Federal Court  Cour fédérale

Date: 20101004

Docket: IMM-3254-09

Citation: 2010 FC 987

Ottawa, Ontario, October 4, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MALIHA ADIL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a Visa Officer (Officer), dated 27 March 2009 (Decision), which refused the Applicant's application for a permanent resident visa as a member of the Convention Refugee Abroad class or as a member of the Humanitarian-Protected Persons Abroad class.

BACKGROUND

[1] The Applicant, Maliha Adil, is a citizen of Afghanistan. In January 2008 the Applicant, accompanied by her husband and five children, left Afghanistan and crossed the border into Tajikistan, where they currently reside. According to the Applicant, they fled Afghanistan to protect their daughter from a local warlord, Razul, who, beginning in October 2007, had threatened repeatedly to kidnap and marry by force their eldest daughter. The daughter was 13 years of age; Razul was 43 years of age and married with children. The Applicant explained to the Officer that she and her husband had consulted the local police, who said that Razul had money and power and that they couldn't help them.

[2] The Applicant applied for a permanent residence visa as a member of either the Convention Refugee Abroad Class or the Humanitarian-Protected Persons Class. The Officer interviewed the Applicant and her husband in Tajikistan on 23 March 2009. Prior to the interview, the Applicant submitted for review photocopies of documents, including diplomas, as proof of their education and employment histories. They brought to the interview the original documents as well as a video recording that was identified by the Applicant's nephew and sponsor in his affidavit dated 5 July 2010 as a recording of the ceremony in which the Applicant's husband received his diploma in pharmacy from the Balkh Intermediate Medical Institute.

[3] The application was rejected at the interview. The Officer stated the following reasons: the responses of the Applicant and those of her husband were vague and lacked credibility; an expert had identified as fake the diplomas evidencing the educational qualifications of the Applicant and her husband; and the Applicant was a member of neither the Convention Refugee Abroad Class nor the Humanitarian-Protected Persons Class.

[4] On 25 June 2009, the Applicant filed an application for judicial review of the Officer's negative Decision. Leave was granted on June 7, 2010.

DECISION UNDER REVIEW

[5] In the Computer Assisted Immigration Processing System, or CAIPS notes, the Officer identified his two primary concerns regarding the application. First, the diplomas offered as proof of the Applicant's education and that of her husband were determined by a specialist to be fake. Second, during the interview many of the Applicant's responses as well as those of her husband were "very vague," particularly with respect to their education and employment. Based on these concerns, the Officer concluded that the Applicant and her husband were not truthful in answering all questions and, therefore, the Applicant did not meet the definition of a refugee.

[6] In his letter to the Applicant dated 27 March 2009, the Officer elaborated on these reasons. According to his assessment of what the Applicant stated in the interview, she was not facing any persecution in Afghanistan. For this reason, she did not meet the requirements of section 96 of the

Act and Regulations 139(1)(*e*), 145 and 147 (*sic*) of the Immigration and Refugee Protection Regulations.

ISSUES

[7] The Applicant has formally stated the following issues:

1. Did the Officer err in law and in fact when he made erroneous findings of fact or misinterpreted the law?
2. Did the Officer fail to observe a principle of natural justice, procedural fairness or other procedure he was required to observe, or did he act in a perverse and capricious manner by basing his Decision on irrelevant or extraneous considerations and, having done so, by refusing the application for not meeting the criteria of the Act?
3. Did the Officer fail to observe a principle of natural justice, procedural fairness or other procedure that he was required by law to observe when he failed to consider the relevant evidence, the facts particular to the Applicant's case and the publicly available documents in reaching his Decision?

