

Federal Court



Cour fédérale

Date: 20171204

Docket: IMM-4953-16

Citation: 2017 FC 1096

Ottawa, Ontario, December 4, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

NASSER TARABEIN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review brought under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision of the Immigration Program Manager and Deputy Program Manager of the Embassy of Canada in Beirut, Lebanon [Visa Officer] dated October 27, 2016, which found the Applicant inadmissible to Canada for two reasons: (1) because of organized criminality pursuant to paragraph 37(1)(b) of *IRPA*, *i.e.*,

money laundering; and (2) because of misrepresentations contrary to paragraph 40(1)(a) of *IRPA*.

[2] The determinative issue is whether the Applicant was afforded procedural fairness by the Officer.

[3] In my respectful view, the finding of organized criminality, *i.e.*, money laundering, described in paragraph 37(1)(b) of *IRPA* was vitiated by procedural unfairness. I am of the same view with respect to the finding of misrepresentation contrary to paragraph 40(1)(a). As a result, the application for judicial review is granted. My reasons follow.

II. Standard of Review

[4] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 [*Dunsmuir*], the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review, as is required in this case:

When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[5] In this connection, it is also accepted that the general rule for determinations by visa officers is their "duty of procedural fairness lies at the lower end of the spectrum" *Mirosavljevic v Canada*, 2016 FC 439 at paras 18-20 per Zinn J. However, where misrepresentation is

concerned, “a very high standard of fairness is to be applied in the application of this provision”, due to the fact that a finding of misrepresentation triggers a five-year bar on admission to Canada: *Menon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1273 at para 15 per Gibson J.

III. Facts

[6] The Applicant is a dual Lebanese-Venezuelan national. He was born in Lebanon and moved to Venezuela in 1980. In 1988, he married his wife, who joined him in Venezuela. In Venezuela, the Applicant incorporated various companies including the Texas Shop Cowboy, CA and Buffalo, CA, which are general trading companies that sell consumer goods.

[7] On or around October 2008, the Applicant says he was kidnapped and held for ransom by criminals in Venezuela. Fearing the safety of their children, the Applicant’s wife returned to Canada to protect their children. His wife and children are Canadian citizens.

[8] Upon his release, the Applicant fled to Lebanon where he began efforts to be reunited with his family in Canada. However, while in Lebanon, the Applicant claims to have experienced recurring threats from his capturers and feared that he would, again, be threatened.

[9] In September 2008, the Applicant was admitted to Canada as a temporary resident for a six-month period. In 2009, his wife submitted an in-Canada sponsorship application, but in March 2009, the Applicant returned to Lebanon for a family emergency. Thereafter, he submitted a sponsorship application from Lebanon.

IV. Procedural Background

[10] In August 2013, the Applicant's application for permanent residence was refused because the Applicant was inadmissible on security grounds, specifically, under paragraph 34(1)(f) (being a member of a listed terrorist entity: Hezbollah) and subsection 37(1) (organized criminality) of *IRPA* [the First Decision].

[11] He applied for judicial review but his application was remitted for redetermination on consent because it was agreed the Applicant had not received a fair process, specifically, the Applicant was not sufficiently informed of the case against him.

V. The Undertaking

[12] As part of the settlement, the Respondent, through counsel at the Department of Justice, gave an undertaking to the Applicant's counsel that prior to the redetermination, the Applicant would receive a procedural fairness letter and, in addition, the Applicant would have 45 days to respond [the Undertaking].

[13] The Applicant's counsel confirmed the Undertaking by letter which stated, in part:

We confirm that a fairness letter and 45 days to make submissions is acceptable, and our client is prepared to accept the settlement offer on these terms.

[14] The client department confirmed the Undertaking in internal correspondence:

It was agreed that the application will have 45 days to respond to a procedural fairness letter.

[15] There is no doubt that the Undertaking was given. Moreover, it is agreed that what was promised was never performed.

[16] Instead of honouring the Undertaking, the Respondent convoked an interview with the Applicant. It is common ground that the Applicant did not receive a procedural fairness letter of any kind. It is also agreed that he did not receive 45 days in which to make written submissions. Therefore, it is inescapable that neither element of the Undertaking was satisfied. There is no suggestion that the Applicant consented to the process arbitrarily adopted by the Respondent.

[17] In my respectful view, the Respondent's failure to honour the Undertaking resulted in procedural unfairness and in this case, fatally so. The interview, without a procedural fairness letter could not be, and was no substitute for the promised procedural fairness letter and 45 days to make responding submissions.

[18] On this record, it is clear that the finding of organized criminality, *i.e.*, money laundering, made under paragraph 37(1)(b) of *IRPA* derived entirely from this procedurally unfair process. The same is also true of the finding of misrepresentation under paragraph 40(1)(b) of *IRPA*. Therefore, both aspects of the decision now under review must be set aside for redetermination in accordance with the Undertaking.

[19] In the circumstances, I make no finding on whether the CBSA and FINTRAC reports found in the CTR should have been disclosed on the assumption that the Undertaking had not

been given. Indeed, this Judgment is based on the failure to honour the Undertaking; while many additional facts and legal issues were argued, I decline to comment on them.

VI. Section 87 Proceeding

[20] As further procedural background, the initial certified tribunal record contained a number of redactions. The Respondent applied under section 87 of *IRPA* for non-disclosure of information. I convened a public hearing at which the Applicant's counsel identified information that should be reviewed with a view to its possible release, and counsel also identified redactions that were not contested. Submissions were made by both parties at this public hearing. Thereafter, I conducted an *in camera* hearing, without the presence of counsel for the Applicant, subsequent to which the Respondent consented to the release of the bulk of the information previously withheld. I ordered certain other information withheld that was not contested by the Applicant. I saw no need to appoint a Special Advocate.

VII. Certified Question

[21] No question of general importance was proposed for certification, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the Visa Officer is set aside and remanded to a different decision-maker for redetermination.
3. No question of general importance is certified.
4. There is no order as to costs.

“Henry S. Brown”

Judge

Immigration and Refugee Protection Act, SC 2001, c 27

**Application before entering
Canada**

11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

...

**Obligation – answer
truthfully**

16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

...

Security

34 (1) A permanent resident or a foreign national is inadmissible on security grounds for

- (a)** engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;
- (b)** engaging in or instigating the subversion by force of any government;

- (b.1)** engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;
- (c)** engaging in terrorism;

Visa et documents

11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

...

Obligation du demandeur

16 (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

...

Sécurité

34 (1) Empoignent interdiction de territoire pour raison de sécurité les faits suivants :

- a)** être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
- b)** être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
- b.1)** se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
- c)** se livrer au terrorisme;

(d) being a danger to the security of Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
(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 (a), (b), (b.1) or (c).

...

Organized criminality

37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or
(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.

...

Misrepresentation

d) constituer un danger pour la sécurité du Canada;
e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
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 a), b), b.1) ou c).

...

Activités de criminalité organisée

37 (1) Empoignent interdiction de territoire pour criminalité organisée les faits suivants :

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;
b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

...

Fausses déclarations

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation

(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;

Application

(2) The following provisions govern subsection (1):

(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.

40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :

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 un risque d'entraîner une erreur dans l'application de la présente loi;

Application

(2) Les dispositions suivantes s'appliquent au paragraphe (1) :

a) l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;

b) l'alinéa (1)b) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4953-16

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CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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APPEARANCES:

Lorne Waldman FOR THE APPLICANT

Kristina Dragaitis FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman and Associates FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

Nathalie G. Drouin FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario