Date: 20081216

Docket: IMM-2472-08

Citation: 2008 FC 1375

BETWEEN:

MUHAMMAD NAEEM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON D. J.

INTRODUCTION

[1] These reasons follow the hearing at Toronto on the 26th of November, 2008, of an application for judicial review of a decision of an officer (the "Officer") in the Respondent's Ministry, dated the 23rd of May 2008, and communicated to the Applicant on or about the 27th of May, 2008, whereby the Officer found the Applicant inadmissible to Canada pursuant to paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*[1] (the "*Act*") and, as a consequence, refused the Applicant's application for permanent residence in Canada.

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[1] S.C. 2001, c. 27.

BACKGROUND

[2] The decision here under review represents the second such decision in respect of the Applicant. Judicial review in this Court of the first such decision was sought and, in the result, that decision was set aside. The Applicant again applied for permanent residence in Canada with the decision now before the Court being the result.

[3] The background facts are essentially not in dispute. The following summary of those facts relies heavily on the opening paragraphs of the first decision of this Court in the saga of the Applicant's efforts to achieve status in Canada.

[4] The Applicant is a citizen of Pakistan who came to Canada in 1999 and made a refugee claim based upon his membership and activities in the Mohajir Quami Movement - Altaf Faction (the "MQM-A") and its student wing, the All Pakistan Mohajir Student Organization (the "APMSO"). He was found to be a Convention refugee in February of 2001. Immediately thereafter he applied for permanent residence in Canada.

[5] In February of 2005, the Applicant was interviewed by the officer who made the first decision for the purpose of determining whether he was inadmissible to Canada under paragraph 34(1)(f) of the *Act* as a result of his admitted membership in the MQM-A and its student wing, the APMSO.

[6] As earlier indicated, a first decision finding the Applicant to be inadmissible on security grounds under paragraph 34(1)(f) of the *Act* followed. It was judicially reviewed and the decision was set aside.

[7] The Applicant again applied for landing.

THE LEGISLATIVE SCHEME

[8] Section 33 and the opening words of subsection 34(1) and paragraphs (a), (b), (c) and (f) of that subsection of the *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	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	*b*) être l'instigateur ou l'auteur d'actes visant au renversement d'un

government;	gouvernement par la force;
(*c*) engaging in terrorism;	*c*) se livrer au terrorisme;
…	…
(*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*).

THE DECISION UNDER REVIEW

[9] The Officer would appear, from her reasons, to have proceeded to the second decision, which is now before the Court, in three stages. The Officer first reviewed the material with respect to the Applicant and his involvement with the Mohajir Quami Movement, the MQM-A and the APMSO, background material on the MQM and the MQM-A and, instances of violent activity attributed to members of the MQM and the MQM-A while the Applicant was a member, and concluded:

> I am of the opinion that the activities listed above provide reasonable grounds to believe that the ... [MQM] and the subsequent faction ... [MQM-A] is an organization that engages or has engaged in terrorism. The MQM is characterized as a violent organization in the following documentation. A profile of the MQM prepared by York University's Center for International and Security Studies states: "The MQM's activities within Pakistan are inevitably connected with violence. Every strike that is called comes with the price of violence, with either fatalities and injuries, or destruction of property. The MQM has systematically denied any involvement in criminal acts, continuously accusing rival factions or the government of fabricating lies and of framing the MQM. While there may be some basis to some of these allegations, the evidence against the MQM is overwhelming.

> There are no analyses that argue that the MQM has not been engaged in acts of terrorism within Karachi and Hyderabad.
>
> [emphasis added]

[10] The Applicant and his counsel were interviewed on the 23 of January, 2008, concerning the Applicant's involvement with the MQM and the Officer's concern that there were reasonable grounds to believe that the MQM was an organization that engages or has engaged in acts of terrorism. Documentation on which the Officer relied was provided to the Applicant for information and an opportunity was provided to the Applicant, following the interview, to respond to the material and to the interview.

[11] Through counsel, the Applicant availed of the opportunity provided.

[12] In the second stage of her reasons, the Officer reviewed the Applicant's response at some length with particular emphasis on an opinion of Dr. Lisa Given to which, she noted, Applicant's counsel gave "considerable weight".

[13] The Officer essentially reaffirmed her first stage conclusion. She wrote:

> Based on the totality of the information at my disposal, I have concluded that the Applicant, Mohammad Naeem, is an inadmissible person described under section 34(1)(f) of the Immigration and [Refugee] Protection Act, for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism, and is therefore inadmissible to Canada.

[14] The Applicant, once again on invitation and through counsel, provided further additional documentation and submissions with particular emphasis on material from "... a second expert witness, Dr. Gowher Rizvi from Harvard University who had previously testified at a refugee claim hearing in front of the IRB." The Officer noted:

> ...
> Dr. Rizvi claimed that violence was widespread in Pakistan and that business people settle disputes in a violent manner.
>
> He claimed that the police and media are corrupt and not to be believed. He also claimed that Amnesty International [a source on which the Officer relied] was not academically verifiable. He did admit in his testimony [presumably before the IRB] that there may have been members of the MQM that practiced violent means but that it was not a policy of the party.

[15] Without further analysis, the Officer concluded:

> I have reviewed these submissions, as well as previous documentation in its entirety, and remain of the opinion that there is reasonable grounds to believe that the MQM is a terrorist organization and that Mr. Naeem, as a member of the MQM is inadmissible pursuant to A34(1)(f) of IRPA

[16] The decision now under review followed.

THE ISSUES

[17] Counsel for the applicant, in addition to the issue of standard of review, identifies the following issues in the Applicant's Memorandum of Fact and Law:

- did the Officer err in law because she failed to consider the proper test for when an organization qua organization engages in acts of terrorism?

- did the Officer err in law in her finding that MQM-A has engaged in acts of terrorism because she failed to explain how she understood and applied the definition of "terrorism" and failed to provide a proper analysis and reasons for her conclusion?
- did the Officer err in law by misunderstanding the expert evidence of Dr. Given and Dr. Rizvi and by failing to provide valid reasons for not accepting the expert evidence?

[18] Counsel for the Respondent simply urges that the Applicant has failed to identify any reviewable error in the Officer's assessment of the Applicant's admissibility.

ANALYSIS

a) Standard of Review

[19] Counsel for the Applicant and for the Respondent did not differ in their submissions that the appropriate standard of review, since *Dunsmuir v. New Brunswick*[2], is reasonableness. I agree.

[20] In *Afridi v. Canada (Minister of Public Safety and Emergency Awareness)*[3], Justice Russell, in support of a conclusion that the appropriate standard of review in a judicial review of a decision under subsection 34(2) of the *Act* is reasonableness, wrote at paragraphs 20 to 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

[2] 2008 S.C.C. 9.
[3] [2008] F.C.J. No. 1471, 2008 F.C. 1192, October 23, 2008.

> 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.
>
> 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)*, ... at paragraphs 39-40 holds that the standard of review of 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" ... . 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]

b) Failure To Consider The Proper Test For When An Organization Qua Organization Engages In Acts Of Terrorism

[21] In *Alemu v. Canada (Minister of Citizenship and Immigration)*[4], Justice Layden-Stevenson wrote at paragraphs 32 of her reasons and following:

> For paragraph 34(1)(c) to apply, the decision-maker would have to have regard to the definition of terrorism in *Suresh v. Canada (Minister of Citizenship and Immigration)* ... in relation to the actions <u>of the group</u>. Mr. Justice Lemieux, in *Fuentes v. Canada*

[4] [2004] F.C.J. No. 1210, 2004 F.C. 997, July 15, 2004.

> *(Minister of Citizenship and Immigration*), ... determined that departure from the *Suresh* definition of terrorism by an adjudicator constituted reviewable error. Mr. Justice Mosley reached a similar result in *Zarrin v. Canada (Minister of Citizenship and Immigration)* ... . Further guidance in examining the meaning of "engaging in terrorism" is now available by reference to the statutory definition of "terrorism" provided in the *Anti-Terrorism Act* ... .
>
> Paragraph 34(1)(f) makes clear reference to paragraphs (a), (b) and (c) of the subsection. Because the word "or" is used, any one of (a), (b) or (c) will suffice to satisfy the requirement. However, the decision-maker must specify what acts the organization engaged in, i.e. those referred to in (a), (b) or (c) or any combination thereof. A sweeping statement that merely references paragraph 34(1)(f), without more, will not suffice. It is no answer to say that in *Gariev*, ... the court concluded that the applicant was inadmissible under paragraph 34(1)(f). In that case, the submission was that it had to be shown that the applicant was a direct member of the organization in question. Moreover, the parties accepted that the organization was one that engaged or has engaged in acts of espionage against democratic governments ... .
> ...
> ... I conclude that a generalized reference to paragraph 34(1)(f) of IRPA without some further specificity linking and identifying the acts of the organization to one or more of paragraphs (a), (b) or (c) of subsection 34(1) is patently unreasonable and constitutes grounds for review.
>
> [citations and some text omitted; emphasis added]

[22] I reach the same conclusion on the facts of this matter. The Officer simply failed to link her conclusion regarding the MQM-A and its student wing to "... one or more of paragraphs (a), (b) or (c) of subsection 34(1)".

c) Failure By The Officer To Explain How She Understood And Applied The Definition Of "Terrorism" And Failed To Provide A Proper Analysis And Reasons For Her Conclusion

[23] I am satisfied the quotation above is entirely responsive to this issue question and demonstrates reviewable error in this regard.

d) Failure On The Part Of The Officer To Demonstrate That She Understood The Expert Evidence Of Dr. Given And Dr. Rizvi and Failure To Provide Valid Reasons For Not Accepting The Evidence Of Either Or Both Of Them

[24] While the foregoing brief analysis is sufficient to justify allowing this application for judicial review, I will go further and express the Court's view that, with great respect, the Officer's analysis of Dr. Given's relevant expertise together with the rejection, without any analysis whatsoever, of Dr. Rizvi's evidence constituted further reviewable error. A decision such as that here under review is critical to an individual such as the Applicant in this matter. Where substantive expert evidence is put forward, by respected counsel, on behalf of a person such as the Applicant in this matter, it deserves more thoughtful and comprehensive analysis if it is to be rejected.

CONCLUSION AND CERTIFICATION OF A QUESTION

[25] For all of the foregoing reasons, this application for judicial review will be allowed and the Applicant's application for landing will be referred back to an appropriate authority, not the Immigration Officer whose decision is here at issue, for redetermination.

[26] At the close of the hearing of this matter, I advised counsel that my decision herein would be reserved. Counsel requested an opportunity to review my reasons once they were issued and to make submissions on certification of a question. I agreed to counsel's request. These Reasons will be circulated and counsel will have four weeks from the date of such circulation to agree on a schedule for submissions on certification and to provide submissions and any appropriate reply submissions, within that time limitation. Only thereafter, will an order implementing these reasons issue.

"Frederick E. Gibson"
Deputy Judge

Ottawa, Ontario
December 16, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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