Federal Court Cour fédérale

Date: 20140124

Docket: IMM-10493-12

Citation: 2014 FC 85

Ottawa, Ontario, January 24, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

HAIDAR IBRAHIM NASSEREDDINE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Division of the Immigration and Refugee Board (IRB), dated September 26, 2012 in which it concluded that the Applicant was inadmissible to Canada pursuant to subsection 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) by reason of his membership in the Amal Movement (Amal) in Lebanon. This application is brought pursuant to section 72 of the *IRPA*.

Background

[2] The Applicant is a citizen of Lebanon. He left Lebanon in 2001 to visit family in the United States and remained there past the period of his authorized stay. On January 26, 2009, accompanied by his lawyer, the Applicant came to Canada to claim refugee status. He has a daughter who lives in Canada.

[3] In his "Claim for Refugee Protection in Canada", Form IMM-5611, signed on January 26, 2009, in response to question 46, "Organizations", the Applicant stated that he was part of the AMAL Movement (Al Risala Scouts Group), described as a "Social Group", from January 1976 to February 2001. In his Personal Information Form (PIF) dated February 18, 2009, the Applicant again stated that he was a member of the "AMAL MOVEMENT" and, as a result, he had been targeted by Hezbollah.

[4] On June 16, 2011, a Canada Border Services Agency (CBSA) officer interviewed the Applicant in connection with CBSA's investigation into his admissibility to Canada. During that interview the Applicant stated that he joined Amal in 1976 or 1977 when he was a teenager and that he held a membership card, a copy of which is found in the Certified Tribunal Record (CTR). The Applicant stated that he worked as a boy scout leader and later as an ambulance driver in the civil defence section of Amal. From 1984 to 1994 he worked at a port controlled by Amal inspecting shipping containers. He reported directly to the manager of the port. He then worked as a security guard until 2001. When he resigned from Amal in 2001 he gave his resignation letter to Ali Hassan Khalil, who at the time was the Amal leader for all of Beirut and

a senior aide to Nabih Berri, and who is now an Amal representative and Minister of Public Health in the Lebanese Parliament.

[5] In the "Case Review and Recommendation Whether a Referral to an Admissibility Hearing is Warranted" form, the CBSA officer found that Amal is an organization that engages, has engaged or will engage in subversion by force or terrorism. The officer found that Amal has been responsible for suicide attacks against Israeli military forces, assassination bombings and other attacks against rival group members in an effort to gain control of Lebanon and other acts of violence against Israeli and other identifiable groups, with the intent of intimidating local populations. The officer noted that the Applicant was not forthright during the interview and that he had concerns about the Applicant's credibility as he had failed to disclose a criminal conviction in the United States for larceny. The officer concluded that there were reasonable grounds to believe that the Applicant's membership in Amal rendered him inadmissible to Canada pursuant to subsection 34(1)(f) of the *IRPA* and recommended a referral to an admissibility hearing.

[6] The Applicant was referred to an admissibility hearing before the IRB on April 18, 2012 which continued on September 18 and September 26, 2012.

[7] The IRB delivered an oral decision at the conclusion of the hearing. This is the judicial review of that decision (Decision).

Decision Under Review

[8] Prior to giving its oral decision at the hearing, the IRB heard testimony from the Applicant and his daughter and submissions by counsel for the Minister. It then rendered its decision that the Applicant was a foreign national inadmissible to Canada pursuant to subsection 34(1)(f) of the *IRPA*.

[9] The IRB noted the Minister's allegations that the Applicant was a member of Amal which has engaged in acts of terrorism. Further, that the documentary evidence was replete with examples of Amal having committed acts of terrorism such as bombings, hijackings, kidnappings and the innocent killing of civilians. However, that there was no evidence that the Applicant personally engaged in acts of terrorism or that he was a person with authority within that organization.

[10] The IRB also noted that the Applicant became a member of Amal at the age of 15 which he likened to joining a boy scout group. He stated that, as a member of the civil defence wing, he worked as an ambulance driver providing humanitarian relief during the conflict in Lebanon. Through Amal, he obtained a job working at a port inspecting containers. The Applicant remained a member of Amal for twenty five years and ceased his membership only when he left for the United States in 2001. The IRB noted the Applicant's submission that he had no direct knowledge of the terrorist activities that Amal was alleged to have been involved in.

[11] The IRB referred to the definition of terrorism set out by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3

[*Suresh*] being that terrorism requires an organization to have committed an act whose intent was to cause death or serious bodily harm to a civilian, and, that 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. The IRB also referred to *Fuentes v Canada (Minister of Citizenship and Immigration)*, [2003] 4 FC 249 which emphasized that the definition in *Suresh* focuses on the protection of civilians.

[12] Relying on *Issam Al Yamani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1457, the IRB found that, in deciding if an applicant is inadmissible pursuant to subsection 34(1)(f), it must determine if there are reasonable grounds to believe that the subject organization engaged in terrorism and, secondly, if the evidence establishes there are reasonable grounds to find that the applicant is or was a member that organization. There is no temporal component to the analysis.

[13] The IRB noted that there was no evidence disputing any of the documentary evidence submitted by the Minister to establish that Amal is a terrorist organization. Therefore, the IRB found that the evidence was trustworthy and credible.

[14] The IRB then turned to the question of membership. It stated that, while there is no definition of being a member of an organization contained in the *IRPA* or its regulations, *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 [*Chiau*] reconfirms that the term should receive a broad and unrestricted interpretation. The IRB also referred to *Amaya v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 549 [*Amaya*], which

found that being a member includes merely belonging to a criminal organization, and stated in its view that the same reasoning should apply for the purposes of subsection 34(1)(f). The IRB also noted the case of *Ikbel Singh* (phonetic, no citation provided or located) stating that therein this Court found that a person was a member on the basis of a close association with other members of the group.

[15] The IRB noted that the Applicant himself had never denied and acknowledged being a member of Amal. It concluded that the Applicant was a member of an organization of which there are reasonable grounds to believe engages, has engaged or will engage in terrorism.

[16] The IRB also noted the case of *Uddin Jilani v Canada (Citizenship and Immigration)*, 2008 FC 758 [*Jilani*], but found that complicity as it relates to membership was not an issue in this case. Although the Applicant's participation in Amal was minor, he had no leadership role and did not take up arms to support Amal's objectives, these are non-essential elements for a finding under subsection 34(1)(f) of the *IRPA*.

[17] The IRB noted that section 34 provides a comprehensive approach to inadmissibility determinations. It addresses the goals of maintaining the security of Canada by denying access to persons who are security risks while still providing, by way of the subsection 34(2) exception, that persons who would otherwise be inadmissible still have an opportunity to satisfy the Minister that their presence is not detrimental to the national interest. The Applicant did not, however, apply for such an exception.

Issue

[18] In my view, the sole issue in this application is whether the IRB erred in finding that the Applicant was a member of Amal and therefore inadmissible under subsection 34(1)(f).

Standard of Review

[19] A standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 57 [*Dunsmuir*]; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18 [*Kisana*]).

[20] I agree with the parties that the standard of review for decisions relating to subsection 34(1) of the *IRPA* is reasonableness (*Najafi v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 876 at para 82; *Flores Gonzalez v Canada (Citizenship and Immigration)*, 2012 FC 1045 at para 36; *Krishnamoorthy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1342 at para 12 [*Krishnamoorthy*]).

[21] Reasonableness is concerned with the justification, transparency and intelligibility of the decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir*, above, at para 47).

Legislation

[22] This application concerns section 33, subsection 34(1)(f) and, indirectly, subsection 34(2) (currently subsection 42.1(2)), of the *IRPA*:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
…	…
(c) engaging in terrorism;	*c)* se livrer au terrorisme;
…	…
(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) 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*) ou *c*).
(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.[Repealed, 2013, c. 16, s. 13]	(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. [Abrogé, 2013, ch. 16, art. 13]

Exception —Minister's own initiative 42.1 (2) The Minister may, on the Minister's own initiative, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest.	Exception — à l'initiative du ministre (2) Le ministre peut, de sa propre initiative, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de tout étranger s'il est convaincu que cela ne serait pas contraire à l'intérêt national.

Applicant's Submissions

[23] The Applicant submits that the IRB erred in attributing the actions of Amal's militia to its civil department. The Applicant worked for the civil wing of Amal which did not engage in terrorist attacks and, where distinct factions exist, it is inappropriate to treat the organization as a single entity when determining membership pursuant to subsection 34(1)(f). The IRB was required to determine if Amal's civil wing was sufficiently distinct from its armed wing to be treated as a separate entity and then determine if the civil wing had engaged in terrorist activities (*Cardenas v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 139 (QL) at paras 2-4, 15-21 (TD) [*Cardenas*]; *Ali v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1174 at paras 64-68 [*Ali*]; *Suresh*, above, at para 98).

[24] Even if there were reasonable grounds to believe that Amal had engaged in terrorist acts, the IRB erred by failing to consider the criteria for membership before determining that that

Applicant was a member. These included the degree of his involvement, the length of time he was involved, his intentions, purpose, and commitment to the organization and its objectives. Not every act of support for a terrorist group will constitute membership under subsection 34(1)(f) (*Krishnamoorthy*, above, at paras 19, 23 and 27; *Tharmavarathan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 985 at para 28 [*Tharmavaratham*]; *Toronto Coalition to Stop the War et al v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957 at paras 110, 128 [*Toronto Coalition to Stop the War*]). Being involved in low-level activities that are ordinarily associated with membership, such as distributing pamphlets for a terrorist organization, do not necessarily mean that a person is caught by section 34(1)(f) (*Krishnamoorthy*, above at para 26).

[25] Here, the Applicant testified that Amal controlled the area in which he lived and compelled individuals his age to work for them. He chose not to carry arms but to become involved with Amal through another entity called social services work in order to assist individuals injured in the war. He indicated that he disavowed violence, that he had no direct knowledge that Amal was a terrorist organization, and, submits that there is no evidentiary link between Amal's terrorist activities and his work at the port. The Applicant states that the facts in this case are distinguished from *Suresh,* above, where the applicant's support of the terrorist organization was clear as he held a full time executive position with the organization and he collected funds.

