Federal Court Cour fédérale

Date: 20230809

Docket: IMM-4902-22

Citation: 2023 FC 1089

Ottawa, Ontario, August 9, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MOHAMMED SAHIB OUDA AL-RUBAYE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a migration officer [Officer] of Immigration, Refugees and Citizenship Canada [IRCC] in the Migration Section of the Canadian Embassy in Amman, Jordan, dated April 5, 2022 [the Decision]. In the Decision, the Officer refused the Applicant's application for permanent residence based on a finding that he was inadmissible to Canada, on grounds of violating human or international rights, pursuant to paragraph 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] As explained in greater detail below, this application is allowed, because the Decision does not identify evidence supporting a conclusion that the Applicant held a position in the top half of the relevant organization and was therefore a senior member of the public service in Iraq.

II. Background

[3] The Applicant is an Iraqi citizen. In August 2016, after obtaining refugee status in Canada, the Applicant's wife included the Applicant as a dependent in her application for permanent residence in Canada.

[4] As part of this application, the Applicant was asked on December 18, 2018, to provide information regarding his past employment. The Applicant provided his employment record on December 28, 2018 [Employment Record].

[5] On December 22, 2019, the Officer sent the Applicant a procedural fairness letter [PFL]. The PFL noted that the governments of Ahmed Hassan Al-Bakr and Saddam Hussein, who were in power in Iraq between 1968 and May 2003, were designated governments for the purposes of paragraph 35(1)(b) of the Act. This provision of the Act renders a permanent resident or a foreign national inadmissible to Canada on the grounds of violating human or international rights for being a prescribed senior official in the service of a government that, in the opinion of the Minister of Public Safety and Emergency, engages or has engaged in terrorism, systematic or gross human rights violations, genocide, a war crime, or a crime against humanity.

[6] The PFL then identified the portions of the Applicant's employment history that were of concern. The Officer noted that from 1998 to 2004 the Applicant held senior positions in the Iraq Civil Aviation Authority [ICAA] under the Minister of Transportation. The first position was Deputy Director General of the ICAA (from 1998 to 2003), and the second was Director General

of the ICAA (from 2003 to 2004). Both positions were two positions removed from the Minister of Transportation, and in both positions the Applicant supervised 1250 people.

[7] Based on this employment history, the Officer stated that they had reasonable grounds to believe that the Applicant was inadmissible to Canada pursuant to paragraph 35(1)(b) of the Act. However, as the Officer noted in the PFL, the Applicant was given the opportunity to submit additional information addressing this issue.

[8] The Applicant's response to the PFL was received on January 12, 2020. In his response, the Applicant explained how he had obtained his positions in the ICAA and the responsibilities of his positions, including explaining that his positions did not include any work related to security, political, or diplomatic affairs. The Applicant also explained that his position as Director General of the ICAA from 2003 to 2004 was assigned to him by the Senior Advisor in the United States Department of Defence, Office of Reconstruction and Humanitarian Assistance, following the liberation of Iraq from Saddam Hussein's regime.

III. Decision under Review

[9] On April 5, 2022, in the Decision that is the subject of this application for judicial review, the Applicant's application for permanent residence was refused, and he was found inadmissible to Canada pursuant to paragraph 35(1)(b) of the Act. The substantive portion of the letter conveying the Decision reads as follows:

> Specifically, from 1998 to 2003, you were Deputy Director General in the service of the Iraq's government with the Iraq Civil Aviation Authority. In the opinion of the Minister, that government has engaged in terrorism, systemic or gross human rights

> violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*. I have reached this conclusion because as a Deputy Director General, you are considered a senior member of the public service (senior official) under a designated regime. As a result, you are inadmissible to Canada pursuant to section 35(1)(b) of the Act.

[10] Also relevant is the following portion of the Officer's notes in the Global Case Management System [GCMS], which form part of the reasons for the Decision:

