

Date: 20070511

**Dockets: IMM-2696-06
IMM-2699-06**

Citation: 2007 FC 509

Ottawa, Ontario, May 11, 2007

PRESENT: The Honourable Mr. Justice Blais

BETWEEN:

SHAHRAM GOLESTANEH

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Applicant

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), an enforcement officer at the Canada Border Services Agency (CBSA), prepared a report dated January 20, 2006, alleging that the applicant was inadmissible, as per paragraphs 34(1)(f) and 35(1)(a) of the Act, by reason of his involvement with the Mujahideen-E Khalq (MEK), a listed terrorist entity in Canada. Pursuant to subsection 44(2) of the Act, the report

prepared by the enforcement officer was then referred by the Minister of Public Safety and Emergency Preparedness (the Minister) to the Immigration Division of the Immigration and Refugee Board (the Immigration Division) for an admissibility hearing. The applicant now seeks judicial review of the decisions made under subsections 44(1) (Docket IMM-2696-06) and 44(2) (Docket IMM-2699-06) of the Act.

[2] The respondent then submitted an application pursuant to section 87 of the Act, for the non-disclosure of confidential information considered and relied upon by the enforcement officer, including the Security Intelligence Report (SIR) prepared by the Canadian Security Intelligence Services (CSIS) following their investigation of the applicant, which report was supported by a series of documents listed in the footnotes to the SIR.

[3] In the course of an *in camera* hearing with counsel for the respondent, I learned from said counsel that the enforcement officer did not have access to the documentation supporting the SIR before rendering his decision, but was limited to reading the report itself. This alone is a serious error of law that justifies setting aside the decision of the enforcement officer, as I myself noted in *Sogi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 692, [2006] F.C.J. No. 863 (QL), where I referred to the following paragraphs from Justice Andrew MacKay's decision in *Jaballah (Re)*, 2005 FC 399, [2005] F.C.J. No. 500 (QL):

¶ 34 In this case, it became clear that the record before the delegate included the SIR, i.e. the narrative report by CSIS of its grounds for believing Mr. Jaballah is inadmissible to Canada, without the reference documents or appendices footnoted in that report. Included in the record also were the public summary statements of August 14, 2001 and February 5, 2002 based on the SIR and testimony in public by a CSIS officer, released as public documents to Mr. Jaballah by order of this Court in earlier

proceedings concerning the reasonableness of the Ministers' certificate. I note that any reference documents or appendices footnoted in those summaries were apparently not provided to the Minister's delegate even though copies of those documents had been provided to Mr. Jaballah's counsel on August 14, 2001.

¶ 35 The decision in *Mahjoub* has since been followed in respect of the same evidentiary issue by Mr. Justice Blanchard in *Almrei v. Canada (Minister of Citizenship and Immigration)* (2005), 262 F.T.R. 7 (F.C.) (see paragraphs 14 and 86).

¶ 36 I note that in the *Mahjoub* and *Almrei* decisions the Courts concerned were dealing with decisions made pursuant to subsection 115(2) of the IRPA applicable to Convention refugees as both Messrs. Mahjoub and Almrei were, and thus they were already qualified as persons in need of protection under IRPA. Here the decision in question was made pursuant to subparagraph 113(d)(ii) of IRPA for consideration of an application for protection by a foreign national, as Mr. Jaballah is. While the two provisions relate to differently qualified persons, the essence of the decisions required in both cases is the same, in my opinion. Failures in proper process under subsection 115(2) have equal significance for the process under subparagraph 113(d)(ii). I agree with Mr. Jaballah's argument that the process in *Mahjoub* and *Almrei* was found inadequate to support an independent assessment by the Minister's delegate of the danger the person in question posed to the security of Canada. So the similar process in this case would be inadequate to support an independent assessment.

[4] In the present case, we are dealing with a decision made pursuant to subsection 44(1) of the Act, as opposed to sections 113 or 115, but the reasoning in the above-noted cases remains just as relevant. Although the CSIS document may set out precisely the grounds of inadmissibility of the applicant, the officer who must decide whether to issue a subsection 44(1) report has a duty, when examining the file for the first time, to consult all of the reference documents, including the appendices to the CSIS report and the information on the sources underlying this report, before making a decision. This is necessary in order to ensure that the

procedure followed will sufficiently guarantee the independence of the decision-maker and thus protect the rights of the individual concerned.

[5] Accordingly, the decision of the enforcement officer to prepare a report for the Minister under subsection 44(1) of the Act, and the subsequent decision by the Minister under subsection 44(2) of the Act to refer the report to the Immigration Division for an admissibility hearing, are set aside, and the file is referred back to a different enforcement officer for re-determination in light of these reasons.

JUDGMENT

1. The applications for judicial review of the decision of the enforcement officer to issue a subsection 44(1) report (Docket IMM-2696-06) and of the decision of the Minister to proceed with a subsection 44(2) referral (Docket IMM-2699-06) are allowed.
2. The decisions in question are set aside and the file is referred back to a different enforcement officer for re-determination.

“Pierre Blais”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-2696-06 and IMM-2699-06

STYLE OF CAUSE: SHAHRAM GOLESTANEH v. MPSEP

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: Friday, May 11, 2007

REASONS FOR JUDGMENT AND JUDGMENT: MR. JUSTICE BLAIS

DATED: Friday, May 11, 2007

APPEARANCES:

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Mr. Toby Hoffman	FOR RESPONDENT (CSIS)

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