Federal Court  Cour fédérale

Date: 20150525

Docket: IMM-7502-14

Citation: 2015 FC 673

Ottawa, Ontario, May 25, 2015

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

ALAM GUL WARDAK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under subsection 72(1) of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the decision of a visa officer at the Canadian High Commission in Islamabad, Pakistan, in which the officer refused the applicant's application for permanent residence for himself, his wife, and their seven children as members of the Convention refugees abroad class and the country of asylum class.

II. Facts

[2] The applicant, his wife and seven children are citizens of Afghanistan. Their claim for refugee protection relates back to thirty (30) years ago, when the applicant failed to report for military service in Afghanistan at the end of his university studies. He returned instead to his parents' home in a village of Wardak, where his father was arrested by the Mujahedeen for refusing the local warlord's request that he send his son to join the Mujahedeen as a jihadist.

[3] Following the arrest of his father, the applicant feared that the local warlord would have him arrested too, and so he fled to Peshawar, Pakistan in 1984. He discovered ten (10) years later that the Mujahedeen had killed his father. He believes he cannot return to Wardak, since the threat of killing family members in Pashtun culture continues until all the family members are dead, and that he cannot return to any other part of Afghanistan either, as the jihadists are well connected all over the country. The applicant claims that he has not returned to Afghanistan since he fled in 1984.

[4] Before the officer was a copy of the applicant's tenancy agreement for January 2014 to December 2014, his renewed Pakistani proof of registration card, which states that it allows him to stay in Pakistan through to December 31, 2015, the prior proof of registration cards for the rest of his family, and the birth certificates of his children, all born in Peshawar. Documents attached to the applicant's affidavit in support of this application cannot be accepted by the Court as they were not before the officer (*Abbott Laboratories Ltd v Canada (Attorney General)*, 2008 FCA

354 at paras 37-38; *Puida v Canada (Minister of Citizenship and Immigration)*, 2014 FC 781 at paras 26, 40). I will therefore not consider them in my determination of this application.

[5] The officer interviewed the applicant, his wife and one of their children on September 3, 2014.

III. The Impugned Decision

[6] In a decision letter dated September 5, 2014, the officer advised the applicant that his application for permanent residence was refused on the basis that he was not satisfied the applicant and his family resided in Pakistan as stated, and that he found it more likely that they had repatriated or otherwise resided in Afghanistan. The officer stated that he had given the applicant and his family multiple chances to answer truthfully and had considered all of their explanations and responses but did not find their story credible.

[7] The Global Case Management System [GCMS] notes document the interviews and the decision given by the officer following the interviews. These notes form part of the officer's reasons. In giving his decision, the officer noted that while the applicant had provided his proof of registration card and current tenancy agreement, neither he nor his wife or daughter were able to provide their address in Peshawar prior to 2014, other than that it was located in Phase 2. He indicated that the applicant had offered to provide tenancy agreements for his previous addresses.

[8] The applicant claimed that he had not picked up the new proof of registration cards for his wife or other children because they were unable to travel outside together due to their fear of

the person who had killed his father. However, the officer found that the applicant had exaggerated his claimed fear of the commander as an excuse for his inability to show more concretely that he was living outside Afghanistan.

[9] As such, the officer was not satisfied that the applicant and his family were residing outside their country of nationality, and consequently found that they did not meet the requirements of the Act for either class.

IV. Issues

[10] This matter raises the following issues:

A. Did the officer breach his duty of procedural fairness by failing to give the applicant an opportunity, subsequent to the interview, to present evidence of prior residency in response to his concerns?

B. Was the officer's decision reasonable?

V. Standard of Review

[11] The first issue is a question of procedural fairness and is accordingly reviewable on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Qarizada v Canada (Minister of*

Citizenship and Immigration), 2008 FC 1310 at para 18, [*Qarizada*]; *Nassima v Canada (Minister of Citizenship and Immigration)*, 2008 FC 688 at para 10, [*Nassima*]).

[12] Whether or not an applicant falls within the Convention refugees abroad class or country of asylum class is a question of mixed fact and law and is reviewable on a standard of reasonableness (*Qarizada* at para 15). Assessments of credibility and factual findings are also reviewable on a reasonableness standard (*Qarizada* at para 17; *Nassima* at paras 8-9).

VI. Analysis

A. *Did the officer breach his duty of procedural fairness by failing to give the applicant an opportunity to present evidence in response to his concerns subsequent to the interview?*

[13] The Convention refugees abroad class is governed by sections 144 and 145 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], and the country of asylum class by sections 146 and 147 thereof. Section 145 states that foreign nationals will be members of the Convention refugees abroad class if they have been determined, outside Canada, by an officer to be a Convention refugee. The definition of Convention refugee in section 96 of the Act requires, among other things, that the person be outside each of their countries of nationality. Section 147 states that foreign nationals will be members of the country of asylum class if they have been determined by an officer to be in need of resettlement because they are outside of all their countries of nationality and habitual residence, and they have been and continue to be seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.

[14] Therefore, in order to succeed in his application under either class, the applicant had to establish, among other things, that he was outside Afghanistan.

[15] The applicant submits that the officer breached his right to procedural fairness by rendering his decision without giving him an opportunity after the interview to provide further evidence of his residence in Pakistan. He could not have reasonably known in advance of the interview that he would need to provide his past tenancy agreements, because proof of prior residency is not a requirement under section 96 of the Act or section 147 of the Regulations. Thus, in the circumstances, the officer had a duty to inform him of his preliminary findings and to give him an opportunity to disabuse him thereof. Instead, despite the applicant's offer to retrieve past tenancy agreements, the officer rendered his negative decision immediately following the interview.

[16] The respondent submits that the officer was under no obligation to seek out further information on behalf of the applicant, since it is the applicant's responsibility to include relevant information in his application (*Qarizada* at para 28; *Kamara v Canada (Citizenship and Immigration)*, 2008 FC 785; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paras 42-62). Where a visa officer's concerns arise directly from the requirements of the Act and Regulations, the officer is not required to make these concerns known to the applicant in advance of rendering his or her decision (*Nassima* at para 16).

[17] I stated in my reasons in *Nassima* that applicants bear the burden to demonstrate that they are outside their country of nationality and are members of the class under which they are

applying. Thus officers are not required to make their concerns regarding current residency known to an applicant as these concerns arise directly from the requirements of the Act and Regulations.

[18] The applicant in this case, however, provided documentation establishing his current address in Pakistan, and the officer did not identify any inconsistencies in the testimony provided by him, his wife and his daughter. The officer's concern related to the applicant's previous addresses, which is not a concern arising directly from the requirements of the Act and Regulations. Section 96 of the Act requires an applicant to establish that he or she "is outside each of their countries of nationality" and section 147 of the Regulations requires applicants to show that "they are outside all of their countries of nationality and habitual residence." This required the applicant to prove his current, not his past, residence.

[19] As the officer's concern regarding the applicant's prior residency did not arise directly from the requirements of the Act or Regulations, fairness required him to make this concern known to the applicant and to give him an opportunity to respond thereto. The applicant offered to provide the officer with his past tenancy agreements, but the officer did not give him an opportunity to submit them prior to rendering his decision. In the circumstances, by failing to give the applicant this opportunity, the officer breached his duty of procedural fairness.

[20] This is sufficient to quash the decision. For these reasons, the application for judicial review is allowed. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is to be sent back for redetermination by a different visa officer; and
2. There is no question for certification.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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