Federal Court  Cour fédérale

Date: 20140520

Docket: IMM-5233-13

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[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, May 20, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MIRZA MOHAMMAD MORAD MOHAMMAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Preliminary remarks

[1] In this case, the applicant is a Hazara and, more specifically, a member of the Ismaili sect of Afghanistan. The applicant's credibility is not in issue; rather, a major error was made in terms of understanding the case owing to an undetected defect (possibly because of a heavy influx of files to be evaluated) in the officer's analysis as regards the specific context of the

person involved and the distinct conditions of that person's country, which in all likelihood would have fatal consequences for the applicant if he were to return with his family.

[2] Justice Robert Mainville (now of the Federal Court of Appeal) stated the following in this regard at paragraph 28 of *Saifee v Canada (Minister of Citizenship and Immigration)*, 2010 FC 589: "However, in the case of a refugee claim determination, it must be assumed that the generally available country conditions were before the officer prior to the decision being made. Consequently this is not a case where the Applicant is adding to the record. The Applicant is rather setting out the facts which were available to the officer and which were or should have been taken into account in his decision". Justice Mainville further wrote, at paragraph 30 of the same judgment, "that if it can be showed [*sic*] that the officer made a decision without knowledge of country conditions, this in itself could constitute a valid reason to overturn the decision in judicial review".

II. Introduction

[3] This is the judgment in an application for judicial review pursuant to paragraph 72(3)(*c*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision dated June 7, 2013, in which an immigration officer at the Canadian Embassy in Moscow, Russia, rejected the application for permanent residence in the Convention refugee abroad class and the country of asylum class under sections 145 and 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[4] In the present case, the officer did not consider all the evidence, which consisted of the answers to questions put to the applicant and the documents in the file, in the light of the context and nuances of the conditions in the country in question, Afghanistan.

III. Facts

[5] The applicant, Mirza Mohammad Morad Mohammad, age 73, married with two children, is a citizen of Afghanistan and belongs to the Ismaili Shiite Hazara religious and ethnic minority. He is currently residing in Tajikistan, where he has temporary refugee status, and is seeking Canada's protection.

[6] The applicant first left Afghanistan in 1998 because of his problems that he said he had with the Taliban, whereby he, his wife and his children were the victims of violent physical assaults and one of his sons was kidnapped while another was murdered, which means he lost two sons. He returned in 2010, when he also denounced the theft of his taxi by the same people who had allegedly killed his brother as well.

IV. Analysis

[7] The applicant's fear was laid out in a direct manner in an interview with the applicant, his spouse and their two sons (with the help of a Dari-speaking interpreter): "When you were living in Afghanistan did you ever feel any discrimination because you were Hazara?" In answer to this question, the applicant replied, "No, I did not. We don't feel like we are guilty to be Hazara, we feel scared of the Taliban" (Respondent's Memorandum at p 15).

[8] The officer failed to give any consideration whatsoever to the country of asylum class; this oversight alone is enough to have the matter referred back to an officer other than the one who made the decision regarding the applicant.

[9] In consulting all the notes from the interview with the applicant (at pp 13-17), submitted by the respondent in his memorandum for the Court's analysis, the Court notes that the officer did not at all address the information in the notes in his own possession in its full context without taking the answers out of this context.

[10] Speaking through an interpreter, the applicant clearly explained that it was death, not discrimination, that he feared. At page 15, that applicant states the following regarding discrimination: "It is not openly expressed, but sometimes we do feel some kind of bad sentiment towards Hazara. They do not show this attitude openly, but secretly they have a bad attitude towards religious minorities too".

[11] In response to the question "What do you fear would happen to you if you were to return", the applicant answered, "We don't want to have another incident. We cannot take this risk again, we don't want to lose another brother in our family. This is really intolerable" (at p 15).

[12] In response to the questions "Could the authorities help you? Can you go to the police?", he answered, "The police and the authorities are the ones who rule Afghanistan. There is no independent government, it is all corrupt. I am sure that these people will find us and I am sure

that there will be no justice. If we return back to Afghanistan these Pashtuns and these Talibans are powerful".

[13] The officer assessed the application solely in respect of the Convention refugee class and failed to analyse it as an application in the country of asylum class.

[14] According to Justice Mainville in *Saifee*, above, such a failure to determine a claimant's eligibility for the country of asylum class is in itself a reviewable error.

