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Docket: IMM-5267-07

Citation: 2008 FC 1319

Ottawa, Ontario, November 26, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**ABDULLAHI MOHAMED YAHIE
ZAHRA FARAH AHMED**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Second Secretary of the Canadian High Commission in Nairobi (Officer) dated September 17, 2007 (Decision) refusing Abdullahi Mohamed Yahie's (Applicant) application for permanent residence in Canada pursuant to s. 35(1)(b) of the Act on the grounds of his being a senior official in the service of a government that engages, or has engaged, in terrorism, systematic or gross human rights violations, genocide, a war crime or crimes against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24..

BACKGROUND

[2] Abdullahi Mohamed Yahie was born in 1950 in Geladi, Ethiopia and is a citizen of both Ethiopia and Somalia. He currently resides in Tunisia and works for the African Development Bank as a socio-economist.

[3] Mr. Yahie's wife of twenty-nine years, Zahra Farah Ahmed, and their four children currently reside in Toronto. They are all Canadian Citizens.

[4] With the exception of Mr. Yahie's two-year study period in the United States, the family lived together in Mogadishu until the civil war broke out in Somalia in early 1991. During the civil war, he became separated from his wife and children while he sought refuge in rural parts of the country. He was unable to re-establish contact with his family until the end of 1994, when he fled to Ghana. There he learned that his family had fled to Canada in October 1991 and had made successful claims for refugee protection.

[5] In 1998, Mr. Yahie's wife and children joined him in Abidjan and stayed there until June 2000, when they returned to Canada due to the civil unrest in that country. The family returned again to Abidjan in August 2001, but again had to leave in September 2002 and return to Canada because of a deteriorating political situation.

[6] Mr. Yahie worked at the Ministry of Planning in Somalia as a statistical clerk from the time of his high school graduation until 1981, when he received a World Bank scholarship to do post-graduate studies in California. He obtained his Masters in Economics (MA) and then rejoined his family in Somalia. After completing his MA, he became an economist in the Ministry of Planning in Somalia from March 1984 to June 1986, after which he began working on his PhD in Economics in California.

[7] In 1987, Mr. Yahie was promoted to the position of Director of Human Resources in the Ministry of Planning in Somalia. He reported to either the Director General of the Ministry or the Permanent Secretary, who in turn reported to the Deputy Minister. The Deputy Minister reported to the Minister of Planning. As Director of Human Resources, Mr. Yahie had ten to fifteen people under his direction, six of whom were professional economists and the rest of whom were support staff. He says he helped develop social projects to help the poor in rural areas, did capacity building, and organized courses to train civil servants in financial management. He did not have his own budget; the Human Resources budget was controlled by the Department of Finances, with funding coming primarily from the World Bank, UNDP, UNICEF and USAID.

[8] In 1997, he became employed as a socio-economist with the African Development Bank in Abidjan, Cote d'Ivoire. In 2001, the African Development Bank relocated to Tunisia.

[9] In 2005, Zahra Farah Ahmed made an application to sponsor Mr. Yahie to join the family in Canada. Mr. Yahie and his wife purchased a home just north of Toronto and Mr. Yahie planned to

take up work in Toronto as an international economic consultant in order to live with his family on a full-time basis. He has visited Canada five or six times.

[10] Mr. Yahie had his permanent residence application processed in Nairobi. He was requested to attend an interview. He failed to appear for two scheduled interviews with the Canadian High Commission. His file was refused for non-compliance. A notice of appeal was filed and the file was re-opened. Another interview was scheduled for July 9, 2008.

[11] At his interview, Mr. Yahie answered the questions of the Officer and was told at the conclusion of the interview that he was inadmissible to Canada with no recourse or right of appeal. He says he was told he could seek relief from the Minister of Public Safety.

DECISION UNDER REVIEW

[12] During his interview with the Officer, Mr. Yahie was questioned on his relationship with his sponsor, as well as on his antecedents. His application was refused because the Officer concluded he had occupied a “senior civil servant” position with the Government of Somalia, in violation of section 35(1)(b) of the Act. The Government of Somalia is a designated regime that has been found to have committed acts of terrorism, human right violations, genocide, war crimes or crimes against humanity.

[13] The Officer concluded that, even if a person may never have personally participated in any violations of s. 35(1)(b), those in senior positions with offending governments share the responsibility of those violations because they have been in a position to influence the actions, laws and/or policies of the government in question.

ISSUES

[14] The Applicants raise the following issues for review:

- 1) **What is the standard of review?**
- 2) **Did the Officer err in law in her finding that Mr. Yahie was a prescribed senior official as defined in s. 35(1)(b) of the Act and s. 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations)?**
- 3) **Did the Officer breach the duty of fairness by failing to provide Mr. Yahie with a meaningful opportunity to address her concerns?**

STATUTORY PROVISIONS

[15] The following provisions of the Act are applicable in these proceedings:

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

(a) committing an act outside

Atteinte aux droits humains ou internationaux

35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :

a) commettre, hors du Canada,

Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

(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*; or

(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

Exception

(2) Paragraphs (1)(b) and (c) do not apply in the case of a permanent resident or a

une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;

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*;

c) être, sauf s'agissant du résident permanent, une personne dont l'entrée ou le séjour au Canada est limité au titre d'une décision, d'une résolution ou d'une mesure d'une organisation internationale d'États ou une association d'États dont le Canada est membre et qui impose des sanctions à l'égard d'un pays contre lequel le Canada a imposé — ou s'est engagé à imposer — des sanctions de concert avec cette organisation ou association.

Exception

(2) Les faits visés aux alinéas (1)b) et c) n'emportent pas interdiction de territoire pour

foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[16] The following provisions of the Regulations are applicable in these proceedings:

Application of par. 35(1)(b) of the Act

16. For the purposes of paragraph 35(1)(b) of the Act, a prescribed senior official in the service of a government 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;

Application de l'alinéa 35(1)b de la Loi

16. Pour l'application de l'alinéa 35(1)b de la Loi, occupent un poste de rang supérieur au sein d'une administration les personnes qui, du fait de leurs actuelles ou anciennes fonctions, 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) 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.

[17] The following provisions of the *Crimes Against Humanity and War Crimes Act* are also relevant:

Definitions

(3) The definitions in this subsection apply in this section.

"crime against humanity"
«*crime contre l'humanité*»

'crime against humanity' means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Définitions

(3) Les définitions qui suivent s'appliquent au présent article.

«crime contre l'humanité»
"*crime against humanity*"

«crime contre l'humanité»
Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans

ce lieu.

"genocide"

«*génocide*»

'genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

"war crime"

«*crime de guerre*»

'war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

«crime de guerre»

"*war crime*"

«crime de guerre» Fait — acte ou omission — commis au cours d'un conflit armé et constituant, au moment et au lieu de la perpétration, un crime de guerre selon le droit international coutumier ou le droit international conventionnel applicables à ces conflits, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

«génocide»

"*genocide*"

«génocide» Fait — acte ou omission — commis dans l'intention de détruire, en tout ou en partie, un groupe identifiable de personnes et constituant, au moment et au lieu de la perpétration, un génocide selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans

ce lieu.

Interpretation — customary international law

(4) For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.

Interpretation — crimes against humanity

(5) For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:

(a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and

(b) the Proclamation by the Supreme Commander for the

Interprétation : droit international coutumier

(4) Il est entendu que, pour l'application du présent article, les crimes visés aux articles 6 et 7 et au paragraphe 2 de l'article 8 du Statut de Rome sont, au 17 juillet 1998, des crimes selon le droit international coutumier, et qu'ils peuvent l'être avant cette date, sans que soit limitée ou entravée de quelque manière que ce soit l'application des règles de droit international existantes ou en formation.

