Federal Court  Cour fédérale

**Date: 20120203**

**Docket: IMM-4378-11**

**Citation: 2012 FC 134**

**Toronto, Ontario, February 3, 2012**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**LINA OSMANI, PAIANDA OSMANI,
SURHAB OSMANI, SEAIR OSMANI,
SORIA OSMANI, SUMAYA OSMANI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants challenge a decision of an immigration officer at the Canadian High Commission in Islamabad, Pakistan, refusing their application for permanent residence in Canada as members of the Country of Asylum class of applicants. For the reasons that follow, this application is dismissed.

**Background**

[2] The applicants are a family of seven. Lina Osmani, the principal applicant is married to Paianda Osmani, the male applicant. The couple has five children, Surhab Osmani, Seair Osmani, Soria Osmani, Ryan Osmani and Sumaya Osmani. The family are citizens of Afghanistan except for the youngest two children, Ryan and Sumaya who the parents assert were born in Pakistan.

[3] The family fled Afghanistan in 2001 and arrived in Peshawar, Pakistan. In 2003, the principal applicant's sisters residing in Canada formed a sponsor group for the family. The sponsorship was approved by Immigration Canada and the applicants filed for permanent residence as members of the Convention refugees abroad class as defined in the *Immigration and Refugee Protection Act*, SC 2001, c 27 and sections 145 and 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[4] In 2005 and 2006 the family attended two different interviews conducted by two different officers. The second officer made a negative credibility finding relating to specific aspects of the male applicant's past military service. As a result, the family's application was refused. They filed an application for judicial review of that decision which was granted and the matter was referred back for redetermination: *Osmani v Canada (Citizenship and Immigration)*, 2007 FC 419.

[5] The Computer Assisted Immigration Processing System (CAIPS) notes reveal that three different officers were, in turn, charged with the redetermination. The first officer held an interview on August 28, 2007, in which she determined that the applicants met the definition of the Convention Refugees Abroad class, subject to requisite statutory background checks and the submission of an updated application form. On May 5, 2008, she requested that her assistant telephone the applicants to verify their address; the result raised concerns. Specifically, on January 16, 2009, the person who answered the call stated that the family resides in Afghanistan and calls weekly to ask if any letters have been received. If they reside in Afghanistan and not Pakistan then they would not be Convention refugees abroad as they are not "outside all of their countries of nationality and habitual residence" as required by paragraph 147(a) of the Regulations.

[6] In February 2010, as the first visa officer was no longer stationed at the High Commission, a second visa officer assumed responsibility and determined that a new interview should be held to address the issue of residency.

[7] At the new interview held on July 6, 2010, the officer expressed concerns regarding the family's residency. He noted a phone verification which indicated the family lived in Afghanistan, that the family had no knowledge whatsoever of Pashto and Urdu, the two most commonly spoken languages in their alleged region of residency in Pakistan, and that there was no credible explanation as to why they did not possess proof of registration (POR) cards. The officer therefore requested further documentary evidence.

[8] By the time the requested documents were received on January 7, 2011, the second officer had been appointed to a different position and a third assumed responsibility for the file. He reviewed the file and the new documentary evidence. The CAIPS notes dated April 12, 2011 show the reason why each of these documents was given little to no weight:

> AS ADDITIONAL PROOF OF RESIDENCE THE APPLICANTS HAVE PROVIDED ELECTRICITY BILLS AND GAS BILLS IN THE NAME OF MIR ABAS KHAN AT 244-D-2 HAYATABAD. IT IS NOT EXPLAINED WHO MIR ABAS KHAN IS. AT THE INTERVIEW THE APPLICANTS WERE NOT ABLE TO NAME THEIR LANDLORD. I AM NOT SATISFIED THAT THESE DOCUMENTS ARE PROOF OF RESIDENCE IN PAKISTAN.
>
> THE PA [PRIMARY APPLICANT] PROVIDED A LETTER WITH SIGNATURES OF PEOPLE SHE STATES ARE CUSTOMERS OF HERS AS SHE WORKS AS A BEAUTICIAN. THIS DOCUMENT APPEARS TO BE SELF SERVING AND CARRIES LITTLE WEIGHT.
>
> THE PA'S SPOUSE HAS PROVIDED A LETTER THAT DOES NOT CONTAIN ANY LETTERHEAD FROM A PERSON BY THE NAME OF NASIR WHO IS THE MANAGER OF LABOUR AT THE LABOUR SUPER MARKET, HAYATABAD, PESHAWAR. IT STATES THAT THE PA'S SPOUSE HAS BEEN WORKING AS A LABOURER SINCE 2006. THE LETTER APPEARS TO BE SELF SERVING, CONTAINS NO CONTACT NUMBER OR FULL NAME FOR NASIR. AS SUCH I AM NOT SATISFIED THAT IT IS GENUINE.
>
> THE APPLICANT HAS ALSO PROVIDED A NOTE FROM PAK ESTATE PROPERTY AND BUILDERS IN PESHAWAR. THE NOTE STATES THAT THE PA'S HUSBAND HAS BEEN LIVING AT HIS STATED ADDRESS FROM 2008 TO THE PRESENT. IT IS NOT EXPLAINED BY THE APPLICANTS WHO PAK ESTATE PROPERTY AND BUILDERS ARE. I AM NOT SATISFIED THAT THIS BUSINESS IS THE APPLICANTS LANDLORD OR INDEPENTANT ENTITY THAT CAN VERIFY THE APPLICANTS ADDRESS. THE PA DID PROVIDE ONE ULTRASOUND REPORT FROM HER PREGNANCY THAT WAS DONE ON 30 JUNE, 2010, ONE WEEK PRIOR TO THEIR INTERVIEW. THE PA HAS NOT PROVIDED ANY OTHER DOCUMENTS THAT WOULD NORMALLY BE ASSOCIATED WITH A PREGNANCY, INCLUDING MULTIPLE DOCTORS REPORTS, ULTRASOUNDS OR EVEN A BIRTH CERTIFICATE AS SHE STATES THAT THE CHILD WAS BORN AT HOME. SPECIFIC BIRTH CERTIFICATES ARE AVAILABLE FOR AFGHAN CITIZENS WHO ARE BORN IN PAKISTAN. THE APPLICANTS WERE AWARE OF THE REQUEST

> FOR PROOF OF RESIDENCY BY HAVING A WELL DOCUMENTED BIRTH OF A CHILD IN PAKISTAN. BASED ON THE LACK OF DOCUMENTATION I AM NOT SATISFIED THAT THE PA'S MOST RECENT CHILD WAS BORN IN PAKISTAN.

[9] The officer also noted that the applicants provided no reasonable explanation for not having a POR card. As he was not satisfied that the statements and application were credible, he determined that the family did not meet the requirements for immigration in Canada and refused their application.

**Issues**

[10] In my view, there are three issues that must be addressed by the Court:

1. Is the applicants' affidavit and attached exhibit inadmissible for having been improperly sworn and commissioned?

2. Did the officer rely on extrinsic evidence and fail to provide the applicants with the opportunity to respond to certain concerns?

3. Did the officer base his decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before him?

[11] The first issue is a matter of proper process in an application of this sort. The second issue is a question of procedural fairness and is reviewed under the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43. The third issue is purely a

question of fact and is reviewed under the reasonableness standard: *Dunsmuir v New Brunswick*, 2008 SCC 9.

**Analysis**

**1. Admissibility of Evidence**

[12] The respondent objects to the admissibility of the undated and unsigned letter from "Wadak Trading Company" attached as Exhibit "A" to the applicants' further affidavit. The respondent submits that the affidavit is improperly sworn and commissioned "by phone." The respondent also objects because of the lack of an opportunity to test the author of the letter under cross-examination. Lastly, the respondent highlights that the letter post-dates the decision and as such is of no relevance for the review.

[13] This letter, even if its transmitting affidavit was proper, is not admissible in the application. It is trite law that when a decision is being attacked on the basis that it is unreasonable or was perverse, capricious, or made without regard to the material this Court may assess that submission only on the basis of the material that was before the decision-maker and not anything that may have subsequently been tendered. As noted by the respondent, the letter post-dates the decision under review and was not before the decision-maker and for that reason it must not be considered. It forms no part of the record before this Court.

[14] Even if I had accepted this letter, I fail to see how it would have assisted the applicants. The letter is from Faisal Wardak, the owner of the carpet shop the applicant's used to receive their mail. In the letter it is stated that Mr. Wardak and his partner, "julabeeb" have known the

principal applicant and her husband for 9 years. I note that the CAIPS notes indicate that at the interview the officer asked the principal applicant for the name of the store owner and she stated that it was Gulbuddin Safi and she knew him well. Her husband stated that the store was owned by a friend, Dr. Ahmad Shah. As such, the recent evidence appears to contradict the applicants.

**2. Failure to Respond**

[15] The applicants submit that the officer based his decision on evidence that was not disclosed at the interview. Specifically, they say that they were not provided with an opportunity to explain the result of the telephone verification which led to doubts regarding the family's place of residence. As such, it is submitted that their right to procedural fairness was breached: *Manvalpillai v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1297 and *Abdulle v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1508.

[16] The CAIPS notes show the result of a telephone conversation that occurred on January 15, 2009:

> CALLED FN [THE PRINCIPAL APPLICANT] YESTERDAY ON THE NUMBER IN CAIPS, THE PERSON STATED IS A SHOPKEEPER AND RECEIVES [LETTERS] FOR FN. HE STATED THAT FN AND HIS FAMILY RESIDES IN AFGHANISTAN AND CALLS WEEKLY TO ASK ABOUT ANY LTRS RECEIVED.

[17] Following this information, another interview was scheduled. The CAIPS notes reveal that at the interview, three concerns were expressed to the applicants:

> CONCERNS EXPLAINED TO APPLICANTS:
>
> PHONE VERIFICATIONS INDICATE RESIDENCE IN AFGHANIST[AN]

> NO PROOF OF REGISTRATION CARDS AND INABILITY TO CREDIBLY EXPLAIN WHY THEY DO NOT HAVE THEM
>
> NO KNOWLEDGE, WHATSOEVER, OF PASHTO OR URUD [*sic*] (VERY SURPRISING CONSIDERING THE FACT THAT THEY CLAIM TO RESIDE IN PESHAWAR SINCE 2001)

[18] I do not accept the respondent's submission that the results of the telephone verification did not constitute a basis for the officer's determination. The letter dated May 6, 2011 rejecting the application shows otherwise. It states:

> Concerns regarding you application were related to you at interview on 06 July, 2010. You were unable to allay those concerns and as a procedural fairness you were asked to provide additional proof of residence in Pakistan by letter dated 04 November, 2010.
>
> After reviewing you application, your interviews and your response to the procedural fairness letter I am not satisfied that your statements and you application are credible…
> [emphasis added].

[19] This letter, which forms part of the decision, refers to the concerns relayed to the applicants at the July 6, 2010 interview and the fact that they were unable to allay those concerns. Additionally, a copy of the CAIPS notes which refers to the telephone verifications was attached to the applicants' refusal letter. Therefore, result of the telephone verifications forms part of the visa officer's decision.

[20] I do not accept the applicants' submission that they were not provided with an opportunity to explain the result of the telephone verifications. The applicants knew that the result indicated that they resided in Afghanistan; the concern was clearly related to them at the

interview on July 6, 2010. Had they wanted more specific information on the result, it was open to them to ask. They chose not to, nor did they offer any explanation as to why the verification result was as claimed by the officer. The onus was not on the officer to give specific details regarding the verification; the burden was on the applicants to explain or ask questions. The door was open wide enough for them to inquire; they did not. There was no breach of procedural fairness.

**3. Quality of the Decision**

[21] The applicants submit that sworn evidence should be presumed true unless there is specific disbelief on adequate grounds. They note that the primary applicant and the male applicant provided consistent answers when they were interviewed separately.

[22] They submit that the officer's credibility finding is based on mere speculation or conjuncture as opposed to reasonable inference. Accordingly, they say that the officer erred in requesting and then rejecting the documentary evidence they provided. Many decisions are cited in support of their position: *Ansong v Canada (Ministry of Employment and Immigration) (FCA)*, [1989] FCJ No 728; *Alfonso v Canada (Minister of Citizenship and Immigration)*, 2007 FC 51; *Singh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 709; *Mahmood v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1526; *Hussein v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 853. The applicants also quote *Pinzon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1138, at para 5, which cited *Istvan Vodics v Minister of Citizenship and Immigration*, 2005 FC 783 at para 11:

> It is not difficult to understand that, to be fair to a person who swears to tell the truth, concrete reasons supported by cogent

> evidence must exist before the person is disbelieved. Let us be clear. To say that someone is not credible is to say that they are lying. Therefore, to be fair, a decision-maker must be able to articulate why he or she is suspicious of the sworn testimony, and, unless this can be done, suspicion cannot be applied in reaching a conclusion. The benefit of any unsupported doubt must go to the person giving the evidence [emphasis added by applicants].

[23] With that principle in mind, the applicants challenge each of the visa officer's findings relating to the documentary evidence.

[24] First, they submit that the officer's conclusion that lack of knowledge of Urdu or Pashto is unreasonable and is not confirmed by the evidence. They submit that there is no information on record which confirms that it would be implausible for a refugee from Afghanistan to reside in Pakistan without knowledge of the two languages. The applicants highlight that the principal applicant testified that everyone around them are Afghans; they do not have a high level of education; the principal applicant stays at home and occasionally cuts her Afghan neighbours' hair; and the male applicant works for Afghans and is not required to know Urdu or Pashto. It is submitted that the visa officer failed to properly consider these explanations.

[25] Second, the applicants submit that the visa officer's finding that they should have POR cards was unreasonable as he failed to consider their situation. The POR card process was conducted in 2006-2007, and until February 2006, the applicants were under the impression that their visa was approved. After they received their refusal letter, this Court granted their judicial review application in April 2007 and their hopes rose again. It is because of those hopes that the

applicants did not find it necessary to obtain their POR cards. Moreover, the applicants say that they did apply for the POR cards but never received them.

[26] Third, the applicants submit that some of the documents were dismissed as self-serving and that it is not, in itself, a reason to reject the evidence: *Suduwelik v Canada (Minister of Citizenship and Immigration)*, 2007 FC 326 and *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 226.

[27] Fourth, the applicants note that the officer dismissed the letter from Pak Estate Properties and Builders because the author of the letter was not explained. The applicants submit that the officer never inquired, directly to them, or by calling the contact information on the letter.

[28] Fifth, the applicants note that the officer expressed no concerns regarding the doctor's note at the interview. This letter states: "This is certified that Ms. Lina Osmani [with] Payanda Osmani is coming to my clinic regular[ly] for ch[e]ck up. She is 34 weeks pregnant." It is submitted that the applicants provided sufficient explanation for the failure to provide a birth certificate for the fifth child. Also, the finding that there is no evidence to prove that the youngest child was born in Pakistan is not based on the evidence and is unreasonable. The officer had the opportunity to see the principal applicant just 13 days before she gave birth. The applicants submit that to conclude that the principal applicant would be able to travel to Afghanistan on such late stage of the pregnancy is not realistic.

[29] Lastly, the applicants submit that the failure to produce supporting documentation cannot reflect adversely on the credibility in the absence of evidence which contradicts the applicants' testimony: *Attakora v Canada (Minister of Employment and Immigration) (FCA)*, [1989] FCJ No 444.

[30] I am unable to accept any of these submissions.

[31] A negative credibility finding can be drawn from a lack of corroborating evidence where there is a reason to doubt an applicant's claim: *Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12.

[32] The concerns of the first visa officer, coupled with the results of the phone verifications which indicated that the applicants were living in Afghanistan and called once a week to see if they had received mail formed a valid reason to question the applicants' claim. Therefore, it was reasonable for the officer to rely on the lack of corroborating evidence in this situation.

[33] It was reasonable for the officer to find that the applicants' lack of ability to speak either of the two most commonly spoken languages in their region weighed against them. It should be pointed out that their ability in either language was so lacking that the consulate required a translator to assist in directing them to the interview room. In short, they had no understanding of either language despite the principal applicant later saying in the interview that "she can understand basic Pashto." The visa officer did not fail to analyze their explanation provided and, as highlighted by the respondent, the applicants claimed they resided in Pakistan for ten years.

The finding that it was improbable that they would not have picked up some of the local language in that period was reasonable.

[34] The second officer who worked on the applicants' file explained the significance of POR cards. He writes:

> It seemed implausible that Afghan refugees residing in Peshawar, Pakistan since 2001 would not be in possession of POR cards, and be incapable of providing a plausible explanation for why they were unwilling or unable to obtain one. In 2005, the government of Pakistan, in cooperation with the UNHCR [United Nations High Commissioner for Refugees], conducted a census of Afghans living in Pakistan. In late 2006 and early 2007 the government of Pakistan, again in cooperation with the UNHCR, completed a registration process of Afghans living in the country for those that were included in the census in 2005. They were all issued computerized POR cards with biometric features, similar to the Pakistani National Identity Card (NIC). Obtaining a POR card was mandatory for Afghans identified in the 2005 census. The POR cards allowed those who have been registered to legally remain in Pakistan for a period of three years. It protects Afghans from arbitrary detention and deportation during their stay in Pakistan. It is also necessary for any Afghans who wish to avail themselves of the voluntary repatriation programs run by the UNHCR. It is also often used as an identity document for Afghans who do not have any other form of identification. In 2010 the government of Pakistan agreed to renew the cards until December 31, 2012.

[35] The officer expected the applicants to have these cards and did not accept the explanation given for not having them. A review of the CAIPS notes shows the interaction between the applicants and the visa officer:

> I ASK THE APPLICANT WHY THEY DO NOT HAVE THE PROOF OF REGISTRATION CARD AND PA STATES THAT THEY DID NOT GIVE ONE TO HIM. I ASK WHY NOT AND HE STATES THAT THEY DID NOT GIVE IT TO MANY PEOPLE.

> I ASK PA IF HE APPLIED FOR THE PROOF OF REGISTRATION CARDS AND HE STATES THAT THEY CAME AND THEY WERE NOT THERE AND THEN THEY APPLIED, AND THEN THEY SAID THAT THEY WOULD COME TO THEIR HOUSE BUT THEY DID NOT COME. I ASK WHERE HE LIVED AT THE TIME, AND HE STATES THAT HE WAS IN ARBAB ROAD. I ASK IF HE IS SURE AND HE STATES THAT HE IS. I NOTE THAT HE LEFT ARBAB ROAD IN 2005 BUT THE CENSUS WHICH [LED] TO THE CARDS WAS CONDUCTED IN 2006/07.

[36] Given the availability of the POR cards and the applicants' answers, it was reasonable for the officer to draw a negative inference from the lack of POR cards.

[37] The applicants submit that a finding that evidence is self-serving is not, in itself, a reason to reject the evidence. I agree; however, this was not the case. The first letter – which had signatures of people the principal applicant stated were clients – was found to carry weight in favour of the applicants', albeit it was stated to be "little weight." The second letter, the only letter that was rejected, was rejected for more than merely being self-serving. It was also found that the letter did not contain a letterhead and provided no contact number or full name for the author of the letter. Combining all those reasons, it was reasonable for the visa officer to find that the letter might not be genuine and to reject it.

[38] Lastly, the officer expected that a birth certificate would be available for the child that was born in Pakistan and notes in the CAIPS notes that:

> SPECIFIC BIRTH CERTIFICATES ARE AVAILABLE FOR AFGHAN CITIZENS WHO ARE BORN IN PAKISTAN. THE APPLICANTS WERE AWARE OF THE REQUEST FOR PROOF OF RESIDENCY BY HAVING A WELL DOCUMENTED BIRTH OF A CHILD IN PAKISTAN. BASED ON THE LACK OF

DOCUMENTATION I AM NOT SATISFIED THAT THE PA'S MOST RECENT CHILD WAS BORN IN PAKISTAN.

[39] It was reasonable for the officer to draw a negative inference. Moreover, according to an affidavit in the record, the "border between Afghanistan and Pakistan is porous and… both documented and undocumented Afghans regularly travel back and forth between the two." Further, the area in Pakistan where the applicants claim to reside is only a few kilometers from the Afghanistan border.

[40] As to the officer having seen the principal applicant in Pakistan two weeks prior to the birth of her last child, I can only observe that it is not this Court's role to decide whether or not the primary applicant would or would not have been able to travel back to Afghanistan in the last 13 days of her pregnancy absent specific evidence, and there is none provided. The officer's refusal to translate his observation of her into proof that the child was born in Pakistan, in the absence of a birth certificate, which was available to the applicants, cannot be said to be unreasonable.

[41] Neither party proposed a question for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4378-11 |
| **STYLE OF CAUSE:** | LINA OSMANI ET AL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | January 31, 2012 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | ZINN J. |
| **DATED:** | February 3, 2012 |

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| Stephen H. Gold | FOR THE RESPONDENT |

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