Federal Court  Cour fédérale

**Date: 20200331**

**Docket: IMM-3680-18**

**Citation: 2020 FC 461**

**Ottawa, Ontario, March 31, 2020**

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

**BETWEEN:**

**A.B.**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] AB is a citizen of India. He is a journalist and editor-in-chief of an Indian newspaper. He seeks judicial review of a decision of a Canadian visa officer [Officer] to refuse his application for a permanent resident visa under s 12(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] AB applied for permanent residence as a member of the Family Class sponsored by his wife. His wife and son, both of whom are Canadian citizens, reside in Canada.

[3] AB was interviewed at the High Commission of Canada in New Delhi, India on June 16, 2015. He was interviewed a second time at the High Commission on December 2, 2015. During the second interview, AB was given a procedural fairness letter. The letter alleged that he may be inadmissible to Canada pursuant to s 34(1)(a) and (f) of the IRPA, because he had cooperated with the Indian Intelligence Bureau [IB] and the Research and Analysis Wing [RAW], and had engaged in espionage against Canada.

[4] AB responded by letter dated December 14, 2015, and vehemently denied any affiliation with the IB or RAW. AB explained that he is a journalist, and he interacted with the IB and RAW in this capacity to gather news and comments for articles that were published in his newspaper.

[5] AB's visa application was refused on November 28, 2016. He commenced an application for leave and judicial review, but the application was settled and discontinued on consent. Following an exchange of correspondence, a new procedural fairness letter was sent to AB providing further details of the allegations against him. He was given a summary of statements he allegedly made during the interview on June 16, 2015, but no transcript of the interview or the notes of the person who conducted it.

[6] On October 4, 2019, this Court granted the Minister's motion pursuant to s 87 of the IRPA for non-disclosure of all information pertaining to the interview on June 16, 2015 that had not been previously disclosed to AB. This included the identity of the person who conducted the interview and the government department or agency with which that person was employed. The Court also ordered the non-disclosure of additional information pertaining to AB contained in the certified tribunal record, and administrative information such as file numbers, employee names and telephone numbers. The Minister does not rely on any of the withheld information to defend the decision under review.

[7] AB says that the Officer's decision was procedurally unfair and contravened the *Canadian Bill of Rights*, SC 1960, c 44 [*Bill of Rights*]. He argues that he was given insufficient information to meaningfully respond to the allegations against him. He also maintains that the Officer's decision was unreasonable because it was based on incomplete or unreliable evidence, and the Officer's adverse credibility findings were unjustified.

[8] The content of the duty of procedural fairness owed to a visa applicant who is outside Canada is at the low end of the spectrum. AB was informed of the gist of the case against him, and given a meaningful opportunity to respond. The Officer's decision was procedurally fair.

[9] However, the Officer's dismissal of AB's testimony in favour of the undated and unattributed interview summary was unreasonable. AB's sworn testimony could be rejected as inconsistent with the summary only to the extent that the summary was accepted as an unassailable and verbatim account of what AB said during his first interview. But there was

nothing before the Officer to indicate how the summary came into being, and no way for the Officer to assess its accuracy. AB's statements contained no obvious inconsistencies; only further elaboration as additional particulars were disclosed to him. AB's explanation for his frequent meetings with Indian security intelligence officials was not so far-fetched as to warrant a finding of implausibility.

[10] The application for judicial review is allowed, and the matter is remitted to a different visa officer for redetermination.

## II. Background

[11] On July 15, 2015, the Security Screening Branch of the Canadian Security Intelligence Service [CSIS] prepared an assessment report regarding AB and provided it to the Canada Border Services Agency [CBSA]. On September 9, 2015, the CBSA conducted an inadmissibility assessment, and concluded there were reasonable grounds to believe that AB was inadmissible because he had engaged in espionage against Canada.

[12] During his second interview at the Canadian High Commission in New Delhi on December 2, 2015, AB was given a procedural fairness letter. According to the letter, AB had declared during his previous interview that he was working with the IB and RAW. AB was invited to respond in writing.

[13] AB provided a written response on December 14, 2015. He vehemently denied any affiliation with the IB or RAW and sought to correct what he described as a "gross misunderstanding". AB explained that he was a journalist, and only interacted with the IB and RAW in this capacity to gather news, comments and quotations for his publications.

[14] AB's application for a permanent residence visa was refused on November 25, 2016. The refusal letter incorrectly stated that AB had not responded to the procedural fairness letter dated December 2, 2015.

[15] AB applied for leave and judicial review. The matter was settled and discontinued on consent. The terms of settlement required that a new procedural fairness letter be sent to AB.

[16] The new procedural fairness letter was sent to AB on August 16, 2017. Like the previous one, the new letter alleged that AB had declared during his interview on June 16, 2015 that he had been working with the Indian intelligence services, specifically the IB and the RAW. AB was given 60 days to respond.

[17] AB retained legal counsel, who responded to the second procedural fairness letter on October 15, 2017 with a request for further disclosure. AB demanded a transcript of the interview in which he allegedly declared he was working with the Indian intelligence services, particulars of his alleged espionage, and an explanation of how his actions were "against Canada or Canada's interests".

[18] Further disclosure was provided to AB on May 18, 2018 in the form of an undated and unattributed summary of what he had allegedly admitted:

> On June 16, 2015, during your interview, you stated that you were approached by both the Indian Intelligence Bureau (IB) and the Research and Analysis Wing (RAW) in the mid-2000s but added that it was not until 2009 that both services requested your formal assistance. You stated that you were tasked by RAW to covertly influence Canadian government representatives and agencies on behalf of the Indian government. You stated that RAW had also tasked you to meet with government officials in Belgium and Canada in an effort to influence their views in favor of the Indian government. You stated that you were told to identify random Caucasian politicians and attempt to direct them into supporting issues that impacted India. You stated that the guidance from RAW included that you were to provide financial assistance and propaganda material to the politicians in order to exert influence over them. As an example, you stated that you were tasked to convince politicians that funding from Canada was being sent to Pakistan to support terrorism. You stated that you met with your IB and RAW handlers outside of Canada at least once every two months, and that the last time you met with them was in May 2015 (i.e. about one month before the interview took place).

[19] AB sought additional information and disclosure on June 29, 2018. He also provided a sworn affidavit in which he denied or provided clarification of the allegations contained in the summary he had received. He was given no further disclosure or particulars.

## III. Decision under Review

[20] The Officer refused AB's application for a permanent residence visa on July 10, 2018. The Officer found AB inadmissible on security grounds pursuant to ss 34(1)(a) and (f) of the IRPA, concluding as follows:

> I find that there are reasonable grounds to believe that you were tasked by a foreign intelligence agency to covertly influence Canadian government representatives, including through guidance to provide financial assistance to politicians in order to exert influence over them, and that you met with representatives of this foreign intelligence agency more than 25 times over a six-year period after you were tasked with such activities.

[21] The Officer therefore refused AB's application under s 11(1) of the IRPA and confirmed, pursuant to s 64(1), that he had no right of appeal to the Immigration Appeal Division.

[22] AB sought leave and judicial review of the Officer's decision on July 31, 2018. Following a request under Rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, AB received the Officer's notes in the Global Case Management System [GCMS]. The GCMS notes, which form part of the Officer's decision, do not include a transcript or additional documents pertaining to AB's interview on June 16, 2015.

[23] The Officer's GCMS notes read in part:

> Given that … the applicant was given two opportunities to explain his relationship with RAW, and that the applicant's two explanations in response to these two opportunities were substantively different, this lowers the believability of the subsequent explanations.
>
> …
>
> It is implausible that an official from an intelligence agency working in a foreign country would ask to meet regularly with a contact and not also be interested in information that this contact could provide. It is also implausible that an official from an intelligence agency working in a foreign country would invest the time and resources required to meet with a contact once every two

> months … if the contact was not providing useful information and/or performing useful tasks or services.
>
> …
>
> It is contrary to Canada's interests to have a foreign national in Canada who is covertly tasked or guided with influencing Canadian politicians … to take views favourable to a foreign power at the behest of and while regularly meeting with that foreign power's intelligence agency.

