Khan v. Canada (Minister of Citizenship and Immigration), 2005 FC 1053 (CanLII)

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Citation: 2005 FC 1053

Vancouver, British Columbia, Tuesday, the 2nd day of August, 2005

Present: THE HONOURABLE MR. JUSTICE CAMPBELL

BETWEEN:

ASIF KHAN

Applicant

- and -

MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application is a judicial review of a decision of a Member of the Immigration Division (the "Member") dated November 4, 2004, wherein the Applicant was found to be inadmissible pursuant to the combined application of s.34(1)(f) and s.34(1)(c) of the *Immigration and Refugee Protection Act* (the "*IRPA*").

[2] The Applicant is a 40 year-old, male citizen of Pakistan, who was a member of the Mohajir Quami Movement, Altaf Faction ("MQM") between December 1991 and April 1994. The Applicant arrived in Canada in April 1994 and made a claim for refugee protection, which was rejected in July 1995, as was his application under the Post-Determination Refugee Claimants in Canada class in May 1996. However, on December 8, 1998, the Minister determined that the Applicant did have sufficient humanitarian and compassionate grounds, subject to meeting criminal, medical and security clearances. In December 2003, after the Applicant filed for mandamus, the Minister argued that the Applicant may be inadmissible. His admissibility hearing was held over five days between June and September 2004. Pursuant to s.34(1)(f) of the *IRPA*, the Applicant was determined to be inadmissible as a foreign national on security grounds for being a member of an organization that there are reasonable grounds to

believe engages in, has engaged in, or will engage in terrorism. This is the decision now under review in the present Application.

[3] Sections 33 and 34 of the *IRPA* read as follows:

INADMISSIBILITY	INTERDICTIONS DE TERRITOIRE
Rules of interpretation	Interprétation
33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are **reasonable grounds to believe** that they have occurred, are occurring or may occur.	33. Les faits -- actes ou omissions -- mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
Security	Sécurité
34. (1) **A permanent resident or a foreign national is inadmissible on security grounds for**	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
(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;	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) 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;
(c) engaging in terrorism;	c) se livrer au terrorisme;
(d) being a danger to the security of Canada;	d) constituer un danger pour la sécurité du Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(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),	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera

(b) or (c).

Exception

(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]

l'auteur d'un acte visé aux alinéas a), b) ou c).

Exception

(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.

A. *The decision under review*

[4] In the decision, the Member made five critical findings which are the focus of the present Application. First, by the following statement, the Member found that, with respect to the application of s.34(1)(f), only the limited time frame of the Applicant's membership in the MQM is relevent, being between December 1991 and April 1994; this finding is not a point of contention in the present application:

A Person may be inadmissible under s. 34(1) for having been a member in the past of an organization that in the past engaged in terrorism. Lack of current membership, or a change in the present nature of the organization, would not exempt a person from inadmissibility under s. 34(1). However it occurs to me that if a person at a certain moment in the past severed their membership, they cannot be held responsible for the conduct of the organization in the period after the person severed their membership. **In other words, to be found inadmissible a person would have to have been a member while the organization was engaged in terrorism.**

[Emphasis added]

(Application Record ("AR"), p. 9, para. 9)

[5] Second, as an element of examining the conduct of the MQM during the 1990s, the Minister found relevant evidence respecting the organization's activities during the time frame in question as follows:

Tab 5 is an extract from an Amnesty International report dated December 1993 and entitled Pakistan: Torture and deaths in custody. Under the sub-heading: Human rights violations reportedly perpetrated by the MQM the following is reported:

The army in June 1992 said it had uncovered 23 torture cells in Karachi in which the MQM reportedly tortured, and sometimes killed, MQM dissidents and political opponents; military spokesman said the cells had been found in MQM offices, schools and hospitals.

Newspapers in Pakistan, whose editors had over the years repeatedly told Amnesty International that they were being intimidated, harassed and physically attacked by MQM members, reproduced photographs of the alleged chambers showing blood-splashed walls, electrical gadgets supposedly used for torture, and ropes and chains dangling from the ceiling...The newspapers also carried extensive interviews with person describing themselves as victims of MQM torture, including rape, and with relatives of people who allegedly died in MQM custody. "The News" and "Dawn" of 25 June 1992 cite several women whose sons or husbands allegedly had been tortured to death in MQM torture cells in Landhi, Karachi...Another woman, Tahira Haider, said her husband Haider Ali was

kidnapped by the MQM in June 1991 but released after the family paid ransom. He was abducted by MQM members again a few days later. "Haider was shot dead outside and arms shop. They also tried to set my house on fire", Tahera Haider said; she identified the alleged killers of her husband, all MQM leaders and workers, by name.

MQM spokesman denied all charges of having maintained torture cells and declared that these had been set up by the army to crush the party and prejudice its members; it said interviews with alleged torture victims were fake.

Amnesty International has not been able to independently verify reports of torture practiced by the MQM, but it has received several similar testimonies from members of the PPP who said that they had been subjected to torture by the MQM in the period 1989 to 1991.

"Newsline" of July 1992 commented: "The fact that these torture cells existed in the centre of the densely populated localities was a bleak reminder of the impunity with which the MQM has run its reign of terror.

That the government did not even pay heed to public indictments of the use of torture by the MQM is borne out by the fact that a report of the Human Rights Commission of Pakistan (HRCP). "Sindh inquiry: Summer 1990" published in 1990, which collated evidence of MQM torture, did not apparently lead to the government initiating any inquiry. The HRCP report cites eyewitness accounts of torture by MQM workers and MQM dissidents who confirmed the "practice of torture as a routine of MQM".... The HRCP concluded regarding the MQM's use of torture: "It was hard to altogether dismiss the testimony of MQM defectors that the organization maintained centres for this purpose." The torture centres named by the dissidents were in the same location as those found by the army in June 1992.

The federal government in September 1992 issues a list of 121 MQM members wanted in connection with setting up and maintaining torture cells. Warrants of arrest against the top leadership were issued in November 1992 and in March 1993, 19 MQM leaders, including Altaf Hussain...were declared proclaimed offenders. Further proclamation warrants were issued in later May 1993 against 12 MQM leaders on charges of possessing illegal arms and running a torture cell in Malir, Karachi.

(AR, p. 15, para. 24)

[6] Third, the Member found the evidence at Tab 5 to be credible:

All of the documents produced by the Minister [including Tab 5] appear to come from credible sources, save for the [irrelevant] exception noted above, **and in any case were not challenged by counsel.** In my opinion the reappearance of similar information and incidents in diverse publications contribute to the trustworthiness of the documents.

[Emphasis added]

(AR, p. 18, para. 31)

[7] Fourth, the Member found that the definition of terrorism to be applied is that found in *Suresh v. Canada (MCI)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3 (S.C.C.), as follows:

"Terrorism" is not defined in *IRPA*. The vagueness of the term "terrorism" was attacked as unconstitutional in two cases before the Supreme Court of Canada: *Ahani* v. *MCI* (2002 S.C.C. 72) and *Suresh* v. *MCI* (2002 S.C.C. 1). The court found that the term was sufficiently settled to permit legal adjudication. The Court said in *Suresh*:

In our view, it may safely be concluded, following the *International Convention for the Supression of the Financing of Terrorism*, that "terrorism" in s.19 of the Act [the former Immigration Act] includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the

hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism.

Parliament did adopt a more detailed or different definition in the *Criminal Code*. **There has not been dispute at this hearing over the definition of terrorism.** In my opinion the definition contained in *Suresh* is satisfactory for the purposes of this hearing, that is, whether there is credible and trustworthy evidence of activities intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

[Emphasis added]

[8] And fifth, as the critical part of the decision, the Member found that the evidence at Tab 5 provides reasonable grounds to make a finding under s.34(1)(f):

38. The Minister's documents describe near urban warfare in Karachi throughout the 1990's. Although Mr. Khan left Pakistan and ended his association with the MQM in April 1994, most of the documents reviewed above pertain to the end of 1994, 1995 and 1996 when the sectarian violence in Karachi intensified significantly. In fact some of the documents refer to specific incidents, for example the murder in December 1994 of the editor of a publication highly critical of the MQM, while others report generally on the MQM's use of violence as a means to achieve its political goals. The most important document for the purposes of this hearing is at Tab 5 of Exhibit C 3 from which I extensively quoted above. It is the only document presented by the Minister on the MQM specifically from the period during which Mr. Khan was associated with it. In that document Amnesty International reports on the MQM's alleged use of torture cells. It presents both sides of the allegations: the army's accusations and the reporting by the local press, against the MQM's denials. The conclusions of Amnesty International are found in its summary at page 26:

Summary: The MQM, before and during its tenure as a coalition partner of the government in Sindh, reportedly maintained torture cells in which it illegally detained, tortured and sometimes executed dissident members of the MQM and political opponents.

39. The balanced coverage of the allegations against the MQM in this report and its specificity to place, date and witnesses lend it considerably credibility. The only contradictory evidence is Mr. Khan's testimony in which he denies knowledge of any violent activity in Karachi while he lived there. In his PIF however it appears that he claims to have been himself a victim of sectarian violence and government repression. He describes being hunted by the police and army, being subject to torture twice, and being chased and beaten by various rival parties. While acknowledging that he stands by the narrative in his PIF that describe the reasons he fled Pakistan, he contradicted that narrative in his oral testimony by denying knowledge of violence in Karachi. Even in consideration of the passage of time and Mr. Khan's limitations as a witness I find that his evidence lacks trustworthiness because it is inconsistent with the persuasive documentary evidence and inconsistent with his own prior statements in the PIF.

40. In my opinion there are reasonable grounds to believe the facts in the Amnesty International summary above. Tab 5 provides credible and trustworthy evidence of activities intended to cause death or serious injury (torture or execution) of civilians (political opponents) not taking an active part in the hostilities in a situation of armed conflict (sectarian violence) when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government to do or to abstain from doing any act (the political goals of the MQMA). On that basis I am satisfied that there are reasonable grounds to believe that the MQMA was, at the time of Mr. Khan's association with it, engaged in terrorism.

(AR. pp. 21-22, paras. 38-40)

B. *Issues and analysis*

1. *Was the Member in error in using the definition of "terrorist activity" as provided in Suresh rather than Parliament's definition found in s.83.01(1) of the Criminal Code of Canada, R.S.C. 1985, c. C-46?*

[9] The Applicant argues that the Member erred in determining that the definition from *Suresh* was "satisfactory for the purposes of [the Applicant's] hearing" because:

The definition of "terrorist activity" drafted by Parliament supersedes the *Suresh* definition of the identical term, particularly because (a) the definition drafted by Parliament has not been constitutionally challenged by the Court, (b) Parliament enacted a more comprehensive definition more narrow in scope, and (c) Parliament enacted the definition after *Suresh* was considered.

(AR, p. 49, para. 45)

The basis for this argument is the statement from *Suresh* quoted above that "Parliament is not prevented from adopting more detailed or different definitions of terrorism."

[10] I find it is important to note that the definition used by the Member was not a matter of dispute by Counsel for the Applicant in the hearing before the Member. In any event, I find it is not necessary to do a critical analysis of the two provisions for two reasons: first, during the course of the oral hearing, Counsel for the Applicant was unable to identify a clear distinction between the *Suresh* and *Criminal Code* definitions in that both require intention, and both include political motive, which, on the evidence of Tab 5, are features of the MQM's activities in the time frame in question; and second, this Court has already determined that applying the definition in *Suresh* is appropriate (see *Fuentes v. Canada (M.C.I.)*, 2003 FCT 379 (CanLII), [2003] 4 F.C. 249 (T.D.); *Zarrin v. Canada (M.C.I.)*, [2004] F.C.J. No. 323 (T.D.); and *Ali v. Canada (M.C.I.)*, [2005] 1 F.C.R. 485 (T.D.).

[11] As a result, the answer to this question is "no".

2. *Was there sufficient credible evidence to establish reasonable grounds for finding that the MQM was engaged in terrorist activities at the relevant time?*

[12] As an incidental evidentiary point, in the written submissions, Counsel for the Applicant advanced an argument that the decision under review is tainted by the Member providing a history of the activities of the MQM, rather than simply focusing on the time frame in question. This argument was not stressed during the oral hearing of the Application. For clarity, I find that the Member's statement of the factual context of the MQM's activities, outside the time frame in question, usefully identifies the nature of the MQM as an organization. In addition, it is clear from the decision that the context was not used as evidence with respect to the MQM's activities during the period that the Applicant was a member. Therefore, I find that the statement of the context has no impact on the decision rendered.

[13] As a central objection, Counsel for the Applicant attacks the sufficiency of the Amnesty International Report relied on by the Member, because it was not an independent assessment of MQM activities. On this point, the Applicant argues as follows:

71. All of these "reports" and "allegations" are heresay [*sic*], and not credible. In fact, Amnesty International questioned the credibility of their very own report stating: "Amnesty International has not been able to independently verify reports of torture by the MQM".

72. In other words, this single document to the issue before the Member is very questionable on credibility.

[Original underlining]

(AR, pp. 54-55, paras. 71-72)

[14] With respect to this argument, I find that a complete reading of the Report (AR, p.37) does not bear out the credibility argument advanced. While the Report does state that Amnesty International was unable to independently verify the reports of torture, it goes on to state the information was gathered a variety of sources being members of other political parties, the media, the army, and "observers". I find no error in the Member's willingness to give the Report weight for the stated reason that the "reappearance of similar information and incidents in diverse publications contribute to the trustworthiness of the documents" (AR, p. 19, para. 31).

[15] As a result, I have no hesitation in agreeing with Counsel for the Respondent's argument that the evidence contained in Tab 5, while it might be less than proof on a balance of probabilities, is more than a flimsy suspicion. As a result, I find that the evidence in Tab 5 meets the standard of "reasonable grounds to believe" as that term is used in s.34(1)(f). Thus, the answer to this question is "yes".

3. *Was there a lack of consideration of whether the Applicant fits under the exception in s.34(2) of IRPA?*

[16] The Applicant submits that:

[...] section 34(2) of the *IRPA* creates a positive duty on the Minister and/or the Member to, at the very minimum, consider whether or not a person determined inadmissible under section 34(1) falls under section 34(2) when there is some evidence presented by the Applicant on this very issue.

[Original underlining]

(AR, pp. 50-51, para. 51)

[17] As I stated during the course of the oral hearing, s.34(2) requires an application to be made by the Applicant to the Minister before the Minister assumes a duty to respond. As I find there is no evidence that such an application was made with respect to the conduct of the hearing before the Member, I dismiss this argument.

C. *Conclusion*

[18] For the reasons provided, I find that the Member's decision was not made in reviewable error.

ORDER

Accordingly, the Application is dismissed.

During the course of the oral hearing, Counsel for the Applicant stated that, if the Application is dismissed, a certified question should go to the Court of Appeal for determination on the issue of the definition of terrorism. Given my findings in these reasons, I do not consider the definition of terrorism to be determinative of the present Application. Accordingly, I find there is no question to certify.

(Sgd.) "Douglas R. Campbell"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-9767-04

STYLE OF CAUSE: ASIF KHAN

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

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DATED: August 2, 2005

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