Date: 20071113

Docket: IMM-1669-07

Citation: 2007 FC 1170

Ottawa, Ontario, November 13, 2007

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ROOZBEH KIANPOUR ATABAKI

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The Minister of Citizenship and Immigration (the "Minister") seeks to quash the December 4, 2006 decision of a member of the Refugee Protection Division (the "tribunal") granting Mr. Roozbeh Kianpour Atabaki (the "Respondent" or "Mr. Atabaki"), a citizen of Iran, recognition as a refugee having been satisfied there were no grounds to exclude him under Article 1F(a) of the *Convention* and there was a serious possibility that he would face persecution if returned to his country of nationality.

[2] The Minister bases his judicial review application on one sole ground, namely, his counsel had given notice to participate pursuant to subsection 170(e) of the *Immigration and Refugee Protection Act* (the "Act") he intended to intervene by presenting evidence, questioning witnesses and making representations was denied natural justice or fairness when, on September 12, 2006, the tribunal ruled she could only question the respondent on the issue whether he was excludable but denied her the opportunity to question the claimant on the issue of whether he was a Convention refugee i.e. had a well-founded fear of persecution if returned to Iran.

[3] Counsel for the respondent did not disagree with the Minister's counsel on this judicial review application that subsection 170(e) of the *Act* entitled the Minister's counsel before the tribunal to question the respondent on both the exclusion and the inclusion phases of the inquiry. His point was twofold:

- Despite the tribunal's ruling on the Minister's counsel's non participation on questioning the claimant's well-founded fear of persecution, the transcript of the proceedings clearly demonstrates Minister's counsel had asked a substantial number of questions in the exclusion phase whose purpose was in effect to challenge Mr. Atabaki's credibility on his well-founded fear of persecution;

- In the alternative, he argued it would be futile to return the decision to a differently constituted tribunal because, in the proceeding before me, the Minister had not challenged the fundamental findings of the tribunal which led to its conclusion Mr. Atabaki was a

Convention refugee and, in particular, argues the Minister has not challenged the decision on inclusion, nor Mr. Atabaki's credibility, nor his being at risk in Iran. Also, the applicant does not challenge the tribunal's finding Mr. Atabaki was not subject to Article 1F(a). For the proposition of futility, he relied upon the Supreme Court of Canada's decision *in Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202.

[4] Subsection 170(e) reads:

The Refugee Protection Division, in any proceeding before it, …	Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés : […]
(e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations;	e) donne à la personne en cause et au ministre la possibilité de produire des éléments de preuve, d'interroger des témoins et de présenter des observations;

The Tribunal's Decision

[5] The tribunal began its reasons by covering the procedural history of Mr. Atabaki's refugee claim which was originally filed on February 24, 2004. A hearing was held on June 11, 2004 and a negative decision was rendered on August 27, 2004. The panel excluded Mr. Atabaki pursuant to Article 1F(a). On July 11, 2005, one of my colleagues set aside the panel's decision and returned the matter of Mr. Atabaki's refugee claim to the Refugee Protection Division for determination by a different panel.

[6] In the first proceeding, the Minister intervened on the basis of Articles 1F(a) and 1F(c). At the first hearing the Minister's representative did not appear and only provided written submissions which principally addressed Article 1F(a).

[7] On December 20, 2005, the Minister intervened in the second hearing "pursuant to the Notice of Intent to Participate filed May 20, 2004". The tribunal stated on the first day of the second hearing, the Minister's counsel advised she was only going to argue Article 1F(a) and not 1F(c) and noted the Minister's later written submissions were confined to Article 1F(a). That same day, Mr. Atabaki added to his original claim he had converted to Christianity and submitted this provided him with another basis on which to claim for protection. Because of this new ground, the tribunal adjourned the hearing until September 12, 2006.

[8] Hearings resumed on September 12 and 13, 2006 on the exclusionary aspect of the claim and the tribunal indicated the inclusionary phase would be dealt with on December 4, 2006.

[9] The tribunal then set out the basis for Mr. Atabaki's claim as recited in his Personal Information Form and testimony. The tribunal wrote:

> The claimant comes from a politically active family. His father had been engaged in anti-regime activities both against the Shah and later against the Islamic Republic. His father was imprisoned by both regimes. The claimant was a non-practising Muslim who styled himself an atheist and throughout his schooling was disciplined for not following the straight and narrow. His rebelliousness also caused him difficulties in employment.
>
> The incidents that gave rise to this claim began in July 2000 when his doctor and family friend Dr. Bani Torfi approached him for assistance. Dr. Bani Torfi was a member of the outlawed

> Mujahadeen-e-Khalq (MEK). He was aware of the claimant's skill with electronic devices and so asked the claimant to record some satellite broadcasts for distribution amongst the MEK. The claimant did so over a period of six or seven months and on two occasions distributed leaflets for Dr. Bani Torfi.
>
> On December 30, 2000, the claimant was called by his sister at the claimant's maternal uncle's home and warned that security forces had searched the family home and had a Summons for him to appear at the Revolutionary Islamic Court. The claimant remained at his uncle's house in hiding until he was advised that on July 21, 2001 authorities had again searched the family home but this time had found the claimant's videotapes and leaflets and arrested his father. His uncle arranged for the claimant's exit from Iran.
>
> Eventually the claimant arrived in Australia where he claimed unsuccessfully for refugee protection. In January 2004, the claimant arrived in Canada and claimed protection. Sometime after his arrival in Canada, the claimant converted to Christianity and was baptised.

[10] The tribunal said there were two issues. The first issue was whether Mr. Atabaki was excludable pursuant to Article 1F(a) of the *Convention*. If so, the tribunal ruled: "That is the end of the matter." If he was not excludable the second question is whether "he at risk of persecution or of torture or of cruel and unusual treatment or punishment or to his life if he returns to Iran?"

[11] As noted above, the tribunal found the Respondent not excludable on the grounds of having participated in "crimes against humanity" or "war crimes".

[12] The tribunal concluded the MEK was not an organization limited to a brutal purpose because "it has used many different tactics to overthrow the Shah's regime and the Islamic Republic which followed it. Certainly, there were many

military and other attacks against governmental targets by the MEK over the years. But, there have been rallies, manifestos and the like as well."

[13] The tribunal observed the MEK may still commit crimes against humanity if it targets civilian populations. Relying on documentary evidence, the tribunal concluded the MEK hit civilian targets and "was at the very least wilfully blind to the reality that by conducting some of the attacks in the ways that it did, it would kill civilians." The tribunal found the MEK was an organization which has committed crimes against humanity and was engaged in this at the same time that the claimant was offering to assist the organization. It noted the record shows that several countries have designated the MEK as a terrorist organization.

[14] The tribunal then discussed whether Mr. Atabaki had "personal and knowing participation" and a "shared common purpose" in the activities of the MEK. It stated that if he did, he was excludable but that if he did not he was not excludable. It then analysed the Minister's submissions and the Respondent's submissions on this point. It said "there is no dispute Mr. Atabaki's contact with the MEK seems only to have been through Dr. Bani Torfi – the claimant's own medical doctor, or that the claimant held any significant planning position or that he participated in any of the crimes directly." The tribunal found the claimant "was not meaningfully aware of the criminal nature of some of the actions of the MEK during the six-seven months that he assisted them" and concluded Mr. Atabaki "cannot therefore be said to have shared a common purpose with the

MEK with respect to those actions." It also found Mr. Atabaki "did not have a personal and knowing sense of the extent of the MEK's activities" and "it does not have serious reasons for considering that the claimant has committed a crime against peace, a war crime, or a crime against humanity…".

[15] The tribunal's analysis of Mr. Atabaki's inclusion is very brief. It reads:

> "The claimant has told many stories and there has been some inconsistencies but throughout the thread of his activity with Dr. Bani Torfi has been consistent. And it is this former participation with the MEK that will cause problems for the claimant, should he return to Iran. The regime is looking for him; they have seized the videotapes and leaflets he had secreted at his family home. With respect to the activities that caused him to leave, the claimant's wife gave testimony about visiting the claimant's father in Iran in 2004. She provided pictures and gave a believable account. In her account she recalled the father having told her that the claimant had fled Iran because of his political activities. This testimony adds credence to the claimant's account. [Emphasis mine.]
>
> It is well-documented that Iran imprisons political opponents and particularly those of the MEK. Iran is also known to torture those imprisoned.
>
> Given the situation in Iran, the panel finds no protection or Internal Flight Alternative (IFA) available to the claimant, should he return."

Analysis

[16] The sole question in this proceeding is whether the Minister's counsel was denied natural justice or procedural fairness in not having an opportunity to participate on the issue of whether the respondent had a well-founded fear of persecution i.e. was a Convention Refugee (the inclusionary aspect of his claim). The tribunal is owed no deference on such a question; if the tribunal breached natural justice or fairness, its decision must be set aside subject to the *Mobil Oil* doctrine (above) relied upon by Mr. Atabaki's counsel.

[17] A review of the transcript reveals the following.

[18] The tribunal commenced hearing evidence on September 12, 2006 in the presence of the Minister's counsel, the Refugee Protection Officer (RPO) and the Respondent's counsel. The tribunal suggested the exclusionary phase be embarked upon first with the counsel for the Minister leading the questioning, followed by the RPO, then by the tribunal and concluding with counsel for Mr. Atabaki. For the inclusion phase, the tribunal proposed the roles be reversed with the RPO leading the questioning, then followed by counsel for the Minister, then the tribunal and concluding with counsel for the respondent.

[19] It was at this point counsel for Mr. Atabaki raised an objection. He argued the Minister had not intervened on credibility grounds on the inclusion part. He submitted the Minister could comment on credibility with respect to exclusion, but that there was no "intent to participate on credibility, only on exclusion grounds". The tribunal then asked counsel for the Minister: "So you're happy to restrict your comments to exclusionary issues." Counsel for the Minister answered: "Yeah, although I think the -- it's difficult to draw a line between inclusion and exclusion as the basis -- part of the basis of the claimant's claim is his MEK involvement, so I think counsel accepts that if there are credibility issues that arise from that aspect of the evidence, I will comment on it."

[20] The tribunal then reviewed the Minister's notice to participate and stated: "Now, we can get into a nice argument of whether or not that includes credibility, but I think the better way to proceed here, as Ms. Chan is really only interested in exclusion, is for her to ask questions with respect to exclusion and, if it overlaps with credibility during her first time up to bat, then you're welcome to object at that point. And then the second time around, we'll exclude you from asking questions on the inclusionary aspect, unless something is raised there on exclusion that you think appropriate."

[21] After this ruling, counsel for the Minister began her questioning of Mr. Atabaki. Her examination covers approximately 55 pages of the September 12, 2003 transcript. That examination covered issues of how her Australian claim was processed – with or without interpreters and legal counsel and this at two levels: the administrative level before Australian Immigration officials and at the appeal's level before the Refugee Review Tribunal (RRT) where she explored issues such as whether an oral hearing was accorded to the Respondent, whether he was represented by legal counsel there, the nature of the post hearing proceedings including a notice from the RRT of inconsistencies in his testimony and a request that he comment.

[22] Minister's counsel then explored the Respondent's knowledge of the MEK, when he first knew about it, when he was first involved in it through Dr. Torfi, what kind of tasks he performed, his motive for helping the doctor, his knowledge of whether the MEK committed violent acts and how he kept informed on current affairs. Then counsel for the Minister attempted to impugn Mr. Atabaki's credibility in the following areas:

- Testing his credibility on his knowledge or lack of knowledge of MEK's violent activities in relation to a bomb attack in the Respondent's home city of Awaz on November 25, 1999;

- Whether his father was a member of MEK which, in his testimony, he said he was in contrast to what he mentioned to the RRT that his father was a member of MEK;

- When he assisted Dr. Torfi by contrasting his testimony at the hearing and what he told the RRT in Australia; and

- The inconsistencies between his testimony at the hearing and what he told the RRT on his knowledge of MEK's violent actions and what he told Canadian officials on May 11, 2005.

