Federal Court Cour fédérale

Date: 20181113

Docket: IMM-5352-17

Citation: 2018 FC 1134

Ottawa, Ontario, November 13, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

HUSSEIN ALI SUMAIDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review application made pursuant to section 72 of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA]. The decision under review, made on October 30, 2017, is that of a senior decision maker with respect to the pre-removal risk assessment [PRRA] of the applicant. In my view, this case must be returned to a different officer for the purpose of conducting a new determination.

I. The status of the applicant

[2] The applicant was excluded from refugee protection some 27 years ago. That conclusion of the Convention Refugee Determination Division reached on December 12, 1991 was confirmed by the Federal Court of Appeal in the case of *Sumaida v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 66.

[3] He is a citizen of Iraq (whether his citizenship has been revoked is unclear) and Tunisia. His father was a high ranking diplomat in Iraq during the dictatorship of Saddam Hussein. As he was studying in England between 1983 and 1985, Mr. Sumaida joined a group opposing Hussein and his government. The objective of that group was to overthrow the regime and to establish an Iranian style theocracy in Iraq. Thus, some of its members engaged in active international terrorism although it was understood that cells outside Iraq were involved primarily in recruiting and in organizing propaganda and anti-Hussein demonstrations.

[4] Being disillusioned with that organisation, the applicant chose to report the names of members of that organisation to the Iraqi secret police [the Mukhabarat]. The members on which the applicant informed were mostly students in England. The information supplied to the Iraqi secret police would have been on over 30 members.

[5] But the activities of the applicant while in England were not limited to providing information to the Mukhabarat. It is known that he did intelligence work for Israel's Mossad, mainly against the Palestine Liberation Organisation [PLO]. The Court of Appeal decision notes

that "[e]ventually, he confessed to Iraqi authorities that he was working for Israel. He was pardoned on condition that he acts as a double agent. Eventually, he returned to Iraq and joined the Iraqi Mukhabarat" (para 5).

[6] I provide this information taken from the Federal Court of Appeal decision because it provides some background to the decision to exclude the applicant from refugee protection. In fact, this information is public knowledge because the applicant discussed these and other spying activities in his published auto-biography, *Circle of fear*.

[7] As a result of his activities, the Refugee Determination Division was satisfied that working for Israel would put Mr. Sumaida in danger if he returned to the Middle East. However, he could not benefit from refugee protection because there were serious reasons for considering that he had committed crimes against humanity. As such, the *United Nations Convention relating to the Status of Refugees* [the Convention] does not apply to him. The applicable provision of the Convention taken from Article 1 reads as follows:

F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**F** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:
a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the International instruments drawn up to make provision in respect of such crimes;	**a)** Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

By operation of s. 98 of the IRPA, the exclusion found in section F of Article 1 of the Convention is incorporated in our domestic law. Paragraph 112(3)(c) denies refugee protection where the claim was rejected on the basis of section F of Article 1.

[8] The Court of Appeal left undisturbed the Board's conclusion "that there were serious reasons for finding that the respondent had committed crimes against humanity. This was based on the respondent's activities for the Mukhabarat in the U.K. and in Iraq, as well as on his voluntary supplying of arms to a known terrorist." (para 10).

[9] Not being eligible to benefit from refugee protection does not prevent for a person being in Canada to seek the Minister's protection if they are subject to a removal order. Such protection is in the form of a pre-removal risk assessment pursuant to Division 3 of the IRPA. Mr. Sumaida benefited from a PRRA which concluded that he would be at risk if deported to Iraq, but not if removed to Tunisia. Mr. Sumaida had to be found and arrested before he was removed to Tunisia on September 6, 2005.

[10] It is not disputed that the application for protection for someone like Mr. Sumaida is made subject to paragraph 113(d) of IRPA which reads:

Consideration of application	**Examen de la demande**
113 Consideration of an application for protection shall be as follows:	**113** Il est disposé de la demande comme il suit :
[…]	**[…]**
(d) in the case of an applicant described in subsection 112(3)	**d)** s'agissant du demandeur visé au paragraphe 112(3) —

— other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and	sauf celui visé au sous-alinéa e)(i) ou (ii) —, sur la base des éléments mentionnés à l’article 97 et, d’autre part :
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	**(i)** soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada; and	**(ii)** soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu’il constitue pour la sécurité du Canada;
[…]	**[…]**

[11] Thus, when Mr. Sumaida returned to Canada in 2006, as he did less than a year after he was deported, he had no status in Canada and could not seek refugee protection. His status has remained the same ever since.

II. Facts

[12] Mr. Sumaida has led, as the euphemism goes, an interesting life. Born in 1965, he arrived in Canada for the first time in April 1990 on an Iraqi diplomatic passport. He made a refugee claim in August, but departed Canada in October 1990 for the United Kingdom, before his refugee claim had been dealt with, where he attempted to make a refugee claim there. However, he was unsuccessful in the United Kingdom due to his prior refugee claim made in Canada.

Thus, he returned to Canada in October 1990, was detained upon arrival but released three days later. The book to which the Court of Appeal referred was published shortly thereafter, in 1991, under the fuller title "*Circle of Fear, A Renegade's Journey from the Mossad to the Iraqi Secret Service*" In an article published in the Walrus Magazine of September 12, 2012, one can read:

> By 1985, Sumaida, then 20, grew disillusioned with his role in Hussein's "killing machine," and to exact some measure of revenge, he contacted the Mossad and began feeding information on two members of the Palestine Liberation Organization in London and Brussels. An Arab collaborating with Israel's spy service, Sumaida has said, was "akin to a Jew working for the Gestapo." Nevertheless, his double-dealing satisfied an appetite for intrigue and money. "It was a very fast life," Sumaida says.
>
> But Samaida wasn't done flipping sides. When the Mukhabarat became suspicious that he was dealing with the Mossad, Sumaida "confessed" that he was framed into working for the Israelis. The ploy worked and his life, he says, was spared by Hussein himself on condition that he act as a double agent. Eventually, he returned to Iraq and continued working for the Mukhabarat, in one case helping to broker an arms deal with Abu Abbas, the mastermind of the infamous 1985 hijacking of the cruise ship Achille Lauro."

[13] Following the decision of the Federal Court of Appeal, upholding the ineligibility for refugee status, the applicant sought permanent residence on the basis of humanitarian and compassionate grounds. The application was denied. This Court upheld the decision on June 23, 2003. Followed a first PRRA, on June 25, 2003. Close to 18 months later, in December 2004, the decision made was to the effect that Mr. Sumaida would be at risk if he removed to Iraq, but not if he moved to Tunisia. He was finally removed to Tunisia on September 6, 2005. It appears that Tunisian officials were at the airport when he arrived.

[14] Mr. Sumaida alleged that he was submitted to torture while in Tunisia but was eventually released from custody. He was successful in leaving Tunisia, less than one year after arriving, on

the pretext that he was attending a trade show in Holland in the summer of 2006. It appears that he was subjected to restrictions as to his leaving Tunisia but, yet, he obtained a visa and bribed his way out of the airport to catch his plane leaving for the Netherlands. Once in the Netherlands, as resourceful as ever, he claims that he consulted a lawyer and was successful in obtaining travel documents under a false identity to board a plane for Canada. On August 29, 2006, upon his return to Canada, he was reported for failing to obtain an Authorisation to Return to Canada and a new deportation order was issued. He was convicted of using a document to contravene the IRPA, which constitutes an offence under paragraph 122(1)(b) of IRPA. He made another PRRA application on November 18, 2006. It is the PRRA application that is the subject of this judicial review application.

[15] That PRRA application was made the subject of an initial determination on April 30, 2007: it was approved. In view of the mistreatment suffered by the applicant in Tunisia while he was living there in 2005-2006, together with two letters produced by Amnesty International on February 2, 2005 and in November 2006, it was found that the applicant was at risk in the following words:

> - I am strongly of the opinion that there is sufficient credible, objective evidence before me to conclude that, on a balance of probabilities, the applicant would be subjected personally to a danger of torture if he were removed to either Iraq or to Tunisia
>
> - furthermore, I am also strongly of the opinion that there is sufficient credible, objective evidence before me to conclude that, on a balance of probabilities, the applicant would be subjected personally to a risk to his life <u>and</u> to a risk of cruel and unusual treatment or punishment if he were removed to either Iraq or to Tunisia. [Emphasis in the original.]

[16] It appears that the mention in the PRRA decision that the PRRA application had been approved was mistaken as the process was not yet completed. It is only 4 ½ years later, on November 23, 2011, that Mr. Sumaida was informed that the Minister's delegate is not bound by the PRRA officer's opinion and that, in fact, his PRRA application was yet to be determined. It has taken another 6 years for the decision to come, on October 30, 2017, which is the decision on the PRRA that is a subject of the judicial review.

[17] The Court inquired at the hearing of this matter what the explanation for the delay might be. Counsel for the parties were unable to shed light on this unfortunate situation and no argument was presented concerning the said delay.

III. The PRRA decision

[18] The decision under review, which is issued by a senior decision maker, is that of the Minister's Delegate appointed pursuant to subsection 6(2) of the IRPA. According to s. 172 of the Immigration and Refugee Protection Regulations (DORS/2002-227), the Delegate considers a written assessment on the basis of the factors set out in s. 97 of the IRPA as well as on the basis of the factors set out in subparagraph 113(d)(ii), in the case of an applicant described in subsection 112(3).

[19] The case turns exclusively on the risk of return to Tunisia as the Minister's Delegate concluded that "on a balance of probabilities, […] Mr. Sumaida may be at risk of death if removed to Iraq" (p. 18 of 35, Reasons for decision, October 30, 2017).

[20] Although the decision is relatively long, it boils down to a limited number of issues. Mr. Sumaida has continuously argued that he is at risk of suffering torture if he is returned to Tunisia because of his previous work as a Mossad agent and with the Iraqi government “as a secret service recruiter”. He claimed to have suffered from Post Traumatic Syndrome Disorder [PTSD] for five years following his detention in Tunisia. The applicant also alleged that the country conditions in Tunisia show little respect for human rights, and little control over prisons and security forces where there is no accountability.

[21] Furthermore, terrorism has increased, with added instability within Tunisia itself, which increases the risk of torture and even death at the hands of jihadist groups who would see him as a potential target in view of his past activities which are publicly known from the publication of his book, as well as articles which can be easily retraced.

[22] The decision reproduces in large part what is referred to as an Amnesty International Bulletin from 2005 which reports on the disappearance of the applicant upon his return to Tunisia in September 2005, claiming that he was taken into custody by Tunisian authorities upon arrival at the Tunis airport. Similarly, one finds a number of paragraphs from a report prepared by a psychiatrist on February 26, 2007, following two sessions with the applicant on January 24 and February 21, 2007. The portion of the assessment reproduced in the decision reports on the alleged ordeal in Tunisia (torture in order to obtain information in relation to Israeli operations), including an attempted suicide. The assessment also describes the symptoms and informs the reader of various medications prescribed by medical practitioners in Tunisia and Canada since the applicant’s return.

[23] The applicant's story is therein presented in the form of a "rough transcription" of the hearing before the Minister's Delegate on January 5, 2017. There was no explanation for that "rough transcription" instead of having an official transcript of the hearing.

[24] The Minister's Delegate accepts that Mr. Sumaida suffered mistreatment at the hands of Tunisian authorities from September 6, 2005 to approximately September 16. Such is not the case for two periods of detention alleged to have taken place in 2006. They are said not to be credible. Among other reasons, the decision maker faults the other two accounts for not having the same level of details as for the first period of detention. The applicant is said to have offered inconsistencies and incoherencies.

[25] The Delegate seems to compare in the decision the testimony given in January 2017 to an email of August 2016 and an Amnesty International letter of November 2006. From the "rough transcript", it does not appear that the applicant was shown the document, even less so confronted with the alleged discrepancies. The decision goes on to fault the applicant for his lapse of memory concerning foreigners he socialized with while in Tunisia. Remains unexplained what might be the importance of not revealing names of foreigners met more than 10 years earlier.

[26] Similarly, the name of the Dutch lawyer met in The Netherlands after the applicant left Tunisia on the pretext he was attending a trade show was the subject of comment. The Minister's Delegate noted that the applicant was unable at the hearing to recall the lawyer's name and, given legal advice, "it would be reasonable to assume he would have approached the Canadian

authorities using his real identity" (p. 20 of 35, reasons for decision, October 30, 2017). This is odd because the Court was advised that the record shows emails where the identity of counsel is revealed, which suggests that he is not fictitious and that the applicant truly forgot the identity details of more than 10 years ago. More importantly, one is hard pressed to understand why someone deported from Canada less than one year earlier (deportation in September 2005 and departure from Tunisia in July 2006) would contact Canada authorities with his real name. To do what?

[27] On the alleged PTSD, the decision maker was dubious. There is only one psychiatric report, which is dated February 2007, yet it is asserted that the applicant suffered from PTSD for five years after leaving Tunisia. Furthermore, the report does not state that the PTSD suffered would be on account exclusively of the experiences in Tunisia. The decision maker refers to the psychiatrist having noted the applicant's "dramatic past history".

[28] For the decision maker, there was one period during which he was detained in Tunisia, upon his arrival. In effect, Mr. Sumaida was not credible on a number of fronts. One reads at page 32 of 35:

> <u>Mr. Sumaida is a known quantity</u>: the fact that Mr. Sumaida was questioned and monitored previously by state security in 2005-2006 and apparently no derogatory information was uncovered is important. As explained earlier in my decision I do not find Mr. Sumaida's allegations that he was detained on numerous occasions credible. I am satisfied he was only detained once in Tunisia – upon arrival. He was then released by the authorities after interrogation. He was granted permission to open and run his business. There is no reliable evidence that he was deemed to be a threat by the authorities at the time he was released from detention in 2005 or since. There is nothing to suggest he would now be seen as a threat. [Emphasis in original.]

[29] The Minister's Delegate also considered extensively the change in country conditions in Tunisia. The point appears to be that the regime change since the "Arab Spring" of 2011 has brought about a new attitude in Tunisia, with new state security structures, laws and policies. The decision maker found the changes promising in spite of a May 2017 Report of the Office of the United Nation High Commission for Human Rights relating to Tunisia which made the following observation which is reproduced in the decision:

> 31. The Committee against Torture remained concerned about consistent reports that torture and ill-treatment continued to be practised in the security sector, particularly by the police and National Guards, against persons held in custody, especially against terrorism suspects.58 The Special Rapporteur on torture made similar remarks and added that, during his visit in June 2014, he had heard multiple credible accounts that detainees had been subjected to torture and ill-treatment, particularly during arrest, transfer, interrogation and the first hours of *garde à vue* detention (policy custody), particularly in police stations. He expressed serious concern over reports that law enforcement officials used torture and ill-treatment as a means of conducting investigations, extracting confessions and in the contexts of repression of demonstrations and counter-terrorism operations. **He was, however, encouraged to find that accounts of torture and ill-treatment by guards in both garde à vue facilities and prisons were significantly fewer than before the revolution[29].** [Footnote omitted and emphasis in original.]

The Delegate commented following the passage from the Rapporteur just reproduced:

> While I acknowledge that the practice of torture has not been eradicated, it is encouraging that progress is being made by the authorities to curb the practice. I also note that the reports of ill-treatment appear to be focused on those suspected of terrorism given the serious threats posed by jihadist groups in recent years. This fact is highlighted in the recent Amnesty International Report submitted by Counsel, which explains the following: […]

[30] The Amnesty International Report (Amnesty International, ‘We want an End to the Fear’- Abuses under Tunisia’s State of Emergency, February 13, 2017) referred to is more nuanced than suggesting that abuses are limited to anti-terrorism actions:

> […]
>
> Since the state of emergency was reinstated in November 2015, the Tunisian authorities have carried out thousands of raids across the country, in which they have often used excessive and unnecessary force, and searched houses without judicial authorization, causing great fear and anxiety among residents, including children. Thousands of individuals have been arrested. While Amnesty International cannot comment on the overall proportion of arrests that were lawful or unlawful, it is concerned that, in the 19 cases it documented, the arrests were carried out without judicial warrants and were therefore arbitrary.
>
> The authorities have also used emergency measures to impose night-time curfews in areas of unrest, and to detain and pass harsh sentences against those accused of “breaking the curfew”. They have placed hundreds under assigned residence orders, amounting at times to house arrest, banned hundreds of others from travelling abroad, and arbitrarily applied border control orders inside Tunisian borders. In the cases documented by Amnesty International these measures have often been applied arbitrarily and have had a hugely detrimental impact on people’s everyday lives, affecting their right to health, employment and family life.
>
> The authorities have claimed that such measures are necessary to monitor the movements of individuals suspected of involvement in armed attacks, including those who have travelled to conflict areas such as Libya, Syria, Iraq and Algeria. However, many individuals who have had their rights violated as a result of these measures have told Amnesty International that they have never travelled to any of these countries. Indeed, in some cases, it appears that they were targeted on the basis of their perceived religious beliefs, for growing beards and wearing religious clothing, in a manner resembling the discriminatory policies adopted under former president Ben Ali. (…)
>
> In addition to the abusive use of emergency laws, the Tunisian authorities have also brought in new laws in their efforts to combat security threats. In July 2015, parliament speedily passed a new counter-terrorism law to replace a 2003 law that had often been

> used by the Ben Ali regime to repress peaceful opposition and criticism. Between 2003 and 2011, according to United Nations estimates, around 3,000 people had been tried and sentenced under the 2003 law, often based on confessions extracted under torture, and for "offences" such as "growing beards, wearing specific clothing and consulting prohibited sites". The new counter-terrorism law includes an overly broad definition of terrorism, increases surveillance powers of security forces and proscribes the death penalty for certain offences. Lawyers and activists have raised concerns that it could endanger human rights in a similar way to the 2003 law (…)
>
> In June 2016, changes to the Code of Criminal Procedures came into force that strengthened safeguards for detainees against torture and other ill-treatment, such as by reducing the time allowed for pre-charge detention to a maximum of four days and ensuring immediate access for detainees to their families and lawyers and to medical care. These changes are positive, but it is too early to assess the effect they have had in practice. Furthermore, they do not apply to those detained on terrorism-related charges, who can still be kept in pre-charge detention for up to 15 days and have their access to a lawyer delayed, increasing the risk of torture and other ill-treatment (…)
>
> What achievements have been made since the uprising have faltered in the face of the security challenges that Tunisia has had to face. Often overlooked in the first years after the uprising, Tunisia has struggled from the start with an increasing security threat that has led the authorities to impose the state of emergency for prolonged periods since then.[30] [Footnote omitted.]

It is on the basis of these observations that the Minister's Delegate notes laconically that "these are not characteristics which Mr. Sumaida shares" (p. 28 of 35, reasons for decision, October 30, 2017).

[31] The Minister's Delegate also discounts the anti-Israeli sentiment in Tunisia and a perceived increasing concern with respect to Mossad's alleged activities in Tunisia. Even in 2005, ordinary Tunisians did not persecute Mr. Sumaida or even became aware of the applicant's

past. The implication seems to be that if no one cared in 2005, no one would care now. As for the authorities, there is a tradition of tacit acceptance of Israeli agents in spite of an absence of diplomatic relations with Israel since 2000. Israel and Tunisia share a common enemy, the jihadist terrorism.

[32] In spite of Mr. Sumaida having gone to Twitter to condemn jihadist terrorism, as revealed in the decision, it is unlikely that it would have been noticed by the Islamic State. Such groups pose a threat to the civilian population in general, such threat being random: there is no more than a possibility that the applicant may be affected in the view of the decision make in this case.

IV. Argument and Analysis

[33] There is no dispute that procedural fairness requires a standard of correctness, which implies that no deference is owed the decision maker (Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12; [2009] 1 SCR 339; Mission Institution v Khela, 2014 SCC 24, [2014] 1 SCR 502). As for questions of fact, of mixed fact and law, the standard of review is presumptively that of reasonableness which entails in the words of the Supreme Court in Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2018 SCC 31, that "the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law""

[34] Whatever one may think of the applicant's character, such is not the issue before the Court. It is rather for the Court to determine if the decision made in his case is legal, whether it was correct from a procedural fairness standpoint or reasonable in view of the facts and the law. Similarly, the Court does not seek to determine if torture is prevalent in Tunisia. That is not an assessment to be made by the Court as Parliament chose to give the jurisdiction to administrative decision makers who have the expertise to assume that responsibility. To the extent their decisions are reasonable, following a process that is fair, the legality of the decisions will be confirmed.

[35] In my view, the procedural fairness owed to the applicant has been violated and the matter should be sent back to a different decision maker to be re-determined. In particular the applicant in this case was not afforded an opportunity to participate fully in the proceedings.

[36] The duty of fairness is largely context specific. As Brown & Evans put it "(b)ecause of the wide range of circumstances in which the duty of fairness applies, its content is not monolithic" (Judicial Review of Administrative Action in Canada, Thomson Reuters, loose-leaves, #7:1000). Indeed it has a constitutional element as section 7 of the *Canadian Charter of Rights and Freedoms* (Part I of The *Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11) requires the procedural protection of fair hearing where the right to life, liberty and security of the person is engaged.

[37] It has been said that oral hearings permit a dialogue, giving an opportunity to respond and know the issues viewed as important by the decision maker. They are "thought to be

indispensable where credibility is a significant issue in making a decision" (Brown & Evans, supra, #10.1100).

[38] There is little doubt that the credibility of the applicant played an important role in the decision reached. The Minister's Delegate doubted the credibility of the applicant, including of course that he suffered some mistreatment three times at the hands of the authorities in the few months he resided in Tunisia (2005-06). The decision maker referred to inconsistencies and incoherencies, or versions that purportedly conflicted with each other. There was also the suspicion that the applicant had strategic memory losses.

[39] The hearing that was conducted in January 2017 was not transcribed, but rather a "rough transcription" was used by the Minister's Delegate as evidence of what transpired. From my reading of that rough transcription, it appears clear that the applicant was allowed to give his evidence and tell his story, but it is only after the fact that the decision maker found inconsistencies with emails and other documents. In a word, the credibility of the applicant was assessed without the dialogue of a hearing, without him being confronted to alleged contradictions or discrepancies.

[40] It is certainly true that the rules of evidence do not apply with the same rigour before administrative tribunals than before courts of law. However, some rules of fairness may inform the duty put on one who wishes to impugn credibility in proceedings. That brings to mind the so-called "Rule in Browne v. Dunn". The oft-quoted paragraph from the House of Lords ((1893),

GR. 67, at p. 70-71) seems to me to insist on the fairness to the witness required if extraneous material is to be used to impugn credibility:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. [320] [Footnote omitted and my emphasis.]

[41] I do not mean to suggest that a hearing must take place everytime a credibility issue arises. But, at least, the applicant ought to be informed of the concerns. In the context of immigration cases, the law is nicely summarized in *Talpur v Canada (Citizenship and Immigration)*, 2012 FC 25, at para 21:

> [21] It is by now well established that the duty of fairness, even if it is at the low end of the spectrum in the context of visa applications (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 at para 41; *Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422 at para 39), require visa officers to inform applicants of their concerns so

> that an applicant may have an opportunity to disabuse an officer of such concerns. This will be the case, in particular, where such concern arises not so much from the legal requirements but from the authenticity or credibility of the evidence provided by the applicant. […]

[42] Chief justice Lutfy put it bluntly in *Martinez de la Cruz v Canada (Citizenship and Immigration)*, 2011 FC 259:

> [3] It was procedurally unfair for the member to ground her reasons for decision on the discrepancies between the first and second PIFs, without raising these inconsistencies during the hearing and affording the claimants the opportunity to provide an explanation. Also, the member's decision makes no reference to clarifications regarding the first PIF set out in the applicants' second PIF.
>
> [4] It is trite law that not every inconsistency must be put to a claimant. Here, however, the inconsistencies were directly related to the member's negative credibility finding. It was necessary, in the circumstances of this case, for the member to confront the claimants with the first narrative by raising her concerns during the hearing: *Kumara v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1172. The member failed to do so.

[43] The duty does not include an obligation to provide a "running score" on the strengths or weaknesses of the case. But where credibility is in play, the duty of fairness is engaged:

> The jurisprudence of this Court on procedural fairness in this area is clear: Where an applicant provides evidence sufficient to establish that they meet the requirements of the Act or regulations, as the case may be, and the officer doubts the "credibility, accuracy or genuine nature of the information provided" and wishes to deny the application based on those concerns, the duty of fairness is invoked[.]
>
> (*Madadi v Canada (Citizenship and Immigration)*, 2013 FC 716).

> (See more generally, Procedural Fairness When Credibility is an Issue, by Steven Meurrens, Immigration & Citizenship Bulletin (2017) Vol. 28, no. 2).

[44] As I have indicated earlier, the intensity of the procedural fairness requirements is context specific. Surely when someone faces deportation, after having spent more than 10 years in Canada and fearing mistreatment upon his return to his country of citizenship, perhaps attaining the level of torture, he is entitled, as a matter of fairness, to be confronted to the information that may be used to impugn his credibility.

[45] In the seminal case of *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999, the Supreme Court relied on five factors that affect the content of the duty of fairness. They have been summarized in the following fashion in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 [2004], 2 SCR 650.

> The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In my view and having regard to the facts and legislation in this appeal, these considerations require the Municipality to articulate reasons for refusing the Congregation's second and third rezoning applications.

[46] In the case at hand, one can hardly have a more important decision where possible torture is in play. I note that the country condition reports do not establish that mistreatment and even

torture have been eradicated. I also note that the PRRA officer who reviewed the factors set out in section 97 of the IRPA concluded that the applicant would be at risk if removed to his country of nationality. It is a live issue whether the situation has changed sufficiently today.