## IV. Issues

[24] This application for judicial review raises the following issues:

A. Was the Officer's decision procedurally fair?

B. Was the Officer's decision reasonable?

[25] AB raised the further issue of whether the allegations regarding his conduct, even if presumed to be true, constituted espionage. AB's counsel indicated in oral submissions that he would not emphasize this argument. The application for judicial review may be determined without addressing this question.

## V. Analysis

[26] Procedural fairness is a matter for the Court to decide. The standard for determining whether the decision-maker complied with the duty of procedural fairness is generally said to be

correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79). The ultimate question is whether the applicant knew the case to meet, and had a full and fair chance to respond.

[27] The Officer's finding that AB is inadmissible to Canada is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). The Court will intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

A. *Was the Officer's decision procedurally fair?*

[28] AB says he was entitled to a high degree of procedural fairness, given his personal circumstances (citing *Ge v Canada (Citizenship and Immigration)*, 2017 FC 594 at para 28; *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 22). He notes that the effect of the Officer's decision is to permanently bar him from Canada, where his wife and son currently reside. He has no statutory right of appeal, and he cannot seek relief on humanitarian and compassionate grounds under s 25(1) of the IRPA.

[29] The preponderance of jurisprudence holds that the content of the duty of procedural fairness owed to visa applicants is at the lower end of the spectrum (*Amiri v Canada (Citizenship and Immigration)*, 2019 FC 205 [*Amiri*] at paras 28-32). Inadmissibility determinations give rise to a lesser duty of fairness where they involve the refusal of a visa to a person who is outside of Canada. Visa applicants bear the burden of proving they are admissible (*Amiri* at para 32, citing *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (FCA) at para 54, leave to appeal ref'd, [2001] SCCA No 71).

[30] Even at the lower end of the spectrum, procedural fairness generally requires that applicants be provided with the information on which a decision is based so they can present their version of the facts and correct any errors or misunderstandings. Procedural fairness does not, however, require that applicants be provided with all information in the possession of immigration authorities (*Amiri* at para 33). Furthermore, an individual's right to have a visa application determined and to have that decision reviewed in accordance with law, including the norms of procedural fairness, may need to be balanced against the state's duty to protect national security (*Karahroudi v Canada (Citizenship and Immigration)*, 2016 FC 522 [*Karahroudi*] at para 27).

[31] Full disclosure of information in the Minister's possession may not be required, provided that the content or gist of the concerns are raised and conveyed to the applicant (*Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879 at para 105). What matters is whether the applicant had sufficient knowledge of the information relied upon, and an opportunity to

meaningfully participate in the decision-making process (*Karahroudi* at para 33; *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 at para 22).

[32] These considerations are particularly germane in the present case, given the Minister's refusal to disclose some information in his possession that may be pertinent to the decision under review. Like the applicant in *Amiri*, AB was made aware of the nature of the Officer's concerns through the procedural fairness letters he received and the questions he was asked during his interviews. The summary contained in the second procedural fairness letter provided AB with the gist and sufficient details of the Officer's concerns. AB was given several opportunities to respond, and he did so both personally and through counsel.

[33] AB also relies on s 2(e) of the *Bill of Rights*, which states that every law of Canada shall be construed and applied so as not to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice. The Minister objects that the *Bill of Rights* is directed towards legislation, not particular administrative proceedings. In any event, it is unclear how the *Bill of Rights* could be said to increase the content of the duty of fairness beyond what was provided in this case. AB has been given all documents and information that the Minister relies on to defend the decision under review.

*B. Was the Officer's decision reasonable?*

[34] The Officer based the decision on the undated and unattributed summary of statements allegedly made by AB during his interview on June 16, 2015. No transcript of the interview was disclosed, and it is unclear whether one exists. The Minister does not seek to defend the Officer's

decision on any basis other than the summary and the Officer's interpretation of the evidence submitted.

[35] AB provided sworn testimony in which he categorically denied any affiliation with Indian intelligence services. He explained that all his contact with the IB and RAW occurred in the context of his profession as a journalist and newspaper editor-in-chief. AB was not cross-examined on his affidavit.

[36] Importantly, AB did not deny his numerous contacts with Indian intelligence officials. Nor did he dispute that he was asked by the IB and RAW to perform various functions; however, he maintains that he always refused. AB disputes the accuracy of certain words attributed to him in the summary, including "tasked", "covertly" and "handlers".

[37] The Officer's GCMS notes assert inconsistencies "across multiple statements". The major inconsistency emphasized by the Minister is that AB initially explained his interactions with the IB and RAW as "regular newsgathering and dissemination". Once he was provided with the summary of his interview, however, he acknowledged that he was also "asked to act as an unofficial lobbyist or diplomat".

[38] There was nothing obviously inconsistent in the accounts that AB gave of his interactions with the IB and RAW. He provided an initial response to the broad and general allegations that he had cooperated with the IB and RAW and engaged in espionage against Canada. When a more detailed summary was eventually provided, he responded with further particulars.

[39] The Minister argues that the Officer reasonably preferred the summary of AB's first interview to AB's subsequent explanations and sworn testimony. The Minister says that AB's statements during the first interview were spontaneous, and it was only when he realized the extent of his jeopardy that he sought to amend those statements and advance a new narrative, aided by counsel.

[40] While the summary originated with a presumptively reliable source (a government department or agency), there was nothing before the Officer to indicate how it came into being and no way for the Officer to assess its accuracy against AB's sworn testimony. Nevertheless, it is clear from the CGMS notes that the Officer treated the summary as an unassailable and verbatim account of AB's statements during the interview:

> At the interview in June 2015, per the summary notes, the applicant stated that he was tasked by RAW to "covertly" influence Canadian government representatives. In his May 2018 affidavit, the applicant stated that he never used the word "covertly" in the interview. At the interview in June 2015, per the summary notes, the applicant stated that he was provided with guidance from RAW to provide financial assistance to politicians. In his May 2018 affidavit, the applicant stated that he was never asked to provide financial assistance to politicians. At the interview in June 2015, per the summary notes, the applicant stated that he was "tasked" with a number of activities by RAW. In his May 2018 affidavit, the applicant stated he was not "tasked" with activities and did not agree to do any of the things he was asked to do; instead, he "flatly refused." There is no indication that the applicant refused in the June 2015 interview per the summary notes.

[41] The use of the word "tasked" in the interview summary was ambiguous. It may have meant only that AB was asked to perform certain tasks, which he does not dispute. The word

"covertly" may have been an inference made by the person who prepared the summary, rather than a verbatim account of what AB said. AB points out that if he had been acting "covertly", then it is unlikely he would have been so candid during the interview.

[42] The Officer's decision rests in large part on the finding that it was implausible for AB to claim he did not supply information to the Indian intelligence services when he met with representatives of those agencies 25 times over several years (beginning in the mid-2000s, according to the summary). However, AB is a journalist and editor-in-chief of a newspaper. It is not inconceivable that he would meet with government sources every other month while maintaining his journalistic independence. It is well established that adverse plausibility findings should be made only in the clearest of cases, *i.e.*, if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have occurred in the manner asserted (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 (FC) at para 7).

[43] The Officer's dismissal of AB's testimony in favour of the undated and unattributed interview summary was unreasonable. AB's sworn testimony could be rejected as inconsistent with the summary only to the extent that the summary was accepted as an unassailable and verbatim account of what AB said during his first interview. But there was nothing before the Officer to indicate how the summary came into being, and no way for the Officer to assess its accuracy. AB's statements contained no obvious inconsistencies; only further elaboration as additional particulars were disclosed to him. AB's explanation for his frequent meetings with

Indian security intelligence officials was not so far-fetched as to warrant a finding of implausibility.

## VI. Conclusion

[44] The application for judicial review is allowed, and the matter is remitted to a different visa officer for redetermination. No question is certified for appeal.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed, and the matter is remitted to a different visa officer for redetermination.

"Simon Fothergill"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-3680-18 |
| **STYLE OF CAUSE:** | A.B. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MARCH 11, 2020 |
| **JUDGMENT AND REASONS:** | FOTHERGILL J. |
| **DATED:** | MARCH 31, 2020 |

**APPEARANCES:**

| | |
|---|---|
| Lorne Waldman | FOR THE APPLICANT |
| Lorne McClenaghan | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Waldman & Associates<br>Barristers and Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
| | FOR THE RESPONDENT |
| Attorney General of Canada<br>Toronto, Ontario | |