[23] At Applicant's Record, pages 141 and 142, counsel for the Minister raised her participation in the inclusion issue with the tribunal in these terms:

> "I believe those are all my questions dealing with exclusion. I know earlier counsel raised an issue about me asking questions during the inclusion part of the claim and whether I could question with respect to credibility as we have not given notice of intervention on that basis. I guess right now I'm just -- I guess I wish to -- I don't know, for lack of a better word, challenge that. I mean I would like to ask questions regarding credibility. I don't believe it would be prejudicial to the claimant in any way. Credibility is always an issue in every claim. It's obviously been identified as an issue.

> I mean I'm just basically saying I believe that the Minister should have an opportunity to question on matters of inclusion and credibility.
>
> I mean I can follow the RPO and the Member or be the last person, it's just that I think it's difficult to segregate in this case, and probably in many other cases, the exclusion and inclusion aspect, because when you're -- if I do need to make comments on credibility, I'll have to do it on the totality of the evidence and it will be hard to sort of splice, you know, so far -- you know, what I've heard so far and conclude on that basis."

[24] Counsel for Mr. Atabaki opposed this request. He argued the Minister had to give notice at least 20 days in advance of the grounds the Minister was going to intervene on. "That could be credibility, that could be exclusion." he said. He added the Minister's notice of intervention both times -- one in 2004 and the more recent one for the purposes of this hearing -- claim only exclusion on the notice of intervention. He stated neither notice of intervention suggested they were intervening on credibility. He maintained his objection on the ability of the Minister to intervene now on the issue of credibility as it pertained to the elements of inclusion.

[25] Counsel for Mr. Atabaki stated counsel for the Minister could certainly question on aspects of credibility as it relates to grounds of exclusion "but if the questions of credibility relate to did he actually participate in the MEK at all, is that real or not, that to me doesn't appear to be part of the Minister's case, or shouldn't be, since it undermines their participation on the grounds of exclusion." He added "If the theory of the Minister, or the sense of the Minister, is that the inclusionary aspects are not true, then why are they here?" He concluded "But it appears they have every right to -- and again I don't object to her asking questions on the grounds of credibility as they relate to exclusionary

issues, *mens rea*, complicity and so on, that may arise in the inclusion part of the evidence."

[26] Counsel for the Minister commented that the Minister's theory could change as the case went along. She stated she could "very well envision a case where the Minister intervenes on exclusion and it turns out that the person doesn't really seem to be a member of that organization or wasn't where they said they were and so it becomes an issue of credibility and that could only be really -- that could only unravel during the course of the hearing probably." She added the Minister sometimes withdraws the exclusion grounds when that happens. She stated the Minister does not have to stick with the Notice of Intervention and said: "We're saying that issues of exclusion may arise in the case or they are potential issues, but it's not a foregone conclusion."

[27] The tribunal ruled that counsel for the Minister could not ask questions on the inclusionary aspect of the claim.

[28] The tribunal gave three reasons for its decision. First, it said counsel for the Minister had agreed she would not question on the inclusionary aspects of the claim. Second, the tribunal cited time management of its own process. Lastly, the tribunal invoked Rule 25 of the *Refugee Protection Division Rules* (the "Rules") dealing with interventions by the Minister and, in particular, mentioned subsection 25(2) headed "contents of notice" which provides "the Minister must state how the Minister will intervene …" The tribunal also referred to subsection 25(3) which provides "If the

Minister believes that section E or F of Article 1 of the Refugee Convention may apply to the claim, the Minister must also state in the notice the facts and the law on which the Minister relies."

[29] Mr. Atabaki's evidence on inclusion was presented on December 4, 2006. His wife also testified on what Mr. Atabaki's father told her when she visited Iran in 2004. Counsel for the Minister was not present on December 4, 2006 to present her closing submissions on exclusion. She filed her written argument limited to exclusion on December 1, 2006.

Conclusion

[30] Notwithstanding the able argument put forward by counsel for Mr. Atabaki, for the reasons expressed below, this judicial review application must be allowed.

[31] First, as previously mentioned, counsel for Mr. Atabaki did not challenge counsel for the Minister's interpretation as to the scope of section 170(e) of the *Act*. On its face, the tribunal must give the Minister and the concerned a reasonable opportunity to present evidence, question witnesses and make representations. The wording of the Act is clear; it speaks to process and not issues and applies to both the Minister and the claimant. This interpretation is confirmed by the clause by clause analysis of Bill C-11, which led to the enactment of the Act. The explanation provided of section 170 was as follows:

> This provision codifies the concept of the Specialized Board of Inquiry model adopted by the Board in 1995. It also allows for an unconditional participation of the Minister in proceedings before the Refugee Protection Division, whereas in

> the current situation, the Minister, as of right, may only present evidence or participate fully in exclusion issues. Additionally, the Minister no longer requires leave of the Chairperson to be granted in order to proceed with a vacation proceeding.

[32] Moreover, this interpretation is sanctioned by the case law. In *Makani v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 891 in which my colleague Justice Campbell wrote:

> [5] On the present Application, Counsel for the Applicant argues that the conduct of the hearing by the Presiding Member was contrary to s. 170(e) of the *IRPA* which states that a claimant must be given a "reasonable opportunity to present evidence, question witnesses, and make representations". On the basis of the record I have just described, I agree with this argument.

[33] Second, with respect, in my view the tribunal erred in relying on Rule 25 of the *Rules* to limit the Minister's counsel participation to the exclusion phase. The Tribunal could not rely on subsection 25(3) of the *Rules* to cut down the Minister's right to participate on the inclusion phase of Mr. Atabaki's hearing. Subsection 25(3) contains a requirement. If the Minister believes section E or F of Article 1 of the *Convention* may apply to the claim, he must also state in the notice of intention to participate the facts and the law on which he relies. This subsection does not deal at all with inclusion and the Rule imposes no requirement on the Minister in this respect. In so far as subsection 25(2) of the *Rules* is concerned, the Minister, in his notice to participate must state how he will intervene i.e. in what way or by what way. He did just that in his Notice – his counsel said she would question witnesses, present evidence and make representation. The french text of the subsection uses the word "la façon" which lends force to this interpretation. This interpretation of Rule 25 of the *Rules* is in harmony with the scope of section 170(e) of the *Act* as discussed above.

[34] Third, I believe the tribunal erred in ruling that at the start of the hearing, counsel for the Minister agreed not to question on the inclusion phase of Mr. Atabaki's claim or, as his counsel put it, she waived her rights in this respect. There was no clear agreement on her part which is why she sought clarification. She was always troubled, in this case, with the overlap between inclusion and exclusion because of the prominence MEK played in both phases.

[35] Fourth, I must reject the argument put forward by counsel for Mr. Atabaki that during her cross-examination counsel for the Minister did test Mr. Atabaki's credibility on inclusion. It is true that Minister's counsel did test Mr. Atabaki's credibility but by not being able to question him on the inclusion phase she was not able to test potential contraditions between his testimony and his PIF or whether his subjective fear was objectively well founded at the present time (the amnesty issue), how his family and Dr. Torfi were now being treated by the authorities, country conditions, credibility on inclusion and an examination of Mr. Atabaki's wife upon which the tribunal placed corroborative weight which was important in this case because the tribunal in its reasons noted inconsistencies in Mr. Atabaki's testimony.

[36] Counsel for the Minister clearly put forward the notion that during hearing of this type the situation is fluid and overlapping and cannot be neatly compartmentalized into the exclusion and inclusion phase. She felt the need to question on the inclusion phase which in my view was her right under section 170(e) of the *Act*.

[37] Finally, the argument sending back the applicant's claim for reconsideration would be futile is speculative. What the outcome would have been if Minister's counsel had been allowed to participate in the inclusion phase is pure conjecture. In addition, I draw no negative inference on the fact that in the proceeding before me the Minister may not have challenged certain aspects of Mr. Atabaki's claim. There was no purpose to such challenge given the nature of the issue before me which the Minister raised – a denial of his right to participation on a fundamental aspect of the case before the tribunal.

[38] I close by saying it is true counsel for the Minister did not attend the December 4, 2006 hearing. She delivered her representation in writing limited to the exclusion phase. She could not participate on the inclusion phase on December 4, 2006 because of the tribunal's ruling.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed, the tribunal's decision of February 28, 2007 is set aside and the respondent's refugee claim is remitted for consideration by a differently constituted tribunal. No question is certified.

"François Lemieux"

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Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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