Federal Court Cour fédérale

Date: 20240130

Docket: IMM-11898-22

Citation: 2024 FC 148

Ottawa, Ontario, January 30, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Nenad Vanovac

Applicant

and

Minister of Public Safety and Emergency Preparedness

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Nenad Vanovac, has been a permanent resident of Canada since December 1994. He is a citizen of Bosnia and Herzegovina and he was the president of the Central Commission for the Exchange of Prisoners for the Bosnian Serb regime (i.e. the Serbian Republic of Bosnia and Herzegovina) in 1992 to 1993, before coming to Canada.

[2] The Bosnian Serb regime subsequently was designated pursuant to paragraph 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], which refers to prescribed senior officials in service of a government that, in the Minister's opinion, has engaged in terrorism, human rights violations, genocide, war crimes, or crimes against humanity. This played a part in the inadmissibility determination made by the Immigration Division [ID] of the Immigration and Refugee Board of Canada against the Applicant [Decision] and the contemporaneous deportation order issued on November 15, 2022.

[3] More specifically, the ID found that the Applicant was a prescribed senior official because the position he occupied was able to exert influence on the exercise of government power, pursuant to section 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], and further, the Bosnian Serb regime's designation covered the period when the Applicant held the above position.

[4] See Annex "A" for relevant provisions.

[5] The Applicant takes issue with the ID's finding that aspects of the Applicant's position fell within paragraphs 16(c), (d) and (f) of the *IRPR*, instead of just paragraph 16(c). The latter was the focus of the parties' submissions, further to the Respondent's counsel's representation to the Applicant's counsel before the hearing that the "Minister's allegation is based on your client's role as senior advisor, thus R. 16(c)." The Applicant therefore asserts a breach of procedural fairness and seeks judicial review of the Decision and the deportation order.

[6] Questions of procedural fairness attract a correctness-like standard of review: *Benchery v Canada (Citizenship and Immigration)*, 2020 FC 217 at paras 8-9; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77 [*Vavilov*]. The focus of the reviewing court is whether the process was fair in the circumstances: *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24.

[7] The onus is on the Applicant to establish that procedural fairness requirements were not met: *Lopez Santos v Canada (Citizenship and Immigration)*, 2021 FC 1281 at para 38; *Hundal v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1482 at para 4.

[8] I am not persuaded that the Applicant has met his burden. For the reasons that follow, the Applicant's judicial review application will be dismissed.

[9] The Applicant also proposes possible questions for certification, discussed further below.

II. Analysis

A. *Procedural Fairness*

[10] Given the length of time the Applicant has been a permanent resident in Canada and the stakes at issue, I am not persuaded that the duty owed to the Applicant falls at the low end of the spectrum, as argued by the Respondent, but rather it falls at the higher end: *Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2009 FC 104 at para 35; *Gallo v Canada (Public*

Safety and Emergency Preparedness), 2010 FC 1199 at para 30. Noting, however, that the duty of procedural fairness is variable, flexible and contextual, I am satisfied that the Decision is not procedurally unfair in the circumstances, as explained further below: *Vavilov*, above at para 77.

[11] The factors courts should consider in assessing the appropriate level of procedural fairness include: the nature of the decision being made; the process followed in making it; the more the process provided for; the function of the tribunal; the nature of the decision-making body; and the determinations that must be made: *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1992] 2 SCR 817 at para 23.

[12] The Minister bears the burden of establishing to the ID that the Applicant is inadmissible: *Sidamonidze v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 681 at para 10, 13; *Al-Naib v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 723 at para 1; *Damte v Canada (Citizenship and Immigration)*, 2023 FC 58 at para 15. The applicable standard is "reasonable grounds to believe," pursuant to section 33 of the *IRPA*.

[13] There are three criteria that must be met to establish that a person is a "prescribed senior official" as contemplated by paragraph 35(1)(b) of the *IRPA*: (i) the regime must have been designated by the Minister; (ii) there must be reasonable grounds to believe that the person held a position within that regime; and (iii) there must be reasonable grounds to believe that the position within the regime was that of a "senior official": *Habeeb v Canada (Citizenship and Immigration)*, 2011 FC 253 [*Habeeb*] at para 14; *Canada (Citizenship and Immigration) v Kljajic*, 2020 FC 570 [*Kljajic*] at paras 132-133.

[14] In my view, the second and third criteria described in *Habeeb* can be combined (as was done in *Kljajic*) to read: there must be reasonable grounds to believe that the person held a "senior official" position within that regime.

[15] If a person falls within an enumerated position described in section 16 of the *IRPR*, it is presumed that they are or were able to exert significant influence on the exercise of government power or to benefit from their position. This means that once an individual is found to be a prescribed senior official, no further analysis is required*: Canada (Citizenship and Immigration) v Kassab*, 2020 FCA 10 [*Kassab*] at paras 3-4, 21, 77.

[16] On the other hand, if the individual did not hold one of the positions enumerated in section 16, the decision maker then may consider whether the individual "was able to exercise significant influence on the regime's actions or policies or was able to benefit from the position": *Kojic v Canada (Citizenship and Immigration)*, 2015 FC 816 [*Kojic*] at para 18.

[17] I find that the ID followed the above procedure described in *Kassab* and *Kojic.* The ID found that, while the Applicant's position did not fit neatly in any of the positions enumerated in paragraphs 16(c), (d) and (f), it nonetheless encompassed aspects of all three. The ID consequently examined whether the Applicant was able to exert significant influence on the exercise of government power. Whether it did so reasonably is not in issue before the Court, because the Applicant's written and oral submissions focused solely on the issue of procedural fairness.

[18] Further, I agree with the Respondent that the "ID is… not bound by the arguments raised by the parties in the proceedings": *Julien v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 150 at para 23; *Saroya v Canada (Citizenship and Immigration)*, 2015 FC 428 at para 20; *Doe v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 518 at para 44; *Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224 at para 31, citing Fong v Canada (Public Safety and Emergency Preparedness), 2010 FC 1134 at para 31.

[19] As noted by the Respondent, the report under subsection 44(1) of the *IRPA* mentions paragraph 35(1)(b) of the *IRPA* and section 16 of the *IRPR*, without limitation. Although the referral to the ID and the procedural fairness letter sent to the Applicant refer only to paragraph 35(1)(b) of the *IRPA* in terms of the applicable legislative provisions, in my view section 16 of the *IRPR* is implicated by reason of the wording "prescribed senior official" in paragraph 35(1)(b).

[20] I also am satisfied that the ID explained during the hearing and in the Decision why it was departing from the parties' limited submissions on paragraph 16(c) of the *IRPR*, as the ID was entitled to do because it was not bound by the parties' views. In particular, I note that when the ID member asked the Minister's representative about the possible applicability of paragraph 16(f) at the hearing, the representative indicated being "some unprepared to answer that question."

[21] The ID took a break at that point and indicated to the Applicant's counsel that the ID also wanted to hear from counsel about the applicability of paragraph 16(f). The break was for half an hour at the request of Applicant's counsel, who then later addressed the issue.

[22] I am not persuaded that the Applicant's reliance on *R v Mian*, 2014 SCC 54 [*Mian*] is of assistance in the circumstances. Noting that it should be done rarely but that the test is flexible, the Supreme Court of Canada outlines three considerations or criteria for raising a new issue in the appellate context (*Mian*, above at paras 41, 50-52):

i. Jurisdiction of decision maker to consider the issue;

ii. Sufficient evidentiary record; and

iii. Procedural fairness.

[23] While the Supreme Court agrees with the principles of notification and opportunity to respond in the event of a new issue, the Court specifically acknowledges that the issue may be raised during an oral hearing: *Mian*, above at para 57. Here, even if it can be said that the ID's interest in paragraph 16(f) represents a new issue, of which I am not convinced, the ID took a break of half an hour, the length of time requested by the Applicant, so that the parties could consider and address the issue the ID raised about the possible applicability of paragraph 16(f).

[24] I further agree with the Respondent that the Applicant is required to raise an allegation of a breach of procedural fairness at the earliest practical opportunity: *Highway v Peter Ballantyne Cree Nation*, 2023 FC 565 at paras 56-57. As the Respondent notes, there is no evidence that the Applicant sought a remedy before the ID, such as requesting additional time (beyond the half an

hour) to provide written or oral submissions, or an adjournment or extension of time to better prepare his case.

[25] Although I have found that the level of procedural fairness owed to the Applicant is at the higher end of the spectrum in the circumstances, I conclude that his right to procedural fairness was not breached. There is no obligation on the ID to forewarn the Applicant on what paragraph of section 16 of the *IRPR* may be at play, given the non-exhaustive list of positions that could be implicated. Further, the subsection 44(1) report, which referred the Applicant's case to the ID, mentions section 16 of the *IRPR* broadly, and thus, in my view, constitutes sufficient notice of the case to be met.

B. *Proposed Questions for Certification*

[26] I am prepared to certify one of the Applicant's proposed questions, reformulated, as explained below.

[27] The Applicant proposes the following questions for certification:

1) Does a failure to provide an individual with specific notice regarding the category of inadmissibility under which they are alleged to fall constitute a breach of the right to a fair hearing and the right to know and meet the case against them under procedural fairness principles?

2) To what extent does the duty to provide procedural fairness require the provision of detailed notice about the specific nature of the allegations against an individual, particularly in the context of the broad inadmissibility categories under section 16 of the *IRPR*?

3) Whether it is a breach of procedural fairness if the Minister provides notice that a person is inadmissible under a specific regulation; however, the ID declares a person inadmissible under another category in which the Minister did not allege?

[28] As I held in *Kandiah v Canada (Citizenship and Immigration)*, 2021 FC 1388 at paras 81-82, the appropriate test for this Court to apply in considering whether to certify a proposed question is at least four-fold:

i) Whether the question is a serious one that is dipositive of the appeal;

ii) Whether the question transcends the parties' interests;

iii) Whether it raises an issue of general importance; and

iv) Whether the question has arisen from the case and been dealt with by the Court (*Lunyamila* criteria): *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 [*Lunyamila*] at para 46.

[29] The threshold for certification is whether the question is dispositive of the appeal: *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 [*Zazai*] at para 11. The corollary of the threshold is that the question must have been raised and decided by the lower court: *Zazai*, above at para 12; *Lunyamila*, above at para 46.

[30] I am not persuaded that questions 1 and 3 of the proposed questions rise above the specific facts of this matter and, therefore, I decline to certify them. I cannot say the same about the second question, however.

[31] In my view, the second question could be dispositive of any appeal taken. Further, I find that it transcends the parties' interests because the outcome of an appeal on this issue could affect how ID proceedings involving paragraph 35(1)(b) of the *IRPA* are conducted, if the Court of Appeal were to find that procedural fairness was breached in this case. Finally, the question of whether the ID is required to give notice regarding the specifics of the broad, non-exhaustive

categories of section 16 of the *IRPR* that may apply is not one, I believe, that has been settled previously by this Court.

[32] In the circumstances, I am prepared to certify the Applicant's second question but reformulated as follows:

> Does the duty of procedural fairness owed to an applicant in the context of potential inadmissibility under paragraph 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, require detailed notice about the specific nature of the allegations against an individual in respect of the broad, non-exhaustive categories of a "prescribed senior official" under section 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227?

III. Conclusion

[33] For the above reasons, I conclude that the Applicant's application for judicial review will be dismissed. The reformulated question shown in paragraph 32 of these Reasons will be certified.

JUDGMENT in IMM-11898-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed.

2. The following question is certified:

> Does the duty of procedural fairness owed to an applicant in the context of potential inadmissibility under paragraph 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, require detailed notice about the specific nature of the allegations against an individual in respect of the broad, non-exhaustive categories of a "prescribed senior official" under section 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227?

"Janet M. Fuhrer"

Judge

Annex "A": Relevant Provisions

Immigration and Refugee Protection Act, SC 2001, c 27.
Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27.

Inadmissibility **Rules of interpretation** **33** The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**Interdictions de territoire** **Interprétation** **33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
Human or international rights violations **35 (1)** A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for … **(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*;	**Atteinte aux droits humains ou internationaux** **35 (1)** Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants : … **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;
…	…
Loss of Status and Removal	**Perte de statut et renvoi**
Report on Inadmissibility	**Constat de l'interdiction de territoire**
Preparation of report	**Rapport d'interdiction de territoire**
44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	**44 (1)** S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
Referral or removal order	**Suivi**
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	**(2)** S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

Immigration and Refugee Protection Regulations, SOR/2002-227.
Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227.

Inadmissibility	**Interdictions de territoire**
Determination of Inadmissibility	**Constat de l'interdiction de territoire**
Application of paragraph 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 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 les personnes qui, du fait de leurs fonctions — actuelles ou anciennes —, 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.

FEDERAL COURT

SOLICITORS OF RECORD

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