Federal Court  Cour fédérale

**Date: 20160510**

**Docket: IMM-4629-15**

**Citation: 2016 FC 522**

**Ottawa, Ontario, May 10, 2016**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**MORTEZA MASHAYEKHI KARAHROUDI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

## I. Introduction

[1] The Applicant challenges the decision of a visa officer at the Embassy of Canada in Warsaw, Poland refusing his application for permanent residence as a member of the Skilled Worker Class.

[2] The officer's decision was based largely on information that was not disclosed to the Applicant, as to do so could be injurious to national security. For that reason, much of the able argument advanced on the Applicant's behalf by his counsel was moot as it could not address all of the factual matters underlying the decision.

[3] Having considered all of the evidence including those portions of the Certified Tribunal Record withheld from the Applicant and the submissions of the parties, the application is dismissed.

## II. Background

[4] Mr. Morteza Mashayekhi Karahroudi is a citizen of Iran with a Master's degree in geophysics from Tehran University. Following his graduation in 1990, he began working as a geophysicist with the Atomic Energy Organization of Iran (AEOI). In 1997, he applied to immigrate to Canada under the Federal Skilled Worker Category. Mr. Karahroudi disclosed his work with the AEOI in that application. The application was approved and he arrived in Canada with his family on October 18, 1998. They returned to Iran after only a few months in Canada, because his wife's mother fell ill. The Applicant's entire family was also issued a visa to travel to Canada in 2003.

[5] The AEOI is the primary Iranian organization involved in research and development in the field of nuclear technology. It has been listed by the British, US, and EU governments as an entity of concern for the proliferation of nuclear weapons. It is also listed in the Annex to United Nations Security Council (UNSC) Resolution 1737, adopted in 2006, as an entity involved in

Iran's nuclear proliferation program. Since 2006, the UNSC has imposed four rounds of sanctions against Iran in response to the proliferation risks posed by its nuclear program.

[6] On 22 July, 2010, Canada implemented the UNSC Resolutions through the *Special Economic Measures Act*, SC 1992, c 17. In the 2009/2010 *Public Report of the Canadian Security Intelligence Service* (CSIS or the Service), it was noted that Iran's proliferation efforts pose a direct threat to Canada's national security.

[7] In 2009, the Applicant submitted the application for permanent residence which is the subject of this judicial review. By way of a letter dated 3 June, 2014, the Applicant was asked to attend an interview at the Canadian Embassy in Warsaw. The interview was conducted on 30 July, 2014. During the interview the Applicant was questioned about his history, including his employment with the AEOI, his activities since leaving the AEOI, and his travels outside of Iran. The Applicant indicated that after leaving the AEOI in 2004 he established a private trading company that, among other things, imported auto parts from China. He also stated that he had travelled widely outside Iran, largely for vacations.

[8] The application was then referred to the National Security Screening Division (NSSD) of the Canadian Border Services Agency (CBSA). A non-favorable report from the NSSD was received by the Embassy on 20 March, 2015. Relying on information received from CSIS in a letter dated 23 January, 2015, the NSSD advised that there were reasonable grounds to believe that the Applicant is inadmissible to Canada under paragraph 34 (1) (d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[9] The NSSD report noted that "the NSSD is of the view that individuals who are linked, directly or indirectly, to nuclear proliferation or proliferation of WMD may be found inadmissible as there are reasonable grounds to believe they present a danger to the security of Canada".

[10] In a letter dated 9 May, 2015 (the procedural fairness letter), the Applicant was informed that he may be inadmissible to Canada in accordance with paragraph 34 (1) (d) of the *IRPA*. The letter stated: "there are reasonable grounds to believe that your previous employment with the Atomic Energy Organization of Iran, subsequent associations and recent travel history includes you as a member of the inadmissible class of persons". The Applicant was given 30 days to respond, and was subsequently granted an extension of time. The NSSD report was not made available to the Applicant.

[11] The Applicant's representative submitted a ten page reply dated 8 July, 2015. The reply noted that the Applicant had obtained a copy of the Global Case Management System (GCMS) notes related to his file via an *Access to Information Act* request. The GCMS notes did not include a summary or any notes pertaining to the Applicant's July 2014 interview. The Applicant submitted that there is also no explanation in the notes for why the immigration officer would have connected the Applicant's recent travel to his employment at the AEOI or who the "subsequent associations" of concern might be. As part of his reply submissions, the Applicant requested a copy of any reports relied on by the officer in Warsaw so that he could respond to the evidence against him.

[12] The Applicant was informed in a letter dated 2 September, 2015 (the refusal letter), that in accordance with paragraph 34 (1) (d) of the *IRPA*, he did not meet the requirements for a permanent resident visa.

## III. Decision under Review

[13] The refusal letter stated the following:

> [T]he Atomic Energy Organization of Iran (AEOI) is the main organization involved in research and development in the field of nuclear technology. The AEOI has been listed by the British, U.S. and E.U. government as an entity of concern for proliferation activity. It is also listed in the Annex to the United Nations Security Council Resolution 1737 (2006) as an entity involved in Iran's nuclear proliferation program. Entities that engage in activities related to nuclear proliferation pose a danger to the security of Canada. The Atomic energy Agency of Iran is such an entity. Given your work history and associations with this company you facilitated directly or indirectly these activities. You are therefore inadmissible to Canada as per section 34(1)(d)) of the *Immigration and Refugee Protection Act*.

## IV. Relevant Legislation

[14] The applicable provision of the *IRPA* reads as follows:

| | |
|---|---|
| 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 : |
| d) being a danger to the security of Canada; | d) constituer un danger pour la sécurité du Canada; |

## V. Issues

[15] The issues addressed in this application are:

(1) The respondent's preliminary motion for non-disclosure.

(2) The appropriate standard of review.

(3) Whether the officer breached the principles of natural justice by failing to disclose the CBSA-NSSD memo and CSIS letter, and by failing to consider the Applicant's response to the fairness letter?

(4) Whether the officer's decision is unreasonable because they failed to justify their decision, or in the alternative, because the officer made unreasonable inferences and findings of fact in relation to the Applicant's inadmissibility under paragraph 34(1) (d) of the *IRPA*?

## VI. Analysis

### A. *Respondent's Preliminary Motion for Non-disclosure*

[16] The Certified Tribunal Record (CTR) was filed on 24 February, 2016 with a number of blank pages representing information that was being withheld by the Minister of Citizenship and Immigration (the Minister). The respondent then brought an application on 1 March, 2016 for a nondisclosure order pursuant to s. 87 of the *IRPA* supported by three classified affidavits. The redacted information consisted of large sections of the CBSA-NSSD memo and the CSIS letter which the officer considered when making a finding of inadmissibility. The Court was advised

by the respondent that they intended to rely on the information for which the s. 87 order was being sought on the judicial review of this application.

[17] In a letter to the Court dated March 16, 2016, the Applicant took no position on the non-disclosure motion but asked that the Court review the redacted information to determine whether it would, if disclosed, be injurious to national security. The Applicant also requested that the respondent not be permitted to rely on any new evidence contained in the classified affidavits filed in support of the motion to substantiate the decision of the officer under review.

[18] The Court read the redacted information and the three classified affidavits filed in support by the respondent. One affidavit pertained only to information that is routinely protected and would carry no weight in these proceedings. The Court considered that it was not necessary to hear from that affiant. The other two affiants testified and were closely examined by the Court on the more substantive information in a closed and *ex parte* hearing on 7 April, 2016. There was no evidence in the three affidavits or the oral testimony which could be considered new evidence in support of the officer's decision.

[19] In the course of the *ex parte* hearing, the respondent agreed to a certain amount of further disclosure and the Court was provided with revised pages to be added to the CTR and disclosed to the Applicant. After considering the matter, the Court concluded that the s. 87 application was justified and supported by the evidence and submissions. An order to that effect with reasons was issued on 8 April, 2016 (2016 FC 397).

[20] In an effort to provide the Applicant with some understanding of the content of the redacted information, an Annex was attached to the order containing an unclassified summary along with the revised pages of the CTR.

[21] To date there has been uncertainty as to whether s. 87, which imports s. 83 of the *IRPA*, could be interpreted to allow for the issuance of a summary of information withheld on the basis of national security.

[22] Justice Noël addressed this question in *AB v Canada*, 2012 FC 1140, which was a judicial review application regarding the denial of a sponsored application for permanent residence status. The Minister filed a s. 87 Motion, and the Applicant sought to have a special advocate assigned and requested that a summary of the information be disclosed. Justice Noël denied the request, noting in his Order and Reasons for Order on the motion:

> [12] Because disclosure of certain types of information would be injurious to national security or endanger the safety of any person, such information cannot be disclosed (see *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, at para 58). I am satisfied that there was no need to involve a special advocate at that stage. As for the request for a summary of the redacted information, although permitted for the purposes of certificate proceedings (see section 83 (1) of the *IRPA*), it is explicitly excluded for the purposes of judicial reviews involving immigration matters and information protected on grounds of national security (see section 87 of the *IRPA*).

[23] Section 87 of the *IRPA* provides as follows:

| | |
|---|---|
| 87. The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 — other than the obligations to | 87 Le ministre peut, dans le cadre d'un contrôle judiciaire, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. |

| | |
|---|---|
| appoint a special advocate and to provide a summary — applies in respect of the proceeding and in respect of any appeal of a decision made in the proceeding, with any necessary modifications | L'article 83 s'applique à l'instance et à tout appel de toute décision rendue au cours de l'instance, avec les adaptations nécessaires, sauf quant à l'obligation de nommer un avocat spécial et de fournir un résumé. |

[Emphasis added]

[24] At first impression, the underlined words could be construed as removing any discretion for the Court to order that a summary be provided.

[25] However, s. 87 excludes "obligations" to appoint a special advocate and to provide a summary of protected information. These obligations arise in the context of security certificate proceedings under sections 78 and 82 to 82.2. Section 83 codifies a set of requirements for those proceedings. Under paragraph 83 (1) (a), the Judge hearing a certificate case shall appoint a special advocate upon hearing the representations of the parties. And under paragraph 83 (1) (e), the Judge shall ensure that the permanent resident or foreign national who is the subject of the proceeding is provided with a summary of the information or other evidence that enables them to be reasonably informed of the case made by the Minister.

[26] The clear legislative intent of the language in s. 87 is that neither of these obligations applies to non-disclosure motions that arise in another immigration proceeding. Nothing in the section precludes the Court from exercising its discretion to provide a summary when it deems it appropriate. A summary is, nevertheless, not explicitly required in order to guarantee a fair

process on a s. 87 motion. This interpretation is supported by Justice Noël's subsequent Reasons for Judgment in *AB v Canada*, 2013 FC 134:

> [58] In her September 16, 2011 letter to the Applicant, the officer requested an interview to inform him of her "concerns" and to give him an opportunity to respond to them. It also informed the Applicant that inadmissibility based on national security grounds, which is encompassed by section 34 of the *IRPA*, was possible without further specification. As seen previously, the Applicant's counsel requested that the officer provide the documentation on which her "concerns" were based and to specify the precise subsection(s) of section 34 at issue.
>
> [59] Having read the CBSA and the CSIS briefs and having reviewed the CTR as a whole, it is clear that that the briefs were of utmost importance to the officer. Her "concerns" were based in large part - if not totally - on these documents. They contain the information that formed the basis of the decision made.
>
> [60] Such documents initially contained protected information. As seen in this file and as a result of a section 87 review, redactions were lifted while some information still remain redacted but it is information that is known to the Applicant through other avenues such as questions asked during the CSIS interviews or other means. In such cases, it may be appropriate to consider the issuance of a summary of the content in order to protect national security assets such as human, technical sources. This was not necessary in the present case. [Emphasis added]

[27] The Court appreciates that the summary provided in this case contained little information that would assist the Applicant in understanding the reasons for his refusal. The right of an individual to have an application for a visa determined and to have that decision reviewed in accordance with law, including the norms of procedural fairness, may need to be balanced against the duty of the state to protect national security. As stated by the Federal Court of Appeal in *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 at para 2 [*Chiau*], such matters present a considerable challenge to the institutions of an open and democratic society. On occasion, the process of balancing the interests will work to the

disadvantage of the individual. That does not mean that the process is unfair. In considering these issues, the Court must be vigilant to ensure that the application for non-disclosure is based on solid evidence and a realistic prospect of harm and not over-claiming by the state.

B. *Standard of Review*

[28] There was no dispute between the parties with regard to the applicable standards. Questions of natural justice invoke a standard akin to correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43. The task for the Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances. The content of the duty of fairness owed to a foreign national seeking entry to Canada falls on the lower end of the spectrum, especially where issues of national security arise: *Chiau*, at paras 48-54; *Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345 at para 30; *Fallah v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1094, at para 8 [*Fallah*].

[29] The standard of review for the substance of a visa officer's decision is one of reasonableness: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, at para 85 [*Suresh*]; *Fallah* at para 13. The factual inferences drawn by the officer are also assessed on a reasonableness standard: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47 [*Dunsmuir*].

C. *Breach of natural justice*

(1) Failure to disclose the CBSA-NSSD memo and CSIS letter

[30] The Applicant contends that the officer breached the principles of natural justice and procedural fairness by failing to disclose the "non-favorable" decision received by the Embassy. They rely on my decision in *Pusat v Canada (Minister of Citizenship and Immigration*), 2011 FC 428, in support of this position.

[31] In *Pusat*, I considered the procedural fairness involved in a process whereby a visa officer found an Applicant inadmissible in accordance with paragraph 34 (1) (f) of the *IRPA*, and held:

> 25 In the particular circumstances of this case, the certified record contains documents that predate the first refusal and appear to have strongly influenced the officer's decision. In my view, those documents, with redactions if necessary, or at least the gist of the information they contain, should have been disclosed to the Applicant prior to the second interview so that he might have been better prepared to answer questions about the grounds for suspecting that he was a member of the PKK.
>
> 26 The documents in the certified record include a memorandum from the Canada Border Security Agency's (CBSA) Counter Terrorism Section which recommends that the Applicant be found inadmissible for being a member of the PKK. The memorandum identifies a number of criteria to be assessed in making a determination of inadmissibility pursuant to paragraph 34 (1) (f) and relates several of those factors to information provided by the Applicant in an earlier interview. Other criteria cited in the memorandum have no bearing on the Applicant's history or conduct. The officer's analysis mirrors that part of the CBSA memorandum which reflects adversely on the Applicant. While it is the role of the officer to weigh all of the factors and determine whether the Applicant is a member of a terrorist organization, fairness required that the Applicant be given a reasonable opportunity to address those factors before a decision was made.
>
> 28 The CBSA memorandum considered by the officer in this instance was similar to that discussed by Justice Eleanor Dawson, as she then was, in M*ekonen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1133, 66 Imm. L.R. (3d) 222. That case also dealt with the issue of disclosure in the context of a paragraph 34 (1) (f) determination. Citing factors applied by the

> Federal Court of Appeal in *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407 (C.A.) (QL), and *Canada (Minister of Citizenship and Immigration) v. Bhagwandass*, 2001 FCA 49, Justice Dawson found that the circumstances of that case required the officer to provide the Applicant with the CBSA memorandum and other open-source documents to allow him to make submissions that were responsive to the material. This was necessary, she held at paragraph 26 of her reasons, in order for Mr. Mekonen to have a meaningful opportunity to present relevant evidence and submissions and to have his evidence and submissions fully and fairly considered by the officer.
>
> 29 At paragraph 19, Justice Dawson found that the CBSA memo in question in that case:
>
> > [W]as an instrument of advocacy designed, in the words of the Federal Court of Appeal in Bhagwandass [*Canada (Minister of Citizenship and Immigration) v. Bhagwandass*], "to have such a degree of influence on the decision maker that advance disclosure is required 'to 'level the playing field'".

[32] The Applicant contends that as in *Pusat*, he was not given the opportunity to respond to the concerns raised in the "non-favourable" decision despite making a request for any documents that the officer may have relied on to reach their finding of inadmissibility.