[15] In addition, the officer failed entirely to conduct a nuanced analysis of the conditions in the country on the basis of the applicant's direct answers and the supporting documents in the officer's possession. In my judgment in *Elyasi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 419, I repeat several times regarding the conditions in this specific country that the Hazaras are fighting the Taliban, are persecuted by the Taliban and have been considered enemies for decades. Furthermore, the Pashtuns regard the Hazaras as outcasts.

[16] On this point, Justice Mainville stated the following in paragraph 28 of *Saifee*, above: "However, in the case of a refugee claim determination, it must be assumed that the generally available country conditions were before the officer prior to the decision being made. Consequently this is not a case where the Applicant is adding to the record. The Applicant is rather setting out the facts which were available to the officer and which were or should have been taken into account in his decision". Justice Mainville also wrote, at paragraph 30 of that same judgment, "if it can be showed [*sic*] that the officer made a decision without knowledge of

country conditions, this in itself could constitute a valid reason to overturn the decision in judicial review".

[17] Regarding the officer's failure to analyze the situation of the Hazaras, the Court notes the principle laid down in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 ACWS (3d) 264, at paragraph 15.

[18] In addition, the officer did not consider that it must be borne in mind that the applicant is also an Ismaili, a member of a very distinct sect, led by the Agha Khan, that practises a faith and way of life that is different from the people surrounding them, especially in countries where violence reigns despite their own pacifism and charitable acts that are part of the Ismaili faith (*Gillani v Canada (Minister of Citizenship and Immigration)*, 2009 FC 461 at para 11. The Court notes that the situation for Ismailis in Pakistan frequently deteriorates, but it is even worse for Ismailis in Afghanistan).

[19] The Court therefore refers back to the situation of the Hazaras as set out in *Elyasi*, above, in the judgment's conclusion at pages 11 to 17 (the original English version of the excerpt and the French version follow) :

> It is important to specify that the information package from the Canadian Immigration and Refugee Board (IRB) on country conditions demonstrates that the Hazara ethnic group has continuously fought or been persecuted by the Taliban. (As per the National Documentation Package, Afghanistan – 18 March 2009 of the IRB). Although the new constitution gives the Hazaras equal rights, a significant margin of difference exists between the theory and reality on the ground. It is recognized that the Hazaras are not only considered the traditional enemy of the Taliban but the Pashtuns also consider them as outcasts. It is important also to note

that the Allied forces in Afghanistan often employ the Hazaras for their knowledge of the country, language and fierce loyalty to values other than those opposed by the Allied forces. (Not to belabour the point but simply to mention that in popular best selling literature such as in The Kite Runner, by Khaled Hosseini, the Hazara minority is witnessed as an ethnic group that has been separate and apart from Pashtun society:

HAZARAS

20.16 The Minority Rights Group International further noted that:

> "The Hazaras speak a dialect of Dari (Persian Dialect) called Hazaragi and the vast majority of them follow the Shi'a sect (twelve Imami). A significant number are also followers of the Ismaili sect while a small number are Sunni Muslim. Within Afghani culture the Hazaras are famous for their music and poetry and the proverbs from which their poetry stems … The Hazaras are reported to have nuclear families with the husband considered the head of the family except in the case of husband's death, when the woman becomes the head. In the latter case the older wife in polygamous marriages succeeds the deceased husband until the eldest sun [sic] reaches maturity. At national level Hazaras tend to be more progressive concerning women's rights to education and public activities. Educated Hazara women, in particular ones who returned from exile in Iran are as active as men in civic and political arenas. Hazara families are eager to educate their daughters. U.N. officials in Bamian, 20 miles to the east, said that since the collapse of Taliban rule in late 2001, aid agencies have scrambled to build schools and have succeeded in attracting qualified female teachers to meet the demand." **[76a]**

20.17 Minority Rights Group International also noted:

> "Hazaras are one of the national ethnic minorities recognized in the new Afghan constitution and have been given full right to Afghan citizenship. Their main political party, Hizb-e Wahdat gained only one seat in the cabinet. Hazaras are concerned about the rising power of the warlords, who they feel pose

> a direct threat to their community. Also, given the suppression suffered by Hazaras under the Mujaheedin, the power of Northern Alliance (Mujaheedin leadership of 10 years ago) in the new leadership is a cause for worry." **[76a]**

From a recent historical perspective, as the situation in Afghanistan is in continuous flux, it is recognized that the information package of 18 May 2007 of the IRB contained the following perspective which it appears should not be ignored:

20.20 A Minority Rights Group (MRG) briefing dated November 2003 stated that Hazaras have been traditionally marginalised in Afghan society. MRG reported:

