Federal Court  Cour fédérale

Date: 20150901

Docket: IMM-6202-14

Citation: 2015 FC 1040

Toronto, Ontario, September 1, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

NK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a July 15, 2014 decision [Decision] by an immigration officer refusing the application for permanent residence [PR] of a refugee claimant on the basis of inadmissibility due to section 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The PR application was based on a positive refugee claim, decided

by the Immigration and Refugee Board [Board] on February 3, 1999. This judicial review was filed under section 72(1) of the Act.

II. The Facts

[1] The Applicant is a national of Pakistan who came to Canada in May 1997 and thereafter made a refugee claim. In February 1999, he was found to be a Convention refugee by the Refugee Protection Division of the Board. The Applicant filed his PR application later that month.

[2] An inadmissibility report pursuant to section 44(1) of the Act was issued on March 21, 2005 by a Canada Border Services Agency [CBSA] officer. In that report, the CBSA officer stated that since the Applicant had been a member in both the Mohajir Quami Movement and the Mohajir Quami Movement-Haqiqi [MQMH], organizations found to have engaged in terrorism, the Applicant was inadmissible to Canada for security reasons under section 34(1)(f) of the Act. The CBSA officer subsequently referred the report to the Immigration Division of the Board.

[3] In February 2006, the Applicant made an application for Ministerial Relief [Relief] under section 34(2) of Act (as it then read).

[4] The Immigration Division, in June 2006, found that the Applicant did not come within section 34(1)(f) the Act.

[5] The Minister successfully appealed that Immigration Division decision to the Immigration Appeal Division [IAD] in October 2007. The IAD found the Applicant to be inadmissible under section 34(1)(f) of the Act on the basis of his membership in the MQMH – that is, for being a member of an organization that there are reasonable grounds to believe engages in terrorism. A deportation order was issued against him.

[6] The Applicant challenged this inadmissibility decision in the Federal Court, but leave for judicial review was dismissed in August 2008.

[7] The Minister denied Relief in May 2012. The Applicant challenged that denial in this Court, but by mutual consent the Relief application went back for reconsideration. The Relief reconsideration was pending at the time that written pleadings for this judicial review were filed, but I was subsequently advised by the parties at the March 24, 2015 judicial review hearing that the Relief application has once again been refused by the Minister. That second Relief refusal is currently the subject of a separate judicial review application by the Applicant.

III. Submissions and Decision Under Review

[8] A Citizenship and Immigration Canada [CIC] Senior Immigration Officer [Officer], by letter dated May 22, 2014, gave the Applicant an opportunity to make updated submissions in support of his February 2009 PR application, on or before June 30, 2014. In response, by letter dated June 27, 2014, the Applicant argued two key grounds. First, the Applicant submitted that the law had changed since October 2007 when the IAD found him inadmissible under section 34(1)(f) due to the impact of the ruling in *Ezokola v Canada (Citizenship and Immigration),*

2013 SCC 40 [*Ezokola*]. Second, the Applicant submitted that the Officer must hold the PR application in abeyance until a final Relief decision is made.

[9] The Officer comprehensively reviewed the Applicant's background, dating back to submissions made during his original 1999 refugee claim, all the way through to his July 2014 submissions. The Officer found that the Applicant had admitted to involvement in the MQMH, an organization that had engaged in terrorism. He concluded that the Applicant was a full member in the impugned organization, based both on the IAD decision and the Applicant's statements in his July 25, 2011 letter to the Officer. On the issue of *Ezokola*, the Officer stated that he gave "great weight" to the IAD decision and further that he "…[did] not have the judicial authority to void the IAD's admissibility decision based on the *Ezokola* ruling."

[10] On the issue of timing, the Officer decided that there was no reason to delay his Decision on the PR application pending the final outcome of the Relief application.

[11] The Officer thus refused the Applicant's PR application, finding that (i) there were reasonable grounds to believe the Applicant is inadmissible to Canada under section 34(1)(f), (ii) he could not consider the effect of *Ezokola* on the Applicant's status, and (iii) it was unnecessary to await the outcome of the Relief application. This judicial review challenges the Officer's negative Decision.

IV. Standard of Review

[12] I am reviewing a discretionary decision of an administrative decision maker. Generally, the standard of review for decisions relating to section 34(1)(f) of the Act is reasonableness (*Nasseredine v Canada (Minister of Citizenship and Immigration)*, 2014 FC 85 at para 20; *Najafi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 876 at para 82). As such, the Court will only intervene where there is an absence of justification, transparency and intelligibility within the decision-making process and where the decision falls outside of the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[13] However, where questions of procedural fairness are concerned, a different standard applies. Procedural fairness requires that an applicant be provided with a meaningful opportunity to present the various types of evidence relevant to his or her case and to have that evidence fully considered (*Miller v Canada (Minister of Citizenship and Immigration)*, 2015 FC 371 at para 16). This requires a much stricter review on the non-deferential standard of correctness (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43).

V. Issues and Analysis

A. *Considering Ezokola*

[14] The Applicant contends that the Officer erred when he stated that he did not have the ability to reconsider an earlier IAD decision on a determination of inadmissibility. The Applicant argues that the law has changed since that 2007 IAD decision with the release of the Supreme Court's decision in *Ezokola*, which he brought to the Officer's attention and which the Officer

wrongly declined to consider. Section 21(2) of the Act, according to the Applicant, requires that the Officer consider whether *Ezokola* changed the law relating to section 34(1)(f). While the Applicant concedes that it would be a challenging exercise for a CIC officer to consider the impact of *Ezokola*, given that *Ezokola* addressed a different section of the Act, it was nonetheless relevant for this litigation, and the Officer should have done so.

[15] The Respondent replies that the 2007 IAD decision found the Applicant to be inadmissible under section 34(1)(f) and the Officer made no reviewable error by following it. *Ezokola* involved the interpretation of article 1F(a) of the United Nations *Convention Relating to the Status of Refugees,* Can TS 1969 No 6, as adopted into the Act through an entirely different part of the legislation, and thus has no effect on the case at hand.

[16] I agree with the Applicant that the Officer committed an error in declining to consider the impact of *Ezokola* on section 34(1)(f) of the Act. However, for the reasons that follow, it was not a fatal error to the decision in this circumstance because of subsequent appellate jurisprudence.

[17] In terms of the inadmissibility analysis, the Officer made a positive finding on section 34(1)(f) inadmissibility, placing weight on previous decisions of the Board and arriving at his own conclusion as to why the provision should continue to render the Applicant inadmissible. The Officer engaged with the evidence and made findings about the MQMH and the Applicant's involvement in it. This analysis included a review of the Applicant's evidence from his refugee claim through to his subsequent statements purporting to minimize his involvement with the MQMH.

[18] However, the Officer erred in stating that he did "not have the judicial authority to void the IAD's inadmissibility decision based on the Ezokola ruling" (Certified Tribunal Record [CTR], page 7). The Officer should have considered the relevance of an intervening Supreme Court decision, rather than abdicating himself from any consideration of it.

[19] The Applicant argues that the intervening *Ezokola* decision vitiated the prior IAD decision due to its impact on the Act's provision in question (section 34(1)(f)). Procedural fairness dictates that this position be considered and addressed. The Officer erred in refusing to do so.

[20] If the Officer lacked the "judicial authority" to consider the application of a Supreme Court decision to the facts before him under the Act, any of its affiliated regulations, or any internal CIC policies, neither the Officer nor the Respondent provided evidence of any such restriction, and I could find none myself. Indeed, the legislation and policy guidelines all point to the opposite – that CIC officers making these PR decisions must be satisfied that the foreign national making an application meets the requirements of both the Act and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (see, for instance, section 11 of the Act, section 6.4 of CIC Operations Manual ENF 2/OP 18, "Evaluating Inadmissibility" [ENF 2]). The admissibility component of this analysis requires the officer to also consider cases that interpret the law, including of course, Supreme Court of Canada jurisprudence.

[21] Ordinarily, the appropriate remedy for this type of error would be to send the matter back for reconsideration. However, since the hearing in this matter, the Federal Court of Appeal

[FCA] released *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 [*Kanagendren*]. The FCA held that *Ezokola* does not change the existing legal test for assessing membership in a terrorist organization under section 34(1)(f) (*Kanagendren* at paras 28 and 38), directly negating the argument that the Applicant attempted to advance before the Officer.

[22] Normally, a breach of procedural fairness results in the need to send the decision back for redetermination. However, a reviewing Court may refuse to grant judicial review notwithstanding the error where it is satisfied that the breach of procedural fairness could not have affected the decision (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at 228; *Canada (Minister of Citizenship and Immigration) v Patel*, 2002 FCA 55 at paras 4-5; *Sarker v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1168 at paras 16-17; *Mwaura v Canada (Minister of Citizenship and Immigration)* 2015 FC 874 at para 30).

[23] As the issue in question has been decisively concluded by the FCA in *Kanagendren*, it would be futile to send the matter back for reconsideration: another officer would be bound by *Kanagendren* and would end up with exactly the same outcome after considering *Ezokola*'s impact on section 34(1)(f), rendering the exercise wholly futile.

B. *Sequencing of Decision-Making*

[24] The Applicant submits that the existing jurisprudence leaves undecided the question of whether an officer, when deciding a PR application, should await disposition by the Minister of the pending Relief application. Moreover, the Applicant argues that under the former

Immigration Act, RSC, 1985, c I-2, the law required that the Relief decision had to be made first. The Applicant notes that under section 34 of the current legislation there is no requirement that the inadmissibility decision be held in abeyance pending a determination for Relief (*Azeem v Canada (Citizenship and Immigration)*, 2012 FC 402; *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 121) [*Poshteh*]). However, since the Applicant's Relief decision was pending at the same time that section 34(2) of the Act, which permitted the Minister to grant Relief, was repealed, the Applicant argues that he is entitled to its disposition under the terms of this previous provision, pursuant to section 43 of the *Interpretation Act*, RSC, 1985, c I-21.

[25] The Applicant also points to section 173(b) of the Act, which requires the Immigration Division proceed without delay, noting that there is no similar requirement for an immigration officer to dispose of PR applications under section 21(2). The Applicant submits that in determining the intent of Parliament, the statute must be interpreted purposively. There is no purpose served by determining the PR application against the Applicant when there is a pending application for Relief, which would, if decided positively, cure the inadmissibility. The law has an interest in preventing a multiplicity of proceedings.

[26] Finally, the Applicant points to section 13.6 of ENF 2, which was in effect when section 34(2) existed but has since been deleted, and which stated that "…[t]he application for entry into Canada should be held in abeyance while the Minister of PSEP considers the matter of relief".

[27] The Applicant notes that generally, prospective immigrants must apply for immigrant visas at Canadian visa posts abroad, but Convention refugees are an exception, as they are

allowed to apply for permanent residence from within Canada. The Applicant argues that the intent of the Manual's procedural guidance was to have it apply to all applicants for permanent residence, without regard to the location of filing, and so the Officer erred in not delaying his Decision.

[28] The Respondent replies that the Officer's approach was entirely reasonable and consistent with the law, which does not require the Officer to await the outcome of a Relief application before rendering a PR decision. Specifically, the Respondent points out that neither the provisions concerning Relief nor PR address the order in which competing applications must be processed, and thus the Officer's decision to determine one application before the other did not violate the legislation. Accordingly, it does not constitute an error.

[29] I agree with the Respondent on the issue of sequencing, in that the Officer had every right to decide the application when he did: there is simply nothing in the legislation, whether the Act or its regulations, which prevents an officer from making a decision on a PR application before a Relief application has been decided. Other relevant interpretative sources, including jurisprudence and policy guidance, also allow the Officer to proceed with making his Decision on a flexible timeline (see, for instance, Operations Bulletin 524 below, or *Poshteh* at para 10).

C. *Fettering of Discretion*

[30] Connected to this issue of the sequence of decision making, the Applicant contends that the Officer fettered his discretion in making a premature decision by following internal CIC Operations Bulletin 524 [OB 524] dated May 16, 2013 (See OB 524 in Affidavit of Gwen

Smoluk, Exhibit A). First, the Applicant argues that the Officer fettered his discretion by failing to consult with CBSA to determine where the Relief decision stood. Second, the Officer should have followed another policy guideline – section 5.22 of CIC Immigration Manual IP5 – which allows for the officer's exercise of discretion in suspending processing pending a Relief application.

[31] The Respondent replies that there was no evidence on the record that suggests the Officer followed the internal memorandum. Even if he had, the Respondent submits that ultimately the law is clear that officers have the ability to make PR decisions, in their discretion, after considering the facts. This is, based on the record, clearly what the Officer did. The proper exercise of discretion supersedes policy guidelines, which are appropriate for officers to heed, as long as the guidelines do not fetter the discretion of officers (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 54-55, citing *Lim v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956 at para 4).

[32] I find that if anything, the policy is that CIC officers should not delay their decisions due to a pending Relief application. The following extract of OB 524 makes that position quite clear.

> This Operational Bulletin (OB) provides instructions on the processing of applications for permanent residence (APR) that are currently in inventory from persons who are inadmissible on grounds of security (A34)…and with an outstanding application for Ministerial Relief (MR)...
>
> …
>
> Effective immediately, APRs should no longer automatically be held in abeyance pending a decision on MR request…
>
> …

> Previously, the *Inland Processing Manual* – Chapter IP 10 – *Refusal of National Security Cases/Processing of National Interest Requests* instructed officers to hold applications in abeyance until a decision had been reached by the Minister of Public Safety to either grant or refuse MR under relevant sections.
>
> …
>
> In Poshteh v Canada (Minister of Citizenship and Immigration): 2005 FCA 121, the Federal Court of Appeal established that there is no temporal aspect to subsection 34(2). This means that a MR request can be submitted at any time. It further supports that officers may process APRs to finalization, regardless of the status of the MR application, if one has been submitted. The MR request will continue to be processed accordingly, for a final decision by the Minister of Public Safety.
>
> IP 5 was updated to indicate that officers "may" hold APRs in abeyance pending an MR decision in contrast to previous instructions requiring officers to automatically hold applications in abeyance. This direction allows officers to render a final decision on a case by case basis with flexibility, based on circumstances.
>
> Citizenship and Immigration Canada's (CIC) officers are to render a decision on all APRs and to no longer **automatically** hold incoming APRs in abeyance while pending a MR decision from the Minister of Public Safety. [Emphasis in original]

[33] According to this policy guidance, officers have the discretion to decide PR cases when they wish. They are no longer under instruction to hold these cases in abeyance. There is no evidence that the Officer fettered his discretion in any way. Furthermore, there is no indication that the Officer relied on OB 524, and even if he did, he clearly considered the facts that were before him in making his Decision, and articulated why he concluded that the consequence of making a PR decision before the Relief outcome would neither be unreasonable nor prejudicial:

> …I find that the Applicant has shown me little evidence he will suffer any concrete or lasting personal, financial or legal damage by having to apply again for permanent residence should the Minister subsequently grant relief from the inadmissibility under section 34(2) of IRPA (which was in force when the Applicant

> made his initial application for relief). I note that the Applicant is still a Convention Refugee in Canada so he cannot now be removed from this country to Pakistan and he has a valid work permit that is in force until the 25th of April 2015; in these circumstances I find that requiring the applicant to submit another application for permanent residence is not unreasonable nor is it prejudicial to the Applicant [Officer's Decision, AR, p 86].

[34] Therefore, the Officer properly exercised his discretion in deciding the PR application when he did. There is no evidence that he was improperly constrained by any policy directive. Rather, the evidence suggests that he considered the circumstances of this case and exercised his discretion according to those circumstances (*Yhap v Canada (Minister of Employment and Immigration)*, [1990] 1 FC 722 (TD)).

D. *Procedural Unfairness*

[35] The Applicant states that the Respondent's internal documentation which, when not made available to the Applicant prior to the Decision, resulted in a breach of his rights to a fair process. These undisclosed documents included OB 524, as well as a departmental email produced in the CTR which the Applicant received post-Decision.

[36] The Respondent disagrees, stating that the process was fair, that the Officer paid ample attention to the facts, and that there is no duty for CIC or the officer to share every internal document and email with an applicant. If that were the case, the disclosure process would become completely unmanageable, particularly for a file such as this, which has been active for over 15 years.

[37] I agree that the Officer had no duty to share the internal communications, whether internal emails or OB 524. The Officer provided the Applicant with an opportunity to provide submissions on the PR application, which the Applicant did. He then took those submissions into consideration, which was evident in the Decision. Sharing all emails would be unwieldy and there was no basis to share these internal communications. The policy guidance relied on did not prejudice the Applicant, and there is no obligation for the government to publish all such guidance.

VI. Certified Questions

[38] The Applicant proposed the following two questions for certification:

i. Does an immigration officer have the legal authority to decide an outstanding application for permanent residence while there is a pending application for Ministerial relief under former s. 34(2) or present s. 42.1 of the Act which has not yet been finally determined?

ii. Does an immigration officer, when deciding an application for permanent residence, have the jurisdiction and/or obligation under the Act, s. 21(2) to draw his or her own conclusions on admissibility of the applicant where there has been a prior finding of inadmissibility by the Immigration and Refugee Board and subsequent jurisprudence throws into question the legal validity of that finding?

[39] For question (i), nothing in law, policy or procedure requires the officer to await the Relief decision, and for question (ii), *Kanagendren* definitively pronounces on the law. The

questions are therefore neither determinative of this judicial review, nor do they transcend the interests of the parties to the litigation and contemplate issues of broad significance or general application (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para. 9).

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.
2. There are no questions for certification.
3. There is no award as to costs.
4. The style of cause shall be amended to initials only (NK) for confidentiality purposes, as agreed by both parties.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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