Federal Court of Appeal Cour d'appel fédérale

Date: 20200116

Docket: A-414-18

Citation: 2020 FCA 10

CORAM: **DAWSON J.A.**
RENNIE J.A.
RIVOALEN J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

ZAGHLOL KASSAB

Respondent

Heard at Toronto, Ontario, on November 27, 2019.

Judgment delivered at Ottawa, Ontario, on January 16, 2020.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: RENNIE J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Paragraph 35(1)(*b*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), renders a foreign national inadmissible for:

35. (1) …	35. (1) …
(*b*) being a prescribed senior official in the service of a government that, in	*b*) occuper un poste de rang supérieur — au sens du règlement — au sein

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*;

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*;

(underlining added)

(soulignements ajoutés)

[2] The term “prescribed senior official” is defined in section 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations):

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

(*a*) heads of state or government;

(*b*) members of the cabinet or governing council;

(*c*) senior advisors to persons described in paragraph (*a*) or (*b*);

(*d*) senior members of the public service;

(*e*) senior members of the military and of the intelligence and internal security services;

(*f*) ambassadors and senior diplomatic

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) le chef d’État ou le chef du gouvernement;

b) les membres du cabinet ou du conseil exécutif;

c) les principaux conseillers des personnes visées aux alinéas *a*) et *b*);

d) les hauts fonctionnaires;

e) les responsables des forces armées et des services de renseignement ou de sécurité intérieure;

f) les ambassadeurs et les membres du

officials; and	service diplomatique de haut rang;
(*g*) members of the judiciary.	*g*) les juges.
(underlining added)	(soulignements ajoutés)

[3] As explained in more detail below, the principal issue raised on this appeal is whether the Federal Court erred in finding that, notwithstanding an individual was a senior member of the public service of a designated government, for the individual to be deemed to be inadmissible it was necessary to conduct a broader analysis to determine whether the individual was actually able to exert significant influence on the exercise of government power or to benefit from their position.

[4] For the reasons developed below, I have concluded that the Federal Court erred.

Factual background

[5] For a person to be inadmissible under paragraph 35(1)(*b*), the Minister of Public Safety must designate the government they work or worked for to be a regime that engages, or has engaged, "in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity". To date 11 regimes have been designated. Of relevance to this appeal is that the governments of Ahmed Hassan Al-Bakr and Saddam Hussein, in power in Iraq from 1968 until May 22, 2003, are designated governments.

[6] The respondent, Zaghlol Kassab, is a citizen of the Republic of Iraq and an engineer who holds a PhD in electrical engineering. From April 1969 until June 2000 he was employed by the governments of Ahmed Hassan Al-Bakr and Saddam Hussein in a variety of positions.

[7] The respondent and his wife applied for permanent residence in Canada as sponsored refugees under the Convention Refugees Abroad Class. While a visa officer was satisfied that the respondent and his wife each met the definition of Convention refugee, the visa officer concluded that there were reasonable grounds to believe that the respondent is inadmissible to Canada for being a "prescribed senior official" in the service of a designated regime that engaged in serious human rights abuses.

[8] The respondent successfully challenged the finding of inadmissibility in the Federal Court. For reasons cited 2018 FC 1215, the Federal Court allowed the application for judicial review, remitted the matter to a different visa officer for reconsideration and certified the following question:

> In determining whether an individual is a prescribed senior official within the meaning of paragraph 35(1)(*b*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 on the basis that the individual may be a senior member of the public service as enumerated in subsection 16(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, when significant evidence is put forward that the individual was unable to exert significant influence or benefit from their position, can an officer conclude that an individual is a senior member of the public service solely on the basis that the individual is within the top half of the government hierarchy, or is the officer required to conduct a broader analysis and consider such evidence?

[9] This is an appeal by the Minister of Citizenship and Immigration from the judgment of the Federal Court.

