Federal Court  Cour fédérale

Date: 20160317

Docket: IMM-8308-14

Citation: 2016 FC 327

Ottawa, Ontario, March 17, 2016

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

FARBOD ALIJANI
SARVIN RASTEGAR NIYAKI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicants seek judicial review of two decisions of a Citizenship and Immigration Canada [CIC] officer, whereby she denied their work permit applications on the basis of Mr. Farbod Alijani's inadmissibility. The officer found that Mr. Alijani had not convinced her that he was not inadmissible pursuant to paragraph 34(1)(*d*) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [IRPA]. Being the wife of Mr. Alijani, Mrs. Sarvin Rastegar Niyaki's application for a work permit was denied on the basis that she is the accompanying family member of a person who is inadmissible. I will only refer to the principal Applicant throughout these reasons.

[2] Shortly after this application was filed, the Respondent filed a motion for the non-disclosure of some excerpts of the Canada Border Services Agency's [CBSA] 2012 inadmissibility assessment (found at pages 548-556 of the Certified Tribunal Record), pursuant to section 87 of IRPA. In response to the motion, the Applicant argued that if the non-disclosed information contained new information central to the rationale of the contested decision, the Court should consider appointing a special advocate. On August 21, 2015, I granted the Respondent's motion for the required redactions and found that they did not give rise to issues of fairness and natural justice. I also found that the appointment of a special advocate was not warranted. The Respondent undertook not to rely on the redacted portions of the CBSA inadmissibility report in the course of this application for judicial review and he did not.

[3] For the reasons discussed below, this application for judicial review is granted.

II. Facts

[4] Farbod Alijani and Sarvin Rastegar Niyaki are citizens of Iran. From 2004 to 2011, Mr. Alijani attended the Amirkabir University of Technology [AUT] in Tehran. He first obtained a Master's Degree in Mechanical Engineering, with a thesis on the "Application of Extended Kantorovich Method to the Bending of Cylindrical Panels". Then, he obtained a Doctorate

Degree in Mechanical Engineering with a thesis on "Nonlinear Vibrations of FGM Doubly-Curved Shells". The Applicant first came to Canada in December 2009 with a visitor's visa valid until June 2010, in order to pursue post-doctoral research on "Nonlinear Vibrations of Shells and Plates" under the supervision of Professor Marco Amabili at McGill University in Montreal.

[5] In 2010, the Applicant obtained an extension of his visitor's visa, valid until December 2012 and later extended until February 2014; he and his wife also made applications for permanent residence at the Canadian Embassy in Warsaw, Poland. The permanent residence applications are still pending.

[6] On November 26, 2012, the CBSA issued an inadmissibility assessment concluding that the Applicant was inadmissible pursuant to paragraph 34(1)(*d*) of IRPA.

[7] On March 24, 2014, the Applicant was appointed as Postdoctoral Scholar in the Department of Mechanical Engineering at McGill University for the period of April 15, 2015 to April 14, 2016. His task would have been to perform research on the "dynamics and stability of human aorta related to dissection".

[8] On March 31, 2014, a CIC officer refused the Applicant's application for an extension of his work permit on the basis that the Applicant had not convinced him that he was not inadmissible pursuant to paragraph 34(1)(*d*) of IRPA. The Applicant filed an application for leave for judicial review of that decision (file IMM-2760-14), but desisted from that application

as CIC had agreed to reassess his file. The Applicant and his wife were invited to leave Canada voluntarily, which they did.

[9] On September 12, 2014, another CIC officer sent the Applicant a procedural fairness letter outlining concerns that the Applicant could be inadmissible on grounds of security and advising him that he could provide additional information, may he wish to do so. The officer noted that AUT is listed by some governments as an "entity of concern" with respect to nuclear weapons and military imports. Based on the Applicant having studied there and based on his field of study, the officer stated that there were reasonable grounds to believe that the Applicant had contributed or could contribute to Iran's ballistic missiles and nuclear programs.

[10] The Applicant's counsel submitted a letter of reply to CIC, accompanied by a new letter from the Applicant himself; his official transcripts; an affidavit from Professor Amabili and letters from colleagues stating that the Applicant's research had nothing to do with nuclear programs; and relevant Internet pages. The Applicant also requested that an interview be held if any of the information was deemed insufficient.

III. Decision

[11] The officer's decision found that despite the Applicant's submissions regarding the concerns outlined in the September 12, 2014 letter, the Applicant is inadmissible as he represents a "danger for the security of Canada". The officer acknowledged the Applicant's explanation that the sole fact of having attended AUT in engineering did not imply that he was involved in Iran's nuclear program. The officer noted, however, that the Applicant had not denied that the AUT had

links with the government, or nuclear, spatial, or weapons of mass destruction [WMD] programs, nor had he denied that AUT could be used as a façade for military imports and research. The officer cited the Wikipedia page that the Applicant had submitted with respect to the entrance exam for admission to AUT, which states that the entrance exam not only tests students' knowledge, but also their "commit[ment] to the ideology of the revolution".

[12] The officer also cited the AUT website which states that there are nearly 130 doctoral students in Mechanical Engineering there, and that these students play an important role within Iranian industries and government. The officer then considered the Applicant's thesis topics and gave little weight to the letters from the Applicant's colleagues, finding that one of the Applicant's research proposals could be used for nuclear, spatial, missile and WMD technology.

[13] The officer barely considered the content of Professor Amabili's affidavit, finding that it was somewhat contradicted by the preface of his book, *Nonlinear Vibrations and Stability of Shells and Plates*, which states that the book is notably intended for "engineers working on aircraft, missiles, launchers, cars, computer hard and optical disks, storage tanks, heat exchangers, nuclear plants, biomechanics, nano-resonators or thin-walled roofs and other structures in civil engineering."

[14] Overall, these findings led the officer to conclude that the Applicant had not refuted that he could be involved in nuclear, spatial, missile and/or WMD programs in Iran, given his seven years of study at AUT, his current specialized areas of study, and his intellectual capacity.

IV. Issues and standard of review

[15] In my view, this application for judicial review raises a single determinative issue:

- *Did the officer err in finding that the Applicant is inadmissible on the ground of security?*

[16] As this question is one of mixed fact and law, it is reviewable against the standard of reasonableness (*Jahazi v Canada (Citizenship and Immigration)*, 2010 FC 242 at para 39 [*Jahazi*]).

V. Analysis

[17] In *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 90 [*Suresh*], the Supreme Court of Canada found that in order to conclude that a person represents a danger to the security of Canada pursuant to paragraph 34(1)(*d*) of IRPA, the officer has to have an "objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible." As the issue here is not one of *refoulement* as it was in *Suresh* (see for example *Suresh* at para 89), that holding needs to be read with *Jahazi*, above at para 64, in which this Court held that the "reasonable grounds to believe" standard "requires a *bona fide* belief in a serious possibility based on credible evidence", a standard which seems slightly higher than that set out in *Suresh*.

[18] Therefore, in my view, the officer had to address the following issues:

- Could the Applicant's expertise find application in nuclear technology or in the production of missiles and other weapons? In other words, does the theory of dual use apply here?

- If so, is there a serious possibility based on credible evidence that the Applicant could use his expertise in nuclear technology or in the production of missiles and other weapons?

[19] However, in her decision, the officer focussed on the second issue without seriously assessing the technical aspect of the Applicant's expertise.

[20] The Applicant argues that the officer made unreasonable inferences and findings of fact and that she misconstrued and misunderstood the scientific evidence relating to his field of study. The officer made an unreasonable inference from the preface to Professor Amabili's book. She assumed that because this book is intended for, among others, "engineers working on aircraft, missiles, nuclear plants [etc.]" that the Applicant's field of study must be applicable to nuclear programs and technology.

[21] The Applicant provided numerous letters from colleagues that describe what his research is actually about – not only in much more detail than any of the documentary evidence relied upon by the officer, but in a way that is specific to the Applicant. The officer barely discussed these letters, giving them little weight. She rather focussed on a research proposal that the Applicant had made but that never materialized, and which, according to the Applicant's affidavit, related to the flutter of wings modeled as trapezoidal plates, and was applicable to airplanes' wings. Extrapolating from this proposal, the officer found that part of the Applicant's current research could apply to nuclear technology, aerospace vehicles, ballistic missiles and WMD.

[22] Professor Amabili's affidavit seems to specifically address the question as to whether the Applicant's expertise or current field of study finds application or could find application in nuclear technology or in the production of missiles and other weapons. However, the officer set it aside on the basis of the generic preface to the book written by Professor Amabili, which states that the book is intended for graduate engineering students as well as "engineers working on aircraft, missiles, launchers, cars, computer hard and optical disks, storage tanks, heat exchangers, nuclear plants, biomechanics, nano-resonators or thin-walled roofs and other structures in civil engineering." I find that it was unreasonable for the officer to simply dismiss Professor Amabili's affidavit strictly on that basis.

[23] It could be that in fact, the officer chose to set aside Professor Amabili's affidavit because it is not drafted in the simplest terms. It is well known that decision makers must treat scientific evidence with extreme caution: "immigration officers… cannot simply discard experts' opinions without giving at least one reason that stands to probing examination" (*Curry v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1350 at para 4). Nevertheless, it is the duty of the party bearing the burden of proof to present scientific evidence in terms that are likely to make sense to the decision maker. Here, it might be said that large portions of Professor Amabili's affidavit could only be understood by mechanical engineers.

[24] In any event, it is not the duty of this Court to assess the evidence that was before the officer. It was for the officer to assess the affidavit of Professor Amabili and determine whether the latter expresses the opinion that the Applicant's expertise or field of study does not or could not find application in nuclear technology or in the production of missiles and other weapons. If

the answer to that question is affirmative, the second question that was before the officer (see para 18 of these reasons) might not even arise.

VI. Conclusion

[25] For the reasons discussed above, I find that the decision of the officer with respect to the Applicant was unreasonable, and thus should be quashed and remitted back for re-determination by a different officer. For the same reasons, the decision with respect to the Applicant's wife should also be quashed and remitted back for re-determination. The parties did not propose any question of general importance for certification and none arises from this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The decisions of Citizenship and Immigration Canada, both dated December 11, 2014, are set aside and the file remitted back to a different Immigration Officer for re-determination in accordance with these reasons;
3. No question of general importance is certified.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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