[33] As Justice Judith Snider pointed out in *Gebremedhin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 380, at para 9, each case must turn on its facts. Not every document considered by an immigration officer must be disclosed. The relevant question is whether the Applicant had the opportunity to meaningfully participate in the decision-making process: *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49, at para 22.

[34] In *El Maghraoui v Canada (Minister of Citizenship and Immigration)*, 2013 FC 883, at para 22, Justice de Montigny recognized that there will be instances in which documents may be protected by privilege based on national security. The duty of fairness, he found, can be met without having to furnish all of the documents and reports the decision-maker relied upon.

[35] In this instance, the Applicant was given an interview during which he answered questions about his position and employment history with the AEOI, any continued connection with the AEOI, and concerns with respect to his travel history. It would have been helpful to the Court to have had the officer's notes of that interview but they were not included in the CTR nor requested by the Applicant. He was provided with an opportunity to respond to the fairness letter which raised concerns regarding his involvement with the AEOI and Iran's nuclear program. While he has maintained throughout these proceedings that he does not know what "subsequent associations" the officer was referring to in the fairness letter, the failure of the officer to provide him with the specific documents upon which those concerns were based does not constitute a breach of procedural fairness in the particular circumstances of this case.

(2) Did the officer fail to consider the Applicant's response to the fairness letter?

[36] The Applicant submits that his attempt to respond to the concerns raised in the fairness letter was not addressed in the refusal letter. The tribunal record, he argues, establishes that the officer issued their decision without considering the Applicant's response, effectively rendering the fairness letter meaningless.

[37] The officer's annotation in the electronic case management system to the effect that the response was considered is, in my view, a sufficient answer to this complaint. The duty of fairness does not require that the officer include a detailed written assessment of each point in the refusal letter. In addition, the response provided by the Applicant was largely a restatement of the information that he had already provided the officer.

D. *Reasonableness of the decision.*

[38] The Applicant submits that the officer's decision is unreasonable because they failed to adequately justify their conclusions as to why there are reasonable grounds to believe that the Applicant is a danger to the security of Canada. As stated in *Mugesera v Canada (MCI)*, 2005 SCC 40, at para 114, there must be an objective basis for the reasonable grounds based on compelling and credible information.

[39] The reasons provided must "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" : *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 16 [*Newfoundland Nurses*]. The reasons provided must contain enough information about the decision so that the party can understand the basis for the decision and for the reviewing court to assess whether the decision met minimum standards of legality: *Ralph v Canada (Attorney General*), 2010 FCA 256, at paras 17-19.

[40] As discussed above, the Court has had the opportunity to read the complete record including the information which was the subject of the non-disclosure Motion and Order. It is now well established that in considering the adequacy of reasons provided for a decision in a reasonableness analysis the Court may take into account the evidentiary record. As stated by Justice Stratas in *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158, at para 17(b), the task is to determine whether the reasons satisfy, in a minimal way, the fundamental purposes required of them. A handful of well-chosen words can suffice.

[41] In the context of this particular case, and in consideration of the evidentiary record, I am satisfied that the decision was adequately explained. On the basis of the entire record it is clear that the reasons provided by the officer are not simply conclusions but reflect the substance of the concerns underlying the decision. The concerns were not based on mere speculation or suspicion but are well-founded on objective evidence.

[42] As I noted at the outset, counsel for the Applicant argued this case from the unenviable position of not having access to all of the information in the tribunal record. Notwithstanding that burden, her written and oral submissions on behalf of her client were all that her client could have hoped for in the circumstances.

[43] Neither party proposed questions for certification. This case turned on its particular factual circumstances.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

No question is certified.

"Richard G. Mosley"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-4629-15 |
| **STYLE OF CAUSE:** | MORTEZA MASHAYEKHI KARAHROUDI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | APRIL 12, 2016 |
| **JUDGMENT AND REASONS:** | MOSLEY, J. |
| **DATED:** | MAY 10, 2016 |

**APPEARANCES:**

| | |
|---|---|
| Clarissa Waldman | FOR THE APPLICANT |
| Gregory George | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Lorne Waldman<br>Waldman & Associates<br>Toronto, Ontario | FOR THE APPLICANT |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |