Date: 20081023

Docket: IMM-266-08

Citation: 2008 FC 1192

Toronto, Ontario, October 23, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ZUBAIR AFRIDI

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the *Minister of Public Safety and Emergency Preparedness* (Minister) dated December 14, 2007 (Decision) and communicated to the Applicant on January 8, 2008, which refused the Applicant's request for ministerial relief pursuant to s. 34(2) of the Act because of his membership in the Mohajir Quami Movement (MQM).

BACKGROUND

[2] The Applicant was born in Hyderabad, Pakistan. He is part of the Mohajir minority that migrated from India during the partition of the Indian subcontinent.

[3] The Applicant has strong political ties to the MQM. His cousin was an organizer of the MQM Hyderabad and a member of the National Assembly, while the Applicant's grandfather is a member of the MQM senior's committee in Mirpurkhas. The Applicant's sisters are also active members of the MQM.

[4] The Applicant had an interest in politics in his youth and read a substantial amount of political literature. He joined the All Pakistan Mohajir Student Organization (APMSO) in 1990 while going to college. He obtained his Bachelor of Science degree from Sindh University in Pakistan.

[5] In June 1992, the Muslim League decided to split the MQM and encouraged a breakaway faction. With the party under siege, the leaders and workers of the MQM went underground. During this time the Applicant had the following duties:

1) The organization of an emergency meeting of the senior's Mohajir committee;
2) The secret distribution of party literature;
3) The arrangement of secret places to hide party members;
4) The arrangement of protests against the Government.

[6] The Applicant was arrested by intelligence officers on August 14, 1992, which was the day of a demonstration of women protesting against the arrests and killings of innocent Mohajirs. The Applicant was interrogated and his family had to bribe the intelligence and police officers in order to obtain his release.

[7] The Applicant then began working for Fateh International Chemical (Pvt.) Ltd. in November 1992. By 1996, he was the chief chemist for the company and was sent to Bangladesh where he stayed for a month and a half. Upon the Applicant's return to Hyderabad, he worked on the 1997 election for the MQM. The Applicant's house was raided and the police informed his family that they knew the Applicant had been involved in the 1993 and 1997 elections working for MQM candidates. After the raid of the Applicant's house, Fateh International Chemical arranged for him to return to Bangladesh again, which he did promptly. However, he returned to Pakistan in May 1997.

[8] In 1998, the Applicant applied to work for a paint company called I.C.I. and attended an interview with the company in Lahore, Pakistan. In Lahore, the Applicant was stopped and detained at his hotel by police. They accused him of being a MQM worker who had come to Lahore to hide out. The Applicant called his boss, who sent someone to bribe the police to release him. Because of the troubles in Pakistan, the Applicant's boss offered to obtain visas for the UK, Japan and Canada for the Applicant to do feasibility reports for the company.

[9] In September 1998, the Applicant was arrested by police while sleeping at a friend's house. Following his arrest, the Applicant promised to become an informer. He believed that the police would kill him if he refused. The Applicant's family had to bribe the police to release him after three days. After this arrest, the Applicant went to Karachi to stay at his sister's home, and then decided to leave Pakistan permanently for one of the three countries for which his boss could obtain a visa.

[10] The Applicant felt that Canada was the only country where he could apply for asylum and live legally.

[11] On September 9, 1998, he left Pakistan and entered Vancouver on September 10, 1998. By the following week, the Applicant had made his way to Toronto, where a friend told him how to seek protection.

[12] The Applicant married a Canadian woman in January 2002. He has an 8-year-old stepson and the family has purchased a house in Toronto.

[13] The Applicant has worked in Canada for the last five years. He started out as a factory worker with Stakepole and began working at Toyota in May, 2000 as a salesperson. He is presently with Toyota as an Assistant Sales Manager with a projected salary in excess of $95,000 for this year. The Applicant is also an instructor at the Automotive Sales College of Canada where he inspires unemployed and under-employed persons to better their lives financially.

[14] The Applicant is afraid to return to Pakistan as he believes he will be persecuted and mistreated. He is concerned about the safety of his family and believes that the security forces in Pakistan want to kill him.

DECISION UNDER REVIEW

[15] An immigration officer wrote to the Applicant on January 8, 2008 informing him that he was a person described in ss. 34(1)(*f*) of the Act and was, therefore, inadmissible to Canada based on his membership in the MQM. The MQM is designated as "an organization that there are reasonable grounds to believe engaged, has engaged or will engage in acts of terrorism."

[16] The Minister was not satisfied that the Applicant's presence in Canada would not be detrimental to the national interest. Therefore, the Applicant's ministerial relief application was refused.

[17] Based upon the finding that the Applicant was inadmissible under ss. 34(1)(*f*) of the Act, and following the refusal of his request for Ministerial relief, the Applicant was denied permanent residence on January 8, 2008.

ISSUES

[18] The Applicant has raised the following issues:

1) What is the standard of review of the Minister's decision on an application for Ministerial relief?

2) What are the reasons for the Decision in this case?

3) Did the Minister err in law in failing to properly consider the "national interest"?

4) Did the Minister err in law by relying on patently unreasonable findings of fact, or by ignoring evidence, or by making unreasonable inferences?

5) Did the Minister improperly fetter his discretion when assessing all of the facts of the Applicant's application?

STATUTORY PROVISIONS

[19] The following provisions of the Act are applicable in these proceedings:

Security	**Sécurité**
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 they are understood in Canada;	*a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression 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	*e*) être l'auteur de tout acte de

violence that would or might endanger the lives or safety of persons in Canada; or	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*).
Exception	**Exception**
(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.

STANDARD OF REVIEW

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at para. 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[21] The Court in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, a reviewing court may adopt that standard. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[22] *Naeem v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 173 (F.C.) at paragraphs 39-40 holds that the standard of review on an application under s. 34 of the Act is reasonableness *simpliciter*. Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to this issue to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47). Put another way, the Court should only intervene if the Decision is unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

Briefing Notes

[23] Both the Applicant and the Respondent agree that the briefing notes are the "reasons" for the Decision, as they formed the basis of the Decision, and no other reasons were given: *Kanaan v.*

Canada (Minister of Citizenship and Immigration), [2008] F.C.J. 301 and *Miller v. Solicitor General*, [2006] F.C.J. No. 1164.

The Applicant

Evidence Evaluation

[24] The Applicant submits that the briefing notes do not produce or consider all of the relevant evidence. He says that an assessment of whether the Applicant's entry into Canada would be offensive to the Canadian public based on the Applicant's activities within the prohibited organization should have been done. The Applicant contends that no evidence was before the Minister's delegate that he would be a danger to the public, especially since the interviewing officer found no evidence to suggest that the Applicant posed a security threat to Canada.

[25] The Applicant submits that the Minister did not give adequate consideration to the Applicant's letter which highlighted his humanitarian considerations, including the interest of the child involved in this case, his establishment in Canada, and his adoption of "the democratic values of Canadian society as per the table in the Minister's Guidelines."

[26] The Applicant submits that he has demonstrated he is a law-abiding member of society who has severed all ties with the MQM since 2001, despite his peaceful role in that organization. He maintains he does not represent a danger to the public, has not been involved in violence, has no criminal record, denounces the use of violence, is a Convention refugee and should attract

humanitarian and compassionate considerations, including the best interests of his child that should have been taken into account.

[27] The Applicant suggests that the Officer's notes are based upon unreasonable inferences: that the Applicant's family involvement in the MQM equates to the Applicant's being committed to the MQM; or that the Applicant would be aware of any alleged party-sponsored violence or acts of terrorism committed by the MQM. The Applicant cites and relies upon *Kanaan v. Canada (Minister of Citizenship and Immigration)*, 2008 F.C.J. No. 301 at paragraph 8:

> I therefore conclude that the Minister's decision was patently unreasonable in that it failed to take into account evidence and factors presented in the Applicant' submissions of March 31, 2006 and July 25, 2006. The decision seems to have turned on the simplistic view that the presence in Canada of someone who at some time in the past may have belonged to a terrorist organization abroad can never be in the national interest of Canada. I will therefore set aside the Minister's decision and refer the matter back to him for reconsideration.

National Interest

[28] The Applicant submits that when assessing the "national interest," a decision maker must make a complete evaluation and take into consideration the totality of the relevant issues and factors referred to in the Minister's guidelines. The Minister "is mandated to consider whether, notwithstanding the applicant's membership in a terrorist organization, it would be detrimental to the national interest to allow the applicant to stay in Canada" when looking at an inquiry under sub-section 34(2): *Ali v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1416 at paragraph 42.

[29] The Minister's failure in the present case to refer to, and consider, all of the critical facts suggests that the Decision was made without full regard to the evidence. The Applicant argues at paragraph 27 of his written memorandum as follows:

> The Applicant submits that Mr. Jolicoeur's analysis is woefully inadequate because it does not address key factors relevant to the determination of whether his admission to Canada would be "detrimental to the national interest." **Rather, it equates the national interest with membership in an allegedly terrorist organization and as a result is a fettering of discretion. By failing to address the issue before him, and by failing to consider all of the factors relevant to such an analysis, the Minister erred in law. If Mr. Jolicoeur's analysis is accepted, then s. 34(2) of the Act becomes superfluous. If the mere fact that a person was in the past associated with the MQM is sufficient to warrant a negative feeling, then the section is deprived of all meaning.** In *Soe v. Canada, supra* [2007 F.C.J. 620 (*Soe*)] a case in which the Briefing Note to the Minister similarly recommended that relief not be granted on the grounds that the Applicant had engaged in terrorist activity and that accordingly his presence in Canada was detrimental to the "national interest," this Court noted:
>
> > 33. The Briefing Note goes on to observe that there are no compelling reasons to grant protection or permanent residence. The factors examined are largely those related to a close connection to Canadian society, including jobs and family in the country.
> >
> > 34. The difficulty with this analysis is that it renders the exercise of discretion meaningless. It is tantamount to saying that an individual who commits an act described in s. 34(1) cannot secure Ministerial discretion because they committed the very act that confers jurisdiction on the Minister to exercise discretion under s. 34(2).

[30] The Applicant also suggests that the Minister erred under the national interest analysis by not examining the five questions in Appendix D of the *IP10 Refusal of National Security Cases/Processing of National Interest Requests* Guidelines (Guidelines):

1) Will the applicant's presence in Canada be offensive to the Canadian public?

2) Have all ties with the regime/organization been completely severed?

3) Is there any indication that the applicant might be benefiting from assets obtained while a member of the organization?

4) Is there any indication that the applicant might be benefiting from previous membership in the regime/organization?

5) Has the person adopted the democratic values of Canadian society?

The Respondent

Evidence Evaluation

[31] The Respondent argues that the Minister referred to and considered all of the "critical facts," as all of the major points in issue were addressed in the briefing notes. The Respondent relies upon *Miller v. Solicitor General and Minister of Public Safety and Emergency Preparedness* 2006 FC 912 at paragraph 83 as follows:

> Although the applicant may disagree with the weight assigned in the memorandum to the factors she considered to be the more important, or with the extent to which certain points were developed, she has fallen short of demonstrating that the memorandum did not "address" the "major points in issue" (*Via Rail Canada Inc. v. National Transportation Agency et al.* (2000), 193 D.L.R. (4th) 357, [2000] F.C.J. No. 1685 (F.C.A.) at paragraph 22…

> In my view, the applicant has not demonstrated that the Minister has failed to "consider and weight" the "patently relevant factors" so as to render patently unreasonable her exercise of discretion.

National Interest

[32] The Respondent notes that the Minister has to take into account many different considerations in his analysis, including the concept of "national interest," which includes domestic and international interests and obligations. The Respondent again relies upon *Miller* at paragraph 73, for the following:

> Subsection 34(2) of the IRPA simply indicates that the applicant's burden was to satisfy the Minister that her "presence in Canada would not be detrimental to the national interest". The broad language used in subsection 34(2) speaks to Parliament's intention that the Minister be free to take into account a wide range of factors in exercising her discretion. This is consistent with the guidelines.

[33] The Respondent suggests that the core of the Decision is that Canada cannot harbour individuals who have admitted to assisting organizations engaged in terrorist acts, as this would be contrary to the country's interests. This determination, in turn, must be given the broadest of deference and the most minimal of interference.

[34] The Respondent argues that the Minister did not err by not explicitly addressing the questions in Appendix D of the Guidelines. The questions do not need to be addressed in the reasons for a decision, and their applicability depends upon the facts of each case. As well, the Guidelines are intended to be of assistance to decision-makers; they are not binding on the decision-maker and do not carry the force of law. The national interest analysis is not exhausted by the five

questions, as the Minister must also consider Canada's national and international interests and obligations in accordance with the Act's objectives.

[35] The Respondent emphasizes that the Applicant belonged to an organization engaged in terrorist activities for a lengthy period of time. The Applicant also maintained those ties for years after coming to Canada. The Respondent suggests that, even if the Applicant does not appear to be a danger to the Canadian public, the Minister still has the discretion to refuse a request for relief, as "national interest" involves more considerations than are found in the Guideline questions.

[36] The Respondent concludes that the Minister has the discretion to find that the Applicant's presence would be contrary to the national interest. The Minister's discretion should not be interfered with lightly by the Court.

ANALYSIS

[37] I agree with the Respondent that a high level of deference is required when dealing with an exercise of the ministerial discretion under section 34(2) of the Act.

[38] I also agree with the Respondents that at the core of a Minister's decision under section 34(2) is the concept of "national interest" which involves extremely broad national and international considerations. As the Respondent points out, this is captured in section 13.6 of the CIC Policy and Program Manual for Inland Processing, IP 10:

> National Interest
>
> The consideration of national interest involves the assessment and balancing of all factors pertaining to the Applicant's admission against the stated objectives of the Act as well as Canada's domestic and international interests and obligations.

[39] The dispute in the present case is, at bottom, a disagreement over whether, in rendering the Decision under review, there was any "balancing of all factors pertaining to the Applicant's admission against the stated objectives of the Act."

[40] The Applicant says that no such balancing and weighing occurred in the present case, with the result that the Decision is unreasonable. What occurred instead was that the national interest was equated entirely with the Applicant's former membership in MQM and no weighing or appropriate analysis took place.

[41] The Applicant says that the Minister failed to follow the relevant guidelines on this matter and, while he concedes that the guidelines are not law, they do highlight the need for a full evaluation of the national interest that takes into account the totality of the relevant issues and factors.

[42] The Respondent says that all of the relevant evidence was considered and a proper evaluation took place and directs the Court to two strong recent decisions of this Court in *Chogolzadeh v. Canada (Minister of Public Safety and Emergency Preparedness and Minister of*

Citizenship and Immigration) 2008 FC 405 and *Kablawi v. Canada (Minister of Public Safety and Emergency Preparedness)* 2008 FC 1011.

[43] In both of these decisions the Court points out that the exercise of the ministerial discretion under section 34(2) of the Act is a balancing exercise in which the Minister is called upon to assess and weigh the evidence presented.

[44] In *Chogolzadeh*, Justice Shore emphasizes that the applicant in that case had no grounds for complaint because the "Minister's reasons for that decision sets (*sic*) out an account of appropriate considerations," (paragraph 38) and Mr. Chogolzadeh was merely asking the Court to re-weigh the evidence.

[45] In the present case, the Applicant is not asking the Court to re-weigh evidence. The Applicant is saying that, on the facts of the present case, no such weighing occurred. The relevant guidelines and all factors other than the Applicant's prior involvement with the MQM were simply ignored. After reviewing the Decision, I have to agree with the Applicant. There is no attempt to identify and acknowledge the matters enumerated in the guidelines or to engage in any kind of assessment and balancing of all of the factors and evidence at play.

[46] Similarly in *Kablawi*, Justice Barnes found that the applicant in that case could not complain because "the CBSA briefing note provides a balancing of the positive and negative considerations

sufficient to address the ‘major points in issue’ and is reflective of a ‘consideration of the main relevant factors.’” No such balancing is evident in the case before me.

[47] The briefing note in the present case acknowledges that the “consideration of Ministerial relief involves the assessment and balancing of all factors pertaining to the applicant’s admission against the objectives of IRPA, as well as against Canada’s domestic and international interests and obligations.” However, apart from a cursory acknowledgment that “Mr. Afridi is well established in Canada. He is employed as a car sales manager and owns a house. He married a naturalized Canadian citizen in 2002 and supports her one child,” there is no explanation regarding any kind of balancing process or any attempt to address the questions posed in the guidelines, the answers to which would all appear to be in the Applicant’s favour.

[48] The rationale for the Decision simply equates former membership in MQM with the denial of an application on the basis of national interest. This Court has pointed out the dangers and inappropriateness of such an equation.

[49] In *Soe v. Canada (Minister of Public Safety and Emergency Preparedness)* 2007 FC 461, Justice Phelan warned that such an approach to section 34(2) “renders the exercise of discretion meaningless,” (paragraph 34) and in *Kanaan v. Canada (Minister of Citizenship and Immigration),* [2008] F.C.J. No. 301 Justice Strayer had the following to say:

> 7. Of course, a tribunal need not mention every bit of evidence considered, but when the evidence is sufficiently important and is not mentioned, a Court may infer that it was not considered: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*

> (1998), 157 F.T.R. 35. Instead, in the closing words of the briefing note (which must be taken to reflect the Minister's views) it is said that:
>
> > ... Mr. Kanaan's lengthy membership in an organization listed as a terrorist entity, coupled with his obvious lack of credibility, makes it impossible for CBSA to make a recommendation that his presence in Canada would not be detrimental to the national interest... .
>
> This seems to negate the purpose of subsection 34(2) which contemplates that even persons who are or have been members of a terrorist organization might be admissible if "their presence in Canada would not be detrimental to the national interest". The assumption of the quoted rationale seems to be that if a person has ever admitted or wrongly denied membership in a terrorist organization he will always be a threat to the national interest of Canada. It does not consider, for example, that even if the Applicant had been a member of ANO and whatever the quality of that membership, he had been absent from Lebanon and the activities of the ANO for 14 years prior to the Minister's decision.
>
> 8. I therefore conclude that the Minister's decision was patently unreasonable in that it failed to take into account evidence and factors presented in the Applicant's submissions of March 31, 2006 and July 25, 2006. The decision seems to have turned on the simplistic view that the presence in Canada of someone who at some time in the past may have belonged to a terrorist organization abroad can never be in the national interest of Canada. I will therefore set aside the Minister's decision and refer the matter back to him for reconsideration.

[50] The Decision in the present case falls into a similar error. The briefing note is one-sided and unbalanced for the reasons put forward by the Applicant. This is one of those occasions when the Minister’s decision must be overturned. For the reasons given, it is unreasonable. The Applicant should have his case reconsidered in accordance with the relevant guidelines and the governing jurisprudence. In this regard, the decision of Justice Dawson in *Naeem v. Canada (Minister of*

Citizenship and Immigration), [2007] F.C.J. No. 173 provides a principled and detailed approach that I will not reproduce here, but which should be taken into account.

[51] Because this disposes of the application, there is no reason to consider the other issues raised. However, on reviewing the record, it would appear to me that the briefing note does not accurately summarize some of the evidence cited against the Applicant concerning his activities in Canada and great care should be taken to ensure that this problem does not recur.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application is allowed, the Decision is set aside and the matter is referred back to the Minister for reconsideration.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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