Federal Court  Cour fédérale

Date: 20170419

Docket: IMM-2434-16

Citation: 2017 FC 379

Ottawa, Ontario, April 19, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

HESHMATOLLAH AZIZIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Heshmatollah Azizian, is a 74 year old citizen of Iran who, in 2009, applied for permanent residence as an investor under the Quebec Investor Program. His application was refused, however, by an officer [the Officer] in the Immigration Section of the Embassy of Canada in Ankara, Turkey, who determined in a letter dated April 12, 2016, that the Applicant did not meet the requirements for a permanent resident visa because of his health condition and his former employment with the Central Bank of Iran. The Applicant has now

applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the Officer's decision.

I. Background

[2] In connection with his application to the Quebec Investor Program, the Applicant was interviewed in October 2009 by an officer at the Canadian Embassy in Ankara, and later that year he was selected into the Program. In March 2013, the Applicant underwent a medical examination for purposes of his application; more than a year later, an immigration officer informed the Applicant by letter dated August 12, 2014, that he might be inadmissible to Canada on medical grounds because he had been diagnosed with Malignant Neoplasm of the Pancreas. The letter noted that the tumour in the Applicant's pancreas had been surgically removed and that he would require "close multi-disciplinary specialist team care, outpatient treatment in tertiary healthcare facilities, hospital admissions to manage his condition, chemotherapy/ radiotherapy and/or medical treatment as appropriate." The letter further noted that the Applicant might be inadmissible for permanent resident status under paragraph 38(1) (c) of the *IRPA* because his health condition might reasonably be expected to cause excessive demand on health or social services, since the estimated cost for health related services would be $36,877 per year, an amount which exceeded the average per capita cost of $6,327 annually. The officer afforded the Applicant 60 days to submit additional information or documents to respond to the officer's concerns.

[3] Shortly after the officer sent the letter of August 12, 2014, the Canada Border Services Agency provided to the Canadian Embassy in Ankara an inadmissibility assessment concerning

the Applicant dated September 5, 2014. CBSA noted in the assessment report that the Applicant had been employed with the Central Bank of Iran [CBI] from 1966 to 2006 and promoted to various senior positions during the course of his career with the CBI. The CBSA report explained that the CBI is believed to be providing financial contribution to Iran's proliferation-sensitive nuclear activities as well as financing terrorist organizations such as Hamas and Hezbollah. The CBSA concluded that there were reasonable grounds to believe that the Applicant had not only engaged in terrorism and was inadmissible pursuant to paragraph 34(1) (c) of the *IRPA*, but also assisted Iran's weapons development and proliferation efforts and was inadmissible to Canada pursuant to paragraph 34(1) (d) of the *IRPA*. The Applicant did not receive disclosure of the CBSA report prior to the commencement of this application for judicial review.

[4] On October 8, 2014, an officer provided the Applicant with another letter which stated that the Applicant might be inadmissible on security grounds pursuant to paragraphs 34(1) (c) and 34(1) (d) of the *IRPA* in view of his employment and senior positions with the CBI. The letter stated: "Numerous credible open source reports indicate that the CBI is believed to be providing financial support to known terrorist organizations, which in turn have been responsible for the killings of countless civilians and the mass destruction of civilian property." The letter further stated that: "we have reasonable grounds to believe that you had significant knowledge of and contribution to the CBI's activities related to terrorist financing, and that you are inadmissible to Canada pursuant to paragraph 34(1)(c) of the *IRPA*." The letter went on to state: that the CBI is "believed to be involved in the nuclear missile weapons programs and is suspected of providing transactions contributing to proliferation sensitive nuclear activities, or to the development of nuclear weapon delivery systems "; that the CBI was designated as a "listed

entity" by the United States Department of Treasury and the European Union; and that the proliferation activities and expansion of Iran's nuclear plans "constitute a significant risk to Canada." The letter concluded by stating that: "we have reasonably [*sic*] grounds to believe that you are also inadmissible to Canada pursuant to paragraph 34(1) (d) of the *IRPA* for your involvement in the CBI's proliferation and weapons development activities." The officer afforded the Applicant 60 days to submit any information that would allay the officer's concerns.

[5] The Applicant's counsel provided submissions to the visa office in December 2014 with respect to his health condition, explaining that the initial medical examination occurred around the time the Applicant's tumour was removed and that subsequent testing indicated that his cancer was in complete remission. The Applicant provided a medical report from his oncologist who concluded that the Applicant "is currently in complete remission and does not require any further therapies (radio-chemo). Because of stage of disease the prognosis is good and the recurrence rate is low." The Applicant's counsel submitted that, in view of this prognosis, the Applicant did not need to undergo the medical procedures listed in the letter of August 12, 2014, and therefore he was no longer medically inadmissible. The Applicant's counsel further submitted, in the alternative, that the Applicant's ability to pay for private chemotherapy treatment in Quebec was relevant to the assessment of excessive demand.

[6] In a letter dated May 6, 2015, the Applicant's counsel responded to the concerns that the Applicant was inadmissible on security grounds, noting that the officer had failed to identify the "numerous credible open source reports" in the letter of October 8, 2014, and that a subsequent privacy request revealed no open source reports in the Applicant's file. The Applicant provided

with his submissions all potentially relevant and available reports and specifically requested that any other reports which he had not included be identified. The Applicant denied any involvement in terrorist activities and stated it was impossible to reply in a meaningful and informed way to the officer's concerns because neither the terrorist organizations nor the terrorist acts had been identified. The Applicant noted that he was unable to find any open source reports indicating that the CBI funded acts of terrorism, and submitted in the alternative that if the CBI was involved in such activities, there was no evidence that he had been involved in any activity within the CBI which made him complicit under paragraph 34(1) (c) of the *IRPA*. The Applicant rejected the notion that he was a danger to the security of Canada and inadmissible under paragraph 34(1) (d), arguing that inadmissibility under this paragraph required tangible and identifiable evidence that he was either a present or future danger to Canada, and that since he had ceased his employment with the CBI in 2006 he could not be a present or future danger to Canada. The Applicant submitted that there was no evidence he had been either directly involved or complicit in any activities that endanger the security of Canada, or involved in transactions contributing to the proliferation of sensitive nuclear activities or the expansion of Iran's nuclear program.

II. The Officer's Decision

[7] In a letter dated April 12, 2016, the Officer refused the Applicant's application for a permanent resident visa because he was inadmissible on health grounds and on security grounds. The Officer stated that the Applicant's health condition might reasonably be expected to cause excessive demand on health or social services, thus making him inadmissible pursuant to paragraph 38(1) (c) of the *IRPA*. The Officer further stated that there were reasonable grounds to believe that the Applicant was a member of the inadmissible class of persons described in

paragraph 34(1) (d) of the *IRPA*, thus making him inadmissible on security grounds. The Officer acknowledged that the Applicant's responses to the two procedural fairness letters had been considered, but his responses did not change the final assessment of his health condition or alleviate the concerns arising under paragraph 34(1) (d) of the *IRPA*. The Officer's letter did not contain any inadmissibility findings pursuant to paragraph 34(1) (c) of the *IRPA*, despite the fact that concerns in this regard had been raised in the letter of October 8, 2014.

[8] The Global Case Management System [GCMS] notes provide further detail as to why the Applicant was found to be inadmissible under paragraph 38(1) (c) of the *IRPA*. The Officer noted that, although a medical officer had reviewed the Applicant's submissions, they did not modify the initial medical assessment which indicated that the Applicant's cancer was at stage IIA and not stage I as indicated by the Applicant. The Officer agreed with the medical officer's previous calculation of the estimated health costs and also noted that the costs might be significantly higher if the cost of palliative care was included.

[9] The Officer's GCMS notes also explain the rationale for the inadmissibility finding under paragraph 34(1) (d) of the *IRPA*. The Officer noted that there was credible, publicly available information that the CBI is involved in terrorism financing and weapons of mass destruction proliferation activities, and cited documents from the United States Treasury which state that the CBI was sending money to the Hezbollah terrorist organization and had asked other financial institutions to conceal its involvement in missile procurement, nuclear programs, and terrorist financing. The Officer further noted that the CBI had been listed as an entity of concern for weapons of mass destruction, nuclear proliferation, and activities circumventing international

sanctions imposed by the European Union, the United Nations, and the United States. The Officer acknowledged that the CBI did serve some legitimate functions, but also noted that the evidence shows its involvement in the proliferation of weapons of mass destruction and the financing of terrorism. The Officer did not believe that the Applicant had never heard of these concerns during his 40 year tenure at the CBI, particularly in view of his senior positions. The Officer also found it was not credible that the Applicant would not have been involved in decisions about policy and the allocation of funds, since he had served as the Secretary General of the CBI and been involved in the development and supervision of the implementation of by-laws and guidelines for the Iranian banking system. The Officer stated that Iran's weapons development threatens Canada's security and individuals who are or have been linked directly or indirectly to nuclear proliferation may be found inadmissible under paragraph 34(1) (d). The Officer concluded his GCMS notes by writing:

> Based on the PA's positions, including the positions of Secretary General of the Bank, the length of his career at CBI, which implies some level of responsibility and knowledge, I have reasonable grounds to believe the PA was involved in the entity's proliferation and weapons development activities; therefore, the PA represents a danger to Canada's security. For this reason, I have reasonable grounds to believe that he is inadmissible under A 34(1) d).

III. Additional Affidavits

[10] The parties have filed various affidavits in addition to the Officer's decision which require the Court's attention. The Respondent has filed an affidavit from Dr. Rene LaMontagne, the medical officer who assessed the Applicant's medical condition and associated treatment costs. The Applicant has filed two affidavits: one from Ronald Poulton, the Applicant's former counsel who responded to the two procedural fairness letters; and the other from Bahar Azizian,

the Applicant's daughter who is a permanent resident of Canada and has been involved in retaining and instructing the Applicant's legal counsel.

[11] The Applicant submits that Dr. LaMontagne's affidavit is an improper attempt to supplement and correct his reasons as to why the Applicant was found to be inadmissible on medical grounds, by adding evidence and justifications which did not previously exist in the record. The Respondent objects to Ms. Azizian's affidavit on the basis that it articulates legal arguments and significant portions of it are based on hearsay.

[12] As a general rule, the record for judicial review is usually limited to that which was before the decision-maker; otherwise, an application for judicial review would risk being transformed into a trial on the merits, when a judicial review is actually about assessing whether the administrative action was lawful (see: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 14-20, 428 NR 297, cited in *Gaudet v Canada (Attorney General)*, 2013 FCA 254 at para 4, [2013] FCJ No 1189; also see: *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-28, 261 ACWS (3d) 441).

[13] There are a few recognized exceptions to the general rule against the Court receiving evidence which was not before the decision-maker in an application for judicial review. One exception involves situations where affidavits are sometimes necessary to bring the Court's attention to procedural defects that cannot be found in the evidentiary record of the

administrative decision-maker, so that the court can fulfil its role of reviewing for procedural fairness.

[14] In my view, the only affidavit which warrants acceptance and review by the Court in this case is that of Mr. Poulton because it addresses the absence of a handwritten medical letter from both the application record and the certified tribunal record. This letter is dated June 17, 2014, and indicates that the Applicant's pancreatic cancer was at the stage IIA level. The Applicant's former counsel obtained a copy of this letter in response to a request under the *Access to Information Act*, RSC, 1985, c A-1.

IV. Issues

[15] This application for judicial review raises several issues which may be stated as follows:

1. What is the appropriate standard of review?
2. Did the Officer breach the duty of procedural fairness by not disclosing Dr. LaMontagne's medical report?
3. Was the Officer's inadmissibility finding under paragraph 38(1) (c) of the *IRPA* unreasonable?
4. Did the Officer breach the duty of procedural fairness by not disclosing the CBSA inadmissibility assessment and the open source documents?
5. Did the Officer breach the duty of procedural fairness by making an adverse credibility finding without convoking an interview?
6. Was the Officer's inadmissibility finding under paragraph 34(1) (d) of the *IRPA* unreasonable?

V. Analysis

A. *Standard of Review*

[16] The Officer's determination as to the Applicant's medical inadmissibility is to be reviewed under the reasonableness standard (*Vazirizadeh v Canada (Citizenship and Immigration)*, 2009 FC 807 at para 15, 179 ACWS (3d) 909; *Iqbal v Canada (Citizenship and Immigration)*, 2011 FC 1167 at para 16, [2011] FCJ No 1879). When assessing an applicant's medical inadmissibility, an immigration officer has an obligation "to assess the reasonableness of the medical officer's opinion" (*Sapru v Canada (Citizenship and Immigration)*, 2011 FCA 35 at para 48, [2012] 4 FCR 3 [*Sapru*]). Similarly, the standard of review in respect of the Officer's decision that the Applicant was inadmissible on security grounds for being a danger to the security of Canada is a question of mixed fact and law to be reviewed on the reasonableness standard (*S N v Canada (Citizenship and Immigration)*, 2016 FC 821 at para 28, [2016] FCJ No 810 [*S N*]; *Alijani v Canada (Citizenship and Immigration)*, 2016 FC 327 at para 16, [2016] FCJ No 297).

[17] The Court should not intervene, therefore, if the Officer's decision is justifiable, transparent, and intelligible, and it must determine "whether the decision falls 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 para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*,

2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61, [2009] 1 SCR 339 [*Khosa*].

[18] As to the standard of review for questions of procedural fairness, it is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Khosa* at para 43). Under the correctness standard, a reviewing court shows no deference to the decision-maker's reasoning process and the court will substitute its own view and provide the correct answer if it disagrees with the decision-maker's determination (see *Dunsmuir* at para 50). Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). When applying a correctness standard of review, it is not only a question of whether the decision under review is correct, but also a question of whether the process followed in making the decision was fair (see: *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14, 238 ACWS (3d) 199; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 249 ACWS (3d) 112).

[19] It warrants note that the content of the duty of procedural fairness is typically "at the low end of the spectrum" in the context of visa applications made by individuals outside of Canada because "the interests at stake in such cases are less serious" (*Khan v Canada (Minister of*

Citizenship and Immigration), 2001 FCA 345 at paras 30-32, [2002] 2 FCR 413 [*Khan*]; *Fouad v Canada (Citizenship and Immigration)*, 2012 FC 460 at para 14, [2012] FCJ No 768).

B. *Did the Officer breach the duty of procedural fairness by not disclosing Dr. Montagne's medical report?*

[20] The Applicant argues that the Officer breached the duty of procedural fairness by failing to disclose Dr. LaMontagne's medical assessment which indicated that the Applicant's pancreatic cancer was at the stage IIA level. The Applicant contends that Dr. LaMontagne's medical assessment constitutes extrinsic evidence that he should have been able to assess and address. The Officer never provided the Applicant with Dr. LaMontagne's opinion that his cancer was at stage IIA and, according to the Applicant, fairness dictated that he should have had an opportunity to respond to that diagnosis. The Applicant further argues that the procedural fairness letter provided by the Officer failed to mention the fact that the Applicant has stage IIA pancreatic cancer, and refers to *Firouz-Abadi v Canada (Citizenship and Immigration)*, 2011 FC 835 at para 20, [2013] 2 FCR 31, where this Court noted that a procedural fairness letter "must clearly set out all of the relevant concerns so that an applicant knows the case to be met and has a true opportunity to meaningfully respond to all of the visa officer's concerns."

[21] The Respondent maintains that the Officer was not required to provide a copy of the medical officer's assessment to the Applicant. The Respondent says that the Applicant has not provided any jurisprudence to support its position because none exists. According to the Respondent, imposing an obligation to provide a copy of the medical officer's assessment would create a never-ending process where the Applicant would respond to the materials with new

medical reports, and the Officer (who is not medically trained) would have to refer these new medical reports to the medical officer for a subsequent opinion, which would then have to be sent back to the Applicant.

[22] The jurisprudence suggests that, while an immigration officer is not required to disclose the medical officer's full medical report and assessment, an officer is nonetheless obligated to fully inform the Applicant of the medical diagnosis, prognosis, and expected health care services in order to enable the Applicant to respond in a meaningful manner. In *Khan*, the Federal Court of Appeal stated that: "If a visa applicant is informed of the medical diagnosis, prognosis, and the services likely to be required, and is advised that, in view of the medical condition, admission would impose excessive demands on medical or social services, fairness does not normally require further disclosure, at least where additional information is not requested" (para 37). Similarly, in *Oliveira v Canada (Citizenship and Immigration)*, 2002 FCT 1283 at para 11, 226 FTR 302, this Court stated that an officer's procedural fairness letter must: "clearly advise an applicant of the medical diagnosis and prognosis, and of the services likely to be required. The Minister is not normally obliged to disclose in the fairness letter the detail supporting the conclusion as long as the applicant effectively knows the grounds for the potential refusal and has the knowledge necessary to pursue the matter further." In *Sapru*, the Federal Court of Appeal stated that a procedural fairness letter in the context of assessing medical admissibility under the *IRPA* and the *Immigration and Refugee Protection Regulations*, SOR/2002-227, must be one "that clearly sets out all of the relevant concerns and provides a true opportunity to meaningfully respond to all of the concerns of the medical officer" (para 64).

[23] In view of the foregoing jurisprudence, and because the duty of procedural fairness falls at the lower end of the spectrum in the context of applications for permanent residence made by individuals outside of Canada, the Officer in this case was not required to produce and disclose the medical officer's assessment and report. The Officer was required, however, to clearly advise and inform the Applicant in the procedural fairness letter as to the medical diagnosis and prognosis, and of the services likely to be required in order to enable the Applicant to meaningfully respond to the Officer's concerns.

[24] In this case, although the Officer's procedural fairness letter noted the Applicant's diagnosis of pancreatic cancer and quoted extensively from the medical officer's opinion, the letter made no mention whatsoever of the fact the Applicant's cancer was at the stage IIA level. This was a material and significant fact to the Officer's determination, which was absent from the procedural fairness letter. In my view, this was not fair because the absence of any mention as to the stage to which the Applicant's pancreatic cancer had progressed meant that he was not made fully or completely aware of the specific medical diagnosis he had to address and displace. The Officer's determination that the Applicant was medically inadmissible under paragraph 38(1) (c) of the *IRPA* cannot stand and must be set aside.

C. *Was the Officer's inadmissibility finding under paragraph 38(1) (c) of the IRPA unreasonable?*

[25] In view of my determination that the Applicant was treated unfairly by not being made aware of the specific medical diagnosis he had to address, little needs to be said to dispose of this issue. A decision which is the product of an unfair process cannot be justified and, consequently,

the Officer's determination that the Applicant was medically inadmissible under paragraph 38(1) (c) of the *IRPA* was unreasonable.

D. *Did the Officer breach the duty of procedural fairness by not disclosing the CBSA inadmissibility assessment and the open source documents?*

[26] The Applicant argues that the Officer breached the duty of procedural fairness by failing to disclose CBSA's inadmissibility assessment and various open source documents. According to the Applicant, although the Officer's procedural fairness letter noted that "numerous credible open source reports" indicate the CBI's financial support to terrorist organizations and its involvement in nuclear weapons, the reports were not disclosed to the Applicant despite his request to the visa office for them. The Applicant characterizes the CBSA report as an "instrument of advocacy" that should have been disclosed, and its non-disclosure prevented the Applicant from addressing several errors in the report, such as the definitions of "engaging in terrorism", "complicity", and "danger to the public", which are inconsistent with the jurisprudence.

[27] The Respondent submits that the content of the duty of procedural fairness owed to the Applicant was low because inadmissibility determinations give rise to a lesser duty of fairness when they involve the refusal of a visa to a person outside Canada. According to the Respondent, although the Officer was not required to disclose the publically-available open source documents, the Officer clearly set out the allegations against the CBI involving nuclear weapons proliferation and the sources of those concerns, namely the United States Department of Treasury and the European Union. The Respondent argues that the Officer met the duty of

procedural fairness by relaying the specific concerns about the Applicant's inadmissibility and providing the Applicant with sufficient information to know and respond to the inadmissibility concerns. The Respondent also argues that the Officer was not required to disclose the CBSA inadmissibility assessment because the information contained within the report was disclosed through the procedural fairness letter of October 8, 2014.

[28] I agree with the Respondent that the Officer was not required to disclose the CBSA report itself. Comparing the CBSA report and the Officer's procedural fairness letter reveals that the Officer disclosed all of the pertinent facts to the Applicant concerning the allegations which underpinned the inadmissibility concerns. As noted in *S N*, what is important is: "that the information contained in the CBSA report is communicated to the applicant… the document itself does not need to be tendered" (at para 27). Similarly, in *Fallah v Canada (Citizenship and Immigration)*, 2015 FC 1094 at para 9, [2015] FCJ No 1106, the Court found that the duty of procedural fairness did not require a visa officer to disclose a CBSA inadmissibility assessment because the procedural fairness letter outlined that it was the applicant's senior employment relationship with "an internationally sanctioned entity that …was the potential basis for a refusal decision." So too in this case. The Applicant was well aware of the allegations and the Officer was not required to further disclose the CBSA report.

[29] I am not convinced that, in the circumstances of this case, the Officer was required to disclose the open-source documents that supported the inadmissibility decision. The basic rule in this regard was set out by the Federal Court of Appeal in *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 565, [1998] 3 FC 461, (CA); there is no

requirement to disclose published documentary sources of information before the decision is made. An officer's reliance upon information gleaned from websites has been found to be fair and not an improper resort to extrinsic evidence in several decisions of this Court (see e.g.: *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 at para 58, 472 FTR 285; *Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 at paras 39-40, 164 ACWS (3d) 667; *De Vazquez v Canada (Citizenship and Immigration)*, 2014 FC 530 at paras 27-28, 456 FTR 124; *Pizarro Gutierrez v Canada (Citizenship and Immigration)*, 2013 FC 623 at para 46, 434 FTR 69).

[30] The Officer relied on two websites as noted in the GCMS notes, which were also cited in the CBSA report: the United States Department of Treasury website and an online Wall Street Journal article. The Applicant knew the allegations against him. He was not denied procedural fairness by the Officer's non-disclosure of the information garnered from these websites. Although the Court's comments in *Ali v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1174 at para 77, [2005] 1 FCR 485 [*Ali*], suggest that the Officer should have disclosed such information, especially given the Applicant's explicit requests to the visa office for disclosure of the information, this case is distinguishable from *Ali* because the immigration officer in that case merely told the applicant he was inadmissible since there were reasonable grounds to believe that Mr. Ali was a member of a terrorist group and the officer did not identify the evidence that supported the conclusion that the Mohajir Qaumi Movement was such a group. In contrast, the Officer in this case explicitly explained that the United States Treasury Department had stated that the CBI was involved in missile procurement, nuclear programs, and terrorist financing. The Applicant knew the allegations against him.

E. *Did the Officer breach the duty of procedural fairness by making an adverse credibility finding without holding an interview?*

[31] The Applicant argues that the Officer impermissibly made negative credibility findings against him without conducting an interview. In particular, the Officer rejected the Applicant's statement that he was unaware of the allegations against the CBI. The Officer stated in the GCMS notes that:

> Given the availability of the information [about the CBI], I found it difficult to believe that the applicant has never heard of these concerns during his employment at CBI and since retiring… I do not find credible that the applicant would have not been involved in policy decision making and decisions concerning allocation of funds, especially since the PA held the position of Secretary General of the bank and because he indicated in his affidavit that his duty in 2003-2009 was to develop and supervise the implementation of the by-laws and guidelines for the Iranian banking system.

[32] The Applicant says his sworn evidence should have been presumed to be true unless proven otherwise. According to the Applicant, if the Officer did not believe him, then the Officer had a duty to either interview him or provide an opportunity to respond to the credibility concerns.

[33] On this issue, I agree with the Applicant that, at a minimum, the Applicant should have been afforded an opportunity to address the Officer's credibility concerns. The Applicant clearly stated in his affidavit submitted to the Officer that: "At no time was I aware, directly or indirectly, that CBI was engaged in channelling funds to terrorist organizations or in the development of weapons, nuclear or otherwise. I never heard of such a thing in the bank and never saw any documents indicating this." Whether the Applicant was or was not aware of the

allegations against the CBI was a central question to determine his inadmissibility under paragraph 34(1) (d) of the *IRPA*, and not affording him an opportunity to address the Officer's credibility concerns constituted a breach of procedural fairness in this case.

F. *Was the Officer's inadmissibility finding under paragraph 34(1) (d) of the IRPA unreasonable?*

[34] The Applicant argues that the Officer's findings with respect to paragraph 34(1) (d) of the *IRPA* were unreasonable. According to the Applicant, the Officer was required to establish that the Applicant was a "present or future danger" to the public to substantiate an inadmissibility finding and that the danger must be tangible and identified; it cannot be speculative and relate to the past. Additionally, the Applicant says an inadmissibility finding under paragraph 34(1) (d) requires evidence that his direct actions endangered the security of Canada or that he was complicit in activities that endanger the security of Canada. In order to establish complicity, the Applicant maintains that he must have made significant contributions to the work of the CBI which was involved in transactions contributing to the proliferation of nuclear activities and the expansion of Iran's nuclear program.

[35] The Applicant says the Officer unreasonably relied on the fact that the European Union and Canada had placed sanctions on Iran to find him inadmissible and, further, that imposed sanctions cannot prove an allegation under paragraph 34(1) (d). The Applicant further says the Officer applied the wrong test for complicity under section 34 of the *IRPA*, and in this regard states that the Officer failed to apply *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*], and unreasonably found that long tenure and senior

managerial positions with the CBI constituted complicity with its alleged involvement in nuclear proliferation.

[36] The Respondent defends the Officer's decision on the basis that it was reasonable. According to the Respondent, there is no temporal restriction to paragraph 34(1) (d) of the *IRPA* and a finding of inadmissibility for security grounds under section 34 of the *IRPA* requires the Minister to have reasonable grounds to believe that the facts giving rise to inadmissibility have occurred, are occurring, or may occur. In the Respondent's view, the Officer reasonably concluded that the Applicant, as a senior executive with the CBI, was aware of its activities which threatened Canada's security.

[37] In my view, the test for complicity emanating from *Ezokola* is not relevant under paragraph 34(1) (d) of the *IRPA*, although an inadmissibility finding under paragraph 34(1) (c) for engaging in terrorism could possibly engage a consideration of complicity (see: *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 25, [2016] 1 FCR 428). *Ezokola* dealt with the issue of a senior public official's exclusion from refugee protection under article 1F (a) of the United Nations *Convention Relating to the Status of Refugees* for being complicit in a crime against peace, a war crime, or a crime against humanity committed by a government. This case involves an application for permanent residence, not a claim for refugee protection. Furthermore, a finding of inadmissibility for security grounds under section 34 of the *IRPA* requires that there be "reasonable grounds to believe that the facts giving rise to inadmissibility have occurred, are occurring, or may occur" (see: *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 30, [2014] 2 SCR 33).

[38] In this case, the Officer determined that there were reasonable grounds to believe the Applicant is a danger to the security of Canada because he held senior managerial positions at the CBI and because his statement that he was unaware of the allegations against the CBI was not credible. This determination, however, cannot be justified and is unreasonable. There was no objective evidence whatsoever to show that the Applicant knew or ought to have known about the CBI's activities. The Officer relied on the Applicant's senior position to make a negative credibility finding in the face of the Applicant's sworn testimony that he was unaware of the CBI's involvement in terrorist financing or nuclear proliferation. Once this credibility finding was made, the Officer unreasonably inferred, again by virtue of the Applicant's association with the CBI, that he, like the CBI, was a danger to the security of Canada by channelling funds to terrorist organizations and assisting in the development of nuclear weapons. This is the sort of "guilt by association" which the Supreme Court cautioned against in *Ezokola* (see: paras 80 to 82). It is all the more troubling in this case because the Officer made these inferences and concluded that the Applicant was inadmissible under paragraph 34(1) (d) of the *IRPA* without affording the Applicant an opportunity to address the credibility concerns. In this case, the Officer's inadmissibility finding under paragraph 34(1) (d) of the *IRPA* was not reasonable.

VI. Conclusion

[39] For the reasons stated above, this application for judicial review is allowed. The Officer's decision is set aside and the matter returned for redetermination by a different immigration officer.

[40] Neither party proposed a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the decision of the immigration officer dated April 12, 2016, is set aside and the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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