[8] In her argument, the Applicant also raises the following specific issues:

1. Whether the Officer erred in finding that the Applicant was not a person in need of protection under the Act;
2. Whether the Officer failed to provide the Applicant with an opportunity to prove the authenticity of her educational/employment documents;

3. Whether the Officer erred in finding that the Applicant's educational/employment documentation was not credible;

4. Whether the interpretation provided during the interview was inaccurate.

STATUTORY PROVISIONS

[9] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
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,	**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*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*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*) 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.	*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.
Person in need of protection	**Personne à protéger**

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé

	adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[10] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 are also applicable in these proceedings:

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	**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*) the foreign national is outside Canada;	*a*) l'étranger se trouve hors du Canada;
(*b*) the foreign national has submitted an application in accordance with section 150;	*b*) il a présenté une demande conformément à l'article 150;
(*c*) the foreign national is seeking to come to Canada to establish permanent residence;	*c*) il cherche à entrer au Canada pour s'y établir en permanence;
(*d*) the foreign national is a person in respect of whom	*d*) aucune possibilité raisonnable de solution durable

there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely

n’est, à son égard, réalisable dans un délai raisonnable dans un pays autre que le Canada, à savoir :

(i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or

(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) resettlement or an offer of resettlement in another country;

(ii) soit la réinstallation ou une offre de réinstallation dans un autre pays;

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

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

…

…

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.

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.

…

…

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

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

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

(*b*) they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.

b) une guerre civile, un conflit armé ou une violation massive des droits de la personne dans chacun des pays en cause ont eu et continuent d'avoir des conséquences graves et personnelles pour lui.

148. (1) A foreign national is a member of the source country class if they have been determined by an officer to be in need of resettlement because

148. (1) Appartient à la catégorie de personnes de pays source l'étranger considéré par un agent comme ayant besoin de se réinstaller en raison des circonstances suivantes :

(*a*) they are residing in their country of nationality or habitual residence and that country is a source country within the meaning of subsection (2) at the time their permanent resident visa application is made as well as at the time a visa is issued; and

a) d'une part, il réside dans le pays dont il a la nationalité ou dans lequel il a sa résidence habituelle, lequel est un pays source au sens du paragraphe (2) au moment de la présentation de la demande de visa de résident permanent ainsi qu'au moment de la délivrance du visa;

(*b*) they

b) d'autre part, selon le cas :

(i) are being seriously and personally affected by civil war or armed conflict in that country,

(i) une guerre civile ou un conflit armé dans ce pays ont des conséquences graves et personnelles pour lui,

(ii) have been or are being detained or imprisoned with or without charges, or subjected to some other form of penal control, as a direct result of an act committed outside Canada that would, in Canada, be a legitimate expression of freedom of thought or a legitimate exercise of civil

(ii) il est détenu ou emprisonné dans ce pays, ou l'a été, que ce soit ou non au titre d'un acte d'accusation, ou il y fait ou y a fait périodiquement l'objet de quelque autre forme de répression pénale, en raison d'actes commis hors du Canada qui seraient considérés, au Canada, comme une

rights pertaining to dissent or trade union activity, or	expression légitime de la liberté de pensée ou comme l'exercice légitime de libertés publiques relatives à des activités syndicales ou à la dissidence,
(iii) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, are unable or, by reason of such fear, unwilling to avail themself of the protection of any of their countries of nationality or habitual residence.	(iii) craignant avec raison d'être persécuté du fait de sa race, de sa religion, de sa nationalité, de ses opinions politiques ou de son appartenance à un groupe social particulier, il ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection du pays dont il a la nationalité ou de celui où il a sa résidence habituelle.
(2) A source country is a country	(2) Est un pays source celui qui répond aux critères suivants :
(*a*) where persons are in refugee-like situations as a result of civil war or armed conflict or because their fundamental human rights are not respected;	*a*) une guerre civile, un conflit armé ou le non-respect des droits fondamentaux de la personne font en sorte que les personnes qui s'y trouvent sont dans une situation assimilable à celle de réfugiés au sens de la Convention;
(*b*) where an officer works or makes routine working visits and is able to process visa applications without endangering their own safety, the safety of applicants or the safety of Canadian embassy staff;	*b*) un agent y travaille ou s'y rend régulièrement dans le cadre de son travail et est en mesure de traiter les demandes de visa sans compromettre sa sécurité, celle des demandeurs ni celle du personnel de l'ambassade du Canada;
(*c*) where circumstances warrant humanitarian intervention by the	*c*) les circonstances justifient une intervention d'ordre humanitaire de la part du

Department in order to implement the overall humanitarian strategies of the Government of Canada, that intervention being in keeping with the work of the United Nations High Commissioner for Refugees; and	ministère pour mettre en oeuvre les stratégies humanitaires globales du gouvernement canadien, intervention qui est en accord avec le travail accompli par le Haut-Commissariat des Nations Unies pour les réfugiés;
(*d*) that is set out in Schedule 2.	*d*) il figure à l'annexe 2.

STANDARD OF REVIEW

[11] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[12] The issue of whether the Officer erred in assessing the Applicant as a Convention refugee or a person in need of protection as per sections 96 and 97 of the Act is concerned with whether the Officer applied the legal test to the facts at hand in an appropriate way. This is an issue of mixed fact and law and is to be reviewed on a standard of reasonableness. See *Dunsmuir*, above, at paragraph 164.

[13] The issue of whether the Officer erred in his assessment of the evidence before him is a factual issue. Accordingly, it will be reviewed on a standard of reasonableness. See *Dunsmuir*, above, at paragraph 64.

[14] Whether the Officer based his decision on irrelevant considerations is reviewable on a standard of reasonableness. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 53 (QL); *Dunsmuir*, above, at paragraph 14.

[15] 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 paragraph 47. 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."

[16] A standard of correctness is the appropriate standard for the review of issues involving procedural fairness and natural justice. See *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at paragraph 46, and *Dunsmuir*, above, at paragraphs 126 and 129. As such, correctness is the appropriate standard when considering whether the Officer breached procedural fairness by: a) not providing proper language interpretation; and b) depriving the Applicant of the opportunity to respond.

ARGUMENTS

The Applicant

Officer Did Not Raise Credibility Concerns Regarding Fear of Persecution

[17] The Applicant submits that the Officer erred in fact and in law because he based his finding that the Applicant was neither a member of the Convention Refugee Abroad class nor a member of the Humanitarian-Protected Persons Abroad class on the authenticity of the educational diplomas and on credibility concerns about the education and employment experience of the Applicant and her husband and not, as he should have, on the Applicant's claim that she feared persecution in Afghanistan.

[18] The Officer's decision letter stated: "from what you have told (*sic***)** during the interview you were not facing any persecution in Afghanistan." Given that the Applicant claimed that she feared persecution, procedural fairness and principles of fundamental justice demanded that she be told the extent to which the Officer believed her evidence. However, there is no indication in the CAIPS notes that the Officer raised his credibility concerns with her. See *Sadeora v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 430.

Consideration #1: Authenticity of Documents

Authenticity is Irrelevant

[19] The first factor upon which the Officer based his negative finding was his belief that the documents offered by the Applicant and her husband as proof of their education were fake. In *Ngongo v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1627 (F.C.) (QL), Justice Tremblay-Lamer held that the authenticity of the document was irrelevant to the issue of whether or not the Applicant would be in danger if he were to return to his country. See also *Muhazi v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1392. In such circumstances, the Officer is nevertheless obliged to determine whether or not the Applicant feared such persecution. Doubt concerning the credibility of the applicant's documents does not release the Officer from that duty. See *Attakora v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. 444 (F.C.A.) (QL).

No Opportunity to Address Concerns about Documents

[20] Procedural fairness and principles of fundamental justice required the Officer put to the Applicant his credibility concerns regarding the authenticity of the documents and to provide her with an opportunity to respond. See *Sharma v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 71 (F.C.A.). Most of the documents were issued by independent sources that would have supported the Applicant's claims. Instead, the Officer raised his concerns at the end of the interview and refused to look at the original documents. In so doing, he ignored relevant evidence.

Officer Should Have Considered Original Copies

[21] The documents assessed by the expert as fake were, in fact, photocopies of the originals. The Applicant had the originals with her at the interview and offered them for inspection so that the Officer might lay to rest his concerns about their authenticity. The Officer refused to look at them, despite having assured both the Applicant and her husband that they would have an opportunity to respond to his credibility concerns. Moreover, he did not explain why reviewing the original documents could not alleviate his concerns.

