Cour fédérale Federal Court

Date: 20160304

Dockets: IMM-1221-15
IMM-1222-15
IMM-1223-15

Citation: 2016 FC 273

Ottawa, Ontario, March 4, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

Docket: IMM-1221-15

BETWEEN:

LAYTH AHMED JASIM AL-ANBAGI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1222-15

AND BETWEEN:

SUAD AHMED JASIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1223-15

AND BETWEEN:

ZAINAB LAYTH AHMED AL-ANBAGI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] These are three applications for judicial review made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (the Act), which seek to set aside three separate but related decisions of a visa officer (the Officer), dated December 2, 2014, denying the Applicants' applications for permanent residence as members of the Convention refugee abroad class under paragraph 139(1)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[2] As similar facts and issues pertain to all three judicial review applications, they will be dealt with together in this decision.

II. Background

[3] Mr. Layth Ahmed Jasim Al-Anbagi (the Principal Applicant), his wife, two daughters, and sister seek refuge in Canada as members of the Convention refugee abroad class. They filed their permanent resident visa applications in July 2013 under three separate applications, those of (i) the Principal Applicant, which includes his spouse (Izdihar), and younger daughter (Zahraa) (Court Docket IMM-1221-15); (ii) Suad Ahmed Jasim (Suad), the Principal Applicant's blind and illiterate sister (Court Docket IMM-1222-15); and (iii) Zainab Layth Ahmed Al-Anbagi (Zainab), the Principal Applicant's elder daughter (Court Docket IMM-1223-15) (collectively, the Applicants).

[4] The Principal Applicant was born in Iraq and worked as a civil engineer for the Iraqi government. From April 2003 to October 2004, he allegedly worked for the United States army as a civil contractor to help rebuild the city of Bagdad. As a result of his involvement with the United States army, his name was put on an assassination list which put him and his family at risk from Al-Qaeda and other insurgents in Iraq.

[5] In October 2004, while the Applicants were driving home one evening, their car was shot at. Sometime later, the person guarding the Applicants' house was murdered while guarding the home and attacks were made on the lives of the Principal Applicant's brothers. Following these events, the Applicants fled Iraq and have been residing in Jordan ever since.

[6] The Principal Applicant and a partner now run a medical supplies business with an office in Jordan and business ties to Iraq. The Principal Applicant sometimes travels to Iraq for business purposes. At the time the Officer's decision was rendered, his younger daughter, Zahraa, had recently graduated from high school and his elder daughter, Zainab, was illegally working for an architectural firm.

[7] On August 27, 2014, the Principal Applicant, his wife, and two daughters were interviewed by the Officer in Amman, Jordan, who assessed the Applicants' applications for permanent residence visas in Canada. The principal Applicant's sister Suad, did not attend the interview.

[8] The Officer found that the Principal Applicant, his wife, and two daughters were not members of the Convention refugee abroad class pursuant to paragraph 139(1)(d) of the Regulations since they have a durable solution in Jordan. In refusing the Principal Applicant's application, the Officer noted the following:

> You are able to avail yourself of protection in Jordan. You have been settled in Jordan for almost ten years and have legal residency status here. You are settled to the extent that you run a business with an office in Jordan and ties in Iraq; you and your family travel internationally, including to countries with visa requirements; your children attend high quality educational institutions in Jordan. You have stated that you fear being targeted as Shiahs by Jordanian Sunnis if the monarchy falls; however, Jordan is currently stable and the possibility of the kingdom giving way to sectarianism is remote. I note that you feel secure here to the extent that you have let your UNHCR registration, and the access to protection services that it entails, lapse.

[9] The Officer made similar if not identical findings with respect to the applications filed by Zainab and Suad. In the case of Suad, the Officer further found that she continues to live part-time in Iraq with one of her brothers and that, as a result, she has not fled Iraq and does not fear returning there. Therefore, the Officer determined that Suad is not a member of the Convention refugee abroad class.

[10] The Applicants claim that the Officer's finding of a durable solution in Jordan in the form of local integration is unreasonable since the minimum rights they have in Jordan are tenuous. Firstly, the Applicants' stay in Jordan is conditional on the Principal Applicant's ability to renew his temporary 1-year residency permit each year. Renewal of temporary resident status in Jordan is highly contingent on a person's ability to contribute to the economy. As a result, if the Principal Applicant were to fail in his business, he would not be in a position to renew the temporary residence status. Moreover, the Applicants argue that the Principal Applicant is prohibited from gaining employment in Jordan in his profession as an engineer and that his daughter, Zainab, is not able to legally work in Jordan. The Applicants also contend that they have no protection from *refoulement* if their temporary status is not extended. For these reasons, Jordan offers the family a "temporary safety" rather than a durable solution.

[11] The Applicants also contend that the Principal Applicant's travel history to countries neighbouring Jordan using his Iraqi passport is not a relevant factor for assessing the existence of a durable solution under Citizenship and Immigration Canada's Operational Manual 5 Overseas Selection and Processing of Convention Refugees and members of the Humanitarian-protected

persons Abroad Classes (the OP5 Manual). The Applicant further argues that this travel was necessary to sustain his business in Jordan.

[12] Regarding the lapse of their United Nations High Commissioner for Refugees (UNHCR) status, the Applicants argue that the Officer erred when she inferred that the lapse in status is indicative that the Applicants feel secure in Jordan and suggest that they allowed the UNHCR status to lapse since they were in the process of being sponsored to Canada.

[13] With respect to the Officer's rejection of Suad's application, the Applicants contend that it is essential for Suad to remain with her family from a humanitarian and compassionate perspective since she is an integrated member and completely dependent on them. The Applicants argue that while Suad did make periodic trips to Iraq to visit one of her siblings, these trips were short and she remained indoors. The Applicants also argue that Suad was not given an opportunity to address the Officer's concern that she is not afraid for her safety in Iraq.

III. Issues and Standard of Review

[14] The issue in this judicial review is to determine whether the Officer committed a reviewable error as contemplated by section 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7 in deciding that the Applicants have a reasonable prospect of a durable solution in Jordan within a reasonable period of time.

[15] The question of whether the Applicants have a durable solution of resettlement in Jordan is clearly a question of mixed fact and law and is thus subject to review on the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 53 [*Dunsmuir*]; *Mushimiyimana v Canada (Citizenship and Immigration)*, 2010 FC 1124, at para 21 [*Mushimiyimana*]). As is well-established, this standard is concerned with "the existence of justification, transparency and intelligibility within the decision-making process" and with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, at para 47).

IV. Analysis

[16] Pursuant to section 139 of the Regulations, a visa officer cannot issue a permanent resident visa to a foreign national if the foreign national has a reasonable prospect of a durable solution, either through voluntary repatriation or resettlement, within a reasonable time in a country other than Canada. This assessment is forward looking and the onus is on the visa applicant to establish that no such reasonable prospect exists (*Barud v Canada (Citizenship and Immigration)*, 2013 FC 1152, at para 15 [*Barud*]; *Dusabimina v Canada (Citizenship and Immigration)*, 2011 FC 1238, at para 54).

[17] In *Barud*, the Court, noting that there is no precise definition for the term "durable solution," held that the issue to be determined in such instances is whether the visa officer reasonably concluded that the foreign national, based on an assessment of his/her personal circumstances and the conditions in the person's country of residence, has a durable solution in a country other than Canada (*Barud*, at paras 3 and 12). Such analysis depends, in large measure,

on the facts of each case (*Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, at para 79, [2004] 3 FCR 195 [*Ha*]).

[18] In the absence of a precise definition of what a durable solution is, both parties have relied on the OP5 Manual as a guide for determining whether the Officer reasonably found that a durable solution exists for the Applicants in Jordan. As is well-settled, such guidelines are not law and, as a result, are neither binding on the Minister or his agents and cannot fetter the discretion of a visa officer (*Lee v Canada (Citizenship and Immigration)*, 2008 FC 1152, at para 29; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125; *Vaguedano Alvarez v Canada, (Citizenship and Immigration)*, 2011 FC 667, at para 35).

[19] At the same time, it has long been established that statutory interpretation requires consideration of the ordinary meaning of the words used as well as the statutory context, purpose and intent of Parliament (*Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, at para 10, [2005] 2 SCR 601; *Canada (Citizenship and Immigration) v Patel*, 2011 CAF 187, at para 32). In the recent case of *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], the Supreme Court of Canada reminded that, although not legally binding and not intended to be either exhaustive or restrictive, Ministerial guidelines designed to assist immigration officers are useful in indicating what constitutes a reasonable interpretation of a given provision of the Act (*Kanthasamy*, at para 32). Thus, the OP5 Manual can, within these confines, be of assistance to the Court in determining whether the Officer reasonably applied paragraph 139(1) of the Regulations to the Applicants' circumstances.