[26] The Applicant also submits *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] has significantly altered the legal landscape regarding complicity in both

war crimes and terrorism. The principles from decisions concerning subsection 98(1) of the *IRPA*, an exclusion clause for refugee claimants who are found to have committed war crimes or crimes against humanity, are also relevant to inadmissibility decisions made pursuant to subsection 34(1)(f) of the *IRPA* (*Joesph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1101 at para 14 [*Joseph*]). Therefore, the IRB's Decision, which is premised on "guilt by association" reasoning, is no longer valid and is unreasonable.

Respondent's Submissions

[27] The Respondent submits that subsection 34(1)(f) of the *IRPA* is to be broadly interpreted. It prohibits the entry into Canada of individuals in respect of whom there are reasonable grounds to believe have been members of an organization involved in terrorism. However, there is relief from the broad scope of the section by way of subsection 34(2). The inadmissibility provision differs from provisions which exclude persons from refugee protection such as Article 1F(a) of the *Convention Relating to the Status of Refugees* 28 July 1951, 189 UNTS 137 (the Refugee Convention), as the former is much broader (*Kanapathy v Canada (Minister of Citizenship and Immigration)*, 2012 FC 459 at paras 35-36 [*Kanapathy*]). The evidentiary burden for establishing reasonable grounds for believing a person is a member of a terrorist organization is low and informal participation or support can suffice (*Chiau*, above; *Kanendra v Canada (Minister of Citizenship and Immigration)*, 2005 FC 923 at paras 21-23 [*Kanendra*]; *Sepid v Canada (Minister of Citizenship and Immigration)*, 2008 FC 907 at para 17).

[28] The Respondent submits that there were ample grounds for the IRB to find that the Applicant was a member of Amal. Further, the Applicant does not appear to dispute the

evidence that Amal engaged in terrorism or that he was a member of Amal. The Applicant admitted his membership and candidly acknowledged that he would have concealed his involvement if he knew the difficulty his admission would bring him.

[29] The Respondent states that the Applicant now seems to dispute the length of time that he was a member of Amal, however, this is not legally significant as subsection 34(1)(f) does not depend on length of membership. In any event, based on the record before the IRB, it was entitled to find that the Applicant was a member for 25 years.

[30] The Respondent submits that subsection 34(1)(f) bars members of terrorist organizations and not just those who commit terrorist atrocities themselves. The Applicant's evidence and submissions, if found to be true, might be relevant in response to an exclusion motion, but not for a finding of inadmissibility. The exclusion provisions are distinct from the inadmissibility provisions.

[31] The Respondent submits that there is no basis in the law for the Applicant's argument that he must have been a member of an alleged military "wing" of Amal to be found inadmissible. A finding of complicity of crimes against humanity is of a higher standard than the inadmissibility provisions, thus the Applicant's reliance on *Cardenas,* above, is misplaced. Further, there is no evidence that Amal is comprised of two different groups, and therefore *Ali*, above, has no application. Any attempts to distinguish between the legitimate wings of an organization and the criminal wings are invalid (*Chiau*, above at paras 57-59, 60).

[32] The IRB properly considered the evidence, applied the case law and found that the Applicant was a member of Amal, which organization engaged in terrorism. This was sufficient to support an inadmissibility finding under subsection 34(1)(f). Claims of limited interaction within a terrorist group are better advanced under the subsection 34(2) exception (*Kanapathy*, above, at para 39; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 78, aff'g 2011 FCA 103 at para 64 [*Agraira*]).

[33] The Respondent submits that *Ezokola*, above, does not change the subsection 34(1)(f) test for membership. It was concerned with complicity under the exclusion provision of Article 1F of the Refugee Convention, which the Court determined had been stretched too far. Those considerations are not relevant to a subsection 34(1)(f) assessment of membership. An inadmissibility determination prescribes membership in terrorist organizations without need for complicity or "knowing participation" in terrorist acts. Further, *Agraira*, above, released a month earlier, concerned relief from a subsection 34(1)(f) finding of inadmissibility under subsection 34(2), and confirmed that issues of alleged innocent or indirect or passive membership are to be considered under the Ministerial relief provisions of subsection 34(2).

[34] The Respondent submits that *Joseph*, above, is not authority for the circumstances of the present case. Without access to the record before the Court, there is no basis for knowing how it came to the conclusion that, were the IRB to hear the matter again, it would not find the applicant therein inadmissible based on mere "indirect contact" with a terrorist organization. In any event, there is no evidence in the present case that the Applicant had merely indirect contract with Amal.

Analysis

[35] The Applicant does not take issue with the finding that Amal is a terrorist organization or challenge the documentary evidence relied upon by the IRB in reaching that conclusion. Accordingly, that issue need not be addressed by this Court. The only issue is whether the IRB reasonably found that the Applicant was a member of Amal.

i) Amal "Civil Wing"

[36] The Applicant submits that Amal is a divided organization and that he worked solely in its civil wing which was not involved in terrorist activities. Thus, even if the IRB found that Amal is a terrorist organization, it was required to go further and determine if Amal's civil wing was a distinct entity from its armed wing and then to determine if the civil wing was involved in terrorist activities.

[37] In this regard, the Applicant refers to *Ali*, above, as supporting his proposition that it may be inappropriate to conflate two related groups when there is no evidence that one of the groups has taken part in the terrorist activities. In my view, *Ali* can be distinguished from the present case.

[38] There, the applicant admitted his ongoing involvement with the MQM-A but maintained that, to the best of his knowledge, the MQM-A was a peaceful political party engaged in good work for the benefit of the poor in Pakistan. Significantly, the IRB report clearly recognized that the MQM was composed of two factions, the MQM-A and the MQM-H. And, while certain acts

of terrorism were attributed to the MQM-H, most of the IRB report did not distinguish between the two groups. The Court found that the officer's reasons did not provide an adequate basis for her finding that there were reasonable grounds to believe that the MQM-A was a group engaged in terrorist activities.

[39] *Cardenas,* also relied on by the Applicant, concerned an exclusion based on complicity in crimes against humanity pursuant to Article 1F of the Refugee Convention. There was evidence before the Board of a division within the military and political factions of the Manuel Rodriguez Patriotic Front (Front). The Court held that by ignoring the division the Board unreasonably equated membership in the Front with a belief in the use of violence to achieve political goals. That assumption was not supported by the material before the Board which clearly showed that only a dissident faction within the Front advocated the use of violence. Thus, the Board cast an overly broad net in its application of the exclusion clause to the applicant's claim for refugee status as it inculpated the applicant based on guilt by association. Again, in *Cardenas*, and although concerned with Article 1F and not subsection 34(1)(f), there was clear evidence of the existence of different organizational factions in the materials that were before the Board.

[40] Here the CTR contains no evidence of the existence of a civil defence branch of Amal. Rather, it indicates that Amal was expressly formed to protect and increase the influence of Lebanon's Shi'ite Muslim population, it was founded as the military wing of the "Movement of the Disinherited", and, it was responsible for civilian fatalities.

[41] The Applicant submits that because the IRB did not dispute his claim that he belonged to Amal's civil defence department that it therefore "arguably acknowledged" that Amal was a divided entity. I do not agree with that submission.

[42] The only evidence that Amal had a civil defence wing was the Applicant's testimony. Unlike *Ali* and *Cardenas,* both above, there were no materials before the IRB that supported that a separate wing both existed and that it was distinct from a military branch of that organization which carried out terrorist activities. The Applicant submits that his testimony must be presumed to be true in the absence of an adverse credibility finding (*Maldonado v Canada (Minister of Employment and Immigration),* [1980] 2 FC 302, [1979] FCJ No 248 (CA)) and, therefore, accepted as evidence of the existence of an Amal civil wing.

[43] The presumption that a claimant's sworn testimony is true is always rebuttable and in appropriate circumstances may be rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention. Further, the Board is entitled to give more weight to documentary evidence, even if it finds the Applicant to be credible (*Bustamante v Canada (Minister of Citizenship and Immigration),* [2002] FCJ No 643 (TD) at para 9 (QL); *Eminidis v Canada (Minister of Citizenship and Immigration)*, 2004 FC 700 at paras 16-17).

[44] In my view, it cannot be that an applicant who admits to membership in a terrorist group may then escape inadmissibility simply by asserting that he or she is a humanitarian who operated within a non-violent faction of that terrorist organization absent documentary or other evidence to support this assertion. The existence of the faction, its distinct identity and its

operations must be objectively established. If an applicant is unable to establish this, then he or she may still seek the potential relief available pursuant to subsection 42.1(2) (formerly subsection 34(2).

[45] In *Ugbazghi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 694, the applicant therein was found to be a member of the Eritrean Liberation Front (ELF), an organization potentially engaged in terrorism. Her application for permanent residency was refused on the grounds that she was found to be inadmissible pursuant to subsection 34(1)(f). Initially, she stated that she was a member of the ELF. She later submitted that she was not a member of the ELF, but was a member of an ELF support group. Justice Dawson dismissed the application for judicial review. She noted that the applicant provided no evidence confirming the existence of such a separate support group. Further, the applicant's own evidence showed that the support group completely identified with and worked to further the goals and activities of the ELFF, it did not support a finding that the group was entirely separate and distinct from the ELF.

[46] Justice Dawson noted that in any case it is always possible to say that a number of factors support a membership finding and that a number of factors point away from membership. The weighing of these factors is within the expertise of the officer (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 36 [*Poshteh*]). Justice Dawson found that:

> [47] Without doubt, subsection 34(1) of the Act is intended to cast a wide net in order to capture a broad range of conduct that is inimical to Canada's interests. Parliament's intent is further reflected in section 33 of the Act, which requires that the facts that constitute inadmissibility include facts that "there are reasonable grounds to believe" occurred. Thus, the test for inadmissibility is whether "there are reasonable grounds to believe" that a foreign national was a member of an organization that "there are

> reasonable grounds to believe" engages, has engaged, or will engage in acts of terrorism. This is a relatively low evidentiary threshold. It is because of the very broad range of conduct that gives rise to inadmissibility that the Minister is given discretion, in subsection 34(2) of the Act, to grant relief against inadmissibility.

[47] In the matter before me, the Applicant in his testimony consistently asserted that his work with Amal was in its civil defence department. However, he provided no other evidence as to the existence of the civil defence department, its objectives and goals, how it operated, under what leadership it operated or how it was distinct from Amal's military branch. Given this, and the absence of any documentary or other evidence that supported the Applicant's submission, the IRB did not err by failing to consider the role of Amal's "civil wing" in the context of the Applicant's section 34 inadmissibility hearing. And, in any event, the test for inadmissibility as described in *Ugbazghi*, above, was met based on the Applicant's admission of membership in Amal.

ii) Membership Criteria

[48] The next point raised by the Applicant concerns the criteria used to determine an individual's membership in a terrorist organization pursuant to subsection 34(1)(f).

[49] The term "member" is not defined in the *IRPA* but, in the context of the legislative scheme, jurisprudence has held that it is to be interpreted broadly. The Federal Court of Appeal noted in *Poshteh*, above at paras 27-29, that the predecessor of subsection 34(1)(f) was concerned with subversion and terrorism and that the context in immigration legislation is public safety and national security, the most serious concerns of government. Justice Rothstein, as he

then was, concluded that, based on the rationale in *Canada (Minister of Citizenship and Immigration) v Singh* (1998), 151 FTR 101 at para 52 (TD) [*Singh*] and, in particular, on the availability of an exemption from the operation of subsection 34(1)(f) in appropriate cases, the term "member" under the *IRPA* should continue to be interpreted broadly (also see *B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146 at para 27; *Chiau*, above at para 25; *Kanendra*, above; *Gebreab v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1213 at paras 24-25 [*Gebreab*]).

[50] In *Saleh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 303 [*Saleh*], the applicant therein argued that mere formal membership should not inevitably constitute "membership" for the purposes of subsection 34(1)(f) of the *IRPA*. Justice Gibson, as he then was, dismissed this argument finding that:

> [19] With great respect to counsel for the Applicant, the burden of the jurisprudence of this Court and the Federal Court of Appeal appears to be to the contrary. In short, if one is a "member" then he or she is a "member" for the purposes of paragraph 34(1)(f) with all of the implications that that membership carries with it and with relief, if warranted, lying in the discretion of a Minister of the Crown under subsection 34(2) of IRPA and not in the discretion of Immigration Officers or this Court. An example of this interpretation is reflected in the reasons of my colleague, Justice de Montigny, who in *Tjiueza v. Canada (Minister of Citizenship and Immigration*) wrote at paragraph [31]:
>
>> Once again, I do not think that the ID [Immigration Division] erred in its interpretation of s. 34(1)(f) of the Act. That provision makes a foreign national inadmissible for membership in an organization; it does not require active participation. If active participation were necessary, then s. 34(1)(f) would be redundant, because active participation in subversion by force is a ground for inadmissibility under s. 34(1)(b) of *IRPA*. Paragraphs 34(1)(b) and 34(1)(f) are "discreet but overlapping grounds": ...

[51] There is, however, also case law which states that when determining whether a foreign national is a member of an organization described in subsection 34(1)(f) there should be some assessment of that individual's participation in the organization. In this case, the Applicant has admitted his membership in Amal but argues that having a membership card does not make one a "member" within the meaning of subsection 34(1)(f).

[52] In *B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146, where the applicant was an informal member of the Liberation Tigers of Tamil Eelam [LTTE], Chief Justice Crampton stated the following:

> [29] …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 (*TK v*

> *Canada (Minister of Public Safety and Emergency Preparedness*, 2013 FC 327, at para 105 [*TK*]; *Toronto Coalition*, above, at para 130; *Basaki*, above at para 18; *Sepid*, above, at para 14; *Ugbazghi*, above, at paras 44-45). Where there are some factors which suggest that the foreign national was in fact a member and others which suggest the contrary, those factors must be reasonably considered and weighed (*Toronto Coalition*, above, at para 118; *Thiyagarajah v Canada (Minister of Citizenship and Immigration),* 2011 FC 339, at para 20 [*Thiyagarajah*]).

[53] In *Krishnamoorthy*, above, the applicant while in high school, and as a result of fear and duress, had sold soap and distributed pamphlets for the LTTE. Justice Mosley found that the IRB had erred in concluding that the applicant was a member of the LTTE because it failed to consider the relevant criteria for membership identified in the jurisprudence such as involvement, length of time, and degree of commitment which defines membership in a broad sense. Further, that not every act of support for a group that there are reasonable grounds to believe is involved in terrorist activities will constitute membership (paras 23-27).

[54] And, in *Sinnaiah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1576, Justice O'Reilly, stated at para 6 that "to establish "membership" in an organization, there must at least be evidence of an "institutional link" with, or "knowing participation" in, the group's activities: *Chiau*, above; *Thanaratnam*, above."

[55] *Toronto Coalition to Stop the War*, above, concerned the inadmissibility of a British Member of Parliament who had provided financial support to a group, Viva Palestina, which deployed medical and other supplies to Gaza in opposition to an Israeli blockade, knowing that his actions may be construed as support of Hamas. Canada has identified Hamas as a terrorist organization. In considering membership in the context of section 34, Justice Mosley stated that

an unrestricted and broad definition is not a license to classify anyone who has had any dealings with a terrorist organization as a member of the group. Consideration has to be given to the facts of each case including any evidence pointing away from a finding of membership. Further, that membership may be found from the evidence as a whole, including statements and actions that provide a basis from which to infer that the purpose of the contribution was to facilitate or to enable the terrorist objects of the organization.

[56] Recently, in *TK v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 327, in considering whether the applicant was a member of the LTTE, Justice Russell stated the following about the criteria used to determine membership:

> [117] Parliament intended that the term “member” should have an “unrestricted and broad interpretation” (see *Poshteh*, above, at paragraph 52) but it must have some meaning and restriction, otherwise subsection 34(1) would be incomprehensible. The jurisprudence around subsection 34(1) has made it clear that the RPD must consider various criteria and attempt to ascertain whether the acts in question constitute membership.

[57] Of note is that most of the case law requiring consideration of various criteria to determine if an applicant is a member in a terrorist organization, including all of the cases referenced above, is concerned with situations where the applicant had not admitted membership in a terrorist organization. That is not, and in my view distinguishes, the situation in this case where the Applicant has consistently acknowledged that he was a member of Amal.

[58] In *Gebreab*, above, the applicant admitted being a member of the Ethiopian Peoples’ Revolutionary Party (EPRP), an organization which, there were reasonable grounds to believe, engages, has engaged or will engage in the acts referred to in subsections 34(1)(b) and 34(1)(c),

namely subversion by force of any government and terrorism. The applicant participated by attending meetings, giving speeches and handing out pamphlets regarding the oppression by the government. Justice Snider found that there was no issue that the applicant was a member of the EPRP as it was admitted. Thus, the only issue was whether the EPRP was an organization as contemplated by subsection 34(1)(f) of the *IRPA*.

[59] Given this, in my view *Saleh,* above, is factually closer to this situation as there the applicant also argued that mere formal membership should not inevitably constitute "membership" for the purposes of subsection 34(1)(f) of the *IRPA*. As noted above, that argument was dismissed on the basis that the burden of the jurisprudence of this Court and the Federal Court of Appeal appears to be to the contrary. Accordingly, and based on a broad interpretation of subsection 34(1)(f) and the Applicant's admitted membership, the IRB reasonably found that he was a member of Amal and, therefore, it was not required to consider and weigh the various criteria of membership.

[60] That said, and regardless of whether or not the IRB was required to look to the factors identified above in this circumstance of admitted membership, the evidence was that the Applicant acknowledged that he had belonged to Amal for a period of 25 years which membership only ended when he went to the United States. He worked as a scout leader and then as an ambulance driver and, finally, for over ten years as a container inspector, all of which was under Amal. When he tendered his resignation from Amal, it was to Ali Hassan Khalil, who at the time was the Amal leader for all of Beirut and a senior aide to Nabih Berri. The Applicant's evidence was that at no time did he take up arms and that he worked only in civil

defence. There was no evidence that he held a leadership role in Amal or personally engaged in terrorist activities. However, during his CBSA interview and the IRB hearing held on April 17, 2012, he acknowledged that he was aware of Amal's involvement in fighting in the Shatila and Sabra refugee camps in which thousands died, his involvement being burying the dead. He was also aware of Amal's subsequent besiegement of refugee camps. He also acknowledged that he knew that Amal used a suicide car bomb on one occasion.

[61] Given his long membership in Amal, that he financially benefited from his work with them, that he was not recruited or coerced into joining and remained a member even after the ceasefire and although he was aware of at least some of, and claimed that he objected to, their terrorist activities, the IRB's finding as to membership was within the range of possible outcomes.

iii) *Ezokola*

[62] The Applicant also submits that the Supreme Court of Canada's decision in *Ezokola*, above, has the effect of changing the legal test for assessing membership in terrorist organizations pursuant to subsection 34(1)(f) of the *IRPA*.

[63] *Ezokola* concerns subsection 98(1) of the *IRPA* which states that a person referred to in sections E or F of Article 1 of the Refugee Convention is not a refugee or person in need of protection. Article 1F(a) guards against abuses of the Refugee Convention by denying refugee protection to any person with respect to whom there are serious reasons for considering that he or she has committed a crime against peace, a war crime, or a crime against humanity.

[64] In *Ezokola*, the Supreme Court of Canada stated that decision-makers should not overextend the concept of complicity to capture individuals based on mere association or passive acquiescence. In Canada, the personal and knowing participation test had, in some cases, been overextended to capture individuals on the basis of complicity by association. It was, therefore, necessary for the Court to rearticulate the Canadian approach to bring it in line with the purpose of the Refugee Convention and Article 1F(a), the role of the RPD, the international law to which Article 1F(a) expressly refers, the approach to complicity under Article 1F(a) taken by other state parties to the Refugee Convention, and, fundamental criminal law principles. These sources all supported the adoption of a contribution-based test for complicity – one that requires a voluntary, knowing and significant contribution to the crime or criminal purpose of a group.

[65] The Court's task in *Ezokola* was to determine what degree of knowledge and participation in a criminal activity justifies excluding secondary actors from refugee protection. In other words, for the purposes of Article 1F(a), when would mere association become culpable complicity?

[66] The Court determined that the test for complicity to be applied by the Article 1F(a) decision-maker is that an individual will be excluded from refugee protection for complicity in international crimes if there are serious reasons for considering that he or she voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime. The evidentiary burden is on the Minister as the party seeking the

exclusion. The test is subject to the "unique evidentiary standard" contained in Article 1F(a) being "serious reasons for considering". This sets a standard above mere suspicion.

[67] The Court concluded that whether there are serious reasons for considering that an individual has committed international crimes will depend on the facts of each case. Accordingly, to determine whether an individual's conduct meets the *actus reas* and *mens rea* for complicity, several factors can be considered including: the nature and size of the organization; the part of the organization with which the refugee claimant was most directly concerned; his or her duties and activities within the organization; their rank or position in the organization; the length of time that they were in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and, the method by which they were recruited and their opportunity to leave the organization. While such factors are useful for guidance, the focus must remain on the individual's contribution to the crime or criminal purpose. They must be weighed for one key purpose which is to determine whether there was a voluntary, significant and knowing contribution to a crime or criminal purpose.

[68] The Applicant submits that the restated test for exclusion from refugee protection for complicity in international crimes under Article 1F(a) is also relevant to subsection 34(1)(f). This is because subsection 34(1)(f) requires a finding of whether a person is inadmissible by reason of being a member of an organization that has, does or will engage in terrorism. The Applicant submits that both tests involve the concept of complicity. Article 1F(a) is concerned with complicity for war crimes while subsection 34(1)(f) is concerned with complicity in terrorism.

[69] In support of this position the Applicant relies on *Joseph*, above. There, the applicant was deemed to be inadmissible to Canada pursuant to subsection 34(1)(f) of the *IRPA* and applied for mandamus, which was denied. However, in the course of that decision, Justice O'Reilly stated that:

> [13] However, I must also note that, after the ID's decision on her inadmissibility, the Supreme Court of Canada rendered its decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40. There, the Court emphasized that individuals should not be held responsible for crimes committed by a particular group just because they are associated with that group, or acquiesced to its objectives (at para 68).
>
> [14] In my view, while *Ezokola* dealt with the issue of exclusion from refugee protection, the Court's concern that individuals should not be found complicit in wrongful conduct based merely on their association with a group engaged in international crimes logically extends to the issue of inadmissibility. At a minimum, to exclude a person from refugee protection there must be proof that the person knowingly or recklessly contributed in a significant way to the group's crimes or criminal purposes (at para 68). Similarly, it seems to me that to find a person inadmissible to Canada based on his or her association with a particular terrorist group, there must be evidence that the person had more than indirect contact with that group.
>
> [15] In light of *Ezokola*, it seems highly unlikely that Ms Joseph could now be found inadmissible to Canada based on membership in a terrorist group. *Ezokola* teaches us to be wary of extending rules of complicity too far. To my mind, that includes the definition of "membership" in a terrorist group. I doubt the ID, based on *Ezokola*, would now conclude that Ms Joseph was a "member" of the LTTE.
>
> [16] Therefore, while I must dismiss Ms Joseph's application for *mandamus*, I would expect that her PRRA application, post *Ezokola*, could be dealt with reasonably expeditiously.

[70] This is in contrast to prior jurisprudence such as *Miguel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 802 at para 22, where Justice Tremblay-Lamer found that 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." And *Kanapathy*, above, at para 35 which held that the requirements for establishing inadmissibility on security grounds are less stringent than the requirements for exclusion on grounds of violating human rights:

> The latter requires complicity or knowing participation in the commission of a specific international crime, while the former does not require any complicity or knowing participation in an act of terrorism.

[71] In its Decision, the IRB found that complicity was not in issue in the context of the Applicant's membership in Amal based on *Jilani*, above, and the IRB's interpretation of subsection 34(1)(f), being that inadmissibility arises if an applicant is a member of a terrorist organization. Because the Applicant was a member of Amal which is a terrorist organization, his limited participation, lack of a leadership role and the fact that he did not take up arms in support of Amal's objectives were "non-essential elements" for a finding of inadmissibility under subsection 34(1)(f).

[72] The Respondent takes the view that *Ezokola* does not change the law as it pertains to subsection 34(1)(f). The inadmissibility provisions proscribe membership in terrorist organizations without any need for complicity or "knowing participation" in any terrorist acts. Further, if the Supreme Court had intended the case law pertaining to subsection 34(1)(f) to be overruled by its decision in *Ezokola* then it would have expressly said so. Instead, in *Agraira*, above, released a month prior to *Ezokola*, and which concerned relief from a subsection 34(1)(f)

inadmissibility finding under subsection 34(2), the Court confirmed that issues of alleged innocent, indirect or passive membership are to be considered under the Ministerial relief provisions of subsection 34(2). The Respondent submits that the comments in *Joseph* are obiter as that case concerned a mandamus application. And, in any event, while the background facts in that matter cannot be discerned from that decision, in this case there was more that mere "indirect contact" with Amal.

[73] *Agraira*, above, was concerned with the potential relief available pursuant to subsection 34(2). However, it is not obvious to me that the Court's finding in that case stands for the proposition asserted by the Respondent:

> [76] The respondent argues that the *IRPA* is concerned with public safety and national security. More specifically, he argues that the purpose of s. 34(1)(*c*) and (*f*) is to ensure the safety and security of Canadians, while s. 34(2) provides for relief only for innocent or coerced members of terrorist organizations who would otherwise be inadmissible.
>
> [77] The respondent is correct in saying that the *IRPA* is concerned with national security and public safety. In fact, the Court recognized this in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539:
>
>> The objectives as expressed in the *IRPA* indicate an intent to prioritize security. . . . Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act. [para. 10]
>
> [78] That said, the respondent's argument that s. 34(2) is focused exclusively on national security and public safety, and that it provides for relief only for innocent or coerced members of terrorist organizations, fails to give adequate consideration to the other objectives of the *IRPA*. Section 3(1) of the *IRPA* sets out 11

> objectives of the Act with respect to immigration. Only two of these are related to public safety and national security: to protect public health and safety and to maintain the security of Canadian society (s. 3(1)(*h*)), and to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks (s. 3(1)(*i*)). The other nine objectives relate to other factors that properly inform the interpretation of the term "national interest" (e.g. "to permit Canada to pursue the maximum social, cultural and economic benefits of immigration" (s. 3(1)(*a*))). The explicit presence of these other objectives in the *IRPA* strongly suggests that this term is not limited to public safety and national security, but that the Parliament of Canada also intended that it be interpreted in the context of the values of a democratic state. Section 34 is intended to protect Canada, but from the perspective that Canada is a democratic nation committed to protecting the fundamental values of its *Charter* and of its history as a parliamentary democracy.

[74] However, I do agree with the Respondent that the Applicant's complicity is not an issue in this case. Further, in my view, the requirement for complicity in connection with the conduct of acts of terrorism is removed from a subsection 34(1)(f) analysis by the existence of subsection 34(1)(c) whereby inadmissibility arises from an individual "engaging in terrorism". That provision contemplates actual participation in acts of terrorism while subsection 34(1)(f) is only concerned with membership in an organizations which has, does or will engage in terrorism. Subsection 34(1)(c), on its own, might well involve a consideration of complicity, but that provision was not under consideration in this matter (see *Toronto Coalition to Stop the War*, above, paras 113-114).

[75] My view in this regard is also influenced by the availability of potential relief pursuant to subsection 34(2) of the *IRPA* (currently subsection 42.1(2)). In *Tjiueza v Canada (Citizenship and Immigration)*, 2009 FC 1260, Justice de Montigny identified that in assessing an application

for relief from subsection 34(1)(f), the Minister considers many factors including those which mitigate inadmissibility, including:

> [39] …whether the person represents a danger to the public, whether the activity was an isolated event, **whether the person was personally involved or complicit in the activities of the organization**, the role or position of the person in the organization, whether the person was aware of the activities of the organization, and whether ties to the organization have been severed: see *Immigration Enforcement Manual*, Chapter 2, section 13.7. (Emphasis added)

[76] Given the scheme of section 34 as a whole, including the potential relief available under subsection 34(2), in these circumstances, the IRB did not err in concluding that complicity was not at issue.

[77] For these reasons I am also not convinced that *Ezokola* changes the test for admissibility pursuant to subsection 34(1)(f). Further, in my view, Justice O'Reilly's comments in *Joseph*, above, with respect to the impact of *Ezokola* on subsection 34(1)(f) inadmissibility decisions would not affect the IRB's finding in the present case. Here, the Applicant admitted his membership in Amal. Thus, this is not a situation of complicity arising from association, or "indirect contact" with, a terrorist group.

Certification

[78] The Respondent has proposed the following question for certification:

> Does *Ezokola v Canada (MCI)*, 2013 SCC 40 change the existing legal test for assessing membership in terrorist organizations, for the purposes of assessing admissibility under subsection 34(1)(f) of the *IRPA*?

[79] The Federal Court of Appeal recently reiterated the test for certified questions in *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168, at para 9:

> It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4*; Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 (CanLII), 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 (CanLII), 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

[80] Despite my finding here, the Applicant's submissions on this issue have some merit in the sense that complicity may arguably be implicit in a finding of membership under subsection 34(1)(f). Further, as noted above, there is case law that indicates that when determining whether or not an individual is a member of a terrorist organization pursuant to subsection 34(1)(f) the IRB is to consider various criteria, many of which directly overlap those identified by the Supreme Court in *Ezokola* to be considered when determining whether there was significant, knowing and willing participation in criminal activity under the subsection 98(1) exemption and Article 1F.

[81] In my view, the first branch of the test for certification is met in the circumstances of the present case. If *Ezokola* does change the legal test for assessing membership in a terrorist organization for purposes of assessing admissibility under subsection 34(1)(f) such that, regardless of admitted membership, individuals must be assessed so as to determine whether there was a voluntary, significant and knowing contribution to the terrorist group in issue, that is,

complicity with the group, then this would affect the finding of the IRB and of this Court and would be dispositive of the appeal. As the second branch of the test is also met, I certify the following question:

> Does *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 change the existing legal test for assessing membership in terrorist organizations, for the purposes of assessing admissibility under subsection 34(1)(f) of the *IRPA*, whether such membership is admitted or not?

JUDGMENT

THIS COURT ORDERS that:

1. the application for judicial review is dismissed; and

2. the following question is certified pursuant to subsection 74(d) of the *IRPA*:

   Does *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 change the existing legal test for assessing membership in terrorist organizations, for the purposes of assessing admissibility under subsection 34(1)(f) of the *IRPA*, whether such membership is admitted or not?

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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