Federal Court  Cour fédérale

Date: 20160506

Docket: IMM-4307-15

Citation: 2016 FC 510

Ottawa, Ontario, May 6, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

BABAR MIRZA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Babar Mirza, seeks judicial review of the decision dated September 4, 2015, of a Senior Immigration Officer [the Officer] which confirmed that he is inadmissible to Canada pursuant to paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] and found that there were insufficient humanitarian and compassionate [H&C] grounds to forward his application to the Case Management Branch for further consideration of an exemption from inadmissibility.

[2] On judicial review, the applicant argues that the decision is not reasonable and in addition, that there is a breach of procedural fairness due to institutional bias in the decision making structure.

[3] For the reasons that follow, I find that the decision is not reasonable. There is no need to address the argument that the decision making process reflects an institutional bias.

I. Background

[4] The applicant is a citizen of Pakistan. He arrived in Canada on October 27, 1996 and was accepted as a Convention refugee on January 28, 1999. His application for permanent residence was approved in principle on September 22, 1999. He was interviewed by the Canadian Security Intelligence Service on October 11, 2000. The applicant appears to have not been made aware of the progress of his permanent residence application between 2000 and 2010.

[5] On April 14, 2010, the applicant received a letter from Citizenship and Immigration Canada [CIC] indicating that he may be inadmissible to Canada pursuant to paragraph 34(1)(f) of the Act due to his membership in the Muttahida Qaumi Movement [MQM]. On April 28, 2010, he was interviewed by CIC. He then made submissions that it would be unreasonable to find him inadmissible pursuant to paragraph 34(1)(f) and asked CIC to consider H&C grounds to grant him permanent resident status.

[6] On March 23, 2011, a CIC officer found that the applicant is inadmissible to Canada pursuant to paragraph 34(1)(f). The application for leave and for judicial review of that decision was denied.

[7] On June 18, 2011, the applicant requested Ministerial Relief. This application remains outstanding.

[8] The applicant applied again for permanent resident status on H&C grounds, pursuant to section 25 of the Act, shortly before the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16 came into force in an effort to preserve his eligibility for the H&C exemption, but did not make extensive submissions. The application was refused on October 25, 2013, as was his request for reconsideration.

[9] The applicant's original application for permanent residence made in 1999 based on his Convention refugee status was, at some later point, transferred to the Backlog Reduction Office in Vancouver. The applicant was notified on March 28, 2014 and made further submissions on June 16, 2014 and March 10, 2015. His request was not barred by the *Faster Removal of Foreign Criminals Act* because he had first requested an exemption on H&C grounds in 2010.

[10] The decision made with respect to this application for an exemption on H&C grounds is the subject of judicial review.

[11] In the applicant's various applications, he provided information about his involvement with the MQM, Muttahida Qaumi Movement-Altaf [MQM-A] and All Pakistan Muttahida Students Organization [APMSO] between 1990 and 1996. He did not deny being a member, but noted that he joined at the age of 14 and had limited involvement. He also noted that he was not aware of the violence of the organization, although he had been a victim of violence while working during the 1993 election.

[12] There is no evidence that the applicant had any involvement with the MQM/MQM-A after arriving in Canada in 1996 or any criminal history in Canada or elsewhere. The applicant has been employed throughout his time in Canada and currently works as a heavy equipment operator. He has been married to his wife for over ten years. They have two children and the applicant has custody of his son from a previous relationship. The applicant also has extended family in Calgary.

II. The Decision Under Review

[13] The Officer noted the applicant's admissions of membership and involvement in the MQM/MQM-A. The applicant described in his Personal Information Form [PIF] that he joined an MQM rally in January 1990 and became a regular member of the MQM in September 1991. The applicant recounted an incident when he escaped a shooting attempt in April 1992. He also described that he was arrested, detained and beaten in June 1992. He stated that he was attacked and threatened when working for the election in October 1993. He attended an underground meeting and was arrested in April 1994, but was released on the payment of a bribe. The Officer

noted that the applicant continued an apparently voluntary association with the MQM-A after he knew his involvement was dangerous.

[14] The Officer noted some variations in the applicant's account of his membership between his application and interview. The applicant explained that the description of his membership in his PIF was for the purpose of his refugee claim. The Officer noted that the applicant stated he had become a member at the age of 14, had thought that the organizations helped the poor and had not been too sure of the MQM's purpose or mandate, but was unaware of MQM violence.

[15] The Officer reviewed the history of the MQM, MQM-A and APMSO, noting that the Immigration and Refugee Board, Canada Border Services Agency, CIC, and the Federal Court have all found that there are reasonable grounds to believe that the MQM-A and the APMSO are or were organizations that have engaged in terrorism.

[16] The Officer concluded that the applicant's voluntary association with the MQM-A in "dangerous circumstances" constituted membership in the organization and that there are reasonable grounds to believe the applicant is described in paragraph 34(1)(f).

[17] With respect to the applicant's request for an exemption from the finding of inadmissibility and the Officer's task to consider whether the H&C grounds justify consideration by the next level decision maker, i.e., the Case Management Branch, the Officer noted the applicant's employment and family history, statement of remorse for being a member of the

MQM once he learned of its activities, and his lack of involvement since coming to Canada in 1996.

[18] With respect to the hardship alleged, the Officer noted the submissions of the applicant that his lack of permanent resident status left him in a state of limbo and that the resulting stress had an effect on his family, but found that the risk of removal from Canada was speculative because the applicant is a Convention refugee and not subject to removal. As a result, the Officer did not consider submissions relating to the effect of a potential separation of his family. The Officer accepted that this causes the applicant "emotional pain" and that he might have more certainty if he were a permanent resident. The Officer found that this uncertainty has no impact on the applicant's children. Similarly, the Officer placed little weight on the best interests of the applicant's children because the applicant would remain with his children regardless of his status.

[19] The Officer stated that he placed greater weight on the applicant's long, voluntary association or membership in the MQM-A and found that there are reasonable grounds to believe that the applicant is a person described in paragraph 34(1)(f), adding that "this is a very serious ground of inadmissibility." The Officer found that the "mild" H&C grounds in the applicant's favour do not warrant consideration by the Case Management Branch.

III. The Issues

[20] The applicant argues that the decision is not reasonable and is not procedurally fair.

[21] With respect to whether the decision is reasonable, the applicant raises three issues:

- Did the Officer err in his consideration of the test to determine whether H&C factors justify consideration of an exemption from inadmissibility by the Case Management Branch, in other words, whether the Officer should forward the application to the Case Management Branch?

- Did the Officer err in his consideration of the evidence of inadmissibility?

- Did the Officer err in his consideration of the impact of the applicant's immigration status?

[22] With respect to whether the decision is procedurally fair, the applicant argues that the structure of the decision making process to determine whether to grant an exemption from inadmissibility on H&C grounds demonstrates institutional bias. The applicant submits that if the test applied by the Officer to determine whether to forward the application for further consideration of an exemption based on H&C grounds is more onerous than the wording in the Operational Manual for Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds (IP 5) [the Manual] suggests, which refers to the Officer's belief that H&C factors "might justify an exemption", the structure is flawed because it denies consideration by a higher level decision maker and by the Minister. The applicant submits that this would amount to a breach of procedural fairness.

IV. Standard of Review

[23] The standard of review applicable to an officer's decision on an H&C application is reasonableness: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paras 18, 20, [2010] 1 FCR 360; *Figueroa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 673 at para 24, [2014] FCJ No 702 (QL) [*Figueroa*].

[24] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). The Court will not re-weigh the evidence or re-make the decision.

[25] An issue of procedural fairness, in this case, the allegation of institutional bias, if established, is reviewed on the correctness standard (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

[26] Whether the Officer applied the correct test to determine whether to forward the application to the Case Management Branch raises a possible error of law. There is a distinction between whether the correct legal test was applied, which is reviewed on the standard of correctness, and for which no deference is owed, and whether the decision maker applied the correct test to the particular facts, which is a question of mixed fact and law reviewed on the reasonableness standard, and for which deference is owed (*Dunsmuir* at para 53).

V. Is the Decision Reasonable?

Did the Officer err in his consideration of the test to determine whether H&C factors justify consideration of a waiver of inadmissibility by the Case Management Branch, in other words, whether the Officer should forward the application to the Case Management Branch?

[27] The applicant submits that the Manual governing H&C exemptions from inadmissibility, which is applicable to delegated decision makers, makes it clear that where the Officer does not have the authority to grant the exemption, as in the present case, the Officer must forward the application to a delegated decision maker (the Case Management Branch) if the Officer "believes that the H&C factors might justify an exemption."

[28] The applicant submits that the use of the term "might" signals a threshold lower than reasonable and probable grounds or a reasonable likelihood and would include circumstances where some H&C factors are present and a delegated decision maker could possibly find an exemption. The applicant acknowledges that some balancing is required in this assessment.

[29] The applicant adds that, because the Officer cannot approve the exemption, but can only refuse the application or refer it to the Case Management Branch, which can then only refuse it or refer it to the Minister, the threshold of "might" must be a low threshold. Otherwise, no potentially successful applications would reach the Minister for consideration.

[30] The respondent submits that the Officer is tasked with conducting a more comprehensive analysis of the H&C grounds, which requires a balancing of the H&C factors with the finding of

inadmissibility. Although the Manual uses the term "might", the guidelines are not the law. The respondent adds that the Officer's decision is reviewable on the reasonableness standard; there are a range of reasonable outcomes and deference is owed to the Officer.

The Officer did not err in applying the test; the Officer should and did conduct a thorough H&C analysis

[31] Generally, issues regarding the application of the correct legal test are reviewed on the standard of correctness. The issue that arises in this case is a hybrid issue that is more related to how the determination was made. Moreover, the meaning of what "might justify an exemption" is not determinative of this application for judicial review.

[32] The Manual guides the Officer to forward the application for further consideration if the Officer believes the H&C factors "might justify an exemption." In my view, this requires the Officer to conduct a thorough assessment of the application and balance the various factors. The mere possibility that another decision maker could take a different view of the H&C application is not the test; the Officer conducting the assessment must form the belief that there are sufficient H&C grounds that "might", in the sense of a reasonable possibility (or at least more than a mere possibility) justify the exemption.

[33] In the present case, the Officer did conduct an assessment of the H&C grounds and weighed them against the applicant's inadmissibility. The Officer concluded that there were "mild" H&C grounds in the applicant's favour, but found that these grounds did not warrant consideration by the Case Management Branch. However, as explained below, the Officer

formed his belief and made his findings without conducting a full analysis of all the evidence and a nuanced consideration of the facts underlying the finding of inadmissibility as required.

Did the Officer err in his assessment of the evidence of the applicant's inadmissibility?

[34] The applicant does not challenge the finding that he is inadmissible to Canada. Rather, the applicant submits that the Officer erred by focussing on the ground of inadmissibility, finding it to be serious, instead of focussing on the facts which underlie that finding and the seriousness of the applicant's conduct. The applicant argues that, as established in *Figueroa* at para 34, there must be a nuanced consideration of the nature of the applicant's membership in the organization balanced against the H&C considerations.

[35] The applicant submits that the Officer failed to consider the applicant's knowledge of the organization's purpose or activities, his age at the time he joined, or the nature of his activity as a member.

[36] The respondent argues that the applicant's circumstances differ from those in *Figueroa,* including the nature of the organization, the involvement of the applicant and the strength of the H&C factors. Regardless, the Officer did consider the nuances, consistent with *Figueroa*; he noted the nature of the applicant's ongoing involvement, despite dangerous encounters, and his varying accounts of his activity.

The Officer erred in his assessment of the evidence of inadmissibility

[37] The issue is whether the Officer considered the finding that the applicant is inadmissible to Canada by reason of his membership in the MQM/MQM-A to be determinative and whether the Officer should have looked at the conduct of the applicant as a member of the organization.

[38] Although the respondent argues that *Figueroa* is distinguishable on its facts, this is true of most decisions that involve the consideration of several factors and the exercise of discretion. It would be rare to find identical circumstances. Although the facts differ in some respects, and in *Figueroa* the Court was considering a decision of the Case Management Branch, there are many commonalities between the applicant's circumstances and those in *Figueroa*.

[39] In *Figueroa*, Justice Mosley noted that the Manual requires an officer to consider any new information or evidence provided by an applicant in relation to their admissibility (at para 30). He elaborated at paras 31-32 and 34:

> [31] This requires the Minister's Delegate to do two things: (1) consider a prior inadmissibility finding in light of any submissions to determine whether that finding still stands; and (2) consider the gravity of the inadmissibility in light of the submissions. In this instance, the Delegate failed to consider the gravity of the inadmissibility in light of Mr. Figueroa's submissions. Rather, the Delegate simply reviewed and confirmed Mr. Figueroa's inadmissibility to Canada pursuant to paragraph 34(1)(f), on the basis of his membership of the FMLN and the commission of terrorist acts by components of the FMLN while he was a member. This in itself rendered the decision unreasonable.
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> [32] The Delegate's decision to dismiss the H & C application because "Mr. Figueroa's inadmissibility was of a serious nature" is also unreasonable as it failed to take into account the nature of the conflict and Mr. Figueroa's personal role as a non-combatant political advocate. The finding that Mr. Figueroa's inadmissibility

> is of a "serious nature" amounts to nothing more than a facile observation that it is serious, in general, to be found inadmissible on security grounds. This is simply not good enough.
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> […]
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> [34] I agree with the applicant that the Delegate erred in failing to take this into account in her analysis. What was called for was not just a simple application of the formula which applies to a factual determination of membership under s 34, which does not have a temporal component- i.e., once a member of an organization that had engaged in acts of terror, always a member. Rather, the analysis required a more nuanced consideration of the nature of that membership and how it should be balanced against the strong humanitarian and compassionate factors in determining whether an exemption was warranted under s 25.
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> [Emphasis added]

[40] In the present case, the Officer's decision does not reflect a nuanced consideration of the nature of the applicant's membership in the MQM/MQM-A. The Officer simply confirmed the finding of inadmissibility based on the applicant's acknowledgment of membership noting that this is a "very serious" ground of inadmissibility.

[41] All findings of inadmissibility are serious and have serious consequences. Despite the seriousness of a finding of inadmissibility, the Act provides for an exemption from the consequences of such a finding. As the respondent notes, this relief is indeed exceptional and perhaps rare. While careful consideration of an application for such exceptional relief is necessary, it should not be impossible to obtain. The Officer was required to consider the applicant's involvement or activities as a member of the organization to determine how serious these activities were and then go on to balance this with the relevant H&C grounds.

[42] Although the Officer recited the applicant's submissions, the Officer did not fully assess the facts underlying the inadmissibility finding, including the nature or level of the applicant's involvement and his awareness of the organization's purpose. For example, the Officer noted that the applicant was 14 years old when he joined the organization, but did not consider whether he would have been aware of the activities of the organization or what membership entailed at the age of 14. The Officer characterised the applicant's involvement as "long", but did not appear to take into account that he joined in 1990 or 1991, at 14 years of age, and came to Canada in 1996 and has not had any involvement since that time. The Officer acknowledged the applicant's descriptions of his involvement, although there were varying accounts, but in the assessment of the nature of the applicant's involvement, appears to have overlooked that the applicant did not participate in any violent confrontations and does not appear to have done more for the organization than drive voters to one election.

Did the Officer err in his consideration of the impact of the applicant's immigration status?

[43] The applicant submits that the Officer's assessment of the effect of a negative decision was unreasonable. Although the Officer acknowledged that the applicant would feel more certain if he were a permanent resident, the Officer characterized this as an emotional issue rather than a legal issue. The Officer failed to acknowledge that the applicant's lack of status, among other things, requires him to obtain work permits and travel documents, limits his participation in civil society, and has an impact on his children and their best interests.

[44] The applicant also argues that the Officer failed to consider that, if country conditions in Pakistan change, he could face removal, despite that he was found to be a refugee. A change in country conditions would likely not have an impact if the applicant were a permanent resident.

[45] The applicant submits that the Officer significantly downplayed the impact of the decision on the applicant's children by finding that there was no prospect of removal and, therefore, no likelihood of being separated from his family.

[46] The respondent submits that the Officer cannot be faulted for referring to the emotional impact, given that the applicant's H&C submissions and affidavit focussed on his emotional state.

The Officer's assessment of the impact of the decision was not reasonable

[47] The Officer appears to have misunderstood the applicant's submissions with respect to the impact of remaining without status in Canada, as opposed to being granted status as a permanent resident, and the consequent impact on the best interests of his children.

[48] The applicant's submissions clearly raised both the emotional impact of his lack of status and the legal implications, and specifically noted that he was required to renew work permits, had limitations on his ability to travel and faced other impediments. The Officer misconstrued the effect on the applicant of continually applying for work permits, health care and refugee travel documents when needed; not having the certainty that comes with permanent resident status; and, not being on the path to the privilege of citizenship.

[49] While it is true that the applicant does not currently face removal from Canada and, if he did, there would be other opportunities to challenge his removal, this does not alleviate or address the impact on him of his lack of status at the present time.

[50] In conclusion, the Officer's findings that the H&C factors do not justify consideration of an exemption from inadmissibility by the next level decision maker, the Case Management Branch, are not reasonable because the Officer ignored or misconstrued the relevant evidence and failed to conduct the nuanced consideration of the nature of the applicant's membership in a terrorist group and how this should be balanced against the relevant H&C factors.

VI. Was There a Breach of Procedural Fairness?

[51] The issue of whether there was institutional bias resulting from the structure of the decision making process, amounting to a breach of procedural fairness, does not need to be determined. As a result, the question proposed for certification, related to the allegation of institutional bias, does not need to be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The application shall be remitted for consideration by another Officer.

3. No question is certified.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Laura Best	FOR THE APPLICANT
Kim Sutcliffe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Embarkation Law Group Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT