

Federal Court



Cour fédérale

Date: 20121004

Docket: IMM-1775-12

Citation: 2012 FC 1171

Ottawa, Ontario, October 4, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**ASADOLLAH FOROOGH
BADRIEH FOROOGH**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review of a visa officer's [Visa Officer] decision denying Mr. and Mrs. Foroogh's application for permanent residence as Convention refugees. The decision first confirmed Mr. Foroogh's status as a refugee (his wife's application was dependent on her husband's), but then found him "inadmissible".

[2] The applications of the two children, Farzan and Farhad, for refugee protection have been accepted.

II. FACTS

[3] The Applicants are Afghanistan citizens currently residing in Quetta, Pakistan. Their application for refugee protection and necessary visas were sponsored by the Lutheran Rim ad hoc Committee, a sponsoring organization authorized by the Respondent.

[4] The critical fact in this matter is that Mr. Foroogh served in the military from 1977 to 1979. He claimed that after one month of training, he was stationed in a communications unit as a clerk. He described his responsibilities as arranging for the paperwork for attendance, mess and patrol duties. He could not accurately name the weapon on which he was trained nor did he have his identity card containing the details of his military service.

[5] The Visa Officer's interview is described in the Computer Assisted Immigration Processing System [CAIPS] Notes, supplemented by the Visa Officer's affidavit filed in this judicial review. There is no transcript and the CAIPS Notes are at times confusing and apparently incomplete.

[6] The interview was conducted with an interpreter. There were apparent problems with translation and when Mr. Foroogh protested about the quality of the translation, he was sent out of the interview room by the Visa Officer.

[7] In the Decision Letter the Visa Officer described his reason for not being satisfied that Mr. Foroogh was “not inadmissible” was that Mr. Foroogh was not being truthful regarding his military service location, when he served and his related duties. Given that Mr. Foroogh did not have documentary evidence about his military service (I note that he had been in the military 34 years prior), the Visa Officer said that he had to rely on Mr. Foroogh’s version of facts which he said had “significant inconsistencies”.

[8] The specific inconsistencies cited against Mr. Foroogh were that he claimed he was trained on AK47s when AK47s were not used at that time in the Afghan military and that Mr. Foroogh could not state his assignments, duties, and dates of assignment with their locations. From this, the Visa Officer determined that he had not met the requirements of the *Immigration and Refugee Protection Act* [IRPA]. The specific provision at issue is s 11(1) of the IRPA:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[9] In the Visa Officer’s CAIPS Notes, the Visa Officer added references to events during the time of Mr. Foroogh’s military service, in particular the end of the Daoud regime in 1978 and incidents of human rights violations at that time. There was no correlation drawn or relevance shown between these human rights violations and Mr. Foroogh’s own military service.

[10] In the Visa Officer's affidavit filed by the Respondent, supposedly to address the issues of procedural fairness, the Visa Officer draws out more historical facts said to support his decision. The Visa Officer states, in addressing credibility, that from his own experience of interviews, soldiers assigned to clerical duties engaged in patrolling as well. Mr. Foroogh had said that he was only involved in administrative work and had not been engaged in patrolling.

III. ANALYSIS

[11] The substantial legal issues are:

- was there a breach(es) of procedural fairness?
- was the decision reasonable?

[12] Before addressing the substantive issues, some preliminary issues must be considered. The parties raised other issues such as the use of supplemental materials and whether Mrs. Foroogh was a protected person.

[13] Since Mrs. Foroogh's application was dependent on Mr. Foroogh's, that issue need not be addressed.

[14] As to the introduction of supplementary evidence that was not before the decision-maker, both parties engaged in this tactic. The Applicants are in the strange position of objecting to the Visa Officer's affidavit for some matters but relying on it for others.

[15] The Applicants' supplemental materials are not significant in the context of the result in this Court. The Visa Officer's affidavit is highly relevant on the issue of procedural fairness. The fact that he improperly attempts to further justify the merits of the decision is a matter relevant to procedural fairness.

A. *Standard of Review*

[16] It is by now trite law that procedural fairness is reviewed on a correctness standard of review (*Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539).

[17] Issues of the merits of a visa decision are subject to the reasonableness standard of review.

The standards of review applicable in this case are well described in *Saifee v Canada (Minister of Citizenship and Immigration)*, 2010 FC 589, 2010 CarswellNat 1510 at paras 25-26:

... 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.

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.

B. *Procedural Fairness*

[18] In assessing the impact of procedural fairness issues in this case, it is important to bear in mind that Mr. Foroogh was found to be a Convention refugee but that protection was denied to him and his wife because of the “inadmissibility issue”. The procedural fairness issues all revolve around the inadmissibility issue and have significant consequences for the Applicants.

[19] The Applicants say that the failure to provide proper translation is a breach of fairness. However, without a proper record, this Court cannot determine that the translation was so poor as to constitute a breach of fairness.

[20] What is problematic is how the Visa Officer dealt with Mr. Foroogh’s complaint, midway through the interview, that the translator was not properly translating his words. No attempt was made to determine if there was a problem and Mr. Foroogh was banished from the room. On its own, the translation issue might not rise to the level of a breach of fairness but in the context of other issues, it points to how unsatisfactory this hearing process was and how infirmed the ultimate decision is.

[21] The most serious breach of procedural fairness was the Visa Officer’s reliance on the extraneous evidence, in this case the personal experience of the Visa Officer interviewing other clerks, that clerks were often involved in patrolling and guarding in addition to administrative duties. It is evident from the decision that the Visa Officer’s adverse credibility finding was significantly tied to this extraneous evidence.

[22] That extraneous evidence, read together with the comments about human rights, leads one to conclude that Mr. Foroogh was, in some unspecified and unproven way, involved in patrolling while human rights violations were being committed.

[23] The Visa Officer owed it to Mr. Foroogh to confront him, at the very least, with the suggestion that clerks did patrols and guarded and therefore Mr. Foroogh's evidence was inconsistent with those facts. Mr. Foroogh had a right to comment and allay any suspicions. He was never afforded that opportunity on a matter of crucial importance to the Visa Officer.

[24] This Court in *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 43 Imm LR (2d) 291, 1998 CanLII 7505 (FC), stated that visa officers could not be "coy" about their concerns; they act as a questioner and judge and therefore have a duty to be scrupulous about exposing their concerns.

[25] This issue alone justifies granting judicial review of the inadmissibility finding.

C. *Reasonableness of Decision*

[26] The reasonableness of the decision is substantially linked to the facts underlying the procedural fairness issues.

[27] The Visa Officer did not accept Mr. Foroogh's version because the Visa Officer relied on extraneous evidence.

[28] Absent that evidence, the Visa Officer's conclusion that Mr. Foroogh had not provided sufficient evidence of his military service is unreasonable. Mr. Foroogh described when he joined, where he was stationed, what unit he was attached to and what his duties were. It is difficult to determine what more the Visa Officer could reasonably need or want to know.

[29] The Visa Officer never indicates in what way Mr. Foroogh could be inadmissible such as through complicity in human rights violation or some other offending conduct. Therefore, the only basis for being "not inadmissible" is the sufficiency of Mr. Foroogh's evidence.

[30] If insufficiency of evidence was the basis of the decision, and this Court has concluded that it was not, then the finding is unreasonable by reason of paragraph 28 herein. If the decision is said to have any semblance of reasonableness, it rests on the truth of extraneous evidence and its relevance to the Applicant but not put to him.

[31] Therefore, the decision is also unreasonable.

IV. REMEDY

[32] The appropriate remedy is a challenge. The Applicants were successful on being found Convention refugees. It seems unfair that this positive finding could be put at risk by virtue of this case being remitted back for a new decision.

[33] However, this Court is concerned that this whole process was flawed. The Court will quash the decision in whole and remit the matter back to a different officer. Given the findings with

respect to the two sons and the refugee finding in respect of Mr. Foroogh, it would be unusual to not have the original refugee conclusion reaffirmed.

[34] There is no question for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is granted, the decision of the Canadian High Commission is quashed and the matter is to be remitted back to a different officer.

“Michael L. Phelan”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1775-12

STYLE OF CAUSE: Asadollah Foroogh
Badrieh Foroogh

and

The Minister of Citizenship and Immigration

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: September 25, 2012

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

DATED: October 4, 2012

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