[20] Here, section 13.2 of the OP5 Manual lists three types of durable solutions, namely, voluntary repatriation, local integration, and resettlement. In the present case, the Officer's reasons imply that the Applicants have a durable solution in Jordan because they have been able to locally integrate there. Section 13.2 describes local integration in the following terms:

> Local integration is a long-lasting solution to a refugee's situation. It is more than the granting of safe conditions of asylum, which is a key obligation of signatories of the Convention Relating to the Status of Refugees.
>
> […]
>
> Local integration allows the refugee to live permanently in safety and dignity in the country of refuge and partake of its enduring legal, economic and social benefits.

[21] To determine whether local integration has occurred, the OP5 Manual indicates that officers must consider "both country conditions, the applicant's individual circumstances and a comparison of these circumstances to the Department's guidelines described here." The OP5 Manual includes a list of questions that an officer should consider to help him/her assess whether local integration has occurred. In addition to the list of questions, the OP5 Manual explains that "[l]egal status as a long-term resident is a key indicator of local integration," but recognizes that *de facto* local integration may occur where states have fair procedures for status renewal. Moreover, the OP5 Manual indicates that officers must compare the treatment of applicants to that of nationals since "[f]or local integration to occur, there should be no significant exclusion from access to the same opportunities available to nationals, such as access to job opportunities comparable to nationals with similar education and work experience." In this respect, the OP5 Manual indicates that "[t]he legal permission to work without restrictions is normally a sufficient

indicator but where that does not exist then de facto access to employment or self-employment may be sufficient in some circumstances."

[22] These factors are consistent with the UNHCR standards of local integration found in the UNHCR Resettlement Handbook, International Protection and the Search for Durable Solutions (the UNHCR Handbook). While the UNHCR Handbook is not formally binding on signatory states of the Convention, "the Handbook has been endorsed by the states which are members of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the courts of signatory states" (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689; *Elyasi v Canada (Citizenship and Immigration)*, 2010 FC 419, at para 28). As such, I am of the view that the UNHCR Handbook may also be useful in providing guidance to the Court.

[23] The UNHCR Handbook defines local integration in similar terms and recognizes local integration as a "legal, economic and socio-cultural process aiming at providing the refugee with the permanent right to stay in the country of asylum, including in some situations, as a naturalized citizen." Section 1.3.4 of the Handbook indicates that local integration should be seen as a gradual process that takes place through three interrelated dimensions:

> legal: refugees are granted a progressively wider range of rights (similar to those enjoyed by citizens) leading eventually to permanent residency and, in some situations, to naturalization;
>
> economic: refugees gradually become less dependent on aid from the country of asylum or on humanitarian assistance and become increasingly self-reliant to support themselves and contribute to the local economy;
>
> social and cultural: the interaction between refugees and the local community allows refugees to participate in the social life of their new country without fear of discrimination or hostility while not obliged to abandon their own culture.

[24] Both the OP5 Manual and the UNHCR Handbook point to long-term residency and ability to contribute to the host country's local economy and community as key indicators of local integration. Indeed, the UNHCR Handbook states that host countries that provide refugees with limited and temporary forms of asylum undermine the achievement of local integration. This is consistent with the guidelines in the OP5 Manual to the extent that the OP5 Manual warns that refugees may suffer a significant risk of *refoulement* if they have settled in states "that have restrictive refugee status renewal policies" as these states "may not possess the conditions for true local integration."

[25] Given the foregoing, in my view, the Officer committed a reviewable error in ignoring or misapprehending facts and circumstances personal to the Applicants, which tend to demonstrate that their settlement in Jordan is temporary in nature rather than leading toward the recognition of a long term right to stay and integrate locally (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, at paras 15-18, 83 ACWS (3d) 264).

[26] Jordan is not a signatory to the 1951 Convention on the Status of Refugees (the Convention). It is, as a result, under no legal obligation to offer the Applicants long-term residence. In fact, the Applicants do not have legal status in Jordan as long-term residents. As a result, if and when Jordan decides not to renew the Applicants' temporary 1-year residency permit, the Applicants will not be protected from *refoulement* to Iraq. In this regard, the record shows that Jordan does not have fair procedures for status renewal as the evidence indicates that the residency requirements in Jordan change constantly in a manner that impedes permanent settlement there. This evidence is not discussed in the Officer's decision. In addition, in

determining that the Applicants would have no difficulty in satisfying the residency requirements in Jordan in the future, the Officer failed to consider that the family's ability to retain residency status in Jordan is highly contingent on the Principal Applicant's ability to maintain a successful business. If, for whatever reason, the business fails, it is likely that the temporary residency status will not be renewed, in which case, the Applicants may face *refoulement* to Iraq.

[27] The Officer also misapprehended the Applicants' ability to participate in the local economy as the evidence demonstrates that Iraqi refugees do not have access to the official labour market. While the Principal Applicant is able to derive an income from operating a business, the same cannot be said for the rest of his family as evidenced by his daughter Zainab, who told the Officer during the interview that if she is caught working, she will be sent to prison.

[28] In my view, in coming to the conclusion that the Applicants have a durable solution in Jordan, the Officer erred in considering irrelevant factors such as the Applicants' travel history and lapse of UNHCR registration rather than assessing the country conditions and the Applicants' individual circumstances as suggested by the OP5 Manual and mandated by this Court's jurisprudence (*Barud,* at paras 12 and 16; *Mushimiyimana,* at para 21; *Salimi v Canada (Citizenship and Immigration),* 2007 FC 872, at para 11).

[29] In sum, in view of the fact that Jordan is not a signatory to the Convention and of the evidence pointing to the fact that what the Applicants have been offered so far is a temporary place of refuge now linked to the success or failure of the Principal Applicant's business, rather

than the opportunity to integrate locally for the long-term, I am unable to find that the Officer's decision falls within a range of possible, acceptable outcomes defensible in fact and in law.

[30] The Respondent claims that the solution offered by the third party country is not required to be permanent, only durable. It seems to me that, to the extent the OP5 Manual and the UNHCR Handbook are to be of any assistance in interpreting paragraph 139(1) of the Regulations when the question is related to local integration, the solution offered by the third party country must at least, on a balance of probabilities, amount to the reasonable possibility of attaining, within a reasonable delay, legal or *de facto* permanent status allowing for local integration in that country or of residing in that country without fear of *refoulement*. This view appears to be more consistent with the overall context and objectives of the Act.

[31] Regarding the Officer's determination against Suad, I have difficulty agreeing with the Respondent's argument that Suad's trips to Iraq demonstrate that she lacks a subjective fear of persecution in Iraq since, further to a review of the Officer's Global Case Management System notes, it is clear that the Officer acknowledged that all the other Applicants at one point or another since 2004 made brief trips to Iraq. The Officer does not explain why Suad's travels to Iraq demonstrate that she is not a member of the country asylum class while the trips made to Iraq by the other Applicants do not preclude them from being considered members of the country of asylum class. But most importantly, considering that Suad, who did not attend the interview, was not provided with an opportunity to address the Officer's concerns regarding her trips to Iraq, I am of the view that the Officer did not give a fair consideration to Suad's application (*Sekhon v Canada (Citizenship and Immigration*), 2008 FC 561).

[32] For these reasons, the judicial review application in all three cases is granted and all three matters are referred back to a different visa officer for determination.

[33] The Applicants claim that this would be an opportune time to seek guidance from the Federal Court of Appeal on the minimal rights that a person from the Convention refugee abroad class must have in order to have a durable solution. As they point out, this question was certified in *Ha*, above. However, the Federal Court of Appeal declined to answer that question as it found that it would be "unwise and inappropriate" to attempt to set out in a factual vacuum all of the legal rights and obligations that such a person must possess outside Canada, in all cases, in order to have a durable solution, an issue which is largely dependent on the facts of each case (*Ha*, at para 79). The Respondent opposes certification and notes that the fact that there is no specific definition of "durable solution" in the legislation or the case law has not prevented this Court from evaluating the reasonableness of a visa officer's decision based on the evidence before the officer.

[34] For the same reasons stated in *Ha*, I shall, with all due respect, refrain from certifying the same question in the present case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review applications are granted in Court Dockets IMM-1221-15, IMM-1222-15 and IMM-1223-15;

2. The matters are referred back to Citizenship and Immigration Canada to be determined by a different visa officer;

3. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1221-15
STYLE OF CAUSE:	LAYTH AHMED JASIM AL-ANBAGI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-1222-15
STYLE OF CAUSE:	SUAD AHMED JASIM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-1223-15
STYLE OF CAUSE:	ZAINAB LAYTH AHMED AL-ANBAGI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	NOVEMBER 5, 2015
ORDER AND REASONS:	LEBLANC J.
DATED:	MARCH 4, 2016

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