Federal Court  Cour fédérale

Date: 20091123

Docket: IMM-1797-09

Citation: 2009 FC 1199

BETWEEN:

Khalid ABDELLA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

GIBSON D. J.

Introduction

[1] These reasons follow the hearing at Toronto on the 5th of November, 2009 of an application for judicial review of a decision of The Minister of Public Safety and Emergency Preparedness (the "Minister"), dated the 26th of January, 2009, refusing the Applicant's application under subsection 34(2) of the *Immigration and Refugee Protection Act*[1] (the "Act"), for relief from a determination that the Applicant was inadmissible to Canada.

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1 S.C. 2001, c. 27.

The Decision Under Review

[2] The decision under review is brief. It reads as follows:

> REQUEST FOR MINISTERIAL RELIEF PURSUANT TO SECTION 34(2) OF THE *IMMIGRATRION AND REFUGEE PROTECTION ACT*
>
> Subject:
> ABDELLA, Khalid
> January 1, 1975
>
> Based on the Review of all of the material and evidence submitted, and also specifically
>
> - The fact that the applicant continued to seek contact with OLF offices after coming to Canada.
> - The applicant by his own admission had attended at OLF Offices and Events.
> - The OLF is a terrorist organization that has targeted transport routes, economic centers and other civilian targets, an approach which they have reconfirmed in recent years.
> - The applicant did not appear to appreciate the seriousness of the actions of the OLF.
> - The applicant did not sufficiently sever his connection to a known terrorist group.
>
> It is not in the national interest to admit individuals who have been members of and who have tried to contact known terrorist organizations. Ministerial relief is denied.
>
> Date: Jan 26/09

The Statutory Scheme

[3] Section 33 and the relevant portions of section 34 of the *Immigration and Refugee Protection Act* read as follows:

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 that they have occurred, are occurring or may occur.

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 peuvent survenir.

34. (1) A permanent resident or a 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;
(*b*) engaging in or instigating the subversion by force of any government;
(*c*) engaging in terrorism;
...
(*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*).

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

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) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
c) se livrer au terrorisme;
…
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*).

(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.

Background

[4] In an affidavit that was before the Minister, sworn the 24th of September, 2002, the Applicant attested:

> I am a citizen of Ethiopia and am a member of the Oromo ethnic group. I was involved in the Oromo Liberation Front ("OLF") when I was a high school student at Addis Ketema Secondary School in Addis Ababa, Ethiopia. My activities took place between May 1992 and June 1993 when I graduated from high school. I was never a member of the OLF and my activities were limited to attending a peaceful demonstration in Addis Ababa in May 1992, distributing pamphlets and speaking to fellow students in support of the OLF.
>
> In 1991 and 1992 the OLF was part of the Transitional Government in Ethiopia and it was a legal and legitimate political party. I have never been involved in any type of violent activities and I do not and I never have supported the use of violence.[2]
>
> [emphasis added]

[5] The Applicant arrived in Canada on the 28th of March, 1995. He claimed Convention refugee status. He was found to be a Convention refugee on the 18th of January, 1996. He applied for landing in Canada. He was found to be inadmissible to Canada due to his past involvement with the Oromo Liberation Front (the "OLF"), an organization said to be described in paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, earlier quoted.

[6] In the Applicant's affidavit earlier referred to, he attests:

> In Canada I have never been involved in any political activities regarding Ethiopia. After I had first arrived in Canada I went to an office of the Oromo community that I understood was an OLF office on Jane Street in Toronto. I went to this office one time and I attended a meeting but I never returned there. I have later learned

[2] Tribunal Record, pages 66 and 67.

> that this is not an OLF office but an office of an Oromo community organization. But I have no interest in Oromo politics. I have involved myself in Canada with the Ethiopian Association as a volunteer to assist newcomers to Canada. I have never contributed money to the OLF or any other Oromo organizations, except that at the one meeting I attended at the office on Jane Street I contributed $5.00 to their campaign to bring a singer to Canada.
>
> I have no criminal record and I have never had any kind of problem from the police in Canada.

[7] The material that was before the Minister at the time he made the decision under review indicates that the Applicant was 16 years old when he first became involved with the OLF which, at that time, operated openly and legally in Ethiopia. An OLF office opened in the Applicant's high school. The Applicant has never been involved, except perhaps when he found himself in the wrong place at the wrong time, in any type of violent activities in Ethiopia or in Canada. Further, he has not been involved in any political activities regarding Ethiopia while he has been in Canada. He is opposed to the use of violence and was unaware at any relevant time that the OLF had committed acts of violence. He has been in Canada continuously since March 1995. Since 1998, he has been employed as a dental technician and has the support of his employer who indicates that the Applicant is hard-working and self-supporting. Further, since 1996, the Applicant has also held a second part-time job. He contributes to the support of his family abroad. He fears return to Ethiopia due to his past activities.

[8] As earlier noted, he sought relief from the Minister pursuant to subsection 34(2) of the *Immigration and Refugee Protection Act.*

[9] In the decision under review, the Minister indicates that he reviewed all of the material and evidence submitted. The material that was before him, by reference to the Tribunal Record, included a briefing note prepared for the Minister, date stamped the 9th of March, 2006, and signed by the President of the Canada Border Services Agency, background information on the OLF, a memorandum from an Immigration Officer dated the 19th of November, 1999, reporting on an interview that the Officer conducted with the Applicant on the same date, with supporting materials, a further memorandum from another Immigration Officer, dated the 18th of December, 2001, reporting on an interview conducted on the 14th of November, 2001, the Applicant's Personal Information Form dated the 2nd of August, 1995, prepared in conjunction with his application for Convention refugee status and submissions from the Applicant's counsel dated the 2nd of October, 2002, the 8th of November, 2002 and the 2nd of December, 2002.

[10] In summary, there is nothing before the Court that would indicate that the Minister had before him any material or evidence dated later than the 9th of March, 2006, and, as earlier noted, the decision under review is dated the 26th of January, 2009, almost three years later than the date of the latest material and more than seven years after the date of the latest interview material with the Applicant.

[11] The briefing note that was before the Minister recommended that relief be granted to the Applicant and, of course, the decision under review was not to grant relief.

The Issues

[12] The sole issue raised on behalf of the Applicant on this application for judicial review was described in the Applicant's Memorandum of Argument filed on his behalf in the following terms:

> Did the Minister err by failing to carry out the required balanced assessment of the factors that must be considered in reaching a decision [such as that here under review]?

[13] Counsel for the Respondent, in a Further Memorandum of Argument, urged that the Minister's decision warrants considerable deference and, further, that the Minister did not err in assessing the Applicant's request for relief under subsection 34(2) of the *Immigration and Refugee Protection Act.*

[14] As on all applications for judicial review such as this, the issue of standard of review arises. In what follows, I will turn first to the issue of standard of review.

Analysis

a) *Standard of review*

[15] In *Afridi v. Canada* (*Minister of Public Safety and Emergency Preparedness*)[3], a judicial review of a decision similar to that here before the Court, Justice Russell wrote at paragraphs 20, 21 and 22 of his Reasons:

> In *Dunsmuir v. New Brunswick* ... 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

[3] 2008 FC 1192, October 23, 2008.

> any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" ... . Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.
>
> 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.
>
> *Naeem v. Canada* (*Minister of Citizenship and Immigration*) ... 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 this 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" ... . 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."
>
> [citations omitted]

[16] I adopted the foregoing quotation as my own in *Ismeal v. Canada* (*Minister of Public Safety and Emergency Preparedness*)[4]. *Ismeal* was, like *Afridi*, a judicial review of a decision similar to that here before the Court.

b) *Deference*

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4 2008 FC 1366, December 10, 2008.

[17] Counsel for the Respondent referred the Court to *Ramadan v. The Minister of Citizenship and Immigration and The Minister of Public Safety and Emergency Preparedness*[5], where Justice Zinn wrote at paragraph 16 of his Reasons:

> This is a decision [similar to the decision here before the Court] that implements or reflects broad public policy. It is a decision where the Minister is obliged to strike a balance between the interests of an applicant who wishes to obtain residency in order to be reunited with his family, and the public interest in ensuring that the national interest is not prejudiced by a favourable decision. The fact that t is only the Minister, and not a delegate, who is granted this authority also suggests that significant deference is due. Taking all of these factors into account, there is no doubt that the Minister in making the decision at hand is deserving of the highest degree of deference.

Justice Zinn further commented at paragraph 1 of his Reasons:

> It is the Minister's task to determine whether waiving an inadmissibility restriction for a person who is otherwise inadmissible to Canada would be "detrimental to the national interest". The Minister is uniquely placed to make such an assessment. The Court's role is to satisfy the foreign national and the Canadian public that the decision-making process that was followed was fair and that the decision, based on all the evidence, was reasonable.

All of the foregoing is directly applicable here with the sole exception of the reference to reuniting of the Applicant with his family.

[18] That being said, the Minister is not without parameters relating to the form and substance of his decision.

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5 2008 FC 1155, October 14, 2008.

c) *The Duty To Ensure That Relatively Current Evidence Is Before The Decision-maker And To Carry Out A Balanced Assessment*

[19] Appendix D of the *IP 10 Refusal of National Security Cases/Processing of National Interest Requests Guidelines* (the "Guidelines") sets out five questions to be examined in the context of a national interest analysis, that being, in essence, the analysis that was here required of the Minister. Those questions are the following:

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?

[20] With great respect, those questions, while fully addressed in the briefing note that was before the Minister, which reached a different conclusion from that reached by the Minister, which was shared with the Applicant so that he knew the recommendation that was before the Minister, but which itself was substantially out of date when the Minister reached his decision and was based on information, also before the Minister, which was even more substantially out of date, were simply not directly addressed in the form of a balanced assessment in the decision under review.

[21] The Applicant urges 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 Guidelines. The Court would go further. In assessing the "national interest" a decision-maker must not only make a "complete evaluation" and take into consideration the "totality of the relevant issues and factors" referred to in the Guidelines, but he or she must do so on the basis of relatively complete and, relatively current, information.

[22] Once again, in *Afridi*, *supra*, Justice Russell wrote at paragraph 45 of his Reasons:

> 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 [here the OLF] 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 in balancing of all of the factors and evidence at play.

I am satisfied that much the same might be said here with the following modifications: here, there is no attempt on the face of the decision under review to identify and acknowledge a number of the matters enumerated in the Guidelines. In particular, the evidence before the Minister of the Applicant's severance of ties with the OLF, the absence of any evidence that the Applicant might be benefiting from assets obtained from members of the OLF or benefiting from his previous adherence, not membership, to the OLF and of his apparent adoption of the democratic values of Canadian society and, I would add of its norms and values, would not appear to have been assessed or evaluated in a balancing of the totality of the evidence at play. Further, the fact that the evidence at play appears to be badly out of date was not even acknowledged.

Conclusion and Certification of a Question

[23] In the result this application for judicial review will be allowed. The decision under review will be set aside and the Applicant's request for relief will be referred back to the Respondent for reconsideration and redetermination. Signed copies of these reasons will be circulated to counsel. Counsel for the Respondent will have 10 working days from the date of circulation to serve and file any submissions on certification of a question. Counsel for the Applicant will have five working days from the date of service on him of any submissions by the Respondent's counsel to respond in writing served and filed with the Court. Finally, counsel the Respondent will have three working days to serve and file any reply. Only thereafter, and once the Court has had an opportunity to consider any such submissions, will an Order issue.

Ancillary Matter

[24] A limited amount of material in the Tribunal Record here before the Court was expurgated. Counsel for the Applicant filed a motion pursuant to section 87 of the *Immigration and Refugee Protection Act* seeking review of the expurgation. The Chief Justice of this Court determined the expurgations not to be relevant to the hearing of this proceeding and continued the motion *sine die*. The matter was not raised at hearing. Given the decision herein, the motion will be dismissed in the Order to follow.

"Frederick E. Gibson"
Deputy Judge

Ottawa, Ontario
November 23, 2009

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Paul VanderVennen	FOR THE APPLICANT
Martin Anderson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

VANDERVENNEN LEHRER Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT