Federal Court  Cour fédérale

Date: 20100429

Dockets: IMM-1105-09
IMM-1107-09

Citation: 2010 FC 471

Ottawa, Ontario, April 29, 2010

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ALI FARKHONDEHFALL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ali Farkhondehfall seeks judicial review of two decisions made by the same immigration officer. The first decision found that Mr. Farkhondehfall was inadmissible to Canada as there were reasonable grounds to believe that he had been a member of an organization that has engaged in acts of terrorism. The second decision dismissed his application for permanent residence because of his inadmissibility.

[2] Mr. Farkhondehfall argues that the failure of the officer to provide him with a document that was central to the officer's analysis meant that he was denied procedural fairness in the assessment of his admissibility to Canada. The officer further erred, Mr. Farkhondehfall says, in analyzing the question of membership, and in finding that there was a link between an organization which Mr. Farkhondehfall had admittedly been a member of – namely the Muslim Iranian Students Society (or "MISS"), and the Mujahedin-e-Khalq (or "MEK") - an organization on the list of entities associated with terrorism maintained by Public Safety Canada.

[3] For the reasons that follow, I have concluded that the officer did not err as alleged. Consequently, the applications for judicial review will be dismissed.

Procedural History

[4] Mr. Farkhondehfall is a citizen of Iran. He arrived in Canada in 1991 and was granted refugee protection shortly thereafter. He then applied for permanent residence, and his application was approved in principle in June of 1993.

[5] Mr. Farkhondehfall attended interviews with representatives of the Canadian Security Intelligence Service on July 17 and November 29, 1994. Mr. Farkhondehfall was also interviewed by an immigration officer on December 11, 1998, and again on December 14, 2001. The immigration officer subsequently found Mr. Farkhondehfall to be inadmissible to Canada pursuant to section 19(1)(f)(iii)(B) of the *Immigration Act, 1976*. Mr. Farkhondehfall then requested Ministerial relief under the provisions of subsection 34(2) of the *Immigration and Refugee*

Protection Act, S.C. 2001, c. 27. This request was denied, as was his application for permanent residence.

[6] Mr. Farkhondehfall sought judicial review of both the refusal of his application for permanent residence and the refusal of Ministerial relief. Both of Mr. Farkhondehfall's applications for judicial review were ultimately allowed on consent, and the cases remitted to the Minister and to an immigration officer for re-determination. It is the decisions resulting from the re-determination of Mr. Farkhondehfall's admissibility to Canada and his eligibility for permanent residence that underlie these applications for judicial review.

[7] The issue of Ministerial relief is not currently before the Court. After the Minister's first section 34(2) decision was set aside, Mr. Farkhondehfall's request for Ministerial relief was turned down for a second time by the Minister, and leave to judicially review this second decision was denied by this Court.

The Section 87 Proceedings

[8] After the commencement of Mr. Farkhondehfall's most recent applications for judicial review, the Minister brought a motion for non-disclosure of portions of the Certified Tribunal Record, in accordance with the provisions of section 87 of the *Immigration and Refugee Protection Act*. The Minister claimed that the disclosure of the redacted information would be injurious to national security or to the safety of any person.

[9] In response to the Minister's motion, Mr. Farkhondehfall brought a motion seeking the appointment of a special advocate to protect his interests in each of the section 87 proceedings. I subsequently determined that considerations of fairness and natural justice did not require the appointment of a special advocate to protect Mr. Farkhondehfall's interests in either application.

[10] In coming to this conclusion, I observed that the redactions from the records in these proceedings were minimal, and that Mr. Farkhondehfall had had access to the overwhelming majority of the information on the record: see *Farkhondehfall v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1064.

[11] I was further satisfied that Mr. Farkhondehfall had been made fully aware of the substance of the information that was relied upon by the immigration officer in finding that he was inadmissible to Canada, and in dismissing his application for permanent residence. I also noted that much of the information relied upon in support of the inadmissibility finding had been obtained from Mr. Farkhondehfall himself in the course of his interviews with Canadian authorities.

[12] The Minister's motion for non-disclosure was subsequently granted, in part. I was, however, satisfied that the disclosure of certain portions of the Certified Tribunal Record to Mr. Farkhondehfall would not be injurious to national security, nor would it endanger the safety of any person.

[13] While a limited amount of information still has not been disclosed to Mr. Farkhondehfall, my decision on the merits of this application has been made without regard to the redacted information. This case has been decided solely upon the public record.

The Legislative Authority for the Decision

[14] Before turning to examine the arguments advanced by Mr. Farkhondehfall, it is helpful to first review the legislative framework governing inadmissibility findings such as this.

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[15] The inadmissibility finding in this case was made under the provisions of section 34(1)(f) of the *Immigration and Refugee Protection Act*, the relevant portions of which provide that:

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 :
…	…
(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 don=t 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)*.

