Federal Court  Cour fédérale

Date: 20181001

Docket: IMM-4072-16

Citation: 2018 FC 973

Ottawa, Ontario, October 1, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

AYOOB HAJI MOHAMMED AND AIERKEN MALIKAIMU

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

ORDER AND REASONS ON A MOTION FOR THE APPOINTMENT OF A SPECIAL ADVOCATE

[1] This Order disposes of the Applicants' request made under section 87.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for the appointment of a special advocate. The request arises in the context of a motion brought by the Respondent pursuant to section 87 of the Act for the non-disclosure of information redacted from the Certified Tribunal Record [CTR] filed by the Respondent in the course of the judicial review proceedings initiated

by the Applicants. It also disposes of the Applicants' joint demand that said request for the appointment of a special advocate be argued orally. The Respondent opposes both requests.

[2] The decision being challenged in the underlying judicial review proceedings is that of a visa officer [Officer] stationed at the Canadian Embassy in Rome, Italy, rejecting Mr. Mohammed's spousal sponsored permanent residence application on the basis that there were reasonable grounds to believe that Mr. Mohammed was a member of the East Turkistan Islamic Movement [ETIM], an organization that engaged in terrorism.

[3] This is the second time in this case that a section 87 motion and a corresponding section 87.1 request for the appointment of a special advocate have been submitted. The first motion was brought prior to the granting of leave to initiate the present judicial review proceedings and was allowed. After allowing the parties to make oral submissions on the issue, I held that the appointment of a special advocate was not necessary, at least at that stage of the proceedings (*Malikaimu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1026 [*Malikaimu 2017*]).

[4] As I have already indicated, the second section 87 motion and the corresponding section 87.1 request were brought post-leave, in the context of the filing of the CTR, as required by rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. In said second section 87 motion, the Respondent indicated that he would not rely on any of the redacted material in the CTR to defend the reasonableness of the impugned decision but that he would rely on a "small part" of that information in order to address a procedural fairness

argument raised by the Applicants. The Respondent did not however identify what that argument was.

[5] The background to the present case - and more generally to the Applicants' underlying judicial review proceedings - can be found in *Malikaimu 2017* and will not be repeated here.

[6] In a direction issued on July 16, 2018 [Direction], following a case-management conference held on July 13, 2018, I indicated the manner in which the section 87 motion, including the corresponding section 87.1 request, was to proceed. This process, which was based on the road map proposed by Justice Simon Noël in *A.B. v Canada (Citizenship and Immigration)*, 2012 FC 1140 and which was similar to the one followed in the course of the first section 87 motion and corresponding section 87.1 request, is described as follows in the Direction:

> 2. The Court will hold an *ex-parte* and *in camera* hearing aimed at gaining knowledge of the Certified Tribunal Record [CTR]'s redacted material and of the justifications for the redactions so that the Court is in a better position to exercise its judicial discretion in assessing whether the standards of fairness and natural justice require the appointment of a Special Advocate and to determine, as requested by the Applicants, whether there is a need to hear oral submissions on that issue;
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> […]
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> 6. The Applicants' request that the issue of the appointment of a special advocate be argued orally will be determined after the *ex parte* and *in camera* hearing has concluded;

[7] Also discussed at the case-management conference was the Respondent's reluctance to identify which of the procedural fairness arguments raised by the Applicants in the underlying

judicial review proceedings would require the Respondent to rely on a "small part" of the redacted material in the CTR in order to respond to such argument. In that regard, I directed the Respondent as follows:

> 3. To that end, the Respondent (as represented by Mr. George), is to inform the Court and Mr. Balasundarum , in writing, by August 3, 2018, whether it is prepared to identify which procedural fairness argument that "small part" of redacted information is intended to address. In the event the Respondent is not prepared to identify that argument for the Applicants, it is to file, by that same date, with the Court's Designated Proceedings Registry a classified affidavit and classified written submissions, to be considered at the *ex-parte* and *in camera* hearing, providing justification for not identifying that argument;
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> 4. Also, the Respondent (as represented by Mr. Reid) is to be prepared, for the purposes of the *ex parte* and *in camera* hearing, to identified which part of the CTR's redacted information will be relied upon to address said procedural fairness argument. The Respondent is to provide that information to the Court's Designated Proceedings Registry, either in the form of a classified letter or of a supplementary classified affidavit, at least one (1) week ahead of the date of the *ex parte* and *in camera* hearing;

[8] On August 7, 2018, counsel for the Respondent informed the Court that the procedural fairness issue in question could only be addressed in an *ex parte, in camera* hearing and that the Respondent was therefore not prepared to identify this issue to the Applicants. As a result and as directed, he also informed the Court that a few days prior, on August 3, 2018, he had filed with the Court's Designated Proceedings Registry a short classified affidavit and a brief classified factum to be considered by the Court at an *ex parte, in camera* hearing.

[9] The *ex parte, in camera* hearing contemplated by paragraphs 2 to 4 of the Direction was held on September 20, 2018 in the presence of counsel for the Attorney General of Canada and the deponents of the two classified affidavits filed in support of the section 87 motion. In the

course of the hearing, I heard the testimony of - and questioned - these deponents regarding the redacted information and the grounds underlying the claim for non-disclosure. I also heard submissions from counsel.

[10] Also present at the *ex parte, in camera* hearing was the deponent of the classified affidavit filed on August 3, 2018 in relation to the procedural fairness argument for which reliance on some of the redacted material in the CTR was allegedly needed in order to address that argument. In the course of the hearing, counsel for the Attorney General of Canada indicated that he was now prepared to disclose said procedural fairness argument to the Applicants, but was instructed to do so upon the following terms:

> The Minister of IRC filed an *ex-parte* affidavit by the Migration Program Manager and *ex-parte* written submissions to address the procedural fairness issue raised by the Applicant with regard to the contents of the letter used to summon him to his initial interview.

[11] Counsel also confirmed that, contrary to what was indicated in the section 87 motion materials, none of the redacted material in the CTR was relevant to the procedural fairness issue and that, therefore, none of that material would be relied upon to address it. The Migration Program Manager then took the stand and I questioned her on the content of her classified affidavit. I additionally heard submissions from counsel regarding the content of said affidavit.

[12] With the emergence of the procedural fairness argument issue, there are, in my view, two aspects to the Applicants' section 87.1 request and joint demand for an oral hearing. The first concerns the actual section 87 motion and the redacted material in the CTR the Respondent seeks to protect from disclosure; and the second concerns the procedural fairness argument issue

which, as counsel for the Attorney General confirmed at the *ex parte, in camera* hearing, does not involve the redacted material relating to the section 87 motion but rather other classified information in the form of the Migration Program Manager's classified affidavit.

[13] These two aspects will be dealt with separately.

I. The CTR's Redacted Information Aspect

[14] Section 87 of the Act allows the Respondent, in the course of a judicial review proceeding filed under the Act, to apply for the non-disclosure of information or other evidence when, in his opinion, disclosure of that information or other evidence would be injurious to national security or endanger the safety of any person. When such an application is made, section 83 of the Act, which governs the protection of information in security certificate proceedings initiated under the Act, applies to the section 87 proceeding, with any necessary modifications. However, the requirement found in section 83 to appoint a special advocate does not apply. In accordance with section 87.1 a special advocate will only be appointed if the Court is satisfied that considerations of fairness and natural justice require that such appointment be made so as to protect the interests of the judicial review applicant.

[15] In *Malikaimu 2017*, I had this to say on the special advocate regime put in place by the Act:

> [31] As this Court has stated on a number of occasions, the Act's special advocate provisions were introduced as a result of the Supreme Court of Canada decision in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*]. In that case, the Supreme Court determined that the challenges to the

fairness of the process leading to possible deportation and the loss of liberty associated with detention in the context of security certificates issued under the Act raised important issues of liberty and security and on that basis, concluded that section 7 of the *Charter* was engaged. It held that to satisfy the section 7 analysis there must be meaningful and substantial protection, the question being whether the basic requirements of procedural fairness have been met, either in the usual way or in an alternative fashion appropriate to the context, having regard to the government's objective and the interest of the person affected (*Charkaoui*, at paras 18 and 27; see also: *Malkine v Canada (Citizenship and Immigration)*, 2009 FC 496, at para 20; *Farkhondehfall v Canada (Citizenship and Immigration)*, 2009 FC 1064, at para 28 [*Farkhondehfall*]; *Kanyamibwa v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 66, at para 43).

[32] The special advocate system was identified in *Charkaoui* as an example of a less intrusive alternative to reconcile the demands of national security with the procedural protections guaranteed by the *Charter* (*Charkaoui*, at paras 86-87).

[33] In the wake of *Charkaoui*, Parliament made it mandatory to appoint a special advocate in security certificate proceedings. However, in other types of immigration cases, the appointment of special advocates was left to the discretion of the presiding designated judge. In these cases, as the wording of section 87.1 clearly contemplates, a special advocate will only be appointed where the presiding designated judge is of the opinion that considerations of fairness and natural justice require such appointment in order to protect the interest of the applicant (*Farkhondehfall*, at para 29; *Karakachian v Canada (Citizenship and Immigration)*, 2009 FC 948, at para 24 [*Karakachian*]; *Afanasyev v Canada (Citizenship and Immigration)*, 2010 FC 737, at para 24 [*Afanasyev*]).

[34] There is therefore no absolute right to have a special advocate appointed when an *in camera* hearing is requested under section 87 of the Act (*Dhahbi v Canada (Citizenship and Immigration)*, 2009 FC 347, at para 21). By the very wording of section 87, proceedings brought under that provision, which are governed by the procedure outlined in section 83 of the Act applicable to security certificate matters, are explicitly not subject to the obligation to appoint a special advocate.

[35] Although of the utmost importance, the right to know the case to be met is not absolute either. So far, Canadian courts have declined to recognize notice and participation as invariable

> constitutional norms. The approach to procedural fairness remains, as stated in [*Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817], context-specific (*Baker*, at para 21; *Charkaoui*, at para 57).
>
> [36] The same can be said of the open-court principle which, despite its fundamental nature in our legal system, remains subject to a number of exceptions, national security considerations being one. As the Court pointed out in *Karakachian*, at paragraph 21, "Canadian courts have repeatedly recognized the constitutionality of in camera or ex parte hearings where national security considerations so require." The Applicants correctly point out, however, that these exceptions need to be carefully delineated and assessed on a case by case basis (*Afanasyev*, at para 22).

[16] The Applicants claim that at this stage of the proceedings, that is post-leave, considerations of fairness and natural justice support the appointment of a special advocate for the duration of the proceedings. The gist of the Applicants' position is outlined at paragraph 17 of their written submissions in response to the section 87 motion:

> 1) As a litigant before the Federal Court, Mr. Mohammed is afforded a higher level of procedural fairness and natural justice that in the underlying administrative proceeding.
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> 2) The relevant factors considered by the Court in *Kanyamibwa v Canada* support appointment of a special advocate, and in particular a proper application of the *Baker* factors dictates that the Applicant are owed a higher duty of procedural fairness.
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> 3) Alternatively, even if the Court does not find that the Applicants are owed a higher duty of procedural fairness, the other *Kanyamibwa* factors weigh so significantly in the favour of appointment of a special advocate, that one is necessary to preserve fairness and natural justice in the proceedings.

[17] These arguments are essentially the same as those I considered in *Malikaimu 2017* apart from some nuances arising from the caveats I outlined in *Malikaimu 2017* due to the fact the (first) section 87 motion and corresponding section 87.1 request were made at the leave stage of

the Applicants' Application for Leave and Judicial Review. The legal principles put forward are similar and the approach for considering the appointment of a special advocate is identical.

[18] Therefore, to the extent that the Applicants have already had the benefit of an oral hearing on this very same issue in the context of the pre-leave section 87 motion and corresponding section 87.1 request, I see no need to conduct another hearing on this issue. I agree with the Respondent that the Applicants have not presented any reason that would justify a second hearing in these circumstances, especially given the fact that the Applicants have submitted, on both occasions, extensive written submissions on this issue.

[19] Now, having gained knowledge of the redacted information in the CTR and the grounds underlying the claim for non-disclosure, I am satisfied that the appointment of a special advocate is not necessary for the duration of the proceedings.

[20] The Applicants urge me to reconsider my position in *Malikaimu 2017* regarding their claim that the factors set out in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] weigh strongly in favour of a high degree of procedural fairness in determining whether a special advocate should be appointed in this case, especially in light of the fact that the decision to be rendered on the section 87 motion is judicial in nature, as opposed to purely administrative as is the impugned decision denying the Applicants' permanent residence application.

[21] In particular, they urge me to depart from the existing line of cases which state that when the Court is called upon to determine whether considerations of fairness and natural justice require the appointment of a special advocate in a section 87 proceeding, as is the case here, the duty of fairness owed to the Applicants is at the lower end of the spectrum. Moreover, the Applicants propose that the Court should not apply the principle of judicial comity too broadly. They further claim that the developments in the present case since *Malikaimu 2017* further distinguish this case from the existing case law.

[22] With all due respect, I see no basis to depart from my findings a year ago in *Malikaimu 2017*. According to the Applicants, the developments that would warrant departure from these findings are:

a. The granting of leave to judicially review the Officer's decision;
b. The intention of the Respondent to rely on some of the redacted information in the CTR for the purpose of responding to the underlying judicial review application; and
c. The fact that the CTR reveals that the Officer's decision was drafted "after input from [the] case management branch" and that the Canada Border Services Agency sent an inadmissibility assessment [CBSA Assessment] to the Immigration Program Manager in Rome stating, after having sought advice from the Security Screening Branch of the Canadian Security Intelligence Service [CSIS Brief], that there were reasonable grounds to believe that Mr. Mohammed was inadmissible to Canada.

[23] In my view, none of these "developments" justify departing from the existing case law on the level of procedural fairness owed to an applicant in the same situation as the Applicants to

this proceeding, when determining whether considerations of fairness and natural justice require the appointment of a special advocate in a section 87 proceeding.

[24] First, the fact that leave was granted is of no assistance to the Applicants as the case law in question made reference to instances where leave had been granted. As I indicated in *Malikaimu 2017*, the section 87 motion and corresponding section 87.1 request considered in that decision were the first to be brought at the leave stage of a judicial review application filed under the Act. In other words, this was unprecedented.

[25] Second, we now know that the Respondent will not rely on any of the redacted material in the CTR to defend the Officer's decision.

[26] Finally, as to the third development, I see nothing that distinguishes the present matter from those considered in this clear and convincing line of inadmissibility cases. Invariably, and irrespective of a CBSA inadmissibility assessment, when there is one, visa officers must inform visa applicants of the case to be met and provide them with the opportunity to disabuse their concerns, particularly those that may form the basis of their decision. Therefore, I still see no reason to deviate from this line of cases.

[27] This brings me to the other factors that need to be considered in a section 87.1 analysis. These factors are (i) the extent of non-disclosure, (ii) the materiality/probity of the information subject to non-disclosure and (iii) the applicant's ability to know and meet the case against him, although no one factor is necessarily determinative (*Malikaimu 2017* at para 52). Ultimately, the

Court's task, as stated in *Farkhondehfall v Canada (Citizenship and Immigration)*, 2009 FC 1064 at para 31, is to "balance all of the competing considerations in order to arrive at a just result".

[28] Following the September 20, 2018 *ex parte*, *in camera* hearing, the Respondent filed a revised version of pages 214, 215 and 243 of the CTR. This means that the redacted material found on pages 214 and 215 are no longer redacted. As for page 243, a few words under the heading "Source Annex" at the very bottom of the page remain redacted.

[29] With this revised version of the CTR, all the redacted material contained therein are found in two documents, the CBSA Assessment, a 9-page document (CTR at 235-243), and the CSIS Brief, a 4-page document (CTR at 231-234). In both documents, the extent of the non-disclosure is quantitatively significant. However, as I indicated in *Malikaimu 2017*, quoting from *Jahazi v Canada (Citizenship and Immigration)*, 2010 FC 242, determining the extent of non-disclosure is not merely a quantitative exercise; it also requires taking into account the significance of the redacted information. Here, I am satisfied that the redacted material in both documents lacks materiality in the sense that if disclosed, it would permit the quashing of the Officer's decision (*Yadav v Canada (Citizenship and Immigration)*, 2010 FC 140 at para 37; see also *El Dor v Canada (Citizenship and Immigration)*, 2015 FC 1406; *Aryaie v Canada (Citizenship and Immigration)*, 2013 FC 469 at paras 23-27). I am satisfied, in turn, that, should it be held, the non-disclosure of this material would not impair, to any degree, the Applicants' ability to know the case against them at this stage of the judicial review proceedings and to respond to it in a meaningful way. This includes advancing their arguments based on sections 9

and 10 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, regarding the first of the two interviews Mr. Mohammed was asked to attend by the Visa section of the Canadian Embassy in Rome in the context of his application for permanent residence.

[30] As I indicated in *Malikaimu 2017*, the Applicants, in my view, are quite aware of the reasons why Mr. Mohammed was found inadmissible for being a member of a terrorist organization. Both the Officer's decision letter and the notes of the interview she conducted with Mr. Mohammed show the basis of the Officer's inadmissibility concerns regarding Mr. Mohammed's membership in a terrorist organization. They indicate that: Mr. Mohammed stated he went to Afghanistan and for three months he lived and travelled with a group of individuals who were fighting for the political objective of Turkistan independence; that the group was armed and that Mr. Mohammed saw Kalashnikovs in the cave where he lived with this group; that this group was possibly named ETIM by the American authorities; and, that he shared the group's political vision. The Officer's credibility concerns are also cogently expressed and detailed in the decision letter as well as in the notes.

[31] I am therefore satisfied that the Applicants have had access to the gist of the information on which the Officer relied in order to deny Mr. Mohammed's spousal sponsored permanent residence application. The redacted information in the CTR (upon which the Respondent will not rely in order to respond to the Applicants' underlying judicial review application) is either inconsequential or unrelated to the concerns that form the basis of the Officer's decision or form part of the gist of the information to which the Applicants have had access.

[32] In sum, I find that considerations of fairness and natural justice do not require the appointment of a special advocate insofar as debating the Respondent's claim for non-disclosure of the redacted materials in the CTR is concerned.

II. The Migration Program Manager's Classified Affidavit Aspect

[33] The Respondent has now identified the Applicants' procedural fairness argument for which the Migration Program Manager's classified affidavit and brief classified written submissions were filed on August 3, 2018. This argument concerns the contents of the letter used to summon Mr. Mohammed to his initial interview held at the Canadian Embassy in Tirana, Albania, on January 15, 2015 at the request of the Visa section of the Canadian Embassy in Rome.

[34] Indeed, the Applicants claim that the Respondent failed to disclose the true purpose of that interview, which, in *Malikaimu 2017*, I refer to as the "First Interview", thereby denying them meaningful counsel. They contend that had they known the true purpose of the interview, their counsel at the time would have provided different legal advice and would have taken the necessary steps to ensure that their procedural fairness rights were protected.

[35] Do considerations of procedural fairness and natural justice require the appointment of a special advocate in these circumstances, given the filing of the Migration Program Manager's classified affidavit which basically explains why the content of the letter used to summon Mr. Mohammed to the First Interview was as it was? Again, the question here is whether or not having access to the Migration Program Manager's classified affidavit, either directly or through

a special advocate, would impair the Applicants' ability to meet the case against them and advance this procedural fairness argument. I am satisfied that it would not.

[36] This is not an instance where the contents of said letter could have been more specific but were not. It was what it was and it is up to the Applicants to make the case, against the less stringent correctness standard, that it did not constitute sufficient and proper notice of what was to come at the interview. In my view, nothing, in the current state of the public record, deters or diminishes the Applicants' ability to make that case in a meaningful way. I therefore fail to see how the appointment of a special advocate could improve their capability in this regard. Nor do I see the need to hold an oral hearing in order to hear submissions from the parties on this point.

[37] The Applicants' section 87.1 request will therefore be dismissed.

[38] The Respondent's section 87 motion will be dealt with in a separate Order.

ORDER IN IMM-4072-16

THIS COURT ORDERS that

1. The Applicants' request made under section 87.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for the appointment of a special advocate is dismissed.
2. The Applicants' joint demand that the request for the appointment of a special advocate be argued orally is denied.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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