Federal Court  Cour fédérale

Date: 20150918

Docket: IMM-3869-14

Citation: 2015 FC 1094

Ottawa, Ontario, September 18, 2015

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

RAMIN FALLAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ramin Fallah, sought to enter Canada from Iran under a work permit to secure 3-year term employment with Exapharma Inc. carrying on business as Canadian Plasma Resources. His application was denied by a Visa Officer (Officer) under section 34 of the *Immigration and Refugee Protection Act* (IRPA) and, in particular, because he was found to be inadmissible as being a danger to the security of Canada. It is this decision that is challenged on this application.

[2] Mr. Fallah contends that he was denied procedural fairness by the Officer's failure to sufficiently inform him of the underlining admissibility concerns. He also argues that the decision was unreasonable because it was ostensibly based on a misunderstanding of international open-source material discussing the past conduct of his Iranian employer and because certain evidence was arguably overlooked.

I. Ex Parte Hearing

[3] On June 17, 2015 I heard an *ex parte* motion brought by the Respondent seeking an order for non-disclosure of information in the record on the basis of an asserted national security privilege. After hearing evidence, I issued an Order on July 30, 2015 confirming the right of the Minister to withhold from disclosure certain passages contained in a Canadian Border Security Agency (CBSA) inadmissibility assessment on the basis that the release of that information could be injurious to national security or would endanger the safety of unnamed persons. In granting that Order, I was satisfied that the CBSA inadmissibility assessment contained more than sufficient information for Mr. Fallah to know the basis for its inadmissibility recommendation and to permit him to meaningfully respond on this application for judicial review. In particular, the CBSA inadmissibility assessment states that Mr. Fallah's Iranian employer "has been involved with procurement connected to the Iranian nuclear program". This was the precise basis for the Officer's conclusion that Mr. Fallah's employer was known to trade in dual use technologies and "is widely believed to be involved with the procurement of goods directly related to Iranian Nuclear proliferation".

II. The Fairness Issue

[4] Mr. Fallah complains that the Officer's fairness letter reflected a misunderstanding of his employer's status under Canada's *Special Economic Measures Act*, SC 1992, c 17 (SEMA) regulations, failed to disclose all of the Officer's concerns, and disclosed a misunderstanding about that company's export control status in the United Kingdom and Japan. Mr. Fallah also contends that it was a breach of fairness to fail to disclose the contents of the CBSA inadmissibility assessment setting out the factual underpinnings of the Officer's decision.

[5] There is no doubt that the Officer relied, in part, on extrinsic evidence in finding that Mr. Fallah's Iranian employer represented a security risk. In particular, the Officer considered the CBSA inadmissibility assessment stating, "Mr. Fallah has been the Managing Director of Fanavari Azmayeshgahi since October 2001 [redacted]… this company has been involved with procurement connected to the Iranian nuclear program". That assessment noted that Mr. Fallah's employer had been identified in open sources and by allied governments as being an entity of Weapons of Mass Destruction (WMD) concern. The report also described the nature of the equipment traded by Fanavari that was of particular concern:

> …Further, according to its website, Fanavari Azmayeshgahi represents well-known brands and products that have potential dual-use application. For example, several products under the Siemens brand have potential dual use application, such as X-ray equipment, which is highlighted in the U.S.'s 2010 Technology Alert List (TAL) as critical technologies for the production of WMDs. X-ray equipment/technologies highlighted in the TAL include: FLASH DISCHARGE TYPE X-RAY SYSTEMS, FLASH X-RAY, IMAGING SYSTEMS, and X-RAY AND ANALOGOUS (NOT INCLUDING MEDICAL X-RAY PURPOSES SUCH AS MRIS).

[6] The CBSA recommended that Mr. Fallah be found inadmissible on the basis of his employer's "reported involvement with procurement connected to the Iranian nuclear program".

[7] I am not convinced that the Officer's undisclosed reliance on these extrinsic sources gave rise to a breach of procedural fairness.

[8] In the context of foreign nationals seeking entry to Canada, it is important to recognize that the content of the duty of fairness is less demanding. That is particularly the case where national security issues are in play. These points were addressed by the Federal Court of Appeal in *Chiau v Canada (Minister of Citizenship and Immigration),* 193 FTR 159, [2001] 2 FCR 297 in the following way:

> [48] In fact, Mr. Chiau was relatively well informed. He knew the legal basis on which the officer was minded to base his decision; he knew the organization of which he was suspected of being a member; he knew that the basis of this suspicion included his relationship with allegedly triad-controlled studios and their heads, and with another member of the triad.
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> [49] He was thus far from being in the dark about the officer's concerns, and could have attempted to assuage them by, for instance, providing evidence that he had made films for studios other than those believed to be owned by triad-controlled companies.
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> [50] Despite the lack of clarity in the evidence about what took place at the visa interview, I am not persuaded that Mr. Chiau was denied a fair opportunity to present material, either at or after the interview, that might have supported his position. It is relevant here to note that subsection 8(1) of the Act places on applicants for admission to Canada the burden of establishing that their entry would not be contrary to the Act.
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> …
>
> [51] I have concluded on the basis of the above considerations that there was no breach of the duty of fairness. The appellant was

> not denied a reasonable opportunity to know and answer the case against him before he was refused a visa, even though the visa officer in part had based his decision on material that he kept entirely confidential.
>
> [52] Despite the individualized and relatively structured nature of the decision-making power exercised by the visa officer, the adverse effect of the decision on the appellant was comparatively slight. In contrast, the potential damage to Canada's security and international relations as a result of disclosing any part of the confidential material was substantial. The amount of information given to the applicant, and the opportunity that he had to respond, are also relevant to my conclusion that no breach of the duty of fairness occurred.
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> [53] It is true, as Ms. Jackman pointed out, that subsection 39(6) of the *Immigration Act* imposes a duty on the Security Intelligence Review Committee to provide to a person about whom a report is made a summary of security or intelligence reports so that the person concerned can be as fully informed as possible about the circumstances giving rise to the report: *see Chiarelly v. Canada (Minister of Employment and Immigration), supra*.
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> [54] However, this statutory requirement does not necessarily indicate that the duty of fairness requires the production of a similar summary before a person is refused a visa on national security grounds. This is because section 39 of the Act applies to the deportation of permanent residents of Canada: deportation normally has a more serious impact on the individual concerned, and on his or her family, than the refusal of a visa to a person seeking admission to Canada as an independent immigrant, and thus attracts greater procedural safeguards. When another decision, such as the refusal of a visa, has a less serious impact on individual interests, there is less justification for requiring a degree of disclosure that might result in damage to national security, and the factors determining the content of the duty of fairness must be rebalanced.

Also, see *Fouad v Canada (Citizenship and Immigration,)* 2012 FC 460 at para 14, [2012] FCJ No 768.

[9] These points apply equally to Mr. Fallah. He was told in the Officer's procedural fairness letter that his senior employment relationship with "an internationally sanctioned entity that deals with goods and products that are listed under" the SEMA regulations was the potential basis for a refusal decision. He was also told to provide any information that would allay those concerns. Mr. Fallah, thus, knew of the Officer's concern about the past trading practices of his employer and about its attempts to procure dual purpose technologies. Nevertheless, his lawyer's response only obliquely addressed that primary issue. The response was limited to the observation that Canada's SEMA regulations did not specifically name Mr. Fallah or his employer as sanctioned parties, nor did they expressly list the kinds of medical products his employer traded in. As further evidence, Mr. Fallah verified that his employer had been previously permitted to import medical products from the United States and Europe and was accordingly "not an internationally sanctioned entity".

[10] What Mr. Fallah notably failed to address was whether his employer had ever been denied access to products on the basis of WMD concerns. If his employer had never or only rarely been barred from importing equipment capable of dual purpose application, one would fully expect to see that statement in his affidavit. Mr. Fallah's failure to directly address this concern about his employer's impugned business practices was specifically noted by the Officer (see Application Record at p 61).

[11] Mr. Fallah was well positioned to fully address the Officer's concerns but, for the most part, he failed to do so. Although he presumably was unaware of the Officer's reliance on open source material pertaining to the United Kingdom and Japan, he would have been aware of any

previous difficulties encountered by his employer concerning the importation of dual purpose commodities. Indeed, in his attempt to dispel the Officer's concern, he provided "samples" of favourable licensing decisions emanating from the United States and the United Kingdom. Notably absent from Mr. Fallah's response was an explanation for those occasions when his employer was refused a license to import products to Iran. He would have been privy to that information and ignored the issue at his peril.

[12] Mr. Fallah had the opportunity and obligation to provide a full, exculpatory history of his employer's business practices, yet his response to Officer's fairness letter was profoundly deficient. I am satisfied that the content of the Officer's fairness letter was sufficient to inform Mr. Fallah of the case he had to meet. He should have anticipated the need to provide a full history of his employer's business practices and he failed to meet the requisite burden.

III. Was the Officer's Decision Reasonable?

[13] The standard of review applicable to the substance of the Officer's decision is reasonableness: see *Nassereddine v Canada (Citizenship and Immigration)* 2014 FC 85 at para 19, [2014] FCJ No 79. The Officer was required to determine whether the evidence was sufficient to support a finding of inadmissibility under paragraph 34(1)(d) of the IRPA. That assessment is conducted on the standard of "reasonable grounds to believe", meaning an objectively based evidentiary burden falling between mere suspicion and a balance of probabilities: see *Nagulathas v Canada (Citizenship and Immigration)* 2012 FC 1159 at para 27, 2012 CarswellNat 4023.

[14] Mr. Fallah argues that the Officer misunderstood the significance of the United Kingdom and Japanese export licensing provisions pertaining to his employer and its products. The impugned passage from the decision is the following:

> In addition to information provided in our brief, open source information checks confirm that the UK's Export Control Organisation (ECO) lists the company as an entity of proliferation concern. They are also listed with the Japanese Ministry of Economy, Trade and Industry. PA has elected to focus only on the products and activities which do not violate sanctions and ignores areas of concerns. Fanavari Azmayeshgahi deals with several products that have dual use concerns, and is widely believed to be involved with the procurement of goods directly related to Iranian Nuclear proliferation. There are still reasonable grounds to believe that, by virtue [sic] of his position with this company, PA is inadmissible under 34(1)(d) of the IRPA. Refused.

[15] Mr. Fallah complains that the Officer read too much into the listing of his employer in finding that it was "an entity of proliferation concern" in the United Kingdom and Japan. He says that as an importer of medical imaging products capable of being repurposed, it was inevitable that its business would be scrutinized by exporting countries. This, by itself, would not support the Officer's view that the company was "an entity of proliferation concern". According to this argument, the fact that Canada did not list Mr. Fallah or his employer under the SEMA regulations was strong evidence that they were not of any concern and that the Officer's contrary view was perverse.

[16] In my view the Officer's characterization of the United Kingdom and Japanese export protocols concerning Mr. Fallah's employer was reasonable. The record discloses that the company was on a watch list in the United Kingdom and Japan so that its importation of dual purpose products could be scrutinized. The record also discloses that the company's attempts to

import products had sometimes been blocked. This was sufficient support for the Officer's view that the company represented a "proliferation concern".

[17] It is not an answer to this finding to point out that some importations had been approved. Based on the limited records submitted by Mr. Fallah, those transactions appear not to have involved any technology risks because the imported products were only useful in medical applications. What would have been far more persuasive was evidence showing that Mr. Fallah's employer was regularly authorized to import dual purpose technologies. The absence of any evidence to that effect is a telling omission.

[18] The fact that neither Mr. Fallah nor his employer were prohibited from exporting Canadian products to Iran under the SEMA regulations says very little about whether they, nevertheless, represented an ongoing security concern. The company appears to have pursued legitimate business interests in the supply of medical equipment of all sorts. There would be no obvious reason for Canada to block those transactions by listing the company or Mr. Fallah.

[19] In the face of the evidence available to the Officer, including the inadequacy of Mr. Fallah's response, the decision to deny a visa to him was reasonable. While the record might have supported a different outcome, it is not the role of the Court on judicial review to reweigh the evidence or to substitute its interpretations for those of the assigned decision-maker.

[20] This application is, accordingly, dismissed. Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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