

Federal Court



Cour fédérale

**Date: 20160420**

**Docket: IMM-3215-15**

**Citation: 2016 FC 443**

**Ottawa, Ontario, April 20, 2016**

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

**BETWEEN:**

**QURBAN ALI BARAT**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of the decision of an immigration officer (the Officer), dated May 19, 2015, whereby the Officer refused the application for permanent residence as a member of the Convention refugee abroad class or as a member of the country of

asylum class pursuant to section 145 or 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

## **II. Background**

[2] The Applicant is a citizen of Afghanistan and belongs to the Ismaili Shiite Hazara religious and ethnic minority.

[3] He lived in Kabul with his wife and children until 1993 when a group of Sunni extremists broke into his home, beat him and demanded that the family leave their home or they would be killed. The very next day, a rocket was launched into the Applicant's home, destroying everything. The family was able to escape and fled to Pakistan without any possessions. The Applicant and his family allege to have resided in Pakistan for the past twenty-three years, where they benefit from temporary refugee status.

[4] The Applicant, his wife and two sons applied for Canadian permanent resident visas as members of the Convention refugee abroad class or the country of asylum class. They were interviewed by the Officer at the High Commission of Canada in Islamabad, Pakistan on May 13, 2015.

[5] The Officer refused to grant the Applicant's application for permanent residence in Canada since she determined that he does not meet the criteria set out in section 145 of the Regulations. The Officer held the opinion that the Applicant does not face a well-founded fear of persecution on a ground enumerated in the refugee Convention. Although the Applicant did not

submit his ethnicity and religion as a ground of persecution, the Officer nevertheless conducted an analysis to determine whether the Applicant fell within the ambit of section 145 of the Regulations because of his Hazara ethnicity and Ismaili Shiite faith. The Officer quoted the following extracts from the UK Border Agency's Country of Origin Information (COI) Report on Afghanistan dated February 15, 2013, reissued on May 8, 2013 (the COI Report), which cites passages from a National Geographic article published in February 2008 entitled *Hazaras:*

*Afghanistan's Outsiders:*

Hazaras have long been branded outsiders. They are largely Shiite Muslims in an overwhelmingly Sunni Muslim country. They have a reputation for industriousness yet work the least desirable jobs. Their Asian features-narrow eyes, flat noses, broad cheeks-have set them apart in a de facto lower caste, reminded so often of their inferiority that some accept it as truth... 'Six years after the Taliban fell, scars remain in the highlands of the Hazara homeland [...]. A new political order reigns in Kabul, seat of President Hamid Karzai's central government. Hazaras have new access to universities, civil service jobs, and other avenues of advancement long denied them [...]

[6] When discussing the presence of Hazaras in Kabul, the Officer noted the following passage from the same National Geographic article:

Some 40 percent of the population is now Hazara. On neighbourhood streets in the western part of the city, you see Hazara children in uniform going to school, Hazara vegetable vendors setting up their carts, and Hazara shop owners and tailors opening stores [...]. The middle class of Hazaras is growing very fast.

[7] The Officer also found that the Applicant does not meet the criteria set out in section 147 of the Regulations as she held the opinion that the Applicant is no longer seriously and personally affected by civil war, armed conflict or massive violation of human rights in

Afghanistan. On this point, the Officer wrote in her GCMS notes that Kabul is “relatively safe” and cites various statistics from a report of the UK Home Office, entitled *Afghanistan: Security* (August 2014) to support this conclusion:

The violence is concentrated in certain parts of the country, with 70 per cent of the security incidents in 2013 taking place in the east, south-east, and in particular the south. [...] Civilian deaths and injuries in the first 6 months of 2014 have increased compared to the same period in 2013 due to escalating ground engagements [...] UNAMA documented increased civilian casualties from ground engagements in every region throughout Afghanistan. During 2013, the proportion of casualties caused by ground engagement and the detonation of improvised devices (in particular radio-controlled devices) increased by 43% and 14% respectively [...] Taking the numbers of civilians killed and injured in the first six months of 2014, 0.02% of the population were directly affected by violence during this time.

[8] The Applicant alleges that the Officer failed to consider all the evidence, namely, the Officer failed to have regard for the Immigration Refugee Board’s National Documentation Package on Afghanistan and more specifically, sources concerning the conditions of persons of Ismaili Shiite Hazara ethnicity and religion in Afghanistan.

