Federal Court  Cour fédérale

Date: 20090513

Docket: IMM-528-08

Citation: 2009 FC 496

Ottawa, Ontario, May 13, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

VITALI MALKINE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

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

[1] Vitali Malkine's application for a single entry Temporary Resident Visa was refused as a result of a visa officer's determination that Mr. Malkine was a person described in paragraphs 37(1)(a) and 37(1)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The officer found that Mr. Malkine was inadmissible to Canada for being a member of a group engaged in organized or transnational crime.

[2] Mr. Malkine seeks judicial review of the officer's decision. In the context of this application for judicial review, the Minister has brought a motion for non-disclosure of portions of the Certified Tribunal Record, in accordance with the provisions of section 87 of *IRPA*, asserting that the disclosure of the redacted information would be injurious to national security or to the safety of any person.

[3] In response to the Minister's motion, Mr. Malkine has brought this motion seeking the appointment of a special advocate to protect his interests in the section 87 proceedings.

[4] For the reasons that follow, I have determined that the appointment of a special advocate is not necessary in this case. As a consequence, Mr. Malkine's motion will be dismissed.

Background

[5] Because many of Mr. Malkine's submissions on this motion related to Mr. Malkine's lengthy history with Canadian immigration authorities, it is necessary to have some understanding of that history in order to put his submissions into context.

[6] As early as 1994, Mr. Malkine attempted to come to Canada as a landed immigrant in the entrepreneur category under the former *Immigration Act*. After his first application was refused, Mr. Malkine successfully sought judicial review in this Court: see *Malkine v. Canada (Minister of Citizenship and Immigration)*, (1999), 177 F.T.R. 200. Mr. Malkine's application was then remitted for re-determination by a different visa officer.

[7] Three years later, not having received a decision with respect to the re-determination of his application, Mr. Malkine returned to this Court, this time seeking an order of mandamus. This application was dismissed after the Minister of Citizenship and Immigration agreed to a timeline for the determination of his application. In January of 2005, Mr. Malkine's application for permanent residency was refused for misrepresentation, and once again Mr. Malkine sought judicial review in this Court.

[8] This time, the Minister consented to the application for judicial review being allowed, and an Order was issued remitting the matter for a further re-determination. Mr. Malkine's application was then reconsidered once again, and was once again refused. Mr. Malkine did not apply for judicial review with respect to that decision. Instead, he commenced an action in this Court seeking damages, as well as a declaration that the January 2005 decision was reached improperly, as a result of an unlawful agreement or conspiracy that sought to deprive him of his ability to gain permanent resident status in Canada.

[9] Mr. Malkine's statement of claim was struck out by a prothonotary. His appeal of that decision was dismissed based upon the Court's finding that the action amounted to a collateral attack on the visa officer's decision. The Court held that the relief that Mr. Malkine was seeking should properly have been sought through an application for judicial review: see *Malkine v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 573.

[10] No longer interested in moving to this country, Mr. Malkine then applied for a Temporary Resident Visa. This time, Mr. Malkine sought to come to Canada for five days, in order to attend to issues relating to his ownership of a number of commercial condominium units in the City of Toronto. It is the negative decision made in relation to this application that underlies Mr. Malkine's most recent application for judicial review.

The Visa Officer's Decision

[11] The visa officer determined that Mr. Malkine was inadmissible to Canada under paragraphs 37(1)(a) and (b) of *IRPA*.

[12] Amongst other things, the unredacted portion of the officer's CAIPS notes state that Mr. Malkine is a Senator in the Federation Council – the Upper House of the Russian Federation. The notes go on to describe Mr. Malkine as being considered to be "among the ranks of known Russian oligarchs", and discuss his former position as Chairman of the Board of the Russian Credit Bank, an institution that was allegedly controlled by criminal organizations.

[13] Mr. Malkine is also identified in the notes as a shareholder in a company known as "Abalone Investments Limited". This company was allegedly involved in a transaction by which monies intended to reduce the debt owed by Angola to Russia were diverted to the company's account. Mr. Malkine is reported to have personally received some $48 million (U.S.) in the transaction.

[14] The CAIPS notes also refer to Mr. Malkine's association with individuals involved in money laundering, the arms trade, and the trade in Angolan "conflict diamonds". Mr. Malkine's involvement in former Russian President Yeltsin's re-election campaign is also discussed, with the officer stating that Mr. Malkine had used profits from organized crime to subvert the democratic process in Russia.

Mr. Malkine's Submissions on the Special Advocate Issue

[15] Mr. Malkine vehemently denies ever having been involved in organized crime. He says that he has never been provided with any credible evidence to support the allegations against him, and has thus never been able to respond to those allegations. Moreover, access to information requests made on Mr. Malkine's behalf with numerous government agencies, including the Canadian Security Intelligence Service, the Department of Foreign Affairs and International Trade and the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") have not revealed any negative information regarding Mr. Malkine.

[16] According to Mr. Malkine, the decision under review is part of a pattern on the part of the Minister to delay or refuse his immigration-related applications. The Minister's conduct has negatively affected Mr. Malkine's reputation, and the allegations against him have been personally embarrassing. While Mr. Malkine has been able to travel freely to many other countries, the unsupported allegations against him have prevented him from entering Canada on trade missions, or to deal with his investments in this country.

[17] While acknowledging that the redactions from the Certified Tribunal Record in this case are minimal, Mr. Malkine is concerned that affidavits filed by the Minister in support of the section 87 motion may contain additional information regarding Mr. Malkine's alleged criminal activities. Mr. Malkine does not know if these affidavits were before the visa officer, nor would he have any way of knowing how much additional negative information would be contained in these affidavits. As a consequence, Mr. Malkine says that a special advocate should be appointed so as to protect his interests in relation to this information.

[18] Mr. Malkine further submits that this is an exceptional situation. While recognizing that no Charter rights are at stake in this case, he submits that his business interests have been affected, and he has suffered damage to his reputation as a result of the repeated refusal of his immigration-related applications.

[19] In light of the 15-year history of his interactions with Canadian immigration authorities, Mr. Malkine says that fairness requires that a special advocate be allowed to test the undisclosed information, in order that this matter can be resolved, for once and for all.

Analysis

[20] The special advocate provisions of *IRPA* had their genesis in the Supreme Court of Canada's decision in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9. In *Charkaoui*, the Supreme Court held that in light of the significant liberty interests at stake in security certificate proceedings, the requirements of fundamental justice necessitated that the

individual named in the certificate be provided with full disclosure of the case against him or her, or a "substantial substitute" for such disclosure had to be found: see *Charkaoui*, at para. 61.

[21] While the amendments to *IRPA* made in the wake of the *Charkaoui* decision make the appointment of special advocates mandatory in security certificate proceedings, the appointment of special advocates in other types of cases under the Act is left to the discretion of the presiding designated judge.

[22] That is, section 87.1 of *IRPA* gives this Court the discretion to appoint a special advocate "if it is of the opinion that considerations of fairness and natural justice require" such an appointment in order to protect the interests of an applicant.

[23] While I accept that Mr. Malkine is frustrated as a result of his experience with the Canadian immigration system over the last 15 years, his current application for judicial review is not an opportunity to revisit each of his earlier unsuccessful immigration applications. What is at issue in this case is an application for judicial review of a decision denying him a Temporary Resident Visa, and his request for the appointment of a special advocate has to be viewed in that context.

[24] Unlike security certificate proceedings, no Charter rights are at stake in this case. Mr. Malkine is not in detention, and there is no issue of his potential removal to a place where his life or freedom would be at risk. Indeed, the only reason that Mr. Malkine has given for wanting to come

to Canada is to protect his economic interests in this country. As such, the Charter's "fundamental justice" guarantees are not engaged. Instead, the issue is one of common-law procedural fairness.

[25] As the Supreme Court of Canada observed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the content of the duty of fairness is variable, and how much fairness is owed in a given case depends on the context of the specific case at issue.

[26] The visa officer's decision in this case did not deprive Mr. Malkine of any legal rights. As a foreign national, he had no right to enter Canada: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at para. 24.

[27] Where, as here, what is at stake is a Temporary Resident Visa, the nature of the individual interests at stake suggest that the requirements of procedural fairness will be at the lower end of the spectrum: see, for example, *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (F.C.A.) at paras. 38-41; *Khan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345 (F.C.A.), at paras. 30-32.

[28] Also relevant is the fact that the amount of information that has not been disclosed to Mr. Malkine is very limited. As was noted in *Segasayo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 585, in security certificate proceedings, the amount of information that is not disclosed to the subject of the certificate will usually be extensive.

Moreover, the individual in question will have no way of knowing the extent of the non-disclosure: see *Segasayo*, at para. 28.

[29] In contrast, in this case the entire Tribunal record is 29 pages in length, and the redactions account for a total of approximately 21 lines of text. Indeed, Mr. Malkine has conceded that the redacted information is "minimal".

[30] Moreover, as Justice Noël observed in *Dhahbi c. Canada (Ministre de la citoyenneté et de l'immigration)*, 2009 CF 347, experience has shown that in cases such as this, the information redacted from the record often adds little to the matters in issue. Examples cited by Justice Noël include references to investigative techniques, administrative and operational methods, names and telephone numbers of CSIS personnel, and information regarding relationships between CSIS and other agencies in Canada and abroad: at para. 24. Some of the redactions in issue in this case would fall within that description.

[31] A review of the unredacted Certified Tribunal Record discloses that Mr. Malkine has had access to the overwhelming majority of the information on the record, and is aware of the substance of the information that was relied upon by the visa officer in refusing his application for a Temporary Resident Visa.

[32] Mr. Malkine has also expressed concern with the affidavit or affidavits filed by the Minister in support of the section 87 application. The two affidavits relied upon by the Minister explain the

reasons why, in the view of the deponents, the disclosure of the redacted information would be injurious to the national security of Canada or would endanger the safety of any person. There are no additional allegations regarding Mr. Malkine contained in these affidavits, and given that the affidavits were sworn after Mr. Malkine had commenced his application for judicial review, it is clear that the affidavits were not before the visa officer when the decision under review was made.

Conclusion

[33] In light of the above considerations, I have concluded that considerations of fairness and natural justice do not require the appointment of a special advocate in this case. As a result, Mr. Malkine's motion is dismissed.

ORDER

THIS COURT ORDERS that the applicant's motion for the appointment of a special advocate is dismissed.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Joseph R. Young	FOR THE APPLICANT
Kristina Dragaitis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

JOSEPH R. YOUNG Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT