Hassanzadeh v. Canada (Minister of Citizenship and Immigration), 2005 FC 902 (CanLII)

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IMM-201-05

2005 FC 902

Ahmad Hassanzadeh (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

Indexed as: Hassanzadeh v. Canada (Minister of Citizenship and Immigration) (F.C.)

Federal Court, Mosley J.--Vancouver, June 14; Ottawa, June 24, 2005.

Citizenship and Immigration -- Exclusion and Removal -- Inadmissible Persons -- Judicial review of Immigration and Refugee Board, Immigration Division's refusal to adjourn admissibility hearing pending applicant's Immigration and Refugee Protection Act (IRPA), s. 34(2) ministerial relief application -- Applicant unsuccessful refugee claimant whose subsequent permanent residence application on humanitarian, compassionate grounds approved in principle in 1997 -- Now subject of report alleging inadmissibility on grounds of national security under IRPA, s. 34(1)(f) -- Applicant filing request for ministerial relief, seeking adjournment of admissibility hearing pending outcome of request -- Contrary to former Immigration Act, no restriction in statutory language as to when Minister's discretion can be exercised -- In most instances, preferable evidence presented, fact-finding conducted by Board before discretionary relief application considered -- Application dismissed.

This was an application for judicial review of the refusal by the Immigration Division of the Immigration and Refugee Board to adjourn the applicant's admissibility hearing pending the outcome of his application for ministerial relief.

In 1997 the applicant, an Iranian citizen whose refugee claim had been dismissed in 1993, submitted an application for permanent residence on humanitarian and compassionate grounds, which was approved in principle but has yet to be completed. In 2004, the respondent issued a report alleging that the applicant was inadmissible on grounds of national security under paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act* (IRPA). An admissibility hearing was scheduled, and the applicant filed the above-mentioned request for relief under subsection 34(2). The issue was whether the Board had the jurisdiction to refuse to adjourn the admissibility hearing proceedings.

Held, the application should be dismissed.

Unlike the former *Immigration Act*, language indicating that Parliament intended that the Minister's exemption decision should be made prior to a determination by the Board as to inadmissibility does not appear in section 34

of IRPA. This conclusion is supported by *Poshteh v. Canada (Minister of Citizenship and Immigration)*, in which the F.C.A. held that there is no longer any restriction in the statutory language as to when the Minister's discretion can be exercised. Although there may be exceptional reasons for seeking an exemption prior to an inadmissibility decision, in most instances, it would be preferable for the evidence to be presented and the fact-finding to be conducted by the Board before the Minister considers an application for discretionary relief.

statutes and regulations judicially

considered

Immigration Act, R.S.C., 1985, c. I-2 , ss. 19(1)(*l*) (as am. by S.C. 1992, c. 49, s. 11), 27(2.1) (as enacted *idem*, s. 16), (4) (as am. *idem*).

Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 27(3), 37(1)(*b*).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 34, 44, 48.

Immigration and Refugee Protection Regulations, SOR/2002-227 , s. 209.

Immigration Regulations, Part I, SOR/62-36 , s. 3D (as enacted by SOR/73-20 , s. 2), 3G (as enacted *idem*).

cases judicially considered

applied:

Poshteh v. Canada (Minister of Citizenship and Immigration) 2005 FCA 121 (CanLII), (2005), 332 N.R. 374; 2005 FCA 121.

considered:

Ramawad v. Minister of Manpower and Immigration, [1978] 2 S.C.R. 375; (1997), 81 D.L.R. (3d) 687; 18 N.R. 69; *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Prassad v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 131 (S.C.C.), [1989] 1 S.C.R. 560; (1989), 57 D.L.R. (4th) 663; [1989] 3 W.W.R. 289; 36 Admin. L.R. 72; 7 Imm. L.R. (2d) 253; 93 N.R. 81; *Canada (Minister of Citizenship and Immigration) v. Adam*, 2001 CanLII 22027 (F.C.A.), [2001] 2 F.C. 337; (2001), 196 D.L.R. (4th) 495; 11 Imm. L.R. (3d) 296; 266 N.R. 92 (C.A.); *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1174 (CanLII), [2005] 1 F.C.R. 485; (2004), 42 Imm. L.R. (3d) 237; 2004 FC 1174.

referred to:

Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Poshteh v. Canada (Minister of Citizenship and Immigration)* 2005 FCA 85 (CanLII), (2005), 331 N.R. 129; 2005 FCA 85; *Davies v. Canada (Attorney General)* 2005 FCA 41 (CanLII), (2005), 330 N.R. 283; 2005 FCA 41.

authors cited

Immigration Manual: Inland Processing (IP). Chapter IP 10: Refusal of National Security Cases/Processing of National Interest Requests. Ottawa: Citizenship and Immigration Canada.

APPLICATION for judicial review of the refusal by the Immigration Division of the Immigration and Refugee Board to adjourn a hearing into whether the applicant was inadmissible on grounds of national security under paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, pending the outcome of his application for ministerial relief under subsection 34(2) of the Act. Application dismissed.

appearances:

Adrian D. Huzel for applicant.

Helen C. H. Park for respondent.

solicitors of record:

Embarkation Law Group, Vancouver, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order and order rendered in English by

[1]Mosley J.: The question in this application for judicial review is whether an inadmissibility hearing must be adjourned where an application for ministerial relief is pending.

[2]The applicant, Mr. Hassanzadeh, is an Iranian citizen who arrived in Canada in September 1993 and submitted a refugee claim. The claim was denied on the ground that he had status in Austria equivalent to nationality that would allow him to live in that country. In December 1996 he married a South Korean national. They submitted an application for permanent residence on humanitarian and compassionate [H & C] grounds in April 1997 and were advised in September of that year that the application was approved in principle. Eight years later the application has yet to be completed.

[3]On June 2, 2004, the Minister issued a report under under subsection 44(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) alleging that the applicant was inadmissible on grounds of national security under paragraph 34(1)(*f*) and an inadmissibility hearing was then scheduled for February 7, 2005 by the Immigration Division of the Immigration and Refugee Board (the Board).

[4]Paragraphs 34(1)(*a*), (*b*), (*c*) and (*f*) read as follows:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(*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;

(*b*) engaging in or instigating the subversion by force of any government;

(*c*) engaging in terrorism;

. . .

(*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*).

[5]Mr. Hassanzadeh filed a request for relief under IRPA subsection 34(2) with the respondent Minister. The request was subsequently forwarded to the Minister of Public Safety and Emergency Preparedness, as such requests are now under her jurisdiction.

[6]Subsection 34(2) states:

34. (1) . . .

(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.

[7]On December 9, 2004, the applicant requested an indefinite postponement of the inadmissibility hearing because of the pending subsection 34(2) request. Submissions were filed for and against an adjournment. The request was denied on December 29, 2004. The inadmissibility hearing did not proceed on February 7, 2005 due to the unavailability of the Minister's counsel and has been set down for rescheduling.

Argument

[8]The applicant argues that the Board lacks jurisdiction to proceed with a subsection 34(1) inadmissibility determination where a subsection 34(2) application has been filed with the Minister. Thus, the Board erred in refusing to postpone the hearing indefinitely pending the Minister's decision.

[9]In his written submissions, the applicant also took issue with the Board's reasons for the decision and alleged failure to take into account the long delay in processing the H & C application but those issues were abandoned at the hearing. I do not need to consider whether the decision to refuse the adjournment meets the standard of reasonableness that the content of a procedural decision would otherwise require: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1992] 2 S.C.R. 817. The sole issue before me, therefore, is whether the Board had the jurisdiction to refuse to adjourn the proceedings.

[10]The applicant cites four decisions that arose under the former Immigration Acts: *Ramawad v. Minister of Manpower and Immigration*, [1978] 2 S.C.R. 375; *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Prassad v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 131 (S.C.C.), [1989] 1 S.C.R. 560 and *Canada (Minister of Citizenship and Immigration) v. Adam*, 2001 CanLII 22027 (F.C.A.), [2001] 2 F.C. 337 (C.A.).

[11]In *Ramawad*, Pratte J. found that the authority of a special inquiry officer to withhold an employment visa and deport the applicant under paragraph 3D(2)(*b*) of the *Immigration Regulations, Part I* [SOR/62-36 (as enacted by SOR/73-20 , s. 2)] was suspended by paragraph 3G(*d*) [as enacted *idem*] which permitted the Minister to make a discretionary determination on exemption from paragraph 3D(2)(*b*) because of special circumstances. The officer's inquiry had to be adjourned until that determination was made.

[12]*Ramawad* was applied by Justice Reed of the Federal Court Trial Division in *Qi* to an analogous provision of the former Act [*Immigration Act*, R.S.C., 1985, c. I-2], subsection 27(4) [as am. by S.C. 1992, c. 49, s. 16]. Reed J. found that the inquiry officer had a duty to adjourn an inquiry and potential deportation order concerning an overstayed visitor's visa pending the exercise of the Deputy Minister's discretion to grant an exemption under subsection 27(2.1) [as enacted *idem*].

[13]In *Prassad*, an appellant who had been deported from Canada and returned without obtaining ministerial consent made an application for a Minister's permit to authorize her stay under paragraph 37(1)(*b*) of the former Act [*Immigration Act, 1976*, S.C. 1976-77, c. 52]. A deportation order was issued before the ministerial decision had been rendered. The Supreme Court distinguished *Ramawad*, holding that the Minister's permit under paragraph 37(1)(*b*) was a separate and alternative remedy, rather than one specifically tied to the deportation proceedings under subsection 27(3). Thus nothing in the scheme of the Act required the adjudicator to adjourn the proceedings.

[14]The applicant argues that the provisions at issue in these proceedings are analogous to those considered by the Supreme Court in *Ramawad* and by the Federal Court in *Qi* and distinguishable from the separate and alternative remedy dealt with in *Prassad*.

[15]In *Adam*, the Federal Court of Appeal determined that once a finding of inadmissibility was made under paragraph 19(1)(*l*) [as am. by S.C. 1992, c. 49, s. 11) of the former Act [R.S.C., 1985, c. I-2], a ministerial exemption, under the same provision, was no longer available to the applicant. Mr. Hassanzadeh submits that *Adam* stands for the proposition that a request for an exemption is a condition precedent to a determination of inadmissibility.

[16]The applicant argues that there are a number of factors that support this position. First, as a matter of policy, it would be a waste of the resources of the Board to convene a hearing on the question of inadmissibility if the Minister could overrule it later. Second, a finding of inadmissibility would be prejudicial to the applicant when there may be other considerations that militate in favour of an exemption. The determination would remain in place notwithstanding a positive decision by the Minister: *Ali v. Canada (Minister of Citizenship and Immigration)*, [2005] 1 F.C.R. 485 (F.C.).

[17]Further prejudice to the applicant would arise from the fact that should the Board find him to be inadmissible his work permit would be rendered invalid, pending a decision on his application for relief: IRPA section 48 and

section 209 of the *Immigration and Refugee Protection Regulations* [SOR/2002-227]. IRPA is silent as to what should be done with someone who is awaiting the exercise of ministerial discretion. Finally, the applicant fears losing the H & C approval that he and his wife received in principle. No prejudice to the respondent arises from delaying the proceedings. The timing of a ministerial decision on the exemption request is entirely under the control of the respondent.

[18]The respondent submits that a decision whether or not to adjourn a proceeding is an interlocutory matter entirely within the discretion of the Board: *Prassad*. The Board has a statutory duty to hold a hearing when a section 44 report has been filed. The Minister's exemption authority under subsection 34(2) is not integral to the Board's decision under subsection 34(1). An adequate alternative remedy is open to the applicant if the hearing proceeds and results in a negative decision. The applicant may then seek judicial review of the decision: *Ali*.

[19]It is reasonable, the respondent contends, for the Minister to wait for the outcome of the inadmissibility hearing under subsection 34(1). That proceeding will allow for an independent determination of the facts based on the evidence, in an adversarial setting. There is no explicit language in section 34 requiring an adjournment to be granted when an application for ministerial relief is filed.

[20]With respect to the effect of an adverse determination pending the outcome of the Minister's decision, the respondent points to the terms of Chapter IP-10 [Refusal of National Security Cases/Processing National Interest Requests] of its *Immigration Manual: Inland Processing (IP)* indicating that any final decision on an application for permanent residence and any enforcement action on a removal order should be suspended until the application for relief is decided.

Analysis

[21]Neither party made submissions on the standard of review to be applied in these proceedings. On a pragmatic and functional analysis, jurisdiction is commonly found to be a question of law requiring the standard of correctness: *Poshteh v. Canada (Minister of Citizenship and Immigration)* (2005), 331 N.R. 129 (F.C.A.); *Davies v. Canada (Attorney General)* (2005), 330 N.R. 283 (F.C.A.).

[22]The applicant's argument rests essentially on the premise that a decision by the Minister under subsection 34(2) is an integral part of the inadmissibility determination under subsection 34(1). The Minister is empowered to conclude that the grounds in subsection 34(1) "do not constitute inadmissibility" if the Minister finds that the applicant does not pose a threat to the national interest. Under paragraph 19(1)(*l*) of the former Act, the conclusion that a ministerial exemption had to be resolved before the visa officer's decision was supported by the presence of the words "have satisfied" in the excepting language, as was found by the Federal Court of Appeal in *Adam*.

[23]Those words or any other language indicating that Parliament intended that the Minister's exemption decision should be made prior to a determination by the Board as to inadmissibility do not appear in IRPA section 34.

[24]The Federal Court of Appeal recently had occasion to consider whether *Adam* governs the interpretation of subsection 34(2) in *Poshteh v. Canada (Minister of Citizenship and Immigration)* (2005), 332 N.R. 374. The Minister had sought reconsideration of a prior decision of the Court ((2005), 331 N.R. 129) on the ground that a statement in that decision was inconsistent with *Adam*, as it indicated that the applicant could try to satisfy the Minister that his presence in Canada was not detrimental to the national interest following an inadmissibility hearing.

[25]On the motion for reconsideration, the Court of Appeal found that there was no longer any restriction in the statutory language as to when the Minister's discretion could be exercised. At paragraph 10 the Court stated:

There is simply no temporal aspect to subsection 34(2). Nothing in subsection 34(2) appears to fetter the discretion of the Minister as to when he might grant a ministerial exemption. Because the decision in *Adam* was based on a different tense of verbs in a different provision, *Adam* is not authority for the interpretation the Minister places on subsection 34(2).

[26]The applicant argues that the Court of Appeal did not decide the procedural issue. He says that he is entitled to an answer from the Minister before he gets the Board's decision. The Court should not assume that the Minister

will arrive at a negative decision.

[27]Justice Mactavish, in *Ali*, held that a subsection 34(1) finding is a separate and discrete determination of inadmissibility and is not tied to the exercise of the Minister's discretion under subsection 34(2). At paragraphs 42 and 43 she arrived at the following conclusions:

A subsection 34(2) inquiry is directed at a different issue to that contemplated by subsection 34(1). The issue for the Minister under subsection 34(2) is not the soundness of the officer's determination that there are reasonable grounds for believing that an a pplicant is a member of a terrorist organization--that determination will have already been made. Rather, the Minister is mandated to consider whether, notwithstanding the applicant's membership in a terrorist organization, it would be detrimental to the na tional interest to allow the applicant to stay in Canada.

In other words, subsection 34(2) empowers the Minister to grant exceptional relief, in the face of a finding that has already been made by the immigration officer.

[28]I agree with Justice Mactavish that a subsection 34(2) exemption decision would normally follow a determination of inadmissibility under subsection 34(1); however, that is not mandated by the statute. There may be exceptional reasons for seeking an exemption prior to an inadmissibility decision. In most instances, it would be preferable for the evidence to be presented and the fact-finding to be conducted by the Board before the Minister considers an application for discretionary relief.

[29]While recognizing that there would be adverse effects of a determination of inadmissibility that might be avoided by a positive ministerial decision, I find nothing procedurally unfair in having the Board's determination precede the Minister's consideration of the exemption request.

[30]The application is therefore dismissed. Mr. Hassanzadeh is not entitled to have a decision from the Minister before the Immigration Division holds his admissibility hearing or makes a ruling on his admissibility.

[31]The applicant has proposed the following question for certification:

Does the Immigration Division have jurisdiction to find that a permanent resident or foreign national is inadmissible on security grounds under section 34 of the *Immigration and Refugee Protection Act* where an application for Ministerial relief under subsection 34(2) is outstanding?

[32]The respondent opposes certification of a question relating to the interpretation of section 34 but has offered an alternative version of the applicant's question for the Court's consideration.

Is the Immigration Division required to adjourn every admissibility hearing indefinitely and until such time as an application for Ministerial relief that has been submitted is determined?

[33]The Court of Appeal's decision on the reconsideration motion in *Poshteh*, is, in my view, determinative of the question that the applicant wishes to have certified and I decline, therefore, to certify it.

ORDER

THIS COURT ORDERS that this application is dismissed and no question is certified.