> "The Hazaras are thought to be descendants of the Mongol tribes who once devastated Afghanistan, and are said to have been left to garrison the country by Genghis Khan. The Hazaras have often faced considerable economic discrimination – being forced to take on more menial jobs – and have also found themselves squeezed from many of their traditional lands by nomadic Pashtuns. Starting at the end of the nineteenth century, successive Pashtun leaders pursued active policies of land colonization, particularly in the northern and central regions, rewarding their supporters, often at the expense of the Hazaras. This policy was partially reversed during the Soviet occupation, but started again under the Taliban." **[76] (p6)**

20.21 On 29 July 2004, the Pakistan Tribune reported on the position of Hazaras in Bamian [Bamiyan]:

> "Armed with a new constitution that guarantees equal rights to minority groups, Hazaras are engaged in an intense campaign to grasp some power and lift themselves from the bottom of Afghan society. The Hazaras have a great stake in seeing that the Taliban does not return to power. When the extremist Islamic movement controlled Afghanistan in the 1990s, its fighters killed hundreds – by some estimates thousands – of Hazaras in an effort to break the back of resistance to Taliban rule." **[30a]**

20.22 In a report dated 21 September 2004, the UN-appointed independent expert of the Commission on Human Rights in Afghanistan commented on a case of human rights violations, which the UNHCR had verified and brought to his attention. The case involved approximately 200 Hazara families (about 1,000 individuals) displaced from Daikundi over the last decade by local commanders and now living in Kabul. The independent expert noted:

> "Some members of the community arrived during the past year, having fled ethnically based persecution, including the expropriation of land and property, killings, arbitrary arrests and a variety of acts of severe intimidation perpetrated by warlords and local commanders who control the Daikundi districts and who are directly linked to a major political party whose leader occupies a senior governmental post." **[39k] (para. 72)**

20.24 The US State Department Report 2005 (USSD 2005), published on 8 March 2006, noted that "The Shi'a religious affiliation of the Hazaras historically was a significant factor leading to their repression, and there was continued social discrimination against Hazaras." **[2a] (section 2c)** The USSD 2005 Report also recorded that; "Ethnic Hazaras prevented some Kuchi nomads from returning to traditional grazing lands in the central highlands, in part because of allegations that the Kuchis were pro-Taliban and thus complicit in the massacres perpetrated against Hazaras in the 1990s. Hazaras also found difficulty in returning to the country. In December 2004 a local leader from Karukh district in Herat blocked the return of approximately 200 Hazara refugees from Iran." **[2a] (section 2d)**

20.25 On 21 July 2005, Agence France-Presse (AFP) reported that:

> "Suspected Taliban guerrillas attacked an ethnic Hazara village in the southcentral province of Uruzgan on Monday, killing 10 villagers, provincial governor Jan Mohammad Khan told AFP. A day later, Hazara tribesmen from Uruzgan's Kejran district—blaming the attack on their neighboring Pashtun-dominated village—launched a raid that killed four people, the governor said…

> "The governor said that tensions between the two tribes ceased after elders from the two villages launched an investigation and found that Monday's attack was carried out by Taliban fighters." **[40u]**

The volatile situation in Afghanistan requires consideration as to whether "a change in circumstances", as juridically described by Justice Marc Nadon in *Mahmoud v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1442 (QL), 69 F.T.R. 100, has occurred:

> [25] I have concluded that the Board erred in law by not applying the proper test for a consideration of changing country conditions. I have also concluded that the Board, in finding that the changes in circumstances were of an enduring nature, made a finding which it could not possibly have made based on the evidence before it. In other words, this finding was made without consideration of the material before it.
>
> [26] In so concluding, I have adopted as the proper test of changing country conditions the one proposed by James Hathaway in The Law of Refugee Status, Butterworths, Toronto, 1991, at pages 200-203. Hathaway writes as follows:
>
> First, the change must be of substantial political significance, in the sense that the power structure under which persecution was deemed a real possibility no longer exists. The collapse of the persecutory regime, coupled with the holding of genuinely free and democratic elections, the assumption of power by a government committed to human rights, and a guarantee of fair treatment for enemies of the predecessor regime by way of amnesty or otherwise, is the appropriate indicator of a meaningful change of circumstances. It would, in contrast, be premature to consider cessation simply because relative calm has been restored in a country still governed by an oppressive political structure. Similarly, the mere fact that a democratic and safe local or regional government has been established is insufficient insofar as the national government still poses a risk to the refugee.

