Federal Court  Cour fédérale

Date: 20180214

Docket: IMM-4640-16

Citation: 2018 FC 171

Toronto, Ontario, February 14, 2018

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

SEYED HOSSEIN HOSSEINI;
MAHNAZ MIRI;
SEYED MOHAMMAD HOSSEINI;
SEYED MASOUD HOSSEINI;
SEYED MOEIN HOSSEINI

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr Seyed Hossein Hosseini and his family, citizens of Iran, sought permanent residence in Canada but an immigration officer dismissed their applications. The officer concluded that Mr Hosseini was inadmissible because he is a danger to Canada's security (pursuant to s 34(1)(*d*) of

the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]; all enactments cited are set out in an Annex).

[2] The officer found that there were reasonable grounds to believe that Mr Hosseini assisted with Iran's development of weapons of mass destruction. The officer based his finding on Mr Hosseini's employment history as a chemical engineer for the National Iranian Oil Company (NIOC), and other related entities. The officer reasoned that Mr Hosseini, a long-time senior manager, likely knew about and contributed to Iran's weapons program.

[3] Mr Hosseini submits that the officer treated him unfairly by not providing him an oral hearing, and by relying on information of which Mr Hosseini was unaware. In addition, he maintains that the officer failed to conduct a proper analysis of the evidence, which led the officer to an unreasonable conclusion. Finally, Mr Hosseini contends that the officer's treatment of the evidence gave rise to a reasonable apprehension of bias.

[4] I agree with Mr Hosseini that the officer treated him unfairly by considering evidence of which Mr Hosseini had no knowledge. I also agree that the officer's conclusion was unreasonable on the evidence. Therefore, I will grant Mr Hossieni's application for judicial review, quash the officer's decision, and order another officer to reconsider the permanent residence applications.

[5] The issues are:

1. Did the officer treat Mr Hosseini unfairly?

2. Was the officer's conclusion unreasonable?

[6] The applicants also argued that the officer's analysis gives rise to a reasonable apprehension of bias. In light of my rulings on the first two issues, it is unnecessary to address the question of bias.

[7] The Minister filed a motion seeking redactions of the record of this case under s 87 of IRPA. I have ruled on that motion in a separate order.

II. Factual Background

[8] Mr Hosseini is a 62-year-old retired chemical engineer who has worked for NIOC, a company called Kala Naft, and the National Iranian Gas Export Company (NIGEC). His various titles included Head of the Environmental Department (NIGEC), Head of Research and Development (NIGEC and NIOC), Infrastructure Director (NIGEC and NIOC), Manager for Infrastructure Installations (NIGEC), Main Member of Installations (NIGEC), and Purchasing Manager (Kala Naft, Calgary). Mr Hosseini also served as the Main Member of the Board of Directors (NIGEC).

[9] The applicants originally applied for permanent residence in 2004. An earlier negative decision was quashed on consent; a subsequent negative decision was set aside by this Court in 2015. Accordingly, this is the third negative decision that has come up for judicial review.

III. The Officer's Decision

[10] The officer took note of the various positions Mr Hosseini occupied over the years and concluded that Mr Hosseini significantly and knowingly assisted his employers in advancing Iran's weapons program. The officer stated that Mr Hosseini was not being held responsible for the actions of others; rather, the officer claimed to base his decision on objective evidence relating to Mr Hosseini personally.

[11] The officer originally, and incorrectly, considered the fact that NIOC and Kala Naft were subject to Canada's *Special Economic Measures (Iran) Regulations*. In fact, these companies were delisted in 2016; the officer later conceded his error but maintained that the delisting did not necessarily mean that the companies had not been involved in facilitating Iran's weapons program. Rather, according to the officer, the delisting provided an incentive to Iran to refrain from developing nuclear weapons in the future. Accordingly, even if he had been aware of the delisting, the officer would have had the same concerns about Mr Hosseini's work history.

[12] The officer considered Mr Hosseini's assertion that Kala Naft had been subject to sanctions only because another Iranian entity had used Kala Naft to obtain materials that could be used to develop nuclear weapons. According to the officer, the evidence showed that it was not clear whether Kala Naft had been innocently involved in those transactions. Further, the officer was not satisfied that employees of Kala Naft were not involved or complicit in the purchase of suspicious goods.

[13] The officer also considered the fact that the European Court of Justice had found that Kala Naft had attempted to procure goods putatively for use in oil and gas development, but that could also be used to further Iran's nuclear program.

[14] The officer considered Mr Hosseini's assertion that Iran was not involved in developing weapons of mass destruction. However, the officer found that the evidence showed that Iran has a program for developing nuclear weapons, but has not yet achieved its goal.

[15] The officer conceded that Mr Hosseini was now retired. Still, the officer found that Mr Hosseini could return to work at any time; his retirement did not mean that he was no longer a danger to Canada's security. Rather, the officer found that Mr Hosseini had contributed to Iran's weapons program, and had been complicit in his employers' involvement in that program.

[16] At various points, the officer made clear that he did not believe Mr Hosseini's evidence. For example, the officer found that Mr Hosseini had failed to explain some of his activities related to procuring goods at Kala Naft, which diminished his credibility. Overall, the officer found that Mr Hosseini's testimony was disingenuous and lacking credibility.

[17] Accordingly, the officer concluded that Mr Hosseini's actions had directly or indirectly contributed to the development of Iran's weapons program, and that his conduct amounted to complicity in the weapons-related activities of his employers. On that basis, the officer concluded that there were reasonable grounds to believe Mr Hosseini posed a risk to Canada's security.

IV. Did the officer treat Mr Hosseini unfairly?

[18] The Minister maintains that the officer's negative credibility findings against Mr Hosseini were merely secondary grounds for the officer's conclusion and, therefore, that the officer was not obliged to afford Mr Hosseini an oral hearing. Alternatively, the Minister contends that the officer did not make a clear negative credibility finding; rather, he simply found that Mr Hosseini had failed to provide sufficient evidence in support of his application.

[19] I disagree.

[20] The officer doubted Mr Hosseini's testimony about his limited role in the companies that employed him and specifically found that Mr Hosseini's evidence lacked credibility. The officer made clear adverse credibility findings, which should have been made only after an oral hearing, not on the basis of the written submissions alone. The officer's failure to convene a hearing was unfair to Mr Hosseini.

[21] The Minister also submits that the officer did not treat Mr Hosseini unfairly by considering evidence unknown to Mr Hosseini. The Minister contends that the officer had no obligation to disclose a document describing Mr Hosseini's possible status as an Iranian intelligence officer. Rather, says the Minister, the officer's duty was merely to disclose the concerns that were expressed in that document. The officer advised Mr Hosseini that there was an issue relating to inadmissibility under s 34(1)(*d*) and provided Mr Hosseini a chance to respond. That, according to the Minister, was sufficient.

[22] Again, I disagree.

[23] The document in issue is a report from the National Security Screening Division (NSSD) which includes an opinion that Mr Hosseini may be an Iranian intelligence officer acting on behalf of the Iranian Ministry of Intelligence and Security (MOIS). MOIS was known to engage in espionage in Canada.

[24] More particularly, the NSSD report also stated:

- Many Iranians, like Mr Hosseini, who were employed at NIOC and Kala Naft in Calgary, were Iranian intelligence officers engaged in clandestine procurement activities.
- MOIS is known to have direct links to international terrorism.
- MOIS is believed on reasonable grounds to have engaged in espionage in Canada and elsewhere.
- There are reasonable grounds to believe Mr Hosseini is a MOIS intelligence officer, or that he is acting in a similar capacity.

[25] These concerns were never disclosed to Mr Hosseini. Providing a vague reference to Mr Hosseini's possible inadmissibility on security grounds was insufficient to satisfy the officer's duty of fairness. Mr Hosseini was entitled to know what allegations had been made against him and what evidence was relied on to support those allegations. He also deserved an opportunity to respond fully to the evidence against him (*Kamel v Canada (Attorney General)* 2008 FC 338 at para 72; overturned on other grounds: 2009 FCA 21).

[26] Further, the NSSD report contained a recommendation that Mr Hosseini should be found inadmissible under s 34(1)(*d*). He was entitled to receive notice of the opinion advocating that conclusion (*Abdi v Canada (Attorney General)*, 2012 FC 642 at para 25).

[27] I find, therefore, that the officer failed to treat Mr Hosseini fairly.

V. Was the officer's conclusion unreasonable?

[28] My conclusion on the issue of fairness is a sufficient basis for granting Mr Hosseini's application for judicial review. However, the next officer dealing with his permanent residence application will have to address at least some of the substantive issues raised on Mr Hosseini's application, which were the subject of extensive submissions before me. I will briefly deal with those issues for the benefit of the next officer.

[29] The Minister argues that the officer reasonably concluded that Mr Hosseini is inadmissible as a person who poses a threat to Canada's security based on his employment history.

[30] Mr Hosseini asserts that in order for him to be considered a threat to Canada's security, the Minister must offer up some evidence to show that he has knowingly participated in some form of activity that contributes to such a threat. In effect, Mr Hosseini maintains that the reasoning of the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)* 2013 SCC 40 should apply here; the Court concluded that, for purposes of the exclusion clauses

of IRPA, a person could not be considered to have committed a serious crime without evidence that the person had made a knowing and significant contribution to that crime.

[31] As can be seen above, the officer actually imposed quite a strict test for determining whether Mr Hosseini posed a risk to Canada's security. That test amounted to determining whether Mr Hosseini had "significantly and knowingly" assisted his employers in advancing Iran's weapons program. The officer also stated that Mr Hosseini was not being held responsible for the actions of others, only for his own conduct. The officer concluded that Mr Hosseini's actions had directly or indirectly contributed to the development of Iran's weapons program, and that his conduct amounted to complicity in the weapons-related activities of his employers.

[32] As I see it, the officer actually applied a standard similar to the one articulated in *Ezokola*.

[33] However, I find that the officer's conclusion that that standard had been met here was unreasonable. In other words, the officer applied a suitable test, but arrived at an unreasonable conclusion.

[34] Under paragraph 34(1)(*d*), a person is inadmissible if he or she is a danger to Canada's security. The Minister points out that inadmissibility under this provision is not tied to an activity, such as committing an offence (as in *Ezokola*, or engaging in terrorism under s 34(1)(*c*)). Under the Minister's approach, inadmissibility under s 34(1)(*d*) relates to a state of being, not any particular conduct on the applicant's part.

[35] There is some support for the Minister's position in the case law, particularly in decisions relating to employees of Iranian corporations: *Fallah v Canada (Minister of Citizenship and Immigration)* 2015 FC 1094; *N(S) v Canada (Minister of Citizenship and Immigration)* 2016 FC 821; *SMN v Canada (Citizenship and Immigration)* 2017 FC 731.

[36] However, I note that in those cases, in addition to evidence about the applicants' employment status, there was also evidence indicating concerns about their credibility. In other words, the cases did not turn on the applicants' employment status alone, but also involved concerns about whether the applicants had been truthful about the role they had actually performed in their employment.

[37] Other decisions involving Iranian employees have upheld findings of inadmissibility under s 34(1)(*d*) where there was some evidence that the applicants could have played a role in advancing Iran's development of weapons of mass destruction: *Hadian v Canada (Minister of Citizenship and Immigration)* 2016 FC 1182; *Karabroudi v Canada (Minister of Citizenship and Immigration)* 2016 FC 522.

[38] On the other hand, Justice Jocelyn Gagné found that an Iranian applicant's technological expertise was insufficient to justify a finding of inadmissibility: *Alijani v Canada (Minister of Citizenship and Immigration)* 2016 FC 327.

[39] It is difficult to conceive how a person could represent a danger to Canada's security without evidence that the person had actually done, or was expected to do, something that could be considered a threat to Canadians. The fact that s 34(1)(*d*) permits a finding of inadmissibility for a person "being a danger to the security of Canada" does not mean that a person is

inadmissible without evidence that he or she has done something, or might do something, that supports the conclusion on dangerousness.

[40] On the other hand, the precise reasoning in *Ezokola* may not apply here.

[41] In *Kanagendren v Canada (Minister of Citizenship and Immigration)*, Justice Eleanor Dawson ruled that *Ezokola* did not alter the wide meaning that should be given to the word "member" in s 34(1)(*f*), which relates to members of terrorist groups, for example. However, Justice Dawson acknowledged that *Ezokola* might affect the scope of s 34(1)(*c*), which renders inadmissible persons who engage in terrorism (2015 FCA 86 at para 25). Justice Cecily Strickland came to the same conclusion in *Nassereddin v Canada (Minister of Citizenship and Immigration)*, 2014 FC 85 at para 74.

[42] I agree with the conclusions in those cases; *Ezokola* did not suggest that the definition of complicity it set out should be incorporated into the concept of "member" in s 34(1)(*f*). However, both cases acknowledged that *Ezokola* might affect the interpretation of other inadmissibility clauses, most obviously those relating to the commission of crimes.

[43] At the same time, as I have said elsewhere, the breadth of the meaning of membership should perhaps be rethought after *Ezokola* (see *Joseph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1101 at para 14). In my view, the Supreme Court's concern that individuals should not be found complicit in wrongful conduct based merely on their association with a group engaged in international crimes may extend to inadmissibility, generally, and to the

definition of membership specifically. In *Joseph*, for example, I stated that, to find a person inadmissible to Canada based on his or her association with a particular terrorist group, there must at least be some evidence that the person had more than indirect contact with that group. However, I did not conclude that complicity as defined by the Supreme Court in *Ezokola* should be read into s 34(1)(*f*).

[44] Similarly, Justice David Stratas of the Federal Court of Appeal has stated that membership in a terrorist group may be inferred from "certain activities that materially support a terrorist group's objectives, such as providing funds, providing false documents, recruiting or sheltering persons, . . . even though the activities do not directly link to terrorist violence" (*Mahjoub v Canada (Citizenship and Immigration*) 2017 FCA 157 at para 92). I take Justice Stratas to mean that mere passive membership may be insufficient for the purposes of s 34(1)(*f*) but, on the other hand, proof of complicity of the kind outlined in *Ezokola* is not required (see *Mahjoub v Canada (Citizenship and Immigration*) 2017 FCA 157 at paras 96-97).

[45] In the same vein, I note that Justice Keith Boswell concluded that the test for complicity in *Ezokola* is not relevant under paragraph 34(1)(*d*) of IRPA because *Ezokola* dealt with exclusion from refugee protection not an application for permanent residence, and because a finding of inadmissibility simply requires reasonable grounds to believe that the facts giving rise to inadmissibility have occurred, are occurring, or may occur (*Azizian v Canada (Minister of Citizenship and Immigration)* 2017 FC 379 at para 37).

[46] Nevertheless, Justice Boswell found that an officer's conclusion that there were reasonable grounds to believe that the applicant was a danger to the security of Canada simply because he held senior managerial positions at the Central Bank of Iran was unjustified and unreasonable. He concluded that the officer's approach amounted to the sort of "guilt by association" which the Supreme Court cautioned against in *Ezokola* (*Azizian* at para 38). In other words, having concluded that *Ezokola* did not apply directly to determinations under s 34(1)(*d*), Justice Boswell found that the officer had improperly applied the kind of reasoning that offended the approach followed by the Supreme Court in *Ezokola*.

[47] Similarly, the Federal Court of Appeal applied *Ezokola* in the citizenship revocation context, finding that a person should not be found responsible for the actions of a group unless he or she made a significant and knowing contribution to it (*Oberlander v Canada* 2016 FCA 52 at para 84).

[48] Clearly, therefore, the effects of *Ezokola* can be felt outside the sphere of the exclusion clauses in which it arose. While the Supreme Court's articulation of the concept of complicity may not be directly applicable to certain admissibility provisions, a decision-maker's analysis may nonetheless contradict the principles set out in that judgment. Invoking the idea of guilt by mere association may not be acceptable.

[49] In any case, with respect to Mr Hosseini, it appears to have been accepted by the officer that a finding under s 34(1)(*d*) requires some evidence of knowledge and contribution.

[50] The key question, then, is whether there was evidence before the officer supporting the officer's conclusion. In my view, there was not.

[51] I cannot find in the officer's reasons an evidentiary basis for his conclusion that Mr Hosseini had "significantly and knowingly" assisted his employers in advancing Iran's weapons program, that he had directly or indirectly contributed to the development of that program, and that his conduct amounted to complicity in the weapons-related activities of his employers.

[52] As mentioned, the officer took note of the various positions Mr Hosseini occupied over the years and concluded from that evidence that Mr Hosseini had significantly and knowingly assisted his employers in advancing Iran's weapons program. The officer did not actually point to any evidence to support that conclusion.

[53] Further, the officer stated that he was not satisfied that employees of Kala Naft were not involved or complicit in the purchase of suspicious goods. This statement reverses the burden of proof – the officer had to be satisfied that the evidence showed that employees, including Mr Hosseini, were involved in activities related to Iran's weapons program.

[54] Looking at the evidence on which the officer relied, it is clear that the officer was satisfied that Mr Hosseini was guilty by association, not because he had actually made a deliberate contribution to Iran's weapons program.

[55] In my view, the officer's conclusion was unreasonable because it was not supported by the evidence. Nothing in the record supported the officer's finding that Mr Hosseini made a significant and knowing contribution to Iran's weapons program, or the officer's ultimate conclusion that Mr Hosseini's presence in Canada posed a threat to national security.

[56] Therefore, I find that the officer's conclusion was unreasonable.

VI. Conclusion and Disposition

[57] Mr Hosseini was treated unfairly by the officer who found him inadmissible to Canada. Moreover, the officer's decision was unreasonable because it failed to identify any evidence that showed Mr Hosseini posed a risk to the security of Canada.

[58] Therefore, I must grant this application for judicial review and order another officer to assess the applicants' applications for permanent residence.

[59] The applicants proposed a question of general importance for certification: Whether the requirements for complicity as stated by the Supreme Court of Canada in *Ezokola* apply to s 34(1)(*d*) and to the issue of danger to the security of Canada. I find that the question is not dispositive of the issues in the case (given the issue of fairness) and, therefore, decline to certify the proposed question.

[60] The applicants also ask for costs. Given that the applicants have only recently learned about the assessments in 2012 and 2013 relating to Mr Hosseini (written prior to his previous

two applications for judicial review), I am satisfied that these special circumstances merit an award of costs of $2000.00.

JUDGMENT IN IMM-4640-16

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, with costs payable in the amount of $2000.00.

2. No question of general importance is stated.

"James W. O'Reilly"
Judge

ANNEX

Immigration and Refugee Protection Act, SC 2001, c 27

Security

34 (1) A permanent resident or a foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;

(b) engaging in or instigating the subversion by force of any government;

(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;

(c) engaging in terrorism;

(d) being a danger to the security of 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), (b.1) or (c).

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Sécurité

34 (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

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), b.1) ou c).

FEDERAL COURT

SOLICITORS OF RECORD

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