Date: 20081125

Docket: IMM-1871-08

Citation: 2008 FC 1310

Ottawa, Ontario, November 25, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MUHAMMAD SADIQ QARIZADA
HAMIRA HAMIRA
ALHAM NAVEED QARIZADA
AHMAD OMID QARIZADA
REDWANA QARIZADA
SEBGHATULLAH QARIZADA
NASEER AHMAD QARIZADA
SHAHIR AHMAD QARIZADA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, Mr. Muhammad Sadiq Qarizada, his wife and six children are citizens of Afghanistan and currently reside in Peshawar, Pakistan. They seek judicial review of a decision made on February 14, 2008 by a visa officer at the Canadian High Commission in Islamabad in which their application for permanent residence in Canada as Convention refugees or as members of the country of asylum class was denied.

[2] The applicants' claim is based on Mr. Qarizada's fear of persecution by a militia Commander, Ahmed Khan, in their home city of Aibak in Samangan province, Afghanistan. In 1992, it is said, Commander Khan tried to force Mr. Qarizada's sister, Razia, to marry him. Mr. Qarizada opposed the marriage and, as a result, was jailed for two months. While in detention he was tortured. Community elders intervened on his behalf to obtain his release. The family, including Razia, then made their way across the border to Peshawar. In 2000, the eldest son was kidnapped in Peshawar and held for three months which Mr. Qarizada also attributes to Khan's enmity.

[3] The applicants' record includes a document with the heading "Summary of Circumstances, in part with reference to his personal notes" which contains a narrative of Mr. Qarizada's claim for protection. In addition to describing the attempted forced marriage, jailing and torture referred to above, the narrative links the family's departure to the general upheaval which occurred as a result of the regime change in 1992. Mr. Qarizada may have been on the wrong side when the Afghan government was overturned. The narrative refers to "my history with General Dostum". Dostum was a militia Commander whose switch in allegiance contributed to the downfall of the Najibullah regime in 1992.

[4] In 2004, the family returned to Afghanistan. Mr. Qarizada's narrative says that he was hoping that things might have changed enough for them to resume their normal life. They had land and a shop in Aibak which they sought to reclaim, unsuccessfully. The property had been given to a family who fought for Dostum. Ahmed Khan had become the head of the military garrisons in Samangan and was antagonistic to Mr. Qarizada's return.

[5] The record is unclear as to how long the family remained in Afghanistan during this visit. It may have been just a few months or as long as a year before they returned to Peshawar. The sister, Razia, appears to have then married someone else. In June, 2006 the applicants applied for permanent residence in Canada with the support of a Vancouver-based church group.

[6] Mr. and Mrs. Qarizada were interviewed by a visa officer on February 12, 2008 at the High Commission in Islamabad. The interview was conducted in the Dari language with the aid of an interpreter. The record in the officer's Computer Assisted Immigration Processing System ("CAIPS") notes, contains a number of inconsistencies but recounts the story of Commander Khan's enmity as the basis for the application. It was noted that Razia was living in Peshawar with her new husband but that Mr. Qarizada's mother and other sister remained living freely in Samangan province. Mrs. Qarizada's mother and two brothers live in Kabul. When asked why they did not want to relocate to Kabul, Mr. Qarizada stated that the Commander would follow them there. His wife said they sought a better education for their children in Canada.

Decision under Review

[7] The application was refused in a decision letter dated February 14, 2008. The officer's CAIPS notes also form part of the certified record. The respondent filed the officer's affidavit made on September 19, 2008. It explains the officer's background and experience and describes the interview with the applicants' in Islamabad. While it does not form part of her reasons for decision, the affidavit provides additional information such as the fact that, while conditions were difficult,

many millions of refugees had returned to Afghanistan including to Kabul where the applicants had close family members.

[8] The operative portions of the decision letter read as follows:

> I have now completed the assessment of your application for a permanent resident visa in Canada as a member of the Country of Asylum Class.
> …
> I have carefully assessed all information in your application and I am not satisfied that you have been and continues [sic] to be personally and seriously affected by armed conflict, civil war or massive violation of human rights in Afghanistan.
>
> Your reasons for not wishing to return to live in Afghanistan appear to be primarily related to personal enmity with a Commander, who is alleged to have made an unfavorable marriage proposal to your sister and who is alleged to be occupying your shop and home. I did not find it credible or reasonable that your fears [sic] this Commander to the extent has made a refugee claim premised on this fear whereas your sister, object of Commander's proposal, appears to be living freely in Pakistan with a spouse who married [sic] despite the Commander's proposal and while your mother and other sister live freely in vicinity [sic] of Commander in their home province in Afghanistan. While I sympathize with your sincere wish to provide your children a quality education and to reunite with your family members in Canada, I am unable to conclude that you meet the definition of Country of Asylum Class.
>
> Given the internationally supported voluntary repatriation movement, a lack of specific circumstances indicating a condition of continuing to be seriously and personally affected, and I am not satisfied that you meet the definition of the Country of Asylum Class.

Regulatory Framework

[9] The visa officer's refusal letter refers to sections 139 and 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[10] Pursuant to subsection 139(1) of the Regulations, a permanent resident visa shall be issued to a foreign national in need of protection if it is established, among other things, that the foreign national is a member of a class under Part 8, Division 1 of the Regulations and there is no reasonable prospect, within a reasonable period, of a durable solution for the foreign national in a country other than Canada. The "durable solutions" contemplated by paragraph 139(1)(d) of the Regulations are (i) voluntary repatriation or resettlement in their country of nationality, or (ii) resettlement in another country.

[11] Section 147 of the Regulations provides that a foreign national is a member of the country of asylum class if they are 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.

Issues

[12] As a preliminary matter, the respondent objects to the inclusion within the applicants' record of several documents that were not before the visa officer. These documents pertain to conditions in northern Afghanistan following the collapse of the Taliban government in late 2001 and were included, counsel advised, to confirm the existence of Commander Khan and his role as head of the Samangan military council in the Afghan interim administration.

[13] It is argued that this information is admissible under the procedural fairness exception to the general principle that material which was not before the decision-maker should not be considered on judicial review: *Hutchinson v. Canada (Minister of the Environment)*, 2003 FCA 133 at paragraph 44. The breach of procedural fairness alleged is that the visa officer failed to conduct an assessment of the conditions in northern Afghanistan at the relevant time. The new material in the record is the type of country condition evidence the officer should have considered.

[14] The remaining allegations of error are that the officer based her conclusion on irrelevant considerations, that her credibility findings were not reasonable and that she ignored evidence that was before her. The applicants also submit that the officer's reasons for decision are inadequate and thus constitute a further breach of procedural fairness.

Standard of Review

[15] Where the applicable standard of review can be ascertained from existing jurisprudence, there is no need to engage in a standard of review analysis: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9. Past jurisprudence has held that whether an applicant comes within the Convention refugees abroad class or country of asylum class is a question of mixed fact and law and is reviewable on a standard of reasonableness: *Kamara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 785, [2008] F.C.J. No. 986 (QL); *Nasir v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 504, [2008] F.C.J. No. 634 (QL); *Krishnapillai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 244, [2005] F.C.J. No. 302 (QL).

[16] Thus, the analysis of the officer’s decision will be concerned with the “existence of justification, transparency and intelligibility within the decision-making process” and also with “whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law” (*Dunsmuir*, above, at paragraph 47).

[17] The Court ought not to intervene with the officer’s assessment of the facts unless it is shown that the decision is based on an erroneous finding made in a perverse or capricious manner and without regard to the evidence: section 18.1(4)(d), *Federal Courts Act*, R.S.C. 1985. Prior to *Dunsmuir*, it had been held that findings of fact in this administrative context are clearly within the purview of the officer's responsibilities and were to be reviewed on a standard of patent unreasonableness: *Khwaja v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 522, [2006] F.C.J. No. 703 (QL) at paragraph 23.

[18] Procedural fairness is reviewable on the correctness standard and a breach will normally, but not always, vitiate a decision: *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co.*, 2006 FCA 398, [2006] F.C.J. No. 1837 (QL) at paragraph 13.

Submissions

[19] The officer’s CAIPS notes and decision letter indicate that she did not consider it plausible that Mr. Qarizada feared the Commander to the extent that he would make a claim for protection when his sister Razia, the object of the Commander’s attentions, remained just across the border in

Pakistan and his mother and other sister continued to reside in Afghanistan. The applicants submit that these facts are of no relevance to the central issue of their claim, which is whether Mr. Qarizada would face a serious possibility of persecution if he returns to Afghanistan. The officer erred in basing her decision, in part, on the fact that other family members have not been persecuted.

[20] The applicants submit further that the officer drew inferences based on mere conjecture and speculation without regard to the social-political, cultural and personal circumstances of the applicants and without a factual basis in the evidence.

[21] In addition, the applicants submit that while the officer made reference in her reasons to Mr. Qarizada’s arrest and detention in 1992, she failed to address the fact that he had been tortured while in detention. By doing so, the officer failed to consider the substance of their claim and the totality of the evidence. If the officer believed that the reasons for which Mr. Qarizada sought protection had ceased to exist, then she was obliged to consider whether his past persecution constituted a "compelling reason" exception pursuant to section 108 of the IRPA.

[22] Further, it is argued, the officer failed to consider that while they did not suffer physical harm upon their brief return to Afghanistan, the cumulative acts of torture, seizure of the shop and land and resulting impact on Mr. Qarizada’s ability to earn a living, were persecutory.

[23] Lastly, the applicants submit, the officer’s reasons are inadequate to provide a transparent explanation of how she arrived at her decision.

[24] The respondent submits that on the basis of the facts that were before the officer, her findings and conclusions were reasonable. These facts included the following:

a. it had been 16 years since the Commander had Mr. Qarizada arrested, detained and tortured in an effort to force his sister Razia to marry him;
b. the Commander was persuaded to release Mr. Qarizada;
c. there was no actual evidence, just speculation, that Mr. Qarizada's son's kidnapping in Pakistan was related to the Commander;
d. Mr. Qarizada and his family returned to their town in Afghanistan after the alleged kidnapping;
e. Razia is now married;
f. Mr. Qarizada's mother and other sister live in Afghanistan and have not had any problem with the Commander;
g. other than the seizure of his land and shop during his 12 year absence and the refusal to relinquish them, Mr. Qarizada and his family did not suffer any harm from the Commander during their stay in Afghanistan in 2004.

[25] The evidence concerning the other family members is material in the respondent's submission. It was reasonable for the officer to infer from that evidence that if the Commander wanted to use physical harm against Mr. Qarizada so that he could forcibly marry Razia, that harm could extend to Mr. Qarizada's entire family.

[26] With respect to the assertion that the officer failed to consider documentary evidence regarding country conditions in Afghanistan, the respondent submits that there is no evidence that

any such information was put before the officer for consideration and that there was no legal obligation on the officer to conduct her own research. The Court should presume that the officer considered all of the evidence. She was not required to refer to every piece of evidence in her reasons. The reasons were clear and sufficient to explain her decision. The possibility of cumulative persecution did not arise on the facts of this case. The compelling reasons exception does not apply in the present case, the respondent submits, as the officer did not believe that a valid claim existed from the outset. There was no evidence that the loss of his land and shop would affect the principal applicant's ability to earn a livelihood.

Analysis

[27] As a preliminary observation I would note that much of the case law cited in support of their arguments by the applicants is of little assistance to the Court as it stems from proceedings of the Refugee Protection Division in a quasi-judicial context. Here, the officer was making an administrative decision based upon the material that was put before her by the applicants and the results of her interview with them. The officer had the benefit of seven years of experience in Asia and while on a temporary assignment to process applications in Islamabad, it is clear from her notes that she directed her mind to the pertinent questions she needed to address under the regulatory framework.

[28] The application before the officer was not based upon the general conditions in Afghanistan after several decades of insurrection and civil war but upon Commander Khan's purported enmity towards the principal male applicant stemming from his refusal to allow the Commander to marry

his sister. The officer was not obliged to search out and to reference country condition evidence to address issues that were not raised and were not grounded in the evidence: *Kamara v. Canada (Minister of Citizenship and Immigration)* 2008 FC 785 at paragraph 25. This is not a case where the applicants were claiming that conditions in Afghanistan were such that they could find no durable solution in any region of the country if they were to repatriate.

[29] The new material in the applicants' record, which the applicants argue is of the type the officer should have considered, consists of excerpts of articles dealing with conditions in the northern provinces following the defeat of the Taliban. The focus of the material is on the composition of the military forces, reconstruction efforts and persecution of the Pashtun minority in the region. The Taliban largely drew their support from the Pashtuns. The majority is of Uzbek or Tajik ethnicity. The applicants' ethnicity is Tajik. That Commander Khan exists and was in charge of militia forces in the province in 2004 is not in dispute. The remainder of the information is not relevant to the applicants' claim.

[30] I agree with the respondent that there was no denial of procedural fairness by the officer in this matter. First, there is no evidence that she failed to consider documentary evidence about conditions in the region at the relevant times. In any event, such documentary evidence, including country condition reports, that the applicants wished the officer to consider should have been presented as part of their application. As for the adequacy of her reasons, the decision letter and the CAIPS notes form a complete record of how she arrived at her decision and are sufficiently clear.

[31] This is not a case, such as *Puventhirarasa v. Canada (Minister of Citizenship and Immigration)* 2004 FC 947, cited by the applicants, where the officer failed to consider the current risk to the applicants if they should return to their country of origin, regardless of their credibility. In this instance, the officer considered that they had reavailed themselves of the protection of their country in 2004 and had not suffered harm. The fact that they were unable to recover property they had abandoned twelve years earlier when they fled is not, in itself, evidence of continuing persecution.

[32] There is no specific reference in the officer's notes or decision letter to the torture which the application states occurred in 1992. The absence of such references is not sufficient to conclude that the officer ignored the evidence in arriving at her decision. Her notes indicate that she inquired about how Mr. Qarizada secured his release. The failure to refer to this aspect of the claim is not fatal to the decision. It is clear from her notes and reasons, as a whole, that she did not believe that the claim was valid.

[33] The officer's findings as to credibility also undermine the applicants' argument that the compelling reasons exception applies. In order to rely upon that exception, the officer must first have found that the applicant had a valid claim in the past and that the reasons underlying it had ceased to exist: *Martinez v. Canada (Minister of Citizenship and Immigration)* 2006 FC 343. Here, the officer did not find the claim valid as she did not believe that Mr. Qarizada had a subjective fear of persecution.

[34] While I agree with the applicants that a visa officer should not base a decision solely on the lack of persecution of other family members, it was open to the officer in this case to refer to the immediate family's situation in support of her finding that the applicant's account was not credible. A decision-maker is entitled to use common sense in assessing the credibility of a claimant's allegations: *Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (C.A.). In my view, that is what the officer did in this instance.

[35] The officer found it implausible that the entire family, including the object of the Commander's attentions, Razia, could have returned to Aibak for some considerable time and that the mother and other sister could have remained there without harm if Mr. Qarizada's subjective fear was real. On the evidence that was a reasonable finding and supported her conclusion about the applicants' credibility.

[36] In conclusion, I am satisfied that the officer directed her mind to both the past evidence of persecution and to the current situation in the country. The decision was not 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. Accordingly, the application is dismissed. No questions were proposed for certification.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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