Secondly, there must be reason to believe that the substantial political change is truly effective. Because, as noted in a dissenting opinion in Ruiz Angel Jesus Gonzales, "...there is often a long distance between the pledging and the doing...", it ought not to be assumed that formal change will necessarily be immediately effective:

... there were free elections [in Uruguay] on March 1, 1985 that put an end to 12 years of military government. According to [the U.S. Country Reports], the reestablishment of democracy is complete. I may be permitted to express doubts that in a period of one or two years it would be possible to recover completely from the abuses of a military dictatorship. Good intentions may have existed, of course, but I refuse to believe that there were no chance mishaps.

The formal political shift must be implemented in fact, and result in a genuine ability and willingness to protect the refugee. Cessation is not warranted where, for example, de facto executive authority remains in the hands of the former oppressors:

The facts that there were "above board" elections in Peru in 1980-81, which sent members of various parties and factions to the parliament, does not prove that the applicant does not have a well-founded fear of returning to his country, which is still, as far as executive authority is concerned, a military dictatorship which tolerates no opposition. It is just another case of old wine in new bottles.

Nor can it be said that there has truly been a fundamental change of circumstances where the police or military establishments have yet fully to comply with the dictates of democracy and respect for human rights:

It was argued that the applicant need no longer be afraid of returning to his homeland as there has been a change in the government since he left. The applicant, however, adduced evidence to show that although the government has changed, members of the Peruvian police and armed forces are still

violating human rights and as yet do not appear to be under control by the new government.

In other words, the refugee's right to protection ought not to be compromised simply because progress is being made toward real respect for human rights, even where international scrutiny of that transition is possible. Two mid-1989 judgments of the Immigration and Refugee Board, relating to Poland and Sri Lanka respectively, demonstrate an appropriate concern to see evidence of the real impact of a formal transition of power:

...Solidarity calculates that the Communist Party directly or indirectly controls about 900,000 appointments...the nomenklatura casts its own shadow. In other words, changing the government does not [necessarily] change much. The panel is of the view that the claimant's fear that the changes in Poland are still too uncertain is supported by the documentary evidence.

Although it is alleged that the scale of military confrontation between the Indian Peacekeeping Force and the Tigers has diminished in recent months, there is still an intense rivalry between the Tamil militant groups for the control of the territory and the population. We agree with the points made by counsel, that the normalization process has not yet achieved political stability and peace for Sri Lanka.

Third, the change of circumstances must be shown to be durable. Cessation is not a decision to be taken lightly on the basis of transitory shifts in the political landscape, but should rather be reserved for situations in which there is reason to believe that the positive conversion of the power structure is likely to last. This condition is in keeping with the forward-looking nature of the refugee definition, and avoids the disruption of protection in circumstances where safety may be only a momentary aberration.

[27] Although the author discusses changing country conditions in the context of cessation, the nature of the changing circumstances of a country

must nonetheless be considered in the context of an application seeking convention refugee status. (See *M.E.I. v. Obstoj*, File No. A-1109-91, May 11, 1992 (F.C.A.) [Please see [1992] F.C.J. No. 422], and *M.E.I. v. Paszkowska* (1991) 13 Imm. L.R. (2d) 262 (F.C.A.).)

[28] Two decisions of the Federal Court of Appeal support the position which I have taken with regard to changing country conditions by adopting the essence of Hathaway's test. The two decisions were rendered for the Court by Marceau J.A. In *Cuadra v. The Solicitor General of Canada* (A-179-92, July 20, 1993) [Please see [1993] F.C.J. No. 736], Marceau J.A. was faced with changing country conditions in Nicaragua. The Applicant was a former contra who was seeking Convention refugee status in Canada. The Board refused the Applicant's claim primarily because of a change of circumstances in Nicaragua and more particularly the election of Mrs. Chamaro. Although the brother of the former Sandinista President of Nicaragua, Daniel Ortega, remained the Chief of the military, the Board concluded that the oppressive Sandinista regime did not remain in place. Although the Board recognized that the Applicant had received harsh treatment from the military in which the Sandinistas continued to play a leading role, the Board was of the view that the Chamaro government had taken "positive steps" to diminish the influence of the Sandinistas. As a result, the Board held that the Applicant's claim did not have an objective basis. At page 3 of his decision, after having decided that the Board's decision could not stand, Marceau J.A. writes as follows:

Again, a more detailed analysis of the conflicting evidence in respect of a change in circumstances was necessary to meet the requirement that the change be meaningful and effective enough to render the genuine fear of the Appellant unreasonable and hence without foundation.

FRENCH VERSION OF THE ORIGINAL DECISION

Il importe de préciser que le dossier d’information de la Commission de l'immigration et du statut de réfugié (CISR) sur les

conditions ayant cours dans le pays montre que le groupe ethnique constitué par les Hazaras a depuis toujours combattu des Talibans ou a toujours été persécuté par les Talibans. (Voir le Cartable national de documentation, Afghanistan – 18 mars 2009, de la CISR). La nouvelle constitution confère aux Hazaras l'égalité des droits, mais il y a un écart important entre la théorie et la réalité sur le terrain. Il est reconnu que les Hazaras sont considérés par les Pachtounes non seulement comme l'ennemi traditionnel des Talibans, mais également comme des réprouvés. Il importe de noter que les forces alliées en Afghanistan recourent souvent aux Hazaras pour leur connaissance du pays, leur connaissance de la langue et leur loyauté farouche envers des valeurs autres que celles auxquelles s'opposent les forces alliées. (Sans vouloir appesantir sur la question, mais simplement pour mentionner que, dans les ouvrages littéraires les plus connus, par exemple The Kite Runner, de Khaled Hosseini, la minorité Hazara est vue comme un groupe ethnique qui se distingue de la société pachtoune) :

[TRADUCTION]
HAZARAS

20.16 Le Minority Rights Group International faisait aussi observer que :

> « Les Hazaras parlent un dialecte de Dari (dialecte persan) appelé hazaragi, et la grande majorité d'entre eux suivent la fois chiite (les douze Imams). Beaucoup d'entre eux sont également des adeptes de la secte des Ismaélites, alors qu'un petit nombre sont des Musulmans sunnites. À l'intérieur de la culture afghane, les Hazaras sont célèbres pour leur musique et leur poésie, ainsi que pour les proverbes d'où provient leur poésie… On dit que les Hazaras ont des familles nucléaires, le mari étant considéré comme le chef de la famille, à moins qu'il ne soit décédé, auquel cas c'est la femme qui devient le chef. Dans ce dernier cas, la femme la plus âgée des mariages polygames succède au mari décédé jusqu'à ce que l'aîné des fils atteigne la maturité. Au niveau national, les Hazaras sont en général plus progressistes en ce qui concerne les droits des femmes à l'éducation et aux activités publiques. Les femmes hazaras éduquées, en particulier celles qui sont revenues de leur exil en Iran, sont aussi actives que les hommes dans le domaine civil et le domaine politique. Les familles hazaras tiennent à éduquer leurs filles. Les fonctionnaires des Nations Unies à

> Bamiyan, à 20 milles à l'est, ont dit que, depuis l'effondrement de la domination des Talibans à la fin de 2001, les organismes d'aide ont tant bien que mal construit des écoles et sont parvenus à attirer des enseignantes qualifiées pour répondre à la demande ». **[76a]**

20.17 Le Minority Rights Group International relevait aussi que :

> « Les Hazaras sont l'une des minorités ethniques nationales reconnues dans la nouvelle constitution afghane et détiennent maintenant un droit intégral à la nationalité afghane. Leur principal parti politique, le Hizb-e Wahdat, n'a obtenu qu'un seul siège au Cabinet. Les Hazaras sont préoccupés par le pouvoir grandissant des chefs de guerre, qui, croient-ils, constituent une menace directe pour leur collectivité. Par ailleurs, étant donné la répression subie par les Hazaras aux mains des Moudjahidine, le pouvoir de l'Alliance du Nord (le commandement moudjahidine d'il y a 10 ans) dans la nouvelle direction est source d'inquiétude ». **[76a]**

D'un point de vue historique récent, étant donné que la situation en Afghanistan change constamment, il est reconnu que la trousse d'information du 18 mai 2007 de la CISR contenait la perspective suivante, qui, semble-t-il, ne devrait pas être ignorée :

[TRADUCTION]

20.20 Un exposé du Minority Rights Group (MRG) daté de novembre 2003 mentionnait que les Hazaras ont toujours été marginalisés dans la société afghane. Le MRG signalait ce qui suit :

> « On croit que les Hazaras descendent des tribus mongoles qui autrefois ont dévasté l'Afghanistan, et l'on dit qu'ils ont été laissés en garnison dans le pays par Genghis Khan. Les Hazaras ont souvent dû affronter une discrimination économique considérable – ils étaient forcés d'accepter des tâches subalternes – et se sont trouvés également évincés d'une bonne partie de leurs terres traditionnelles par les Pachtounes nomades. À partir de la fin du XIXe siècle, les chefs pachtounes qui se sont succédé ont appliqué résolument des politiques de colonisation foncière, en particulier dans les

régions du nord et du centre, récompensant leurs partisans, souvent au détriment des Hazaras. Cette politique a été en partie abandonnée durant l'occupation soviétique, mais elle est réapparue sous le régime des Talibans ». **[76] (p6)**

