A-207-04

2005 FCA 85

Piran Ahmadi Poshteh (*Appellant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

and

Canadian Foundation for Children, Youth and the Law (*Intervener*)

Indexed as: Poshteh v. Canada (Minister of Citizenship and Immigration) (F.C.A.)

Federal Court of Appeal, Rothstein, Noël and Malone JJ.A.--Toronto, January 20; Ottawa, March 4, 2005.

Citizenship and Immigration -- Exclusion and Removal -- Inadmissible Persons -- Security grounds -- Minor -- Appeal from Federal Court decision Immigration Division of Immigration and Refugee Board correct in finding reasonable grounds to believe appellant member of terrorist organization despite appellant's status as minor at relevant time -- Appellant, Iranian, participating as minor in activities of Mujahedin-e-Khalq (MEK), terrorist organization -- Denied membership in MEK but allowed to distribute propaganda leaflets -- Continued doing so until almost age 18 -- Ceasing activity after arrested by police -- Appellant arriving in Canada and subject of admissibility hearing -- Whether reasonable grounds to believe appellant member of terrorist organization (MEK) regardless of age -- Whether appellant's status as minor relevant consideration under Immigration and Refugee Protection Act (IRPA), s. 34(1)(f) -- Broad meaning to be given to "member" in s. 34(1)(f) -- No blanket exemption for minors in s. 34(1)(f) -- Immigration Division having expertise to assess factors in determining whether appellant member of terrorist organization -- Requisite knowledge, mental capacity, relevant considerations in assessment -- Immigration Division properly considering all relevant factors regarding appellant in determination on membership.

Citizenship and Immigration -- Judicial Review -- Appeal arising from question certified by Federal Court in application for judicial review of Immigration Division decision -- Issues involving mixed questions of fact and law -- Pragmatic and functional analysis applied -- Standard of review applicable to Immigration Division's interpretation of "member" in s. 34(1)(f) that of reasonableness -- Standard of review applicable to issue of appellant's status as minor and to considerations to be taken into account in determining membership in terrorist organization that of correctness.

Constitutional Law -- Charter of Rights -- Life, Liberty and Security -- Principles in Charter, s. 7 apply only when individual deprived of right to life, liberty or security -- Finding of inadmissibility to Canada not engaging individual's Charter, s. 7 rights.

This was an appeal arising from a question certified by the Federal Court in an application for judicial review of the decision of the Immigration Division of the Immigration and Refugee Board that the appellant was an inadmissible person under subsection 34(1) of the *Immigration and Refugee Protection Act* (IRPA) because there were reasonable grounds to believe he was a "member of an organization that there were reasonable grounds to believe engages, has engaged or will engage in acts of terrorism". The appellant is a citizen of Iran, whose father had been a member of the Mujahedin-e-Khalq (MEK), a terrorist organization the overriding goal of which was to overthrow and replace the current Iranian government. After his father's death in 1999, the appellant attempted to join the MEK but was denied membership. Nonetheless, he was allowed to participate by distributing MEK propaganda leaflets once or twice a month. He did this until he was almost 18 but stopped after he was arrested and detained by the police. The appellant came to Canada in September 2002 and was interviewed by an immigration officer, who reported that the appellant was inadmissible under paragraph 34(1)(*f*) of the IRPA. An admissibility hearing was held before the Immigration Division and the appellant was found to be inadmissible. The appellant's application for judicial review of the Immigration Division's finding was dismissed by the Federal Court.

The two main issues in this appeal were whether, irrespective of his age, there were reasonable grounds to believe that the appellant was a member of the MEK; and whether the appellant's status as a minor was a relevant consideration under paragraph 34(1)(*f*) of the IRPA, and if so, what considerations were to be taken into account in determining membership by a minor. The issue of applicable standard of review to decisions of the Immigration Division and of the Federal Court was also addressed.

Held, the appeal should be dismissed.

The issues in this case involved questions of mixed fact and law, to which different standards of review applied. In the first issue, the interpretation of the term "member" in paragraph 34(1)(*f*) was the legal component. The Immigration Division's constituent legislation includes paragraph 34(1)(*f*) and it has some expertise in interpreting that term. Based on a pragmatic and functional analysis, the review standard of reasonableness was applicable to its interpretation of that term. However, the issue of the appellant's status as a minor and the considerations to be taken into account to determine membership of a minor under paragraph 34(1)(*f*) was a legal question the Immigration Division would not regularly encounter; therefore the review standard of correctness applied. The standard of review that applied to the Federal Court's decision was correctness on a question of law, and palpable and overriding error on a question of fact or mixed law and fact.

In determining whether the appellant was to be considered a member of the MEK for the purposes of paragraph 34(1)(*f*), it was necessary to examine the appellant's activities within that organization. His status as a minor needed to be considered only if his activities resulted in him being found to be a member if he were an adult at the relevant time. The IRPA does not define "member". The Federal Court--Trial Division previously said that "member" in the former *Immigration Act* is to be given a broad and unrestricted interpretation given that, in immigration legislation, public safety and national security are highly important. These same considerations apply to the current IRPA and "member" should continue to be interpreted broadly.

Consequently, it was not unreasonable for the Immigration Division to have interpreted that term broadly. Moreover, under subsection 34(2) of the IRPA, an individual who is a member of a terrorist organization would not be inadmissible if that individual satisfied the Minister that their presence in Canada would not be detrimental to the national interest.

It was within the Immigration Division's expertise to assess factors to determine whether the appellant was a member of a terrorist organization. It thoroughly assessed the evidence by considering what the appellant did, the length of the appellant's involvement with the MEK, his attempt to become a formal member, and the effect of the appellant's distribution of propaganda. Based on its assessment, it was not unreasonable for the Immigration Division to have concluded that the appellant's activity was not minimal or marginal and was sufficient to constitute membership for purposes of paragraph 34(1)(*f*). Accordingly, the Federal Court did not err in deferring to that decision.

As for the issue of the appellant's status as a minor, there is no blanket exemption from paragraph 34(1)(*f*) for minors. Unlike paragraph 36(3)(*e*) which provides that a minor will not be found to be criminally inadmissible for most offences that the minor commits, section 34 is silent on the subject of age. However, an individual's status as a minor is widely recognized in both statute and common law and that recognition does not require a blanket exemption from applying a law to minors. In the case of common law recognition, capacity is often viewed on a continuum on which the presumption of capacity increases with the age of the minor. A statutory blanket exemption or exclusion in respect of minors is often a proxy for individual assessments of matters such as maturity, responsibility or mental capacity to make an informed decision. Because Parliament did not provide for a blanket exemption in section 34, the status of a minor is simply a further consideration in the individual assessment to be made under paragraph 34(1)(*f*). In the context of age, requisite knowledge or mental capacity, which should be viewed on a continuum, are relevant considerations in determining membership of a minor in a terrorist organization. There is a presumption that the closer the minor is to 18 years of age, the greater the likelihood that the minor will possess the requisite knowledge or mental capacity. The Immigration Division considered such factors as the appellant's age, his awareness of the violent nature of the organization, his voluntary involvement in that organization, his continued involvement for over two years and his departure only after he was arrested by police. Its reasons showed that it dealt with the appellant's age and inferentially with his knowledge and mental capacity and was correct in doing so.

The appellant's and intervener's argument that, in the case of a minor, the best interests of the child had to be taken into account as provided for in paragraph 3(3)(*f*) of the IRPA was rejected. Because the appellant was an adult when he invoked and became subject to Canada's immigration laws and procedures, it was not necessary to consider the "best interests of the child".

The appellant's individual Charter, section 7 rights to life, liberty and security of the person were not engaged when it was found that he was inadmissible to Canada. The principles of fundamental justice in section 7 are to be considered only when it is first demonstrated that an individual is being deprived of the right to life, liberty or security of the person. It is the deprivation that must be in accordance with the

principles of fundamental justice. A finding of inadmissibility does not engage an individual's Charter, section 7 rights.

statutes and regulations judicially

considered

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 7.

Convention on the Rights of the Child, November 20, 1989, [1992] Can. T.S. No. 3, Art. 3.

Criminal Code, R.S.C., 1985, c. C-46, s. 13.

Immigration Act, R.S.C., 1985, c. I-2.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(3)(*f*), 33, 34, 36, 44(1),(2), 74(*d*).

Young Offenders Act, R.S.C., 1985, c. Y-1.

Youth Criminal Justice Act, S.C. 2002, c. 1.

cases judicially considered

applied:

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; (1998), 160 D.L.R. (4th) 193; 11 Admin. L.R. (3d) 1; 43 Imm. L.R. (2d) 117; 226 N.R. 201; amended reasons [1998] 1 S.C.R. 1222; (1998), 11 Admin. L.R. (3d) 130; *Canada (Minister of Citizenship and Immigration) v. Singh* (1998), 151 F.T.R. 101; 44 Imm. L.R. (2d) 309 (F.C.T.D.).

referred to:

