Federal Court  Cour fédérale

Date: 20170127

Docket: IMM-4720-15

Citation: 2017 FC 106

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 27, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

ISEN SINANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is challenging the decision by a visa officer at the Canadian embassy in Vienna, Austria (the Officer) to refuse to issue him a permanent resident visa as a member of the family class because there are reasonable grounds to believe that he is inadmissible to Canada on security grounds under section 34 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[2] The applicant argues that the Officer's decision must be set aside because it is unreasonable and the decision-making process breached the rules of procedural fairness. It should be noted from the outset that said decision was based largely on information that, for national security reasons, was not entirely disclosed to the applicant. However, it must also be noted that, in two orders rendered during the proceedings under interlocutory applications for which the applicant had the opportunity to present his position, the Court stated that it was satisfied that the essential parts of that information had nonetheless been disclosed to the applicant as part of the security screening and procedural fairness process related to his application for permanent residence and that, under the circumstances, the rules of natural justice did not require the appointment of a *special advocate* within the meaning of section 85 of the Act.

[3] Having considered the record as a whole, I am of the view, for the reasons that follow, that this application for judicial review should not be allowed.

I. Background

[4] The applicant is a citizen of Macedonia, where he lives with his parents. He was born a Muslim. Between 2003 and 2009, he travelled to Egypt and subsequently to Saudi Arabia to pursue religious studies in Arabic. In 2009, he returned to Egypt, this time for university studies on Islam. He left Egypt in May 2011.

[5] On November 5, 2012, the applicant married a Canadian citizen whom he had met a few months earlier and who was also born a Muslim. The marriage was performed in Macedonia. In

January 2013, sponsored by his new spouse, who lives in Canada, the applicant filed an application for permanent residence in the family class.

[6] It was established early in the processing of that application that the applicant met the regulatory requirements for membership in the family class. However, following the initial security screening regarding his admissibility to Canada, additional checks proved necessary, in cooperation with partner agencies, including the Canada Border Services Agency (CBSA).

[7] In August 2014, the applicant was called for an interview at the Canadian embassy in Austria. The interview concerned primarily his knowledge of the *Takfir* doctrine, an Islamic concept on the basis of which, according to the applicant's memorandum, citing *Almrei (Re)*, 2009 FC 1263, certain extremist Islamic groups justify acts of violence.

[8] In early June 2015, the CBSA sent Citizenship and Immigration Canada a classified report in which its *National Security Screening Division* stated that it was of the opinion that the applicant is inadmissible on security grounds within the meaning of paragraphs 34(1)(c), (d) and (e) of the Act, namely because it found that there are reasonable grounds to believe that, if he has the opportunity, the applicant [TRANSLATION] "will take part in activities that can be considered acts of 'terrorism,' whether in Canada or abroad" (Certified Tribunal Record, at page 215).

[9] That report was followed, on July 22, 2015, by a fairness letter in which the applicant was informed that the assessment of his permanent residence application raised two concerns. The first concern was having failed, contrary to the requirement in subsection 16(1) of the Act, to respond

truthfully to the interview questions regarding his reasons for leaving Egypt and Saudi Arabia and the fact that he stated that he did not know and had never met anyone who espoused the *Takfir* doctrine. In that regard, the letter states that the applicant had been vague and evasive about those topics while also showing an in-depth knowledge of the *Takfir* doctrine. The second concern was related to the applicant's security screening, which showed that there are reasonable grounds to believe that he was in contact, in Macedonia, Egypt and Saudi Arabia, [TRANSLATION] "with individuals who had committed or planned to commit terrorist acts and with individuals who had recruited or recruit young people to radicalize them to commit such acts" and that he is therefore inadmissible in Canada within the meaning of paragraphs 34(1)(c), (d) and (e) of the Act (Certified Tribunal Record, at page 222).

[10] That letter invited the applicant to respond to those concerns, which he did on August 11, 2015, by submitting a letter and documentation.

[11] On September 10, 2015, the Officer dismissed the applicant's permanent residence application (Certified Tribunal Record, at page 224). Essentially, that decision indicates the following:

> [TRANSLATION]
>
> On July 22, 2015, I sent you a letter indicating that you might not meet the requirements for immigration to Canada because I was not satisfied that you had truthfully answered all questions put to you and because I had reasonable grounds to believe that you are inadmissible under paragraphs 34(1)(c), (d) and (e) of the Act.
>
> I have carefully reviewed your response to that letter and the supporting documents that we received on August 11, 2015, but they did not address the elements mentioned in the letter dated July 22, 2015. I therefore remain satisfied that, on a balance of probabilities, you still have not truthfully answered all questions

> put to you, and I am satisfied that there are reasonable grounds to believe that you are inadmissible under paragraphs 34(1)(c), (d) and (e) of the Act.

