Federal Court  Cour fédérale

Date: 20090406

Docket: IMM-4002-07

Citation: 2009 FC 347

Ottawa, Ontario, April 6, 2009

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

YOUSR DHAHBI

ADEL KHRIBI

Applicants

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] I was assigned this case by the Chief Justice. It is an application, for which leave was duly granted, for judicial review of a decision made on July 30, 2007, by a visa officer (the decision maker) refusing the applicants' application for permanent residence in Canada because of Mr. Khribi's inadmissibility under paragraph 36(1)(*c*) of the *Immigration and Refugee Protection Act* (IRPA).

[2] In the context of this application, the respondent is applying to the Court under section 87 of the IRPA for authorization not to disclose the information, as defined in section 76 of the IRPA, that was redacted in the decision maker's certified record. According to the Minister, the disclosure of that information would be injurious to national security or endanger the safety of any person. Specifically, it is requested under section 87 and paragraph 83(1)(*c*) of the IRPA that the Court decide this question by hearing the information in the absence of the public, the applicants and counsel.

[3] As a preliminary application, the applicants object for the following reasons:

- they were not told all the information in the decision maker's possession, which was a breach of procedural fairness, and the visa officer's decision is therefore void;
- if this is not the case, then in the alternative the applicants request that a special advocate be appointed for the purposes of the *in camera* hearing and that a summary of the evidence heard at that hearing be provided to them.

[4] In reply, the Minister submits that procedural fairness was observed and that a special advocate does not have to be appointed because:

- the refusal of the application for permanent residence was based not on the redacted information, although that information was part of the decision maker's record, but rather on certain facts known to the applicants from which the decision maker concluded that Mr. Khribi was inadmissible on grounds of criminality under paragraph 36(1)(*c*) of the IRPA;

- the appointment of a special advocate is not justified in the circumstances, since all that is in issue is a decision refusing an application for permanent residence made from outside Canada; the applicants' freedom and safety are not at issue;
- the redacted information is minor compared to the record as a whole and, in any event, during two interviews, the applicants were told most of the information in question, which concerns Mr. Khribi's involvement with a certain organization and his possible acquaintance with certain identified persons during the time he lived in Canada;
- section 87 of the IRPA expressly exempts the respondent from providing a summary of the redacted information.

Steps taken

[5] To fulfil my judicial duties, it seemed important that I first become apprised of the redacted information by calling an *in camera* hearing and, if necessary, hear one or more witnesses before making any decision.

[6] For that purpose, I presided over a hearing with all counsel by conference call and told them what I intended to do. The *in camera* hearing in the presence of one counsel was held on December 10, 2008. One witness was heard, and legal comments were provided by counsel for the respondent. I also had an opportunity to examine the witness on the redaction of the information.

[7] I subsequently held another hearing with all counsel by conference all, during which I told them the outcome of the *in camera* hearing:

- additional information was disclosed to the applicants following the *ex parte in camera* hearing;
- after discussions, I did not consider the presence of a special advocate necessary in the circumstances;
- the redacted information did not concern the decision maker's decision that Mr. Khribi was inadmissible on grounds of criminality under paragraph 36(1)(*c*) of the IRPA, and the applicants had all the facts at their disposal to deal with that decision;
- the redacted information was redacted because its disclosure would be injurious to national security or endanger the safety of any person, and it should not be disclosed to the applicants and their counsel.

Issue

[8] Therefore, the issue to be debated has to do with the decision about Mr. Khribi, which concerns the facts serving as the basis for his inadmissibility on grounds of criminality under paragraph 36(1)(*c*) of the IRPA. A date for a hearing to deal with this issue in everyone's presence was set, and the hearing was held.

[9] However, before addressing the judicial review issue, namely the decision to refuse the application for permanent residence, it is appropriate to deal with the preliminary questions arising out of the applicability of section 87 of the IRPA, namely the alleged breach of procedural fairness and, in the alternative, if there was no such breach, the right to have a special advocate appointed for the *in camera* hearing called to discuss the redaction of information.

Does the non-disclosure to the applicants of information known to the decision maker amount to a breach of procedural fairness?

[10] In *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (*Charkaoui*), at paragraphs 58 *et seq.*, the Supreme Court recognized that information that relates to national security or could have the effect of endangering a person's life must be protected and that its non-disclosure to the individual concerned is justified. In such circumstances, the stakes are such that the information must not be disclosed.

> More particularly, the Court has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual. (paragraph 58, *Charkaoui*)

[11] In addition, however, the applicants' fundamental rights are not in jeopardy, as the Supreme Court noted in *Charkaoui* when dealing with the security certificate procedure. Although the decision is an important one for their own lives, it is only a decision refusing their application for permanent residence made from outside Canada. Their lives, freedom and safety are not at risk.

[12] In this specific context, it is important to recall that the duty to act fairly is assessed based on the context and that some minimum duties must be met, as the Federal Court of Appeal stated in *Khan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345, at paragraph 31:

> The factors tending to limit the content of the duty in the case at bar include: the absence of a legal right to a visa; the imposition on the applicant of the burden of establishing eligibility for a visa; the less serious impact on the individual that the refusal of a visa typically has, compared with the removal of a benefit, such as continuing residence in Canada. . . .

[13] Account must also be taken of the fact that the redacted information is insignificant compared to the certified record as a whole. That record is 482 pages long, and nine of those pages are redacted in part. The recent *in camera* hearing substantially eliminated the redaction of information and thus allowed a skilled reader to have a good understanding of the factual issues in this case. Moreover, the decision maker's notes indicate that Mr. Khribi was questioned about his involvement with a certain organization and his ties to certain individuals during his stay in Canada.

[14] What is even more important, however, is that the redacted information is not relevant to the decision maker's decision. The decision to refuse permanent residence is substantially based on the fact that Mr. Khribi is inadmissible under paragraph 36(1)(*c*) of the IRPA because he participated in the falsification or unlawful production of a university identification card, which amounts to an act prohibited by paragraph 366(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46 (see pages 47-51 of the Tribunal Record).

[15] In his decision, the decision maker took the trouble of stating that Mr. Khribi's alleged acquaintance with certain persons during his stay in Canada and his answers concerning this matter could not establish sufficient facts to find him inadmissible under section 34 of the IRPA (see pages 48 and 50 of the Tribunal Record).

[16] While recognizing the respondent's right not to disclose information relating to national security or the safety of any person and to have that right validated under section 87 of the IRPA, the Court concludes that, in the circumstances of this case, no breach of procedural fairness resulted from the fact that the applicants did not have all the information available to the decision maker.

[17] I would add that the applicants argue that they were not sufficiently informed.

[18] The above-mentioned reasons describe the applicants' knowledge of the fact situation in issue. The detailed notes from the applicants' interviews show how much they knew about the facts in issue (see pages 40 *et seq.* of the Tribunal Record). Everything the decision maker was concerned with is referred to in those notes. The applicants were confronted with facts relating to the names of individuals, Mr. Khribi's activities during his stay in Canada, including his studies and occupations, Mr. Khribi's universities studies in Sousse, Tunisia, his explanation about his participation in making a false university identification card, etc. The applicants were sufficiently informed, even amply informed.

[19] The applicants also allege that they are entitled to a summary of the evidence. Yet the IRPA deals expressly with that obligation in subsection 87(2). In the circumstances of this case, and taking into account the legislative exemption from providing a summary of the evidence, such a summary did not have to be provided.

[20] Based on these preliminary arguments, there is no legal justification for finding that the decision maker's decision is void, as requested.

In the alternative, the applicants request that a special advocate be appointed

[21] There is no absolute right to have a special advocate appointed when an *in camera* hearing is requested under section 87 of the IRPA. Each case turns on its own facts. Section 87.1 provides as follows:

> If the judge during the judicial review, or a court on appeal from the judge's decision, is of the opinion that considerations of fairness and natural justice require that a special

> advocate be appointed to protect the interests of the permanent resident or foreign national, the judge or court shall appoint a special advocate from the list referred to in subsection 85(1). Sections 85.1 to 85.5 apply to the proceeding with any necessary modifications.

[22] What should be noted from this statutory provision is that Parliament does not state that a special advocate is appointed at the request of a permanent resident or foreign national; rather, it is within the designated judge's discretion to appoint a special advocate after reviewing the record and the considerations of fairness and natural justice requiring that a special advocate be appointed to protect the interests of the permanent resident or foreign national.

[23] To undertake such an exercise, the designated judge must consider the record, the issues, the redacted information and whether that information was important to the decision being judicially reviewed. Depending on the circumstances, the judge must also preside over an *in camera* hearing with a court reporter present, ask why the information was redacted and sometimes question its relevance. Having done so, the judge is in a position to make an informed decision on the appointment of a special advocate after hearing the parties on the subject.

[24] Experience in similar cases shows that, in such situations, it has often been found that the redacted information adds nothing to the facts in issue. For example, for reasons relating to investigative techniques, administrative and operating methods, such as file numbers, CSIS staff names and dealings between CSIS and other agencies in or outside Canada, are not disclosed. Such information in itself does not help in understanding the case. It sometimes happens as well that redacted information is disclosed as a result of the designated judge's involvement. The instant case is a perfect example of this.

[25] On the other hand, if the redacted information goes to the very heart of the decision under review, then the judge must assess the history of the case, the rights in issue, if any, which party bears the burden of justifying the application to immigration services and whether or not the consequences of the decision on the evidence in question are important. As we have seen, a decision on an application for permanent residence made from outside Canada does not have the same consequences as a decision by two ministers issuing a security certificate against someone. Each case turns on its own facts and requires an analysis that non-exhaustively takes account of the factors set out in this paragraph but also of the record as a whole. In short, the standards of fairness and natural justice, which vary with the circumstances, must be assessed by taking account of all the facts of the case and the issues.

[26] Here, the appointment of a special advocate was not necessary. The case concerns an application for permanent residence made from outside Canada, most of the redacted information was disclosed after the *in camera* hearing, the decision under review contained reasons unrelated to the information that remained redacted, and most of that information was disclosed during the interviews.

[27] Having dealt with the issues arising out of the request for an *in camera* hearing under section 87 of the IRPA, what remains to be addressed is the issue in the application for judicial review, namely the decision refusing the application for permanent residence based on the facts accepted by the decision maker, namely that Mr. Khribi was inadmissible on grounds of criminality under paragraph 36(1)(*c*) of the IRPA because of his involvement in making a false document.

Facts

[28] This is a second decision refusing an application for permanent residence. The first decision of April 21, 2005, was set aside by the Court with the Minister's consent after the Court granted leave to apply for judicial review.

[29] For the purposes of the decision under review, the decision maker met with the applicants for about four hours. About 15 minutes of that time were devoted to Ms. Dhahbi and the rest to Mr. Khribi. The questions concerned studies, work, family and Mr. Khribi's acquaintances in Canada during his stay here.

[30] As discussed above, the decision refused the application for permanent residence because Mr. Khribi had requested a false university identification card, which amounted to a criminal offence under sections 366(1), 21, 24 and 464 of the *Criminal Code* of Canada with a maximum term of imprisonment of 10 years. This meant that the applicants were inadmissible under subsection 36(1) of the IRPA and paragraph 70(1)(*e*) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227).

[31] The applicants are challenging the version of the facts on which their inadmissibility is based. The issue is therefore one of credibility between their versions and that of the decision maker.

[32] In the notes in the Tribunal Record and in his affidavit, the decision maker stated that Mr. Khribi had explained at the interview that, after failing twice in his second year at the faculty of medicine, he had become an independent student for his third attempt. He said that, to avoid

military service, he had convinced a friend to make him a student card stating that he was a regular student and not an independent student. Mr. Khribi added that he and his friend had been caught in the act of making the card.

[33] The applicants dispute these facts but also complain that the decision maker did not inform them of their inadmissibility and that he should have given them an opportunity to address his concerns about the false identification card and its consequences.

[34] There is no reason to question the decision maker's version of the facts concerning the identification card. His notes are complete and very detailed, and they were written during the interview. He discussed the subject openly, and Mr. Khribi himself described the events. Following the decision, he tried to tone down those events. He had ample opportunity to explain himself.

[35] Accordingly, there is no justification for intervening and setting aside the decision. The application for judicial review is dismissed.

[36] The Court invited the parties to submit a question for certification, but they declined.

JUDGMENT

THIS COURT ORDERS THAT:

- The preliminary applications are dismissed.
- The request to appoint a special advocate is denied.
- The redacted information, except the information expressly excluded following the *in camera* hearing and disclosed, remains redacted for reasons of national security.
- The application for judicial review is dismissed.
- No question will be certified.

"Simon Noël"

Judge

Certified true translation

Monica F. Chamberlain, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-4002-07**
STYLE OF CAUSE:	**YOUSR DHAHBI & ADEL KHRIBI** **v.** **MCI**
PLACE OF HEARING:	**Montréal**
DATE OF HEARING:	**March 10, 2009**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**The Honourable Mr. Justice Simon Noël**
DATE OF REASONS:	**April 6, 2009**

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