Interprétation : crimes contre l'humanité

(5) Il est entendu qu'un crime contre l'humanité transgressait le droit international coutumier ou avait un caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations avant l'entrée en vigueur des documents suivants :

a) l'Accord concernant la poursuite et le châtement des grands criminels de guerre des Puissances européennes de l'Axe, signé à Londres le 8 août 1945;

b) la Proclamation du Commandant suprême des

Allied Powers, dated January
19, 1946.

Forces alliées datée du 19
janvier 1946.

STANDARD OF REVIEW

[18] Questions of procedural fairness by a visa officer in this process are to be reviewed on the standard of correctness: *Lak v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 350.

[19] In *Dunsmuir v. New Brunswick* 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review” (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[20] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[21] In *Yassin v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 1029 the Court held that reasonableness *simpliciter* was the appropriate standard of review of an officer’s decision

on the “senior member” issue. As well, in *Holway v. Canada (Minister of Citizenship and Immigration)* 2006 FC 309, the Court held that whether the applicant was a “senior member” of the military was a question of mixed fact and law so that the standard of review was reasonableness *simpliciter*.

[22] Thus, in light of the Supreme Court of Canada’s decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the second issue raised by the Applicants to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at paragraph 47). Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law”.

ARGUMENTS

The Applicant

Interview Letter/Meaningful Opportunity to Address the Concerns of the Officer

[23] The Applicants submit that Mr. Yahie was not provided with a meaningful opportunity to address the concerns of the Officer because he was not afforded an opportunity to present evidence to show that his position in the Somali government was not a senior position, and that he did not

exercise any control or influence over the government or its policies or finances. The Applicants say this means that the Officer breached the duty of fairness.

Prescribed Senior Official

[24] The Applicants submit that Mr. Yahie’s position did not fall within the meaning of a “senior official” in s. 35 of the Act. They suggest that he did not exert significant influence on the exercise of government power as he only had 10-15 staff members in his department. In addition, his department worked in the development and planning of social projects dealing with women and poverty and received financial resources primarily from international donors.

[25] Section 8.2 of the ENF 18 - *War Crimes and Crimes Against Humanity* guidelines from Immigration Canada deals with section 16(d) of the Regulations. It states as follows:

8.2. Requirements to establish inadmissibility

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

2. Persons described in

R16(c), R16(d), R16(e), and R16(f) senior diplomatic officials

- Designation of regime
- Proof of position held
- Proof that position is senior (see the note following this table)

8.2. Critères pour établir l’interdiction de territoire

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

2. Personnes visées au

R16*c*), *d*), *e*) et *f*)(diplomates de haut rang)

- Régime désigné
- Preuve du poste occupé
- Preuve d’un poste de rang supérieur (voir la note à la fin du tableau)

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 then by holders of similar positions).

3. Persons not described in R16

- Designation of regime
- Proof that the person could exercise significant influence or was able to benefit from the position

In addition to the designation of the regime, it must be

Outre la preuve nécessaire, on doit établir que le poste est de rang supérieur. À cette fin, on doit situer le poste dans la hiérarchie où le fonctionnaire travaille. On peut trouver des exemplaires d'organigrammes dans des ouvrages comme *Europa World Year Book*, *Encyclopedia of the Third World*, *Country Reports on Human Rights Practices* (du département d'État des É.-U.) et les bases de données du Système des crimes de guerre contemporains (SCGC). Si l'on peut prouver que le poste est dans la moitié supérieure de l'organisation, on peut considérer qu'il est un poste de rang supérieur. Un autre moyen de l'établir est celui des preuves de responsabilités liées au poste et du type de travail effectué ou des types de décisions prises (à défaut d'être prises par le demandeur, par les titulaires de postes analogues).

3. Personnes non visées au R16

- Régime désigné
- Preuve que la personne était en mesure d'influencer sensiblement l'exercice du pouvoir ou a pu tirer des avantages de son

En plus de la désignation du régime, on doit établir que la

established that the person, although not holding a formal position, is or was able to exercise significant influence on the actions or policies of the regime or was able to benefit from the position.

A person who assists in either promoting or sustaining a government designated by the Minister can be characterized as having significant influence over its policies or actions. The concept of significant influence is not limited to persons who made final decisions on behalf of the regime; it also applies to persons who assisted in the formulation of these policies, e.g., by providing advice, as well as persons responsible for carrying them out. If a person conducts activities which directly or indirectly allow the regime to implement its policies, the test for significant influence is met. The phrase "government power" in R16 is not limited to powers exercised by central agencies or departments but can also refer to entities that exercise power at the local level. Once it is established that the person exerted significant influence or benefited, the extent or degree of this influence or benefit is not relevant to the finding of inadmissibility; however, they are factors that could be considered by the Minister when deciding whether

personne, même si elle n'occupait pas un poste officiel, est ou était en mesure d'influer sensiblement sur les actions et politiques du régime ou a pu en tirer certains avantages.

La personne qui favorise ou qui soutient un gouvernement désigné par le ministre peut être considérée comme influant sensiblement les actes ou les politiques de ce gouvernement. La notion d'influence sensible ne se limite pas aux personnes prenant les décisions finales au nom du régime, mais s'applique aussi à celles qui ont participé à la formulation de ces politiques, par exemple par des conseils, ainsi qu'aux personnes chargées de les mettre en application. Si une personne exerce des activités qui permettent directement ou indirectement au régime de mettre en oeuvre ses politiques, la preuve d'une influence sensible est établie. Le terme «exercice du pouvoir par leur gouvernement» au R16 ne se limite pas aux pouvoirs exercés par les organismes centraux ou les ministères, mais peut également s'entendre des entités qui exercent le pouvoir à l'échelon local. Lorsqu'on a établi que la personne exerçait une influence sensible ou tirait certains avantages, l'ampleur ou la mesure de cette influence ou de ses avantages n'est pas pertinente pour l'établissement

authorizing the person to enter Canada would not be detrimental to the national interest.

de l'interdiction de territoire; toutefois, certains facteurs doivent être pris en compte par le ministre pour décider si l'entrée de cette personne au Canada serait préjudiciable à l'intérêt national.

Note: There is no definition of "senior" in the *Immigration and Refugee Protection Act* and no case law from the Federal Court. However, in considering this issue in relation to a military position, a tribunal of the Immigration Appeal Division determined that: "A senior member of the military would be a person occupying a high position in the military and would be a person of more advanced standing and often of comparatively long service. Advanced standing would be reflected in the responsibilities given to the person and the positions occupied by the person's immediate superiors." [T99-14995, May 11, 2001]

Note : Il n'y a pas de définition de « supérieur » dans la *Loi sur l'immigration et la protection des réfugiés* et aucune jurisprudence de la Cour fédérale. Toutefois, en étudiant le problème relativement à un poste militaire, un tribunal de la Section d'appel de l'immigration concluait : « Une personne de rang supérieur de l'armée serait une personne occupant un poste élevé dans les forces armées et une personne de rang plus avancé et souvent, avec des états de service comparativement longs. Une situation élevée se traduirait par les responsabilités données à cette personne et les postes occupés par les supérieurs immédiats de celles-ci. » [T99-14995, 11 mai 2001]

[26] Based on these guidelines, the Applicants submit that Mr. Yahie was a director of a human resources department in the Ministry of Planning—one of a dozen departments in the Ministry of Planning. They say he was not high enough in the government hierarchy to have shared a common purpose with the government in committing abuses. The Applicants conclude by saying that the Officer did not engage in any analysis or consider where Mr. Yahie ranked in the Somali government; nor did she consider the responsibilities attached to his position and the type of work

he did: *Hamidi v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 402 (F.C.); *Lutfi v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1703 (F.C.) and *Nezam v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 554 (F.C.).

The Respondent

Interview Letter/Meaningful Opportunity to Address the Concerns of the Officer

[27] The Respondent maintains that there was no breach of the duty of fairness by the Officer. The Respondent says that Mr. Yahie was directly informed of the information that was required of him. He was also given an opportunity to respond to the concerns of the Officer. The Respondent submits that Mr. Yahie's evidence confirmed that he was inadmissible to Canada under paragraph 35(1)(b). In the Respondent's view, the Applicants have failed to demonstrate that this Court should intervene in the Officer's assessment of inadmissibility. The fact that the Applicants disagree with the Officer's conclusion is not a ground for judicial intervention.

Prescribed Senior Official

[28] The Respondent points out that the Somalia Government is designated as a regime that has engaged in gross human rights violations and other crimes. The Respondent also indicates that Mr. Yahie held his position in the government during the height of the atrocities against the people of Somalia. It is the view of the Respondent that Mr. Yahie had direct links to the training of civil servants and capacity building in rural areas, which would have significantly aided the government in carrying out its goals and objectives.

ANALYSIS

[29] First of all, I do not see any procedural fairness problems on the facts of this case. Mr. Yahie was well aware that the Officer was interested in the nature of his position and his duties with the government of Somalia from previous correspondence. In addition, the questions asked of him were not of a kind that required advance notice and preparation. He had no difficulty in providing answers and was not placed at a disadvantage.

[30] The real focus of this case is the lack of analysis and transparency in the Decision as to how the Officer arrived at her conclusion that Mr. Yahie was a senior official in the Government of Somalia.

[31] The Respondent's counsel has suggested several factors that lie in the background of this case that could have led the Officer to take the position she did take. However, those suggestions remain speculative and I must look at the Decision itself for an explanation.

[32] In examining the Decision as a whole, I have to conclude that the Applicants are correct that the Officer did not engage in any analysis of Mr. Yahie's position in the hierarchy of the government of his actual responsibilities. It is not possible to tell from the Decision and the material examined by the Officer whether Mr. Yahie was sufficiently senior to warrant exclusion. The Officer did not follow the Guidelines; Respondent's counsel suggests that the Officer simply based her "senior officer" designation upon what Mr. Yahie told her at the interview. The Officer decided

that, in her view, Mr. Yahie was “senior” without referring to the Guidelines or any relevant authority.

[33] It is true, of course, that the Officer has a broad discretion to make this kind of decision. But such a discretion is not free-floating and cannot be exercised without being connected to authority and precedent. And this is what the Officer neglects to do. She does not provide any authority for the criteria she uses to make a decision on seniority, and she does not say how the facts of this case satisfy any such authority.

[34] The Decision lacks a jurisprudential grounding and relevant analysis. The reasons are inadequate. It is unreasonable for this reason and should be reconsidered. I have the same problems with this Decision as Justice Heneghan expressed in *Nezam* at paragraph 26, and that Justice Blanchard encountered in *Sungu v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1639 (F.C.) at paragraph 45. These are matters that need to be addressed in any reconsideration.

[35] The problem in this case is not related to the Federal Court of Appeal’s finding in *Canada (Minister of Citizenship and Immigration) v. Adam*, [2001] 2 F.C. 337 (F.C.A.) concerning the unavailability of a rebuttable presumption. The problem is, rather, that the Officer nowhere reveals what she is relying upon for her definition of “senior,” and she nowhere says what facts before her lead her to conclude that Mr. Yahie is excluded by any such definition.

[36] The Respondent has raised the spectre of a previous visa application that was refused and was not appealed by Mr. Yahie. There is nothing before me to suggest that this was the basis of the Officer's Decision, or how a separate decision on admissibility should impact the application under consideration here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

- 1) The Application is allowed and the matter is returned for reconsideration by a different officer in accordance with the reasons.
- 2) There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5267-07

STYLE OF CAUSE: *ABDULLAHI MOHAMED YAHIE and ZAHRA FARAH AHMED v. MCI*

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REASONS FOR JUDGMENT AND JUDGMENT: JUSTICE RUSSELL

DATED: November 26, 2008

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OF CANADA
TORONTO, ONTARIO

FOR THE RESPONDENT