Federal Court Cour fédérale

Date: 20190829

Docket: IMM-3756-18

Citation: 2019 FC 1117

Ottawa, Ontario, August 29, 2019

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MOHAMMAD SADEQ SAMANDAR,
SHAKILA AYOUB,
NOORUDIN MOHAMMAD SADEQ
NOORULLAH MOHAMMAD SADEQ
ZAHRA MOHAMMAD SADEQ
SHAHABUDIN MOHAMMAD SADEQ and
SADRUDIN MOHAMAD SADEQ

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision made by an immigration officer

[Officer] of Immigration, Refugees and Citizenship Canada dated January 24, 2018. The Officer rejected the Applicants' application for Canadian permanent resident visas as members of the Convention refugee abroad class [Decision].

II. Facts

[2] The Applicants consist of the Principal Applicant, his wife and his children, all of whom were born in Afghanistan.

[3] An official at the Canadian Embassy interviewed the Applicants in March, 2014. The Principal Applicant alleged they left Afghanistan because they were threatened by a Taliban commander and held temporary refugee status in Tajikistan. The Principal Applicant alleged he was working for a company delivering fuel to an American camp near Kabul, Afghanistan, but was threatened by the Taliban for working with "non-believers". During a delivery in August, 2012, the Principal Applicant alleged he and his cousin were captured by the Taliban; after some conflict, the cousin killed the Taliban commander. The Principal Applicant allegedly then escaped to Tajikistan in December, 2012.

[4] In the interview, the Principal Applicant alleged he belonged to the "Hazara, Ismali Shi'a" group and that there were problems with this group where the Taliban were present.

[5] Further in a previous 2014 interview, the officer at the time noted the Principal Applicant completed a two-year business administration program at an American university and is fluent in

English. He also never travelled outside of Afghanistan or Tajikistan. As noted below these findings are not accurate.

[6] The officer was satisfied the Applicants met the definition of a refugee, pursuant to section 96 of *IRPA*. The UNHCR processing guidelines indicates those who worked with coalition forces are vulnerable. Moreover, the Applicants belong to a minority ethnic group (Hazara) and a minority religious group (Ismail Shi'a). The officer was satisfied the Applicants had well-founded fear of persecution on the basis of their religious beliefs and membership in a social group, and that country-wide risk of persecution existed.

[7] The Embassy subsequently sent a procedural fairness letter [PFL] to the Principal Applicant in 2016, indicating concerns that he did not meet the requirements to immigrate to Canada due to credibility. Specifically, the PFL stated the Principal Applicant did not disclose what turned out to be two prior refusals of requests for immigration to Canada, one made in 2005 and 2009. The PFL also indicated there existed significant discrepancies between the claims in the current and former two applications, and that the Principal Applicant failed to disclose his time in Pakistan (which turned out to be 10 years).

[8] The Principal Applicant responded to the procedural fairness letter alleging he faced a well-founded fear of persecution in Afghanistan on the basis of race and religion as a Hazara Shia and for being a driver for a foreign fuel company. The Principal Applicant alleged he is illiterate and that he was not aware his application forms omitted important information. He said he did not mean to deceive the authorities.

[9] The Principal Applicant was therefore interviewed a second time, which took place in January, 2018. He admitted to the Officer that he lived in Pakistan from 1998 to 2009 – which he had not disclosed when he requested the visas. The Principal Applicant claimed to be illiterate and submitted that he did not previously disclose his time in Pakistan because the person who filled out his papers told him to lie. Further, the Principal Applicant admitted the story about the Taliban commander was not true and the commander did not exist – the person who filled the form fabricated the story.

III. Decision under review

[10] The Officer refused the application due to the Officer's credibility concerns. The analysis of the decision from the GCMS notes dated January 24, 2018 states:

> ANALYSIS
>
> I have reviewed all documents on file, including PP letter, and response to PFL. I have reviewed country information regarding conditions in Afghanistan particular to Hazaras and to individuals who have worked with company's [*sic*] associated with foreign presence. While these documents support the case for Afghanistan being dangerous for people with these profiles, they do not remedy the very serious credibility concerns with the applicant. It is not in question that the applicant is of Hazara ethnicity, and that they may face discrimination and abuse in Afghanistan.
>
> The applicant failed to disclose two previous refusals for Canadian Immigration, and the alleged time spent residing in Pakistan when he would have been applying for these processes had he actually resided there. The applicant applied under a different name so these refusals were not initially detected. He failed to disclose this history both in writing (forms) and orally at interview. I explained my concerns to the client and allowed him the opportunity to respond. The client states that the story he told at the last interview (and in the forms) regarding the commander Yakatod was not true. He understood the interpreter, and was informed by the interviewing officer that failure to be truthful could result in refusal of his application. While the client states that the reason he lied at

> the 2014 interview is fear for his children, and his illiteracy, he was given opportunities, orally, to tell the truth, and did not do so.
>
> I have considered the explanations provided by the client and by counsel, however they do not allay my concerns that the applicant has not been forthcoming and credible in his answers - narratives about where the client was living, when, and why he fled cannot be considered credible at this point, given multiple omissions and purposeful dishonesty on the part of this client. I am not satisfied that he answered all questions relating to his residence and history (including those related to past criminal acts) truthfully, and as such I am note satisfied that he meets the requirements of the act and is not inadmissible.
>
> Refusing per A11 (1) and A16, R139 (1)e [*sic*] refusal drafted.
> ...

IV. Issues

[11] The Applicants submit the following issues for determination:

> A. The Officer erred by failing to consider the risk profile of the Applicant as a Hazara Shia; and
>
> B. The Officer erred by failing to consider the vulnerable context of an overseas refugee applicant.

[12] With respect, the issue is whether the Decision taken as a whole is reasonable.

V. Relevant statutory provisions

[13] Subsections 11(1) and 16(1) of *IRPA* provide:

Application before entering Canada	**Visa et documents**
11 (1) A foreign national must, before entering Canada, apply	**11 (1)** L’étranger doit, préalablement à son entrée au

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.	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 reasonably requires.	**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 éléments de preuve pertinents et présenter les visa et documents requis.
[Emphasis added]	[Nos soulignés]

VI. Standard of review

[14] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada holds that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." *Safdari v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1357 at para 14, per Russell J [*Safdari*], determines that the standard of review is reasonableness, and I agree.

[15] In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 [*Canadian Human Rights Commission*] at para 55, the Supreme Court of Canada explains what is required of a court reviewing on the reasonableness standard of review:

> [55] In reasonableness review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

[16] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

VII. Analysis

A. *The Officer erred by failing to consider the risk profile of the Applicants as a Hazara Shia*

[17] The Applicants submit despite the credibility concerns, the Officer failed to conduct a risk analysis regarding the Principal Applicant's undisputed identity as a Hazara in Afghanistan. The GCMS notes dated January 24, 2018 states: "It is not in question that the applicant is of Hazara ethnicity." There was no negative identity finding made and ethnicity should have been considered. This Court held in *Fixgera Lappen v Canada (Minister of Citizenship and Immigration)*, 2008 FC 434, per Mandamin J at para 27:

> [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." (*Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para. 41; see also *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1008).

[18] The Applicants say the facts of their case are similar to *Safdari*, cited above, where Justice Russell decided on the facts before him that the officer's failure to assess risks to an applicant due to his Hazara ethnicity was unreasonable, para 39:

> [39] 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.

[19] The Applicants refer to objective evidence concerning risks faced by Hazaras in Afghanistan. The Applicants cite the 2013 version of the *UN High Commissioner for Refugees [UNHCR] Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* [*UNHCR Guidelines*], which is not in the Certified Tribunal Record [CTR]. The *UNHCR Guidelines* dated April 19, 2016, which is in the CTR, provides at pages 74 and 76:

> Ethnic divisions in Afghanistan remain strong. The Peoples under Threat Index compiled by Minority Rights Group International lists Afghanistan as the fourth most dangerous country in the world for ethnic minorities, especially because of targeted attacks against individuals based on their ethnicity and religion. The index refers specifically to the Hazaras, Pashtuns, Tajiks, Uzbeks, Turkmen and Baluchis as ethnic minorities at risk in Afghanistan.
>
> ...
>
> Hazaras have been reported to face continuing societal discrimination, as well as to be targeted for extortion through illegal taxation, forced recruitment and forced labour, and physical abuse. Hazaras have historically been marginalized and discriminated against by the Pashtuns. While they were reported to have made significant economic and political advances since the 2001 fall of the Taliban regime, more recently there has reportedly been a significant increase in harassment, intimidation, kidnappings and killings at the hands of the Taliban and other AGEs [(anti-government elements)].
>
> [Footnotes removed]

[20] The Respondent submits the Officer’s inability to make an admissibility finding because of the lack of credibility of the Principal Applicant was determinative. The Applicants had to meet subsection 11(1) of *IRPA* to be granted a visa. That is, before issuing a visa, an officer must be satisfied that the foreign national is not inadmissible. Therefore, the Respondent submits, an

officer is entitled to reject an application if he or she is not satisfied that the foreign national is not inadmissible as subsection 11(1) legislates.

[21] In my respectful view, the Respondent's submissions best reflect the jurisprudence in this respect. More particularly, in my view, a specific finding of inadmissibility is not required: *Noori v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1095, per Southcott J [*Noori*] at paras 17–18 (where "the inconsistencies in the Principal Applicant's evidence caused the Officer's sufficient concerns about the veracity of his testimony that further inquiries were precluded and the Officer was unable to conduct an admissibility assessment" at para 17) and see *Ramalingam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 278, per Scott J [*Ramalingam*] at para 37.

[22] The negative credibility finding calls into question the veracity of the totality of the Principal Applicant's answers. Therefore, there was no requirement to analyze the Applicants' assertions regarding their risk as Shia Hazara. This very point was dealt with by Justice Scott in *Ramalingam*, at paras 36 and 37:

> [36] I find myself, on the whole, convinced by the Respondent's interpretation of section 11(1), as being more logical with regard to the language of the provision. After reading *Manigat*, I agree with the Respondent that there is no indication that the Court intended to limit its application to the narrow grounds described by the Applicant.
>
> [37] Based on the recent case of *Kumarasekaram*, I find that the Applicant is incorrect in arguing that there is no jurisprudence in support of rejecting an application on the basis of section 11(1). I am persuaded that an Officer can reject an application without a specific finding of inadmissibility, on the grounds that the failure of the Applicant to provide a complete picture of his background, that Officer cannot actually determine that the Applicant is "not inadmissible".

[23] I agree with what my colleague Justice Southcott found in *Noori*, at para 22:

> [22] The Applicants are correct that the Officer did not analyse these assertions or assess whether they were supported by the country condition evidence. However, as analyzed above, the Officer was unable to be satisfied that the Principal Applicant was not inadmissible to Canada, because of concerns about the veracity of his testimony. As the Applicants have not been successful in challenging the reasonableness of that finding, it precludes the Applicants being eligible for Convention refugee status, and I cannot conclude that the Decision is unreasonable based on the Officer not having analysed the claimed risk of persecution due to the Applicants' ethnicity and religious beliefs.

[24] Here, the Officer was unable to make a determination on inadmissibility. I am unable to accept the Applicants' submission that the Officer was required to go further and analyse the claimed risk of persecution due to the Applicants' ethnicity, religious beliefs and country conditions. The essence of the Applicants' claim is to read out of the decision-making process the visa officer's legislated duty under subsection 11(1) of *IRPA* to decide if he or she is "satisfied that the foreign national is not inadmissible." The Officer cannot be faulted for carrying out that analysis.

[25] I should add that in any event, in my respectful view, the Officer in fact both considered and assessed the Applicants' risk as Hazara Shia in Afghanistan, and made a finding in the Applicants' favour:

> I have reviewed country information regarding conditions in Afghanistan particular to Hazaras and to individuals who have worked with company's [sic] associated with foreign presence. While these documents support the case for Afghanistan being dangerous for people with these profiles, they do not remedy the very serious credibility concerns with the applicant. It is not in question that the applicant is of Hazara ethnicity, and that they may face discrimination and abuse in Afghanistan.

B. *The Officer erred by failing to consider the vulnerable context of an overseas refugee applicant*

[26] The Applicants submit the Officer should have conducted a credibility assessment within the special, vulnerable context of overseas refugees and, in particular, that of the Principal Applicant. In this case, the Applicants submit the Principal Applicant relied on an acquaintance in Tajikistan who spoke English to complete his papers for permanent residence as an overseas refugee. The Applicants state the acquaintance held himself out as an expert and charged for the service.

[27] The Applicants submit that, unlike inland refugee claimants, they do not have access to legal aid, lawyers, interpreters, or community workers; and cannot get professional medical reports. The legal processes are difficult to navigate for desperate refugee claimants escaping violence and trauma, with basic education.

[28] The Applicants submit it was important to do a contextual analysis of credibility, especially when the Principal Applicant was an illiterate refugee claimant without access to interpreters, counseling, medical care, or proper legal advice. There was also objective and corroborative evidence (e.g. proof of employment, fuel receipts, Taliban Code of Conduct, country conditions evidence) showing the risk faced by the Principal Applicant in Afghanistan due to his employment with the petroleum company.

[29] On the other hand, the Respondent submits the Officer's credibility findings were reasonable. The Principal Applicant admitted to repeated untruthfulness to Canadian

immigration authorities, notwithstanding being advised to tell the truth. He failed to disclose the 10 years he spent in Pakistan. He failed to disclose two previous applications made under a different name, first in 2005 and a second time in 2009. It is noteworthy that his 2009 claim failed in part because the Principal Applicant failed to disclose his 2005 claim. The 2005 claim was rejected because he failed to make out the requirements of the asylum class. He was warned to tell the truth during all three hearings, and received a PFL before the 2018 hearing leading to this judicial review.

[30] In this connection, I note that the Officer considered the Applicant's illiteracy, but in my respectful view reasonably found non-credibility given the Applicant was invited to tell the truth orally (without need to read or write) and chose not to.

[31] The Respondent submits the Officer's credibility concerns should be afforded deference: *Ramalingam* at para 47. I agree. The Federal Court of Appeal confirmed that findings of fact and determinations of credibility fall within the "heartland" of the expertise of the RPD: *Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238 (FCA). In my view the same applies with respect to credibility findings made by visa officers after an oral hearing, as here.

[32] It is worth noting that the Principal Applicant breached his duty to tell the truth, contrary to subsection 16(1) of *IRPA*.

[33] The Applicants also took issue with the description of the Principal Applicant by the officer who made the 2014 determinations to the effect that he was fluent in English and well-educated. These findings were obviously not made in respect of the Principal Applicant. However, these findings were neither referred to nor relied upon by the Officer in 2018; I attach no significance to them.

VIII. Procedural Note

[34] After the Applicants filed their application for judicial review, the Respondent filed a redacted CTR and moved under section 87 of *IRPA* for an order approving the redactions. The Respondent stated it would not rely on the redacted material in opposing the review application. I convened a public hearing during which I explained the import of a section 87 motion, and invited counsel for the Applicants for his input, noting that the Court (not the Respondent) would ultimately determine what should and should not be disclosed in the CTR. I indicated that certain personal identifiers are routinely redacted in these matters. Thereafter, I held an *in camera* hearing without the presence of the Applicants or their counsel, at which I heard from security-cleared counsel for the Respondent. As a result, I approved the redactions requested. For the record, I place no reliance on the redacted material in arriving at my decision in this case. As already noted, the Respondent did not rely on the redacted material.

IX. Conclusion

[35] Stepping back and looking at the Decision as an organic whole, I have concluded the Decision is reasonable in that it falls within the range of possible, acceptable outcomes that are

defensible on the facts and law in this case, as required by *Dunsmuir* at para 47. Therefore judicial review must be dismissed.

X. Certified question

[36] Neither party submitted a question of general importance to certify, and none arises.

<u>JUDGMENT in IMM-3756-18</u>

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question of general importance is certified, and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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