Federal Court  Cour fédérale

Date: 20180712

Docket: IMM-4915-17

Citation: 2018 FC 725

Ottawa, Ontario, July 12, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

SHAHID AHMADZAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Shahid Ahmadzai, is a 29-year-old citizen of Afghanistan. He arrived in Canada with his cricket team on September 3, 2009, and made a refugee claim on September 22, 2009. His refugee claim was denied on January 11, 2013, and he has continued to live in Canada on an open work permit since then due to a Temporary Suspension of Removals to Afghanistan. The Applicant's first application for permanent resident status from within Canada on humanitarian and compassionate [H&C] grounds was rejected on September 22, 2015. The

Applicant again applied for such status on October 10, 2016. However, in a decision dated October 27, 2017, a Senior Immigration Officer refused the Applicant's second H&C application. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision. He asks the Court to set aside the Officer's decision and return the matter for redetermination by a different immigration officer.

I. Background

[2] The Applicant's family is originally from Kabul, Afghanistan, but he lived in Pakistan between 1998 and 2002. He is single and has no children. In September 2002, his father and older brother went to Logar Province, Afghanistan, where they owned land, and were killed by relatives associated with the Taliban. The Applicant remained in Kabul with his surviving family members and began playing cricket for Afghanistan in 2005. Between 2005 and 2009, the Applicant travelled with his cricket teams to the United Arab Emirates, Malaysia, Nepal, and Kuwait, before coming to Canada in September 2009 to play in qualifying rounds for the U-19 Cricket World Cup in New Zealand.

[3] Due to economic difficulties and threats to his family by his Taliban-affiliated relatives, the Applicant claimed refugee status in Canada in September 2009. His claim for refugee status was rejected on January 11, 2013, with credibility being the determinative factor. He has completed his secondary education and worked at various jobs in Canada in the fields of labour, retail, plumbing, and as an Uber driver. He has also volunteered as a cricket player and instructor in Toronto, where he organized a cricket league for young people. In August 2016, the Applicant

was selected as a team member for Canada's national cricket team. The Applicant states that if he is returned to Afghanistan, he would be targeted by the Taliban due to his association with Canada, and his removal from Canada would jeopardize his ability to support his family in Afghanistan and his career as a cricket player on Canada's national team.

II. The Officer's Decision

[4] The Officer refused the Applicant's second application for H&C relief on the grounds that there were insufficient H&C factors to grant permanent resident status. The Officer considered the Applicant's degree of establishment in Canada and country conditions in Afghanistan. The Officer acknowledged that conditions in Afghanistan were "less than favourable" but gave greater weight to the fact that the Applicant's immediate family members continued to live in Afghanistan and noted that no statements had been made that they had been negatively affected by the country conditions there. The Officer also acknowledged the Applicant's level of education, employment, and his position as a member of the Canadian national cricket team, as well as evidence of his friendships in Canada. The Officer accepted that while the Applicant had demonstrated "some integration into Canadian society," his establishment in Canada was not to such a degree that he could not return to Afghanistan and apply for a permanent resident visa in the normal manner. The Officer noted the Applicant's level of establishment in the context of Afghanistan's status as a country subject to a Temporary Suspension of Removals, but found there was insufficient evidence to suggest he was established to such a degree that he would be unable to apply for permanent residence from outside Canada. Given the Applicant's work and education experience, the Officer found there was insufficient evidence that he would not be able to find employment or start his own business in Afghanistan.

[5] Based on the Applicant's years in Afghanistan and his history as a cricket player, the Officer found it reasonable to believe that he would have developed and continued to have friends, acquaintances and social networks in Afghanistan. The Officer gave considerable weight to the fact that the Applicant has a strong familial network in Afghanistan, consisting of his mother and younger brother, and found insufficient evidence to indicate that he financially supports them or that they would be unable to assist him on return to Afghanistan. With respect to the Applicant's friends in Canada, the Officer found there was insufficient evidence to suggest these were characterized by a degree of interdependency or reliance, or that these friendships could not be maintained via other means such as telephone, letters, and social media outlets. The Officer noted that the Applicant had a history of travel to various countries to play cricket, demonstrating that he is resourceful and adaptable in the face of new locales, differing cultures, different languages, and life changes, including associated life situations such as securing employment and integrating.

[6] Although the Officer accepted that returning to Afghanistan may pose some difficulties and there would be a period of adjustment, the Officer stated that the Applicant would not be returning to an unfamiliar place, language or culture. The Officer concluded by stating:

> I have performed a global assessment on the H&C factors presented herein. I have considered the grounds the applicant has forwarded in conjunction with the submissions provided. I considered the personal circumstances of the applicant including his allegations of risk owing to the general country conditions in Afghanistan, his education, employment and the friendships he developed. I was also mindful that the applicant spent the majority of his life in Afghanistan, where he was born, educated, and where his mother and brother continue to reside. After reviewing the factors and evidence presented herein, I am not satisfied that the applicant has established that a positive exemption is warranted on H&C grounds.

III. Analysis

[7] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* involves the exercise of discretion and is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909). An officer's decision under subsection 25(1) is highly discretionary, since this provision "provides a mechanism to deal with exceptional circumstances," and the officer "must be accorded a considerable degree of deference" by the Court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4, [2016] FCJ No 1305; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15, [2002] 4 FC 358).

[8] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. So long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to

reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339.

A. *Was the Officer's decision reasonable?*

[9] The Applicant says the Officer unreasonably found he had demonstrated only "some" establishment in Canada when, in fact, he had arrived in Canada with a grade 10 education and no employment history, and now is a highly valued member of Canada's national cricket team and is described by his Canadian coach as one of the best cricket players in Canada. In the Applicant's view, the Officer failed to explain why his level of establishment is insufficient to warrant H&C relief. According to the Applicant, it was unreasonable for the Officer to find that applying for permanent residence from outside of Canada would not cause unusual or disproportionate hardship since Afghanistan is an active war zone where the Taliban actively seeks to kill anyone with ties to Western countries. The Applicant submits that H&C applicants need not adduce evidence of individual hardship where country conditions support a reasoned inference about the challenges a particular applicant would face on return.

[10] The Applicant further says the Officer failed to consider that he is now the sole provider for his mother and brother in Afghanistan, and that with the unemployment rate in Afghanistan being 40% it is unreasonable to expect that he would be able to continue to support them or rely on their assistance. In the Applicant's view, the Officer's conclusion that his cricket-related travel experience makes him able to adapt to new environments is speculative since this travel experience consisted only of flying to a country, playing cricket, and then returning to Afghanistan. According to the Applicant, the Officer unreasonably found that his friendships in

Canada were not characterized by interdependency and reliance in the face of evidence of his importance to his cricket team and students and to his friends, thus mischaracterizing relevant evidence.

[11] The Applicant impugns the Officer's finding that no statements had been made indicating that his mother and brother had been negatively affected by country conditions in Afghanistan, despite the fact that he had stated in his affidavit that his mother and brother are unemployed and rely upon him for support. The Applicant also challenges the Officer's characterization of conditions in Afghanistan as being "less than favourable" on the basis that this ignores the country condition evidence submitted to the Officer attesting to the extremely dangerous conditions in that country. In the Applicant's view, the Officer's finding that he has a "strong network of familial support" is unreasonable and ignores his personal circumstance, given that this network consists only of his mother and younger brother, both of whom are unemployed and dependent on him for support.

[12] The Respondent notes that H&C relief is a highly discretionary measure and that a decision may only be set aside if an applicant can show that the decision-maker erred in law, acted in bad faith or proceeded on an incorrect principle. The Respondent contends that the Applicant's arguments amount to a disagreement with the Officer's weighing of the evidence, and that the Officer reasonably considered all of the evidence and reached a decision which was within the range of reasonable outcomes.

[13] In my view, the Officer's decision in this case is unreasonable and must be set aside. The Officer unreasonably assessed the Applicant's level of establishment and, also, ignored or failed to reasonably address the fact that the Applicant was financially supporting his mother and brother.

[14] The Officer's assessment of the Applicant's level of establishment is problematic. Although the Officer found the Applicant had demonstrated "some integration into Canadian society," he or she failed to examine whether disruption of his establishment in Canada to return to Afghanistan to apply for permanent residence weighed in favour of granting an exemption under subsection 25(1) of the *IRPA*. In my view, the Officer unreasonably discounted the degree to which the Applicant had established himself in Canada and failed to provide any explanation as to why the establishment evidence was insufficient (see: *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at para 21, 414 FTR 268; also see *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258 at para 80, [2014] 3 FCR 639, and *Stuurman v Canada (Citizenship and Immigration)*, 2018 FC 194 at para 24, 288 ACWS (3d) 740).

[15] Moreover, in my view it was illogical and unintelligible for the Officer, on the one hand, to acknowledge that conditions in Afghanistan were "less than favourable" and that the country is currently subject to a Temporary Suspension of Removals; yet, on the other hand, determine that the Applicant could return to Afghanistan and apply for a permanent resident visa in the normal manner. The fact of the matter is that the Applicant has faced, and for the foreseeable future will face, a prolonged inability to return to Afghanistan because of the adverse country conditions there.

[16] The Officer's finding that there was insufficient evidence to support the Applicant's statement that he financially supports his family in Afghanistan is also problematic. The Officer does not explain why the Applicant's affidavit in this regard is insufficient. It is trite law that "When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness" (*Maldonado v Canada (Employment and Immigration)*, [1979] FCJ No 248 at para 5, [1980] 2 FC 302). The Officer provided no reason why the Applicant's affidavit evidence should not be accepted or was open to doubt. This finding is unintelligible and unreasonable in the absence of any explanation by the Officer as to why the Applicant's sworn statement about financially supporting his family was insufficient.

[17] In short, the Officer's decision in this case is unreasonable. The decision must be set aside and the matter returned to another officer for redetermination.

IV. Conclusion

[18] The Applicant's application for judicial review is allowed.

[19] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

JUDGMENT in IMM-4915-17

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the decision of the Senior Immigration Officer dated October 27, 2017, is set aside; the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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