

Federal Court



Cour fédérale

**Date: 20101118**

**Docket: IMM-4866-09**

**Citation: 2010 FC 1157**

**Ottawa, Ontario, November 18, 2010**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**NADA YOUNIS and  
ANMAR MOHAMAD NOURI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an applicant pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a refusal letter of the Second Secretary - Immigration (the officer) of the Canadian Embassy in Damascus, Syria, refusing the applicants' application for permanent residence on the grounds that Anmar Mohamad-Nouri (the male applicant) is inadmissible to Canada pursuant to paragraph 35(1)(b) of the Act. The decision was

based on the officer's determination that there were reasonable grounds to believe that the male applicant was a senior member of the Iraqi Army during Saddam Hussein's regime.

[2] The applicants seek an order setting aside the decision of the officer and an order directing that a different panel review and assess the applicants' application for permanent residence in Canada.

### **Background**

[3] During the period of the male applicant's military service, 1983 to 1996, the Iraqi military was designated as a regime which, in the opinion of the respondent Minister, has engaged in gross human rights violations and other crimes. Having been a prescribed senior official in the service of that military would render a foreign national inadmissible to Canada pursuant to paragraph 35(1)(b) of the Act.

[4] The Canadian Embassy in Syria that processed the application, noticed the male applicant's declared military service in the Iraqi Army and on December 16, 2008, sent a note to the applicants requesting that the male applicant complete a Details of Military Service form. Correspondence ensued in which the applicants were specifically advised of the officer's concerns regarding the male applicant's tenure in the Iraqi Army and were given opportunities to provide information and address those concerns.

[5] The male applicant's submission to the Canadian Embassy was that he was merely an engineer with the army and while he may have moved up in rank to the position of lieutenant colonel, was never involved in any type of combat. He worked in the electro mechanical directorate from July 1983 to September 1989 and in the computer directorate from October 1989 to September 1996.

[6] On February 26, 2009, Canada Border Services Agency (CBSA) provided a report to the officer which outlined the relevant law, standard of proof, policy and the application of paragraph 35(1)(b) to the male applicant. The recommendation was that the male applicant be found inadmissible. Based on the evidence, the male applicant's rank of lieutenant colonel was clearly within the top half of the Iraqi Army, being the sixth-highest rank out of fifteen.

[7] The Canadian Embassy sent two more notes to the applicants requesting details regarding the organizational chart of the Iraqi Army indicating the male applicant's placement.

[8] On May 26, 2009, the officer provided a fairness letter indicating that there were reasonable grounds to believe that the male applicant was a member of the inadmissible class of persons described in paragraph 35(1)(b) of the Act. In the officer's opinion, the organizational charts supplied by the male applicant confirmed that he was in the top half of the organization and that his position was six positions removed from General Saddam Hussein.

[9] The male applicant submitted in reply that within the Iraqi Army, positions of responsibility were classified into three classes: A, B and C. The positions the male applicant occupied fell within the C class which included commanders and officers who were running support services and other backup directorates. He reiterated that he had nothing to do with any combat activities. The male applicant also submitted that he was not loyal to Hussein's regime and in fact that he was forced to retire from the military. His family also secretly opposed the regime and even had members in the opposition forces.

[10] On July 23, 2009, the officer rendered her final determination refusing the application. After considering all of the information on file, the officer was still not satisfied that the rank or positions held by the male applicant were not senior ones. Despite the submissions that his positions were merely support, service or backup in nature, the officer was not satisfied that the positions he held were not positions of significant responsibility.

### **Issue**

[11] Was the officer's decision reasonable?

### **Relevant Legislation and the Standard of Review**

[12] Paragraph 35(1)(b) of the Act provides:

<p>35.(1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for</p> <p>...</p> <p>(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 <i>Crimes Against Humanity and War Crimes Act</i>; or</p>	<p>35.(1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :</p> <p>...</p> <p>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;</p>
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[13] It is not in dispute that the government of Iraq under Ahmad Hassn Al-Bakr and later under Saddam Hussein between 1968 and May 22, 2003, is designated as a regime that, in the opinion of the Minister of Citizenship and Immigration, engaged in systematic or gross human rights violations and other such crimes.

[14] Defining senior official for the application of section 35 of the Act, section 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) provides:

<p>16. For the purposes of paragraph 35(1)(b) of the Act, a prescribed senior official in the service of a government is a</p>	<p>16. Pour l'application de l'alinéa 35(1)b de la Loi, occupent un poste de rang supérieur au sein d'une</p>
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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	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) heads of state or government;	a) le chef d'État ou le chef du gouvernement;
(b) members of the cabinet or governing council;	b) les membres du cabinet ou du conseil exécutif;
(c) senior advisors to persons described in paragraph (a) or (b);	c) les principaux conseillers des personnes visées aux alinéas a) et b);
(d) senior members of the public service;	d) les hauts fonctionnaires;
(e) senior members of the military and of the intelligence and internal security services;	e) les responsables des forces armées et des services de renseignement ou de sécurité intérieure;
(f) ambassadors and senior diplomatic officials; and	f) les ambassadeurs et les membres du service diplomatique de haut rang;
(g) members of the judiciary.	g) les juges.

