Federal Court  Cour fédérale

Date: 20161208

Docket: IMM-1370-16

Citation: 2016 FC 1357

Ottawa, Ontario, December 8, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**SHAHBAZ KHAN SAFDARI,
SEMIN SAFDARI, ANASHA SAFDARI,
SHAMSUDDIN SAFDARI,
HAMINA SAFDARI, TAHMINA SAFDARI,
AND KHATIMA SAFDARI**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of an immigration officer in the Canadian Embassy in Ankara, Turkey [Visa Officer], dated January 6, 2016 [Decision], which denied the

Principal Applicant's application for permanent residence as a member of the Convention refugee abroad class or as a member of the humanitarian-protected persons abroad designated class.

II. BACKGROUND

[2] The Principal Applicant is a 38-year-old citizen of Afghanistan and has resided in Tajikistan since May 22, 2008, where he holds refugee status. He claims a fear of return to Afghanistan based on his identification as Hazara, an ethnic minority group that has faced marginalization and discrimination in Afghanistan.

[3] The Principal Applicant says that he left Afghanistan with his wife and five children after a series of violent incidents against his family. In July 1997, his mother was attacked by armed gunmen in their family home. In 2003, after his older brother obtained employment with an American company, he says the Taliban attacked the family home again and killed his younger brother. The older brother was subsequently abducted and decapitated after the family could not afford the demanded ransom.

[4] In May 2010, the Principal Applicant and his family applied for permanent residence in Canada under the Convention refugee abroad and humanitarian-protected persons abroad classes. In connection with the application, the Principal Applicant was interviewed on March 15, 2011 with the assistance of an interpreter fluent in English and Dari. During the interview, he explained that the sole reason for leaving Afghanistan was his fear that his children would be kidnapped, but he had never been personally targeted by the Taliban. He also stated that he and

his wife wished to leave Tajikistan because they did not see Tajikistan as a permanent solution that would lead to a good life for their children. He then confirmed that he had never been persecuted for reasons of race, religion, nationality, or member of a group or political opinion. On June 3, 2011, the application was refused on the basis that the visa officer was not satisfied that the Principal Applicant met the definition of a Convention refugee, as he did not seem to be facing persecution and his reasons for not returning to Afghanistan appeared to be related to the poor economic situation and general instability.

[5] In September 2013, the Principal Applicant and his family applied again for permanent residence in Canada under the Convention refugee abroad and humanitarian-protected persons abroad classes. The documentation for the 2013 application disclosed his 2010 application. In connection with the 2013 application, the Principal Applicant was interviewed on June 1, 2015 with the assistance of an interpreter fluent in English and Dari. The interview was conducted by a visa officer different from the one who had conducted the 2011 interview. During the interview, the Principal Applicant explained that he had left Afghanistan due to the numerous threats his family had faced there, including the deaths of his parents and brothers. He also said that he had never been refused a visa or refugee status.

[6] According to the Global Case Management System [GCMS] notes, the Visa Officer was satisfied after the 2015 interview that the Principal Applicant met the requirements of a Convention refugee, noting that he had a well-founded fear of persecution based on his ethnicity as Hazara. However, the Visa Officer subsequently learned about the 2010 application, which had not been declared during the interview.

[7] Based on the inconsistencies in the answers between the 2011 and 2015 interviews, the Visa Officer sent the Principal Applicant a procedural fairness letter dated July 9, 2015 to explain his concern regarding the inconsistencies and their effect on the outcome of the application. The letter also provided the Principal Applicant with 60 days to submit additional information regarding the inconsistencies, which he did by a letter received July 21, 2015. In his response, the Principal Applicant stated that he did not understand English and had relied on another individual to complete the information in his 2010 application, which did not include all the relevant information, including the series of violent incidents against his family in Afghanistan. The Principal Applicant explained that after the 2010 application was denied, he relied upon a different individual to assist in completing the 2013 application, which was the reason for the inconsistencies between the applications.

III. DECISION UNDER REVIEW

[8] The Decision sent from the Visa Officer to the Principal Applicant by letter dated January 6, 2016 determined that the Principal Applicant did not qualify for immigration to Canada in the Convention refugee abroad class or humanitarian-protected persons abroad designated class.

[9] The Visa Officer concluded that the Principal Applicant did not meet the requirements of s 96 of the Act, as he did not come under the definition of a Convention refugee. Furthermore, the Visa Officer concluded that the Applicant also did not meet the requirements of the protected classes under s 139(1)(e) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[10] The Visa Officer was not satisfied that the evidence presented at the 2015 interview was credible. The Visa Officer noted the inconsistencies in the answers given between the 2011 and 2015 interviews as to why the Principal Applicant had left Afghanistan and did not think a return was possible. The Decision also noted that the Principal Applicant had not declared the prior 2010 application during the interview. The Visa Officer acknowledged the Principal Applicant's response to the procedural fairness letter, but stated that the concerns regarding the inconsistencies remained unsatisfied. As a consequence of finding the Principal Applicant not to be credible, the Visa Officer was unconvinced he had a well-founded fear of persecution.

[11] In the GCMS notes, the Visa Officer noted that the Principal Applicant did not address the inconsistencies between the answers provided in the 2011 and 2015 interviews. Instead, the Principal Applicant only explained that inconsistencies regarding the written documentation were due to the different interpreters who had assisted in completing the applications.

IV. ISSUES

[12] The Applicants submit that the following are at issue in this application:

1. Did the Visa Officer err by failing to consider the vulnerable context of an overseas refugee applicant?
2. Did the Visa Officer err by failing to consider the risk profile of the Principal Applicant as a Hazara Shia Ismaili?

V. STANDARD OF REVIEW

[1] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[2] The issues raised by the Applicants ask whether the Visa Officer failed to appropriately consider the context of an overseas refugee applicant as well as conduct a risk profile analysis of the Hazara Shia Ismaili. A visa officer's assessment of an application for permanent residence involves questions of mixed fact and law and is reviewable under the standard of reasonableness: *Canada (Citizenship and Immigration) v Young*, 2016 FCA 183 at para 7; *Odunsi v Canada (Citizenship and Immigration)*, 2016 FC 208 at para 13.

[3] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above,

at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[4] The following provisions from the Act are relevant in this proceeding:

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.

[5] The following provisions from the Regulations are relevant in this proceeding:

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 :
…	…
(e) the foreign national is a member of one of the classes prescribed by this Division;	e) il fait partie d'une catégorie établie dans la présente section;
…	…
Member of Convention refugees abroad class	**Qualité**
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.
Person in similar circumstances to those of a Convention refugee	**Personne dans une situation semblable à celle d'un réfugié au sens de la Convention**
146 (1) For the purposes of subsection 12(3) of the Act, a person in similar circumstances to those of a Convention refugee is a member of the country of asylum class.	146 (1) Pour l'application du paragraphe 12(3) de la Loi, la personne dans une situation semblable à celle d'un réfugié au sens de la Convention appartient à la catégorie de personnes de pays d'accueil.

Humanitarian-protected persons abroad	**Personnes protégées à titre humanitaire outre-frontières**
(2) The country of asylum class is prescribed as a humanitarian-protected persons abroad class of persons who may be issued permanent resident visas on the basis of the requirements of this Division.	(2) La catégorie de personnes de pays d'accueil est une catégorie réglementaire de personnes protégées à titre humanitaire outre-frontières qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.
Member of 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

VII. ARGUMENTS

A. *Applicants*

[6] The Applicants submit that the Visa Officer's Decision was unreasonable.

[7] The Principal Applicant has submitted an affidavit to provide background information to assist the Court, not to bolster the claim or explain away inconsistencies.

[8] The Visa Officer erred in his credibility assessment by applying the standard of an inland refugee applicant rather than considering the vulnerable context of overseas refugee applicants, who often lack the resources to navigate the application process. In this case, the Principal Applicant is barely literate and, in completing his first application, relied on an acquaintance whose English skills were also tenuous. As such, he was unaware the application was inaccurately completed and lacked the details regarding the violence perpetuated against his family in Afghanistan. The Principal Applicant did not mention the violence during the 2011 interview because his focus was on the immediate concerns surrounding his children. He was unaware that these concerns were not relevant to his claim for refugee protection. Additionally, the Principal Applicant was not able to sufficiently address the Visa Officer's concerns regarding the inconsistencies between his interview answers in the response to the procedural fairness letter because he lacked access to legal assistance or interpreters.

[9] The Visa Officer also erred by failing to consider the risk profile of the Principal Applicant as an ethnic Hazara Shia Ismaili. The credibility concerns address the Principal Applicant's answers regarding the reasons for his leaving Afghanistan, not his ethnic identification as Hazara. Although the Visa Officer accepted that the Principal Applicant identified as Hazara and would face persecution as a result of this identification, as evinced in the GCMS notes, the Decision does not consider ethnicity at all. The Principal Applicant argues

that, even if the Visa Officer did not believe the details of his persecution, a thorough analysis of the country conditions for Hazara in Afghanistan should have been undertaken.

B. *Respondent*

[10] The Respondent submits that the Visa Officer's Decision was reasonable and the Applicants have failed to demonstrate that the Visa Officer made a reviewable error.

[11] As a preliminary issue, the Respondent argues that the Principal Applicant's affidavit is inadmissible due to the inclusion of new facts that were not before the Visa Officer. Notably, the affidavit includes information about the Principal Applicant's educational background and lack of interpretive assistance in the application process. The Respondent submits that since this evidence was not before the decision-maker, it is not relevant to procedural fairness, does not disclose the complete absence of evidence on a certain subject-matter, and does not provide neutral background information to assist the Court in understanding the record. Hence, it does not fall within the exception for admission on judicial review and should be disregarded.

[12] The Visa Officer reasonably determined the evidence presented by the Principal Applicant at the 2015 interview was not credible. Visa officers are in the best position to assess an applicant's credibility and adverse credibility determinations may be made where there are inconsistencies or contradictions in an applicant's representations. In this case, the Visa Officer noted inconsistencies regarding the reasons why the Principal Applicant left Afghanistan. In the 2011 interview, the Principal Applicant stated that he had never felt personally targeted or persecuted in Afghanistan and only left the country due to a fear that his

children would be kidnapped. Conversely, in the 2015 interview, he provided several examples of violent threats against his family and denied the existence of any prior refugee application. In light of these contradictions, the Principal Applicant was notified via a procedural fairness letter and given an opportunity to address them; however, the response failed to address the inconsistencies between the interviews. As a result, the Visa Officer was unsatisfied that the evidence presented was credible.

[13] The Applicants' argument that the credibility analysis was flawed because it did not take into account the Principal Applicant's circumstances as a poor, illiterate overseas refugee claimant is without merit. Both interviews were conducted with the assistance of interpreters and the Principal Applicant confirmed he understood the interpreters and the need to be truthful. He was also given the opportunity to address the Visa Officer's credibility concerns but failed to do so. The fact that the application and response letters were completed in English with assistance does not preclude a negative credibility finding. The Visa Officer's negative credibility findings were not based on erroneous findings of fact made in a capricious manner and without regard to the evidence. Instead, the Visa Officer's credibility finding was based upon the inconsistences in the evidence and was justified, transparent, and intelligible.

[14] The Visa Officer's decision not to further consider the risk profile of Hazara in Afghanistan is reasonable. The initial determination that the Principal Applicant's identity as Hazara led to a well-founded fear of persecution in Afghanistan was vitiated by the credibility concerns. The situation of Hazaras in Afghanistan was considered, but the initial finding was

based on evidence later deemed not to be credible. As such, the Visa Officer was not obligated to further analyze the risks of Hazara in Afghanistan in the Decision.

[15] Furthermore, the Respondent submits that once the Visa Officer did not find the Principal Applicant to be credible, it was not possible to establish membership in the Convention refugee abroad or country of asylum classes. Both require applicants to provide credible evidence of fear of persecution or that they have been personally affected by the situation in the country; claims based solely on objective country conditions cannot succeed. If there is no other evidence supportive of the claim, as is the case here, country conditions do not need to be considered. As the Court commented in *Saifee v Canada (Citizenship and Immigration)*, 2010 FC 589 at para 34, an absence of subjective fear may render useless any analysis of country condition if the applicant is found to be not credible.

VIII. ANALYSIS

[16] The Visa Officer's procedural fairness letter gave the Principal Applicant a fair opportunity to explain the inconsistencies in his responses at the 2011 and the 2015 interviews to the question of why he had left Afghanistan.

[17] In his response to the procedural fairness letter, the Principal Applicant did not address these significant inconsistencies. The Applicants now say that the Visa Officer was unreasonable for not taking into account the Principal Applicant's circumstances as a poor, illiterate, overseas refugee claimant who did not have access to legal assistance at any time during the claims

process, and who had to rely upon different people to write letters for him in English, and assist with his application forms.

[18] This does not explain, however, why the Principal Applicant gave such widely different answers at the two interviews where he was assisted by interpreters and where he confirmed that he understood what was being asked and was advised to be truthful in his answers. The Principal Applicant did not raise any concerns about the quality of the interpretations at the interviews or suggest in any way that he was confused. He simply gave two very different accounts of what he fears in Afghanistan at both interviews and, inexplicably, he denied at the 2015 interview that he had ever been refused a visa, notwithstanding his earlier failed application.

[19] I am willing to accept that the Principal Applicant may not have fully understood the whole application process and was highly dependent on others to complete the application forms, but this does not explain the answers he gave at the interviews, and it is difficult to see what more the Visa Officer could have done to ensure that the Principal Applicant knew what was expected of him at the interviews and that he understood the questions. It is also difficult to see what more the Visa Officer could have done to give the Principal Applicant an opportunity to both understand and explain the discrepancies in his interview answers.

[20] On the evidence before him, it was not unreasonable or unfair for the Visa Officer to conclude that the evidence presented at the 2015 interview was not credible.

[21] It seems to me, however, that the Visa Officer's findings on a lack of credibility relate solely to the discrepancies in the Principal Applicant's answers as to why he had left Afghanistan and feared to return. It does not appear to me that the Visa Officer made a general non-credibility finding or that he doubted that the Principal Applicant was of Hazara ethnicity. If the Visa Officer did doubt this, then he did not make it clear enough so that the Decision would lack transparency and intelligibility on this point. However, when the Visa Officer says in his Decision that "I am not satisfied that the evidence presented to me at the interview on June 1, 2015 is credible," he is clearly referring to what immediately precedes this conclusion, i.e., the "inconsistencies regarding your refugee claim and the reasons why you left your country of nationality between your fist [sic] interview on March 15, 2011 and your second interview on June 1, 2015." There were no inconsistencies with regards to the Principal Applicant's Hazara ethnicity. This is confirmed by the GCMS notes, which make it clear that the Principal Applicant had failed to respond adequately to the "concerns" set out in the fairness letter. The fairness letter does not say that Hazara ethnicity is a concern.

[22] So this raises the issue of whether, given the Principal Applicant's Hazara ethnicity, the Visa Officer should have considered whether this, in itself, places the Principal Applicant at risk of persecution in Afghanistan.

[23] There can be little doubt that the Visa Officer was aware of the ethnic nature of the claim because he referred to it himself in the GCMS notes:

> I am satisfied that the PA has a well founded fear of persecution on account of ethnicity Hazara. Reliable country of origin information supports that the minority ethnic group Hazara faces discrimination in Afghanistan amounting to persecution. Satisfied that the threat

> of persecution exists countrywide. PA does not have a reasonable prospect, within a reasonable time period of a durable solution. PA cannot safely return to Afghanistan.

[24] This aspect of the claims did not change from the 2011 interview, and there was no inconsistency. It is also supported by the objective documentation available to the Visa Officer, which makes it clear that people with Hazara ethnicity are in danger throughout Afghanistan. At the very least, the Visa Officer should have considered whether the inconsistencies set out in the fairness letter made any difference to his earlier findings of a well-founded fear on account of ethnicity.

[25] The jurisprudence of the Court suggests that this omission is a reviewable error. See *S. (S.) v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 694, and *Fixgera Lappen v Canada (Citizenship and Immigration)*, 2008 FC 434:

> [27] This Court has held previously that there may be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the "country conditions are such that the claimant's particular circumstances make him/her a person in need of protection."

[26] Reading the Principal Applicant's response to the Visa Officer's fairness letter, it is clear that he is not well-educated, does not know English, and requires the help of others to complete the forms and to reply to the letter. In fact, he says that "my children know a little bit English" and "I have founded the difference between 2011 and 2015 by my children cooperation…." The Principal Applicant may not directly explain the discrepancies that concerned the Visa Officer, but he reveals himself in his response as someone who would have little idea about what those concerns are and their significance for his refugee application, and that he had to rely on his

children to come up with some kind of response? The Visa Officer cannot be held to be unreasonable in making a negative credibility finding based upon the absence of a full response, but the Visa Officer must have known, having interviewed the Principal Applicant, that he was dealing with someone who is in a very difficult situation in terms of understanding the application process, what is important and what is not important, and simply translating his own thoughts into English and communicating them. The resort to the use of his children who "know a little bit English" speaks volumes about the predicament of the Principal Applicant.

[27] The Principal Applicant has already been found to be a refugee in Tajikistan, he clearly fears the Taliban and, as the Visa Officer himself found, he has every reason to fear the Taliban, given his ethnicity: "I am satisfied that the PA has a well founded fear of persecution on account of ethnicity Hazara…. PA cannot safely return to Afghanistan." Under these circumstances, I don't think the inconsistent interview answers can be used to reject this whole claim. This is one of those instances where the Visa Officer should have gone further in deciding whether there were grounds for subjective fear. He had already found that, objectively speaking, the Principal Applicant had every reason to fear the Taliban on the basis of Hazara ethnicity alone.

[28] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer in accordance with these reasons.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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