Federal Court  Cour fédérale

Date: 20220630

Docket: IMM-5109-20

Citation: 2022 FC 980

Ottawa, Ontario, June 30, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

AYOUB HAJI MOHAMMED,
AIERKEN MAILIKAIMU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicants, a husband and wife, apply for judicial review of a redetermination decision [Redetermination] made on August 21, 2020 by a visa officer [Second Officer]. Ayoub Haji Mohammed is the Principal Applicant in this matter [PA]. In the Redetermination, the Second Officer denied the PA's application for permanent residency.

[2] In a July 11, 2016 decision, [First Decision] a visa officer [First Officer] denied the PA's application for permanent residency. The First Decision was deemed procedurally unfair by this Court in *Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 326 *[Mohammed 2019]* and was remitted for redetermination. This judicial review relates to the redetermination of the First Decision.

[3] In the Redetermination, the Second Officer found the PA inadmissible under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], with reference to paragraph 34(1)(c). The Officer held that there were reasonable grounds to believe that the PA was a member of the East Turkistan Islamic Movement [ETIM], an organization that allegedly engages in acts of terrorism. Accordingly, the Second Officer denied the PA's application for permanent residency pursuant to subsection 11(1) of the *IRPA*.

[4] The application for judicial review is dismissed.

II. Background

A. *Background Facts*

[5] The PA, a Chinese citizen and ethnic Uyghur, states that he left China for Pakistan in August 2001 due to persecution and to further his education in the United States [US].

[6] In response to procedural fairness letters sent during the redetermination process, the PA submitted statutory declarations to the Second Officer dated April 9, 2020 [April Statutory

Declaration] and July 16, 2020 [July Statutory Declaration]. The statutory declarations explained the following.

[7] The PA travelled from China to Pakistan because a family friend living there was going to help him with his US study permit application. In Pakistan, he made a friend named Ali, who also decided to apply for a US study permit. The PA received his study permit and while awaiting Ali's study permit, the two decided to travel around Pakistan and Afghanistan. The pair travelled to Afghanistan because they learned that Pakistanis were sending Uyghers back to China.

[8] The PA and Ali decided to leave Afghanistan when the US invaded after 9/11. One day, prior to their departure, Ali did not return from the market. The PA decided to go back to Pakistan by himself by bus. On his way to the bus station, an armed group of men stole his money, identification, and student visa. An elderly witness took the PA in and eventually arranged for a taxi to take the PA to the Tora Bora Mountains, where a group of Uyghers were staying in a "village." The PA stayed in the village and slept in a nearby cave for approximately three months until the group decided to cross the mountains back to Pakistan.

[9] In or around October 2001, US authorities arrested the group in Pakistan. After being detained for six months in Kandahar, Afghanistan, the PA was detained in Guantanamo Bay for five years without a trial. In 2005, the Combatant Status Review Tribunal declared that the PA was not an enemy combatant. After his release in 2006, he was resettled in Albania, where he currently resides as a refugee.

[10] In March 2010, the PA married his wife, a Canadian citizen. They have two children who are also Canadian citizens. The PA's wife and children have status in Albania and have lived with the PA in Albania for "several periods" albeit temporarily.

B. *The First Decision & the March 2016 Interview*

[11] Prior to the First Decision, the PA attended two interviews. The first interview occurred on January 15, 2015 and no inadmissibility concerns were raised. Ultimately, this interview resulted in the preparation of a CSIS report and a CBSA inadmissibility assessment.

[12] The second interview occurred on March 10, 2016 [March 2016 Interview]. The invitation stated that the purpose of the interview was to continue processing the Applicant's application for PR. Ultimately, the First Officer found the PA inadmissible on security grounds because there were reasonable grounds to believe that he was a member of the ETIM.

[13] During the March 2016 Interview, the PA explained the following. He travelled to Pakistan in August 2001 to obtain a US study visa. He did not apply for a US visa in China because there was no US embassy in Turkistan and because he had a relative in Pakistan that could help him complete his application. He obtained a US study visa but did not travel there because he was waiting for Ali to obtain his US visa so they could travel together. They decided to wait in Afghanistan because the PA heard rumours that Pakistanis were capturing Uyghurs and sending them back to China. The First Officer asked why the PA travelled around Pakistan before going to Afghanistan if there was a risk of being deported to China. The PA stated that he regretted his decision and that he wanted to see the country.

[14] The PA also explained that after arriving in Afghanistan, a group of men robbed, kidnapped, and beat him. An elderly man helped him and brought him to a "training camp" where other Uyghurs lived, including a man named Hamat. The PA said the training camp was for Uyghur people "against China" and that some of the members could not return to Turkistan due to "political problems." The PA stated that for three months, he was "living in a cave" with the group and that they shared "solidarity", were "like one family", and "were all under the oppression of the Chinese." He explained that others in the group might have been training with weapons, but that he never used the weapons. He also said that he heard that some went back to China after training. During the interview, the PA stated that he was still in contact with some of these people.

[15] The First Officer asked the PA what the group was called. He stated that the group was "against the Chinese government" and that they "are people for independence" who "want [their] country back." The PA then stated that the group is called the "Turkistan Uyghur people group" and that Americans may refer to the group as the ETIM.

[16] At the end of the March 2016 Interview, the First Officer told the PA that they had reasonable grounds to believe that he was inadmissible on security grounds for being a member of the ETIM. The First Officer asked if the PA had a response and the PA made some additional statements. This was the first time the PA was advised of inadmissibility concerns.

C. *Mohammed 2019*

[17] The PA sought judicial review of the First Decision. In *Mohammed 2019*, Justice St-Louis held that the First Officer breached the PA's rights to procedural fairness and allowed the application for judicial review. Justice St. Louis opined:

> [28] …in the context of inadmissibility under section 34 of the [*IRPA*], the Court [has] found that procedural fairness is breached when an officer requests an interview without specifying the precise subsection of section 34 at issue: [*AB v Canada (Citizenship and Immigration)*, 2013 FC 134 [*AB*]] at paras 63-66. In the present case, the letters requesting an interview did not inform Mr. Mohammed of the Officer's concerns with inadmissibility and did not mention section 34. As such, the breach of procedural fairness becomes more flagrant.
>
> [29] The Court is satisfied that procedural fairness was breached because the Officer failed to (1) provide prior notice of her specific concerns (*Brhane v Canada (Citizenship and Immigration)*, 2018 FC 220 at para 19), (2) disclose documents she relied on in her decision, and (3) give Mr. Mohammed the opportunity to provide post-interview submissions.
>
> [30] Regarding lack of prior notice, the interview notices were generic, whereas the interviews' true purpose—to address security concerns—was unknown to Mr. Mohammed until the conclusion of the second interview. The Court is satisfied such an approach breaches procedural fairness (*Johnson v Canada (Citizenship and Immigration)*, 2017 FC 550 at paras 14–17; *Bushra v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1412 at paras 20–21). Further, the Officer failed, prior to the interview, to specify the precise subsections at issue under section 34 of the [*IRPA*] and, during the interview, informed Mr. Mohammed of her concerns related to paragraphs 34(1)(d) and (f) of the [*IRPA*], but ultimately found inadmissibility based on 34(1)(c) and (f) grounds (*AB* at para 53).
>
> [31] The Court is satisfied that failure to disclose of the reports was problematic, as they drove the decision-making process (*Krishnamoorthy v Canada (Citizenship and Immigration)*, 2011 FC 1342 at paras 38–39; *Pusat v Canada (Citizenship and Immigration)*, 2011 FC 428 at para 30 [*Pusat*]; *Mekonen v Canada (Citizenship and Immigration)*, 2007 FC 1133 at paras 19, 26).
>
> [32] Regarding failure to allow post-interview submissions, procedural fairness required an opportunity to provide submissions after an interview if notice of specific concerns was not given in

> advance (*Bin Chen v Canada (Citizenship and Immigration)*, 2008 FC 1227 at paras 34–35). This is not a case where the applicant waived his right to respond at the earliest opportunity (*Lally v Telus Communications Inc*, 2014 FCA 214 at paras 25–26). Nor is it a case where the applicant failed to provide updated documentation (*Rodriguez Zambrano v Canada (Citizenship and Immigration)*, 2008 FC 481 at paras 39–40).
>
> [33] The Minister argues that, given his former counsel's submission letter, and the facts he himself disclosed, Mr. Mohammed was aware of the inadmissibility concerns and could have attempted to assuage them (*Chiau v Canada (Minister of Citizenship & Immigration*), [2001] 2 FC 297 at paras 47–50). However, the letter introducing his permanent residence application outlined that the American authorities had exonerated him, and specifically stated that, should there be further issues or concerns with respect to admissibility, Mr. Mohammed would like an opportunity to address them.
>
> [34] The Minister submits that the Court should still refuse to quash the decision on the basis that a negative decision is inevitable (*Yassine v Canada (Minister of Employment and Immigration)* [1994] FCJ No 949 (FCA)). The Court disagrees. As a general rule, "the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness", except when the demerits are such that the claim "would in any case be hopeless" (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at para 54). In the case at bar, Mr. Mohammed requested the opportunity to make further submissions if needed, and was unaware of the CSIS and CBSA briefs. The Court cannot presume what impact Mr. Mohammed's response and explanations would not have on the Officer's decision (*Pusat* at paras 33–34).

[18] Justice St. Louis concluded: "[t]he Court will allow the application and return the file for a new determination" (at para 35).

D. *Redetermination Process*

[19] The Global Case Management System notes indicate that an officer in the Rome Consulate [Rome Officer] made what the Applicants refer to as "a preliminary finding of inadmissibility" on June 6, 2019. These notes were not disclosed to the PA.

[20] On September 4, 2019, the Rome Consulate informed counsel for the Applicants [Counsel] that the PA would be interviewed the week of September 16, 2019. Correspondence between the Rome Consulate and Counsel indicate the following: the interview was scheduled for September 19, 2019; the Rome Consulate advised that it was the PA's responsibility to bring an interpreter and provide the name of that interpreter; and Counsel advised that an unidentified Uygher interpreter from a Canadian translation company would attend via phone. Counsel wrote, "[i]f this is not possible, then [the PA] will be unable to 'participate in a meaningful manner.'" The Rome Consulate cancelled the interview via email citing "technical and security concerns." Counsel acknowledged the cancellation and explained that the PA is not aware of a Uygher interpreter in Albania. Therefore, Counsel said that an interpreter from the Canadian company would still be required at the rescheduled interview.

[21] On November 22, 2019, the Rome Consulate asked if the PA could travel to another office to attend an interview. Counsel responded on December 19, 2019 explaining that the PA could not leave Albania because he did not have travel documents.

[22] On January 28, 2020, the Rome Consulate communicated that the PA would not receive a telephone interview due to privacy concerns. The email explains the Rome Consulate's efforts to find a Uygher interpreter and then states, "[a]s it is in both of our best interests to move the file

along, [Immigration, Refugees and Citizenship Canada] will now proceed with a procedural fairness letter (PFL) in writing." The Rome Consulate also noted that the application would be transferred to the Nairobi, Kenya office. On February 14, 2020, Counsel replied, "[w]e await the procedural fairness letter referenced in your communication that was received by [Counsel] on January 29, 2020." Counsel also explained that in the past, the application was not processed rapidly. Counsel stated their hope "that re-determination will commence as soon as possible."

[23] Following these communications, the PA received two procedural fairness letters [PFLs] dated March 12, 2020 [March PFL] and June 16, 2020 [June PFL]. The PA responded to both. The March PFL referenced the March 2016 Interview. In his reply, the PA raised concerns that the Second Officer was relying on statements made in the March 2016 Interview.

[24] The June PFL also referenced the March 2016 Interview and certain credibility concerns arising from a publication. The PA replied again raising concerns that the Second Officer was relying on the March 2016 Interview. The PA's reply included hundreds of pages and dozens of exhibits, including the PA's April Statutory Declaration and July Statutory Declaration. In the PA's reply he requested that a decision be made within 30 days.

III. The Redetermination

[25] The Second Officer made three key factual findings in the Redetermination.

[26] First, based on a United Nations Security Counsel [UNSC] Report and the 2011 US State Department Country Reports on Terrorism, the Officer found reasonable grounds to believe that

the ETIM engaged in terrorism. The Officer also considered the PA's submission that experts contest whether the ETIM is a terrorist organization. The Officer found that the PA had not provided sufficient evidence to impugn the findings of the UNSC or the US government.

[27] Second, the Second Officer found reasonable grounds to believe that the group the PA stayed with was the ETIM because:

- The PA's description of the group given in the 2016 Interview aligns with the description of the ETIM in the UNSC Report;
- A US Department of Defense document from Guantanamo states that the PA "received training in an ETIM training camp in Afghanistan";
- Hozaifa Parhat, a member of the group the PA stayed with, stated that the known and wanted leader of the ETIM was at the same "training camp" as himself and the PA. Mr. Parhat was also detained in Guantanamo; and
- The PA's statements in his April Statutory Declaration are substantively different from his statements in the 2016 Interview. The Second Officer held that the 2016 Interview was more credible than the statutory declarations.

[28] Third, the Second Officer concluded that the PA was a member of the ETIM for four reasons:

- The PA's three-month stay showed "a high degree of commitment";
- The PA's statements in the 2016 Interview indicated agreement with the goals of the ETIM;
- The PA remains in contact with members of the ETIM; and

- While the US cleared the PA of enemy combatant status, this did not clear him of ETIM links.

[29] Next, the Second Officer considered the PA's procedural fairness concerns about their reliance on the 2016 Interview. The Second Officer noted that *Mohammed 2019* did not exclude the use of the interview notes. Additionally, the Second Officer found that the previous breaches of procedural fairness were corrected because: the March PFL and June PFL informed the PA of the case to meet; all documents were disclosed; and the PA responded. Finally, although the PA claims there were language barriers in the March 2016 Interview, the Second Officer concluded that there is evidence that the PA understands and can communicate in English.

[30] Lastly, the Second Officer made two negative credibility findings. First, they drew a negative inference from the PA's inconsistent statements about when he met Ali and whether he travelled with him from China to Pakistan. The Second Officer also drew a negative inference due to the PA's inconsistent statements regarding where he stayed in Afghanistan and whether there were weapons at that location.

IV. Preliminary Issue - Style of Cause

[31] I agree with the parties that the Applicants' two children should be removed from the style of cause. The Redetermination does not directly affect the children's legal rights.

V. Issues and Standard of Review

[32] After reviewing the submissions of the parties, the issues are best characterized as:

1. Did the Second Officer breach the PA's rights to procedural fairness?
    a. Is there a reasonable apprehension of bias in the Redetermination decision?
    b. Did *Mohammed 2019* preclude the use of the 2016 Interview?
    c. Did the Second Officer otherwise err by relying on the 2016 Interview?
    d. Was the PA entitled to a fresh interview?
2. Was the Second Officer's inadmissibility finding unreasonable?
    a. Were the Second Officer's credibility findings unreasonable?
    b. Did the Second Officer unreasonably conclude that the group that the PA stayed with was the ETIM?
    c. Did the Second Officer unreasonably conclude that the PA was a member of the ETIM?
3. Should the Court enter an indirect substitution?

[33] The parties agree that the merits of the Decision are reviewable on the standard of reasonableness. This case does not engage one of the exceptions set out by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Therefore, the presumption of reasonableness is not rebutted (at paras 23-25, 53).

[34] In assessing the reasonableness of a decision, the Court is to consider not only the outcome but also the underlying rationale to assess whether the "decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). The reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). For a decision

to be reasonable, a decision-maker must adequately account for the evidence before it and be responsive to the Applicants' submissions (*Vavilov* at paras 125-128). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86).

[35] I agree with the Applicants that the appropriate standard of review for issues of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Oleynik v Canada (AG)*, 2020 FCA 5 at para 39, *Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]).

[36] The Respondent is correct to note that, in the context of foreign nationals seeking entry to Canada, the content of procedural fairness is at the lower end of the spectrum, especially where national security issues are at play (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297, 195 DLR (4th) 422 (CA) at paras 41-54; *Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345 at paras 30-32; *Fallah v Canada (Citizenship and Immigration)*, 2015 FC 1094 at para 8).

VI. Analysis

A. *Did the Second Officer breach the PA's rights to procedural fairness?*

(1) Is there a reasonable apprehension of bias in the Decision?

(a) *Applicants' Position*

[37] Like *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*], the Rome Officer's June 6, 2019 notes raise a reasonable apprehension of bias, tainting the Redetermination (*Baker* at paras 45-48). These notes indicate that the Rome Officer had a closed mind and predetermined inadmissibility before the redetermination process began. The Rome Officer played a significant role because their notes form part of the Decision and their comments pertained to the determinative issue of inadmissibility.

(b) *Respondent's Position*

[38] Nine lines in the Rome Officer's notes do not give rise to "substantial grounds" for a reasonable apprehension of bias (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, 68 DLR (3d) 716 [*Committee for Justice*]). The Second Officer carefully engaged with the matter. They wrote seven pages of notes explaining their inadmissibility concerns, carefully considered *Mohammed 2019*, permitted the PA to make further submissions, and gave detailed and responsive reasons. Here, unlike *Baker*, the Rome Officer did not play a significant role in the Decision.

(c) *Conclusion*

[39] The Rome Officer's June 16, 2019 notes do not give rise to a reasonable apprehension of bias. When assessing bias the Court must ask "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly" (Baker at para 46 citing Committee for Justice at 394).

Moreover, as pointed out by the Respondent, the grounds to establish a reasonable apprehension of bias must be "substantial" (*Committee for Justice* at 395).

[40] The starting point in this case is to ask whether the Rome Officer played a significant role in the Decision. The Rome Officer's June 6, 2019 notes state:

> [A]fter careful review of information in the file, notes of previous officer, notes of interview which took place on March 10, 2016 and information provided by the applicant, as well as open source information, I have reasonable grounds to believe that [the PA] was a member of ETIM, an organization that engaged in terrorism and that PA is inadmissible under A34(1)(c) and A34(1)(f) of the IRPA. Procedural fairness letter to be sent.60 days to answer.

[41] I find that the above excerpt does not indicate that the Rome Officer mandated or recommended an outcome nor does the record indicate that the Rome Officer played a significant role in the Decision.

[42] Even assuming that the Rome Officer did play a "significant role", I do not find that their notes reveal substantial grounds for a reasonable apprehension of bias. The Rome Officer only refers to the "information in the file", "notes of [the] previous officer", "notes of [the] interview", "information provided by the applicant", and "open source information." Nothing within the June 6, 2019 notes demonstrates that the Rome Officer prejudged the matter, relied on stereotypes, or engaged in any impermissible reasoning (see *Baker* at paras 5, 45, 48). More importantly, the Second Officer's Redetermination decision clearly grapples with the Applicants' submissions independently. In my view, the Rome Officer's notes were but one part of the Redetermination.

(2) Did *Mohammed 2019* preclude the use of the March 2016 Interview?

(a) *Applicants' Position*

[43] *Mohammed 2019* implicitly instructed that the March 2016 Interview was to be excluded on redetermination (*Mohammed 2019* at paras 29-32). A "decision-maker to whom a case is returned to must always comply with the reasons and findings of the judgment allowing the judicial review, as well as the directions and instructions explicitly stated by the Federal Court" (*Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 at para 27 [*Yansane*]). Therefore, the Court should focus on the findings and reasons in *Mohammed 2019* and how the Second Officer did not comply with them.

(b) *Respondent's Position*

[44] *Mohammed 2019* does not expressly preclude the use of the March 2016 Interview, nor can this be inferred. Regardless, only directions and instructions explicitly stated in a judgment are binding on a decision-maker (*Yansane* at paras 19, 23, 25). In *Mohammed 2019*, the PA never even requested this relief. In the absence of instruction or direction from a reviewing court, an officer may consider past information from applications and interviews as long as the officer does not fetter their discretion (*Ngyuen v Canada (Citizenship and Immigration)*, 2020 FC 1126 at paras 19-21 [*Ngyuen*]). There is no evidence, nor does the Applicant allege, that the Second Officer felt bound by the First Decision.

(c) *Conclusion*

[45] I find that *Mohammed 2019* did not preclude the use of the March 2016 Interview. This is apparent from a reading of Justice St. Louis's reasons set out earlier at paragraph 17. I agree that a decision-maker on redetermination must always account for a reviewing court's decision and findings but there is nothing in *Mohammed 2019* that indicates that the breaches committed by the First Officer "tarnished" or "tainted" the contents of the March 2016 Interview. The breaches identified by Justice St. Louis related to the process leading up to the First Decision. Justice St-Louis did not find that the First Officer's procedural errors "tainted" the contents of the March 2016 Interview, nor did she instruct that the March 2016 Interview be excluded during redetermination. Only instructions explicitly stated in a judgment bind the subsequent decision-maker (*Yansane* at para 19).

[46] The Second Officer also considered the PA's argument that *Mohammed 2019* precluded them from considering the March 2016 Interview. The Officer noted that the Applicants never asked for this relief in *Mohammed 2019* and that Justice St-Louis never explicitly excluded the use of the interview. The Second Officer's approach is consistent with *Yansane*.

[47] Moreover, the Second Officer considered Justice St-Louis' findings about non-disclosure, lack of notice, and the opportunity to make post-interview submissions and concluded that all of these problems had been remedied in the present case.

[48] As a result of *Mohammed 2019* and the process leading to the March PFL and June PFL, the PA was well aware of the inadmissibility concerns at play, he had full access to the evidence in question, and he knew that the merits of the inadmissibility finding were going to be addressed

on redetermination. The PA had two opportunities to make submissions on these points (in his responses to the two PFLs). In short, the PA went through the redetermination process well informed and he knew the case against him. This fulfilled the relatively low duty of fairness (*Lyu v Canada (Citizenship and Immigration)*, 2020 FC 134 at paras 15, 17-18; *Ngyuen* at para 20). Accordingly, the Second Officer was not precluded from considering the March 2016 Interview.

(3) Did the Second Officer err by relying on the March 2016 Interview?

(a) *Applicants' Position*

[49] The Second Officer's choice to rely on the March 2016 Interview breached the PA's procedural fairness rights because the interview itself was procedurally unfair. The March 2016 Interview was procedurally unfair partially because the Applicant was not given an interpreter.

[50] In response to the Respondent's argument, the Applicant submits that the three-part test for issue estoppel is not met. The preconditions to the operation of issue estoppel include:

1. that the same question has been decided;

2. that the judicial decision which is said to create the estoppel was final; and

3. that the parties to the judicial decision or their privies were the same person as the parties to the proceedings in which the estoppel is raised or their privies (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25 [*Danyluk*]).

[51] The first prong is not met because *Mohammed 2019* did not consider whether the PA was entitled to an interpreter. The third prong is not met because the Redetermination is a fresh matter that is separate from the First Officer's decision and the decision-makers are not the same. The Applicants do not make submissions on the second part of the test.

(b) *Respondent's Position*

[52] The doctrines of issue estoppel and abuse of process preclude the Applicants' arguments about procedural unfairness. The issue of an interpreter at the March 2016 Interview is barred by issue estoppel and abuse of process because it was raised and abandoned in *Mohammed 2019*. There is also evidence that the PA can understand and communicate in English, as indicated in the notes of the March 2016 Interview. The PA only raised language concerns after the First Decision.

(c) *Conclusion*

[53] I agree with the Respondent that the Applicant's submissions concerning the lack of interpretation are barred by the principle of *res judicata* and issue estoppel. The Applicants set out the appropriate test and I add that the test was also enunciated by the Chief Justice of this Court in *Watts v Canada (Revenue Agency)*, 2019 FC 1321 [*Watts*] at paragraphs 17-19:

> The doctrine of *res judicata* is premised on the principle that a litigant "is only entitled to one bite at the cherry": *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 46, at para 18 [*Danyluk*]. Put differently, once an issue has been decided, it "should not generally be re-litigated to the benefit of the losing party and the harassment of the winner": *Danyluk*, above.
>
> There are two steps to the Court's approach to the issue estoppel form of *res judicata*. In the first, the Court determines whether the

> following three preconditions to the application of the doctrine are met:
>
> > i. the same issue must have been previously decided;
> >
> > ii. the prior decision that is said to create the estoppel must have been final; and
> >
> > iii. the parties to the prior decision (or their representatives) must be the same as the parties to the proceedings in which the doctrine of issue estoppel is being raised.
>
> *Danyluk*, above at para 25.
>
> In the second step, the Court assesses whether to exercise its discretion to apply issue estoppel.

[54] I agree with the Respondent that the issue of an interpreter is caught by issue estoppel. Where, through reasonable diligence, an issue could or should have been raised in a previous proceeding, issue estoppel will operate (*Grandview v Doering*, [1976] 2 SCR 621 at 638, 61 DLR (3d) 455; *Pharmascience Inc v Canada (Health)*, 2007 FCA 140 at paras 2, 39). As the Respondent points out, and the Applicants acknowledge, the Applicants raised this issue when they sought leave to apply for judicial review of the First Decision, but abandoned it at judicial review before Justice St. Louis. As stated by the Supreme Court, "[t]he law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so" (*Danyluk* at para 18). Accordingly, I find that the Applicants may not rely on this argument now – particularly after deciding not to pursue it in *Mohammed 2019*.

[55] I also find that Mohammed 2019 was a final decision, thereby satisfying the second consideration. The parties had the opportunity to make submissions, which they did, and Justice St-Louis pronounced on the matters related to breaches of procedural fairness.

[56] The third consideration is satisfied because the parties in *Mohammed 2019* are the same as the parties in this matter. I find this irrespective of the fact that different officers considered the PA's application.

[57] Having found that issue estoppel applies to the question of an interpreter, it is unnecessary to consider whether raising this issue is also an abuse of process.

[58] Turning to the second step, the Court must consider whether there is anything about the circumstances of this case that would give rise to an injustice if the doctrine were applied in the Respondent's favour (*Watts* at para 33 citing *Danyluk* at 63-67). In my view, whether the PA can understand and communicate in English is clearly relevant to whether it would be unjust to apply the doctrine of issue estoppel. The PA raised the issue of an interpreter with the Second Officer and the Second Officer reasonably determined that there was evidence that the PA could understand and communicate in English. The Second Officer noted that the PA's original Generic Application Form stated that his preferred language for an interview was English. The Second Officer also noted that the PA told the First Officer that he understood the First Officer's English and the PA never raised any language concerns with the First Officer during the March 2016 Interview. On the evidence, there was a basis for the Second Officer to conclude that the PA can communicate and understand English. Accordingly, I find that no injustice would arise

by precluding the Applicants from raising the issue of interpretation, which he abandoned in *Mohammed 2019*.

(4) Was the PA entitled to a fresh interview?

(a) *Applicants' Position*

[59] If the Second Officer did not err by relying on the March 2016 Interview, the PA's rights to procedural fairness were breached because he was not given a fresh interview. The PA had a legitimate expectation to an interview for at least four reasons. First, like *Kandiah v Canada (Citizenship and Immigration)*, 2018 FC 1096 [*Kandiah*], the PA was assured on multiple occasions that he would be interviewed. Second, the decision-maker voluntarily held an interview with the PA in the past (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 94-95). Third, the Immigration, Refugees and Citizenship Canada [IRCC] Operational Bulletins state that when files are transferred to new offices, new PFLs or interviews may be required. Contrary to the Respondent's submissions, the PA did not accept that the redetermination process would proceed by way of PFL. Finally, the PA had a legitimate expectation to an interview because his credibility was at issue.

(b) *Respondent's Position*

[60] Procedural fairness did not require another interview. The PA knew the case to meet and had an opportunity to respond (*Canadian Pacific* at para 56). The Respondent informed the PA that the redetermination would occur by way of PFLs and Counsel agreed. The PA only raised concerns that there was no interview after the Redetermination. Indeed, on July 17, 2020 (35

days before the Redetermination was made), Counsel asked that a decision be rendered within 30 days of July 16, 2020.

[61] This case differs from *Kandiah* because, unlike *Kandiah*, an interview was never promised in this case. There was an attempt to schedule one but it never occurred due to security concerns. The PA benefitted from a past interview and the PA provided written responses to concerns arising from that interview.

(c) *Conclusion*

[62] I find that the PA was not entitled to a fresh interview. An "administrative process can be changed as long as the change to the process is fair and is properly communicated" with sufficient notice (Kandiah at para 27). In Kandiah, Justice Walker emphasized that "[t]he Procedural Fairness Letter contained no indication that the Applicant's written submissions were requested in lieu of an interview. It did not state or suggest that [Citizenship Immigration Canada] was changing the review process it had established and communicated to the Applicant" (*Kandiah* at para 26). On this basis, the present matter is distinguishable.

[63] After the Rome Consulate cancelled the interview, it wrote to Counsel on January 28, 2020 stating, "[a]s it is in both our best interests to move the file along, IRCC will now proceed with a procedural fairness letter (PFL) in writing." When situated in its larger context, it is clear that this sentence was notice that the file would proceed by way of PFL instead of an interview. The preceding paragraph in the January 28, 2020 email explains all the difficulties associated with obtaining a translator. On February 12, 2020 Counsel replied stating, "[w]e await the

procedural fairness letter referenced in your communication that was received by [Counsel] on January 29, 2020." In my view, these emails constitute sufficient notice of a change in procedure and Counsel's consent to proceed by way of PFL. More importantly, I agree with the Respondent that Counsel's request for a final decision within 30 days of their July 17, 2020 response to the second PFL further demonstrates their consent.

B. *Was the Second Officer's inadmissibility finding unreasonable?*

(1) Were the Second Officer's credibility findings unreasonable?

(a) *Applicants' Position*

[64] The Second Officer's credibility findings were unreasonable for two reasons. First, the Second Officer unreasonably drew a negative inference about when the PA met Ali. The Officer relied on an ambiguous sentence in the PA's statutory declaration: "[a]fter leaving China, I came to Kirgizstan then Pakistan with a friend to apply for a US visa." Given that the PA is not fluent in English, this sentence could have multiple meanings. The PA has always been consistent that he travelled alone to Pakistan, where he met Ali. Regardless, any discrepancy about Ali is minor and cannot be used to draw a negative credibility finding. These details are irrelevant to the PA's overall credibility or inadmissibility. The Respondent inappropriately tries to buttress the Officer's finding on this point by pointing to earlier statements made by former counsel and current counsel in *Mohammed 2019* (*Vavilov* at para 96).

[65] Second, the Second Officer made an unreasonable adverse inference about where the PA stayed and the presence of weapons by failing to account for the evidentiary record. In the March

2016 Interview, the PA states that he was staying in a rundown village and sleeping in a cave. Contrary to the Second Officer's conclusions, this was consistent with the PA's response to the March PFL.

[66] The PA has always maintained that he saw a single rifle. The Second Officer ignored this statement and selectively referred to another line in the March 2016 Interview to support his finding that there were multiple weapons. The Officer also failed to account for the PA's subsequent responses to the PFLs regarding weapons.

(b) *Respondent's Position*

[67] The Second Officer's credibility findings were reasonable. The statement, "[a]fter leaving China, I came to Kirgizstan then Pakistan with a friend to apply for a US visa" is not ambiguous. The Second Officer reasonably relied on this statement to draw a negative inference. The fact that the PA's previous and current counsel made statements in *Mohammed 2019* that the PA travelled with a friend to Pakistan supports the Officer's negative inference. This inconsistency is not minor because it calls into question a key aspect of the PA's narrative. Regardless, minor credibility concerns can go to an applicant's overall credibility (*Qasem v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1182 at para 48; *Zhai v Canada (Citizenship and Immigration)*, 2012 FC 452 at para 17).

[68] The Officer's negative inference about where the PA stayed and whether there were multiple weapons is reasonable. The Officer reasonably inferred that there would be more than one weapon since the purpose of the camp was to "train against China." Furthermore, this

conclusion is supported by the fact that the PA was in Afghanistan near the infamous Tora Bora cave complex shortly after 9/11. US Courts of Appeals decisions involving other Uyghers at the same camp similarly confirm the existence of multiple weapons.

(c) *Conclusion*

[69] I agree with the PA that the Respondent has tried to inappropriately buttress the Second Officer's reasons by referring to evidence that the Second Officer did not discuss (*Vavilov* at para 96). Nonetheless, I find that all of the Second Officer's credibility findings are reasonable.

[70] The Second Officer reasonably drew a negative inference due to inconsistencies about when and where the PA met Ali. The following statement is not ambiguous: "[a]fter leaving China, I came to Kirgizstan then Pakistan with a friend to apply for a US visa." In my view, this sentence means that the PA travelled with Ali to Pakistan with the intent to apply for student visas. Therefore, I find that the Officer reasonably concluded that the PA made inconsistent statements about where and when he met Ali.

[71] I find that the inconsistencies about where and when the PA met Ali are relevant to this case. The Second Officer reasonably concluded that "[t]his inconsistency is related to whether the [PA] travelled alone from China to Pakistan or with a friend – a friend who the applicant states is one of the reasons he went to Afghanistan…". A central issue in this matter is why the PA went to Afghanistan. The PA's narrative is that he and Ali met in Pakistan and Ali applied for a student visa after the PA applied for his student visa. According to the PA, he travelled with Ali around Pakistan and then to Afghanistan while awaiting Ali's student visa. Where the pair

met is important because it explains the delay between their applications. Had they travelled to Pakistan together to obtain student visas, they presumably would have made their applications around the same time. The delay in their applications was offered as the explanation for why they chose to travel around Pakistan and then, ultimately, to Afghanistan. In considering this detail, the Officer did not commit a reviewable error by engaging in a "microscopic evaluation of issues peripheral or irrelevant to the case" (*He v Canada (Citizenship and Immigration)*, 2019 FC 2 at para 23 citing *Harmichael v Canada (Citizenship and Immigration)*, 2016 FC 1197 at para 15).

[72] Likewise, I find that the Officer reasonably concluded that the PA made inconsistent statements about where he stayed and whether there were multiple weapons. I disagree with the Applicants that the PA consistently stated that he saw a single rifle. During the March 2016 Interview, the First Officer noted that the PA said, "I did not use these weapons. The weapons were for training against China." The Second Officer noted the plural nature of the word "weapons" and concluded that this statement was inconsistent with the PA's version of events in his statutory declarations. Given these inconsistencies, it was open to the Second Officer to draw a negative inference. The Second Officer also reached this conclusion by reasonably inferring that there would be more than one weapon if the group was training against China.

[73] The Applicants take issue with the fact that the Second Officer did not grapple with the PA's statement to the First Officer that the group had "a Kalashnikov." With respect, this statement reinforces the Second Officer's finding that the PA's narrative is inconsistent. The fact

that the PA told the First Officer that he saw "a Kalashnikov" does not transform or erase his multiple references to "weapons."

[74] Similarly, I am not persuaded by the Applicants' submission that he has been consistent about living in the village and sleeping in the cave. The PA described the village in the March 2016 Interview but never explained that this was where he was living. As noted by the Second Officer, during the March 2016 Interview the PA said he was "living" in the cave – this is different from what he said in his statutory declarations. As such, it was reasonable for the Second Officer to conclude that the PA made inconsistent statements and to draw a negative inference on this basis.

(2) Did the Second Officer unreasonably conclude that the group that the PA stayed with was the ETIM?

(a) *Applicants' Position*

[75] The Officer's membership finding was unreasonable because he relied on contested documents and failed to engage with the evidence before him. Experts have referred to the UNSC Report, which classifies the ETIM as being associated with al Qaida, Osama bin Laden, or the Taliban, as a 'quid pro quo' between China and the US. These expert opinions, which contradict a key finding, were before the Second Officer but they completely failed to engage with them (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53 at para 17, 83 ACWS (3d) 264 [*Cepeda-Gutierrez*]). The Second Officer preferred the PA's statements in the March 2016 Interview over the April Statutory Declaration in which the PA describes the village. The Second Officer preferred the credibility of the March 2016 Interview,

noting its specificity and spontaneous nature, which is irrelevant. The March 2016 Interview was procedurally unfair. No amount of spontaneity makes it fair to now rely on the PA's statements when considering his membership, or for any other purpose.

(b) *Respondent's Position*

[76] The Second Officer reasonably concluded that the group was the ETIM. The Second Officer relied on the March 2016 Interview, the UNSC Report, a document submitted by the PA, and the PA's PFL submissions. A person's first spontaneous story is usually the most genuine and, therefore, the one to be most believed (*Azam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1033 at para 18).

(c) *Conclusion*

[77] I disagree with the Applicants that the Second Officer failed to engage with the record before them by failing to make specific reference to 'expert reports' that contradict the US government's and the UNSC's finding that the ETIM is a terrorist group. A reviewing court should not be hypercritical or hold a decision-maker to a standard of perfection (*Vavilov* at para 91; *Medina v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 926 at 4, 12 Imm LR (2d) 33 (FCA)). Likewise, decision-makers are not required to refer to every piece of evidence that is contrary to their finding and explain how they dealt with it (*Hassan v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 946 at 2, 147 NR 317 (FCA)). As noted in *Cepeda-Gutierrez*, this would be "too onerous a burden to impose upon administrative

decision-makers who may be struggling with a heavy case-load and inadequate resources" (at para 16. See also Vavilov at para 91).

[78] A decision-maker is required, however, to have regard for the evidence before it (*Vavilov* at paras 125-126). In the present case, I find that the Second Officer engaged with the contradictory evidence offered by the Applicants. The Second Officer explicitly notes that the Applicants pointed to "statements from a US member of Congress, a professor from George Washington University, and a Congressional Research Service (CRS) researcher, among others." The Second Officer identifies the Applicant's key concerns that the ETIM's classification as a terrorist group was a 'quid pro quo', that the ETIM did not take responsibility for alleged acts of violence, and that those alleged acts of violence were not publically reported on in China. All of this demonstrates that the Second Officer engaged with the evidence and was responsive to the PA's submissions. After assessing the evidence, the Second Officer concluded that there was insufficient evidence that the UNSC or the US government falsely listed an organization as a terrorist organization. The weighing of evidence is within the expertise of the decision-maker. The Second Officer's reasons demonstrate that they adequately engaged with the evidence. Moreover, those reasons are transparent, intelligible, and justified.

(3) Did the Second Officer unreasonably conclude that the PA was a member of the ETIM?

(a) *Applicants' Position*

[79] The Second Officer's membership determination is unreasonable because he failed to apply the legal test for membership and failed to engage with the facts of the case. The PA's "participation" in the group does not amount to "membership" as defined by the jurisprudence.

[80] An "unrestricted and broad" definition of "membership" does not mean anyone who has dealings with terrorist organizations are members (*Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness*), 2010 FC 957 at para 118 [*Coalition to Stop the War*]). "Mere passive membership" is not sufficient for a finding of membership under paragraph 34(1)(f) of the IRPA (*Hosseini v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 171 at para 44 [*Hosseini*]). Likewise, "low-level activities" such as distributing or photocopying pamphlets, attending meetings, or holding a supporter card will not result in automatic membership in a terrorist organization (*Nassereddine v Canada (Citizenship and Immigration*), 2014 FC 85 at para 24 [*Nassereddine*]; *Miguel v Canada (Citizenship and Immigration*, 2012 FC 802 at paras 24, 32-33 [*Miguel*]). Based on the Second Officer's findings, the PA was not even involved in low-level activities. Certainly, his "participation" was not substantial enough that one could infer formal membership (*Miguel* at para 31). The PA never participated in military training, nor did he touch a weapon. He did not even learn about the ETIM until his interrogations at Guantanamo.

[81] Additionally, the Second Officer's findings about the PA's activities are themselves unreasonable. First, the PA's three-month stay in the village should not be a proxy for membership. Second, the PA's agreement with the goals of the ETIM cannot be equated to membership. Third, associating with Uyghers that were also wrongly accused of being terrorists

cannot reasonably lead to a positive membership finding. Finally, in addition to not being an enemy-combatant, there is no credible evidence that the PA is a member of the ETIM.

