Ali v. Canada (Minister of Citizenship and Immigration) (F.C.), 2004 FC 1174 (CanLII)

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IMM-5086-03

2004 FC 1174

Syed Zahid Ali (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

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

Federal Court, Mactavish J.--Toronto, July 15; Ottawa, August 26, 2004.

Citizenship and Immigration -- Exclusion and Removal -- Inadmissible Persons -- Applicant Convention refugee, citizen of Pakistan, MQM Altaf faction member -- Denies faction terrorist -- Application for judicial review of immigration officer's IRPA, s. 34(1) decision no further consideration of landing application because applicant member of organization that there are reasonable grounds to believe engages in terrorism -- S. 34(2) request for ministerial relief outstanding -- Preliminary objection by MCI: currently no "decision" capable of review -- Upon consideration of statutory scheme, preliminary objection denied -- Roles of officer, Minister different -- Applicant prejudiced if must await Minister's decision -- Whether officer's decision final or interlocutory -- Favourable decision by MCI not rendering instant application moot -- Ministerial relief process not adequate alternate remedy -- Standard required for s. 34(1) inadmissibility finding -- Case law, statutory definitions of "terrorism" -- Shortcomings of officer's reasons -- Duty of fairness breached by failure to observe request to know documentation relied on by officer.

This was an application for judicial review of an immigration officer's decision that a landing application would not be considered in that the officer had reasonable grounds to believe applicant was a member of the terrorist organization Mohajir Qaumi Movement (MQM). While applicant admitted to membership in MQM's Altaf faction, he denied that this faction is involved in terrorism and said that the officer failed to identify any particular terrorist acts committed by MQM-A. His argument was that the duty of fairness was breached by non-disclosure of the evidence relied upon by the officer. Applicant has also sought ministerial relief under IRPA, subsection 34(2), asserting that his presence here would not be contrary to the national interest. A preliminary objection was advanced for the Minister: since applicant's ministerial relief application is still pending, there has not been a final admissibility determination and accordingly no "decision" open to judicial review.

The applicant is a citizen of Pakistan who was found to be a Convention refugee in 1999. But after he applied for permanent resident status, CSIS indicated its desire to interview him prior to a decision being made on the landing

application. The matter of concern was his association with MQM in Pakistan. Later, the immigration officer wrote to applicant, advising that the "CIC possesses information indicating that you are inadmissible to Canada pursuant to sub-paragraph 34(1) of the Act".

The issues were: (1) whether the determination of an immigration officer under subsection 34(1) that there are reasonable grounds to believe that an applicant is a member of a terrorist organization is a judicially reviewable decision when an application for ministerial relief is outstanding; (2) whether the officer provided proper reasons for concluding that MQM-A is a terrorist organization; (3) whether there was a breach of the duty of fairness.

To deal with the preliminary objection, it was necessary to consider the statutory scheme, in particular sections 33 and 34. Reference had also to be made to subsection 6(3), which makes it clear that the Minister possesses a discretion, which may not be delegated, to grant an exemption based on national interest. The Minister submitted that it was open to applicant to argue that the MQM-A is not a terrorist organization and that the officer's conclusions on that could be revisited by the Minister. And if an applicant should be dissatisfied with the Minister's subsection 34(2) decision, judicial review could then be sought. Applicant's position was that he would suffer prejudice if required to await the ministerial relief decision because he cannot bring his wife to Canada as long as his own immigration status remains in question. His relief application has been oustanding for more than a year. He would be further prejudiced in being unable to challenge the officer's underlying findings. Applicant suggested that the officer's determination, that he belonged to a terrorist organization, is final and not interlocutory. Applicant pointed to the section 44 "Report on Inadmissiblity", prepared by the officer on the very day of their interview, as evidence that a final determination has been made on a substantive issue. While the Court will not normally judicially review interlocutory administrative decisions, it will, in "special circumstances" exercise its jurisdiction.

Held, the application should be granted and the matter remitted for redetermination by a different immigration officer.

(1) It was appropriate for the Federal Court to entertain an application for judicial review of an officer's decision nowithstanding that an application for ministerial relief under subsection 34(2) was pending. Although a final admissibility determination will not be made until the ministerial relief application is disposed of, it did not necessarily follow that the officer's subsection 34(1) determination was interlocutory in nature. The Minister's role under subsection 34(2) is not to revisit the officer's subsection 34(1) determination of terrorist organization membership but rather to consider whether--given such membership--it would be detrimental to the national interest for that person to remain here. So the officer's decision did dispose of a substantive issue. It was a finding of inadmissibility, subject to a grant of exceptional relief by the Minister. This conclusion found support in the fact that the officer considered it appropriate to prepare a section 44 report confirming her opinion that the applicant was inadmissible. The Court was not persuaded that a grant of ministerial relief would render this application moot. Even though it would permit applicant to remain, it would still leave the finding of terrorist organization membership which might have serious ramifications for applicant's future.