[22] In refusing to review the original documents, the Officer disregarded evidence relevant to his determination of the Applicant's credibility. See (*Saddo v. Canada (Immigration Appeal Board)* (1981), 126 D.L.R. (3d) 764 (F.C.A.). In *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 106, the Federal Court of Appeal stated at paragraph 12 that "the failure to take account of material evidence has been variously characterized by this court in allowing s. 28 applications."

[23] The Officer's erroneous finding that the documents were fake was sufficiently prejudicial to colour his assessment of all other factors relating to the Applicant's fear of persecution. See *Sicaja-Gonzalez v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1020 (F.C.) (QL).

Consideration #2: Credibility of Education/Employment Experience

[24] The second factor upon which the Officer based his negative finding was his belief that the answers given by the Applicant and her husband concerning their education and job histories were vague.

No Evidence that Applicant Lied About Education/Employment Experience

[25] The Officer indicated in the CAIPS notes and the Decision that the Applicant and her husband lied about their education and work experience. This finding was based on inference, not evidence, and as Justice Barnes noted in *Sadeora*, above, at paragraph 14, such a finding can attract "danger" and be more amenable to review than a credibility ruling based on testimonial inconsistencies. The husband's response to the question of how he could afford to study for two years without working, as recorded in the CAIPS notes, indicates that he misunderstood the question. The husband speaks Dari and a little English. The interpreters were not from Afghanistan, and the question was not rephrased.

[26] In his affidavit, the Officer again says that the Applicant lacked credibility, but he has no evidentiary basis for so doing. For example, the Officer assumes that the Applicant and her husband, having grown up in peasant families, could not have afforded higher education. This was in spite of their assertions that they had completed their educational programs and their explanations as to how they were able to afford them. Similarly, the Officer had no evidence that the explanation

offered by the Applicant and her husband as to why the husband had been exempted from military service (that is, because he had elected to become a teacher for a six-year term) was inaccurate. Nevertheless, he concluded that it was.

[27] On this point, the Applicant seeks to introduce into evidence a letter from the Consulate General of Afghanistan in Toronto. This letter attests that, before the 1978 revolution, Afghanistan did have a policy exempting from military service males who had a grade 12 education and were willing to serve as teachers for six years. It remains unclear, however, whether that policy was still in place at the time the Applicant's husband claimed to have availed himself of it.

[28] The jurisprudence states that an Applicant has the right to be assessed according to the particular facts of her case. See *Baker v. Canada (Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817 at paragraph 821. Moreover, the Applicant's testimony is to be believed in the absence of evidence to the contrary. See *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (F.C.A.) at paragraph 5.

Officer Disregarded Evidence Supporting Claims

[29] The Officer should have but did not take judicial notice of the fact that education in Afghanistan is free. The Applicant's Record includes an entry from the website of the Library of Congress entitled "Library of Congress Country Studies: Afghanistan: Education." It states: "In 1935, education was declared universal, compulsory and free."

[30] Moreover, the Officer disregarded the Applicant's explanation that she worked to support the family so that her husband could attend to his studies.

Inaccuracies in Translation

[31] The Applicant also submits that some of the vague answers offered by the Applicant's husband should be considered evidence not of the husband's intention to deceive but rather of the interpreter's poor translation. For example, in the CAIPS notes, the husband states: "After graduating this two years, my wife also studied at the institute as a nursery." This sentence makes no sense, particularly in light of the fact that the husband had already told the Officer that his wife was a nurse when he took his entrance exam.

ARGUMENTS

The Respondent

No Arguable Issue

[32] The Respondent submits that the Applicant has failed to demonstrate an arguable issue of law upon which the application for judicial review might succeed. The Officer properly assessed the Applicant's application. The Applicant and her husband were clearly given an opportunity to respond to his concerns about the authenticity of their diplomas; the Applicant was simply unable to alleviate the Officer's concerns. It was open to the Officer to assess the explanations offered and determine whether they were reasonable in the circumstances. The Officer did so in this case.

Applicant's Reply and Further Memorandum

The Officer's Affidavit Should Be Given Little or No Weight

[33] The Officer's affidavit raises issues and provides explanations that were not reflected in the Decision or the CAIPS notes. See *Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185. For example, in his affidavit the Officer explains that he refused the application because the Applicant was not persecuted as a member of an at-risk group or minority, nor had she suffered massive human rights violations as a direct result of the civil war in Afghanistan. Rather, "her claim rested solely on the demand that this commander made against her daughter." Nowhere in the Decision or the CAIPS notes did the Officer offer this explanation as a basis for refusing the application. Similarly, in his affidavit the Officer states that he found the Applicant's allegations regarding Razul not credible, and yet this finding was not recorded in the CAIPS notes nor in the Decision.

[34] This position is supported by the jurisprudence. In *Kalra v. Canada (Minister of Citizenship and Immigration)*, 2003 CarswellNat 2333, Justice Martineau stated at paragraph 15:

> In my view, the CAIPS notes can constitute the reasons for the visa officer's decision but not the affidavit. The affidavit should only be considered as a means to enter into evidence the CAIPS notes and to elaborate on the information found in the CAIPS notes but not as a late explanation for the decision. The affidavit is usually filed for the purpose of the judicial review and is filed many months or a year after the decision. It is usually based on the CAIPS notes which should reflect the reasoning followed by the visa officer to reject or allow the application. As pointed out in *Idedevbo v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 175, [2003] F.C.J. No. 255, if the visa officer's affidavit is inconsistent with the CAIPS notes, the latter should be considered more accurate

> considering that they were entered following the review of the file and were closer in time to the actions than the former. In the case at bar, if I compare the visa officer's CAIPS notes and affidavit, it is obvious that the latter incorporates a lot more information than the former which raises the question: upon what documents, information or notes did the visa officer base her affidavit, which was executed a little less than a year after the decision?

In *Idedevbo*, above, this Court gave no weight to the affidavit since it was inconsistent with the CAIPS notes. Further, this Court in *Bonilla v. Canada (Minister of Citizenship and Immigration)* (2001) 12 Imm. L.R. (3d) 83 (F.C.) found that the letter to the applicant together with the visa officer's notes comprised the reasons. In the instant case, the Officer did not identify the documents upon which he relied in the affidavit. Procedural fairness and natural justice demand that the Decision and the CAIPS notes alone should constitute the Officer's reasons and that the affidavit be given little or no weight. See *Kalra*, above; *Fakharian v. Canada (Minister of Citizenship and Immigration)*, 2009 CarswellNat 1288.

[35] The affidavit is, at times, inconsistent with the CAIPS notes. For example, in the affidavit the Officer states that the Applicant did not refer to any direct meeting between the Applicant and her husband and the warlord, Razul. This is contradicted in the CAIPS notes, where the Applicant states that Razul came to see them.

[36] Finally, the considerable lapse of time between the interview and the affidavit is an important consideration. The affidavit was sworn 16 months after the Officer's interview with the Applicant and her husband. Without doubt, the Officer interviewed many other applicants within

that period of time. In *Alam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 182, Justice Mactavish held at paragraph 19:

> It is apparent from the affidavit that, at the time that the affidavit was signed, the officer continued to have a specific recollection of the interview with Mr. Alam. Nevertheless, the affidavit was sworn several months after the interview, presumably at a point where the officer was aware that her decision was being challenged. In the circumstances, I prefer to focus my attention on the reasons expressed in the CAIPS notes, and to give little weight to the after-the-fact explanation provided by the officer.

See also *Najat v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1237, where Justice Mactavish adopts the above passage from *Alam*. The Decision and the CAIPS notes are closer in time to the interview and therefore are more likely to be accurate.

Family Is Valid a Social Group

[37] The Applicant and her family are not mere spectators with respect to the persecution that is directed at their daughter. Razul threatened violence against the Applicant and her husband too if they refused his proposal of marriage to her. See *Tomov v. Canada*, [2004] R.P.D.D. No. 863.

Respondent's Further Memorandum

The Applicant Is Not a Convention Refugee

[38] In order for the Applicant to be a Convention refugee as a member of a familial social group, the risk must be directed toward the Applicant as a member of that family. It is not enough that the Applicant's relative is being persecuted. See *Musakanda v. Canada (Minister of Citizenship*

and Immigration), 2007 FC 1300; *Devrishashvili v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1528 (F.C.) (QL).

[39] Further, the family constitutes a social group where there is evidence that the family is itself subject to reprisals and vengeance, and where the Applicant is targeted simply because he or she is a member of that family. That is not the case here. See *Al-Busaidy v. Canada (Minister of Employment and Immigration)* (1992), 139 N.R. 208 (F.C.A.); *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (F.C.); *Addullahi v. Canada (Minister of Citizenship and Immigration)* (1996), 122 F.T.R. 150 (F.C.); *Lakatos v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 657 (F.C.) (QL); *Canada (Minister of Citizenship and Immigration) v. Bakhshi*, [1994] F.C.J. No. 977 (F.C.A.) (QL); *Granada v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2164 (F.C.).

[40] Persecution against one family member does not entitle all family members to be considered refugees. See *Pour-Shariati v. Canada (Minister of Citizenship and Immigration)* (1997), 215 N.R. 174 (F.C.A.); *Marinova v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 178.

The Officer's Affidavit Offers No New Reasons

[41] The Officer's Affidavit does not constitute reasons. Instead, it adopts the reasons in the CAIPS notes and the Decision and elaborates on them. The Affidavit is entirely consistent with the reasons contained in the CAIPS notes.

The Officer Put Concerns to the Applicant

[42] Contrary to the Applicant's submissions, the Officer did put his concerns to the Applicant and allow her to respond. With respect to Razul, the educational and employment experience of the Applicant and her husband, and the husband's exemption from military service, the Officer questioned them extensively during the interview and advised them that their evidence was not credible. The Officer offered the Applicant at the end of the interview an opportunity to respond to his concerns regarding the fake documents but their responses did not alleviate the Officer's concerns.

The Letter from the Consulate General Should Not Be Considered in the Application for Judicial Review

[43] This letter was not before the Officer, was not included in the Application Record and was not attached to a further affidavit. The jurisprudence states that the judicial review of a decision of a federal board, commission or other tribunal should proceed only on the basis of evidence that was before the decision maker. It is not open to the Applicant to ask this Honourable Court to make new findings of fact. See *Lemiecha (Litigation Guardian of) v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1333 (F.C.) (QL).

The Duty of Fairness

[44] The Supreme Court of Canada and the Federal Court of Appeal have held that the content of the duty of fairness is contextual. *Baker*, above, at paragraph 21; *Khan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345, at paragraphs 22, 30-32. In deciding what that duty entails, with respect to visa applicants, the Courts have been careful to balance the requirements of fairness with the needs of the administrative immigration process. See *Khan*, above, at paragraphs 30-32; and *Canada (Minister of Citizenship and Immigration) v. Patel*, 2002 FCA 55 at paragraph 10.

[45] The duty of fairness in cases involving an administrative decision maker, such as the instant case, are more limited than those involving a quasi-judicial tribunal where the obligation to confront an applicant may be more stringent: *Khan*, above, at paragraphs 31-32. The Federal Court has held that the Officer is under no duty to provide a running score of weaknesses in the Applicant's application: *Thandal v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 489, at paragraph 9; *Nabin v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 200, at paragraphs 7-10; *Soor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1344, at paragraph 12.

[46] The duty of fairness was met in this case. The Applicant was given an opportunity to respond to the Officer's concerns at the end of the interview but was unable to satisfy them. This

Court in *Rahim v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1252, at paragraphs 15-16 held:

> … the duty to inform applicants of the case against them will be fulfilled where "the visa officer adopts an appropriate line of questioning or makes reasonable inquiries which give the applicant the opportunity to respond": *Liao v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1926 (T.D.) (QL) at para. 17.
>
> Therefore, so long as an applicant is confronted with the concerns of the officer at their interview, and they are given a reasonable opportunity to respond, the duty of fairness will be met. It is otherwise immaterial at what point during the interview this occurs: *Khwaja*, above, at para. 18.

[47] The onus is on the Applicant to establish a well-founded fear of persecution, and the Applicant did not meet the onus in this case.

ANALYSIS

Basis For Decision

[48] The Decision is contained in the Officer's undated letter to the Applicant and in the CAIPS notes.

[49] In the letter, the Officer says:

> After carefully assessing all factors relative to your application, I am not satisfied that you are a member of any of the classes prescribed because from what you have told me during the interview you were not facing any persecution in Afghanistan. Therefore you do not meet the requirements of this paragraph.

[50] It is not possible to tell from the letter what the Officer concluded" He may be saying that the Applicant does not face persecution in Afghanistan because, even though the Officer accepts her story, he does not think that what the Applicant fears is "persecution" as that term is defined by the relevant jurisprudence. Alternatively, it may be that the Officer just does not accept the Applicant's account of what has happened to her in the past and the dangers that she says she and her family face. The CAIPS notes provide further clarification on this point.

[51] The core of the Decision is rendered as follows:

> We had your diplomas verified by our specialist in Islamabad, and he told us they were fakes for the following reasons: although both docs have been issued at the same time, the top right side shows a big difference. There is no date of issuance on these documents. Photos of degree or diploma are always stamped, yet there is no such think on these documents. Stamp is not readable and dates are not clear.
>
> In answering many of my questions today, I found very vague, especially concerning your job and education and how you could finance them, which makes me doubt whether your husband was ever a teacher and a pharmacist.
>
> All of this leads me to believe that you were not truthful in answering all my question sand in turn, leads me to believe that you do not meet the definition of a refugee.

[52] Although it is not entirely clear, this looks like a general negative credibility finding. The Officer is saying that, because the diplomas are fake, and because he found the Applicant vague about her job and education and how she could finance them, the Applicant was not truthful "in answering all my questions." This could mean that, although the Applicant was not truthful in answering <u>all</u> of the Officer's questions, there were some that were answered truthfully, but I have

to reject this interpretation because the Officer nowhere explains what he accepts and what he does not accept.

[53] In my view then, the basis of the Decision is a general negative credibility finding based upon supposedly fake diplomas and vagueness about the Applicant's job and education and how she could finance them, and doubt as to whether the husband ever was a teacher and a pharmacist.

[54] It is possible for the Officer to reject a claim based upon a general negative credibility finding. On this issue, the Federal Court of Appeal stated in *Sellan v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, [2008] F.C.J. No. 1685 at paragraph 3: "where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence."

[55] One of the problems with the present Decision is that it is not explicit on the reasons why the Officer thought the Applicant was vague about her job and application. The Applicant was clear that she had obtained a nursing diploma in 1997 and that she was a nurse in a hospital. She also made it clear that her husband was a teacher, that she had encouraged him to study pharmaceuticals and that he studied and eventually worked as a pharmacist. The husband provided confirmation on point.

[56] Why any of this should be considered “vague” is unclear in the Decision but, as the CAIPS notes suggest, the Officer seems to have concluded that he was not convinced that they would have been able to finance their education. As I read the Decision, however, it is clear that this issue of finance was never fully raised with the Applicant. The Applicant was never asked how she financed her education and it seems obvious from the context that the husband financed his education because his wife was a nurse and working at the hospital.

[57] In his affidavit, sworn for the purpose of this application, the Officer says that

> it does not seem consistent that the Applicant and her husband would come from simple families of peasants if they were able to pursue higher education as they did. The Applicant claimed to have become a nurse and her husband to have obtained a diploma in pharmacology. Higher education in Afghanistan is a sign of prestige that only well-off families can afford. If the Applicant and her husband had been from simple families of peasants, they would not have been able to continue higher education.

[58] If this was a concern, then it was never clearly put to the Applicant and her husband. They were not fully alerted to the issue and they were not asked how they had managed to finance their educations.

[59] The Applicant explained clearly that, although her father was a peasant and her mother was a housekeeper, she was able to go to school and college. If the Officer was, as his affidavit suggests, relying upon extrinsic evidence for his conclusion that this was unlikely, then the Applicant should have been given that evidence and an opportunity to explain how she acquired her education despite coming from a humble background.

[60] So, apart from the diplomas, the Officer's conclusions on the issue of education and jobs are nothing more than speculation based upon extrinsic evidence that was never placed before the Applicant.

[61] Negative findings have to be made in clear and unmistakable terms. See *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236, [1991] F.C.J. No. 228 (F.C.A.). What is more, discrepancies have to be placed before the Applicant and an opportunity provided to explain. In *Li v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1231, (1999) 90 A.C.W.S. (3d) 464 at paragraph 5, Justice Gibson of this Court observed:

> At the interview, he was entitled to a degree of procedural fairness. More particularly, he was entitled to have the visa officer put to him the visa officer's concerns regarding the applicant's application and to have an opportunity to respond to those concerns. It is of no consequence that his responses might very likely have failed to assuage the concerns of the visa officer.

[62] The CAIPS notes record the Officer as saying that "I will explain my concerns in details (*sic*), then I will give you an opportunity to respond." However, this does not occur. As the Officer's affidavit makes abundantly clear, the Officer did not explain his concerns in detail. He merely referred to the diplomas and some unexplained vagueness about jobs and education.

[63] Even as regards the diplomas, it cannot be said that the Applicant was given an opportunity to explain. The CAIPS notes record the following response from the Applicant:

> Just one second, I have all my diplomas here and I want to show them to you. I have to say that before getting the diploma, I received several awards and certificates. Even my students, once they

> graduated they gave their appreciation letter to me. If you want, I can show all of these letters, I have them myself.

[64] The Officer's reply is revealing:

> I have listened to your answer but unfortunately, the appreciation of your students doesn't mean that you obtained this diploma or that you answered all questions truthfully. I am therefore refusing your application today.

[65] This answer demonstrates that the Officer is focussed upon the diploma and what the expert in Islamabad has told him. The Officer is not open to any kind of explanation. The fact that student appreciation might not authenticate her diploma is no reason not to look at the original diplomas and/or other awards and certificates. It may be that the original of the diploma might have revealed something that did not show up in the photocopies. The Officer could have asked what the difference was between the original and the copy. The Applicant is explicit that the copies examined by the expert did not clearly show the authenticating stamps which are clear on the originals, so that if the Officer had looked at the originals he would have seen that the expert had no basis for his opinion that the diplomas were false. But now we will never know if the original would have solved the problems created by the copy because the Officer refused to look at it and to ask for an explanation. In my view, this cannot constitute an opportunity to respond, even on the issue of the fake diploma. It is also clear evidence of the Officer's refusal to take into account highly material evidence regarding the whole basis of his negative credibility finding. This in itself is a breach of procedural fairness that requires the Decision to be reconsidered.

[66] Even more problematic is the Officer's attempt, through an affidavit, to bolster and expand significantly upon his Decision by preparing and submitting a very detailed account, which he says was sworn for the specific purpose of supporting "the Respondent's position on the within application… ."

[67] The affidavit is an obvious attempt to shore up a defective decision and is not admissible for such purpose. In *Yue v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 717, at paragraph 3, Justice Strayer observes:

> … [I]t is inappropriate to file such an affidavit prepared after the event, supplementing the Officer's reasons given in her letter and the record of the interviews upon which it was based. Such an affidavit as to the nature of the hearing can only be relevant and admissible if it is somehow necessary to describe the procedure or some event in the decisional proceeding which is in dispute, but not to elaborate on the evidence before the Officer or her decision.

[68] However, the affidavit is revealing in other ways. The Officer cannot have it both ways. If the affidavit is a true account of the basis for his Decision, then it reveals that the Decision was based upon extrinsic evidence and discrepancies that were never clearly placed before the Applicant. The affidavit, if it is true, gives the lie to the Officer's words in the CAIPS notes that he will place his concerns before the Applicant and give her an opportunity to respond to those concerns. This is a further breach of procedural fairness that requires this matter to be returned for reconsideration.

[69] Both counsel agree that there is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed. The Decision is quashed and returned for reconsideration by a different Officer.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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