

Federal Court



Cour fédérale

Date: 20110309

Docket: IMM-4087-10

Citation: 2011 FC 253

Ottawa, Ontario, March 9, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

**ZINAH HABEEB AND
HASAN ABDUL RAZZAQ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Principal Applicant, Ms. Zinah Habeeb, and her husband, Mr. Hasan Abdul Razzaq, (together referred to as “the Applicants”) are citizens of Iraq. In March of 2010, the Applicants applied for permanent residence in Canada as sponsored members of the Convention Refugee Abroad Category. During the course of the application process, it came to light that Mr. Hasan

Abdul Razzaq (the Male Applicant), a medical doctor, served in the Iraqi army from 1991 to 2003, attaining the rank of Lieutenant Colonel.

[2] In a decision dated May 20, 2010, the Second Secretary – Immigration (the Officer) with the Embassy of Canada in Damascus, Syria concluded that the Male Applicant was inadmissible to Canada pursuant to s. 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), on the basis of his senior rank in the Iraqi Army. The Principal Applicant was found to be inadmissible as the accompanying family member of an inadmissible person, as contemplated by s. 42(a) of *IRPA*.

II. Issues and Standard of Review

[3] The Applicants submit that this application raises the following issues:

1. Did the Officer err in finding that the Male Applicant was a prescribed senior official as defined in s. 35(1)(b) of *IRPA* and s. 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*Regulations*)?
2. Did the Officer breach the duty of fairness by failing to provide the Principal Applicant with a meaningful opportunity to address her concerns?

[4] The question of whether the Male Applicant is a “prescribed senior official” is a question of mixed fact and law should be reviewed on the standard of reasonableness (*Ndibwami v Canada*

(*Ministre de la Citoyenneté & de l'Immigration*), 2009 FC 924, 359 FTR 182 (Eng); *Hamidi v Canada (Minister of Citizenship & Immigration)*, 2006 FC 333, 53 Imm LR (3d) 150 [*Hamidi v. Canada*]; *Yahie v Canada (Minister of Citizenship & Immigration)*, 2008 FC 1319, 78 Imm LR (3d) 91).

[5] As taught by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at paragraph 47:

[R]easonableness 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.

[6] Questions of procedural fairness in the context of decisions made by immigration officers are to be reviewed on the standard of correctness, as decided in *Lak v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 350, 62 Imm LR (3d) 101 (see also *Yahie v Canada (Minister of Citizenship & Immigration)*, 2008 FC 1319, 78 Imm LR (3d) 91 at paragraph 18).

III. Statutory Scheme

[7] I will begin by briefly setting out the statutory scheme applicable to this matter.

[8] Pursuant to s. 35(1)(b) of *IRPA*, a foreign national is inadmissible to Canada on the grounds of violating human or international rights for being a “prescribed senior official in the service of a government that, in the opinion of the Minister, 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 s. 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c. 24”.

The term “prescribed senior official” is described in s. 16 of the *Regulations*. Of particular relevance to this application, s. 16(e) of the *Regulations*, states that a “prescribed senior official” includes “senior members of the military”.

[9] The Iraqi government of Saddam Hussein, under which the Male Applicant served from 1991 to 2003, has been designated as a regime to which s. 35(1)(b) is applicable (See Canada’s Program on Crimes Against Humanity and War Crime, Ninth Annual Report, 2005-2006, Appendix 4).

[10] As a result of the Officer’s finding that the Male Applicant was inadmissible, the Principal Applicant’s application was also refused pursuant to s. 42(a) of *IRPA*. Under that provision, a foreign national is inadmissible on the grounds of an inadmissible family member if their accompanying family member or, in prescribed circumstances, their non-accompanying family member, is inadmissible.

IV. Did the Officer err in finding that the Male Applicant was a prescribed senior official?

[11] There is no factual dispute that the Male Applicant was a Lieutenant Colonel in the Iraqi army from July 2001 to April 2003. The question before me is whether this position was a “senior official” of the military. A senior member of the military is not defined in *IRPA* or the

Regulations. In Canada (Minister of Citizenship & Immigration) v. Hussein, [2001] IADD No 1330), the Immigration Appeal Division stated, at paragraph 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.

[12] In *Hamidi v. Canada*, above, the Court added that one must consider the particular military regime. At paragraph 26, this Court stated that, “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.” In other words, it is necessary for a reviewing officer to examine the military hierarchy for the particular military organization – in this case, that of the Iraqi military – to determine the relative ranking of the individual within that organization.

[13] Further, in the Citizenship and Immigration Manual, ENF 18: War crimes and crimes against humanity (Ottawa: Public Works and Government Services Canada)[ENF 18] the following guidance is provided:

8.2. Requirements to establish inadmissibility

Persons who are described in A35(1)(b) may be broken down into three categories, each with its own evidentiary requirements, as set out in the following table:

8.2. Critères pour établir l’interdiction de territoire

Les personnes décrites à L 35(1)*b* peuvent être réparties en trois catégories, chacune avec ses preuves exigées, comme on le constate au tableau qui suit :

Category	Evidence Required	Notes
...
2. Persons described in R16(c), R16(d), R16(e), and R16(f) senior diplomatic officials	<ul style="list-style-type: none"> • Designation of regime • Proof of position held • Proof that position is senior (see the note following this table). 	<p>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. Copies of organization charts can be located from the <i>Europa World Year Book</i>, <i>Encyclopedia of the Third World</i>, <i>Country Reports on Human Rights Practices</i> (U.S. Department of State) and the Modern War Crimes System (MWCS) database. 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).</p>
...

Catégorie	Preuve requise	Remarques
...
2. Personnes visées au R16(c), d), e) et f) (diplomates de haut rang)	<ul style="list-style-type: none"> • Régime désigné • Preuve du poste occupé 	<p>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.</p>

Catégorie	Preuve requise	Remarques
	<ul style="list-style-type: none"> • Preuve d'un poste de rang supérieur (voir la note à la fin du tableau). 	<p>On peut trouver des exemplaires d'organigrammes dans des ouvrages comme <i>Europa World Year Book</i>, <i>Encyclopedia of the Third World</i>, <i>Country Reports on Human Rights Practices</i> (du département d'État des É.-U.) et les bases de données du Système des crimes de guerre contemporains (SCGC). 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).</p>

Note: There is no definition of "senior" in the *Immigration and Refugee Protection Act* and no case law from the Federal Court. However, in considering this issue in relation to a military position, a tribunal of the Immigration Appeal Division determined 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

Note : Il n'y a pas de définition de « supérieur » dans la *Loi sur l'immigration et la protection des réfugiés* et aucune jurisprudence de la Cour fédérale. Toutefois, en étudiant le problème relativement à un poste militaire, un tribunal de la Section d'appel de l'immigration concluait :

« Une personne de rang supérieur de l'armée serait une personne occupant un poste élevé dans les forces armées et

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." [T99-14995, May 11, 2001]

une personne de rang plus avancé et souvent, avec des états de service comparativement longs. Une situation élevée se traduirait par les responsabilités données à cette personne et les postes occupés par les supérieurs immédiats de celles-ci. » [T99-14995, 11 mai 2001]

[14] In brief, for those suspected of being senior officials of the military under a designated regime, there are three requirements for a finding of inadmissibility pursuant to s. 16(e) and ENF 18. Specifically, each of three requirements must be met to establish that a person is caught by s. 35(1)(b) of *IRPA*:

1. the regime must have been designated by the Minister;
2. there must be reasonable grounds to believe that the person held a position within that regime; and
3. there must be reasonable grounds to believe that the position within the regime was that of a "senior official".

[15] The first two requirements are not at issue. The only question, in this case, is whether the Male Applicant's position, as a Lieutenant Colonel, was that of a prescribed senior official in the Iraqi army.

[16] Before arriving at the conclusion that he was, in fact, a prescribed senior official in the Iraqi army, the Officer considered the following:

- a Iraqi Military Hierarchy chart;
- section 9.2 of ENF 18 which indicates that the position can be held to be “senior” if the position is in the top half of the organization; and
- a reference to the War Crimes Unit to determine that this position was, in fact, ranked 6 of 17 within the Iraqi army.

