

Federal Court



Cour fédérale

Date: 20090731

Docket: IMM-4953-08

Citation: 2009 FC 759

Montréal, Quebec, July 31, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

MOHAMMED HUSSEIN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review brought by Mohammed Hussein pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), of the decision of the First Secretary of the Canadian Embassy in Damascus (First Secretary), dated June 8, 2008, denying Mr. Hussein's application for a permanent resident visa in the spouse in Canada class, on the grounds of inadmissibility to Canada given the position he held in the Iraqi government led at the time by Saddam Hussein.

II. Facts

[2] The applicant is an Iraqi citizen. His wife, Worood Nasralla, is applying to sponsor him as a member of the spouse or common-law partner class.

[3] After reviewing his file, the First Secretary concluded that the applicant was subject to paragraph 35(1)(b) of the Act, and was therefore inadmissible and, for this reason, dismissed his application.

[4] More specifically, it would appear that the applicant held the position of a high-ranking legal advisor in Saddam Hussein's government between 1996 and 2003, during which time this same government committed gross human rights violations and crimes against humanity.

III. Issue

[5] Is the First Secretary's finding that the applicant is inadmissible to Canada erroneous or unreasonable with regard to the facts and the law and does it warrant the intervention of the Court?

IV. Analysis

A. Standard of review

[6] The issue involves the interpretation of the Act and its application to the facts. The question is therefore one of mixed fact and law; the applicable standard of review is therefore reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9). Judicial deference is required.

B. *Statutory framework*

[7] Paragraph 35(1)(b) and subsection 35(2) of the Act read as follows:

**Human or international
rights violations**

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*; or*

[...]

Exception

(2) Paragraphs (1)(b) and (c) do not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

**Atteinte aux droits humains
ou internationaux**

35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :

[...]

*b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;*

[...]

Exception

(2) Les faits visés aux alinéas (1)b) et c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt

national.

[Emphasis added.]

[Je souligne.]

[8] Section 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR), defines the expression “prescribed senior official in the service of a government” for the purposes of paragraph 35(1)(b) of the Act as follows:

**Application of par. 35(1)(b)
of the Act**

16. For the purposes of paragraph 35(1)(b) of the Act, a prescribed senior official in the service of a government is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position, 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;

**Application de l’alinéa
35(1)b) de la Loi**

16. Pour l’application de l’alinéa 35(1)b) de la Loi, occupent un poste de rang supérieur au sein d’une administration les personnes qui, du fait de leurs actuelles ou anciennes fonctions, sont ou étaient en mesure d’influencer sensiblement l’exercice du pouvoir par leur gouvernement ou en tirent ou auraient pu en tirer certains avantages, notamment :

a) le chef d’État ou le chef du gouvernement;

b) les membres du cabinet ou du conseil exécutif;

c) les principaux conseillers des personnes visées aux alinéas a) et b);

d) les hauts fonctionnaires;

e) les responsables des forces armées et des services de renseignement ou de sécurité intérieure;

f) les ambassadeurs et les

(f) ambassadors and senior diplomatic officials; and	membres du service diplomatique de haut rang;
(g) members of the judiciary.	g) les juges.

[Je souligne.]

[Emphasis added.]

[9] The applicant contends that the First Secretary erred in law because the grounds relied on by him are unreasonable, since they are not, in the applicant's view, based on the evidence.

[10] Paragraph 35(1)(b) is relevant where the government concerned has been designated, as is the case here, as a regime that was 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*.

[11] It so happens that the Iraqi governments of Ahmed Hassan Al-Bakr and Saddam Hussein, in power since 1968, are on the list of regimes designated by the Minister, on September 3, 1996, as having committed crimes, most notably by committing gross human rights violations.

[12] According to the information provided by the applicant with his application for a permanent resident visa, he acted as senior advisor and official for the seven years during which he served in Saddam Hussein's government. He made no reference to any attempt on his part to dissociate himself from the regime, nor did he ever offer his resignation, despite having had every opportunity to do so.

[13] The positions he held were all senior, according to the organizational chart included with the information submitted to the First Secretary: Counselor, Legal and Consular Affairs – Iraqi Permanent Mission to the UN in Geneva, 1996-1998; Counselor, Legal Advisor – Legal Department, Ministry of Foreign Affairs, Baghdad, 1998-2001; Counselor and acting Charge d’ Affairs – Iraqi Embassy, Madrid, Spain, 2001-2003.

[14] In *Canada (Minister of Citizenship and Immigration) v. Adam*, [2001] 2 F.C. 337 (F.C.A), after having reviewed the former paragraph 19(1)l of the Act, which was then in force and whose wording is nearly identical to that of the current paragraph 35(1)(b), the Federal Court of Appeal ruled that, when a person has held one of the positions listed in section 16 of the IRPR, that person is presumed to have held a position in which he or she was able to exert a significant influence on the exercise of government power. The Court further concluded that the presumption enacted by the former paragraph 19(1)l of the Act was irrebuttable, so that the person deemed to have held a senior position 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.

[15] The Court had already been called upon to interpret paragraph 35(1)(b) of the Act in *Lutfi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1391; after having cited *Adam* (above), Justice Harrington, writing for the Court, made the following observations:

Mr. Lutfi did not personally by word or deed engage in such atrocities. The question is whether he has the status of a prescribed senior official. If he does, any personal lack of blameworthiness is simply not relevant [...].

[Emphasis added.]

[16] It must be concluded from these decisions and from the very wording of the Act that paragraph 35(1)(b) enshrines 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.

[17] The applicant merely insists that he had no knowledge of the acts committed by the regime for which he worked and relies almost exclusively on case law relative to those cases of exclusion on grounds of complicity in crimes against humanity. However, even if this ignorance is proven to be true, he still falls within the provisions of paragraph 35(1)(b) of the Act governing the inadmissibility of members of governments responsible for gross human rights violations, as well as their senior advisors and senior members of the public service.

[18] The applicant can scarcely claim he was merely a subordinate official. Given the importance of his position within Saddam Hussein's regime, it is not unreasonable to conclude that he could not have been unaware of the crimes committed by the regime. Since he indicates that he never took steps to resign from his position or oppose the crimes of the government in which he served, it is not unreasonable to conclude, until proven otherwise, that he was complicit with the government with respect to crimes committed under its authority, even if the impugned decision in this proceeding does not refer to them.

[19] Consequently, the impugned decision was justified, both in terms of the facts and applicable law. This decision was therefore reasonable. The application for judicial review must be dismissed.

[20] No serious question of general importance was proposed or merits being proposed; accordingly, no question will be certified.

JUDGMENT

FOR THESE REASONS, THE COURT:

DISMISSES the application for judicial review.

“Maurice E. Lagacé”

Deputy Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4953-08

STYLE OF CAUSE: MOHAMMED HUSSEIN v. THE MINISTER OF
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PLACE OF HEARING: Montréal, Quebec

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**REASONS FOR JUDGMENT
AND JUDGMENT:** LAGACÉ D.J.

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