Federal Court  Cour fédérale

Date: 20221108

Docket: IMM-3292-22

Citation: 2022 FC 1520

Toronto, Ontario, November 8, 2022

PRESENT: Madam Justice Go

BETWEEN:

MAJID AHMED WASTA ISMAEL

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Majid Ahmed Wasta Ismael, challenges a decision of the Immigration Division [ID] finding him inadmissible to Canada for being a member of an organization that engages, has engaged, or will engage in instigating the subversion by force of any government, contrary to paragraphs 34(1)(f) and 34(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], respectively [Decision].

[2] The Applicant is a Kurdish citizen of Iraq who arrived in Canada on June 4, 2019 and made a refugee protection claim at the border.

[3] Two Canada Border Services Agency [CBSA] officers examined the Applicant over the course of three days [CBSA Interviews]. During the CBSA Interviews, the Applicant revealed that he was a member of the Patriotic Union of Kurdistan [PUK].

[4] On June 7, 2019, one of the officers who examined the Applicant prepared a report pursuant to subsection 44(1) of the *IRPA* [s. 44(1) Report] finding that the Applicant was a member of the PUK from 1999 until 2007, and that the PUK engaged in and/or instigated the subversion by force of the Government of Iraq. A Minister's Delegate reviewed the s. 44(1) Report and referred the Applicant for an admissibility hearing at the ID [Admissibility Hearing].

[5] At the Admissibility Hearing, the Applicant submitted to the ID that he was not involved in the PUK other than attendance at a meeting that took place at the Sulaymaniyah Technical Institute [Institute], where the Applicant began his post-secondary education in 1999. The Applicant called two witnesses, a former teacher at the Institute and a former classmate of the Applicant's, and argued that the witnesses' testimonies along with five support letters submitted as evidence corroborated his testimony at the Admissibility Hearing.

[6] The ID found that the Applicant's account at the Admissibility Hearing was not credible, and that the Applicant did not adequately explain material discrepancies that arose between his answers at the CBSA Interviews and the Admissibility Hearing pertaining to his association with

the PUK. The ID concluded that the Applicant was a member of the PUK and was thus inadmissible under paragraph 34(1)(f) by paragraph 34(1)(b) of the *IRPA*.

[7] The Applicant argues that the ID's reasoning lacked transparency, intelligibility, and was not justified. The Applicant submits that the ID failed to apply the three-prong legal test for membership set out by Chief Justice Crampton in *B074 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1146 [*B074*]. The Applicant contends that the test should be applied even where an admission of membership is made.

[8] Despite counsel's skilled advocacy and thoughtful submission, I find that the ID did not err by failing to apply the three-prong legal test where membership was admitted. I also find that the ID reasonably justified its findings in the Decision. The application is therefore dismissed.

[9] The Applicant has incorrectly named the Minister of Public Safety and Emergency Preparedness as the Respondent, when it should be the Minister of Citizenship and Immigration. I have changed the style of cause accordingly.

II. Issues and Standard of Review

[10] The Applicant raises two issues: a) that the ID erred by not applying the three-prong test for membership under paragraph 34(1)(f) of the *IRPA*; and b) that the ID did not reasonably justify its finding with respect to membership.

[11] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[12] Reasonableness is a deferential but robust standard of review: *Vavilov* at paras 12–13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para 85. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88–90, 94 and133–35.

[13] For a decision to be unreasonable, the applicant must establish that the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep": *Vavilov* at para 100.

III. Analysis

[14] The Decision was made pursuant to paragraphs 34(1(b) and 34(1)(f) of the *IRPA*, which can be found in Appendix A.

A. *Did the ID err by not applying the three-prong test for membership when finding that the Applicant was a member?*

[15] During the CBSA Interviews, the Applicant revealed that he was a "member" of the PUK, but at other points of the interviews stated that he was not a "full member." The Applicant was not asked to explain the difference between the two characterizations. At the Admissibility Hearing, the Applicant denied being a member of the PUK, claiming that he only voted for the PUK, and clarifying that he only attended one meeting. The Applicant provided some explanations as to why he used the word "member" in his answers to the CBSA, alluding to a culturally different understanding of the word.

