Federal Court  Cour fédérale

Date: 20190917

Docket: IMM-4696-18

Citation: 2019 FC 1180

Ottawa, Ontario, September 17, 2019

PRESENT: THE CHIEF JUSTICE

BETWEEN:

KADIR JEFFREY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This case concerns the degree of disclosure that must be provided to someone who has been provided an opportunity to make written submissions explaining why an inadmissibility report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [**IRPA**] should not be made against him.

[2] Persons who are provided with an opportunity to make such submissions must be given any material information that is unknown and unavailable to them. In the present case, the Respondent maintains that the Canada Border Services Agency [the **CBSA**] has no such information. The Applicant, Mr. Jeffrey, has not demonstrated the contrary.

[3] Pursuant to sections 3 and 26 of the *Immigration Division Rules*, SOR/2002-229 [the ***I.D. Rules***], the Respondent Minister and his delegates have no duty to disclose other information until after a decision has been made to hold an admissibility hearing contemplated by subsection 44(2) of the IRPA.

[4] Accordingly, this Application for an Order of Mandamus compelling the Respondent to disclose all relevant information in its possession will be dismissed.

II. **Background**

[5] Mr. Jeffrey is a national of Afghanistan. In 2008, he, his spouse and their two children fled that country for Turkey, due to fears of physical harm at the hands of the Taliban. The following year, while they were still in Turkey, they were granted refugee status by the United Nations High Commissioner for Refugees [the **UNHCR**]. The family was then resettled in Canada as permanent residents in the Fall of 2012.

[6] Mr. Jeffrey’s spouse and two children were granted Canadian citizenship in March 2018. However, his application for citizenship remains pending.

[7] He has been interviewed twice by the Canada Border Services Agency officer [the **Officer**] whose decision is the subject of review in this Application, as well as by other Canadian authorities, including at the Canadian High Commission in Turkey.

[8] During his interviews, he was questioned about his military service in Afghanistan. He recalls replying that he was conscripted into the military sometime in the mid-1990s and then worked as a baker with the military. After serving for slightly more than the obligatory two years, he was sent home. However, he initially was not given his discharge papers because he did not return his rifle, which he claimed had been taken from him by the Taliban after they captured the city in which he was located (Herat). Ultimately, approximately three years after he claims to have completed his service with the military, he was given his discharge documents.

[9] In August 2018, the Officer wrote to Mr. Jeffrey to advise him that a report under subsection 44(1) of the IRPA had been or may be prepared alleging that he is inadmissible to Canada under paragraph 34(1)(e) ad 34(1)(f) of the IRPA, and because of an alleged misrepresentation on his application for permanent residence in Canada.

[10] In that correspondence, which appears to be a variation of a standard form "procedural fairness" letter, the Officer also stated, among other things, the following:

> A decision to allow you to remain in Canada or to seek to have a removal order issued against you will be made in the near future. The next step in the process is to conduct a review of the circumstances of your case. If a report is prepared, the Manager may cause an Admissibility Hearing to be held, which could result in a removal order being issued.

> You may make a written submission providing reasons why a removal order should not be sought. …

[11] In response to the Officer's letter, Mr. Jeffrey's counsel requested two things. First, he requested an extension of time to file written submissions. Second, he requested "all relevant material in your possession and control in relation to your correspondence dated August 10, 2018 so that we can prepare our written submissions accordingly."

III. **The decision under review [the Decision]**

[12] In the Decision, the Officer granted Mr. Jeffrey's request for an extension of time to file his submissions. However, she rejected his request for the information described immediately above for the following reasons:

> At this time, no report has been written, as I am waiting for your submissions. The material I have reviewed is information that your client provided with his applications for permanent resident and citizenship. I have also reviewed interviews that have been conducted with your client including the interviews I have conducted. As your client has either provided the information for the applications and or was involved in the interviews the information will not be released at this time. The reason for the investigation is Canada Border Services Agency (CBSA) believes that your client may be a member of the Taliban. Under Public Safety Canada the Taliban is listed as a terrorist entity. The allegations that are being considered are sections A34(1)(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; and/or A34(1)(F) [*sic*] 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 [34] (a) (b), (b.1) or (c) of the [IRPA].

