Federal Court  Cour fédérale

Date: 20240426

Docket: IMM-9556-22

Citation: 2024 FC 645

2024 FC 645 (CanLII)

Toronto, Ontario, April 26, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

HONG CHENG ZHAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Hong Cheng Zhao [the Applicant], is a Chinese citizen who applied for permanent residence in Canada. An Officer of Immigration, Refugees and Citizenship Canada [the Officer] found the applicant inadmissible to Canada [the Decision]. The Officer's Decision was based on the Applicant's educational training at a Chinese military university and his membership in a unit of the People's Liberation Army that specializes in communications and signals

intelligence. The Officer concluded that there were reasonable grounds to believe that the Applicant had been involved in espionage that was either against Canada or contrary to Canada's interests.

[2] The Officer rendered the Decision using sources that were not disclosed in a procedural fairness letter that was issued to the Applicant. One of these sources not only contained information that purported to support a key finding of the Officer, but was information that was highly relevant to an important submission of the Applicant. The Applicant was denied the opportunity to respond to the information relied upon by the Officer. Accordingly, I am allowing this application for judicial review based on this failure of natural justice. Government disclosure and the corresponding right to respond remain basic tenants of natural justice that cannot be minimized in the interests of expediency.

II. The Legal Framework

[3] A foreign national is inadmissible to Canada on security grounds for reasons that include being a member of an organization for which there are reasonable grounds to believe engages in, has engaged in, or will engage in espionage that are either against Canada or contrary to Canada's interests (*Immigration and Refugee Protection Act*, SC 200, c 27, ss. 34(1)(a),(f) [*IRPA*]).

III. The Facts

[4] The Applicant was born on December 22, 1969, in Beijing. He is a citizen of China who studied between 1988 and 1992 at the People's Liberation Army [PLA] Information Engineering

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University [PLAIEU], China's military university. He obtained his bachelor's degree in "Computer and Communication".

[5] Beginning in July 1992, the Applicant served in a PLA military signals intelligence unit, unit MUCD 57481. His division reported to the Third Department of the Headquarters of the General Staff, known as the General Staff 3rd Department [3/PLA]. The 3/PLA is China's primary signals intelligence collection and analysis agency.

[6] On December 5, 2018, the Applicant applied for permanent residence under the family class in Canada.

[7] On January 4, 2022, a procedural fairness letter was sent to the Applicant advising him that the Officer had concerns relating to his inadmissibility to Canada pursuant to subsection 34(1)(f) of *IRPA* due to his membership in the 3/PLA.

[8] On February 20, 2022, the Applicant provided submissions and evidence through counsel to answer the procedural fairness letter, including a submission from outside legal counsel; a Military Officer Demobilization certificate issued on July 31, 1996; an education certificate and transcripts; and various supporting letters.

[9] In the Applicant's submissions to the Officer, he confirmed his education at the PLAIEU and his service with the 3/PLA, first as an Assistant Engineer and then in 1993, as a Specialized Technical Lieutenant until his demobilization on July 31, 1996. The Applicant described his duties

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as being limited to the basic maintenance and repair of computers and electronic telecommunication equipment for the 3/PLA, though he acknowledged that the main task of his unit at that time was to "listen to the shortwave radio communications of the military forces of the surrounding countries." The Applicant denied that the gathering of intelligence by the 3/PLA constituted espionage and argued that there was no evidence that the 3/PLA had any offensive mission against Canada during the time that the Applicant was a member.

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[10] The Officer found that the response to the procedural fairness letter did not alleviate the Officer's concerns that the Applicant has been a member of an organization that was engaged in espionage targeted at Canada and its allied nations for political, economic and military-related intelligence. Based on the following considerations, the Officer maintained his finding that there are reasonable grounds to believe that the Applicant is a member of an inadmissible class of persons described in subsection 34(1)(f) of *IRPA*:

i. the Applicant had confirmed his membership in the 3/PLA;

ii. the 3/PLA was an organization engaged in espionage at the time that the Applicant was a member;

iii. in carrying out his duties as an engineer for a unit within the 3/PLA which listened to communications of military forces in neighbouring countries, the Applicant knowingly participated and furthered the goals of the 3/PLA; and

iv. these acts of espionage were either against Canada or contrary to Canada's interests.

IV. Issues and Standard of Review

[11] The Applicant has raised issues of procedural fairness relating to the Officer's reliance on undisclosed documents as well as issues going to the reasonableness of the Decision. As will be

explained, given my finding that there was a breach of procedural fairness related to the non-disclosure of a source relied upon by the Officer, I do not consider it necessary for me to decide the issues going to the reasonableness of the Decision.

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[12] An allegation of procedural fairness is determined on a standard of correctness (*Canadian Pacific Railway Company v Canada (Attorney General*), 2018 FCA 69 at paras 37-56) which is a non-deferential standard of review (*NMS v Canada (Citizenship and Immigration)*, 2023 FC 391 at para 50). It has been recognized that in the context of inadmissibility decisions, an applicant is owed "a somewhat higher level of procedural fairness" given the issues at stake (*Krikor v Canada (Citizenship and Immigration)*, 2016 FC 458 at para 13 [*Krikor*]).

V. Analysis

[13] The Applicant argues that the Officer relied on extrinsic evidence, and that procedural fairness requires that prior notice be given to the Applicant to ensure that the Applicant had a fair opportunity to make a meaningful response to the Officer's concerns.

[14] The Applicant specifically points to the Officer's reliance on two documents that were not disclosed to him in the procedural fairness letter: (i) a website link: https://www.mandiant.com/sites/default/files/2021-09/mandiant-apt1-report.pdf [the *Mandiant* Report]; and (ii) a 450-page document, *Pollpeter, K and Allen, K. The PLA as an Organization v.2.0* [the *Pollpeter* Document].

[15] In its written submissions, the Respondent takes the position that the duty to disclose information in an inadmissibility decision is not absolute, and that the relevant question is not whether any particular *document* was provided, but whether the *information* in the document was disclosed to the Applicant (*Macaulay v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1458 at para 25 [*Macaulay*]). At the hearing, counsel for the Respondent acknowledged that the duty of disclosure includes more than just the disclosure of information; it includes the accompanying right to provide a meaningful response to the information (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22 [*Baker*]). Even so, the Respondent maintains that there was no breach of natural justice in this case since the Applicant knew the case he had to meet and the issues that he had to respond to.

[16] Considerations of procedural fairness do not occur in a vacuum. The nature of the duty of fairness is flexible and variable and is dependant on the circumstances. This requires an appreciation of the context of the non-disclosure and the rights affected (*Baker* at para 22). It is therefore necessary to look at how the Officer used the undisclosed sources in relation to the issues at stake and the Officer's findings on those issues. Only then, can it be determined whether the information contained in them was in fact previously and sufficiently disclosed (despite the fact that the document was not) and whether the Applicant had a meaningful opportunity to respond to the information (*Krikor* at para 17).

A. *Failure to disclose the Mandiant Report*

[17] This is how the Officer used the *Mandiant* Report in the Decision:

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> In response to the representative's analysis that there is no evidence that the larger organization of the 3PLA had any offensive mission against Canada, open source reporting shows that the 3/PLA “has systematically stolen hundreds of terabytes of data from at least 141 organizations” including organizations located in the United States, in Canada and in the United Kingdom (https://www.mandiant.com/sites/default/files/2021-09/mandiant-apt1-report.pdf).

[18] In other words, the *Mandiant* Report was used to support the Officer’s finding that the 3/PLA was engaged in offensive missions against Canadian organizations (and its allies).

[19] This information was available to the Applicant since one of the documents sent in the procedural fairness letter to the Applicant, referred to as “Project 2049”, which provided the same information. In fact, the Officer referred to Project 2049 in the Decision saying:

> According to Project 2049, one of 3/PLA's 12 bureaus is mandated to target “the United States and Canada, most likely focusing on political economic and military-related intelligence.” Project 2049 also states that 3/PLA “oversees a vast bureaucracy responsible for monitoring foreign communications, assuring the security of PLA computer and communications networks, and conducting cyber surveillance on priority targets around the world.

[20] The Applicant took the position in his response to the procedural fairness letter that there was “no evidence that the larger organization of 3PLA had any offensive mission against Canada” providing a link to a source for the proposition that the “key differentiator between 4PLA (China’s electronic warfare department) and 3PLA is 4PLA’s offensive mission.”

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[21] Thus, I find that the information contained in the *Mandiant* Report was provided to the Applicant in the procedural fairness letter, and the Applicant knew the case to meet and not only had the opportunity to respond to it, but did respond to it (*Macaulay* at para 29).

B. *Failure to Disclose the Pollpeter Document*

[22] The Officer cited the *Pollpeter* Document at page 6 of the Decision stating:

> According to credible sources, since its creation in the 1930s, the 3/PLA was responsible for collection of intelligence, translation and deciphering/encryption. The 3/PLA has since diversified its traditional signals intelligence (SIGINT) mission to include cyber surveillance / computer network exploitation. (Pollpeter, K and Allen, K. The PLA as an Organization v.2.0 p.148).

[23] The Officer used the *Pollpeter* Document for two purposes. The first purpose was to show that the 3/PLA was engaged in espionage by noting that the Applicant's military unit "was responsible for collection of intelligence, translation and deciphering/encryption". The second purpose was to support the position that the activities of the 3/PLA had not changed since its creation in the 1930s, though the sophistication of its methods had. It is this second use by the Officer that was problematic.

[24] It was a major point of disagreement between the Officer and the Applicant as to whether the Officer should limit his assessment of the Applicant's admissibility under subsection 34(1)(f) of *IRPA* to the activities of the 3/PLA only while he was a member (referred to as a temporal nexus requirement).

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[25] The Applicant took the position in his response to the procedural fairness letter, that the Officer erred in relying on evidence of espionage that post-dated his involvement in the 3/PLA. The Applicant argued that a temporal nexus is required in the subsection 34(1)(f) analysis, but that in any event, the authority of *El Werfalli v Canada (Minister of Citizenship and Immigration)* 2013 FC 612 [*El Werfalli*] governed the Applicant's case. In *El Werfalli*, the Court held that subsection 34(1)(f) has no application in circumstances where someone ceased being a member of an organization before the organization became engaged in the impugned activity (*El Werfalli* at para 93).

[26] The Officer took the position that there was no temporal element to subsection 34(1)(f), but that in any event, there was a continuity of surveillance activities by the 3/PLA against Canadian interests including while the Applicant was a member, the only difference being the use of increasingly sophisticated technologies over time. The Officer found that the 3/PLA had been conducting espionage continuously since the 1930s and held:

> "…it appears that the organization in question was involved in signals intelligence during applicant's tenure with the 3/PLA and continues to this day.
>
> …
>
> "It does not appear that the basic fundamentals of the organization (3/PLA) have changed since [the Applicant] was on active military duty, it has only become more technologically advanced."

[27] There are two reasons why the Officer's reliance on the *Pollpeter* Document was problematic in the context of this difference of opinion between the Officer and the Applicant.

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[28] First, there is no support in the Decision for the Officer's finding that the 3/PLA conducted espionage against Canada or its interests in the period 1988 to 1992 based on the documents that were properly disclosed. The only source cited by the Officer for this finding was the undisclosed *Pollpeter* Document.

[29] This meant that the Applicant was denied the opportunity to address the evidence supporting one of the Officer's key findings. At the hearing, counsel for the Applicant took the position that a careful review of the *Pollpeter* Document shows that it actually does not speak to the activities of the 3/PLA going back to the 1930s. Procedural fairness dictates that the Applicant should have been given the opportunity to make this argument before the Officer.

[30] The Officer's reliance on the undisclosed *Pollpeter* Document was also problematic by reason that the Officer did not respond to the Applicant's argument that his circumstances were governed by the *El Werfalli* authority. The Officer relied exclusively on the undisclosed evidence without addressing the Applicant's submission. This in itself constitutes a reviewable error (*Baker* at para 28; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 127). The inapplicability of the temporal nexus requirement considered in *El Werfalli* was directly relevant to the Officer's finding that the timing of the Applicant's membership in the 3/PLA was irrelevant since the organization had been engaged in espionage continuously since the 1930s. The Officer should have engaged with this core submission.

[31] Accordingly, I find that there was a breach of natural justice justifying this Court's intervention. The Applicant was unable to correct the prejudicial information figuring in the

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extrinsic document that the Officer heavily relied upon, and the Officer failed to address the Applicant's argument on *El Werfalli*. For that reason, the application for judicial review is allowed and the matter should be sent back to another officer for redetermination.

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[32] I note that the Applicant had also raised a further procedural fairness issue related to his application for permanent residency. In his response to the procedural fairness letter, the Applicant stated very clearly that if he was found inadmissible, he wished to be considered for a temporary resident permit to allow him to remain in Canada with his family while he applied for ministerial relief [the TRP Request]. The Officer did not act on the TRP Request.

[33] The Respondent conceded the failure to act on the TRP Request was a reviewable error under section 24 of *IRPA*. While I do not need to deal with this issue, I have noted the issue and the Respondent's concession in the hope that this type of error will not be repeated by officers going forward.

[34] Neither party requested that the Court certify a question for appeal and none arise.

JUDGMENT in IMM-9556-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted, the underlying decision is set aside and the matter is remitted to a different officer for redetermination.
2. There is no question to certify.

"Allyson Whyte Nowak"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9556-22
STYLE OF CAUSE:	HONG CHENG ZHAO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 22, 2024
JUDGMENT AND REASONS:	WHYTE NOWAK J.
DATED:	APRIL 26, 2024

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