

Federal Court



Cour fédérale

Date: 20200401

Docket: IMM-5248-19

Citation: 2020 FC 466

Ottawa, Ontario, April 1, 2020

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

**FAVZIYA HAYATULLAH, HAYATULLAH HAMIDULLAH,
PARISA HAYATULLAH, ARSALAN HAYATULLAH,
AND SADAF HAYATULLAH**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision by an Immigration Officer in the Embassy of Canada in Ankara, Turkey [the Officer] refusing the Applicants' permanent residence visa application.

[2] The Applicants argued they were being persecuted in Tajikistan so they sought permanent residence in Canada as members of the *Convention refugee abroad class*

[*Convention*]. The Officer found the Applicants were protected in Tajikistan meaning they had a durable solution outside Canada and they did not meet the requirements under subsection 139(1)(d) of the *Immigration and Refugee Protection Regulations*, SOR 2002/227 [*Regulations*].

I. Preliminary issue

[3] The Respondent says the Applicants' affidavits (dated October 27, 2019 and January 31, 2020) are inadmissible. The Respondent observes that these affidavits failed to be sworn or affirmed before a commissioner or a notary, and they do not include a translator's jurats. They also say that the October 2019 affidavit contains new information at paragraph 13.

[4] The Applicants acknowledge the issues raised concerning the affidavits however they say the "substantive objectives of the requirements are met and the affidavits should still be considered" given the Tajikistan practices. The Applicants submitted that notaries in Tajikistan would not complete the same steps as notaries in Canada. The Applicants pointed out that instead the Tajikistan notaries did sign and stamp a page as well as the interpreter stamped and signed the last page making the breaches technical. Alternatively, they ask that the Court to rely on the parts of the Certified Tribunal Record [CTR] which contain similar information to the affidavits.

[5] In response to the concern that there is new evidence in paragraph 13, the Applicants point to the CTR to show that the information contained in paragraph 13 is not new evidence. I agree with them as that information was before the decision maker. After the procedural fairness letter the Applicants responded in a letter dated December 12, 2018, that was considered by the

decision maker. Some of the alleged new evidence is found in that letter or elsewhere in the CTR.

[6] In this particular circumstance, I will accept the affidavits as they were as compliant as they could possibly be in the circumstances.

II. Facts

A. *Background*

[7] The Applicants are a husband (Hayatullah) and wife (Favziya) and three of their five children. They have been married since 1986. The wife is the principal Applicant and is trained as a civil engineer. The oldest two daughters are not applicants and are married and reside in Japan and Canada with their families. Since the family's arrivals in Tajikistan in 1995 (Hayatullah) and 1996 (Favziya), they have resided at the same address in the capital city Dushanbe.

[8] Of the young adults who are the Applicants, the oldest, Sadaf was born in 1994 while the couple was still living in Afghanistan and was two years old when the Applicants fled Afghanistan to Tajikistan. The other two Applicants included in this application Arsalan (born in 1996) and Parisa (born in 1998) were both born in Tajikistan. The Applicants all have Afghan passports and renewable (5 years) resident permits in Tajikistan.

[9] The Applicants were recognized as “refugees” by the Tajik government when they came to Tajikistan in 1995 and 1996 and as a result they were issued refugee certificates. Later in 1999 they received residence permits (Soviet style cards), and not the red books that refugees hold. The cards grant the right to study, and live in Dushanbe which the others cannot. They have had no issues in the past with renewing and must continue to renew their residence permits every five years.

[10] Hayatullah has been a shopkeeper at a grocery shop in Dushanbe, Tajikistan for the 25 years they have resided in the city. Favziya was a civil engineer but has not been employed outside the home since arriving in Tajikistan. Arsalan and Sadaf each graduated from a dentistry school at Tajik State Medical University. Parisa graduated high school and is attending an English language course. The daughter in Japan also a graduate of an University in Tajikistan.

[11] The Applicants were privately sponsored to come to Canada in 2017. On October 28, 2018, the Applicants were interviewed in connection with their application for permanent residence as members of the *Convention*. Under section 145 of the *Regulations*, permanent residence is available in Canada if an officer finds a foreign national living abroad to meet the definition of a refugee under the *Convention*.

B. *Procedural fairness letter and response*

[12] The Applicants were sent a procedural fairness letter dated November 26, 2018 raising the fact that “During the interview, your family members stated several times that, despite being permanent residents, you are not permitted to find employment. On the contrary, the permanent

resident status that you hold in Tajikistan grants you the full range of socio-economic rights in Tajikistan and is similar to permanent residence status in Canada.” The letter allowed them to make further submissions.

[13] The following month, the Applicants responded that they had limited job opportunities, that refugees in Tajikistan are not allowed to buy property, and that the two children with dentistry schooling struggle to find work because of their status as well as other treatment by officials. This letter was considered by the decision maker.

C. *Decision under review*

[14] In a decision dated July 2, 2019, the Officer informed the Applicants that their permanent resident visa application was denied:

You are able to avail yourself of protection in Tajikistan, where you currently reside, as you are permanent residents of that country. Therefore, you have a durable solution in a country other than Canada and you do not meet the provisions of the above paragraph.

The Officer informed the Applicants that they did not meet the requirements under subsection 139(1)(d) of the *Regulations* which says a permanent resident visa shall be issued to a foreign national in need of refugee protection if there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada:

III. Issues

[15] The issues are:

- A. Was the Officer's finding that the Applicants had a durable solution unreasonable?
- B. Was there a breach of the Applicants' procedural fairness rights?

IV. Standard of review

[16] The parties agree the standard of review is reasonableness for the durable solution issue, and correctness for the procedural fairness issue.

V. Analysis

A. *Was the Officer's finding that the Applicants had a durable solution unreasonable?*

[17] The Applicants submit that the finding that there was a durable solution in Tajikistan was unreasonable. The Applicants criticize several points throughout their further memorandum:

- The Officer failed to engage with evidence about the Applicants' employment, ability to own property, and experiences of harassment and discrimination;
- The Officer inappropriately focused on the Applicants' title as permanent residents in Tajikistan rather than the legal and *de facto* rights it provides, and should not have challenged the way they referred to themselves as refugees;
- The Officer found Sadaf and Arsalan had been working at a dental clinic following the interview when really they were doing unpaid practicum;

- Dental clinics are mostly operated by the government, which the Applicants are unable to work for;
- The Officer did not assess the ability to open a business without interference by the police and government;
- The finding that their living situation was “not as grim as they suggest” because they had lived in the same place for 23 years was “speculative”; and
- The parents are aging which exacerbates the difficulties that Sadaf and Arsalan face finding paid employment as dentists.

[18] The Respondent counters that the onus is on a visa applicant to establish that a reasonable prospect of a durable solution does not exist (*Al-Anbagi v Canada (Citizenship and Immigration)*, 2016 FC 273 at para 16). The Respondent says the Applicants have been living safely and with dignity in Tajikistan and there is no indication they will not be able to do so for the foreseeable future, meaning the evidence supports the Officer’s finding that there is a durable solution in Tajikistan.

[19] I find that the Officer was reasonable in finding the Applicants had a durable solution in Tajikistan. Evidence to support that it was reasonable for the officer to find that the Applicants had a durable solutions was:

- The father and mother have been living in Tajikistan since 1995 and 1996, respectively;
- The renewable permits grant them full range of socio-economic rights that are similar to permanent residence in Canada. The cards filed are marked permanent resident on the documents themselves and are different in form and rights conferred from refugee

documents held by other Afghans in Tajikistan. They only have to renew these cards every five years while the refugee holders have to do it every year (page 201 of CTR);