20.21 Le 29 juillet 2004, le Pakistan Tribune décrivait la position des Hazaras à Bamiyan :

[TRADUCTION] « Armés d'une nouvelle constitution qui garantit l'égalité des droits aux groupes minoritaires, les Hazaras sont engagés dans une intense campagne afin de s'emparer d'une partie du pouvoir et de s'extraire du bas de la société afghane. Les Hazaras ont tout intérêt à ce que les Talibans ne reviennent pas au pouvoir. Lorsque le mouvement islamique extrémiste contrôlait l'Afghanistan durant les années 90, ses combattants ont tué des centaines – et d'après certaines estimations, des milliers – de Hazaras, dans le dessein de briser toute résistance à la domination des Talibans ». [30a]

20.22 Dans un rapport daté du 21 septembre 2004, l'expert indépendant de la Commission des droits de l'homme en Afghanistan, nommé par les Nations Unies, s'est exprimé sur un cas de violations des droits de l'homme, que le HCNUR avait vérifié et porté à son attention. Il s'agissait d'environ 200 familles hazaras (environ 1 000 personnes) qui avaient été déplacées de la province de Daikundi par des commandants locaux au cours des dix années antérieures et qui vivent aujourd'hui à Kaboul. L'expert indépendant écrivait ce qui suit :

[TRADUCTION] « Certains membres de la communauté sont arrivés au cours des 12 derniers mois, après avoir fui des persécutions fondées sur l'appartenance ethnique, notamment expropriation de terres et de biens, assassinats, arrestations arbitraires et une diversité de graves intimidations, tout cela perpétré par des chefs de guerre et des commandants locaux qui contrôlent les districts de Daikundi, et qui sont directement rattachés à un important parti politique dont le chef occupe une importante charge au sein du gouvernement ». **[39k] (paragraphe 72)**

20.24 Le Rapport de 2005 du Département d'État des États-Unis (USSD 2005), publié le 8 mars 2006, relevait que [TRADUCTION] « l'appartenance religieuse des Hazaras à la foi chiite a toujours été un facteur important de la répression qu'ils subissent, et une discrimination sociale a toujours été exercée contre les Hazaras ». **[2a] (section 2c)** Le Rapport USSD 2005 précisait aussi que : [TRADUCTION] « Les Hazaras de souche ont empêché certains nomades kuchis de retourner vers leurs pâturages traditionnels des hautes terres centrales, en partie en raison d'allégations selon lesquelles les Kuchis étaient favorables aux Talibans et donc complices des massacres commis contre les Hazaras dans les années 90. Les Hazaras ont également eu de la difficulté à retourner au pays. En décembre 2004, un chef local originaire du district de Karukh, dans la province d'Herat, a bloqué le retour d'environ 200 réfugiés hazaras depuis l'Iran ». **[2a] (section 2d)**

20.25 Le 21 juillet 2005, l'Agence France-Presse (AFP) signalait que :

> [TRADUCTION]
> « Des combattants suspectés de soutenir les Talibans ont attaqué lundi un village de l'ethnie hazara, situé dans la province d'Uruzgan, au centre-sud, tuant 10 villageois, a dit à l'AFP le gouverneur de la province, Jan Mohammad Khan. Le lendemain, des hommes de l'ethnie hazara, originaires du district de Kejran dans la province d'Uruzgan — imputant l'agression au village voisin dominé par les Pachtounes — ont lancé un raid au cours duquel quatre personnes ont été tuées, a dit le gouverneur […]
>
> « Le gouverneur a dit que les tensions entre les deux tribus ont cessé après que des sages des deux villages eurent ouvert une enquête et constaté que l'agression de lundi avait été menée par des combattants talibans ». **[40u]**

La situation instable qui règne en Afghanistan requiert de se demander s'il s'est produit « un changement de circonstances », expression à laquelle le juge Marc Nadon a donné une description juridique dans la décision *Mahmoud c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1993] A.C.F. n° 1442 (QL), 69 F.T.R. 100 :

[25] J'ai conclu que la commission avait commis une erreur de droit en n'appliquant pas le critère approprié dans l'examen du changement de la situation au pays. J'ai également conclu que la commission, en constatant que les changements de circonstances étaient de nature durable, avait tiré une conclusion qu'elle ne pouvait certainement pas tirer d'après la preuve dont elle disposait. Autrement dit, cette conclusion a été tirée sans tenir compte des documents dont elle disposait.

