

Federal Court



Cour fédérale

Date: 20160503

Docket: IMM-2764-14

Citation: 2016 FC 490

Ottawa, Ontario, May 3, 2016

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

NOUR HUSIEN, KHAIAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Khaiar Nour Husien challenges a decision of an Immigration Officer [Officer] dated February 5, 2014 finding him inadmissible to Canada because of his membership in a terrorist organization, namely the Eritrean Liberation Front [ELF]. Mr. Husien asserts a breach of procedural fairness based on the Officer's failure to disclose a key document. He also argues that the decision was unreasonable because it took account of unreliable evidence concerning the historical activities of the ELF.

[2] The decision under review was preceded by the Officer's preliminary inadmissibility report drafted in June 2010. In that decision, the Officer quoted extensively from a Canada Border Services Agency [CBSA] Report from January 2007 describing in detail numerous instances of ELF terrorist activity between 1969 and 1991. Included in that narrative were indications that the ELF had engaged in several aircraft hijackings, kidnappings and attacks against civilians. The Officer's February 5, 2014 decision summarized the terrorism evidence in the following way:

Open source shows the ELF was involved in terrorist activities from its inception until about 1991. The organization was involved in armed conflict against the Ethiopian government and was engaged in many acts of terrorism which included, assassination of government agents, kidnappings, killings, destruction of bridges, derauling of trains and hijacking of aircrafts. They were involved in car bombings, some of which involved fatalities. They kidnapped foreign diplomats and sometimes threatened to kill hostages if their demands were not met.

I am satisfied that a pattern of attacking passenger airlines and endangering the lives of civilians are acts of terrorism. I am satisfied also that the kidnapping of businessmen and diplomats are acts of terrorism and so is the killing of a missionary nurse who was not a part of the struggle. I am further satisfied that kidnapping and holding foreign citizens hostage are acts of terrorism.

After assessing all the documentary evidence before me about the ELF, I am satisfied there are reasonable grounds to believe that the ELF has engaged in acts of terrorism.

[3] From the outset, Mr. Husien acknowledged his membership in the ELF. However, he described the ELF as a humanitarian liberation movement. He also maintained that his involvement with the ELF was strictly political and humanitarian. He denied any knowledge that the ELF had targeted civilians.

[4] The record discloses that Mr. Husien and his family attended an interview with Citizenship and Immigration Canada [CIC] on November 9, 2009. On April 23, 2010 Mr. Husien's legal counsel wrote to the CIC requesting information about the interview and seeking an update on the family's application for permanent residence. CIC responded on April 28, 2010 advising that a written decision was imminent.

[5] On April 30, 2010, the CIC wrote to Mr. Husien advising him of a concern that he could be inadmissible to Canada under subsection 34(1) of the *Immigration Refugee and Protection Act*, SC 2001, c 27 [IRPA] [the fairness letter]. As stated in the fairness letter, the Officer enclosed several references describing terrorist activities attributed to the ELF. Mr. Husien was asked to respond in writing by May 28, 2010. For reasons that are not explained in the record before me, Mr. Husien did not immediately disclose the fairness letter or the enclosures to his then legal counsel. Instead he took it upon himself to reply. His reply acknowledged the documents sent to him and it did not challenge the allegations that the ELF had engaged in terrorist activities. Instead, Mr. Husien denied any knowledge of ELF's terrorist activities. He also expressed his opposition to terrorism in any form.

[6] On June 18, 2010 the Officer drafted a report finding Mr. Husien inadmissible because of his admitted membership in the ELF. That report quoted extensively from the 2007 CBSA report, including the listing of 22 incidents of terrorist activity by the ELF, mostly targeting non-combatants.

[7] Shortly afterwards Mr. Husien's legal counsel sought to intervene on his behalf. Indeed, it appears from the record that he was, at this time, represented by two different counsel, namely Catherine Bruce and Lisa Wyndels. Ms. Wyndels wrote to the Officer on July 9, 2010 and Ms. Bruce wrote on the following day. Ms. Wyndels' letter of July 9, 2010 referred only to Mr. Husien's request for Ministerial Relief. Ms. Bruce's letter of July 10, 2010 acknowledged Mr. Husien's receipt of the CIC fairness letter of April 30, 2010 along with the enclosures describing the history of ELF terrorism. That letter expressed uncertainty about the status of CIC's admissibility assessment and requested an opportunity to intervene.

[8] The Officer responded to Ms. Bruce's letter granting her request for an extension of time to make submissions in support of Mr. Husien's outstanding claim for Ministerial Relief. The Officer's reply made no explicit reference to the status of CIC's admissibility assessment.

[9] It was not until late October 2010 that Ms. Bruce made substantive representations to the Officer. That submission addressed only Mr. Husien's claim to Ministerial Relief and was silent as to his admissibility status. Once again, Mr. Husien acknowledged his membership in the ELF and denied any knowledge of, or involvement with, terrorism.

[10] On November 2, 2010 the Officer wrote a report to her manager stating that an inadmissibility finding had been made against Mr. Husien on June 18, 2010. The Officer asked that Mr. Husien's claim for Ministerial Relief be processed.

[11] On October 2, 2013, the Officer drafted a decision on Mr. Husien's application for permanent residence and, relying on the June 2010 inadmissibility report, determined that his application should be refused. However, it was not until February 5, 2014 that the Officer informed Mr. Husien and Ms. Bruce that a finding of inadmissibility had been made against him and that his application for permanent residence had been refused. The stated rationale for the decision was the following:

Mr Nour Husien acknowledged in his application for permanent residence dated 21 February 2001 that he was a member of the ELF from 1980 to 1998. In another document he showed that he was a member of the ELF-RC from 1995 to 1998. His wife in her sworn declaration dated 31 March 2008 stated that her husband and his family were active members of the ELF and that her husband participated by collecting money, distributing pamphlets, transporting medicine, food and clothes to ELF members and that in 1981 his activities were discovered and he was detained. At his interview at Scarborough CIC he confirmed that he joined the ELF in 1984 and that prior to that time he was just a supporter. Based on this evidence as well as other information on file, I am satisfied that Mr Nour Husien was a member of the Eritrean Liberation Front from about 1980 to 1998.

[...]

After assessing all the documentary evidence before me about the ELF, I am satisfied there are reasonable grounds to believe that the ELF has engaged in acts of terrorism.

[12] It is noteworthy that, up to this point, Mr. Husien had not addressed, let alone contested, the Officer's stated belief that the ELF had engaged in terrorist acts. It is also of significance that Mr. Husien's legal counsel did not request that the inadmissibility assessment be reopened on the basis of a misunderstanding about the status of that process.

[13] It is against this general background that Mr. Husien asserts a breach of procedural fairness. In particular, he complains that the Officer acted unfairly by relying on the 2007 CBSA report without disclosing its contents to him: see paras 103 and 104 of the Applicant's Further Memorandum of Fact and Law. This issue is reviewable on the standard of correctness.

[14] I agree with counsel for Mr. Husien that, in some cases, fairness will require a decision-maker to disclose the content of extrinsic evidence to an interested party. This is well established in the authorities and in the Minister's own admissibility guidelines. The underlying concern is that meaningful participation in the decision-making process demands an awareness of the case to be met: see *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 at para 22, [2001] 3 FC 3 (FCA). The obligation will be met when the decision-maker sufficiently informs the interested party of the issues and evidence such that they can be addressed, contradicted, clarified or corrected: see *Nadarasa v Canada (Citizenship and Immigration)*, 2009 FC 1112 at para 25, 182 ACWS (3d) 161.

[15] Mr. Husien's complaint concerning the Officer's failure to disclose the 2007 CBSA report must be examined in the context of what Mr. Husien knew and what he did. He was made aware in 2010 of the Officer's concern about the reported terrorism history of the ELF and, at a fairly early point, his legal counsel was also aware of that concern. At least some of the relevant country condition documentation relied upon by the Officer was also identified to Mr. Husien in the fairness letter. At no time leading up to the inadmissibility finding in 2014 did Mr. Husien take issue with the Officer's 2010 characterization of the ELF as a terrorist organization.

[16] Although the undisclosed CBSA report was a key document supporting the Officer's ELF finding, Mr. Husien has no cause for complaint in the face of his indifference at the time.

Mr. Husien knew the Officer had a concern about the history of the ELF and he was given the opportunity to respond. He chose not to address that issue in his submissions and his counsel failed to seek to have the issue reassessed. It is not open to a party to ignore an issue properly raised by a decision-maker and then to complain about a lapse in procedural fairness because only some of the supporting evidence was produced: see *Khoshnavaz v Canada (Citizenship and Immigration)*, 2013 FC 1134 at paras 33 and 34, 235 ACWS (3d) 1068 and *Zhang v Canada (Citizenship and Immigration)*, 2015 FC 463 at para 15, 252 ACWS (3d) 778. Such conduct is a form of waiver. Accordingly, no breach of fairness has been made out.

[17] Notwithstanding Mr. Husien's indifference at the time, he now complains that the Officer relied on two unreliable reports in support of a finding that the ELF was a terrorist group. This argument is supported, in part, by evidence that was not put to the Officer. As I indicated during argument, this new evidence is not admissible on judicial review and I have ignored it.

[18] The only admissible evidence concerning the reliability issue is a report authored by Professor Dan Connell. The Connell report was apparently written in support of an unrelated asylum claim in the United States. The Connell report expresses reservations about the reliability of some of the reporting by the RAND Corporation and in the Global Terrorism Database. However it provides only a few examples of apparently mistaken attributions or dubious conclusions, leaving much of the evidence used by the Officer unchallenged. I can find

nothing in the Connell report that directly and unequivocally challenges the Officer's conclusion that the ELF had engaged in terrorism.

[19] It is important to recognize that the Officer's ELF finding was based on the lower standard of reasonable grounds to believe (i.e. less than a balance of probabilities). In my view, there was ample unchallenged evidence in the record to support the Officer's finding on this issue. The standard of review that applies to this issue is, of course, reasonableness. The Applicant's argument invites reweighing of the evidence, which is not the Court's role on judicial review.

[20] For the foregoing reasons, this application is dismissed.

[21] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: NOUR HUSIEN, KHAIAR v THE MINISTER OF
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