Federal Court  Cour fédérale

Date: 20170705

Docket: IMM-4664-16

Citation: 2017 FC 648

Ottawa, Ontario, July 5, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

PALWASHA BARAK; ABDUL SHAKOOR BARAK; FARISHTA BARAK; AHMAD FAHIM BARAK; EHSANULLAH BARAK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for leave and for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the IRPA], of a September 2, 2016 decision of a visa officer [the Officer], in Islamabad, Pakistan [the Decision] wherein the Officer determined that the Applicants do not meet the requirements for permanent residence immigration to Canada, under either of the Convention Refugee Abroad and Country of Asylum

classes. For the reasons explained below, the judicial review will be granted. A brief summary of the facts follows.

[2] The Applicants claim to be nationals of Afghanistan who fled as a family to Pakistan in 1996. The Applicants claim to be targeted in Afghanistan and to have been displaced in Pakistan after first fleeing from Kabul to Kandahar, because of their way of life which was deemed to be too liberal and because they are Pashtun. Three of the Applicants claim to have received, through bribes, Pakistani national ID cards given to Pakistani citizens.

[3] The Applicants were interviewed by the Officer on August 29, 2016. Another of the Applicants was in the United States at the time and did not participate in the interview. During the interview, the Officer questioned the Applicants on their Pakistani ID cards and on their lack of Afghani documentation.

[4] The Officer was not satisfied that the Applicants were not nationals of Afghanistan, thus failing to meet the Convention Refugee definition. The Officer also decided that they did not qualify for the Country of Asylum Class as they found life peaceful in Pakistan.

[5] However, the Officer found that even in the event the Applicants were nationals of Afghanistan, they did not describe anything that would show that they were, or would be, seriously and personally affected by the situation in Afghanistan, such that they might qualify under the Convention Refugee Abroad definition.

II. Issues and Analysis

[6] The Applicants contend that the Officer erred by failing to: (a) respect procedural fairness requirements; (b) exercise jurisdiction in assessing the classes incorrectly; and (c) properly considering evidence, including objective country condition documentary evidence.

A. *Standard of Review*

[7] Starting with the first issue raised, the standard of review of correctness is applicable to an alleged breach of procedural fairness (*Sahar v Canada (Citizenship and Immigration)*, 2015 FC 1400 at para 14). The remaining two issues raised are all subject to a reasonableness review: an officer's decision about whether an applicant falls within the Convention Refugee Abroad or Country of Asylum classes is a question of fact and mixed fact and law to be determined on a standard of reasonableness: *Adan v Canada (Citizenship and Immigration)*, 2011 FC 655 at para 23.

[8] After considering the arguments raised and applying the appropriate standard of review, I find the Decision to be flawed in at least two crucial areas, and as a result, will return it to the visa office for reconsideration by a different Officer.

B. *Procedural Fairness*

[9] Turning then, to the substantive analysis, the Officer fell short in two related respects of the brief analysis that was done following the short interviews of the various claimants. The first

involved the analysis of refugee claims, and the failure to fairly examine the Applicants during their interviews. The Officer did not adequately engage with the Applicants in the central aspects of their claims (ethnicity and gender).

[10] As a departure point, this Court has noted the significance of the responsibility for visa officers abroad when it comes to making refugee decisions. While the process differs from that before the Immigration and Refugee Board, the effect of the decision is the same. The assessment of these decisions differs from economic and family-based categories of immigration, whereby the applicants are expected to provide all evidence to substantiate eligibility criteria. Not so with refugee determinations, where the applicants must raise Convention grounds (or even just the reasons) for which they are claiming status. As stated by Justice Mosley in *Krishnapillai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 244 at para 7, a case also involving a Convention refugee abroad determination:

> The authorities cited by the Respondent all involve visa Officers making decisions about permanent residence and visitor applications without the added element of statutory interpretation in this case. While the decision-maker remains the same, the nature of the decision is significantly different, being more law-intensive. The experience of visa Officers in making refugee determinations is not as extensive as that, for example, of the members of the Refugee Protection Division (RPD).

[11] Other cases have similarly found what amounts to a heightened duty of scrutiny – and therefore fairness – when it comes to refugee determinations as opposed to other types of determinations abroad. The duty on the officers abroad to consider all legal grounds of a refugee claim inferred from the evidence stems from the early leading Canadian case on refugee law, *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 745: the Supreme Court noted that,

arising out of paragraph 66 of the United Nations High Commissioner for Refugees Handbook, "it is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide whether the Convention definition is met; usually there will be more than one ground." (See also: *Elyasi v Canada (Citizenship and Immigration)*, 2010 FC 419 at para 25).

[12] There was some discussion of the onus of Convention refugee grounds raised during the hearing. Clearly, the onus does not fall on the Officer to make out the claim for the Applicant. As stated by this Court recently in *Mariyadas v Canada (Citizenship and Immigration)*, 2015 FC 741 at para 25 "the Officer cannot invent fears and must rely upon what the Applicants say they fear".

[13] However, once a refugee ground is raised, the officer has a duty to examine it, and engage with the evidence in analysing whether there is a well-founded fear of persecution. In failing to consider all grounds of persecution raised, the Officer errs, and the matter requires reconsideration (*Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at para 108).

[14] Here, the Applicants clearly raised the fear of persecution in Afghanistan on the basis of their ethnicity. In addition, the female Applicants – given that they studied in university (in the case of the daughter) and taught in school (in the case of the mother) – also asserted a fear of persecution based on their ability to conduct these activities in Afghanistan. In sum, the Officer should have, at minimum, explained why the Applicants had no well-founded fear of persecution on the grounds of ethnicity and gender.

C. *Assessing the Classes Abroad*

[15] I find that the Officer confounded the refugee definition with the Country of Asylum class, in finding that "[i]f you are nationals of Afghanistan, you did not describe anything that would show you were seriously and personally affected by civil war, armed conflict or massive violation of human rights". That is the test for the Country of Asylum (Humanitarian-Protected Persons Abroad Designated), and not the Convention Refugee Abroad class. It is an error of law to conflate the Country of Asylum test with the refugee determination test.

[16] This error is somewhat related to the first, in that the Officer did not address the fear of persecution based on ethnicity or gender in the parts of the Decision which purported to address the Convention Refugee Abroad class. In this way, the Decision suffered from the same flaws as did the Islamabad visa office decision under review for Afghanis in *Ismailzada v Canada (Citizenship and Immigration)*, 2013 FC 67.

[17] In short, I find that the Officer failed to address either of the main Convention refugee grounds sufficiently (namely (i) ethnicity and (ii) gender). These grounds were readily identifiable on the record, both in the application forms, as well as in discussion raised during the interview. However, to the extent that the Officer addressed the situation in Afghanistan – and the Decision was focused more on the belief that the Applicants had a durable solution in Pakistan – the Officer failed to engage in any meaningful analysis of these two grounds.

D. *Overlooking Evidence*

[18] Finally, the Applicants argue that the Officer erred in failing to properly consider evidence, by overlooking certain country condition evidence. Given the two errors explained above - which are determinative of this judicial review - there is no need to rule on this third issue raised.

III. Conclusion

[19] For the reasons above, this application for judicial review is granted, and will be returned to the visa office for reconsideration by a different officer. The parties agreed that there are no questions for certification, and I agree that none arise.

JUDGMENT in IMM-4664-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The file will be returned to the visa office for reconsideration by a different officer.

3. There are no questions for certification, nor costs ordered.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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