Federal Court  Cour fédérale

**Date: 20160420**

**Docket: IMM-4543-15**

**Citation: 2016 FC 439**

**Ottawa, Ontario, April 20, 2016**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**DRAGISLAV MIROSAVLJEVIC**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The applicant, a Serbian national, is seeking an order setting aside an officer's decision to deny him a temporary resident visa [TRV] on the basis that he is inadmissible to Canada. The decision under review was made with respect to the third TRV application from this applicant.

**Background**

[2] In 2010, the applicant applied for a TRV in order to visit his daughter and her family. Shortly after receiving his application, an officer sent the applicant a procedural fairness letter, inviting him to respond to the officer's concern that, as a Lieutenant Colonel in the Yugoslav army, he was inadmissible under paragraph 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. That paragraph provides that:

> A foreign national is inadmissible on grounds of violating human or international rights for … being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*…"

[3] From February 28, 1998, to October 7, 2000, the governments of the Federal Republic of Yugoslavia and the Republic of Serbia were designated by the Minister for the purpose of paragraph 35(1)(b) of the Act.

[4] In response to the letter, the applicant provided submissions explaining his position in the Yugoslav army. He explained that, during the period when Yugoslavia and Serbia were designated governments, he served as the assistant to the director of a military hospital. In a subsequent oral interview, he admitted that "just by rank alone, as Lt Colonel, he was in the top half of the rank structure." However, he nonetheless maintained that "his position was not in the top half of the organization of the army in terms of the hierarchy of the organization of the army." Based on the information provided, the officer granted the applicant's application. She concluded that:

> I am satisfied that it is not reasonable to believe that applicant's position in the hierarchy of the Yugoslav army during the time in question was considered a senior position for the purpose of IRPR 16(e). Given applicant's description of the hierarchy and the superiors above him, his position was not in the top half of the hierarchy of the military organization and on top of that his responsibilities were also of not such a nature that would have implied significant influence on outcome of higher government decisions and policy.

[5] In 2011, the applicant applied for another TRV. His application was considered by the same officer who had granted his TRV application in 2010. However, this time, the officer denied his application. In her GCMS notes, the officer explains what changed between 2010 and 2011. She states that, in 2010, she accepted the applicant's submission that, even though his rank was in the top half of the military hierarchy, his influence over government power was such that he was not in the top half of that organization. In 2011, after consulting with the Canada Border Services Agency [CBSA] legal department, she reversed this position, and concluded that the fact that the applicant's rank was in the top half of the military hierarchy was sufficient to establish that he was in the top half of that organization. He therefore was a "senior member of the military" within the meaning of paragraph 16(e) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which prescribes "senior members of the military" as falling within paragraph 35(1)(b) of the Act as inadmissible persons. The officer concluded that:

> Given that the applicant himself admits to having had the rank of Lt Colonel in the Yugoslav army during the period of designation of the Yugoslav government and in the absence of having exact numbers for the make up of the Yugoslav army at the time, and applying the method of determining one's seniority in the organization by assessing the level of the rank held in relation to the rank hierarchy of the organization during the period of designation and determining whether the rank was in the top half – having established that the applicant's rank was in the top half of the rank hierarchy of the Yugoslav army of the time – it is reasonable to believe that applicant's position was senior and he is

> described in IRPR 16(e). Applicant is therefore inadmissible to Canada for IRPA 35(1)(b) IRPR 16(e).

[6] Before making her decision, the officer raised her concerns with the applicant during a phone conversation on June 27, 2011. During the call, the applicant provided detailed information about his position in the army. Prior to that call, a different officer had contacted the applicant on June 9, 2011, seeking information about the ranks and size of the Yugoslav army during the relevant period. The applicant told the officer that he did not know where to find this information, and could not provide it.

[7] In 2015, the applicant made his present application for a TRV. Once again, the applicant provided detailed information about his position in the Yugoslav army. He also made an application for Ministerial relief, pursuant to subsection 42.1(1) of the Act, to be considered in the event that he was found inadmissible.

[8] On August 11, 2015, the officer rejected the applicant's TRV application, and did not mention his application for Ministerial relief. The officer found that the applicant was "a member of an inadmissible class of persons described in the *Immigration and Refugee Protection Act*." In particular, the officer found that the applicant was inadmissible under paragraph 35(1)(b) of the Act, as a "prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*."

[9] On August 18, 2015, the officer provided additional reasons for his decision. After recounting the applicant's career in the Yugoslav army, the officer held that:

> You were refused a Temporary Resident Visa on August 12, 2011 as you were determined to be inadmissible pursuant to subsection 35(1)(b) of IRPA. You also enclosed a submission with this application dated February 11, 2015, in anticipation of a similar finding.
>
> In this submission, you contest our previous application of A35(1)(b) and R16(e) which states that "a prescribed senior official in the service of a government is a person who, by virtue of the position they held or was able to exert significant influence on the exercise of government power or was able to benefit from their position and includes senior members of the military."
>
> By virtue of the rank you held, that of Lieutenant Colonel, you fall within the top 50% of the military and therefore meet the definition of senior member of the military; you also benefited from the office according to persons holding this rank. By virtue of the senior rank you held, it is not necessary for us to establish that you were able to exert significant influence on the exercise of government power.
>
> Consequently, the information you provided does not mitigate my assessment that you are inadmissible pursuant to subsection 35(1)(b) of IRPA.

[10] The officer's decision was based, in part, on an inadmissibility report prepared by the CBSA. The report sets out two versions of the hierarchy of the Yugoslav army: one based on the International Encyclopedia of Uniform Insignia [Encyclopedia], and one based on the applicant's own evidence. These versions are not necessarily inconsistent: the former may reflect the official hierarchy across the army as a whole, while the latter may reflect that hierarchy as it worked in practice in the applicant's particular case. These versions are as follows:

| **Hierarchy in Encyclopedia** | **Hierarchy According to Applicant** |
|---|---|
| 1. Army General<br>2. Colonel General<br>3. Lieutenant General<br>4. Major General<br>5. Colonel<br>6. Lieutenant Colonel (**Applicant**)<br>7. Major<br>8. Captain (1st Class)<br>9. Captain<br>10. 1st Lieutenant<br>11. 2nd Lieutenant<br>12. Warrant Officer (1st Class)<br>13. Warrant Officer<br>14. Senior Sergeant (1st Class)<br>15. Senior Sergeant<br>16. Sergeant (1st Class)<br>17. Sergeant<br>18. Junior Sergeant<br>19. Corporal<br>20. Private (1st Class)<br>21. Private | 1. Minister of Defence<br>2. High Level General (in charge of sanitary headquarters department)<br>3. General (in charge of military academy)<br>4. Colonel (in charge of military hospital)<br>5. Lieutenant Colonel **(Applicant)**<br>6. 3 Lieutenant Colonels (one in charge of finance, one in charge of technical matters, and one in charge of administration)<br>7. 7. 142 civilian staff |

**Issues**

[11] The applicant raises two issues that require analysis.

1. Did the officer act unfairly by failing to provide the applicant with an opportunity to address his concerns?

2. Did the officer err in finding the applicant to be inadmissible pursuant to paragraph 35(1)(b) of the Act, and were the officer's reasons adequate?

[12] The parties and the Court agree that first issue is reviewable on a standard of correctness, while the second issue is reviewable on a standard of reasonableness.

[13] The applicant also raises the issue of whether the officer acted beyond his jurisdiction by terminating the applicant's application for ministerial relief. However, in light of the officer's affidavit evidence that this application was not terminated and is still being considered by the Minister's delegate, this allegation has no merit and it does not require further consideration.

**Analysis**

A. *Did the officer act unfairly by failing to provide the applicant with an opportunity to address his concerns?*

[14] The applicant submits that, if the officer was concerned that the applicant might be inadmissible, the officer was obliged to provide the applicant with an explicit opportunity to address that concern. Given the facts of this case, I disagree.

[15] When the applicant made his TRV application in 2015, he had already made two previous TRV applications, in 2010 and 2011. In both previous applications, the primary issue was whether the applicant was inadmissible under paragraph 35(1)(b) of the Act as a prescribed senior official. In fact, the applicant's 2011 application failed on precisely this basis.

[16] Given this history, the applicant should have reasonably understood that his 2015 TRV application would very likely turn on whether he was found to be a prescribed senior official. The applicant therefore had an opportunity to present his case on this point. The applicant took advantage of this opportunity. As the applicant states in his affidavit (in reference to his 2015 application):

> I was also aware that it was my obligation to convince the visa officer that I was eligible for a TRV, and admissible to Canada. As such, I attached the April 2010 Letter, along with a detailed Cover letter, dated February 11, 2015 (the "2015 Cover Letter") to my 2015 TRV Application, both of which clearly detailed my responsibilities in my position as Assistant to the Director, and included information about my supervisor's position. [emphasis added]

[17] Having received all of this information in the applicant's 2015 application, the officer saw no reason to provide the applicant with an additional opportunity to address whether he was a prescribed senior official. As the officer states in his GCMS notes, "[a]s the PA prepared a procedural fairness letter along with his application, a second one is not necessary." The officer also states in his reasons that:

> You were refused a Temporary Resident Visa on August 12, 2011 as you were determined to be inadmissible pursuant to subsection 35(1)(b) of IRPA. You also enclosed a submission with this application dated February 11, 2015, in anticipation of a similar finding. [emphasis added]

[18] Requiring the officer to take the additional step of explicitly providing the applicant with an opportunity to address an issue that he was already aware of and had already addressed, would be to elevate the form of procedural fairness over its substance. As the Federal Court of

Appeal held in *Chiau v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 204, 195 DLR (4th) 422 at para 47:

> The factors considered above [regarding the level of procedural fairness owed by a visa officer] must be balanced, not in the abstract, but in the factual context of the particular case. Thus, a determination of whether fairness required the disclosure of any part of the secret material on which the visa officer relied must also include a consideration of the extent to which the individual's knowledge of the nature of the visa officer's concerns effectively enabled him to respond. [emphasis added]

[19] A visa officer's duty of procedural fairness lies at the lower end of the spectrum (*Fargoodarzi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 90, [2008] FCJ No. 133 at para 12), and the threshold was met in this case.

[20] The applicant also faults the officer for failing to provide him with the CBSA report that informed the officer's determination that he was in the top half of the Yugoslav army. Again, I disagree. As this Court held in *Nadarasa v Canada (Citizenship and Immigration)*, 2009 FC 1112, [2009] FCJ No 1350 at para 25, the relevant question is whether the applicant knew of the information (not the document) and had an opportunity to respond to it.

[21] The only extrinsic information in the report is information about the military hierarchy of the Yugoslav army during the relevant time. This information is publicly available (on the Encyclopedia) and the applicant has not stated what additional submissions he would have made to impugn it, had he known about it: See *Khoshnavaz v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1134, 235 ACWS (3d) 1068 at paras 35-38. Most importantly, the applicant served in the Yugoslav army from 1972 to 2001, and ascended through the ranks of

that organization. In light of his almost 30 years of military service, it is inconceivable that the applicant would not already have known what the Yugoslav army's hierarchy was. The applicant has not been ambushed with new evidence; there is no unfairness here.

B. *Did the officer err in finding the applicant to be inadmissible pursuant to paragraph 35(1)(b) of the Act, and were the officer's reasons adequate?*

[22] The applicant submits that the officer erred in determining that he was inadmissible, solely based on his position in the Yugoslav army hierarchy, and without regard to his actual influence over government power, or the number of people who served above and below him. As counsel put it in oral submissions, the officer failed to consider the applicant's position in the hierarchy he actually operated within.

[23] I am not persuaded that the officer made any error here. It is true that the officer did not consider the applicant's actual influence in his role as Lieutenant Colonel. However, he was not required to do so. As the respondent points out, this Court has repeatedly accepted that, if an officer finds that an individual occupies a position in the top half of the military, this is sufficient to establish that they are a "senior member of the military" for the purposes of paragraph 16(e) of the Regulations. This Court has also accepted that, once an individual is determined to be a "prescribed senior official" within the meaning of section 16, no analysis of their ability to exert influence over the exercise of government power is required: *Ali Al-Ani v Canada (Minister of Citizenship and Immigration)*, 2016 FC 30 , 262 ACWS (3d) 458 at paras 2, 12-21.

[24] The officer concluded that, by virtue of his rank, the applicant was in the top half of the Yugoslav army, during the relevant period. It is not clear from the reasons whether the officer made this determination in light of the actual number of people who served above and below the applicant, as the case law suggests he should: See for example *Lutfi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1391, [2005] FCJ No 1703 at para 14. However, it is noted that the applicant admitted that "just by rank alone, as Lt Colonel, he was in the top half of the rank structure" and absent any evidence to the contrary, it is appropriate to assume that the Yugoslavian military is pyramidal – with more persons at the lower ranks than at the higher ranks.

[25] In this case the officer examined the rank within the military as a whole and not simply the unit within which he served. That interpretation of the relevant statutory and regulatory provisions is reasonable and entitled to deference by this Court.

[26] For these reasons, I find that the officer's decision is fair and reasonable, and the application must be dismissed.

[27] The applicant proposed the following question as one appropriate to be certified:

> In establishing that the applicant was a senior prescribed official pursuant to paragraph 35(1)(b) of the *Immigration and Refugee Protection Act* and paragraph 16(e) of the *Regulations*, must the officer have considered the specific organizational structure within the military in which the applicant served, or just the applicant's rank within the overall military structure?

[28] The respondent opposes certifying that question. The Minister submits that there is no jurisprudence to support the applicant's suggestion that the officer must look at a structure outside that of the military as a whole. Further, it is submitted that even if he had in this case, the applicant's own evidence is that there were more persons below him than above him, and thus on such an analysis he would still would have been found inadmissible.

[29] I am not persuaded that the question proposed can be certified. The officer's interpretation of the provisions is reasonable and the higher courts have held, as he is interpreting his home statute, that is the standard on which his decision is to be reviewed. Further, I agree with the respondent that the applicant's evidence is that, within the structure in which he operated, there were more people below him than above him, such that the result would not change.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4543-15 |
| **STYLE OF CAUSE:** | DRAGISLAV MIROSAVLJEVIC v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | APRIL 5, 2016 |
| **JUDGMENT AND REASONS:** | ZINN J. |
| **DATED:** | APRIL 20, 2016 |

**APPEARANCES:**

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| John Loncar / Alex Kam | FOR THE RESPONDENT |

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