

Federal Court



Cour fédérale

Date: 20160205

Docket: IMM-2979-15

Citation: 2016 FC 143

Ottawa, Ontario, February 5, 2016

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

**HELLAY FAIZI
MOHAMMAD HASIB FAIZI
MOHAMMAD ADIL FAIZI
AYESHA FAIZI
ASMA FAIZI**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants have applied for judicial review of a Decision dated May 12, 2015 [the Decision] of a Member of the Refugee Protection Division of the Immigration and Refugee Board [the Board]. The Board found the Applicants are neither Convention refugees nor persons

in need of protection. This application is made pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

I. Background

[2] The principal Applicant [the Applicant], Helay Faizi, is a 32 year old female citizen of Afghanistan. The other Applicants are her children. They are: Mohammad Hasib Faizi, age 13, Mohammad Adil Faizi, age 10, Ayesha Faizi, age 9, and Asma Faizi, age 7.

[3] When the Applicant was 14 years old, a man visited the Applicant's father and asked to have her married to his son, Naheem. Two weeks later, the Applicant's father was invited to participate in a gathering. The Applicant's father was forced to agree to the marriage for fear of being killed.

[4] The Applicant's father later tried to change his mind and withdraw from the marriage agreement. However, Naheem's father said this was impossible and threatened to report him to the Taliban for breaching tradition.

[5] As a result, the Applicant's family fled to Pakistan and, in 2002, the Applicant married Mohammad Yassin who was a neighbour in Pakistan [the Applicant's Husband].

[6] After the Taliban was overthrown, the Applicant's Husband returned alone to Afghanistan. Several years later, the Applicant returned to Afghanistan and Naheem eventually learned of her return.

[7] In May 2012, armed men, including Naheem, forced themselves into the Applicant's home. The Applicant's Husband returned while the men were there and he was thrown to the ground. Others screamed and the intruders left. The police were called and they arrived to investigate.

[8] A few weeks later, the Applicant's Husband was stopped by two armed men and told to divorce the Applicant, take the children, and leave Afghanistan. He was told that Naheem was a loyal Taliban commander, and that he had filed a Taliban court order against the Applicant's Husband for unlawfully marrying the Applicant. According to Sharia law and Afghan and Pashtun tradition, the penalty for kidnapping another man's wife is death.

[9] On August 1, 2012, the Applicant received a call from her husband's business partner telling her that armed men had taken her husband to see commander Naheem. A few days later, Naheem and armed men came to the Applicant's home and told her that she should leave with him. Naheem advised that he had her husband in custody and that, if she did not go with him, her husband would be killed.

[10] The Applicant's mother-in-law cried out for help and the neighbours called the police. When they arrived, gunfire was exchanged. The mother-in-law was shot in the leg and was taken to the hospital. The Applicant's father-in-law took the Applicant to his brother's house. The police said that they could not provide protection because they realized Naheem was powerful.

[11] The Applicant's father found a smuggler to take her and her children to Canada. She has not heard from her husband.

[12] One month after arriving in Canada, the Applicant was interviewed for an hour by a CIC Officer with the assistance of an interpreter. During the interview, the Applicant's children (then aged 9, 7, 6 and 4 years) played with toys nearby and the CIC Officer noted that they spoke "exceptional English". They spoke nothing but English and sang songs in addition to conversing.

[13] When the Applicant was questioned about this, she stated they went to a private school in Afghanistan and learned English there. However, she could not name the school. She explained this by saying that her husband took the children to school.

[14] The hearing before the RPD took place on April 13 and 29, 2015. When the hearing opened on the second date, the Applicant submitted the following documents [the Late Disclosure]:

- an e-mail dated April 25, 2015 and received by the Applicant's counsel on April 28, 2015. It attached an undated letter from an elected official in Kabul saying that the Applicant had lived there from 2007 to 2012.
- An undated letter from the Applicant's father, which was sent to the Applicant by e-mail, and which a friend helped her download.

II. The Decision

[15] The Board accepted that the Applicants are citizens of Afghanistan but concluded that there was insufficient credible evidence to establish that the Applicant and her children were in Kabul during the relevant events (May to August 2012) and during the five year period before they arrived in Canada on August 13, 2012.

[16] The Board found that documents were lacking. There were no school documents and no documents to show where the children were born. As well, there were no police reports dealing with Naheem's invasions of the Applicant's home, and no medical report following the shooting of the Applicant's mother-in-law.

[17] As a result of the children's exceptional English, the Board concluded that they had been raised in an English language jurisdiction.

[18] The Board also rejected the Late Disclosure because the letter from the Afghan official was undated and sent by e-mail. Further, because it was transmitted by e-mail rather than by letter, the provenance of both the letter and the covering e-mail could not be verified. The same concerns were expressed about the letter from the Applicant's father.

[19] The Board also found that the Applicant answered questions in an evasive manner. Further, the Board concluded that inconsistencies between the Applicant's Claim for Refugee Protection Form and her PIF about who she feared; and between the CIC Officer's notes and her testimony about how long she stayed in the U.S. and her failure to claim in the U.S., also diminished her credibility.

III. The Issues

[20] The Applicant says that the Board unreasonably concluded that the Applicant's children had been raised and educated in an English language jurisdiction.

[21] The Applicant says that given problems with interpretation, it was unreasonable to conclude that the Applicant responded to questions in an evasive manner.

[22] The Applicant says it was unreasonable to disregard the Late Disclosure.

[23] Finally, the Applicant says, notwithstanding the negative credibility finding, it was unreasonable of the Board not to consider whether she would face persecution as a woman in Afghanistan.

IV. Discussion

[24] In my view, it was reasonable of the Board to conclude that when the CIC Officer spoke of the children's English being exceptional, she meant that they were fluent. Children at play will do what is easiest, and the fact that they used no Dari words at all in an hour does indicate fluency and that English is their first language.

[25] It is clear that the Applicant's failure to provide a sensible explanation for her children's exceptional English is at the foundation of the Board's concern about her credibility. Her only explanation was that they attended a school where English was taught. However, two of the

children were of pre-school age. It was also problematic that she could not name the school when asked by the CIC Officer given that the eldest boy had allegedly been there for several years.

[26] It is also my view that once this credibility concern developed, it was reasonable for the Board to expect some documentary corroboration of the Applicant's claim.

[27] As well, given the credibility concern, it was reasonable to insist that the Late Disclosure be provided in a reliable form (i.e. original letters with envelopes).

[28] The Applicant submitted that problems with interpretation caused the evasiveness the Board described. Evidence from an interpreter who re-translated approximately 14 minutes of the two day transcript was adduced to show that errors did occur, and that the Applicant said that they caused her to provide non-responsive answers and become frustrated with the questioning.

[29] There was one error in interpretation. When the Board asked for confirmation of the Applicant's earlier evidence that the police could not protect her from Naheem because he was too notorious (transcript – pg. 261) in the sense of having fame or a reputation in the community, the interpreter did not translate notorious that way. Instead, the interpreter conveyed to the Applicant that the Board was talking about whether Naheem was dangerous.

[30] However, the Board had previously on that day been given clear evidence that the police had not been familiar with Naheem's name before the Applicant reported him to the police.

Accordingly, his notoriety had not reached the police and the transcript shows that this was the Board's concern. For this reason, I have concluded that this error was not material.

[31] It is also my conclusion that the Board found the Applicant evasive not because of interpretation errors but because she gave explanations that did not make sense. For example, she "forgot" to name Naheem in her CIC form and mention that he was Taliban and "forgot" to mention in her PIF that the police could not give her protection because they knew Naheem by reputation.

[32] As well, she appeared evasive because her evidence changed from the first to the second hearing day. On the first day, she said the police knew Naheem by name but, as noted above, she denied that fact on the second day of the hearing.

[33] Finally, she sometimes appeared evasive because of the manner in which she responded to the questions. She would answer "yes" or "no" and then provide other facts which were not pertinent so that her answer overall appeared non-responsive.

[34] I found no serious errors in the balance of the translated transcript and have therefore concluded that the Applicant did receive the continuous, precise and competent interpretation to which she was entitled, and that interpretation errors were not the source of the Board's conclusion that she was "evasive" in answering its questions.

[35] The last issue is the Board's failure to consider whether the Applicant faced persecution as a woman returning to Afghanistan. No such fear was expressed in evidence at the hearing or in counsel's submissions. The Board was given no information about the Applicant's circumstances on her return to Afghanistan. For example, the Board did not know whether she has her husband's family to protect her, whether she is wealthy, where she might live, and even whether she plans to stay in Afghanistan.

[36] It is my conclusion that, in these circumstances, the Board was not required to assess her risk of persecution as a woman in Afghanistan. It was not for the Board to speculate about the Applicant's profile, when the Applicant was represented by counsel and expressed no fear other than that associated with Naheem.

V. Proposed Certified Question

[37] The Applicant proposed the following question [the Proposed Question]:

In circumstances in which a refugee claimant is represented by counsel, is the Board obligated to consider grounds of persecution or engage in a risk analysis or inquiry where grounds or risks are not raised by the claimant or counsel.

[38] In *Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, the Court said:

2. The Judge also certified a question, namely: where there is relevant objective evidence that may support a claim for protection, but where the Refugee Protection Division does not find the claimant's subjective evidence credible except as to identity, is the Refugee Protection Division required to assess that objective evidence under s. 97 of the *Immigration and Refugee Protection Act*?

3. In our view, that question should be answered in the following way: where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[My emphasis]

[39] In my view, the Federal Court of Appeal decision means that the onus is on an applicant to express fear and relate his or her circumstances or profile to the documentary evidence. In view of the Federal Court of Appeal's decision, I have concluded that the Proposed Question is not serious. Accordingly, it will not be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed;
2. The Proposed Question is not certified for appeal.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2979-15

STYLE OF CAUSE: HELLAY FAIZI, MOHAMMAD HASIB FAIZI,
MOHAMMAD ADIL FAIZI, AYESHA FAIZI
ASMA FAIZI v THE MINISTER OF CITIZENSHIP AND
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 21, 2016

JUDGMENT AND REASONS: SIMPSON J.

DATED: FEBRUARY 5, 2016

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