Date: 20081210

Docket: IMM-4818-07

Citation: 2008 FC 1366

Ottawa, Ontario, December 10, 2008

PRESENT: The Honourable Frederick E. Gibson

BETWEEN:

EDD ABDI ISMEAL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

Introduction

[1] These reasons follow the hearing at Toronto on the 26th of November, 2008, of an application for judicial review of the decision of the Minister of Public Safety and Emergency Preparedness (the "Minister"), dated the 18th of October, 2007, 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 as a person described in paragraph

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

34(1) (f) of the *Act* in that there were reasonable grounds to believe that he had been a member of an organization that there were reasonable grounds to believe had engaged in terrorism.

BACKGROUND

[2] The Applicant is a citizen of Ethiopia. In his Personal Information Form, he described himself, while he lived in Ethiopia, as an agitator for and a supporter of the Oromo Liberation Front. He entered Canada on the 17th of March, 1998, and shortly thereafter claimed Convention refugee protection. He was reported under section 20 of the former *Immigration Act* and a conditional departure order was issued against him.

[3] The Applicant was granted Convention refugee status on the 4th of August, 1998. On the 4th of September, 1998, he applied for permanent residence in Canada. He passed medical examination on the 20th of April, 1998. He passed Royal Canadian Mounted Police criminal checks on the 14th of January, 1999. He was interviewed by the Canadian Security Intelligence Service on the 31st of August, 1999. It would appear that that interview triggered a security review. In the result, the Applicant was interviewed by an Immigration Officer (the "Officer") on the 1st of October, 2003. In her report of that interview, the Officer concluded:

> As a result, I am obliged to report subject [the Applicant] as inadmissible for security reasons pursuant to subsection 34(1)(f) of the Immigration and Protection [*sic*] Act.
>
> However, I believe this case is deserving of consideration pursuant to subsection 34(2) of the Act.

- Subject has been granted Convention Refugee status and as such is entitled to live in Canada and to the protection of Canada.

- His involvement with the organization [the Oromo Liberation Front] was minimal and I do not believe we have evidence to believe he himself was involved in violence.

- He has lived in Canada since March 1998, is self-supporting, has met all other requirements and has never come to our adverse attention other than his self-proclaimed support of OLF in his home country. He appears to be stable and he has worked with the same employer for the past fifteen months and has provided a confirmation letter. There is no reason to believe his admission to Canada would be contrary to the National interest. In my opinion there is no useful purpose in continuing to deny him permanent residence in Canada.

[4] Given the Officer's conclusion that she was obliged to report the Applicant as inadmissible for security reasons, tempered by her recommendation that the Applicant's case was deserving of relief under subsection 34(2) of the *Act*, the Applicant applied for such relief with the application supported by submissions that he prepared himself.

THE DECISION UNDER REVIEW

[5] A briefing note for the Minister, dated the 7th of April, 2006, was prepared. It identified the "KEY ISSUES" on the Applicant's request for relief in the following terms:

- The purpose of this briefing note is to present Mr. Ismeal's application for Ministerial relief pursuant to subsection 34(2) of *IRPA*, for your consideration and decision.

- Mr. Ismeal is a Convention refugee who is inadmissible to Canada pursuant to paragraph 34(1)(f) of *IRPA* (Appendix 1). He is a former member of the Oromo Liberation Front

> (OLF), and organization for which there are reasonable grounds to believe is or was engaged in terrorism (see Appendix 2 for background information on the OLF).
>
> - We recommend that you not grant Ministerial relief to Mr. Ismeal to subsection 34(2) of *IRPA*.

[6] While the Officer's memorandum dated the 22nd of October, 2003, and referred to above, is an enclosure to the briefing note, and its conclusion that the Officer found herself obliged to reach is cited therein, its specific recommendation for relief was not referred to in the briefing note, unlike the specific references to two other enclosures quoted above with reference to "KEY ISSUES". Indeed, the only references in the briefing note to factors weighing in favour of relief for the Applicant are oblique at best.

[7] The Minister endorsed the briefing note denying relief. He provided no reasons other than those reflected in the briefing note.

THE STATUTORY SCHEME

[8] Section 33, the opening words of subsection 34(1), paragraphs (a), (b), (c) and (f) of that subsection and subsection 34(2) 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

(*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*).

34. (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.

34. (2) Les faits visés aux alinéas (1)*b*) et *c*) 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.

THE ISSUES

[9] Counsel for the Applicant, in the Memorandum of Argument filed on the Applicant's behalf, identified only one issue, and that in the following terms:

> Did the Minister err by ignoring relevant evidence or otherwise fail to carry out a balanced assessment of the Applicant's application for Ministerial Relief?

[10] Counsel for the Respondent, in a Further Memorandum of Argument filed, simply asserted that the Minister reasonably exercised his discretion to not grant an exemption pursuant to subsection 34(2) of *IRPA*.

[11] As on all applications for judicial review such as this, the issue of standard of review arises.

ANALYSIS

a) Standard of Review

[12] In *Afridi v. Canada (Minister of Public Safety and Emergency Preparedness)*[2], 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*, 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

[2] [2008] F.C.J. No. 1471, 2008 FC 1192, October 23, 2008.

> 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)*, [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."

[13] I adopt the foregoing quotation as my own.

[14] The foregoing being said, it was not in dispute before the Court that briefing notes, such as the briefing note here provided to the Minister and earlier referred to, are the "reasons" for the decision under review, where no other reasons were given and the briefing note was in no way supplemented by the Minister to indicate that he took into account other considerations or other

materials that were before him as appendices or enclosure to the briefing note and decision block[3].

b) Ignoring Relevant Evidence or Otherwise Failing to Carry Out a Balanced Assessment of the Applicant's application for Ministerial Relief

[15] 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?

[16] With great respect, those questions were simply not directly addressed in the briefing note that was placed before the Minister in this matter. That being said, they were addressed in the memorandum prepared by the Officer who interviewed the Applicant in this matter and who reached a different conclusion from that reflected in the briefing note.

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[3] See *Kanaan v. Canada (Minister of Citizenship and Immigration),* [2008] F.C.J. 301, 2008 FC 241, February 22, 2008 and *Miller v. The Solicitor General of Canada et al,* [2006] F.C.J. No. 1164, 2006 FC 912, July 24, 2006.

[17] 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 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 subsection 34(2)[4].

[18] Once again, in *Afridi*, *supra*, note 2, 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 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, substituting the OLF for the MQM, precisely the same might be said here in respect of the briefing note that must be considered to constitute the Minister's reasons in this matter. In the result, I am satisfied that, against a standard of review of reasonableness as earlier described, the decision here under review was made in reviewable error.

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[4] *Ali v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1416 at para. 42.

CONCLUSION AND CERTIFICATION OF A QUESTION

[19] In the result, this application for judicial review will be allowed. At the close of the hearing of this matter, counsel were advised as to the result and consulted on the issue of certification of a question. Neither counsel recommended certification of a question. The Court itself is satisfied that no serious question of general importance arises on this matter that would be determinative on an appeal from my conclusion. No question will be certified.

ORDER

THIS COURT ORDERS that this application for judicial review is allowed, the decision under review is set aside and the matter is referred back to the Minister of Public Safety and Emergency Preparedness for redetermination.

"Frederick E. Gibson"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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