Federal Court Cour fédérale

Date: 20110517

Docket: IMM-3139-10

Citation: 2011 FC 558

Ottawa, Ontario, May 17, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

RACHID FATHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] Mr. Rachid Fathi, a citizen of Morocco, married a Canadian he met while he was in this country without status. He returned to Morocco and applied for admission to Canada. His application was dismissed on the grounds that there is reason to believe that he is a member of a terrorist organization and that he had misrepresented material facts about his sojourn and contacts in Canada. These are my reasons for dismissing his application for judicial review of that decision.

[2] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“IRPA”) of the decision made on May 26, 2010 by a visa officer in the Immigration Section of the Canadian Embassy at Rabat, Morocco.

BACKGROUND:

[3] Mr. Fathi came to Canada in October 1992 on a visitor's visa to participate in a martial arts competition. He overstayed and remained in Canada until March 2005, residing and working mainly in Montreal. Mr. Fathi married a Canadian citizen in 1994 and filed an application for permanent residence with his wife’s sponsorship in 1995. That was withdrawn when the couple separated a few months later.

[4] Mr. Fathi obtained a divorce from his first wife in 1996. In the same year, he says he lost his passport and, unable to obtain a legitimate replacement without making a police report, fraudulently bought a Canadian passport and obtained other documents in the name of Rachid Farouq. He used that passport to travel to Germany to visit his brother in 1997 and his family in Morocco in 1999. He says that he destroyed the fraudulent passport following the events of September 11, 2001 and reverted to using his real identity.

[5] Mr. Fathi met his present wife in July 2003 at Montreal and they married in March 2004. In November 2004 he filed a new application for permanent residence sponsored by his wife. In February 2005 Mr. Fathi disclosed that he was already in Canada and on March 17, 2005 he

presented himself to immigration officials and returned to Morocco on a flight he had previously arranged.

[6] Mr. Fathi was first interviewed with respect to his application for landing on September 15, 2005 by an officer at the Rabat embassy. The marriage was determined to be genuine and security checks were requested. His wife has visited Morocco on several occasions. The couple's first child was born in February 2006 and a second in December 2010.

[7] Mr. Fathi was called in for a second interview on October 25, 2006 to address some concerns which had arisen during the security checks. During the second interview, the applicant was questioned about his activities and contacts in Montreal. His answers contained a number of falsehoods and misrepresentations. In January 2008 the applicant requested a third meeting to clarify those matters. In an interview conducted on April 2, 2008 he admitted to having lied in the second interview. Mr. Fathi also admitted to having purchased and used false documents during his stay in Canada.

[8] While living in Montreal and using the Farouq identity, Mr. Fathi had associated with a number of persons linked to terrorist organizations from North Africa, notably Abdellah Ouzghar. Ouzghar was later extradited to France and convicted of offences including membership in a terrorist organization and procuring false documents for individuals involved in terrorist activities.

[9] A fairness letter containing the officer's preliminary assessment was sent to the applicant on January 22, 2010 and a response received on February 25, 2010. The officer's decision refusing the application was sent to the applicant on May 26, 2010.

DECISION UNDER REVIEW:

[10] The officer determined that the applicant was inadmissible on security grounds pursuant to paragraphs 34(1)(c) and (f) of the IRPA, for engaging in terrorism and for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism. The organizations referenced are the Armed Islamic Group\Groupe islamique armé ("GIA") and the Libyan Combat Islamic Group\Groupe islamique combatant libyen ("GICL").

[11] The officer also found Mr. Fathi to be inadmissible pursuant to paragraph 40(1)(a) of the IRPA for directly misrepresenting material facts. Specifically, the officer noted that in his October 2006 interview, the applicant denied using false documents and denied knowing Abdellah Ouzghar and others believed to be involved with the GIA and the GICL. Only after being prompted by the officer in the April 2008 interview did he admit these facts, none of which were disputed by the applicant in his February 2010 response to the fairness letter. The officer found that the applicant's lies, attitude and contradictions between his interviews undermined his credibility.

[12] The officer noted the applicant's request to consider exceptional circumstances under which his inadmissibility under paragraph 40(1)(a) could be waived and a temporary residence visa issued.

The officer stated that she did not have the jurisdiction to consider whether the circumstances justified the issuance of a temporary residence permit under s.24 of the IRPA since the applicant was found to be inadmissible for security reasons. The officer forwarded the application for an exemption to Citizenship and Immigration Canada Headquarters in Ottawa for consideration.

[13] At the applicant's request, the officer examined possible humanitarian and compassionate ("H&C") considerations in his file. The officer found that Mr. Fathi's circumstances did not justify an H&C exemption, taking into account the best interests of the child (a second child was born to the applicant and his wife following this determination), the hardships which the mother and child would face if they were required to move to Morocco and the fact that the applicant was found to be inadmissible based on sections 34 and 40 of the IRPA.

PROTECTION ORDER:

[14] By motion dated December 22, 2010 the respondent sought a non-disclosure order pursuant to s.87 of the IRPA regarding information that was redacted from the Certified Record submitted by the Embassy and filed on December 17, 2010. The respondent filed *ex parte* secret affidavits with attached exhibits containing the redacted information in the Designated Proceedings Registry of the Court. The applicant requested that the Court consider whether the appointment of a Special Advocate was necessary to assist the Court in determining whether the information should be protected.

[15] By Order dated February 4, 2011, I granted the respondent’s motion and ordered that the information redacted from the Certified Record shall not be disclosed to the public including the applicant and his counsel. The Order stated that the appointment of a Special Advocate was not required to protect the interests of the applicant in this judicial review.

[16] In issuing that Order I noted that I had read the redacted information and was satisfied that the redactions were justified; that much of the redacted content was information of an internal or administrative nature; that certain substantive content appeared to be information that had already been disclosed to the applicant in one form or another and that the essence of the substantive content had been summarized in the decision and written reasons for decision of May 26, 2010 and was known to the applicant.

ISSUES:

[17] There is no evidence in the record before me that the applicant has engaged in terrorism within the meaning of paragraph 34(1)(c). Counsel for the respondent fairly conceded this point at the hearing. Thus, the decision can not be upheld on that ground. The applicant does not dispute that the organizations of which he is alleged to be or to have been a member are organizations that engage in terrorism and, therefore, fall within the scope of paragraph 34(1)(f). He disputes that he is or was ever a member of either organization. The issues raised in this application are, therefore:

a. Were the officer's inadmissibility findings reasonable?

b. Was the officer's H&C determination reasonable?

RELEVANT STATUTORY PROVISONS:

[18] Section 33 of the IRPA establishes a threshold of "reasonable grounds to believe" for the fact-finding necessary to determine inadmissibility under sections 34 to 37 :

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

[19] Section 34 of the *IRPA* outlines the grounds on which individuals are inadmissible to Canada for reasons of security. The portions relevant to this judicial review are paragraphs 34 (1) (c) and (f):

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
[…]	[…]
(c) engaging in terrorism;	*c*) se livrer au terrorisme;
[…]	[…]
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph …(*c*).	*f*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas… *c*).

[20] As noted, there is no suggestion that the applicant has directly engaged in terrorism. Paragraph 34(1)(c) is therefore relevant to the present proceedings only in so far as it is referenced in paragraph 34(1)(f).

[21] Section 40 of the IRPA deals with inadmissibility due to misrepresentation. Paragraph 40(1)(a) reads as follows:

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(*a*) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	*a*) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

[22] Section 25 of the IRPA provides that an exemption from a determination of inadmissibility may be granted if justified on humanitarian and compassionate grounds :

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou

national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[23] A person found to be inadmissible on security grounds may seek a waiver of that determination under subsection 34 (2) of the IRPA. This enabling authority requires a determination by the Minister that the applicant's presence in Canada would not be detrimental to the national interest. It arose in this case only in the context of a submission by the respondent that this option remained open to the applicant.

ANALYSIS:

Standard of Review:

[24] The "reasonable grounds to believe" threshold in paragraph 34(1)(f) and section 33 of the IRPA has been held to require more than mere suspicion, but less than the civil standard of proof on a balance of probabilities. It requires an objective basis for the belief in the alleged facts based on compelling and credible information: *Mugesera v. Canada (Minister of Citizenship of Immigration)*, 2005 SCC 39 at para 114; *Mohammad v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 51 at para 50; *Almrei (Re)*, 2009 FC 1263 at para 100.

[25] Whether someone is a member of an organization that engages, has engaged or will engage in terrorism within the meaning of paragraph 34(1)(f) is a mixed question of fact and law calling for the application of the reasonableness standard of review: *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487 at paras 16-23.

[26] The reasonableness standard reflects the factual element in questions of membership and the expertise that officers possess when assessing applications against the inadmissibility criteria in subsection 34(1): *Ugbazghi v. Canada (Minister of Citizen and Immigration)*, 2008 FC 694, [2009] 1 F.C.R. 454; *Saleh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 303.

[27] There might well be more than one reasonable outcome in a case such as this. As long as the process adopted by the visa officer and its outcome fits comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paras 46 and 59.

Were the officer's inadmissibility findings reasonable?

[28] The applicant did not contest the officer's finding that he was inadmissible for misrepresentation under paragraph 40(1)(a) of the IRPA. The duration of that inadmissibility is limited to two years under paragraph 40(2)(a) and an officer could make a determination that a temporary resident permit was justified under subsection 24(1). Such does not apply if the applicant is inadmissible for security reasons.

[29] As noted above, the “reasonable grounds to believe” threshold for making a finding of membership for the purpose of 34(1)(f) is low but requires compelling and credible information that amounts to more than suspicion. Normally, this will include evidence of "knowing participation" in the terrorist group's activities: *Sinnaiah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1576, 43 Imm. L.R. (3d) 269 at para 6. See also *Toronto Coalition to Stop the War v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957, 219 C.R.R. (2d) 226 at para 102; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.) (QL); *Thanaratnam v. Canada (Minister of Citizenship and Immigration)* 2004 FC 349, [2004] 3 F.C.R. 301, rev’d on other grounds at 2005 FCA 122, [2006] 1 F.C.R. 474. There is no evidence of knowing participation in a terrorist groups’ activities in the record before me.

[30] In the national security context, the courts have given the concept of membership a broad interpretation: *Poshteh*, above, at paras 27-32; *Farkondehfall v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 471 at para 30. What this has meant in practice in some cases is that the courts have been prepared to uphold membership findings based on inferences drawn from the available information where there is no direct evidence of active participation but compelling evidence of links to other persons who play a significant role in the proscribed organizations. But mere association will not be sufficient to establish membership.

[31] I note that in the case of Mr. Ouzghar, the extradition judge, Madame Justice Susan Himel, had found that there was insufficient evidence to establish all of the elements of the *Criminal Code* offence of participation in a criminal organization. The evidence against Ouzghar pre-dated the adoption of the terrorism offences relating to participation now found in the *Criminal Code*. Justice

Himel committed Ouzghar for extradition on several charges of conspiracy, forgery and uttering false passports. The Minister of Justice ordered his extradition on all offences including the French charge of membership in a terrorist organization.

[32] On judicial review, the Minister's decision was upheld by the Ontario Court of Appeal: *France v. Ouzghar*, 2009 ONCA 69, 94 O.R. (3d) 601; leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 122. The Court observed at paragraphs 23-26 that while the evidence before Justice Himel may not have satisfied the Canadian participation offence, as it was at the relevant time, it was sufficient to meet the elements of the French crime. The evidence before Justice Himel included evidence of association with members of a terrorist organization in France, association with members of a false passport ring in Canada and the provision of a passport to a known terrorist. Ouzghar was linked to Fateh Kamel, convicted of a conspiracy to commit terrorist acts in France who in turn was linked to Ahmed Ressam, convicted in the United States in relation to a plan to bomb the Los Angeles airport.

[33] In the present matter, the applicant lied about knowing Abdellah Ouzghar when he was first asked and then, after a considerable delay, conceded having had contacts with Ouzghar and others with whom Ouzghar associated. These concessions occurred after Justice Himel's ruling and before that of the Ontario Court of Appeal. It was open to the officer to draw a negative inference from the applicant's delay in correcting the record of the second interview.

[34] The applicant had also denied using the pseudonym Rachid Farouq when he lived in Montreal and then admitted that he had bought a false passport in that name and used it to travel to

Germany and Morocco. He says he bought it from a Costa Rican. It was open to the officer to rely on the applicant's lies to question his credibility and, on all of the evidence, to draw an adverse inference about the nature and scope of his activities.

[35] In my view, the evidence of Mr. Fathi's association with Ouzghar and others in Montreal was insufficient in itself to support a finding of membership in any terrorist organization. Indeed, the officer seems to have recognized that in the January 22, 2010 Fairness Letter in stating that the applicant "semblez avoir été impliqué dans des organizations terroristes inspirées d'Al-Qaida en Afrique du nord…" The officer's choice of terms indicates that she was not certain that the evidence was sufficient to establish membership.

[36] Nonetheless, when that evidence was coupled with the applicant's lies and his use of a false identity and passport, there was a borderline but sufficient evidentiary basis to satisfy the "reasonable grounds to believe" threshold. The officer's membership finding was based not just on the applicant's associations, but also his direct lies, misrepresentations and actions. The negative credibility finding resulting from that evidence cast doubt on any explanation given by the applicant regarding his involvement or lack of involvement in the referenced organizations.

[37] In the result, the officer's decision fell within the range of possible outcomes that are defensible in light of the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R.190 at para 47; *Khosa*, above, at para 59.

Was the Officer's H&C determination reasonable?

[38] When making an H&C determination, the officer must be "alert, alive and sensitive" to, and must not "minimize" the best interests of the children affected by that decision: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para 75. At the same time, the child's best interests are not determinative: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (F.C.A.). Further, it is incumbent upon an applicant to prove that hardship would be unusual, undeserved or disproportionate.

[39] Here, the officer recognized the genuineness of the relationship between the applicant and his partner and noted that it remained stable despite several years of physical separation. She considered the financial effect of the separation, especially as it had to do with the best interests of their child and future child. The officer also took into account the fact that the applicant's wife and sponsor wanted to be in Canada so as to care for her mother who had been diagnosed with Cancer.

[40] In my view, the officer's H&C findings were reasonable and there are no grounds for the Court's intervention on this basis.

[41] I note again that the officer believed that she did not have the authority to consider the issuance of a temporary resident permit due to her finding on inadmissibility for security reasons. In the circumstances of this case, in particular the borderline evidence of membership, the stable and genuine marriage to a Canadian citizen and the two Canadian born children, this may be a case which would warrant the exercise of the Minister's discretion under s.34 (2).

[42] This application is dismissed. No serious questions of general importance were proposed and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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