Date: 20081014

Docket: IMM-950-08

Citation: 2008 FC 1155

Ottawa, Ontario, October 14, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SALAH-EDDIN RAMADAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] It is the Minister's task to determine whether waiving an inadmissibility restriction for a person who is otherwise inadmissible to Canada would be "detrimental to the national interest". The Minister is uniquely placed to make such an assessment. The Court's role is to satisfy the foreign national and the Canadian public that the decision-making process that was followed was fair, and that the decision, based on all of the evidence, was reasonable.

[2] In this case the Minister's decision cannot be maintained as it was not based on all of the evidence.

BACKGROUND

[3] This is an application for judicial review of a decision of the Minister of Public Safety and Emergency Preparedness, by which Mr. Ramadan's request for relief under subsection 34(2) of the *Immigration and Refugee Protection Act,* S.C. 2001, c.27 was denied. The decision under review was made on December 14, 2007. Subsection 34(2) of the Act provides for a discretionary Ministerial exemption to a finding of inadmissibility under subsection 34(1), which provision establishes a statutory bar to admissibility on the enumerated security grounds. Section 34 of the Act provided as follows:

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 :
(*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;	*a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(*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;
(*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;
(*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*) 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*) ou *c*).
(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[4] Mr. Ramadan was born in Yazour (Jaffa) in Palestine, in 1945; however, he is a citizen of Jordan. He was determined by the Immigration and Refugee Board to be a Convention Refugee in 1997. His claim for refugee protection was based on his fear of persecution at the hands of the Jordanian regime due to his political beliefs and his involvement with the Fatah faction of the Palestinian Liberation Organization (PLO). The background to that fear stems from the 1970 conflict between the King of Jordan and the PLO - known as Black September. Mr. Ramadan's history prior to these events is also relevant for the purposes of this application.

[5] As noted, Mr. Ramadan was born in Palestine, however, he spent the first two decades of his life in Bethlehem, in what was then Jordanian territory. After the Six Day War of 1967, when Israel took control of the West Bank, he and his family left for the Jordanian capital of Amman. There, Mr. Ramadan became active in Fatah. Fatah is a Palestinian political party and a faction of the PLO. Mr. Ramadan was a self-described “political instructor”. He says that his role was to “impart the historical and political context of the conflict between the Palestinians and Jordan to new recruits coming to Fatah”.

[6] In this role he was critical of the government of Jordan. As such, when the violent Jordanian crackdown on the PLO broke out in 1970, he was not a neutral observer. He admits that while his “primary role was not combat, we were forced into a defensive position and I led my group into a defensive position from which we could defend ourselves against the assault coming from the Jordanian army and its allies”. Although many of his friends and colleagues died in the fighting, Mr. Ramadan emerged alive and fled with his family to Kuwait, where he stayed in exile for a decade, only returning with his family to Amman, Jordan, in 1980.

[7] There, Mr. Ramadan started to publish occasional opinion pieces in Tunisian and Lebanese newspapers under a nom de plume, in which he criticized the Jordanian regime. He also started to give speeches of a similar bent at what he described as “ceremonial occasions”. These activities were eventually noticed by the Mukhabarat, the Jordanian security services, and in May of 1989 he was arrested. He was detained and tortured for six months. When he was finally released in

October of 1989, he immediately fled to Libya, where he stayed until he was sent back to Jordan in 1994, when President Gaddafi expelled his Palestinian guests.

[8] Mr. Ramadan stayed in Jordan only briefly. Sensing that he was still in danger there, he left Jordan for the United States and then came to Canada, crossing at Windsor, Ontario in 1996, where he made his claim for protection. That claim was accepted on February 6, 1997. Mr. Ramadan filed an application for permanent residence in Canada for himself and his family on July 11, 1997. The processing of that application was suspended due to the Minister's determination on August 11, 2005, that Mr. Ramadan was inadmissible to Canada pursuant to subsection 34(1)(f) of the Act because of his prior and acknowledged ties with Fatah. As a part of that process Mr. Ramadan was interviewed by a Citizenship and Immigration officer in Windsor in November 2002. While the interviewing officer determined that it was clear that Mr. Ramadan was inadmissible on account of his ties to Fatah, he nonetheless was of the opinion that "[he] has since divorced himself from anyone or anything that maybe (*sic*) connected to the PLO since his arrival to Canada" and the officer stated that he did not believe that "Mr. Ramadan becoming a Permanent Resident would jeopardise the National Security of Canada or its citizens".

