Federal Court  Cour fédérale

Date: 20210514

Docket: IMM-7450-19

Citation: 2021 FC 451

[ENGLISH TRANSLATION]

Toronto, Ontario, May 14, 2021

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

PAMELA TSHIBANGILE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] By this application for judicial review, the applicant challenges the refusal of her application to immigrate to Canada under the Private Sponsorship of Refugees Program by an immigration officer of the Canadian High Commission in Dar es Salaam (Canadian High Commission), Tanzania. For the following reasons, the application is allowed.

II. FACTS

[2] The applicant is a citizen of the Democratic Republic of the Congo (DRC), a widow and the mother of two adult daughters. She alleges that in 2016, her family was subjected to atrocities in the DRC, including that she and her daughters were raped, and that her husband was killed. Following these events, the three women fled to Zambia in 2016, where they have been living in a refugee camp since 2018 thanks to the refugee status granted to them by the United Nation High Commissioner for Refugees (UNHCR).

[3] In 2019, the applicant filed an application with the Canadian High Commission to immigrate to Canada under the Private Sponsorship of Refugees Program, sponsored by a group of five Canadian citizens residing in Canada. On May 16, 2019, she had an interview with an immigration officer (the officer). The officer had initially concluded that the applicant was indeed a refugee due to the civil conflict in the DRC, which was seriously and personally affecting her.

[4] Upon further review of the file and biometrics, it was reported to the officer that the applicant's elder daughter (the elder daughter) traveled to Burundi in 2018 on a Congolese passport and obtained a United States study visa. With these documents, she allegedly remained in the United States for several months. On May 22, 2019, in light of this revelation, the officer sent a procedural fairness letter to the applicant, stating that he was no longer satisfied that the applicant met the criteria for immigration to Canada. This letter also states the officer's

suspicions as to the reality of the applicant's residence in a particularly troubled region of the DRC, as she was not originally from there.

[5] In her response dated May 23, 2019, the applicant informed the officer that she had no idea that her elder daughter held a Congolese passport, that she had traveled to Burundi to obtain it, or that she had traveled to the United States for her studies. She explained in her response to the procedural fairness letter that her elder daughter worked secretly with the help of a man she met in Zambia, who obtained a passport from the Congolese Embassy in Burundi, and who paid for the visa and her trip to the United States. She noted that she was not entirely surprised by her elder daughter's actions, as she had demonstrated runaway behaviour in the past. In addition, the applicant explained that she had lived in the conflict region of the DRC because her husband was originally from there.

III. IMPUGNED DECISION

[6] On November 28, 2019, the officer refused the application (the decision). The officer detailed his findings in a refusal letter and in his notes recorded in the Global Case Management System (GCMS notes). First, in his notes, the officer found it implausible that the elder daughter ran away to Burundi and subsequently to the United States for several months, without saying a word to her family upon her return to the refugee camp in Zambia. In addition, the officer found the story about the unknown man not credible. He noted that obtaining a study visa in the United States would have required evidence of significant financial resources and some degree of establishment through employment, which the alleged fraudster could not have produced.

[7] The officer also had doubts about the applicant's residence in the conflict area of the DCR. He stated that it was impossible to validate the origin of her husband because he was deceased. In addition, the applicant demonstrated a lack of specific knowledge about the nature of the conflicts in the region. The officer also noted the applicant's impeccable French-language skills, which he considered to be unusual among residents of the conflict area, who generally have a low level of education. Notwithstanding these observations, the officer also noted that the applicant's story is strangely similar to those of other Congolese refugees.

[8] Finally, the officer noted that the applicant was not originally from the province in question and that she had family in other parts of the DRC not ravaged by the conflict in question. He concluded that it is impossible to establish the applicant's current residence in Zambia, and that it is impossible to rule out the possibility of a durable solution in another part of the DRC.

IV. ISSUES

[9] There are two main issues in this proceeding. First, there is the issue of whether the officer's decision was reasonable. Second, I must determine whether there was a breach of procedural fairness to the detriment of the applicant.

V. DISCUSSION

A. *Standard of review*

[10] The standard of reasonableness applies to decisions of immigration officers (*Anku v Canada (Citizenship and Immigration)*, 2021 FC 125 at para 8 [*Anku*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*].

[11] In assessing a procedural fairness argument, the Court must consider whether the proceedings were conducted fairly and equitably in light of all the circumstances. The standard of correctness must be followed (*Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at paras 46–47; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway Company*]).

B. *Procedurally unfair decision-making process*

[12] The applicant alleges a breach of procedural fairness in the decision-making process, particularly regarding the conclusion that there could be a durable solution in the DRC, since she was never given the opportunity to make her arguments on this issue. The respondent rejects this argument, stating that the applicant knew what elements she had to prove and was given a full and fair opportunity to respond.

[13] In my opinion, there is merit to the applicant’s argument. It is undisputed that the officer properly called the applicant for an interview, provided her with an interpreter, ensured that she

understood the interpreter, invited her to ask any questions and raise any issues, and, following the interview, sent the procedural fairness letter. That said, in terms of procedural fairness, he still failed to take a fundamental step: according to the findings listed in the GCMS notes, the applicant was not asked the relevant questions.

[14] To better understand this failure, I first reproduce an extract from the procedural fairness letter:

> [TRANSLATION]
>
> One of the questions you were asked very clearly in the interview was:
>
> "Have you ever left Zambia since you arrived?"
>
> Your response to this question was that no, you never had a passport and you had never left Zambia since you arrived in this country in August 2016. However, it was reported to us that your daughter . . . applied for a visa with the US Embassy [in Burundi] in late 2018, which she was granted. As a result, she traveled by air to the United States. In addition, your daughter travelled using a Congolese passport, a country that supposedly persecutes you.
>
> This information undermines the credibility of your refugee protection claim and makes me question the following elements of your claim:
>
> - You are not originally from the [conflict] region. . . . You state that you moved to [the conflict region] in 1999, just as you stated that you never left Zambia or obtained a Congolese passport, statements that have proven to be false. I therefore have reason to believe that you and your family all hold passports and that it is possible that you still reside in the Congo.
>
> - You have stated that you have been residing in Zambia since August 2016, but your refugee certificate states that you have been living in the [refugee camp] since February 2018. Therefore, there is no way to verify that you have been living in Zambia for that long or even that you are living in the [refugee camp].

> - You stated that the [UNHCR] gave you flour and beans to help you survive and that you had to trade between [several villages] in order to survive. This representation of your economic status does not at all address the fact that one of your daughters can afford to travel first [to Burundi] and then to the United States.
>
> [Emphasis added.]

[15] This letter highlights the importance the officer placed on the disclosures about the elder daughter's whereabouts during the file review. The GCMS notes also reveal the key role that these disclosures played in the refusal of the application. The refusal letter reiterates this point.

[16] In fact, these disclosures were the only events that took place between the initial decision to grant the application, the issuance of the procedural fairness letter and the ultimate reversal of that decision. The officer did not point to any other new factors or information during the decision-making process that would justify the reversal of the application. The applicant argues that these revelations can be explained by the runaway behaviour of her elder daughter, yet they appear to have resulted in the reconsideration of several other aspects of the application, as outlined in the procedural fairness letter.

[17] The officer concluded, following the interview, that the applicant met the legal criteria for immigration to Canada, in particular because she was personally and significantly affected by the conflicts in the DRC; she met the definition of a refugee, given her story. However, the officer had a complete change of heart following the revelations about her daughter, doubting all aspects of the applicant's story from that point on. He wrote at the end of his interview in the GCMS notes:

> SELECTION DECISION:
>
> Based on information on file and [the] interview and in light of conditions in DRC, I am satisfied that the applicant has been seriously and personally affected by civil conflict and that the client meets the Asylum Class Definition. Based on info on file and provided by the applicant, I am satisfied the family does not have a prospect, within a reasonable time period, of a durable solution in their country of refuge. I am satisfied that the family will adapt successfully in Canada and become self-sufficient within a reasonable period of time.

[18] Most problematically, the officer subsequently appears to have based his refusal on several questions that were never asked of the applicant, either at the interview or in the procedural fairness letter. The officer's conclusions regarding these questions nevertheless undermined the credibility of the applicant's account. In other words, the final decision was based on different issues than those that had been brought to the applicant's attention, even though the officer never appeared to question the murder of the husband or the rape of the applicant and her daughters during the attack in the conflict region of the DRC.

[19] First, the officer never mentioned to the applicant that there was an apparent inconsistency regarding her elder daughter obtaining a study visa. According to the procedural fairness letter, the doubts raised by her travels were based on obtaining the Congolese passport and the financial resources required.

[20] However, the officer was not satisfied with the explanation provided by the applicant about the unknown man, concluding instead in the final decision that the granting of the study visa was inconsistent with that explanation. Not surprisingly, this explanation did not dispel the doubts raised in the final decision, since these differed from the initial doubts raised in the

procedural fairness letter. The applicant was therefore unable to speak to the officer's doubts because she did not know about them.

[21] The account of the elder daughter's whereabouts was central to the dismissal of the application, yet the officer never made his concerns about it clear to the applicant. Since he said nothing, the applicant did not have the opportunity to dispel those concerns.

[22] The same is true for the majority of the officer's findings. He concludes in the GCMS notes that the applicant's account resembled a "standard" account produced by other Congolese refugees, and did not demonstrate a sufficient level of knowledge of the conflict from which the applicant and her daughters allegedly fled. He also notes that the applicant spoke impeccable French, which was unexpected given that she was supposed to come from a province with a low level of education.

[23] Finally, the officer doubts that there is any durable solution for the applicant and her family in the DRC as she is from an area that is not in conflict. In addition, the officer notes that the applicant has family ties in other parts of the DRC not ravaged by the conflict.

[24] In my opinion, this case is similar to *Abasher v Canada (Citizenship and Immigration)*, 2019 FC 1591 [*Abasher*] and *Ge v Canada (Citizenship and Immigration)*, 2017 FC 594 [*Ge*]. The Court found a breach of procedural fairness. The decision maker had based his decision on a lack of credibility due to doubts arising from a response to a procedural fairness letter, without communicating these doubts to the applicants. Similarly, in *Abasher* (at paras 19 and 26) and *Ge*

(at paras 27 and 29), the Court found that these doubts should have been communicated to the applicants in order to give them an opportunity to respond.

[25] I consider the same to be true in this case. The officer should have disclosed to the applicant the inconsistencies noted in the GCMS notes. At a minimum, procedural fairness in these circumstances required that a second procedural fairness letter be sent. The decision-making process was therefore neither fair nor equitable, and this is sufficient reason to allow this application.

[26] At the hearing, the respondent attempted to justify not disclosing all the reservations noted in GCMS to the applicant, in two ways. First, he argued that these reservations (relating in particular to the applicant's good French, her origin, and her so-called "standard" and incomplete account of the conflict from which the applicant had fled) were rather observations made by the officer during the review of the file. The decision, according to the respondent, was not based on these observations, but rather on the reservations raised at the interview and in the procedural fairness letter.

[27] Moreover, the respondent argues that all of these reservations, including those noted in GCMS, stem entirely from the applicant's lack of credibility, which was undermined by the disclosures about her daughter.

[28] In my opinion, these arguments are unsatisfactory. First, as the respondent himself stated in his written submissions, the GCMS notes are part of the decision and provide insight into the

officer's analysis (see *Housou v Canada (Citizenship and Immigration)*, 2020 FC 964, at para 9). Until the contrary is proven, it is therefore assumed that the officer's decision is based in part on these notes.

[29] Moreover, the fundamental issue of procedural fairness remains whether the applicant was aware of the evidence to be rebutted and whether she had full opportunity to make her arguments on it (*Canadian Pacific Railway*, at para 56). In this case, the GCMS notes reveal several points on which the applicant was unable to make her arguments because she was never informed of them. It is therefore obvious that the applicant had neither the knowledge of this evidence to be rebutted, nor the opportunity to respond to it.

C. *Unreasonable decision*

[30] On the merits of the decision, the applicant challenges both the officer's findings and his reasoning. She argues that the officer did not explain why he found that the applicant was not a Convention refugee under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. He simply relied on that provision without analyzing the applicant's situation under that section. She also argues that the officer did not specify why the applicant did not meet the criteria set out in section 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002 227 [Regulations].

[31] In addition, the applicant submits that it was unreasonable for the officer to rely on the fact that her daughter had obtained a Congolese passport and then conclude that the applicant also had a Congolese passport and a durable solution in the DRC. Similarly, it was unreasonable

for him to rely on the false statement to refuse the application. On the one hand, the applicant argues that the false statement was not her own, but her daughter's. She states that her own statements were true. On the other hand, she argues that a misrepresentation can only justify the refusal of an application where it goes to the heart of the application, and she relies on the case law of *Koo v Canada (Citizenship and Immigration)*, 2008 FC 931 regarding the second point.

[32] I accept the applicant's argument that the application must also be allowed on the basis of the unreasonableness of the decision. First, the officer does not clearly explain why he concludes that she did not meet the criteria of section 96 of the IRPA, or section 147 of the Regulations. It is clear that the officer doubts that the applicant is currently living in a refugee camp in Zambia and that she fears for her life and the lives of her daughters. Apparently, his doubts are based only on the revelations about the elder daughter's movements and the fact that the applicant was not from the conflict region.

[33] It is correct, as the respondent observes, that the applicant has the burden of proving that she cannot resettle in her country of origin, that is, that there is no durable solution there (see *Anku* at para 24; *Shahbazian v Canada (Citizenship and Immigration)*, 2020 FC 680 at para 26). To meet this burden, the applicant provided the officer with certificates from the UNHCR confirming her refugee status in Zambia, granted in February 2018. I also note that there is a document in the record attesting to the fact that the applicant and her daughters were hosted by a church in Zambia for psychological care and support from November 2016 until they moved to the refugee camp in February 2018. This letter, along with a letter written by the elder daughter

and a medical record from a Zambian hospital, appears to validate several aspects of the applicant's account, including the psychological and sexual abuse they suffered in the DRC.

[34] In addition to explaining the revelation of the daughter's movements in her response to the procedural fairness letter, the applicant states that she met her deceased husband in a certain province of the DRC, where he was beginning his studies, because her father had been assigned to that region for work. When her husband finished his studies, the young couple moved to the conflict region, where her husband was originally from.

[35] In his refusal letter, the officer rejects these explanations without justification:

> [TRANSLATION]
>
> You were interviewed by an immigration officer on May 16 and the following concerns were identified during the interview:
>
> - You stated that you are living in destitute conditions in Zambia while your older daughter was in the United States for several months prior to the interview.
>
> - You are not from the [conflict] area . . . [and] you were born [somewhere else] and spent many years [in the area where your husband was studying]. This called into question your statements related to the events you experienced [in the conflict area].
>
> After reviewing your responses, I am not satisfied that you meet the immigration criteria for Canada as stated above. I do not find your explanations plausible and I am not satisfied that you do not have access to a durable solution in the DRC.
>
> [Emphasis added.]

[36] As noted above, however, the GCMS notes provide additional reasons that are inconsistent with the rationale in the refusal letter. This makes it very difficult for the Court, and

even more difficult for the applicant, to understand the real reasons for the application to be refused.

[37] The respondent argued at the hearing that the officer has professional expertise, and that it was therefore reasonable for him not to explain his reasoning regarding certain reservations raised in the file. Further, the respondent argued that these misrepresentations undermined the applicant's credibility sufficiently to call into question the underlying facts of her account, without necessarily having to explain everything in detail.

[38] I am not persuaded that these observations relieve the officer of the obligation to be transparent and consistent in his decision and reasoning. As the Supreme Court of Canada observed in *Vavilov* at para 84, a reviewing court analyzing the reasonableness of a decision must scrutinize the reasons, giving them respectful attention, in order to understand the line of reasoning followed by the decision maker in reaching his or her conclusion. The reasons, read as a whole, reveal an unreasonable decision when they "fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis" (at para 103). A decision is also unreasonable "if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point" (at para 103).

[39] In this case, the refusal letter, the GCMS notes and the procedural fairness letter reveal several inconsistencies in the officer's reasoning, particularly regarding the applicant's credibility. I must note the absence of a coherent chain of analysis to support the officer's conclusion that the applicant did not meet the criteria of section 96 of the IRPA and section 147

of the Regulations. Therefore, the impugned decision does not meet the standards of justification, transparency and intelligibility.

VI. CONCLUSION

[40] In light of the breach of procedural fairness and the unreasonableness of the impugned decision, this application is allowed.

JUDGMENT in IMM-7450-19

THIS COURT'S JUDGMENT is as follows:

1. The application is allowed.

2. The case is sent back to the tribunal for reconsideration by another officer.

3. There are no questions of general importance to certify.

"Alan S. Diner"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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