Federal Court  Cour fédérale

Date: 20160209

Docket: IMM-2158-15

Citation: 2016 FC 166

Ottawa, Ontario, February 9, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

SALEH MOHAMMAD SHERZAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Saleh Mohammad Sherzai [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*] of a decision by an Islamabad Visa Officer, High Commission of Canada, Visa Section (Pakistan) [the Officer] dated March 11, 2015, and communicated to the Applicant on March 18, 2015, in which the Officer determined that the Applicant is inadmissible to becoming a permanent resident of Canada under paragraph 35(1)(b) of the *IRPA* and subsection 16(d) of the

Immigration and Refugee Protection Regulations [*IRPR*]. Leave to apply for judicial review was granted by Justice Heneghan on October 28, 2015.

[2] On October 1, 1994, the Minister's then predecessor designated the Marxist regime which existed in Afghanistan from 1978 to 1992 as a regime that has been 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*, SC 2000 c 24.

[3] The Applicant was found to have been a senior member of the public service of Afghanistan and thereby inadmissible by virtue of the combined effect of paragraph 35(1)(b) of *IRPA*:

Human or international rights violations	**Atteinte aux droits humains ou internationaux**
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	**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

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*; or ….	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]	[soulignement ajouté]

And subsection 16(d) of the *IRPR*, which states:

Application of par. 35(1)(b) of the Act	**Application de l'alinéa 35(1)b) de la Loi**
16 For the purposes of paragraph 35(1)(b) of the Act, 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, and includes	**16** Pour l'application de l'alinéa 35(1)b) de la Loi, occupent un poste de rang supérieur au sein d'une 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	**e)** les responsables des forces

military and of the intelligence and internal security services;	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]	[soulignement ajouté]

[4] By way of further background, the Applicant was born in Afghanistan in 1940. He is married and has three daughters, one of which is married and currently living in Canada.

[5] The Applicant was a career public servant, working for the Afghanistan government from 1959 to 1996. From 1980 to 1990 he had ten people working under him. From 1990 to 1996, he had forty people working under him. The Applicant held the following positions within the Afghan government from 1970 to 1996 which included the 1978 to 1992 period relevant to this application:

A. Tahawoni (assistance and help) depot: 1959 to 1980. Issued invoices under the executive director's orders. The organization was importing electronic goods, clothing, etc. from different countries for sale to the public and to merchants.

B. Tasfia Wahed (distribution and verification division): 1980 to 1990. Director HR, director of staffing. Reported to the executive director in Department of Finance, referred files and accounts from directorates which were terminated when their activities were considered non-essential. Ten persons reported to him.

C. Zorab-Khana and Matboha Soukouk: 1990 to 1996. Became Level 1 in 1990. Head of the factory that issued licence plates after approval by the executive

> director. Forty persons reported to him. The Zorak-Khana prepared and printed licence plates for government and private vehicles upon receiving requests from Kabul's Traffic Directorate.

[6] The Applicant claims he biked or walked to work. The Applicant, after 31 years of regular and systematic periodic level increases, was a "Level 1" employee in the public service, which is the highest rank for employees. The Applicant never served in the military nor was he a member of the Marxist party.

[7] The Applicant and his family fled from their home town in Afghanistan in 1997. One night in 1997, three Talibs came to the Applicant's home and demanded to marry the Applicant's daughters. This demand was basically an attempt to kidnap the daughters. The Applicant's nephew, who lived in the same home with his mother, tried to protect the young girls. The nephew was shot dead. After this incident and fearing for their lives, the family fled their home. They first went from Kabul to Jalalabad and from there to Peshawar. They currently live in Pakistan, where there is widespread discrimination against Afghanis.

[8] The Applicant and his family were interviewed by the Officer on February 7, 2013. On March 11, 2014, the Officer sent the Applicant a procedural fairness letter outlining concerns about the Applicant's inadmissibility due to his public service. The Applicant answered in a letter dated April 14, 2014. No additional interactions occurred between the Applicant and the Officer until the decision issued in March 2015.

[9] The Officer determined that the Applicant (and his dependents) were inadmissible to Canada under paragraph 35(1)(b) of the *IRPA*, based on the Officer's conclusion that there were reasonable grounds to believe the Applicant was a senior official in the public service [Department of Finance] during the Marxist regime in Afghanistan from 1978 to1992, as prescribed by subsection 16(d) of the *IRPR*.

[10] Two issues arise in this case. The first is whether the Supreme Court of Canada's decision in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] changes the requirements for assessing inadmissibility under paragraph 35(1)(b) of the *IRPA*. In my view, this is a question of law to be assessed on the standard of correctness. Secondly, as an alternative, the Applicant challenges the reasonableness of the decision finding the Applicant to be a senior official in the public service of Afghanistan between 1978 and 1992.

[11] In terms of standard of review, in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 57 and 62, the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." Reasonableness is the standard of review applicable to inadmissibility findings: *Kojic v Canada (Minister of Citizenship and Immigration)*, 2015 FC 816; *Tareen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1260 at para 15. In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of

> justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

I. Does *Ezokola* change the requirements for assessing inadmissibility under paragraph 35(1)(b) of the *IRPA*?

[12] The first issue turns on whether inadmissibility is contingent on membership in a class or on the status of an applicant, as is in my respectful view required by the wording of the law and Regulations. This I refer to as the group/status exclusion approach. Set against the group/status approach is what I refer to as the complicity approach to inadmissibility which says that the Courts should read down the language statute such that it only applies to those found personally complicit 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*.

[13] There are, in other words, two competing approaches to inadmissibility, one based on an applicant's group or status, and the other saying that regardless of the language of the statute, group membership or status does not lead to inadmissibility because inadmissibility may only arise if a claimant is personally complicit in terrorism, systematic or gross human rights violations, genocide, a war crime or a crime against humanity.

[14] This group/status versus personal complicity dichotomy is directly addressed in *Tareen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1260 [*Tareen*] by Justice Camp.

Tareen concerns a finding of inadmissibility under the same paragraph of the *IRPA* namely 35(1)(b) as in the case at bar, and concerns the same subsection 16(d) of the *IRPR* at issue in this case. In *Tareen* the Court held that: "[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." *Tareen* both considered and rejected a claim based on *Ezokola.* In my respectful view, *Tareen* was correctly decided in this regard. Therefore, I am unable to accept the contention that *Ezokola* changes the approach this Court should take to paragraph 35(1)(b) of the *IRPA.*

II. Reasonableness of the Decision

[15] The second issue is whether the Applicant was reasonably found to be a senior member of the public service. While I appreciate that inadequacy of reasons is not a stand-alone ground for judicial review, I conclude the Officer failed to conduct a reasonable review of the facts of this case. The decision letter is simply the conclusion. With respect, the Applicant (and his family) and the law require more. This case is very similar to *Hamidi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 333,where Justice Snider ordered judicial review in the following terms which I consider apt in this case:

> Issue #2: Decision under s. 35(1)(b)
>
> …
>
> [25] The issue before the officer - and now before this Court - is the meaning of "senior". Neither the *IRPA* nor the *Regulations* contain a definition of "senior". In *Hussein v. Canada* (*Minister of Citizenship and Immigration*), [2001] I.A.D.D. No. 1330, the Immigration Appeal Division stated, at para. 13, that:

> A senior member of the military would be a person occupying a high position in the military and would be a person of more advanced standing and often of comparatively long service. Advanced standing would be reflected in the responsibilities given to the person and the positions occupied by the person's immediate superiors.

[26] Following on this statement, I would add that whether any particular rank qualifies for inclusion under s. 16(e) of the *Regulations* will depend on the facts related to the particular military regime. While the rank of colonel or general may be senior in the Canadian military, I think it an error to apply Canadian standards to foreign military hierarchies.

[27] This view is reinforced in section 8.2 of "ENF: 18 War crimes and crimes against humanity", the Enforcement Manual of Citizenship and Immigration Canada (CIC), where guidance is given to officers considering exclusion inadmissibility under s. 35(1)(b). In particular, CIC suggests that the officer obtain "proof that position is senior" and provides further guidance as follows:

> In addition to the evidence required, it must be established that the position the person holds or held is a senior one. In order to establish that the person's position was senior, the position should be related to the hierarchy in which the functionary operates. . . . If it can be demonstrated that the position is in the top half of the organization, the position can be considered senior. This can be further established by evidence of the responsibilities attached to the position and the type of work actually done or the types of decisions made (if not by the Applicant then by holders of similar positions).
>
> Outre la preuve nécessaire, on doit établir que le poste est de rang supérieur. À cette fin, on doit situer le poste dans la hiérarchie où le fonctionnaire travaille ... Si l'on peut prouver que le poste est dans la moitié supérieure de l'organisation, on peut considérer qu'il est un poste de rang supérieur. Un autre moyen de l'établir est celui des preuves de responsabilités liées au poste et du type de travail effectué ou des types de décisions prises (à défaut d'être prises par le demandeur, par les titulaires de postes analogues).

[28] ENF 18, at section 8.4, also offers a caution to officers faced with these important s. 35(1)(b) determinations:

Officers should be aware of the sensitive nature of A35(1)(b) and the need for careful and thorough consideration of all relevant information. It is not intended that officers should cast the net so widely that all employees of a designated regime are considered inadmissible.	Les agents doivent être conscients de la nature délicate de ce qui touche L 35(1)b) et de la nécessité d'une évaluation soignée et approfondie de tous les renseignements pertinents. L'intention n'est pas que les agents emploient des critères si généraux que tous les employés de régimes désignés soient considérés comme interdits de territoire.

[16] I also note *Yahie v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1319 per Justice Russell, also emphasizes the need to follow the ENF Guidelines which call for careful and thorough consideration of all relevant information:

> [32] In examining the Decision as a whole, I have to conclude that the Applicants are correct that the Officer did not engage in any analysis of Mr. Yahie's position in the hierarchy of the government of his actual responsibilities. It is not possible to tell from the Decision and the material examined by the Officer whether Mr. Yahie was sufficiently senior to warrant exclusion. The Officer did not follow the Guidelines; Respondent's counsel suggests that the Officer simply based her "senior officer" designation upon what Mr. Yahie told her at the interview. The Officer decided that, in her view, Mr. Yahie was "senior" without referring to the Guidelines or any relevant authority.[33] It is true, of course, that the Officer has a broad discretion to make this kind of decision. But such a discretion is not free-floating and cannot be exercised without being connected to authority and precedent. And this is what the Officer neglects to do. She does not provide any authority for the criteria she uses to make a decision on seniority, and she does not say how the facts of this case satisfy any such authority.[34] The Decision lacks a jurisprudential grounding and relevant analysis. The reasons are inadequate. It is unreasonable for this reason and should be reconsidered. I have the same problems with this Decision as Justice Heneghan expressed in *Nezam* at paragraph 26, and that Justice Blanchard encountered in *Sungu v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1639 (F.C.) at paragraph 45. These are matters that need to be addressed in any reconsideration.

[17] With respect, the careful review required is missing in the present case; all we have are bare conclusions. Had the ENF Guidelines been employed, still in place today, in my view, the result might have been different. But as it is, the reasons lack sufficient transparency and justification to survive a *Dunsmuir* challenge. The decision does not fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and law.

[18] Therefore judicial review must be granted.

III. Ministerial Relief under Section 42.1 of the *IRPA*

[19] Before concluding, I note that the *IRPA* specifically gives the Minister the ability to grant relief to those caught by an overly-broad reach of paragraph 35(1)(b) and subsection 16(d) of the *IRPR*, as indeed might be the situation the Applicant finds himself in now, having been found inadmissible by virtue of his group membership and status absent evidence of personal complicity as outlined above. The *IRPA* in section 42.1 provides:

Exception — application to Minister **42.1 (1)** The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.	**Note marginale: Exception — demande au ministre** **42.1 (1)** Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.
Marginal note: Exception — Minister's own initiative **(2)** The Minister may, on the Minister's own initiative,	**Note marginale: Exception — à l'initiative du ministre** **(2)** Le ministre peut, de sa propre initiative, déclarer que

declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest.	les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de tout étranger s'il est convaincu que cela ne serait pas contraire à l'intérêt national.
Marginal note: Considerations	**Note marginale: Considérations**
(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.	**(3)** Pour décider s'il fait la déclaration, le ministre ne tient compte que de considérations relatives à la sécurité nationale et à la sécurité publique sans toutefois limiter son analyse au fait que l'étranger constitue ou non un danger pour le public ou la sécurité du Canada.

[20] It appears the Applicant was not aware, nor was he made aware by the Officer, of section 42.1. It also appears that he did not have the assistance of counsel or an immigration consultant. I was asked to find the Officer's decision unreasonable or unfair because the Officer did not, either in the fairness letter or otherwise, draw the Applicant's attention to the existence of the section 42.1 relief valve. While I do not agree that officers should in all circumstances alert those under consideration for exclusion on the basis of being in a prescribed class of Ministerial relief or turn their mind to granting such Ministerial relief without a specific request to do so (*Rogers v Canada (Minister of Citizenship and Immigration)*, 2009 FC 26 [*Rogers*] at para 39; *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1193 at para 35; see also *Saito v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1192; *Sherzady v Canada (Minister of Citizenship and Immigration)*, 2005 FC 516 at paras 14-20), in some matters that might be required: *Rogers* at para 42.

[21] The Applicant is now 75 years of age. He has waited six years to get to this point. Through no fault of his own, he must now go through a new process. If he applies for Ministerial relief under section 42.1 as an alternative or otherwise as he is advised, his application should be dealt with on a priority basis so that, should he fail again under paragraph 35(1)(b), any claim he might make for Ministerial relief may be considered as soon thereafter as possible. The reconsideration ordered in this matter should also take place on a priority basis.

[22] The Applicant proposed that I certify a question asking whether *Ezokola* changes the requirements for assessing inadmissibility under paragraph 35(1)(b) of the *IRPA*. The respondent opposes. In my view, there is no need to certify a question for the reasons given in *Tareen*, where such a request was refused.

JUDGMENT

THIS COURT'S JUDGMENT is that judicial review is granted, the Officer's decision is set aside, the matter is remitted to a different Officer for re-determination which re-determination shall take place on a priority basis, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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