

Federal Court



Cour fédérale

Date: 20120328

Docket: IMM-4303-11

Citation: 2012 FC 365

Ottawa, Ontario, March 28, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**HABIBOLLAH NABIZADEH;
FARSHAD NABIZADEH**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Second Secretary, Immigration at the Canadian Embassy in Moscow, Russia (Officer), dated 3 June 2011 (Decision), which refused the Applicants' application for permanent residence as members of the Country of Asylum Class or Convention Refugee Abroad Class.

BACKGROUND

[2] The Applicants, Habibollah Nabizadeh (Habibollah), who is 51, and his son, Farshad Nabizadeh (Farshad), who is 24, are both citizens of Afghanistan. They are ethnic Tajiks, currently living in Tajikistan. Before they lived in Tajikistan, the Applicants and the rest of their family lived in Kazakhstan for approximately eighteen months. Their status in Tajikistan is unclear on the record.

[3] The Applicants' family consists of Habibollah, his wife, Farshad, another son, and three daughters (Family). In August 2010, the Family applied for permanent residence under the Convention Refugee Abroad and Humanitarian Protected Persons Abroad class. Farshad completed his Schedule 1 – Background/Declaration (Schedule 1) and Schedule 2 – Refugees Outside of Canada (Schedule 2) forms on 1 December 2010. The rest of the Family's forms are not in the Certified Tribunal Record (CTR) before the Court.

[4] The Applicants and the rest of their Family were sponsored to Canada by the Yousufi Group (Sponsor), under a "Group of Five" sponsorship, which allows groups of five or more Canadian citizens or permanent residents to sponsor refugees to Canada. The Sponsor was represented by Shekiba Yousufi, Habibollah's sister-in-law. In form IMM 5373 – Undertaking/Application to Sponsor – Groups of Five, the Sponsor said the Family had a well-founded fear of persecution, noting that they were robbed on one occasion. The Sponsor also noted that the Family could not live in peace in Afghanistan because they have young children, young girls are frequently kidnapped, and young men are forced to join the Taliban.

[5] In Schedule 2, Farshad said that he was always afraid he would be forced to join the Taliban. He noted that the Family had been supported by their other family in Canada and that, in Tajikistan, they could not work or study. He also said that, since leaving Afghanistan, he had not had the opportunity to work.

[6] On 8 February 2011, the Immigration Section at the Canadian Embassy in Moscow, Russia (Immigration Section) scheduled the Applicants for an interview on 15 March 2011. On 3 March 2011, the Sponsor confirmed that they would attend.

[7] On 15 March 2011, the Officer interviewed the Applicants separately with the assistance of an interpreter. Although the CAIPS notes from Habibollah's interview do not appear in the CTR, excerpts of those notes appear in the CAIPS notes of Farshad's interview.

[8] The Officer began Farshad's interview by reviewing the purpose of the interview and his obligation to answer her questions truthfully. She also informed him that his answers were confidential. Farshad confirmed that he understood the instructions and the interpreter. The Officer then asked about his travel history, and he said the Family arrived in Tajikistan on 1 November 2010. In Habibollah's interview, he said that the family had gone to Kazakhstan from Afghanistan in March 2009. He also said they arrived in Tajikistan four months before the interview (approximately December 2010), but he forgot the exact month.

[9] Farshad said at his interview that neither he nor any of his family members had ever been affiliated with the People's Democratic Party of Afghanistan – the communist party which overthrew the Afghan government in 1978. He also said that he had never been recruited or

provided material support to any armed groups and that no one in his family had ever worked for KHAD – the Afghan intelligence agency.

[10] The Officer then asked Farshad to explain everything that led to his departure from Afghanistan. He said that the economic situation there was weak; although three members of his family worked in one shop, they did not have enough money to feed themselves. He described one occasion when, after picnicking in a park outside of Herat, the city in Afghanistan where they lived, the Family was set upon by burglars (Burglars) as they were leaving to go home. The Burglars forced the family out of their car and stole their possessions, including phone bills, a driver's licence, cash, and gold ornaments. They then tied up and beat Habibollah and warned the Family not to go to the police. The Burglars said that if the Family went to the police, things would go badly for them.

[11] The Family was released by the Burglars but had to return home on foot. During their journey, police stopped them at a checkpoint. The Family told the police what happened to them, so the police sent two cars after the Burglars. The police went to the location of the robbery, but did not find the Burglars. They told Habibollah to report to the police station the next day to make a statement and said that the Family would be informed if anything was found.

[12] Eight months after contacting the police, the Family received a letter from the Burglars. This letter said that the police had caught some of them and told them to go to the police and recant; if they did not, the letter said the Burglars would kidnap the daughters and kill the sons. The Family received a second letter from the Burglars some time after this.

[13] After Farshad told his story, the Officer asked him to explain why he was afraid or unwilling to return to Afghanistan. Farshad said the economic situation there was weak and that, after the Family received the threatening letters, they realized they could not return. When asked if there was anywhere in Afghanistan he could be safe, he said the situation was terrible and that they had no choice because they had nothing.

[14] After hearing the Applicants' stories, the Officer had several concerns. She thought that the Applicants could have applied for refugee status in Tajikistan or Kazakhstan. The Officer presented this concern to the Applicants and asked for their comments. Habibollah said they did not need to claim protection in Kazakhstan because it was easy to get a visa. However, the Family left Kazakhstan when the authorities changed their policy and stopped giving visas to Afghans. Habibollah also said they did not apply for refugee status in Tajikistan because they thought they did not need it. Farshad said that people in Kazakhstan were racist and did not like them, so they left.

[15] In each of their interviews, the Officer asked the Applicants why they could not move to another region in Afghanistan to get away from the Burglars. Habibollah said in his interview that Afghanistan was not safe anywhere. Farshad said they had nothing in Afghanistan and would be killed; he also said they had no home or education there. The Officer also confronted the Applicants with her concern that their reasons for leaving Afghanistan seemed to be more economic than related to persecution. She said that they did not seem to be facing persecution related to any of the Convention grounds and their reason for leaving was related to the general instability and economic situation in Afghanistan. Habibollah said that none of the family worked in Tajikistan, that they

were moving from one home to another, and that they had no money. He also said that his daughter could be in second grade. Farshad did not address this concern in his interview.

[16] After concluding the interviews, the Officer considered the applications and made her Decision. She advised the Applicants of the Decision, each in separate letters, dated 3 June 2011 (June Letter).

DECISION UNDER REVIEW

[17] The Decision in this case consists of both the June Letter, and the CAIPS notes on Farshad's file.

[18] In the June Letter, the Officer informed the Applicants that she determined they did not meet the requirements of either the Convention Refugee Abroad or Humanitarian Protected Persons Abroad classes. She noted that they had been interviewed with the assistance of an interpreter on 15 March 2011.

[19] In the CAIPS notes, the Officer found that Farshad was a victim of crime, not persecution. She also found that his explanation of events subsequent to the robbery lacked credibility. Although he was afraid the Burglars would find him, he said the Family received two letters from them. The Officer found that, if the Burglars truly wanted to threaten Farshad or the rest of the Family, they would have gone to their home. She also found that it was unclear why the Burglars would send letters rather than threatening the Applicants at home and that this reduced the credibility of their story.

[20] The Officer also noted that Farshad had lived in Kazakhstan for eighteen months and Tajikistan for four months, but had not claimed refugee status in either country. She found that the reasons he had given for not claiming in those countries lacked credibility. Had he and his Family considered themselves refugees, the Officer found that they would have claimed in either Kazakhstan or Tajikistan. This would have allowed them to work or attend school. The Officer concluded that she was not satisfied Farshad met the definition of a Convention refugee, that he met the criteria for the Country of Asylum Class, or that he met the requirements of the Act, so she refused his application.

[21] In the June Letter, the Officer reviewed the requirements of section 96 of the Act and sections 145 and 147 of the *Immigration and Refugee Protection Regulations* SOR 2002-227 (Regulations). She noted that Afghanistan is not one of the source countries currently recognized by Canada for the Source Country class. The Officer said that, after assessing all the factors in their applications, she was not satisfied that Farshad was a member of any of the classes prescribed. She based this conclusion on her finding that the Applicants did not seem to be facing persecution in Afghanistan, but that they were unwilling to return because of the general instability and poor economic situation there. The Officer noted that section 11 of the Act prohibits an officer from issuing a visa unless she is satisfied that an applicant meets the requirements of the act; because Farshad did not meet these requirements, she could not issue him a permanent resident visa.

ISSUES

[22] The Applicants raise the following issues in this application:

- a. Whether the Officer failed to consider a ground they advanced;
- b. Whether the Officer's reasons are adequate;

- c. Whether the Officer's credibility findings are reasonable;
- d. Whether the Officer erred in her interpretation of section 147 of the Regulations;
- e. Whether the Officer's findings of fact are reasonable.

STANDARD OF REVIEW

[23] 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 a 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.

[24] In *Vilmond v Canada (Minister of Citizenship and Immigration)* 2008 FC 926, Justice Michel Beaudry held at paragraph 13 that the RPD's "failure to consider the claim as it is put forward by the applicant constitutes a misapprehension of the facts and the evidence" which is reviewable on the standard of reasonableness. The standard of review on the first issue is reasonableness.

[25] Recently, in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, the Supreme Court of Canada held at paragraph 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." With respect to the second issue, the adequacy of the reasons will be analysed along with the reasonableness of the Decision as a whole.

[26] In *Mugesera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 40, the Supreme Court of Canada held at paragraph 38 that the standard of review with respect to findings of credibility and the assessment of evidence is reasonableness. The standard of review on the third issue is reasonableness. See also *Hou v Canada (Minister of Citizenship and Immigration)* 2005 FC 1586 at paragraph 23 and *Mugu v Canada (Minister of Citizenship and Immigration)* 2009 FC 384 at paragraph 33.

[27] The Supreme Court of Canada held at paragraph 54 of *Dunsmuir*, above, that a tribunal's interpretation of its enabling statute will generally be accorded deference. The Supreme Court of Canada upheld this approach in *Smith v Alliance Pipeline Ltd.* 2011 SCC 7 at paragraph 26. More recently, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, the Supreme Court of Canada held at paragraph 30 that the standard of review on a tribunal's interpretation of its home statute is reasonableness, unless the interpretation falls into the enumerated categories for which the correctness standard applies: constitutional questions, questions of central importance to the legal system as a whole, questions on the jurisdictional lines between specialized tribunals, and true questions of *vires*. The standard of review on the fourth issue is reasonableness.

[28] In *Qurbani v Canada (Minister of Citizenship and Immigration)* 2009 FC 127, Justice Orville Frenette held at paragraph 8 that the standard of review applicable to a determination of whether a claimant is a member of either the Convention Refugee Abroad class or the Humanitarian Protected Persons Abroad class is a factual determination to be evaluated on the standard of reasonableness. (See also *Kamara v Canada (Minister of Citizenship and Immigration)* 2008 FC

785 at paragraph 19 and *Nasir v Canada (Minister of Citizenship and Immigration)* 2008 FC 504 at paragraph 9). The standard of review with respect to the fifth issue is reasonableness.

[29] 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, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. 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.”

STATUTORY PROVISIONS

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

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.

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

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.

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.

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

[31] The following provisions of the Regulations 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:

...

...

(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

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) 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;

140. Family members of an applicant who is determined to be a member of a class under

140. Les membres de la famille du demandeur considéré comme appartenant

this Division are members of the applicant's class.

à une catégorie établie par la présente section font partie de cette catégorie.

...

...

146. (1) For the purposes of subsection 12(3) of the Act, a person in similar circumstances to those of a Convention refugee is a member of one of the following humanitarian-protected persons abroad classes:

146. (1) Pour l'application du paragraphe 12(3) de la Loi, la personne dans une situation semblable à celle d'un réfugié au sens de la Convention appartient à l'une des catégories de personnes protégées à titre humanitaire outre-frontières suivantes:

(a) the country of asylum class; or

a) la catégorie de personnes de pays d'accueil;

(b) the source country class.

b) la catégorie de personnes de pays source.

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.

ARGUMENTS

The Applicants

The Officer Erred in Finding Alternative Protection

[32] The Applicants say that there was no evidence before the Officer of a refugee protection system in place in either Tajikistan or Kazakhstan. They refer to *Tung v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 292 (FCA), where Justice Stone held that

[...] the tribunal found that the appellant's failure to "claim asylum" in any of the countries he visited enroute to Canada to be inconsistent with that of a person who fears for his life. There is no evidence that any of these countries in question had ratified the 1951 U.N. Convention and the 1967 Protocol or that they had adopted laws implementing those instruments. Be that as it may, while the Board is authorized by subsection 68(2) of the Act "to take notice of any facts that may be judicially noticed", I think it was wrong for it to have speculated that refugee protection was available in these countries. That apart, the appellant was at all times in transit to Canada and had already decided to claim Convention refugee status after he arrived here.

[33] It was an error for the Officer to impugn the Applicant's claims on the basis that refugee protection was available in either Tajikistan or Kazakhstan, so the Decision must be returned for reconsideration.

The Officer's Interpretation of Section 147 of the Regulations was Unreasonable

[34] The Applicants say that the Officer denied their application under the Country of Asylum class because they failed to make a refugee claim in Kazakhstan or Tajikistan. This was an error, because the failure to make a refugee claim is irrelevant to a determination under section 147 of the Regulations.

The Officer's Reasons are Inadequate

[35] In the Decision, the Officer said that the reasons the Applicants did not want to return to Afghanistan “seem to be more related to the general instability and poor economic situation there.” The Applicants say she failed to make a finding as to whether they have been and continue to be seriously and personally affected by civil war, armed conflict, or massive violation of human rights, as she was required to do. They say that general instability, which the Officer found their application was related to, includes all the factors enumerated under subsection 147(b) of the Regulations. Habibollah testified that Afghanistan is not stable and the police cannot help; on this basis, the Applicants say that the Officer's reasons are inadequate.

The Officer Failed to Consider a Ground the Applicants Raised

[36] The Applicants also say that one of the grounds they advanced to support their application was the lack of access to education for Habibollah's daughters. They say that Habibollah raised this ground in his interview, when he said that “My daughter is 8 and she hasn't been to school yet [...] In Afghanistan there are no conditions for her to go to school.” They also say that the narrative parts of their applications are short and they did not provide any documentary evidence beyond their applications.

[37] The Applicants point to *Ali v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1392, where Justice William McKeown held that it was an error for the RPD not to find that the applicant was a refugee after she was denied access to education in Afghanistan. The Applicants say that the Officer should be held to a proper characterization of the law; since she did not, the Decision must be returned for reconsideration.

The Officer's Credibility Findings are Unreasonable

[38] The Officer found that Farshad's allegation that the Burglars who threatened them did so by letter reduced the credibility of his story. The Applicants say that she gives no reason for rejecting his allegation of receiving threatening letters and note that a threat alone can amount to persecution. There was no evidence before the Officer that sending threatening letters is not the general practice of burglars in Afghanistan. The Applicants say that the Officer believed that a credible agent of persecution would have gone to their house in person.

[39] The Applicants also say that the Officer's credibility finding was unclear. If she did not find that they were not credible, she was obligated to accept the truth of their allegation of threats by letter. By not accepting this allegation, the Officer ignored evidence. The Applicants rely on *Shahiraj v Canada (Minister of Citizenship and Immigration)* 2001 FCT 453 for the proposition that, where it is unclear if evidence was rejected, the Court must treat that evidence as if it were accepted as credible.

[40] The Applicants further say it was unreasonable for the Officer to find that they were not credible because they did not claim protection in Kazakhstan or Tajikistan. In Kazakhstan, they were subject to racism and had to pay bribes, but they had tried to stay there. In Tajikistan, the Applicants had visitors' visas, which is an acceptable reason not to claim protection. They point to *El Balazi v Canada (Minister of Citizenship and Immigration)* 2006 FC 38, where Justice Yvon Pinard had this to say at paragraphs 9 and 10:

In Houssainatou Diallo v. Minister of Citizenship and Immigration, 2002 FCT 2004, I stated as well:

[9] Finally, the explanations given by the plaintiff about the delay in making the claim were solidly based on evidence and seem quite reasonable to me: she was entitled to be in Canada on her student visa and, as appears from her physician's letter, she was suffering from severe depression. ...

In the case at bar, the IRB, in my opinion, erred in ruling that the delay in claiming undermined the credibility of the applicant, the holder of a student visa.

[41] The Court can assess the legitimacy of the Decision with reference to subsection 3(2) of the Act, which sets out the objectives of the Act with respect to refugees.

The Officer's Finding of Fact was Unreasonable

[42] The Applicants further say that it was unreasonable for the Officer to find that they had not made a refugee claim when she was processing their application for permanent residence. They say their application for permanent residence qualifies as a refugee claim.

The Respondent

[43] The Officer found that the Applicants did not face persecution in Afghanistan and were unwilling to return there because of the instability and the economic situation. This finding, which was based on the Officer's consideration of their applications and answers at their interviews, was reasonable. It was not unreasonable for the Officer to question why the Burglars would send a letter, when they had the Applicants' address and could have threatened them personally. The Officer reasonably found that they were victims of crime, not persecution.

[44] Habibollah said in the interview that Afghanistan was difficult to live in because it was unsafe and had a poor economy. This was a reasonable basis for the Officer's conclusion that the Applicants' motivation for their application was economic. Though she may not have explicitly mentioned all the evidence, the Court must presume that the Officer considered all the evidence before her, so the Decision should stand.

The Applicants' Reply

[45] The Applicants say that the Respondent has not addressed the arguments they have raised in their memorandum. In particular, they note that he has not addressed their argument that the Officer did not consider the persecution Habibollah's daughters face by being denied access to education in Afghanistan. The Applicants say that the Court has recognized that a lack of access to education is a ground on which to find persecution.

ANALYSIS

[46] The Applicants have raised a wide range of issues and, while I do not agree with all of them, I think there is a fundamental problem with the Decision that requires it to be sent back for reconsideration.

[47] The Officer's focus throughout is upon persecution and the Applicants' fear of the Burglars. In fact, Habibollah says that what he fears in Afghanistan is the Burglars and Farshad confirms this. However, both Applicants – in written submissions and at their interviews – also raise other problems besides the Burglars that could be grounds for protection in this case. In particular, we are

repeatedly told that education for girls is a problem in Afghanistan and Farshad makes it clear that one of the reasons the Family does not wish to return to Afghanistan is the education situation.

[48] Likewise, the Applicants provided information about the general situation in Afghanistan that suggests a possible claim under subsection 147(b) and that the Applicants may be people who are “seriously and personally affected by civil war, armed conflict or massive violation of human rights...” The Officer, by focusing exclusively upon the Burglars and “persecution” does not adequately consider these other grounds.

[49] This matter takes on a particular importance in the context of applicants who apply under the Convention refugee abroad and country of asylum classes. The Applicants in this case were not legally represented and may well not have understood they could claim protection based upon more than just a fear of Burglars. People in this kind of situation cannot be expected to characterize in legal terms the whole basis for their claim or to know what is important when seeking protection in Canada under these classes. They certainly have the evidentiary burden, but the Officer had an obligation to characterize their claim based upon the evidence before her. See *Ward v Canada (Attorney General)*, [1993] 2 SCR 689 at paragraph 60.

[50] As the Applicants have noted, in *Ali*, above, Justice McKeown dealt with the issue of Afghan girls being denied education:

[1] The applicants, citizens of Afghanistan, seek judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (the Board) dated November 1, 1995, wherein the Board determined that the applicants were not Convention refugees.

[2] The primary issues are: 1) whether one of the applicants, Hossay Ali, a nine-year-old female at the time of the Board hearing, is entitled to refugee status on the same basis as her mother, Bilqis

Ali, who was granted refugee status as part of a group of educated woman; and 2) whether the Board properly applied the case of *Salibian v. Canada (Minister of Employment & Immigration)*, [1990] 3 F.C. 250 (C.A.) with respect to differentiated risk.

[3] Hossay Ali, a daughter of the applicant, Shaysta-Ameer Ali, and his wife, Bilqis Ali, was denied refugee status by the Board. It stated at pages 10-11 of its reasons that:
... One of the minor claimants is female, but as she was born in 1986, and is therefore an uneducated Afghani child as opposed to an educated Afghani woman...

[4] I do not agree with this reasoning, since it means if Hossay Ali is returned to Afghanistan, the only way she can avoid being persecuted is to refuse to go to school. Education is a basic human right, and I direct the Board to find that she should be found to be a Convention refugee.

[...]

[12] For these reasons, the application for judicial review with respect to the applicant, Hossay Ali, is allowed. The matter is to be returned to the Board with the direction that she be declared to be a Convention refugee. The remainder of the application is dismissed.

[51] There are other cases where the decision-maker has been held in error for failing to consider grounds that, although not formulated and characterized by an applicant, are nevertheless apparent on the evidence adduced (see *Viafara v Canada (Minister of Citizenship and Immigration)* 2006 FC 1526 at paragraph 6 and *Vilmond*, above).

[52] In the present case, I agree with the Applicants that there was a sufficient evidentiary basis to alert the Officer to the fact that they could qualify for protection on grounds other than their immediate fear of the Burglars. This evidence raised education issues for their daughter which could ground a claim for protection under section 96 of the Act, so section 146 of the Regulations could apply. The evidence also showed the general situation in Afghanistan could lead to a positive

finding under subsection 147(b). It was unreasonable for the Officer not to address these additional grounds, so the Decision must be returned for reconsideration.

[53] Counsel agree that there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decisions for both Applicants are quashed and the matter is 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

DOCKET: IMM-4303-11

STYLE OF CAUSE: **HABIBOLLAH NABIZADEH and
FARSHAD NABIZADEH**

Applicants

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 1, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

DATED: March 28, 2012

APPEARANCES:

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