The ministerial relief process does not constitute an adequate alternate remedy since it does not involve an examination of the original decision's soundness and it was for this reason that this Court's decision--affirmed by the Federal Court of Appeal--in *Fast v. Canada (Minister of Citizenship and Immigration)*, could be distinguished. There was yet another problem. Should applicant seek judicial review of the decisions of both the officer and the Minister, he might be faced with rule 302 and an argument that he was attempting to review two different decisions upon a single application for judicial review. This application should, therefore, be entertained.

(2) An inadmissibility finding under subsection 34(1) has to be based on something more than a flimsy suspicion, though it need not meet the civil standard of a balance of probabilities. Also, the officer must follow the definition of "terrorism" adopted in *Suresh v. Canada (Minister of Citizenship and Immigration)*, the *Anti-terrorism Act* and the *Criminal Code*, subsection 83.01 definitions of "terrorist activity" and "terrorist group". The officer concluded that applicant belonged to a terrorist organization but it was impossible to discern how she defined "terrorism". It has been held that any departure from the *Suresh* definition constitutes reviewable error. The impugned reasons were insufficient to allow the Court to determine whether the term had been correctly defined. Again, the officer failed to identify any specific act carried out by MQM-A that would meet the definition of "terrorism" in *Suresh*. In providing no explanation for the finding that there were reasonable grounds to believe that the MQM-A is a

terrorist organization, she fell into reviewable error.

(3) The Court found as a fact that a specific request had been made at the interview for a copy of the documentary evidence relied upon by the officer as to MQM activities but that request was not complied with. The question was whether, in the circumstances, fairness required that applicant be fully apprised of the case he had to meet. This was not a case involving generic, publicly available information on country conditions but rather specific information relied upon in arriving at an exclusion finding. IRPA, section 34 proceedings should not be reduced to a guessing game in which an applicant has to figure out on his own what information is being used against him. The officer's failure to identify the I.R.B. report relied upon amounted to reviewable error.

The matter should be remitted for redetermination and the following question certified as one of general importance: "Is a determination under subsection 34(1) of the *Immigration and Refugee Protection Act*, a judicially reviewable decision if an application for Ministerial relief under subsection 34(2) is outstanding and no decision has been made on the application for landing?"

statutes and regulations judicially

considered

Anti-terrorism Act, S.C. 2001, c. 41.

Criminal Code, R.S.C., 1985, c. C-46 , s. 83.01(1) "terrorist activity" (as enacted by S.C. 2001, c. 41, s. 4), "terrorist group" (as enacted *idem*).

Federal Court Rules, 1998, SOR/98-106, r. 302.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 6(3), 33, 34, 44(1).

cases judicially considered

applied:

Canadian Pacific Ltd. v. Matsqui Indian Band, 1995 CanLII 145 (S.C.C.), [1995] 1 S.C.R. 3; (1995), 122 D.L.R. (4th) 129; 26 Admin. L.R. (2d) 1; [1995] 2 C.N.L.R. 92; 177 N.R. 325; *Alemu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 997 (CanLII), 2004 FC 997; [2004] F.C.J. No. 1210 (F.C.) (QL); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1; *Fuentes v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 379 (CanLII), [2003] 4 F.C. 249; (2003), 231 F.T.R. 172; 28 Imm. L.R. (3d) 172 (T.D.).

distinguished:

Fast v. Canada (Minister of Citizenship and Immigration), 2000 CanLII 17155 (F.C.), [2001] 1 F.C. 257; (2000), 24 Admin. L.R. (3d) 74; 186 F.T.R. 16; 7 Imm. L.R. (3d) 40 (T.D.); affd 2001 FCA 368 (CanLII), (2001), 41 Admin. L.R. (3d) 200; 288 N.R. 8 (F.C.A.); *Mancia v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9066 (F.C.A.), [1998] 3 F.C. 461; (1998), 161 D.L.R. (4th) 488; 45 Imm. L.R. (2d) 131; 226 N.R. 134 (C.A.).

considered:

Zündel v. Canada (Human Rights Commission), 2000 CanLII 17138 (F.C.A.), [2000] 4 F.C. 255; (2000), 25 Admin. L.R. (3d) 135; 256 N.R. 125 (C.A.).

referred to:

Szczecka v. Canada (Minister of Employment and Immigration) reflex, (1993), 116 D.L.R. (4th) 333; 25 Imm. L.R. (2d) 70; 170 N.R. 58 (F.C.A.); *Pfeiffer v. Canada (Superintendent of Bankruptcy)*, 1996 CanLII 4059 (F.C.), [1996] 3 F.C. 584; 116 F.T.R. 173 (T.D.); *Froom v. Canada (Minister of Justice)*, 2003 FC 1299 (CanLII), [2004]

2 F.C.R. 154; (2003), 8 Admin. L.R. (4th) 1; 242 F.T.R. 1 (F.C.).

authors cited

D. J. M. Brown and J. M. Evans. *Judicial Review of Administrative Action in Canada*, looseleaf. Toronto: Canvasback Publishing, 1998.

APPLICATION for judicial review of immigration officer's decision she had reasonable grounds to believe a permanent residence applicant belonged to a terrorist organization and accordingly his application could not go forward. Application allowed, matter remitted for redetermination and question certified.

appearances:

Krassina Kostadinov for applicant.

Mary Matthews for respondent.

solicitors of record:

Waldman & Associates, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

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

[1]Mactavish J.: Syed Zahid Ali is a Convention refugee from Pakistan, who is trying to obtain permanent resident status in Canada. An immigration officer determined that she had reasonable grounds to believe that Mr. Ali is a member of a terrorist organization, that is, the Mohajir Qaumi Movement (MQM). In accordance with the provisions of paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act* [S.C. 2001, c. 27] (IRPA), the officer then notified Mr. Ali that his application for landing would not be considered further. Mr. Ali was also advised that he had the option of seeking ministerial relief in order to allow his application to continue to be processed.

[2]Mr. Ali admits that he is a member of the Altaf faction of the MQM. He does not, however, agree that the Altaf faction (also known as the MQM-A), is engaged in terrorism. Accordingly, he seeks to judicially review the finding of the immigration officer in this regard, contending that the officer erred in failing to properly identify any specific acts of terrorism that the MQM-A is alleged to have committed. Mr. Ali also argues that the officer breached the duty of fairness owed to him by failing to disclose the evidence that she relied upon to support her finding that the MQM-A is a terrorist organization.

[3]Mr. Ali has also applied for ministerial relief, in accordance with subsection 34(2) of IRPA, asserting that his presence in Canada would not be contrary to the national interest.

[4]The respondent contends that the documentary evidence before the immigration officer clearly shows that the MQM-A is a terrorist organization. Mr. Ali was made aware of the concerns regarding his application for permanent residence, and was afforded ample opportunity to address these concerns. As a result there has been no denial of natural justice.

[5]As a preliminary matter, the respondent submits that as long as the request for ministerial relief is pending, no final determination has been made with respect to Mr. Ali's admissibility. As a consequence, there is currently no "decision" that may properly be subject to an application for judicial review.

Background

[6]Mr. Ali is a citizen of Pakistan. In 1999, he was found to be a Convention refugee, and in April 2000, he applied for permanent resident status. Six months later, the Canadian Security Intelligence Service informed Citizenship and Immigration Canada (CIC) that it wished to interview Mr. Ali prior to a decision being rendered in connection with his application for landing. This interview took place in early 2001.

[7]Mr. Ali was then asked by CIC to provide additional proof of his identity, which he did. After receiving this information, CIC scheduled an interview with Mr. Ali in order to discuss his association with the MQM. He was advised that his application for landing may be refused, as it appeared that he might be inadmissible on security grounds because of his association with the MQM in Pakistan.

[8]Mr. Ali was interviewed on May 28, 2003, in the presence of his counsel. That same day, the immigration officer prepared a report under subsection 44(1) of IRPA, indicating that she had reasonable grounds to believe that Mr. Ali was inadmissible on security grounds. It does not appear, however, that this report was ever transmitted to the Minister.

[9]On June 19, 2003, the officer sent Mr. Ali a letter advising him that: "CIC possesses information indicating that you are inadmissible to Canada pursuant to sub-paragraph 34(1) of the *Immigration and Refugee Protection Act* of Canada." After referring to the text of paragraph 34(1)(*f*), which refers to organizations which are engaged or will engage in acts of terrorism, the letter goes on to say: "There are reasonable grounds to believe that you are a member of the Mohajir Qaumi Movement (MQM)."

[10]As a result of this finding, the immigration officer advised Mr. Ali that "[T]here will be no further consideration of your application for permanent residence in Canada. However, it was understood . . . that you would like to request ministerial `relief' which, if granted would allow your case to continue to be processed for permanent residence." Mr. Ali was asked to confirm this understanding by signing and returning a "Request to seek the Opinion of the Minister".

[11]The June 19, 2003 letter advises Mr. Ali that, in considering his request for relief, the Minister would consider:

. . . whether granting you permanent residence to Canada would be contrary to the national interest to Canada. This will require an assessment of the detriment that you pose to the national interest of Canada as well as any humanitarian and compassionate circumstances pertinent to your situation (*sic* throughout).

[12]Mr. Ali filed his application for ministerial relief on July 17, 2003. This request is still outstanding. He also filed an application for leave and for judicial review, challenging the officer's finding under paragraph 34(1)(*f*) of IRPA. The respondent initially defended the application on the basis that the immigration officer's June 19 letter constituted a "decision". This position changed, however, shortly before the hearing, when counsel became aware that an application for ministerial relief was pending.

[13]The respondent now argues that no final decision has been made with respect to Mr. Ali's application for permanent residence, and that, as a result, there is currently no "decision" that may properly be subject to judicial review.

Issues

[14]There are three issues before the Court. The first is the preliminary question of whether the determination of an immigration officer under subsection 34(1) of IRPA that there are reasonable grounds to believe that an applicant is a member of a terrorist organization is a judicially reviewable decision when an application for ministerial relief is outstanding.

[15]In the event that I find that the officer's decision is properly reviewable, the issue then arises as to whether the officer provided proper reasons for her conclusion that the MQM-A is a terrorist organization. I must also decide whether the officer breached the duty of fairness owed by her to Mr. Ali by failing to identify the evidence that she was intending to rely upon in arriving at her conclusion that the MQM-A is a terrorist organization. I will deal with each of these issues in turn, beginning with the preliminary question of whether the officer's decision is properly reviewable.

The Statutory Scheme

[16]In order to determine whether a reviewable decision has been made with respect to Mr. Ali's application for permanent residence, it is necessary to have regard to the statutory scheme in issue. The relevant sections of IRPA

are sections 33 and 34, which provide:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

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;

(*d*) being a danger to the security of Canada;

(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(*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*).

(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.

[17]Regard must also be had to subsection 6(3) of IRPA, which makes it clear that the discretion to grant an exemption based on national interest under subsection 34(2) is one that vests exclusively in the Minister, and may not be delegated.

Is the Immigration Officer's Finding Under Subsection 34(1) a Reviewable Decision?

The Respondent's Position

[18]The respondent acknowledges that a determination by an immigration officer that an individual is a member of a terrorist organization can properly be the subject of an application for judicial review, where the applicant chooses not to avail him or herself of the option of seeking ministerial relief pursuant to subsection 34(2). Indeed, I am advised by counsel for the respondent that where an applicant is dissatisfied with the findings of an immigration officer under subsection 34(1), the normal course is to immediately seek judicial review of those findings. The respondent does not suggest that there is anything wrong with this practice, and I am advised that applications to review findings made under subsection 34(1) of IRPA are regularly dealt with by this Court.

[19]This case is unusual, counsel says, as Mr. Ali has elected to seek ministerial relief, while, at the same time seeking to judicially review the immigration officer's findings under subsection 34(1). According to the respondent, as long as the request for ministerial relief is outstanding, the issue of whether or not Mr. Ali is admissible has not been finally determined, and the application for judicial review is premature.

[20]Although the focus of an application for ministerial relief under subsection 34(2) is usually on the role of the applicant within the organization in question, the respondent submits that it is nonetheless open to Mr. Ali to continue to argue before the Minister that the MQM-A is not a terrorist organization. It is further open to the Minister to revisit the conclusions of the immigration officer in this regard.

[21]In support of this argument, counsel points to a document which is allegedly provided to individuals who have been found inadmissible under subsection 34(1), and who may be interested in seeking ministerial relief. This document advises that applicants' submissions should focus on a number of issues, including the purpose of the organization, the individual's role within the organization, the nature and extent of the individual's activities within the organization, and whether these activities involved violence. Information is also requested regarding the timing of the individual's membership in the organization in question, and the individual's current attitude regarding the

organization. Applicants are advised that the Minister will also consider the reason why the individual is immigrating to Canada, and any "special circumstances" surrounding the application. Applicants are also asked to describe any current activities that they are involved in such as employment, education and involvement in the community, and to provide information regarding their family situation, as well as any other information the applicant considers relevant. It should be noted that Mr. Ali denies ever receiving this document, although it is referred to in the June 19, 2003 letter.

[22]If an applicant is dissatisfied with the decision of the Minister under subsection 34(2), the respondent says that it is always open to the applicant to seek judicial review at that point in the proceedings. An application for judicial review initiated after the issue of admissibility has been finally determined can challenge the findings of the Minister under subsection 34(2) and, as well, can challenge the earlier findings of the immigration officer under subsection 34(1).

[23]Finally, the respondent argues that there is no prejudice to Mr. Ali in making him wait until the issue of his admissibility has been finally determined.

Mr. Ali's Position

[24]Mr. Ali submits that he will indeed be prejudiced if he is required to wait until the Minister deals with his request for ministerial relief, pointing out that he wants to bring his wife to Canada, and that as long as his immigration status is in question, he is precluded from doing so. His application for ministerial relief has been outstanding for over a year, Mr. Ali says, and there is no indication when a decision from the Minister might be forthcoming. The fact that he continues to be separated from a loved one amounts to very real prejudice.

[25]Mr. Ali asserts that he will be further prejudiced if he is required to wait until the Minister deals with his request for relief under subsection 34(2), as he says that he would then be unable to challenge the underlying findings of the immigration officer made under subsection 34(1) of IRPA.

[26]Mr. Ali also disputes that the decision of the immigration officer is interlocutory in nature. What he seeks to challenge is the final decision of the immigration officer determining that he is a member of a terrorist organization.

[27]According to Mr. Ali, in deciding whether to exercise the discretion conferred by subsection 34(2), the Minister will not revisit the finding that he is a member of a terrorist organization. Rather, the Minister will consider whether or not Mr. Ali's continued presence in Canada would be detrimental to the national interest.

[28]Finally, although the immigration officer's affidavit indicates that she would only prepare a section 44 "Report on Inadmissibility" once a determination has been made with respect to Mr. Ali's request for ministerial relief, Mr. Ali points out that the officer prepared just such a report the same day that she interviewed him. This is evidence, Mr. Ali says, that a final determination has been made on a substantive issue.

The Applicable Legal Principles

[29]In order to avoid a multiplicity of proceedings, and to ensure that administrative proceedings are not derailed by applications to judicially review preliminary or interlocutory decisions, the Court will ordinarily decline to exercise its jurisdiction with respect to a decision that does not finally determine the substantive rights of the individual in question, where an adequate alternate remedy is available later: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998), at paragraph 2-69.

[30]As the Court of Appeal pointed out in *Zündel v. Canada (Human Rights Commission)*, 2000 CanLII 17138 (F.C.A.), [2000] 4 F.C. 255, the rationale for this rule is that a complaining party may be successful in the end result, rendering the application for judicial review of an interlocutory decision totally unnecessary. Further, the delays and expenses associated with such applications can bring the administration of justice into disrepute.

[31]This principle is not absolute, however, and judicial review of an interlocutory decision may proceed where

"special circumstances" exist: *Szczecka v. Canada (Minister of Employment and Immigration)* reflex, (1993), 116 D.L.R. (4th) 333 (F.C.A.).

[32]"Special circumstances" have been found to exist where, for example, the jurisdiction of the Tribunal is in issue: *Pfeiffer v. Canada (Superintendent of Bankruptcy)*, 1996 CanLII 4059 (F.C.), [1996] 3 F.C. 584 (T.D.).

[33]A determination of the availability of an adequate alternate remedy "engages issues of both statutory interpretation and a consideration of the appropriate circumstances under which the Court should decline to exercise its discretion to entertain an application for judicial review because of the existence of an adequate alternate remedy": *Froom v. Canada (Minister of Justice)*, [2004] 2 F.C.R. 154 (F.C.), at paragraph 52.

[34]As the Supreme Court of Canada noted in *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (S.C.C.), [1995] 1 S.C.R. 3, a variety of factors should be considered in determining whether it is appropriate to engage in judicial review, or whether an applicant should be compelled to avail him or herself of the alternate available remedy. These factors include the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body. The list is not an exhaustive one, and it is for the courts to identify and balance the relevant factors in specific situations.

[35]An adequate alternate remedy was found to exist where the review process allowed the initial decision to be examined as to its soundness: *Fast v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17155 (F.C.), [2001] 1 F.C. 257 (T.D.), affd 2001 FCA 368 (CanLII), (2001), 41 Admin. L.R. (3d) 200 (F.C.A.).

[36]With this understanding of the applicable legal principles, I turn now to the application of these principles to the facts of this case.

Analysis

[37]Having carefully considered the positions advanced by each of the parties, I have concluded that judicial review should lie from the decision of an immigration officer made pursuant to subsection 34(1) of IRPA. In my view, it is appropriate for the Federal Court to entertain an application for judicial review of an officer's decision, notwithstanding that an application for ministerial relief under subsection 34(2) is pending.

[38]In coming to this conclusion, I have considered whether the immigration officer's determination is interlocutory in nature, and, as well, whether the avenue of ministerial relief constitutes an adequate alternate remedy. Each of these issues will be addressed in turn.

Is the Finding of the Immigration Officer under Subsection 34(1) an Interlocutory One?

[39]It is true that section 34 deals with the overall question of admissibility to Canada, and that no final determination with respect to Mr. Ali's admissibility will have been made until such time as his application for ministerial relief is finally disposed of. That said, it does not necessarily follow that the determination by the immigration officer pursuant to subsection 34(1) that there are reasonable grounds to believe that Mr. Ali is a member of a terrorist organization is interlocutory in nature.

[40]There are two components to section 34 of IRPA. When read in conjunction with section 33, subsection 34(1) contemplates a determination being made by an immigration officer as to whether, amongst other things, there are reasonable grounds for believing that an applicant is a member of a terrorist organization.

[41]Subsection 34(2) contemplates that a different decision maker--that is the Minister herself--consider whether the continued presence in Canada of a foreign national such as Mr. Ali would be detrimental to the national interest.

[42]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 applicant 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 national interest to allow the applicant to stay in Canada.

[43]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.

[44]As a result, I am satisfied that the decision of the immigration officer in issue here did dispose of a substantive issue raised on Mr. Ali's application for permanent residence--that is, whether there are reasonable grounds to believe that he is a member of a terrorist organization. This is not a preliminary or interlocutory step in the process. It is a finding of inadmissibility, subject to the grant of exceptional relief based upon a consideration of the national interest.

[45]This view is supported by the fact that once the May 28, 2003 interview with Mr. Ali was completed, the immigration officer felt it appropriate to prepare a section 44 report confirming her opinion that Mr. Ali was inadmissible.

[46]I am also not persuaded that a positive finding by the Minister in relation to Mr. Ali's request for ministerial relief would have the effect of rendering this application unnecessary or moot. A finding by the Minister under subsection 34(2) that Mr. Ali's continued presence in Canada would not be detrimental to the national interest would allow Mr. Ali to be granted permanent residence, which is, after all, what he is seeking. However, Mr. Ali would still be left with the finding that there are reasonable grounds for believing that he is a member of a terrorist organization. This is a very serious finding, and one which may well have ramifications for Mr. Ali in the future.

Can an Application for ministerial Relief Provide an Adequate Alternate Remedy?

[47]The respondent submits that while a decision made by an immigration officer under subsection 34(1) is properly the subject of an application for judicial review where the applicant elects not to seek ministerial relief under subsection 34(2), it is not judicially reviewable when such an application is outstanding, because the ministerial relief process provides the applicant with an adequate alternate remedy.

[48]I confess to being troubled by this argument. It seems to me that the avenue of ministerial relief either provides an applicant with an adequate alternate remedy or it does not. If it does, then applicants should be compelled to seek such relief prior to coming to the Federal Court on judicial review. If, on the other hand, it does not provide applicants with an adequate alternate remedy, then the fact that an application for relief under subsection 34(2) is outstanding should not operate to preclude judicial review of the findings under subsection 34(1).

[49]In other words, the choice made by an applicant as to whether or not to avail himself of the procedure under subsection 34(2) should not affect the characterization of an application for ministerial relief as an adequate alternate remedy or not.

[50]The ministerial relief process does not, in my view, constitute an adequate alternate remedy for Mr. Ali. As noted above, in exercising the jurisdiction conferred on her by subsection 34(2), the Minister is not reviewing the soundness of the decision of the immigration officer under subsection 34(1). Instead, the Minister exercises a separate and distinct statutory function, considering the impact that the continued presence of an applicant in Canada would have for the national interest. In this regard, the facts of this case are distinguishable from those in *Fast*.

[51]There is a further difficulty that I see with the respondent's position. The respondent says that if Mr. Ali is dissatisfied with the decision of the Minister under subsection 34(2) of IRPA, it would be open to him to seek judicial review at that point in the proceedings, with respect to both the decision of the Minister, and the decision of the immigration officer. However, if Mr. Ali were to attempt to review the findings of the immigration officer at the same time that he sought judicial review of the decision of the Minister not to grant relief pursuant to subsection 34(2), he would potentially run afoul of rule 302 of the *Federal Court Rules, 1998* [SOR/98-106]. That is, it could be argued that Mr. Ali was seeking to review two decisions, made by two different individuals, in a single application for judicial review.

[52]As a result, I am not persuaded that the ministerial relief route provides an adequate alternate forum in which Mr. Ali can challenge the finding of the immigration officer that there are reasonable grounds to believe that he is a member of a terrorist organization. It is therefore appropriate to entertain Mr. Ali's application for judicial review.

Failure to Link the MQM-A to Acts of Terrorism

[53]The officer's reasons consist of her notes of her interview with Mr. Ali. In the interview, Mr. Ali admitted membership in the MQM-A, but asserted that, unlike the MQM-H, the MQM-A was a peaceful political party, one which focussed on the needs of the poor in Pakistan. Mr. Ali claimed that the organization did not believe in violence, and that he had never heard any discussions of violent activities within the group. Had he been aware that the MQM-A was engaging in violent activities, Mr. Ali says, he never would have become involved in the organization, as he is a peaceful person.

[54]Mr. Ali asserts that the immigration officer erred in finding that the MQM-A is an organization which there are reasonable grounds to believe has engaged, is engaging or will engage in acts of terrorism, by failing to provide proper reasons for her conclusion. The officer failed to provide any analysis to support her conclusion that the MQM-A is a terrorist organization. In particular, she failed to identify any specific acts that the MQM-A is alleged to have committed in order to justify her finding that it is a terrorist organization.

[55]The respondent submits that it cannot be logically argued that Mr. Ali was not aware of the violent activities of the MQM-A, as he admits to being a member, and was attending and organizing meetings of the organization. Further, Mr. Ali was confronted with information during the interview that suggests that the MQM is a violent organization. Mr. Ali did not deny that these events occurred, saying simply that he was not aware of them. According to the respondent, Mr. Ali's professed belief that the MQM-A is a peaceful organization is simply not consistent with the documentary evidence.

[56]Further, the respondent says, the suggestion that the immigration officer failed to provide adequate reasons is unfounded. According to the respondent, the decision of the immigration officer clearly discloses that Mr. Ali was found to be a member of an organization for which there are reasonable grounds to believe is or was engaged in terrorism.

[57]In order to make a finding of inadmissibility under subsection 34(1) of IRPA, an immigration officer must have "reasonable grounds to believe" that an applicant is, amongst other possibilities, a member of an organization that is engaged in terrorism. The standard of proof required to establish "reasonable grounds" is: "more than a flimsy suspicion, but less than the civil balance of probabilities": *Alemu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 997 (CanLII), 2004 FC 997; [2004] F.C.J. No. 1210 (F.C.) (QL), at paragraph 26.

[58]Further, in order to arrive at a finding under paragraph 34(1)(*f*), the immigration officer would have to have regard to the definition of "terrorism" provided in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, at paragraph 98, where the Court stated that:

. . . "terrorism" . . . includes 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".

Reference may also be had to the *Anti-terrorism Act*, S.C. 2001, c. 41, and the definitions of "terrorist activity" and "terrorist group" contained in subsection 83.01(1) [as enacted by S.C. 2001, c. 41, s. 4] of the *Criminal Code*, R.S.C., 1985, c. C-46.

[59]In this case, a review of the immigration officer's notes discloses that Mr. Ali admitted his ongoing involvement with the MQM-A. However, he maintained throughout the interview that to the best of his knowledge the MQM-A was a peaceful political party engaged in good works for the benefit of the poor in Pakistan.

[60]Midway through the interview, the officer's notes record that she "Read excerpt from Int'l Human Rights re

violence by MQM(A)", following which the officer asked Mr. Ali for his comments. It is not clear from the notes what document the officer was referring to. However, the officer's affidavit identifies the document as a paper prepared by the Research Directorate of the Immigration and Refugee Board relating to the activities of the MQM in Pakistan between January 1995 and April 1996. There is no indication in either the officer's notes, or in her affidavit as to which extracts from the paper were read to Mr. Ali. According to the officer's notes, Mr. Ali responded by asserting that the MQM never believed in violence.

[61]The officer later stated that "It's stated MQM involved in violence & used terrorist tactics to keep control over Karachi--violence peaked 95/98 your thoughts on that", to which Mr. Ali reportedly responded "As long as I was in Pakis[tan], none of these things happened, we were the victims."

[62]Although there is no analysis or finding contained in the officer's notes, her June 19, 2003 letter reflects a finding that she had reasonable grounds to believe that Mr. Ali was a member of a terrorist organization. In my view, this conclusion cannot stand.

[63]First, there is no indication in either the officer's notes, or in her letter, as to what she means when she says that Mr. Ali is a member of an organization that is engaged in "terrorism", as it is impossible to discern how the officer defines the term. It is clear that a departure from the *Suresh* definition of terrorism by a decision maker constitutes a reviewable error: *Fuentes v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 379 (CanLII), [2003] 4 F.C. 249 (T.D.). The reasons of the officer in this case are simply insufficient to allow the Court to determine whether the term has been properly defined in this case.

[64]There are additional problems with the officer's decision. The immigration officer's reasons make specific reference to Mr. Ali's admission that he was, and still is, a member of the MQM-A. As such, there is a clearly articulated explanation for the officer's finding of membership in the organization. However, I am concerned about the failure of the officer to identify any specific acts carried out by the MQM-A that would meet the *Suresh* definition of "terrorism", or to provide any analysis of that evidence. There is also a question as to the sufficiency of the evidence supporting the officer's conclusion.

[65]In argument, counsel for the respondent pointed to various extracts from the Immigration and Refugee Board document as support for the proposition that the MQM-A is a terrorist organization. There was indeed evidence before the officer that would support the conclusion that the MQM generally, and the MQM-H in particular, were engaged in acts of terrorism. However, in the case of the MQM-A, the evidence is much more limited, and is largely confined to violent acts carried out by MQM-A members against members of the rival MQM-H organization.

[66]The IRB report clearly recognizes that the MQM is comprised of two factions: the MQM-A and the MQM-H. While certain acts of terrorism are clearly attributed to the MQM-H, most of the report does not distinguish between the two groups, referring only to actions carried out by "MQM activists", "MQM workers", or "MQM militants".

[67]As Justice Layden-Stevenson observed in *Alemu*, at paragraph 41:

An exclusion finding is extremely significant to an applicant. Caution must be exercised to ensure such findings are properly made. The court will not substitute its opinion for that of the decision-maker when the analysis and basis for the decision are reasonable. That is not the situation here. A finding of exclusion must provide some basis for the determination regarding the nature of the group. . . . Failure [to do so] . . . yields a result that falls [far] short of being reasonable.

[68]In this case, the officer's reasons do not provide an adequate basis for her finding that there are reasonable grounds to believe that the MQM-A is a group engaged in terrorist activities. In particular, there is no analysis of the IRB report, and no identification of which activities on the part of the MQM-A the officer considers to be terrorist in nature. In my view, in light of the seriousness of the finding in issue and its consequences for Mr. Ali, it was incumbent on the officer to provide some explanation for her finding that there are reasonable grounds to believe that the MQM-A is a terrorist organization. Her failure to do so constitutes a reviewable error.

Failure to Disclose the Evidence Relied upon by the Immigration Officer

[69]Although it appears from the record that there may have been other documents before the officer that have not been disclosed, both parties focussed their attention exclusively on the question of whether there was any obligation on the part of the respondent to disclose the Immigration and Refugee Board report. As a result, I shall confine my analysis to this issue.

[70]Mr. Ali asserts that the immigration officer breached the duty of fairness by failing to provide him with a copy of the IRB report relied upon by the officer with respect to the activities of the MQM-A. According to Mr. Ali's affidavit, at the conclusion of the May 28, 2003 interview, his counsel asked the immigration officer what information she was relying on with respect to the allegation that the MQM was engaged in terrorism. The officer reportedly responded that she was relying on information that she had obtained over the Internet.

[71]Mr. Ali deposes that his counsel then asked for a copy of this material. Counsel also asked for the opportunity to present submissions in response with respect to the MQM organization. However, Mr. Ali's counsel was never provided with the requested information, nor was she provided with an opportunity to make submissions with respect to the nature of the MQM organization.

[72]Although there is no reference to this discussion in the immigration officer's notes, the officer does not dispute that a discussion took place at the interview with respect to the document in question. The officer has submitted an affidavit, sworn some six months after the interview, in which she deposes that "At the end of the interview Ms. Kostadinov asked me what evidence I would be relying on to make my decision. I indicated that I had accessed information from the Internet." The officer goes on to state "I had reviewed information from the Research Directorate, Documentation and Research Branch, IRB Ottawa." She then identifies the IRB paper, which is attached as an exhibit to her affidavit.

[73]According to the immigration officer "If the Applicant or his Counsel had requested a copy of the documents I relied upon regarding the MQM, I would have provided them with a copy or a list of the documents and where they could find them." Thus, although the immigration officer does not expressly say so, it is implicit in her affidavit that no such request was forthcoming from counsel for Mr. Ali.

[74]With respect, this does not make sense. Both sides agree that Mr. Ali's counsel asked about the documentation that was being considered, and that the immigration officer advised that she was relying on information obtained over the Internet. Neither side suggests that the paper was ever identified by name, or that the information was specifically identified as emanating from the Immigration and Refugee Board. Even though the information in question is readily accessible through the Board's Web site, without knowing what she was looking for, counsel for Mr. Ali would have had no way of locating it.

[75]Common sense dictates that, at the very least, counsel for Mr. Ali would have asked for the name and source of the document in issue, so that she could obtain a copy. Otherwise, there would simply have been no point to her having asked about the document in the first place. As a result, I prefer the affidavit of Mr. Ali to that of the immigration officer and find that a specific request was made at the interview for a copy of the documentary evidence relied upon by the immigration officer with respect to the activities of the MQM.

[76]As a general rule, there is no duty on the respondent to disclose publicly available information with respect to conditions in other countries: *Mancia v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9066 (F.C.A.), [1998] 3 F.C. 461 (C.A.). Counsel for Mr. Ali submits that nevertheless, in cases such as this, where the effect of the finding of inadmissibility is to brand Mr. Ali as a member of a terrorist organization and thus to deny him permanent residence, fairness requires that he be fully apprised of the case that he has to meet.

[77]I think that a distinction can arguably be drawn between the situation contemplated in *Mancia*, where the Court of Appeal was concerned with generic information regarding country conditions in the context of what was then known as a Post-determination Refugee Claimants in Canada Class decision (PDRCCC), and the situation here, where the officer was relying on specific information in order to reach an exclusion finding. However, I do not need to decide whether there is a general duty on the part of an immigration officer to disclose publicly available documentary information in the context of a subsection 34(1) proceeding, as I am satisfied that in this case, there was a specific request from counsel for Mr. Ali for information regarding the documentation being

considered, and that no such information was provided prior to a decision being made by the immigration officer.

[78]Proceedings under section 34 of IRPA can have serious consequences for applicants and should not be reduced to a guessing game, where the applicant has to try to figure out on their own what information is being used against them.

[79]The failure of the immigration officer to identify the Immigration and Refugee Board report for Mr. Ali, in response to an express request from his counsel for such information, amounts to a reviewable error, and constitutes a further basis for setting aside the officer's decision.

Conclusion

[80]For the foregoing reasons, this application is allowed. The decision of the immigration officer is set aside, and the matter is remitted to a different immigration officer for redetermination.

Certification

[81]The respondent proposes the following question for certification:

Is a determination under subsection 34(1) of the *Immigration and Refugee Protection Act* a judicially reviewable decision if an application for ministerial relief under subsection 34(2) is outstanding and no decision has been made on the application for landing?

[82]In my view, this is a serious question of general importance--one which transcends the interests of the parties in this case. As a result, I am prepared to certify the question.

ORDER

THIS COURT ORDERS that:

1. This application is allowed. The decision of the immigration officer is set aside, and the matter is remitted to a different immigration officer for redetermination.

2. The following question is certified:

Is a determination under subsection 34(1) of the *Immigration and Refugee Protection Act* a judicially reviewable decision if an application for ministerial relief under subsection 34(2) is outstanding and no decision has been made on the application for landing?