Federal Court  Cour fédérale

Date: 20160210

Docket: IMM-2722-15

Citation: 2016 FC 30

Toronto, Ontario, February 10, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

FAISAL ABDULHALEEM ALI AL-ANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. Introduction

[1] Faisal Abdulhaleem Ali Al-Ani has brought an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Immigration Division of the Immigration and Refugee Board [the Board]. The Board found him to be inadmissible to Canada pursuant to s 35(1)(*b*) of the IRPA because he was a "prescribed senior official" in Saddam Hussein's government in Iraq. This regime has been

designated by the Minister of Citizenship and Immigration [the Minister] as one that has engaged in gross human rights violations and other international crimes.

[2] Mr. Al-Ani argues that, despite his rank of Brigadier General, he was not a "senior member of the military" within the meaning of s 16(e) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] because he did not "exert significant influence on the exercise of government power." However, this Court's jurisprudence is clear that once an individual is found to be a prescribed senior official in the service of a designated regime, no analysis of their ability to exert influence over the exercise of government power is required. Mr. Al-Ani has not persuaded me that this jurisprudence is wrong in law, and accordingly his application for judicial review must be dismissed.

II. Background

[3] Mr. Al-Ani is 82 years old and a citizen of Iraq. He served in the Iraqi military from 1954 to 1978. He began his military career as a Second Lieutenant in 1954, and was promoted to First Lieutenant a few years later. In 1962, Mr. Al-Ani was promoted to the rank of Captain, then Major, and then Lieutenant Colonel as the commander of the Third Battalion of the Iraqi Infantry, where he was responsible for training members of the battalion and the safekeeping of weaponry. In 1974, he was promoted to the rank of Colonel while he was an instructor at a military college and a staff college. From 1976 to 1978, he was the Manager of the Air Force Administration in the General Inspectorate. In 1978, the year he retired, he was promoted to the rank of Brigadier General. During his career, he was asked to join Saddam Hussein's Ba'ath

Party, but refused. At a time when non-Baathist members were being purged from the military, Mr. Al-Ani was forced to retire or was temporarily released.

[4] While Mr. Al-Ani was still serving in the Iraqi military, the Iraqi government was designated pursuant to *Appendix 4: Regimes Designated Pursuant to Paragraph 35(1)(b) of the Immigration and Refugee Protection Act* as a regime which, in the opinion of the Minister, had engaged in gross human rights violations and other international crimes.

[5] Mr. Al-Ani fled Iraq in 2006 because he feared persecution as a Sunni Muslim with a past association to the former military regime of Saddam Hussein. Mr. Al-Ani arrived in Canada in October 2013, and made a claim for refugee protection in February 2014. The determination of his refugee claim was held in abeyance pending his admissibility hearing.

III. The Board's Decision

[6] In a decision dated May 26, 2015, the Board determined that Mr. Al-Ani was inadmissible to Canada as a prescribed senior official in Saddam Hussein's government in Iraq. Pursuant to s 35(1)(*b*) of the IRPA, a foreign national is inadmissible to Canada if they are found to be a prescribed senior official in the service of a government that, in the opinion of the Minister, has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime, or crimes against humanity within the meaning of ss 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24.

[7] The Board applied s 16 of the Regulations, which states that "a prescribed senior official in the service of a government is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position." The Board also relied on s 8.2 of Citizenship and Immigration Canada's *Immigration Manual*, Chapter ENF 18: *War Crimes and Crimes against Humanity* [ENF 18], which states that a position may be considered "senior" if the position falls within the "top half" of the organization.

[8] The Board accepted that Mr. Al-Ani was unable to exert significant influence over the exercise of government power during his service in Saddam Hussein's regime. However, the Board nevertheless found that Mr. Al-Ani was a prescribed senior official within the meaning of the Regulations because his position of Brigadier General fell within the "top-half" of the Iraqi military structure. Based on this Court's decisions in *Younis v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1157 [*Younis*], *Habeeb v Canada (Minister of Citizenship and Immigration)*, 2011 FC 253 and *Ismail v Canada (Minister of Citizenship and Immigration)*, 2006 FC 987 [*Ismail*], the Board concluded that Mr. Al-Ani's inability to exert significant influence over the exercise of government power was inconsequential for the purpose of determining whether he met the definition of "prescribed senior official" pursuant to s 16 of the Regulations. The Board therefore declared him to be inadmissible to Canada pursuant to s 35(1)(*b*) of the IRPA.

IV. Issues

[9] This application for judicial review raises the following issues:

A. What is the applicable standard of review?

B. Was the Board's determination that Mr. Al-Ani is inadmissible to Canada pursuant to s 35(1)(*b*) of the IRPA as a prescribed senior official in a designated regime reasonable?

V. Analysis

A. *What is the applicable standard of review?*

[10] According to Mr. Al-Ani, the Board's interpretation of the phrase "senior member of the military" in s 16(e) of the Regulations should be reviewed by this Court against the standard of correctness because it involves a question of statutory interpretation. In the alternative, Mr. Al-Ani submits that the range of possible, acceptable outcomes should be narrow. The Minister says that the Board's finding of inadmissibility is reviewable against the standard of reasonableness.

[11] The question of whether Mr. Al-Ani is a senior member of a designated government pursuant to s 35(1)(*b*) of the IRPA and s 16 of the Regulations falls squarely within the Board's expertise and involves questions of mixed fact and law that are reviewable against the standard of reasonableness (*Tareen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1260 at para 15 [*Tareen*], citing *Kojic v Canada (Minister of Citizenship and Immigration)*, 2015 FC 816). Moreover, there is a presumption that the reasonableness standard applies where a tribunal is interpreting its home statute (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34). However, I agree with Mr. Al-Ani that, since the Board was engaged in statutory interpretation, the range of reasonable outcomes may be

narrow (*Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75 at para 14; *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87 at para 72).

B. *Was the Board's determination that Mr. Al-Ani is inadmissible to Canada pursuant to s 35(1)(*b*) of the IRPA as a prescribed senior official in a designated regime reasonable?*

[12] Pursuant to s 33 of the IRPA, the Board must have "reasonable grounds to believe" that an individual held a senior position in the service of a designated regime. Pursuant to s 16 of the Regulations, a "prescribed senior official" is a person who, by virtue of the position they held, was able to exert significant influence on the exercise of government power, or was able to benefit from their position. In *Ismail* at para 18, Justice Phelan found that an applicant who held the rank of Brigadier General in the Iraqi military was a senior official within the meaning of s 16 of the Regulations, even though the position was administrative and non-combative.

[13] Mr. Al-Ani acknowledges that he rose through the ranks of the military from 1954 to 1978, and was ultimately promoted to Brigadier General. The Minister asserts that Mr. Al-Ani's position was four levels below the position held by Saddam Hussein. This is confirmed by country condition reports that describe the hierarchy of the Iraqi military. Mr. Al-Ani does not dispute that he held a position in the "top half" of the organization.

[14] Mr. Al-Ani challenges the Board's reliance on a "top-half" analysis to determine whether he held a senior position. However, this Court has approved the use of a "top-half" analysis in numerous decisions (see *Younis* at para 25, citing *Hamidi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 333).

[15] In *Adam v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 337 at para 7, [2001] FCJ No 25 [*Adam*], the Federal Court of Appeal ruled that where a person has held one of the positions listed in s 16 of the Regulations, that person is presumed to have been able to exert significant influence on the exercise of government power, and this presumption cannot be rebutted with evidence that the person did not in fact exert such influence. Building on *Adam*, this Court has likened s 35(1)(*b*) of the IRPA to an "absolute liability provision," noting that if a person has the status of a prescribed senior official, it "matters little" whether they were complicit in the violations allegedly committed by the designated regime (*Hussein v Canada (Minister of Citizenship and Immigration)*, 2009 FC 759 at para 16).

[16] Mr. Al-Ani says that the Supreme Court of Canada's reasoning in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*], which significantly changed the law of complicity for international crimes, should affect the interpretation of "senior member of the military" in s 16 of the Regulations. According to Mr. Al-Ani, the Board's finding that he was inadmissible solely because his rank was in the top half of the Iraqi military structure is akin to a finding of guilt by association. In *Ezokola*, the Supreme Court of Canada rejected "a concept of complicity that leaves any room for guilt by association or passive acquiescence" (*Ezokola* at para 81).

[17] The Minister argues that *Ezokola* is distinguishable because it involved an inquiry into the specific actions taken by a claimant in order to determine his eligibility for refugee status. Here, we are concerned with a person's status, not his actions. The Minister says that the determination of whether an individual is a "prescribed senior official" in a designated regime is

analogous to a determination of whether an individual is a "member" of an organization engaged in terrorism. The Minister relies on *Kanagendren v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 86 [*Kanagendren*], in which the Federal Court of Appeal held that *Ezokola* did not alter the proposition that complicity in an offence is irrelevant to a determination of membership in a terrorist organization under s 34(1)(*f*) of the IRPA. Mr. Al-Ani responds that s 35(1)(*b*) of the IRPA and s 16 of the Regulations are distinct from s 34(1)(*f*), because they are concerned with the ability of the individual to exert significant influence over the exercise of government power.

[18] The Board found Mr. Al-Ani's arguments to be "compelling and logical." However, this Court has repeatedly found that the inquiry under s 35(1)(*b*) of the IRPA is not concerned with complicity in prohibited acts, but only with whether an individual held a senior position in a designated regime (*Younis* at para 28, citing *Ismail*). In *Younis* at paras 23-24, Justice O'Keefe found that the words "by virtue of their position" in s 16 of the Regulations places the focus on an applicant'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."

[19] Moreover, this Court recently rejected the argument that *Ezokola* should affect the interpretation of s 35(1)(*b*) of the IRPA. In *Tareen*, the applicant argued that a visa officer wrongly found him to be inadmissible as a senior member of the Taliban in Afghanistan because the officer failed to analyze whether, by virtue of his rank within the designated regime, he was able to exert significant influence on the exercise of government power or benefit from his

position. Justice Camp found that Parliament "intended inadmissibility to flow from an individual's status rather than an individual's actions" (*Tareen* at para 37), and that intent and personal blameworthiness are irrelevant for the purposes of inadmissibility under s 35(1)(*b*) of the IRPA.

[20] In my view, *Ezokola* does not permit an interpretation of s 35(1)(*b*) of the IRPA and s 16 of the Regulations that contradicts their plain language. I agree with the Minister that a finding of inadmissibility under these provisions results from a person's status, not his actions. If an individual holds a sufficiently senior position in a designated regime, then he is presumed to have been able to exert significant influence on the exercise of government power or to benefit from his position. The Board's adherence to precedent was reasonable, and its decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law.

[21] I will end these reasons with the observation that the degree to which an individual was personally complicit in the violations committed by a designated regime may be relevant to a request to apply for permanent residence from within Canada on humanitarian and compassionate grounds.

VI. Conclusion

[22] For the foregoing reasons, the application for judicial review is dismissed. The legal issues raised in this application have previously been addressed by the Federal Court of Appeal

in *Adam* and by numerous decisions of this Court. I therefore decline to certify a question for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified for appeal.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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