- The permits have always been renewed with the father's last being renewed in 2015 until 2020;
- The argument that permanent residence in Canada is different than in Tajikistan as permanent residence in Canada does not involve bribery, bullying and harassment was considered by the Officer, but the Officer determined that the Applicants had integrated into Tajik society and the Officer's reasons set this out clearly;
- The Officer further found the difficulties faced by the Applicants in Tajikistan did not rise to the level of discrimination, and any extrinsic evidence to the contrary is vague and general. Despite the harassment alleged the Applicants have accessed employment and education. The Officer found the Applicants had integrated into Tajikistan and can "continue to live there without fear of refoulement. The applicants have been living, working and studying in Tajikistan for more than two decades. The applicants have a durable solution in a country other than Canada and do not meet the provisions of paragraph 139(1)(d) of the regulations";
- The father Hayatullah has been employed since 1996 and in the interview he said they could not legally work in Tajikistan but information from UNHCR revealed this was incorrect. After the procedural fairness letter the Applicants indicate that they only said they cannot work at government-owned establishments and as the UNHCR indicates they can work in privately owned businesses. The Applicants acknowledge that in Canada there are also restrictions on permanent residents working in government;

- All of the Applicants' children have availed themselves of the education system even though the tuition was more for them;
- The oldest two Applicants completed University at a state medical school in dentistry and at the time of the interview one was working in a dental clinic for over a year and the other had been working at a dental clinic for four months. Though they may have had to pay increased tuition since they were not Tajik citizens and cannot work in government they are well-educated and were able to obtain practicums and most importantly they still can work in private clinics;
- They are allowed to live in the capital city Dushanbe unlike most refugees that are not allowed to live in the capital city;
- The Applicants not being able to own real estate or obtain citizenship or Tajik passports is not requirements of local integration, as well the Applicants do hold Afghan passports;
- The fact that the Tajik government does not provide or create jobs for refugees and that they have to support themselves without social services is not so different than Canada as they would be expected to support themselves. According to USAID, Tajikistan is one of the poorest of the Commonwealth of Independent States and so as the Officer found it is "little wonder then that they do not provide financial support to refugees;" and
- The fact that the Applicants had lived in the same house for 23 years was a proper consideration since section 13.2 of the OP 5: Overseas Selection and Processing of Convention Refugees Abroad Class Manual includes "owns property or has rental housing" as a valid consideration.

[20] I do not agree with the Applicants that it was unreasonable for the Officer to find that the Applicants could work but just not in government which was contrary to what the Applicants said in their interview but acknowledged after the procedural fairness letter (see above paragraphs 12 & 13).

[21] The Officer did not error in his conclusions regarding the two Applicants that are dentists. Without further detailed evidence the Officer would not know what is now alleged that the dentists cannot find work as most clinic are public and that they are working for no money. The evidence before the Officer was that the two Applicants were able to graduate from a State University as dentists having paid a higher tuition, complete their practicums at clinics and though they cannot work for government they could work at private clinics. This evidence makes the Officer's determination reasonable.

[22] All of the evidence listed above shows it was a reasonable conclusion for the Officer to find there was a durable solution for the Applicants meaning they did not meet the requirements for a permanent resident visa under the *Convention*.

B. *Was there a breach of the Applicants' procedural fairness rights?*

[23] The Applicants submit that the Officer breached their procedural fairness rights. The Applicants say the Officer should not have relied upon a UNHCR document that the Officer said he relied on between the interview and the decision without bringing it to the Applicants' attention and letting them address it.

[24] It was confirmed at the hearing that it was not necessarily a document but was “information” about Tajikistan rather than specific documents. The Respondent acknowledged at the hearing that the reference to UNHCR information was vague and could have even included verbal information, but in the context of the decision it seems most likely the Officer was merely referencing open source information from UNHCR.

[25] This issue arose because the Applicants in the interview said “no, we do not have official permission to work because we are not the citizen of Tajikistan... we graduated from the univ of Tajikistan, they are not granting us work permission” (CTR pages 8-9).

[26] As a result of the contradiction from the evidence given in the interview and what the Officer found that it was not true that the Applicants could not work a procedural fairness letter was sent to the Applicants. The procedural fairness letter squarely set out the contradiction and the concern so the Applicants could address it. (see above paragraph 12) The procedural fairness letter gave the Applicants the opportunity to provide additional submissions and they did.

[27] The Officer’s notes say “During the interview, the applicants stated that they could not legally work in Tajikistan. However, subsequently, UNHCR information proved that this was incorrect.” Subsequent notes by the Officer conclude the Applicants “can, as indicated by the UNHCR, work in privately-owned businesses.”

[28] The Applicants say it is procedurally unfair for the Officer to rely on the UNHCR information that was “extrinsic evidence.” The Applicants’ view is that the Officer did not

comply with the procedural fairness duty to disclose. They say employment was “a key consideration in the Officer’s durable solution assessment, and therefore the Officer’s failure to disclose the UNHCR Document is a material breach of procedural fairness.”

[29] This UNHCR information was not extrinsic evidence as UNHCR information is open source and open source information does not need to be put to an applicant for an officer to rely upon it (*Azizian v Canada (Citizenship and Immigration)*, 2017 FC 379 at paras 26-30). The Officer relied on this information because in fact the Applicants could legally work in Tajikistan in privately-owned businesses though not in government and this helped support the Officer’s view that there was a durable solution as this is no different than in Canada.

[30] Additionally, the Applicants’ own permanent residence documents confirm that they can work in Tajikistan just not in government. Their documents list restrictions including that their status “Does not allow to own or buy any properties or work for government offices or health establishments in Republic of Tajikistan” (see translated document at page 28 of second volume of CTR). The Officer therefore could have had valid concerns about the Applicants’ statements about strict restrictions on work in *private* businesses even without relying on any UNHCR information to demonstrate the apparent exaggeration in the Applicants’ statements about ability to work.

[31] In any event, relying on the UNHCR information was not unfair to the Applicants. In the procedural fairness letter, the Officer clearly set out his concerns being that the Applicants said

they could not be legally employed. In their own response letter they say they could be employed just not by the government so this fact is clearly not extrinsic evidence.

[32] The Officer's concerns that the Applicants had rights akin to a permanent resident were put to the Applicants in the procedural fairness letter and the Applicants were given an opportunity to respond. I do not find a breach of procedural fairness.

VI. Conclusion

[33] I will therefore dismiss this application for judicial review.

[34] No question for certification was presented and none arose. No question will be certified.

JUDGMENT in IMM-5248-19

THIS COURT'S JUDGMENT is that:

1. This application is dismissed;
2. No question is certified.

Glennys L. McVeigh

Judge

Annex A – Relevant legislation

Immigration and Refugee Protection Act,
SC 2001, c. 27

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.

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.

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch. 27

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.

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.

*Immigration and Refugee Protection
Regulations, SOR/2002-227*

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

- (a) the foreign national is outside Canada;
- (b) the foreign national has submitted an application for a permanent resident visa under this Division in accordance with paragraphs 10(1)(a) to (c) and (2)(c.1) to (d) and sections 140.1 to 140.3;
- (c) the foreign national is seeking to come to Canada to establish permanent residence;
- (d) the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely
 - (i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or
 - (ii) resettlement or an offer of resettlement in another country...

Convention refugees abroad class

144 The Convention refugees abroad class is prescribed as a class of persons who may be issued a permanent resident visa on the basis of the requirements of this Division.

*Règlement sur l'immigration et la protection des
réfugiés, DORS/2002-227*

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 :

- a) l'étranger se trouve hors du Canada;
- b) il a fait une demande de visa de résident permanent au titre de la présente section conformément aux alinéas 10(1)a) à c) et (2)c.1) à d) et aux articles 140.1 à 140.3;
- c) il cherche à entrer au Canada pour s'y établir en permanence;
- d) aucune possibilité raisonnable de solution durable n'est, à son égard, réalisable dans un délai raisonnable dans un pays autre que le Canada, à savoir :
 - (i) soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle,
 - (ii) soit la réinstallation ou une offre de réinstallation dans un autre pays...

Catégorie

144 La catégorie des réfugiés au sens de la Convention outre-frontières est une catégorie réglementaire de personnes qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

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.

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.

FEDERAL COURT
SOLICITORS OF RECORD

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