obtained Canadian citizenship in 2003.

[4] In 2002, the United Nations (UN) placed the Bosnian branch Al-Haramain on a list of Al-Qaeda associates. The Bosnian branch was deemed then and is still considered by the United Nations to be an organization with links to terrorism although it now appears to be defunct. The evidence is that sometime in mid-1996 after Mr. Werfalli's departure, some individuals within the Bosnian branch of Al-Haramain funnelled funds to Al-Qaeda.

[5] Mr. El Werfalli's citizenship application precipitated the Minister's admissibility concerns because of his links to the Bosnian branch of Al-Haramain which became associated with Al-Qaeda. Mr. Werfalli's citizenship application was delayed and he was summonsed for an interview in July 2009 by the Canadian Border Services Agency (CBSA). The matter proceeded to an inadmissibility hearing in 2010 in which the Board issued the decision now under judicial review.

[6] The Board found "Mr. El Werfalli has been found to be a member of the Al-Haramain [sic] office in Bosnia and there are reasonable grounds to believe that this organization engaged in terrorism. As such, he is a person described in subsection 34(l)(f) of the Act."

[7] I have concluded the Board, while reasonable in its finding of facts, did not have regard for the proper interpretation of paragraph 34(1)(f) of *IRPA*. I am granting the application for judicial review. My reasons follow.

Decision Under Review

[8] The Board conducted the admissibility hearing concerning Mr. El Werfalli pursuant to subsection 42(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) and issued its decision on December 24, 2010.

[9] The Board first considered the motion to stay proceedings by Mr. El Werfalli on the basis of his assertion that the delay of 14 years to address inadmissibility issues prejudiced Mr. El

Werfalli's ability to defend himself. The Board found an unreasonable delay of eight years but also found that delay did not prevent Mr. El Werfalli from being able to meaningfully respond to the Minister's allegations. Applying the test in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, (*Blencoe*) the Board held the unreasonable delay was not enough to stay proceedings on the grounds they constitute an abuse of process. Since Mr. El Werfalli was able to present evidence despite the unreasonable delay, the Board found that the proceeding was not contrary to the interests of justice and denied the motion to stay the proceeding.

[10] The Board noted the Minister alleged Mr. El Werfalli is inadmissible to Canada because he is a person described in s. 34(1)(c) of the *IRPA* for engaging in terrorism and also a person described in s. 34(1)(f) being a member of a group that has engaged in terrorism. The Minister further alleged Mr. El Werfalli provided medical treatment to Mujahedin fighters despite knowing that these fighters murdered captured opponents. Accordingly the Minister also alleged that Mr. El Werfalli is inadmissible to Canada because he is a person described in s. 35(1)(a) of the *IRPA* for violating human or international rights.

[11] The Board decided Mr. El Werfalli is not a person engaging in terrorism as described in s. 34(1)(c). The Board also decided he is not a person who has violated human or international rights as described in s. 35(1)(a) of the *IRPA*. The Board did decide that Mr. El Werfalli is a person who is a member of a group that has engaged in terrorism as described in s. 34(1)(f).

[12] At the hearing, the Minister alleged that Mr. El Werfalli worked for Al-Haramain despite being aware of Al-Haramain's links to Al-Qaeda, a terrorist organization. The Minister further

alleged that Mr. El Werfalli provided medical assistance to the Mujahedin who engaged in terrorism. Finally, the Minister alleged that Mr. El Werfalli knew a person associated with Al-Qaeda.

[13] The Board disposed of the Minister's allegations concerning terrorism. It began by having regard for the definition of terrorism set out by the Supreme Court of Canada in *Suresh v Canada*, 2002 SCC 1 (*Suresh*). Terrorism involves causing death or serious bodily harm to civilians or non-combatants in order to intimidate a population or to compel a government or an international institution to act or refrain from acting.

[14] The Board accepted the evidence of the applicant's witness, Thomas Quiggin, an Intelligence Analyst for Privy Council in 1996. He testified there was no organized Al-Qaeda presence in Bosnia from 1991 to 1996. Al-Qaeda operations had been centered in Sudan and only after it was expelled from Sudan did Al-Qaeda try to establish a presence in Bosnia. There was no evidence exactly when the Al-Haramain branch in Bosnia became linked to Al-Qaeda. Mr. El Werfalli's employment with Al-Haramain ended in early 1996. The Board found the evidence was not sufficient to show that there are reasonable grounds to believe that Mr. El Werfalli engaged in terrorism as a result of his employment with the Al-Haramain branch in Bosnia.

[15] Mr. Quiggin also testified he was not aware of any terrorism activity in Bosnia during the period he worked as an Intelligence Analyst in regards to the Balkins from 1992 to 1997. The Board stated Mr. El Werfalli's association with the Mujahidin cannot lead to a finding he had

engaged in terrorism because the Mujahidin did not commit acts of terrorism (as opposed to international or human rights violations) in the course of combat during the war.

[16] The Board considered Mr. El Werfalli's interaction with an Al-Qaeda associate. The Board found there was no evidence of Mr. El Werfalli assisting that Al-Qaeda associate beyond possibly treating him at a medical centre in Bosnia. There was a telephone call and two meetings in Canada. The Board found the evidence did not show Mr. El Werfalli had a close relationship with the Al-Qaeda associate. The Board found this evidence was not substantial enough to find there are reasonable grounds to believe Mr. El Werfalli engaged in terrorism as a result of this contact with the Al-Qaeda associate. It is noteworthy that the Board did not doubt the applicant's credibility in this or any other part of his testimony.

