

Federal Court



Cour fédérale

Date: 20120221

Docket: IMM-4343-11

Citation: 2012 FC 239

Toronto, Ontario, February 21, 2012

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

**RAHIM HUSSAINI, NOOR HUSSAINI,
REENA HUSSAINI, RAHIMA HUSSAINI,
KHALID HUSSAINI, JAVAID HUSSAINI**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants have applied for judicial review of the April 12, 2011 Immigration Officer's decision refusing the Applicants' application for permanent residence under the Convention Refugees Abroad and Humanitarian Protected Persons Abroad category.

[2] The Officer decided the Applicants were resident in Afghanistan and not refugees residing in Pakistan and further found the Applicants did not have a well founded fear of persecution.

[3] For reasons that follow, I am granting this application for judicial review.

Facts

[4] Mr Rahim Hussaini, the Principal Applicant, and Mrs. Noor Hussaini, his wife, and their children are citizens of Afghanistan who claimed to be resident in Pakistan.

[5] The Applicants say they fled Afghanistan for Pakistan sometime around 1982 as a result of the Soviet invasion of Afghanistan. The Applicants travelled to Peshawar, Pakistan, and then on to Karachi. The Applicants remained there for 15 years before they moved to Rawalpindi where they now live as refugees. The Applicants say they were not legally in Pakistan and face many difficulties.

[6] The Applicants were sponsored by a group of Canadian citizens including the Principal Applicant's sister-in-law who is a police officer in Calgary.

[7] The Immigration Officer interviewed the Principal Applicant in Pakistan on January 13, 2011. Following the interview, the Officer sent the Principal Applicant a letter dated April 12, 2011 providing the reasons for the refusal of their application.

Decision Under Review

[8] The Officer's reasons for refusing the Applicants' application are found in both the refusal letter dated April 12, 2011 as well as the CAIPS notes. In the refusal letter, the Officer observes that the Principal Applicant was interviewed with the assistance of an interpreter fluent in English and Dari and that the Principal Applicant did not indicate that he had any difficulty in understanding the translator or in having the translator understand him.

[9] The Officer set out the relevant statutory provisions, then stated that he was not satisfied that the Applicants were members of the Convention Refugee Abroad class or the Country of Asylum class because the Officer was not satisfied as to the credibility of the information provided by the Principal Applicant. The Officer noted that the Principal Applicant stated he travelled to Jalalabad to obtain their tazkiras (identity cards) and passports. The Officer stated they could have acquired these from one of the Afghan Consulates in Pakistan. The Officer was not satisfied that they would have returned to Afghanistan solely to obtain these documents and was not satisfied that they had been residing in Pakistan rather than Afghanistan.

[10] The Officer was not satisfied that they met the Country of Asylum class definition. The Officer found that the reasons provided for not wanting to return were linked to the fact that they had no family in Afghanistan as well as general insecurity. The Officer found the Applicants had not demonstrated that they were and remain seriously and personally affected by the conflict in Afghanistan. The Officer also stated the Principal Applicant had indicated a fear of persecution due to their religion as Ismailis. Taking this into consideration as well as the present circumstances in

Afghanistan, the Officer held that he was not satisfied that they had a well founded fear of persecution if they were returned to Afghanistan and was therefore not satisfied that they met the Convention Refugee Abroad definition.

Standard of Review

[11] The Supreme Court of Canada has held in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. The Supreme Court has also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated: *Dunsmuir* at para 62.

[12] Credibility findings are fact based. They are to be reviewed on a reasonableness standard and are entitled to a high degree of deference: *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4.

[13] Recently the Supreme Court of Canada has affirmed that a review of the adequacy of reasons must be done in the analysis of whether the decision as a whole, both the reasons and the result, is reasonable: *Newfoundland & Labrador Nurses Union v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, 208 ACWS (3d) 435 at para 22.

[14] Accordingly, the appropriate standard of review of whether the Officer's reasons with respect to credibility were adequate is reasonableness. Similarly, the appropriate standard of review

of the Officer's reasons with respect to the question of Convention refugee status is also reasonableness.

Relevant Legislation

[15] The *Immigration and Refugee Protection Act*, SC 2001, c 27 provides:

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

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

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

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

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

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

[16] *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] provides:

145. A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been

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

determined, outside Canada, by an officer to be a Convention refugee.

...

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.

[Emphasis added]

agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

...

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.

Issues

[17] Two issues are determinative of this judicial review:

1. Was the Officer's credibility finding unreasonable?
2. Was the Officer's negative finding with respect to a well founded fear of persecution reasonable?

Analysis

[18] The Applicants submit that the Officer's decision was primarily based on the negative credibility finding that the Applicants were residents of Afghanistan and not Pakistan.

[19] The Applicants argue the Principal Applicant provided his reason for returning to Afghanistan: they needed the tazkiras in order to obtain the passports from an Afghan consulate in Pakistan. Since they did not have them, the Principal Applicant returned to Afghanistan to obtain both the tazkiras and the passports.

[20] The Applicants submit the Officer rejected this explanation but provided no reason why the explanation was rejected, other than to say that the passports could have been obtained from an Afghan consulate in Pakistan.

[21] The Applicants also submitted an affidavit by the sister in-law, a Calgary police officer, who was a sponsor. She declared that she had both telephoned and visited her sister in Pakistan. This evidence, however, was not before the Officer and I do not consider it as relevant evidence in this judicial review.

[22] The Respondent argues that the Officer provided clear and cogent reasons for his belief that the Applicants were not Convention refugees under the Country of Asylum class or any other prescribed class.

[23] The Respondent submits the Officer clearly and unequivocally stated why he did not believe the Principal Applicant's account that he had been to Afghanistan only once since 1982 and that was to apply for these documents. The Respondent submits the Officer refrained from any generalities or vague language in making its credibility finding and that the Officer provided clear and specific rationale for why it found the Principal Applicant's account not credible.

[24] In my view, the Officer's credibility finding disbelieving the Principal Applicant's account of traveling to Kabul in Afghanistan to obtain tazkiras and passports was a crucial determination given the CAIPS notes' focus on that question.

[25] The Officer's CAIPS notes record:

HOW DID YOU OBTAIN YOUR TAZKIRAS? I went there and obtained the tazkiras and then the passports.

SO HOW LONG WERE YOU IN AFG? 3 days.

I HAVE THE FOLLOWING CONCERNS WITH THE APPLICATION:

CREDIBILITY: THE APPLICANT STATES THAT HE IS RESIDING IN RAWALPINDI AND TRAVELLED TO JALALABAD TO OBTAIN TAZKIRAS AND PASSPORTS FOR THIS INTERVIEW. IT DOES NOT SEEM REASONABLE THAT THE APPLICANT WOULD TRAVEL ALL THAT DISTANCE TO OBTAIN THESE DOCUMENTS WHEN HE CAN OBTAIN A PASSPORT FROM ONE OF THE AFGHAN CONSULATES IN PAKISTAN WHO REGULARLY ISSUE PASSPORTS EVEN WITHOUT TAZKIRAS. WHILE IS [sic] AM REASONABLY SATISFIED THAT THE APPLICANT DID RESIDE IN PAKISTAN FOR A LONG PERIOD OF TIME, THE MORE PROBABLE EXPLANATION IS THAT THE APPLICANT NOW RESIDES IN AFGHANISTAN.

[Capitals in original]

[26] The Officer gave the Principal Applicant an opportunity to answer his concerns and recorded the answer:

Applicant: they do not issue passports without Tazkiras. I went to Jalalabad to obtain the tazkiras and the passport...

[27] The Officer disbelieved the Principal Applicant would travel to Afghanistan to obtain a passport that could be obtained from an Afghan consulate in Pakistan.

[28] What the Officer fails to have regard for is the December 28, 2010 Immigration Section letter to the Principal Applicant scheduling the interview and instructing him as follows:

For the interview you should bring documents that you may have for yourself and, if applicable, for your family...

Former residents of Afghanistan should bring **original and photocopies** of their **Tazkira, Shanakhati Pass** and any other identification document for them at the time of the interview, if it has not already been submitted. They should bring photocopies of all documents and **English translation** of all **Dari/Persian** documents.

[Emphasis in original]

[29] The Officer makes no reference to whether tazkiras are available from Afghan consulates in Pakistan and disregards the Immigration Section's emphasized instruction to the Principal Applicant to bring original tazkiras to the interview. The Officer would be aware of this instruction but makes no reference to it in coming to a negative credibility finding.

[30] I conclude the Officer's negative credibility finding is unreasonable given that the Principal Applicant had a valid explanation why he went to Afghanistan to obtain the tazkiras. Simply stated, he was instructed by the Immigration Section to bring them to the interview with the Officer.

[31] The Officer also asked the Principal Applicant why they could not return to Afghanistan and whether there was any specific danger for the Principal Applicant or his family. The Principal Applicant responded that they were Ismaili and without land in their village. In their application for permanent residence, they had stated they had lost everything and they had to leave for their safety.

[32] Generally, the onus is on an applicant to describe what kind of fear or danger he faced. The Officer did provide the Principal Applicant with an opportunity to explain to which the Applicant explained they were Ismaili. The Officer is presumed to have specialized knowledge of the circumstances in countries such as Afghanistan. The Officer does demonstrate that he understands that the Principal Applicant's claim of fear is because of religious persecution against Ismailis in Afghanistan.

[33] However, the Officer's analysis of the Applicants' fear of religious persecution is limited to twelve words in his refusal letter:

You have indicated fear of persecution due to your religion as an Ismaili. Taking this into consideration as well as the present circumstances in Afghanistan I am not satisfied that you have a well founded fear of persecution if you returned to Afghanistan

[Emphasis added]

The Officer's notes in the CAIPS record do not set out any analysis or reasons. His only analysis is the above response.

[34] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court of Canada stated:

Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[Emphasis added]

[35] The Applicants' factual information is mixed but it clearly shows they lost their possessions in Afghanistan and they feared for their safety there. To this, the Officer merely makes a general and vague statement, "Taking this into consideration as well as the present circumstances in Afghanistan", without analysis.

[36] I find the Officer made no finding of fact nor provided any analysis for his conclusion for finding the Principal Applicant did not have a well founded fear of persecution in Afghanistan due to his Ismaili religion. I am unable to understand why the Officer decided the Principal Applicant did not have a well founded fear of religious persecution because he was Ismaili.

[37] Neither party submitted a serious question of general importance for certification.

Conclusion

[38] The Officer erred in his credibility finding and failed to provide reasons to find why the Applicants would not face persecution in Afghanistan. I am satisfied the Officer's finding that the Applicants are not members of either the Convention Refugee Abroad class or the Country of Asylum class is unreasonable.

[39] I conclude that the application for judicial review should be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The April 12, 2011 decision is set aside; and the matter is remitted for re-determination by a different Immigration Officer.
3. No serious question of general importance is certified.

“Leonard S. Mandamin”

Judge

Federal Court



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SOLICITORS OF RECORD

DOCKET: IMM-4343-11

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