Federal Court  Cour fédérale

Date: 20161102

Docket: IMM-5820-15

Citation: 2016 FC 1215

Ottawa, Ontario, November 2, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MAHIL AMANI, SOHYLA AMANI AND SAJEDA AMANI, SETARA AMANI, MALIA AMANI AND ALYA AMANI (BY THEIR LITIGATION GUARDIAN MAHIL AMANI)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is a judicial review of an immigrant visa refusal [Decision]. The Applicants applied for permanent residence from abroad, in the Country of Asylum Class [the Class]. The visa officer [the Officer] found that the Applicants had returned to Afghanistan and were not residing

in Pakistan, and accordingly refused the application on the basis that they failed to satisfy requirements for resettlement in Canada either as Convention refugees, per section 96 of the *Immigration and Refugee Protection Act*, LC 2001, ch 27 [IRPA or Act], or as members of the Class, per section 147 of the *Immigration Refugee Protection Regulations*, DORS/2002-227 [IRPR or Regulations].

[2] Specifically the Officer found insufficient documentation to show the Applicants were outside of their country of nationality (Afghanistan) and/or resided in Pakistan in failing to provide:

- school records for any of the minor Applicants;
- identity [PoR] cards that were issued to many Afghanis in 2005-2006 by the Pakistani Government;
- utility bills or address at Jamrud, their stated place of residence for 9 years;
- satisfactory copies of their rental agreements, and reliable translation thereof, which the Officer said was done by an organization "known to produce fraudulent documentation"; and
- a reliable birth certificate for the third daughter, given that the name "Sarah Alkozy" also appeared on it.

[3] The Officer also noted that the Applicants could not remember the name of their landlord during their interview.

II. Issues and Analysis

[4] The Applicants argue that the officer erred by:

(a) unreasonably interpreting the legislative requirement for the Class, as having to prove residency abroad (as opposed to simply being outside the country of nationality), and assessing the evidence in that light;

(b) unfairly failing to provide the opportunity to address, and to the extent required, produce additional documentation; and

(c) failing to assess gender based persecution and contemplate gender guidelines.

[5] For the reasons that follow, I agree with the Applicants' first argument (a), and as such, need not consider arguments (b) and (c).

[6] The parties agree that the reasonableness standard of review applies in this case: see *Satkthiel v MCI*, 2015 FC 292 at para 30.

[7] Section 135 of the Regulations sets out the basis for refugee protection outside Canada. Subsection 147(a) of the Regulations specifically requires members of the Class to be outside of their country of nationality and habitual residence. The key refugee provision in s. 96 of IRPA has the same requirement.

[8] I find that the Officer erred by requiring the Applicants to prove ongoing residence in Pakistan as a pre-condition to be accepted under the Class, as held by Justice Brown earlier this year in *Ameni v MCI*, 2016 FC 164 at paras 24 and 27 [*Ameni*]:

> Turning to the phrases used in the decision, nowhere do the *IRPA* or *IRPR* require a Convention refugee or country of asylum class claimants to "reside outside of the country of nationality", be "residing in Pakistan", "substantiate residency", or be "resident" in Pakistan as insisted upon by the Officers. Further, there is no requirement that the Applicants "substantiate continuous residency", or "establish residency" in Pakistan.

> […]
>
> I agree with the Applicants' submission that simply being outside one's country of nationality is required. This ruling is consistent with internationally accepted guidelines in that regard. The UNHCR's "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" states at para 88: "It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country" [emphasis added]. Note that the verb is not "to reside", nor is it "to live" but rather "to be".

[9] Justice Brown went on to conclude in *Ameni* at paragraphs 28-29:

> In my view, in terms of establishing the quality of connection to a country other than that of their nationality, persons claiming Convention refugee or country of asylum class protection outside Canada need only establish what the statute requires, namely that one "is outside" their country of nationality, i.e., that they be outside such other country. Officers lack the legal authority to require applicants to meet any higher requirement. In my view they also act unreasonably and without statutory authority to the extent they impose, as I find they did in this case, a requirement that such claimants reside or live outside the country of their nationality; being outside such their country of nationality is enough.
>
> The Officers summarized their finding by stating: "…I do not believe that the applicants reside outside of their country of nationality, and therefore do not meet the eligibility criteria for resettlement to Canada as refugees as set out at section 96 of the Act and section 147 of the Regulations." This is an impermissible cause and effect analysis. Therefore this finding is unreasonable, and to the extent the decision depends on this finding and the underlying but non-existent residency requirement, it must be set aside [emphasis added].

[10] Here, the Officer committed the same error as that of *Ameni*, in refusing the Applicants on account of failing to provide sufficient proof of residency in Pakistan, notwithstanding that

they explained why they could not provide certain of the documents requested. Then, the Officer concluded at page 8 of the Certified Tribunal Record [CTR]:

> For reasons explained to you during the course of the interview, I am not satisfied that you reside in Pakistan as stated and find it more likely that you have repatriated or otherwise reside in Afghanistan, your country of nationality.

The Officer thus erred in requiring the Applicants to meet a higher requirement than that articulated in the legislation - namely by finding that they had to prove residency in Pakistan, rather than being outside their country of nationality (Afghanistan).

[11] While further comment is not necessary, as this error alone warrants reconsideration by a different officer, the Officer's assessment of the evidence, based on her unreasonable application of the legislation, merits comment.

[12] To the extent that the finding was a binary one - i.e. because the Applicants were found not to reside in Pakistan, they were therefore resident in their native Afghanistan - that analysis would also be problematic. In other words, the Officer pointed to no evidence demonstrating that the Applicants were residing in Afghanistan when not in Pakistan. Indeed, some of the reasons for the findings regarding "non-residence" in Pakistan were not reasonably justified.

[13] The Officer makes no explicit findings of misrepresentation or credibility. Rather, she simply itemizes concerns, such (i) past fraudulent activity of a translation firm, which appeared on some of the documents and (ii) the third daughter's birth certificate. However, the Officer

raised these two concerns without providing any analysis or explanation as to why she thought the Applicants' documents were fraudulent or invalid.

[14] First, with regard to the implication that certain documents were fraudulent due to the translation firm involved, no evidence was cited regarding the impugned firm.

[15] Second, with regard to the birth certificate that included the name Sarah Alkozy, to the extent that the Officer was insinuating that the family was in Afghanistan for the birth, the Applicants submitted other documentation in support of their assertion that they were not living in Afghanistan, including (1) another birth certificate from Pakistan (of the fourth daughter), (2) immunization cards for the daughters, and (3) other medical documents (which appear to be prescriptions). These documents all indicate the family were in Pakistan during the period in question – but none of them were properly addressed by the Officer.

[16] The Officer further made a negative inference based on the fact that the Applicants were not PoR card holders, noting that the Pakistani Government and UNHCR undertook a major registration endeavour between 2005 and 2006, during which time "nearly the entire Afghan community was registered" (CTR at 115). In her Reasons, the Officer also relied on the fact that more than 4.7 million Afghans have returned home since 2002.

[17] The Applicants, however, informed the Officer that they were unable to obtain PoR cards because they did not have passports. Moreover, the Applicants did not arrive in Pakistan until late in 2006 – the tail end of the PoR card registration initiative. This Court has held that it is not

reasonable for an Officer to draw a negative inference based on the fact that the Applicants are not PoR card holders, without considering plausible and consistent answers as to why they are not registered (*Hosaini v Canada (Citizenship and Immigration)*, 2016 FC 354 at para 39). In this case, I find that the Applicants did provide answers for the lack of PoR cards (i.e. not having passports), but the Officer failed to address these answers.

[18] Finally, objective country condition evidence submitted with this judicial review revealed that "Afghans who arrived after the census of Afghans in 2005 did not have the opportunity to register with the Pakistani government and therefore automatically fell into the undocumented category" (Applicants' Record at 133 [AR]); and "that there are […] one to two million undocumented Afghans in Pakistan" (AR at 127). Furthermore, the Applicants submitted a UNHCR document stating that while 2002-2005 was the era of mass return, the return of Afghans from Pakistan to Afghanistan has since diminished. The evidence shows that not every Afghan in Pakistan (i) had these cards and/or (ii) returned home, but rather that many were left unregistered, and remained in Pakistan.

[19] While there is a presumption that Officers know country conditions to which they refer, as supported by the Citizenship and Immigration Canada Operational Manual OP 5, concerning Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Class (*Saifee v Canada (Minister of Citizenship & Immigration)*, 2010 FC 589 at paras 30-31), and deference is owed to their decisions, it was not reasonable for the Officer to selectively assess and critique certain pieces of evidence, while ignoring contrary documentary evidence, without making any finding on credibility.

III. Conclusion

[20] In light of the above, this application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is to be sent back for redetermination by a different visa officer;

2. There is no question for certification; and

3. No costs will be issued.

"Alan S. Diner"

Judge

Annex A: Legislation

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27*
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 themselves 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.
Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227*
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	b) une guerre civile, un conflit armé ou une violation massive des droits de la personne dans chacun des

conflict or massive violation of human rights in each of those countries.

pays en cause ont eu et continuent d’avoir des conséquences graves et personnelles pour lui.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5820-15
STYLE OF CAUSE:	MAHIL AMANI, SOHYLA AMANI AND SAJEDA AMANI, SETARA AMANI, MALIA AMANI AND ALYA AMANI (BY THEIR LITIGATION GUARDIAN MAHIL AMANI) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 13, 2016
JUDGMENT AND REASONS:	DINER J.
DATED:	NOVEMBER 2, 2016

APPEARANCES:

Timothy Wichert	FOR THE APPLICANTS
Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman Nazami & Associates Toronto (Ontario)	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto (Ontario)	FOR THE RESPONDENT