

CANADA / JUDGMENT

MA6-08455

COURT

Refugee Protection Division

DECIDED

19 July 2010

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Immigration and

Refugee Board

Refugee Protection Division

Commission de l'immigration

et du statut de réfugié

Section de la protection des réfugiés

RPD File / No dossier SPR : MA6-08455

Private Proceeding

Huis clos

Claimant(s)

Demandeur(e)s d'asile

XXXXXX XXXXX

Date(s) of Hearing

Date(s) de l'audience

April 14th, 2010

Place of Hearing

Lieu de l'audience

Montréal, Québec

Date of decision

Date de la décision

July 19th, 2010

Panel

Tribunal

Me Michelle Langelier

Claimant's Counsel

Conseil du demandeur d'asile

Me Annie Belanger

Tribunal Officer

Agent du tribunal

Annie Lemaine

Designated representative

Représentant désigné

N/A

Minister's Counsel

Conseil du ministre

N/A

[1]

[1] Mrs XXXXX XXXXX, citizen of Afghanistan, asked for asylum under sections 96 and 97 of the IRPA.

[2] The Minister of Public Safety and Emergency Preparedness¹ intervened in this case on July 3rd, 2009², and asked that the claimant be excluded from the benefit of Canada's refugee protection, under section 1E of the United Nations Convention relating to the Status of Refugees³, according to section 98 of the IRPA.

THE FACTS

[3] The claimant was born in XXXXX, Afghanistan, in 1985 and is a citizen of that country⁴; this fact is uncontested and established to the satisfaction of the tribunal. I mention this because there is a mistake in her passport which states that she was born in XXXXX, Iran; however, XXXXX is in Afghanistan⁵. Since the Minister has made no representation on the validity of the claimant's Afghan passport, I accept the claimant's explanation that it must be a mistake and I consider that she is a citizen of Afghanistan.

- [4] When the claimant was a few months old she and her parents left Afghanistan for Iran because of the then ongoing war. She never received Iranian citizenship but her stay was tolerated and she and her family members had temporary displaced Afghan refugee status⁶.
- [5] The claimant lived all her life in Iran until she went to the United States in XXXXX 2005 with her husband, a US citizen of Afghan origin who had sponsored her. When she left Iran, she surrendered her refugee identification card and abandoned her status in Iran.
- [6] Her marriage had been arranged by her parents without her consent. She was seriously mistreated by her husband, mentally, emotionally and physically abused and threatened with death by both her husband and her brother-in-law. Her husband also threatened her assuring that she would be deported if she ever left him; he never let her see or have possession of her Green card⁷. She reported the theft of her Green card to the police⁸.
- [7] As a result of this mistreatment and after a failed attempted suicide, at the age of 21, she left her husband in XXXXX 2006, obtained a protection order⁹ forbidding her husband to approach her, and ultimately filed¹⁰ and obtained a divorce¹¹. One of the orders sought by her in the protection request was to recover her Green card¹²; however, she testified that she never recovered it.
- [8] In retaliation, her husband responded to the divorce application by requesting for marriage annulment¹³; he alleged fraud, force and physical incapacity¹⁴. She understood from this request that he intended to make her lose her status in the US. She is not aware of the outcome of that request.
- [9] The claimant's parents were furious that she dishonoured the family, and she was told that her father will not hesitate to kill her if he sees her again.
- [10] From her country of citizenship, she knows very little, as she never lived in Afghanistan. She fears to be the victim of honour-killing if she returns to her country of citizenship; she also fears to be persecuted and even killed only for the fact that she is a young unaccompanied woman. Finally, the claimant remarried in Canada¹⁵ and she fears that this will even exacerbate her parent's anger and plan to kill her.

ANALYSIS

- [11] The issues for the tribunal to analyse in the present case are the following: should the claimant be excluded from the benefit of the protection of Canada according to section 98 of the IRPA, because she is described in section 1E of the Convention? If not, is the claimant a person in need of protection under sections 96 and/or 97 of the IRPA? I will analyse separately both aspects of the case.
- [12] If the claimant is excluded from the benefit of the protection of Canada, this tribunal cannot accept her asylum claim, according to section 98 of the IRPA:

A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

[13] Section 1E of the Convention reads as follows:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

[14] The question of whether the claimant is recognized by the competent authorities of the United States of America, hereafter called the US, as having the rights and obligations which are attached to the possession of US nationality is a question of fact. According to the jurisprudence, the Minister has to establish that there are "serious reasons for considering"16; this means less than the civil standard of balance of probabilities17.

The Minister's arguments

[15] The Minister asks that the claimant be excluded from the benefit of Canada's protection; he alleges that there are serious reasons for considering that the claimant is recognized by the competent authorities of US as having the rights and obligations which are attached to the possession of US nationality.

[16] The Minister submits that the claimant is a permanent resident of US since XXXXX 2005 when she entered the US18. The Minister's evidence comprises the INS computerized notes, the claimant's US immigrant visa in her passport, and a summary of a telephone conversation that the Canada Immigration officer had with a US Immigration Supervisor on January 12, 200619:

I called USINS to find out about US Visa, and at the same time confirm story and authenticity of documents.

With the A# and registration # on the visa, USINS Champlain confirms the person is a US ARRC since 2005. This status is permanent and cannot be lost even if her husband sponsor withdraws.

[...]

I have no documentary proof of her status in US other than US visa and USINS telephone conversation.

[17] The Minister asks me to conclude that the claimant is still a permanent resident of the US, that she has not lost her status even if she lived outside of the US for more than one year. He argues that even if there is evidence that long term absence from the country may lead to a loss in status, a permanent residence can only be lost upon determination of an immigration judge20 and this decision is with the discretion of the US Immigration authorities21. Therefore the Minister argues that since the claimant was not deprived of her permanent residence by a US Immigration judge, she is still a permanent resident of the US.

[18] Furthermore, the Minister argues that:

[...] the claimant, after becoming a permanent resident of the United States, had acted in such a way as to create a serious possibility, if not a probability, that the American authorities would no longer recognize her as a permanent resident and would, for that reasons, deny her the right to return to the United States.²²

The Claimant's arguments

[19] The claimant asked me to follow the three-steps tests elaborated in Zeng (which I will later comment) in order to determine whether I should exclude her from the benefit of the Convention. She reminded me that, as stated in that case, "the refugee program is, in the first instance, about saving lives and offering protection to the displaced and the persecuted"²³.

[20] The claimant acknowledged that at the time she entered Canada, she was still a permanent resident of the US. She argues that the day of her hearing, she no longer had the possibility to return to the US for four reasons:

- because she had stayed out of the US for more than one year with the intention to remain permanently out of that country;
- because she did not ask for a re-entry permit or returning resident visa;
- because she failed to file income tax returns while living outside the US;
- because she is not in possession of proper documents, i.e. she does not have her green card in hand therefore she would not be granted lawful entry but will be subjected to removal procedures.

[21] The claimant argues that these are requirements of the US Immigration authorities in order to maintain permanent residence; she produced a document printed from the US Citizenship and Immigration Services website to support her arguments²⁴. The claimant also produced a legal opinion of a lawyer specialized in refugee matters in the US, Me De Graaf²⁵ that corroborates her allegations.

[22] Finally, the claimant argues that she had good reasons for failing to maintain her status in the US and her right to be permitted to re-enter the US:

- She had the bona fide belief that her permanent resident status was conditional to her marriage with her estranged spouse and since she was in the process to divorce and thought her husband has withdrawn the sponsorship, she thought she would be deported from the US²⁶;
- At the time she entered Canada, she truly believed that she could not re-enter the US²⁷, moreover, as explained earlier, she was never in possession of her green card;

- When she left the US she had the intention to live outside of that country permanently because of the traumatic experiences she lived for the time she resided there;
- When she left the US she was not fully aware of her rights as a woman, having lived all her life in a culture where women are inferior and subjected to men's desire and will²⁸;
- As she related in her addendum: "At that time the only way I thought I could gain my freedom and break the shackles was by getting as far as I could from my husband, in-laws and the Afghans I knew in the United States"²⁹;
- She stated that she was depressed and hated the United States where she had spent the worst time in her young life³⁰;
- Although she is now more in control of her emotions, she relates that at the time she left the US, she could not bear the judgment of the US Afghan community on her and wanted to live somewhere else, where nobody knew her³¹;
- She stated that while she had no family in the US, she had a sister in Canada and she thought she could count on her to start her new life³².

The applicable principles

[23] The three steps test Justice Gibson established in Zeng³³ that the claimant's counsel suggested we use was reformulated by the Federal Court of Appeal³⁴. Honorable Justice Laydon-Stevenson of the Federal Court of Appeal proposed the following test³⁵:

"Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reasons for the loss of status (voluntarily or involuntarily), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts."

[24] I will analyse the claimant's situation in light of this test.

Claimant's status to the date of the hearing

[25] Did the claimant have, at the date of the hearing, a status substantially similar to that of US nationals?

[26] In Shamlou³⁶ Justice Teitelbaum identifies four factors, taken from the doctrine, indicating the rights attached to the possession of a nationality:

"(a) the right to return to the country of residence;

- (b) the right to work freely without restrictions;
- (c) the right to study; and
- d) full access to social services in the country of residence."

[27] The claimant argues that she does not, for the following reasons: first, she would not be granted lawful re-entry because she is not in possession of her green card.

[28] I have not been provided any evidence that the claimant would not have been able to obtain a duplicate or a re-issue of her green card if she had asked for one. Therefore, she did not establish on the balance of probabilities that if she asks the US Immigration authorities, she would not be able to obtain proper documents in order to re-enter the US.

[29] The claimant further argues that she would be considered to have abandoned her status because of her long absence from the US. Her counsel argues, with regards to the standard of proof, that the claimant has to establish that she would not be allowed re-entry in the US on a balance of probabilities and not beyond any reasonable doubt³⁷.

[30] The evidence presented by the claimant is that she has moved to Canada with the intention to remain permanently outside of the US, that she has lived outside of the US for the past four years without obtaining a re-entry permit of returning resident visa, and that she failed, for the past four years, to file income tax returns while living outside of the US.

[31] In her situation, the evidence is clear that she may be found to have abandoned her permanent residence³⁸. I agree with the Minister's argument that until the time a US Immigration adjudicator in fact deprives her of her permanent resident status, she still remains one in theory; the situation is similar in Canada.

[32] However, given her particular circumstances, that theoretical assurance does not resist analysis. The evidence provided by the claimant shows, as Me De Graf stated in his legal opinion, that should the claimant re-enter the US, she would not be allowed to enter freely with consequences, but to the contrary would be subjected to removal proceedings³⁹; the adjudicator would consider the relevant considerations I mentioned above.

[33] I agree with the Minister that the legal opinion "does not necessarily reflect the concrete and actual position of the US government"⁴⁰, but the Minister did not provide me with contrary evidence other than handwritten notes of a telephone conversation with a US Immigration supervisor. And the allegations of this supervisor contradict the overall evidence. He alleged that "this status is permanent and cannot be lost even if her husband/sponsor withdraws"⁴¹. It is trite law that there are circumstances where a permanent resident status can be lost; to say that it "cannot be lost" is to err in law. I understand the supervisor's comment as to be that a permanent resident status cannot be lost for the sole reason of a husband's sponsorship withdrawal.

- [34] I note the admission of the Minister, as mentioned earlier, that the claimant has acted in such a way as to create if not a serious possibility, a probability that the US authorities would deny her the right to return to the US.
- [35] Given that the claimant has, in many aspects that I mentioned earlier, had a behaviour showing an intention to abandon the US as her country of permanent residence, I consider that there are reasons to believe, on the balance of probabilities, that if she were to return and face removal proceedings, a US Immigration adjudicator would deprive her of her permanent residence and deny her the right to enter the US.
- [36] Therefore I conclude that the claimant, if she had attempted to enter the US, on the date of her hearing, on a balance of probabilities, would not have been admitted to the US with status similar to that of US nationals.

Did the claimant previously had such status?

- [37] The claimant acknowledged that when she entered Canada, she had a valid status in the US as a permanent resident. However, as explained earlier, she lost it.

Balancing

- [38] Here is where the Federal Court of Appeal allows me to balance various factors when determining whether I should exclude the claimant: the reason why she lost status, her possibility to return to the US, the risk in Afghanistan, Canada's international obligation to protect refugees, and any other relevant facts such as the domestic abuse she was subjected to in the US.

Reason for the loss of status

- [39] Could the claimant have maintained her status in the US, if so, did she have good and sufficient reasons for failing to do so? There is evidence stating that the claimant could have asked for a re-entry permit or a returning resident visa; also, I explained earlier that there is no evidence that she could not have obtained a re-issue of her green card; she could have filed income-tax returns. Definitely, the claimant could have acted in a way that she would not lose her US residence. Did she have good and sufficient reasons for failing to do so?
- [40] I considered her mental state at the time she entered Canada: she was escaping a violent spouse who had been constantly abusing her and threatening her for the whole period of her stay in the US which corresponds to the time of her marital life. She knew very little of the American cultural and social life as she was kept recluse and under the control of her husband and in-laws until the time she escaped the conjugal residence in XXXXX 2006.
- [41] I considered the claimant's testimony that I mentioned earlier. She testified that she had the intention to live outside of the US permanently because of the traumatic experiences she lived for the time she resided there; she wanted to be as far as possible from her husband and thought this was the only way for her to gain freedom and be safe from his violence and

abuses. She hated her life in the US where she had spent the worst time in her life; she was depressed. She wanted to live somewhere no one knows her and far away from the gossip of the Afghan community; she has not family members in the US but has a sister in Canada and needed her moral support and assistance.

- [42] I also considered the claimant's allegation that she was convinced that leaving the US meant for her losing her status; she had received information for various sources to that effect⁴²; she had also been threatened countless times by her husband that if she left him he would make her be deported; her belief was reinforced when she received her husband's response to her divorce application where he requested the nullity of the marriage.

Risk the claimant would face in Afghanistan

- [43] The claimant was found to be a credible witnesses; she testified in a straightforward manner, giving many details, answering all questions spontaneously; there were no inconsistencies in her testimony or contradictions between her testimony and the other evidence before the tribunal which have not been satisfactorily explained.

- [44] The claimant had divorced the man she was married to by her parents without her consent; she stated that:

My father in particular feels that I have dishonoured and caused humiliation for him and the family. From other family members, I know that he has threatened to kill me whenever we will come face to face.

- [45] The claimant's fear is to be killed upon return to her country because she has dishonoured her family by divorcing her husband. This subjective fear is supported objectively by documentary evidence from reliable sources⁴³.

- [46] The claimant also fears persecution in Afghanistan because she does not conform to the gender role as assigned to her by the society and lives a life contrary to her cultural background. This fear is also supported objectively by documentary evidence from the highly respected UNHCR organization⁴⁴ and other reliable sources⁴⁵. The evidence states that:

Failure to conform to conventional roles or transgression of social and religious norms may expose women and girls to violence, harassment or discrimination in Afghanistan. As such, women with particular profiles, including, but not limited to victims of domestic violence or other serious forms of violence, unaccompanied women or single heads of household (...) may be at risk of persecution on the ground of membership in a particular social group. Where the non-conformity with traditional roles is perceived as opposing traditional power structures, the risk of persecution may be linked to the ground of religion and/or political opinion. Furthermore, measures which restrict one's ability to earn a living so that survival is threatened, or severe limitations to accessing education or health services, may also amount to persecution."⁴⁶

- [47] Regarding the issue of State protection, I find that there is none for women in the situation of the claimant: documentary evidence states that honour killings are frequent in Afghanistan (96 cases were reported in 2008 and 35 in the first six months of 2009⁴⁷) and that the State fails to punish the perpetrators of such killings⁴⁸.
- [48] Taking into consideration the whole of this evidence, I am of the opinion that the claimant, has provided clear and convincing evidence of the absence of State protection and that she would not receive the protection of the State if she were to return to Afghanistan. She has thus rebutted the presumption of State protection.
- [49] Regarding the internal flight alternative, on the above-mentioned evidence and regarding the particular circumstances of this case, given that the claimant is a young unaccompanied woman returning to a "home" country where she had never lived, I find that the risk faced by the claimant exists everywhere in the country therefore there is no internal flight alternative for her. Therefore, the claimant has established a reasonable fear of persecution on the ground of her membership in the particular social group "unaccompanied and/or divorced women in Afghanistan".
- [50] Considering the whole of the evidence, and considering Canada's international obligation towards refugees, I do not exclude the claimant; the Minister's request is denied.

CONCLUSION

- [51] I conclude that XXXXX is a "Convention Refugee".

Michelle Langelier

Me Michelle Langelier

July 19th, 2010

Date

rc

KEYWORDS - REFUGEE PROTECTION DIVISION - DOMESTIC VIOLENCE - IE EXCLUSION - STATUS IN U.S. - ZENG - POSITIVE - AFGHANISTAN - U.S.

1 Hereinafter referred to as the Minister.

2 See the notice of intervention signed by Mélanie Leduc on June 29, 2009.

3 Hereinafter referred to as the Convention.

4 See the claimant's passport filed as exhibit M-1 en liasse.

5 See exhibit A-1 : National Documentation Package on Afghanistan dated January 29, 2010, tab 1.1 a), United Nations (UN). October 2005. Cartographic Section. "Afghanistan."

6 See exhibit C-2 at paragraph 14; copy of the Identity card for Afghan refugees filed as exhibit C-21 (in a bundle) with translation.

7 See exhibit C-2 at paragraph 20; exhibit C-4 page 18 at line 22; also see exhibit A-2 (in a bundle), Immigration documents, particularly the immigration officer's handwritten notes at page 1 last paragraph, and the Interview notes at page 6.

8 See exhibit C-6 : Los Angeles police department investigation report.

9 See exhibit C-4 : request for a protection order filed on XXXXX, 2006 and obtained on XXXXX, 2006 as seen in exhibit C-5.

10 See exhibit C-3, petition for dissolution of marriage filed on XXXXX, 2006.

11 See exhibit C-8 : divorce order dated XXXXX, 2010.

12 See exhibit C-4, page 17 question 20.

13 See exhibit C-7 : Respondent's response and request for nullity of marriage, filed on XXXXX, 2006.

14 Exhibit C-7 page 2 question 8 d.

15 See exhibit C-20 : marriage certificate of claimant, dated XXXXX, 2010.

16 Shahpari v. Canada [1998] F.C.J. 429, at 6.

17 See Ramirez v. Canada, [1992] 2 F.C.J. 306, page 312 ; Penate v. Canada, [1994] 2 F.C. 79, at 4; Moreno v. Canada [1994] 1 F.C.J. 298 A.C., at pages 310-311.

18 See exhibit M-2 : US Border patrol computerized notes, at page 11.

19 See exhibit A-2 (in a bundle) : Immigration documents, handwritten notes of the Immigration officer.

20 Agha v. Canada, 2001 IMM-4282-99.

21 Hadissi v. Canada, [1996] FCJ no 436.

22 See the Minister's further intervention application dated April 30, 2010 at paragraph 17.

23 Zeng v. Canada, 2009 FC 466 at paragraph 37.

24 See exhibit C-22 : US Citizenship and Immigration Services " Maintaining Permanent Residence ", filed together with the claimant's counsel's written submissions on May 14, 2010. A copy was sent to the Minister and I have not received any further arguments following that deposit.

25 See exhibit C-9 : Legal opinion of Me De Graaf dated March 22, 2010, pages 2-3.

26 See exhibit A-2 (in a bundle), Immigration officer interview notes, at page 6.

- 27 See the Immigration officer's handwritten notes in exhibit A-2 (in a bundle), last paragraph.
- 28 See exhibit C-2, addendum to claimant's narrative.
- 29 Ibid, at paragraph 26 a).
- 30 Ibid, paragraph b).
- 31 Ibid, paragraph 26 c) and d).
- 32 Ibid, paragraph 26 e).
- 33 Zeng v. Canada, 2009 FC 466 at paragraph 34.
- 34 Canada v. Zeng, 2010 FCA 118 at paragraphs 27-28.
- 35 Canada v. Zeng, 2010 FCA 118 at paragraph 28.
- 36 Shamlou v. Canada [1995] F.C.J. 1537, at 35-36.
- 37 Mahdi v. MCI (1995) 32 Imm.L.R. (2d) 1 at page 6
- 38 See the above mentioned exhibit C-22
- 39 See the above mentioned exhibit C-9 at page 2 paragraph 2
- 40 See the Minister's further notice of intervention dated April 30th, 2010, at paragraph 12
- 41 See the above mentioned handwritten notes of the Immigration officer dated December 1st, 2006
- 42 See the claimant's narrative as answer to question 31 of her PIF, last page; see also handwritten notes of the immigration officer; see the Immigration officer Interview notes at page 6
- 43 See exhibit C-16 : " Afghanistan : rights watchdog alarmed at continuing " honor killings ", EurasiaNet, 23.09.2006 ", at pages 83-85.
- 44 See exhibit C-13 : UNHCR Guidelines for assessing the international protection needs of asylum-seekers from Afghanistan, UNHCR, July 2009, at page 66.
- 45 See exhibit C-14 : Silence is violence - End the abuse of women in Afghanistan, UN 08.07.2009 at page 76; C-15 : " Searching for my homeland : Dilemmas between borders - Experiences of young afghans returning " home " from Pakistan and Iran ", at page 82.
- 46 See the above mentioned exhibit C-13, at page 69.
- 47 See exhibit C-12 : " We have promises of the world " - Women's rights in Afghanistan, Human Rights Watch, December 2009, at page 51.
- 48 See exhibit C-11 : Afghanistan : Women's rights trampled despite new law, IRIN, 08.03.2010 at page 44.

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