[9] The Applicant also alleges that the Officer violated procedural fairness by failing to provide the Applicant an opportunity to prove his residency in Pakistan after 2006 and by failing to provide the Applicant an opportunity to be heard by not taking sufficient time to analyze in depth the facts and stories of each of the three claimants. The Applicant also contends that the Officer showed bias by assuming that the Applicant repatriated to Afghanistan because according to the UNHCR, millions of Afghanis have repatriated.

### **III. Issue and Standard of Review**

[1] The issue to be determined in this case is whether the Officer committed a reviewable error as contemplated by section 18.1(4) of the *Federal Courts Act*, RSC, 1985 c F-7.

[2] It is well-established that an Officer's decision as to whether an applicant is a member of the Convention refugee abroad class or the country asylum class essentially raises a question of mixed fact and law and is therefore reviewable on the reasonableness standard of review (*Bakhtiari v Canada (Citizenship and Immigration)*, 2013 FC 1229, at paras 22-23 [*Bakhtiari*]; *Qarizada v Canada (Citizenship and Immigration)*, 2008 FC 1310, at para 15; *Saiffee v Canada (Citizenship and Immigration)*, 2010 FC 589, at para 25 [*Saiffee*]).

[3] For issues concerning procedural fairness, the correctness standard of review applies (*Atahi v Canada (Citizenship and Immigration)*, 2012 FC 753, at para 13, 413 FTR 122 [*Atahi*]; *Karimzada v Canada (Citizenship and Immigration)*, 2012 FC 152, at para 10 [*Karimzada*]; *Saiffee*, at para 25).

### **IV. Analysis**

[4] As a preliminary issue, the Respondent alleges that the Applicant is attempting to introduce new evidence before the Court, namely, the UK Home Office, Country Information and Guidance of August 2015 and the Court decision in *Morad Mohammad v Canada (Citizenship and Immigration)*, 2014 FC 483 [*Mohammad*], insofar as it is presented as evidence

of the situation of Hazaras in Afghanistan. The Respondent requests that the new evidence be disregarded.

[5] I agree with the Respondent's position that the UK Home Office, Country Information and Guidance of August 2015 document should not be considered in these proceedings since a party may not raise "evidence that was not before the administrative decision-maker whose decision is the subject of this proceeding" (*Yasane v Canada (Citizenship and Immigration)*, 2008 FC 1213, at para 38; *Saifee* at para 28).

[6] With respect to the Court's decision in *Mohammad*, which the Applicant claims is evidence of the situation of Hazaras in Afghanistan, I agree with my colleague Justice Luc Martineau's position in *Karimzada*, that although the case law is useful in bringing the Court's attention to the particular situation of a group, this "does not dispense an applicant to show that the decision-maker has based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (*Karimzada*, at para 24). Each case must be decided on its own merits.

[7] The Applicant's main contention as to the merits of the Officer's decision is related to the Officer's analysis and reference to country documentation regarding the Applicant's eligibility to the Convention refugee abroad class. Namely, the Applicant is of the view that the Officer failed to have regard for the evidence in coming to the conclusion that if the Applicant were to return to Afghanistan, he will not suffer a reasonable chance of persecution due to his Hazara ethnicity and Ismaili faith.

[8] An applicant will be considered to fall within the Convention refugee abroad class pursuant to section 145 of the Regulations if they show that there is a reasonable chance of persecution should they return to their country of origin or that there are good grounds for their fear of persecution if they were to return (*Bakhtiari*, at para 9).

[9] It is trite law that an application for judicial review is to be decided on the basis of the record before the decision-maker. An applicant bears the burden of establishing that they meet the conditions of the Act and must present all the evidence upon which they rely (*Hakim v Canada (Citizenship and Immigration)*, 2011 FC 51, at para 14; *Qurbani v Canada (Citizenship and Immigration)*, 2009 FC 127, at para 18 [*Qurbani*]). While there may not be a positive obligation on officers to consult specific documents not put before him or her by the applicant, in the case of refugee claims, this Court has held that there is a presumption that generally available country documents are either before the decision-maker prior to the decision being made or could be readily accessible (*Saifee*, at para 28).

[10] Moreover, while an application for judicial review will not be granted on the basis of objective country documentation alone, where an officer makes a decision without knowledge of country conditions or fails to address evidence in the record that directly contradicts an essential element of finding or fails to explain why the evidence was disregarded, there may be a valid reason to overturn the decision on judicial review (*Saifee*, at para 30; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, at paras 15, 17, 83 ACWS (3d) 264 [*Cepeda-Gutierrez*]; *Hinzman v Canada (Citizenship and Immigration)*, 2010 FCA 177, [2012] 1 FCR 257, at para 380; *Basran v Canada (Citizenship and Immigration)*, 2015 FC 1221,

at para 21; *Hernandez Montoya v Canada (Citizenship and Immigration)*, 2014 FC 808, at paras 33-36, 462 FTR 73).

[11] In the past, this Court has found that where an applicant has not raised persecution based on religious or ethnic grounds as a separate ground of risk during an interview with an officer, the applicant cannot then raise these grounds on judicial review with the view of overturning an officer's decision (see *Bakhtiari* at para 31; *Atahi* at para 17). While this may be so, an officer must nonetheless render a decision with regard for country conditions. Where the country conditions demonstrate a pervasive level of discrimination, this Court has found that an officer has a duty to make inquiries to determine whether persecution may be a ground of risk (*Hakimi*, at para 13).

[12] In this case, the Applicant did not raise his Hazara ethnicity or Ismaili faith as reasons for fearing to return to Afghanistan. The Applicant explained that he did not want to return because there "is no peace and security in Afghanistan" and "they are always killing each other and fighting." Despite the fact that the Applicant did not raise his Hazara ethnicity as a ground of risk, the Officer reviewed national country documentation regarding the situation of Hazaras in Afghanistan. Yet, the Officer's GCMS ignores more recent reports of targeted attacks against Hazaras in Kabul. For example, the Refugee Documentation Centre of Ireland released a research report on January 22, 2014 detailing the situation of Hazaras in Afghanistan (the Report). The Report cites an ABC News of Australia report dated March 13, 2013. The ABC news report states that "the security situation in the Afghan capital is getting worse and attackers



are targeting members of the Hazara ethnic group” and that “sending Hazaras to Kabul would be a mistake.”

[13] The United States Department of State report on Afghanistan in its Country Reports on Human Rights Practices for 2012 says:

Ethnic tensions between various groups continued to result in conflict and killings. For example, in November riots occurred at Kabul University after Sunni students tried to prevent ethnic Hazara students from observing Shiite religious practices. Societal discrimination against Shia Hazaras continued along class, race, and religious lines in the form of extortion of money through illegal taxation, forced recruitment and forced labor, physical abuse, and detention.

[14] The COI Report cited by the Officer also refers to the United States Department of State’s Country Report on Human Rights Practices for 2011, Afghanistan, 24 May 2012, which states:

Ethnic tensions between Pashtun and non-Pashtun groups resulted in conflict and occasional killings. The NGO Minority Rights Group’s Peoples under Threat index identified Afghanistan as a country where communities were most at risk of mass killing, especially because of targeting of persons based on ethnicity and religion.

Societal discrimination against Shia Hazaras continued along class, race, and religious lines in the form of extortion of money through illegal taxation, forced recruitment and forced labor, physical abuse, and detention.

[15] While the Officer recognizes that the security situation in many parts of Afghanistan is still difficult, the Officer does not explain why she disregarded evidence contradicting her finding that the Applicant and his family will not suffer a reasonable chance of persecution due

to their Hazara ethnicity if they were to return to Kabul nor does she refer to evidence directly contradicting her finding on this issue. In my view, the Officer committed a reviewable error by failing to address evidence of past and recent targeted killings of Hazaras in Kabul.

[16] Given my finding that the RPD's decision is fatally flawed in this respect, there is no need to determine whether a breach of procedural fairness occurred or to deal with the Applicant's request for certification of a question for the Federal Court of Appeal, a request that the Respondent opposed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The judicial review application is allowed;
2. The matter is referred back to a different immigration officer for determination; and
3. No question is certified.

"René LeBlanc"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3215-15

**STYLE OF CAUSE:** QURBAN ALI BARAT v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

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**DATE OF HEARING:** FEBRUARY 22, 2016

**JUDGMENT AND REASONS:** LEBLANC J.

**DATED:** APRIL 20, 2016

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