Federal Court  Cour fédérale

Date: 20200327

Docket: IMM-2523-17

Citation: 2020 FC 450

Ottawa, Ontario, March 27, 2020

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KAMRAN SOLTANIZADEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This matter has had a protracted history largely caused by the Respondent's failure to provide adequate disclosure.

[2] The Applicant, Karman Soltanizadeh, is a citizen of Iran. In early 2010, he applied to immigrate to Canada under the Quebec Skilled Worker Category. On February 16, 2010, the Province of Quebec issued a selection certificate approving his application to immigrate under

the Quebec Skilled Worker category as a veterinarian. On April 26, 2010, he applied for a permanent resident visa to Canada.

[3] Almost four years later, on January 29, 2014, the Applicant was interviewed in a Canadian consular office for the purposes of his visa application. On March 25, 2014, the Applicant was requested to provide detailed and completed banking statements for both his personal and commercial accounts. He submitted some of the requested information on April 4, 2014.

[4] On May 2, 2014, the Canada Border Services Agency (CBSA) received briefing material from a partner agency. Ten months later, the Applicant wrote to the visa officer to request an update. That prompted the issuance of a Procedural Fairness Letter (PFL) advising the Applicant that he may be in an inadmissible category of persons pursuant to s. 34(1)(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [*IRPA*] due to sanctions imposed against Iran in response to the proliferation risks presented by their nuclear program.

[5] The Applicant replied to the PFL on June 25, 2015 to say that the visa officer had confused him with his brother. He said that his brother has an exchange office in Iran and has legally transferred money to Canada and other countries. The Applicant further states that he and his brother have a joint bank account and that his brother uses this account for financial matters.

[6] The visa officer refused the Applicant’s application for permanent residence on October 22, 2015. The officer was not satisfied with the Applicant’s reply to the fairness letter and found

that the Applicant was inadmissible for being a danger to the security of Canada pursuant to s. 34 (1)(d) of the *IRPA*.

[7] On February 16, 2016, the Applicant filed an application for leave and for judicial review of the visa officer's decision pursuant to s. 72(1) of the *IRPA*. Further to settlement negotiations, the Applicant agreed to discontinue the application for leave and for judicial review in exchange for the matter being sent to a different visa officer. The Applicant requested that, if the new visa officer was of the view that the Applicant is inadmissible, the visa officer should provide the Applicant with additional details and supporting information to allow the Applicant to respond in a meaningful way. The Respondent agreed. On that understanding, the application was discontinued.

[8] The Applicant was sent a second PFL on May 26, 2016 advising that he may be inadmissible pursuant to s. 34(1)(d). This PFL was practically identical to the first PFL and did not provide additional details regarding the inadmissibility finding, as had been requested by the Applicant and agreed to by the Respondent.

[9] On July 4, 2016 and again on July 28, 2016, counsel for the Applicant wrote to the Respondent to encourage compliance with the settlement by providing the Applicant with additional details about the potential inadmissibility finding. The Applicant noted that he could not be expected to respond to the finding that he is a danger to the security of Canada without more information. The Applicant requested that additional information be disclosed but did not

receive a reply. The Applicant sent the Respondent a further request on February 17, 2017 enclosing the prior correspondence.

[10] On April 12, 2017 the Applicant was sent a third PFL advising again that he may be within the inadmissible category of persons pursuant to s. 34(1)(d) of the *IRPA* due to the transfer of money to and from Iran. More specifically, the third PFL merely added the following: "I have reasonable grounds to believe that you have transferred funds to and from Iran." In a letter dated April 13, 2017, the Applicant noted that he had still not received any additional information regarding his inadmissibility.

[11] This led to a determination on May 22, 2017 that the Applicant was inadmissible for being a danger to the security of Canada. The visa officer held that there were reasonable grounds to believe that the Applicant supported Iran's nuclear proliferation program by transferring funds to and from Iran.

[12] On June 6, 2017, the Applicant filed an application for leave and judicial review of the May 22, 2017 decision. Leave was granted by Justice Manson on September 8, 2017 and the matter was set down for hearing on November 22, 2017.

[13] By letter dated September 25, 2017, the Respondent wrote to the Applicant offering again to settle the matter. In return for discontinuance, the Applicant's application for permanent residence would again be referred back for reconsideration and redetermination by a different officer as had previously occurred. Coupled with this, the Respondent wrote to the court on

September 28, 2017 and advised that the Certified Tribunal Record (CTR) had not been produced as settlement negotiations were underway.

[14] Not surprisingly, the negotiations did not succeed as the Applicant pointed out, with reason, that the Respondent had previously failed to uphold their end of the bargain; no additional information had been provided regarding the inadmissibility allegations. Accordingly, the Applicant declined to settle the matter and wished to proceed to a hearing.

[15] On October 3, 2017 the Attorney General of Canada brought a motion on behalf of the Respondent in writing under Rules 8, 36 and 369 of the *Federal Courts Rules*, SOR/98-106 and Rule 21 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 for an order that the decision of the visa officer dated May 22, 2017 be instead set aside and sent back for redetermination by a different visa officer. In the alternative, the Respondent sought an order extending the timelines for the filing of the CTR, affidavits and memoranda and an order adjourning the hearing set for November 22, 2017.

[16] The Respondent's motion was dismissed by Justice McDonald on October 17, 2017.

[17] The Attorney General then brought a motion on behalf of the Respondent in writing under s. 87 of the *IRPA* for a nondisclosure order with respect to information in the CTR. A redacted version of the CTR was filed on November 3, 2017. The Respondent asserted claims for non-disclosure under both s. 87 of the *IRPA* and s. 18.1 of the *Canadian Security Intelligence*

Service Act, RSC, 1985, c C-23 (*CSIS Act).* Consequently, the hearing of the application for judicial review was adjourned to February 26, 2018.

[18] The Respondent provided the Court with a classified record on November 30, 2017. An *ex parte*, *in camera* hearing was conducted on December 7, 2017. Public Reasons for Order were issued on February 2, 2018 and a Classified Order and Reasons was issued on February 14, 2018. An Amended Classified Order and Reasons was issued on March 27, 2018 to correct clerical errors but with no substantive changes. Both Classified Orders required the disclosure of additional information to the Applicant.

[19] A Notice of Appeal of the Classified Order was filed by the Attorney General on February 23, 2018. Pursuant to s. 87.01(2) of the *IRPA* both the execution of the February 2, 2018 Order (as amended by the March 27, 2018 Order) and the hearing of the underlying Application for Judicial Review were suspended pending the outcome of the appeal.

[20] The Federal Court of Appeal rendered its decision on June 6, 2019 with Public Reasons for Judgment. The Judgment required this Court to reconsider certain matters addressed in its February decision, as amended. Upon the reconsideration, Classified Reasons and Order were issued on July 30, 2019 amending one aspect of the March 2018 Classified Order. The Attorney General filed an appeal of that Order that was subsequently discontinued, thereby reviving this Court's disclosure Order, as upheld by the Federal Court of Appeal, and the underlying application before this Court.

[21] By an unclassified letter dated September 30, 2019 counsel for the Respondent provided revised Certified Tribunal Record pages (250, 251, 252, 256, 258 and 259) in response to the Court's Classified Reasons and Order issued July 30, 2019 and its Amended Order of March 27, 2018. The letter further stated:

> Finally, the Minister is exercising his prerogative to withdraw information from the record pursuant to s. 83(1)(f) and (j) of *IRPA*. Section 87 provides that
>
> > S. 83 - other than the obligations to appoint a special advocate and to provide a summary - applies in respect of the proceeding in respect of any appeal of a decision made in the proceeding, with any necessary modifications.
>
> Subsection 83(1) provides that:
>
> > (f) the judge shall ensure the confidentiality of all information other evidence that is withdrawn by the Minister;
> >
> > …
> >
> > (j) the judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the minister withdraws it;
>
> Pages 252, 256, 258, and 259 contain information that is being withdrawn from the record, such that it should not be relied upon by the court for its decision, nor disclosed.

[22] A classified letter to the Court dated September 27, 2019 but received on September 30, 2019 specified the particular information that was being withdrawn. This was the first occasion, to the Court's knowledge, on which the Minister had withdrawn information that had been before the decision maker in the underlying matter, on an *IRPA* s. 87 motion.

[23] Neither section 87 nor paragraphs 83(f) and (j) expressly authorize the Minister to withdraw information that is before the Court in the context of a judicial review. Section 87 provides for an application to be made to the Court for the non-disclosure of information and, as noted, states that section 83 "applies in respect of the proceeding…with any necessary modifications." The grounds for authorizing non-disclosure are those set out in paragraph 83(1)(d):

> [T]he judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person.

[24] Section 77 governs the determination by the Federal Court of the reasonableness of a security certificate, while section 83 governs the protection of the information in both security certificates issued by the Minister of Citizenship and the Minister of Public Safety under Division 9 of the *IRPA* and, "with any necessary modifications", as stated in s 87, applications for judicial review of decisions made under other provisions of the Act including visa officer decisions.

[25] As explained by Madam Justice Tremblay-Lamer in *Charkaoui (Re)*, 2009 FC 1030 (*Charkaoui*), at paragraph 24, the Ministers cannot legally refer a security certificate for a determination of its reasonableness by the Court without filing the evidence on which it is based:

> Such action would not be authorized by the *IRPA*, which requires that the certificate be referred *and* that the evidence be filed at the same time. Thus, a certificate referred without the filing of the evidence on which it is based would be *ultra vires* the Ministers, illegal, and void. Obviously, that was not the situation in this case: the Ministers did file the evidence which, in their opinion, justified

> the certificate against Mr. Charkaoui. However, as permitted by the *IRPA*, they chose to withdraw a significant part of that evidence.

[26] Justice Tremblay-Lamer recognized that in the security certificate context, a *sui generis*, proceeding, evidence could be withdrawn by the Ministers. The certificate proceeding is not a judicial review of adecision by the Minister or an official subject to s 87, as in this instance, but a *de novo* determination of the reasonableness of the certificate by the Court. A Designated Judge can only decide the reasonableness of a certificate based on the evidence that remains before the Court. In contrast, on judicial review, the decision has already been made and the question is whether it was reasonable based on the evidence that was before the Minister or the official.

[27] In the result, in *Charkaoui*, the Ministers conceded that the remaining evidence was no longer sufficient to support the certificate. Consequently, Justice Tremblay-Lamer concluded, at paragraph 25, "the certificate no longer exists within the criteria established by Parliament." The judge considering the referral could no longer base a decision on the withdrawn evidence. The certificate was void.

[28] In *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 the Supreme Court of Canada recognized that in the context of a security certificate proceeding there can be an irreconcilable tension between the interest of the state in protecting sensitive information and that of the subject of the proceeding to be reasonably informed:

> [58] The IRPA scheme is silent as to what happens if there is an irreconcilable tension between the requirement that the named person be "reasonably informed", on the one hand, and the imperative that sensitive information not be disclosed, on the other. The IRPA scheme does not provide that the "reasonably informed"

> standard can be compromised. But nor does it provide that sensitive information can be disclosed where this is absolutely necessary in order for the "reasonably informed" standard to be met.
>
> [59] In my view, the necessary outcome of situations where there is an irreconcilable tension is that the Minister must withdraw the information or evidence whose non-disclosure prevents the named person from being reasonably informed. In some cases, this may effectively compel the Minister to put an end to the proceedings.

[29] This of course is in the context of a certificate procedure where the s. 7 *Charter* interests of the named person are engaged as opposed to the judicial review of a decision to deny permanent residence to a foreign national. But the practical effect of a decision to withdraw information that was before the decision maker may prevent the reviewing court from determining whether the applicant was fairly treated or whether the decision was otherwise reasonable.

[30] In these proceedings, the Respondent has assumed that the Minister has the prerogative to withdraw information over which the Minister has claimed protection under s 87 but which has not been protected by Order of the Court pursuant to s 87. That information was in the record considered by the decision-maker who rendered the decision that is the subject of the application for judicial review before the Court. Absent an Order under s 87, the Applicant would be entitled to disclosure of that information.

[31] The Minister's assumption is based on a broad interpretation of the scope of s 83. As the meaning of the words "with any necessary modifications" referencing s 83 in s 87 was not the subject of a full record and argument before me, I will leave the question for another day. But I

do not wish anything in these reasons to be taken as accepting the Respondent's position with respect to the withdrawal of information in the context of a s. 87 motion.

[32] Following the abandonment of the Attorney General's appeal of the July 30, 2019 Classified Order and Reasons, the Court convened a case management conference with counsel for the parties on October 23, 2019. As a result of the conference, it was not considered necessary to convene an oral hearing as the Respondent continued to seek an Order quashing the visa officer's decision and the only remaining controversy between the parties was the nature of the remedy to be afforded the Applicant. The parties agreed to submit their respective positions in writing regarding the terms of the Order to be issued by the Court. In view of the comments expressed by Justice Tremblay-Lamer in *Charkaoui* about the effect of the withdrawal of information under s. 83 of the *IRPA* in the context of a security certificate, the Court asked the parties to comment on whether the decision of the Visa Officer was a nullity as a result of the actions of the Minister.

[33] The Applicant's position, as set out in written submissions filed on November 25, 2019, was overall that the processing of his application "has been so delayed and so incompetently managed by immigration officials that remitting the matter back for re-decision a third time without clear directions would bring the administration of justice into disrepute."

[34] The Applicant seeks specific and detailed directions to the visa officer "[g]iven the extreme delay in the processing of this application, and the manner in which the application has

been managed by the Minister… taking into account the time effort and expense endured by the Applicant".

[35] The directions proposed by the Applicant include the following:

- That a Permanent Resident Visa be issued within sixty days if the Court is of the view that the confidential information is flawed and does not support refusal of this application.
- That the information withdrawn by the Respondent in his letter of 30 September 2019 to the Court not form part of the record before the visa officer and that the visa officer not rely in any way on the withdrawn information.
- That any procedural fairness letter issued to the Applicant set out specific reasons of concern that would give the Applicant sufficient information to know the case against him and the ability to respond. [Examples of what the Applicant would consider sufficient were provided, such as details of any financial transactions he is alleged to have conducted between Iran and Canada.]
- That any procedural fairness letter to be issued be issued within 60 days of the date of the Order of the Court and that the Applicant have a further 60 days to respond.
- That the officer deliver his or her decision on the application within 30 days of receipt of the Applicant's response to any procedural fairness letter.
- Should no procedural fairness letter be issued by the visa officer, the officer will render his or her decision within 60 days of the Order of the Court.Directions the Court feels appropriate given the Court's knowledge of the confidential information so as to ensure that the Applicant receives a procedurally fair and reasonable decision on his application.

[36] The authorities cited by the Applicant in support of the proposed remedies fall within the narrow line of cases in which the Federal Courts have considered it appropriate to issue what have been described as "directed verdicts" to administrative tribunals. This is part of the general

law of *mandamus*: *Canada (Minister of Public Safety and Emergency Preparedness) v Lebon* 2013 FCA 55 at para 13.

[37] The Applicant did not address the question of whether the effect of the withdrawal of information that had been considered by the Visa Officer rendered that decision void and a nullity.

[38] The Respondent's submissions on remedy filed on January 9, 2020 opposed certain of the terms proposed by the Applicant as fettering the visa officer's discretion. This matter, the Respondent submits, does not fit within the exception of having an inevitable outcome where remitting the case would serve no useful purpose: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 142.

[39] The Respondent proposes the following terms of the Order granting the Applicant a remedy:

- that the Applicant submit a new application for permanent residence within sixty days of the Order of the Court;
- that the visa officer is not to consider the withdrawn information;
- that the Applicant be given sixty days to respond to the Procedural Fairness letter sent to him by a visa officer which is to provide "enhanced disclosure in terms of disclosing credibility related concerns about certain money transfers"; and
- that the Respondent is to make a final decision on the application within thirty days of receiving all required information, including but not limited to medical and background checks both from the Applicant and from "partners" of the Respondent.

[40] With regard to the withdrawal of information by the Minister, in response to a question raised by the Court during the October 23, 2019 case management conference, the Respondent submits that this action did not render the visa officer's decision a nullity but rendered it voidable. The Respondent contends that:

> The legislation takes into account the need to protect sensitive information from public disclosure in both judicial reviews and security certificate proceedings while still permitting the Minister(s) to rely on such information in order to establish or defend the reasonableness of inadmissibility determinations. [Respondent's Responding Submissions on Remedy, para 13. Emphasis added]

[41] The Respondent goes on to submit, in a subsequent paragraph:

> The visa officer's inadmissibility decision is not rendered void by the Minister withdrawing information from the CTR. Rather, it just may ensue that the Minister, unable to rely on this withdrawn information, becomes unable to defend the reasonableness of the decision, or that the Court is unable to assess its reasonableness. In both cases, the decision to set aside, is not rendered void. [Respondent's Responding Submissions on Remedy, para 18. Emphasis added]

[42] It may be, as the Respondent submits, that the Court may conclude that the information, while presumptively relevant as part of the CTR, is not material to the application for judicial review. I agree, therefore, with the Respondent that the visa officer's decision is not rendered a nullity simply because of the withdrawal of information by the Minister; however, I find that it may be found to be unreasonable and quashed for that reason alone. The Minister cannot have it both ways, as suggested by the first excerpt of the Respondent's argument cited above. If the

information is material the Court may be unable to determine what effect it may have had on the officer's decision and to reach a conclusion that the decision is reasonable.

[43] The application will be granted with directions to the visa officer who is to consider the matter. Based on its knowledge of the record, the Court is unable to conclude that the outcome of the application for permanent residence is inevitable. For that reason, the Applicant's request for an Order directing the issuance of a Permanent Resident Visa cannot be granted. However, in the circumstances, it is necessary and appropriate to direct the terms under which a visa officer is to consider the Applicant's application for permanent residence.

[44] The Respondent requested that questions be certified if the Court rendered judgment with respect to whether the Minister has discretion to withdraw information on an application for judicial review of a visa officer's decision. As I have indicated above, in the absence of a full record and argument, the judgment will not address that issue.

[45] No special reasons to award costs were advanced.

JUDGMENT IN IMM-2523-17

THIS COURT'S JUDGMENT is that:

1) The Application for Judicial Review is granted;

2) Within 60 days of being notified of this Judgment the Applicant may submit a new application for permanent residence;

3) Within 30 days of receipt of the Applicant's application, the visa officer shall provide the Applicant with a procedural fairness letter that gives the Applicant enhanced disclosure of any credibility related concerns about money transfers in which he is alleged to have participated;

4) The visa officer who considers the Applicant's new application for permanent residence shall not consider the withdrawn information;

5) The withdrawn information shall not be resubmitted to the visa officer for consideration on the new application; and

6) The Respondent is to make a final decision on the application for permanent residence within 30 days of receiving all required information including but not limited to medical and background checks;

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2523-17
STYLE OF CAUSE:	KAMRAN SOLTANIZADEH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

JUDICIAL REVIEW IN WRITING CONSIDERED AT *OTTAWA, ONTARIO*

JUDGMENT AND REASONS:	MOSLEY J.
DATED:	MARCH 27, 2020

WRITTEN REPRESENTATIONS BY:

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