Federal Court  Cour fédérale

Date: 20121010

Docket: IMM-8416-11

Citation: 2012 FC 1140

Ottawa, Ontario, October 10, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

A.B.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant is asking this Court to appoint a special advocate pursuant to section 87.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ["IRPA"].

[2] The Applicant is challenging a decision dated November 3, 2011 by Immigration Officer Geneviève Cloutier ["the Officer"] that denied a sponsored application for permanent residence filed within Canada. To that end, the Applicant was interviewed. The application for permanent residence was refused for misrepresentation of material facts that induced or could have induced an

error in the administration of the IRPA. Inadmissibility was also found based on security grounds pursuant to section 34 of the IRPA.

[3] The Applicant sought a Confidentiality Order to protect his name, based on privacy considerations, which was granted by Prothonotary Morneau on December 5, 2011. As discussed at the hearing, counsel will do their utmost efforts to be as public as possible subject to the constraints imposed by the Confidentiality Order. The Order ensures that the Applicant cannot be identified. Therefore, any information including but not limited to addresses, dates of birth, and names of third parties that, if disclosed, would identify the Applicant, are to be kept confidential.

[4] The Respondent requested from the Court the protection of information that, if disclosed, could be injurious to national security or endanger the safety of any person. Therefore, pursuant to section 87 of the IRPA, a motion seeking non disclosure of the redacted information included in the certified tribunal record was served and filed. It also requested that an *ex parte*, in camera hearing be held to deal with this matter. As discussed during a teleconference with all counsel the Court asked counsel for the Respondent to prepare, serve and file a detailed public affidavit by the Officer which would explain whether or not the redacted information was useful for the purpose of the determination to be made. Such an affidavit was served and filed. This exceptional procedure was at the Court's initiative to accord fairness and natural justice to the Applicant. It is hoped that this shall not be used for other unnecessary purposes.

[5] In an Order dated September 10, 2012, more information was disclosed to the Applicant as a result of the Respondent's review of the redacted information in preparation for the *ex parte*, in

camera hearing and the Court's exchange with the affiants and counsel during the said hearing. In that same Order, I also concluded that the remaining redactions were justified and should not be disclosed. As mentioned above, counsel for the Applicant is seeking the appointment of a special advocate pursuant to section 87.1 of the IRPA.

[6] It is submitted that only a special advocate would be able to deal with the issues of this case by:

1. Further examining the Officer on the redacted material and/or could provide *ex parte* submissions to the Court as to the relevance and/or credibility of the redacted information.

2. Helping to ensure that all relevant arguments are made.

[7] Section 87.1 of the IRPA establishes the requirements for appointing a special advocate. It reads as follows:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Special advocate	Avocat spécial
87.1 If the judge during the judicial review, or a court on appeal from the judge's decision, is of the opinion that considerations of fairness and natural justice require that a special advocate be appointed to protect the interests of the permanent resident or foreign national, the judge or court shall appoint a special advocate from the list referred to in subsection 85(1). Sections 85.1 to 85.5	87.1 Si le juge, dans le cadre du contrôle judiciaire, ou le tribunal qui entend l'appel de la décision du juge est d'avis que les considérations d'équité et de justice naturelle requièrent la nomination d'un avocat spécial en vue de la défense des intérêts du résident permanent ou de l'étranger, il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à ce titre

apply to the proceeding with any necessary modifications.	dans le cadre de l'instance. Les articles 85.1 à 85.5 s'appliquent alors à celle-ci avec les adaptations nécessaires.

[8] In *Dhahbi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 347, this Court noted at paragraphs 22 and 23 that discretion is given to the presiding judge to appoint or not a special advocate after having reviewed the record and considered the principles of fairness and natural justice applicable to the facts at play.

[9] In order to properly exercise this discretion, the presiding judge ought to examine the redactions, keep in mind the whole record, preside if required an *ex parte*, in camera hearing, ask for justification for the redactions, question the relevancy as presented, suggest and, if necessary, order the unveiling of the information if it is not justified in law and fact. The judge ought to also read the decision subject to the judicial review proceeding. Then, in light of the knowledge gained from the aforementioned approach, the standards of fairness and natural justice will be better understood and applied to the case at bar. However, these standards vary with the circumstances of each case. As a result of this approach, a hearing to present submissions may be necessary and a decision may be rendered on whether or not to appoint a special advocate. Such a hearing was necessary in the present case.

[10] In his most recent submissions, counsel for the Applicant made an argument based on the *Canadian Charter of Rights and Freedoms* ["the Charter"]. He argued that the Applicant's section 7 Charter interests are engaged because he has no access to the redacted information and is therefore not in a position to test the evidence. If the Court concludes that section 7 of the Charter is not

applicable, it is submitted that the Applicant has a common law right to disclosure. Therefore, since the Applicant cannot see the redacted information, it is only through the appointment of a special advocate that he would be able to demonstrate that nondisclosure of some information rendered the proceedings unfair.

[11] In his initial submissions, counsel for the Applicant submits that in order to properly respond to any concern or suspicion that the latter may have, the relevant, redacted information that could reasonably impact on the decision-maker should be disclosed. In the alternative, if such disclosure is not possible, it is suggested that a summary of information should be issued. In a most recent written exchange, counsel for the Applicant suggested that at a minimum a special advocate should be appointed to provide *ex parte* written submissions as to the relevance of the redacted materials. A schedule for doing so is proposed.

[12] Because disclosure of certain types of information would be injurious to national security or endanger the safety of any person, such information cannot be disclosed (see *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, at para 58). I am satisfied that there was no need to involve a special advocate at that stage. As for the request for a summary of the redacted information, although permitted for the purposes of certificate proceedings (see section 83.(1) of the IRPA), it is explicitly excluded for the purposes of judicial reviews involving immigration matters and information protected on grounds of national security (see section 87 of the IRPA).

[13] Counsel for the Applicant submits that as a result of these considerations, a special advocate should be appointed.

[14] Counsel for the Respondent opposes such an appointment for the following reasons:

1. No Charter rights are at stake in this litigation: the decision deals with an application for permanent residence from within Canada sponsored by the Applicant's spouse. The Applicant does not face detention or potential removal to a country where he may be at risk. At this stage, the decision also does not render the Applicant inadmissible on security grounds pursuant to section 34 of the IRPA.

2. The certified tribunal record contains 175 pages out of which 11 pages include redactions. As a result of the Order issued by the Court, September 10, 2012, six of the 11 pages contain minimal redactions.

3. A complete review of the record and the decision indicates that the gist of the information is known to the Applicant and that disclosure of the redactions would as a result add little to the Applicant's understanding of the reasons of the decision and that all arguments can already be made. (See to this effect, the submissions of counsel for the Respondent and more specifically paragraphs 17 to 61.)

4. The decision-maker has flagged as important the Applicant's misrepresentations regarding namely, his relationship with people of North African origin while in France and his relationship with three specific individuals in Canada and with others associated with Islamic extremist organizations as well as his fraudulent claim for refugee status upon arrival to Canada.

5. The affidavit of the Officer can also be helpful to the Applicant.

6. The substance of the redactions is available to the Applicant in other places in the tribunal's record or through questions asked during the Applicant's three interviews.

7. To the recent suggestion of a minimal involvement of a special advocate limited to the relevance of redacted information, the Respondent reiterates its arguments as above.

[15] As mentioned above, aside from written submissions, oral submissions were presented by all parties.

[16] It is important to note that Section 7 Charter issues or common law right to disclosure would not always be trigged by proceedings involving redacted information. The appointment of a special advocate is thus not always justified. Each case must be assessed on its own facts.

[17] The Applicant has raised three arguments in the judicial review proceedings:

1. The alleged failure of the Officer to provide notice that she would be invoking section 40(1)(a) of the IRPA.

2. The alleged failure to provide sufficient notice of her intention to rely on section 34 of the IRPA.

3. The alleged failure to provide full disclosure, more specifically notes or transcript from CSIS regarding interviews with the Applicant and the Officer's "classified notes" which should have been included in the reasons (see Applicant's record, pages 75 and 80 and paragraphs 45 and 68 of the submissions).

[18] Only the issue pertaining to the scope of disclosure may justify the need to discuss the possible appointment of a special advocate. The other matters do not relate to the redacted information and, as such, can be dealt with by counsel with submissions in law and do not call for the appointment of a special advocate.

[19] During the hearing, I explained that some of the redactions were based on reasons of an internal or administrative nature, that other redacted information was already disclosed in one form or another and that the essence of the sensitive information was contained in the decision rendered. I also added that redactions of information of an internal or administrative nature are of no relevance to the decision by the Officer. I further explained that the designated judge presiding the judicial review proceeding would have full knowledge of the redacted information and would be able to assess it in light of the decision subject to judicial review.

[20] It should also be noted that not all of the Respondent's counsel have knowledge of the content of the redacted information. The Respondent is represented by three counsel, Mr. Latulippe

and Mrs. Nobl from Citizenship and Immigration Canada, and Mrs. Strachan from the Canadian Security Intelligence Service. Only the latter was present at the in camera, *ex parte* hearing and is thus the only counsel to have access to the redacted information. Therefore, Applicant's counsel and counsel for the Respondent, except for the one present at the in camera, *ex parte* hearing are not privy to the content of the redactions.

[21] Moreover, during the application for permanent residence process, the Applicant participated in interviews, which form part of the basis on which his permanent residence application was assessed. Therefore, all pieces of information that were addressed by either the Applicant or the interviewing officers are to be considered as disclosed to the Applicant. The relevant information was therefore disclosed during the interviews (*Dhahbi*, above, at para 26).

[22] Since the information redacted is in one form or another known to the Applicant, I find that the Applicant through his counsel can deal with all relevant matters and that therefore, his Charter or common law rights are not affected. Moreover, at the present stage, it cannot be argued that the Applicant is facing a risk of detention or removal to a country where he may be at risk.

[23] As for the concern raised by counsel for the Applicant about the relevancy of the redacted information and the impact it might have had on the decision-maker, it must be understood that the redacted sensitive information is already known in one form or another by the Applicant and can be addressed if so chosen.

[24] In addition to this, the designated judge has full knowledge of all the information and can draw from it any appropriate conclusion. The affidavit of the Officer is also useful to the purpose of assessing whether or not the redacted information is relevant to the decision subject to the judicial review proceeding.

[25] Therefore, at this stage, the appointment of a special advocate would not allow the Applicant to make any additional argument that he is not currently in a position to make. In the present case, on the contrary, such involvement would unjustifiably slow down the process because of the time required for the special advocate to become involved, study the file, prepare submissions and participate in the *ex parte*, in camera hearings and possibly in a public hearing.

[26] Since the Applicant has knowledge of the redacted information in one form or another, he is in a position to deal with the facts of the case as well as the legal issues raised and to advance all possible arguments. As a result, he is also knowledgeable of all the information required to effectively cross-examine the Officer. Therefore, I do not find that there is a breach to section 7 of the Charter, nor a common-law right to disclosure.

[27] Undoubtedly, the day will come where redacted information will be crucial to the legal issues at play. Since the redacted information cannot be released for national security reasons and since such critical information is not known to the individual concerned, a Court may eventually have to consider appointing a special advocate. Fairness and natural justice could be better served then by such an appointment. However, such is not the case here. There may be other circumstances

which are not identifiable at this time that would call for the exercise of the discretion to appoint a special advocate.

[28] Considering the minimal redacted information included in the certified tribunal record, the fact that information is disclosed in one form or another which includes the decision under review, and the full knowledge of the redacted information by the designated judge in charge of the judicial review, I am of the view that considerations of fairness and natural justice do not require that a special advocate be appointed to protect the interests of the Applicant. (See also on that point *Farkhondehfall v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1064 at paragraphs 42 and 43.)

ORDER

THIS COURT ORDERS that:

1. The request to appoint a special advocate be denied; and

2. The hearing of the judicial review will be held in Montreal on December 18, 2012, at 9:30 a.m. and the time reserved shall be three (3) hours.

"Simon Noël"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8416-11
STYLE OF CAUSE:	A.B. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	September 26, 2012
REASONS FOR ORDER AND ORDER:	NOËL J.
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APPEARANCES:

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