[9] Mr. Ramadan applied on November 18, 2005 for Ministerial relief pursuant to subsection 34(2) of the Act. The Minister of Public Safety and Emergency Preparedness refused the request on December 14, 2007. The reasons underlying that decision are contained in an undated briefing note prepared by the President of the Canada Border Services Agency. The briefing note canvasses Mr. Ramadan's past and notes that the CBSA has no information to contradict Mr. Ramadan's claims to

be well-established in Canada, employed on a full-time basis, and free of any criminal record. It also notes that Mr. Ramadan has complained of emotional hardship occasioned by the separation from his family while his residency application has been outstanding, and that he has submitted various letters attesting to this hardship. The material portions of the recommendation read as follows:

> Although Mr. Ramadan is well-established in Canada and there are some humanitarian and compassionate grounds to consider, these do not negate the fact that Mr. Ramadan was a member of the PLO-Fatah faction and his level of involvement in the organization was significant. He voluntarily joined the organization and was in contact with the command structure of the PLO-Fatah faction. According to his statements, he was a devoted member from 1967 until 1980, which indicates a long-term, deep commitment to an organization, devoted to self-governance through any means necessary, including violence. While Mr. Ramadan maintains that he was a non-violent member of the organization; he did participate in armed conflict on at least one occasion and through his public speeches advocated the use of violence [in] reaching the objectives of the PLO, stating in fact that it was the moral obligation of every Palestinian to fight and support the violent uprising. Allowing individuals who have been involved in such activities can be seen as detrimental to our national interest.
>
> Although the PLO is recognized internationally today as the representative of the Palestinian people and CBSA recognizes that the PLO-Fatah faction has abandoned terrorism and is an active participant in the democratic process, Mr. Ramadan was a member prior to the PLO's commitment to peace negotiations. As such, his membership and activities on behalf of the PLO outweigh any national interest that would enable the Agency to make a recommendation that Mr. Ramadan be granted Ministerial relief.

[10] Mr. Ramadan was provided an opportunity to respond to the CBSA briefing note, which he did through his former counsel. Those submissions ranged from inflammatory to substantive. The inflammatory, and irrelevant, included statements such as: "[The CBSA's statements] prove only

one thing that this Officer is biased and anti-Palestinian". The substantive and relevant statements noted discrepancies between information contained in the CBSA briefing note and the evidence accepted at Mr. Ramadan's refugee hearing, as well as what he had related to the officer during his 2002 interview. These discrepancies include the length of time Mr. Ramadan was involved with Fatah, the affirmation that he received military training from the PLO, and the affirmation that his speeches emphasized the moral obligation of every Palestinian to fight and support the Intifada.

[11] There is no indication that these submissions were considered by the Minister, or even brought to his attention. They are not included in the certified record.

ISSUES

[12] The Applicant raised five issues:

(a) What is the standard of review of the Minister's decision on an application for Ministerial relief?

(b) What are the reasons for decision in this case?

(c) Did the Minister err in failing to properly consider the "national interest"?

(d) Did the Minister err by relying on patently unreasonable findings of fact, or by ignoring evidence, or by making unreasonable inferences?

(e) Did the Minister improperly fetter his discretion when assessing all of the facts of the Applicant's application?

ANALYSIS

What is the standard of review?

[13] Both parties submit that the standard of review of the decision under review is reasonableness. This Court in *Naeem v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 123 and *Miller v. Canada (Solicitor General)*, 2006 FC 912, held that decisions refusing Ministerial relief are reviewed on the standard of patent unreasonableness. The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 discarded the patent unreasonableness standard and collapsed the previous three standards of review into two: correctness and reasonableness. Where there is existing jurisprudence analysing and identifying the standard of review, as there is here, that analysis need not be repeated. Accordingly, the standard of review, as counsel agreed, is reasonableness.

