Federal Court  Cour fédérale

Date: 20131206

Docket: IMM-1446-12

Citation: 2013 FC 1229

Ottawa, Ontario, December 6, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ASHOR BAKHTIARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant in this case seeks judicial review of a decision dated November 5, 2011, rendered by a visa officer of the High Commission of Canada in Islamabad, Pakistan, refusing the Applicant's application for permanent residency as a member of the Convention refugees abroad class or the Country of asylum class pursuant to sections 145 and 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "*IRPR*").

[2] For the reasons that follow, I have come to the conclusion that this application ought to be dismissed, as I have found that the officer properly applied the relevant legal principles and did not misunderstand or misconstrue the evidence.

FACTS

[3] The Applicant, his wife and two dependants are Afghan citizens of Shia-Hazara-Ismaili ethnic and religious background, now living in Pakistan. They fled Kabul for Pakistan due to their fear of a man named Janagha and his family, who were members of the Jamiat e Islami Political Party, a very powerful political party that is currently active in Afghanistan. Janagha and the Applicant were neighbours for a long time. In 1996, roughly 15 days after the Taliban captured Kabul, the Taliban searched the Applicant's shop and found homemade alcohol. They told the Applicant he was not a real Muslim. The Applicant and his son were taken into custody and severely beaten. The Applicant's son, fearing for the Applicant's life, revealed to the Taliban that Janagha's son, Sheeragha, had provided the alcohol and that his father knew nothing about it. The Taliban took Sheeragha into custody and beat him with a cable until he fainted. They then began beating the Applicant's son but the Applicant threw himself over him and pled with the Taliban to stop beating him or he would die. The Taliban then took the Applicant to another cell. Six days later, while the Applicant was still in detention, he was informed by other detainees that the Taliban had killed both his son and Sheeragha.

[4] The Applicant was detained for 10 days and was released as a result of his wife selling the contents of their shop and giving the money to the Taliban in exchange for his freedom. His wife told him that Sheeragha's father and uncle had threatened her, saying that their entire family would

be killed if Sheeragha were to die. The following morning, the Applicant and the remainder of his family fled to Pakistan. They have not returned to Afghanistan since.

[5] The Applicant, along with his family, applied for permanent residence in Canada in 2008 as members of the Convention refugees abroad class or the Country of asylum class, through a sponsorship by the Association Éducative Transculturelle in Québec. The Applicant and his family were interviewed at the Canadian High Commission in Islamabad on September 27, 2011, and their application was rejected by letter dated November 5, 2011.

[6] In his application for permanent residency, the Applicant presented his problem with the Taliban and Janagha's family. He explained that Shia-Hazara-Ismaili people were persecuted by the Taliban in Afghanistan and that there is no security or protection of human life in that country. He also explained that in Pakistan his family cannot get work permits or attend government schools and that they suffer from police harassment for working illegally.

DECISION UNDER REVIEW

[7] The visa officer determined that the Applicant did not meet the requirements for immigration to Canada. Citing the relevant legislative provisions and after carefully assessing all of the factors relative to the application, the officer was not satisfied that the Applicant was a member of any of the classes prescribed for reasons brought to his attention during the interview and set out in the notes.

[8] In particular, the officer found that the Applicant did not meet the requirements of a "person in the Country of asylum class (RA)" pursuant to section 147 of the *IRPR* and was not satisfied on the balance of probabilities that he was and continued to be seriously and personally affected by armed conflict, civil war or massive violations of human rights. The officer notes that OP manual 5 defines "seriously and personally affected" as a "sustained, effective denial of basic human rights".

[9] With regard to the Convention refugees abroad class, the officer was not satisfied that there is a reasonable chance that the Applicant or his family member would be persecuted should they return to their country of origin or that there are good grounds for their fear of persecution if they were to return.

[10] The interview notes show that the officer questioned the Applicant regarding his employment as a fruit seller in Pakistan and his housing situation there, appearing to have concerns regarding the consistency of the housing details, however there was no indication of the relevance of this concern.

[11] The officer asked if the family would return to Afghanistan to visit should their application be approved, and they stated that they could not because they have enemies there and fear that the Applicant or another family member would be killed.

[12] The officer questioned the Applicant as to why he and his family decided to leave Afghanistan. He explained the circumstances surrounding his detention by the Taliban and the threats received by Janagha's family.

[13] The officer also asked whether the Applicant and his family could move "anywhere else in Afghanistan". The Applicant stated that they could not because they feared Janagha's family even in Pakistan and would not be safe in Afghanistan due to the family's political affiliation with the Jamiat party and related power.

[14] As can be seen from the notes, the officer asked them whether their fear of Janagha's family was the only reason they could not return to Afghanistan and the Applicant responded affirmatively.

[15] In the assessment, the officer found the Applicant to be credible. In the officer's view, the Applicant fled from Kabul with his family "due to a personal enmity with a family who may or may not be powerful/influential", explaining in parentheses that "this is a consistent description of persons of enmity throughout such applicants" [sic]. The officer notes that the Applicant "clearly stated that his fear is based on this persons [sic] threat to seek revenge for having turned in his son".

[16] The officer notes that the Applicant remained in Kabul even when his wife's family left as a result of civil disturbance before the Taliban took power and states that "[u]pon repeated questioning the PA demonstrates that there is no other reason for having fled, or fearing to return". Although the officer sympathizes with the Applicant and his family, their reasons for having sought refuge do not correspond to the relevant categories.

[17] The officer examined the other members to establish their fear for returning to Afghanistan. The officer informed the family that personal enmities are not a reason for granting refugee status and that the officer was not convinced that they would not have an Internal Flight Alternative (IFA)

or that state protection would not be available. The Applicant's wife explained that because they are Shia-Hazara-Ismaili, they could only live in Kabul and not in other provinces.

ISSUES

[18] The Applicant asserts that the officer erred in law in dismissing his Convention refugee claim on the basis that it arose from a personal enmity. He argues that they are at risk because of their family relationship to their son and that family relationship is a valid social group for seeking refugee status when the family is itself, as a group, the subject of reprisal and vengeance.

[19] The Applicant further argues that the officer misapplied paragraph 147*(b)* of the *IRPR* and wrongly found that the Applicant and his family would not be seriously affected if returned to Afghanistan after accepting that the Applicant was tortured and his son killed by the Taliban and that Janagha's family threatened to kill them.

[20] Finally, the Applicant argues that the officer erred in holding that the Applicant and his family could go anywhere else in Afghanistan, and did not consider the testimony of the Applicant's wife that they belong to the minority Hazara group and cannot go to the provinces where Pashtuns and Taliban reigned. The Applicant also alleges that the officer failed to consider publicly available documents on country conditions in Afghanistan to assess the accessibility and reasonableness of an IFA in this particular case.

[21] I will turn to each of these arguments in the following remarks.

ANALYSIS

[22] Before addressing the Applicant's arguments, the applicable standard of review must be determined. A visa officer's decision as to whether an applicant is a member of the Convention refugees abroad class or the Country of asylum class has been held to be a question of mixed fact and law reviewable on a standard of reasonableness. See e.g. *Azali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 517 at paras 11-12; *Quarizada v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1310 at para 15; *Kamara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 785 at para 19; *Alakozai v Canada (Minister of Citizenship and Immigration)*, 2009 FC 266 at paras 18-20; *Ismailzada v Canada (Minister of Citizenship and Immigration)*, 2013 FC 67 at para 8.

[23] Accordingly, the analysis of the officer's decision will be concerned with the "existence of justification, transparency and intelligibility within the decision-making process" and also with "whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[24] The two relevant classes are described in sections 145 and 147 of the *IRPR*:

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.	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.
147. A foreign national is a member of the country of	147. Appartient à la catégorie de personnes de pays d'accueil

asylum class if they have been determined by an officer to be in need of resettlement because	l'étranger considéré par un agent comme ayant besoin de se réinstaller en raison des circonstances suivantes :
(a) they are outside all of their countries of nationality and habitual residence; and	a) il se trouve hors de tout pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle;
(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.	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.

[25] In both cases, applicants must also conform to section 139 of the *IRPR*. In particular, paragraph 139(1)*(d)* provides:

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	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 :
…	…
(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	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) voluntary repatriation or resettlement in their country of nationality or habitual residence, or	(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) resettlement or an offer of resettlement in another country;	(ii) soit la réinstallation ou une offre de réinstallation dans un autre pays;

a) Did the officer err in concluding that the Applicant's fear is not based on a Convention ground?

[26] There is no dispute that family relationship may constitute a "particular social group" pursuant to section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). However, it is equally well established that the mere fact a claimant is targeted because of his family ties is not sufficient to bring the persecutory treatment within that category. The Respondent correctly states that the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection regime must be taken into account when interpreting the notion of a "particular social group" in the *IRPA*. It is in that context that this Court has consistently held that the victims of crime are not by virtue of that fact members of a particular social group. That being the case, family relationship will not constitute a "particular social group" when the primary victim is targeted for retribution or criminal purposes. In other words, the fact that a person alleges to be persecuted because he or she is a family member of another person who fears persecution is not sufficient, in and of itself, to ground a refugee claim. The primary victim must be persecuted on a valid Convention ground; the fact that a claimant is a member of a family, a member of which has been threatened with death, does not make that claimant a member of a particular social group where the threat is the result of retribution or criminal revenge. As Justice Dawson stated in *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 345 at para 16:

> To find otherwise would be to conclude that persecutory treatment directed to family members in no way related to discrimination or fundamental human rights would attract the protection of the

> Convention. For example, if children were the victims of persecutory conduct as a result of a parent's failure to forego a commercial opportunity or to cheat in a sporting event, I do not believe that it is intended that the Convention should be engaged to protect the children. That does not mean that protection ought not to be afforded, or that it would not be afforded, but simply that the source of the protection ought not to be the Convention.
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> See also: *Forbes v Canada (Minister of Citizenship and Immigration)*, 2012 FC 270 at paras 4-6; *Alassouli v Canada (Minister of Citizenship and Immigration)*, 2011 FC 998 at para 24.

[27] In the case at bar, the Applicant's fears are based on threats of violence in retribution for actions taken by his son. Having been threatened with death, the Applicant is a victim of crime. However the fact that the criminal activity stems from actions taken by a family member and the threats are to the family generally does not bring the persecutory treatment within the ground of a "particular social group". Reference was made in the Applicant's application for permanent residence to the persecution they suffered in Afghanistan as Hazaras. Even if the officer accepted his testimony regarding his son's death and his detention and torture at the hands of the Taliban who said that they were "not real Muslims", it was clear at the interview that family enmity with Janagha's family was the only reason the Applicant and his family feared returning to Afghanistan. The officer made no error in determining that a fear of violence resulting from family feud is not a valid Convention ground.

b) Did the officer err in finding that the Applicant is not a member of the Country of asylum class?

[28] The Applicant's position with regard to the officer's determination of his membership in the Country of asylum class is not entirely clear. The Applicant argued that it was not open for the officer to find that he and his family will not be seriously affected if they return to Afghanistan

while accepting that Janagha's family had threatened to kill the Applicant's entire family and that the Taliban had killed the Applicant's son and tortured the Applicant.

[29] 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.

[30] It is true that in his written application for permanent residence, the Applicant had indicated that "…there is not any security of our life [in Afghanistan], still there is kidnapping, bomb blasts. There is no protection of human life…" (Tribunal Record, p. 71). Yet during the interview, the Applicant focused exclusively on the situation created by the personal enmity with Janagha's family, which the Applicant believed was a very powerful family due to associations with the Jamiat political party. The Applicant's wife and two children each confirmed that this was the basis of their fear. Further, the officer noted that the Applicant had not left Afghanistan when other family members had, following the civil disturbances prior to the Taliban regime. Finally, it was also noted that the Applicant stated he could live in Kabul, were it not for the personal enmity.

[31] In those circumstances, I believe the officer's conclusion on the Applicant's eligibility to the Country of asylum class is reasonable even if he did not conduct a thorough assessment of the

Applicant's situation in this regard. Contrary to the situations in *Saifee v Canada (Minister of Citizenship and Immigration)*, 2010 FC 589 and in *Ismailzada v Canada (Minister of Citizenship and Immigration)*, 2013 FC 67, the officer did not fail to reach a conclusion on the Country of asylum class, and did not confuse the criteria for both tests. The officer was aware of the Applicant's concerns based on his status as a Shia-Hazara-Ismaili. However, these concerns only arose in the context of their fear of Janagha's family and in their response that they could not move elsewhere in Afghanistan to avoid this family. The Applicant's ethnic and religious status was not presented as a separate ground of risk. In those circumstances, it was therefore reasonably open to the officer to conclude that the Applicant had not discharged his burden of establishing that he would be seriously and personally affected by armed conflict or massive violations of human rights in Afghanistan.

[32] Much like the officer, this Court is sympathetic to the family's situation but is unable to conclude that the officer erred in determining that the reasons for having sought refuge do not correspond to the definition found in section 147 of the *IRPA* of a member of the Country of asylum class. Indeed, this case is similar to the situation described in *Qarizada v Canada (Citizenship and Immigration)*, 2008 FC 1310 at para 28:

> The application before the officer was not based upon the general conditions in Afghanistan after several decades of insurrection and civil war but upon Commander Khan's purported enmity towards the principal male applicant stemming from his refusal to allow the Commander to marry his sister. The officer was not obliged to search out and to reference country condition evidence to address issues that were not raised and were not grounded in the evidence.

[33] In light of the above, I am therefore of the view that this second argument of the Applicant in support of his submission to quash the impugned decision ought to be dismissed.

c) Did the officer err in finding that the Applicant has a viable IFA?

[34] The Applicant asserts that the officer erred in holding that they could go anywhere else in Afghanistan where their lives would not be threatened by Janagha's family. The Applicant goes on to submit that the officer erred by failing to identify exactly where in Afghanistan an IFA might exist, and by ignoring his wife's testimony that they cannot safely live among Pashtuns. Finally, the Applicant adds that the officer failed to consider any documents regarding the current country conditions in Afghanistan.

[35] While I do not disagree with the general principles enunciated by the Applicant, they are of no help in the particular circumstances of this case for the simple reason that it is manifest on a reading of the entire decision and of the Computer Assisted Immigration Processing System (CAIPS) notes that the officer did not reject the application on the basis of an IFA. Indeed, there is no mention of an IFA in the decision communicated on November 5, 2011.

[36] The notes reveal that the officer did inquire as to whether the Applicant could relocate to another province in Afghanistan, to which the Applicant's wife responded that they could not live outside of Kabul as a result of their religion and ethnicity. The officer therefore had this evidence before him prior to making his decision. However, the officer's decision was not based on the possibility of relocating. Rather, as noted in the reasons, the officer relied on the Applicant's own statement that he could live in Kabul. It was only the personal situation with Janagha's family which prevented the Applicant from returning to Kabul and, as the officer reasonably found, this was an insufficient basis for a claim as a Convention refugee or a Country of asylum class.

CONCLUSION

[37] For all of the above reasons, the officer's conclusions were reasonable and must be given deference. There is accordingly no basis for review, and the application is dismissed. No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1446-12
STYLE OF CAUSE:	ASHOR BAKHTIARI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	July 17, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	de MONTIGNY J.
DATED:	December 6, 2013

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