Federal Court Cour fédérale

Date: 20180118

Docket: IMM-2453-17

Citation: 2018 FC 48

Ottawa, Ontario, January 18, 2018

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

OKUBAGER KUSUMU DAMIR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application to judicially review the decision of an immigration officer [Officer] in Cairo to deny the Applicant and his family a permanent residence visa on the grounds that he was inadmissible pursuant to s 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], by virtue of reasonable grounds to believe that he was a member of an organization engaged in the subversion by force of a government and terrorism.

[2] The Applicant's position is that the Officer failed to consider the "residual discretion" to issue the visa despite an inadmissibility finding, and that the Officer made unreasonable findings regarding duress and country conditions.

II. Background

A. *Legislation*

[3] The critical provisions are as follows:

Immigration and Refugee Protection Act, SC 2001, c 27

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.	**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.
…	[…]
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 :
(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;	**a)** être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
(b) engaging in or instigating the subversion by force of any government;	**b)** être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;	**b.1)** se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(c) engaging in terrorism;	**c)** se livrer au terrorisme;
(d) being a danger to the security of Canada;	**d)** constituer un danger pour la sécurité du Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	**e)** être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(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).	**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).
…	[…]
42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.	**42.1 (1)** Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.
…	[…]
(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national	**(3)** Pour décider s'il fait la déclaration, le ministre ne tient compte que de considérations relatives à la sécurité nationale et à la sécurité publique sans toutefois limiter son analyse au fait que l'étranger constitue ou non un danger pour le public

presents to the public or the security of Canada.

ou la sécurité du Canada.

Immigration and Refugee Protection Regulations, SOR/2002-227

139 (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that

…

(i) subject to subsections (3) and (4), the foreign national and their family members included in the application for protection are not inadmissible.

…

139 (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis :

[…]

i) sous réserve des paragraphes (3) et (4), ni lui ni les membres de sa famille visés par la demande de protection ne sont interdits de territoire.

[…]

144 The Convention refugees abroad class is prescribed as a class of persons who may be issued a permanent resident visa on the basis of the requirements of this Division.

144 La catégorie des réfugiés au sens de la Convention outre-frontières est une catégorie réglementaire de personnes qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

…

[…]

146 (1) For the purposes of subsection 12(3) of the Act, a person in similar circumstances to those of a Convention refugee is a member of the country of asylum class.

146 (1) Pour l'application du paragraphe 12(3) de la Loi, la personne dans une situation semblable à celle d'un réfugié au sens de la Convention appartient à la catégorie de personnes de pays d'accueil.

(2) The country of asylum class is prescribed as a

(2) La catégorie de personnes de pays d'accueil est une

humanitarian-protected persons abroad class of persons who may be issued permanent resident visas on the basis of the requirements of this Division.	catégorie réglementaire de personnes protégées à titre humanitaire outre-frontières qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

[Emphasis added by Court]

B. *Facts*

[4] The Applicant is an Eritrean citizen. His application for permanent residence referred to his involvement from 1977 to 1985 in the Eritrean Liberation Front [ELF] and the Eritrean People's Liberation Front [EPLF] – two competing "freedom fighter" groups. There was no suggestion in his initial documents that his involvement was coerced or that he was unable to leave either organization.

[5] The Officer found that the Applicant's basis for involvement in these organizations was best laid out in his initial narrative. The most relevant portion is as follows:

> I was struggling for Eritrean independence since 1977 being a member of Eritrean liberation front {ELF}.formerly I was a store keeper of armaments and food supplies of the front in forto sawa and later I was changed to the biggest hospital of the front which is found in hawashait as a food supplier for sick people. There was an ideological and political differences between Eritrean liberation front {ELF} and Eritrea people liberation front {EPLF} which were struggling for Eritrean independence. Both fronts could not come to agree which resulted in bloody war was done between them in 1982.then the ELF came to its last point of its existence in the field of struggle for Eritrean independence. Then I joined the EPLF armed forces to continue the struggle for independence. However my trial of continuing the struggle being collapsed due to the EPLF administration section was kidnapping and killing former ELF members through clandestine ways. A few months later, I realized that the EPLF entity planned to root out the ELF members

> from the struggle for independence. Therefore I decided to flee away from the field to Sudan.

[6] In a later interview the Applicant described being forcibly conscripted into the ELF at 16. The Officer’s notes following the interview contain the conclusion that while the Applicant was conscripted into the ELF, he voluntarily joined the EPLF.

[7] In his subsequent response to a “procedural fairness letter”, the Applicant claimed that his association with the ELF and the EPLF was not voluntary and that he had looked to escape the ELF but was unable to do so.

[8] The Officer, in notes which predate the formal decision, made the following critical observations:

- open source materials did not establish that the ELF engaged in forced recruitment or severe punishment for defection;
- the Applicant’s original testimony was that he had left the ELF when it no longer existed to join the EPLF to continue the struggle for independence, so his association ended because of “political changes”, and he left the EPLF because of “EPLF’s view on ex-ELF members”;
- the Applicant’s reason for joining the ELF and the EPLF was the struggle for Eritrean independence; and
- the Applicant’s testimony indicated that he did not join the EPLF under duress as he stayed for three years before leaving.

[9] The Officer concluded that both organizations were engaged in terrorism and subversion. Further, even if the Applicant's recruitment into the ELF had not initially been voluntary, his continued involvement in the ELF and the EPLF was not under duress. Therefore, he was a member of organizations that engaged in s 34(1)(b) and (c) activities and inadmissible pursuant to s 34(1)(f) of the *IRPA*.

[10] That basic conclusion was repeated in the decision letter of May 10, 2017.

[11] At no time did the Applicant request that the Officer exercise a "residual discretion" to issue a visa despite the finding of inadmissibility.

III. Analysis

[12] The Applicant has raised three legal issues more fully advanced in oral argument:

a) that as a matter of law, the Officer had a discretion to grant a visa even though the Applicant was inadmissible under s 34 of the *IRPA*;

b) that the Officer erred in treating the considerations of membership *per se* in an organization separately from the issue of whether that membership was created through duress; and

c) that the decision was made without regard to country conditions.

A. *Standard of Review*

[13] On the issue of whether inadmissibility precludes the issuance of a visa, or more specifically whether there is a residual discretion to issue a visa despite inadmissibility, the "home statute" must be interpreted, including both the statute and its regulations.

[14] Examining the standard of review in light of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, I note that there is a privative clause, that visa officers exercise an element of expertise as per *Alfaha Alharazim v Canada (Citizenship and Immigration)*, 2010 FC 1044, 378 FTR 45, and that the specific issue is not of central importance to the legal system.

[15] As a consequence, I conclude that based on Supreme Court guidance, the standard of review is reasonableness. I add that even if the standard were correctness, the result would be the same.

[16] For much the same reasons and because there is already a body of law on the standard of review for the remaining issues (*Jalloh v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 317, 2012 CarswellNat 1890 (WL Can) [*Jalloh*]; *Arkeso v Canada (Citizenship and Immigration)*, 2016 FC 1138, 2016 CarswellNat 10630 (WL Can)), the standard of review is likewise reasonableness.

B. *Inadmissibility/Discretion*

[17] With respect, the Applicant does not have a factual foundation for this argument. There was nothing before the Officer which would suggest that this "discretion" was in play and no submission by the Applicant that despite the finding of inadmissibility, the Officer should otherwise issue a visa.

[18] The Applicant seeks to attack the decision not to exercise this residual discretion, but this decision was not in fact made. Without having some reasons which the Court can review, this issue is theoretical and academic, and on that ground alone ought to be dismissed.

[19] However, in the event that I am in error on this first point, I have canvassed Mr. Matas' heartfelt submissions.

[20] The Applicant's position is that a visa officer's decision pursuant to s 139(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] that an applicant is inadmissible is not determinative of whether a visa can be issued. He places great reliance on the use of the word "may" in ss 144 and 146(2) of the *IRPR* as granting a residual discretion for an officer to nevertheless issue a visa:

144 The Convention refugees abroad class is prescribed as a class of persons who may be issued a permanent resident visa on the basis of the requirements of this Division.	**144** La catégorie des réfugiés au sens de la Convention outre-frontières est une catégorie réglementaire de personnes qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

…

146 (2) The country of asylum class is prescribed as a humanitarian-protected persons abroad class of persons who may be issued permanent resident visas on the basis of the requirements of this Division.

[…]

146 (2) La catégorie de personnes de pays d'accueil est une catégorie réglementaire de personnes protégées à titre humanitaire outre-frontières qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

[Emphasis added by the Court]

[21] In my view, this position cannot be sustained. The scheme of the *IRPA* and the specific wording and legislative intent point away from such a conclusion.

[22] The starting point is s 11(1) of the *IRPA* that a visa can only be issued if the foreign national is "not inadmissible":

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.

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.

[23] Section 34(1) of the *IRPA* sets out the grounds of inadmissibility. It is noteworthy that there is no substantial challenge to the inadmissibility finding, and inadmissibility is presumed for the purpose of analysis of this issue.

[24] Relief from the consequences of inadmissibility is found in s 42.1(1) and (3) of the *IRPA* where the Minister has a discretion to grant such relief:

42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.	**42.1 (1)** Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.
…	[…]
(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.	**(3)** Pour décider s'il fait la déclaration, le ministre ne tient compte que de considérations relatives à la sécurité nationale et à la sécurité publique sans toutefois limiter son analyse au fait que l'étranger constitue ou non un danger pour le public ou la sécurité du Canada.

No such application was made to the Minister in this case.

[25] The Applicant's position would allow further relief from an inadmissibility finding by virtue of an unstated discretion in the *IRPR* for a visa officer to grant a visa.

Respectfully, this position is inconsistent with a statutory scheme which provides the Minister with the power of relief. It would be redundant for the exemption power to be available at both the Ministerial level in the *IRPA* and at the visa officer level in the *IRPR*.

[26] Section 139(1) of the *IRPR* must be read and applied in a manner consistent with the *IRPA*. In my view, once a finding of inadmissibility on the grounds in s 34(1) of the *IRPA* is made, a visa officer has no remaining authority to issue a visa.

[27] Sections 144 and 146(2) of the *IRPR* are of no assistance to the Applicant. These provisions must be read in context with s 139 of the *IRPR*. A visa can only be issued if an applicant, being a member of the two classes mentioned, is "not inadmissible".

[28] Therefore, it is both reasonable and correct to conclude that a visa officer had no discretion to issue a visa once there was a finding of inadmissibility.

C. *Membership/Duress*

[29] The Applicant complains that the Officer did not take a holistic approach to the issue of membership. The objection stems from the Officer's conclusion that even if the Applicant's initial recruitment into the ELF was not voluntary, his continued membership was not under duress nor was his tenure and membership in the EPLF.

[30] Both parties rely, as does the Court, on Justice O'Reilly's conclusion at para 38 of *Jalloh* that evidence must be considered as a whole to determine whether membership was voluntary or coerced.

The Applicant argues that the Officer failed to consider membership contextually with duress, and instead improperly found that the Applicant was a member before considering whether membership was excused due to duress.

[31] This would appear to be an argument that there is a fixed process to be followed, with one step rather than two steps. I cannot find any support for such an immutable process. The requirement is to consider the evidence of membership as a whole. How that analysis should occur will be driven by the facts of each case.

[32] What is important here is that the Officer looked at all the evidence, and particularly considered the variances in the Applicant's story between his initial claim, his interview, and his response statement. The Applicant's initial position did not indicate any duress, but his story developed to include it. In fact, the emphasis on duress increased as time progressed.

[33] The Officer sorted through the shifting perspectives being advanced and came to his conclusion. I can find no fault in the process or analysis, and I dismiss this issue. It was reasonable for the Officer to put greater emphasis on the Applicant's early statement as to his reasons for joining and staying with the organizations than on his later versions of his story.

D. *Country Conditions*

[34] The Applicant complains that the Officer failed to find direct evidence that the ELF engaged in forced recruitment or severely punished defecting members. No similar statement was made in respect of the EPLF, and there was evidence that a person could not just walk away from the EPLF with impunity. The Applicant argues that since the s 34(1) finding was in respect of both the ELF and the EPLF, the failure to acknowledge this evidence was significant.

[35] The Applicant's position is linked to the membership/duress issue. However, the real issue here is the weight of the evidence, and not whether country condition evidence was ignored.

[36] The Officer found that open source material did not lead to a conclusion that the ELF engaged in forced recruitment or severely punished defectors, which was what the Applicant later alleged.

[37] The Officer noted particularly that the Applicant originally stated that he left the ELF and joined the EPLF "to continue the struggle", and then fled the EPLF because of the adverse treatment he received as a former ELF member. The Officer found that this was consistent with country condition evidence regarding defections from the ELF to the EPLF at this time, which contributed to the Officer's conclusion that the Applicant's continued involvement with the ELF and the EPLF was not under duress.

[38] Although not argued orally by either party, I have concluded that the whole matter of membership/duress and the related country conditions was a matter of credibility. The Officer accepted the Applicant's first statement of membership untainted by the suggestion of duress in the ELF as accurate, and treated the later developing thesis of duress with suspicion.

There was nothing unreasonable in the Officer's approach. Evidence of forced recruitment and retention by the EPLF which post-dated the Applicant's involvement is not directly relevant.

IV. Conclusion

[39] Therefore, this judicial review will be dismissed.

[40] As to certification of a question, while a legal issue of interpretation was raised, at no time was there a request to the Visa Officer to exercise the so-called residual discretion which the Applicant says exists. There is not a proper factual foundation for the question to be certified and therefore it should not be.

JUDGMENT in IMM-2453-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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