Federal Court Cour fédérale

Date: 20250516

Docket: IMM-8367-24

Citation: 2025 FC 901

Toronto, Ontario, May 16, 2025

PRESENT: The Honourable Mr. Justice A. Grant

BETWEEN:

SAYED MUSTAFA HASHIMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The Applicant wishes to obtain permanent residence in Canada on humanitarian and compassionate [H&C] grounds. An Officer with Immigration, Refugees and Citizenship Canada [IRCC] rejected Mr. Hashimi's application. Mr. Hashimi now seeks judicial review of this application.

[2] For the following reasons, this application will be granted.

I. BACKGROUND

A. *Facts*

[3] The Applicant – Mr. Sayed Mustafa Hashimi – is a citizen of Afghanistan. He is a member of Afghanistan's Hazara ethnic minority and is a Shia Muslim. Prior to coming to Canada, Mr. Hashimi attended university in Kazakhstan, where in 2021 he graduated as one of its top civil engineering students.

[4] After graduation, he returned to Afghanistan. However, this was just before the Taliban's return to power in that country. On top of the generalized conditions of oppression in Afghanistan, the Hazara have since suffered greatly. While the Hazara have faced decades of persecution in Afghanistan, the situation has quickly deteriorated following the return to power of the Taliban, to the point that the group is now at "at serious risk of genocide."

[5] Following the Taliban takeover, the Applicant searched for ways to leave Afghanistan. He eventually obtained a visa to Iran, then travelled to Italy in the hopes of continuing his studies at the University of Genoa. However, he could not afford to continue his studies, and he later travelled to Canada via several countries, including the United States.

[6] On arrival at the Canadian border in December 2022, Mr. Hashimi was found to be ineligible to initiate a claim for refugee protection due to the Canada-U.S. Safe Third Country

Agreement. He was issued an exclusion order and was sent back to the United States. In September 2023, Mr. Hashimi again entered Canada, and in October of that year he attempted to initiate an inland claim for refugee protection. This claim was also ineligible to be referred to the Immigration and Refugee Board. However, Mr. Hashimi has remained in Canada, and his claim may eventually be examined through a Pre-Removal Risk Assessment [PRRA].

[7] When this will happen, however, is completely uncertain. It is uncertain because Canada has implemented a Temporary Suspension of Removals [TSR] to Afghanistan, due to the general conditions in the country, which pose a risk to the entire civilian population. As a result, Mr. Hashimi will not be removed to Afghanistan until, and if, the TSR is lifted. Mr. Hashimi has also been issued a work permit, and so the good news is that, for the time being, he is protected against removal, and he can work in Canada.

[8] However, because Mr. Hashimi's removal is not imminent, he is not considered "removal ready" and, as such, he will not, in the foreseeable future, be issued a PRRA for determination. This is the bad news for Mr. Hashimi – his present status means that he has no clear path to permanent residence in Canada. And while the future is always impossible to predict, there is no indication that the TSR will be lifted in the foreseeable future, and even less indication that the situation of the Hazara in Afghanistan will materially improve any time soon.

[9] As a result of the above, Mr. Hashimi submitted an application for permanent residence from within Canada on H&C grounds, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act* [IRPA]. In support of this application, Mr. Hashimi provided evidence

and submissions on conditions in Afghanistan, focusing particularly on the plight of the Hazara. Mr. Hashimi also pointed to his establishment in Canada, noting that he is financially self-sufficient, but that he is hampered from obtaining work as a civil engineer because he does not have permanent resident status.

B. *Decision under Review*

[10] An IRCC Officer rejected Mr. Hashimi's application. In arriving at this conclusion, the Officer noted that the H&C process is statutorily limited to considering only those hardship factors that are not assessed in the refugee determination context under sections 96 and 97 of the IRPA. The Officer further noted that the Applicant provided little evidence on what hardships he would face if he were to return to Afghanistan. That said, the Officer acknowledged that there are some "instabilities" in Afghanistan and, as such, gave some positive weight to the Applicant's Hazara identity and the general country conditions in Afghanistan.

[11] On the question of the TSR and the legal limbo in which the Applicant finds himself, the Officer acknowledged that it is "not the most ideal" to be unable to apply for permanent residence but concluded that there was little evidence to suggest that living in Canada with the ability to work was inadequate for his current needs.

[12] In conclusion, the Officer emphasized that the TSR was not viewed as a negative factor, but as a mitigating factor in the assessment of Mr. Hashimi's application. The Officer acknowledged that Mr. Hashimi cannot (with the exception of the H&C context) apply for

permanent residence unless he leaves Canada, but concluded that there was little evidence to establish that he must receive immediate permanent residence.

II. ISSUES and STANDARD OF REVIEW

[13] The determinative issue on this application for judicial review is whether the IRCC Officer's decision was reasonable.

[14] The standard of review associated with this issue is reasonableness: *Canada (Minister of Citizenship and Immigration)* v Vavilov, 2019 SCC 65 at para 23.

III. ANALYSIS

[15] I have concluded that the decision under review is unreasonable in that it failed to adequately consider evidence on issues related to both: i) the hardship that Mr. Hashimi may experience; and ii) the establishment impediments he has experienced because of his temporary status in Canada.

A. *Hardship*

[16] The Officer correctly noted that subsection 25(1.3) of the IRPA constrained their analysis of the hardship that Mr. Hashimi may experience if returned to Afghanistan. This provision states:

> In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee

> under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

[17] I have considerable sympathy for immigration officers tasked with applying the above provision. The problem, functionally, is that in a single clause, the provision can appear to forbid officers from doing that which they must do. This is because there will frequently be considerable overlap between the section 96 and 97 factors (which may not be considered), and hardship factors (which must be considered).

[18] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 91 [*Kanthasamy*], the Supreme Court of Canada clarified and confirmed that the restriction in section 25(1.3) does not preclude officers from considering evidence that may also be relevant to refugee determination risk factors. It stated, at paragraph 51:

> s.25(1.3) does not prevent the admission into evidence of facts adduced in proceedings under ss.96 and 97. The role of the officer making a determination under s. 25(1) is to ask whether this evidence, along with any other evidence an applicant wishes to raise, though insufficient to support a s. 96 or s. 97 claim, nonetheless suggests that "humanitarian and compassionate considerations" warrant an exemption from the normal application of the Immigration and Refugee Protection Act.

[19] As Justice Sadrehashemi noted in *Momand v Canada (Citizenship and Immigration)*, 2024 FC 737 (at para 10), the "facts and circumstances related to a risk claim could be considered but through the lens of a hardship assessment," citing both *Kanthasamy* and the Federal Court of Appeal decision in the same matter: *Kanthasamy v Canada (Citizenship and*

Immigration), 2014 FCA 113 [*Kanthasamy* FCA]. In *Kanthasamy* FCA, the Court specifically considered s.25(1.3) of the IRPA and underscored that it was not meant to alter the H&C assessment, but to ensure that evidence considered in that assessment was viewed through the prism of a hardship analysis, rather than a repetition of the refugee determination analysis. The Court clarified the appropriate approach (at paras 73-74):

> In my view, that is a useful way of describing what must happen under section 25 now that subsection 25(1.3) has been enacted—the evidence adduced in previous proceedings under sections 96 and 97 along with whatever other evidence that applicant might wish to adduce is admissible in subsection 25(1) proceedings. Officers, however, must assess that evidence through the lens of the subsection 25(1) test—is the applicant personally and directly suffering unusual and undeserved, or disproportionate hardship?
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> The role of the officer, then, is to consider the facts presented through a lens of hardship, not to undertake another section 96 or 97 risk assessment or substitute his decision for the Refugee Protection Division's findings under sections 96 and 97. His task is not to perform the same assessment of risk as is conducted under sections 96 and 97. The officer is to look at facts relating to hardship, not factors relating to risk.

[20] Therefore, as the Supreme Court held in *Kanthasamy* (at para 92):

> This subsection reminds decision makers that the H&C provision is not meant to be a second refugee proceeding with a lower threshold for admission. However, it does not prevent decision makers from looking at the facts and circumstances raised in the ss. 96 and 97 proceedings.

[21] With this somewhat nuanced understanding of s.25(1.3) in mind, I find the Officer adequately captured the applicable analysis by indicating that "I can only look into consideration for the hardships that would not be considered under section 96 or 97(1)." That said, I find that,

in evaluating the hardship factors raised by Mr. Hashimi, the Officer failed to accurately assess the situation in Afghanistan, particularly for Hazaras.

[22] First, it is frankly a distortion of the facts to describe the situation in Afghanistan, particularly for Hazaras, as merely consisting of "instabilities" that have affected various areas of life. When the documentary evidence states: "as a religious and ethnic minority, the Hazara are at serious risk of genocide," one does not need to delve into a section 96 or 97 analysis to conclude that the Applicant faces the potential for hardship at the very highest end of the spectrum. While it is true that the Applicant did not provide extensive submissions on his own particular hardship, he did express his feeling that once the Taliban took over, all of his accomplishments and pride in his ethnic and religious community became something to use against him. This claim is entirely consistent with the documentary evidence, but was not considered by the Officer.

[23] Second, I do not understand the Officer's rationale when they indicated that the TSR was not viewed as a negative factor, but as a "mitigating factor." It is unclear to me what the TSR issue is meant to mitigate. If the suggestion was that it mitigated the need to assess the hardship that the Applicant would experience in Afghanistan, I find this was a reviewable error for reasons similar to those articulated by Justice Norris in *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623 at para 17. If, on the other hand, the TSR factor was meant to mitigate something else, I cannot discern from the record what that would be. To this extent, the Officer's decision lacks both intelligibility and transparency, and is unreasonable.

B. *Establishment*

[24] I also find that the Officer erred in considering the Applicant's establishment in Canada. More precisely, I find the Officer erred in failing to consider the long-term impediments to establishment created by the legal limbo in which Mr. Hashimi finds himself.

[25] Despite arriving relatively recently, Mr. Hashimi has made impressive strides in establishing himself in Canada, and the Officer appropriately afforded positive weight to this fact. However, in his submissions, Mr. Hashimi also spoke of the limitations that he has experienced because he is not a permanent resident. He specifically stated:

> • However, I believe I can contribute more to Canadian society if I am able to work in my chosen field as a civil engineer. My lack of permanent resident status is preventing me from obtaining this goal. I also plan to obtain a Masters of Engineering degree.
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> • I aspire to work as a civil engineer for which I have a degree. I even started a Master's Degree program in Genoa, Italy (engineering for building retrofitting) but I was unable to afford to continue. However, I still plan to complete this degree in the future while in Canada. To that end I have had my credentials as an engineer evaluated and authenticated by World Education Services. This will allow me to both work as an engineer and pursue further education at a Master's level. I have already interviewed for engineering jobs in Windsor but my lack of status has lead to potential employers not wanting to offer me a position because of the uncertainty of my status.
>
> [Emphasis added]

[26] This aspect of the Applicant's submission was completely disregarded by the Officer. There is no mention in the Officer's reasons of the impediments that Mr. Hashimi faces in finding work in his field, or to the fact that he was specifically denied work because of the

uncertainly of his status. This was an important aspect of the Applicant's submission, and the Officer's disregard of it is a reviewable error.

[27] Though not mentioned by the parties, I would also note that the TSR for Afghanistan is temporary in name only. It has been in place for over 30 years, since 1994. In assessing the Applicant's establishment, it was important for the Officer to acknowledge that, absent H&C relief, the legal limbo preventing his further establishment is a protracted, and potentially life-long, reality.

IV. CONCLUSION

[28] For the above reasons, I will grant this application for judicial review. The parties did not propose a question for certification, and I agree that none arises.

JUDGMENT in IMM-8367-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is remitted to a different decision-maker for reconsideration in accordance with these reasons.

3. No question is certified for appeal.

"Angus G. Grant"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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