

Federal Court



Cour fédérale

**Date: 20160902**

**Docket: IMM-3172-15**

**Citation: 2016 FC 1002**

**Ottawa, Ontario, September 2, 2016**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Applicant**

**and**

**RIYADH BASHEER BADRIYAH**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Respondent, Riyadh Basheer Badriyah, as well as his wife, Vivian Behnam S. Haboush, and two (2) adult children, Fara Riyadh Ba Badriyah and Rasha Riadh Bas Badria, are citizens of Iraq. On June 1, 2015, the Refugee Protection Division [RPD] of the Immigration and Refugee Board found them to be Convention refugees based on their Christian faith, the security situation in Iraq and the threat posed to them by the Islamic State [ISIS]. The RPD also found that the three (3) female claimants faced an additional risk as Christian women in Iraq.

[2] The Applicant, the Minister of Citizenship and Immigration [the Minister], challenges the RPD's decision on two (2) grounds. First, the RPD erred by failing to give proper notice to the Canada Border Services Agency [CBSA] that Mr. Badriyah might be inadmissible to Canada due to his senior position in the Iraqi military. Secondly, even though there was evidence of Mr. Badriyah's voluntary service in the Iraqi military during the Iran-Iraq war, the RPD failed to conduct a proper analysis of whether Mr. Badriyah ought to have been excluded from obtaining refugee status pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and Article 1F(a) of the United Nations *Convention Relating to the Status of Refugees*, Can TS 1969 No 6 [*Refugee Convention*].

[3] Although the application for judicial review was originally directed against Mr. Badriyah, his wife and two (2) daughters, the Minister is no longer challenging the decision of the RPD which found the female claimants to be Convention refugees. As a result, this decision relates only to Mr. Badriyah. The style of cause shall be amended to remove Vivian Behnam S. Haboush, Fara Riyadh Ba Badriyah and Rasha Riadh Bas Badria from the proceedings.

[4] For the reasons set out below, the application for judicial review is allowed.

#### I. Background

[5] On August 8, 2014, upon entry into Canada, Mr. Badriyah made a claim for refugee protection. He was interviewed by a CBSA Officer and provided information about his past service in the Iraqi military. The transcript of the interview and the CBSA Officer's notes reveal that Mr. Badriyah joined the Iraqi military in 1973 and studied in the Soviet Union for three

(3) years to become a radar technician. In 1976, he returned to Iraq and worked as a radar technician in the Radar Unit of the Marines. He served during the Iran-Iraq war and during active combat but was never near the fighting. His work consisted of supervising the radar while the boats were on shore. He was promoted to the rank of Lieutenant in 1985. In 1986, Mr. Badriyah was transferred to a marine academy and began teaching communications. On January 6, 1989, he was promoted to the rank of Colonel. Once the Iran-Iraq war ended and four (4) days after receiving his promotion, Mr. Badriyah was released from the military.

[6] After interviewing Mr. Badriyah, the CBSA Officer referred the matter to CBSA's War Crimes Unit for further review and recommended that Mr. Badriyah's case be forwarded to the RPD. The Minister's Delegate concurred with the recommendation.

[7] On August 26, 2014, the RPD issued Mr. Badriyah a Notice to Appear at a hearing scheduled for September 24, 2014. The same day, the RPD also sent an urgent notice to the Minister pursuant to Rule 26 of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*], indicating that it was the RPD's belief that Article 1F) of the *Refugee Convention* might apply to Mr. Badriyah given that he had "worked for the Iraqi military from 1979 until 1989 on a voluntary basis" and that "his IMM 5669 form indicates that he reached the level of colonel in the Iraqi army and was a teacher at a military academy". The notice also indicated that if the RPD did not hear from the Minister within twenty (20) days of provision of the notice, the RPD would continue with the proceedings on September 24, 2014. Although the box relating to possible exclusion under Article 1F was checked on the notice to the Minister, the other boxes were unmarked, including the one on inadmissibility.

[8] On September 17, 2014, Mr. Badriyah was notified that the hearing was postponed as the CBSA had not yet confirmed whether the security screening was complete.

[9] On April 23, 2015, the RPD notified Mr. Badriyah that the hearing was rescheduled for June 1, 2015. After hearing from Mr. Badriyah, his wife and two (2) daughters, the RPD rendered its decision orally the same day and allowed their claim for asylum. The Minister did not intervene before the RPD.

## II. Decision under review

[10] In its decision, the RPD found Mr. Badriyah, his wife and two (2) daughters to be Convention refugees on the basis that they had a well-founded fear of persecution in Iraq due to their profile as Christians. The RPD also found that the female claimants faced an additional risk as Christian women in Iraq.

[11] The RPD observed that the four (4) claimants lived in Baghdad basically their whole lives and enjoyed considerable success in Iraq as well-educated and successful professionals. Regarding Mr. Badriyah specifically, the RPD noted that he had been in the Iraqi military and had reached the rank of Colonel before retiring in 1989. He then had a successful real estate bureau in Baghdad.

[12] The RPD then provided an overview of the events leading Mr. Badriyah and his family to claim refugee status in Canada, namely that they had come to the United States in July 2014, to attend a conference for the Syria Catholic Church in Florida. Shortly after arriving, family

members back in Iraq urged them not to return due to fear of persecution from ISIS because of their Christian faith and that the situation in Iraq had deteriorated rapidly. On the basis of this information, they decided to seek asylum in Canada.

[13] After finding all four (4) claimants to be credible, the RPD proceeded to discuss Mr. Badriyah's military history as follows:

I would like to briefly speak about the father's military record as it was of concern to me. I note however that he was questioned extensively about his military history when he claimed at the POE and the matter had actually been referred on to the war crimes unit with the CBSA and nothing has come of that. So, I take from that that there was nothing of concern found by that unit and I am going to proceed on the basis that he was a member of the Radar Battalion as he said and that he had no involvement in active combat at any point during the Iran and Iraq war.

[14] Basing itself on the National Documentation Package, the RPD found the evidence about the persecution of Christians within Iraq to be both "sobering and extensive" and concluded that Mr. Badriyah and his family had a well-founded fear of persecution in Iraq. The RPD also concluded that state protection and an internal flight alternative were not available.

### III. Issues and Standard of Review

[15] I have considered both issues raised by the Applicant. In my view, the determinative issue in this case is whether the RPD failed to conduct a proper analysis of whether Mr. Badriyah should have been excluded from obtaining refugee status pursuant to section 98 of the IRPA and Article 1F(a) of the *Refugee Convention*. This is a question of mixed fact and law that is to be reviewed on the standard of reasonableness (*Ndikumasabo v Canada (Citizenship and*

*Immigration*) 2014 FC 955 at para 25 [*Ndikumasabo*]; *Canada (Citizenship and Immigration) v Nwobi*, 2014 FC 520 at para 4 [*Nwobi*]).

[16] In reviewing the RPD's decision on a standard of reasonableness, I must turn my mind to whether the decision is justified, intelligible and transparent and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

#### IV. Analysis

[17] The Minister submits that the RPD had a duty to enquire into possible grounds of exclusion regardless of ministerial intervention. Although there was evidence on the record of Mr. Badriyah's voluntary service in the Iraqi military during the Iran-Iraq war, the RPD failed to apply the framework set out in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] and fully assess Mr. Badriyah's military service.

[18] Mr. Badriyah submits that the record shows that the RPD conducted an independent assessment of possible grounds for exclusion in accordance with the *Ezokola* framework and relies upon the following arguments to substantiate his submission. First, in its reasons for decision, the RPD noted that Mr. Badriyah's military history was initially of concern. In response to this concern, the RPD weighed the evidence and came to an independent conclusion on the issue of exclusion. Second, the notice to the Minister as per Rule 26 of the *RPD Rules* also demonstrates the RPD's engagement on the exclusion issue. Third, contrary to the Minister's assertion, it is apparent from the decision that other evidence contributed to the RPD's

conclusion on exclusion. When the RPD noted that the CBSA Officer had questioned Mr. Badriyah extensively about his military history and that the matter had been referred to the CBSA's War Crimes Unit, it was referring to the transcript of Mr. Badriyah's port of entry interview and the CBSA Officer's notes. The RPD also relied on Mr. Badriyah's testimony regarding his military record, which was found to be "extremely credible".

[19] Mr. Badriyah also submits that while *Ezokola* stipulates a list of factors to consider in making an exclusion determination, the factors are only for guidance. The record before the RPD contained sufficient information to support a proper exclusion analysis and the RPD's determination on the issue. The RPD was not obligated to outline precisely how the *Ezokola* factors were applied to the facts of the case.

[20] Mr. Badriyah further contends that it was reasonable for the RPD to infer that the lack of a response from the Minister pursuant to the notice under Rule 26 of the *RPD Rules*, together with the findings of eligibility and the granting of a security clearance, indicated that the Minister did not have any concerns about the exclusion.

[21] At the hearing, Mr. Badriyah argued that the RPD is not required to conduct a full and wholesome exclusion analysis in every case where a claimant is from the Iraqi military. There must be a threshold for the RPD to engage in an exclusion analysis. While the RPD flagged that the exclusion was of concern, it was reasonable for the RPD not to do a full exclusion analysis given the evidence before it.

[22] While I agree with the Respondent that the RPD considered the possibility of exclusion, I find nonetheless that the RPD failed to conduct a proper analysis of exclusion under section 98 of the IRPA and Article 1F(a) of the *Refugee Convention*.

[23] In *Ezokola*, the Supreme Court of Canada looked at the purpose of the exclusion provisions under Article 1F of the *Refugee Convention*. It highlighted the *Refugee Convention*'s "broad" commitment to refugee protection and the need to protect "the integrity of international refugee protection by ensuring that the authors of crimes against peace, war crimes and crimes against humanity do not exploit the system to their own advantage" (*Ezokola* at paras 32-36).

[24] Recognizing that Article 1F(a) of the *Refugee Convention* does not distinguish between principal perpetrators and secondary actors and that individuals may be excluded from refugee protection for international crimes through a variety of modes of commission, the Supreme Court of Canada looked at what degree of knowledge and participation in criminal activity justified excluding secondary actors from refugee protection (*Ezokola* at paras 1-4). It concluded that in order for a claimant to be excluded from refugee protection under Article 1F(a) of the *Refugee Convention* for complicity in international crimes, there must be "serious reasons for considering that he or she voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime" (*Ezokola* at para 29).

[25] In order to evaluate whether the claimant "voluntarily made a significant and knowing contribution" to the crimes or criminal purpose of the organization, the Supreme Court of Canada at para 91 of *Ezokola* established a list of factors to guide the assessment:



- (i) the size and nature of the organization;
- (ii) the part of the organization with which the refugee claimant was most directly concerned;
- (iii) the refugee claimant's duties and activities within the organization;
- (iv) the refugee claimant's position or rank in the organization;
- (v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
- (vi) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.

[26] The RPD has been entrusted with the responsibility of ensuring that Canada meets its obligations under the *Refugee Convention* by not providing refuge to individuals for whom there are serious reasons to consider that they have committed war crimes or crimes against humanity or are guilty of acts contrary to the purposes and principles of the United Nations (*Canada (Citizenship and Immigration) v Ahmed*, 2015 FC 1288 at para 10 [*Ahmed*]; *Nwobi* at para 19). For this reason, the RPD is required to determine whether section 98 of the IRPA is applicable to an applicant regardless of whether or not the Minister decides to intervene (*Ahmed* at para 11; *Nwobi* at paras 18-19; *Ospina Velasquez v Canada (Citizenship and Immigration)*, 2013 FC 273 at para 15).

[27] I agree with Mr. Badriyah's assertion that the RPD is not required to outline precisely how the *Ezokola* factors were applied to the facts of the case and that it is sufficient that factual findings reasonably support a decision-maker's conclusion. However, in this case, the record shows that the RPD conducted only a cursory review of Mr. Badriyah's military service and that

it failed to adequately assess whether he “voluntarily made a significant and knowing contribution” to war crimes or crimes against humanity committed during the Iran-Iraq war, as per the key components and factors set out in *Ezokola*.

[28] The record shows that the issue of Mr. Badriyah’s military history was a concern from the outset when Mr. Badriyah claimed refugee protection. It was first raised when the CBSA Officer consulted with the CBSA’s War Crimes Unit on August 8, 2014. Then, when it became seized of the matter, the RPD sent an urgent notice to the Minister under Rule 26 of the *RPD Rules* indicating that it believed that Article 1F of the *Refugee Convention* might apply to the claim of Mr. Badriyah. Even when the hearing proceeded before the RPD, Mr. Badriyah’s military background remained a concern, as the RPD noted in its decision. Despite these misgivings, the RPD failed to conduct a full and detailed examination of Mr. Badriyah’s military background during the hearing. The extent of the RPD’s probe into the issue is limited to the following exchange:

PRESIDING MEMBER: So what was your rank when you retired?

MALE CLAIMANT: I was a Colonel.

PRESIDING MEMBER: A what?

MALE CLAIMANT: Colonel.

PRESIDING MEMBER: Colonel?

MALE CLAIMANT: Colonel, yeah, Colonel.

PRESIDING MEMBER: Okay. Were you ever involved in any human rights abuses against citizens of Iran or Iraq?

MALE CLAIMANT: My job was just to maintain the order and the Navy.

PRESIDING MEMBER: Pardon me?

MALE CLAIMANT: My job was just to maintain the (inaudible) in the Navy.

PRESIDING MEMBER: So where were you located?

MALE CLAIMANT: The places were three places only – Basra, Umm Qasr and Fallujah. And we were shifting and moving, it depends on the need in the three locations that I just mentioned.

PRESIDING MEMBER: Did you ever see combat?

MALE CLAIMANT: No, our job was on the land now, it's a base. It's a Navy base.

PRESIDING MEMBER: Where's your ration card?

MALE CLAIMANT: Must be here. Yeah, you mean the food ration right?

PRESIDING MEMBER: Yeah.

MALE CLAIMANT: I think I didn't bring it. It must be a copy with me here. We didn't need that in order to leave Baghdad.

PRESIDING MEMBER: But did you have one in Baghdad?

MALE CLAIMANT: Yes. Yes, I had – they issued that for two years, I had it for 2014 and 15.

PRESIDING MEMBER: And that's back in Baghdad?

MALE CLAIMANT: Yes, back in Baghdad.

[29] In my view, the RPD's questioning was clearly insufficient to adequately assess whether Mr. Badriyah "knowingly and voluntarily made a significant contribution" to war crimes or crimes against humanity, which would exclude him from refugee protection pursuant to Article 1F(a) of the *Refugee Convention*. The RPD should have engaged in more detailed questioning of Mr. Badriyah.

[30] Moreover, I disagree with Mr. Badriyah's assertion that the RPD had sufficient information to assess the possible grounds of exclusion on the basis that it relied on the CBSA Officer's notes and the transcript of Mr. Badriyah's interview on August 8, 2014. While I agree that these documents generally provide information regarding some of the *Ezokola* factors, these documents contain insufficient information to determine Mr. Badriyah's potential contribution to war crimes or crimes against humanity and whether it was knowingly, voluntary and significant.

[31] In describing his activities in the Iraqi military to the CBSA Officer, Mr. Badriyah described his duties as "taking care of [r]adar", "working with the radar, all my job was that", "we supervise the radar and then we just are in charge of it", "the radar look for different things but me I was the technician". The only explanation provided regarding the actual use of the radar was that it was "looking for things". Despite these vague answers, the RPD failed to ask any questions which could provide a better understanding of Mr. Badriyah's exact tasks, duties and practical contribution to the Iraqi military. The RPD did not ask Mr. Badriyah any questions on why he joined the military, the size and nature of the unit he was involved with, its hierarchical placement within the Navy or the Marines, its interaction with the rest of the Iraqi military, where he was posted and for what period, the rank he held during those periods, the content of the courses he taught and to whom he taught these courses, whether he had any knowledge of the use of chemical weapons, and whether he had requested to leave the military before his retirement in 1989, to name a few.

[32] In addition, when the CBSA Officer asked Mr. Badriyah whether he was aware of any of the war crimes that were taking place during the Iraq-Iran war, he responded "we are far from

that. I never was involved with the actual war”. When questioned by the RPD whether he had ever been involved in any human rights abuses against citizens of Iran or Iraq, Mr. Badriyah responded that his job was to “maintain the order and the Navy”. Not only did the RPD fail to question what he meant by “maintain the order and the Navy”, the RPD also failed to seek a clear answer to the question of whether he had been involved in human rights abuses.

[33] Furthermore, by relying on Mr. Badriyah’s assertion that he was not involved in armed combat in order to determine whether or not he should be excluded, the RPD failed to appreciate that a claimant can be found to have made a “knowing, voluntary and significant contribution” to a crime under Article 1F of the *Refugee Convention* without having been involved in direct armed combat. The RPD overlooked the jurisprudence which establishes that one need not be physically present in the place where the crimes are committed to be found responsible on the grounds of voluntary contribution (*Ezokola* at para 77; *Ndikumasabo* at para 31).

[34] In summary, I find that the RPD’s failure to inquire into, address and assess the key components of the contribution-based test for complicity set out in *Ezokola* constitutes a reviewable error which vitiates the RPD’s ultimate conclusion that Mr. Badriyah is a Convention refugee. Thus, the RPD’s decision with respect to Mr. Badriyah is unreasonable as it lacks the necessary justification, transparency and intelligibility.

[35] For these reasons, the application for judicial review shall be allowed and the matter remitted to a differently constituted panel for redetermination in accordance with these reasons.

For the sake of clarity, I reiterate that this decision is only in relation to Mr. Badriyah as the Minister did not challenge the RPD's finding in relation to the three (3) female claimants.

[36] The parties did not propose any certified question in the present proceedings.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed and the matter is remitted to a differently constituted panel for redetermination in accordance with these reasons;
2. The style of cause is amended to remove Vivian Behnam S. Haboush, Fara Riyadh Ba Badriyah and Rasha Riadh Bas Badria as Respondents;
3. No question of general importance is certified.

"Sylvie E. Roussel"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3172-15

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION v RIYADH BASHEER BADRIYAH

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 23, 2016

**JUDGMENT AND REASONS:** ROUSSEL J.

**DATED:** SEPTEMBER 2, 2016

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