Federal Court  Cour fédérale

Date: 20100708

Docket: IMM-213-09

Citation: 2010 FC 737

Ottawa, Ontario, July 8, 2010

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

DMYTRO AFANASYEV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision made by immigration officer Kristin L. Erickson, (the Officer) dated October 2, 2008. The Officer found the applicant inadmissible to Canada pursuant to subsection 34(1)(*a*) and (*f*) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (IRPA), and refused to process his request for an exemption pursuant to subsection 34(2) of the IRPA. As a consequence, the Officer rejected the applicant's application for permanent residence in Canada.

THE FACTS

[2] The applicant, a citizen of Ukraine born in November 1966, applied for permanent resident status in July 2000 under the independent category by virtue of his training and occupation in three categories (translator, contract management officer and legal assistant). He was to be accompanied by his wife, their son and his wife's daughter from a previous marriage.

[3] He was first interviewed in Kiev on July 5, 2004. As a result of that interview, he was approved on selection for immigration purposes on that same day.

[4] A second interview regarding security took place on December 16, 2004, in Warsaw. A third interview with respect to background information and security finally took place in Warsaw on April 26, 2006. During those security interviews, Mr. Afanasyev explained that he completed his compulsory military service in the Soviet Army from 1985 to 1987. He disclosed that he served as a private during six months in a unit that was responsible for telecommunications and intercepts, and that he was trained in radio intelligence. According to a brief from the Canadian Security Intelligence Service (CSIS) sent to the Canada Border Services Agency, the applicant should have admitted that his duties entailed listening to English language communications coming from US bases in West Germany, identifying and debriefing various frequencies and telegraph codes, as well as receiving training in radio intelligence that consisted of propaganda, physical training, interception, grammar, spelling, audition and special NATO telegraphic code. However, the applicant denied any affiliation to the Russian or Ukrainian Intelligence Services.

[5] After leaving the army in 1987, Mr. Afanasyev went back to Kiev University where he earned a Masters Degree in International Law; he also obtained a diploma from the State Examining Board as a Translator of English (legal). His knowledge of Western contract law, his legal translation expertise and his familiarity with emerging commercial law in the Ukraine then lead to his employment as a consulting specialist with the Kiev Chamber of Commerce as well as several private companies.

[6] On April 14, 2008, the Officer sent the applicant a fairness letter informing him that he may be inadmissible to Canada pursuant to subsection 34(1) of the IRPA since she had reasonable grounds to believe that he was a member of the inadmissible class of persons described in subparagraphs 34(1)(*a*) and (*f*) as a result of his activities during his military service. The Officer gave him an opportunity to respond to her concerns before a final decision was made.

[7] On June 13, 2008, applicant's counsel made extensive submissions to the Officer and submitted that the applicant did not volunteer for his assignment in East Germany. He also explained that his duties primarily involved sitting next to a radio receiver and listening to English language military transmissions on various radio frequencies, passing these messages on in encrypted form without any knowledge of their coding. Finally, counsel argued that the applicant's activities can be described, at best, as military intelligence, but did not fall within any reasonable definition of "espionage" or "subversion". In that same letter, counsel also requested, in the alternative, that the applicant be granted ministerial relief from an inadmissibility finding, pursuant

to subsection 34(2) of the IRPA, since the applicant's presence in Canada would not be detrimental to national security.

[8] The Officer acknowledged the applicant's request for ministerial relief, and indicated in a letter dated July 15, 2008 that if he wished to seek ministerial relief he should prepare submissions along with any supporting documentation. To assist with the preparation of submissions, the Officer listed some questions and information that should form part of a package for ministerial relief. She closed in stating that any submissions had to be made within 60 days of the date of that letter, failing which it would be concluded that no submission would be forthcoming.

[9] On August 19, 2008, applicant's counsel replied to the Officer's letter. He reiterated that "espionage" and "subversion" are concepts distinct from that of participating in routine military intelligence exercises as a conscript in the armed forces, and asked the Officer to consider all his submissions on that issue. He further reminded the Officer of his previous alternative request for relief pursuant to subsection 34(2) in the following terms: "Your reply of July 15, 2008 outlines all of the formalities and considerations that should be included in a request for relief under s. 34(2). We appreciate your assistance in this regard and are prepared to provide such a formal request under this section should this be required. However, at this time we have had no final determination from you on the question of his inadmissibility itself. Therefore it would appear premature to present a formal submission for relief under s. 34(2). However we do reserve our right to do so as necessary".

[10] On October 2, 2008, the Officer issued a decision under section 34(1), essentially reiterating the applicant's inadmissibility on the grounds that he was a person described in subparagraphs 34(1)(*a*) and (*f*).

[11] Following that decision, counsel for the applicant wrote to the Officer stating that the October 2, 2008 essentially repeated her earlier tentative concerns regarding admissibility under s. 34(1) without acknowledging the submissions made in his June 13, 2008 letter. To the extent that the Officer had confirmed the applicant's inadmissibility, counsel requested a short period of time to submit additional submissions regarding subsection 34(2), and reiterated the issues previously raised in that respect.

[12] In a subsequent letter dated November 12, 2008, the Officer explained that her decision was based on full and careful review of all the information on file, was final and would not be reconsidered. She added that any additional information could only be considered in the context of a new application.

THE IMPUGNED DECISION

[13] As previously mentioned, the Officer found that there are reasonable grounds to believe Mr. Afanasyev is a member of the inadmissible class of persons described in subsections 34(1)(*a*) and (*f*) of the IRPA. These subsections provide that a permanent resident or foreign national is inadmissible on security grounds for

(*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;
…	[…]
(*f*) being a member of an organization that there are reasonable rounds 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*).

[14] The Officer came to that conclusion essentially on the basis of the CSIS brief already referred to in paragraph 4 of these reasons. Here is what she wrote in that respect:

> Specifically, during your military service with the Soviet Army from 1985 to 1987, you were a member of the 82nd Special Communications Brigade, 11th Company, 1st Platoon. You were trained in radio intelligence that consisted of propaganda, physical training, interception, grammar, spelling, audition, and special NATO telegraphic codes. Your duties during your assignment in Torgau, East Germany entailed listening to English language communications coming from US bases in West Germany and identifying and debriefing various frequencies and telegraph codes. I have reached this conclusion because you made these admissions during your background investigation interviews.

[15] As for the request for ministerial relief under s. 34(2) of IRPA, the Officer found that the applicant failed to make submissions in this regard, as he was invited to do in the July 15, 2008

letter. No submissions having been made in response to that letter, the Officer was of the view that there was nothing to be considered under this subsection, and that no decision was called for.

ISSUES

[16] This application for judicial review raises the following three issues:

(a) What is the applicable standard of review?

(b) Did the Officer err in finding the applicant inadmissible pursuant to subsection 34(1)(*a*) and (*f*) of the IRPA?

(c) Did the Officer err in concluding that no decision was called for pursuant to s. 34(2) as there was nothing to be considered under that subsection?

ANALYSIS

- Preliminary issue

[17] On October 1, 2009, the respondent filed a motion under section 87 of the IRPA to obtain the non-disclosure of confidential security intelligence information that was redacted in the Certified Tribunal Record. This motion was supported by a secret affidavit explaining the reasons for which the blocked-out information cannot be disclosed, to which was appended the confidential information that the respondent seeks to protect.

[18] In response to that motion, the applicant filed a motion on October 13, 2009 requesting the appointment of a special advocate to protect his interests in his absence during the hearing of the respondent's motion.

[19] In accordance with the practice that has been established in similar matters, an *ex parte* and *in camera* hearing was first held on February 19, 2010, at which the Minister called the author of the secret affidavit filed in support of the motion to testify. I was then able to ask the affiant questions regarding the information that the respondent seeks to keep confidential and the grounds underlying that motion.

[20] Subsequently, on March 4, 2010, I heard the submissions of both parties by conference call. On that occasion, counsel for the applicant submitted the grounds on which he believed the Minister's motion should be dismissed and also argued alternatively for the need to appoint a special advocate. The Minister's motion and the applicant's request to appoint a special advocate were then taken under consideration.

[21] On March 12, 2010, another conference call involving counsel for both parties was held, during which I communicated my decisions to grant the motion filed by the Minister under the authority of section 87 of the IRPA and to deny the applicant's request to appoint a special advocate. I then briefly stated the rationale underlying those decisions, and indicated that I would provide more extensive reasons in the context of the final decision regarding the application for judicial review itself. Here, therefore, are those reasons.

[22] With respect to the Minister's application for non-disclosure, I can do no better than reiterate what I have already said in previous similar cases: see *Karakachian v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 948; *Rajadurai v. Canada (Minister of Citizenship and*

Immigration), 2009 FC 119. While the good administration of justice and public confidence in the judicial system generally dictate openness and access, there are exceptional circumstances where national security considerations trump those basic principles. Those exceptions must obviously be carefully delineated and assessed on a case by case basis, with a view to circumscribing as narrowly as possible these encroachments on one of the most essential and hard fought bulwarks of personal freedom and the rule of law.

[23] It is with these principles in mind that I have approached the Minister's application for non-disclosure. Having had the opportunity to examine the witness who signed the affidavit in support of the motion filed by the Minister, and to carefully review the material sought to be redacted, I have come to the conclusion that the disclosure of the confidential information that was taken out of the certified record would be injurious to national security and endanger the safety of some persons. This information must accordingly remain secret and will not be disclosed to the public, the applicant or his counsel.

[24] As for the appointment of a special advocate, I do not think it is required in the circumstances of the present case. Contrary to the situation that prevails in the context of security certificates proceedings, the appointment of special advocate is not mandatory under s. 87.1 of IRPA. Pursuant to that provision, the presiding judge shall appoint a special advocate during a judicial review proceeding if he or she "is of the opinion that considerations of fairness and natural justice require" such an appointment to protect the interests of an applicant.

[25] It is well established that the requirements of procedural fairness must be adapted to the particular circumstances of each case. Not being a Canadian citizen, Mr. Afanasyev has no right to enter Canada: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at paragraph 24. In fact, the Federal Court of Appeal has already held that the duty of fairness owed to visa applicants is minimal: *Khan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345, at paragraph 30; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at paragraph 41.

[26] Moreover, the applicant cannot benefit from any of the rights guaranteed by section 7 of the Charter since he applied for a visa outside the country in order to obtain permanent resident status in Canada. Such an application does not affect his life, liberty or security since Mr. Afanasyev is not in detention and does not risk being removed to a country where he could suffer mistreatment, but involves economic interests at most: *Malkine v. Canada (Citizenship and Immigration)*, 2009 FC 496, at paragraph 24.

[27] Furthermore, the portions of the certified record that were blocked out were not substantial and do not prevent the applicant from availing himself of all means against the negative decision he is challenging. The redacted portions are minimal, and they relate to information disclosed by the applicant himself. Having read the entire record, and in particular the blocked-out evidence that is the subject of the motion filed by the Minister under section 87 of the Act, I have therefore come to the conclusion that Mr. Afanasyev had access to the gist of the information on which the Officer relied to deny him a permanent resident visa. The information to which he does not have access

would add little to his understanding of the reasons for the decision and in no way prevents him from advancing all possible arguments against the decision. In these circumstances, the appointment of a special advocate is not required to ensure procedural fairness before this Court.

a) The standard of review

[28] The Officer had to determine whether the tasks performed by Mr. Afanasyev when he was a conscript in the Soviet Army amounted to "espionage" for the purposes of s. 34(1)(*a*) and (*f*). His findings in this respect involve questions of mixed fact and law. Before *Dunsmuir v. New Brunswick*, 2008 SCC 9, such questions were reviewed under the reasonableness *simpliciter* standard: *Lennikov v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 43, at paragraphs 40-41; *Naeem v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 123, at paragraph 40; *Jalil* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 246, at paragraph 20; *Posteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, at paragraphs 21-24. There is no reason to depart from this approach in the aftermath of *Dunsmuir*, and I note that the reasonableness standard has indeed been consistently applied by my colleagues in similar circumstances: see, *inter alia*, *Kozonguizi v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 308, at paragraphs 16-17; *Chwach v. Canada (Minister of Citizenship and Immigration)* 2009 FC 1036 at paragraph13; *Motehaver v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 141, at paragraph 11; *Contreras v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 246, at parasgraphs 23-25.

[29] To the extent that Mr. Afanasyev's argument relates to the sufficiency of the Officer's reasons, however, I am of the view that the applicable standard of review must be that of correctness. This issue clearly engages a question of procedural fairness, and the standard of review analysis does not apply to those kinds of issues. In those cases, the task of this Court is rather to determine if the process followed by the decision-maker satisfied the level of fairness required, bearing in mind the various factors enumerated by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[30] With respect to the Ministerial relief issue, the applicant challenges the decision of the Officer to put an end to his request under subsection 34(2). Whether this argument is cast as a jurisdictional issue or as another facet of procedural fairness, the result must be the same for the purposes of the relevant standard of review. Once again, the decision of the Officer must be reviewed against the standard of correctness.

b) Did the Officer err in finding the applicant inadmissible pursuant to subsection 34(1)(*a*) and (*f*) of the IRPA?

[31] The Officer found the applicant inadmissible pursuant to section 34(1)(*a*) and (*f*) of the IRPA for "engaging in signals intelligence espionage against the US and NATO forces and for being a member of the 82nd Special Communications Brigade, 11th Company, 1st Platoon which has engaged in acts referred to in paragraph (*a*)". This conclusion is predicated on the Officer's finding that the applicant's duties entailed "listening to English language communications coming from US bases in West Germany and identifying and debriefing various frequencies and telegraph codes".

[32] On the basis of the record before me, I find this conclusion of the Officer problematic for at least two reasons. First of all, it is not entirely clear what "debriefing" various frequencies and telegraph codes entails. This sentence is found word for word in the CSIS brief sent to the Intelligence Directorate of the Canada Border Services Agency. Yet, the same brief goes on to mention that Mr. Afanasyev "described his tasks as listening with headphones to identify radio frequencies, and clarified that his unit was responsible for intercepting a chain of codes, letters and figures, not dialogue. He elaborated that he would write a report, to be sent to the duty officer, but did not know what happened to his reports after that point". Indeed, the applicant has always maintained that while he was trained in radio intelligence consisting in propaganda, physical training, interception, grammar, audition and special NATO telegraphic codes, his only duties and responsibilities while posted in East Germany were writing down the encrypted English words and/or letters and passing them on.

[33] Nowhere does the Officer discuss this discrepancy between the CSIS brief (itself somewhat contradictory and ambiguous) and the applicant's version. Yet, the Officer recognizes that his conclusion is drawn from the admissions made by the applicant himself; there is no documentary evidence whatsoever on record with respect to the espionage activities of the applicant's himself or his Brigade. In those circumstances, it was imperative for the Officer to explain why he rejected the applicant's explanations, thereby impugning his credibility.

[34] But there is more. Her decision is predicated on her understanding of the term "espionage", yet nowhere does she offer any glimpse of what it entails in her view. This oversight is all the more

glaring since there is no definition of that concept in the IRPA, nor is there any accepted understanding of that term to be found in the case law. The only discussion of what constitutes "espionage" appears to be the following paragraphs of Mr. Justice Lemieux's decision in *Qu v. Canada (Minister of Citizenship and Immigration),* [2000] 4 F.C. 71 (reversed on other grounds at 2001 FCA 399), where he dealt with the same word as it was found in the *Immigration Act*, R.S.C. 1985, c. I-2:

> 25. The Immigration Act does not contain any definition of espionage or subversion and, as noted, there are no cases on point except the decision of the Immigration Appeal Board in Wenberg, Eric Ray (1968), 4 I.A.C. 292, which stated at page 307:
>
> > The words "espionage", "sabotage" and "subversive activity" would appear to have no special legal meaning, and they must therefore be given their ordinary meaning.
> >
> > "Espionage" is defined in The Shorter Oxford English Dictionary, 3rd ed., as "The practice or employment of spies". "Spy" is defined as "to watch…in a secret or stealthy manner; to keep under observation with hostile intent…to make stealthy observations (in a country or place) from hostile motives."
>
> …
>
> 26. As then, these words still have the same meaning today. According to the Oxford English Dictionary, 2nd ed., 1989, "espionage" means: "[T]he practice of playing the spy, or of employing spies".
>
> …
>
> 28. According to the Petit Robert 1: Dictionnaire alphabétique et analogique de la langue française, "espionnage" (espionage) means [translation] : « The act of spying. See Surveillance… The occupation of

> spies… a secret organization existing in all nations and of which the function is to reveal the secrets of foreign or enemy powers."

[35] Counsel for the respondent argues that the applicant's only response to the allegations under section 34(1) was that he was conscripted, that these activities occurred over 20 years ago, and that the applicant did not have a higher position than private in the Army. But the applicant's submissions as found in his counsel's letter of June 13, 2008, were far more extensive than as alleged by the respondent. Relying on various definitions of "espionage", "intelligence" and "subversion", counsel submitted that Mr. Afanasyev's activities may at most arguably fall under the broad aegis of military intelligence, "albeit at its most basic level".

[36] In his memorandum, counsel for the respondent submitted that the applicant's attempts to characterize his activities as "military intelligence" as distinguished from espionage were a semantic exercise which does not assist him, since the gathering of military intelligence can be done by espionage. With all due respect, this reasoning begs the question as it does not explain what constitutes "espionage" and why the gathering of intelligence by the applicant did amount to espionage.

[37] In any event, the rationale advanced by counsel for the respondent cannot be a substitute for the Officer's decision. *Ex post facto* justification cannot cure the deficiencies of the reasons provided by the decision maker. In the present case, the final decision of the Officer read exactly the same as the fairness letter, and does not address at all the submissions made by applicant's counsel. As stated by the Federal Court of Appeal in *Via Rail Canada Inc. v. National Transportation*

Agency, [2001] 2 F.C. 25 at paragraphs 21-22, the reasons "must address the major points in issue", and "[t]he reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors." The Officer failed to do this, and as a result her reasons are inadequate and failed to satisfy the procedural fairness requirement.

c) Did the Officer err in concluding that no decision was called for pursuant to s. 34(2) as there was nothing to be considered under that subsection?

[38] As will be recalled, the Officer refused to forward the applicant's request for ministerial relief to the Minister as she seemed to have been of the view that no formal request had been made to that effect. Yet, she acknowledged at least twice the initial request made by counsel for the applicant in his letter of June 13, 2008. First, the Officer stated in her fairness letter dated July 15, 2008, that "you have asked for relief under paragraph 34(2)…", and as a result suggested topics that might be addressed "if you wish to be considered for this exemption". She also entered the following note in the Computer Assisted Immigration Processing System (CAIPS) on June 17, 2008, referring to applicant's counsel letter of June 13: "In the alternative, requests consideration under A34(2) as a foreign national who satisfies Minister that their presence in Canada would not be detrimental to the national interest. Minister of Public Safety and Emergency Preparedness is only authorized decision-maker in this regard. Advice sought from NHQ". In those circumstances, was she justified in finding that there was nothing to be considered under subsection 34(2) and in not forwarding the applicant's file to the Minister? I believe not.

[39] This is clearly a case where form prevailed over substance. It is true, as stressed by counsel for the respondent, that the fairness letter clearly indicated to the applicant that if he wished to be

considered for this exemption, “the onus rests with you to prepare a submission along with any supporting documentation that you deem relevant”, and concluded with the following caveat: “Please provide any submission that you wish to make within 60 days of the date of this letter. If nothing is received within 60 days, we will conclude that no submission will be forthcoming”.

[40] That being said, there can be no doubt that the applicant wished to be considered for this exemption. It might have been more prudent for his counsel to make further submissions immediately after being invited to do so by the Officer in her fairness letter of July 15, 2008. Over the course of his application for permanent resident status and the ensuing correspondence of his lawyer with Citizenship and Immigration Canada, the following issues were raised:

a. Mr. Afanasyev’s activities over 20 years as a private conscript in the Soviet Army were part of lawful and routine military intelligence exercises ordered by his supervisors in his (then) country of citizenship.
b. Refusal to obey assigned duties as a conscripted soldier would have constituted an offence in the Soviet Union as it would in most other countries. The commission of such an offence might itself have rendered Mr. Afanasyev inadmissible to Canada on these grounds.
c. Mr. Afanasyev’s duties involved translating English words emanating from NATO communications without an understanding or knowledge of the codes attached to the words. In any event NATO military codes used in the mid-80s would no longer be relevant today to Canada or to any other country.
d. There is no issue or allegation that any of Mr. Afanasyev’s activities in an intelligence unit in the Soviet army for one year in the mid-1980s ever had any impact on Canada or Canadians or was even directed towards Canada. The intercepted correspondence originated from military communications of a Canadian ally.
e. The military duties performed by Mr. Afanasyev were exercised within the boundaries of the German Democratic Republic, which was then an ally of the Soviet Union under the Warsaw Pact.
f. Both the Soviet Union and the Warsaw Pact Alliance were dissolved in the early 1990s and thus do not currently impact in any way on the interests of Canada or its NATO allies.

g. Since the fall of the USSR, Ukraine has become an independent democratic state with friendly ties to Canada. Ukraine is currently discussing membership in NATO. Mr. Afanasyev is now a citizen of Ukraine and not of Russia.
h. As noted in his permanent residence application, in the years since his brief military service in the 80s, Mr. Afanasyev has become a successful lawyer, translator and business manager in Ukraine;
i. Mr. Afanasyev has participated in three interviews with Canadian officials. It is the information that he volunteered at these interviews which is at the heart of the visa officer "findings".

[41] In light of the foregoing, it cannot reasonably be said that no submissions were received or that there was nothing to be forwarded to the Minister. Indeed, the issues outlined above addressed many of the questions that the Officer recommended that he dealt with in her fairness letter. In the absence of specific rules set out in the legislation or in the regulations as to the procedure to be followed in order to submit a request for ministerial relief under subsection 34(2) of the IRPA, the Officer could not unilaterally decide not to forward the applicant's request to the Minister. The IRPA clearly states that it is a decision to be made by the Minister, and not by a visa officer (IRPA, s. 6(3)). According to the CIC Immigration Manual "Evaluating Inadmissibility" (OP18/ENF2), the role of an officer outside Canada is to :

a. Provide verification of the information provided by the applicant;
b. Obtain any other information that may be required;
c. Provide comments on the submission of the applicant;
d. Provide to the applicant any documents not in the applicant's possession that will be considered by the Minister of PSEP and provide the applicant an opportunity to respond;
e. Forward the submission to the appropriate section of the National Security Division of CBSA, NHQ, with a recommendation.

[42] I am therefore of the view that the Officer exceeded and overstepped her jurisdiction in barring the applicant's ministerial relief and in failing to forward his request for such relief to the

Minister. The applicant had made it abundantly clear that he wished to seek that relief, and had explained through his counsel that he would not make further submissions in this respect until a decision was made pursuant to subsection 34(1). This approach may well have been misguided, considering that subsections 34(1) and (2) involve two separate processes to be determined by two different authorities: see *Suleyman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 780, at paragraphs 23-35; *Ali* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1174, at paragraphs 40-42. As a result, the Officer was certainly entitled to consider that no further submissions were to be considered as none had been forthcoming after the fairness letter of July 15, 2008. But she could not reasonably conclude, having regard to all the circumstances of this case and considering in particular the clear expression of intent by the applicant to seek ministerial relief, that she would not forward the applicant's request to the Minister.

[43] For all of the above reasons, this application for judicial review is granted. The parties did not propose questions for certification, and none arise.

ORDER

THIS COURT ORDERS that this application for judicial review is granted. The matter shall be sent back for redetermination by a different visa officer. No serious question of general importance is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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