Federal Court  Cour fédérale

Date: 20091231

Docket: IMM-1728-09

Citation: 2009 FC 1302

Ottawa, Ontario, December 31, 2009

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MUHSEN AHMED RAMADAN AGRAIRA

Applicant

and

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

Respondents

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of *the Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision by the Minister of Public Safety, Peter Van Loan, denying Mr. Agraira's application for Ministerial relief, under subsection 34(2) of IRPA, contrary to the recommendation of the Canada Border Services Agency (CBSA). These are my reasons for determining that the application will be granted.

Background

[2] Mr. Agraira is a citizen of Libya. He left that country in March of 1996 at the age of 26. His parents, three brothers and three sisters remain in Libya.

[3] The applicant initially sought refugee protection in Germany on the basis that he was a member of the Libyan National Salvation Front (LNSF) and had engaged in activities for that organization for which he would be persecuted. The German authorities did not believe his story. He tried again in Canada in May of 1997. According to his personal information form ("PIF"), the applicant claimed to have belonged to a cell of the LNSF engaged in training, recruiting and fund-raising. The claim was denied by the Immigration and Refugee Board in November 1998, again on credibility grounds.

[4] The applicant was subsequently sponsored by his Canadian born wife and filed an application for permanent residence in September 1999. The couple later separated and a divorce was granted in 2004.

[5] While the sponsorship application was still pending, in May 2002, the applicant was interviewed at Citizenship and Immigration Canada (CIC) in Oshawa, Ontario to assess his admissibility to Canada. In this interview, the applicant confirmed that he had been a member of the LNSF starting in 1994. However, he also stated that he had, in the past, embellished his statements about his involvement in the LNSF to strengthen his refugee claim and denied that he had ever engaged in activities for the LNSF. The applicant also indicated to the CIC officer that he was no

longer a member of the LNSF and had no contact with the LNSF since his arrival in Canada in 1997.

[6] The CIC officer noted several discrepancies in the information provided by the applicant. Although the applicant had initially stated that he attended LNSF meetings in Libya, he later indicated that he never attended any meetings, but only discussed the organization with friends. Mr. Agraira also claimed to have had no contact with the LNSF since leaving Libya, but then stated that he received newsletters from the organization in the United States.

[7] It was the CIC officer's conclusion that the applicant was a person described by paragraph 34(1)(f) of the IRPA, for being a member of the LNSF, an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism referred to in paragraph 34(1)(c) of the IRPA. As such, the applicant was inadmissible to Canada. An application for leave and for judicial review of that decision was denied.

[8] In July 2002, the applicant applied to be considered for Ministerial relief. In 2006, the Canada Border Services Agency (CBSA) recommended that relief be granted to the applicant pursuant to subsection 34(2) of the IRPA. The Agency was of the opinion that there was not enough evidence to conclude that Mr. Agraira's continued presence in Canada would be detrimental to the national interest. On June 27, 2009, the Honourable Peter Van Loan, Minister of Public Safety, denied relief.

Decision Under Review

[9] In his brief set of reasons, the Minister of Public Safety found that:

a. The applicant offered inconsistent and contradictory statements of his involvement with the LNSF;

b. There is clear evidence that the LNSF has engaged in terrorism and has used terrorist violence in attempts to overthrow a government;

c. There is evidence that the LNSF has been aligned at various times with Libyan Islamic groups that have links to Al Qaeda;

d. It is difficult to believe that the applicant, who in interviews with officials indicated at one point that he belonged to a "cell" of the LNSF, was unaware of the LNSF's previous activity.

[10] The Minister concluded that it was not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations.

Issues

[11] The sole issue is whether the Minister's decision was unreasonable.

Analysis

[12] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, the Supreme Court of Canada abandoned the patent unreasonableness standard leaving only two standards of review, correctness and reasonableness. The Supreme Court also held that a standard of review analysis need not be conducted in every instance. Where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review.

[13] In this context, I adopt the views of Justice Anne Mactavish in *Tameh v. Canada (The Minister of Public Safety and Emergency Preparedness)*, 2008 FC 884, [2008] F.C.J. No. 1111, at paras. 34-36:

> 34 Insofar as the merits of the Minister's decision is concerned, a decision to grant or refuse an application for Ministerial relief is a discretionary one, and should thus be accorded significant deference: see *Miller v. Canada (Solicitor General)*, 2006 FC 912, [2006] F.C.J. No. 1164, at para. 42; and *Yamani v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 381, [2007] F.C.J. No. 520, at paras. 38-39.
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> 35 As the Supreme Court of Canada observed at paragraph 51 of *Dunsmuir*, supra, the standard of reasonableness will generally apply when reviewing the exercise of a discretionary power. This is especially so where, as here, the power conferred on the Minister cannot be delegated, and the Minister himself has considerable expertise in matters of national security and the national interest.
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> 36 As a consequence, I agree with the parties that the merits of the Minister's decision are to be reviewed against the standard of reasonableness. In reviewing a decision against the reasonableness standard, the reviewing court must consider the justification, transparency and intelligibility of the decision-making process. The court must also consider whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir*, at para. 47.

[14] In a case such as this one, there might be more than one reasonable outcome. However, as long as the process adopted by the Minister and its outcome fits 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: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at para. 59.

[15] Significant deference should be accorded to discretionary Ministerial decisions as the power conferred on the Minister cannot be delegated, and the Minister has presumably acquired expertise in matters of national security and the national interest in the course of exercising his functions: *Tameh*, supra.

[16] Another consideration in favour of deference is the "political" nature of such a discretionary decision. In *A & others v. Secretary of State for the Home Department*, [2004] UKHL 56, at para. 29, the House of Lords indicated that it is not appropriate for the courts to intervene in ministerial or political decisions:

> 29. … The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum. [Underlining added]

[17] As this Court determined in *Kablawi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1011, [2008] F.C.J. No. 1256, the sensitive nature of such a discretionary

decision by the Minister is deserving of respect by this Court. I adopt the reasoning of Justice Barnes at paragraph 24 of his reasons:

> 24. … The exercise of the Minister's discretion in this situation does not lend itself to a particular result. Either possible outcome can be reasonably defended on the strength of the available evidence. The Minister's decision is transparent; it can be justified; and it is intelligible. It is also a decision arising in an area where the Minister and his advisors have a considerable degree of special knowledge involving sensitivity to the imperatives of public policy and to the nuances of the legislative scheme. In short, this decision falls well within the range of possible, acceptable outcomes described by in *Dunsmuir v. New Brunswick*, above, and it is, therefore, deserving of respect. [Underlining added]

[18] At first impression, therefore, the decision by the Minister of Public Safety denying Mr. Agraira's application for Ministerial relief, is a question at the political end of the spectrum and not a matter which is appropriate for judicial intervention. On closer scrutiny, however, I am persuaded that the decision is reviewable.

[19] The Minister appears to have placed considerable weight on what is described as "clear evidence that the LNSF has engaged in terrorism" and "has been aligned at various times with Libyan Islamic groups that have links with Al Qaeda". On the record of what was before the Minister, the evidence that the LNSF has engaged in terrorism is minimal at best and there is only one mention of Al Qaeda. The second appendix to the CBSA briefing note provides background on the LNSF and discusses links that are believed to exist between several Libyan opposition groups, not including the LNSF, and Al Qaeda.

[20] The trend assessment section of the second appendix entitled "*Extremist Groups: An International Compilation of Terrorist Organizations, Violent Political Groups, and Issue-Oriented Militant Movements*", states that the NFSL (another acronym for the LNSF) is a Libyan opposition

group and that some Libyan opposition groups have links with Al Qaeda. The document provides a brief overview of the history of the group.

[21] I note that the LNSF/NSFL does not appear on the lists of groups proscribed by the UN, Canada and the US as terrorist organizations. In fact, the LNSF appears to have received support from the international community, including western nations, in their efforts to overthrow the Libyan government. However, the issue of whether it is or ever was a terrorist organization is not before the Court and must be taken to have been decided in the proceedings for which leave was denied. But I find it difficult to understand from the record why this factor was considered to be deserving of significant weight.

[22] It would have been contrary to the evidence for the Minister to find that the LNSF is directly linked to Al Qaeda. Libyan opposition groups, including those with Al Qaeda connections, presumably seek the removal of the current Libyan government. Thus they are all aligned, at least to the extent that they share a common objective.

[23] In a recent decision, Deputy Judge Gibson allowed an application based on similar facts where the Minister had denied relief contrary to the CBSA recommendation: *Abdella v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1199, [2009] F.C.J. No 1493. At paragraph 19, Deputy Judge Gibson noted that Appendix D of the IP 10 *Refusal of National Security Cases\Processing of National Interest Requests Guidelines* (the "Guidelines") sets out five questions to be examined in the context of such an analysis. Those questions are the following:

1. Will the applicant's presence in Canada be offensive to the Canadian public?
2. Have all ties with the regime\organization been completely severed?
3. Is there any indication that the applicant might be benefiting from assets obtained while a member of the organization?
4. Is there any indication that the applicant might be benefiting from previous membership in the regime\organization?
5. Has the person adopted the democratic values of Canadian society?

[24] Deputy Judge Gibson found that these questions, while fully addressed in the briefing note that was before the Minister, were not dealt with at all in his reasons. A further consideration was the fact that the evidence was very much out of date.

[25] In this case, it does not appear from the reasons that the Minister addressed the questions set out in IP 10 nor does he seem to have balanced the factors which prior decisions had identified as relevant to the determination of what is in the "national interest". These would include: whether the applicant posed a threat to Canada's security; whether the applicant posed a danger to the public; the period of time the applicant had been in Canada; whether it is consistent with Canada's humanitarian reputation of allowing permanent residents to settle in Canada; the impact on both the applicant and all other members of society of the denial of permanent residence; and the adherence to all of Canada's international obligations: *Soe v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 461, [2007] F.C.J. No. 620; *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425; *Tryus v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 606, [2004] F.C.J. No. 737.

[26] I note also that the Minister's Reasons do not acknowledge that the applicant has resided in Canada since 1997, that he has been a productive member of society, that he owns his own business earning over $100,000 per annum and that he has no criminal record.

[27] I agree with the applicant that in this case, there are concerns whether the Minister's decision "turned on the simplistic view that the presence in Canada of someone who at some time in the past may have belonged to a terrorist organization abroad can never be in the national interest of Canada": *Kanaan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 241, [2008] F.C.J. No. 301, at para. 8.

[28] Accordingly, the Minister's analysis could be said to have rendered the exercise of discretion meaningless. As discussed in *Soe*, above, at para. 34: "It is tantamount to saying that an individual who commits an act described in subsection 34(1) cannot secure Ministerial discretion because they committed the very act that confers jurisdiction on the Minister to exercise discretion under subsection 34(2)".

[29] Considering the evolution of the jurisprudence regarding the Minister's discretion provided by subsection 34(2) and the wide scope given to the national interest, the respondent proposes that the Court certify the following question:

> When determining a ss. 34(2) application, must the Minister of Public Safety consider any specific factors in assessing whether a foreign national's presence in Canada would be contrary to the national interest? Specifically, must the Minister consider the five factors listed in the Appendix D of IP10?

[30] I note that Deputy Judge Gibson declined to certify this question in *Abdella*, above (Order of December 17, 2009) primarily on the ground that the matter before him turned on its particular facts. I am satisfied that the answer to the question would be determinative of this case. The question also raises an issue of broad significance, the resolution of which will have an impact on future cases heard by this Court. I find that the proposed question satisfies the requirements in s. 74(d) of the IRPA.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application for judicial review is granted.

The following question is certified:

When determining a ss. 34(2) application, must the Minister of Public Safety consider any specific factors in assessing whether a foreign national's presence in Canada would be contrary to the national interest? Specifically, must the Minister consider the five factors listed in the Appendix D of IP10?

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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