[16] In making a finding under section 34(1) of the Act, an immigration officer is also guided by section 33 of *IRPA*, which provides that:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe	33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou

> that they have occurred, are occurring or may occur.
>
> peuvent survenir.

Was there a Denial of Procedural Fairness in the Assessment of Mr. Farkhondehfall's Admissibility?

[17] Mr. Farkhondehfall submits that he was denied procedural fairness in this matter as a result of the failure of the officer to provide him with a copy of a document that he says was central to the officer's conclusion that the MISS is part of, or a front for the MEK.

[18] The officer's decision makes reference to the United States Department of State's 2002 document entitled *Patterns of Global Terrorism*, which identifies the MISS as a "front organization [for MEK] used to garner financial support". Mr. Farkhondehfall says that this document was not part of the package of documents provided to him by the immigration officer as background information prior to an interview that had been scheduled to take place in January of 2009. Mr. Farkhondehfall says that he was not made aware of this document until he received the officer's decision, and that this was unfair to him.

[19] I have two reasons for concluding that Mr. Farkhondehfall was not treated in an unfair manner in this regard. Firstly, it is well established in the jurisprudence that, with some limited exceptions, fairness does not require the disclosure of documents from public sources such as the United States' Department of State: see *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461, 161 D.L.R. (4th) 488 (F.C.A.). *Patterns of Global Terrorism* is

an annual report published by the United States Department of State, and is readily available on the Department's website.

[20] Secondly, and more importantly, Mr. Farkhondehfall *was* made aware of the existence of the *Patterns of Global Terrorism* document, and what it said, through the documents that were provided to him by the respondent prior to a decision having been taken in relation to the question of his admissibility to Canada.

[21] That is, Mr. Farkhondehfall was provided with a different American document, namely a "CRS Report for Congress" entitled "*Foreign Terrorist Organizations*". This document describes a number of different organizations, including the MEK. It identifies the MISS as being another name for the MEK, specifically referencing the 2002 *Patterns of Global Terrorism* document as authority for this proposition. A second document in the package also links the MISS and the MEK.

[22] The *Foreign Terrorist Organizations* document goes on to note that the MEK uses front organizations to solicit contributions from Iranian expatriates and others. Once again, the *Patterns of Global Terrorism* document is cited as authority for this proposition.

[23] As a result, I am not persuaded that Mr. Farkhondehfall has been denied procedural fairness in this matter, as I am satisfied that he was, or should have been, aware of the document in issue. I am also satisfied that he was afforded a meaningful opportunity to fully and fairly

present his case to the officer. As a consequence, this case may be readily distinguished from the decision in *Kablawi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 283.

Did the Officer Err in Concluding that Mr. Farkhondehfall was a Member of the MEK?

[24] Mr. Farkhondehfall's second argument is that the officer erred in finding that he was a member of the MEK. This requires an examination of both the officer's finding as to the connection between the MISS and the MEK, and the nature and extent of Mr. Farkhondehfall's involvement with each organization.

[25] I understand both parties to agree that the officer's finding in relation to the issue of membership is reviewable on the standard of reasonableness. Given that what is in issue is a question of mixed fact and law, I agree that reasonableness is the appropriate standard: see *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] F.C.J. No. 381.

[26] Insofar as the connection between the MISS and the MEK is concerned, this is a question of fact. The jurisprudence teaches that the question of whether an organization is one described under paragraph 34(1) of the *IRPA* is also subject to review on the reasonableness standard: see, for example, *Omer v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 478, 157 A.C.W.S. (3d) 601 and *Jalil v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 246, 52 Imm. L.R. (3d) 256.

[27] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R.190 at para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

[28] In determining whether a decision is reasonable, the reviewing court must pay attention to the reasons offered by the decision-maker, or which could have been offered in support of a decision. To the extent that a Tribunal may not fully explain certain aspects of its decision, the reviewing Court may consult evidence referred to by the Tribunal in order to flesh out its reasons: see *Public Service Alliance of Canada v. Canada Post Corporation and Canadian Human Rights Commission*, 2010 FCA 56, per Evans J.A., dissenting, but not on this point, at para. 164.

[29] In order to conclude that Mr. Farkhondehfall was inadmissible to Canada, the immigration officer needed find that he was, or had been, a member of an organization for which there are reasonable grounds to believe engages, has engaged or will engage in terrorism. There are three aspects involved in such a finding that require comment, namely the concept of "membership", the "reasonable grounds to believe" standard, and the definition of "terrorism".

[30] Insofar as the test for membership is concerned, it is clear that actual or formal membership in an organization is not required – rather the term is to be broadly understood: see *Chiau v. Canada (Minister of Citizenship and Immigration)*, [1998] 2 F.C. 642. Moreover, there will always be some

factors that support a membership finding, and others that point away from membership: see *Poshteh* at para. 36.

[31] The Supreme Court of Canada described the "reasonable grounds to believe" evidentiary standard in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, as requiring "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities". The Supreme Court went on to hold that reasonable grounds will exist "where there is an objective basis for the belief which is based on compelling and credible information": at para. 114.

[32] As to the definition of terrorism, the officer adopted the definition from *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 96, where the Supreme Court of Canada described terrorism as:

> Any ... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

[33] Mr. Farkhondehfall acknowledges the term "member" as it is used in paragraph 34(1)(f) of the Act is to be given a broad and unrestricted interpretation: see *Poshteh* at paras. 27 and 28. Nevertheless, he says that there must still be something to connect him to the MEK. In this regard,

Mr. Farkhondehfall submits that there is a difference between being a mere supporter of an organization's political goals, and being a member of that organization.

[34] However, it is clear from a review of the record that there was considerable evidence in the record to support the officer's finding that Mr. Farkhondehfall was a member of the MEK. It is also evident that much of the evidence linking Mr. Farkhondehfall to both the MEK and the MISS came from Mr. Farkhondehfall himself in the course of the interviews that he has given to Canadian authorities over the years.

[35] In his 1991 application for permanent residence, Mr. Farkhondehfall stated that he was a supporter of the "Mojahedin-Tehran" between 1978 and 1981. I do not understand there to be any disagreement that the "Mojahedin-Tehran" refers to the MEK. Mr. Farkhondehfall's application for permanent residence goes on to state that he was a member of an organization which he later confirmed was the MISS in India between 1981 and 1985, and was a supporter of that organization between 1985 and 1990.

[36] Significant contradictions and inconsistencies in Mr. Farkhondehfall's story began to emerge in the course of his various interviews. For example, in Mr. Farkhondehfall's initial CSIS interview, he acknowledged having received an offer of employment with the MEK in Toronto, although he said that he had turned the offer down. In a second interview with CSIS, Mr. Farkhondehfall denied ever having received such an offer, claiming that his earlier answer was the result of a "miscommunication".

[37] Concerns with respect to Mr. Farkhondehfall's credibility were fueled by his claim that although he had attended MEK demonstrations and meetings in Toronto, and had attended their offices on occasion (something he later denied), he did not know any MEK members in Toronto.

[38] Most importantly, Mr. Farkhondehfall admitted to CSIS that he had supported the MEK in Iran by participating in demonstrations, some of which had been violent. His involvement with the MEK in Iran also included attending meetings, selling books and making financial contributions.

[39] The record also shows that Mr. Farkhondehfall indicated that his involvement with the MEK had continued during the time that he was in India, *by virtue of his membership in the MISS*. Thus Mr. Farkhondehfall has himself acknowledged the link between the two organizations, which link is also borne out by the documentary evidence.

[40] Mr. Farkhondehfall has also conceded that his involvement with the MISS had extended to participation in demonstrations that turned violent, although he denied having himself participated in any violent activities. He also acknowledges having sold newspapers for the MISS to support the resistance to the Iranian regime, and having visited pro-MEK politicians.

[41] It should be noted that Mr. Farkhondehfall subsequently disavowed many of his earlier statements, once again attributing the inconsistencies in the description of the nature and extent of his involvement with the MEK and the MISS to "misunderstandings".

[42] The record also shows that Mr. Farkhondehfall continued his involvement with the MEK in Canada. As was noted earlier, he has at various times acknowledged having received an offer of employment with the MEK in Toronto, having participated in MEK demonstrations and meetings in Toronto, and having attended at their offices on occasion. He also acknowledged having met with fellow MEK supporters in Toronto to view pro-MEK videotapes.

[43] Mr. Farkhondehfall also told Canadian authorities that he "loves the MEK and the MISS". He has also claimed that neither organization is involved in terrorism or violence, but that they are instead trying to effect political change by peaceful means. Mr. Farkhondehfall had, however, earlier acknowledged that the MEK has used violent means to achieve political ends.

[44] The primary focus of Mr. Farkhondehfall's submissions was on the alleged lack of evidence linking the MISS to terrorist activity. While pointing out that the MEK has been "de-listed" as a terrorist entity in several western countries, I do not understand Mr. Farkhondehfall to dispute that the MEK is a terrorist organization within the meaning of paragraph 34(1)(f) of *IRPA*.

[45] In order to find that Mr. Farkhondehfall is inadmissible to Canada, the immigration officer needed to find that he was or had been a member of an organization for which there are reasonable grounds to believe engages, has engaged or will engage in terrorism.

[46] The officer reviewed the record, and came to the conclusion that Mr. Farkhondehfall fell within the exclusionary provisions of 34(1)(f) of the *Immigration and Refugee Protection Act*. Based upon the evidence discussed above, I am satisfied that this was a conclusion that was reasonably open to the officer on the record before her. Consequently, the applications for judicial review are dismissed.

Certification

[47] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. These applications for judicial review are dismissed; and

2. No serious question of general importance is certified.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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