

Federal Court



Cour fédérale

Date: 20140227

Docket: IMM-5212-13

Citation: 2014 FC 193

Ottawa, Ontario, February 27, 2014

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

AJJAB KHAN AFRIDI

Applicant

And

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision made by a visa officer (the officer) of the High Commission of Canada in Islamabad, Pakistan, on July 23, 2013, wherein the officer rejected the applicant's application for a temporary resident permit (TRP).

Factual background

[2] Ajjab Khan Afridi (the applicant) is a three (3) year old boy born in Peshawar, Pakistan. The applicant's biological father died before the applicant's birth. The applicant's biological mother could not provide for his needs and the applicant has been looked after by his aunt since his birth.

[3] The applicant's aunt, Waheeda Afridi, is a Canadian citizen living in Peshawar, Pakistan. Her husband, Ashfaq Afridi, is a Canadian citizen living and working in Saskatoon, Saskatchewan. The Afridi are the legal custodians of the applicant and all ties between the applicant and his biological mother have been severed. The applicant's birth certificate and passport confirm that Ms. and Mr. Afrifi are his parents.

[4] Ms. Afridi is sick and would like to get treatment in Canada. However, in order to bring the applicant with her, she needs a visa for him to legally stay in Canada.

[5] Ms. Afridi claims that the situation is very difficult in Pakistan and, because of the ongoing violence, she and the applicant are at risk if they remain in Peshawar.

[6] Ms. and Mr. Afridi failed in their attempt to sponsor the applicant because the province of Saskatchewan refused to provide a "no objection" letter, as the Pakistani concept of legal guardianship does not amount to formal adoption for international adoption purposes.

[7] In January 2013, the applicant applied for a temporary resident visa, which was refused. In March 2013, the applicant re-applied for a temporary resident visa, but it was refused again.

[8] In June 2013, the applicant applied to the High Commission of Canada in Islamabad, Pakistan, for a temporary resident permit (TRP) pursuant to section 24 of the Act.

[9] In a letter dated July 23, 2013, the officer refused the applicant's application for a TRP.

Impugned decision

[10] In the Global Case Management System (GCMS) notes, the officer noted the family situation of the applicant. She observed that "guardianship is not the same as adoption and that the concept of adoption does not exist in Pakistan or Sharia Law". She added that, for this reason, the province of Saskatchewan could not issue the "no objection letter" required to enable an international adoption (Tribunal Record, p 122-123).

[11] The officer concluded that the applicant "does not meet the requirements of a temporary resident visa". The officer was not satisfied that the applicant would leave Canada at the end of his authorized stay, especially since Canada has suspended all adoptions from Pakistan. Furthermore, the applicant's situation is not specific to him or to his family and there is no indication of efforts to relocate to another city or area.

[12] The officer also determined that it would not be in the best interests of the child to issue a TRP to the applicant. The officer notes that the applicant has been living with his aunt in Pakistan, but also with his biological mother and three (3) biological siblings since his birth. He therefore has strong ties with his biological family. Moreover, the fact that Canada has suspended all adoptions from Pakistan and that Pakistan does not recognize adoption would put the applicant at risk should

he leave his home country. Issuing a TRP could even circumvent rules set to comply with the *Hague Convention on Protection of Children (Hague Convention)*.

Issues

[13] The present application raises three (3) issues:

1. Did the officer fail to provide adequate reasons for the negative decision?
2. Did the officer fail to assess the evidence in light of the policy and guidelines pursuant to subsection 24(3) of the Act?
3. Did the officer fail to consider the best interest of the child under section 24 of the Act and humanitarian and compassionate grounds?

Relevant provisions

[14] The following provisions of the *Immigration and Refugee Protection Act* are relevant to the case at bar:

PART I	PARTIE 1
IMMIGRATION TO CANADA	IMMIGRATION AU CANADA
DIVISION 3	SECTION 3
ENTERING AND REMAINING IN CANADA	ENTRÉE ET SÉJOUR AU CANADA
<i>Status and Authorization to Enter</i>	<i>Statut et autorisation d'entrer</i>
...	[...]
Temporary resident permit	Permis de séjour temporaire
24. (1) A foreign national who, in the opinion of an officer, is	24. (1) Devient résident temporaire l'étranger, dont

inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

...

Instructions of Minister

(3) In applying subsection (1), the officer shall act in accordance with any instructions that the Minister may make.

...

Right of temporary residents

29. (1) A temporary resident is, subject to the other provisions of this Act, authorized to enter and remain in Canada on a temporary basis as a visitor or as a holder of a temporary resident permit.

Obligation — temporary resident

(2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.

l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

[...]

Instructions

(3) L'agent est tenu de se conformer aux instructions que le ministre peut donner pour l'application du paragraphe (1).

[...]

Droit du résident temporaire

29. (1) Le résident temporaire a, sous réserve des autres dispositions de la présente loi, l'autorisation d'entrer au Canada et d'y séjourner à titre temporaire comme visiteur ou titulaire d'un permis de séjour temporaire.

Obligation du résident temporaire

(2) Le résident temporaire est assujéti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.

Standard of review

[15] The parties agree that when the adequacy of reasons affect procedural fairness, the applicable standard is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

[16] However, an officer's decision to issue a TRP being highly discretionary, it is otherwise reviewable under the reasonableness standard (*Vidakovic v Canada (Minister of Citizenship and Immigration)*, 2011 FC 605 at para 15, [2011] FCJ No 808 (QL)). In reviewing decisions using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

Analysis

[17] Section 24 of the Act enables an officer to issue a permanent visa to an applicant who otherwise does not meet the requirements of the Act. An officer's decision to refuse a TRP is highly discretionary.

[18] The OP 20 Guidelines provide that, in order to issue a TRP, the officer must be convinced of the existence of "compelling reasons" or "exceptional circumstances" (OP20 Guidelines, Section 2). The applicant cites various provisions of these guidelines which suggest that, given his situation, the officer was not barred from issuing a TRP to the applicant. The Court recalls that while guidelines may prove useful, they do not carry the force of law, they are not binding, they do not create legal

entitlement, and they cannot fetter the discretion of an officer (*Lee v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1152, [2008] FCJ No 1632 (QL)).

[19] The officer observed that a family class permanent residence application made by the applicant's adoptive parents has been previously refused and is now under appeal. She also noted that adoption does not exist under Pakistani law and that legal guardianship is not the same and that the province of Saskatchewan was therefore unable to issue a "no objection" letter. She further observed that Canada has now suspended all adoptions from Pakistan, the intention of the applicant's adoptive family to permanently live with him in Canada, and the negative impacts the issuance of a TRP would have on the applicant's biological family ties. Considering these elements, the officer was not satisfied that the applicant would leave Canada at the end of his stay. She also concluded that issuing a TRP could circumvent rules set to comply with the *Hague Convention*. Hence, the officer was convinced that it would be in the best interests of the child to stay in Pakistan

[20] The applicant argues that no reasons were provided by the officer. This argument lacks merit. The GCMS notes are part of the decision (*Daniel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1391, 422 FTR 69). They address the main issues of the case, and they enable the Court to fully understand the officer's reasoning. The Court is therefore of the view that there is no breach of procedural fairness.

[21] The applicant also failed to convince the Court that the officer erred in her application of the OP 20 Guidelines, which are not binding, or in her analysis of the best interests of the child, which she was not required to undertake. While the officer is not compelled to look at the best interests of

the child in a TPR application (*Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para 36, 302 FTR 54 [*Farhat*]), her decision demonstrates that she considered the best interests of the child, more specifically the separation with his adoptive father, the security situation in Pakistan and the applicant's ties with his biological mother and siblings.

[22] Although the Court is sympathetic to the applicant's case, on the basis of the record and the evidence adduced, it finds that the officer's decision, when read together with the GMCS notes, falls within the possible outcomes defensible in fact and law (*Dunsmuir* above at para 47).

[23] For these reasons, the intervention of the Court is not warranted and the application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application be dismissed. No question is certified.

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5212-13

STYLE OF CAUSE: AJJAB KHAN AFRIDI v
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: SASKATOON, SASKATCHEWAN

DATE OF HEARING: FEBRUARY 20, 2014

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

DATED: FEBRUARY 27, 2014

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