Federal Court  Cour fédérale

Date: 20201102

Docket: IMM-4812-19

Citation: 2020 FC 1022

Ottawa, Ontario, November 2, 2020

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ZARIF NASIMI MIAKHIL

Applicant

and

GOVERNMENT OF CANADA
AND
THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Mr. Zarif Nasimi Miakhil, is a citizen of Afghanistan. He seeks judicial review, pursuant to section 72 of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision of a Visa Officer of the Embassy of Canada in Ankara, Turkey, dated June 3, 2019. The decision denied the Applicant's application for permanent residence as a member of

the Convention refugee abroad class and/or as a member of the Humanitarian-protected persons abroad designated class.

[2] This matter turns on whether the Officer erred in determining that the Applicant has a durable solution in Uzbekistan. For the reasons that follow, the application for judicial review is dismissed.

II. **Facts**

[3] Mr. Miakhil was born on May 3, 1978. Along with other members of his family, he fled to Uzbekistan in 1992 due to the turmoil then occurring in Afghanistan. He has resided there since and was previously recognized as a refugee by the United Nations High Commissioner for Refugees (UNHCR). His status with UNHCR expired on January 2, 2017.

[4] The Applicant is in possession of an Uzbekistan Foreign Residence Permit, which is renewable every five years. He has some post-secondary education. Since 2002, the Applicant has worked as a tourism and finance manager at a hotel partially owned by an uncle. The uncle resides primarily in the United States and has announced his intention to sell his share of the hotel. Members of the Applicant's extended family have obtained permanent residence in several western countries, including in Canada. One brother, with whom the Applicant resides, remains in Uzbekistan.

[5] In 2017, Mr. Miakhil applied for permanent residency in Canada as a refugee outside Canada on the basis that he faces persecution if forced to return to Afghanistan. Five members of his family in Canada sponsored his application.

[6] The Applicant was interviewed by the Officer on November 14, 2018. During the interview, the Applicant acknowledged that he had certain rights in Uzbekistan but stated that he faced other limitations and could lose his status at any time. The Officer subsequently contacted the UNHCR Regional Representation for Central Asia to obtain additional context on the situation of Afghan refugees in Uzbekistan.

[7] In an email dated November 26, 2018, a UNHCR employee stated that, as permanent residents in Uzbekistan, refugees enjoy a range of rights, except the right to vote, be elected or perform service in the military forces. The UNHCR employee noted that they have not received any reports of refoulement or threats of refoulement against refugees holding permanent residence permits. An alternative legal solution is considered available and the need for international protection is considered met for this category of refugees.

[8] In a follow-up email dated November 27, 2018, another UNHCR employee stated that the legal framework in Uzbekistan is not conducive for the permanent resident holders to gradually gain a wider range of rights leading to full citizenship and naturalization. On the same date, an employee of the United Nations Development Programme (“UNDP”) Uzbekistan stated in an email that the Uzbekistan permit held by the Applicant is a form of permanent residence. The UNDP employee further noted that the permit is presented to the border agencies of the host

state and other countries while travelling and allows the holder to enter Uzbekistan without a visa. This was contrary to what the Applicant had told the Officer during the interview.

III. **Decision Under Review**

[9] On December 10, 2018, the Officer, relying on the information provided by the UNHCR and UNDP employees, determined that the Applicant had a durable solution in Uzbekistan. The Officer sent a letter summarizing her assessment and provided the Applicant with a chance to provide additional information.

[10] The Applicant responded on February 22, 2019, with additional information. In particular, he compared his situation to that of the applicant in *Al-Anbagi v Canada*, 2016 FC 273 [*Al-Anbagi*].

[11] In her final assessment letter denying the application the Officer stated:

> You are able to avail yourself of protection in Uzbekistan because you have a **permanent residence permit** which provides you with a range of rights such as freedom of movement, the ability to work and the ability to enter Uzbekistan without a visa. For this reason, in your case, the need of international protection is considered met through local integration. Therefore, you have a durable solution in a country other than Canada…
>
> [Emphasis added]

[12] In her notes to file, the Officer refers to the Applicant holding a "renewable residence permit" and describes it as "similar to permanent resident status in Canada." This was based largely on the UNHCR Regional Representation for Central Asia's email dated November 26,

2018, and the UNDP email of the following day which had characterized the Applicant's renewable residence permit as a form of permanent residence status meeting the requirements for international protection.

[13] The Officer noted that the Applicant had been working at a family-run business since 2002 and acknowledged that the Applicant mentioned his uncle was in the process of selling the hotel, which would require him to seek other employment in a country where discrimination is not illegal. The Officer considered that insufficient evidence had been provided to support the Applicant's contention that he would lose his job and be unable to obtain another. She was satisfied that he was locally integrated in Uzbekistan, had a durable solution there and did not meet the requirements of paragraph 139(1)(d) of the *Immigration and Refugee Protection Regulations* [Regulations].

IV. **Relevant Legislation**

[14] The following legislative provisions from the *IRPA* are relevant to refugee determination:

Application for judicial review	**Demande d'autorisation**
72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.	**72 (1)** Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation.

Judicial review

74 Judicial review is subject to the following provisions:

[…]

(d) subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

Demande de contrôle judiciaire

74 Les règles suivantes s'appliquent à la demande de contrôle judiciaire :

[…]

d) sous réserve de l'article 87.01, le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is

Définition de réfugié

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence

unable or, by reason of that fear, unwilling to return to that country.	habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[15] The following legislative provisions from the Regulations are relevant to refugee determination:

General requirements	**Exigences générales**
139 (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that	**139 (1)** Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis
[…]	[…]
(d) the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely	**d)** aucune possibilité raisonnable de solution durable n'est, à son égard, réalisable dans un délai raisonnable dans un pays autre que le Canada, à savoir :
(i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or	**(i)** soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle,
(ii) resettlement or an offer of resettlement in another country;	**(ii)** soit la réinstallation ou une offre de réinstallation dans un autre pays;

[…]

Member of Convention refugees abroad class

145 A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.

Member of country of asylum class

147 A foreign national is a member of the country of asylum class if they have been determined by an officer to be in need of resettlement because

(a) they are outside all of their countries of nationality and habitual residence; and

(b) 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.

[…]

Qualité

145 Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

Catégorie de personnes de pays d'accueil

147 Appartient à la catégorie de personnes de pays d'accueil l'étranger considéré par un agent comme ayant besoin de se réinstaller en raison des circonstances suivantes :

a) il se trouve hors de tout pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

b) une guerre civile, un conflit armé ou une violation massive des droits de la personne dans chacun des pays en cause ont eu et continuent d'avoir des conséquences graves et personnelles pour lui.

V. **Analysis**

A. *Standard of Review*

[16] In *Barud v Canada (Citizenship and Immigration)*, 2013 FC 1152 [*Barud*], Justice O'Reilly held that a visa officer's determination of whether an applicant has a durable solution is not an international norm. The determination of whether a durable solution exists is a question of mixed fact and law subject to review against the reasonableness standard.

[17] As determined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions. While there are circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arise in the present case.

[18] The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable (*Vavilov* at para 83).

B. *Did the Officer reasonably conclude that the Applicant had a durable solution in Uzbekistan?*

[19] For a permanent resident visa to be issued to a foreign national needing refugee protection, they must fulfill conditions including those set out in paragraph 139(1)(d) of the Regulations. This provision requires that there is "no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely (i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or (ii) resettlement or an offer of resettlement in another country."

[20] The assessment of whether an applicant has a durable solution in another country is forward looking and the onus is on the visa applicant to establish that no such reasonable prospect exists: *Barud* at para 15; *Dusabimana v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1238 at para 54; *Al-Anbagi* at para 16.

[21] Uzbekistan is not a signatory to the 1951 United Nations Convention Relating to the Status of Refugees [Convention]. A core principle of the Convention is non-refoulement, which asserts that a refugee should not be returned to a country in which they would face serious threats to their life or freedom. The Applicant contends that, because Uzbekistan is not a signatory to the Convention, he cannot avail himself of legal protection and faces a risk of refoulement. He claims that his ability to remain in Uzbekistan rests upon the discretion of the government and could be removed at any time.

[22] The Applicant disputes the Respondent's contention that because he has been living in Uzbekistan for 27 years, he has a durable solution. He argues that he has marginal and limited rights, an illusory path to citizenship, is not entitled to healthcare or social services and had to pay higher fees to access education. His ability to work is severely constrained and he would have difficulty finding another job if his uncle's hotel is sold.

[23] The Respondent submits that the Applicant did not establish that he has no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada. The solution needs not to be permanent but must be durable. Here, the Respondent submits, the Officer's decision was reasonable based on the information before her.

[24] The Overseas Processing Manual 5 (OP5) sets out factors that an officer is to consider when determining whether a refugee has a durable solution based on their local integration into a third-party country. The fact that Uzbekistan is not a signatory to the Convention does not preclude a finding of long-term integration. The OP5 states, at page 18, that:

> Refugees are considered to be locally integrated in the country of refuge if they have rights similar to those of citizens such as: they can move around the country freely; they are allowed to earn a living; their children are allowed to attend school; there is no threat of refoulement, etc.

[25] These factors are non-binding guidelines and the analysis is to be flexible and largely dependent on the facts of each case. Perfection is not the standard. Applying the reasonableness standard, if the decision is reasonable on the facts as they were presented to the Officer, the decision should not be interfered with.

[26] During the interview, the Officer considered and inquired about several of the factors set out in the OP5. The Applicant acknowledged being able to travel within the country and to obtain employment in the private sector. But he claimed that he was unable to travel abroad and to return using his foreign resident registration card. That was contrary to information received from the UNDP employee. The Applicant also stated that he would face discrimination in finding work and could not work for the government.

[27] On the record as a whole, there is mixed evidence regarding the Applicant's risk of refoulement. According to a 2017 UNHCR report regarding Uzbekistan submitted to the Office of the High Commissioner for Human Rights' Compilation Report, it remains the only country in Central Asia that is not a signatory to the Convention.

> Furthermore, there is no national legislation, structure or mechanism in place to deal with asylum-seekers and refugees. Asylum-seekers and refugees in the country are therefore considered to be migrants, regulated by migration legislation.

[28] The UNHCR report notes that almost all of the Afghanistan refugees in Uzbekistan prior to May 2017 had been resettled in third countries or had found a way to regularize their situation in Uzbekistan. Some had succeeded in obtaining residence permits. However, the report notes, the legal framework is not conducive for them to obtain wider rights or access to citizenship. Those without legal status live in a precarious situation and are at constant risk of arrest, detention, deportation and refoulement.

[29] The UNHCR employee contacted following the Officer's interview with the Applicant noted that the agency had not received any reports of refoulement or threats of refoulement for

refugees holding resident status in Uzbekistan. Moreover, in the first of the messages received, the UNHCR employee indicated that for persons holding residence permits, an alternative legal solution is considered available and the need for international protection considered met.

[30] I agree with the Applicant that the Officer erred in describing the residence permit he holds as similar to Canadian permanent residence status. There are significant differences. Permanent residence in Canada is governed by legislation and a regulatory scheme whereas there is none in Uzbekistan. While there are residency requirements and the card must be renewed periodically, permanent residence status in Canada is not purely discretionary. A permanent resident of Canada has a path to obtain citizenship. While that appears to be at least theoretically possible in Uzbekistan, it is difficult to achieve. A permanent resident in Canada is entitled to government-funded health care and access to education at the same cost as a citizen. Neither are true in Uzbekistan.

[31] Nonetheless, despite this error, it was open to the Officer to reasonably conclude on the evidence before her that the Applicant was integrated within Uzbekistan and had a durable solution in that country. The Applicant had been resident in the country since 1992, he had received post-secondary education and had been employed since 2002. The evidence, notably that provided by the UNHCR and UNDP, did not support a conclusion that he was at risk of refoulement to Afghanistan.

[32] It was reasonable for the Officer to seek up to date information from the UN agencies rather than to rely solely on information from publicly available sources such as the 2017 UNHCR report.

[33] The facts of this case are distinguishable from those of *Al-Anbagi*, on which the Applicant relies. In *Al-Anbagi*, Justice LeBlanc found that the Officer had committed a reviewable error in ignoring or misapprehending facts and circumstances personal to the Applicants, which demonstrated that their settlement was temporary in nature. The applicants in *Al-Anbagi* were residents of Jordan, which also is not a signatory of the Convention. However, Mr. Al-Anbagi's residence permit was tied to the success or failure of his business, his daughter was not allowed to work and if caught working illegally she would have been imprisoned. Furthermore, there was a risk of refoulement.

VI. **Conclusion**

[34] Considering the reasons for the decision as a whole, as I must, and applying the reasonableness standard of review, I am unable to conclude that the decision was based on an erroneous finding made in a perverse or capricious manner and without regard to the evidence. It falls within the range of possible, acceptable outcomes and is defensible in respect of the facts and the law.

[35] The parties did not propose any serious question of general importance for certification under section 74(d) of the *IRPA* and I agree that none arises on the facts of this case.

JUDGMENT IN IMM-4812-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4812-19
STYLE OF CAUSE:	ZARIF MASIMI MIAKHIL V GOVERNMENT OF CANADA AND THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE OTTAWA AND WINNIPEG
DATE OF HEARING:	OCTOBER 13, 2020
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	NOVEMBER 2, 2020

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