Housen v. Nikolaisen, [2002] 2 S.C.R. 235; (2002), 211 D.L.R. (4th) 577; [2002] 7 W.W.R. 1; 10 C.C.L.T. (3d) 157; 30 M.P.L.R. (3d) 1; 286 N.R. 1; 219 Sask. R. 1; 2002 SCC 33; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; (2003), 223 D.L.R. (4th) 599; [2003] 5 W.W.R. 1; 11 B.C.L.R. (4th) 1; 48 Admin. L.R. (3d) 1; 179 B.C.A.C. 170; 302 N.R. 34; 2003 SCC 19; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247; (2003), 257 N.B.R. (2d) 207; 223 D.L.R. (4th) 577; 48 Admin. L.R. (3d) 33; 31 C.P.C. (5th) 1; 302 N.R. 1; 2003 SCC 20; *R. v. Hill*, [1986] 1 S.C.R. 313; (1986), 27 D.L.R. (4th) 187; 25 C.C.C. (3d) 322; 51 C.R. (3d) 97; 68 N.R. 161; 17 O.A.C. 33; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; [1991] 2 W.W.R. 385; (1990), 69 Man. R. (2d) 161; 62 C.C.C. (3d) 193; 2 C.R. (4th) 1; 1 C.R.R. (2d) 1; 119 N.R. 161; *Fitzgerald (Next Friend of) v. Alberta* (2003), 331 A.R. 111; [2003] 3 W.W.R. 752; (2002), 10 Alta. L.R. (4th) 155; 104 C.R.R. (2d) 170; 2002 ABQB 1086; affd (2004), 348 A.R. 113; [2004] 6 W.W.R. 416; 27 Alta. L.R. (4th) 205; 2004 ABCA 184; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 349 (QL); *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; (2000), 190 D.L.R. (4th) 513; [2000] 10 W.W.R. 567; 23 Admin. L.R.

(3d) 175; 81 B.C.L.R. (3d) 1; 3 C.C.E.L. (3d) 165; 77 C.R.R. (2d) 189; 260 N.R. 1; 2000 SCC 44; *Barrera v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 3; (1992), 99 D.L.R. (4th) 264; 18 Imm. L.R. (2d) 81; 151 N.R. 28 (C.A.).

APPEAL from a Federal Court decision ((2004), 248 F.T.R. 95; 2004 FC 310) dismissing an application for judicial review of a decision of the Immigration Division of the Immigration and Refugee Board that the appellant was inadmissible under subsection 34(1) of the *Immigration and Refugee Protection Act* because there were reasonable grounds to believe he was a member of a terrorist organization. Appeal dismissed.

appearances:

Avi J. Sirlin for appellant.

Stephen H. Gold for respondent.

Lee Ann Chapman and *Martha Mackinnon* for intervener.

solicitors of record:

Avi J. Sirlin, Toronto, for appellant.

Deputy Attorney General of Canada for respondent.

Canadian Foundation for Children and Youth, the Law, Toronto, for intervener.

The following are the reasons for judgment rendered in English by

Rothstein J.A.:

INTRODUCTION

[1]The primary issue on this appeal is whether the Immigration Division properly found that, notwith-standing he was under the age of 18 years at the relevant time (a minor), there were reasonable grounds to believe that the appellant, Piran Ahmadi Poshteh, was a member of a terrorist organization for purposes of determining whether he was inadmissible to Canada on security grounds under paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Paragraph 34(1)(*f*) provides:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

. . .

(*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*).

FACTS

[2]The following facts are taken from the decision of the Immigration Division in Mr. Poshteh's admissibility hearing. They are not in dispute.

[3]Mr. Poshteh is a citizen of Iran. His father had been a member of the Mujahedin-e-Khalq (MEK), an organization in respect of which there are reasonable grounds to believe engages, has engaged or will engage in terrorism. In 1999, when Mr. Poshteh was 15, his father died. Mr. Poshteh blamed the Iranian government for his father's death.

[4]Mr. Poshteh wanted to join the MEK to help achieve his father's goal, which he understood was to overthrow the Iranian government. However, when he approached his father's friend, whom he believed was a member of the MEK, the friend would not allow him to join, although he did allow him to participate through the dissemination of propaganda.

[5]Mr. Poshteh and a friend distributed MEK propaganda leaflets in Tehran one or two times per month. He carried on this activity from February 2000 until June 2002, when he was almost 18 (17 years and 11 months). He ceased this activity when he was arrested and detained for two weeks by the police. Aside from distributing the propaganda leaflets, he had no other involvement in MEK activities.

[6]Mr. Poshteh arrived in Canada on September 16, 2002, and was interviewed by an immigration officer. Pursuant to subsection 44(1) of the Act, the officer reported, among other things, that Mr. Poshteh was inadmissible to Canada under paragraph 34(1)(*f*) of the Act. The immigration officer's report was transmitted to the Minister of Citizenship and Immigration under subsection 44(1) of the Act. The Minister referred the report to the Immigration Division for an admissibility hearing under subsection 44(2) of the Act. Following a hearing, the Immigration Division found that there were reasonable grounds to believe that Mr. Poshteh was a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism and that Mr. Poshteh therefore was not admissible to Canada pursuant to paragraph 34(1)(*f*) of the Act.

JUDICIAL REVIEW AND CERTIFIED QUESTION

[7]Mr. Poshteh sought judicial review in the Federal Court [*Poshteh v. Canada (Minister of Citizenship and Immigration)* (2004), 248 F.T.R. 95 (F.C.)]. Gibson J. found no reviewable error by the Immigration Division and dismissed the judicial review. However, he certified the following question for appeal pursuant to paragraph 74(*d*) of the Act:

Having regard to section 7 of the *Canadian Charter of Rights and Freedoms* and international human rights instruments to which Canada is a signatory, including the *Convention on the Rights of the Child*, is there, on the particular facts underlying this application for judicial review, any distinction in liability between the Applicant who was a minor at all times relevant to his activities on behalf of the Mujahedin-e-Khalq and an adult undertaking equivalent activities on behalf of such an organization without being a formal member of that organization, for inadmissibility under subsection 34(1) of the *Immigration and Refugee Protection Act*?

[8]This appeal arises from that certified question.

ISSUES

[9]There are two issues in the appeal:

1. whether, irrespective of his age, there are reasonable grounds to believe that Mr. Poshteh was a member of the MEK; and

2. whether Mr. Poshteh's status as a minor is a relevant consideration under paragraph 34(1)(*f*) of the Act and if so, what considerations are to be taken into account in determining membership by a minor.

[10]Whether there are reasonable grounds to believe that the MEK engages, has engaged or will engage in terrorism is not in issue. The Immigration Division found there were reasonable grounds to so believe and this determination is not challenged by Mr. Poshteh.

POSITION OF MR. POSHTEH

[11]Mr. Poshteh says that the test for membership in a terrorist organization should be based on the degree of integration of the individual within the organization. He says he was not sufficiently integrated into the MEK to be considered a member.

[12]However, his primary argument is that in the case of a minor, the term "member" in paragraph 34(1)(*f*) should be construed narrowly, interpreted as applying only to individuals directly involved in violence or who hold leadership positions in the terrorist organization. Such an interpretation would mean that paragraph 34(1)(*f*) would be inapplicable to Mr. Poshteh because his activities were not violent and because he was not acting in a leadership capacity.

POSITION OF THE INTERVENER

[13]The intervener, Canadian Foundation for Children, Youth and the Law, takes the position that "the decision as to whether or not the pamphleting activities of a child make the person inadmissible as a member of a terrorist organization must be made in the best interests of the child, whether the child seeks asylum in Canada or seeks asylum after becoming a rehabilitated young adult."

ANALYSIS

Section 33

[14]Section 33 provides:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

[15]The parties do not take issue with the test for inadmissibility applied by the Immigration Division--that there are reasonable grounds to believe that the 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. For the sake of simplicity, I will take the liberty of referring to the security grounds for inadmissibility in this case as "being a member of a terrorist organization."

Standard of Review--Decision of the Immigration Division

[16]There is disagreement between the parties as to whether the standard of review that should be applied by the Federal Court to the Immigration Division's decision is reasonableness or correctness. Based on the approach of the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, a pragmatic and functional analysis is required.

[17]A serious question of general importance arising from the decision of the Immigration Division has been certified under paragraph 74(*d*) of the Act. Although the question refers to "the particular facts underlying this application for judicial review," I infer that the question was certified for appeal because, in the opinion of Gibson J., the application of paragraph 34(1)(*f*) to minors is a question of general importance. This generally suggests a less deferential standard of review.

[18]The Immigration Division has expertise in fact-finding which requires great deference to its findings of fact. In this case, the findings of fact by the Immigration Division are not in dispute.

[19]The issues here are not "polycentric," but rather are ones in which the state is a protagonist against the individual. This supports less deference on both issues.

[20]Both issues involve questions of mixed fact and law. However, the legal components of the issues can be extricated from the mixed questions. In the case of the first issue, the legal question is the interpretation of the term "member" in paragraph 34(1)(*f*). In the case of the second issue, the legal question is whether Mr. Poshteh's status as a minor is to be taken into account and if so, what considerations are relevant.

[21]Paragraph 34(1)(*f*) forms part of the Immigration Division's constituent legislation. The question of membership in a terrorist organization is not something that is extraneous to its regular work. The expertise of the Immigration Division is in, among other things, determining whether criteria for inadmissibility have been established. These criteria include membership in a terrorist organization. Therefore, the interpretation of the term "member" in paragraph 34(1)(*f*) is, I think, a legal matter with respect to which the Immigration Division has some expertise. Finally, I would note that the interpretation of the term "member" in paragraph 34(1)(*f*), while necessary to address, is not a matter squarely within the question certified by Gibson J. Therefore, some deference is due the Immigration Division on this legal issue.

[22]However, whether Mr. Poshteh's status as a minor is to be taken into account and if so, what considerations are relevant, is not a legal question that the Immigration Division would regularly encounter. There is no reference to age in paragraph

34(1)(*f*). On the other hand, the courts do encounter cases in which the application of a law to a minor is a relevant consideration. Whether age is to be taken into account and if so, in what manner are matters in which the expertise of the Court is greater than that of the Immigration Division, suggesting less deference on this issue.

[23]Having regard to the pragmatic and functional considerations to which I have adverted, I conclude:

(a) the question of the interpretation of the term "member" in paragraph 34(1)(*f*) is reviewable on a standard of reasonableness; and

(b) the question of whether age is to be considered under paragraph 34(1)(*f*) and if so, the manner of doing so is reviewable on a standard of correctness.

[24]Applying the relevant standards of review to the legal questions, should the Court find it necessary to intervene, the Court will either quash the Immigration Division's decision if it finds that Mr. Poshteh could not be a member of a terrorist organization or it will remit the matter to the Immigration Division for redetermination having regard to the proper legal tests. However, should the Court not find the Immigration Division's legal determinations with respect to the term "member" and Mr. Poshteh's minor status to be unreasonable or incorrect, respectively, the questions of mixed fact and law, namely the application of the law to the facts by the Immigration Division, should be reviewed on a reasonableness standard.

Standard of Review--Decision of the Federal Court

[25]The standard of review by this Court of the Federal Court decision is correctness on a question of law and palpable and overriding error on a question of fact or mixed law and fact. (See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 and *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226.)

Issue 1: Member--Law

[26]I now turn to whether, without regard for Mr. Poshteh's age, his activities for the MEK could constitute him a member of that organization. If an adult would not be considered a member on the facts applicable to Mr. Poshteh, it will be unnecessary to address the question of age. Only if his activities would have resulted in him being found to be a member if he were an adult at the relevant time, will it be necessary to consider whether his status as a minor at that time requires a different conclusion.

[27]There is no definition of the term "member" in the Act. The courts have not established a precise and exhaustive definition of the term. In interpreting the term "member" in the former *Immigration Act*, R.S.C., 1985, c. I-2, the Trial Division (as it then was) has said that the term is to be given an unrestricted and broad interpretation. The rationale for such an approach is set out in *Canada (Minister of Citizenship and Immigration) v. Singh* (1998), 151 F.T.R. 101 (F.C.T.D.), at paragraph 52:

The provisions deal with subversion and terrorism. The context in immigration legislation is public safety and national security, the most serious concerns of

government. It is trite to say that terrorist organizations do not issue membership cards. There is no formal test for membership and members are not therefore easily identifiable. The Minister of Citizenship and Immigration may, if not detrimental to the national interest, exclude an individual from the operation of subparagraph 19(1)(*f*)(iii)(B). I think it is obvious that Parliament intended the term "member" to be given an unrestricted and broad interpretation.

[28]The same considerations apply to paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*. As was the case in the *Immigration Act*, under subsection 34(2) of the *Immigration and Refugee Protection Act*, membership in a terrorist organization does not constitute inadmissibility if the individual in question satisfies the Minister that their presence in Canada would not be detrimental to the national interest. Subsection 34(2) provides:

34. . . .

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

Thus, under subsection 34(2), the Minister has the discretion to exclude the individual from the operation of paragraph 34(1)(*f*).

[29]Based on the rationale in *Singh* and, in particular, on the availability of an exemption from the operation of paragraph 34(1)(*f*) in appropriate cases, I am satisfied that the term "member" under the Act should continue to be interpreted broadly.

[30]Nonetheless, Mr. Poshteh says that the Immigration Division erred by determining the question of membership on the basis of the nature and duration of his activities, while failing to consider his level of integration within the organization. He says the key consideration for membership is a significant level of integration within an organization. He submits that adopting significant integration as the test for membership would promote more consistent decision- making by the Immigration Division.

[31]I am not persuaded that Mr. Poshteh's significant integration test would achieve the consistency that he says is presently lacking in Immigration Division decisions. A significant integration test would still require an assessment of the facts and a judgment as to whether the degree of integration in any particular case was sufficient to constitute the individual a member. More importantly, a test for membership based on significant integration would not be consistent with the broad interpretation to be given to the term "member."

[32]The Immigration Division adopted a broad approach to the interpretation of the term "member." It was not unreasonable for it to have done so.

Issue 1: Member--Facts

[33]The Immigration Division's factual findings are the following:

(a) Mr. Poshteh's involvement with the MEK consisted solely of disseminating propaganda;

(b) he disseminated propaganda for approximately two years;

(c) at his hearing he referred to himself at one point as a member;

(d) his involvement went beyond that of a mere sympathizer or supporter;

(e) he shared in the MEK's overriding goal to overthrow the Iranian government;

(f) although he was not formally enlisted in the MEK, it was not for lack of trying. He desperately wished to enlist in some formal fashion. He claimed he was denied that permission, but was allowed for a period of two years to engage in an activity for the benefit of the MEK;

(g) propaganda is an important part of the MEK. The purpose is partly to educate but also to enlist sympathy and support for the cause. Support could range from funding, to enlistment of new members, to creating a climate where activities, violent or otherwise, could proceed; and

(h) the distribution of propaganda 24 to 48 times over a period of two years was a significant level of activity and was not marginal or minimal.

[34]Based on these findings, the Immigration Divi-sion concluded that the functions Mr. Poshteh performed were equal to those of a member of the MEK and that he fulfilled the role of member for purposes of paragraph 34(1)(*f*) of the Act.

[35]Mr. Poshteh gives a number of reasons why he was not significantly integrated within the MEK. He says he never received initiation, indoctrination or training. He never attended meetings. He did not know where the meetings were held or the hierarchy of the group. He had no decision-making power. He did not create the propaganda. He did not recruit members or raise funds. His only contacts were his father's friend and the individual with whom he distributed the propaganda. He says he was not involved in influential media such as radio, television or newspaper propaganda. In addition, the flyers were not distributed more broadly than in local neighbourhoods and schools. Given these circumstances, Mr. Poshteh says his involvement was limited.

[36]In any given case, it will always be possible to say that although a number of factors support a membership finding, a number point away from membership. An assessment of these facts is within the expertise of the Immigration Division.

[37]Here, the Immigration Division based its conclusion on what appears to be a thorough assessment of the evidence. It considered what Mr. Poshteh did, the length of his involvement with the MEK, his attempt to become a formal member and the effect of distributing propaganda. It concluded that Mr. Poshteh's activity was not minimal or marginal and was sufficient to constitute membership for purposes of paragraph 34(1)(*f*).

[38]Based upon a somewhat probing examination, I cannot say that the reasons of the Immigration Division do not adequately support its conclusion that Mr. Poshteh was a member of the MEK for purposes of paragraph 34(1)(*f*) (see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paragraphs 48-56). Not finding the Immigration Division's decision to be unreasonable, I conclude that Gibson J. did not err in deferring to that decision.

Issue 2: Age--Law

[39]I now turn to the second issue. Mr. Poshteh does not ask for a blanket exemption from paragraph 34(1)(*f*) for minors. Rather, his argument is that having regard to his status as a minor, he should not be considered to be a member unless he was involved in violent activities or was a leader of the organization.

[40]There is no express exemption for minors in section 34. To find a blanket exemption for minors would require reading words into paragraph 34(1)(*f*) that were not put there by Parliament. The Court must take the statute as it finds it. Therefore, I agree with Mr. Poshteh that there is no blanket exemption from paragraph 34(1)(*f*) for minors.

[41]By contrast, paragraph 36(3)(*e*) of the Act provides that an individual cannot be found to be criminally inadmissible for an offence under the *Young Offenders Act*. (The *Young Offenders Act* [R.S.C., 1985, c. Y-1] was repealed on April 1, 2003, and replaced by the *Youth Criminal Justice Act*, S.C. 2002, c. 1). Paragraph 36(3)(*e*) provides:

36. . . .

(3) The following provisions govern subsections (1) and (2):

. . .

(*e*) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.

Essentially, this means that for most offences committed by a minor, the individual will not be found to be criminally inadmissible. There is no similar provision that would provide for a blanket age exemption in section 34.

[42]However, I do not say that Parliament's silence on the subject of age in section 34 implies that the individual's status as a minor is irrelevant to the question of membership. An individual's status as a minor is widely recognized in both statute and common law and I see no reason why it should be ignored for purposes of paragraph 34(1)(*f*). (See *R. v. Hill*, [1986] 1 S.C.R. 313, at pages 348-351 *per* Wilson J. dissenting. The majority reasons are not in conflict with her general comments on this point.)

[43]Nonetheless, that recognition of an individual's status as a minor does not in all cases require a blanket exemption from application of a law to the minor. That is particularly the case where the status of a minor is recognized by the common law but not by statute. In the case of common law recognition, capacity is often viewed on a continuum on which the presumption of capacity increases with the age of the minor. (In the context of criminal law, see *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at pages1319-1320, *per* Lamer C.J.; in the context of tort law, see *R. v. Hill*, per Wilson J., at pages 350-351.)

[44]A statutory blanket exemption or exclusion in respect of minors is often a proxy for individual assessments of matters such as maturity, responsibility or mental capacity to make an informed decision, where such individual assessments are impractical. In the case of voting rights, for example, it has been held that setting the voting age at 18 is to ensure, as far as possible, that those eligible to vote are mature enough to make rational and informed decisions about who should represent them in government (see *Fitzgerald (Next Friend of) v. Alberta* (2003), 331 A.R. 111 (Q.B.); affd [2004] 6 W.W.R. 416 (Alta. C.A.), leave to appeal to S.C.C. refused, 6 January 2005 [[2004] S.C.C.A. No. 349 (QL)). It would obviously not be possible to conduct such an assessment on an individual basis for voting purposes. A bright-line age test is therefore a practical way to deal with the matter.

[45]Different considerations apply in respect of paragraph 34(1)(*f*). Here, the Act expressly provides for individual assessments for admissibility. That is not to say that Parliament could not, as it did in section 36, provide for a blanket age exemption in section 34. But because Parliament did not do so, an individual's status as a minor is simply a further consideration in the individual assessment made under paragraph 34(1)(*f*).

[46]Having concluded that, although there is no blanket exemption for minors, an individual's status as a minor is still relevant under paragraph 34(1)(*f*), the next question is what considerations are to be taken into account.

[47]It seems to me that in the context of age, relevant considerations in paragraph 34(1)(*f*) would be matters such as whether the minor has the requisite knowledge or mental capacity to understand the nature and effect of his actions. It is open to the minor to advance those considerations and whatever other arguments support an exemption from paragraph 34(1)(*f*) on the basis of his status as a minor and to provide evidence in support of those arguments.

[48]While a finding of membership in a terrorist organization may be possible for a minor of any age, it would be highly unusual for there to be a finding of membership in the case of a young child, say, under the age of 12. Although it will depend on the evidence in each case, it would seem self-evident that in the case of such children, the presumption would be that they do not possess the requisite knowledge or mental capacity to understand the nature and effect of their actions. In the case of young children, the age of the child itself would be *prima facie* evidence of an absence of the requisite knowledge or mental capacity. There would be an obligation on the Immigration Division to carefully consider the level of understanding of such a child.

[49]Indeed, at common law there was an irrebuttable presumption that a child under the age of seven was incapable of possessing criminal intent; once a child reached the age of 14, the common law presumption of criminal incapacity disappeared and was replaced by a rebuttable presumption of capacity for criminal intent. (See *R. v. Chaulk*, at page 1319.) Today, under section 13 of the *Criminal Code*, R.S.C., 1985, c. C-46, a child shall not be convicted of an offence in respect of an act or omission on his part while under the age of 12 years. Section 13 provides:

13. No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.

[50]Over the age of 11, minors are held responsible for their criminal actions. The *Youth Criminal Justice Act* provides for a unique system of procedures, courts and dispositions from that provided in the *Criminal Code*, but it does not provide an exemption from criminal responsibility for a minor's actions.

[51]For purposes of determining membership in a terrorist organization by a minor, the requisite knowledge or mental capacity should be viewed on a continuum. Just as there would be a presumption against the requisite knowledge or mental capacity in the case of young children, there would be a presumption that the closer the minor is to 18 years of age, the greater will be the likelihood that the minor possesses the requisite knowledge or mental capacity.

[52]I have said that it is open to the minor to raise whatever factors he considers relevant in the particular case. For example, issues of duress or coercion may be relevant. However, these issues do not arise in this case since it was Mr. Poshteh who approached his father's friend, asking to become a member of the MEK.

[53]I would agree with Mr. Poshteh that it would be very difficult for a minor to argue that he should not be found to be a member if he had been directly involved in violent activities or had held a leadership role in the terrorist organization. However, lesser involvement may still result in a finding of membership. It is not necessarily the nature of the involvement with the terrorist organization that will determine the issue, although those considerations may be relevant. Rather, matters such as knowledge or mental capacity are the types of considerations to be taken into account in deciding whether a determination of membership in a terrorist organization in the case of a minor is to be different than in the case of an adult.

[54]The Immigration Division's reasons demonstrate that it dealt with Mr. Poshteh's arguments based on age and it was correct in so doing. Even though Mr. Poshteh did not make explicit lack of knowledge or mental capacity arguments, the Immigration Division's reasons do inferentially deal with his knowledge and mental capacity.

Issue 2: Age--Facts

[55]In acknowledging and dealing with Mr. Poshteh's arguments based on age, the Immigration Division concluded that:

1. Mr. Poshteh was not ignorant of the violent activities of the MEK;

2. he became involved with the MEK of his own volition;

3. his involvement may have been initially motivated by passion but it continued for two years; and

4. he made his own decisions, even against the advice of adults.

[56]The Immigration Division found that Mr. Poshteh continued his activity with the MEK until he was 17 years and 11 months. Where a minor of that age knows of the violent activity of the organization, becomes involved of his own volition, continues for over two years and leaves only after he is arrested, it cannot be said that it is unreasonable for the Immigration Division not to accept his arguments based on his status as a minor and to find him to be a member of the terrorist organization.

The Best Interests of the Child

[57]Mr. Poshteh and the intervener argue that in the case of a minor, the Immigration Division must take into account the best interests of the child. Indeed, paragraph 3(3)(*f*) requires that the Act be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory. Paragraph 3(3)(*f*) provides:

3. . . .

(3) This Act is to be construed and applied in a manner that

. . .

(*f*) complies with international human rights instruments to which Canada is signatory.

[58]One such instrument is the *Convention on the Rights of the Child*, November 20, 1989, [1992] Can. T.S. No. 3 (entered into force 2 September 1990). Article 3 requires that in all actions of courts of law and administrative authorities, the best interests of the child shall be a primary consideration. Article 3, paragraph 1 provides:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[59]I do not think that the *Convention on the Rights of the Child* is relevant in this case. For purposes of the Convention, the action in this case is the proceeding and decision of the Immigration Division. However, at the time the matter was considered by the Immigration Division, Mr. Poshteh was no longer a minor. He was 18 when he arrived in Canada. As I read the Convention, it is concerned with the interests of children while they are children. It does not purport to confer rights on adults.

[60]It is important in this case to distinguish between considerations such as whether an individual has the knowledge or mental capacity to understand the nature and

effect of his actions, which are relevant, and the "best interests of the child" considerations under the Convention, which are not relevant. Mr. Poshteh was an adult when he invoked and became subject to Canada's immigration laws and procedures and therefore he cannot rely on the Convention.

Charter Rights

[61]The Immigration Division found that Mr. Poshteh's section 7 Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] rights were not engaged. In his factum, Mr. Poshteh says that he "does not seek to challenge that finding in this proceeding". However, he argues that even though his life, liberty and security of the person rights are not engaged, Parliament's intention is that the Act is to be construed in a manner consistent with principles of fundamental justice. Later in his factum, Mr. Poshteh submits that the Charter and other documents "are unanimous on the principle that the liability of a minor cannot simply mirror that of an adult but rather must provide special treatment."

[62]The principles of fundamental justice in section 7 of the Charter are not independent self-standing notions. They are to be considered only when it is first demonstrated that an individual is being deprived of the right to life, liberty or security of the person. It is the deprivation that must be in accordance with the principles of fundamental justice. (See, for example, *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at paragraph 47.)

[63]Here, all that is being determined is whether Mr. Poshteh is inadmissible to Canada on the grounds of his membership in a terrorist organization. The authorities are to the effect that a finding of inadmissibility does not engage an individual's section 7 Charter rights. (See, for example, *Barrera v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 3 (C.A.).) A number of proceedings may yet take place before he reaches the stage at which his deportation from Canada may occur. For example, Mr. Poshteh may invoke subsection 34(2) to try to satisfy the Minister that his presence in Canada is not detrimental to the national interest. Therefore, fundamental justice in section 7 of the Charter is not of application in the determination to be made under paragraph 34(1)(*f*) of the Act.

CONCLUSION

[64]I would answer the certified question in the following manner:

(a) section 7 of the Charter is not engaged in the determination to be made by the Immigration Division under paragraph 34(1)(*f*) of the Act;

(b) the *Convention on the Rights of the Child* does not apply when the proceedings and decision involving an individual take place when the individual is no longer a minor;

(c) an individual's status as a minor is relevant and there may be a distinction between a minor and an adult in the determination of whether the individual is a member of a

terrorist organization under paragraph 34(1)(*f*) of the Act if the minor provides evidence to support such a distinction; and

(d) in the present case, Mr. Poshteh's age was properly considered by the Immigration Division and it was open to the Immigration Division to determine that he was a member of a terrorist organization for purposes of paragraph 34(1)(*f*) of the Act.

[65]The Immigration Division did not make unreasonable findings in concluding that Mr. Poshteh was inadmissible under paragraph 34(1)(*f*) of the Act. There was no error of law or palpable and overriding error of fact in the reasons of Gibson J.

[66]The appeal should be dismissed with costs.

Noël J.A.: I agree.

Malone J.A.: I agree.