[12] The Officer's entries in Citizenship and Immigration Canada's *Global Case Management System* (GCMS) provide us with more information on the reasons for his decision. In those entries, the Officer notes in particular that:

a. In general, the applicant did not provide a detailed and credible explanation of the reasons that led him to study religion in Egypt and Saudi Arabia;

b. In particular, although the documentary evidence that he presented in that regard shows that he legally resided and attended school in those two countries, it does not, however, establish that he was not involved in other activities there;

c. There is no indication that he did not have the time to take other courses or meet with other individuals in those countries;

d. There is no documentary evidence to show how he spent his time in 2006 and 2007;

e. The applicant did not demonstrate why he needed to return to Egypt in 2009 to pursue studies at an educational institution—Mishkah University—that only offered Islamic religion courses online;

f. The applicant did not address the reasons that led him to leave Egypt and Saudi Arabia in connection with the allegation that he had met individuals who promoted acts of terrorism and who radicalized youth to commit such acts; and

g. No evidence was submitted to show that the applicant associates or has associated with individuals subscribing to an opposing school of thought to *Takfir*, while it was not unreasonable to expect the applicant to be able to submit a letter of support from former classmates or professors confirming his espousal of a doctrine of peace.

II. Issues and standard of review

[13] The issue here is to determine whether, as the applicant alleges, the Officer's decision is unreasonable in light of all the evidence on record or whether it was made contrary to the rules of procedural fairness.

[14] It is settled law that, in this matter, the standard of review applicable to the merit of the Officer's decision is reasonableness (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraph 85, [2002] 1 SCR 3; *Karahroudi v Canada (Citizenship and Immigration)*, 2016 FC 522 at paragraph 29 [*Karahroudi*]), while the standard applicable to the issues related to procedural fairness is that of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43). The parties do not dispute this.

[15] Before undertaking an analysis of the issues, the legal framework of the applicant's permanent residence application and the manner in which it was processed should first be defined. After that, I will address the matter of procedural fairness, as counsel for the applicant focused on that issue at the hearing. I will end my analysis by examining the issue of the reasonableness of the Officer's decision.

III. Analysis

A. *Legal framework*

[16] Pursuant to section 11 of the Act, to be authorized to enter Canada, a foreign national must have a visa or any other document required by the regulations, issued by an immigration officer. That visa or document can be issued by the officer only if it is shown, following an examination, that the foreign national meets the requirements of the Act and is not inadmissible. In any examination, section 16 of the Act requires, in particular, that foreign nationals truthfully answer questions put to them and provide relevant documents and evidence.

[17] Section 34 of the Act sets forth the facts that constitute inadmissibility on security grounds. In this case, as we have seen, the applicant was inadmissible under paragraphs 34(1)(c), (d) and (e), which read as follows:

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 :
[…]	[…]
(c) engaging in terrorism;	c) se livrer au terrorisme;
(d) being a danger to the security of Canada;	d) constituer un danger pour la sécurité du Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	e) être l’auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d’autrui au Canada;

[18] Under section 33 of the Act, to result in inadmissibility, these facts must be assessed based on “reasonable grounds to believe that they have occurred, are occurring or may occur.” Thus, to trigger the application of section 34, the danger to the security of Canada does not need to be current; it is enough that it could occur (*Harkat v Canada (Citizenship and Immigration)*, 2012 FCA 122 at paragraph 152).

[19] It is now well established that, although the belief needed to trigger the application of section 34 must be based on more than mere suspicion, it does not necessarily need to be established on the balance of probabilities standard that applies in civil matters. To meet this common burden, the belief must be objectively based on compelling and credible information (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paragraph 114, [2005] 2 SCR 100; *Nagulathas v Canada (Citizenship and Immigration)*, 2012 FC 1159 at paragraph 27).

[20] Moreover, in the judicial review of a decision such as that rendered in this case, the respondent may apply to the Court, under section 87 of the Act, for non-disclosure of information if disclosure could jeopardize national security or endanger the safety of any person. To that end, the Court may, under section 87.1 of the Act and on the basis of considerations of fairness and natural justice, require that a *special advocate* be appointed, whose role, pursuant to subsection 85.1(1) of the Act, is to protect the interests of the foreign national in any proceedings *in camera* in the absence of the foreign national and his or her counsel in the review of the motion filed by the respondent.

B. *Procedural fairness*

[21] The applicant essentially submits that the Officer breached the rules of procedural fairness, as they applied to him under, in particular, the *Citizenship and Immigration Canada Overseas Processing Operational Manual* in three ways: (i) by failing to give him adequate notice of what would be discussed at his interview in August 2014, which was related primarily to his knowledge of Islam and the *Takfir* doctrine; (ii) by failing to disclose to him all the information that he had and on which his decision would be based, including extrinsic evidence; and (iii) by not giving sufficient reasons for his decision.

[22] These three grounds cannot succeed.

[23] The courts have consistently held that the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 21). In other words, it is up to the Court to determine whether the process that led to the impugned decision in a given case satisfies the degree of procedural protection required in the circumstances of the case.

[24] In that regard, the courts have also consistently held that the degree of procedural fairness required of a visa officer who must determine whether to grant a visa to a person who is outside Canada is at the lower end of the spectrum. In other words, it is minimal, even though the refusal to grant the visa may have significant implications for that person and his or her family. This is not only because the Act does not confer the right to obtain a visa and because the decision as to

whether or not to grant a visa remains highly discretionary, but also because, in such cases, the visa applicant, contrary to a foreign national who is in Canada and is inadmissible, does not risk being held in detention or being removed to a country where his or her life, liberty or safety is at risk (*Chiau v Canada (Minister of Citizenship and Immigration)* (2000), [2001] 2 FC 297 at paragraph 54, [2000] FCJ No. 2043 (QL) (CA) [*Chiau*]; *Canada (Minister of Citizenship and Immigration) v Khan*, 2001 FCA 345 at paragraph 30, [2002] 2 FC 413 [*Khan*]; *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at paragraph 46, [2005] 2 SCR 539 [*Medovarski*]; *Fouad v Canada (Citizenship and Immigration)*, 2012 FC 460 at paragraph 14 [*Fouad*]).

[25] It will therefore be sufficient, for the rules of procedural fairness to be respected, for visa officers to provide visa applicants with the information on which they plan to base their decision, so that applicants can present their version of the facts and correct any errors or misunderstandings (*Maghraoui v Canada (Citizenship and Immigration)*, 2013 FC 883 at paragraph 22 [*Maghraoui*]; *Karahroudi* at paragraph 33). In my view, that obligation has been met in the circumstances of this case.

[26] Regarding the interview held in August 2014, it is true that the call-in letter did not state the nature of the concerns that Canadian authorities had about him beyond the general statement that, following an in-depth examination of his permanent residence application, it was determined that he should undergo an interview to determine whether he is admissible to Canada and meets the requirements of the Act (Applicant’s record, at pages 49–50). Nevertheless, the evidence shows that those concerns were discussed during the interview, that they were

subsequently clarified and that they were set out as comprehensively as possible in the fairness letter dated July 22, 2015, a letter to which the applicant, I reiterate, was given the opportunity to respond, which he did in detail in August 2015.

[27] Considering all the circumstances, as is required, I do not see any breach of the rules of procedural fairness in this regard.

[28] As for the content of what was disclosed to the applicant, it is well established that national security considerations can limit the extent of disclosure of evidence to a litigant (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paragraph 58, [2007] 1 SCR 350 [*Charkaoui*]. In that sense, there is no absolute right to disclosure of all evidence.

[29] There will thus be cases where documents on which the decision-maker relied will be protected under the national security privilege and where the duty of fairness will be satisfied without the full content of those documents having been disclosed (*Maghraoui* at paragraph 22; *Karahroudi* at paragraph 34). In *Maghraoui* more specifically, Justice Yves de Montigny, as he then was, noted the constraints on the visa officer in such a context as follows:

> [27] . . . The officer was not required to give the CSIS reports to the applicant. The Supreme Court of Canada has recognized on a number of occasions that national security considerations may limit the scope of the disclosure of information to an individual: *Ruby v Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 SCR 3; *Suresh*, above; *Charkaoui*, above. Moreover, there is no similar mechanism to the one provided in sections 86 and 87 before the [Immigration and Refugee Board] and the Federal Court enabling the Minister to bring a motion for non-disclosure in an administrative proceeding. It is not at all certain that an officer of the Minister can, without statutory authorization, redact on his or her own initiative and without any framework, information whose

> disclosure could, in the officer's opinion, be injurious to national security or the safety of any person. . . .

[30] Therefore, nothing authorized the Officer to disclose to the applicant the entirety of the security assessment reports based on which he made his findings under section 34 of the Act. With respect to procedural fairness, it was enough for him to disclose sufficient information to give the applicant the opportunity to know and respond to the case against him (*Nadarasa v Canada (Citizenship and Immigration)*, 2009 FC 1112 at paragraph 25 [*Nadarasa*]).

[31] In that regard, in her order allowing the motion filed by the respondent under section 87 of the Act, my colleague Justice Martine St-Louis stated that she was satisfied that the "essence" of the information identified in the motion [TRANSLATION] "was already disclosed to the applicant as part of the security screening and procedural fairness process associated with his permanent residence application" (Order by St-Louis J., July 26, 2016). Having reviewed all of the evidence on record, including the information for which disclosure was prohibited under that order, I am also of the view, like St-Louis J., that the essence of that information was communicated to the applicant and that he could thus "know [the information] and respond to the case against him" (*Nadarasa* at paragraph 25).

[32] It is important to add that St-Louis J., in a previous order, also stated that she was of the view that there are no fairness and natural justice considerations in this case to warrant the appointment of a *special advocate* to protect the applicant's interests during the *in camera* and *ex parte* review of the motion filed by the respondent under section 87 of the Act (Order by

St-Louis J., July 26, 2016). That decision, which was discretionary in nature, was not disputed by the applicant.

[33] In short, I am of the view that, although certain information was not disclosed to him as a result of national security requirements, the applicant's permanent residence application was nevertheless processed and determined by the Officer in full compliance with the rules of procedural fairness.

[34] Lastly, the applicant argues that the Officer's decision breached procedural fairness on the grounds that the Officer did not provide sufficient reasons to allow him to understand why his permanent residence application was denied. However, the argument of inadequacy of reasons, as opposed to that of the absence of reasons in circumstances where they are required, does not concern procedural fairness, but rather, the reasonableness of an administrative decision-maker's decision, and particularly the justification, transparency and intelligibility of the decision-making process (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 22, [2011] 3 SCR 708 [*Newfoundland Nurses*]). Presented from the angle of procedural fairness, the applicant's argument therefore cannot be accepted.

[35] As we will see, it also cannot be accepted in an analysis of the reasonableness of the Officer's decision.

C. *The reasonableness of the Officer's decision*

[36] It is now well established that inadequacy of reasons is not a stand-alone basis for finding that an administrative decision-maker's decision is unreasonable (*Newfoundland Nurses* at paragraph 14). Thus, the Court must avoid adopting an overly formalistic approach and requiring perfection from the administrative decision-maker. Some restraint is required in that regard. In other words, the fact that the reasons for the decision under review do not refer to all the arguments, statutory provisions, jurisprudence or other details the Court would have preferred is insufficient to impugn the validity of said reasons or the result of the decision (*Newfoundland Nurses* at paragraph 16).

[37] The adequacy of the reasons for the impugned decision must instead be assessed in correlation with the result in the overall context of the evidence on record, the arguments submitted by the parties and the applicable process. Thus, while it cannot substitute its own reasons for those of the decision under review, the Court may, before finding that the reasons are inadequate, examine the entire record in order to assess the reasonableness of the result and thereby determine whether the reasons adequately explain the basis for the decision (*Newfoundland Nurses* at paragraph 18; *Karahroudi* at paragraph 40; *De Silva v Canada (Citizenship and Immigration)*, 2014 FC 790 at paragraphs 40–41).

[38] In this case, we could always say that the reasons for the Officer's decision could have been more explicit, but when they are considered in light of the entire record, including the Officer's entries in the GCMS, I am satisfied, on the basis of the teachings in *Newfoundland*

Nurses, that they reflect the essence of the concerns that underlie said decision and that they thus contribute to its reasonableness. Simply put, said reasons, as I understand them, indicate that the applicant did not satisfy the Officer, as was his burden, that he is not inadmissible as a result of his reluctance about important facts revealed by the security screening that was performed as part of the processing of his permanent residence application. I consider that justification to be adequate in the circumstances of this case.

[39] Essentially, the applicant is arguing that the Officer's decision is based solely on suspicions and cultural and ethnic stereotypes. Considering the evidence on record, including what was not disclosed for national security reasons, I am satisfied that the Officer's concerns were not based on simple conjecture or on even any stereotype, but were founded on objective evidence that, on the basis of an analysis under the reasonableness standard, justifies the Officer's findings.

[40] In that regard, I reiterate that when the Court is called upon to determine the reasonableness of a decision by an administrative decision-maker, its role is not to substitute its own assessment of the evidence and the questions of mixed fact and law that underlie the decision under review for that of the decision-maker. This role is more limited, in that the Court, given the administrative decision-maker's expertise in the matters that he or she is accustomed to handling, will generally intervene only if the impugned decision does not have the qualities of justification, transparency and intelligibility or even if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190).

[41] I reiterate that, in this case, the Officer found that the applicant generally had not provided detailed and credible explanations regarding, in particular, (i) what drove him to study religion in Egypt and Saudi Arabia, to leave both of those countries and to return to Egypt to continue with his religious studies at an institution that in fact offers its courses online; (ii) how he spent his time when he was in those two countries; and (iii) the encounters he might have had there, as well as in Macedonia, with individuals who advocate committing acts of terrorism and radicalize youth in order to encourage them to commit such acts.

[42] In light of all the evidence on record, I am of the opinion that it was open to the Officer to find as he did. In other words, the Officer's finding that he is satisfied that there are reasonable grounds to believe that the applicant is inadmissible under paragraphs 34(1)(c), (d) and (e) of the Act, when it is examined in light of the entire record, including the evidence protected by the national security privilege, in my view, has the attributes of justification, transparency and intelligibility and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[43] As part of this judicial review, the applicant clearly tried to refine his evidence in some respects, particularly by submitting academic transcripts and a residency permit from the Saudi institution that he attended. However, the Court cannot consider that evidence, since it was not before the Officer, who, as a result, was unable to verify its authenticity, accuracy or probative value. As the respondent highlights, the judicial review of the reasonableness of an administrative decision-maker's decision must, aside from exceptions that do not apply in this case and that, moreover, are not cited, always be performed in light of the evidence that was

before that decision-maker at the time the decision was made, because it is up to the decision-maker, and not the Court, to rule on the facts (*Runchey v Canada (Attorney General)*, 2013 FCA 16 at paragraph 31).

[44] The application for judicial review will therefore be dismissed.

[45] In light of the outcome of said application, the applicant is asking the Court to certify the following two questions for the Federal Court of Appeal:

a) Did the immigration officer breach procedural fairness by not giving an applicant for a Canadian permanent resident visa the opportunity to explain himself regarding information contained in secret reports?

b) Is an applicant for a Canadian permanent resident visa entitled to receive maximum procedural fairness when his family resides in Canada during the processing of his application at a Canadian visa office abroad?

[46] A question may be certified when it is serious and of general importance and transcends the interests of the parties to the litigation while allowing the appeal to be resolved (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at paragraph 11; *Canada (Minister of Citizenship and Immigration) v Liyanagamage* (1994), 176 NR 4 at paragraph 4, [1994] FCJ No. 1637 (QL) (CA)).

[47] Both of the applicant's questions are of course important to him, but I am not satisfied that they are serious questions of general importance or that they would allow the appeal to be resolved.

[48] With regard to the first question, as we have seen, it has long been held that there is no absolute right to disclosure of all evidence and that national security considerations can limit the extent of the disclosure (*Charkaoui* at paragraph 58). Nevertheless, in the current state of the law, as we have also seen, the rules of procedural fairness require that litigants be made aware, to the extent possible, of the essence of the concerns stemming from reports that contain secret information so that they may know and respond to the case against them. In that regard, it can be said that permanent resident visa applicants are offered, as part of the current system, the opportunity to respond to information contained in secret reports.

[49] In this case, the applicant was made aware of the essence of the information in the reports that were not disclosed to him in their entirety, and he availed himself of the opportunity to provide his version of the facts. Therefore, under the circumstances, I do not consider the first question proposed for certification to be either of general importance or likely to resolve the appeal.

[50] As for the second question, it has also long been held that the degree of procedural fairness that is required of a visa officer who must determine whether to grant a visa to a person who is outside Canada is minimal, since even though a refusal to grant the visa may have significant repercussions for that person and his or her family, contrary to the situation of a foreign national who is in Canada and is inadmissible, it does not raise issues related to the right to life, liberty and security of the person, which require a high level of procedural fairness (*Chiau* at paragraph 54; *Khan* at paragraph 30; *Medovarski* at paragraph 46).

[51] Once again, the state of the law seems to be set and, even with a generous reading, it does not entitle applicants for a Canadian permanent resident visa to “maximum” procedural fairness when their family resides in Canada during the processing of their application at a Canadian visa office abroad.

[52] Therefore, no questions will be certified.

[53] In closing, I must note that counsel for the applicant argued this case in the unenviable position of not having access to all the information on file. Under the circumstances, the applicant could ask no more of his counsel.

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. There is no question to be certified.

"René LeBlanc"
Judge

Certified true translation
This 6th day of February 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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