[16] The ID acknowledged that the Applicant was "likely exhausted from his travel to Canada and perhaps even apprehensive", but did not accept that "the surrounding circumstances at the time impacted the evidence he gave during the [CBSA Interviews]." The ID did not accept the Applicant's change of account regarding his activities with the PUK, pointing out the many steps taken by the CBSA officers and Minister's Delegate to ensure that the Applicant was comfortable and could understand the questions being posed in English. The ID concluded that the Applicant's testimony at the Admissibility Hearing concerning issues of membership and activities with the PUK was not credible.

[17] Before this Court, the Applicant does not challenge the ID's credibility findings regarding the Applicant's testimony on his membership with the PUK, nor does the Applicant dispute his admission of membership. Instead, the Applicant submits that an admission of membership is insufficient for a finding of membership under paragraph 34(1)(f) of the *IRPA*.

[18] The Applicant contends that an admission "necessitates further enquiry", and that this further enquiry should consist of applying the established three-prong test for membership set out in *B074* at para 29:

> In determining whether a foreign national is a member of an organization described in paragraph 34(1)(f), some assessment of that person's participation in the organization in question must be undertaken (*Toronto Coalition*, above, at para 118; *Kanendra*, above, at para 24). **In this regard, three criteria that should be considered include the nature of the person's involvement in the organization, the length of time involved, and the degree of the person's commitment to the organization's goals and objectives**…
>
> [Emphasis added]

[19] In my view, the Applicant's creative argument is not supported by the jurisprudence of this Court and that of Federal Court of Appeal [FCA].

[20] To start, in *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 [*Kanagendren*], the FCA found, at para 22, that "nothing in paragraph 34(1)(f) requires or contemplates a complicity analysis in the context of membership. Nor does the text of this provision require a 'member' to be a 'true' member who contributed significantly to the wrongful actions of the group."

[21] *Kanagendren* has since been cited by this Court as standing for the proposition that the concept of membership in an organization under paragraph 34(1)(f) must be given a broad interpretation, and does not require formal indications of membership or participation in the acts allegedly carried out by the organization: see for instance *Opu v Canada (Minister of Public*

Safety and Emergency Preparedness), 2022 FC 650 at para 100 and *Babu v Canada (Minister of Public Safety and Emergency Preparedness)*, 2022 FC 510 at para 13.

[22] The Applicant submits that *Kanagendren* was not a turning point in the jurisprudence concerning paragraph 34(1)(f) since the FCA was not asked to consider how membership is to be assessed. The FCA was only asked to consider whether the Supreme Court of Canada's decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*], was applicable to assessments under paragraph 34(1)(f), and the FCA found that it was not. The Applicant points out that the FCA was explicit in holding that the existing legal test for membership under paragraph 34(1)(f) did not change: *Kanagendren* at paras 13 and 28.

[23] With respect, the issue is not whether *Kanagendren* was or was not a turning point in the jurisprudence. The issue is whether the three-prong test must be carried out under paragraph 34(1)(f) when membership is admitted. Based on my review of the jurisprudence of this Court, including cases cited by the Applicant, the answer is no.

[24] While I take the Applicant's point that the FCA in *Kanagendren* was considering the issue of complicity and whether *Ezokola* applied to paragraph 34(1)(f), the FCA's comment about the contextual analysis of paragraph 34(1)(f) is nevertheless instructive. When explaining why *Ezokola* did not modify the legal test for assessing membership in a terrorist organization, the FCA reviewed the scheme of the *IRPA*, the incorporation of Article 1F(a) of the *United Nations Convention Relating to the Status of Refugees*, Can TS 1969 No 6 into section 98 of the

IRPA, and the differences between subsections 34(1) and 35(1) of the *IRPA*. Applying a contextual approach to statutory interpretation, the FCA stated at paras 23 and 24:

> [23] This textual analysis of paragraph 34(1)(*f*) is informed by contextual and purposive considerations.
>
> [24] The first contextual factor is paragraph 34(1)(*c*) of the Act which renders a person inadmissible for "engaging in terrorism". Thus, paragraph 34(1)(*c*) of the Act contemplates actual participation in acts of terrorism, while paragraph 34(1)(*f*) is only concerned with membership in a terrorist organization. On the appellant's interpretation of "membership", paragraph 34(1)(*c*) would be redundant.
>
> [Emphasis added]

[25] The FCA continued at paras 26 and 27:

> [26] The second contextual factor is section 42.1 of the Act which permits the Minister to find a person not to be inadmissible pursuant to section 34 if the Minister is satisfied that such a finding is not contrary to the national interest. Because of the very broad range of conduct that gives rise to inadmissibility under paragraph 34(1)(*f*), the Minister is given discretion to grant relief against inadmissibility. There is no similar relieving provision applicable to a finding of inadmissibility under paragraph 35(1)(*a*). A relieving provision is not required where inadmissibility flows from the commission of an offence whether as perpetrator or accomplice.
>
> [27] Finally, I note that the purposes underlying subsection 34(1) and paragraph 35(1)(*a*) are very different. Paragraph 34(1)(*f*) is animated by security concerns. This purpose is served by a wide definition of membership. In contrast, 35(1)(*a*) guards against abuse of Refugee Convention by those who create refugees: those who created refugees are not refugees themselves (*Ezokola*, at paragraph 34).

[26] In other words, the FCA's conclusion that *Ezokola* is not applicable to paragraph 34(1)(f) of the *IRPA* stems from its finding that inadmissibility under that provision is based solely on

membership, without having to consider the nature of the participation of the individual involved.

[27] The FCA's interpretation of paragraph 34(1)(f) is consistent with the earlier case law of this Court. In *Rahman v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 807 [*Rahman*] at para 23, this Court confirmed the finding in *Saleh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 303 at para 19, that once membership is admitted, "no greater analysis is warranted." *Rahman* has also been cited by this Court to find that officers need not address the nature, the duration and the level of an applicant's commitment to the organization for the purpose of determining membership under paragraph 34(1)(f): *Al Ayoubi v Canada (Minister of Citizenship and Immigration)*, 2022 FC 385 at para 25.

[28] The Respondent relies on *Kanagendren* to argue that the ID was not obligated to conduct the three-prong test or any other additional analysis beyond the admission of membership. To do so would be "importing a higher test and make other parts of s. 34 redundant." The Respondent maintains that the ID's conclusion was based on its reasonable weighing of evidence and credibility findings. I agree.

[29] I also agree with the Respondent that *B074*, which was decided before *Kanagendren*, does not state that all applicants must be assessed under a three-prong test. Rather, at paras 27 and 28, the Chief Justice reiterated that the term "member" must be given a broad meaning, and that "actual or formal membership in the organization in question is not required; informal

participation or support for a group may suffice." This implies, as the Respondent argues, that actual or informal membership would suffice in meeting the definition under paragraph 34(1)(f).

[30] Also as pointed out by the Respondent, the three-prong test in *B074* was used to consider whether someone is a member. The Court in *B074* did not state that the criteria are to be used when an individual has already admitted to being a member.

[31] The Applicant refers to several post-*Kanagendren* cases to argue that the failure to consider the three-prong test renders an inadmissibility decision unreasonable. In my view, these cases do not stand for the proposition that the Applicant asserts.

[32] In *Aboubakar v Canada (Minister of Citizenship and Immigration),* 2020 FC 181 [*Aboubakar*], the applicant similarly argued that the ID should have applied the three-prong test. While Justice Roussel, formerly of this Court, did respond to this argument by finding that the ID implicitly considered the three prongs, she emphasized at para 22:

> The applicant may have preferred the ID to have explicitly listed the factors at the start of its analysis and to have dealt with the criteria using subheadings. However, there is no magic formula that the ID must use to explain the reasons for its decision.

[33] The finding of reasonableness by the Court in *Aboubakar* was mainly based on other elements in that case, similar to the case at bar. At paragraph 23, Justice Roussel accepted the ID's credibility findings based on the applicant's backtracking of their admission of membership (from 'member' to 'de facto member' during admissibility hearings). Justice Roussel also

accepted the ID's reasons for not accepting the applicant's justifications for initially admitting to membership (e.g. language barrier reasons): *Aboubakar* at para 23.

[34] Accordingly, the Court's acknowledgement in *Aboubakar* of the ID's application of the three-prong test, and clarification that there is "no magic formula that the ID must use", was more of a response to the applicant's arguments: at para 22. The implied consideration of the three-prong test found by the Court in *Aboubakar* was not, in my view, determinative of Justice Roussel's decision to find the ID decision reasonable.

[35] In *Helal v Canada (Minister of Citizenship and Immigration),* 2019 FC 37 [*Helal*], the applicant was alleged to be a member of organizations that engage in or instigate subversion by force of the Syrian regime. While there was formal membership by virtue of the applicant's employment, there was no admission *per se*, contrary to what the Applicant argues. Rather, the Global Case Management System [GCMS] notes relied on a United Nations High Commissioner for Refugees [UNHCR] report, which the officer interpreted inconsistently at various points in the notes to suggest that there was an admission of membership in the UNHCR report: *Helal* at para 20. The issue in *Helal* was that the applicant was not given an opportunity to address the inconsistent interpretations in the GCMS notes: at paras 20-21. Ultimately, *Helal* was decided on the basis of procedural fairness, and Justice Gleeson's comment at paragraph 29 was to offer guidance when the matter went to reconsideration.

[36] In *Ugbazghi v Canada (Minister of Citizenship and Immigration),* 2008 FC 694 [*Ugbazghi*], the applicant had previously submitted in her refugee claim that she was a member

of Eritrean Liberation Front (ELF). She later retracted her admission when she applied for permanent residence by submitting a statutory declaration that she was a member of an ELF support group instead. The Officer relied on Ms. Ugbazghi's prior admission of membership to find her inadmissible under paragraph 34(1)(f). The Applicant quoted the following comment at para 40 of *Ugbazghi* to suggest that relying on an admission is insufficient:

> [40] Obviously, it would have been preferable for the officer to have expressly dealt with the repeated statements in Ms. Ugbazghi's statutory declaration that she had been a member of an ELF support group. Such failure might have amounted to a reviewable error had the officer simply relied on Ms. Ugbazghi's admission without also considering the evidence that independently led to a conclusion of membership.

[37] I find *Ugbazghi* distinguishable from the present case since both membership, as well as the identity of the group to which the applicant was alleged to be a member, were disputed.

[38] In *Perez Villegas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 105 [*Perez Villegas*], the applicant similarly made a prior admission of membership that was later modified. The Court found the officer's decision unreasonable because they "did not address the applicant's explanations for describing himself as a member" and cited the three-prong test as factors to consider when assessing membership: *Perez Villegas* at paras 44 and 48.

[39] I do not find that *Perez Villegas* supports the Applicant's argument that officers are always required to assess other factors beyond an admission of membership. As the Respondent argues, and I agree, the Court's conclusion in *Perez Villegas* ultimately turned on the fact that the officer failed to adequately engage with the evidence before them, and therefore provided unintelligible reasons: at paras 48-50. The officer's error differs from the case at bar, where the

ID did in fact engage with the evidence, including the Applicant's former admissions and latter explanations for why he said he was a member, and communicated its credibility findings and weighing of evidence.

[40] Finally, the Applicant relies on *Gacho v Canada (Minister of Citizenship and Immigration)*, 2016 FC 794 [*Gacho*]. While I acknowledge that the Court appeared to have engaged in a more detailed analysis of the term "membership", such an analysis was conducted in a different context than the case at bar. In *Gacho,* the applicant's husband denied being a member of a group behind a coup attempt against the government of the Philippines, and asserted the defences of duress and superior orders from the leader of his military unit: at paras 27 and 35. Specifically, the Court conducted the additional analysis in light of the husband's denial of his intent to participate in the coup carried out by the military unit he was enlisted in, as well as his knowledge of the military unit's intent to carry out the coup: *Gacho* at paras 28 and 31-32.

[41] In conclusion, notwithstanding counsel's able submission to the contrary, I agree with the Respondent that there is strong consistency in this Court's position on paragraph 34(1)(f) of the *IRPA*. The term "membership" under the impugned provision has been consistently given a broad interpretation, with no distinction being drawn between formal and informal member. Once membership is admitted, no further analysis is needed. However, a more fulsome analysis is needed in cases where membership is not admitted, or when membership is tied not to the organization alleged to be engaged in subversion, but to an "adjacent" organization, or to an

entity under the control of the organization in question. In these situations, the additional analysis is to be conducted by way of the three-prong test under *B074*, or by some other similar process.

[42] I acknowledge the Applicant's concerns that a rigid approach to admission can be problematic when considering how different cultural-linguistic backgrounds may shape vocabulary. However, ultimately, the Applicant is not arguing before me that when he admitted to being a "member", he meant something other than what the ID had determined it to be. The Applicant also did not provide any cultural or linguistic evidence before the ID to explain the meaning and/or context of his admission of membership in the PUK. Given that the ID's credibility findings with regard to the Applicant's ***admission*** of membership with the PUK is not challenged before this Court, I find that the ID did not err by failing to apply the three-prong test set out in *B074*.

B. *Did the Decision reasonably justify the ID's finding with respect to membership?*

[43] The Applicant further submits that the Decision lacks intelligibility, as the ID Member blended two lines of jurisprudence by stating on the one hand that admission is sufficient, and on the other, by considering the first two prongs of the three-prong assessment without considering the last, namely, the Applicant's commitment to the goals and objectives of the PUK.

[44] As I have already found that the ID did not have to apply the three-prong test where the Applicant has admitted membership, I do not find that the ID erred by not considering the last prong of the test.

[45] The Applicant also argues that the ID Member's internal reasoning is inconsistent, focusing on the Member's failure to clarify his findings as to whether and when the Applicant made donations to or attended meetings organized by either the PUK or the Institute's student union.

[46] I reject the Applicant's argument, which amounts to a disagreement with how the ID weighed the evidence. I instead agree with the Respondent that the ID explained that the Applicant changed his evidence between the CBSA Interviews and the Admissibility Hearing regarding the donations and meetings, which caused inconsistencies in the Applicant's evidence. This change in evidence on the part of the Applicant does not render the Decision itself inconsistent.

C. *Obiter Comment*

[47] I acknowledge that a finding of membership under paragraph 34(1)(f) has significant consequences for the Applicant; it denies him access to a refugee claim and consideration under section 96 of the *IRPA* for a Pre-Removal Risk Assessment. I am sympathetic to the Applicant's position that obtaining ministerial relief from a paragraph 34(1)(f) inadmissibility finding may be illusory because of its lengthy processing. My sympathy however cannot displace the jurisprudence of this Court and that of the FCA.

[48] It is up to the Applicant to decide whether he should seek ministerial relief under section 42.1 of the *IRPA* from the ID's finding of inadmissibility. If he does, the reasons why the Applicant seeks a refugee claim in Canada, the broader social-political context within which the

Applicant became a member of the PUK, the evidence of the Applicant's involvement, if any, within the PUK, as well as his commitment, if any, to the organization's goals and objectives, are all factors that are worthy of positive consideration in determining whether ministerial relief should be granted in this case.

IV. Conclusion

[49] The application for judicial review is dismissed.

[50] There is no question for certification.

JUDGMENT in IMM-3292-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The style of cause will be amended to name The Minister of Citizenship and Immigration as the Respondent.
3. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

APPENDIX A

***Immigration and Refugee Protection Act* (SC 2001, c 27)**
***Loi sur l'immigration et la protection des réfugiés* (LC 2001, ch 27)**

Inadmissibility	**Interdictions de territoire**
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 :
…	…
(b) engaging in or instigating the subversion by force of any government;	**b)** être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
…	…
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (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).

FEDERAL COURT

SOLICITORS OF RECORD

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