Federal Court  Cour fédérale

Date: 20190111

Docket: IMM-1481-17

Citation: 2019 FC 37

Ottawa, Ontario, January 11, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

YUSRA HELAL, KHALDOUN SENJAB, AND JOUDI ALMAGHRIBI AND RIHANNA SENJAB (BY THEIR LITIGATION GUARDIAN YUSRA HELAL)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants are citizens of Syria who fled the ongoing conflict in that country and applied for permanent residency as privately sponsored refugees. Their application was denied,

the visa officer [Officer] in Beirut, Lebanon, concluding there were reasonable grounds to believe Mr. Khaldoun Senjab was a member of the resistance in Syria.

[2] The applicants argue that the Officer's decision was flawed in several ways and seek judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Specifically, the applicants argue that their procedural fairness rights were breached and that the Officer: (1) erred in interpreting and applying section 34 of the IRPA; (2) failed to provide adequate reasons; (3) failed to provide an opportunity to request Ministerial Relief; and (4) fettered his discretion or was biased.

[3] For the reasons set out in greater detail below, I have concluded that in the circumstances of this case, there was a breach of procedural fairness. The application is granted.

II. Background

[4] The record indicates that Mr. Senjab was injured in a diving accident in 1994. As a result of his injuries, he is a quadriplegic who is essentially restricted to lying in bed. He breathes via an artificial respirator and tracheal tube. He can speak but is difficult to hear or understand. He usually speaks through his computer, which he controls with his tongue and lips. Despite his disability, he has supported his family working from home in a freelance capacity as a computer systems programmer, service administrator, and web developer.

[5] Mr. Senjab, his spouse Yusra Helal, and their children Joudi and Rihanna fled from Syria to Lebanon in January 2013. They registered with the United Nations High Commissioner for

Refugees [UNHCR] and were interviewed for the Resettlement Programme. Their application was refused without explanation. They later learned the refusal was related to apparent security concerns.

[6] The applicants then applied for permanent residence via the private sponsorship program. They were interviewed by a visa officer and were advised that their application was accepted and that there were "no concerns" with their security screening. They were later informed, by a different officer, that there were reasonable grounds to believe Mr. Senjab was a member of the resistance in Syria and had engaged in subversion by force of the Syrian regime. In a procedural fairness letter [PFL], the Officer described the concern as follows:

> Based on the information provided to me, there are reasonable grounds to believe that the [*sic*] Khaldoun Senjab is a member of the National Coalition for Revolutionary and Opposition Forces, an organization for which there are reasonable grounds to believe has engaged in the subversion by force of the Syrian regime.

[7] In response to a request from the applicants that they be provided with the basis for the allegations, they were advised that:

> … these allegations are from the Sponsor's own testimony delivered to the UNHCR as part of his Resettlement Referral interview. In that interview, he stated that he was involved with the Syrian National Council (SNC) and the National Coalition for Syrian Revolutionary and Opposition Forces as a web administrator and that, at the time, he maintained their website and oversaw their security.

[8] Counsel was retained and a request was made for disclosure of any evidence upon which the allegations were based. No further evidence was disclosed, and the applicants made

submissions in response to the PFL. The applicants' response to the PFL again included a request that any material information being relied upon be provided.

III. Decision under Review

[9] The decision letter is brief. The Officer noted Mr. Senjab had worked for the SNC and Syrian Revolutionary and Opposition Forces [NCOF]. He found that there were reasonable grounds to believe that the SNC and NCOF were organizations that engage, have engaged, or will engage in or instigate subversion by force of the Syrian regime.

[10] The Officer then found that Mr. Senjab, by virtue of his work as a web administrator for these organizations for three years, was aware of their activities. The Officer found that in his role, Mr. Senjab helped further the goals of the organizations by making information available to the public and providing cyber security support. The Officer concluded Mr. Senjab was a member of the SNC and NCOF and therefore was inadmissible to Canada pursuant to paragraph 34(1)(b) of the IRPA. Due to Mr. Senjab's inadmissibility, the other members of his family were also rendered inadmissible pursuant to paragraph 42(1)(a) of the IRPA.

[11] Relevant extracts from the IRPA are reproduced in the attached Schedule for ease of reference.

IV. Issues and Standard of Review

[12] The applicants have made lengthy submissions and alleged numerous fairness breaches and errors on the part of the Officer. The primary issues raised are the following:

(1) Did the Officer's failure to disclose written reports render the process unfair?

(2) Did the Officer reasonably conclude that Mr. Senjab was a member of the SNC and NCOF?

(3) Are costs warranted?

[13] In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific Railway Company*], the Federal Court of Appeal recently considered what a court is being asked to assess where a procedural fairness argument is raised. The Court of Appeal held that when fairness is in issue, a reviewing court is being asked to consider whether the process was "fair having regard to all the circumstances" and that "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond." The Court of Appeal acknowledged that there is an awkwardness in using standard of review terminology when addressing fairness questions and held that "strictly speaking, no standard of review is being applied" but found that the correctness standard best reflects the court's role (*Canadian Pacific Railway Company* at paras 52–56).

[14] It is well established in the jurisprudence that decisions of visa officers assessing refugee resettlement applications engage questions of fact or mixed fact and law that are to be reviewed

against a standard of reasonableness (*Saifee v Canada (Citizenship and Immigration)*, 2010 FC 589 at paras 25–26; *Kamara v Canada (Citizenship and Immigration)*, 2008 FC 785 at para 19; *Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at para 47; *Alakozai v Canada (Citizenship and Immigration)*, 2009 FC 266 at paras 18–20).

V. Analysis

A. *Did the Officer's failure to disclose written reports that were relied upon render the process unfair?*

[15] The Global Case Management System [GCMS] notes indicate that in rendering the negative decision, the Officer relied on the Canada Border Services Agency's inadmissibility assessment dated May 20, 2016 [Partner Brief] and a UNHCR report. The applicants argue these reports should have been disclosed. They rely on *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 [*Ha*], to submit that greater procedural fairness was required in this case as the Officer's decision included "a significant legal element."

[16] *Ha* involved a matter where counsel was denied the opportunity to attend an interview where the claimants were asked questions of a legal character. The Court noted that the content of the duty of fairness is to be determined on the particular facts of each case (*Ha* at paras 40, 41). The Court then concluded that in the particular circumstances before it, counsel should have been allowed to attend the interview (*Ha* at paras 47–54).

[17] *Ha* does not, in my view, stand for the principle that a greater duty of fairness is owed, as a matter of course, where there is a "significant legal element" to the decision being made. It is

also readily distinguishable from the particular circumstances in this case. *Ha* is therefore of little assistance.

[18] The respondent argues, and I agree, that the fairness owed to foreign nationals seeking entry into Canada is at the lower end of the spectrum. However, I disagree with the respondent's position that the Officer was not required to disclose the reports in this case.

[19] Failure to disclose reports in the context of foreign nationals seeking entry to Canada does not, in itself, evidence a denial of procedural fairness (*Nwankwo v Canada (Citizenship and Immigration)*, 2017 FC 29 at para 23). A reviewing court must instead be satisfied that the information being relied upon has been disclosed and that the applicants have been given an opportunity to meaningfully participate in the decision-making process (*Nwankwo* at para 23, citing *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 at para 22, and *Gebremedhin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 380 at para 9). In the particular circumstances of this case, disclosing the nature of the information being relied upon was insufficient to allow the applicants to meaningfully participate in the process.

[20] The GCMS notes reflect inconsistent interpretations of the UNHCR report. In one instance, the notes indicate that Mr. Senjab "stated that he was involved with the Syrian National Council (SNC) and National Coalition for Syrian Revolutionary and Opposition Forces as a web administrator." Elsewhere, the notes state that Mr. Senjab "himself stated that he was a member." The Partner Brief adopts yet a third interpretation of the UNHCR report, stating "[t]he applicant does not dispute that he had actively worked to further the goals of the National

Coalition for Revolutionary and Opposition Forces." The issue is framed differently in different documents at different times.

[21] As Mr. Senjab had no opportunity to review the Partner Brief or the UNHCR report, he was unable to address the accuracy of the documents' factual statements relating to his involvement and role with the organizations in issue. In addition, he was not provided with the opportunity to address the misinterpretations noted above. Counsel had previously highlighted the challenges that non-disclosure presented, stating the following in response to the PFL:

> [W]hile fairness would not always requires the disclosure [of] information which Mr. Senjab himself has given i.e. in an interview, in the present circumstances—multiple languages being used, the passage of time since the family's interview, and the seriousness of the allegation—it is submitted that disclosure of the actual notes is required.

[22] The multiple and inconsistent interpretations of the UNHCR report highlight the very fairness concern counsel identified.

[23] The basis of the Officer's concerns was not clearly put to the applicants. In responding to the PFL, the applicants were left to speculate as to the actual basis for the Officer's concerns. Non-disclosure in this case denied the applicants the opportunity to meaningfully participate in the process. Their procedural fairness rights were not respected.

B. *Did the Officer reasonably conclude that Mr. Senjab was a member of the SNC and NCOF?*

[24] Having found a breach of procedural fairness, I need not address the Officer's finding that Mr. Senjab was a member of the SNC and NCOF. However, the parties have made extensive submissions on this issue and the Court's views may be of some assistance in reconsidering the application.

[25] The applicants argue the Officer made two errors in assessing Mr. Senjab's inadmissibility under section 34: (1) he failed to demonstrate that Mr. Senjab was directly engaged in or complicit in any acts described in paragraph 34(1)(b), and (2) he failed to demonstrate that Mr. Senjab was a member of an organization described in paragraph 34(1)(f). I will first consider the paragraph 34(1)(f) submissions.

[26] The applicants rely on the decision of Chief Justice Crampton in *B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146 [*B074*], to argue that the Officer was required to address three criteria in assessing the question of membership: (1) the nature of the involvement in the organization; (2) the length of time involved; and (3) the degree of commitment to the organization's goals and objectives.

[27] The jurisprudence establishes that the term "member", as it is used in paragraph 34(1)(f), is to be given a broad meaning and that actual or formal membership is not required (*Poshteh v Canada (Citizenship and Immigration)*, 2005 FCA 85 at paras 27–32; *Re Mahjoub*, 2013 FC 1092 at paras 59–65; *B074* at paras 27–28). However, the application of a broad interpretation

does not equate to an unrestricted interpretation. As noted by the Chief Justice in *B074*, "[i]n determining whether a foreign national is a member of an organization described in paragraph 34(1)(f), some assessment of that person's participation in the organization must be undertaken" (*B074* at para 29). The Chief Justice then set out the three criteria identified above (*B074* at para 29).

[28] In this case, the Officer did not make reference to *B074* but did discuss the nature of Mr. Senjab's involvement (as a website administrator) and the length of his involvement (three years). In their response to the PFL, the applicants made submissions on the third criterion: the commitment to the organization's goals and objectives. They argued that Mr. Senjab's incidental professional contact did not demonstrate commitment to the goals and objectives of the organizations. The Officer did not address this issue or the submissions made.

[29] The absence of any consideration of the third criterion, arguably the most important of the factors to consider in the circumstances of this case, renders the conclusion on membership unreasonable.

[30] The arguments as they relate to paragraph 34(1)(b) arise as a result of the Officer's conclusion that "there are reasonable grounds to believe that Khaldoun Senjab [is] a member of the inadmissible class of persons described in 34(1)(b) of the *Immigration and Refugee Protection Act.*"

[31] The applicants note that it was never alleged Mr. Senjab was actually engaged in subversion and that, at best, one might conclude the Officer implied he had aided and abetted the SNC and NCOF. It is evident upon a review of the record that the Officer's finding that Mr. Senjab "is a member of the class of persons described in 34(1)(b)" is in error. A review of the decision, the GCMS notes, and the record makes it clear that the inadmissibility arises as a result of Mr. Senjab's alleged membership in an organization that engaged in subversion by force, paragraph 34(1)(f), not as a result of him engaging in such activity personally.

[32] In the circumstances, it is not necessary to address the paragraph 34(1)(b) arguments.

C. *Costs*

[33] The applicants seek costs arguing that the Officer's errors coupled with the position the respondent took in dealing with redactions to the Certified Tribunal Record unreasonably prolonged proceedings.

[34] The issues raised were the subject of extensive and detailed submissions. Although the applicants take issue with the respondent's claim for privilege, it is not evident that the position adopted was wholly without merit, and in any event, it was resolved through the agreement of the parties. Costs are not warranted.

VI. Conclusion

[35] The application is granted. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-1481-17

THIS COURT'S JUDGMENT is that:

1. The application is granted;

2. The matter is returned for redetermination by a different decision maker;

3. There is no award of costs; and

4. No question is certified.

"Patrick Gleeson"
Judge

SCHEDULE

Immigration and Refugee Protection Act S.C. 2001, c. 27

Rules of interpretation	**Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
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 :
[…]	[…]
(b) engaging in or instigating the subversion by force of any government;	**b)** être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
[…]	[…]
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	**f)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).
Inadmissible family member	**Inadmissibilité familiale**
42 (1) A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if	**42 (1)** Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les

faits suivants :

(a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or

a) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;

(b) they are an accompanying family member of an inadmissible person.

b) accompagner, pour un membre de sa famille, un interdit de territoire.

Exception — application to Minister

42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.

Exception — demande au ministre

42.1 (1) Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1481-17
STYLE OF CAUSE:	YUSRA HELAL, KHALDOUN SENJAB, AND JOUDI ALMAGHRIBI AND RIHANNA SENJAB (BY THEIR LITIGATION GUARDIAN YUSRA HELAL) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 29, 2018
JUDGMENT AND REASONS:	GLEESON J.
DATED:	JANUARY 11, 2019

APPEARANCES:

Mr. Timothy Wichert	FOR THE APPLICANTS
Mr. Gregory George	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman, Nazami & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT