

Federal Court



Cour fédérale

Date: 20170609

Docket: IMM-4957-16

Citation: 2017 FC 566

Toronto, Ontario, June 9, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JOVO BARAC

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a visa officer [the Officer] dated October 5, 2016, in which the Officer determined that the Applicant does not meet the requirements for a temporary resident visa to Canada. Noting that the Applicant had served in the Bosnian Serb Army [BSA], which had been designated as a regime that has engaged in serious human rights abuses during the Applicant's years of service, the Officer found the Applicant to

be inadmissible pursuant to s. 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This finding was based on the Officer's conclusion that there were reasonable grounds to believe that the Applicant was a senior member of the military pursuant to s. 16(e) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [IRPR] and a prescribed senior official pursuant to s. 35(1)(b) of IRPA.

[2] As explained in more detail below, this application is dismissed, because I have found that the Officer's decision was made in accordance with the jurisprudence of this Court and that there is no basis for a finding that the decision was unreasonable.

II. Preliminary Matter

[3] As a preliminary matter, counsel for the parties agreed at the hearing of this application that the name of the Respondent in the style of cause should be changed to "The Minister of Citizenship and Immigration". My Judgment below reflects this change and the above style of cause has been amended accordingly.

III. Background

[4] The Applicant, Mr. Jovo Barac, is a citizen of Bosnia and Herzegovina who applied for a temporary resident visa for Canada on July 7, 2016. His application outlined his involvement with the military, including dates of service from 1971-1973 and 1991-1996 with the BSA.

[5] On June 16, 1993, the BSA was designated a regime within the meaning of ss. 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, for the period of time between March 27, 1992 and October 10, 1996. This designation was extended on August 15, 1997.

[6] Mr. Barac's military records were requested by letter dated July 8, 2016. On August 5, 2016, he provided a notarized copy of his military booklet issued by the Socialist Federal Republic of Yugoslavia, which indicated that he held the rank of Captain, First Class, during the period of designation.

[7] On September 2, 2016, the Officer received an admissibility brief from a partner agency [the Admissibility Brief]. The Officer subsequently sent Mr. Barac a procedural fairness letter, advising that there were reasonable grounds to believe he was a "senior member of the military" pursuant to s.16(e) of the IRPR, and a "prescribed senior official" pursuant to s.35(1)(b) of the IRPA. The Officer asked Mr. Barac for additional information relating to this issue.

[8] In response, Mr. Barac provided a chart from the Canadian Armed Forces showing the military hierarchy in Canada as well as one from Wikipedia with respect to the Serbian army. He submitted that, in both hierarchies, Captains are considered junior officers and not in the top half of the hierarchy. He also described his duties during his military service as involving procurement of food and gasoline supplies, checking food preparation, supervising food distribution, clothing, and sleeping equipment, and being in charge of transportation vehicles and their maintenance. Mr. Barac submitted that he was not in a position to make any decisions and

that, while he supervised 50 to 100 men, his duties were low level administrative duties, incompatible with a conclusion that he was a person of high military rank.

IV. Impugned Decision

[9] The Officer communicated the subsequent decision by letter dated October 5, 2016. In that letter, the Officer noted that Mr. Barac disclosed that he served in the BSA from 1992 to 1996, that the Minister of Public Safety has designated the Bosnian Serb Government as a regime that engaged in serious human rights abuses between March 27, 1992 and October 10, 1996, and that Mr. Barac served in the military during the designated regime period with the rank of Captain, First Class. The Officer found that there were reasonable grounds to believe that Mr. Barac was a senior member of the military pursuant to s. 16(a) of the IRPR and a prescribed senior official pursuant to s. 35(1)(b) of the IRPA.

[10] The Officer referred to the procedural fairness letter that was sent to Mr. Barac on September 6, 2016, outlining the Officer's concerns related to his service in the BSA, and noted that his submissions in response were reviewed. The Officer stated that the information provided in response did not mitigate the Officer's assessment that Mr. Barac was inadmissible pursuant to s. 35(1)(b) of the IRPA.

[11] The reasons for the Officer's decision are found not only in the October 5, 2016 letter but also in the notes as recorded in the Global Case Management System [GCMS]. Those notes provide an overview of Mr. Barac's military service and refer to the Admissibility Brief. The notes indicate that Mr. Barac served with the rank of Captain in the BSA from 1992 to 1996 and

that he was in this position during the time that the Bosnian Serb Government has been found by the Minister of Public Safety to have engaged in serious human rights abuses. The notes also indicate that Mr. Barac held the rank of Captain, First Class, which is in the top 50% of military ranks in this force.

[12] In a subsequent entry, the GCMS notes refer to Mr. Barac's response to the procedural fairness letter, in which his lawyer stated that he was not a senior official during the designated period but merely a low level administrator, involved in food distribution, clothing purchases and procurement of gas and oil, but also acknowledged that he supervised 50 to 100 men. The notes indicate that the Officer found this explanation to be a self-serving attempt by Mr. Barac to downplay his role in the military and that his contributions to the armed force in his capacity of Captain made a significant contribution to the war effort.

[13] The GCMS notes also refer to Mr. Barac claiming that the rank of Captain was not in the top 50% of military ranks, based on a Canadian and Yugoslavian military rankings guide. However, the Officer found that this guide confirmed that Mr. Barac was in the top 50% of the military, as a result of which the Officer was satisfied of Mr. Barac's inadmissibility under the IRPA and the IRPR.

V. Issues and Standard of Review

[14] The issues raised by Mr. Barac in his written submissions included an argument that the Officer's failure to disclose the Admissibility Brief to Mr. Barac, before making the decision, constituted a breach of procedural fairness. However, at the hearing of this application, Mr.

Barac's counsel explained that this argument was raised before a copy of the Admissibility Brief was made available through production of the Certified Tribunal Record. Having subsequently reviewed this document, Mr. Barac's counsel acknowledged that the information contained in the procedural fairness letter was sufficient for Mr. Barac's then counsel to know what was required to be established in response. Mr. Barac's counsel therefore acknowledged that the failure to provide a copy of the Admissibility Brief did not rise to the level of a breach of procedural fairness, and this argument was not pursued at the hearing.

[15] The remaining issue articulated by Mr. Barac was whether the Officer's reasons are deficient, erroneous, and inadequate, rendering the decision regarding his inadmissibility to be unreasonable.

[16] The parties are in agreement on the applicable standard of review, i.e. that the Officer's determination that Mr. Barac is inadmissible pursuant to s.35(1)(b) of the IRPA, including the adequacy of reasons, is reviewable on a standard of reasonableness (see *Mirosavljevic v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 439 [*Mirosavljevic*], at paras 11-12). I concur with the parties' position on standard of review.

VI. Analysis

[17] In submitting that the Officer's decision was unreasonable, Mr. Barac advances two arguments. First, he argues that the Officer erred in failing to consider the evidence contained in the Yugoslavian military rankings guide, which placed the various military rankings into categories, with Captain, First Class placed in a category entitled "Junior Officers or Company

Grade Officers.” Indeed, Mr. Barac notes that there are eight categories and that “Junior Officers or Company Grade Officers” is the fifth category from the top, meaning that it is in the bottom 50% of the categories.

[18] Second, Mr. Barac argues that there was no evidentiary basis for the Officer’s conclusion that Mr. Barac’s submissions in response to the procedural fairness letter represented an effort to downplay his role in the military or that they were self-serving. Mr. Barac also refers to authorities in which this Court has disapproved of adverse credibility findings based on characterizations of evidence as self-serving. Mr. Barac argues that the Officer should have taken into account the evidence of his duties, which demonstrates that he did not occupy a senior military position.

[19] My conclusion is that these arguments do not support a finding that the Officer’s decision was outside the range of acceptable outcomes, defensible on the facts and the law, so as to constitute an unreasonable decision. The jurisprudence of this Court is clear that it is not necessary for a visa officer to analyze the influence or benefit associated with a person’s military rank. Rather, the focus, in assessing whether a person is a senior member of the military, is on the individual’s rank in the organization. The number of individuals in positions above and below the person is a significant consideration and, if it can be demonstrated that the position is in the top half of the organization, the position can be considered senior (see *Younis v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1157 [*Younis*], at paras 23-25). As noted at paragraph 26 of *Younis*, use of the top half indicator has been cited with approval in other cases

(see *Nezam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 446, at para 26; *Holway v Canada (Minister of Citizenship and Immigration)*, 2006 FC 309, at para 33).

[20] In concluding that Mr. Barac's rank of Captain, First Class was in the top half of the BSA, the Officer relied on the information in the Admissibility Brief, that such rank was the eighth highest out of a total of 21 ranks, as well as the military rankings guide provided by Mr. Barac, which also showed Captain, First Class in the top half of the ranks. This approach is consistent with the applicable jurisprudence. The Officer did not analyse, and does not appear to have had evidence relevant to, the number of individuals in each rank. Such information was noted in *Younis* to be a significant consideration. However, as observed in *Mirosavljevic*, at para 24, it is appropriate to assume that the Yugoslavian military is pyramidal, with more persons in the lower ranks than at the higher ranks.

[21] Mr. Barac argues that, while the jurisprudence speaks of performing this analysis by reference to ranks, none of the cases expressly address the possibility of considering categories of ranks, perhaps because no evidence of categories was adduced in those cases. He therefore submits that it was unreasonable for the Officer to have failed to expressly consider the evidence that the Yugoslavian military rankings guide categorized Captain, First Class as a junior officer. I cannot conclude that this represents a reviewable error by the Officer. The analysis approved by the case law involves assessing whether an individual was in the top half of the military organization. I would not conclude that such analysis must necessarily be performed in relation to rank. However, given the analytical significance of the number of individuals in positions above and below the person, and given the point identified in *Mirosavljevic* that it is appropriate

to assume that there are more individuals in the lower ranks in higher ranks, the analysis performed by the Officer based on rank is consistent with the case law and represents a decision within the range of acceptable outcomes, defensible on the facts and the law, and which is therefore reasonable.

[22] In support of his position that the Officer erred by failing to take into account the evidence as to his duties, which he argues demonstrates that he did not occupy a senior military position, Mr. Barac refers to the applicable administrative manual which guides officers in performing assessments of the sort at issue in the present case. In “ENF 18 War crimes and crimes against humanity”, section 8.2 provides the following guidance:

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 Europa World Year Book, Encyclopedia of the Third World, Country Reports on Human Rights Practices (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 than by holders of similar positions).

(Emphasis added.)

[23] Mr. Barac relies on the emphasized sentence in the above passage. However, taken in context, this sentence does not suggest a requirement to analyse evidence of responsibilities. Rather, such evidence is a further means by which the seniority of a position can be assessed. The passage in section 8.2 indicates that a position can be considered senior if it can be

demonstrated that the position is in the top half of the organization. In other words, as argued by the Respondent, such a conclusion is determinative. This is consistent with the case law, as referenced in paragraph 23 of *Younis*, that it is not necessary to analyse a person's influence or benefit in a military organization, as such is assumed by operation of law if the individual is found to have held a high enough position.

[24] I therefore find no error by the Officer in finding Mr. Barac inadmissible without analysing the evidence of his duties and responsibilities. Whether the Officer can be faulted for his characterization of that evidence, as self-serving or downplaying Mr. Barac's role, is therefore immaterial and does not take the decision outside the range of acceptable outcomes.

[25] Having found no basis to conclude that the Officer's decision was unreasonable, this application for judicial review must be dismissed. Neither party proposed a question for certification for appeal, and none is stated.

JUDGMENT in IMM-4597-16

THIS COURT'S JUDGMENT is that:

1. The identification of the Respondent in the style of cause in this matter is changed to "The Minister of Citizenship and Immigration";
2. This application for judicial review is dismissed; and
3. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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