[26] En concluant ainsi, j'ai adopté, comme le critère approprié du changement de la situation au pays, celui proposé par James Hathaway dans The Law of Refugee Status, Butterworths, Toronto 1991, aux pages 200-203. Hathaway tient les propos suivants:

[TRADUCTION] Tout d'abord, le changement doit être d'une importance politique substantielle, c'est-à-dire que la structure du pouvoir dans laquelle la persécution était réputée être une possibilité réelle n'existe plus. L'effondrement du régime persécuteur, assorti de la tenue d'élections vraiment libres et démocratiques, de la prise du pouvoir par un gouvernement respectueux des droits de l'homme et de la garantie d'un traitement équitable réservé aux ennemis du régime prédécesseur par voie d'animiste ou autrement, est l'indicateur approprié d'un changement de circonstances significatif. Par contraste, il serait prématuré de parler de perte de statut de réfugié simplement parce qu'un calme relatif a été restauré dans un pays toujours gouverné par une structure politique tyrannique. De même, le simple fait qu'un gouvernement local ou régional démocratique et sûr a été établi ne suffit pas dans la mesure où le gouvernement national constitue toujours un risque pour le réfugié.

En deuxième lieu, il doit y avoir lieu de croire que le changement politique substantiel est vraiment efficace. Car, comme il a été noté dans une opinion dissidente dans l'affaire *Ruiz Angel Jesus Gonzales*, « [...] souvent, une longue distance sépare l'engagement de l'accomplissement [...] », on ne devrait pas présumer qu'un changement officiel sera nécessairement d'une efficacité immédiate:

[...] il y a eu des élections libres [en Uruguay] le 1er mars 1985 qui mettaient fin à 12 années de gouvernement militaire. Selon [le U.S. Country Reports], le rétablissement de la démocratie est complet. Je peux me permettre de douter que, dans une période d'un an ou de deux ans, il soit possible de se remettre complètement des abus d'une dictature militaire. De bonnes intentions peuvent avoir existé, bien entendu, mais je refuse de croire qu'il n'y a pas eu de contretemps fortuits.

Le changement politique officiel doit se réaliser dans les faits, et donner lieu à une capacité et à une volonté véritables de protéger le réfugié. La perte de statut de réfugié n'est pas justifiée lorsque, par exemple, le pouvoir exécutif de facto demeure aux mains des anciens oppresseurs:

Le fait qu'il y ait eu des élections « régulières » au Pérou en 1980-1981, qui ont envoyé des membres de divers partis et de diverses factions au parlement, ne prouve pas que le requérant ne craint pas avec raison de retourner dans son pays, qui est toujours, en ce qui concerne le pouvoir exécutif, une dictature militaire qui ne tolère aucune opposition. C'est simplement un autre cas de bouteille neuve, vieux vin.

On ne peut dire non plus qu'il y a vraiment eu un changement de circonstances fondamental lorsque la police ou les établissements militaires n'ont pas encore pleinement respecté les préceptes de la démocratie et les droits de l'homme:

Il a été allégué que le requérant n'avait plus à craindre de retourner dans son pays natal puisqu'il y avait eu changement de gouvernement depuis son départ. Le requérant a toutefois produit la preuve que bien qu'il y ait eu changement de gouvernement, des membres de la police et des forces armées péruviennes violent toujours les droits de l'homme et ne semblent pas encore contrôlés par le nouveau gouvernement.

Autrement dit, le droit des réfugiés à la protection ne devrait pas être compromis simplement parce qu'il y a progression vers le respect réel des droits

de l'homme, même lorsque le regard international sur cette transition est possible. Deux jugements rendus au milieu de l'année 1989 par la Commission de l'immigration et du statut de réfugié, concernant la Pologne et Sri Lanka respectivement, démontrent une préoccupation appropriée de voir la preuve de l'impact réel d'une transition officielle de pouvoir:

[...] Solidarité calcule que le Parti communiste a la haute main sur environ 900 000 nominations [...] la nomenklatoura projette sa propre ombre. Autrement dit, le changement de gouvernement ne change pas [nécessairement] grand-chose. Le tribunal estime que la crainte par le demandeur que les changements en Pologne soient encore trop incertains est étayée par la preuve documentaire. Bien qu'il soit allégué que la confrontation militaire entre l'Indian Peacekeeping Force et les Tigres libérateurs a diminué en importance ces derniers mois, les groupes militants tamouls se disputent encore intensément le contrôle du territoire et de la population. Nous sommes d'accord avec les points soulevés par l'avocat, savoir que le processus de normalisation n'a pas encore atteint la stabilité et la paix politiques pour Sri Lanka. En troisième lieu, on doit prouver que le changement de circonstances est durable. Le retrait du statut de réfugié n'est pas une décision à prendre à la légère sur la base des changements transitoires dans le paysage politique, mais on devrait la réserver à des cas où il y a lieu de croire qu'il est probable que la transformation positive de la structure du pouvoir durera. Cette condition correspond à la nature prospective de la définition de réfugié, et évite l'interruption de la protection dans les cas où la sécurité peut être seulement une aberration momentanée.

[27] Bien que l'auteur discute du changement de la situation au pays dans le contexte de la perte du statut de réfugié, la nature des circonstances changeantes d'un pays doit néanmoins être examinée dans le contexte d'une demande d'obtention du statut de réfugié au sens de la Convention (Voir *M.E.I. c. Obstoj*, n° du greffe A-1109-91, 11 mai 1992 (C.A.F.) et *M.E.I. v. Paszkowska* (1991) 13 Imm. L.R. (2d) 262 (C.A.F.).

> [28] Deux arrêts de la Cour d'appel fédérale étayent la position que j'ai suivie quant au changement de la situation au pays en adoptant l'essence du critère d'Hathaway. Les deux arrêts ont été rendus par le juge Marceau de la Cour. Dans l'affaire *Cuadra c. Le solliciteur général du Canada* (A-179-92, 20 juillet 1993), le juge Marceau se penchait sur le changement de conditions survenu au Nicaragua. Le requérant était un ancien Contra qui demandait le statut de réfugié au sens de la Convention au Canada. La Commission a rejeté la revendication du requérant principalement en raison d'un changement de circonstances au Nicaragua et plus particulièrement du fait de l'élection de Mme Chamaro. Bien que le frère de l'ancien président sandiniste du Nicaragua, Daniel Ortega, soit demeuré le chef de l'armée, mais la Commission a conclu que le régime tyrannique sandiniste n'était pas resté en place. Bien que la Commission ait reconnu que le requérant avait été brutalisé par l'armée où les sandinistes continuaient de jouer un rôle important, la commission a estimé que le gouvernement Chamaro avait pris des « mesures concrètes » pour diminuer l'influence des sandinistes. En conséquence, la Commission, a décidé que la revendication du requérant ne reposait pas sur un fondement objectif. À la page 3 de sa décision, après avoir statué que la décision de la Commission ne pouvait être confirmée, le juge Marceau se prononce en ces termes :
>
> Là encore, une analyse plus détaillée des preuves contradictoires au sujet d'un changement dans les circonstances était nécessaire pour satisfaire à la condition que le changement soit suffisamment réel et effectif pour faire de la crainte authentique de l'appelant une crainte déraisonnable et, partant, non fondée.

V. Conclusion

[20] For all the reasons set out above, the applicant’s application for judicial review is allowed, and the matter is referred back to different officer for redetermination.

Obiter

In addition, the Court notes that the applicant told the officer in one of his answers that he is "not guilty" to be a Hazara; according to his answer in the overall context, it was from the perspective of those who have something against Hazaras. This is reminiscent of the context of battered women in the Supreme Court of Canada's judgment in *R v Lavallée*, [1990] 1 SCR 852, and in *Abbasova v Canada (Minister of Citizenship and Immigration)*, 2011 FC 43, 385 FTR 36, where the battered persons are constrained by feelings of guilt or, in the alternative, do not understand why they have feelings of guilt towards themselves or the group to which they belong (despite having experienced such feelings for a very long time). This emerges from an in-depth understanding of the concepts (handed down by the Supreme Court in the case contemplated above) regarding persons who have been victimized for long periods during which they could not stand up for themselves and in which the inviolability of the human person, through a violability in their everyday circle, affected them to such a point that it became an enduring pattern in their mind (as described and addressed by the cited Supreme Court judgment) through the feelings of guilt that are part of battered wife syndrome or, in similar situations (*mutatis mutandis*), of minority community members targeted by the majority, who persecute them because they are different and were misunderstood. That is to say that individuals themselves, often victims surrounded by others who control them, start to feel that they are targeted in a negative way by those who persecute them.

JUDGMENT

THIS COURT'S JUDGMENT is that the applicant's application for judicial review be allowed and that the matter be referred back to another officer for redetermination, with no question of general importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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