Date: 20081215

Docket: IMM-2368-08

Citation: 2008 FC 1373

Ottawa, Ontario, December 15, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

HUSSEIN JALALUD UMLANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of an immigration officer (Officer), dated March 20, 2008 (Decision) refusing the Applicant's application for authorization to return to Canada under section 52(1) of the Act.

BACKGROUND

[2] The Applicant is a citizen of Pakistan and a permanent resident of the United States. He arrived in Canada in the spring of 2000 and made an application upon his arrival to be deemed a Convention refugee.

[3] The Applicant's wife, who is an American Citizen, applied to immigrate to Canada while the Applicant was waiting for his refugee claim to be processed. The Applicant was included on his wife's immigration application.

[4] Citizenship and Immigration Canada (CIC) wanted to interview the Applicant in the United States for his wife's application for permanent residence. He was unable to attend the interview and her application for permanent residence was eventually withdrawn.

[5] The hearing for the Applicant's refugee claim was due to take place on February 4, 2002 in Toronto. However, the panel member did not arrive and the hearing was re-scheduled.

[6] Prior to the Applicant's re-scheduled hearing, the Applicant departed Canada and entered the United States legally on parole status on June 21, 2002. He had agreed to assist authorities in the United States with a criminal interrogation of his former employer.

[7] The Applicant withdrew his refugee claim and advised the Immigration and Refugee Board (IRB) about his departure from Canada. He did not, however, confirm his departure by checking out with CIC officials at the airport when he was leaving Canada. This meant that a departure order came into effect when he withdrew his claim, which eventually turned into a deportation order.

[8] CIC did not receive formal notification of the Applicant's departure, but was notified by the IRB that the Applicant had withdrawn his refugee claim.

[9] In October 2002, the Applicant was called in for a meeting with CIC. He informed CIC by telephone that he had left Canada. CIC advised him to attend at a Canadian Consulate to show evidence that he had left Canada. The Applicant attended the Canadian Consulate in New York in October 2002 and provided the requested information. He does not recall the name of the officer with whom he spoke. The Canadian Consulate advised him that he would require authorization to return to Canada.

[10] The Applicant applied for authorization to return to Canada through his solicitors on October 12, 2007. The application was made at the Canadian Consulate General in New York.

[11] The Applicant received a request for additional information by a letter dated January 14, 2008 at his home address from the Canadian Consulate General in New York. The Applicant sent a copy of this letter to his solicitors. That letter requested specific information pertaining to the Applicant's establishment in the United States.

[12] The Applicant's solicitors responded by letter to the Canadian Consulate General in New York and enclosed the requested documents, which included proof of employment, proof of funds, proof of marital status and proof of permanent resident status in the United States.

[13] The CAIPS notes under the access to information request indicated that the officer who first reviewed the file was satisfied that the Applicant had strong ties to the United States. The Applicant's application for an authorization to return to Canada was refused by a letter dated March 20, 2008.

DECISION UNDER REVIEW

[14] The Officer denied the Applicant authorization to return to Canada because the Applicant was a failed refugee claimant and had been issued a departure order for which departure was never confirmed.

[15] The Officer found that the departure order was fairly recent and weighed the Applicant's reasons for wishing to enter Canada against the serious impact of the Applicant's removal order and non-compliance with the Act.

[16] The Officer concluded there was no reason to issue an authorization to return to Canada and found the Applicant inadmissible under section 52 of the Act.

ISSUES

[17] The Applicant has raised the following issues:

1) Did the Officer misinterpret the law and breach the duty of procedural fairness in refusing the Applicant's application without considering the totality of the circumstances and did he reasonably exercise his discretion by refusing the Applicant's application for an authorization to return to Canada?

STATUTORY PROVISIONS

[18] The following provisions of the Act are applicable in these proceedings:

In force — claimants	**Cas du demandeur d'asile**
49(2) Despite subsection (1), a removal order made with respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates:	**49(2)** Toutefois, celle visant le demandeur d'asile est conditionnel et prend effet :
(*a*) the day the claim is determined to be ineligible only under paragraph 101(1)(*e*);	*a*) sur constat d'irrecevabilité au seul titre de l'alinéa 101(1)*e*);
(*b*) in a case other than that set out in paragraph (*a*), seven days after the claim is determined to be ineligible;	*b*) sept jours après le constat, dans les autres cas d'irrecevabilité prévus au paragraphe 101(1);
(*c*) 15 days after notification that the claim is rejected by the Refugee Protection Division, if no appeal is made, or by the Refugee Appeal Division, if an appeal is made;	*c*) quinze jours après la notification du rejet de sa demande par la Section de la protection des réfugiés ou, en cas d'appel, par la Section d'appel des réfugiés;
(*d*) 15 days after notification that the claim is declared	*d*) quinze jours après la notification de la décision

withdrawn or abandoned; and	prononçant le désistement ou le retrait de sa demande;
(*e*) 15 days after proceedings are terminated as a result of notice under paragraph 104(1)(*c*) or (*d*).	*e*) quinze jours après le classement de l'affaire au titre de l'avis visé aux alinéas 104(1)*c*) ou *d*).
No return without prescribed authorization	**Interdiction de retour**
52. (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.	**52.** (1) L'exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l'agent ou dans les autres cas prévus par règlement.

[19] The following provisions of the *Immigration and Refugee Protection Regulations*, (SOR/2002-227) (Regulations) are applicable in these proceedings:

Application of par. 42(*b*) of the Act	**Application de l'alinéa 42*b*) de la Loi**
226(2) For the purposes of subsection 52(1) of the Act, the making of a deportation order against a foreign national on the basis of inadmissibility under paragraph 42(*b*) of the Act is prescribed as a circumstance that relieves the foreign national from having to obtain an authorization in order to return to Canada.	**226(2)** Pour l'application du paragraphe 52(1) de la Loi, le cas de l'étranger visé par une mesure d'expulsion prise du fait de son interdiction de territoire au titre de l'alinéa 42*b*) de la Loi est un cas prévu par règlement qui dispense celui-ci de l'obligation d'obtenir une autorisation pour revenir au Canada.

STANDARD OF REVIEW

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[21] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[22] The Court in *Sahakyan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1542 (*Sahakyan*) held that on judicial review of an application under section 52 of the Act, the standard of review is reasonableness *simpliciter*.

[23] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issue of whether the Officer properly exercised his discretion to be reasonableness. When reviewing a decision on the

standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47). Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[24] The Applicant has also raised legal error and procedural fairness issues to which the standard of review is correctness: see *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 and *Dunsmuir* at paragraph 60.

ARGUMENTS

The Applicant

Statutory Requirement of an Authorization to Return to Canada

[25] The Applicant submits that under subsection 52(1) of the Act, if a removal order has been enforced, then a foreign national shall not return to Canada unless authorized by an officer or in other prescribed circumstances. He goes on to point out that, under paragraph 49(2)(*d*), his departure order would have been issued under the Act 15 days after he withdrew his refugee claim. The departure order would become a deportation order thirty days after the departure order had become enforceable under subsection 226(2) of the Regulations.

[26] The Applicant submits that the IRB was advised in a timely way that he had withdrawn his refugee claim and that he had departed Canada. The Applicant was told that the IRB would advise CIC shortly afterwards.

[27] The Applicant cites and relies upon *Sahakyan* at paragraph 21, where the Court considered a failed refugee claimant who had left Canada voluntarily. Due to timing issues, the applicant in that case was also subject to a deportation order. The Court held that the applicant in *Sahakyan* had fallen into "bad company" with people who were inadmissible on various grounds, including national security, violations of human or international rights or serious criminality.

[28] The Applicant submits that he has also fallen into "bad company," even though he is not a security risk, has no criminal record and is not accused of any violations of human or international rights. The Applicant is not even a failed refugee claimant, as he withdrew his application and requested that his file be closed.

[29] The Applicant submits that the Officer did not take into consideration some of the relevant facts in his application, especially that the Applicant mistakenly did not check out with CIC officials at the airport because his counsel had advised the IRB, and the IRB was to advise CIC of his departure. The Applicant also advised CIC shortly after his departure.

[30] The Applicant again cites *Sahakyan* at paragraphs 17, 23 and 24 for the proposition that if an officer focuses on matters that are irrelevant, it is a misinterpretation of the Act. In *Sahakyan,* the Court held that since the officer in that case had focused on the applicant's immigration history, there was a misinterpretation of Part 2 of the Act, as an applicant has the right to make a refugee claim. The Court also held that the officer misinterpreted the objectives set out in section 3 of the Act.

[31] The Applicant cites subsection 3(2) of the Act, which states that one of the objectives of the Act is a recognition of the right to make refugee claims. In addition, subsection 3(1)(*g*) states that the Act is intended to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities. The Applicant submits that the Officer misconstrued these sections of the Act and misinterpreted the law.

Failure to Exercise Discretion Reasonably and Denial of Procedural Fairness

[32] The Applicant goes on to argue that, even if the Officer had not misinterpreted the law, the Officer did not exercise his discretion reasonably. The Applicant again relies on *Sahakyan* to demonstrate that an officer may be seen to exercise his/her discretion unreasonably if the officer overemphasizes the fact that a refugee claimant had a departure order that turned into a deportation order.

[33] The Applicant submits that he was penalized for not being sufficiently conversant with, or attentive to, the procedures involved in verifying his departure from Canada. He says it was unreasonable for the Officer to find that, by issuing the Applicant an authorization to return to Canada, the integrity or objectives of Canada's immigration law would be undermined, or that such authorization would detract from the "serious import of a removal order."

[34] The Applicant cites and relies upon *Akbari v. Canada (The Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1773 at paragraph 14 for the proposition that if an immigration officer does not consider all of the factual circumstances presented by an applicant who has applied for an authorization to return to Canada, then the officer has failed to consider the totality of the evidence, which is a denial of procedural fairness.

[35] The Applicant submits that the Officer's unwillingness to consider all of the factual circumstances relating to his application for an authorization to return to Canada constitutes a denial of procedural fairness.

[36] The Applicant points out that the Respondent relies on the mistaken assumption that the Applicant was a failed refugee claimant and that the removal order against the Applicant was recent. There is no evidence to suggest that either of these assumptions is true. The Applicant withdrew his refugee claim and the removal order against him was over 6 years old. The Applicant submits that, even in the context of Canadian immigration, six years cannot be characterized as "fairly recent."

The Applicant also points out that those convicted of various crimes can apply for rehabilitation after five years in order to overcome their inadmissibility to Canada.

[37] The Applicant states that one of the reasons for the Officer's refusal of the Applicant's application was that a departure order came into effect and turned into a deportation order. He submits that the Officer ought to have assessed and weighed all of the evidence in a reasonable way. The brief written reasons of the Officer include significant inaccuracies, which cast doubt on the reasonableness of his Decision.

[38] The Applicant disagrees with the Respondent's reliance on *Chazaro v. Canada (Minister of Citizenship and Immigration)* 2006 FC 966 (*Chazaro*) for the proposition that a brief reference by an officer that he has carefully reviewed an application is sufficient. The Applicant distinguishes *Chazaro* on its facts, since the applicant in that case was a failed refugee claimant who had been deported from Canada. He had been advised of the necessity of obtaining authorization if he wished to return to Canada. The applicant in *Chazaro* ignored that advice and tried to enter Canada without applying for prior authorization to return. The Court noted that the applicant had provided contradictory statements about the advice he received about applying for an authorization to return to Canada.

[39] The Applicant submits that the facts of *Chazaro* bear little similarity to the present case because the Applicant withdrew his refugee claim, made efforts to advise the Respondent of his withdrawal in a timely way, and made every effort to ensure that he complied with the Act.

[40] The Applicant also takes issue with the Respondent's reliance on *Akbari v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1421 (*Akbari*). The Court in *Akbari* held that it should be presumed that an officer has carefully reviewed an application. The Applicant notes that the Court in *Akbari* allowed the application for judicial review and noted that the officer in that case had focused on the applicant's immigration history and "regrettably" there was no indication that consideration was given to any of the factual circumstances presented by, and of concern to the applicant, including the fact that the applicant in *Akbari* had left Canada voluntarily and was not inadmissible for reasons of criminality.

[41] The Applicant also disagrees with the Respondent's reliance on *Singh v. Canada (Minister of Employment and Immigration)* (1986), 6 F.T.R. 15 (*Singh*) for the position that there is no duty upon an officer who considers an application for authorization to return to Canada to give reasons. The present case is distinguishable because the applicant in *Singh* had pretended to be a *bona fide* immigrant, had worked in Canada illegally under a false name, had failed to appear for an inquiry as required under the Act, and had lied to CIC about who he was. Therefore, the Court held that reasons could be inferred.

[42] In the present case, the Applicant submits that the reasons for rejecting his application are not easily inferred and that the brief reasons offered by the Officer do not serve to clarify matters. Given the mistaken assumptions of the Officer, the reasons actually cast doubt on whether the Officer considered the evidence.

[43] The Applicant disagrees with the Respondent's submission that *Sahakyan* is distinguishable and that the Officer did not limit the submissions of the Applicant. The Applicant submits that the Respondent has not addressed the main points in *Sahakyan*: specifically at paragraph 23 where the Court states that one must look at the context of a deportation order.

The Respondent

[44] The Respondent submits that decision-makers are presumed to have considered all of the information before them and it is sufficient for them to state that there has been a careful review of an application: *Chazaro.* Although the Officer in this case did not refer to the Applicant's proffered explanations, the Respondent submits that this is not fatal to the Decision, as formal reasons are not required. The Officer was simply not satisfied that there was a reason to issue an authorization to return.

[45] The Respondent cites *Singh* for the proposition that when a person is deported, no reasons are required by the Minister for his decision to grant or not to grant consent to return:

> [W]hen the Government of Canada is required to resort to deportation in any instance, it should have an absolute discretion to say yes or no to a request for a Minister's consent. Certainly a variety of reasons may be advanced by the applicant why he should be permitted admission to Canada after a deportation order but, in the final analysis, this decision must be at the discretion of the Minister without the necessity for giving reasons. What duty or responsibility should be imposed on a Minister of Immigration in this situation? In my view, only a duty to fairly consider the reasons advanced, to acknowledge that they were read and considered, and then to decide.

[46] The Respondent submits that the Officer did not make the same error that was made in *Sahakyan*. The Officer did not limit the submissions made by the Applicant on relevant considerations, i.e. an explanation of past non-compliance with the Act.

[47] The Respondent points out that the Applicant understood that he needed to provide an explanation of his past non-compliance and why he was subject to a deportation order. The Applicant was also asked to provide his reasons for wishing to return to Canada; his only answer was for "tourism."

[48] The Respondent submits that the Officer made no error by not referring to each and every individual factor raised by the Applicant. A decision under section 52(1) of the Act is highly discretionary in nature. The Officer carefully reviewed the application and it was reasonable for the Officer not to be satisfied that an authorization to return to Canada was warranted, given the fact that the Applicant's removal was only relatively recent.

[49] The Respondent submits that the Applicant's reason for returning to Canada for "tourism" is not compelling, particularly when compared with the applicant's reasons in *Sahakyan*, who wanted to take up permanent residence in Canada.

[50] The Respondent goes on to point out that the Officer did not make a material error of fact by stating that the Applicant was a "failed claimant" instead of someone who had withdrawn his or her refugee claim. The Respondent says that the Applicant's conduct in making a claim and then

withdrawing it, followed by a failure to comply with the legal obligation to confirm his departure, rendered the Applicant subject to a deportation order.

[51] The Respondent submits that the Officer did not err in exercising his discretion in this case, and that the Applicant is simply asking this Court to re-weigh the evidence that was before the Officer and come to a more favourable decision. This is not the Court's role with respect to discretionary decisions under section 52(1) of the Act.

[52] The Respondent says that the Applicant faults the Officer for not considering all of the factual circumstances presented by the Applicant. However, the Applicant ignores the weakness of his rationale for requesting authorization.

[53] The Respondent submits that, given the strong message that section 52 of the Act is meant to send and the seriousness of a deportation order, it was reasonable for the Officer to not find an authorization to return to Canada warranted in this case.

[54] The Respondent cites the lack of a compelling or exceptional reason from the Applicant to return to Canada as the key distinguishing factor in this case. The Respondent relies upon *Sahakyan*, where "more compelling reasons" for a return to Canada were cited, such as family ties, job qualifications, economic contribution, temporary attendance at an event, a *bona fide* marriage, the funeral of a family member and the acceptance for permanent residence under a provincial nominee

program. The Respondent states that the tourism basis of the Applicant's application undermines the serious consequences associated with a deportation order.

[55] The Respondent points out that although the Applicant's violation of Canada's immigration laws are not the most serious imaginable, it cannot be ignored that he failed to obtain a certificate of departure prior to leaving Canada. His withdrawal of his refugee claim did not relieve him of this responsibility.

[56] The Respondent submits that the Decision was reasonable and within the range of acceptable outcomes. The Officer's material error of fact that the Applicant was a "failed claimant" rather than someone who had "withdrawn" his refugee claim is not a reviewable error. The CAIPS notes show that the Officer was aware of the relevant factors on this point, which relate to the Applicant having made a claim in the first place and his becoming subject to the conditional departure order.

[57] The Respondent concludes by stating that the Applicant has failed to establish a reviewable error in the Officer's exercise of his discretion. The Applicant, in the Respondent's view, is simply asking this Court to re-weigh the evidence that was before the Officer in order to come to a more favourable conclusion. This is not the Court's role. This Decision was reasonable, especially given the broad grant of direction accorded to officers in respect to the issuance of authorizations to return to Canada.

[58] The central aspect of the immigration scheme is the principle that non-citizens do not have an unqualified right to enter or remain in Canada. The Respondent points out that the Applicant is a foreign national and this Decision does not deprive him of any legal right. It simply prevents him from visiting Canada for the purpose of "tourism."

[59] Since the Decision was factually driven and discretionary, the Respondent submits that the Applicant has not demonstrated that it was unreasonable.

ANALYSIS

[60] I agree with the Respondent that, given the highly discretionary and fact-driven nature of ARC decisions, the Court should extend considerable deference in reviewing any such decision against the reasonableness standard. As the case law makes clear, little in the way of reasons or justification is required of a decision maker in this context. See *Akbari* at paragraph 11; *Chazaro* at paragraph 21; and *Singh*.

[61] On the other hand, such decisions cannot be arbitrary and, where reasons are given, those reasons need to make some sense and must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[62] In the present case the Officer provided reasons. He makes it clear that he refused the Applicant's ARC request because:

1. The Applicant is a failed refugee claimant;
2. A departure order was issued against the Applicant that was never confirmed;
3. The stated reason for wishing to enter Canada (tourism) did not outweigh the serious import of a removal order and the Applicant's non-compliance with the *Immigration and Refugee Protection Act*.

[63] The removal order against the Applicant took effect approximately 6 years before the Decision. There is no explanation as to why the Officer regards a 6-year gap as being of any significance or relevance on the facts of this case.

[64] Also, the Applicant is not a failed refugee claimant. He voluntarily withdrew his refugee application for legitimate reasons and moved to the United States. The Respondent says this mistake does not matter because the CAIPS notes show that the Officer was aware of the relevant facts on this point. However, my review of the CAIPS notes discloses no such awareness of the distinction, or why it might matter.

[65] The Respondent says that the "net effect" is the same because it simply meant that the Applicant's refugee claim had not succeeded. In a judicial review application, however, I must examine what the Officer said in his Decision was of significance to him. And the Officer says quite clearly that he thought the Applicant was a failed refugee claimant and that this was a factor in his Decision.

[66] This means that the Officer was mistaken regarding one of the stated bases for his own Decision. This is quite apart from the fact that no reason is given as to why this factor has any relevance to the Applicant's ARC request. In *Sahakyan* at paragraph 35, Justice Harrington thought such a decision unreasonable because the Officer in that case "failed to weigh a patently relevant factor, the reason for Mr. Sahakyan's late departure, and failed to consider limitations, which were the reasons Mr. Sahakyan first came to Canada, and the details of his sojourn here". Justice Harrington cited the Supreme Court of Canada decision in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 as his authority, and I think that judicial comity requires me to take note of *Sahakyan*, especially when I find it hard to make any real distinction on the facts of this case.

[67] The only reason why the Applicant must apply for an ARC is because of his inadvertence in failing to appear before an officer to obtain the relevant certificate when he left the country. There is nothing to suggest that the Applicant poses any kind of risk, that he has not dealt openly with immigration authorities at all relevant times, or that his re-entry would be undesirable in any way. And the Applicant has gone out of his way to correct the mistake and to keep authorities fully informed of why and when it came about. It is obvious that, from time to time, people make the same mistake as the Applicant and forget to comply with the technicalities upon leaving Canada. In fact, it happens often enough that CIC has seen fit to address the issue and provide advice on how it should be dealt with in ENF 11 Verifying Departure. At paragraph 13.5 of that document, direction is given regarding the circumstances in which officers outside of Canada should enforce an unenforced removal order. Officers are cautioned to keep in mind the "CBSA's overriding priority

… to maintain control of the removal process," (a caution that the Respondent emphasizes in this case) but officers are also advised on what they should do regarding precisely the kind of oversight that occurred in the present case:

> The intention of R240(2) is to encourage persons under a removal order to voluntarily comply with their removal order by entering a country where they can obtain legal status. This provision is not intended to facilitate the confirmation of unenforced removal orders of foreign nationals who are illegally in a country where they are making an application. Rather, this provision addresses the oversight by certain foreign nationals to verify their removal orders at a port of entry at the time of their departure, and allows for enforcement of the removal order outside Canada, should a foreign national seek to return to Canada.
>
> Officers should keep in mind that the CBSA's overriding priority is to maintain control of the removal process. The CBSA aims to ensure that persons who are subject to removal orders verify their departure at a POE when they depart from Canada. The enforcement of removal orders outside Canada is not to be encouraged, but applied in limited circumstances where a foreign national is applying for a visa or authorization to return to Canada [IMM 1203B] and satisfies a designated officer that all of the criteria under R240(2)(a) to (c) have been met. (Emphasis added)

[68] Precisely why the Applicant has not received the benefit of these guidelines is unclear. There really is no loss of control on the facts of the present case as the Respondent alleges, and it is difficult to see why the Officer was concerned about the "serious import of a removal order and your non-compliance … ."

[69] The Applicant's reason for wanting to re-enter Canada was hardly compelling (tourism) but he was forced to make an ARC request because of a harmless and inadvertent mistake that, in my view, falls under the "oversight" provisions of the Respondent's own guidelines. The Officer makes

it very clear in the Decision that he undertook a weighing process and it was not just the “tourism” that prompted the Decision. It was also the “failed refugee” factor (a clear mistake on the facts) and the serious import issue (incomprehensible on the facts).

[70] In my view, there is a difference between a decision made on the basis of a broad discretion and a decision made upon the basis of mistaken facts, or upon the basis of assumptions that cannot be related to, or which fail to take into account, the relevant facts.

[71] I also note Justice Layden-Stevenson’s reasons in *Akbari* when she allowed the application in that case because the “failure of the officer to consider the totality of the evidence” had resulted “in a denial of procedural fairness.”

[72] I would also add that the mistakes and arbitrary assumptions which I have identified in the present case take the Decision outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law, even considering the high level of deference required in this situation.

[73] I also emphasize, however, that as was the case with Justice Layden-Stevenson in *Akbari*, my conclusions are factually driven and apply to the unique circumstances of this application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This Application is allowed and the matter is returned for re-consideration by a different officer.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2368-08
STYLE OF CAUSE:	**HUSSEIN JALALUD UMLANI** **v.** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	5-NOV-2008
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APPEARANCES:

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