

Federal Court



Cour fédérale

Date: 20230524

Docket: IMM-7414-22

Citation: 2023 FC 727

Ottawa, Ontario, May 24, 2023

PRESENT: Mr. Justice O'Reilly

BETWEEN:

JAVED KHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 2014, Mr Javed Khan, a 25-year-old citizen of Afghanistan, fled his home country fearing persecution as a member of the Kochi ethnic minority. He originally travelled to Brazil and waited there several months before entering the United States, where he made a refugee claim in 2016. He was detained in the US for around 14 months, then released and granted a work permit. After five years of waiting for his refugee claim to be decided, Mr Khan chose to enter Canada to make a refugee claim here. He was found to be ineligible due to his outstanding

US claim. However, he was allowed to apply for permanent residence on humanitarian and compassionate grounds (H&C).

[2] Although satisfied that conditions in Afghanistan are poor and may prevent Mr Khan from returning there, an immigration officer dismissed his H&C application. The officer found that Mr Khan could have made a refugee claim in Brazil and, in any event, could safely return to the US now to await the disposition of his outstanding US refugee claim.

[3] Mr Khan submits that the officer's decision was unreasonable, first, because the availability of refugee status in Brazil is irrelevant to his H&C application and, second, because there is no evidentiary basis for the officer's assumption that he could now return to the US. Mr Khan asks me to quash the officer's decision and order another officer to reconsider his application.

[4] I agree with Mr Khan that the officer had no evidence on which to conclude that he could return to the US now – that conclusion was unreasonable, and I will allow this application for judicial review on that basis. I need not deal with the question regarding a potential refugee claim in Brazil.

[5] The sole issue is whether the officer's decision was unreasonable.

II. Was the officer's decision unreasonable?

[6] The Minister submits that the burden fell on Mr Khan to show that he could not return to the US.

[7] I agree with the Minister that the burden generally falls on an applicant to show grounds for granting H&C relief. However, Mr Khan did establish that he has no status anywhere other than Afghanistan. He made no claim for asylum in Brazil and his claim for refugee status in the US has not yet been adjudicated. In the interim, he has no status in the US. Further, even he were permitted to re-enter the US, he could still face deportation back to Afghanistan. The officer should have considered that risk (*Abdullah v Canada (MCI)*, 2019 FC 954 at para 26; *Singh v Canada (MCI)*, 2021 FC 710 at para 21).

[8] The officer conceded that the question whether Mr Khan could return to the US was “crucial” to his H&C application. However, the officer assumed that a person without status in the US would be permitted entry there on the strength of a work permit alone, and addressed Mr Khan’s H&C application based on that assumption. Mr Khan did possess a US work permit allowing him to obtain temporary employment while awaiting a decision on his refugee claim. But there was no evidence before the officer indicating that a person lacking status in the US would be permitted to enter the country with just a work permit. Further, the evidence showed that Mr Khan did not possess any travel documents, and could not obtain a passport because the Afghan Consulate in Canada had suspended the issuance of passports.

[9] In my view, the officer should have realized that Mr Khan, lacking status in the US, could not return there. Accordingly, his H&C application should have been considered in light of the risk he would face if returned to Afghanistan.

[10] The officer's decision was unreasonable as it rested on a faulty assumption about Mr Khan's ability to return to the US.

III. Conclusion and Disposition

[11] The officer assumed, without evidence, that Mr Khan could return to the US and await determination of his refugee claim there. That assumption resulted in an unreasonable conclusion dismissing Mr Khan's H&C application. I must, therefore, allow this application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT IN IMM-7414-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is returned to another officer for reconsideration.
2. No question of general importance is stated.

"James W. O'Reilly"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7414-22

STYLE OF CAUSE: JAVED KHAN v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: VANCOUVER, BC

DATE OF HEARING: APRIL 13, 2023

JUDGMENT AND REASONS: O'REILLY J

DATED: MAY 24, 2023

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