

Federal Court



Cour fédérale

Date: 20090603

Docket: IMM-528-08

Citation: 2009 FC 581

Toronto, Ontario, June 3, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

VITALI MALKINE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[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] The respondent has conceded that Mr. Malkine was denied procedural fairness in connection with his application for a visa, as he was not given any opportunity to address the visa officer's concerns prior to a negative decision having been made in relation to his visa application. I agree that this amounted to a denial of procedural fairness. As a consequence, Mr. Malkine's application for judicial review will be allowed.

[3] Where the parties still disagree is in relation to the issue of costs. I have also received submissions from the parties in relation to the form that the order remitting the matter for re-determination should take.

Costs

[4] Mr. Malkine's lengthy history with Canadian immigration authorities was reviewed in my decision dealing with his request for the appointment of a special advocate, in the context of the respondent's motion under section 87 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and need not be repeated here: see *Malkine v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 496, at paras. 6 - 10.

[5] Mr. Malkine submits that because of this history, he should be entitled to his costs associated with this application. Moreover, he argues that it is clear from the record that the respondent intentionally and purposefully set out to deny him an interview, and to deny him procedural fairness in this matter.

[6] Mr. Malkine's counsel was advised by letter dated October 31, 2008 that the respondent was prepared to consent to the setting aside of the visa officer's decision, submitting that it was not necessary for Mr. Malkine to have proceeded with this matter. The respondent further contends that there is nothing in the evidence that would support Mr. Malkine's allegations of intentional misconduct on the part of the respondent, and that it is not appropriate to look at what happened in previous cases in deciding whether or not to award costs in this matter.

[7] Costs are not generally awarded in immigration matters unless there are "special reasons" to do so: see Rule 22, *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22.

[8] Mr. Malkine has already received an award of costs in his favor in at least one of his earlier proceedings: see *Malkine v. Canada (Minister of Citizenship and Immigration)* (1999), 177 F.T.R. 200, at para. 32. At least one other application for judicial review was allowed on consent, and the costs associated with that proceeding would presumably have been a matter for negotiation between the parties. In other proceedings commenced by Mr. Malkine, costs were awarded against him: see *Malkine v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 573, at para. 19.

[9] In these circumstances, I am not prepared to go back and consider what may have gone on in past proceedings, in deciding whether Mr. Malkine should have his costs in connection with this application.

[10] There is also no evidence before me from which I could reasonably conclude that the respondent acted intentionally or in bad faith, in denying Mr. Malkine an interview prior to rendering a decision in relation to his application for a Temporary Resident Visa.

[11] Finally, the fact that the respondent offered to resolve this matter on consent early in the process militates against an order of costs being made in Mr. Malkine's favour in this matter.

[12] In these circumstances, I am not persuaded that there are "special reasons" that would justify the making of an award of costs, and I decline to do so.

Directions

[13] I agree with Mr. Malkine that it would be helpful to provide directions to the visa officer charged with re-determining this matter, in an effort to avoid similar problems in the future. Indeed, I do not understand the respondent to object to this.

[14] As a consequence, an order will issue remitting the matter to a different visa officer for re-determination with the direction that Mr. Malkine be provided with the substance of the allegations against him, other than the matters that have been redacted from the Certified Tribunal Record in this proceeding in accordance with the provisions of section 87 of *IRPA*.

[15] In the event that there are any new, or additional, allegations against Mr. Malkine that will be relied upon by the visa officer in the re-determination process, Mr. Malkine is to be

provided with the substance of those additional allegations, unless that information is subject to a statutory or other privilege.

[16] Finally, Mr. Malkine must be provided with an opportunity to respond to the allegations against him, prior to a decision being made in relation to his application for a Temporary Resident Visa.

Certification

[17] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different visa officer for re-determination in accordance with these reasons;
2. Mr. Malkine is to be provided with the substance of the allegations against him, other than the matters that have been redacted from the Certified Tribunal Record in this proceeding, prior to a decision being made in connection with his application for a Temporary Resident Visa;
3. Mr. Malkine is also to be provided with the substance of any new or additional allegations against him which will be relied upon by the visa officer in the re-determination process, unless that information is subject to a statutory or other privilege;
4. Mr. Malkine shall be provided with an opportunity to respond to the allegations against him, prior to a decision being made in relation to his application for a Temporary Resident Visa;
5. There shall be no order of costs; and
6. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-528-08

STYLE OF CAUSE: VITALI MALKINE v. THE MINISTER OF
IMMIGRATION AND CITIZENSHIP

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 2, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** MACTAVISH J.

DATED: June 3, 2009

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