Date: 20070430

Docket: IMM-2251-06

Citation: 2007 FC 461

Ottawa, Ontario, April 30, 2007

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

THAN SOE
(a.k.a. YE YINT and THIT LWIN)

Applicant

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Than Soe was found to be inadmissible because he had engaged in a terrorist activity, specifically the hijacking of an aircraft from Myanmar (Burma) to Thailand as part of a protest against the regime in Myanmar. His application under s. 34(2) of the *Immigration and Refugee Protection Act* (Act) to the Respondent Minister, Minister of Public Safety and Emergency

Preparedness, for relief from this finding was denied because “his presence in Canada clearly goes against our national interest”.

[2] The Applicant seeks judicial review of the Minister’s decision principally on the grounds that (a) the Minister ignored relevant facts; (b) the Minister’s reasons for decision failed to address matters set forth in a policy guideline in respect of applications for relief from s. 34 inadmissibility findings; and (c) the Minister exercised his discretion on an incorrect basis.

I. BACKGROUND

[3] In October 1989 Soe, along with a friend, hijacked an aircraft carrying 80 passengers diverting it from Burma (Myanmar) to Thailand. Soe and his friend were pro-democracy activists who did the hijacking to draw attention to the abuses suffered in his country at the hands of a military dictatorship. The brutality of that regime is a well recognized fact.

[4] In March 1990 Soe was convicted in Thailand for the hijacking. He was sentenced to six years imprisonment but was released after 2½ years.

[5] In August 1992, Soe was granted a pardon and amnesty by the Thai government. He remained in Thailand until 1996. During this period he was granted “Person of Concern Status” by the UNHCR indicating that he was likely a refugee under the Convention.

[6] In 1996 Soe entered the United States as a recipient of a United States Information Agency Burmese Refugee Scholarship at Indiana State University. Before coming to the U.S., he disclosed to American authorities his role in the hijacking.

[7] Having entered the U.S., he was, however, detained twice by U.S. Immigration and Naturalization Service (INS) officials; firstly, in 1997 for one month and the second time in 2002 for eight months.

[8] During this second detention a judge of the U.S. Immigration Court found that Soe has established a well-founded fear of persecution and torture if he were returned to Myanmar (Burma). Despite this finding and a further finding that Soe was not a security threat to the U.S. or any other country, the judge was unable to grant asylum because of the hijacking incident. Soe was released from detention on a bond. A few months later in November 2003 he fled the U.S., breaching his bond, and entered Canada illegally.

[9] In December 2003, Soe made a refugee claim but in January 2004 he was found to be inadmissible pursuant to s. 34(1)(c) of the Act. His admissibility hearing was adjourned so that he could apply to the Minister for an exemption under s. 34(2).

[10] On March 27, 2006, the Minister denied the application. The Minister's decision was attached to a "Briefing Note for the Minister"; the two documents were said to be the decision and reasons for decision respectively.

[11] The pertinent statutory provisions are:

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;
…	…
Exception	Exception
(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[12] An important feature of the Minister's decision is that unlike a myriad of other powers and duties of the Minister which may be delegated to some official, a s. 34(2) decision cannot be delegated. It is one of only four provisions in the Act which must be dealt with by the Minister directly.

[13] The Briefing Note, prepared by the President of Canada Border Services Agency, provided the details of Soe's case and a recommendation. The Minister then signed the document which said "Based on my review of the material submitted, Ministerial relief is … DENIED".

[14] The Briefing Note recommended that Soe not be granted Ministerial relief because Canada should not harbour individuals who have admitted to committing terrorist acts. The determinative portion of the Briefing Note is as follows:

> Mr. Soe committed a serious offence that meets the threshold of terrorism. Fortunately, no violence was used and luckily no one was injured or killed. People appeared sympathetic to his political statement; however, a threat of actual bodily harm was apparent from the onset and a negative outcome could have resulted from his actions. This activity/political statement could have simply been an act of diverting an airline. However, he and another cohort planned, executed and forced their way onto a plane carrying 80 passengers and proceeded to hijack the aircraft. The Canada Border Services Agency (CBSA) is of the opinion that Mr. Soe did commit a terrorist act. He did hijack a plane and people could have been injured or killed. This fact cannot be ignored.
>
> Mr. Soe has been upfront and honest about his hijacking. He presently does not appear to be a danger to Canadian society; however, his presence in Canada clearly goes against our national interest. Canada should not harbour individuals who have admitted to committing terrorist acts. Unfortunately, there are no compelling reasons to grant Mr. Soe refugee protection or permanent resident status in Canada. He is not employed, he has no family in Canada and he entered the country illegally. He is a well educated individual, but CBSA feels he could request to return to Thailand since he received a pardon and amnesty. Moreover, Mr. Soe's common-law spouse is of Thai origin.

II. ANALYSIS

A. *Reasons*

[15] The Applicant had initially raised the issue that the Briefing Note cannot qualify as the Minister's reasons since the Note was not that of the Minister. At the judicial review hearing, the

Applicant withdrew this issue in the face of the authorities of *Miller v. Canada (Solicitor General)*, 2006 FC 912 and of *Naeem v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 173 (QL).

B. *Standard of Review*

[16] Chief Justice Lutfy in *Miller*, above, conducted a pragmatic and functional analysis of s. 34(2) and concluded that in regards to the decision to grant or deny Ministerial exemption, the standard of review is patent unreasonableness. This standard is of course dependent on the Minister's process being in accordance with fairness and natural justice and the Minister applying the correct legal test. I adopt this standard of review as has Justice Mactavish in *Al Yamani v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 381.

C. *Relevant Facts*

[17] The Applicant says that the Minister erred in accepting CBSA's conclusion that Soe could request return to Thailand where he had received a pardon and amnesty and where his common law spouse is a citizen. In particular, the Applicant says that the Minister failed to consider (or at least failed to address a key piece of contrary evidence) a UNHCR report.

[18] Given that the ability (or assumed ability) of Soe to be returned to Thailand, rather than Myanmar, is stated as a fact in the Briefing Note, and forms part of the rationale for the

recommendation that the Minister reject the application, it is evidently an important conclusion in the decision.

[19] The Briefing Note makes no reference to an extensive UNHCR opinion which was contained in the Tribunal Record (provided originally in the context of U.S. proceedings and accepted in the U.S.). The opinion calls into direct question the conclusion on Soe's ability to return to Thailand as well as raising the fear of persecution upon his return to Myanmar.

[20] The UNHCR conclusion is clear, forceful and unchallenged. It concludes in unequivocal terms that Soe cannot return to Thailand – the salient part of the opinion is:

> It is the opinion of the UNHCR Branch Office in Thailand that there is virtually no chance that Thailand would re-admit Mr. Soe. Thailand is not a party to the 1951 Convention or its 1967 Protocol and has no domestic legislation or procedure in place regarding recognition of refugees. Refugees without valid passports and visas are considered illegal immigrants and are at risk of arrest and immigration detention in very poor conditions. There are camps for Burmese refugees along the Thai-Burmese border, where there are currently around 110,000 refugees; however responsibility for admission to these camps lies with the Royal Thai Government, which has established a policy of no further formal admissions. Because Mr. Soe has no valid visa to enter Thailand and cannot gain formal admission to the existing refugee camp, he is not able to return to Thailand

[21] As indicated earlier, the Briefing Note never refers to the UNHCR opinion or even the substance of the opinion. Soe's ability to return to Thailand is, after reference to the terrorism incident, the most frequently referenced circumstance in the Minister's reasons.

[22] It is a well established principle that while the decision-maker need not refer to every fact in a case, the failure to refer to critical facts suggests that the decision-maker made the decision without regard to the evidence before it (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL) and also *Tryus v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 737 (QL)). As a result, the Minister's finding cannot stand up to the standard of review and therefore is patently unreasonable. The exercise of the Minister's discretion may well have been different if it was recognized that the Applicant could not return to Thailand and might well be forced to go to Myanmar (Burma) where persecution and torture are an issue.

[23] There are other factual issues in the reasons which are contested by the Applicant. These include the potential for violence, the use of a gun and the existence of a real bomb. Much of this information came from Myanmar, a place that the Applicant says is notoriously unreliable. Given the disposition of this case, nothing further need be said. One can expect the new determination will carefully review the reliability of this information.

