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Dockets: IMM-1105-09
IMM-1107-09

Citation: 2009 FC 1064

Ottawa, Ontario, October 21, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ALI FARKHONDEHFALL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Ali Farkhondehfall seeks judicial review of two decisions of an immigration officer. The first found that, in accordance with section 34(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, he was inadmissible to Canada as there were reasonable grounds to believe that he had been a member of an organization that engages, has engaged or will engage in acts of terrorism. The second decision dismissed his application for permanent residence because of his inadmissibility.

[2] The Minister of Citizenship and Immigration has brought motions for the non-disclosure of portions of the Certified Tribunal Record in each case, in accordance with section 87 of *IRPA*. The Minister asserts 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 section 87 motions, Mr. Farkhondehfall has brought motions of his own seeking the appointment of a special advocate to protect his interests in the section 87 proceedings in each application.

[4] For the reasons that follow, I have determined that considerations of fairness and natural justice do not require the appointment of a special advocate to protect the interests of Mr. Farkhondehfall in either application. As a consequence, the motions seeking the appointment of a special advocate will be dismissed.

Background

[5] Mr. Farkhondehfall is a citizen of Iran. He arrived in Canada in 1991 and was granted refugee protection shortly thereafter. Mr. Farkhondehfall then applied for permanent residence, and his application was approved in principle in June of 1993.

[6] Mr. Farkhondehfall was interviewed by an immigration officer on two occasions in between December of 1998 and December of 2001. It was subsequently determined that he was inadmissible to Canada under the provisions of section 19(1)(f)(iii)(B) of the former *Immigration*

Act. Mr. Farkhondehfall's application for Ministerial relief was later rejected, as was his application for permanent residence.

[7] Mr. Farkhondehfall then sought judicial review of both the refusal of his application for permanent residence, as well as the refusal of Ministerial relief. Leave was granted in both cases, and section 87 motions were brought by the Minister in the context of those proceedings.

[8] Mr. Farkhondehfall made no submissions with regard to the Minister's motions for non-disclosure. Instead, his counsel submitted a letter stating that "Upon review of the tribunal record and in view of the fact that the majority of the evidence has been disclosed, we will not be seeking the appointment of a special advocate."

[9] The section 87 motions were then dealt with by Justice Hansen, who granted an order of non-disclosure with respect to most of the redactions claimed by the Minister, having been satisfied that the disclosure of the redacted information would be injurious to the national security of Canada or endanger the safety of any person.

[10] Both of Mr. Farkhondehfall's applications for judicial review were ultimately allowed on consent, and the cases remitted to the Minister and to an immigration officer for redetermination. It is the decisions resulting from the redetermination of Mr. Farkhondehfall's admissibility and his eligibility for permanent residence that underlie his current applications for judicial review.

[11] The issue of Ministerial relief is not currently before the Court. Following Justice Hansen's decision setting aside the initial refusal of Ministerial relief, Mr. Farkhondehfall's request was turned down a second time by the Minister. Leave to judicially review this second decision was denied by this Court.

[12] Counsel agree that with one exception, the contents of the two records before me in these applications, and the redactions that have been made to these records, are identical to the records and redactions that were before Justice Hansen. The exception involves an email that was generated after Justice Hansen's decision, in the context of the redetermination proceedings, which thus only appears in the records before me. This six page document has five lines of text redacted from it.

The Minister's Issue Estoppel Argument

[13] The Minister argues that the request for the appointment of a special advocate should not be entertained as Mr. Farkhondehfall is barred from seeking such an appointment due to the principles of issue estoppel.

[14] As I understand the Minister's argument, having declined to seek the appointment of a special advocate in earlier proceedings, and given that the redactions in issue now are essentially the same as they were in those earlier proceedings, Mr. Farkhondehfall should now be estopped from seeking the appointment of a special advocate in the context of these applications.

[15] I am not satisfied that the doctrine of issue estoppel has any application in this case.

[16] Issue estoppel is a public policy doctrine designed to advance the interests of justice: *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44. Its object is to prevent parties from re-litigating issues that have already been decided in other proceedings.

[17] The policy considerations underlying the doctrine of issue estoppel include the need to have an end to litigation, as well as the desire to protect individuals from having to defend multiple legal proceedings arising out of the same set of circumstances: *Angle v. Canada (Minister of National Revenue – M.N.R.)*, [1975] 2 S.C.R. 248, at p.267, per Laskin J. (dissenting).

[18] Concerns have also been expressed about the cost of duplicative proceedings, as well as the risk of inconsistent results if the same issue is pursued in multiple fora: *Rasanen v. Rosemount Instruments Ltd.* [1994] O.J. No. 200, 17 O.R. (3d) 267 (Ont. C.A.), at para. 69, per Carthy J.A. (concurring in the result).

[19] As the Supreme Court of Canada noted in *Angle*, there are three elements that must be established to engage the doctrine of issue estoppel:

> i) The same issue has been decided in an earlier proceeding;
>
> ii) The decision which raises the issue estoppel is a final decision; and
>
> iii) The parties to the two proceedings are the same parties, or are their privies. (at p.254)

[20] The issue of Mr. Farkhondehfall’s entitlement to the appointment of a special advocate has never been decided before now. As a result, there is no “decision”, final or otherwise, that could possibly give rise to an estoppel.

[21] To the extent that the Minister’s argument may more properly be framed in terms of waiver, the fact that Mr. Farkhondehfall may have waived his right to seek the appointment of a special advocate in earlier proceedings has little bearing on the issues before the Court in this case. There could be any number of reasons, strategic or otherwise, as to why no such motion was brought in the context of the previous litigation. Therefore, I do not view Mr. Farkhondehfall’s failure to seek the appointment of a special advocate in earlier proceedings as creating any impediment to his seeking such an appointment now.

Mr. Farkhondehfall’s Submissions on the Special Advocate Issue

[22] Mr. Farkhondehfall contends that a number of factors should be weighed by the Court in assessing whether considerations of fairness and natural justice require the appointment of a special advocate to protect the interests of an individual in a given case. No one factor will necessarily be determinative – rather, the task for the Court should be to balance all of the competing considerations in order to arrive at a just result.

[23] Mr. Farkhondehfall submits that although his liberty interests are admittedly not engaged in these proceedings in the way that they would be in a security certificate case, the decisions in issue here are nonetheless very important to him. Without permanent residency, Mr. Farkhondehfall

cannot leave the country or sponsor family members to come to Canada. He is also unable to apply for Canadian citizenship.

[24] As a consequence, taking into account the factors identified by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Mr. Farkhondehfall argues that the content of the duty of procedural fairness owed to him in relation to these proceedings should be relatively high. In support of this contention, he also relies on the decision of Justice Dawson in *Mekonen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1133, 66 Imm. L.R. (3d) 222, at para.17, which came to the same conclusion in the context of an admissibility assessment under subsection 34(1) of *IRPA*.

[25] Referring to the observations of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, Mr. Farkhondehfall points out that judges in Canada do not perform an inquisitorial function, and that it is through the adversarial system that evidence is tested.

[26] Mr. Farkhondehfall further observes that special advocates have been appointed in cases involving proceedings under section 38 of the *Canada Evidence Act*, in order to meet the requirements of procedural fairness: see *Canada (Attorney General) v. Khawaja*, 2007 FC 463, 280 D.L.R. (4th) 32, and *Khadr v. Canada (Attorney General)*, 2008 FC 46, 322 F.T.R. 256.

[27] Finally, Mr. Farkhondehfall argues that the amount of material redacted from the records in these two proceedings is significant and appears to relate specifically to the issue of his alleged membership in the Mujahedin-e-Khalq (or "MEK"). As such, Mr. Farkhondehfall should have the opportunity to have that information tested and to have potentially contrary evidence adduced on his behalf.

Analysis

[28] The special advocate provisions of the *Immigration and Refugee Protection Act* had their genesis in the Supreme Court of Canada's decision in the *Charkaoui* case. There, the Court held that in light of the significant liberty and security 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.

[29] While the amendments made to *IRPA* in the wake of the *Charkaoui* decision made 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.

[30] 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.

[31] I agree with Mr. Farkhondehfall that in considering a motion such as this, a number of factors should be weighed by the Court in assessing whether considerations of fairness and natural justice require the appointment of a special advocate to protect the interests of the individual. I also accept that no one factor will necessarily be determinative – rather, the task for the Court should be to balance all of the competing considerations in order to arrive at a just result.

[32] One set of related factors to be considered involves the importance of the decision in issue to the individual, the nature of the interests affected, and the degree of procedural fairness to which the individual is entitled in the case at hand.

[33] As the Supreme Court observed in *Baker*, the content of the duty of fairness is variable, and how much fairness will be owed in a given case depends on the context of the specific case, including the importance of the issues for the person so affected.

[34] While the decisions underlying these applications for judicial review are undoubtedly important to Mr. Farkhondehfall, they do not involve either his liberty interests or his removal from this country. While counsel contends that negative decisions in relation to Mr. Farkhondehfall's admissibility and his eligibility for permanent residence could potentially lead to his removal from Canada further down the road, such an argument is speculative, at best, at this stage in the process. Indeed counsel herself described the possibility of Mr. Farkhondehfall's eventual removal from Canada as "theoretical".

[35] That said, the nature of the decisions in issue and the limitations that his current status necessarily imposes on Mr. Farkhondehfall’s activities are sufficiently serious as to dictate that he be entitled to a relatively high level of procedural fairness.

[36] So too does the objective nature of the decisions in issue, and the fact that no appeal is provided for by the *Immigration and Refugee Protection Act* with respect to either of the decisions under review: see *Mekonen*, at para. 17. Insofar as this latter consideration is concerned, Mr. Farkhondehfall is limited to his applications for judicial review, and then only with leave of the Court.

[37] Another relevant consideration is the amount of information that has not been disclosed to Mr. Farkhondehfall. He says that the amount of the redacted information is “substantial”. I do not agree that this is so.

[38] As this Court observed in *Segasayo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 585, 313 F.T.R. 106, 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.

[39] In contrast, the redactions from the records in these proceedings are minimal. The tribunal records in each of these cases are identical. Each is 282 pages in length. Redactions appear on 16

pages. In a number of cases, the redactions amount to a word or two, or a couple of lines of text. As the Minister pointed out, it is apparent on the face of the redacted record that some redactions merely involve telephone numbers, or the names of CSIS personnel.

[40] 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, and information regarding relationships between CSIS and other agencies in Canada and abroad: at para. 24. A number of the redactions in issue in this case clearly fall within that description.

[41] Another relevant consideration is the extent to which the affected individual has been made aware of the case that they have to meet.

[42] A careful review of the unredacted Certified Tribunal Record in these cases discloses that Mr. Farkhondehfall has had access to the overwhelming majority of the information on the record. I am satisfied that he is fully aware of the substance of the information that was relied upon by the immigration officer in finding that he was inadmissible to Canada, and in dismissing his application for permanent residence. Indeed, it is clear that much of the information relied upon was obtained from Mr. Farkhondehfall himself in the course of his interviews with Citizenship and Immigration Canada personnel.

Conclusion

[43] 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 these proceedings. As a result, Mr. Farkhondehfall's motions are dismissed. A copy of these reasons should be placed on each file.

ORDER

THIS COURT ORDERS that Mr. Farkhondehfall's motions are dismissed.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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