

IMM-3404-95

BETWEEN:

SHAYSTA - AMEER ALI

(a.k.a. Shasta Ameri Ali; Shasta Ameer Ali)

AMINA ALI

HOSSAY ALI

BELAL ALI

SOLIMAN ALI

(a.k.a. Solaiman Ali)

Applicants

- AND -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

(Delivered orally from the Bench

on September 23, 1996, as edited)

McKEOWN J.

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.

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 women; and 2) whether the Board properly applied the case of *Salibian v. Canada (Minister of Employment & Immigration)*, [reflex](#), [1990] 3 F.C. 250 (C.A.) with respect to differentiated risk.

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 ...

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.

The Board rejected the other female applicant, Amina Ali, because:

... Amina is 75 years old, and has never worked outside the home, nor has she had even one day of schooling. She is therefore not educated.

[footnotes omitted]

This finding was open to the Board.

The Board was not asked to make a separate finding with respect to the two young sons and there is no compelling evidence to require a separate consideration of their claim.

I must now consider the second issue, as to whether the applicants as members of Sunni Tajiks group, had a fear (not felt indiscriminately by all citizens as a consequence of the civil war), but a fear felt by a group, Sunni Tajiks, based on one of the reasons stated in the definition of Convention refugee.

The Board made its findings on this point at pages 5 to 7 of its reasons:

We must therefore examine, in light of the foregoing binding jurisprudence, whether or not Sunni Tajiks face a differential risk in Afghanistan from other Afghani citizens. The question is whether or not Sunni Tajiks in Afghanistan are "facing any more or different problems".

From the documentary evidence, there can be no question but that Sunni Tajiks have been victims of human rights abuses in Afghanistan, but can it be said that they face any more or different problems than other Afghani citizens? In the documentary evidence, we note the following:

Kabul is under heavy bombardment. In late January I interviewed Kabul refugees fleeing toward Jalabad [sic] Afghanistan. They told of extremist fundamentalists killing "bad" Muslims, while Tajiks massacred Pushtuns, and vice versa.

Horrific human rights abuses are being committed by every faction. And unlike those in Sarajevo, they are not captured by television cameras. The Afghans have been victims of indiscriminate bombings, torture and mutilation.

The changes in alliances, at times with ethnic overtones resulting from the power struggle have given rise to further uncertainty as to who belongs to which political formation ... The new feature of the changes in alliances has

therefore rendered the political stability in the country even more precarious. Only one element has remained the same: the principal victim of the power struggle is the civilian population.

Another factor which threatens to disrupt peace in other parts of the country is the increased disdain of all factions for the plight of Kabul's civilian population. Shelling, including aerial bombardment, has been ruthlessly indiscriminate with mujahed groups of the warring factions indulging in looting, rape, and other forms of deliberate physical abuse against men, women, and children caught in the crossfire.

Afghan political factions regularly change their allegiances, one day fighting against one side, and then crossing over to their former enemies the next.

While the various Mujahideen factions are ethnically based ... the fighting is primarily based on the objective of one faction, or a coalition of factions, acquiring political power at the expense of some other faction or coalition. Ethnic tensions have existed in Afghanistan for many decades but the fighting is not primarily about ethnic hatreds ... an individual Afghan would not generally be at particular risk from other Afghans solely by reason of ethnicity ... The principal risk for a returning Afghan would be random violence, particularly if residing in Kabul. Some parts of Afghanistan, particularly in western Afghanistan, are non-conflictive.

Given the totality of the documentary evidence, and, in particular, the foregoing, it would appear that all groups in Afghanistan are both victims and perpetrators of human rights violations, a situation recognized by the Federal Court not to lead to a finding of Convention refugee status. The evidence does not disclose that Sunni Tajiks in Afghanistan are facing "more or different difficulties than others in Afghanistan."

In view of the binding authority of Salibian, Rizkallah, Hersi, Abdulle, Mohamud, Isa and Ali, we find that this fear of the claimants does not represent a well-founded fear of persecution for a Convention reason.

[footnotes omitted]

In my view, the Board's finding was made within the confines of the third test, as set out by Décarý J.A. in *Salibian, supra* at 173 and 174, where he stated:

It can be said in light of earlier decisions by this Court on claims to Convention refugee status that

...

(3) a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or if necessary by all citizens on account of a risk of persecution based on one of the reasons stated in the definition ...

Décarý J.A. also adopted Professor Hathaway's description of the law in *Salibian, supra* at 174 and 175, when he quotes from Professor Hathaway, as follows:

... In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee."

It was open to the Board to make its findings that the Sunni Tajiks were not collectively targeted and, therefore, the applicants could not succeed based on their membership in this group. In this respect, I further rely on MacGuigan J.A. in *Rizkallah v. The Minister of Employment and Immigration* (1992), 156 N.R. 1 at 1 (F.C.A.), where he states:

Although the Refugee Division in the case at bar expressed itself incompletely in emphasizing only personal targeting, the evidence, as presented to us, falls short of establishing that Christians in the claimant's Lebanese village were collectively targeted in some way different from the general victims of the tragic and many-sided civil war.

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.

The following question is certified as being a serious question of general importance:

Are refugee claimants excluded from the definition of Convention refugee if all groups in their country, including the group of which they are members, are both victims and perpetrators of human rights violations in the context of civil war?

Judge

OTTAWA (ONTARIO)

October 30, 1996

FEDERAL COURT OF CANADA TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

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REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE McKEOWN
DATED: October 30, 1996

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