

Federal Court



Cour fédérale

Date: 20181204

Docket: IMM-1975-18

Citation: 2018 FC 1215

Ottawa, Ontario, December 4, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ZAGHLOL KASSAB

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of a visa officer dated April 11, 2018, which denied the Applicant's application for permanent residence in Canada on the basis that the Applicant had been a senior official in the Iraqi government, pursuant to paragraph 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

II. Background

[2] The Applicant, Zaghlol Kassab, is a citizen of the Republic of Iraq [Iraq] born January 30, 1946. He is married to Faika Kassab, and they have three adult daughters.

[3] The Applicant earned several degrees in engineering, completing his studies in 1980 with a Ph.D. in electrical engineering from the University of Birmingham in the United Kingdom.

[4] The Applicant worked the majority of his career in the Iraqi civil service, in fields related to electrical engineering. Between 1988 and 1991, he was employed by the Iraqi Atomic Energy Commission. Between 1991 and 2000, he was employed by the Iraqi Ministry of Industry and Minerals in various positions, including Project Manager, Head of the Telecommunications Department, and Director of the Centre for Electronic Systems.

[5] In 2000, the Applicant was granted early retirement from the government, and started an engineering consulting business. In 2004, the Applicant, his wife, and two of their daughters left Iraq to reside in Jordan. Between 2004 and 2014, the Applicant split his residence between Iraq, Jordan, and the United Arab Emirates, while continuing to operate his business.

[6] The Applicant and his family are devout and practicing Catholics, and they experienced several instances of religious persecution while living in Iraq. In 2014, after an incident where armed men threatened death if he attended his church, the Applicant moved to Jordan on a more permanent basis; he currently resides in Jordan on a five year temporary resident visa.

[7] In April 2015, the Applicant and his wife applied for permanent residence in Canada as sponsored refugees under the Convention Refugees Abroad Class [the Application]. Two of the Applicant's daughters also applied separately as independent adults under their own sponsorship undertakings.

[8] On February 10, 2016, the Applicant and his wife were interviewed by a visa officer in Amman, Jordan, and the Applicant was questioned about his work experience with the Iraqi government. The visa officer concluded that they met the definition of Convention refugees, but reserved his decision with respect to the Applicant pending the results of further investigation into the nature of the Applicant's employment.

[9] The Applicant's wife and two daughters have since been granted permanent residence in Canada.

[10] In March 2017, the Applicant provided further information about his employment history, including organizational charts showing the structure of the Iraqi civil service and the Applicant's superiors.

[11] On March 5, 2018, the Applicant received a letter from an unnamed visa officer at the Embassy of Canada [the Procedural Fairness Letter]. The visa officer stated that the Minister of Public Safety and Emergency Preparedness had designated the Iraqi governments of Ahmed Hassam al-Bakr and Saddam Hussein, in power between 1969 and May 22, 2003, as a regime that engaged in serious human rights abuses. The visa officer also noted various positions held

by the Applicant which fell in the top half of the Iraqi government's hierarchy. The visa officer concluded that there were reasonable grounds to believe that the Applicant had been a senior official in a designated regime, and therefore was inadmissible pursuant to paragraph 35(1)(b) of the IRPA.

[12] The Procedural Fairness Letter gave the Applicant 30 days to respond. On March 28, 2018, counsel for the Applicant responded, arguing that the Applicant was never a senior official as contemplated by the IRPA, as he had been excluded from senior positions due to his religious beliefs. The Applicant submitted an affidavit and supporting documents which attested to his faith, his military experience, and his good performance in several employment positions.

[13] A visa officer at the Embassy of Canada [the Officer] refused the Application by way of a letter dated April 11, 2018 [the Decision]. The Officer wrote that there remained reasonable grounds to believe that the Applicant was inadmissible to Canada under paragraph 35(1)(b) of the IRPA, and therefore the Applicant did not meet the requirements for a permanent resident visa.

[14] The Global Case Management System Notes [the GCMS Notes] related to the Applicant's file offer additional insight into the Officer's reasoning:

The admissibility concerns raised are in regards to the applicant's employment and the positions he held. His affiliation, or lack thereof, with the Ba'ath party is not pertinent to this issue and neither is his religious persuasion. I do not find PA's statement, that he had no decision making power in his positions, to be credible. It appears to be quite clear that he held a number of managerial positions, the last one being the Director of the Centre for Electronic Systems in the Ministry of Industry. Although he

may not have reached the upper echelons of the Iraqi Public Service, once can still reasonably conclude that his roles are indicative of being a senior official in the top 50% of Iraqi government public service Hierarchy during a designated regime period. Consequently, I have reasonable grounds to believe that PA is inadmissible to Canada as per 35(1)(b) of the IRPA. Application Refused.

[15] Although never expressly cited, in reaching these conclusions the Officer appears to rely in part on a National Security Screening Division Inadmissibility Assessment [the NSSD Assessment] dated February 16, 2018, which recommended that “there are reasonable grounds to believe that the applicant is inadmissible to Canada pursuant to section 35(1)(b) of the IRPA.”

III. Issue

[16] Was the Officer unreasonable in holding that the Applicant was a senior official within the Iraqi government?

IV. Standard of Review

[17] The standard of review is reasonableness.

V. Relevant Provisions

[18] Paragraph 35(1)(b) of the IRPA states that a permanent resident is inadmissible if they have been a prescribed senior official in the service of a government that, in the opinion of the Minister, 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 6(5) of the *Crimes Against Humanity and War Crimes Act*:

35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

...

(b) 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*;

[19] Section 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] provides a non-exhaustive list of the positions which may meet the definition of “prescribed senior official” in paragraph 35(1)(b) of the IRPA:

16 For the purposes of paragraph 35(1)(b) of the Act, a prescribed senior official 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, and includes

- (a) heads of state or government;
- (b) members of the cabinet or governing council;
- (c) senior advisors to persons described in paragraph (a) or (b);
- (d) senior members of the public service;
- (e) senior members of the military and of the intelligence and internal security services;
- (f) ambassadors and senior diplomatic officials; and
- (g) members of the judiciary.

VI. Analysis

[20] The Applicant argues that the Officer was unreasonable for three reasons:

- i. The Officer's reasons were neither transparent nor justifiable;
- ii. The Officer failed to consider the Applicant's submissions related to his religious beliefs or his lack of membership in the ruling Ba'ath party; and
- iii. The Officer fettered his or her discretion with respect to the applicable guidelines in *ENF 18: War Crimes and Crimes Against Humanity Manual*.

[21] I find that the Officer's conclusion that the Applicant was a senior official in a designated regime was unreasonable, for the reasons below.

[22] As stated by Justice Abella in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 18:

When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive.

[23] Considering in their entirety the Procedural Fairness Letter, the Decision, and the GCMS Notes, I find that the Officer gave adequate reasons for their conclusion. However, as outlined below, in arriving at their conclusion the Officer undertook a flawed analysis which renders their conclusion unreasonable.

[24] The Officer was tasked with analyzing whether the Applicant was a prescribed senior official within the meaning of paragraph 35(1)(b) of the IRPA. In the GCMS Notes, the Officer wrote:

The admissibility concerns raised are in regards to the applicant's employment and the positions he held. His affiliation, or lack thereof, with the Ba'ath party is not pertinent to this issue and neither is his religious persuasion. I do not find PA's statement, that he had no decision making power in his positions, to be credible. It appears to be quite clear that he held a number of managerial positions, the last one being the Director of the Centre for Electronic Systems in the Ministry of Industry. Although he may not have reached the upper echelons of the Iraqi Public Service, once can still reasonably conclude that his roles are indicative of being a senior official in the top 50% of Iraqi government public service Hierarchy during a designated regime period. Consequently, I have reasonable grounds to believe that PA is inadmissible to Canada as per 35(1)(b) of the IRPA. Application Refused.

[Emphasis added]

[25] Based on the authorities before me, there are two stages to the analysis that an officer must undertake when determining if an individual is a prescribed senior official within the meaning of paragraph 35(1)(b) of the IRPA.

[26] At the first stage of the analysis, the officer should look to see whether the individual has held one of the positions enumerated in section 16 of the Regulations. If the officer determines that the individual has held one of the enumerated positions, then, as the Respondent rightly points out, there is an irrefutable presumption that the individual is or was a prescribed senior official (*Hussein v Canada (Citizenship and Immigration)*, 2009 FC 759 at para 14 [*Hussein*], citing *Canada (Minister of Citizenship and Immigration) v Adam*, [2001] 2 FC 337 (CA) at para 7 [*Adam*]). For this reason, paragraph 35(1)(b) has often been termed an absolute liability provision

(*Younis v Canada (Citizenship and Immigration)*, 2010 FC 1157 at para 28). If the officer determines that the individual has not held one of the enumerated positions, the officer may then consider whether the individual, despite not holding an enumerated position, was able to exercise significant influence on the regime's actions or policies or was able to benefit from their position (*Kojic v Canada (Citizenship and Immigration)*, 2015 FC 816 at para 18 [*Kojic*]).

[27] If the officer determines that the individual is or was a prescribed senior official, they should then proceed to the second stage of the analysis, the application of paragraph 35(1)(b) of the IRPA. At this stage, the individual deemed to be or have been a prescribed senior official does not have the opportunity to demonstrate that even though he or she in theory had high-level responsibilities, he or she was not able to exert any influence on the exercise of government power: *Hussein*, above at para 14.

[28] Although the second stage of this analysis is straightforward, the first stage is not necessarily so. In *Adam*, the individual in question was a cabinet minister in a designated regime. In such a case, or in a case involving a member of the judiciary or a head of state, the first stage of the analysis is quite clear – the individual's position is clearly enumerated in section 16 of the Regulations, and the individual is therefore a prescribed senior official; there is, in effect, absolute liability.

[29] However, several of the other positions enumerated in section 16 are less clearly defined, including subsection 16(d), "senior members of the public service". For such subsections, it may not be clear from an individual's job title alone whether they hold or held an enumerated position.

Therefore, a further examination should be done to determine whether or not the individual falls within the scope of “senior members of the public service”.

[30] As the Respondent highlights, past decisions of this Court have established the proper approach for this further examination with respect to subsection 16(e), which relates to senior members of the military. If it can be demonstrated that the individual falls within the top half of the military hierarchy, that is sufficient to find that the individual is a senior member of the military within the meaning of subsection 16(e) (*Sekularac v Canada (Citizenship and Immigration)*, 2018 FC 381 at para 15).

[31] However, that approach does not appear to have been adopted in respect of subsection 16(d) by this Court or the Federal Court of Appeal. Given that a civil hierarchy may be less structured than a military hierarchy, when considering whether a civil appointment constitutes a senior member of the public service, a more fulsome examination should be done both from a purposive viewpoint and contextually. An officer may consider whether the individual’s job title falls within the top half of the government hierarchy [the Top Half Test], but he or she should also look to evidence of the individual’s responsibilities and duties, as well as the nature of the position held.

[32] I acknowledge *ENF 18: War Crimes and Crimes Against Humanity Manual* [the Manual], which offers guidance to visa officers regarding the analysis they should take under

paragraph 35(1)(b) of the IRPA. The following passage from the Manual is quoted in the NSSD

Assessment:

In addition to the evidence required, it must be established that the position the person holds or held is a senior one. In order to establish that the person's position was senior, the position should be related to the hierarchy in which the functionary operates....If it can be demonstrated that the position is in the top half of the organization, the position can be considered senior. This can be further established by evidence of the responsibilities attached to the position and the type of work actually done or the types of decisions made (if not by the Applicant then by holders of similar positions).

[33] Notwithstanding the Manual, in a case such as this, involving a senior member of the public service, where there is highly relevant evidence suggesting that an individual was unable to yield meaningful influence or benefit from their position, relying on the Top Half Test alone is unreasonable.

[34] The Officer found the evidence put forward by the Applicant, that he was unable to exert significant influence due to his religious beliefs and lack of membership in the Ba'ath party, to be irrelevant, and relied solely on the Top Half Test to conclude that the Applicant was a senior member of the public service. I find the Decision to be unreasonable.

[35] The Officer applied an inappropriately technical approach to an analysis that should have been both purposive and contextual, and thereby concluded that the Applicant was inadmissible pursuant to paragraph 35(1)(b) of the IRPA. The Officer's errors go to the very heart of the matter, and as a result this matter must be returned for reconsideration.

VII. Certified Question

[36] At the conclusion of the hearing of this matter, the Applicant proposed the following certified question:

Does an analysis of “senior official” under R.16 of the Immigration and Refugee Protection Regulations require an officer to assess the political affiliations and/or religious persuasion of an applicant?

[37] The Respondent suggested there was no need for a certified question, as the law clearly established that finding an individual to be in the top half of the government hierarchy was sufficient to conclude that the individual was a “senior member of the public service” as enumerated in subsection 16(d) of the Regulations.

[38] The test for certification of a question in accordance with section 74 of the IRPA was recently reaffirmed by the Federal Court of Appeal in *Lewis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paragraph 36:

The case law of this Court establishes that in order for a question to be properly certified under section 74 of the IRPA, and therefore for this Court to have jurisdiction to hear an appeal, the question certified by the Federal Court must be dispositive of the appeal, must transcend the interests of the parties and must raise an issue of broad significance or general importance

[39] I have concluded that an officer’s application of the Top Half Test, without more, and in the face of significant evidence suggesting an individual was unable to exert significant influence on the exercise of government power or benefit from their position, is insufficient to reasonably ground a conclusion that the individual is a “senior member of the public service” within the

meaning of subsection 16(d) of the Regulations. This issue would be dispositive of an appeal, transcends the interests of the parties, and raises an issue of general importance.

[40] Given this conclusion, the following question is certified:

In determining whether an individual is a prescribed senior official within the meaning of paragraph 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 on the basis that the individual may be a senior member of the public service as enumerated in subsection 16(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, when significant evidence is put forward that the individual was unable to exert significant influence or benefit from their position, can an officer conclude that an individual is a senior member of the public service solely on the basis that the individual is within the top half of the government hierarchy, or is the officer required to conduct a broader analysis and consider such evidence?

JUDGMENT in T-1975-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed, and the matter is remitted back to a different officer for reconsideration;
2. The following question is certified:

In determining whether an individual is a prescribed senior official within the meaning of paragraph 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 on the basis that the individual may be a senior member of the public service as enumerated in subsection 16(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, when significant evidence is put forward that the individual was unable to exert significant influence or benefit from their position, can an officer conclude that an individual is a senior member of the public service solely on the basis that the individual is within the top half of the government hierarchy, or is the officer required to conduct a broader analysis and consider such evidence?

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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