

Federal Court



Cour fédérale

**Date: 20100528**

**Docket: IMM-3624-09**

**Citation: 2010 FC 589**

**Ottawa, Ontario, May 28, 2010**

**PRESENT: The Honourable Mr. Justice Mainville**

**BETWEEN:**

**JOMA KHAN SAIFEE  
MARINA HASSANI  
MARIYAM SAIFEE  
HAMADULLAH SAIFEE  
ZAHRA SAIFEE  
AHMAD SANA SAIFEE**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This concerns an application brought pursuant to sections 72 and following of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the “Act”) by Joma Khan Saifee (the “principal Applicant”) and his wife Marina Hassani and their children Mariyam Saifee, Hamadullah Saifee, Zahra Saifee and Ahmad Sana Saifee (collectively referred to as the “Applicants”) seeking the judicial review of a decision rendered on May 10, 2009 by the Second Secretary of Immigration of the Embassy of Canada in Moscow (the “officer”) by which their application for permanent

resident visas to Canada was refused as members of the Convention refugees abroad class or as members of the humanitarian-protected persons abroad classes.

[2] This application is granted for the reasons set out below. In summary, the officer rejected the permanent residence application on the basis that the Applicants did not meet the criteria of the Convention refugees abroad class, but failed to conduct a determination as to their eligibility under the humanitarian-protected persons abroad classes, notably the country of asylum class.

### **Background**

[3] The Applicants are Ismaili Hazaras and all citizens of Afghanistan, except for the youngest child, Ahmad Sana, who was born in Tajikistan in 2007. As a result of the ongoing war in Afghanistan, the Applicants escaped to Pakistan in 1998 and remained there as refugees until 2004 when they returned to Afghanistan.

[4] However, upon their return to Afghanistan, they found that their house had been destroyed and that a powerful commander had built another house in its place. The principal Applicant referred the issue to the Afghan authorities on several occasions, but no action was taken. The commander who had built a new house on the land on which their house previously stood ordered the principal Applicant to cease pursuing his claims concerning the land and the house, otherwise he would kill the principal Applicant and his family. In light of these threats, the Applicants removed themselves to Tajikistan in 2007.

[5] In August of 2008, while in Tajikistan, the Applicants made an application for permanent residence in Canada seeking protection. As required, their application was submitted in conjunction with an undertaking to sponsor.

[6] In their application for permanent residence, the Applicants raised their status as Ismaili Hazaras facing numerous problems in Afghanistan, the destruction of their house, as well as the death threats from the powerful commander who had built over their previous house.

[7] The principal Applicant was interviewed by the officer in relation to this application on March 25, 2009 in Dushanbe, Tajikistan with the assistance of an interpreter.

### **The impugned decision**

[8] After referring to section 96 of the Act and sections 145 and 147 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the “Regulations”), the officer concluded that he was not satisfied that the Applicants meet the requirements of the Act and the Regulations.

[9] In the Computer Assisted Immigration Processing System (CAIPS) notes, the officer describes the interview carried out with the principal Applicant. In that interview, the principal Applicant explained that he and his family first “escaped from Afghanistan because we are oppressed people from the ethnicity of Hazara.” He went on to explain that upon return to Afghanistan in 2004 “our house was destroyed because of the continuous wars” and that others had built on the land on which the house had previously stood. The principal Applicant then explained

his numerous complaints to the Afghan “legal organs” about this situation, and the resulting death threats leading to the Applicants removing themselves to Tajikistan.

[10] The CAIPS notes then set out the following exchange between the principal Applicant and the officer leading to the refusal of the application for permanent residence:

I have finished the preliminary assessment of your case and I have one concern I would like to share with you before rendering my final decision. I will explain my concern in detail. Then, I will give you an opportunity to respond. Please pay careful attention to what I am going to say to you.

-To be eligible for this program, you have to prove that you meet the definition of a refugee as defined by the Geneva Convention. The definition is as follows: a person who has a well-founded fear of persecution based on reasons of race, religion, nationality, political opinion or membership in a particular group.

-Today, you said that you were part of the Hazara and said they were oppressed. However, you are unable to give any details on how you were persecuted as a member of this group. The story you told me about a person who stole the land on which your ancient house was build (sic) does not constitute persecution in my eyes, especially since you were able to defend your rights in local authorities. I am therefore not satisfied that you are facing persecution as per the definition of a refugee I just described to you.

A. I said that they followed me. They also give (sic) me warning. They told me that if I applied another time, that they will kill me. We continue to follow our claim. They followed us. They persecuted us. When I have been informed that they wanted to kill me, then I escaped. Q. Anything else? A. I have nothing to add about your concerns, but I have a lot to say about my thirty five years. I experienced a lot of torture. There have been a lot of events, but I didn't tell about them. Q. Such as? A. Ten armed people came to my house came with weapons. They took whatever I had in my house. They warned me that they could also kill me. Q. When? A. [He hesitates] 2 200 2005, probably 2005, Nawruz (March).

I have listened to your answers, but unfortunately, it doesn't respond to my concerns. Your application is refused.

[11] In an affidavit dated March 17, 2010, the officer reiterated the reasons for his refusal as set out in the CAIPS notes, confirming that he “was not satisfied that the Applicant’s story regarding his house represented a sufficient example of persecution based on ethnicity” (at para. 14 of the officer’s affidavit) and that “[a]lthough the Applicant’s situation may have been dire, he failed to prove that he was persecuted as a member of an ethnic group” (at para. 19 of the officer’s affidavit).

### **Position of the Applicants**

[12] The Applicants first argue that the officer arbitrarily concluded that the principal Applicant had been able to defend his rights with Afghan authorities with regards to the property which had been taken from him. This conclusion is capricious in light of the several attempts made by the Applicant to defend his rights over this property and the death threats which were made against him and his family. The officer thus arbitrarily denied refugee status on the erroneous and unreasonable assumption that the principal Applicant was able to defend his rights with local authorities.

[13] The Applicants have been persecuted as Hazara Ismailis and they have had to flee Afghanistan twice in order to protect their lives. Their property was taken by a commander who threatened their lives if they pursued their rights. In such circumstances, the officer’s decision was unreasonable, particularly in light of the terms of Citizenship and Immigration Canada Manual OP 5, concerning Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Class (“CIC Manual OP 5”).

[14] The officer did not evaluate the Applicants' situation in light of what was generally known about country conditions in Afghanistan. Several country reports on Afghanistan establish the fact that access to justice for constitutional and human rights violations is very limited in that country. In civil matters, the judiciary has remained ineffective due to a lack of capacity and severe corruption. Furthermore, the invasion and taking of private homes by local commanders that goes unpunished has also been constantly reported and forms part of the general knowledge of country conditions in Afghanistan. The Applicants submit the U.S. Department of State *2008 Human Rights Report on Afghanistan* as representative of the general knowledge of country conditions in that country.

#### **Position of the Respondent**

[15] As a preliminary matter, the Respondent submits that the U.S. Department of State *2008 Human Rights Report on Afghanistan* was not before the officer when he made his decision and thus should be expunged from the Applicants' record and cannot serve to prove that the officer's decision was not well founded. Consequently the Applicants' argument that the officer disregarded the generally known country conditions in Afghanistan, as shown in this report, is frivolous and should be ignored.

[16] The Respondent adds that Manual OP 5 is neither mandatory nor exhaustive and is not binding on government institutions and on the courts.

[17] The Respondent further submits that the Applicants did not present evidence that they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive

violation of human rights, and that the general situation in Afghanistan is not such as to prove the Applicants' claims.

[18] The loss of a piece of land did not deprive the Applicants of their basic human rights to housing, since the evidence shows that during their three year stay in Afghanistan, they rented a house. Moreover, the lost of the land, although unfortunate, is the result of the war in Afghanistan and of the absence from Afghanistan of the principal Applicant and his family during the war. When the Applicants returned, they complained to the local authorities, but have failed to submit evidence of how these authorities dealt with their claim. In these circumstances, it was reasonable for the officer to conclude that the fact the Applicants were not able to get back their land does not constitute persecution. The Applicants were able to find housing when they returned to Afghanistan and were able to file claims with the authorities.

[19] As for the threats, there is no evidence that these would have continued had the Applicants dropped their claim to the land or had offered to pay for the costs of the house built on their land.

[20] As for the allegation that the officer failed to have regard for country conditions in order to make a proper determination, since a subjective fear of persecution was not shown by the Applicants, country conditions were not required to be considered as documentary evidence related thereto need not be consulted. Moreover, from the questions asked by the officer during the interview, it can be inferred that it was obvious the officer was aware of general conditions in Afghanistan.

[21] Finally, in oral argument, counsel for the Respondent added that the Applicants were now in Tajikistan and had resided there for the past few years. Though their status in Tajikistan is not entirely clear, it was however recognized by the Applicants that they are not facing any specific danger in that country. Consequently, the Applicants do not continue to be seriously and personally affected by the civil war or armed conflict in Afghanistan and thus do not meet the requirements to be members of the country of asylum class.

### **Pertinent provisions of the Act and Regulations**

[22] Subsection 12(3), paragraph 95(1)(a), section 96 and subsections 99(1) and (2) of the Act provide for the following:

**12.** (3) A foreign national, inside or outside Canada, may be selected as a person who under this Act is a Convention refugee or as a person in similar circumstances, taking into account Canada's humanitarian tradition with respect to the displaced and the persecuted.

**95.** (1) Refugee protection is conferred on a person when

(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident

**12.** (3) La sélection de l'étranger, qu'il soit au Canada ou non, s'effectue, conformément à la tradition humanitaire du Canada à l'égard des personnes déplacées ou persécutées, selon qu'il a la qualité, au titre de la présente loi, de réfugié ou de personne en situation semblable.

**95.** (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :

a) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré



permit for protection reasons;

en vue de sa protection;

**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,

**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) 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

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) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

**99.** (1) A claim for refugee protection may be made in or outside Canada.

**99.** (1) La demande d'asile peut être faite à l'étranger ou au Canada.

(2) A claim for refugee protection made by a person outside Canada must be made by making an application for a visa as a Convention refugee or a person in similar circumstances, and is governed by Part 1.

(2) Celle de la personne se trouvant hors du Canada se fait par une demande de visa comme réfugié ou de personne en situation semblable et est régie par la partie 1.

[23] Paragraphs 139(1)(a) to (e), sections 144 and 145, paragraphs 146(1) and (2) and section 147 of the Regulations provide as follows:

**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

(a) the foreign national is outside Canada;

(b) the foreign national has submitted an application in accordance with section 150;

(c) the foreign national is seeking to come to Canada to establish permanent residence;

(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

(i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or

(ii) resettlement or an offer of resettlement in another country;

(e) the foreign national is a member of one of the classes prescribed by this Division;  
[...]

**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 :

a) l'étranger se trouve hors du Canada;

b) il a présenté une demande conformément à l'article 150;

c) il cherche à entrer au Canada pour s'y établir en permanence;

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) soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle, (ii) soit la réinstallation ou une offre de réinstallation dans un autre pays;

e) il fait partie d'une catégorie établie dans la présente section;

**144.** The Convention refugees abroad class is prescribed as a class of persons who may be issued a permanent resident visa on the basis of the requirements of this Division.

**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.

**146.** (1) For the purposes of subsection 12(3) of the Act, a person in similar circumstances to those of a Convention refugee is a member of one of the following humanitarian-protected persons abroad classes:

(a) the country of asylum class; or

(b) the source country class.

(2) The country of asylum class and the source country class are prescribed as classes of persons who may be issued permanent resident visas on the basis of the requirements of this Division.

**144.** La catégorie des réfugiés au sens de la Convention outre-frontières est une catégorie réglementaire de personnes qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

**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.

**146.** (1) Pour l'application du paragraphe 12(3) de la Loi, la personne dans une situation semblable à celle d'un réfugié au sens de la Convention appartient à l'une des catégories de personnes protégées à titre humanitaire outre-frontières suivantes :

a) la catégorie de personnes de pays d'accueil;

b) la catégorie de personnes de pays source.

(2) Les catégories de personnes de pays d'accueil et de personnes de pays source sont des catégories réglementaires de personnes qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

**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.

**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.

### **Standard of review**

[24] As noted by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (“*Dunsmuir*”) at paras. 54, 57 and 62, the first step in ascertaining the appropriate standard of review is to ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.

[25] In *Azali v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 517, [2008] F.C.J. No. 674 at paras. 11-12 (QL); *Qarizada v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1310; [2008] F.C.J. No. 1662 at paras. 15 to 18 (QL); *Kamara v. Canada (Minister of*

*Citizenship and Immigration*), 2008 FC 785, [2008] F.C.J. No. 986 at para. 19 (QL); and *Alakozai v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 266, [2009] F.C.J. No. 374 at paras. 18 to 20 (QL), it was found that decisions of visa officers determining if applicants are members of the Convention refugees abroad class or the country of asylum class essentially raise issues of fact or of mixed fact and law, and are consequently to be reviewed on a standard of reasonableness; however, issues concerning natural justice and of procedural fairness raised by such decisions are to be decided on a standard of correctness.

[26] I agree with this approach, but add the following *caveat*: decisions by visa officers on pure questions of law made in the context of such decisions may require review on a standard of correctness. Consequently, the application of a standard of reasonableness in this case should not be interpreted as necessarily extending to decisions on issues of law.

#### **The country conditions documentation**

[27] As a preliminary matter, the Respondent seeks that the U.S. Department of State 2008 *Human Rights Report on Afghanistan* be expunged from the Applicants' record. For this purpose, the Respondent refers to the officer's affidavit confirming that this report was not part of the record. Reference is also made to the certified tribunal record, which contains neither this report nor any other documentation on country conditions.

[28] It is trite law that a judicial review application is to be decided on the basis of the record before the decision maker where the decision subject to review is being challenged on a basis other

than a breach to natural justice or procedural fairness. However, in the case of a refugee claim determination, it must be assumed that the generally available country conditions were before the officer prior to the decision being made. Consequently this is not a case where the Applicant is adding to the record. The Applicant is rather setting out the facts which were available to the officer and which were or should have been taken into account in his decision.

[29] Pushed to its limit, the Respondent's argument would lead to the conclusion that visa officers could make decisions concerning eligibility to the Convention refugees abroad class or the country of asylum class without reference to, or knowledge of, country conditions. This is certainly not acceptable and would be contrary to the entire scheme of the Act relating to refugee protection.

[30] In this case, even though the tribunal record shows no reference to any country conditions documentation concerning Afghanistan, it may be assumed that the officer was either knowledgeable of these country conditions or could easily access available country conditions documentation in order to carry out his duties properly. I would add further that if it can be showed that the officer made a decision without knowledge of country conditions, this in itself could constitute a valid reason to overturn the decision in judicial review. It would indeed be unconscionable if Canadian visa officers were making a refugee claim determination without any reference to or knowledge of country conditions.

[31] I am comforted in this approach by the prescriptions of CIC Manual OP 5 which specifically provide that officers unfamiliar with the history of the refugee movement or the social and political

situation in a specific area should either contact a visa office with appropriate expertise or visit various Web sites, including the Immigration and Refugee Board Web site. Though I fully recognize that this CIC Manual OP 5 is not necessarily binding on the officer and certainly not binding on this Court, it nevertheless can offer useful insight into the purpose and meaning of the Act and of the Regulations: *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 270, [2003] 1 F.C. 219, [2002] F.C.J. No. 950 at para. 37 (QL); *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409, 267 D.L.R. (4th) 324, [2006] F.C.J. No. 491 at para. 15 (QL); *Farhat v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275, 302 F.T.R. 54, [2006] F.C.J. No.1593 at para. 28 (QL).

[32] Indeed, I fail to understand how decisions relating to the Convention refugees abroad class or the country of asylum class could be made without a reasonable knowledge of country conditions.

[33] Consequently, the issue here is not that the Applicants are adding to the record by placing newly available country conditions before the Court or referring to country condition sources which are not readily available, as was the case in the decisions referred to by the Respondent: *Qarizada v. Canada (Minister of Citizenship and Immigration)*, *supra* at paras. 29-30 and *Besadh v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 680, [2009] F.C.J. No. 847 at para. 6 (QL), and which can consequently be distinguished from the circumstances at hand. Here the Applicants are rather providing documentation to the Court as to country conditions which the officer either knew

or should have known through a review of the country conditions documentation which was readily available to him from official and reliable sources. I further note that the U.S. Department of State *2008 Human Rights Report on Afghanistan* was issued on February 25, 2009 and was accessible to the officer prior to his decision in this case.

[34] The Respondent also argues that the absence of a subjective fear in this case renders useless any analysis of country conditions. That may have indeed been true had the officer found the principal Applicant not to be credible. But this was not the case. Here the officer did not dispute the principal Applicant's story and his fear of returning to Afghanistan. Rather, the officer rejected the application on the basis that the fear expressed by the Applicants was not founded on a reason contemplated by the Convention refugees abroad class.

[35] Country conditions were thus clearly of interest in this case. The U.S. Department of State *2008 Human Rights Report on Afghanistan* contains, *inter alia*, the following information

[emphasis added]:

Citizens had limited access to justice for constitutional and human rights violations, and interpretations of religious doctrine often took precedence over human rights or constitutional rights. The judiciary did not play a significant role in civil matters due to corruption and a lack of capacity. Land disputes remained the most common civil dispute and were most often resolved by informal local courts.

[...]

The continuing insurgency and related security concerns, as well as economic difficulties, discouraged numerous refugees from returning to the country. In Pakistan, three of the four Afghan refugee camps scheduled for closure during the year remained open. Minister of Refugees and Returnees Shir Mohammad Etibari publicly rejected UNHCR's calls to boost the repatriation of Afghan refugees, citing



lack of capacity and resources to absorb more needy citizens. During the August 30 Tripartite Meeting among Afghanistan, Pakistan, and UNHRC, Pakistan abandoned its unilateral December 31, 2009, deadline to repatriate all Afghan refugees.

The UNHRC estimated approximately 2.6 million refugees were living in Iran and Pakistan [...]

Claims of social discrimination against Hazaras and other Shi'as continued. The Hazaras accused President Karzai, a Pashtun, of providing preferential treatment to Pashtun and ignoring minorities, especially Hazaras.

A 2006 UNHRC paper reported that although there were attempts to address the problems ethnic minorities faced and there were improvements in some areas, there was still a well-founded fear of persecution. Confiscation and illegal occupation of land by insurgents and tribal leaders caused displacement in isolated situations. Other forms of discrimination concerned access to education, political representation, and civil service employment. A 2006 UNHCR paper reported that although the government attempted to address the problems faced by ethnic minorities and some areas improved, there was still a well-founded fear of persecution by tribal and insurgent leaders. Confiscation and illegal occupation of land by powerful individuals, in some cases tied to the insurgency, caused displacement in isolated situations. Discrimination, at times amounting to persecution, continued in some areas, in the form of extortion of money through illegal taxation, forced recruitment and forced labor, physical abuse and detention.

[36] The precarious situation of the Hazaras is moreover confirmed by the jurisprudence of this Court. In his recent decision in *Elyasi v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 419, [2010] F.C.J. No. 484 (QL), Justice Shore noted that the information package from the Canadian Immigration and Refugee Board on country conditions demonstrates that the Hazaras have fought and been persecuted by the Taliban and are considered the traditional enemy of the

Taliban; the country conditions documentation also shows that the Hazaras are also considered outcasts by the Pashtuns.

### **Analysis**

[37] A claim for refugee protection by a person outside Canada must be made through an application for a visa as a Convention refugee or a person in similar circumstances. The eligible classes include the Convention refugees abroad class, which concerns foreign nationals who have been determined by an officer to be Convention refugees as defined in section 96 of the Act, and which itself refers to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion.

[38] Refugee protection for persons abroad is however wider than that set out in section 96 of the Act. Indeed, the humanitarian-protected persons abroad classes include the country of asylum class and the source country class. The source country class is not at issue in this case. However, foreign nationals who are not Convention refugees may nevertheless be extended protection if they meet the criteria for membership in the country of asylum class. The criteria include the following three principal elements:

- a. the foreign nationals are outside all of their countries of nationality and habitual residence;
- b. they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violations of human rights in each of those countries;

- c. there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, either through voluntary repatriation or resettlement in their country of nationality or habitual residence, or resettlement or an offer of resettlement in another country.

[39] Members of the country of asylum class need not meet the definition of Convention refugee, and consequently need not demonstrate a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. Rather, they must demonstrate that they are displaced outside of their country of nationality and habitual residence, and have been and continue to be seriously affected by civil war, armed conflict or massive violations of civil rights, and that there is no reasonable prospect within a reasonable period of a durable solution elsewhere for them.

[40] Indeed, a foreign national may well never have been persecuted for one of the reasons set out in the definition of Convention refugee and still be eligible for protection as a member of the country of asylum class. It is consequently crucial not to confuse the cases of foreign nationals meeting the definition of Convention refugee with those meeting the criteria of the country of asylum class.

[41] In his undated decision, but which the parties agree was rendered on May 10, 2009, the officer referred to the country of asylum class and section 147 of the Regulations, but he included criteria for membership in that class which rather concerns the source country class as set out in

section 148 of the Regulations. In fact, the officer's decision specifically and erroneously states that the criteria applicable to the country of asylum class include criteria applicable to the country of asylum class set out in section 148.

[42] Moreover, and more importantly, the CAIPS notes clearly show that the officer rejected the Applicants' permanent residence application on the sole basis of the Convention refugee class, and consequently failed to conduct a determination as to the eligibility of the Applicants under the country of asylum class. The officer erroneously concluded in his CAIPS notes that to meet the eligibility criteria, the Applicants had to meet the definition of the Convention (at page 7 of the Tribunal record):

To be eligible to this program, you have to prove that you meet the definition of a refugee as defined in the Geneva Convention. The definition is as follows: a person who has a well-founded fear of persecution based on reasons of race, religion, nationality, political opinion or membership in a particular group.

[43] By failing to determine whether the Applicants meet the criteria of the country of asylum class, the officer made a reviewable error.

[44] Counsel for the Respondent argues that the Applicants would not in any event meet the criteria of the country of asylum class, and that consequently the decision of the officer should not be disturbed. In particular, counsel for the Respondent argues that the Applicants are now residing in Tajikistan without fear and therefore have a reasonable prospect of a durable solution in a country other than Canada. In this regard, I note that it is not the responsibility of this Court to carry out an

*ex post facto* analysis to determine if the Applicants meet or not the definition of the country of asylum class. Moreover, there is no evidence that the Applicants indeed have a durable solution in Tajikistan, an issue which the officer who will review anew their application will need to inquire into.

[45] In addition of having failed to review the situation of the Applicants under the country of asylum class criteria, I also note that the officer appears to have largely discounted the situation of the Hazaras in Afghanistan as well as country conditions documentation in his analysis of the eligibility of the Applicants as Convention refugees. Consequently, this Court will order a fresh review of the application by a new officer who will consider anew all aspects of the case, including the eligibility of the Applicants under the Convention refugees abroad class and under the country of asylum class.

[46] The parties raised no important question warranting certification under paragraph 74(d) of the Act, and no such question shall be certified.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is granted;
2. The officer's decision is set aside;
3. The matter is referred back to the Respondent for a fresh determination by a different officer on the basis of the reasons stated herein.

"Robert M. Mainville"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3624-09

**STYLE OF CAUSE:** JOMA KHAN SAIFEE ET AL v.  
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** May 04, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** MAINVILLE J.

**DATED:** May 28, 2010

**APPEARANCES:**

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FOR THE APPLICANTS

Michèle Joubert

FOR THE RESPONDENT

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