III. APPLICATION OF GUIDELINES

[24] Related to this issue of failure to consider the evidence is the Applicant's position that the officer preparing the Briefing Note failed to address issues listed in the department's Guidelines.

[25] The Citizenship and Immigration Canada department has a Guideline in respect of Evaluating Inadmissibility, a portion of which addresses the exercise of the Minister's discretion in

the national interest. The Guidelines give instructions to officers preparing Ministerial Briefing Notes as to the issues which should be addressed. These issues are set forth more particularly by a series of questions which are to be answered.

[26] The Applicant argues that the Minister's decision did not contain any analysis of the questions in the Guideline and ignored consideration of key issues. Therefore, the Applicant says, the Minister failed to address the evidence and issues which are vital to the Applicant's case.

[27] The Guidelines are not law and there is no requirement that a Ministerial Briefing Note (or reasons for decision) must address each and every question in the Guideline. The basis of the claim for Ministerial discretion will frame the relevant questions to be asked. The Guidelines are helpful in assessing whether the Minister's decision was an unreasonable exercise of discretion (see *Al Yamani*, paragraph 71).

[28] In the Certified Tribunal Record of the record which was before the Minister is a letter from the Applicant's then counsel dated December 14, 2005 in which counsel made submissions in respect of some of the issues in the Guidelines.

[29] While it is unclear to which Briefing Notes the letter is addressed, the final Briefing Note being dated three months later, the Applicant outlines his case in respect of the Guideline questions. In respect of the questions in the Guidelines, he specifically refers to the question "Has the person adopted the democratic values of Canadian society?" The Applicant wrote:

> This final question, which was not asked and answered in the CBSA materials, thus apparently not a consideration in making the recommendation, is perhaps the one most critical to the inquiry. The evidence …"

[30] The final Briefing Note and the one which forms the reasons for decision likewise neither asked or answered the question nor did it respond to the Applicant's position that the question was "the one most critical to this inquiry".

[31] However, like many other aspects of the Applicant's submissions which found their way into the Briefing Note analysis one way or the other, the Briefing Note did refer to the Applicant as a pro-democracy activist. It cannot be said that the Minister ignored the Applicant's adoption of democratic values. Their case, on this specific fact, is distinguishable from the facts in the *Al Yamani* case.

[32] More problematic is the conclusion that the Minister should not exercise his discretion because "Canada should not harbour individuals who have admitted to committing terrorist acts". Presumably this rationale is also applicable where the individual denied committing the terrorist act but the evidence confirms that he did. It is the commission of the terrorist act, not the admission of commission of the act, which grounds the refusal to exercise the Ministerial discretion.

[33] The Briefing Note goes on to observe that there are no compelling reasons to grant protection or permanent residence. The factors examined are largely those related to a close connection to Canadian society, including jobs and family in the country.

[34] The difficulty with this analysis is that it renders the exercise of discretion meaningless. It is tantamount to saying that an individual who commits an act described in s. 34(1) cannot secure Ministerial discretion because they committed the very act that confers jurisdiction on the Minister to exercise discretion under s. 34(2).

[35] Quite apart from this "Catch-22" conclusion, the Minister never adequately explains why the discretion should not be exercised because the individual committed an act prescribed by s. 34(1). An applicant is entitled to the real reasons for the refusal to exercise discretion other than that the person has committed an act described in s. 34(1).

[36] Whether one describes this part of the Minister's decision as a failure to provide adequate reasons, a failure to address the proper legal issue or a fettering of discretion by limiting the scope of the analysis, the Minister's decision in this regard cannot be sustained.

IV. CONCLUSION

[37] For all these reasons, the application for judicial review is allowed, the Minister's decision is quashed and the matter is remitted to the Minister for a re-determination.

[38] For the reasons described in *Miller*, above, no question will be certified.

JUDGMENT

IT IS ORDERED THAT the application for judicial review is allowed, the Minister's decision is quashed and the matter is remitted to the Minister for a re-determination.

"Michael L. Phelan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Mr. Ronald Poulton	FOR THE APPLICANT
Ms. Mary Matthews Ms. Judy Michaely	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MAMANN & ASSOCIATES Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
MR. JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT