Federal Court  Cour fédérale

Date: 20160624

Docket: IMM-157-16

Citation: 2016 FC 723

Ottawa, Ontario, June 24, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

HANI TAWFIQ SHAKI AL-NAIB
(AKA HANI TAWFIQ SHAKIR AL-NAIB)

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Proceeding

[1] This application for judicial review, brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] seeks to set aside the December 22, 2015 decision of the Immigration Division [ID] of the Immigration and Refugee Board of Canada. In that decision the ID found the Minister of Public Safety and Emergency Preparedness

[Minister] met its burden in establishing that the applicant is inadmissible to Canada on the basis that he was, pursuant to paragraph 35(1)(b) of the IRPA and paragraph 16(f) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] a "prescribed senior official" in the Al-Bakr and Saddam Hussein government in Iraq. That government had been designated by the Minister as being engaged in international crimes as described at paragraph 35(1)(b) between 1968 and May 22, 2003.

[1] The application is denied for the reasons that follow.

II. Background

[2] Hani Tawfiq Shaki Al-Naib, the applicant, is a citizen of Iraq born in 1934. He was employed by the Iraqi government, first in the Iraqi Ministry of Foreign Affairs mostly as a diplomatic official from 1955 to 1978 often working in various embassies and then from 1978 until his retirement in 1983, at the Ministry of Trade. His employment history is not in dispute.

[3] While serving with the Ministry of Foreign Affairs, Mr. Al-Naib was the Charge d' Affaires ad interim in Nairobi, Kenya from February to May 1974, and he was Charge d' Affaires ad interim in Bonn, West Germany from June to November 1976. In that capacity the applicant was in charge of the embassy in the ambassador's absence, but did not have the full authority of an ambassador. Instead the applicant operated the embassy pending the ambassador's return.

[4] On September 9, 2004 the Minister issued a declaration that the Iraqi governments of Al-Bakr and Saddam Hussein, in power from 1968 to May 22, 2003 in Iraq are regimes described in paragraph 35(1)(b) of the IRPA.

[5] The applicant arrived in Canada in March, 2015 at Sarnia, Ontario and made a refugee claim. The Minister of Citizenship and Immigration prepared a subsection 44(1) report expressing the opinion that the applicant is inadmissible to Canada pursuant to paragraph 35(1)(b) of the IRPA leading to the applicant's referral for an admissibility hearing under subsection 44(2) of the IRPA.

III. ID Decision

[6] In its December 22, 2015 decision the ID notes that the applicant's work as a diplomat and as a Ministry of Trade official for a regime designated under paragraph 35(1)(b) of the IRPA, was not in dispute. The only issue was whether he was a prescribed senior official of that regime.

[7] The ID found that unlike some positions described in section 16 of the IRPR, the "senior members of the public service" position description (paragraph 16(d)) and the "senior diplomatic officials" position description (paragraph 16(f)) rely on general terminology that requires analysis beyond a simple consideration of the applicant's position title.

[8] After considering the applicant's management responsibilities, duties and role within the Ministry of Trade including the hierarchy in which he was employed, the ID concluded he was

never a "senior" Ministry of Trade Official for the purpose of paragraph 16(d) of the IRPR. The ID reached this conclusion while recognizing that the applicant did interact with individuals having significant influence on government power.

[9] The ID concluded that the applicant was a senior diplomatic official pursuant to paragraph 16(f) of the IRPR. The ID noted that the applicant had on two occasions acted as the senior Iraqi diplomatic official in Nairobi, Kenya and subsequently in Bonn, West Germany. The ID recognized that as Charge d'Affaires ad interim, the applicant did not exercise the full authority of an ambassador and the role was limited to managing embassy operations, but in this role he was the top diplomatic official when the ambassador was absent and the second ranking official when the ambassador was present.

[10] The ID noted that the applicant described the Bonn embassy as "a huge embassy" and concluded that the applicant had: (1) managed a large diplomatic mission; (2) maintained a prominent role upon the ambassador's return as an advisor; (3) that he was the second most authoritative diplomat at a large embassy; and (4) that he was clearly a senior diplomatic official within the meaning of paragraph 16(f) of the IRPR.

[11] Having reached this conclusion the ID relied upon Justice Lagacé's decision in *Hussein v Canada (Minister of Citizenship and Immigration)*, 2009 FC 759 at para 14 [*Hussein*] to hold that where one is found to be a person described in section 16 of the IRPR this creates an "irrebuttable" presumption of significant influence on the exercise of government power.