[47] It was only 4 ½ years later, in November 2011, that he was advised that the matter was not closed and that, in fact, the issue was to be decided by the Minister's Delegate. It took another five years for a hearing to take place. If there were issues with his credibility after such a long period of time, procedural fairness required that they be raised in a clear fashion.

[48] To compound the issue, a so-called "fairness letter" was sent to the applicant on January 26, 2017, three weeks after the hearing before the Minister's Delegate, which focused exclusively on the current, at the time, country conditions in Iraq and Tunisia. I agree with counsel for the applicant that the credibility issues were not raised.

[49] Counsel for the respondent took the view that the credibility of the applicant was a peripheral issue. What counted were the country conditions. I do not share that point of view. When read in its entirety, the decision is concerned primarily with two aspects: Mr. Sumaida's experiences in Tunisia between 2005-2006 and the forward-looking risks which include of course the current country conditions. The decision is a function of both aspects. If Mr. Sumaida was not detained three times in less than a year and he did not suffer from PTSD as a result of the ill-treatments, that informs the assessment of the whole case and puts a particular light on the country conditions which show, arguably, improvements of a cosmetic nature and where

mistreatment may not be limited to persons suspected of terrorism (which, in and of itself, cannot be condoned). The applicant's concerns about returning to Tunisia may be overblown. The argument according to which the authorities would show no interest in a former agent for Mossad and Mukhabarat is strengthened if his profile in 2005-06 was already of lesser interest. The assessment might be quite different if he was interrogated three times, was mistreated and there was a "look out" to limit his ability to leave Tunisia.

[50] The applicant's credibility is a central issue. Indeed, in the part of the decision called "Conclusion on Risk, Tunisia", it is striking to read this passage cited by the decision maker and taken from *Circle of Fear*:

> My special talent was people. Talking to them, getting them to talk to me. The Mossad recognized that trait and saw in me an ideal recruiter. I could swim in the sea and hook them a fish. Any kind of fish. If a man is a criminal, then I can act the criminal. If he's religious, I'm more pious than the pope. If he's a gardener, I love flowers. If he's a painter, I've studied Leonardo. Then I can get into his mind and figure out if this man has a weak spot, a grudge, a reason that would make him material for the spy mill. This talent, I believe, is the natural result of growing up as I did. I was a loner who read a lot. I was well traveled. I became a <u>chameleon</u> because I had to be a chameleon to survive in the many environments into which I was dropped (pages 62-63) [My emphasis.]

There are two reasons why I was struck. First, because the Minister's Delegate chose to conclude the decision by using that paragraph, immediately thereafter stating that "(c)onsequently, for all of the above stated reasons, I am satisfied on a balance of probabilities that Mr. Sumaida is not likely to face personalized risks as identified in section 97 of IRPA […]". Second, the choice of that passage tends to confirm that the applicant is not to be believed. Mr Sumaida is a chameleon

who will tell what needs to be told depending on his interest and the particular circumstances in which he finds himself. There may well have been reasons why the applicant's credibility might be doubted. But given the stakes, he has to be advised of the concerns, thus having a fair opportunity to answer.

[51] In an attempt to salvage the decision, the respondent argued that the findings made by the Minister's Delegate were reasonable, scouring the voluminous record for justification even if the decision itself may not have used the information specifically (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at para 18). However, in spite of the valiant effort, the reasonableness of the decision is not the controlling issue in this case. The reasonableness can be considered fully only after a procedurally fair process has been completed, where the applicant is given an opportunity to address the credibility concerns that will have been raised with him and to which he has been properly confronted. It is only after the process has been completed that an assessment, on the basis of the whole file, can be undertaken. Because the case must be returned for a new determination to be completed, it would be inappropriate for the Court to comment on the reasonableness of the decision as supplemented by the work of counsel without having a proper evaluation of the applicant's credibility.

[52] As a result, the judicial review application must be granted. The parties agreed that this case is fact-driven and, therefore, does not qualify for a question to be certified in accordance with paragraph 74(d) of IRPA. No question is certified.

JUDGMENT in IMM-5352-17

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted. The matter is returned to a different decision maker for a redetermination to be effected.
2. There is no question to be certified.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5352-17
STYLE OF CAUSE:	HUSSEIN ALI SUMAIDA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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