[17] The Board then considered the Minister's allegation that Mr. El Werfalli violated human or international rights contrary to s. 35(1)(a) of the *IRPA*.

[18] The Minister argued Mr. El Werfalli provided medical treatment to the Mujahedin despite their committing war crimes thus making him complicit in their crimes. Mr. El Werfalli had testified that he had no direct knowledge the Mujahedin killing captured combatants although he knew of rumours to that effect. Mr. El Werfalli testified how the Mujahedin came to Al-Haramain to ask for food, money and medical help but made it clear that Al-Haramain provided assistance to anyone who asked for help. The Minister conceded that the human rights violations which the Mujahedin committed were not acts of terrorism.

[19] The Board found that, during the period of Mr. El Werfalli's employment with Al-Haramain, that organization's mission in Croatia and Bosnia was to provide humanitarian aid. Mr. El Werfalli provided medical treatment to all those in need. He did not specifically help the Mujahedin as a means of furthering their military operations. The Board found it was not possible to show Mr. El Werfalli had the intent or *mens rea* to be complicit in war crimes.

[20] The Board turned to consider whether Mr. El Werfalli was a person described in s. 34(1)(f) as a member of an organization where there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in terrorism as articulated in s. 34(1)(c) of the *IRPA*.

[21] The Board held two factors were necessary to find a person described under s. 34(1)(f) of the *IRPA*. First, there must be reasonable grounds to believe that the organization engaged in terrorism. Second the evidence must show there are reasonable grounds to find that the person is or was a member of that organization.

[22] The Board returned to *Suresh* for determining two essential elements which must be established in order to find an organization engaged in terrorism:

a. the organization committed an act whose intent was to cause death or serious bodily harm to a civilian;

b. the purpose of the act was to intimidate a population or compel a government or international organization to do or to abstain from doing any act.

[23] The Board found Al-Qaeda's 911 attack on the World Trade Centre in 2001 with the resulting civilian deaths established Al-Qaeda engaged in terrorist activity. Al-Qaeda received funding from the Al-Haramain office in Bosnia and used the office as a front for fundraising and operational activities. In 2002, the Al-Haramain office in Bosnia was closed after it was put on a United Nations Security Council list of Al-Qaeda associates. The Board considered the financial and operational support which the Al-Haramain branch in Bosnia gave to Al-Qaeda was substantial enough to establish there are reasonable grounds to believe the Bosnian branch office of Al-Haramain engaged in terrorism.

[24] The Board accepted evidence from another of the applicant's witnesses, Dr. Warde, an expert in terrorist financing. Dr. Warde testified Al-Qaeda had ties to people in the Al-Haramain branch office in Bosnia it had infiltrated. The Board found the United Nations Security Council's designation of the Al-Haramain branch in Bosnia as an Al-Qaeda associate together with Dr. Warde's testimony that a "terrorist parliament" infiltrated this branch of Al-Haramain were enough to find there are reasonable grounds to believe that the Bosnian branch of Al-Haramain engaged in terrorism.

[25] The Board turned to the question of membership. The Board noted there is no standardized definition of membership in the *IRPA* or in case law but the concept of membership has received a broad interpretation. *Jahazi v Canada*, 2010 FC 242 (*Jahazi*)

[26] Mr. El Werfalli submitted that the terrorist activity of the Al-Haramain branch in Bosnia occurred after he left Bosnia and came to Canada. Accordingly it was impossible for him to have "knowing participation" in terrorism and he cannot be found by the Board to be a member as envisioned in s. 34(1)(f). *Sinnaiah v Canada*, 2004 FC 1576 (*Sinnaiah*)

[27] The Member disagreed with this submission stating:

> The panel disagrees with this argument for a number of reasons. Firstly, there is no temporal requirement when making an assessment for purposes of 34(1)(f). A person can innocently join an organization which later engages in terrorism and still be caught by this section of the *Act*. The section makes no distinction as to when the terrorist activity is to take place, but rather, lays it wide open. It can take place at any point in time.

[28] Mr. El Werfalli submitted he was an employee of Al-Haramain and not a member. The Board also rejected this submission.

[29] The Board noted that the Al-Haramain Islamic Foundation is one of the most prominent Saudi charities in the world. The main headquarters are in Riyadh, Saudi Arabia. The branch offices in other countries facilitate the distribution of charitable funds. Mr. El Werfalli worked out of the Al-Haramain branch in Zenica, Bosnia Herzegovina. The Al-Haramain Islamic Foundation itself was not deemed an Al-Qaeda associate by the UN.

[30] The Board found Mr. Werfalli to be a member because of his employment that lasted two years. He worked as a medical doctor and administered the main medical clinic in Zenica, Bosnia and other off site clinics. He did not voluntarily leave but was let go during downsizing.

The Board found these facts provide a sufficient link to find Mr. El Werfalli was a member of the Bosnian branch of Al-Haramain for the purposes of s. 34(1)(f).

[31] The Board concluded stating:

> The panel recognizes that there [sic] insufficient evidence to show that Mr. El Werfalli himself engaged in terrorism. However, 34 (1) (f) of the Act does not require one to actually engage in terrorism. It only requires one to be a member in a group that, at some point in time, engages in terrorism. This may seem unfair, however, the Act has a provision to cover this type of situation. A person may apply to the Minister under s. 34 (2) of the *IRPA* for a determination to be made that their presence in Canada not be detrimental to the national interest.

[32] In result, the Board found Mr. El Werfalli is not a person described in paragraphs 34(1)(c) or 35((1)(a) of the *IRPA*. The Board found he is a person described in section 34(1)(f) of the *IRPA* and issued a deportation order.

Legislation

[33] The Immigration and Refugee Protection Act provides:

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 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

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

34. (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.

[Emphasis added]

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

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

34. (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

Issues

[34] The applicant raises three issues before the court:

a. Did the Board err in denying the motion for a stay of proceeding?

b. Did the Board err in finding that Mr. El Werfalli was a person described in s. 34(1)(f)?

c. Does s. 34(1)(f) violate s. 2(d) or s. 7 of the *Canadian Charter of Rights and Freedoms*?

Standard of Review

[35] The applicant, relying on *Kastrati v Canada (Citizenship and Immigration)*, 2008 FC 1141 (*Kastrati*) citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 (*Dunsmuir*), submits that:

a. the motions for a stay of proceedings is a question of natural justice and therefore reviewable on the standard of correctness;

b. the Board erred in outlining the necessary requirements for s. 34(1)(f) and because this is a question of law, it is reviewable on a standard of correctness;

c. the finding that Mr. El Werfalli is a member of Al-Haramain is reviewable on a standard of reasonableness.

[36] I agree with the applicant that a question of natural justice invokes a standard akin to correctness. *Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 72 (*Khosa)*

[37] However, in respect of the interpretation of paragraph 34(1)(f) of the *IRPA*, I consider the interpretation of a home statute by a tribunal which has expertise in the subject matter to invoke a standard of reasonableness. In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paragraph 24, (*Canadian Human Rights Commission*) the Supreme Court of Canada stated:

> …if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.

[38] Here the question involves the interpretation and application of a provision of the Board's home statute, the *IRPA*, on subject matter involving the Board's expertise. The question, although important, does not involve a question of general legal importance. Accordingly, I conclude the standard of reasonableness applies to the Board's interpretation to s. 34(1)(f) of the *IRPA*.

[39] I agree that the standard of review for a finding of membership is that of reasonableness. In *Al Yamani v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1457 (*Al Yamani*) the Court articulated reasonableness as the standard of review for a finding of section 34(1)(f) membership:

> The question of whether an organization is one described in s. 34(1)(a), (b) or (c) has been dealt with previously by this Court according to the standard of reasonableness (Kanendra v. Canada (Minister of Citizenship & Immigration), 2005 FC 923 (F.C.) at para. 12). In Kanendra, above, Justice Simon Noël, relying upon a pragmatic and functional analysis conducted by Justice Marshall Rothstein of the Federal Court of Appeal in Poshteh v. Canada (Minister of Citizenship & Immigration), 2005 FCA 85 (F.C.A.) at para. 23 applied the reasonableness standard to a finding of "membership" in an organization described in paragraph 34(1)(f). The facts and issues before me are no different than those considered in those cases and, accordingly, I see no reason to depart from the standard of reasonableness.
>
> [Emphasis added]

[40] The applicant submits that the *Charter* questions are questions of law and therefore reviewable on a question of correctness. However, the *Charter* arguments were not put forth before the Board, so it makes little sense to say they are "reviewable" or to say that they are "reviewable on a correctness standard".

Analysis

[41] I will address the issues in the order identified.

Did the Board Err in Denying the Motion for a Stay of Proceeding?

[42] The applicant argues that the Board erred in dismissing the abuse of process motion. I disagree.

[43] At the outset, it is important to note that section 34(1) deals with terrorism and similar subject matter. The context for this provision of the immigration legislation is national security and public safety which, as the Federal Court of Appeal observed in *Poshteh v Canada (Minister of Citizenship and Immigration),* 2005 FCA 85, are the most serious concerns of government. In my view, such serious matters tend to weigh against deciding the matter procedurally rather than addressing the issues on the merits.

[44] The Applicant argues that the Board erred in failing to conduct the balancing test as articulated in *Blencoe*. The Board found that the Applicant "can rightly claim that the slow pace… has impacted on his ability to gather evidence and to respond to the allegations being made against him." However, the Board then went on to observe that the Applicant was still able to present evidence and tell his story, concluding that the Applicant presented a meaningful defence. The Board considered that, even though he did not have witness accounts from his activities in Bosnia, he was still able to arrange for expert witnesses to testify on his behalf.

[45] The Applicant takes issue with this part of the Board's decision for several reasons. I am not convinced by any of the Applicant's submissions on this point.

[46] The Applicant argues that the delay caused him prejudice, as he was unable to provide evidence that could have allowed him to counter the Minister's assertions having to do with his alleged membership in a terrorist organization. He also claims he could have obtained evidence that would overcome the Board's finding that the Bosnian branch of Al-Haramain was engaged in terrorist activities.

[47] In my view, these submissions are flawed. First, the Applicant clearly was a member of Al Haramain, as a medical officer in Bosnia, from 1993 to 1996. Second, it was the United Nations that placed the Bosnian branch of the Al-Haramain on the list, not the Immigration and Refugee Board or the Minister. The Board simply made a connection between the designated organization associated with terrorist activities and the applicant's employment in that organization. Paragraph 34(f)(1) speaks of a person being a *member of an organization*. One either is or is not a member of an organization. Submitting evidence about the nature of the Bosnian branch has little to do with advancing a claim that employment does not equate to membership.

[48] I conclude that the Board did not err in law by denying the applicant's motion to stay the proceedings. The Board balanced the impact of the delay against the prejudice suffered by the Applicant. The Board found that the Applicant could still mount a meaningful defence. Finally, the Applicant's argument that he could have obtained evidence against the Board's determination would have been of little value; indeed, the Applicant was a member of Al Haramain, an organization that after his departure would be connected to Al Qaeda, a terrorist organization. Finally, given that the Board's decision deals with questions of the most serious concerns of government and given the applicant was able to present evidence in support of his submissions to the Board, it would be better to decide this question on its merits rather than procedural grounds.

Did the Board Err in finding that Mr. El Werfalli was a person described in s. 34(1)(f)?

[49] For purposes of this analysis, I will confine myself to s. 34(1)(c), engaging in terrorism since on the facts of this case, the focus of s. 34(1)(f) relates to subsection 34(1)(c), to wit: "engaging in terrorism". The matter does not involve s. 34(1)(a) espionage or subversion, or s. 34(1)(b) subversion by force of any government.

[50] The applicant submits that the Board's findings that the applicant is inadmissible because of his membership in the Bosnian branch of Al-Haramain are unreasonable. The applicant submits this is so because:

a. There was insufficient evidence to find that the Bosnian branch of Al-Haramain was a terrorist organization; and

b. The Board erred in finding the applicant to be a member of the Bosnian branch of Al-Haramain.

[51] The applicant submits that the evidence before the Board clearly supported the fact that terrorism elements within the organization were limited to a few rogue members who were not sanctioned by the organization or the branch as a whole. The expert intelligence evidence the Board relied upon suggests that after 1996, some individuals within the organization started diverting funds to Al-Qaeda. Furthermore, the expert testimony called into question any reliance on the UN designation of Al-Haramain as a terrorist organization. The applicant submits this evidence is not sufficient to ground a reasonable finding that the Bosnian branch of Al-Haramain

is an organization that engaged in terrorism or sanctioned terrorist activities that may have been conducted by a few of its members.

[52] The respondent submits the "reasonable grounds" to believe test has a very low threshold and is interpreted by the courts to mean something more than a mere suspicion but less than proof on the balance of probabilities. *Vimalenthirakumar v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1181. (*Vimalenthirakumar*) The evidence before the Board meets this threshold.

[53] The applicant also submits he was an employee of Al-Haramain, not a member of the organization for the purpose of s. 34(1)(f). His role was not linked to any kind of nefarious activities. He had no commitment to terrorist political objectives and he did not know or acquiesce to the terrorist support acts in question. The applicant submits knowledge of the offending acts of an organization is important element in determining whether or not employees should be considered a member. The applicant refers to *Suresh* where the Supreme Court of Canada stated "we believe that it was not the intention of Parliament to include in the s. 19 class of suspect persons those innocently contribute to or become members of terrorist organizations."

[54] The respondent responds the term "membership" is to be given a broad and unrestrictive interpretation. *Poshteh*. The respondent submits the broad interpretation of the term "membership" endorsed by the courts is broad enough to include the applicant's two year employment in the organization.

[55] The respondent also draws upon the decision in *Al Yamani* stating:

> It is also important to note that a foreign national or permanent resident is inadmissible under paragraph 34(1)(f) of the *IRPA* irrespective of whether to membership in that organization occurred at a different time than the period of time during which the organization engaged in acts of terrorism.

[56] The respondent adds "As noted by the Board in its reasons for decision, there are no temporal restrictions on the application of paragraph 34(1)(f) of the *IRPA*."

[57] The Board's interpretation of s. 34(1)(f) of the *IRPA* is reflected in various statements in the Board's reasons. The Board stated:

> 46. Two factors must be established to find a person described under section 34(1)(f) of the *IRPA*. There must be reasonable grounds to believe, as required in this case, that the organization engaged in terrorism as articulated in 34(1)(c) of the *IRPA*. Secondly, the evidence must show that there are reasonable grounds to find that the person is or was a member of that organization.
>
> …
>
> 62. The panel disagrees with this argument for a number of reasons. <u>Firstly, there is no temporal requirement when making an assessment for purposes of 34(1)(f).</u> A person can innocently join an organization which later engages in terrorism and still be caught by this section of the *Act*. <u>The section makes no distinction as to when the terrorist activity is to take place, but rather, lays it wide open. It can take place at any point in time.</u>
>
> …
>
> 72. Mr. El Werfalli has been found to be a member of the Al-Haramain [sic] office in Bosnia and there are reasonable grounds to believe that this organization engaged in terrorism. As such, is a person described in section 34(1)(f) of the Act.

> 73. The panel recognizes that there is insufficient evidence to show that Mr. El Werfalli himself engaged in terrorism. However, section 34(1)(f) of the Act does not require one to actually engage in terrorism. <u>It only requires one to be a member of in a group that, at some point in time, engages in terrorism.</u> …
>
> [Emphasis added]

[58] In so deciding the Board made two separate and independent determinations:

a. the applicant had been a member of the organization,

b. the organization engaged in terrorist activities.

[59] In treating the two determinations as entirely separate, the Board did not ask itself whether there was any nexus between the applicant's membership in the organization and the organization's involvement with terrorist activities. The Board makes this clear when it stated "The section makes no distinction as to when the terrorist activity is to take place, but rather, lays it wide open. It can take place at any point in time."

[60] I consider the Board to have erred in treating s. 34(1)(f) as creating two separate independent determinations. Paragraph 34(1)(f) requires one determination, that of being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in terrorism. The paragraph is a single provision requiring regard for all its elements in an integrated manner.

[61] The question before the Board was whether section 34(1)(f) applied to an individual who had worked for and therefore was a member of an organization that had no association with terrorist activity but became associated with terrorist activity after the membership had ended.

[62] The difficulty arising from the Board's interpretation of s. 34(1)(f) is to associate individuals with future terrorism retroactively to the period of their membership, without any regard to honest and lawful participation at the time of the membership. In effect, any permanent resident or foreign national who is a member of any organization, by this interpretation of s. 34(1)(f), has a Sword of Damocles suspended indefinitely over his or her head should the organization they once had been a member become engaged in terrorist activities in the future.

[63] At this point it is appropriate to revisit the relevant wording in s. 34(1). The provision reads:

> 34. (1) <u>A permanent resident</u> or a foreign national is <u>inadmissible</u> on security grounds <u>for</u>
>
> …
>
> (c) <u>engaging in terrorism</u>;
>
> …
>
> (f) <u>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</u> (a), (b) or <u>(c).</u>
>
> [Emphasis added]

[64] In *Canadian Human Rights Commission* at paragraph 33, after finding the standard of review for a tribunal's interpretation of its home statute to be reasonableness, the Supreme Court of Canada stated:

> The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament, (citation omitted).

Text

[65] Turning to the text of s. 34(1)(f), the words "<u>being a member</u>" refer to the time in which a person is a member. "Being" is the present participle of the irregular verb "to be" and its use is in the progressive form of a continuing activity. The proper interpretation I should think points to a period of membership during which there are reasonable grounds to believe the organization engages, has engaged or will engage in acts of terrorism.

[66] The words of s. 34(1)(f) go on to state "of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph …(c) [engaging in terrorism]". Leaving aside the words for the moment "there are reasonable grounds to believe" one reads: "an organization that … has been engaged, engages or will engage in terrorism".

[67] The use of the past and present tenses of "engage" are clear, the untoward terrorist activity of the organization occurs before or during the period of membership. In both, a nexus

may be drawn between the individual and the organization's involvement in terrorist activity before or during the period of the individual's membership.

[68] Membership in an organization implies approval of the organization, its goals and activities. Where the individual's membership is contemporaneous with the terrorist activity, an inference may be drawn in that the person knew or ought to have known of the organization's terrorist activities. Even if the joining is innocent, there remains an implied approval of the organization.

[69] Where the terrorist activity occurred in the past, the person is joining an organization that he or she knew or ought to have known, had engaged in terrorist activities. Such an organization, if not having renounced terrorism, may resume the terrorist activity in the future. In these situations, there is a link between the applicant's membership and organization's in terrorist activities, that being an endorsement of the organization and the past terrorist activity by act of joining.

[70] What is problematic are the words "will engage in terrorism". It seems to me that the interpretation of this phrase requires a more nuanced approach than that which serves for "engaging" in present terrorism or "engaged" in past terrorism.

[71] Assistance is provided by section 33 which reads: "The facts…include facts for which there are reasonable grounds to believe they….may occur." [Emphasis added] The use of the words "may occur" rule out hindsight. Section 33 contemplates a basis for considering future

events that may occur. It implies the basis for the finding is to be found, in the context of subsection 34(1)(f), as existing at the time of an individual's membership.

Context

[72] In *Poshteh*, the Federal Court of Appeal held at paragraphs 27 and 28 that the context for s. 34(1)(f) in *IRPA* is public safety and national security.

[73] If an individual joins an organization that is not engaged in terrorism or has not engaged in terrorism in the past, there cannot be any adverse implication that can be drawn from the individual's membership in the organization. If an organization or persons in the organization become associated with terrorism in the future, there is no connection, without more, with individuals that previously left the organization. I am satisfied in this later instance that there is no nexus between the individual and terrorism.

[74] In addition, s. 34(1)(f) sets a standard for evidence required to trigger the provision. The test is "reasonable grounds to believe". This standard is more than a suspicion but less that the balance of probabilities. *Vimalenthirakumar*

[75] The provision of reasonable grounds to believe an organization may engage in terrorism in the future serves to maintain national security and public safety being the object of the subsection 34(1).

[76] If an individual joins an organization that is not engaged in terrorism or has not engaged in terrorism in the past, there cannot be any adverse implication that can be drawn from the individual's membership in the organization. Where an individual becomes a member in an organization, then leaves and the organization subsequently becomes associated with terrorism, the nexus between the individual and terrorism is at best merely that of suspicion, less than the prescribed standard "reason to believe".

[77] It seems to me, Parliament, in adopting the standard "reason to believe", rejected mere suspicion as a basis for finding an individual to be caught by the circumstance of an organization subsequently becoming involved with terrorist activities at some future point in time after the individual has ceased to be a member.

[78] In the case of organizations where there is reasonable grounds to believe the organization will engage in terrorism in the future, I am satisfied the point of reference must be during the time of membership. Are there reasonable grounds to believe an organization, during the time the individual is a member, will engage in future acts of terrorism? This approach provides for a nexus between membership and future organizational activity associated with terrorism. It provides for the requisite national security and public safety objectives. Importantly, it does not include within s. 34(1)(f) individuals who are themselves innocent of the conduct of the organization in the future.

Jurisprudence

[79] The Board did not undertake to interpret s. 34(1)(f) since it relied on jurisprudence that had considered the provision as related to past or present organizational involvement with terrorism as relative to the time of membership. However, that jurisprudence did not address the circumstances that the applicant faced, namely his membership in a charitable organization that had no past or present taint or association with terrorism and only became associated with terrorist activity after he left the organization.

[80] The jurisprudence referred to by the Board in its analysis of s. 34(1)(f) includes:

a. *Chaiu v Canada (Minister of Citizenship and Immigration)* 2001 2 FC 297

b. *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 1 SCR 3

c. *Jahazi v Canada (Citizenship and Immigration)* 2010 FC 242

d. *Sinnaiah v Canada (Minister of Citizenship and Immigration)* 2004 FC 1576

e. *Thanaratnam v Canada (Minister of Citizenship and Immigration)* 2004 FC 349

f. *Kozonguizi v Canada (Minister of Citizenship and Immigration)* 2010 FC 308

[81] In these cases, the organization's untoward, criminal activities in the case of *Chaiu* and terrorism in respect of the balance, activities were either contemporaneous with the individual's membership or occurred in the organization's past. In other words, the individual in question had joined an organization that was engaging in terrorist activities or had a history of having engaged in terrorist activity. None of these cases involve an individual who became a member of an

organization that was without a history of terrorist activity and only engaged in terrorist activity after the individual left.

[82] *Al Yamani* is the seminal case on the temporal aspect of organizational engagement in terrorism. It was revisited *Gebreab v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1213 (*Gebreab FC*) and confirmed in *Gebreab v Canada (Public Safety and Emergency Preparedness)* 2010 FCA 274 (*Gebreab FCA*).

[83] In *Al Yamani*, the Popular Front for the Liberation of Palestine (PFLP) was involved in terrorist acts from its inception to the time Al Yamani joined in 1972. The terrorist activity continued with chronicled terrorist incidents in 1974, 1984, 1985, 1989. This activity continued after these dates. The Court upheld the Board's finding as reasonable that Al Yamani was a member from 1972 until 1991/1992. He joined in 1972 and remained a member of an organization with a history of ongoing terrorist activity before, during and after his membership. I should think, given the PFLP's persistent history of engaging in terrorism, there would also be a basis to believe the organization would also engage in acts of terrorism in the future.

[84] In *Gebreab FC* the Ethiopian Peoples' Revolutionary Party (EPRP) of the 1970s had engaged in acts of terrorism and subversion. Gebreab joined as a member of the EPRP beginning in 1986. In coming to her decision, Justice Snider reviewed *Al Yamani* stating:

> 22. This Court concluded that, under s. 34(1)(f), the Board must carry out two separate assessments:
>
> > 1. whether reasonable grounds existed to believe that the organization in question engages, has engaged or will

> engage in acts of espionage, terrorism, or subversion by force; and
>
> 2. whether the individual is a member of the organization (at para. 10).
>
> 23. Under this analysis, "there is no temporal component" in the determination of the organization, or in the determination of the individuals membership (*Al Yamani*, above, at paras. 11 – 12). The Board does not have to examine whether the organization has stopped terrorists acts, and does not have to see if there is a "matching up to persons active membership to when the organization carried out its terrorists acts" (*Al Yamani*, above at para. 12). Furthermore, for the purposes of s. 34(1)(f), the determination of whether the organization in question engages, has engaged, or will engage in acts of terrorism is independent of the claimant's membership.

[85] Justice Snider certified the following question in *Gebreab FC*:

> Is a foreign national inadmissible to Canada, pursuant to s. 34(1)(f) of *IRPA*, where there is clear and convincing evidence that the organization disavowed an ceased its engagement in acts of subversion or terrorism as contemplated by s. 34(1)(b) and (c) prior to the foreign nationals membership in the organization?

[86] In a brief decision, the Federal Court of Appeal agreed with the Court's ruling that the Board's decision that the "EPRP was a single continuously existent political organization from the [1970s] through the time of [the appellant's] membership and beyond" to be reasonable and dismissed the appeal. The Court of Appeal responded to the certified question as follows:

> It is not a requirement for inadmissibility under s. 34(1)(f) of the *IRPA* that the dates of an individual's membership correspond with the dates on which the organization committed acts of terrorism or subversion by force.

[87] The Federal Court of Appeal also referred to *Gebreab FCA* in *Harkat v Canada (Citizenship and Immigration)* , 2012 FCA 122 at paragraph 35 (*Harkat*) stating that "[p]aragraph 34(1)(f) does not require a temporal nexus between membership in the organization and the period during which the organization engaged in terrorist activity."

[88] The cases of *Al Yamani* and *Gebreab* are precedential for those cases involving membership in organizations engaged in terrorism in the past or engaging terrorism in the present since the facts of those cases involve those circumstances. However, with respect, I do not consider these cases to have addressed the circumstances that arise in the case at hand.

Limitation in the Application of s. 34(1)(f)

[89] In *Al Yamani*, the Court stated that membership in the organization was without temporal restrictions and there need not be matching of the person's active membership to when the organization carried out its terrorist acts. The Court observed the result may seem harsh but went on to state: "The provision seems to leave no option for changed circumstances by either the organization or the individual." Two subsequent decisions did find "changed circumstances" do affect a different outcome.

[90] In *Karakachian v Canada (Minister of Citizenship and Immigration)*, 2009 FC 948, (*Karakachian*) the Court agreed with the conclusion in *Al Yamani* that timing is not a factor that should be taken into consideration because paragraph 34(1)(f) purely refers to membership in an

organization that there are reasonable grounds to believe has engaged in acts of terrorism in the past. However the Court qualified that agreement stating:

> 48 That said, I believe this must be qualified to a certain extent. It is easy to imagine that the passage of time might be immaterial where an organization has been inactive for some time but has not formally renounced violence. On the other hand, the situation strikes me as entirely different where a violent organization has transformed itself into a legitimate political party and has expressly given up any form of violence. It is difficult to believe that Parliament's intent was to render inadmissible any person belonging to a legitimate political party from the mere fact that the party may have been considered a terrorist organization before the person joined.
>
> [Emphasis added]

[91] In *Chwah v Canada (Minister of Citizenship and Immigration*), 2009 FC 1036 (*Chwah*), the Court came to a similar conclusion stating:

> 24 The Court is of the opinion that the officer erred in failing to assess the organization's role prior to 1990 and its role after 1990. This is an organization which underwent a transformation in 1990 after the civil war when the Christian militia was disbanded. The evidence in the record shows that the applicant joined the ranks of the Lebanese forces in 1992, after this transformation, and thus after the dissolution of the Christian militia. It is worth noting that the transformation of this organization happened in the form of seeking representation in the Lebanese parliament as a political party. This fact is not addressed in the officer's assessment.

[92] In these two cases, the renunciation of terrorism by the organization before the individual joins is considered to have transformed the organization and severed the connection that might have been drawn between the individual's present membership and the organization's past

involvement with terrorism, in effect, because the organization is not one to which s. 34(1)(f) applies.

[93] Similarly, in my view, the prior lack of any involvement in terrorism by an organization may be regarded as a different circumstance such that s. 34(1)(f) has no application.

Subsection 34(2)

[94] The respondent submitted that the timing of membership is not relevant to the Board's determination of inadmissibility under paragraph 34(1)(f) of the *IRPA*. Rather, it is relevant to the Minister's assessment of an application for relief under subsection 34(2). The respondent again relies on the Court's decision in *Al Yamani*. In particular, the respondent quotes:

> 13. The results may seem harsh. An organization may change its goals and methodologies in an individual may choose to leave the organization, either permanently or for period of time. The provision seems to leave no option for changed circumstances by either the organization or the individual. Fortunately, Parliament, in including s. 34(2) in *IRPA*, provided means by which an exception to a finding of inadmissibility under s. 34(1) can be made. Under that provision, a permanent resident or a foreign national may apply to satisfy the minister that "their presence in Canada with not be detrimental to the national interest". Parliament has provided all persons, would otherwise be inadmissible under s. 34(1), with an opportunity to satisfy the minister that their presence in Canada is not detrimental to the national interest. Under this procedure, factors such as the timing of membership or the present characterization of the organization may be taken into account.
>
> [Emphasis added]

[95] Similarly, in *Canada (Public Safety and Emergency Preparedness) v Agraira,* 2011 FCA 103 (*Agraira*) the Federal Court of Appeal addressed the scope of subsection 34(2) of the *IRPA*. The Court of Appeal stated:

> 62. The question which arises at this point is the one who raised in *Soe, supra*: does the emphasis on national security and public safety mean that individuals who commit an act described in subsection 34(1) cannot obtain ministerial relief because they committed the very act that confers jurisdiction on the Minister to exercise the discretion conferred by subsection 34 (2)? Such a result would deprive the provision 34(2) of any effect, an absurd result.
>
> 63. A partial answer to this question is provided by the decision of the Supreme Court in *Suresh* [citation omitted]. The Supreme Court dealt with section 19 of the Immigration Act, supra, which, as set out above, contain substantially the same inadmissibility and ministerial relief provisions as are now found in section 34. Given the broad sweep of section 19, Mr. Suresh argued it could be applied to persons innocently joinder supported organizations that, unbeknownst to them, were terrorist organizations and thus lead to their deportation to places where things the risk of you mean treatment. The Supreme Court dealt with this argument by invoking Ministerial relief provision, as follows, *Suresh, supra* at para. 110:
>
>> We believe it was not the intention of Parliament to include in the s. 19 class of suspect persons those innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from these. 19 classes "persons who have satisfied the Minister that their admission would not be detrimental to national interest". Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to established that the alleged association with the terrorist group was innocent. In such case, the minister, exercising their discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.