IV. Issues and Analysis

A. *Position of the Parties*

[12] The applicant submits the ID committed a reviewable error in interpreting paragraph 35(1)(b) of the IRPA. The applicant argues that the unanimous Supreme Court of Canada decision in *Ezokola v Canada (Minister of Citizenship and Immigration)*, [2013] 2 SCR 678 [*Ezokola*] impacts upon how the ID should have interpreted paragraph 35(1)(b). Specifically the applicant argues that there was a need for the ID to consider whether the applicant had personally engaged in or was complicit in war crimes, crimes against humanity, or other crimes described in section 35(1)(b), of the IRPA. Restricting the analysis to the nature of the applicant's position within the regime, as the ID did, was not sufficient.

[13] The applicant further argues that the ID's decision was unreasonable as the ID did not undertake an analysis of the evidence to determine if the applicant's position allowed him to exert significant influence on the exercise of government power. The applicant submits that the evidence demonstrates he was nothing more than a public servant performing non-political and non-partisan duties.

[14] The respondent submits that the sole issue in dispute was whether the applicant was a prescribed senior official under paragraph 35(1)(b), specifically a senior diplomatic official under paragraph 16(f) of the IRPR and that the ID reasonably determined that he was. The evidence demonstrated the applicant's position as the number two official at an embassy after the ambassador, placing him in the top half of an organization and therefore he was a senior

diplomatic official. The respondent further submits that once the applicant was determined to be an individual described in paragraph 16(f) of the IRPR the ID concluded that this established an irrebuttable presumption that the applicant held a position where he was able to exert significant influence on the exercise of government power.

[15] The respondent argues that the principles in *Ezokola* are not engaged in the paragraph 35(1)(b) context, an issue that has been previously considered and determined by this Court. *Ezokola* interprets the Refugee Convention as it relates to one's actions in the context of the commission of serious international crimes, as does paragraph 35(1)(a) of the IRPA. Paragraph 35(1)(b) on the other hand considers one's status in a designated regime.

B. *Issues*

[16] The application raises the following issues:

A. What is the applicable standard of review: and

B. Did the ID reasonably determine the Applicant was a prescribed individual under paragraph 35(1)(b) of the IRPA? Answering this question requires determining if the Supreme Court of Canada's decision in *Ezokola* applies to the paragraph 35(1)(b) context.

(1) Standard of Review

[17] The applicant submits that the issues raised engage questions of statutory interpretation requiring an understanding of criminal law and international human rights law attracting a

correctness standard of review. The respondent submits that the decision of inadmissibility should be reviewed against the standard of reasonableness.

[18] The question of the appropriate standard of review to be applied by this Court when reviewing a decision made pursuant to paragraph 35(1)(b) of the IRPA was recently considered by Justice Simon Fothergill in *Al-Ani v Canada (Minister of Citizenship and Immigration)*, 2016 FC 30 [*Al-Ani*] where he states at paragraph 11:

> [11] The question of whether Mr. Al-Ani is a senior member of a designated government pursuant to s 35(1)(*b*) of the IRPA and s 16 of the Regulations falls squarely within the Board's expertise and involves questions of mixed fact and law that are reviewable against the standard of reasonableness (*Tareen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1260 at para 15 [*Tareen*], citing *Kojic v Canada (Minister of Citizenship and Immigration)*, 2015 FC 816). Moreover, there is a presumption that the reasonableness standard applies where a tribunal is interpreting its home statute (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34). However, I agree with Mr. Al-Ani that, since the Board was engaged in statutory interpretation, the range of reasonable outcomes may be narrow (*Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75 at para 14; *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87 at para 72).

[19] I am in agreement with Justice Fothergill, and will review the decision on a reasonableness standard, recognizing that the range of reasonable outcomes may be narrow.

(2) Does *Ezokola* Apply to the Interpretation of Paragraph 35(1)(b)?

[20] In considering and interpreting paragraph 35(1)(b) of the IRPA, this Court, relying on the decision of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v*

Adam, [2001] FCJ No 25, 266 NR 92 (CA) [*Adam*] has described the provision as enshrining "an absolute liability: with respect to the issue of inadmissibility, it matters little whether the person in question was complicit in or aware of the violations allegedly committed by the government of the country of origin" (*Hussein* at paras 14, 16). The applicant argues that *Ezokola* has substantially changed the law in this regard, submitting that *Ezakola* requires that a complicity analysis be undertaken before one can conclude an individual is a "senior diplomatic official" as that term is used in paragraph 16(f) of the IRPR. I respectfully disagree.

[21] In *Kanagendren v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 86, 382 DLR (4th) 562 [*Kanagendren*], the Federal Court of Appeal engaged in a detailed statutory interpretation of paragraph 34(1)(f) of the IRPA in response to an argument that is similar to that being advanced by the applicant in this case. The Federal Court of Appeal read subsection 34(1) against subsection 35(1) of the IRPA, specifically paragraph 34(1)(f) against paragraph 35(1)(a) and concluded that there is a distinction between those provisions arising from (1) inadmissibility based on one's actions that may attract criminal liability and where complicity is therefore relevant as a mode of commission of the offence under paragraph 35(1)(a); and (2) one's status, membership in an organization, where complicity is not relevant to the question of membership under paragraph 34(1)(f) (*Kanagendren* at paras 20-22).

[22] This same distinction is evident when comparing paragraphs 35(1)(a) and 35(1)(b) of the IRPA. Paragraph 35(1)(a) speaks to an applicant's "committing an act…that constitutes an offence referred to in sections 4 to 7 of the *Crimes against Humanity and War Crimes Act*" complicity is relevant as it is a mode of commission of the crimes described. Paragraph 35(1)(b),

on the other hand, speaks to a person's status as "being a prescribed senior official in the service of a government…"

[23] Nothing in the language of paragraph 35(1)(b) of the IRPA or in paragraph 16(f) of the IRPR contemplates the requirement for a complicity analysis in the context of determining if an individual is a senior diplomatic official in the service of a designated government; "These concepts cannot be read into the language used by Parliament" (*Kanagendren* at para 22).

[24] My view in this regard is neither new nor novel. This argument has been considered in two prior cases where my colleagues Justice Camp and Justice Fothergill have come to similar conclusions (*Tareen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1260 at paras 36-40 and *Al-Ani* at paras 17-20). The applicant was unable to point to any precedent to the contrary but rather urged that the Court view the matter differently. I have not been so persuaded.

(3) Was the Decision Reasonable

[25] In light of my finding above I am satisfied that: (1) there was sufficient evidence upon which the ID could reasonably conclude that the applicant was a senior diplomatic official in the service of a designated government under paragraphs 35(1)(b) of the IRPA and 16(f) of the IRPR; and (2) having reached that conclusion, the ID reasonably relied on *Hussein* to determine no further analysis was needed on the question of significant influence.

[26] The ID did not simply consider the applicant's evidence of being the Charge d'Affairs ad interim in reaching this conclusion. Rather the ID noted that the applicant's position as Charge

d'Affaires ad interim was evidence of his prominent role. The applicant's evidence further established his position in the organizational hierarchy, he was second in command at the embassies and he ran the embassies when the appointed ambassadors were not present. Similarly the applicant's evidence was to the effect that the ambassadors in Kenya and West Germany were political appointments who relied on the applicant as an advisor. There was ample evidence available to allow the ID to reasonably conclude that the applicant was not a low level diplomat but rather held a senior position within the Ministry of Foreign Affairs.

[27] The applicant points to evidence before the ID indicating that a Charge d'Affaires is the lowest rank of diplomatic representative recognized under the Vienna Convention of Diplomatic Relations (1961) and therefore cannot be a senior diplomatic official. Again I respectfully disagree. As noted by the ID, paragraph 16(f) of the IRPR "does not require one to be the most senior diplomatic official at an embassy…It casts a wider net and includes those who can be reasonably determined to have been senior diplomats."

[28] As Justice Fothergill did in *Al-Ani* at paragraph 21: "I will end these reasons with the observation that the degree to which an individual was personally complicit in the violations committed by a designated regime may be relevant to a request to apply for permanent residence from within Canada on humanitarian and compassionate grounds."

V. Certified Question

[29] The applicant has advanced the following question for certification:

> Does the *Ezokola* decision of the Supreme Court of Canada change the requirements for assessing inadmissibility under paragraph 35(1)(b) of the IRPA?

[30] The Federal Court of Appeal has set out the test for certification of issues for the purposes of an appeal under paragraph 74(d) of the IRPA on a number of occasions (*Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paras 10-12, 36 Imm LR (3d) 167; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at para 9, 28 Imm LR (4th) 231). These authorities establish that this Court may certify a question under paragraph 74(d) only where it (1) is dispositive of the appeal and (2) transcends the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. Furthermore, the question must arise from the case itself.

[31] I take the same view as Justice Fothergill did in *Al-Ani* at paragraph 22 that in this case the legal issues raised and considered have been addressed by the Federal Court of Appeal in *Adam* and in other decisions of this Court that were consistent with *Adam*. In the circumstances I am not satisfied that the proposed question engages issues of broad significance or general importance. I therefore decline to certify the proposed question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

The application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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