[17] The Federal Court has approved the use of “a top-half indicator” ranking chart on numerous occasions (*Youis v Canada*, 2010 FC 1157, [2010] FCJ No 1441 (QL) at paragraphs 24-26). Use of the top half indicator has also been cited, with apparent approval, in other cases (see *Nezam v Canada (Minister of Citizenship & Immigration)*, 2005 FC 446, 272 FTR 9 (Eng) at paragraph 26; *Holway v Canada (Minister of Citizenship & Immigration)*, 2006 FC 309, 146 ACWS (3d) 697 at paragraph 33).

[18] Moreover, the Federal Court of Appeal has concluded that evidence of either complicity or personal culpability is not relevant to inadmissibility findings under s. 35(1)(b) of *IRPA* (*Adams v Canada*, [2001] 2 FC 337, 196 DLR (4th) 497 at paragraphs 7-8,11).

[19] The case of *Lutfi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1391, 52 Imm LR (3d) 99, raised by the Applicants, is distinguishable and of little assistance to this Court. In that case, it appears that the decision maker had failed to examine the hierarchy of the military in question and had failed to consult with the War Crimes Unit for assistance. In the case before me, there were no such errors.

[20] The Applicant submits that the Officer's reasons regarding this determination were inadequate. I cannot agree. The Officer considered the fact that the Iraqi Government is a Designated Regime by the Canadian Government, the Applicant admitted that he held the position of Lieutenant Colonel and the Officer considered the Applicant's potential "senior" position with a reference to the War Crimes Unit, who determined this position to rank 6 out of 17. The Officer, on the evidence before her, reasonably concluded that the Applicant was inadmissible to Canada pursuant to s. 35(1)(b) of *IRPA*. I see no error, or inadequacy, in the Officer's analysis.

[21] Based on the evidence before the Officer, the decision and the reasons show transparency and intelligibility and fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

V. Did the Officer breach the duty of fairness?

[22] The Applicants assert that the Officer breached her duty of fairness by failing to provide the Applicants with a meaningful opportunity to address the Officer's concerns regarding

inadmissibility. In particular, the Applicants submit that Officer was obliged to provide the Applicants with a “fairness letter” as required by section 8 of ENF 18.

[23] The duty of an officer to allow an individual an opportunity to demonstrate that his or her position is not senior is codified in section 8.3 of ENF 18.

8.3 Opportunity for person to be heard

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 improper 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.

[Emphasis added.]

8.3. Occasion pour une personne d’être entendue

Si l’agent envisage de refuser une demande en vertu de L35(1)*b*), le demandeur doit avoir la possibilité de prouver qu’il n’occupe ou n’occupait pas des fonctions de rang élevé visées à l’article R16 (catégorie 2) et qu’il n’a pas ou ne pouvait pas influencer sensiblement les actions, décisions ou politiques de son gouvernement (catégorie 3). On peut le faire par la poste ou par interview personnelle. Dans l’un ou l’autre cas, l’agent doit fournir au demandeur des exemplaires des documents non protégés dont il sera tenu compte dans l’établissement de l’admissibilité.

[Non souligné dans l’original.]

[24] The Computer Assisted Immigration Processing System (CAIPS) indicates that the Applicants were interviewed, by the Officer, on May 19, 2010. The CAIPS notes also indicate that the Applicants were asked many direct questions regarding the Male Applicant’s rank in the Iraqi army, his length of service, his duties and his commanding officers. The Officer also discussed, at

length, her concerns with his potential inadmissibility to Canada. The Applicants were given ample opportunity to respond.

[25] In these circumstances, a “fairness letter” was not required. There was no breach of the Applicants’ procedural fairness rights.

VI. Conclusion

[26] In conclusion, I can find no reason to intervene with the decision of the Officer. The application for judicial review will be dismissed.

[27] Neither party proposes a question for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. the application for judicial review is dismissed; and
2. no question of general importance is certified.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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