> 64. As I read the Supreme Court's decision, it concluded that the saving provision of section 19 of the immigration act would apply to protect persons who innocently join or contributed to organizations that, unbeknownst to them, were terrorist organizations. There may be other cases in which persons who would otherwise be caught by subsection 34(1) of the *IRPA* may justify their conduct in such a way as to escape the consequences inadmissibility. For example, those who could persuade the minister that their participation in the terrorist organization was coerced might well benefit from ministerial relief.
>
> [Emphasis added]

[96] Accordingly, subsection 34(2) provides the Minister with the discretion to decide that a person may be admitted to Canada notwithstanding their membership in an organization associated with terrorism where the Minister is satisfied their presence in Canada would not be detrimental to the national interest. The Minister is tasked with weighing the circumstances of such membership with national security and public safety considerations.

[97] In *Suresh* the Supreme Court of Canada found s. 34(2) could apply to individuals whose membership in a terrorist organization was innocent. In *Harkat*, the Federal Court of Appeal also thought s. 34(2) could also have application where membership in a terrorist organization was coerced. Both cases involved circumstances of membership and past or present organizational terrorist activity. As discussed above, innocent or coerced membership pose a question about an individual's approval or participation in the organization and thus pose a circumstance for the exercise of Ministerial discretion pursuant to subsection 34(2). The Minister may decide if the membership was such that there is no issue of national security or public safety and exempt the individual from an inadmissibility finding.

[98] However, in *Karakachian*, the Court did not consider Parliament intended the Ministerial relief provision as applying where the individual's membership was not with a terrorist organization. Justice de Montigny stated:

> 49 It is true that subsection 34(2) of the act softens the inadmissibility provisions contained in different paragraphs of subsection 34(1) by providing a permanent resident or a foreign national may make application with a view to satisfying the minister that "their presence in Canada would not be detrimental to national interest." <u>However, I am not satisfied that subsection 34(2) was enacted to deal with the type of situation in which Mr. Karakachian finds himself., Rather it seems to me that this case essentially raises prior question of whether Mr. Karakachian can be considered a member of the terrorist group.</u>
> [Emphasis added]

[99] Subsection 34(2) involves a discretionary exercise by the Minister weighing the circumstances of an individual's membership in a terrorist organization against national security and public safety considerations in coming to a decision whether to grant s. 34(2) relief.

[100] In the applicant's case, there is no taint to his membership. He did nothing wrong. There is no danger or threat that can be found on reasonable grounds to believe based on his membership in an organization that had no involvement with terrorism. The only role for the Minister in a s. 34(2) application would be to decide whether to waive a parliamentary overreach in s. 34(1)(f). This cannot be correct. Ministerial discretion cannot override an enactment of Parliament.

[101] In my opinion, s. 34(2) was not intended to apply to the applicant's situation. Rather, the question is more properly the interpretation of s. 34(1)(f) which I have addressed in the preceding paragraphs.

The Charter

[102] The applicant submits that s. 34(1)(f) violates s. 7 of the *Canadian Charter of Rights and Freedoms (Charter)* on the grounds that it deprives an individual of his rights to liberty and security of the person and is not in accordance with the principles of fundamental justice.

[103] More particularly, the applicant submits since the decision of the Supreme Court of Canada in *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 (*Re B.C. Motor Vehicle Act*), courts have been required to measure the content of legislation against principles of fundamental justice contained in s. 7 of the *Charter* to ensure the morally innocent are not punished.

[104] Having found as I have that the applicant is not a person described in s. 34(1)(f), I need not address the *Charter* submissions of the applicant.

Conclusion

[105] I conclude that the Board erred in applying an interpretation of s. 34(1)(f) that there was no need for a temporal connection between the applicant's membership and the organization's involvement in terrorist activities after the applicant left. I am satisfied the application of the

paragraph 34(1)(f) with respect to future events addressed by the words "will engage" require a more nuanced interpretation. I find the Board failed to consider whether there was a nexus between the applicant at the time of membership and the organization's future involvement with terrorism after the applicant left. I further conclude the Board's interpretation, as applied to the facts of this case, is not reasonable having regard to the text, context and purpose of paragraph 34(1)(f).

[106] The application for judicial review is granted. The decision of the Board is quashed.

[107] The matter is to be remitted for re-determination by a differently constituted board on the basis of the facts as found by the Board and in accordance with these reasons.

Costs

[108] On the facts, the applicant is innocent of any association with terrorism as set out in s. 34(1)(f). He was put through considerable expense and anxiety in the course of the admissibility hearing before the Board. This circumstance raises a question of costs.

[109] I am satisfied the Board's treatment of the facts was both thorough and reasonable. While the jurisprudence did not serve as a clear guide for the Board in the unique circumstances of the applicant's case, the Board was nevertheless relying on available jurisprudence.

[110] In the result, I do not find this case to be a matter for awarding costs.

Certified Question

[111] Having decided on an issue not squarely addressed by the parties, I consider that the parties should have an opportunity to submit a proposed question of general importance for certification on this question. The respondent shall have 14 days from the date of this decision, the applicant a further seven days to respond, and the respondent seven days to reply if any.

[112] The applicant has submitted a question related to his *Charter* argument. As I have not dealt with that question, the *Charter* argument remains available to the applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the Board is quashed.

2. The matter is remitted for re-determination by a differently constituted panel in accordance with the facts as found by the Board and these reasons.

3. I do not award costs.

4. The respondent shall have 14 days from the date of this decision to submit a proposed question of general importance for certification; the applicant a further seven days to respond, and the respondent seven days to reply if any.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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