Federal Court Cour fédérale

Date: 20151218

Docket: IMM-1671-15

Citation: 2015 FC 1400

Ottawa, Ontario, December 18, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SAHAR GUL SAHAR
SOFIA MOHAMMADZAI
ELHAM SAHAR
MARIAM SAHAR
ELIAS SAHAR
FERDAWS SAHAR
ABBAS SAHAR
ARIAN IBRAHIM SAHAR
SARAH SAHAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Once, one or more of the five possible grounds for refugee status has been identified,

what is the legal balancing act by which to determine whether the benefit of the doubt should be accorded?

II. Introduction

[2] The Principal Applicant, Sahar Gul Sahar (age 68), his wife, Sofia Mohammadzai (age 51), and their children are citizens of Afghanistan.

[3] The Principal Applicant alleges that prior to his departure to Pakistan, he was a community leader in Jalalabad, Afghanistan. His duties as a community leader included: protesting against the malfeasance of the Taliban regime, monitoring the human rights situation, educating members of the community in respect of their rights and whom to seek for advisory services and advocacy within the Afghan authorities.

[4] As a result of his role as a community leader, the Principal Applicant alleges that, in November 1997, he was assaulted by five men, detained in a dark room, and tortured for seven days. After the seventh day of his detention, his brother was able to procure his release from detention in exchange for a ransom.

[5] The Principal Applicant was freed in December 1997. After planning his escape from Afghanistan, the Principal Applicant and his remaining family members therein, left Afghanistan in December 1997; and, arrived in Peshawar, Pakistan, where they allegedly still reside subsequent to their 1997 departure from Afghanistan.

[6] On March 3, 2011, the Applicants submitted an Application for permanent residence. The visa office in the city of Islamabad, then, opened a file for the Applicants in the country of asylum category.

[7] On February 19, 2015, an interview was conducted with the Applicants at the Embassy of Canada in Islamabad. Following the interview, the Officer rejected the Applicants' application:

> I am not satisfied that you meet the definition of either a Member of the Country of Asylum Class or the Convention Refugee Class. I am not satisfied that you are residing outside of your country of citizenship. You presented few documents from Pakistan, some dated August 2014, appeared extremely recent that you admitted were obtained as part of your preparations for interview, some showed medical treatment in Pakistan in 2011 and 2012 which is often sought by Afghans resident in Afghanistan border areas, our call in letter was returned undeliverable with a post office notation that no one of that name lived at the address and, finally, your explanations for Tazkiras, which require the person receiving them be present at the time of issue, issued last week in Nangharhar, Afghanistan was not credible. I clearly noted these concerns to you at interview. I have reviewed your application in full, and have considered all of your explanations and responses, but find that you do not allay my concerns. As a result, you do not meet the criteria set out at section 96 of the Act or section 147 of the Regulations. Consequently, with reference to section 139(1)(e) of Regulations and section 11 of the Act, your application is refused.
>
> (Tribunal's Record at p 127)

III. Position of the Parties

[8] The Applicants submit that the Officer breached procedural fairness as the Applicants were not given a meaningful opportunity to present all the necessary evidence in their case. Secondly, the Applicants argue that the Officer could not reject their application solely on the basis that the Officer did not believe that the Applicants had resided in Pakistan since 1997;

rather, the Officer should have examined whether the Applicants were physically outside of their country of nationality for the last number of years, having actually sought in 1997 to flee their country of origin. Thirdly, the Officer erred in his assessment of section 147(*a*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[9] Conversely, the Respondent primarily submits that the Applicants' record does not include an affidavit from any of the nine Applicants, rather, only from the daughter of the Principal Applicant, Gul Makay Sahar, who lives in Canada and is not an Applicant in this case. The Respondent submits this contravenes subsection 81(1) of the *Federal Courts Rules*, SOR/98-106. Secondly, it was reasonable for the Officer to reject the Application as the Officer relied on many elements to disbelieve their allegations in regard to having lived in Pakistan (they did not have any recent Proof of Registration cards issued by the Pakistani Government; the letter of convocation for an interview with Canadian authorities was returned as undeliverable; school documents dated August 2014 were in pristine condition; the utility bills, in and of themselves, are not reliable and are to the attention of differently name-designated individuals).

[10] The burden was on the Applicants themselves to demonstrate they were living in Pakistan (*Nassima v Canada (Minister of Citizenship and Immigration)*, 2008 FC 688 at paras 12, 15 and 16 [*Nassima*]). Thirdly, contrary to the allegations of the Applicants, the Respondent submits that documentary evidence states that Tazkiras are not issued outside of Afghanistan. As a result, the fact that the Applicants have Tazkiras issued on February 11, 2015, demonstrates that the Applicants returned to Afghanistan as Tazkiras are only issued in person. Moreover, the Officer fulfilled his duty of procedural fairness as he did not prevent the Applicants from presenting

evidence; and, the Applicants did not request more time to present further evidence. Furthermore, the burden of the proof rests on the Applicants to demonstrate that they meet all the requirements (*Hakimi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 51 at para 18). Finally, the Officer had no obligation to alert the Applicants of concerns he may have had with regard to their Application arising directly from the requirement of the IRPA or its regulations (*Nassima*, above at para 18).

IV. Legislation

[11] The following are the relevant legislative provisions of the IRPA and the IRPR:

Sections 11, 16 and 96 of the IRPA

Application before entering Canada	**Visa et documents**
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.
Obligation – answer truthfully	**Obligation du demandeur**
16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer	**16**. (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous

reasonably requires.	éléments de preuve pertinents et présenter les visa et documents requis.
Convention refugee	**Définition de « réfugié »**
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 themself 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.

Sections 139 and 147 of the IRPR

General requirements	**Exigences générales**
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,	*d*) aucune possibilité raisonnable de solution durable n'est, à son égard, réalisable

within a reasonable period, of a durable solution in a country other than Canada, namely	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;
Member of the country of asylum class	**Catégorie de personnes de pays d'accueil**
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	**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*) 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.

V. Issues

[12] The Applicants submit three issues:

1) Did the Officer breach procedural fairness by failing to provide the Applicants an opportunity to submit complimentary documentation?

2) Did the Officer err in finding that the Applicants did not reside in Pakistan?

3) Did the Officer err in his interpretation of section 147(*a*) of the IRPR?

VI. Standard of Review

[13] The standard of review of reasonableness is applicable wherein fact and law determinations as well as fact determinations are reached by immigration officers (*Osmani v Canada (Minister of Citizenship and Immigration)*, 2012 FC 134 at para 11 [*Osmani*]; *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*]).

[14] The standard of review of correctness is applicable to an alleged breach of procedural fairness (*Osmani*, above at para 11; *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339, 2009 SCC 12 at para 43).

VII. Analysis

[15] As the issues submitted are intertwined, the Court will examine all three issues together below.

[16] If the Principal Applicant promoted empowerment and was known to have been engaged thereon; then, the family would be in danger upon return to Afghanistan, recognizing that without status in Pakistan they cannot establish residence therein. It is recalled that the Principal Applicant and his family have the supporting document of an affidavit from his daughter, who is a permanent resident in Canada and has been residing in the province of Quebec since September 2013.

[17] Recognizing that the Principal Applicant was not contradicted as to his work in promoting empowerment, therefore, that alone, if credible, would place the family in a situation of peril upon return to Afghanistan.

[18] Recognizing the chaotic situation of the past in Afghanistan, original documents may not have been able to be submitted; therefore, a necessity exists to ensure that documents which establish residence in Afghanistan, be verified for their authenticity before speculating that they lead to a lack of credibility (*Osmani*, above at para 22), as the immigration officer has done. Key reference is made to *Wardak v Canada (Minister of Citizenship and Immigration)*, 2015 FC 673, IMM-7502-14.

[19] As recognition of the identity and origin of claimants for refugee status (applicants before the Federal Court) may be questionable due to the history of Afghanistan, therefore, a need exists for either verification of data, or greater analysis on the part of decision-makers, in order for fatal mistakes not to be made subsequent to written responses from claimants (applicants) who could be in dire danger.

[20] The benefit of the doubt, in respect of the jurisprudence as to the granting of refugee status, must be kept in mind in acknowledging and understanding that the fragility of the human condition, or its vulnerability requires a balancing act. That balancing act requires an analysis as to the fragility and/or vulnerability of the human condition, on the one hand, coupled with analysis as to maintenance of the integrity, and, thus security of the immigration system, on the other. The integrity of the immigration system is based on the laws and regulations in place in

Canada for the well-being and security of citizens and accepted immigrants therein; this equation requires the balancing act of an equilibrium between the two parts of the equation: the vulnerability or fragility of the human condition of individuals considered, coupled with the need for maintaining the integrity of the immigration system.

[21] For a decision to be reasonable, articulated reasons are necessary by which to demonstrate reasonableness in respect of the equation discussed above (*Dunsmuir*, above at para 47).

[22] The Refugee Convention was not written for the purpose of ensuring, without a doubt, that an Applicant for refugee status is, without question, credible; but, rather, the benefit of a (calculated) doubt is given only when the integrity of the system or its security is, thus, not itself, placed in peril or compromised; yet, it must be recalled that if complete certainty was desired in respect of refugee claimants, the risk to refugee claimants (applicants) would be such, that it would make the Refugee Convention meaningless, as, in a very large proportion of cases, only corpses or cadavers would be granted refugee status. As is specified below in the UNHCR Handbook, cited by the Supreme Court below, in respect of the interpretation of the Refugee Convention, the following paragraphs outline the pertinent paragraphs relevant to the subject-matter in this case:

> 196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on

> the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.
>
> (2) Benefit of the doubt
>
> 203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.

(See also: *Chan v Canada*, [1995] 3 SCR 593, as per Justice La Forest, writing for the majority, at p 142, in his reference to the UNHCR Handbook in respect of the "Benefit of the Doubt").

> 204. The benefit of the doubt should, however, only be given when <u>all available evidence has been obtained and checked</u> and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts. [My emphasis.]
>
> (UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011 [UNHCR Handbook and Guidelines], at para 196, 203 and 204)

The Finnish-fact finding mission states the following with respect to the process for obtaining a taskira (identity card) – Afghanistan: Issue of Taskira (Tazkira) inside or outside of Afghanistan: Information contained in the document during the Taliban and post-Taliban, Research

Directorate, Immigration and Refugee Board, 18 December 2007, Document AFG102680.E: "Due to Afghanistan's violent past, many registries have been destroyed".

Key reference is also made to Justice Robert Barnes' decision in *Rahimi v Canada (Minister of Citizenship and Immigration)*, IMM-6254-14, especially at paras 4 and 5.

[23] A doubt was expressed by the Respondent as to the affidavit of the daughter of the Principal Applicant in Canada; and, thus, that of the family in the Respondent's mind as to a potential discrepancy; however, prior to adequate or sufficient analysis, it cannot be said that a contradiction or even a doubt exists, as was suggested by the Respondent on the basis of an appearance of speculation without ascertained validity.

VIII. Conclusion

[24] Therefore, for all the above reasons, the application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted. The matter is to be heard anew by a different officer. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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