[82] Lastly, the PA does not have the required "institutional link" with or "knowing participation" in the group's activities to be a member of the ETIM under paragraph 34(1)(f) (*Sinnaiah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1576 at para 6 [*Sinnaiah*]). Such a link can be established through "admitted membership" and "voluntary engagement in various activities which have been established by the case law as meeting the requirements for membership under s 34(1)(f)" (*Khan v Canada (Citizenship and Immigration)*, 2017 FC 397 at para 34 [*Khan*]). The PA has never participated in any activities that support the ETIM nor is he a member of the organization.

(b) *Respondent's Position*

[83] The Second Officer's membership finding was reasonable. "Membership" under the *IRPA* does not require formal membership or actual participation in acts of terrorism (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at paras 24-25; *Khan* at paras 29-30; *Vukic v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 370 at paras 33-34). Membership will often have to be inferred based on the circumstances (*Coalition to Stop the War* at para 128; *Nassereddine* at para 55). In this case, the facts satisfy the "unrestricted and broad" interpretation given to "organization" and "membership" in section 34 of *IRPA* (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 27-32).

[84] While the Applicants take issue with the Second Officer's observation that the PA maintains connections with members of the camp, the PA fails to note that the Second Officer explicitly states that their membership finding would not change if the PA was not in contact with these individuals.

(c) *Conclusion*

[85] In my view, when the facts of this case are taken together with the Second Officer's adverse credibility findings, their conclusion that the PA is a member of the ETIM falls within a range of reasonable outcomes.

[86] As noted by the Respondent, a decision-maker will almost always have to infer a finding of membership, since it will be rare that such information is volunteered (*Coalition to Stop the War* at para 128; *Nassereddine* at para 55).

[87] The Applicant cites a series of cases for the proposition that minor contributions to terrorist organizations do not equate to membership (*Hosseini* at para 44; *Nassereddine* at para 24; *Miguel* at paras 24, 33). The criteria for assessing membership is contextual and may include the degree of one's involvement, the length of time one was involved, their intentions, purpose, and commitment to the organization, and the organization's objectives (*Nassereddine* at para 24). Formal membership in the sense understood for lawful organizations is not required (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 92 [*Mahjoub FCA*]). Informal participation or support for an organization can satisfy membership (*Khan* at para 30).

[88] While the Applicants submit that an “institutional link” or “knowing participation” in a terrorist organization is required for inadmissibility under paragraph 34(1)(f), I note that this Court has found that neither *Sinnaiah* or *Krishnamoorthy* elaborated on what those terms mean (*Khan* at 34).

[89] On one hand, this Court has held that “knowledge” and “complicity” are not prerequisites for “membership” (*Khan* at para 29; *Kanagrendin* at paras 22, 25; *Nassereddine* at para 74). However, despite this rule, various decisions have nonetheless considered whether an “institutional link” or “mental element” exists (see e.g., *Khan* at para 43 and *Mahjoub (Re)*, 2013 FC 1092 at paras 64-65, 590-591, 631 [*Mahjoub (Re)*]).

[90] In *Mahjoub (Re)* the Federal Court considered whether the applicant in that case had a mental element of membership. The Federal Court held that the applicant had “an institutional link with Al Jihad and knowingly participated in that organization’ and there were reasonable grounds to believe that ‘he knew about [the terrorist] training’ at a Sudanese farm where he worked and was ‘complicit’ in it” (*Mahjoub FCA* at para 95 citing *Mahjoub (Re)* at paras 482, 504, 628-632). On appeal, the Federal Court of Appeal did not interfere with the Federal Court’s approach (*Mahjoub FCA* at paras 91, 95, 98). Ultimately, while it may not be required in every case, the determination of an institutional link requires evidence and depends on the facts at hand (*Sinnaiah* at para 17).

[91] In my view, the Second Officer’s reasons demonstrate that they adequately turned their mind to these legal principles and applied these principles to the evidence before them. The

Second Officer noted that the PA lived with members of the ETIM for three months in Afghanistan and that this demonstrated a high degree of commitment. The Second Officer also noted that the group possessed “weapons” for their “training against China.” Further, the Second Officer noted that in the March 2016 Interview, the PA expressed agreement with the goals of the group and stated that they shared “solidarity” and were like a “family.” In my view, in light of these particular facts, the Officer reasonably concluded that the PA was a member of the ETIM. I find that these facts, taken together, demonstrate that the PA had an institutional link or knowingly participated in a terrorist organization for the purposes of paragraph 34(1)(f). While knowledge or complicity is not required, on the record I find that the PA’s knowledge of and agreement with the group’s goals and the length of his stay with the group indicate more than mere passive participation.

[92] The Second Officer reasonably engaged with the evidence, including the issues related to credibility, and made a reasonable determination that the PA was a member of the ETIM.

C. *Should the Court enter an indirect substitution?*

[93] It is not necessary to address this issue since I have found that the Redetermination was reasonable and the Second Officer did not breach the PA’s rights to procedural fairness.

VII. Conclusion

[94] The application for judicial review is dismissed without costs. The Applicants' rights to procedural fairness were not breached and the Redetermination decision contains all of the hallmarks of a reasonable decision.

[95] The parties do not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-5109-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

3. The style of cause is amended to remove the two children's names.

4. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5109-20
STYLE OF CAUSE:	AYOUB HAJI MOHAMMED, AIERKEN MAILIKAIMU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 10, 2022
JUDGMENT AND REASONS:	FAVEL J.
DATED:	JUNE 30, 2022

APPEARANCES:

Prasanna Balasundaram	FOR THE APPLICANTS
Gregory George Bradley Bechard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT