Federal Court Cour fédérale

**Date: 20160301**

**Docket: IMM-3595-15**

**Citation: 2016 FC 263**

**Ottawa, Ontario, March 1, 2016**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**NIZAMUDDIN HAIDARI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is a judicial review of a decision of a Visa Officer at the Canadian High Commission in Islamabad [Officer] dated May 26, 2015, in which the Officer determined that the Applicant and his family were not Convention refugees pursuant to section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] or members of the Country of Asylum class pursuant to section 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] made under IRPA.

[2] For the reasons that follow, this application is allowed.

## I. Background

[3] The Applicant, Nizamuddin Haidari, is married with five children. His eldest son, now 22 years old, was born in Afghanistan before the family fled for Pakistan in 1993. The four younger children were all born in Pakistan. They are citizens of Afghanistan and are of Hazara ethnicity, adhering to the Shia Ismaili branch of Islam.

[4] The family fled to Pakistan after Panjshiri warlords took their house for military purposes, beat the Applicant and threatened his family. They have not returned to Afghanistan for fear of being killed by the Taliban or other extremist groups.

## II. Impugned Decision

[5] The impugned decision states that, on the basis of the totality of the information provided, the Officer was not satisfied that the Applicant and his family were Convention refugees, finding that they did not face a well-founded fear of persecution on a ground enumerated in the Convention, or members of the Country of Asylum class, as they did not continue to be seriously and personally affected by civil war, armed conflict or massive violation of human rights in Afghanistan.

[6] The Officer considered documentary evidence including reports from the United Nations High Commission for Refugees [UNHCR] and contained in the Immigration and Refugee

Board's National Documentation Package for Afghanistan, noting that UNHCR reports indicate that more than 4.7 million Afghans have returned to Afghanistan voluntarily, with returnees forming a quarter of the current population of Afghanistan, while as many as 1.6 million registered Afghans remain in Pakistan. The Officer notes that Hazaras constitute about one fifth of the population in Afghanistan, a number coinciding with the number of Shia, and that Ismailis are a much smaller group, constituting only 2% of the population.

[7] With respect to ethnic and religious discrimination, the decision refers to the UNHCR's Guidelines on the Assessment of the International Protection Needs of Asylum Seekers from Afghanistan [the UNHCR Guidelines] as indicating the following:

A. Afghanistan is the third most dangerous country in the world for ethnic minorities including Hazaras, although all ethnic groups face risks of ethnic violence in Afghanistan, supporting a finding that some groups that might be in a majority in one region may find themselves in a minority in another; and

B. Shia representation in government has increased, and overt discrimination against them has decreased, although violent attacks against the Shia population continue to occur.

[8] The Officer referred to the documentary evidence revealing that the situation of Hazaras in Afghanistan has improved markedly since the end of the Taliban regime, but that discrimination continues to be reported. The Officer noted that the UK Border Agency's Country of Origin Information Report [the UK COI Report] called the highlands of the Hazara homeland,

Hazarajat, one of the safest in the country. Referencing the United States Department of State 2013 Human Rights Report [the US DOS Report], the Officer concluded that there was insufficient evidence Hazaras are excluded from participating in political life and noted that there were few reports of targeted discrimination against Ismailis but no elaboration on the nature of the discrimination nor a suggestion of systemic discrimination amounting to persecution.

[9] With respect to access to education, the Officer again referred to the US DOS Report and UK COI Report, noting both impediments to education and the prioritization of education in Hazarajat. The Officer found that, while the Applicant's children may face some initial difficulty in understanding the written script in which they would be studying in Afghanistan, it was highly likely that they would learn the Dari alphabet in a short time given their knowledge of Urdu.

[10] In relation to the difficulties facing women in Afghanistan, the Officer referred to the US DOS Report and the UNHCR Guidelines and noted danger, discrimination and barriers, particularly when women were lacking male support. However, the Officer found that, as the Applicants would be returning to Afghanistan as a family, there was insufficient evidence to conclude that the female members of the Applicant's family would be denied the protection of their male family members such that they would be in a position where the discrimination could be found to be tantamount to persecution. The conclusion was that, while the female members would face restrictions, these were discriminatory, not persecutory.

## III. Issues and Standard of Review

[11] The Applicant's written representations submit the following issues for the Court's consideration:

A. By selective reading of the evidence the Officer erred in finding that the Applicant and his family would not be at risk due to their ethnicity as Hazara pursuant to section 96 of IRPA if they returned to their country of nationality;

B. The Officer relied on outdated documents on country conditions in coming to the negative decision and failed to consider the most recent documents available at the time of interview and at the time the decision was rendered; and

C. The Officer ignored the Applicant's particular situation in light of the pleading and the critical age of the children under section 147 of the Regulations and the possibility of a safe relocation.

[12] At the hearing of this application, the Applicant also raised the issue whether the Officer erred in applying the wrong test in analyzing whether the Applicant was a member of the Convention Refugee class under section 96 of IRPA. The Applicant's argument is that the language of the decision indicates that the Officer thought it was necessary for the Applicant to have been persecuted personally, rather than being a member of a persecuted group, in order to be a member of this class. The Respondent took the position that the Applicant had not raised this as an issue prior to the hearing and that the Court should therefore not consider this

argument. As explained in my Analysis below, I am allowing this application for reasons unrelated to the test applied by the Officer. It is therefore not necessary for me to decide whether the issue raised by the Applicant surrounding the test applicable to the section 96 analysis was properly before the Court.

[13] Other than in relation to that issue related to the section 96 test, to which the Applicant argued a standard of correctness applied, the parties agree that the standard of reasonableness applies to the issues in this application. I concur that reasonableness is the appropriate standard of review (see *New Brunswick (Board of Management) v. Dunsmuir,* 2008 SCC 9 at para 47).

## IV. Submissions of the Parties

### A. *Applicant's Position*

[14] The Applicant argues that, contrary to the Officer's finding that millions of Afghans returned voluntarily, the UNHCR Refworld in its 2006 survey noted many Afghans felt coerced to leave despite lack of security in Afghanistan. Further, the Officer did not refer to any evidence to indicate what percentage of those who returned were Hazaras. The Applicant points to contrary recent evidence from Human Rights Watch 2014 and 2015 that the increase of Afghans repatriating from Pakistan appears to relate to coercive pressures from local governments and that the insecurity has led to a decrease in the number of returnees.

[15] The Applicant submits that the Officer failed to properly analyze the Applicant's claim under section 96 of the IRPA on the ground of the Applicant's ethnicity by misapprehending the

evidence, by selective reading of the evidence, and by relying on outdated evidence. He notes specifically that the Officer did not acknowledge his evidence that he and his family cannot cross the Jalalabad city because there is still a group of Taliban and Tayesh there.

[16] Referring to the documents relied on by the Officer, the Applicant argues that this evidence does not support the finding in the decision that the Applicant's family as Hazaras will not be at risk if they returned to their country. The Applicant repeatedly stated that, due to their ethnicity, Hazaras are being killed by Taliban and Daish, and the Applicant's family are afraid of ending with the same fate.

[17] The Applicant also submits that, in finding that Hazarajat is safe, the Officer relied on an outdated document that was published in the UK COI Report but which related to 2007 or 2008. The Officer quoted the sections of this report that supported this finding but ignored sections of the same report that were in stark contrast to the finding, particularly in relation to access to the Hazarajat provinces. The Applicant also refers to sections of the UNHCR Guidelines that were not referenced by the Officer but which contradict this finding. He relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 for the principle that the more important the documentary evidence that is not mentioned and analyzed in the reasons, the more willing the Court may be to infer from the silence that there was an erroneous finding made without regard to that evidence.

[18] The Applicant further argues that the Officer did not consider the latest documents and news on country conditions, which predated the Applicant's interview and reflect the increasing

and systemic persecution of Hazaras at the hands of the Taliban and other extremist groups since the withdrawal of foreign forces in 2014. He states that the documents quoted by the Officer were from 2013. The Applicant instead references numerous documents from 2014 and 2015 describing persecution against his ethnic group.