[13] The Officer then explained that the next step in the process would be to conduct a review of the case. She added that if a report were to be prepared, a disclosure of the evidence would be provided in accordance with the *I.D. Rules*.

IV. **Relevant Legislation**

[14] Pursuant to paragraph 34(1)(e) of the IRPA, a permanent resident or a foreign national is inadmissible on security grounds for engaging in acts of violence that would or might endanger the lives or safety of persons in Canada. Further to paragraph 34(1)(f), an additional ground of such inadmissibility is "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)" of section 34.

[15] Pursuant to subsection 44(1) of the IRPA, an officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

[16] Under subsection 44(2), if the Minister is of the opinion that the report referred to in subsection 44(1) is well founded, the Minister may refer the report to the Immigration Division [the **I.D.**] of the Immigration and Refugee Board of Canada for an admissibility hearing.

[17] Pursuant to section 3 of the *I.D. Rules*, when the Minister requests the I.D. to hold an admissibility hearing, the Minister must provide to the permanent resident or the foreign

national, as the case may be, any relevant information or document that the Minister may have, including any evidence that he may present at the hearing.

[18] This disclosure obligation is reinforced by section 26 of the *I.D. Rules*, which states:

Disclosure of documents by a party	**Communication de documents par une partie**
26 If a party wants to use a document at a hearing, the party must provide a copy to the other party and the Division. The copies must be received	**26** Pour utiliser un document à l'audience, la partie en transmet une copie à l'autre partie et à la Section. Les copies doivent être reçues :
(a) as soon as possible, in the case of a forty-eight hour or seven-day review or an admissibility hearing held at the same time; and	**a)** dans le cas du contrôle des quarante-huit heures ou du contrôle des sept jours, ou d'une enquête tenue au moment d'un tel contrôle, le plus tôt possible;
(b) in all other cases, at least five days before the hearing.	**b)** dans les autres cas, au moins cinq jours avant l'audience.

V. **Issue**

[19] The sole issue raised in this proceeding is as follows:

> Is Mr. Jeffrey entitled to the disclosure he seeks from the Officer, by way of a *mandamus* Order?

VI. **Standard of review**

[20] It is common ground between the parties that the issue Mr. Jeffrey has raised in this proceeding is one of procedural fairness. Issues of procedural fairness are ordinarily reviewable on a standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In assessing such issues, the Court's focus is upon whether an impugned process was or is procedurally fair: see *Mission Institution v Khela*, 2014 SCC 24 at para 90; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

VII. **Analysis**

[21] Mr. Jeffrey submits that the Officer's decision not to disclose all information in the CBSA's possession that is relevant to the issue concerning his possible membership in the Taliban's organization amounts to a breach of the duty of fairness. He therefore asserts that an Order of *mandamus* may be made to compel the disclosure of such information to him. I disagree.

[22] Before the Court will consider exercising its discretion to issue an order of *mandamus* to compel a public authority to make a decision, an applicant must demonstrate the following:

i. There is a public legal duty to act;

ii. The duty is owed to the applicant;

iii. There is a clear right to performance of that duty. In particular:

a) The applicant has satisfied all the conditions precedent giving rise to the duty, and

b) There was

1) a prior demand for performance of the duty,

2) a reasonable time to comply with the demand (unless refused outright), and

3) a subsequent refusal, which can be either expressed or implied, e.g., unreasonable delay;

iv. No adequate remedy is available to the applicant;

v. The order sought will be of some practical value or effect;

vi. There is no equitable bar to the relief sought; and

vii. On the balance of convenience, an order of mandamus should issue.

Apotex Inc v Canada (Attorney General) (1993), [1994] 1 FC 742, at pp 766-769 (CA).

[23] In the circumstances that gave rise to the present Application, the Officer was not subject to any duty to provide to Mr. Jeffrey the information that he seeks. It is therefore unnecessary to address the other factors listed immediately above.