> File reviewed. According to the documents provided in support of his application, PA indicated that he held senior positions in the Iraq Civil Aviation Authority (ICAA) under the Ministry of Transportation. PA was promoted to Deputy Director General in 1998, a position in which he supervised 1250 persons, and was two positions removed from the Minister. In 2003, PA was promoted to Director General, a position in which he supervised 1250 persons, and was also two positions away from the Minister. The governments who were in power in Iraq between 1968 and 22 May 2003 were designated as governments that have engaged in terrorism, systematic or gross human rights violations, genocide, war crimes or crimes against humanity. As a Deputy Director General and Director General with the Iraq Civil Aviation Authority under a designated regime, PA was considered a senior member of the public service (senior official) as per R16(d). For this reason, there was reasonable grounds to believe that PA was inadmissible to Canada as per 35(1)(b) of IRPA. A PFL was sent to PA on 22 December 2019. A response was received on 12 January 2020. Response reviewed. In a letter, PA described his work history since his graduation in 1986. He said that during his position as a deputy director general, he did not have any interactions with passengers and was not involved in any political, security or diplomatic affairs. PA added that as a Shia Muslim, he was not allowed to hold the position of director general or higher as these positions were considered political and highly sensitive so he remained in the position of deputy director and was never promoted until the overthrow of the regime by the coalition forces in 2003. He was assigned the position of Interim Director General by the US government. PA submitted a letter of appointment dated 21 May 2003 for the position of Interim Director General for the Iraq General Company for Civil Aviation by Mr. Stephen Browning – Senior Ministry Advisor, US Department of Defence.

> PA also submitted a letter of recommendation by Lieutenant Colonel David Jones, from the United States Air Force. It appears that PA was appointed Director General of the Iraq Civil Aviation Authority after the end of the designated regime. However, PA admitted to be a Deputy Director General from 1998 to 2003 with the Iraq Civil Aviation Authority under a designated regime in Iraq. PA is considered a senior member of the public service (senior official) as per R16(d). For this reason, there are reasonable grounds to believe that PA is inadmissible to Canada as per 35(1)(b) of IRPA. Application Refused.

IV. Issues and Standard of Review

[11] Based on the submissions of the parties, this application for judicial review raises the following two issues for the Court's determination:

A. Did the Officer err in concluding that the Applicant was a senior official as defined by paragraph 35(1)(b) of the Act?

B. Did the Officer breach the Applicant's procedural fairness rights by failing to provide him an opportunity to respond to the Officer's concerns?

[12] The parties agree (and I concur) on the applicable standards of review. The standard of reasonableness applies to the first issue (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25). The second issue deals with procedural fairness, which is subject to judicial scrutiny to ensure that a fair and just process was followed, an exercise best reflected in the correctness standard even though, strictly speaking, no standard of review is being applied (see *Canadian Pacific Railway Company v Canada (Transport Agency)*, 2021 FCA 69 at paras 46-47).

V. Analysis

A. *Did the Officer err in concluding that the Applicant was a senior official as defined by paragraph 35(1)(b) of the Act?*

[13] There are three requirements that must be met to establish that a person falls within the ambit of paragraph 35(1)(b) of the Act: (i) the relevant regime must have been designated by the Minister, (ii) there must be reasonable grounds to believe that the person held a position within that regime, and (iii) there must be reasonable grounds to believe that the position within the regime was that of a "senior official" (see *Habeeb v Canada (Citizenship and Immigration)*, 2011 FC 253 at para 14).

[14] In the present case, the first two requirements are not contested. As such, the question for the Court is whether it was reasonable for the Officer to find that the Applicant was a senior official.

[15] Neither the Act nor the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] contains a definition of "senior". However, subsection 16(d) of the Regulations, which was referenced in the GCMS notes excerpted above, states that for the purposes of paragraph 35(1)(b) of the Act, a prescribed senor official is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position, and includes senior members of the public service.

[16] Further, Chapter 18 of the Operational Manual published by IRCC, titled "ENF 18 Human or international rights violations", provides that a person can be considered senior if it can be demonstrated that their position is in the top half of the organization. This has been referred to as the "top half" test in the jurisprudence, and its use has been approved by this Court on numerous occasions (see, e.g. *Hamidi v Canada (Minister of Citizenship and Immigration)*,

2006 FC 333 [*Hamidi*] at para 27; *Ndibwami v Canada (Citizenship and Immigration)*, 2009 FC 924 at para 34; *Gebremedhin v Canada (Citizenship and Immigration)*, 2013 FC 380 [*Gebremedhin*] at para 35. See also the discussion of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Kassab*, 2020 FCA 10 [*Kassab*] at paras 31-37).

[17] Further, if a person falls within the ambit of section 16 of the Regulations, it is presumed that, in the words of section 16, the individual is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position. Stated differently, once an individual is found to be a "senior member of the public service", no further analysis is required (see *Kassab* at paras 3-4, 77).

[18] Against this legislative backdrop, none of which I understand to be at issue between the parties, the Applicant submits that in this case it was unreasonable for the Officer to conclude that he was a senior member of the public service, because the Officer has not demonstrated, by citing to evidence, that the Applicant's position was in the top half of the organization.

[19] In responding to this argument, the Respondent relies in part on evidence contained in a document entitled NSSD Inadmissibility Assessment, prepared by the National Security Screening Division [NSSD] on August 7, 2019, in which the NSSD recommends that there are reasonable grounds to believe that the Applicant is inadmissible to Canada pursuant to paragraph 35(1)(b) of the Act. The Respondent notes that this evidence includes an explanation of the authority of the Director General of the ICAA, as including approving, enforcing and, if deemed necessary, amending ICAA's regulations, which set regulatory requirements for civil aviation in Iraq.

[20] The NSSD Inadmissibility Assessment is one of the documents underlying the Applicant's procedural fairness arguments, as he submits that he was not afforded an opportunity to comment on the evidence in this document before the Decision was made. However, I need not delve into the procedural fairness argument, as I agree with the Applicant's submission, in relation to the reasonableness of the Decision, that the Decision does not disclose reliance on the evidence in the NSSD Inadmissibility Assessment to which the Respondent refers.

[21] Rather, as I read the Officer's April 5, 2022 letter and related GCMS notes, the Decision turned on application of the "top half" test to the information the Applicant provided in his Employment Record. In particular, when he served as Deputy Director General of the ICAA, he supervised 1250 persons and was two positions removed from the Minister of Transport. The Applicant argues that it was unreasonable for the Officer to conclude that the Applicant was in the top half of the relevant organization based on this information, because the Officer references no evidence as to the hierarchical structure of the organization, or the number of persons within that structure, above the role of Deputy Director General of the ICAA.

[22] In response to this argument, the Respondent submits that it was reasonable for the Officer to assume that the organization had a pyramidal structure and that it defies credulity that there could be 1250 people in the Ministry of Transport occupying the two positions between the Deputy Director General and the Minister.

[23] The Respondent relies on *Kassab*, in which the Federal Court of Appeal determined that it was reasonable for an officer to find that the applicant was a senior member of the Iraqi public

service, as he was three levels in the reporting hierarchy below Saddam Hussein (at para 13-14, 70). Similarly, in *Gebremedhin*, this Court held that it was reasonable to find that the applicant was a senior member of the Ethiopian public service, as he was two levels below the Commissioner of the Relief and Rehabilitation Commission, which was an agency of the designated government (at para 42).

[24] The difficulty with the Respondent's reliance on these authorities is that they turn on their particular facts, involving evidentiary records that appear to have included evidence of the sort that is lacking in the case at hand. *Kassab* was an appeal from the Federal Court's decision in *Kassab v Canada (Citizenship and Immigration)*, 2018 FC 1215, which noted at paragraph 10 that the evidence provided by the applicant included organizational charts showing the structure of the Iraqi civil service and the applicant's superiors. Similarly, *Gebremedhin* references an organizational chart (at para 42), as well as the number of persons (as opposed to positions) above him in the organization (at para 38).

[25] I agree with the Applicant that the case at hand is more akin to *Lutfi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1391, which held to be unreasonable a conclusion that a lieutenant colonel was inadmissible to Canada as a prescribed senior official in the Iraqi government. Justice Harrington's reasoning included the fact that there was no information on file as to the size of the armed forces, the number of rankings ahead of lieutenant colonel, and how many persons occupied those positions. As Justice Harrington expressed the point - for all the Court knew, there may have been 100,000 generals in the Iraqi armed forces (at para 14).

[26] While that comment is perhaps expressed in hyperbolic terms, it makes the point that an officer making an inadmissibility determination under paragraph 35(1)(b) must rely on evidence rather than assumptions, including assumptions that the structure of a foreign civil service is the same as or comparable to that of Canada. As explained in *Hamidi*, it is an error to apply Canadian standards to foreign hierarchies (at para 26).

[27] I agree with the Applicant that neither the Decision nor the record before the Officer discloses sufficient evidence, related to the portion of the relevant organization above the Applicant, to make the Decision reasonable. As such, this application for judicial review must be allowed, and it is unnecessary for the Court to consider the Applicant's procedural fairness arguments.

[28] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-4902-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, the Decision is set aside, and this matter is returned to another migration officer for re-determination.

2. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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