[19] Finally, the Applicant argues that the Officer failed to analyze under section 147 of the Regulations his family's particular situation including the possibility of safe relocation. Specifically, this included the critical age of his children and the fear expressed by the Applicant and his son for the younger family members at the hands of the Taliban. His position is that the Officer assumed that violence against women and children is only committed by family members and that they would be safe if they returned as a family unit. Moreover, there is nothing in the Officer's notes to indicate assessment of the possibility of safe relocation for the family particularly in light of their claim that the Taliban have increasingly singled out those of their ethnicity. The Applicant notes that the UNHCR Guidelines refer to the government of Afghanistan being unable to protect its citizens and to internally displaced people being in particular danger.

B. *Respondent's Position*

[20] The Respondent argues that the Officer's decision was reasonable as the country documentation from the usual sources associated with refugee claims was examined. The Respondent's position is that the Applicant simply disagrees with how the evidence was weighed and that his argument that the Officer failed to undertake a consideration of his family's ethnicity and persecution of similarly situated persons is dispelled by a plain reading of the reasons. The

Officer considered documentation specifically related to Hazaras and referenced documentation addressing the post-2014 transition following withdrawal of international forces. The Respondent notes that the Officer is deemed to have considered all of the evidence in making the decision and there is no obligation on the Officer to list every single piece of evidence (*Gutierrez v Canada (Minister of Citizenship and Immigration*), 2009 FC 610 at para 27).

[21] The Respondent also relies on decisions of this Court that it is reasonable for an officer to consider evidence of large numbers of people who had fled in times of conflict returning to their home country, particularly when the UNHCR played a role in that resettlement effort.

[22] The Respondent argues that the Applicant had the burden of providing the Officer with specific evidence he wished the Officer to consider and points out that some of the evidence now referred to by the Applicant in this application for judicial review was identified though his counsel's research for inclusion in this Application Record and had not been provided to the Officer. Particular emphasis is placed on *Sribalaganeshamoorthy v Canada (Minister of Citizenship and Immigration),* 2010 FC 11, which held at paragraph 37 that the fact some country condition documentation may support the applicant's case does not impose a duty upon and officer to search for and produce that evidence on the applicant's behalf.

[23] The Respondent also submits that the Officer considered the claimed risk of forcible recruitment, educational concerns and risk of persecution of Hazaras, Shia, and Ismailis. The Officer devotes a large portion of the reasons to the educational situation in Afghanistan generally and in relation to Hazaras and females in particular.

## V. Analysis

[24] The Respondent's position focuses significantly on principles of administrative law and the Court's role in judicial review. When considering the analysis of country conditions, particularly by a visa officer based in the relevant country, the Respondent emphasizes the deference that the Court must afford the officer. It will always be possible for an applicant to point to particular documents favouring the applicant's position that were not referenced by an officer, and the Respondent cautions against the Court being drawn into a role of re-weighing evidence that the visa officer is better able to assess. The Respondent argues that the Court's role should instead assess whether the Officer has kept abreast of country conditions in Afghanistan and has made a reasonable decision demonstrating knowledge of those conditions.

[25] I am conscious of the points raised by the Respondent, particularly in a case such as this one where the Applicant seeks to rely on documentary evidence of country conditions that includes material that does not form part of the Immigration and Refugee Board's National Documentation Package [NDP] and had not been raised by the Applicant for the Officer's consideration. However, my decision to allow this application turns not on an analysis of this material that the Respondent would characterize as new evidence not before the decision-maker, but rather on consideration of the reasonableness of the decision as demonstrated by the reasons given by the Officer. My conclusion is that the Officer's decision does not demonstrate sufficient support by the documentary evidence in order for the decision to be transparent, intelligible and therefore reasonable.

[26] Perhaps the most significant of the reasons the Applicant raised for being unable to return to Afghanistan was his family's minority ethnicity as Hazaras. The Officer's decision begins with references to repatriation figures and then the existing human rights problems in Afghanistan surrounding discrimination and abuse against ethnic minorities. This component of the decision is general in nature and does not focus on the circumstances facing Hazaras in particular. However, the decision then identifies the minority position of Hazaras in Afghanistan and notes the UNHCR Guidelines' reference to Afghanistan being the third most dangerous country in the world for ethnic minorities including Hazaras, finding that all ethnic groups face risks of violence in Afghanistan as some groups who are in a majority in one region may be in a minority in another.

[27] The Officer then states that the documentary evidence reveals that the situation of Hazaras in Afghanistan has improved markedly since the end of the Taliban regime but that discrimination continues to be reported. The evidence the Officer cites is the US DOS Report and the UK COI Report. The former refers to societal discrimination against Shia Hazaras in the form of extortion of money through illegal taxation, forced recruitment, forced labour, physical abuse and detention. This evidence supports the Officer's statement that discrimination continues to be reported but not the conclusion that the situation of Hazaras in Afghanistan has improved markedly since the end of the Taliban regime. However, the information referenced from the UK COI Report could be considered supportive of that conclusion, as it calls the Hazara homeland one of the safest in Afghanistan. It also refers to Hazaras making up 40% of the population in Kabul as both a growing middle class and an underclass of labourers.

[28] The difficulty is that, as emphasized by the Applicant, the reference in the UK COI Report is to an article from the National Geographic magazine that appears to be significantly outdated. The UK COI Report, while itself dating to February 2013, refers to this National Geographic article as being an undated article that was accessed on October 1, 2012. However, the Applicant points out that the paragraphs quoted from the article indicate it to date to a period six years after the Taliban fell, which the parties agree was in 2001. As such, the Applicant correctly characterizes this as an article appearing to date back to 2007. After the Officer's reference to the UK COI Report, the only other documentary evidence referred to, before moving to consideration of discrimination on religious grounds, is a section from the US DOS Report from which the Officer finds there is insufficient evidence that Hazaras are excluded from political life.

[29] Read in its entirety, the Officer's decision to refuse the Applicant's application, in so far as it relates to the Applicant's Hazara ethnicity, is intelligible only if it based on the Officer's finding that the situation of Hazaras in Afghanistan has improved markedly since the end of the Taliban regime. That finding in turn appears unsupported by any evidence cited by the Officer other than the dated National Geographic article.

[30] The Applicant points to a number of more recent publications and media reports containing what he considers to be contradictory evidence. This includes information that appears to be external to the NDP but also information that is contained in the UK COI Report and the UNHCR Guidelines, the sources that were relied on by the Officer. The UK COI Report, referencing a UNHCR publication from 2010, describes a worsening security situation on access

routes to and from districts where Hazaras form a majority, with regular reports of ambushes, robberies, kidnappings and killings by the Taliban. In that context, the Applicant notes that travel through areas occupied by the Taliban was one of the concerns he expressly raised with the Officer. The UNHCR Guidelines, referencing sources from 2012 and 2013, note reports of Hazaras continuing to be subject to harassment, intimidation and killings at the hands of the Taliban.

[31] As explained earlier in this decision, I am conscious that the Court's role is not to re-weigh the country condition evidence, even that which is contained in the same documents that were cited by the Officer. However, in this case, the evidence that was cited by the Officer does not appear to support the decision, with the exception of a magazine article dating to some eight years prior to the decision. It could be that, if the Officer were to consider the more recent evidence, the decision would be unchanged. However, the situation with which the Court is presented is a decision that on its face appears to be based solely on information that is not sufficiently current to make the decision a reasonable one.

[32] Given the significance of the Applicant's ethnicity to the application considered by the Officer, the analysis above is sufficient to set aside the decision. However, I note that the portion of the decision related to access to education suffers from the same deficiency. The Officer quotes at length largely negative information from the US DOS Report, including its description of the status of girls and women in education as remaining a grave concern. The Officer then refers to more specific information about access to education for Hazara children who reside within the traditional Hazara homeland of Hazarjat. This describes education as a priority and

refers to initiatives to provide access to education and the number of girls pursuing higher education as rising. However, this information specific to Hazarjat is again taken from the National Geographic article apparently dating to 2007.

[33] The Officer makes no express finding with respect to access to education, other than in relation to the ability of the children to adapt to a new language. However, given the rejection of the application, the Officer must have discounted the Applicant's concerns about access to education including that of his daughter. As with the portion of the decision related to ethnicity, I find the decision also to be unreasonable in its assessment of access to education, as apparently relying solely on the eight year old magazine article.

[34] The decision must therefore be set aside and referred to another visa officer for re-determination.

[35] Neither party proposed a question of general importance for certification for appeal.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed and the matter is referred to another visa officer for re-determination. No question is certified for appeal.

"Richard F. Southcott"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **STYLE OF CAUSE:** | NIZAMUDDIN HAIDARI V THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
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