Federal Court  Cour fédérale

Date: 20141211

Docket: IMM-10242-12

Citation: 2014 FC 1201

Ottawa, Ontario, December 11, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SUKHBIR SINGH MANGAT

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Sukhbir Singh Mangat has been in Canada since April 1992. During all of those years, his immigration status in this country has been at best precarious. He wishes to challenge, on judicial review, the decision of the Minister, made on September 7, 2012, to refuse him permanent residence because he is inadmissible in Canada. The judicial review application is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] It is essential to state clearly at the outset what is before this Court. The only matter under consideration is the decision made in accordance with paragraph 34(1)(f) of the IRPA, on behalf of the Minister of Citizenship and Immigration. The decision is concerned exclusively with a determination of whether the conditions required under paragraph 34(1)(f) are met in accordance with the burden appropriate under section 34. It is not concerned with a determination made under subsection 34(2). These are two different decisions that are governed by their own standards. Indeed, the two issues were the subject of different judicial review applications. Paragraph 34(1)(f) and subsection 34(2) read:

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 :
…	…
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).
Exception	**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.	(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.

The invitation made by counsel for the applicant that this application for judicial review should be assessed in conjunction with the companion application (relating to the decision made under subsection 34(2)) must be rejected. There should not be any confusion about what is relevant to this judicial review application, and it has nothing to do with the so called "ministerial relief" under subsection 34(2), a provision which has since been repealed by Parliament (SC 2013, c 16, s 13).

I. History of the Proceedings

[3] The applicant came illegally to Canada, arriving from New York City [NYC], by taxi, on April 8, 1992. He would have travelled from India, his country of citizenship, via London, on or about March 13, 1992. He indicated in his Personal Information Form [PIF] that he was detained upon arrival in NYC because he was travelling on a false passport, under a different name than his.

[4] After arriving in Montreal, the applicant sought refugee status on April 27, 1992. His application was dismissed by the Immigration and Refugee Board on March 17, 1993. His application for authorization and judicial review to this Court was also denied.

[5] It appears that a first determination of inadmissibility was made in 1999, pursuant to paragraph 19(1)(f)(iii)(b), the predecessor in the then *Immigration Act* (*Canada: Immigration Act*, 1976-77, c 52, s 1) to current paragraph 34(1)(f) of the IRPA.

[6] Counsel for the respondent was incapable to shed light on that decision, or anything that could have happened between 1999 and the decision under review in this judicial review application. There appears to have been, from time to time, activity on the "ministerial relief" front during that period.

[7] Leave to judicially review the decision of September 7, 2012, was granted on June 18, 2014. The matter had been held in abeyance while the case of *Agraira v Canada (Public Safety and Emergency Preparedness)* was before the Supreme Court of Canada. After the matter was adjudicated upon, this case and the companion case (IMM-8432-12) relating to the decision under subsection 34(2) came back before this Court. The other judicial review application, about the "ministerial relief", has been successful.

II. State of Proceedings

[8] A court order, on October 27, 2014, provided the parties with the milestones to lead to the hearing which took place on December 2, 2014. The applicant was allowed to file an affidavit before November 14; the respondent would have until November 21 to cross-examine the affiant. A reply memorandum of facts and law by the applicant could be produced no later than November 28, 2014.

[9] The leave application had been granted on the two issues raised in the memorandum of facts and law: (1) was Mr Mangat a member of an organisation that there are reasons to believe has engaged in terrorism? (2) was the faction of the organization Mr Mangat was involved in one that engaged in terrorism?

[10] However, the applicant filed a memorandum of facts and law on November 28, 2014 which was not a reply, as ordered by the Court on October 27, 2014. Instead, the applicant brought to the fore a new set of issues for which no authorization had been sought or granted.

[11] The Court raised *proprio motu* the impropriety of raising new issues at this stage. Indeed the Crown would have been made aware of these new issues only three days before the hearing. In *Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22, Dawson J., then of this Court, developed a framework in order to decide whether the Court should entertain new issues after leave had been granted. At paragraph 12 of her judgment, one can read:

> [12] Thus, for these reasons, I am satisfied that in every case it is for the Court to exercise its discretion as to whether to allow issues to be raised for the first time in a party's further memorandum of fact and law. Considerations relevant to the exercise of that discretion, in my view, include:
>
> (i) Were all of the facts and matters relevant to the new issue or issues known (or available with reasonable diligence) at the time the application for leave was filed and/or perfected?
>
> (ii) Is there any suggestion of prejudice to the opposing party if the new issues are considered?
>
> (iii) Does the record disclose all of the facts relevant to the new issues?
>
> (iv) Are the new issues related to those in respect of which leave was granted?
>
> (v) What is the apparent strength of the new issue or issues?
>
> (vi) Will allowing new issues to be raised unduly delay the hearing of the application?

[12] Be that as it may, the Crown chose not to avail itself of the opportunity to argue that the new memorandum of facts and law should not be considered because the issues had not been part of the authorization granted by this Court. In those circumstances, the Court proceeded on the broader basis, the Crown stating that it was ready to address the new issues.

III. Analysis

[13] Because the applicant was able to broaden the base of his challenge, the Court considers the applicant's contention that he was not able to argue his case prior to the decision of September 7, 2012. In essence, the applicant contends now that procedural fairness was infringed in that he was not heard before the decision in issue here was made.

[14] The decision under review notes that, "[o]n September 20, 1999 the officer determined that he was inadmissible to Canada pursuant to S. 19(1)(f)(iii)(b) due to his membership in the Khalistan Liberation Force (KLF)." The record does not enlighten as to that decision, nor as to why there is now a new determination. Indeed, as pointed out, it remains very much unclear what happened, if anything, in the intervening period, between September 1999 and September 2012. Furthermore, counsel for the respondent did not try to explain what the earlier decision was about and how the decision of September 2012 would have been different. Strangely, it was as if nothing had occurred before September 2012.

[15] The decision under review also states that a letter was sent to the applicant on March 20, 2012, inviting him to respond to concerns about his admissibility. Mr Mangat, in his affidavit of November 14, 2014, declares unequivocally that he received no such letter:

> 8. The CIC officer makes reference to a letter dated March 20, 2012, addressed to me and giving me an opportunity to respond to concerns regarding my admissibility. I did not receive this letter and I note that a copy of this letter cannot be found in the Certified Tribunal Record.
>
> 9. The only letter sent to me on March 20, 2012 was a letter from CIC with respect to my request for relief under the national interest provisions of Canada's immigration legislation. I duly responded to that letter with submissions as to why I should receive a favourable Ministerial decision.
>
> 10. However, that letter did not did not (*sic*) advise me that CIC proposed to make a decision on whether or not I was admissible to Canada as per s.34 of IRPA.

The affiant was not cross-examined on his affidavit in spite of the fact that this Court's Order of October 27, provided specifically for a period of time to do so.

[16] It bears repeating that two decisions are made under section 34. One, under subsection 34(1), is made by the Minister of Citizenship and Immigration. Another one, under subsection 34(2), is made by the Minister of Public Safety and Emergency Preparedness. The case before the Court is the one decided by the representative of the Minister of Citizenship and Immigration and it would appear that the applicant saw fit to ask for submissions, yet no request for submissions appear to have been received or sent.

[17] Counsel for the respondent confirmed at the hearing of this case that the March 20, 2014 letter that would have invited Mr Mangat to offer submissions cannot be found.

[18] On this record, applicant's counsel's argument that there was no participation in the September 7, 2012 decision is not contradicted. The record is clear that no submissions were

made in anticipation of the September 7, 2012 decision; the applicant swears he did not receive a notice and none was found either in the Certified Tribunal Record or, as confirmed by counsel for the respondent, in the department's record. The balance of probabilities favours the applicant in view of the lack of explanation.

[19] It is trite law that the applicant had a right to be heard: *audi alteram partem*. No deference is owed to the decision-maker in that regard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 129).There is no evidence on this record that the applicant was afforded that ability. That constitutes a breach of procedural fairness.

[20] Accordingly, the application for judicial review must be granted. I express no view as to the merits of this case as the matter will be returned to a different officer for the purpose of making a new determination, having given the applicant the opportunity to make submissions.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter will be returned to a different officer for the purpose of making a new determination.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

David Orman	FOR THE APPLICANT
Lorne McClenaghan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT