Federal Court  Cour fédérale

Date: 20201210

Docket: IMM-3670-19

Citation: 2020 FC 1141

Ottawa, Ontario, December 10, 2020

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

MAHDI SULIMAN NOURELDIN ABDELRAHMAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Abdelrahman is a citizen of Sudan. He fled Sudan in 2010 and has been living in Israel. He sought a temporary resident permit or TRP to enter Canada. Twice a visa officer with the Canadian Embassy in Tel Aviv denied his application on the basis of inadmissibility. Mr. Abdelrahman therefore seeks judicial review, again, this time of the more recent denial of his

TRP application on April 4, 2019 pursuant to subsection 24(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA], which reads as follows:

Temporary resident permit	**Permis de séjour temporaire**
24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.	**24 (1)** Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

[2] I grant the Applicant's judicial review application. I find the tribunal record is incomplete, with insufficient explanation and no meaningful way to assess the centrality of the missing documents. I also find that the officer's questioning, during Mr. Abdelrahman's interview, about his knowledge of other options for refugee resettlement was unfair. Overall, the second decision on Mr. Abdelrahman's TRP application is unreasonable.

[3] For the more detailed reasons that follow, the April 4, 2019 decision therefore is set aside and the matter is to be remitted to a different visa officer for reconsideration and redetermination.

II. Background

[4] The Applicant alleges torture and persecution at the hands of militia in Sudan who believed he was politically active against the government. He fled first to Egypt and then to Israel where he has been living since 2010. Mr. Abdelrahman fears more torture and persecution if he is deported and returned to Sudan as a failed refugee claimant. He submitted his TRP

application in 2017. He believed that he would not be admissible to Canada or would not meet the requirements of the IRPA for refugee protection. As a result, he claimed that the impediments he would face when submitting his refugee application, including not being registered with the United Nations High Commissioner for Refugees [UNHCR] and thus having no refugee status document [RSD], would justify granting him a TRP.

[5] A visa officer rejected the Applicant's TRP application on the basis that the application reads more like a request for refugee protection, and that were no compelling reasons to issue a TRP. Associate Chief Justice Gagné (as she now is) concluded that the brief reasons provided by the visa officer to dismiss the Applicant's TRP application (and reproduced in her decision) were insufficient to engage in a meaningful analysis of the issues Mr. Abdelrahman raised in his first judicial review application (*Abdelrahman v Canada (Citizenship and Immigration)*, 2018 FC 1085 [*Abdelrahman 2018*]). She therefore set aside the decision and sent the matter back for redetermination. I add that Associate Chief Justice Gagné's decision contains a review of the framework for assessing whether a TRP should be granted: *Abdelrahman 2018*, at paras 5-16.

[6] The visa officer interviewed the Applicant in Tel Aviv before issuing the April 4, 2019 decision. Mr. Abdelrahman explained his personal circumstances, including why he left Sudan and what he was doing in Israel. He presented his original Sudanese passport to the officer. He indicated that Israeli officials took this document away from him and kept it while he was in prison for a total of 1.5 years for immigration detention. He therefore could not access protection in Israel because he could not get refugee status. According to his statements during the

interview, Israeli officials returned his passport to him upon his release. When asked, he stated that he always had been able to renew his passport.

[7] After his release from immigration detention, Mr. Abdelrahman applied for asylum in Israel. He claimed he had not heard anything so far regarding his asylum application. He also clarified that he had applied by post to register with the UNHCR in 2011, but that when he attended the Israeli UNHCR office, much later in 2016, they did not have a record of him. He explained he got the feeling from the demeanor of the person with whom he spoke that it was not worth it to apply again, and confirmed that he had not followed up with the UNHCR since then.

[8] The visa officer noted Mr. Abdelrahman's statement that he completed school as far as Grade 7 and that his statements were consistent with his written narrative on file. In other words, the visa officer did not raise any credibility concerns. It was incumbent on the officer and the Respondent to raise any such concerns in clear and unmistakable terms: *Hilo v Canada,* [1991] FCJ No 228 (FCA).

[9] Mr. Abdelrahman also was questioned at length about the nature of his application and his knowledge about how to apply for refugee resettlement in Canada as a privately sponsored refugee.

[10] The visa officer concluded, in the Global Case Management System [GCMS] notes:

> PA applied for a TRP on the basis that he requires protection, and that there is no other category in which he can apply to go to Canada. While I am satisfied that he has compelling reasons to fear returning to Sudan and to seek a durable solution, I am not satisfied that he has no other option than a TRP. Specifically,

> I am not satisfied the [*sic*] he cannot apply for resettlement as a privately sponsored refugee. Based on PA's statements at the interview, he is not aware of the requirements or process to apply as a PSR, and has not made a serious effort to do so. Meanwhile, PA presented his current situation in Israel as stable – he is able to renew his visa, he is working, and he has had no issues with Israeli authorities since 2015. Refused.

[11] The April 4, 2019 letter from the Canadian Embassy, Immigration Section to Mr. Abdelrahman communicating the decision states in part:

> A Temporary Resident Permit is intended to allow entry to Canada in spite of inadmissibility, and it can be issued only in exceptional circumstances, based on compelling reasons. After a careful and sympathetic review, and after balancing all factors, I have determined that there are insufficient grounds to merit the issuance of a permit in your case.

III. Issues and Standard of Review

[12] The Applicant raises the following issues:

a. Did the Officer fetter their discretion or refuse to exercise their jurisdiction by misstating the law and by precluding a substantive analysis?

b. Did the Officer act without regard for the evidence when they qualified the applicant's situation in Israel as stable?

[13] The Respondent asserts instead that what is at issue is whether the visa officer's assessment of the Applicant's TRP application is reasonable. I agree. This requires an analysis of the visa officer's decision and reasons, which subsumes the issues raised by the Applicant. In addition, the Applicant raised the issue of the incomplete certified tribunal record at the hearing of this matter. I note that the Applicant's Notice of Application for Leave and Judicial Review

alleges breach of natural justice (which subsumes the duty of procedural fairness), among other grounds.

[14] The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. A reasonable decision is one "based on an internally coherent and rational chain of analysis" and justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, at para 85. To avoid judicial intervention, the decision also must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. The Court must avoid reassessing and reweighing the evidence before the decision maker; a decision may be unreasonable, however, if the decision maker "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, at paras 125-126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[15] Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific"; it must be determined with reference to all the circumstances, including the *Baker* factors: *Vavilov*, above at para 77. In sum, the focus of the reviewing court is whether the process was fair.

IV. Analysis

[16] I find in the case before me that the incompleteness of the record, coupled with the unfairness of the interview and unreasonableness of the decision, warrant sending the matter back for redetermination. Although I could allow the judicial review application on any one of these bases, because the matter already has been sent back once for redetermination, I believe that additional guidance from the Court is warranted.

(i) *Incomplete Tribunal Record*

[17] Starting with the certified tribunal record, I note that the first version produced by the Canadian Embassy was missing 50 pages. The second, amended version of the record still was missing three articles attached to the November 13, 2018 email from the Applicant's former representative. Subsequent to the filing of the second version of the record with the Court, and after both parties had filed their arguments, the visa officer who rendered the April 4, 2019 decision swore an affidavit, 11 months after the decision.

[18] The visa officer attested that, rather than printing a paper copy of the articles, the officer consulted them online; hence their omission from the amended record. Further, when the omission came to the officer's attention, the officer tried but was unable to locate the original email and, therefore, the officer was unable to produce a copy of the three news articles. The affidavit is silent about the two forms that also were attached to the email. The officer confirmed having consulted the articles online. The officer indicated that their content was similar to news

articles the Applicant previously submitted regarding Sudanese asylum seekers in Israel, including risks of return to Sudan, and that their content was taken into consideration.

[19] A difficulty I have with this evidence is that the copy of the November 13, 2018 email in the record shows that all the attachments were pdf documents. There do not appear to be any links to the articles in the email itself. The affidavit does not describe how the officer accessed the articles online, nor whether what was accessed online was identical to what was attached to the email. It also does not explain the reasons for doing so when copies of the articles are in hand, except perhaps to confirm their subsistence or veracity but the affidavit is silent about this.

[20] In any event, the articles are not contained in the Applicant's Record; thus, they are not before this Court and cannot be reviewed. This is the third scenario regarding incomplete tribunal records described in *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 at para 16, as cited in *Rasasoori v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 207 at para 13. The question therefore arises whether the missing articles were central to the finding under review. This is difficult to ascertain without the articles themselves. That said, because the officer was "satisfied that [Mr. Abdelrahman] has compelling reasons to fear returning to Sudan and to seek a durable solution," the apparent titles of the missing articles suggest their importance, if not centrality, to assessing the reasonableness of the April 4, 2019 decision: 10 key questions about Israel's African asylum seeker controversy _ The Times of Israel.pdf; 'More than 200 people' died in South Darfur camp _ Radio Dabanga.pdf; man dies during interrogation at sudan security office after deportation.pdf.

[21] More fundamentally, the affidavit appears to be directed to bolstering the Respondent's position that the decision maker's lack of reference the general documentary evidence on the conditions for African asylum seekers in Israel is not a reviewable error. It also appears to be a response to the Applicant's position that in the context of an application for a temporary visa, the officer's notes must indicate that the evidence was weighed: *Henry v Canada*, 2017 FC 1039 at para 30. No such weighing is evident in the GCMS notes. The finding of stability in Israel appears to be premised solely on the Applicant's statements at the interview about no difficulty renewing his passport, his job as a cleaner (as well as his previous job in construction) and no further detention or issues with the authorities since his last release in 2015. There is no acknowledgement of, or grappling with, the country condition documents submitted, including the missing articles, regarding the precarious situation of Sudanese asylum seekers in Israel nor the low numbers of those granted refugee status.

[22] It also is not evident on what basis the visa officer was satisfied that the Applicant "has compelling reasons to fear returning to Sudan and to seek a durable solution." I also agree with the Applicant that the decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 does not permit judicial retrofitting; dots can be connected only where the lines and their direction are evident and can be drawn readily: *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11; *Vavilov*, above at para 97.

[23] In the end, as noted in *Parveen v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 103, 1999 CanLII 7833 (FC) at para 9: "the respondent controls the record that

is put before the Court; an incomplete record alone could be grounds, in some circumstances, for setting aside a decision under review." I find such circumstances present in this case. When the matter is sent back for redetermination, the Applicant is to be provided with an opportunity to (re)submit the same or similar articles. Because Mr. Abdelrahman has different representation, it is not known whether copies of the same articles are in counsel's possession or available to counsel for submission.

(ii) *Unfair Interview*

[24] An Arabic-English interpreter was present at the interview for Mr. Abdelrahman and the record indicates they had no difficulty understanding each other. I find it incomprehensible, however, and hence procedurally unfair, that someone with only Grade 7 education and who "does not speak or read English" would be expected to understand the intricacies of the Canadian refugee protection system. This is exemplified by the following questioning [with the visa officer's questions bolded]:

> "**Do you know what kind of application you have with us, this application?** All I know is that I have a sponsor in Canada and they submitted this application. **Who helped you prepare this TRP application?** A Sudanese friend helped me to fill out the application […] **Did you pay for this application?** No, I never paid anything, [my friend] just helped me fill out the forms. **How did you come to submit this type of application in Canada, it is not the usual type of application we see from someone trying to go to Canada as a refugee?** There is a lawyer in Canada, my friends in Canada got in touch with the lawyer. My friend in Canada told me he would try to help me, that he would pay for the lawyer. […] **Are you aware of how to apply for refugee resettlement to Canada other than applying for a permit?** What do you mean… I do not understand. **Did you and your friends in Canada ever try to put together a privately sponsored refugee application?** What do you mean, I have an application now. **Did you ever try with your friends to make an application for resettlement as a privately sponsored refugee to Canada?** No, this is my first application. First I sent some forms to [a friend]

> to submit an application in Canada. Then [my friend] said they were not acceptable. So I sent some more forms. And now, this is my application."

[25] Mr. Abdelrahman's responses make it clear he did not understand the questions being asked of him.

(iii) *Unreasonable Second Decision*

[26] I find that this line of questioning resulted in part in the unintelligibility of the visa officer's decision. For example, the visa officer stated in the reasons reproduced above in paragraph 10: "PA applied for a TRP on the basis that he requires protection, and that there is no other category in which he can apply to go to Canada." Mr. Abdelrahman did not understand that there was some other basis, however, and further his statement was that his friend helped him fill out the forms.

[27] The officer also stated in the reasons: "Based on PA's statements at the interview, he is not aware of the requirements or process to apply as a PSR, and has not made a serious effort to do so." Mr. Rahman did not understand, however, the distinction between the different applications and that he should pursue one over the other. In his mind, he was pursuing the necessary application with which his friend was helping him. Even when the officer explained the PSR application process to Mr. Abdelrahman during the interview, it is not surprising he would comment that "he did not know about this." In my view, it is unintelligible that Mr. Abdelrahman should have been expected to "make a serious effort" to pursue a type of application about which he has no clear, if any understanding, nor that he would be expected to grasp the distinction in the course of the interview, even when explained to him.

[28] I further find the visa officer in the case before me made a similar error as described by Associate Chief Justice Gagné in *Abdelrahman 2018* in paragraphs 17-18. It is unclear whether the visa officer denied Mr. Abdelrahman's application because the reasons for seeking the TRP were not sufficiently compelling or because he should have applied for resettlement as a privately sponsored refugee. I find that the visa officer's interview of Mr. Abdelrahman unduly focused on the latter, to the exclusion of the former. As mentioned above in paragraph 21, notwithstanding the reference to "balancing all factors" in the April 4, 2019 decision letter, the reasons, including the GCMS notes, do not demonstrate that such balancing or weighing occurred: *Vavilov*, above at para 128.

[29] More fundamentally, I find there was no substantive analysis of whether the TRP should have been granted. The visa officer was satisfied that Mr. Abdelrahman has compelling reasons to fear returning to Sudan and to seek a durable solution. The fact that he may have other options than a TRP does not contradict or undermine that finding. Nor does the finding that the Applicant's current situation in Israel is stable, when there was no contextualization, balancing, or weighing of the Applicant's documentary evidence to the contrary. During the hearing before me, the Respondent submitted that the decision maker cannot rely simply on documentation, that it is necessary to look at the Applicant's circumstances. I find the converse applies as well regarding balancing and weighing, and this was not done in this case or, at best, was done selectively regarding the Applicant's situation in Israel. I agree with the Applicant that adverse country conditions can be inferred from evidence of harm to others who share the Applicant's profile: *Kanthasamy v Canada* (Citizenship and Immigration), 2015 SCC 61 at para 56.

V. Conclusion

[30] I conclude that the visa officer's April 4, 2019 decision and reasons do not rise to the level of justification, intelligibility and transparency demanded by *Vavilov*. I therefore grant the Applicant's judicial review application, and set aside the decision with the matter to be remitted to a different visa officer for reconsideration and redetermination.

[31] Neither party proposed a serious question of general importance for certification, and I find that none arises.

JUDGMENT in IMM-3670-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The April 4, 2019 decision is set aside and matter is to be remitted to a different visa officer for reconsideration and redetermination;
3. When the matter is sent back for redetermination, the Applicant is to be provided with an opportunity to (re)submit the same or similar articles as those attached to the November 13, 2018 email from the Applicant's former representative;
4. There is no question for certification; and
5. No costs are awarded.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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