Federal Court  Cour fédérale

Date: 20160422

Docket: IMM-4297-15

Citation: 2016 FC 458

Ottawa, Ontario, April 22, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ANTRANIK SOUREN MOURAD KRIKOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant was found inadmissible to apply from overseas for permanent resident status under the government refugee resettlement program because his military service rendered him inadmissible to Canada on grounds of violating human or international rights. He asks the Court to set aside that decision on procedural fairness and reasonableness grounds.

Background

[2] In November 2012, the applicant fled Iraq with his wife to escape alleged ongoing harassment and intimidation by Islamic extremists. They settled in Amman, Jordan, where they made their refugee claims. The applicant was interviewed on May 14, 2014, by an officer at the Canadian Embassy in Jordan.

[3] On July 20, 2014, the applicant received a procedural fairness letter from an officer, stating that there were reasonable grounds to believe that he is a member of the inadmissible class of persons described in section 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The letter observed that the applicant had served in the Iraqi military as a senior officer between May 1982 and December 1988 and that, during this time, the government of Iraq had engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime, or a crime against humanity. The letter went on to state:

> By examining where a person fits into the overall hierarchy of an organization, their position can be considered senior if it can be demonstrated that the position falls within the top half of an organization. You stated that at the beginning of this service period you were a First Lieutenant, then you were promoted to Captain, and that in 1985 or 1986 you were promoted to Major. When you were discharged in 1988 you were in Infantry Major. Within the structure of the Iraqi military, officers holding the rank of Major at the time you served fell within the top half of the military organization. For this reason, I have reasonable grounds to believe that you were a senior member of the military in a designated regime.

The officer concluded the letter by giving the applicant an opportunity to "respond and demonstrate that your positions were not as a senior member of the Iraqi military."

[4] On August 11, 2014, the applicant responded to the procedural fairness letter with detailed submissions. The applicant referred to his affidavit dated August 12, 2014, in which he stated that:

> I was not a senior official in the Iraqi military and I was not in the top half of the Iraqi military. To my knowledge, there were at least six ranks above mine: (1) First Lieutenant Colonel, (2) Colonel, (3) Brigadier General, (4) Major General, (5) Lieutenant General, and (6) Marshal. In contrast, the highest position I ever reached in the Iraqi military – that of Major – was superior to only four ranks: (1) infantry, (2) Lieutenant, (3) Second Lieutenant, and (4) First Lieutenant.

[5] The applicant's counsel in her submissions also noted that he "has not been provided with any documentation – relied upon by the Canadian Embassy in Jordan – that establishes that his position as Major was in the top half of the Iraqi military." He observed that, "[a]s a result, he has not had the opportunity to respond to and be heard with regard to the veracity or reliability of any documentation that may have been relied upon in finding that he may be a senior official – or in the top half – of the Iraqi army."

[6] The applicant's application was denied. In the decision, the officer sets out the relevant legislation and states that:

> …from 1966 until 1988 you served in the military forces of the Government of Iraq. In the opinion of the Minister, that government engages or has engaged in terrorism, systemic 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*.
>
> You were sent a letter in which I outlined my concern that, as a Major in the Iraqi Military in the 1980s, you are a person described in section 35(1)(b). You were sent a procedural fairness letter and given the opportunity to respond to this concern. Your response was received and carefully reviewed along with all the information

> presented in your application, including your oral statements at interview. I still conclude that there are reasonable grounds to believe that you were a senior member in a designated regime.
>
> By examining where a person fits into the overall hierarchy of an organization, their position can be considered senior if it can be demonstrated that the position falls within the top half of an organization. You stated that you were promoted to First Lieutenant in 1984, and that you were promoted to Major in 1986. When you were discharged in 1988 you were an Infantry Major. You have stated that, as a Major, you were not a senior official in the Iraqi Military because you were not in the top half of the Iraqi military. However, reliable open source information indicates that during the period when you served in the military, the Iraqi military ranks ran from Basic Private (Jundi) up to Marshal (Muhib), and that persons holding the rank of Major fell within the top half of the military organization.
>
> You have stated that you were conscripted into the Iraqi military, that your responsibilities and level of influence were limited relative to more senior officers, and that at the time of your military service you were not aware of crimes and human rights abuses committed by the military. While this may be so, section 35(1)(b) of the Act specifically describes inadmissibility due to being a prescribed senior official in a designated regime. I conclude that there are reasonable grounds to believe that you were a senior member of the military in a designated regime. As such, you are inadmissible to Canada under section 35(1)(b) of the Act. I am therefore refusing your application. [emphasis added]

[7] The officer's notes elaborate on the reasons set out in the letter. They provide some additional details about the applicant's military service, including that as a Major he commanded companies of 300-400 privates while they were being trained in the use of light weapons. The notes also state that:

> Reliable open source material (http://www.defense.gov/news/Apr2003/pipc10042003.html) indicates that during the period of PA's military service the Iraqi military comprised of ranks running from Basic Private (Jundi), Private (Jundi Awad), Private First Class, Corporal (Nalb), Sgt (Arif), 2nd Lt (Mulazzim), 1st Lt (Mulazzim Awad), Captain (Naqib), Major (Ra'ed), Lt Col (Muqaddam), Col (Aqid),

> Brigadier Gen (Amid), Maj Gen (Liwa), Lt Gen (Fariq), Gen (Fariq Awad), and Marshal/Head of Army. In this structure, and keeping in mind the larger numbers in lower ranks, PA falls within the top 50% of the military. Lawyer's statements about PA's level of influence and actual activities, awareness of military activities, and refs to Ezakola and issues of complicity, relate to A35(1)(a), whereas A35(1)(b) is clearly only concerned with inadmissibility due to being a prescribed senior official of a designated regime.

[8] The "reliable open source material" that the officer refers to is a former United States Department of Defence web page that contains pictures of a set of "Personality Identification Playing Cards." The face and numbered cards in the deck each include details of a different high-profile official in the Iraqi regime. The Joker cards provide general information for interpreting the other cards: one is entitled "Arab Titles" and the other is entitled "Iraqi Military Ranks." The officer appears to have used this latter card to determine the hierarchy in the Iraqi military and, in particular, to conclude that the applicant, as a Major, was in the top half of that hierarchy.

Issues

[9] The applicant raises two issues: did the officer act unfairly by failing to disclose to the applicant documents that were considered in the admissibility decision; and was the officer's finding that the applicant was inadmissible reasonable?

[10] The parties agree that the first issue, being one of procedural fairness, is reviewable on a standard of correctness, while the inadmissibility issue is reviewable on a standard of reasonableness: *Tareen v Canada (Citizenship and Immigration)*, 2015 FC 1260, 260 ACWS (3d) 563 at para 15.

Analysis

A. *Procedural Fairness*

[11] The applicant submits that the officer acted unfairly by determining that the applicant was a senior official in the Iraqi military by reference to the Joker card issued by the United States Department of Defense without disclosing that card to him.

[12] The parties disagree on the level of procedural protection owed. While the respondent refers to jurisprudence finding that visa officers should only be required to provide a low level of procedural protection, the applicant points out that this is not a typical visa case. Rather, the applicant is applying to come to Canada as a refugee and claims to fear persecution, and even death, if he is forced to return to Iraq.

[13] I accept that the officer's decision in this case was more important to the applicant than an officer's decision would normally be in a non-refugee case and I therefore accept that, according to the contextual analysis set out by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No. 39, a somewhat higher level of procedural fairness was owed.

[14] The Minister submits that the officer was not required to disclose the Joker card to the applicant, or advise him that it was the basis for his understanding of the Iraqi military structure; rather, it was sufficient for the officer to state in the procedural fairness letter that:

> Within the structure of the Iraqi military, officers holding the rank of Major at the time you served fell within the top half of the military organization. For this reason, I have reasonable grounds

> to believe that you were a senior member of the military in a designated regime.

[15] The applicant points out that the officer's failure to disclose the source of his information deprived the applicant of any opportunity to question the credibility or reliability of that source, including by pointing out that: (i) the web page depicting the "Personal Identification Playing Cards" is no longer available on the United States Department of Defense website, (ii) according to its URL, the web page depicting the cards appears to have been created in April, 2003, about 15 years after the applicant left the Iraqi military, and (iii) the rank listed on the applicant's Military Conscription Book is "Major Reserve rank 20 session 2" and no such rank is listed on the Joker card (although the rank of Major is).

[16] In support of his position, the Minister cites *Nadarasa v Canada (Citizenship and Immigration)*, 2009 FC 1112, [2009] FCJ No. 1350 [*Nadarasa*]. That case involved an applicant from Sri Lanka who had been found inadmissible as a result of misrepresentation, and for security reasons. The applicant told an immigration officer that neither he nor anyone in his family had ever worked for the Tamil Tigers. However, the applicant's son told CSIS that he had worked for the Tamil Tigers. This contradiction (and the source of it) was put to the applicant in an interview, and he was given an opportunity to respond. However, he was not shown the report detailing CSIS's interview with his son. On judicial review, the applicant claimed that the officer's failure to disclose the report was unfair. The Court disagreed.

[17] *Nadarasa* at paras 25–27 stands for the proposition that it is not necessary for an officer to provide an applicant with an extrinsic document that the officer is relying upon, as long as the

information contained within that document is conveyed in such a manner that the applicant can know and meet the case against him and, in particular, correct any prejudicial statement that may arise from that document. The Court in *Dasent v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 720, [1994] FCJ No 1902, which was relied on in *Nadarasa*, observed at para 23 that "[t]he relevant point is whether the applicant had knowledge of the information so that he or she had the opportunity to correct prejudicial misunderstandings or misstatements." Sometimes the knowledge of the information will include the source of that information. Unlike *Nadarasa*, the applicant here did not know the source of the information and was not informed of it.

[18] Although the applicant was thus put on notice that it was the placement of his rank within the Iraqi military that he was required to address, he did not know the basis of the officer's opinion. Had it been known to him, then he could have addressed in response to the procedural fairness letter the validity of the Joker card information vis-à-vis his particular situation, and in particular, that the information was 15 years after he completed his military service. In these unique circumstances, I find that procedural fairness required that the source of the officer's information be put to the applicant so that he could respond meaningfully to the officer.

B. *Reasonableness of Inadmissibility Finding*

[19] I do not accept the submission of the applicant that the officer incorrectly assessed his rank as Major when he was listed at discharge as Major Reserve rank 20 session 2. The officer in the procedural fairness letter specifically indicates that the applicant's rank is Major and the

applicant took no issue with that description at that time. In fact, he and his counsel use the word 'Major' to describe his rank.

[20] However, I find the officer's reliance on the Joker card to be unreasonable. There is no evidence that the Joker card depicts the structure of the Iraqi military as of the late 1980s, when the applicant completed his military service. Indeed, the evidence suggests that it depicts that structure as of a much later date, sometime around the United States' invasion of Iraq in 2003. The officer's apparent failure to appreciate this fact may have led him or her to place much more weight on the cards than they actually deserved. Perhaps there is no objective evidence of the military structure at the time the applicant served. If so, the officer's reliance on the Joker card may have been reasonable, but some statement to that effect, or effort on the officer's part to find earlier evidence is required.

[21] When assessing the impact of the officer's reliance on the card, it is important to consider it in light of the applicant's affidavit evidence, according to which the rank of Major was not in the top half of the Iraqi military hierarchy when he served. The applicant's credibility and reliably was never explicitly impugned. Had the officer realized that the cards post-dated the applicant's military service by several years, he or she may have accepted the applicant's sworn evidence about the structure of the Iraqi military at the time that he served. I therefore conclude that the officer's decision was unreasonable.

[22] The applicant submits that, in cases where the officer cannot determine whether an applicant falls within any of the enumerated categories of "prescribed senior official" set out in

paragraphs 16(a)-(g) of the Regulations, the officer must apply the residual test described in the body of section 16, that "a prescribed senior official in the service of a government is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position:" see for example *Kojic v Canada (Citizenship and Immigration)*, 2015 FC 816, 256 ACWS (3d) 675. The applicant further submits that this inquiry involves looking into the applicant's degree of complicity in the crimes committed by the designated regime.

[23] The issue does not arise in the present case because the officer found that the applicant fell within an enumerated category of "prescribed senior official," namely that set out in paragraph 16(e) of the Regulations: senior members of the military. The question of how to apply the residual test in the body of section 16 therefore is not engaged.

[24] For these reasons this application is allowed. No question was proposed to be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is granted, the officer's decision is set aside, the application is to be redetermined by a different officer, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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