Federal Court Cour fédérale

Date: 20120831

Docket: IMM-5924-11

Citation: 2012 FC 1045

Ottawa, Ontario, August 31, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

DELIA PATRICIA FLORES GONZALEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA or the "Act"] to judicially review the decision of an immigration officer (the "Officer") at Citizenship and Immigration Canada (CIC) dated August 16, 2011. The Officer refused the Applicant's permanent residence application on the basis that, as a member of the Farabundo Marti National Liberation Front (FMLN), an organization that has engaged in acts of terrorism, she is inadmissible as a person described in paragraph 34(1)(f) of the Act.

1. Facts

[2] The Applicant is a 44 year-old citizen of El Salvador and has been living in Canada since 2002.

[3] On August 4, 2002, the Applicant arrived in Canada from the United States of America (USA) where she had been living illegally with her estranged husband, Renato Menendez ("Renato"), who is a Canadian citizen. They had been in the USA since 1999, having fled there from El Salvador to escape the Salvadoran civil war.

[4] Upon arrival at the Fort Erie port of entry, the Applicant claimed refugee status because she feared persecution on the basis of her political beliefs. Renato was not present at the port of entry when she completed a Schedule 1 – Background Information Form (the "Schedule 1 Form"). In her Schedule 1 Form, which was completed with the assistance of a Spanish translator, the Applicant indicated that she had been a member of the FMLN. The Applicant answered "yes" to the following questions on the Schedule 1 Form:

> G. Have you ever used, planned, or advocated the use of armed struggle or violence to reach political, religious or social objectives?
>
> H. Have you ever been associated with a group that used, uses, advocated or advocates the use of armed struggle or violence to reach political, religious or social objectives?

[5] The Applicant also said in the Schedule 1 Form that she "used to be a member of the guerilla - FMLN" and that some of the guerillas used force, but she had not done so. At the bottom of the Schedule 1 Form, the Applicant signed a declaration, saying that the information she gave in the form was truthful, complete, and correct, and that she understood all the statements in the

Schedule 1 Form "having asked for and obtained an explanation on every point that was not clear to [her]." She also declared that she would immediately inform CIC if any of the information in the form changed.

[6] To support her refugee claim, the Applicant submitted a Personal Information Form (PIF) to the Refugee Protection Division of the Immigration and Refugee Board (RPD). The PIF she completed indicates on the first page that the information provided must be complete, true, and correct; it also required the Applicant to notify the RPD if any of the information in it changed. She completed the PIF with Renato's help and he signed the interpreter's declaration indicating that he had accurately interpreted the contents of the form for her.

[7] In her PIF narrative, reproduced at page 44 of the Applicant's Record, the Applicant wrote that she first sympathized with the FMLN guerillas in her teen years. At that time, she believed that one option for changing El Salvador was revolution. She also wrote that, in 1985, she met people in FMLN and learned methods for collecting information on people who disagreed with the guerillas. She also learned how to use a gun for protection, and participated by preparing propaganda, organizing strikes, and gathering intelligence. Further, the Applicant sheltered guerillas in her home after they made attacks in two of El Salvador's major cities.

[8] On May 9, 2005, the RPD declared the Applicant's refugee claim abandoned. Also in May of that year, the Applicant applied for a Permanent Resident Visa with Renato as her sponsor. The Certified Tribunal Record (CTR) does not include her application form related to this application and does not show if she disclosed her membership in FMLN at that time.

[9] On January 6, 2006, Renato was convicted of uttering threats to the Applicant. As a term of his probation for this offence, Renato was forbidden from having contact with the Applicant. He wrote to CIC on December 20, 2007, declaring that he wanted to withdraw his sponsorship of the Applicant. He stated in this letter that they had been separated for three years, since 2004.

[10] CIC denied the Applicant's 2005 permanent residence application (CTR page195) on February 26, 2008. The officer who denied that application said that she was not satisfied that the Applicant's marriage to Renato was not entered into primarily for immigration purposes. That officer noted that they had ceased to cohabit before she submitted her application for permanent residence and said that the Applicant attempted to gain permanent resident status through misrepresentation.

[11] The Canada Border Services Agency (CBSA) informed the Applicant on December 10, 2008, that she was eligible to apply for a Pre-Removal Risk Assessment (PRRA). She applied for a PRRA on December 22, 2008. On her PRRA application form, she indicated that she had not been a member of a paramilitary organization or involved in armed conflict.

[12] The Applicant also referred to her counsel's submissions in response to the direction on her PRRA application form to set out all significant events which had caused her to seek protection outside of El Salvador. In these submissions, the Applicant said that she left El Salvador because of the ongoing strife in that country. She also said that Renato had abused her during their relationship and that she largely followed the instructions of her husband as to immigration matters in Canada. Finally, she stated that Renato had filled out the PIF on her behalf because she trusted him, but that

she did not understand its contents. At the bottom of the PRRA form, the Applicant signed a declaration that the information within that form was truthful, complete, and correct.

[13] On November 3, 2008, the Applicant also submitted an application for permanent residence on humanitarian and compassionate grounds under subsection 25(1) of the Act (an "H&C Application"). The form she filled out for the H&C Application asked her to list all the organizations she had belonged to since her eighteenth birthday, including political and social organizations. In submissions she made with her H&C Application, the Applicant again stated that Renato had completed her PIF and that she did not understand its contents. She also reiterated her position that she had not questioned him about its contents and had signed it on his instructions. The Applicant did not disclose her FMLN membership in her H&C Application. She declared that the information in the H&C Application form and her submissions was truthful, complete, and correct (CTR page 208).

[14] CIC informed the Applicant by letter dated September 9, 2009, (the "Interim Letter") that her H&C Application was approved in principle. The Interim Letter informed her that CIC had approved an exemption under section 25 of the Act. It also informed her that she would need to meet all other statutory requirements of the Act and that her application could be refused if she did not meet those requirements. The CBSA informed the Applicant on September 9, 2009, that her PRRA file was closed because her H&C Application was approved in principle.

[15] The Applicant made additional submissions in support of her H&C Application on March 22, 2011, (CTR page 140) including an updated application form. This form was the same as the

one she had completed in 2008. She again did not mention her FMLN membership and declared that this information was also truthful, complete and correct.

[16] On June 2, 2011, the Officer requested the Applicant's file from the RPD, including her PIF and any documents entered as evidence. He wrote to the Applicant on June 13, 2011, to inform her that he believed she might be inadmissible under subsection 34(1) of the Act (the "Fairness Letter"). The Officer invited the Applicant to attend an interview at CIC in order to address these concerns. He said that information indicated that she may have been an FMLN member, and included with his letter documents on the FMLN and its activities.

[17] The Officer interviewed the Applicant on August 4, 2011. He began by explaining that the interview was to discuss her admissibility under section 34 of the Act. The Officer asked the Applicant if the information in her PIF was correct, to which she replied that Renato had completed it. She confirmed that it was her signature in the declaration portion of her PIF. When asked about the FMLN membership, the Applicant said she was never involved with them, had no role in the organization, and that she had no opinion on the events which occurred in El Salvador while the FMLN was a terrorist organization. The Applicant also said she had not seen combat and did not know what the FMLN was fighting for, though she knew that the current President of El Salvador was a member of the FMLN. The Applicant told the Officer that what she said to him was the complete truth.

[18] The Officer wrote to the Applicant again on August 16, 2011 (the "Refusal Letter"). In this letter, he told her that it appeared she was inadmissible under paragraph 34(1)(f) of the Act because

of her involvement with the FMLN. The Officer wrote that he had considered the information in her application along with the results of her interview. The Officer refused the Applicant's permanent residence application on the grounds of inadmissibility described under paragraph 34(1)(f) of the Act.

2. The impugned decision

[19] The decision in this case consists of the Refusal Letter and the Officer's memorandum to the Intelligence Directorate of the CBSA's Enforcement Branch.

[20] The Officer briefly reviewed the Applicant's immigration history. He then reviewed the documents that had been sent to the Applicant with the Fairness Letter, as well as sections 33 and 34 of the Act. The Officer informed himself regarding the test for inadmissibility under paragraph 34(1)(f) of the Act. He said that he needed to have reasonable grounds to believe that the Applicant was a member of a group that there are reasonable grounds to believe engaged, engages, or will engage in acts of terrorism. He noted that, although the test involves a subjective assessment, it requires objective evidence.

[21] The Officer also reviewed the legal definitions of "terrorism" and "member." He noted that the Supreme Court of Canada defined terrorism in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 at para 98 as follows:

> [Any] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

[22] The Federal Court of Appeal reviewed the notion of membership in *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] FCR 487, and said that, based in part on the availability of an exemption from the operation of paragraph 34(1)(f) in appropriate circumstances under subsection 34(2) of the Act, "the term 'member' under the Act should continue to be interpreted broadly" (at paragraph 29).

[23] As for the FMLN, the Officer found that it was a Marxist-Leninist group that was founded in 1980 with the goal of overthrowing the El Salvadoran government. The FMLN had used violence in its attempt to achieve its goal and had destroyed a suspension bridge, attacked El Salvador's electricity infrastructure, and detonated a bomb in a market in San Salvador which killed nine civilians and two soldiers. The Officer concluded that, although the FMLN had become an official political party, he was satisfied that there were reasonable grounds to believe it was an organization that has engaged in acts of terrorism.

[24] Having determined that the FMLN was a terrorist organization, the Officer examined the Applicant's ties to the group. In her PIF, she made several statements that suggested her involvement to the Officer.

[25] The Officer also noted that the Applicant had not indicated that she was a member of the FMLN in the H&C forms she completed in 2011. He further noted her denial at the interview of the statements made in her PIF, her statement that Renato had completed the PIF on her behalf, and the fact that she had confirmed the declaration at the bottom of the PIF. The Officer noted that the

Applicant said she had become aware of the PIF content at a hearing in 2009 and that she had not read it until a week prior to the interview because her English was poor.

[26] At the interview, the Officer also asked the Applicant why, if her PIF was not true, she had said at the port of entry that she was an FMLN member. She answered that Renato had told her what to say and that Renato told her to lie, as this was a sure way to get into Canada. When confronted at the interview with the statements from her PIF, she said she did not support the FMLN cause, did not know any FMLN members, and had not collected information on behalf of the FMLN. She also denied participating in propaganda activities, sheltering guerillas, or receiving weapons training. When asked why she left El Salvador, the Applicant said she left to obtain a better education for her daughters.

[27] The Officer noted that the Applicant did not dispute that the FMLN was a terrorist organization, though she denied involvement with the group. He found that she was downplaying her role in FMLN because she learned that it would be an obstacle to obtaining status in Canada. The Officer found that it was not reasonable to believe that she first learned of the contents of her PIF in 2009. He found that the statements she made in her PIF about being a member of FMLN were true in light of similar statements made previously at the port of entry.

[28] The Officer found that the Applicant, by her own admission, was a member of FMLN for fifteen years. During that time, she had attended meetings, collected information about the FMLN's opposition, organized strikes, circulated propaganda, and received weapons training. The Officer found that these activities met the threshold for membership as they were more than casual in

nature. The fact that she had received weapons training suggested that she knowingly put herself in danger through her support of the FMLN.

[29] The Officer found that the Applicant had joined the FMLN of her own free will and would have been aware of the group's violent activities. On all the facts before him, the Officer was satisfied that the Applicant was a member of the FMLN. The Officer denied the Applicant's permanent residence application on that basis.

3. The issues

[30] This application for judicial review raises the following three issues:

i) Did the Officer err by failing to adequately consider all of the evidence?

ii) Did the Officer err procedurally by failing to consult with the National Security Division prior to rendering his decision?

iii) Did the Officer err procedurally by failing to exercise his discretion to refer the matter to a delegated authority to assess whether, on humanitarian and compassionate grounds, the Applicant should be exempted from the inadmissibility determination?

4. Analysis

Preliminary issue

[31] Before addressing the substantive issues raised by this application, a word must be said about the motion for non-disclosure brought by the Respondent pursuant to section 87 of IRPA. The CTR was filed with this Court on January 4, 2012. The cover letter accompanying the CTR indicated that certain pages or portions thereof had not been disclosed on the grounds that disclosure

would be injurious to national security or to the safety of any person, or on the grounds that the information consisted of third-party information unrelated to this case. By letter dated January 26, 2012, the Respondent forwarded another letter to this Court and to the parties, advising that certain pages that had previously been redacted in their entirety were now being fully disclosed. In addition, one page was modified so that certain portions of the page were no longer black-lined.

[32] In support of the motion for non-disclosure of information, the Respondent presented to this Court a classified affidavit that included the information which the Respondent does not want disclosed to the public or to the Applicant and her counsel. Having carefully reviewed that affidavit and the information redacted, and having heard the Respondent in an *in camera* hearing held on March 22, 2012, I indicated that the motion for non-disclosure would be granted, for the following reasons.

[33] First of all, the information redacted is not substantial and does not prejudice the Applicant in making her case. Moreover, that information is not material to the issues raised on the application for judicial review and the Respondent does not rely on the confidential information for the purpose of responding to the Applicant's application for judicial review. Finally, counsel for the Applicant consented to the Respondent's motion.

[34] Secondly, I am satisfied that the disclosure of the redacted information could have a detrimental effect on the ability of investigative agencies to fulfil their mandates in relation to Canada's national security. If released, that information would be injurious to the national security

of Canada or endanger the safety of persons. Therefore, it ought not be disclosed to the public or to the Applicant and her counsel.

Standard of review

[35] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[36] In *Naeem v Canada (Minister of Citizenship and Immigration)*, 2007 FC 123, [2007] 4 FCR 658, Justice Eleanor Dawson held at paragraph 40 that the standard of review on an admissibility decision under section 34 of the Act was reasonableness *simpliciter*. Justice Frederick Gibson made a similar finding in *Naeem v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1375, [2008] FCJ no 750, at paragraph 19. Further, Justice Anne Mactavish held at paragraph 35 of *Hagos v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1214, [2011] FCJ no 1484, that the standard of review on an admissibility finding under section 34 was reasonableness. Accordingly, the standard of review on the first issue is reasonableness.

[37] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable

outcomes which are defensible in respect of the facts and law" (see *Dunsmuir*, above, at para 47, and *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 SCR 339 at para 59). Put another way, the Court should intervene only if the decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[38] On the second and third issues, Justice Judith Snider held in *Zaki v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1066, [2005] FCJ no 1314 at para 14, that the fettering of discretion is an issue of procedural fairness. Justice Richard Mosley made a similar finding in *Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2007] 1 FCR 107 at para 133. Finally, the Federal Court of Appeal held in *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 FCR 385 at para 33, that the standard of review with respect to fettering of discretion is correctness. The standard of review on these issues, therefore, is correctness.

i) Did the Officer err by failing to adequately consider all of the evidence?

[39] The Applicant does not take issue with the finding by the Officer that the FMLN is/was a terrorist organization. The Applicant only takes issue with the finding by the Officer that she was a member of the FMLN.

[40] The Applicant argues that the Officer did not examine all the evidence which was before him when he concluded that she was inadmissible under paragraph 34(1)(f) of IRPA. According to the Applicant, the only time she said she was an FMLN member was in her PIF, which Renato

completed for her. She made no mention of the FMLN in her 2005 application for permanent residence, her 2008 H&C Application, or the supplementary H&C Application form she submitted in 2011. While this would tend to show that she was not trying to minimize her involvement with the FMLN in order to gain status in Canada, and that she was consistent since at least 2008 in asserting that she did not know the contents of her PIF, this is inconsistent with the statements made by the Applicant at the port of entry.

[41] The Applicant also contended, however, that the Officer did not consider the abusive nature of the Applicant's relationship with Renato. This would explain why the Applicant signed her PIF without knowing its contents, blindly trusted his advice and followed his advice in answering the questions at the port of entry as she did.

[42] After carefully reviewing the file and considering the oral and written submissions from both counsel, I find that the Applicant has failed to demonstrate that the Officer ignored any evidence or improperly considered the evidence when he assessed the credibility of the Applicant's assertion that she was not a member of the FMLN. She clearly indicated that she had been a member of the FMLN when she answered questions set out in the Schedule 1 Form at the port of entry. Renato was not present when she completed this form. The entire form was interpreted for her. The Officer found it difficult to believe her story that she could have no idea of the contents of her PIF given that she had made similar statements at the port of entry.

[43] Her explanation that she was unaware that her husband had said she was a member of the FMLN until she became apprised of the content of her PIF in 2009, does not address the fact that at

the port of entry she claimed to be a member of the FMLN. She cannot claim that she did not know about this statement, as she made it in the presence of an interpreter. I agree with the Respondent that the Officer's reliance upon this noted contradiction is reasonable and well within the range of possible, acceptable outcomes which are defensible in respect of the facts and of the law.

[44] I also agree with the Respondent that the Applicant's abusive relationship with Renato is immaterial to the Officer's findings and is not relevant to the credibility of her explanation that she did not know what was written in her PIF. The abusive relationship cannot explain the fact that she must have known about her claim of membership in the FMLN even prior to completing the PIF since this was the statement she made at the port of entry while she was assisted by an interpreter.

[45] If the Applicant's assertion that she was coached into misrepresenting her role with the FMLN to obtain refugee status in Canada were to be accepted, questions arise as to why the Applicant persisted in misrepresenting herself to the Respondent, even after having separated from her husband in 2004. If she had truly been coached, one might have expected the Applicant to take steps to rectify her prior fraudulent representations in subsequent applications or correspondence. The fact that she made no such attempt and made no express mention of her membership in the FMLN in her 2005 permanent residence application or in any subsequent forms or correspondence with CIC undermines the credibility of this claim.

[46] With these considerations in mind, it was reasonable for the Officer to conclude that the Applicant lacked credibility and modified her story so as to secure a status in Canada. The Officer

made a reasonable decision when he rejected her explanation for not disavowing membership sooner, and it was open to him to disbelieve her later disavowal of that membership.

ii) Did the Officer err procedurally by failing to consult with the National Security Division prior to rendering his decision?

[47] The Applicant alleges that the Officer, though not bound to follow Operational Manuals, acted in a manner contrary to section 5 of *ENF 2/OP 18: Evaluating Inadmissibility* by failing to consult with the CBSA's National Security Division prior to deciding on her inadmissibility. According to the Applicant, this has the double implication that the Officer did not apply the law in a consistent manner, carry out his duties "with prudence" or establish his reasons "with the utmost clarity" (see *Daud v Canada (Minister of Citizenship and Immigration)*, 2008 FC 701, [2008] FCJ no 913 at para 8).

[48] As the Applicant herself conceded, it is trite law that policy guidelines are not legally binding on immigration officers. The policy itself states that officers "should not" refuse an application based on subsection 34(1) allegations without first consulting the CBSA's National Security Screening Division. It is true that the opening paragraph of section 5 of that Operational Manual states that "[s]hould CIC officers encounter security issues, they must seek guidance from the appropriate section of the National Security Division at the CBSA, NHQ." In the case at bar, however, the facts did not require the Officer to consult with the National Security Division as the Applicant had clearly admitted on at least two occasions to being a member of the FMLN, which,

incidentally, she concedes to be an organization that has engaged in terrorism. Any request for guidance in those circumstances would have been superfluous.

iii) Did the Officer err procedurally by failing to exercise his discretion to refer the matter to a delegated authority to assess whether, on humanitarian and compassionate grounds, the Applicant should be exempted from the inadmissibility determination?

[49] Counsel for the Applicant submitted that the Officer erred because he fettered his discretion by not considering, on his own initiative, an H&C exemption from paragraph 34(1)(f) of IRPA. In support of this conclusion, the Applicant points to the fact that the Officer does not address any H&C factors such as, for example, the best interests of the child or establishment in Canada. Once again, I must disagree with the Applicant.

[50] When, as in the case herein, the Applicant has not made a specific request to be exempted from an inadmissibility finding, the decision to consider H&C grounds for exemption from the inadmissibility determination is wholly discretionary. Applicants remain responsible for requesting such an exemption, as is made clear by sections 5.25 and 5.27 of the CIC Operational Bulletin *IP 5 – Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds*, which state as follows:

> 5.25
> […]
> If the applicant did not specifically request an exemption and the inadmissibility was discovered during the application process, the officer can refuse the application.
> […]
>
> 5.27

> […]
> When the applicant does not directly request an exemption, but facts in the application suggest that they are requesting an exemption for the inadmissibility, **officers should treat the application as if the exemption has been requested**. [Emphasis in the original]
> […]

[51] Counsel for the Applicant relied on my decision in *Rogers v Canada (Minister of Citizenship and Immigration)*, 2009 FC 26, 339 FTR 191 [*Rogers*], for the proposition that the Officer erred by failing to consider exempting the Applicant on H&C grounds from her inadmissibility. The Applicant's reliance on *Rogers*, however, ignores an important statement that I made at paragraph 41 of that case:

> The respondent is no doubt correct in stating that no breach of procedural fairness is established on the mere basis that the immigration officer did not put the applicant's case forward for consideration for an exemption on his own initiative. Although the Bulletin contemplates situations in which an immigration officer may consider putting an applicant's case forward for an exemption in the absence of a request from an applicant, it cannot mandate an officer to do so.

[52] Moreover, *Rogers* was fact specific and can easily be distinguished from the present one. In *Rogers*, the applicant was self-represented and he filled out an application for permanent residence that contained no information on presenting an H&C claim. It is in that context that the Court concluded that the Officer should have considered whether there were sufficient grounds to grant an exemption.

[53] In the case at bar, on the other hand, the Applicant had the benefit of both legal counsel and new permanent residence application forms that instruct applicants that they must clearly indicate that they wish to be considered for an exemption to overcome an inadmissibility, thus bringing the

form in line with the CIC Operational Bulletin *IP 5*. As a result, the Officer was not required to consider an H&C exemption without a proper request. Not only has the Applicant never explicitly requested an exemption from an inadmissibility finding, but she never even implicitly alluded to that possibility. The Applicant knew that the basis of the interview in 2011 was to consider whether she was inadmissible. She could have made a request for an exemption; however, she did not do so, choosing instead to go to great lengths to convince the Officer that she was never at any given time a member of the FMLN. In those circumstances, the Officer cannot be faulted for not having considered that possibility.

[54] In light of all the foregoing reasons, I find that this application for judicial review ought to be dismissed. Of course, the Applicant is still entitled to make an application for ministerial relief under subsection 34(2) of IRPA.

JUDGMENT

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

No question was proposed for certification, and none arises.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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