Federal Court  Cour fédérale

Date: 20130506

Docket: IMM-2321-12

Citation: 2013 FC 473

Ottawa, Ontario, May 6, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ALLA OKOMANIUK
VOLODYMYR OKOMANIUK
DANA OKOMANIUK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Alla and Volodymyr Okomaniuk and their daughter Dana, citizens of Ukraine, applied for permanent residence in Canada in December 2006. Their application was refused by letter dated February 9, 2011 on the ground that Volodymyr was inadmissible as a former member of the Ukrainian Security Service. This is their application for judicial review of that decision under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, the application is granted.

BACKGROUND:

[3] Mr. Okomaniuk worked for the Ukrainian Security Service (SBU) from 1995 to 1998 in a counter-terrorism role, in particular to risks from religious extremists. During this time he was given six months of compulsory training at the Academy of the Security Service of Ukraine but not the 5-year training customary for career SBU officers. He then worked for the Department of the State Guard as an "officer of defence" from 1998 to 2000.

[4] His wife Alla Okomaniuk trained as a teacher and then entered government service in 1997. From 2000 to 2004 she was posted as First Secretary at the Ukrainian Embassy in Ottawa. She left the government in 2004 and since 2007 the couple have managed a restaurant in the town of Khmelnytskyi, Ukraine.

[5] Mr. Okomaniuk says that during his wife's posting to the Ottawa Embassy, he was employed by the State Border Service as a security guard at the Embassy. He was subordinate to a senior guard and, through that guard, to a security officer who was an SBU member. Mr. Okomaniuk says that he reported up to the SBU officer only concerning protection of the Embassy's physical premises, damage to property or vehicles, and emergencies.

[6] Ms. Okomaniuk received sufficient points to qualify for permanent residence in the skilled worker class.

[7] The Computer Assisted Immigration Processing System (CAIPS) notes in the court record indicate that in August 2009; a "simplified processing docs request" was sent to the applicants, who provided documentation on their education, work, and travel histories, as well as photographs. In October 2009 it was assessed that Ms. Okomaniuk qualified on the points chart even though her work in Canada at the embassy did not count towards adaptability points.

[8] However, it was deemed necessary to clarify whether Mr. Okomaniuk had worked for the security service, or the state protection service of the Ministry of the Interior. The applicants sent more documentation, which was received in October 2009. In April 2010, an interview was scheduled for May 19, 2010 and duly took place.

[9] In June, August, October, and December 2010, the applicants inquired about the status of their case and were advised that it was still under consideration. The Canada Border Security Agency (CBSA) provided a recommendation to the Immigration Officer in December 2011. This was reviewed and an interview was scheduled "for procedural fairness purpose".

[10] The notes record that the interview was conducted in Ukrainian on February 7, 2011 with an interpreter present. Mr. Okomaniuk was asked to confirm that he was a member of the Ukrainian Security Service (SBU) from 1995 to 1998. He confirmed it. He explained the chain of command for his security guard work in Canada.

[11] Sections 34(1)(*a*) and (*f*) of IRPA were then explained to the applicants. It was indicated that although Mr. Okomaniuk did not fall under s 34(1)(*a*), there were reasonable grounds to believe that he did fall under 34(1)(*f*).

DECISION UNDER REVIEW:

[12] The CAIPS notes for February 7, 2011 indicate that all the information available, including the recommendation provided by CBSA dated 22 December 2011, had been reviewed. It is noted that: "Based on the information provided by the CBSA I have reasonable grounds to believe that the SBU is an organization that has engaged in activities described at 34(1)(*a*) of IRPA during the period of Mr. Okomaniuk's membership in the organization." Since he had admitted his membership, "I therefore have reasonable grounds to believe that Mr. [*sic*] is inadmissible".

[13] The refusal letter dated February 9, 2011 cites "reasonable grounds to believe" that Mr. Okomaniuk is inadmissible under section 34(1)(*f*) but does not mention the CBSA report.

ISSUES:

[14] The issues which arise in this matter are as follows:

a. Were the visa officer's reasons deficient with respect to the finding that the applicants were inadmissible to Canada pursuant to section 34(1)(*f*) because they did not evidence an assessment of the SBU activities in question?

b. Did the visa officer breach principles of procedural fairness by not disclosing the CBSA report on which the conclusion about the SBU was based?

[15] Prior to the hearing of this matter, the respondent brought an application for the protection of certain information in the certified tribunal record under s 87 of the IRPA. A closed hearing was held to determine whether the redacted information should be disclosed.

[16] Having read the information that the Minister sought to protect from disclosure and upon receiving evidence and submissions from the respondent in the closed session, I was satisfied that the redacted information was not relevant to any of the issues before the Court. An Order issued granting the Minister's application for nondisclosure subject to any representations received from the applicants at the open hearing.

[17] At the open hearing, counsel for the applicants advised that he had nothing to submit with respect to the redacted material and did not think that it would affect the outcome. I agreed with that submission.

APPLICABLE LEGISLATION:

[18] The relevant provisions of the Act are 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	*a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression

they are understood in Canada;	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.
42. A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if	**42.** 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.

87. The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 — other than the obligations to appoint a special advocate and to provide a summary — applies to the proceeding with any necessary modifications.	**87.** Le ministre peut, dans le cadre d'un contrôle judiciaire, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. L'article 83 s'applique à l'instance, avec les adaptations nécessaires, sauf quant à l'obligation de nommer un avocat spécial et de fournir un résumé.

ANALYSIS:

Standard of Review

[19] The admissibility decision under 34(1) was within the discretion of the officer and would normally be reviewable on a standard of reasonableness: *Ugbazghi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 694 at para 36. However, the applicants allege that the officer fettered his or her discretion and did not assess the CBSA memorandum. They contend that the officer merely applied the CBSA memorandum without question and therefore did not exercise his or her discretion.

[20] The standard of review with respect to the fettering of discretion is correctness, as stated by the Federal Court of Appeal in *Thamotharem v Canada (Minister of Citizenship and Immigration)* 2007 FCA 198 at paragraph 33.

[21] The second issue relating to the non-disclosure of the CBSA report concerns procedural fairness and is also subject to review without deference.

> *Were the visa officer's reasons deficient because they did not evidence an assessment of the SBU activities in question?*

[22] The applicants contend that the visa officer relied on the CBSA memorandum to conclude that the SBU is an organization described in s 34(1)(*f*) without conducting any independent analysis of that issue. Reasons must be detailed enough for the applicants to sufficiently know why the application was denied: *Ogunfowora v Canada (MCI)*, 2007 FC 471 at para 60. Here there were no "reasoned reasons" as discussed in *Adu v Canada (MCI)*, 2005 FC 565 at paras 10-11. A finding of inadmissibility is particularly significant to an applicant and caution must be exercised to ensure that it is properly made. The requirement for reasons in such circumstances was stressed in *Alemu v Canada (MCI)*, 2004 FC 997 at paras 24, 27 and 36. See also *Jalil v Canada (MCI)*, 2006 FC 246 at paras 25-29.

[23] In this case, the only ground of inadmissibility was membership in the SBU, and the characterization of the SBU was, therefore, of the utmost importance. The officer did not engage in any independent analysis regarding the SBU, merely citing "information provided by the CBSA".

[24] The applicants rely on *Peer v Canada (MCI)*, 2010 FC 752 [*Peer*] at para 28:

> I agree with the submissions of the applicant that "there is nothing in the reasons or the evidence to justify any finding that the organization [of which the applicant was a member] engaged in espionage or subversion at all." The officer provides no basis at all for her conclusion that the CMI and/or the ISI are organizations falling within the description provided in subsection 34(1) of the Act. The only support for this conclusion was to be found in the reports that were not properly before the officer. If this were the only basis on which the applicant was found inadmissible, this application would be allowed; however, the officer also found that the applicant himself had engaged in espionage within the meaning of subsection 34(1)(a) of the Act.
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> [Underlining added]

[25] Here, unlike in the *Peer* case, it is not in question that the report was properly before the officer. But nor is there any alternate basis of personal involvement alleged that would justify inadmissibility. It is also impossible to tell from the CAIPS notes whether the officer turned his or her mind to the nature of the SBU or what he or she understood "espionage" to mean.

[26] The respondent contends that the visa officer's linkage of the 34(1)(*f*) finding to 34(1)(*a*). was sufficient clarity for the applicants and for this Court, and a sufficient basis for meaningful judicial review: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. In this instance, neither the allegation of membership in the SBU nor the allegation that the SBU was involved in espionage were denied by the applicants.

[27] I think that it is clear from the CAIPS notes that the officer relied almost entirely upon the CBSA report. That in itself was not surprising as the officer would not necessarily have access to any better source of information about the nature of the organization in question. But there is also no

indication in the notes that the officer considered disclosing the report to the applicants, redacted as necessary, and giving them an opportunity to respond to the information it contained.

[28] I find that the reasons provided were deficient due to the lack of evidence of an independent assessment by the officer.

Did the visa officer breach principles of procedural fairness by not disclosing the CBSA report?

[29] In *Pusat v Canada (MCI)*, 2011 FC 428 [*Pusat*] at paras 28-30, this Court held that judicial review ought to be allowed on the basis of non-disclosure of a CBSA memorandum:

> **28** The CBSA memorandum considered by the Officer in this instance was similar to that discussed by Justice Eleanor Dawson, as she then was, in *Mekonen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1133, 66 Imm. L.R. (3d) 222. That case also dealt with the issue of disclosure in the context of a paragraph 34 (1) (f) determination. Citing factors applied by the Federal Court of Appeal in *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407 (C.A.) (QL), and *Canada (Minister of Citizenship and Immigration) v. Bhagwandass*, 2001 FCA 49, Justice Dawson found that the circumstances of that case required the officer to provide the applicant with the CBSA memorandum and other open-source documents to allow him to make submissions that were responsive to the material. This was necessary, she held at paragraph 26 of her reasons, in order for Mr. Mekonen to have a meaningful opportunity to present relevant evidence and submissions and to have his evidence and submissions fully and fairly considered by the officer.
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> **29** At paragraph 19, Justice Dawson found that the CBSA memo in question in that case: [W]as an instrument of advocacy designed, in the words of the Federal Court of Appeal in Bhagwandass [Canada (Minister of Citizenship and Immigration) v. Bhagwandass, "to have such a degree of influence on the decision maker that advance disclosure is required 'to 'level the playing field'".
>
> **30** The CBSA memorandum in the present case contains a recommendation in almost identical terms to that in *Mekonen* and states that the information being forwarded to the officer "provides sufficient conclusive evidence to support a determination of inadmissibility pursuant to paragraph 34 (1) (f) IRPA". As in *Bhagwandass* and *Mekonen*, disclosure was required to level the playing field. See also: *Rana v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 696, a case decided by Justice Sean

> Harrington in which the failure to disclose a similar report in analogous circumstances was found to have denied the applicant procedural fairness.

[30] The respondent contends that the applicants were advised at the procedural fairness interview of the concern that Mr. Okomaniuk had been a member of the Ukraine security services while working at the Ukrainian embassy in Canada and that the SBU was an organization that conducted espionage. The conclusion of the CBSA memorandum was presented to the applicants for comment and they were given an opportunity to respond at that time.

[31] The respondent contends that this was sufficient to meet the requirements of procedural fairness because it is unclear what evidence the applicants were prevented from adducing to rebut the content of the report. Nor is it clear, the respondent argues, what assistance advance disclosure could have given the applicants.

[32] In my view, the memorandum in the present instance did amount to "an instrument of advocacy" as discussed in *Pusat*, above, and *Mekonen*, which the former cites. This is not a case such as *Johnson v Canada (MCI)*, 2008 FC 2 where the inadmissibility concerns arose from the provisions of the IRPA itself. In *Johnson*, the applicant was inadmissible by reason of a criminal conviction. It was not necessary for the officer to disclose the fact that he was aware of Johnson's conviction when the interview was conducted. The fact of the conviction was known to Johnson and his admissibility stemmed directly from the occurrence of that fact. Here, it was necessary for the officer to determine the nature of the SBU and its activities and Mr. Okomaniuk's membership in the organization before the admissibility finding could be made.

[33] While it may not have been necessary to disclose the actual memorandum, particularly as it contained information that it would prove necessary to redact, the content or gist of the concern about the nature of the SBU and Mr. Okomaniuk's involvement with it should have been conveyed to the applicants prior to the interview: *Nadarasa v Canada (MCI)*, 2009 FC 1112 at paragraph 25 citing the following quote from Justice Rothstein (then from this Court) in *Dasent v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 720, at para 23:

> The relevant point as I see it is whether the applicant had knowledge of the information so that he or she had the opportunity to correct prejudicial misunderstandings or misstatements. The source of the information is not of itself a differentiating matter as long as it is not known to the applicant. The question is whether the applicant had the opportunity of dealing with the evidence. This is what the long-established authorities indicate the rules of procedural fairness require. In the well known words of Lord Loreburn L.C. in *Board of Education v. Rice*, [1911] A.C. 179 (H.L.) at page 182:
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> > They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.
>
> See also: *Muliadi* v. *Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 205 (F.C.A.); *Chen* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 41; *Knizeva* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 268.

[34] In this instance, the applicants were not given a fair opportunity to correct or contradict the content of the CBSA memorandum. It is clear from the information filed by the applicants on this application that they could have presented such information had they been given the chance to do so. It was not sufficient for the officer to inquire, at the end of the interview, whether they had anything to add at that time.

[35] In the result, I am satisfied that there has been a breach of procedural fairness and the matter should be remitted for a fresh determination by another officer. In the circumstances, the applicants must be allowed to present the information they would have submitted had they been given the opportunity by the visa officer in the first instance.

[36] No serious questions of general importance were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted for redetermination by a different visa officer in accordance with these reasons. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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