Federal Court  Cour fédérale

Date: 20100625

Docket: IMM-5381-09

Citation: 2010 FC 696

Ottawa, Ontario, June 25, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

AFZAL RANA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] An immigration officer concluded that Mr. Rana is inadmissible to Canada as he was a member of the Muttahida Quami Movement (formerly known as Mohajir Quami Movement) (MQM) which she had reasonable grounds to believe had engaged in terrorist activities in Pakistan. This is the judicial review of that decision.

[2] The relevant parts of s. 34(1) of the *Immigration and Refugee Protection Act* provide:

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 or an act of subversion against a democratic government, institution or process as they are understood in Canada;	*a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au 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;
(*c*) engaging in terrorism;	*c*) se livrer au terrorisme;
[…]	[…]
(*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*) 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*) ou *c*).

[3] Mr. Rana advances three broad propositions in support of his position that the decision should set aside and the matter referred back to another immigration officer for reconsideration. He asserts that he was never a member of the MQM, merely a supporter. Furthermore, he was a supporter of the MQM-A. The officer failed to draw a sufficiently clear distinction between MQM-A and MQM-H, the latter being the one which engaged in terrorist activities. Finally, he asserts that

the rules of natural justice were breached in that the officer had before her notes of previous interviews with him, copy of which were not provided to him in advance of his interview and that undue influence was placed on the officer to reach the decision she did.

[4] It is unnecessary, and indeed it would be inappropriate, for me to assess the reasonableness of the findings that Mr. Rana was a member of MQM-A, and that it had engaged in terrorist activities at relevant times. Mr. Rana was entitled to, but did not receive, due process.

[5] It is a fundamental principle of our rule of law that one know the case he has to meet, to be given a fair opportunity to meet that case, and to have the matter decided with impartiality.

[6] It had not been disclosed to Mr. Rana and his counsel that the officer had on file a letter from an intelligence officer of the Canadian Border Service Agency (CBSA) to the CBSA's immigration enforcement supervisor to which was attached a CBSA memorandum to which, in turn, was attached a brief from the Canadian Security Intelligence Service (CSIS).

[7] The letter states in part:

> Security Review is of the opinion that the CSIS report (attached) compiled after interviewing **RANA**, provides **sufficient** evidence to support a determination of inadmissibility under IRPA, Sec.A34. However, the immigration officer is responsible to make a determination with respect to admissibility.

[8] The CBSA memorandum states: "In our opinion, the information outlined in the brief i.e. the CSIS brief, "provides evidence to support a determination of inadmissibility under section A34 of the *Immigration and Refugee Protection Act* (IRPA)." It goes on to say:

> As the decision-maker the Immigration office is responsible to review all of the evidence and to make the determination with respect to admissibility. To assist in making a well-informed decision, we are providing you with a copy of the CSIS brief.
>
> [My emphasis.]

[9] The question is not whether this silent undue pressure led to actual bias on the immigration officer's part. The issue is whether there is an appearance of bias.

[10] The immortal words of Mr. Justice De Grandpré in *Committee for Justice and Liberty v. Canda (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394, have been repeated by Canadian courts ever since:

> [The] apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[11] Although the immigration officer is certainly not a judge, the fact remains that it was her decision to make and hers alone. The decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, is instructive. In that case, an assistant deputy attorney general with the federal Department of Justice met with the Chief Justice

of the Federal Court of Canada simply to discuss the scheduling of various cases. The merits were not on the agenda. The Chief Justice later spoke with the judge handling the matter and assured the assistant deputy attorney general that the matter would be expedited, which it was. All of this was done outside the presence and knowledge of the other parties, who complained bitterly and moved that the proceedings be permanently stayed.

[12] Then, the judge responsible for the matter recused himself. At para. 72, the Supreme Court said:

> What emerges out of this is a simple test for determining whether the appearance of judicial independence has been maintained: whether a reasonable observer would perceive that the Court was able to conduct its business free from the interference of the government and over judges.

The Court went on:

> [86] Although the meeting and subsequent exchange of letters between Mr. Thompson and the Chief Justice were very serious matters that compromised the appearance of the Chief Justice's and the Associate Chief Justice's independence, on balance the damage was not sufficiently serious to warrant the granting of that ultimate remedy of a stay of proceedings. The lesser remedy of ordering the appellants' cases to proceed before a different judge of the Federal Court -- Trial Division will, together with the additional conditions, suffice.

[13] How could a reasonable observer think otherwise than that it was put to the officer by the CBSA and by CSIS that the only "well-informed" decision was the one which was actually made? The appropriate recourse is to start over. As Mr. Justice Le Dain held in *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, at p. 661:

> I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been […]

[14] Mr. Rana proposed questions to be certified to support an appeal. Since he was successful, the certification of the proposed questions would serve no useful purpose in this case.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The judicial review is granted.

2. The matter is referred back to another immigration officer for a fresh determination.

3. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5381-09
STYLE OF CAUSE:	Rana v. MCI
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATE OF HEARING:	June 16, 2010
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	June 25, 2010

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