Federal Court  Cour fédérale

Date: 20130402

Docket: IMM-2499-12

Citation: 2013 FC 324

Ottawa, Ontario, April 2, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ASHRAF ARIA
MARIAM ARIA
ARASH ARIA
ARIAN ARIA
NILOFAR ARIA
MORSAL ARIA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[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 a decision made by a member of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the "Member"),

dated February 10, 2012, whereby the Member decided that the Applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97(1) of the *Act*.

[2] For the reasons that follow, I find that this application for judicial review must be granted, as the Member's conclusions with regard to the credibility of the Applicants and the availability of an internal flight alternative (IFA) are unreasonable.

Facts

[3] Ashraf Aria (the "principal Applicant"), his wife Mariam and their four children Arash, Arian, Nilofar and Morsal (collectively, "the Applicants") are Afghan citizens. The Applicants' problems began in December 2009, when a group of Pashtun warlords approached the principal Applicant and one warlord demanded to marry his 13 year-old daughter Morsal. The principal Applicant rejected the demand but the group returned approximately three weeks later. On that occasion, a member of the group told the principal Applicant they would take his daughter whether he agreed or not.

[4] Out of fear that the warlords would carry out their threats, the family left their Kabul home and moved to Khair Khana, 30 km north of Kabul, and stayed with the principal Applicant's uncle. The Applicants learned from their former neighbours in Kabul that the warlords were still looking for them. The warlords told the neighbours they would find the Applicants wherever they were. One month after having moved to Khair Khana, the principal Applicant saw the same group of men driving around the area.

[5] Immediately following this sighting, the family decided to leave Afghanistan, but first moved to Macroryan, where they stayed with a family member. In Macroryan, the principal Applicant once again saw the same group of men prowling around the area. The family then moved to Shar-e-Now, and then to Bagh-e-Rayes. The family left for Pakistan on June 8, 2010, and arrived in Canada on June 15, 2010, where they immediately sought refugee protection.

The impugned decision

[6] The Member rejected the Applicants' claim on February 10, 2012. The Member found that the principal Applicant lacked credibility and alternatively decided that the Applicants had a viable IFA in Herat.

[7] The Member made six negative credibility findings. First, the Member took issue with the fact that the principal Applicant could not remember the exact date of the group's first visit. Second, the principal Applicant's description in his Personal Information Form (PIF) of the group's vehicle as an "unusual truck" was found to be inconsistent with his description of the vehicle as a "pickup truck" at the hearing. Third, the Member found a discrepancy between the principal Applicant's PIF, where he stated that he was approached by a "group" of men, and his testimony, when he was asked to specify the number of people in the group, and indicated that there were four people in that group. According to the Member, the principal Applicant was vague in many areas in his PIF in order that "it would be easy for him to remember his allegations". Fourth, the Member found it implausible that the group of men would not have followed the family to Khair Khana while they were in the process of moving. Fifth, the Member found it implausible that the warlords would not

have found the Applicants after they left Kabul. Finally, the Member found it implausible that the warlords would wait until their third visit to take the principal Applicant's daughter.

[8] With respect to the IFA finding, the Member's reasons are brief enough to reproduce them here in their entirety:

> 13. Even if I believed the claimant, which I do not, I find that the claimant has an Internal Flight Alternative (IFA) in Herat. When this was put to the claimant, he stated that maybe these warlords would not find them, but for certain other warlords would claim his daughter. The panel does not have to accept the assumption of the claimant. Herat is a large and cosmopolitan city. It is not credible that all young women are subject to forced marriages which are not forced by their own families. If this were the case, the objective evidence would mention this. Since it has not, I find that the claimant and his family have a credible Internal Flight Alternative. The claimant was a taxi driver and would be able to find work in Herat. It is not required that the claimant would know people in the IFA and there are no restrictions on persons such as the claimant and his family from traveling there. Therefore, on a balance of probabilities, I find that the claimant and his family have an Internal Flight Alternative in Herat.

Issues

[9] This application raises the following issues:

a) Did the Member err by ignoring, misapprehending or misconstruing relevant evidence when she found the principal Applicant to be not credible?

b) Did the Member err in finding an IFA existed in Herat?

Analysis

[10] It is settled law that the standard of review for both credibility findings and the availability of an IFA is reasonableness: *Aguebor v (Canada) Minister of Employment and Immigration* (1993),

160 NR 315, [1993] FCJ No 732 (FCA); *Khokhar v Canada (Minister of Citizenship and Immigration)*, 2008 FC 449, 166 ACWS (3d) 1123.

a) Did the Member err by ignoring, misapprehending or misconstruing relevant evidence when she found the principal Applicant to be not credible?

[11] It is somewhat telling that the Respondent chose not to make submissions with regard to the Member's credibility findings. At the hearing, counsel for the Respondent explicitly stated that she was not conceding the alleged errors raised by the Applicant, but again refrained from making any submission in that respect.

[12] I agree with the Applicants that the credibility findings are not reasonable, because they are either not supported by the evidence, or based on a microscopic assessment of the evidence. By way of example, with respect to the date of the first visit, the principal Applicant explained that he did not remember the exact date but did remember that it was on a Wednesday. He went on to explain that he was so horrified that he forgot many things, and that it was not common for Afghans to refer to dates. The Member rejected those explanations, first because the principal Applicant was able to fill out the exact birth dates of his children and second because he provided no objective evidence that it was a cultural practice not to refer to dates. Such a finding is clearly unreasonable. The principal Applicant was never asked to identify who completed the birth dates of his children on the forms and how that information was obtained, nor was he ever asked to explain any perceived inconsistency. Moreover, there was no contrary evidence before the Member to suggest that the principal Applicant's testimony regarding the Afghan custom of referring to days of the week rather

than dates was not credible, and considerable caution is required when assessing the norms and patterns of different cultures (*Shaikh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 74, 136 ACWS (3d) 928).

[13] The Member's finding that the principal Applicant's description in his PIF of the group's vehicle as an "unusual vehicle" is inconsistent with his description of the vehicle as a "pickup truck" at the hearing is a clear example of the Member ignoring, misapprehending and misconstruing the evidence given by the principal Applicant. The principal Applicant was faulted for saying that the unusual vehicle was of the type that was not used by police, when in fact he said the exact opposite. Furthermore, the Member faulted the principal Applicant for saying that he had indicated in his PIF that the vehicle was a pickup truck, while in fact it was made clear at the hearing that the principal Applicant was not referring to his PIF but rather to the expedited report.

[14] As for the fact that the principal Applicant referred to a "group" in his PIF and failed to mention that there were four people in the group, I must confess that I fail to see the relevance of this detail. It strikes me as a perfect example of what the Court of Appeal had in mind when it cautioned against a microscopic examination of the evidence in *Attakora v Canada (Minister of Employment and Immigration)* (1999), 99 NR 168, [1989] FCJ No 444 (QL). The precise number of men in the group is clearly a peripheral detail, which was discovered as a result of the more detailed questioning from the Member. The principal Applicant satisfactorily explained at the hearing that for him, four men constituted a group of men just as five or ten would. There is nothing egregious in such an explanation, and there is certainly no inconsistency between his testimony and his PIF. It is well established that the Board should not draw a negative credibility inference from

the omission of a peripheral detail in a refugee claimant's PIF (*Feradov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 101 at para 18, [2007] FCJ No 135 (QL). There is no analysis in the Member's reasons as to why the perceived omission with respect to the number of men was material. What appears to be the material fact is that the principal Applicant was approached by a group of men who sought to take his daughter; the number of men in the group is secondary.

[15] The Member also found it implausible that the principal Applicant would have taken a month to remove valuables from the house where his daughter was threatened. When reading the transcript, however, it appears that the Member ignored the uncontradicted evidence on this point. The principal Applicant stated that he and his family moved to his uncle's place the day after the second visit, and that he only returned to retrieve some valuables that had been left behind.

[16] The Member also misconstrued the facts when she stated the following, at paragraph 11 of her reasons:

> The claimant stated that they moved three times to secure their safety. In two locations, the claimant alleged that he saw the group of men prowling around the area; however, they did not see him. The claimant alleged that this group of men were powerful warlords. They twice found him and his family, but only prowled around the area. This scenario is completely lacking in credibility. If these powerful warlords could follow the family to two other cities, it lacks credibility that they would not be able to find the claimant and his family. Therefore, on a balance of probabilities, I find the claimant is not a credible or a trustworthy witness.

[17] First, it is not clear what exactly the Member meant to say. She says that the group "did not see" the principal Applicant and that "they twice found him and his family", which appears to be

inconsistent. She then goes on to consider that the men did *not* find the Applicants, which is certainly inconsistent with the previous statement. More importantly, the finding that the group "twice found [the principal Applicant] and his family" appears to rest, once more, on a misconstruction of the evidence. The principal Applicant never said that the group twice found him and his family, and there is no evidence that the warlords followed the family. The evidence is that the principal Applicant twice saw the warlords after they left Kabul, but that the warlords never saw him. The fact that the group prowled around the first two areas where they moved does not mean that they had followed them, and it cannot be inferred that the group would have found the claimant in the third place where they subsequently moved.

[18] Finally, the Member found the principal Applicant's explanation as to why the group did not take his daughter the second time instead of waiting until the third visit, to be lacking in credibility. It was unreasonable to expect the principal Applicant to know why the agents of persecution acted in the way they did, and to make a negative credibility finding based on the principal Applicant's speculations on the actions of a third party (*Kong v Canada (Minister of Employment and Immigration)* (1994), 23 Imm LR (2d) 179, 73 FTR 204 (TD)).

[19] In summary, the credibility findings made by the Member are seriously flawed as they are based on a misconstruction of the evidence, unreasonable inferences, and questionable determinations of implausibility. As previously mentioned, counsel for the Respondent has not seen fit to make written or oral submissions in support of the Member's credibility findings. In those circumstances, I feel compelled to find that the decision of the Member with respect to credibility issues does not fall within the range of reasonable outcomes.

b) Did the Member err in finding an IFA existed in Herat?

[20] In finding an IFA, the Member was required to be satisfied on a balance of probabilities that there was no serious possibility of the Applicants being persecuted in Herat and that in all the circumstances, including circumstances particular to them, conditions in Herat are such that it would not be unreasonable for them to seek refuge there: *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, 140 NR 138 (CA); *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, [1993] FCJ No 1172 (CA).

[21] There were a number of country conditions documents before the Member referring to the prevalence of kidnappings and rape of young girls by armed groups in Afghanistan, as well as forced marriages of young girls. There was also evidence indicating that Afghans face serious unemployment problems, that an IFA in Afghanistan can only be sought where protection is available from the individual's extended family, and that relocation to an area with a predominantly different ethnic/religious make-up may also not be possible due to the latent or overt tensions between ethnic/religious groups. The evidence also spoke of the links between militias and local and central administration throughout the country and their ability to have an impact nationwide.

[22] The principal Applicant had indicated in his evidence that he had no family or friends living in Herat, that he had never been there before and that he believed that groups such as the people who sought to harm his family had links everywhere. He was also unsure as to whether he would be able to find employment in Herat.

[23] It may be, as argued by counsel for the Respondent, that the evidence can be distinguished. In particular, she submitted that the evidence speaks of instances where armed individuals or warlords have abducted and raped young girls, but not of young girls being forced to marry warlords without family consent. She also contended that the documentary evidence is to the effect that a nuclear family could subsist in urban and semi-urban areas like Herat, without family or community support.

[24] This may well be the case, but in putting forward these submissions, counsel for the Respondent is attempting to buttress the Member's weak and inadequate reasoning with reasons of her own. It is trite law that a party cannot supplement the reasons given by the decision-maker on judicial review (*Xiao v Canada (Minister of Citizenship and Immigration)*, 2009 FC 195 at para 35, [2009] 4 FCR 510). It is the reasoning of the Member that has to be reviewed by this Court, not the reasons provided by counsel for the Respondent.

[25] There is another problem with the Member's reasoning. Before going to the second prong of the test (and even assuming that the conditions in Herat were such that it would not be unreasonable for them to seek refuge there), the Member was required to determine whether the evidence shows that there is, on a balance of probabilities, a serious possibility of persecution in the IFA. The Member appears to have misunderstood this first part of the test when she stated that "[i]t is not credible that all young women are subject to forced marriages which are not forced by their own families". A "serious possibility" of persecution does not mean that "all young women" would be subject to forced marriages with warlords.

[26] Not only did the Member misunderstand the test, but she also misapplied it. The principal Applicant never conceded that the warlords would not follow them in Herat, and the Member never assessed that possibility or the principal Applicant's assumption that other warlords would claim his daughter. The only analysis of the Member is that she does not have to accept the assumption of the principal Applicant. This falls far short of what was required, particularly in light of the documentary evidence that was before the Member.

[27] I do recognize that a reviewing court must consider the entire record in determining whether a decision is reasonable: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paras 12 and 15, [2011] 3 SCR 708. I do think, however, that in the case at bar the Member's mischaracterization of the first prong of the test renders her entire IFA analysis unreasonable.

[28] For all of the foregoing reasons, I am of the view that the decision of the Member must be quashed, that the application for judicial review must be granted, and that the claim must be remitted to a differently constituted panel.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review must be granted, and that the claim must be remitted to a differently constituted panel.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2499-12
STYLE OF CAUSE:	ASHRAF ARIA ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	December 13, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	de MONTIGNY J.
DATED:	April 2, 2013

APPEARANCES:

Carole Dahan	FOR THE APPLICANTS
Bridget O'Leary	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Refugee Law Office Toronto, ON	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, ON	FOR THE RESPONDENT