Federal Court  Cour fédérale

Date: 20190318

Docket: IMM-4072-16

Citation: 2019 FC 326

Ottawa, Ontario, March 18, 2019

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

AYOOB HAJI MOHAMMED AND AIERKEN MAILIKAIMU

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek judicial review of a decision rendered on July 11, 2016 by a visa officer (the Officer) stationed at the Canadian embassy in Rome, Italy. The Officer rejected Mr. Ayoob Haji Mohammed's permanent residence application on the basis that there were reasonable grounds to believe he was a member of the East Turkistan Islamic Movement (the

Movement). Mr. Mohammed was thus found to be inadmissible under paragraphs 34(1)(c) and (f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons exposed hereinafter, the Application will be allowed.

II. Context

[3] In 2009, Mr. Mohammed, a Chinese citizen and ethnic Uyghur, met Mrs. Mailikaimu, a Canadian citizen, and in 2010, they were married. The two reside with their two Canadian children in Albania, where Mr. Mohammed holds permanent resident status.

[4] On April 28, 2014, with the help of a Canadian counsel, Mr. Mohammed submitted a permanent residence application under the Family class, sponsored by his Canadian wife. In his application, Mr. Mohammed outlined his history in Pakistan, in Afghanistan, and at Guantanamo Bay, and stressed that the Americans had exonerated him. His lawyer's letter accompanying the application specifically indicated that Mr. Mohammed's case is unusual, which is why he was providing more extensive submissions, and that, should there be any further issues or concerns with respect to admissibility, they would like an opportunity to address those matters.

[5] On July 2, 2014, the sponsorship application was approved and the application for permanent residence was forwarded to the visa office for further processing.

[6] On December 8, 2014, Mr. Mohammed was invited to attend an interview in order to continue with the processing of his application. The invitation email made no reference to

inadmissibility concerns, and referred only to a selection interview and to subsections 16(1) and 16(1.1) of the Act. On January 15, 2015, Mr. Mohammed attended this interview and thought it went well. He recalls discussing a variety of topics, including his personal history and relationship to his wife, his travel to Pakistan, the events leading to his imprisonment at Guantanamo Bay, his time there, his transfer to Albania, his political views, his knowledge of China's policies against the Uyghurs and the Movement, and political movement of other Uyghurs. No notes from this interview were received by the Court.

[7] On May 11, 2015, responding to the Canada Border Services Agency (CBSA)'s request seeking security advice, the Canadian Security Intelligence Service (CSIS) prepared a report concerning Mr. Mohammed. On September 16, 2015, the CBSA followed with an inadmissibility assessment, determining that there are reasonable grounds to believe that Mr. Mohammed is inadmissible pursuant to paragraphs 34(1)(d) and (f) of the Act.

[8] The Officer exchanged emails with a litigation analyst in Ottawa, discussing her concerns regarding Mr. Mohammed's inadmissibility and the best way to address them while ensuring procedural fairness (Exhibit A in the Cross-Examination of Jennifer Woo held on January 10, 2019).

[9] On February 8, 2016, Mr. Mohammed was invited to another selection interview to continue with the processing of his application. Once again, the email referred strictly to subsections 16(1) and 16(1.1) of the Act. On February 8, 2016, Mr. Mohammed attended his second interview. As per the notes in the Global Case Management System (GCMS), various

matters were discussed. The CSIS and CBSA briefs were not disclosed to Mr. Mohammed, and near the end of the interview, the Officer indicated to Mr. Mohammed that she had concerns about his membership to the Movement and had reasons to believe he was inadmissible based on paragraphs 34(1)(d) and (f) of the Act.

[10] On July 11, 2016, the Officer denied Mr. Mohammed's application for permanent residence on the basis of inadmissibility on security grounds pursuant to paragraphs 34(1)(c) and (f) of the Act, rather than paragraphs 34(1)(d) and (f), outlined at the end of the interview. The Officer stated that she had reasonable grounds to believe that Mr. Mohammed was a member of the Movement, an organization that engaged in terrorism.

[11] On October 4, 2016, further to rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*Immigration Rules*], Mr. Mohammed received GCMS notes from the second interview, which reveal that, during the interview, the Officer showed Mr. Mohammed two open-source articles. On December 4, 2017, Justice LeBlanc ordered that, pursuant to section 87 of the Act, the notes from the first interview shall not be disclosed.

[12] On March 30, 2017, the Certified Tribunal Record was received, and included redacted versions of the CSIS and CBSA reports. On October 12, 2018, Justice LeBlanc confirmed that the redacted information shall not be disclosed pursuant to section 87 of the Act.

III. Parties' submissions

A. *Mr. Mohammed's submissions*

[13] In support of his application, Mr. Mohammed filed his affidavit, sworn on February 1, 2018, an affidavit from his former lawyer, sworn on January 31, 2018, and an affidavit by Mr. Benjamin Rozon, sworn on February 2, 2018 and attaching documents submitted with the sponsorship application, and orders rendered previously regarding disclosure of documents. Mr. Mohammed also filed letters and open-source documents disclosed under rule 14(2) of the *Immigration Rules*.

[14] In their Further Memorandum submitted on February 14, 2019, the Applicants seek an Order to (1) quash the Officer's decision, (2) refer the matter back for redetermination by a different officer, (3) exclude the CSIS and CBSA reports from the record or, alternatively, disclose the reports to counsel (*Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 at para 16), and (4) declare that the first interview violated Mr. Mohammed's subsection 10(b) *Charter* right.

[15] The Applicants argue that (1) the Officer breached the duty of fairness owed to Mr. Mohammed; (2) the Officer's inadmissibility finding under paragraphs 34(1)(c) and (f) of the Act is unreasonable; and (3) the first interview violated Mr. Mohammed's rights under subsection 10(b) of the *Canadian Charter of Rights and Freedoms*.

[16] The Applicants submit that for questions related to procedural fairness and *Charter* compliance, the appropriate standard of review should be the standard of correctness, and that the Officer's inadmissibility determination should be reviewed on the standard of reasonableness (*Caruth v Canada (Citizenship and Immigration)*, 2009 FC 891 at para 45).

B. *The Minister's submissions*

[17] The Minister begins its submissions by pointing out that non-citizens do not have an unqualified right to enter or remain in Canada (*Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 46). The Minister maintains that the applicable standard of review is reasonableness, except for procedural fairness issues, for which no standard of review is applied (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 85; *Canada Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 33–56).

[18] The Minister submits that the Officer (1) rendered a reasonable decision, (2) did not breach procedural fairness, and (3) did not breach subsection 10(b) of the *Charter*.

[19] With respect to procedural fairness, the Minister argues, first, that Mr. Mohammed's affidavits are unreliable given that, earlier in the proceedings, he tried to undermine the Officer's decision by alleging interpretation problems when there were no such problems.

[20] Second, the Minister maintains that Mr. Mohammed was aware of inadmissibility concerns and had the opportunity to respond to them. The Minister explains that Mr.

Mohammed's former counsel's submission letter and attachments prior to the first interview, as well as Mr. Mohammed's email to counsel following the interview, demonstrate that they were aware of the inadmissibility concerns. In addition, the Minister asserts that all the inadmissibility concerns would be difficult to set out in a procedural fairness letter and that Mr. Mohammed could make additional statements during and after the second interview. The Minister argues that Mr. Mohammed's failure, after the second interview, to raise concerns regarding the interview or to make additional submissions is fatal to his "lack of notice" argument. Finally, the Minister submits that the Officer made no error in raising concerns about particular grounds of inadmissibility and then deciding based on one of those grounds.

[21] Third, the Minister argues that the Officer did not have to disclose the CSIS and CBSA briefs nor the two Google articles. The latter are public available and already contained in Mr. Mohammed's former counsel's submission letter and attachments (*Azizian v Canada (Citizenship and Immigration)*, 2017 FC 379 at paras 29–30). The Minister goes on to state that Mr. Mohammed had the opportunity to meaningfully participate in the decision-making process (*Gebremedhin v Canada (Citizenship and Immigration)*, 2013 FC 380 at paras 9–16).

[22] Fourth, the Minister submits that, even if the Court accepts that procedural fairness was breached, the Court should still refuse to quash the decision on the basis that a negative decision is inevitable (*Yassine v Canada (Minister of Employment and Immigration)* (1994), 172 NR 308 (FCA)).

[23] Fifth, the Minister maintains that the claim of a reasonable apprehension of bias is unfounded. Rather, the Officer's initial concern about Mr. Mohammed's inadmissibility is a matter of common sense and the fact that the Officer sought guidance is not proof of bias (*Butterfield v Canada (Attorney General)*, 2016 FC 777 at para 19).

IV. Discussion

A. *Standard of review*

[24] With respect to procedural fairness, the Federal Court of Appeal outlined that the Court does not, strictly speaking, apply a standard of review. Rather, it must consider whether the procedure was fair having regard to all the circumstances and whether, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, a fair and just process was followed (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

B. *The Officer breached procedural fairness*

[25] The Court is satisfied that the Officer breached procedural fairness. Visa officers have a duty to ensure that applicants have the opportunity to meaningfully participate in the application process (*Toki v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 606 at para 25; *AB v Canada (Citizenship and Immigration)*, 2013 FC 134 at para 55 [*AB*]).

[26] The Federal Court of Appeal has recognized the general assertion that an immigration officer's duty to act fairly extends to letting "the immigrant know what his immediate impression

is so that the immigrant can disabuse him" (*Muliadi v Canada (Minister of Employment & Immigration)*, [1986] 2 FC 205 (Fed AD) at para 16). This has been interpreted as a duty for immigration officials to inform applicants of their concerns (*Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879 at para 98; *Sidhu v Canada (Citizenship and Immigration)*, 2012 FC 515 at para 75 [*Sidhu*]; *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 at para 22).

[27] Case law has also recognized that this duty to inform can be discharged by an appropriate line of questioning or reasonable inquiries which give the applicant the opportunity to respond to the visa officer's concerns (*Sidhu* at para 76; *Liao v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1926 (Fed TD) at paras 16–17). This could suggest that, in the present case, the Officer acted fairly, as she shared her inadmissibility concerns with Mr. Mohammed during the second interview and he had the opportunity to respond.

[28] However, more recently and in the context of inadmissibility under section 34 of the Act, the Court found that procedural fairness is breached when an officer requests an interview without specifying the precise subsection of section 34 at issue: *AB* at paras 63-66. In the present case, the letters requesting an interview did not inform Mr. Mohammed of the Officer's concerns with inadmissibility and did not mention section 34. As such, the breach of procedural fairness becomes more flagrant.

[29] The Court is satisfied that procedural fairness was breached because the Officer failed to (1) provide prior notice of her specific concerns (*Brhane v Canada (Citizenship and*

Immigration), 2018 FC 220 at para 19), (2) disclose documents she relied on in her decision, and (3) give Mr. Mohammed the opportunity to provide post-interview submissions.

[30] Regarding lack of prior notice, the interview notices were generic, whereas the interviews' true purpose—to address security concerns—was unknown to Mr. Mohammed until the conclusion of the second interview. The Court is satisfied such an approach breaches procedural fairness (*Johnson v Canada (Citizenship and Immigration)*, 2017 FC 550 at paras 14–17; *Bushra v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1412 at paras 20–21). Further, the Officer failed, prior to the interview, to specify the precise subsections at issue under section 34 of the Act and, during the interview, informed Mr. Mohammed of her concerns related to paragraphs 34(1)(d) and (f) of the Act, but ultimately found inadmissibility based on 34(1)(c) and (f) grounds (*AB* at para 53).

[31] The Court is satisfied that failure to disclose of the reports was problematic, as they drove the decision-making process (*Krishnamoorthy v Canada (Citizenship and Immigration)*, 2011 FC 1342 at paras 38–39; *Pusat v Canada (Citizenship and Immigration)*, 2011 FC 428 at para 30 [*Pusat*]; *Mekonen v Canada (Citizenship and Immigration)*, 2007 FC 1133 at paras 19, 26).

[32] Regarding failure to allow post-interview submissions, procedural fairness required an opportunity to provide submissions after an interview if notice of specific concerns was not given in advance (*Bin Chen v Canada (Citizenship and Immigration)*, 2008 FC 1227 at paras 34–35). This is not a case where the applicant waived his right to respond at the earliest opportunity (*Lally v Telus Communications Inc*, 2014 FCA 214 at paras 25–26). Nor is it a case where the

applicant failed to provide updated documentation (*Rodriguez Zambrano v Canada (Citizenship and Immigration)*, 2008 FC 481 at paras 39–40).

[33] The Minister argues that, given his former counsel's submission letter, and the facts he himself disclosed, Mr. Mohammed was aware of the inadmissibility concerns and could have attempted to assuage them (*Chiau v Canada (Minister of Citizenship & Immigration)*, [2001] 2 FC 297 at paras 47–50). However, the letter introducing his permanent residence application outlined that the American authorities had exonerated him, and specifically stated that, should there be further issues or concerns with respect to admissibility, Mr. Mohammed would like an opportunity to address them.

[34] The Minister submits that the Court should still refuse to quash the decision on the basis that a negative decision is inevitable (*Yassine v Canada (Minister of Employment and Immigration)* [1994] FCJ No 949 (FCA)). The Court disagrees. As a general rule, "the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness", except when the demerits are such that the claim "would in any case be hopeless" (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at para 54). In the case at bar, Mr. Mohammed requested the opportunity to make further submissions if needed, and was unaware of the CSIS and CBSA briefs. The Court cannot presume what impact Mr. Mohammed's response and explanations would not have on the Officer's decision (*Pusat* at paras 33–34).

V. Conclusion

[35] The Court will allow the application and return the file for a new determination.

JUDGMENT in IMM-4072-16

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the file is returned for a new determination;

2. No question is certified.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Prasanna Balasundaram	FOR THE APPLICANTS
Gregory George and Bradley Bechard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT