

Date: 20090122

Docket: IMM-2052-08

Citation: 2009 FC 63

Toronto, Ontario, January 22, 2009

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**MARYAM ALI LATIF and NADIMA ALI,
SHAHIR AHMAD ALI and BAHIR ALI
by their litigation guardian MARYAM ALI LATIF,
and AFGHAN WOMEN'S ORGANIZATION**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] I find that the present Application is special because, in rendering a decision under s.139 of the *Immigration Regulations*, the Visa Officer concerned failed to determine the critical legal and policy issues presented; the failure is complete. The Application is also special because, in the face of this failure, the Minister chose to defend the indefensible. There is a responsibility that flows from that decision.

I. The Evidence

[2] The principal Applicant (Applicant) presented a privately sponsored refugee claim, in conjunction with an application for permanent residence, pursuant to the Convention Refugee Abroad Class and the Humanitarian-protected Persons Abroad Class, to a Visa Officer at the Canadian High Commission in Islamabad, Pakistan. The undisputed evidence presented by the Applicant grounds her claim of gender-related persecution and also risk to life and cruel and unusual treatment at the hands of her in-laws. This evidence is concisely stated by Counsel for the Applicant as follows:

Maryam Ali Latif and her children are citizenship of Afghanistan. She was born March 15, 1978, and is currently 30 years old. She has a daughter, Nadima Ali, born September 27, 1998, and two sons: Shahir Ahmad Ali, born March 29, 2000, and Bahir Ali, born May 28, 2002. Her husband was killed in Afghanistan on May 8, 2002 during the election campaign. His father (i.e. Maryam Ali Latif's father-in-law) was campaigning as a candidate for the Loya Jirga in Mazar e Sharif, Afghanistan. During the campaign, her husband was killed by his father's political opponents.

At the time of her husband's murder, Maryam Ali Latif was pregnant with her third child, who was born a few weeks after her husband's death. After that, following cultural traditions, her husband's family required her to remain with them in Mazar e Sharif, Afghanistan. She remained there for approximately 9 months. During this time, she was badly mistreated. She was severely beaten on a number of occasions, sometimes in the presence of her young children. They too were severely traumatized by the events. Part of the reason for her mistreatment was the grief that the family was experiencing due to the loss of their son. However, she was also beaten and mistreated because she did not wish to comply with the family's demands. In particular, they wanted to force her to marry her husband's younger brother, who was only 16 years old at that time. She refused.

Maryam Ali Latif was able to contact her father in Kabul, who tried to make arrangements for her to leave Mazar e Sharif. Her father-in-law was persuaded by elders in the community to allow Maryam Ali Latif to leave for Kabul to get medical treatment. After she escaped

to Kabul, her father helped her get to Pakistan, where she has continued to live.

Maryam Ali Latif is afraid to return to Afghanistan because of the danger she would face from her father-in-law and others in the family. The fact that she has escaped and fled from the country makes her situation even worse. At this point, her life would be in danger because she disobeyed their demands and refused their cultural requirements to marry their younger son. Meanwhile, the AWO has provided financial assistance to her in Pakistan.

(Applicants' Application Record, pp. 176 – 177)

II. Legal Determinations Required on the Evidence

[3] It is not contested that, in considering the Applicant's overseas claim, pursuant to s. 139, and ss. 144-148 of the *Immigration Regulations*, the Visa Officer was required to make a determination on all relevant classes being the Convention Refugees Abroad Class, as well as the Humanitarian-protected Persons Abroad Class which includes the Country of Asylum Class.

III. Policy Determinations Required on the Evidence

[4] It is not contested that, pursuant to the *Immigration Manual OP5*, "*Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian – protected Persons Abroad Class*", visa officers are required to make two determinations where there are "signs of gender-related persecution": whether a person is "vulnerable" under s. 6.58; and whether a person is a Woman-at-risk (AWR) under s. 6.59. These provisions read as follows:

6.58 Vulnerable

"Vulnerable" means, in respect of a Convention refugee or a person in similar circumstances, that the person has a greater need of protection than other applicants for protection abroad because of the person's particular circumstances that give rise to a heightened risk to their physical safety or well-being.

The vulnerability may result from circumstances such as:

- a. The lack of protection normally provided by a family unit (e.g. women who are at risk of abduction, rape, sexual abuse, etc. due to the absence of the normal protection of a family unit; the elderly who have no family or support network to assist them and are at greater risk as a result, etc.); or
- b. Medical conditions (e.g., medically-at-risk/disabled persons, victims of torture or other trauma) give an example, as a medical condition in and of itself does not make a person vulnerable.

Cases identified as vulnerable are eligible for expeditious processing.

6.59 Women-at-risk (AWR)

The acronym AWR was taken from the UNHCR's program "assistance for women at risk". The Women-at-risk Program (AWR) was introduced in 1988 to provide women applicants with more equitable access to resettlement opportunities than was available in the past, by ensuring that the assessment of their ability to establish themselves successfully takes full account of their circumstances. A special program is necessary both to enhance awareness of the special problems facing refugee women and to ensure that women at risk receive appropriate settlement assistance once in Canada. Woman [sic] at risk usually receive priority processing and may, if circumstances allow, be eligible for JAS.

Women at risk are women without the normal protection of a family unit who can find themselves in precarious situations where the local authorities cannot ensure their safety. This includes women who are experiencing significant difficulties, such as harassment by local authorities or by members of their own communities.

Some women may need immediate protection while others are in permanently unstable circumstances that allow for no other remedy. The persecution or harassment they are experiencing may be solely gender-based. In addition, they may not fully meet the requirement to demonstrate an ability to establish themselves in Canada in the short or medium term.

(Applicants' Application Record p. 158-159)

[5] With respect to the proficiency of visa officers to make determinations under s. 6.58 and s. 6.59, Appendix B of OP5 “*CIC Declaration on refugee protection for women*” sets the following standard:

Refugee selection abroad

Citizenship and Immigration Canada is committed to the inclusive interpretation of the definition and the gender-sensitive approach contained in the Immigration and Refugee Board Guidelines in assessing applications for resettlement from abroad by refugee women. Citizenship and Immigration Canada recognizes the need to overcome traditional, male-oriented views of the potential of refugees for “successful establishment” in Canada. Although many refugee women have had limited access to formal education and wage employment and are often responsible for young children, many of them demonstrate great resourcefulness, life skills, and adaptability, which are useful in coping with a new life in Canada.

Gender sensitivity in Canada

The ability to question with sensitivity, awareness of the signs of gender-related persecution, and knowledge of conditions affecting women in source countries, are required of those who deal with refugee women. Citizenship and Immigration Canada is committed to the development of training and direction for all officers in Canada and abroad, for other staff, and for interpreters, to promote this sensitivity, awareness and knowledge. Citizenship and Immigration Canada is also committed to achieving an equitable gender balance in the selection of staff throughout the organization. Citizenship and Immigration Canada recognizes that refugee claims by women may be jeopardized because they do not tell of experiences of sexual violence, they may be unwilling to speak of such experiences in front of their husbands, or they may be intimidated by the presence of male officials or interpreters. Wherever operationally feasible, Citizenship and Immigration Canada will ensure that women making refugee claims have the option of being interviewed by female officers, with the assistance of trained female interpreters.

(Applicants’ Case Authorities, January 21, 2009, Tab 1)

IV. The Visa Officer's Decision

[6] It is not contested that the Visa Officer failed to meet the legal requirements because she gave only a negative determination on the Applicant's claim under the Country of Asylum Class and failed to meet the requirement of making a determination under the Convention Refugees Abroad Class. Counsel for the Applicant argues that, apart from being an error in law, this failure resulted in a profoundly unfair rejection of the Applicant's gender-based claim of persecution; this is so because gender-related issues are directly in play in determinations under the Convention Refugees Abroad Class. In response, Counsel for the Minister argues that, nevertheless, the reasons for decision show that the Visa Officer was alive to the nature of the Applicant's gender-related claim:

I have carefully assessed all information in your application and the information you provided at [sic] interview. I am not satisfied that you continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in Afghanistan.

Your reason for not wishing to return to live in Afghanistan appears to be motivated primarily related to a conflict between your in-laws traditional arrangements for widowed woman in the family and your own wish to remain unmarried. I am not satisfied that it is credible that you would not be able to return to live in Kabul where your parents, siblings and extended family live or that your father would not be able to provide protection against your in-laws apparent wish to marry off you [sic] to your late spouse's brother.

With the passage of time, and the solution of returning to live with your family, as well as your father's considerable position in the government, I am not satisfied your claim to being in danger from your in-laws is credible. While I sympathize with your sincere wish to begin a new life in Canada, I am not satisfied that you meet the definition of the requirements to be resettled to Canada as a member of the 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.

(Decision pp. 1 - 2)

[7] In my opinion, the Visa Officer's reasons do not display any credible understanding of the reality of the persecution and risk that the Applicant faces. The Visa Officer's failure to make the correct legal determination, the failure to meet the OP5 policy requirements, and failure to provide substantiation for the far-reaching personal opinions expressed in the decision have not only resulted in a decision made in manifest reviewable error, but has resulted in an insensitive and very unfair disposition of the Applicant's claim.

[8] It is important to note that after the decision was released, the Visa Officer was given an opportunity to reconsider on the basis of a clear opinion of the reality of the Applicant life. The Visa Officer's CAIPS notes include the following passage with respect to the opinion sent to the Visa Officer's manager, and which was ultimately considered by the Visa Officer:

Request for reconsideration received from Afghan Women's Organisation, Executive Director, Adeena Niazi. This was received after interview. Author attests to having been in correspondence with applicant for several years and confirms that to her knowledge applicant has been living in Pakistan as stated. Full copy of request for consideration copied below:

Dear [...] Immigration Program Manager.

I am writing on concerning Mary Ali. Maryam was privately sponsored by our organization, and called me after her recent interview. The description she gave of the interview concerns me greatly, and I have chosen to write on her behalf because she is both known to me personally, and has a very compelling case.

Due to the fact that she does not have a Pakistani POR, she has experienced several obstacles during her interview, and I am hoping to clarify the misunderstandings that have occurred. She reports that the Visa Officer she met in Islamabad, Pakistan, did not believe her reasons for not being able to register for the document. She also reports that the visa officer encouraged her to return to Afghanistan and live with a relative and “hide from her in-laws.” This is obviously not a safe or long-term solution for her or her children and she is seeking to resettle to Canada to finally find protection.

Ms. Ali has lived in Pakistan since before her sponsorship was submitted. Her husband was killed in Afghanistan in order to prevent his father from campaigning for the emergency Loya jirga (grant assembly) in Afghanistan. I was a delegate elected by the Afghan Canadian community at the same Loya jirga, and I heard the news there. Following her husband’s assassination, Ms. Ali was forced to live with her in-laws under their restricted control. She was confined at home and barred from going out and contacting her family and friends. Based on her in-laws family tradition she was pressured to marry her brother-in-law. She refused and her own family helped her to get her to their home and then she fled to Pakistan, where she has been living since then.

While in Pakistan, she has been unable to obtain POR card as the process has not been well-organized or systematic, and therefore very difficult, especially for women. She is waiting for another opportunity to apply for the ID card but has not been able to secure one to date. I know a large number of other Afghan refugees who were not able to obtain the document even they attempted to register and were qualified.

Needless to say, these last few years have been extremely difficult and distressing for Ms. Ali. She has been living without any rights or dignity during this time and has not had any options of her own. Her human and women’s rights have been violated on all sides. She should not be forced to marry or live with others. She should not be forced to live in hiding. The cultural complexities of her situation should warrant fair consideration and full understanding from the visa officer.

Please let this letter validate that Ms. Maryam Ali has been residing in Pakistan for a number of years. We have been in contact with her during this time and therefore can confirm this to be true. We are strongly urging you to consider her case on the basis of her

vulnerability and protection need, as a single refugee woman and not on the basis of the availability of documents. I acknowledge that she has been living in Pakistan with her children, our organization includes her children in our orphan support program and we have been providing them with financial support as well.

Please take these details of Ms. Ali's case into account while reviewing her file.

Thank you for your understanding with this very sensitive and urgent matter.

Sincerely,

Adeena Niazi
Executive Director
Afghan Women's Organization
789 Don Mills Road Suite 312
Toronto, Ont. M3C 1T5
Tel: 416 588 3585 Ext. 222
Fax: 416 588 4552

(Tribunal Record pp. 6-7)

In the CAIPS notes the Officer wrote the following response to Ms. Niazi's letter:

I have carefully reviewed this application as well as the request for reconsideration as per above.

Having taken all of the information into account, I am not satisfied that the applicant meets the definition of RA in that has not been personally and seriously affected by civil war, armed conflict or massive violation of human rights. Applicant's reasons for leaving AF are related to a family dispute involving applicant's former in-laws. I am satisfied that applicant's father who is an extremely high-ranking government official residing in Kabul and who has successfully extricated applicant from the family home of in-laws in Mazar E Sharif would be able to provide a secure home and protection, if required, to applicant and her family. Applicant has parents, siblings and extended family members living in Kabul and given father's position in current government as well as previous success in extricating applicant from family of applicant's former spouse, am satisfied applicant has an alternative option to living in

Pakistan. Given the passage of time, and applicant's sustained absence from residence of former in laws, as well as protection of applicant's father, I am satisfied applicant has option of return to Afghanistan. Despite applicant's claimed fears of reprisals or forced marriage by former in-laws, applicant has lived without interference or incident in Peshawar in a strong Afghan community, where to my knowledge, whereabouts [sic] of applicant and family could easily be ascertained by in-laws if they wished to continue their coercion. I have also considered the size and relative population of Kabul city/province as well as the influence and relative power of her father in the city and ability to prevent the alleged forced marriage of his dtr, the applicant. In making my decision, I also considered whether applicant might meet definition of CR but was not satisfied applicant as to the well-foundedness of applicant's fear, based on a convention ground, of being unable or unwilling to return to AF.

Refusal decision is maintained.

As there is no signed authorization on file to permit direct correspondence between author of request for reconsideration letter and this mission, no direct response can be sent to Sponsorship Agreement Holder.

(Tribunal Record pp. 7-8)

[9] I agree with Counsel for the Applicant that the plea for reconsideration achieved nothing. It is clear to me that Ms. Niazi's attempt to inform and convince the Visa Officer was met with a mind unwilling to learn.

V. Appropriate Relief

[10] Counsel for the Applicant argues that the Visa Officer's decision should be set aside and the matter be redetermined by a different visa officer, but on specific directions which will facilitate a prompt and proper decision. Given the unfair decision-making experienced by the Applicant, I agree with this submission and, therefore, include Counsel for the Applicant's suggested directions in the order below.

[11] Counsel for the Applicant also argues for costs. Given the special nature of the present Application as expressed at the outset, I have no hesitation in awarding costs. This is not a case of usual decision-making reviewable error defended on the basis of a hope of success. This is case of reviewable error which would be obvious to a gender-sensitive eye possessed by a decision-maker who has accomplished the understanding and skill expected by the professional standard set in Appendix B to OP5 as quoted above. Since the Minister has set this expectation, I find that the Minister must understand it and must meet it as well. I find that the Minister's decision to contest the present Application all the way to a hearing, despite the obvious reviewable errors in the decision rendered, requires the Minister to assume responsibility to pay the costs of making the Applicant suffer the arduous and expensive judicial review process for no good reason.

[12] In the order which follows, I award costs on the basis of the maximum amount of legal costs estimated to be wasted.

ORDER

For the reasons provided, I set aside the Visa Officer's decision and refer the matter back to a different visa officer for redetermination on the following directions:

The visa officer's fresh review of the application and any interviews with the applicants shall be completed and a decision shall be rendered on the applicants' eligibility within 60 days of receipt of the applicants' updated application;

The visa officer shall specifically consider the provisions for Vulnerable refugees and Women at Risk when considering the Applicants' application, as well as the IRB's Gender Guidelines for Women Refugee Claimant's Fearing Gender-Related Persecution;

And, if the applicants are determined to be eligible, the Minister shall render a final decision and issue the visas as soon as is reasonably practicable thereafter.

I award costs to the Applicants in the sum of \$7,000, payable forthwith.

"Douglas R. Campbell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2052-08

STYLE OF CAUSE: MARYAM ALI LATIF and NADIMA ALI, SHAHIR AHMAD ALI and BAHIR ALI by their litigation guardian MARYAM ALI LATIF, and AFGHAN WOMEN'S ORGANIZATION v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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