[14] Notwithstanding that the standard of review is reasonableness, counsel for the Respondents submitted that the Minister's decision is entitled to the highest degree of deference. Counsel noted that the Supreme Court in *Dunsmuir* at paragraph 48 cautioned that "[t]he move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism." It was submitted that the pre-*Dunsmuir* patently unreasonable test, which Ministerial decisions such as this were judged against, had attracted the highest level of deference. It is submitted that this level of deference has not changed, despite *Dunsmuir*.

[15] Justice Binnie in *Dunsmuir* observed that the reasonableness standard must be contextually applied. It is through the lens of context that one considers the breadth of reasonableness. Justice

Binnie noted that there are a number of considerations the reviewing judge should keep in mind when examining the decision from the perspective of the decision-maker:

> The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

[16] This is a decision that implements or reflects broad public policy. It is a decision where the Minister is obliged to strike a balance between the interests of an applicant who wishes to obtain residency in order to be reunited with his family, and the public interest in ensuring that the national interest is not prejudiced by a favourable decision. The fact that it is only the Minister, and not a delegate, who is granted this authority also suggests that significant deference is due. Taking all of these factors into account, there is no doubt that the Minister in making the decision at hand is deserving of the highest degree of deference.

What are the reasons for decision?

[17] The Minister was provided with a briefing note prepared by the President of the CBSA. It concluded with a page for the Minister to indicate his decision – either Approved or Denied – and a place for the Minister's signature. The Minister provided no separate reasons other than the briefing note. In such circumstances, the briefing note constitutes the Minister's reasons: *Miller*, above and *Kanaan v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 301.

Did the Minister fail to properly consider the "national interest"?

[18] Mr. Ramadan submits that the reasons of the Minister are inadequate in that they failed to address the key factors relevant to a determination of whether his admission to Canada would be detrimental to the national interest. He points to the assessment guidelines in the manual entitled "Evaluating Inadmissibility" (ENF 2/OP 18) which were considered by Justice Dawson in *Naeem v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 123. She observed that while they did not have the force of law, they were an indicator of what constitutes a reasonable interpretation of the power:

> … [T]he Minister's guidelines are intended to be instructive to the official responsible for preparing the memorandum and recommendation to the Minister. As the Supreme Court explained in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraph 36, its review of the Minister's discretion in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 was based upon the failure of the Minister's officials to comply with ministerial guidelines. In *Baker*, at paragraphs 72, the Court described the ministerial guidelines as "a useful indicator of what constitutes a reasonable interpretation of the power" conferred by the applicable section of the Act. The "fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise" of the discretion conferred by the Act.

[19] Mr. Ramadan submits that, in this instance, the Minister's reasons indicate that he effectively determined that Mr. Ramadan's past membership in a terrorist organization was itself sufficient to warrant a negative finding with respect to the exercise of discretion. Relying on this Court's decision in *Soe v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 461, it is submitted that this approach effectively renders the exercise of discretion in subsection 34(2) meaningless. In *Soe*, Justice Phelan wrote:

> 32 More problematic is the conclusion that the Minister should not exercise his discretion because "Canada should not harbour individuals who have admitted to committing terrorist acts". Presumably this rationale is also applicable where the individual denied committing the terrorist act but the evidence confirms that he did. It is the commission of the terrorist act, not the admission of commission of the act, which grounds the refusal to exercise the Ministerial discretion.
>
> 33 The Briefing Note goes on to observe that there are no compelling reasons to grant protection or permanent residence. The factors examined are largely those related to a close connection to Canadian society, including jobs and family in the country.
>
> 34 The difficulty with this analysis is that it renders the exercise of discretion meaningless. It is tantamount to saying that an individual who commits an act described in s. 34(1) cannot secure Ministerial discretion because they committed the very act that confers jurisdiction on the Minister to exercise discretion under s. 34(2).

[20] Justice Phelan accurately described Mr. Soe's circumstances as a Catch-22 situation. The decision in this case is quite different. Here, there is no sweeping statement of the sort in *Soe* that discretion should not be exercised, regardless of all else, because Canada should not harbour terrorists. In this case the reasons indicate that the personal circumstances of Mr. Ramadan were considered, including his level of involvement in the terrorist organization, that he voluntarily joined

the organization, that he was in contact with the command structure, that he was a committed member, that the organization was devoted to achieving its objectives through any means, including violence, and that he had engaged in violence.

[21] The briefing memo is not formatted in the manner set out in ENF 2/OP 18, but form is not a requirement for validity. It references a number of enclosures. These enclosures, and in particular item 4, “Immigration Officer’s interview notes and report dated November 28, 2002”, item 5, “Submissions of Mr. Ramadan dated October 10, 2004”, and item 6, “Submissions from Mr. Ramadan’s counsel and physician dated December 10, 2003” address many if not all of the relevant considerations referenced in ENF 2/OP 18. Specifically, this collection of documents addresses or provides the facts required to respond to the most significant questions set out in the guideline, which is reproduced below:

Question	**Details**
Will the applicant's entry into Canada be offensive to the Canadian public?	Is there satisfactory evidence that the person does not represent a danger to the public? • Was the activity an isolated event? If not, over what period of time did it occur? • When did the activities occur? • Was violence involved? • Was the person personally involved or complicit in the activities of the regime/organization? • Is the regime/organization internationally recognized as one that uses violence to achieve its goals? If so, what is the degree of violence shown by the organization?

<table>
<tr><td></td><td>• What was the length of time that the applicant was a member of the regime/organization?

• Is the organization still involved in criminal or violent activities?

• What was the role or position of the person within the regime/organization?

• Did the person benefit from their membership or from the activities of the organization?

• Is there evidence to indicate that the person was not aware of the atrocities/criminal/terrorist activities committed by the regime/organization?</td></tr>
<tr><td>Have all ties with the regime/ organization been completely severed?</td><td>Has the applicant been credible, forthright, and candid concerning the activities/membership that have barred entry into Canada or has the applicant tried to minimize his role?

• What evidence exists to demonstrate that ties have been severed?

• What are the details concerning disassociation from the regime/organization? Did the applicant disassociate from the regime/organization at the first opportunity? Why?

• Is the applicant currently associated with any individuals still involved in the regime/organization?

• Does the applicant's lifestyle demonstrate stability or a pattern of activity likely associated with a criminal lifestyle?</td></tr>
<tr><td>Is there any indication that the applicant might be benefiting from assets obtained while a member of the organization?</td><td>Is the applicant's lifestyle consistent with Personal Net Worth (PNW) and current employment?

• If not, provide evidence to establish that the applicant's PNW did not come from criminal activities.</td></tr>
<tr><td>Is there any indication that the applicant may be benefiting from previous membership in the regime/organization?</td><td>Does the applicant's lifestyle demonstrate any possible benefits from former membership in the regime/organization?

• Does the applicant's status in the community demonstrate any special treatment due to former membership in the regime/organization?</td></tr>
</table>

Has the person adopted the democratic values of Canadian society?	What is the applicant's current attitude towards the regime/ organization, his membership, and his activities on behalf of the regime/organization? • Does the applicant still share the values and lifestyle known to be associated with the organization? • Does the applicant show any remorse for their membership or activities? • What is the applicant's current attitude towards violence to achieve political change? • What is the applicant's attitude towards the rule of law and democratic institutions, as they are understood in Canada?

[22] Accordingly, in my view, it cannot be concluded that the Minister failed to properly consider the "national interest", as he was required to do.

Did the Minister rely on patently unreasonable findings of fact, ignore evidence, or make unreasonable inferences?

[23] As previously indicated, the briefing note sent to the Minister indicates on its face that it encloses eight attachments; however, the certified record delivered to the parties and the Court pursuant to Rule 17 of the *Federal Courts Immigration and Refugee Protection Rules,* SOR 93/22, contains only six enclosures. Missing from the record are enclosures 7 and 8 – "Personal Information Form (PIF)" and "Further submissions from client after disclosure process". The Applicant's PIF is included in the document enclosed as item 4, 'Immigration Officer's notes and report"; however the Applicant's response to the briefing note is not included anywhere. Accordingly, the only evidence in the record as to whether this document was before the Minister is

the list of enclosures typed at the foot of the briefing note. The Memorandum filed by the Applicant succinctly states his objection as follows:

> [W]hile the Applicant was given the opportunity to review and respond to the Briefing Note prior to it being forwarded to the Minister, there is no evidence that the submissions in response were considered. The Applicant's letter of response … highlighted several significant inconsistencies between the Briefing Note and the interview and other statements made by the Applicant. Despite these clarifications, there is no evidence that the Briefing Note was amended in any way to take into account the changes. In fact, the final version that was submitted to the Minister is completely identical to the earlier draft to which the response was made.

[24] The Respondents submit that the reference in the briefing note to its enclosure gives the Court some reason to be confident that the Minister had the benefit of the Applicant's response prior to rendering his decision. With respect, that reference provides me with no confidence at all that the rebuttal letter was before the Minister. The best evidence of what was before the Minister is the Certified Record, which was filed with an affidavit attesting that it was a copy of the original. As that record does not contain a copy of the rebuttal letter, there is every reason to conclude that it was not before the Minister. I may have concluded otherwise had the briefing note been amended to reflect that some of the facts cited therein were challenged by Mr. Ramadan and detailed his response, but it was not. Accordingly, I find that the Applicant's rebuttal was not before the Minister.

[25] The Applicant's rebuttal challenges many statements in the briefing note, including that he had personal contact with PLO commanders, advocated the use of violence, had been involved in violent acts, and had a significant level of involvement with the PLO.

[26] As noted earlier, the Minister should be granted considerable deference with respect to the decision he was required to make. He must review and weight the evidence before him in reaching his decision. That is the Minister's role, not the Court's. This Court has held that where there is evidence before the Minister that, on its face, supports the application for relief, that evidence has to be addressed and the failure to do so constitutes a reviewable error: See *Yamani v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 381.

[27] In my view, where there is evidence submitted in support of the application for relief that challenges the material facts that are placed before the Minister, and that rebuttal evidence is not before the Minister in order that it can be weighed, that too is a reviewable error. In this case, it is not a matter of the Minister having ignored evidence; it is a case of the proffered evidence not having been before the Minister at all.

[28] On this basis, I must allow the application and refer the matter back for a redetermination by the Minister. In determining the matter again, the briefing note should indicate that due consideration has been given to the rebuttal submitted by the Applicant and, in some detail, indicate the reasons for accepting or rejecting the Applicant's rebuttal. The Applicant's rebuttal must be placed squarely before the Minister for his consideration.

Did the Minister improperly fetter his discretion when assessing all of the facts of the Applicant's application?

[29] The Applicant alleges that the author of the briefing note made unreasonable credibility findings. Strictly speaking I need not address this issue in view if my findings above; however I will nonetheless make some brief comments in this respect. The Applicant’s assertion is based on the fact that the immigration officer who interviewed him believed that he had distanced himself from the PLO since his arrival in Canada, and considered that Ministerial relief was warranted. It is submitted that the adverse credibility findings of the author of the briefing note, which were made later and without the benefit of a personal interview, and allegedly without any factual foundation, constituted an improper fettering of discretion.

[30] I cannot agree with the Applicant’s submission in this regard. The immigration officer was tasked with determining whether there were reasonable grounds to believe that the Applicant is or was a member of the PLO. The view of the officer that Mr. Ramadan ought to be granted relief was, strictly speaking, outside his mandate and was a personal opinion, based solely on the facts before him. The author of the briefing note was specifically tasked with making a recommendation as to whether or not granting that relief would be detrimental to national security. Although I have found that the note was problematic, I am not of the view that the Minister’s discretion was fettered.

[31] Neither party proposed any question for certification and on these facts, there is no certifiable question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed and the matter is remitted back to the Minister for a redetermination in accordance with these Reasons; and
2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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