Federal Court  Cour fédérale

Date: 20151106

Docket: IMM-309-15

Citation: 2015 FC 1260

Ottawa, Ontario, November 6, 2015

PRESENT: The Honourable Mr. Justice Camp

BETWEEN:

FAREEHA TAREEN, MOHAMMAD AZAM TAREEN, MOHAMMAD EDRISS TAREEN, SARA TAREEN, and MARWA TAREEN (by her litigation guardian FAREEHA TAREEN)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. BACKGROUND

[1] The principal applicant, Fareeha Tareen, and her husband, Mohammad Azam Tareen, are citizens of Afghanistan. She is 55 years old. He is 65. She was a schoolteacher in Afghanistan. He was a civil servant. They have five children, three of whom are included as dependents in this

application: Mohammad Edriss, Sara, and Marwa. An older daughter, Maryam, has a separate refugee sponsorship application, and another daughter, Roya, is already a permanent resident of Canada, sponsored by her spouse. Their status is not at issue in this case. The applicants fled Afghanistan and, while in Pakistan, sought refuge in Canada. They submitted an application for permanent residence under the Convention Refugee Abroad or Humanitarian designated class. They were privately sponsored by Ms. Tareen's sister and four other Canadians.

[2] The applicants now apply for judicial review of a decision, dated December 4, 2014, of an immigration officer (the Officer) at the High Commission of Canada in Islamabad, Pakistan, refusing the applicants permanent resident visas to Canada. The Officer found the applicants to be inadmissible under paragraph 35(1)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [IRPA] due to Mr. Tareen's service as a senior official with the Afghan government at the time the Taliban was in power.

[3] The applicants challenge the decision on both reasonableness and fairness grounds, and seek an order quashing the decision and remitting the matter for an expeditious redetermination. The Minister submits the decision was fair and reasonable and asks that the application be dismissed.

[4] In Mr. Tareen's application, originally submitted in 2008, he indicated that he held various positions in government while in Afghanistan. Of interest is an entry dated from March 1995 to August 1997, wherein Mr. Tareen noted "First Rank"; "Foreign relation department";

and "Voice [*sic*] president". Under a separate heading, he indicated that he had been unemployed since August 1997.

[5] In another document submitted to Citizenship and Immigration Canada (CIC), dated April 18, 2012, Mr. Tareen noted that he was employed in "office works" in Kabul from March 1980 to August 1997, and unemployed thereafter. Under the heading "Government positions", Mr. Tareen indicated that he was employed as a civil servant of the first rank from March 1995 to August 1997, with the "Ministry of Labour & Social Affairs, Foreign Relation Department". In an attached "Afghanistan Questionnaire", Mr. Tareen again noted that he was employed with the Ministry of Labour & Social Affairs from March 1995 to August 1997, as "Voice [*sic*] President for (ILO) documents".

[6] On April 24, 2012, the applicants were interviewed by an immigration officer at the Canadian High Commission in Islamabad, Pakistan. Mr. Tareen advised the immigration officer that he worked for the Ministry of Labour from 1980 to August 1997. He noted that he was fired from that position. The applicants discussed their flight from Kabul and then from Afghanistan. The interviewing officer made a positive credibility finding, and was of the view that the applicants had a well-founded fear of persecution if returned to Afghanistan. A second interview was scheduled to explore Mr. Tareen's military service and his employment as a first level civil servant with the government.

[7] The second interview was conducted on July 3, 2012. Mr. Tareen informed the interviewing officer that he was employed with the Afghan government from 1972 to August

1998, and that he worked at the Ministry of Labour from 1981 until 1997, when the Taliban took over. He stated that he had held the title of Deputy Director and was in charge of the department of the International Labour Organization. He reported to his boss, the General Director, who reported directly to the Minister of Labour. He described his rank within the Ministry as "level one" and "position one".

[8] On May 21, 2014, the Officer advised Mr. Tareen, by letter, that there were reasonable grounds to believe he was a prescribed senior official in the service of a regime designated under paragraph 35(1)(b) of the IRPA. The Officer noted that the application forms indicate that Mr. Tareen held a senior position with the Afghan government between 1995 and 1997, and that this information had been confirmed and expanded upon during the interviews held on April 24, 2012, and July 3, 2012. The Officer advised Mr. Tareen that the former governments of Afghanistan, from 1978 to 1992, and from September 27, 1996 to December 22, 2001, have been designated as regimes involved 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*." The Officer advised Mr. Tareen that his service with the Afghan government overlapped with this period. The Officer informed Mr. Tareen that he had considered Mr. Tareen's various positions in the hierarchy of the Afghan public service, and concluded there were reasonable grounds to believe that Mr. Tareen's position, as Deputy Director, Level 1, Position 1, was a senior position within the government. The Officer afforded Mr. Tareen the opportunity to respond to this concern.

[9] On June 17, 2014, Mr. Tareen responded with four letters confirming his service with the government. Three of these letters indicate that Mr. Tareen worked at the Ministry of Labour until 1997. The Director General at the Ministry of Labour wrote that Mr. Tareen "worked as deputy planning and external relation during the period of 1995-1997 in the Ministry, Social Affairs, Martyrs and Disabled." The Human Resources Department of the Ministry also drafted a letter, which read, in part, as follows:

> In 1995-1997, he also worked as director assistant at foreign relation directorate and moreover as person in charge at (ILO) Labour International Organization under the supervision of respectful Waheedullah "Barikazai" Planning and Foreign Relation Chief.
>
> Since his working background has been considered, he has not been committed any crimes from his employment till the end of his duty (1997) and he is also not involved to any sort of torturing people.
>
> […]
>
> As stated above, the aforementioned person's working background has been described based on Labour and Social Affairs, Disabled and Martyred Ministry's preserved database.

[10] The fourth letter said nothing about the period of employment, but stated: "(Mohammad Tareen) was the only civil servant in his department which he could talk English fluently, write English properly and each department needed him."

[11] On December 4, 2014, the Officer advised the applicants by letter that their application for permanent resident visas was refused.

II. IMPUGNED DECISION

[12] In the decision under review, the Officer found Mr. Tareen was a senior official in the Afghan government from 1995 to 1997, which overlaps with the rule of the Taliban, a regime designated by the Minister pursuant to paragraph 35(1)(b) of the IRPA. Given this determination, the Officer found the applicant and his family inadmissible by operation of section 42 of the IRPA. These provisions provide as follows:

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35**. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
[…]	[…]
(*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*; […]	*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*;
[…]	[…]
42. (1) A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if	**42**. (1) Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants :
(*a*) their accompanying family	*a*) l'interdiction de territoire

member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or	frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;
(*b*) they are an accompanying family member of an inadmissible person.	*b*) accompagner, pour un membre de sa famille, un interdit de territoire.

[13] The Officer noted that Mr. Tareen was given an opportunity to address this concern, but his response confirmed that his service as a senior official in the Afghan government ended in 1997.

III. ISSUES AND STANDARD OF REVIEW

[14] The applicants raise the following issues:

1. Did the Officer ignore or misinterpret the evidence that Mr. Tareen had been forced out of his job by the Taliban?
2. Did the Officer err by failing to analyze Mr. Tareen's position within the hierarchy of the government and his actual responsibilities?
3. Did the Officer breach procedural fairness by providing inadequate reasons for the decision?
4. Did the Officer breach procedural fairness by failing to disclose documents that were considered in the decision?
5. Are paragraph 35(1)(b) of the IRPA and section 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] inconsistent with section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act* 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11 [Charter]?

[15] Inadmissibility findings are questions of mixed fact and law and reviewed on a standard of reasonableness: *Kojic v Canada (Citizenship and Immigration)*, 2015 FC 816. Issues of procedural fairness are reviewed on a standard of correctness.

[16] The applicants submit that pure questions of law made in the context of decisions by visa officers require review on a correctness standard, citing *Saifee v Canada (Citizenship and Immigration)*, 2010 FC 589 [*Saifee*]. *Saifee* was decided in the wake of *Dunsmuir v New Brunswick*, 2008 SCC 9. There is now a general presumption that questions concerning the interpretation of a tribunal's home statute are subject to deference on judicial review: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61. A visa officer is an administrative decision-maker whom Parliament has conferred an area of decision-making authority. The question of whether Mr. Tareen is a senior official of a designated government, as provided in paragraph 35(1)(b) of the IRPA, is one such area of authority. Insofar as there are legal questions arising in this case, they fall squarely within the scheme of the IRPA and are intermingled with questions of fact. The reasonableness standard applies.

IV. CONTENTIONS OF THE PARTIES

A. *Did the Officer ignore or misinterpret the evidence that Mr. Tareen had been forced out of his employment by the Taliban?*

[17] The applicants submit Mr. Tareen was never employed with the Taliban regime during its reign from September 27, 1996 to December 22, 2001. It is submitted that Mr. Tareen made it clear that the Taliban forced him out of his position, but the Officer ignored this evidence and asked Mr. Tareen no questions about working for the Taliban regime. The applicants also claim

they mistakenly indicated Mr. Tareen had worked until August 1997 because of an error in translation from the Afghan to the Gregorian calendar. In support, the applicants note that the same error was replicated in Ms. Tareen's 2008 application materials:

> But at the month of August 1997 the other terrorist regime of the Taliban came in to power and they proved to be the wildest group of the world, they were backed by some foreigner Islamists and terrorists.

[18] In this same document, Ms. Tareen also wrote:

> Their second crime was that they dismissed most of the educated persons like the directors, bosses and other high level officers who were at the different posts in the government of Afghanistan and instead of them they were appointed uneducated Talibs.
>
> Unfortunately, I and my husband were among those who were dismissed from their jobs.

[19] The applicants point out that it is well-known that the Taliban came to power in 1996, not 1997, as evidenced by the Minister's designation of the Taliban government commencing on September 27, 1996. Thus, like Ms. Tareen's erroneous statement above, it is submitted that Mr. Tareen mistakenly referred to 1997. According to the applicants, there is no dispute that Mr. and Ms. Tareen were terminated from their employment by the Taliban, that the family suffered persecution at the hands of the regime, and that the Taliban took over the government in September 1996. Based on these facts, it is submitted the Officer erred by failing to infer that Mr. Tareen was fired from his employment as soon as the Taliban came to power, rather than in August 1997, as was indicated in error.

[20] The Minister contends there is no reviewable error in respect of the Officer's treatment of the evidence. According to the Minister, Mr. Tareen indicated that his service with the Afghan government ended in 1997 on seven occasions, and on one occasion, that it ended in 1998. The Minister highlights the fact that Mr. Tareen noted "August 1997" on his application forms, a date which Mr. Tareen confirmed during his interviews in 2012. Furthermore, the Minister points out that Ms. Tareen indicated she left her position as a teacher in Kabul in 1997. The Minister notes that the May 21, 2014 letter sent to Mr. Tareen referred to his employment ending in 1997, and further indicated that the former Afghan government from September 27, 1996 to December 22, 2001, is a designated regime. The Minister points out that, in his response, Mr. Tareen did not identify any error in the dates. Instead, Mr. Tareen provided three separate employment letters which confirmed that his service ended in 1997.

B. *Did the Officer err by failing to analyze Mr. Tareen's position within the hierarchy of the government and his actual responsibilities?*

[21] The applicants submit the Officer failed to analyze whether Mr. Tareen was in fact a senior member of the Taliban regime. They submit the Officer assumed, without an appropriate evidentiary basis, that Mr. Tareen's rank within the Afghan government was senior. According to the applicants, there was no consideration of how Mr. Tareen's position within the government "relates to the hierarchy in which the functionary operates": *Hamidi v Canada (Citizenship and Immigration)*, 2006 FC 333 at paras 26-27. It is contended the Officer failed to analyze Mr. Tareen's alleged rank within the designated regime, and whether, by virtue of this rank, Mr. Tareen was able "to exert significant influence on the exercise of government power"

or benefit from his position, as that language is used in section 16 of the Regulations: *Yahie v Canada (Citizenship and Immigration)*, 2008 FC 1319 at paras 32-34.

[22] Finally, the applicants advance the argument that inadmissibility under paragraph 35(1)(b) of the IRPA must be considered in light of *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] and *Kanengendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 [*Kanengendren*]. In *Ezokola*, the Supreme Court of Canada found that exclusion under Article 1F(a) of the United Nations *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 [*Refugee Convention*] requires a nexus between the accused's conduct and the group that committed the crime. The applicants submit this reasoning should also apply to paragraph 35(1)(b). They submit that more than mere rank is required; the Officer should have considered whether Mr. Tareen was complicit in the Taliban government.

[23] Responding to the applicants' reliance on *Ezokola* and *Kanagendren*, the respondent submits the test under paragraph 35(1)(b) of the IRPA does not require complicity by the senior official. The Federal Court of Appeal in *Kanagendren* held that *Ezokola* does not alter the test for inadmissibility by dint of membership under paragraph 34(1)(f), and the respondent submits the same reasoning should apply to inadmissibility by dint of status under paragraph 35(1)(b). It is submitted that personal blameworthiness is irrelevant to paragraph 35(1)(b). Rather, to be found inadmissible under this provision, it is argued that the government in question must be designated and the individual must be a prescribed senior official of that government: *Lutfi v Canada (Citizenship and Immigration)*, 2005 FC 1391 at para 8 [*Lutfi*]. As such, according to the Minister, an officer is not required to analyze how the individual exerted significant influence on

the exercise of government power or benefitted from the position. Influence or benefit is simply assumed by virtue of the senior position held: *Younis v Canada (Citizenship and Immigration)*, 2010 FC 1157 at para 23.

[24] In response to the submission that the Officer failed to consider Mr. Tareen's actual rank within the government, the Minister submits there was ample evidence upon which to conclude Mr. Tareen's position was senior. The Minister notes that Mr. Tareen admitted he was a Deputy Director, holding the rank of level one, position one, and that he reported to only one person above him, who then reported to the Minister of Labour. It is the contention of the Minister that Mr. Tareen occupied a position at the apex of the civil service.

C. *Did the Officer breach procedural fairness by providing inadequate reasons for the decision?*

[25] The applicants submit that procedural fairness requires adequate reasons, which set out the facts, address the major points in issue, and provide a path to the decision reached. According to the applicants, the Officer stated a conclusion without providing any analysis, which was unfair, citing *Adu v Canada (Citizenship and Immigration)*, 2005 FC 565 and *Lemus Ortiz v Canada (Citizenship and Immigration)*, 2006 FC 404.

[26] It is the position of the Minister that the reasons of the Officer provide a satisfactory explanation for the decision.

D. *Did the Officer breach procedural fairness by failing to disclose documents that were considered in the inadmissibility decision?*

[27] It is submitted that the Officer breached procedural fairness by failing to provide the applicants with copies of all unclassified documents considered in assessing inadmissibility: *Bhagwandass v Canada (Citizenship and Immigration)*, 2001 FCA 49 at para 35; *Sheikh v Canada (Citizenship and Immigration)*, 2008 FC 176 at para 10; *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283; *Muliadi v Canada (Minister of Employment and Immigration)*, [1986] 2 FC 205 (FCA) at para 14. The applicants submit that such a duty is mandated by chapter 18 ("ENF 18: War crimes and crimes against humanity") of CIC's Operation Manual on enforcement , at paragraph 8.3:

> If an officer is contemplating the refusal of a person under A35(1)(b), the applicant must be given an opportunity to demonstrate that their position is not senior as described in R16 (category 2) or that they did not or could not exert significant influence on their government's actions, decisions, or policies (category 3). This can be done by mail or by personal interview. In either case, the officer should provide the applicant with copies of all unclassified documents that will be considered in assessing admissibility.

[28] The applicants contend that the Officer failed to disclose two categories of documents. First, after Mr. Tareen's second interview on July 3, 2012, the interview notes indicate that the file was sent to the War Crimes Program in Ottawa (RZTW) for analysis. The applicants never received the results of this inquiry. Second, the file notes reveal that the visa office received a "poison pen" e-mail on June 6, 2013. The applicants were never informed of this fact. The applicants point out that the e-mail was received after the interviews in 2012, but prior to the Officer's decision. As the author of this e-mail alleged that Mr. Tareen assisted the Taliban, the

applicants submit this evidence, while inherently unreliable, was nevertheless material to issues of credibility and inadmissibility. The applicants submit they were entitled to a higher level of procedural fairness in this instance, as there had already been a positive finding of credibility in relation to their refugee claim. They submit the duty of fairness required the Officer to confront the applicants with this e-mail and provide them with a fair opportunity to respond to the specific concerns that this e-mail raised.

[29] The Minister submits there is no evidence that these documents informed the Officer's inadmissibility assessment. Rather, the Officer relied on the applicants' own evidence, including the documents signed and submitted by Mr. Tareen in support of his application, as well as the information disclosed to the Officer during the interviews held in 2012. With respect to the RZTW information, the Minister submits there is no evidence the Officer received any response to the request, and there is likewise no evidence that any such information was relied upon in the decision. As for the poison pen letter, the Minister submits that disclosure is not necessary where an officer does not consider the allegations or where an officer has given the applicant an opportunity to assuage his or her concerns: *Wang v Canada (Citizenship and Immigration)*, 2011 FC 812 at paras 11-13; *Aleaf v Canada (Citizenship and Immigration)*, 2015 FC 445 at para 26; *Gill v Canada (Citizenship and Immigration)*, 2015 FC 452 at paras 6 and 12. Here, the Minister submits there is no evidence the Officer relied on this email.

E. *Are paragraph 35(1)(b) of the IRPA and section 16 of the Regulations inconsistent with section 7 of the Charter?*

[30] The applicants submit their section 7 interests are engaged as they have no durable solution in Pakistan, and failing their application to Canada, they inevitably face removal to Afghanistan, which threatens their life, liberty, and security of the person. They submit that paragraph 35(1)(b) of the IRPA and section 16 of the Regulations violate section 7 because these provisions, in effect, create "absolute liability" for senior officials. It is contended that the impugned provisions draw an arbitrary distinction between senior and non-senior officials, by whether the official is at the top or bottom half of the hierarchy. The provisions also lack any requirement that the prescribed official made a "significant contribution" to the designated regime: *Ezokola*, at para 87. The applicants contend this is unconstitutional. In addition, it is submitted that section 7 mandates an interpretation of paragraph 35(1)(b) in accordance with the dissenting judgment in *Canada (Citizenship and Immigration) v Adam*, [2001] 2 FC 337 (FCA) [*Adam*].

[31] It is the contention of the Minister that a finding of inadmissibility does not engage section 7 of the *Charter*: *Poshteh v Canada (Citizenship and Immigration)*, 2005 FCA 85 at para 63; *Segasayo v Canada (Citizenship and Immigration)*, 2010 FC 173 at para 27. According to the Minister, the applicants' *Charter* claim is premature, as section 7 is only engaged when there is a serious prospect of removal to a risk of harm: *Medovarski v Canada (Citizenship and Immigration)*, 2005 SCC 51 at para 46. Even if section 7 is engaged, the Minister submits the

applicants have failed to demonstrate the impairment of their right to life, liberty, and security of the person was not in accordance with the principles of fundamental justice.

V. ANALYSIS

A. *Did the Officer ignore or misinterpret the evidence that Mr. Tareen had been forced out of his employment by the Taliban?*

[32] From September 27, 1996 to December 22, 2001, the former government of Afghanistan was designated by the Canadian government as a regime involved in terrorism, systematic or gross human rights violations, genocide, a war crime or a crime against humanity.

[33] There was ample evidence from which the Officer could conclude Mr. Tareen was in the service of the government during this period, that is, until August 1997. Mostly this evidence came from Mr. Tareen himself, or his wife. But it also came from three other sources: the three letters Mr. Tareen provided in June 2014 – at a time when he had been informed that there was a concern that he was still working for the government when the Taliban took over. While it is true that he and his wife said that they were forced out of their jobs when the Taliban took over, that evidence is overwhelmed by the repeated statements that Mr. Tareen left his government position in August 1997. Errors in translation of dates from one calendar system to another can explain a single or perhaps several errors, but not repeated errors on this scale.

[34] Several further considerations affect Mr. Tareen's credibility in regard to his claim that he left his employment with the government in September 1996 rather than August 1997. An error in translation of the date would require a double error in this case: both the year and the

month would have had to have been mistranslated. Mr. Tareen worked in foreign relations; he was in charge of reporting to the International Labour Organization based in Geneva. The implication is that he would have been well-versed in translating dates from one system to another. On the strength of information he himself supplied, he is fluent in both written and oral English. He now says he was forced out of government employment by the Taliban in August 1996; but the Taliban only entered Kabul at the end of September that year.

[35] The applicants make a valid point that Mr. Tareen was never interviewed about his alleged work for the Taliban government. It would have been preferable if the interviewing officer had asked Mr. Tareen directly if his employment with the Ministry of Labour continued after the Taliban regime came to power, and if so, in what capacity. However, there was ample evidence from various sources, including Mr. Tareen's own written and oral statements, that his employment ended in August 1997. It cannot be said that this finding of fact was unreasonable.

B. *Did the Officer err by failing to analyze Mr. Tareen's position within the hierarchy of the government and his actual responsibilities?*

[36] I deal first with the applicants' reliance on *Ezokola* and *Kanengendren*, and the impact of these cases on paragraphs 35(1)(a), (b), and 34(1)(f) of the IRPA. These provisions provide:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34**. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
(*a*) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;	*a*) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
(*b*) engaging in or instigating the subversion by force of any	*b*) être l'instigateur ou l'auteur d'actes visant au renversement

government;	d'un gouvernement par la force;
(*b.1*) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;	*b.1*) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(*c*) engaging in terrorism;	*c*) se livrer au terrorisme;
[…]	[…]
(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*), (*b.1*) or (*c*).	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*), *b.1*) ou *c*).
35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35**. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(*a*) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;	*a*) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;
(*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*; […]	*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*;
[Emphasis added.]	[Non souligné dans l'original.]

[37] On its face, paragraph 35(1)(b) of the IRPA is more like paragraph 34(1)(f) than paragraph 35(1)(a). Both paragraphs 35(1)(b) and 31(1)(f) utilize the verb "being", which suggests that Parliament intended inadmissibility to flow from an individual's status rather than an individual's actions. By contrast, paragraph 35(1)(a), like Article 1F(a) of the *Refugee Convention*, concerns acts. As inadmissibility flows from the commission of an offence, complicity on behalf of the individual is required: *Kanengendren* at para 21.

[38] The underlying purpose of paragraph 35(1)(a) is to exclude from refugee protection those who create refugees themselves: *Ezokola* at para 34; *Kanengendren* at para 27. Paragraph 34(1)(f), by contrast, is animated by security concerns. Inadmissibility flows from membership in groups which engage in acts contrary to the national interest, such as terrorism. As any member of such a group is categorically inadmissible, ministerial relief is available under section 42.1. The scheme of the IRPA thus provides for consideration of the individual case under paragraph 34(1)(f). Such relief is not available for individuals found inadmissible under paragraph 35(1)(a).

[39] In the case of paragraph 35(1)(b), inadmissibility flows from an individual's service for a government which engages or has engaged in terrorism, systematic/gross human rights violations, genocide, a war crime, or a crime against humanity. An individual is inadmissible by virtue of the position held in such a government. The individual must be or have been a "senior official" in that government. A senior official is described in section 16 of the *Regulations*:

16. For the purposes of paragraph 35(1)(*b*) of the Act, a prescribed senior official in the service of a government is	**16**. Pour l'application de l'alinéa 35(1)*b*) de la Loi, occupent un poste de rang supérieur au sein d'une

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	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.
[Emphasis added.]	[Non souligné dans l'original.]

[40] Senior members of the public service are examples of officials able to exert significant influence on the exercise of government power, or able to benefit from their position. A finding that an individual is or was a senior member of the public service of a government described in paragraph 35(1)(b) of the IRPA is sufficient for a finding of inadmissibility. Like paragraph 34(1)(f), ministerial relief is available to individuals found inadmissible under this provision. As a result, *Ezokola* does not assist the applicants. The Officer was not required to consider whether

Mr. Tareen was complicit in the Taliban regime. He was only required to consider whether Mr. Tareen was a senior official of that regime within the meaning of section 16 of the Regulations.

[41] I am unable to agree with the applicants that the Officer failed to consider whether Mr. Tareen's position within the designated regime was in fact senior. The Officer found that Mr. Tareen was the Deputy Director with the Foreign Relations Department of the Ministry of Labour and Social Affairs, noting that Mr. Tareen had obtained a first rank position and reported directly to the Director General, who in turn reported to the Minister. The Officer noted the fact that Mr. Tareen supervised over 20 persons. In my view, he adequately assessed whether the applicant's service satisfied the meaning of a prescribed senior official.

[42] A finding that Mr. Tareen worked until August 1997 as a senior official in the Afghan government is sufficient for the purposes of inadmissibility under paragraph 35(1)(b). Just as deference is owed to the finding that Mr. Tareen worked until August 1997, deference is owed to the Officer's determination that Mr. Tareen was a senior official in the service of the government during this time.

C. *Did the Officer breach procedural fairness by providing inadequate reasons for the decision?*

[43] The adequacy of reasons is only relevant to the reasonableness of a decision. It does not give rise to an issue of procedural fairness: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14. In any event, the

applicants were advised that the enclosed notes, attached to the decision letter, also form part of the reasons for decision. The reasons were adequate.

D. *Did the Officer breach procedural fairness by failing to disclose documents that were considered in the inadmissibility decision?*

[44] There is no indication that documents from the RZTW were received by the Officer or relied upon in the decision. There is no evidence that the RZTW responded to the analysis request. The Officer cannot be faulted for failing to disclose documents that do not exist.

[45] In relation to the poison pen e-mail, which, of course, is inherently unreliable: there is no indication at all that the Officer relied on this e-mail.

[46] The question before the Officer was whether Mr. Tareen was a senior official in the service of a designated government. The decision turned on Mr. Tareen's evidence of his particular position in the government, and the evidence that his employment ceased in August 1997. The information disclosed in the poison pen e-mail, as prejudicial and unreliable as it is, is irrelevant to these issues. Perhaps had Mr. Tareen claimed before the Officer that his employment ended in 1996, and the Officer's conclusion to the contrary depended on a negative credibility finding, then the poison pen e-mail could have had some impact. Here, however, the material facts necessary for a finding of inadmissibility were admitted by Mr. Tareen. The poison pen e-mail has no bearing on these questions of fact. As a result, no procedural unfairness arose from the failure to disclose the poison pen e-mail.

E. *Are paragraph 35(1)(b) of the IRPA and section 16 of the* Regulations *inconsistent with section 7 of the* Charter*?*

[47] Section 7 of the *Charter* is not engaged in the present case. The Minister relies on *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 68 [*Febles*], where Chief Justice McLachlin noted that the *Charter* does not provide a positive right to refugee protection. The unavailability of refugee protection to a person facing removal to a risk of harm will not violate section 7 where other protections are available. In *Febles*, the appellant, while excluded from refugee protection, was nevertheless entitled to seek a stay of removal, thereby safeguarding his section 7 interests. Similarly, in the present case, even assuming that section 7 is engaged by a finding of inadmissibility, the applicants may seek ministerial relief from this finding pursuant to section 42.1(1) of the IRPA.

VI. SHOULD A QUESTION BE CERTIFIED?

[48] The applicants, joined somewhat (it seemed to me) half-heartedly by the respondent, wish a question to be certified. That question is whether the *Ezokola* decision of the Supreme Court of Canada changes the requirements to establish that a person is a prescribed senior official for the purposes of assessing inadmissibility under paragraph 35(1)(b) of the IRPA.

[49] The applicants' argument runs thusly: in *Ezokola*, the Supreme Court held that "joint criminal enterprise, even in its broadest form, does not capture individuals merely based on rank or association within an organization or an institution" (para 67).

[50] Therefore, contend the applicants, the door has been opened for the argument that when applying paragraph 35(1)(b) of the IRPA, regard must also be had to the question of whether the individual concerned made a contribution to the organization's criminality, with some form of subjective awareness. Implicit in this argument is that authorities such as *Adam* and *Lutfi,* to the effect that personal blameworthiness is not a relevant consideration in applying paragraph 35(1)(b), must be abandoned.

[51] I do not think that this argument has merit. Paragraph 35(1)(b) does not deal with behaviour. It does not require an investigation of intent. It deals with senior status within designated governments.

[52] In *Kanagendren* the Federal Court of Appeal rejected an argument similar to that presently advanced for the applicants in relation to a provision that is, for present purposes, similar to paragraph 35(1)(b), that is to say, paragraph 34(1)(f). At para 22 of that case the following was said:

> […] nothing in paragraph 34(1)(*f*) requires or contemplates a complicity analysis in the context of membership. Nor does the test of this provision require a "member" to be a "true" member who contributed significantly to the wrongful actions of the group. These concepts cannot be written to the language used by Parliament.

[53] By parity of reasoning, there is no point in revisiting the effect and meaning of paragraph 35(1)(b).

[54] Moreover, and as pointed out above, paragraphs 34(1)(f) and 35(1)(b) have one other thing in common: ministerial dispensation is available in regard to applicants found inadmissible under either of these paragraphs. It is at this point that culpability, intent, common purpose and other aspects of "action" as distinct from "being", arise. Such dispensation is not available to those paragraphs in sections 34 and 35 of the IRPA where words like "engaging in" or "committing" are used.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. There will be no order as to costs;

3. No question is certified.

"Robin Camp"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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