[10] Importantly, there is no dispute about the positions the respondent held while employed by the government of Iraq. At the request of the visa officer, the respondent provided documents setting out the title of each position he held in the government, the dates he served in each position, the duties of each position and, for each position, the number of persons senior to him in the hierarchical structure and the number of persons junior to him or that he supervised.

[11] Three positions were of particular concern to the visa officer and they were enumerated in the procedural fairness letter sent to the respondent.

[12] First, from April 1991 to September 1993, the respondent was the Chief Engineer reporting to the "Director General of the Energy Production". The respondent was responsible for the rehabilitation of all telecommunication networks of the electricity sector in Iraq following the first Gulf War. He supervised 10 teams employing a total of 90 engineers and technicians.

[13] Second, from October 1993 to December 1994, the respondent was the "Head of Telecommunication Department/Centre of Electronic Systems". The respondent was responsible for the telecommunication services "to the entities of the ministry of Industry". During this period the Centre was supervised by the Military Industrialization Commission. The respondent was three levels in the reporting hierarchy below Saddam Hussein.

[14] Finally, from January 1995 to August 1995, the respondent was the "Director of Centre for Electronic Systems". The respondent was responsible for telecommunication, computers and

control services for the "entities of the ministry of Industry". Again, the respondent was three levels in the reporting hierarchy below Saddam Hussein.

[15] While the respondent admitted that he held these and other senior positions in the Iraqi government, and the duties performed in each position, he stated that he and his family are and were devout, practising Catholics and that he was never a member of the Ba'ath Party. The respondent stated that these facts resulted in significant informal restrictions being placed upon his mobility and his ability to exert influence regarding governmental power within the Iraqi public service. This was the evidence of the respondent's ability to exert influence or benefit considered by the Federal Court and referenced in the certified question.

The decision of the visa officer

[16] The visa officer did not find the respondent's religious faith or lack of association with the Ba'ath Party to be pertinent. Consequently, the visa officer did not find the respondent's statement that he had no decision-making power in his positions to be credible. In the view of the visa officer, the respondent held a number of managerial positions so that while he may not have reached the upper echelons of the Iraqi public service it was reasonable to conclude that his roles were indicative of being a senior official in the top 50% of the Iraqi government public service hierarchy. It followed that the respondent was, in the view of the visa officer, inadmissible to Canada.

The decision of the Federal Court

[17] The Federal Court correctly stated that the standard of review to be applied to the decision of the visa officer is reasonableness (reasons, paragraph 17).

[18] After setting out the applicable legislative provisions, the Federal Court's analysis is contained in the following paragraphs:

> [25] Based on the authorities before me, there are two stages to the analysis that an officer must undertake when determining if an individual is a prescribed senior official within the meaning of paragraph 35(1)(b) of the IRPA.
>
> [26] At the first stage of the analysis, the officer should look to see whether the individual has held one of the positions enumerated in section 16 of the Regulations. If the officer determines that the individual has held one of the enumerated positions, then, as the Respondent rightly points out, there is an irrefutable presumption that the individual is or was a prescribed senior official (*Hussein v Canada (Citizenship and Immigration)*, 2009 FC 759 at para 14 [*Hussein*], citing *Canada (Minister of Citizenship and Immigration) v Adam*, [2001] 2 FC 337 (CA) at para 7 [*Adam*]). For this reason, paragraph 35(1)(b) has often been termed an absolute liability provision (*Younis v Canada (Citizenship and Immigration)*, 2010 FC 1157 at para 28). If the officer determines that the individual has not held one of the enumerated positions, the officer may then consider whether the individual, despite not holding an enumerated position, was able to exercise significant influence on the regime's actions or policies or was able to benefit from their position (*Kojic v Canada (Citizenship and Immigration)*, 2015 FC 816 at para 18 [*Kojic*]).
>
> [27] If the officer determines that the individual is or was a prescribed senior official, they should then proceed to the second stage of the analysis, the application of paragraph 35(1)(b) of the IRPA. At this stage, the individual deemed to be or have been a prescribed senior official does not have the opportunity to demonstrate that even though he or she in theory had high-level responsibilities, he or she was not able to exert any influence on the exercise of government power: *Hussein*, above at para 14.
>
> [28] Although the second stage of this analysis is straightforward, the first stage is not necessarily so. In *Adam*, the individual in question was a cabinet minister in a designated regime. In such a case, or in a case involving a member of the judiciary or a head of state, the first stage of the analysis is quite clear – the

individual's position is clearly enumerated in section 16 of the Regulations, and the individual is therefore a prescribed senior official; there is, in effect, absolute liability.

[29] However, several of the other positions enumerated in section 16 are less clearly defined, including subsection 16(d), "senior members of the public service". For such subsections, it may not be clear from an individual's job title alone whether they hold or held an enumerated position. Therefore, a further examination should be done to determine whether or not the individual falls within the scope of "senior members of the public service".

[30] As the Respondent highlights, past decisions of this Court have established the proper approach for this further examination with respect to subsection 16(e), which relates to senior members of the military. If it can be demonstrated that the individual falls within the top half of the military hierarchy, that is sufficient to find that the individual is a senior member of the military within the meaning of subsection 16(e) (*Sekularac v Canada (Citizenship and Immigration)*, 2018 FC 381 at para 15).

[31] However, that approach does not appear to have been adopted in respect of subsection 16(d) by this Court or the Federal Court of Appeal. Given that a civil hierarchy may be less structured than a military hierarchy, when considering whether a civil appointment constitutes a senior member of the public service, a more fulsome examination should be done both from a purposive viewpoint and contextually. An officer may consider whether the individual's job title falls within the top half of the government hierarchy [the Top Half Test], but he or she should also look to evidence of the individual's responsibilities and duties, as well as the nature of the position held.

[32] I acknowledge *ENF 18: War Crimes and Crimes Against Humanity Manual* [the Manual], which offers guidance to visa officers regarding the analysis they should take under paragraph 35(1)(b) of the IRPA. The following passage from the Manual is quoted in the NSSD Assessment:

> 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).

[33] Notwithstanding the Manual, in a case such as this, involving a senior member of the public service, where there is highly relevant evidence suggesting

> that an individual was unable to yield [*sic*] meaningful influence or benefit from their position, relying on the Top Half Test alone is unreasonable.
>
> (underlining added)

[19] While what was at issue was the reasonableness of the officer's interpretation of paragraph 35(1)(*b*) of the Act and, in turn, subsection 16(*d*) of the Regulations, the Federal Court did not in its reasons consider whether the visa officer's decision was consistent with the principles of statutory interpretation and the text, context and purpose of the applicable legislation.

[20] As the Minister argues, and as explained below, the reasons of the Federal Court are problematic in at least two important respects.

The Federal Court erred in law

[21] First, the Federal Court correctly stated, at paragraphs 26 and 27, the nature of the analysis to be conducted. Referring to the decision of this Court in *Canada (Minister of Citizenship and Immigration) v. Adam*, [2001] 2 F.C. 337, 266 N.R. 92 (F.C.A.), the Federal Court stated that if it is found that an individual has held a position enumerated in section 16 of the Regulations "there is an irrefutable presumption that the individual is or was a prescribed senior official". Thereafter, the Court cited no authority for the proposition advanced in paragraph 29 of the reasons that the "irrefutable presumption" applies only to some, but not all, of the positions enumerated in section 16.

[22] In *Adam*, one of the questions addressed by this Court was whether paragraph 19(1)(*l*) and subsection 19(1.1) of the *Immigration Act*, R.S.C. 1985, c. I-2, then in force "contain a rebuttable presumption".

[23] The provisions then at issue read as follows:

19(1) No person shall be granted admission who is a member of any of the following classes:	19(1)Les personnes suivantes appartiennent à une catégorie non admissible :
…	…
(*l*) persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity within the meaning of subsection 7(3.76) of the *Criminal Code*, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.	*l*) celles qui, à un rang élevé, font ou ont fait partie ou sont ou ont été au service 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 à des crimes de guerre ou contre l'humanité, au sens du paragraphe 7(3.76) du *Code criminel*, sauf si elles convainquent le ministre que leur admission ne serait nullement préjudiciable à l'intérêt national.
19(1.1) For the purposes of paragraph (1)(*l*), "senior members of or senior officials in the service of a government" means persons who, by virtue of the position they hold or have held, are or were able to exert a significant influence on the exercise of government power and, without limiting its generality, includes	19(1.1)Les personnes visées par l'alinéa (1)*l*) sont celles qui, du fait de leurs présentes ou anciennes fonctions, sont ou étaient en mesure d'influencer sensiblement l'exercice du pouvoir par leur gouvernement, 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	*c*) les principaux conseillers des

described in paragraph (*a*) or (*b*);	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 apparatus;	*e*) les responsables des forces armées, des services de renseignement ou de la 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.
(underlining added)	(soulignements ajoutés)

[24] The provisions, while not identical, are substantially similar to those now at issue.

[25] At paragraph 8 of the Court's reasons in *Adam*, the majority, quoting with approval from an earlier decision of the Federal Court, described the legislative scheme in the following terms:

> … The scheme of the legislation is to consider senior members or officials of a government as persons who were able to exert a significant influence on the exercise of the government's power such that they must take responsibility for the objectionable acts of their government. Persons holding specific positions within a government are deemed to be senior members of, or senior officials in the service of a government for that purpose. It is on that basis that the applicant, as an ambassador, was considered to be a person within the meaning of paragraph 19(1)(*l*).
>
> (underlining added)

[26] At paragraph 11 of the Court's reasons, the majority concluded that the Federal Court "correctly determined that paragraph 19(1)(*l*) does not contain a rebuttable presumption and that the Board erred in deciding that it did."

[27] Nothing in the decision in *Adam* supports the conclusion of the Federal Court in this case that some, not all, of the positions enumerated in section 16 of the Regulations require a factual inquiry into whether the incumbent was actually able to exert significant influence or benefit from their position. In every case the question is whether an individual falls within one of the positions enumerated in section 16 of the Regulations. In the case of subsection 16(*d*) the question is whether a person is or was a senior member of the public service.

[28] The Federal Court's conclusion is inconsistent with this Court's statement in *Adam* of the legislation's rationale. This rationale is that senior officials are considered, by virtue of their position, to be able to exert significant influence on the exercise of government power. Thus, persons holding specific positions are by virtue of their position deemed to be prescribed senior officials.

[29] Similarly, this Court's statement that then paragraph 19(1)(*l*) did not contain a rebuttable presumption applied to all individuals falling within the definition of "senior members of or senior officials in the service of a government". Unlike the Federal Court, this Court drew no distinction between the enumerated exemplars set out in what was then subsection 19(1.1) of the Act.

[30] The decision in *Adam* was a binding precedent on the Federal Court, and the Court erred in failing to follow *Adam*. To the extent the Federal Court believed the *Adam* decision to be problematic, rather than purporting to overrule the decision, the Federal Court ought to have

followed it while providing written reasons explaining why the decision was viewed to be problematic (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at paragraph 21).

[31] The next concern, related to this concern, is the Federal Court's erroneous statement, at paragraph 31, that the Federal Court had not adopted the "top half" test in respect of subsection 16(*d*) of the Regulations.

[32] The "top half" test refers to the guidance contained in Chapter 18 of the Operational Manual, issued by what formerly was Citizenship and Immigration Canada, dealing with War Crimes and Crimes Against Humanity. The Manual instructs that with respect to persons described in subsections 16(*c*), (*d*), (*e*) and senior diplomatic officials described in subsection 16(*f*):

> 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). If it can be demonstrated that the person is in the top half of the organization, the position can be considered senior.

[33] Contrary to the conclusion of the Federal Court in this case, the "top half" test has been applied by the Federal Court without any further contextual analysis in the following decisions relating to inadmissibility based on senior membership in the public service:

> *Ndibwami v. Canada (Citizenship and Immigration)*, 2009 FC 924, 359 F.T.R. 182
>
> *Gebremedhin v. Canada (Citizenship and Immigration)*, 2013 FC 380, 431 F.T.R. 42

[34] In *Tareen v. Canada (Citizenship and Immigration)*, 2015 FC 1260, [2015] F.C.J. No. 1308, while the Federal Court did not refer to the "top half" test, at paragraph 40 the Court wrote:

> Senior members of the public service are examples of officials able to exert significant influence on the exercise of government power, or able to benefit from their position. 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. Like paragraph 34(1)(*f*), ministerial relief is available to individuals found inadmissible under this provision. As a result, *Ezokola* does not assist the applicants. The Officer was not required to consider whether Mr. Tareen was complicit in the Taliban regime. He was only required to consider whether Mr. Tareen was a senior official of that regime within the meaning of section 16 of the Regulations.
>
> (underlining added)

[35] The doctrine of judicial comity operates to prevent the same legal issue from being decided differently by members of the same Court – the doctrine promotes certainty and predictability in the law. The doctrine is a manifestation of the principle of *stare decisis*. The Federal Court has applied the doctrine, holding that while decisions rendered by colleagues are persuasive and should be given considerable weight, a departure is authorized when a judge is convinced that the prior decision is wrong and can advance cogent reasons in support of this view (*Apotex Inc. v. Allergan Inc.*, 2012 FCA 308, 440 N.R. 269 at paragraph 47, citing *Dela Fuente v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 992, 276 F.T.R. 241, at paragraph 29 and *Stone v. Canada (Attorney General)*, 2012 FC 81, 404 F.T.R. 104, at paragraph 12).

[36] In my view, the Federal Court erred in law by failing to reference these prior, conflicting decisions and by failing to give cogent reasons supporting the conclusion that the prior jurisprudence was wrong.

[37] I have dealt with the reasons of the Federal Court in some detail because of the importance of the doctrine of *stare decisis*. However, it is well-settled that on an appeal to this Court from a judgment of the Federal Court rendered on judicial review of a decision of an administrative decision-maker, this Court is to “step into the shoes” of the Federal Court and focus upon the decision of the administrative decision-maker (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 46 and 47). In the present case, this Court must consider whether the visa officer’s interpretation of the term “prescribed senior official” was an interpretation that the language of the Act and Regulations “can reasonably bear.” (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at paragraph 40).

Was the visa officer’s interpretation of the term “prescribed senior official” and the application of that term to the facts before him reasonable?

[38] As explained above, the visa officer applied the “top half” test. As, without doubt, the respondent had held positions within the “top half” of the Iraqi government public service, the visa officer reasoned that it followed that the respondent had served as a senior member of the public service of a designated regime. The respondent therefore fell within the definition of a “prescribed senior official” and was inadmissible pursuant to paragraph 35(1)(*b*) of the Act. On

the officer's interpretation of the definition, the respondent's religion and political affiliation were not pertinent.

[39] I pause here to note that the visa officer did not conduct a formal, statutory interpretation exercise before determining that neither the respondent's religious faith nor his lack of association with the Ba'ath Party was pertinent. Rather, he applied the guidance contained in the relevant Operational Manual. The Manual, as set out in paragraph 32 above, instructed that to determine whether a position was senior, an officer was to consider whether the position was one in the top half of the organization's hierarchy.

[40] The Federal Court concluded that it was unreasonable to apply the "top half" test to a senior member of the public service when there was evidence suggesting that the individual was in fact unable to yield meaningful influence or benefit from the position.

[41] The visa officer's decision was predicated upon his interpretation of "prescribed senior official". It follows that to assess the reasonableness of the officer's decision it is necessary to look to the legal or factual considerations that constrained the visa officer. This includes the publicly available Operational Manual, the governing legislative scheme and the principles of statutory interpretation.

[42] I turn first to the Operational Manual. This Manual informs or explains in greater detail the visa officer's decision. Further, guidelines such as those found in the Manual have been held to provide a useful indicator of what constitutes a reasonable interpretation of a given provision

of the Act (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, at paragraph 32). This said, such guidelines are not legally binding.

[43] I next turn to the principles of statutory interpretation – not for the purpose of conducting a *de novo* analysis – but rather to consider whether the visa officer's decision is consistent with the text, context and purpose of the relevant provisions.

[44] As to the relevant text, paragraph 35(1)(*b*) of the Act renders a permanent resident or foreign national inadmissible on the basis of their status. The provision requires an inquiry into whether a person holds or held a specified position, namely were they a "prescribed senior official"? This is to be contrasted with paragraph 35(1)(*a*) of the Act which renders a person inadmissible for their own actions: committing a specified offense outside of Canada. No such direct culpability is required in the case of paragraph 35(1)(*b*).

[45] Section 16 of the Regulations provides a non-exhaustive definition of the term "prescribed senior official". In material part for the purpose of this appeal, a "prescribed senior official" is one "who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power". The definition then goes on to expressly include within the definition "senior members of the public service".

[46] In the third edition of her work *Statutory Interpretation* (Toronto: Irwin Law, 2016) at page 80, Professor Ruth Sullivan explains that non-exhaustive definitions "are usually introduced by the expression 'includes,' or 'does not include,' followed by a directive which adds or

subtracts from the ordinary (or technical) meaning of the defined term." She provides the following example:

> In this Part,
>
> "nets" includes crab pots and lobster traps but does not include gill nets.

[47] Professor Sullivan then explains:

> This definition presupposes that the interpreter knows or will be able to determine the ordinary meaning of "nets" in this context. The point of the definition is not to fix the meaning of "nets" but to ensure that provisions governing the use of nets apply equally to crab pots and lobster traps, which are functional equivalents, and do not apply to gill nets, which are meant to be governed by different rules.

[48] Applying this principle to the definition of "prescribed senior official", the definition is worded so as to ensure that "senior members of the public service" are included within the definition of a "prescribed senior official". In every case, the focus of the inquiry is to be on whether a member of the public service qualifies as a "senior" member of the public service. Senior members of the public service are deemed "by virtue of the position they hold or held" to be or to have been "able to exert significant influence" on the regime.

[49] The text of the definition also includes as prescribed senior officials those who, while not holding an enumerated position, are or were actually able to exert significant influence or to benefit from their position.

[50] The visa officer's interpretation of the definition of "prescribed senior official" was consistent with the text of the definition.

[51] I now turn to the purpose of section 35 of the Act and section 16 of the Regulations. Section 35 is an inadmissibility provision designed to exclude persons implicated in human or international rights violations. Section 16 is intended to provide clarity as to the scope of persons to be excluded as a result of their position in a designated regime. Among others, senior advisors to heads of government and cabinet, senior members of the public service and military and senior diplomatic officials are rendered inadmissible. A broad net is cast to avoid the evidentiary challenges posed by having to establish that any particular individual has or had influence on the exercise of government power.

[52] In *Adam*, at paragraph 8, the majority of this Court adopted the statement that the focus, or purpose, of the predecessor legislation was to “ensure, as far as possible, that Canada does not become a haven for persons who have engaged in terrorism, systematic or gross human rights violations, war crimes or crimes against humanity.” I agree that this remains the purpose of the current legislation. To this I would add that the purpose also includes preventing the admission into Canada of persons deemed, by virtue of the position they hold or held in a designated regime, to be or to have been able to exert significant influence on the exercise of their government’s power. The provision seeks to hold such individuals responsible for the actions of their government and render them inadmissible.

[53] The officer’s interpretation of the definition is consistent with this purpose.

[54] Finally, I turn to the legislation’s context. In my view, there are two important contextual factors.

[55] The first is found in section 42.1 of the Act, which permits the responsible Minister, either on the application of a foreign national or on the Minister's own initiative, to, among other things "declare that the matters referred to in … paragraphs … 35(1)(*b*) … do not constitute inadmissibility in respect of the foreign national". The Minister may make such a declaration if satisfied that the declaration "is not contrary to the national interest."

[56] Subsection 42.1(3) specifies that:

42.1(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.	42.1(3) 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.
(underlining added)	(soulignements ajoutés)

[57] The relevance of section 42.1 is this. The combined effect of paragraph 35(1)(*b*) of the Act and section 16 of the Regulations is to deem senior members of the public service to be able to exercise significant influence on their government by virtue of the office they hold. Because of the broad class of persons rendered inadmissible under these provisions, the Minister is given discretion to grant relief against inadmissibility. Section 42.1 permits this, and recognizes that in a particular case the admission of a senior member of the public service may not be contrary to Canada's national interest. The inquiry into the national interest is to be a narrow one: would the admission of a particular individual give rise to foreign or domestic national security or public safety concerns? The narrow focus of the inquiry permits individuals who, notwithstanding the

office they hold or held, lack or lacked the ability to benefit from their position or to wield significant influence, to argue that their admission would not be contrary to Canada's national interest. Put another way, persons who actually lacked the ability to exert significant influence may be relieved from a finding of inadmissibility. Their admission would not offend the purpose of the legislation.

[58] This contextual factor supports the reasonableness of the officer's interpretation. It is for the Minister to later consider if the admission of a former senior member of the public service would be contrary to the national interest. On this inquiry, religion, non-membership in the Ba'ath Party and the respondent's sphere of influence may well be relevant factors for the Minister to consider.

[59] The second contextual factor looks to subsection 16(*b*) of the Regulations in the context of the other positions enumerated in section 16.

[60] The Federal Court was of the view that for a number of the enumerated positions, such as heads of state or cabinet ministers, "the individual's position is clearly enumerated in section 16 of the Regulations, and the individual is therefore a prescribed senior official; there is, in effect, absolute liability." (reasons, paragraph 28). However, for other enumerated positions "a more fulsome examination should be done …. An officer… should also look to evidence of the individual's responsibilities and duties, as well as the nature of the position held." (reasons, paragraph 31). The visa officer's decision in this case was found to be unreasonable because his inquiry was limited to the respondent's place in the hierarchy of the public service – in the view

of the Federal Court it was necessary to consider whether the respondent was in fact able to exert meaningful influence or benefit from his position (reasons, paragraph 33).

[61] However, on this interpretation there is no principled reason why the occupant or former occupant of any enumerated position would not be able to avoid a finding of inadmissibility on the basis that he or she did not actually benefit or exert any significant influence on their government. The Federal Court's interpretation would, for example, permit a head of state to argue that as a constitutional monarch he or she did not in fact exert significant influence and so is not inadmissible. This approach would defeat the purpose of a list of prescribed offices and would be contrary to Parliament's intent.

[62] Having considered the text, context and purpose of the legislation, and having found that the visa officer's interpretation of the definition of "prescribed senior official" was consistent with the legislative text, context and purpose, I find that the officer's interpretation of the legislation was one that the legislation could reasonably bear. It was, therefore, reasonable.

[63] It remains to consider whether the officer's application of that definition to the facts before him was reasonable.

[64] As previously mentioned, there is no dispute about the positions the respondent held while employed by the government of Iraq.

[65] In addition to the three positions described at paragraphs 12, 13 and 14 above, from November 1988 to January 1991 the respondent was the Head of Research Activity for the Iraqi Atomic Energy Commission. The respondent described his duties to be responsible for: electronic designs related to the nuclear warhead; mechanical designs related to the nuclear warhead; and, the application and maintenance of industrial computers.

[66] From January 1991 until April 1991, during the first Gulf War, the respondent was the “Al Rabat Project Manager”. He described his position as being responsible for extending the telecommunication network to cover various ministries and shelters in Baghdad, so as to provide telephone communication during the war.

[67] All of these positions were senior positions in the Iraqi public service. While the respondent may not have been able to influence government policy, the legislation does not require this. Section 16 requires only that an individual “is or was able to exert significant influence on the exercise of government power”.

[68] An individual who headed research activity for the Iraqi Atomic Energy Commission, was responsible for providing telephone communications during the first Gulf War and was responsible for later rehabilitating all telecommunication networks of the electricity sector exerted significant influence on the exercise of power by the Iraqi government.

[69] Notwithstanding his Catholic faith and non-membership in the Ba'ath Party, the respondent rose to a senior level in the public service; in at least two positions he was three levels below Saddam Hussein in the reporting hierarchy.

[70] In my view it was reasonable for the visa officer to conclude that the respondent was a senior member of the Iraqi public service and so to be inadmissible pursuant to paragraph 35(1)(*b*) of the Act.

The certified question

[71] In the present case, it is apparent that the respondent occupied very senior positions in the Iraqi public service, well within the top half of the public service. In view of this, no argument was made on appeal as to whether the "top half" test (as opposed, for example, to a "top third" or "top quarter" test) appropriately demarcates or fixes in every case the limits of "senior members of the public service". The Federal Court did not deal with this issue either, notwithstanding its reference to the "top half" test in the certified question.

[72] This means that the certified question is problematic to the extent it puts in issue the appropriateness of a test not dealt with by the Federal Court. It is well-settled that a question must have been raised and dealt with in the Federal Court for a certified question to be proper. If an issue is not dealt with by the Federal Court certifying a question amounts to a reference of the question to this Court (*Canada (Minister of Citizenship and Immigration) v. Zazai,* 2004 FCA 89, 318 N.R. 365, at paragraph 12).

[73] In the present case, the question actually argued and considered by the Federal Court was whether a person who occupied a senior position in the public service of a designated regime could argue that, notwithstanding the position they held, they are not inadmissible because of their inability to exert significant influence or to benefit from their position. The certified question does not align with the Court's reasons.

[74] I would, therefore, reframe the certified question as follows:

> If an officer is satisfied that an individual occupies or occupied a senior position in the reporting hierarchy of the public service of a designated regime, may the officer reasonably conclude that the individual is or was a "senior member of the public service" and a "prescribed senior official" within the meaning of paragraph 35(1)(*b*) of the Act and section 16 of the Regulations or is a broader analysis into the individual's ability to benefit or exert influence required?

[75] While the "top half" test may be an appropriate test to determine whether one is a "senior member", this is a question to be answered in a case when it is raised on the facts and considered by the Federal Court.

Conclusion

[76] For these reasons I would allow the appeal and set aside the judgment of the Federal Court. Pronouncing the judgment that ought to have been pronounced, I would dismiss the application for judicial review of the decision of the visa officer.

[77] I would answer the certified question as follows:

> If an officer is satisfied that an individual occupies or occupied a senior position in the reporting hierarchy of the public service of a designated regime, the officer may reasonably conclude that the individual is or was a "senior member of the public service" and a "prescribed senior official" within the meaning of paragraph 35(1)(*b*) of the Act and section 16 of the Regulations. A broader analysis into the individual's ability to benefit or exert influence is not required in this circumstance.

"Eleanor R. Dawson"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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