

Federal Court



Cour fédérale

**Date: 20160329**

**Docket: IMM-3756-15**

**Citation: 2016 FC 354**

**Ottawa, Ontario, March 29, 2016**

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

**BETWEEN:**

**HOSAINI, ROZMA  
HOSAINI, KHAIRUDDIN  
HOSAINI, RAILA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of three identical decisions of a visa officer [Officer] dated June 4, 2015 [Decision], which refused the Applicants' application for permanent residence in

Canada as members of the humanitarian-protected persons abroad class or as members of the humanitarian-protected persons abroad designated class.

## II. BACKGROUND

[2] The Applicants – Rozma Hosaini [Principal Applicant], Khairuddin Hosaini [Second Applicant] and Raila Hosaini [Third Applicant] – are all citizens of Afghanistan. They allege that they have resided in Pakistan since 1998 after leaving Afghanistan for fear of being persecuted by the Taliban due to their ethnicity as Hazaras.

[3] The Principal Applicant's husband was killed by a rocket explosion during the communist regime of Najibullah.

[4] The Applicants claim that none of them has an elementary level of education and they do not know their exact ages. Nor do they know the exact date their husband or father passed away, or the exact date that they left Afghanistan.

[5] In 2005, the Applicants were registered with Pakistan's government for the purpose of the issuance of proof of residence cards [POR cards]. However, during the distribution of the cards, around October 2006, the Principal Applicant was pushed down by the crowd waiting at the government offices and broke her arm. She claims that she was scared of being hurt again and did not attempt to revisit the office. At the time, the Applicants say they did not understand the importance of having the POR cards.

[6] On June 2, 2015, the Applicants were each interviewed at the Canadian High Commission in Islamabad with the assistance of an interpreter. The Applicants allege that, on the day of their interview at the Canadian Embassy, they were stopped by the police who treated them harshly.

[7] The Principal Applicant's children are fluent in Urdu. Her son, the Second Applicant, speaks some English which he says he learned through night classes taken in Pakistan.

### III. DECISION UNDER REVIEW

[8] The Officer decided that the Applicants were not members of the humanitarian-protected persons abroad classes because she was not satisfied that the Applicants resided in Pakistan. She found that it was more likely that the Applicants had repatriated or were otherwise residents in Afghanistan.

[9] The Officer also found that the Applicants had failed to provide credible explanations and responses when questioned during their interview. Contradictions emerged in responses related to schooling, the date that the Applicants moved to Pakistan, and how long they had lived at each address in Pakistan. Furthermore, the Officer found that it was not plausible that the Second Applicant would have learned English through his minimal education and personal circumstances. As a result, the Applicants were unable to address the Officer's concerns or, meet the criteria set out in s 96 of the Act and s 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], and the applications were refused.

#### IV. ISSUES

[10] The Applicants raise the following issues in this proceeding:

1. Did the Officer err in her negative credibility and implausibility findings?
2. Did the Officer look too hard for inconsistencies and fail to consider the totality of the evidence before her?

#### V. STANDARD OF REVIEW

[11] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[12] Both issues brought forward by the Applicants are matters of mixed fact and law and address an administrative decision-maker's substantive decision regarding whether an applicant is a member of the Convention refugee abroad class or humanitarian-protected person abroad class. It is settled law that the standard of review to be applied in such cases is that of reasonableness: *Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 at para 19; *Bakhtiari v Canada (Citizenship and Immigration)*, 2013 FC 1229 at para 22.

[13] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: see *Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

## VI. STATUTORY PROVISIONS

[14] The following provisions of the Act are relevant in this proceeding:

### **Application before entering Canada**

11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

### **Refugees**

12 (3) A foreign national, inside or outside Canada, may be selected as a person who under this Act is a Convention refugee or as a person in similar circumstances, taking

### **Visa et documents**

11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

### **Réfugiés**

12 (3) La sélection de l'étranger, qu'il soit au Canada ou non, s'effectue, conformément à la tradition humanitaire du Canada à l'égard des personnes

into account Canada's humanitarian tradition with respect to the displaced and the persecuted.

**Obligation — answer truthfully**

16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

**Convention Refugee**

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

déplacées ou persécutées, selon qu'il a la qualité, au titre de la présente loi, de réfugié ou de personne en situation semblable.

**Obligation du demandeur**

16 (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

**Définition de réfugié**

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[15] The following provisions of the Regulations are relevant in this proceeding:

### **General Requirements**

139 (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that

(e) the foreign national is a member of one of the classes prescribed by this Division;

### **Member of Convention refugees abroad class**

145 A foreign national is a Convention refugee abroad and a member of the convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.

### **Member of country or asylum class**

147 A foreign national is a member of the country of asylum class if they have been determined by an officer to be in need of resettlement because

(a) they are outside all of their countries of nationality and habitual residence; and

(b) they have been, and continue to be, seriously and personally affected by civil

### **Exigences générales**

139 (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis:

e) il fait partie d'une catégorie établie dans la présente section;

### **Qualité**

145 Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

### **Catégorie de personnes de pays d'accueil**

147 Appartient à la catégorie de personnes de pays d'accueil l'étranger considéré par un agent comme ayant besoin de se réinstaller en raison des circonstances suivantes:

a) il se trouve hors de tout pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

b) une guerre civile, un conflit armé ou une violation massive des droits de la personne dans

war, armed conflict or massive violation of human rights in each of those countries.

chacun des pays en cause ont eu et continuent d'avoir des conséquences graves et personnelles pour lui.

## VII. ARGUMENTS

### A. *Preliminary Issue*

[16] As a preliminary issue, the Respondent submits that the affidavit of Muhammed Aleem sworn July 8, 2015 (which includes a copy of the Applicants' rent agreement and residence attestation as exhibits), and portions of the affidavit of Ghazal Khedri sworn on October 14, 2015, should be struck or disregarded as attempts to introduce evidence that was not before the Officer. The reasonableness of the Decision should be considered based on the evidence that was before the Officer at the time the Decision was rendered: *Afable v Canada (Citizenship and Immigration)*, 2010 FC 1317 at paras 20-22.

[17] The Applicants say that they are not adding anything new to the record. They were asked to bring their POR cards and utility bills to the interview to prove their residence. As they did not have POR cards, they submitted their utility bills. Furthermore, the Third Applicant told the Officer the name of her previous landlord, Mr. Aleem. His affidavit is evidence of her testimony and therefore represents nothing new. Finally, the Applicants referenced their current address as "plaza" and they all said they lived on the upper floor. The 2012 rental agreement and the attestation from the local government therefore confirm the Applicants' explanation at the interview.



B. *Applicants' Submissions*

[18] The Applicants submit that the Officer's plausibility findings were not supported by any specific evidence. They say that when their historical, cultural and educational backgrounds are taken into account, the explanations they provided to the Officer's questions were plausible. For instance, when asked about their lack of POR cards, the Applicants explained that they were scared to return to pick up the cards after the Principal Applicant broke her arm after being pushed down by the waiting crowd. Furthermore, the Applicants say that POR cards were issued for a few months around the end of 2006. However in the following years, while previously issued cards were renewed, no new cards were issued to refugees. The Officer provided no reason as to why these explanations, provided by all of the Applicants consistently and unambiguously, were not plausible. Furthermore, the Officer raised no concern about the credibility of the Applicants' explanation of the incident that caused them to miss picking up their cards.

[19] The Applicants highlight the Court's comments in *Divsalar v Canada (Citizenship and Immigration)*, 2002 FCT 653 [*Divsalar*], which warned that a tribunal rendering a decision based on a lack of plausibility must proceed with caution.

[20] The Applicants also take issue with the fact that while they provided proof of their residence in Pakistan by way of their utility bills, as was requested of them, the Officer made no mention of this objective piece of evidence which was critical to deciding whether the Applicants truly resided in Pakistan. As stated in *Cepeda-Gutierrez v Canada (Citizenship and*

*Immigration*), [1998] FCJ No 1425 [*Cepeda-Gutierrez*], “the more important the evidence that is not mentioned specifically and analyzed in the agency’s reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact ‘without regard to the evidence.’”

[21] Where inconsistency did emerge in terms of the Applicants’ accounts about the schooling they had received and the date that they moved to Pakistan, the Officer failed to consider the Applicants’ lack of sophistication and the fact that the Principal Applicant’s three children were minors at the time they lived in Afghanistan during the civil war and when they left the country. Furthermore, the country conditions clearly indicate that the education system was broken during the civil war in Afghanistan and when the Taliban took over in 1996. The Applicants say that it is an error to rely on minor and superficial inconsistencies that do not go to the core of the matter. The Applicants’ explanation about their limited schooling in Afghanistan, or their lack of knowledge regarding their siblings’ schooling, is absolutely plausible and does not warrant the rejection of the application. Whether the Applicants attended school at some point during the war is not relevant to their current situation and whether they will be personally at risk if they were to return to their country now.

[22] The Officer never asked the Second Applicant where he learned English. The Officer had a duty to put any concerns about this issue to the Second Applicant since it had a direct bearing on the Officer’s credibility findings.

[23] The Applicants say that the Officer's finding that they might have repatriated to Afghanistan was baseless and without regard to the circumstances of a widowed woman with three young adult children going to a country mired in chaos and insecurity.

[24] The Applicants draw attention to the United Nations High Commissioner for Refugees [UNHCR] Refworld report of 2006 and the Human Rights Watch Report 2014 which indicate that while the government of Pakistan may have claimed that repatriations were voluntary, many Afghans felt coerced to leave despite insecurity in Afghanistan. Furthermore, the Human Rights Watch Report was available to the Officer at the time of the interview and noted that the number of returnees to Afghanistan has fallen and that Afghans are fleeing to Western countries.

[25] The Applicants allege that the Officer looked too hard for inconsistencies and was insensitive to the point that the Principal Applicant started crying during her interview. The Applicants say that they were not represented by counsel when preparing for the Officer's questions and that they gave their testimony while in a state of anxiety and fear that was only exacerbated by the Officer's behaviour and by the fact that the Officer was communicating with the Applicants from behind a window.

### C. *Respondent's Submissions*

[26] The Respondent submits that the law has established that the Court should not interfere with a tribunal's credibility assessment, particularly where an oral hearing has occurred and the decision-maker has seen and heard from a witness: *Khosa*, above. Furthermore, an applicant has the burden of putting together a complete, relevant, convincing and unambiguous application.

This is something that the Applicants failed to do: *Obeta v Canada (Citizenship and Immigration)*, 2012 FC 1542 at para 25.

[27] The Respondent says that the Officer reasonably found that the Applicants were not credible given the inconsistencies and implausibilities in their evidence. They failed to provide documentation concerning their residence (such as POR cards) and while the Officer did consider the Applicants' accounts, she concluded that they did not offer a plausible explanation for not having cards. The Officer noted that in 2005-2006, Pakistan had registered nearly all Afghans living in Pakistan and that those who did not have POR cards faced discrimination and harassment from the authorities and the prospect of being deported back to Afghanistan. Given the documentary evidence concerning the importance of the POR cards, it was open to the Officer to draw a negative inference from the Applicants' lack of cards. The Officer was entitled to assess the plausibility of the Applicants' testimony with common sense and rationality and the Applicants have failed to show that this finding was not reasonable.

[28] Furthermore, the Applicants offered inconsistent evidence about their departure from Afghanistan: the Principal Applicant said she did not know when they left but it was when her children were still in school and during the time of the Taliban; the Second Applicant said that the family left in 1998; the Third Applicant said that the family left in 1988, when she was about 15 years old and that her brother was crawling at the time; and the Principal Applicant's youngest son, Shamsuddin Hosaini (who is not an applicant) said he did not know when they left but that he was about 5 years old.

[29] The Applicants were also inconsistent in their evidence of school attendance: the Principal Applicant said that her children had not attended school in Afghanistan; the Second Applicant said that he studied to Grade 6 in Afghanistan, his sister did not go to school and his brother attended a school called Tuion in Jamat Kama What; the Third Applicant said that she studied to Grade 4 in Afghanistan and then left school, her older brother studied to Grade 6 and her younger brother was just crawling at the time; and Shamsuddin Hosaini said he did not go to school but went to Tuion What and did not think his brother and sister went to school. These are not minor inconsistencies. The Applicants' schooling relates to the timeframe during which the Applicants departed from Afghanistan and when they resided in Pakistan. It was not unreasonable for the Officer to expect the Applicants to provide consistent testimony here.

[30] Further inconsistencies in the Applicants' evidence emerged when asked about their residences in Pakistan: the Principal Applicant said the family had been living in their current residence for one year; the Second Applicant said that they had lived there for two or three years, having lived elsewhere for one or two; the Third Applicant said that they had been living in the current residence for one year and previously lived on street number 2 for four or five years before moving to street number 1 for four years; and Shamsuddin Hosaini said they lived in their current residence for one year and a different residence prior to that for five months and several different places before that. Again, the Respondent says that these are marked discrepancies in testimony and it was reasonable for the Officer to find that the Applicants had failed to provide credible evidence concerning their residency in Pakistan.

[31] It was also open to the Officer to find that the Applicants' utility bills did not establish that the Applicants resided in Pakistan. The argument that the Officer failed to consider the utility bills is without merit, as the Decision makes specific reference to them and indicates that the Applicants' names were not on the bills and that the Principal Applicant did not know who the named person was. This is contrary to assertions made by the Applicants that the Officer had only noted that the Applicants had brought bills to their interview.

[32] The Applicants have failed to rebut the presumption that the Officer considered all of the evidence. The Respondent says that the threshold for adequacy of reasons of an administrative officer who uses notes as the method to provide reasons is low: *Ozdemir v Canada (Citizenship and Immigration)*, 2001 FCA 331 at paras 9-11; *Shali v Canada (Citizenship and Immigration)*, 2009 FC 1108 at para 31.

[33] The Officer also did not err by finding that the Second Applicant's knowledge of English was inconsistent with the Applicants' evidence regarding their education and current circumstances and the fact that the Principal Applicant had indicated that none of the Applicants attended school in Pakistan.

## VIII. ANALYSIS

[34] The Officer was not satisfied that the Applicants reside in Pakistan as required by the governing legislation. She thought it was more likely that they had repatriated or otherwise live in Afghanistan, their country of nationality.

[35] The Officer accepted that the Applicants had been consistent in their “answers to general questions,” but her negative findings were based upon the following two principal grounds:

- a) The “explanation for the lack of POR card does not seem plausible”; and
- b) “Answers to many of the questions were inconsistent.”

[36] The Officer also elaborated further as follows:

Other questions they had difficulty responding to or answers contradicted each other, such as schooling they received, when they moved to Pakistan, how long they lived at each address. I also note that Khairuddin speaks and understands English. Does not seem plausible that studying to Grade six, living in Rawalpindi, and selling French fries that he would have learned the language.

[37] The final point about Khairuddin’s (the Second Applicant’s) ability to speak English was never raised in the interview with the Second Applicant, so that he was never given an opportunity to explain how he came to speak English. Nor is it clear how the Second Applicant’s ability to speak English supports a conclusion that “it is more likely that [the Applicants] have repatriated or otherwise reside in Afghanistan.” On this point, then, there is simply no evidence to support an implausibility finding. It is pure speculation and was reached in a procedurally unfair manner. This is a reviewable error. See *Khosa*, above, at para 45; *Cepeda-Gutierrez*, above, at paras 14-17. This error does not necessarily render the Decision unreasonable in its entirety. However, in my view, there are other significant reviewable errors which render the Decision as a whole unsafe.

[38] There were no inconsistencies in the evidence of the Applicants as to why they did not have POR cards. Once again, the Officer simply finds their explanation implausible. The basis for this implausibility finding is as follows:

According to reports from the UNHCR, from 2005 to late 2006, the Government of Pakistan with assistance from the UNHCR began and completed a registration of 2.15 million persons. During the process nearly the entire Afghan community was registered. This census and registration process was conducted over many months, in all major areas of Pakistan, through an approximate 100 registration centres. This registration process was widely advertised and communicated within the Afghan community. The lack of these cards, which were issued during the stated period of residency in Pakistan causes further concerns with respect to residency in this country. Without a POR card, Afghans in Pakistan face discrimination from the police throughout the country. At check points they will often be harassed from bribes and in some cases can and are deported back to Afghanistan. Instances of such harassment have been reported to UNHCR. The lack of POR cards for long term residents presents concerns given the importance of these documents to the holder. There is a high incidence of fraud in this office and a high number of applicants who incorrectly claim residence in Pakistan in order to pursue refugee applications with this office. Since 2002, more than 4.7 million Afghans have returned from Pakistan under the biggest facilitated voluntary return programme conducted by the UNHCR. This is in addition to the hundreds of thousands of Afghans that have returned outside the voluntary repatriation program. UNHCR estimates that a further 900,000 Afghans returned without assistance.

[39] The Officer relies upon inconsistencies in evidence in other parts of the Decision but does not credit the complete consistency in the evidence given by all of the Applicants on this point. Her logic appears to be that the Applicants' testimony is not plausible because the failure to obtain a POR card exposes the Applicants to various problems in dealing with the authorities. Raila (the Third Applicant) explained that, indeed, the police stop her brothers but not the women in the family. Notwithstanding these difficulties, there is nothing implausible about the



Applicants eventually giving up attempting to obtain POR cards for the reasons they gave. The Court has consistently warned against the dangers of implausibility findings and, in *Divsalar*, above, endorsed the view that plausibility findings should only be made in the clearest of cases, where the facts as presented are either so far outside the realm of what could reasonably be expected that the trier of fact can reasonably find it could not possibly have happened. This is not such as case. The consistent explanations provided by the Applicants on this issue were reasonable, and certainly could not be said to fall outside of the realm of what could reasonably be expected. The POR card issue is such a significant aspect of the Decision that this error alone requires that the matter be returned for reconsideration. The Respondent relies upon *Osmani v Canada (Citizenship and Immigration)*, 2012 FC 134 [*Osmani*], where the Court appears to have accepted as reasonable an officer's implausibility finding based in part on the importance of POR cards in Pakistan. But in *Osmani*, the applicants, who had lived in Pakistan since 2001, indicated that after applying for POR cards, they simply did not receive them. The Court held that the officer reasonably expected the applicants to have POR cards given the amount of time they had allegedly resided in the country and the emphasis that had been placed on acquiring POR cards by the UNHCR and the government of Pakistan during that time. The applicants in *Osmani* did not provide the consistent and plausible explanation that was before the Officer in the present case. There certainly were come inconsistencies in testimony related to the family's departure from Afghanistan, school attendance, and residence times in Pakistan, but given the ages of the children at the relevant time and the general circumstances under which this family has had to live, these inconsistencies are explainable and certainly are not sufficient to ground a negative Decision given my findings regarding the POR card issue.

[40] Counsel agree there are no questions for certification and the Court concurs.

[41] I agree with the Respondent's preliminary objections to the new evidence the Applicants have attempted to introduce in this application. I have excluded that evidence in my review.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The Application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.

“James Russell”

---

Judge

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

**DOCKET:** IMM-3756-15

**STYLE OF CAUSE:** HOSAINI ET AL v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 9, 2016

**JUDGMENT AND REASONS:** RUSSELL J.

**DATED:** MARCH 29, 2016

**APPEARANCES:**

Zahra Khedri FOR THE APPLICANTS

Amy King FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Zahra Khedri FOR THE APPLICANTS  
Barrister and Solicitor  
East York, Ontario

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of  
Canada  
Toronto, Ontario