[15] The standard of proof required is set out in section 33 of the Act:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are	33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils
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reasonable grounds to believe that they have occurred, are occurring or may occur.	sont survenus, surviennent ou peuvent survenir.
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[16] It was for the officer to determine whether there were reasonable grounds to believe that the male applicant's military service constituted service as a senior official. This Court has held that following the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and this Court's previous jurisprudence, the applicable standard of review governing a visa officer's decision relating to paragraph 35(1)(b) of the Act is reasonableness (see *Yahie v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1319, 78 Imm. L.R. (3d) 91 at paragraph 21).

### **Written Submissions of the Parties**

[17] The applicants submit that the decision was unreasonable because the officer failed to follow the respondent's enforcement manual, "ENF 18: War Crimes and Crimes against Humanity" (ENF 18) in making her decision. In particular, the officer failed to consult with the modern war crimes section of the CBSA as cautioned by section 8.4 of ENF 18. The officer also erred by failing to refer to section 16 of the Regulations and by doing so, failed to examine the male applicant's degree of influence or the benefits he derived from his position as required in order to determine if an individual is a senior official. The officer erred further by concluding that positions within the top half of the Iraqi Army were considered senior positions without providing any analysis of why such a conclusion was reached. The applicants finally raise the issue that the officer did not have

adequate information before her on the Iraqi Army to make a conclusive determination regarding the male applicant's level of seniority.

[18] The respondent submits that the decision was reasonable and that there was no error in not referring to the manual specifically. The officer followed the procedure in ENF 18. Indeed, it is ENF 18 which states, "If it can be demonstrated that the position is in the top half of the organization, the position can be considered senior". The officer then continued to follow the procedure in ENF 18 and even went beyond by affording the male applicant three opportunities to demonstrate that his position was not senior. The officer was not required by ENF 18 to consult the modern war crimes section because the male applicant was described in subsection 16(e) of the Regulations. Contrary to the applicants' suggestion, the officer did consider the male applicant's degree of influence. The officer noted the male applicant's movement within his 12 year tenure to positions of increasing responsibility. Finally, the information the male applicant provided confirmed that he was in the top half of the Iraqi Army and accordingly, could be considered senior.

### **Analysis and Decision**

#### [19] **Issue 1**

##### Was the officer's decision reasonable?

Because of the standard of review, the decision will be deemed reviewable and remedial action considered if the decision is found to be unreasonable. The Supreme Court in *Dunsmuir* above, held that on a reasonableness review, the Court should inquire into the qualities that make a



decision reasonable and to consider the decision as a whole. Reasonableness is primarily concerned with the existence of justification, transparency and intelligibility in the decision making process, but is also concerned with the end result and whether that result falls within the range of possible, acceptable outcomes (at paragraph 47).

[20] The applicants point to several perceived errors in the decision or decision making process. I will now turn to analyze those perceived errors individually. The next step will be to assess the decision on the whole and determine if an established error or errors so severely impugn the merits of the decision that it ought to be interfered with.

[21] The applicants' first claim is that the officer failed to consult with the modern war crimes section of the CBSA as cautioned by section 8.4 of ENF 18. In my view, there was no error here. Section 8.4 of ENF 18 in relevant part provides:

Before considering the refusal of an applicant whose position is not listed in R16, officers are requested to consult with RZTW.

Therefore, the manual only requests that officers consult with RZTW, the modern war crimes section, if the individual's position is not listed in section 16 of the Regulations. Although the particular subsection was not cited, it is clear that in the officer's view, the male applicant's position fell within subsection 16(e) "senior members of the military and of the intelligence and internal security services".

[22] The applicants then argue that it was a reviewable error that the officer did not refer to section 16 of the Regulations in her decision. Section 16 is important as its opening sets out the only legislative direction for the qualities that senior officials should have. It provides that persons should be considered senior when, by virtue of the position they hold or held, they are able to exert significant influence on the exercise of government power or are able to benefit from their position. The two key words are influence and benefit. What I take to be the essence of the applicants' argument is not the officer's failure to reference section 16 *per se*, but the officer's failure to conduct an analysis of the male applicant's ability to influence the Iraqi government or to have benefited from his position.

[23] However, the case law implies that such analysis is not required. Indeed, section 16 appears to do away with the need to conduct such analysis with the words "...by virtue of the position they hold or held...". This puts the focus on the individual's rank in the organization and to a degree, leaves influence and or benefit to be simply assumed by operation of law if the individual is found to have held a high enough position.

[24] The cases the applicants rely on turn on whether the officer properly conducted an analysis of the individual's comparative rank within the organization. In *Lutfi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1391, 52 Imm. L.R. (3d) 99, the decision was ruled unreasonable because the officer made a factual error in considering the applicant to have been a colonel when he was only a lieutenant colonel in the Iraqi Army and also because the officer failed

to consider the scheme of rankings in the Iraqi Army and approximately how many individuals were in each position.

[25] The number of individuals in positions above and below the male applicant have proved to be a significant consideration due to section 8.2 of ENF 18, which provides that when considering military personnel, "...If it can be demonstrated that the position is in the top half of the organization, the position can be considered senior". While this guideline would disqualify a great many number of individuals in an organization such as the Iraqi Army of the 1980s and 1990s, this Court repeated implied approval of its use by immigration officers. In *Hamidi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 333, 53 Imm. L.R. (3d) 150, Madam Justice Judith Snider quoted from section 8.2 of ENF 18 and the decision was ruled unreasonable because the officer failed to collect a military service table for the former Marxist regime of Afghanistan that would allow the officer to appropriately consider the applicant's rank therein. The officer simply assumed that the rank of colonel was senior (at paragraph 30).

[26] Use of the top half indicator was also cited with apparent approval in other cases (see *Nezam v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 446, 272 F.T.R. 9 (Eng.) at paragraph 26 and *Holway v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 309, 146 A.C.W.S. (3d) 697 at paragraph 33).

[27] In the present case, the officer appears to have followed the guidelines by first satisfying herself that the government concerned has been designated by the Minister. Second, the officer

satisfied herself that the male applicant had held the position of lieutenant colonel by his own admission. Third, the officer considered the male applicant's ranking in the Iraqi Army by gathering operational charts of the army with the approximate number of positions at each level. The male applicant's position was six positions removed from Saddam Hussein and the sixth highest rank in the Army out of 15 total ranks. It was also considered that while there were 5,400 lieutenant colonels in the Army, the entire army was approximately 1.4 million strong. This gave the officer the evidentiary background to conclude that the male applicant was in the top half of the Iraqi Army. Section 8.2 of ENF, the use of which has been approved by this Court, allowed the officer to rely on this finding to find that the male applicant's position was senior. The officer however, continued and also considered the male applicant's relatively long tenure of 12 years and his promotions to positions of increasing responsibility to further buttress her opinion that he had been senior.

[28] While the male applicant argued vigorously that his position was administrative or academic in nature and that he had no involvement in any combat, such arguments were correctly discarded by the officer. The Federal Court of Appeal has determined that personal lack of blameworthiness is simply not relevant to whether one is inadmissible under paragraph 19(1)(1) of the former *Immigration Act*, R.S.C. 1985, c. I-2, now paragraph 35(1)(b) of the Act (see *Canada (Minister of Citizenship and Immigration) v. Adam*, [2001] 2 F.C. 337). As has been repeatedly affirmed, the inquiry under paragraph 35(1)(b) of the Act is not about complicity in prohibited acts but whether a position held is senior (see *Ismail v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 987, 150 A.C.W.S. (3d) 890 at paragraph 18). It has been likened to an absolute liability provision.

[29] The applicants finally raise the issue that the officer did not have adequate information before her on the Iraqi Army to make a conclusive determination regarding the male applicant's level of seniority. I would note here that the officer is not required to be sure and indeed, cannot always obtain accurate historical information regarding some regimes. The standard of proof as set out in section 33 of the Act, only requires that the officer have reasonable grounds for believing the disqualifying situation to be true. The Court in *Chiau v. Canada (Minister of Citizenship and Immigration)*, [1998] 2 F.C. 642, [1998] F.C.J. No. 131, (T.D.) held that reasonable grounds 'is more than a flimsy suspicion, but less than the civil test of balance of probabilities... It is a *bona fide* belief in a serious possibility based on credible evidence.' In the present case, the officer gathered evidence identifying the male applicant's position and duties, as well as information regarding the Iraqi Army as a whole and involved the male applicant in the information gathering process. I cannot require that the officer ought to have done more or gathered more.

[30] The evidence objectively points to a position somewhere in the top half of the Iraqi-Army. The officer came to the conclusion that the male applicant held a position that was senior. The officer's decision "falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law" (see *Dunsmuir* above, at paragraph 47). As a result, I cannot say that the officer's conclusions were unreasonable. Hence, the Court should not interfere. Moreover, the officer supported her decision by demonstrating that the position was senior under the guidelines by providing support for her conclusion that it was in the top half of the army and that his position had significant responsibilities.

[31] While the Court in *Lutfi* above, allowed judicial review regarding an individual of the same rank and within the same organization, the case does not set a precedent favourable to the male applicant. To the extent that the errors in the decision making process identified in *Lutfi* above, were not made by the officer in this case, the case is not applicable.

[32] As a result, the application for judicial review must be dismissed.

[33] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

**JUDGMENT**

[34] **IT IS ORDERED that** the application for judicial review is dismissed.

“John A. O’Keefe”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4866-09

**STYLE OF CAUSE:** NADA YOUNIS and  
ANMAR MOHAMAD NOURI

- and -

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 15, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** November 18, 2010

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