Federal Court Cour fédérale

Date: 20201104

Docket: IMM-4809-19

Citation: 2020 FC 1032

St. John's, Newfoundland and Labrador, November 4, 2020

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SHAH WALI NAZARI
RAZIA NAZARI
FOROZAN NAZARI
BASIRA NAZARI
LIDA JAN NAZARI
ALI DIDAR NAZARI

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Shah Wali Nazari (the "Principal Applicant"), his wife Razia Nazari and their children Forozan Nazari, Basira Nazari, Lida Jan Nazari and Ali Didar Nazari (collectively "the Applicants") seek judicial review of the July 22, 2019 decision of a Migration Officer (the "Officer") refusing their application for permanent residence in Canada as members of the

Convention refugees abroad class, as defined in sections 144 and 145 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the "Regulations").

[2] The Applicants are citizens of Afghanistan. They first sought permanent residence in Canada by an application made in Pakistan in May 2004. In connection with that application, the Principal Applicant attended an interview on December 30, 2005. That application was refused on January 4, 2006 and the Applicants subsequently returned to Afghanistan.

[3] In April 2017, the Applicants were recognized as Convention refugees by Tajikistan. They submitted another application for permanent residence on August 16, 2017 and the Principal Applicant attended an interview with the Officer in Dushanbe, Tajikistan on May 6, 2019.

[4] Subsequently, the Officer sent a "Procedural Fairness" letter dated June 12, 2019, noting that he had concerns with the truthfulness of some answers given by the Principal Applicant and providing him with the opportunity to submit more information. Specifically, the Officer was concerned about the changing accounts given by the Principal Applicant about time that he spent in Iran in the 1980s.

[5] Counsel for the Applicants responded by letter dated July 9, 2019. In that letter, Counsel for the Applicants admitted that the Principal Applicant had given untruthful information in the interview about his time in Iran.

[6] The Officer, in denying the application for permanent residence, found that the Principal Applicant lacked credibility. He also concluded that the Principal Applicant failed to provide truthful evidence as required by subsection 16(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). He determined that the Applicants did not meet the requirements for immigration to Canada, as he was not satisfied that the Primary Applicant was not inadmissible to Canada as required by subsection 11(1) of the Act.

[7] The Applicants now argue that the Officer breached their rights to procedural fairness by not putting credibility concerns to the Principal Applicant and providing an opportunity to respond. They also submit that the negative credibility finding was unreasonable and that the Officer's failure to make an inadmissibility finding renders the decision unreasonable.

[8] Further, the Applicants argue that the Officer erred by dismissing their request, pursuant to subsection 25(1) of the Act, for the positive exercise of discretion on humanitarian and compassionate ("H and C") grounds.

[9] Further, the Applicants submit that the Officer breached their rights to procedural fairness by considering the issue of "durable solution", as referenced in paragraph 139(1)(d) of the Regulations, on the basis of a superficial examination of the evidence they submitted and by reliance on extrinsic sources.

[10] As well, the Applicants made an oral argument that in their case, a “durable solution” required settlement in another country and their status, as “Convention refugees” in Tajikistan did not satisfy that condition.

[11] The Minister of Citizenship and Immigration (the “Respondent”) argues, among other things, that the Officer met the required duty of procedural fairness, made reasonable conclusions about credibility and inadmissibility, reasonably exercised his discretion, and otherwise made no reviewable error.

[12] Issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[13] Further to the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), 441 D.L.R. (4th) 1 (S.C.C.), the standard of reasonableness presumptively applies to administrative decisions, including decisions made under the Act, except where legislative intent or the rule of law suggests otherwise; see *Vavilov*, *supra* at paragraph 23.

[14] In considering reasonableness, the Court is to ask if the decision under review “bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision”; see *Vavilov*, *supra* at paragraph 99.

[15] I am not persuaded that the Applicants have shown any breach of procedural fairness by the Officer.

[16] In the procedural fairness letter, the Officer clearly identified his concern with the truthfulness of the Principal Applicant's evidence about time spent in Iran. No breach of procedural fairness arises from the fact that the Officer did not identify other subjects to be addressed.

[17] The dispositive issue in this application for judicial review is the Officer's negative credibility finding. That finding is directly related to the "various accounts" given by the Principal Applicant about the time that he spent in Iran in the 1980s.

[18] In my opinion, the standard of reasonableness applies in this case to the Officer's conclusions about credibility, the exercise of discretion pursuant to subsection 25(1) of the Act, and his treatment of "durable solution" for the Applicants as members of the Convention refugee abroad class.

[19] According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the standard of reasonableness requires that a decision be justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[20] Having regard to the evidence contained in the Certified Tribunal Record, the Officer's negative credibility finding is reasonable. The Officer reviewed notes in the Global Case Management System recorded in 2006 in connection with the earlier application for permanent residence made by the Principal Applicant.

[21] According to the 2006 notes, as quoted and referenced in the Officer's 2019 interview notes, the Principal Applicant gave different answers as to his whereabouts in the 1980s.

[22] Specifically, the Officer noted that in the 2006 interview, the Principal Applicant said that he had worked for his father in Afghanistan until 1986. When asked why he had not begun his military service when he turned 18 in 1982, the Principal Applicant said that he had been in Iran. He initially said that he had been in Iran for 2-3 months, then he said he had been there for 2-3 years, and finally, he said that he had been there from 1981 to 1986.

[23] According to the Officer's notes, during the 2019 interview the Principal Applicant said that he had never been to Iran and had lived with his grandfather in the Parwan province of Afghanistan for four years before starting his military service in 1987.

[24] In the response to the procedural fairness letter, Counsel for the Applicants said that the Principal Applicant had lived in Iran in the 1980s.

[25] The Officer expressed the opinion that in the face of his changing story, the Principal Applicant was "utterly without credibility".

[26] In these circumstances, the Officer's negative credibility finding meets the legal standard of reasonableness.

[27] Once he found that the Principal Applicant was not credible, the Officer was not required to determine his admissibility. In this regard, I refer to the decision in *Ramalingam v. Canada (Minister of Citizenship and Immigration)* (2011), 386 F.T.R. 108 (F.C.) at paragraph 37:

> …an Officer can reject an application [on the basis of subsection 11(1)] 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".

[28] According to the decision in the present application for judicial review, the Officer considered the best interests of the minor children when assessing the exercise of H and C discretion. He found that those interests did not overcome his concerns that the Principal Applicant was not inadmissible to Canada.

[29] In my opinion, the Officer's conclusion relative to consideration of the H and C factors was reasonable, in light of the evidence presented and the submissions that were made.

[30] The Officer did not directly deal with "durable solution" as those words appear in paragraph 139(1)(d) of the Regulations. Rather, in his discussion of the H and C factors, he observed that the Applicants currently reside, and can continue to reside, in Tajikistan with the status of refugees.

[31] Considering the evidence before the Officer, I am satisfied that he reasonably considered and determined the issue of durable solution.

[32] The Applicants have not shown a breach of procedural fairness or any other reviewable error on the part of the Officer, and the application for judicial review will be dismissed. There is no question for certification arising.

[33] The style of cause was amended during the hearing to remove the Minister of Immigration, Refugees and Citizenship as the Respondent and to replace with the Minister of Citizenship and Immigration.

JUDGMENT in IMM-4809-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4809-19
STYLE OF CAUSE:	SHAH WALI NAZARI, RAZIA NAZARI, FOROZAN NAZARI, BASIRA NAZARI, LIDA JAN NAZARI, ALI DIDAR NAZARI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON SEPTEMBER 2, 2020 FROM ST. JOHN'S, NEWFOUNDLAND AND LABRADOR (COURT), OTTAWA, ONTARIO, AND TORONTO, ONTARIO (PARTIES)

JUDGMENT AND REASONS:	HENEGHAN J.
DATED:	NOVEMBER 4, 2020

APPEARANCES:

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Susanne Wladysiuk	FOR THE RESPONDENT

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