[24] In support of his position that such a duty was and remains owed to him, Mr. Jeffrey maintains that he is not in a position to make meaningful submissions to the Officer without the disclosure of the information that he has requested. But that is not so. He was told that the reason an inadmissibility report may be prepared pursuant to subsection 44(1) of the IRPA is that CBSA believes he may have been a member of the Taliban, which has been listed as a terrorist entity. He was also informed of the specific allegations being considered, namely, those contemplated

by paragraphs 34(1)(e) and (f) of the IRPA. In addition, he was informed that the relevant information in the Officer's possession consists solely of information that he provided with his applications for permanent residence and citizenship, as well as in his interviews with the Officer and others. The Officer explained that since he either provided that information or was present during the interviews, he would not be provided with copies of that information. For greater certainty, in a letter dated March 26, 2019, counsel to the Respondent confirmed that the other interviews referred to by the Officer were interviews with Canadian authorities. Moreover, in the initial letter that the Officer sent to Mr. Jeffrey in August 2018, reference was made to an alleged misrepresentation on his application for permanent residence in Canada.

[25] Accordingly, Mr. Jeffrey is aware that he has to address the issue of his possible membership in the Taliban organization and to clarify any information that he may have previously provided in his applications for permanent residence and citizenship, and in his interviews with the Officer and other Canadian authorities.

[26] Mr. Jeffrey claims that he does not know the basis upon which the Officer is concerned that he may be or have been a member of the Taliban. However, he was informed that the information that has given rise to that concern is all information that he himself provided, or that was discussed during his interviews with the Officer and other Canadian authorities. Once again, he simply has to address that information and clarify any inconsistencies that may have arisen.

[27] In any event, he is or ought to be in possession of all of the information that he has been seeking from the Officer. In the absence of any persuasive evidence to suggest that some of the

information that he seeks is "material and otherwise unknown and unavailable," the Officer is not at this time subject to any duty to disclose to Mr. Jeffrey the information that he seeks: *Durkin v Canada (Minister of Public Safety and Emergency Preparedness*, 2019 FC 174, at para 18 (emphasis added) [***Durkin***].

[28] Mr. Jeffrey further states that he did not fill out any application for permanent residence. I pause to note that at one point in the affidavit he swore in support of this Application, he put this somewhat differently when he stated that he did "not remember filling out any forms for [his family's] permanent residence in Canada" (emphasis added). In any event, if in fact he did not fill out such an application, he merely needs to convey that position to the Officer. If a report under subsection 44(1) is made, he will have the opportunity to obtain full disclosure of all relevant information in the Officer's possession, pursuant to sections 3 and 26 of the Rules (see paragraphs 17-18 above).

[29] Mr. Jeffrey also asserts that he is entitled to a heightened level of procedural fairness due to the potentially serious consequences that he faces, including the loss of his permanent resident status and his possible deportation.

[30] However, at this stage of the process, the Officer is merely engaged in a fact finding exercise: *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, at paras 35 and 44. Consequently, Mr. Jeffrey's procedural fairness rights consist of being informed of the basic facts that have triggered the investigation under subsection 44(1), being provided with an opportunity to present evidence and make submissions, being interviewed after having been told

of the purpose of the interview and of the possible consequences, being offered the possibility to seek assistance from counsel, and receiving disclosure of information that is material and otherwise unknown and unavailable to him: *Sharma v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 319, at para 34; *Shirambere v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 602, at para 54; *Durkin*, above. Mr. Jeffrey has not suggested that any of those rights were breached.

[31] Parliament has specifically provided, in sections 3 and 26 of the *I.D. Rules*, that the appropriate time at which disclosure of other relevant information should be made to him is after a decision has been made to hold an admissibility hearing. These provisions have displaced any procedural fairness right that Mr. Jeffrey may otherwise have had at common law to the disclosure of information prior to that time, beyond that which was described in *Durkin*, above: *International Woodworkers of America, Local 2-69 v Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282, at 323-324, quoting *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105, at 1113. (See also, *Johnny v Adams Lake Indian Band*, 2017 FCA 146 at para 31, applying the same principle to another aspect of natural justice.)

[32] Mr. Jeffrey relies on *AB v Canada*, 2013 FC 134 [***AB***] in support of his position that the Officer owes him a duty to disclose the information that he has requested. However, that case is distinguishable on the basis that the breach of procedural fairness there concerned a failure to disclose (i) the "nature" of the allegations against the applicant, namely, that he may have been inadmissible under paragraph 34(1)(f) of the IRPA, and (ii) certain extrinsic information: *AB*,

above, at paras 53-54 and 61-67. No similar failure to disclose occurred between the Officer and Mr. Jeffrey.

[33] In summary, the Officer did not owe Mr. Jeffrey a duty to disclose "all relevant material which formed the basis for the issuance of" the letters that the Officer sent to him. Accordingly, an important requirement for the issuance of the *mandamus* Order that he has requested this Court to make has not been met.

[34] The only disclosure obligation to which the Officer was subject was to disclose information that is material and otherwise unknown and unavailable to Mr. Jeffrey. The Minister maintains that no such information exists. Mr. Jeffrey has not demonstrated the contrary. Therefore, he has not established that his procedural fairness rights were breached.

[35] Insofar as other information in the Officer's possession is concerned, sections 3 and 26 of the *I.D. Rules* explicitly contemplate that the disclosure of other information, beyond that described immediately above, is only required to be made after a decision to hold an admissibility hearing has been made.

[36] Notwithstanding the foregoing, like Justice Barnes in Durkin, above, at para 31, I question the wisdom of the Officer's refusal to disclose any information whatsoever to Mr. Jeffrey. I recognize that it would likely impose a significant administrative burden on CBSA officers to assemble, photocopy or scan, and send extensive information to individuals who are the subject of an investigation under subsection 44(1). However, it is reasonable to expect that

the significant cost and administrative burden associated with proceedings before this Court could be avoided where the essence of the officer's concern is conveyed to the individual, so that they have a better sense of what has given rise to the officer's concern. Implicit in this is that the individual would then be in a position to make more meaningful submissions to the CBSA officer. In this case, a basic explanation of why the Officer believed that Mr. Jeffrey may have been a member of the Taliban may have avoided the considerable time and effort that has been spent by the parties and the Court in relation to this proceeding. In other cases, a reference to specific documentation that has been provided by the individual might achieve the same purpose.

VIII. **Conclusion**

[37] This Application will therefore be dismissed.

[38] At the end of the hearing of this Application, the Applicant struggled to articulate a serious question of general importance for certification. The Respondent took the position that no such serious question arises from the facts and issues in this case. I agree. Accordingly, no question will be certified pursuant to paragraph 74(d) of the IRPA.

JUDGMENT in IMM-4696-18

THIS COURT'S JUDGMENT is that:

1. This Application is dismissed.

2. No serious question of general importance, as contemplated by paragraph 74(d) of the IRPA, arises from the facts and issues in this case.

"Paul S. Crampton"
Chief Justice

APPENDIX 1 — Relevant Legislation

DIVISION 5	SECTION 5
Loss of Status and Removal	**Perte de statut et renvoi**
Report on Inadmissibility	Constat de l’interdiction de territoire
Preparation of report	*Rapport d’interdiction de territoire*
44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	44 (1) S’il estime que le résident permanent ou l’étranger qui se trouve au Canada est interdit de territoire, l’agent peut établir un rapport circonstancié, qu’il transmet au ministre.
Referral or removal order	*Suivi*
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	(2) S’il estime le rapport bien fondé, le ministre peut déférer l’affaire à la Section de l’immigration pour enquête, sauf s’il s’agit d’un résident permanent interdit de territoire pour le seul motif qu’il n’a pas respecté l’obligation de résidence ou, dans les circonstances visées par les règlements, d’un étranger; il peut alors prendre une mesure de renvoi.

FEDERAL COURT

SOLICITORS OF RECORD

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