Federal Court  Cour fédérale

Date: 20220830

Docket: IMM-2336-20

Citation: 2022 FC 1234

Ottawa, Ontario, August 30, 2022

PRESENT: Mr. Justice Gascon

BETWEEN:

MOUTAZ RADIYEH, DORIS FARAH AND SERGIO RADIYEH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Moutaz Radiyeh, his wife Ms. Doris Farah and their minor son Sergio Radiyeh are all citizens of Syria. They are seeking judicial review of a decision rendered in February 2020 [Decision] by an international migration officer [Officer] of the Canadian Embassy in Beirut, Lebanon. In the Decision, the Officer dismissed their request for permanent residence made

under Canada's resettlement program because he/she was not satisfied, based on credibility concerns, that Mr. Radiyeh and Ms. Farah had established they were "not inadmissible" to Canada.

[2] Mr. Radiyeh and Ms. Farah ask this Court to set the Decision aside and to send their matter back for redetermination by a different immigration officer. They claim that the Decision is unreasonable, that the Officer breached the rules of procedural fairness, and that insufficient reasons were provided. They further seek an award of costs against the Minister.

[3] For the reasons below, I will grant Mr. Radiyeh and Ms. Farah's application. After considering the Officer's findings, the evidence presented and the applicable law, I find that, in the circumstances of this case, the Officer breached the rules of procedural fairness by failing to provide answers to the questions asked by Mr. Radiyeh and Ms. Farah about their application and to clarify his/her "concerns". This is sufficient to justify the intervention of this Court, and I must therefore remit the case for reconsideration by a different immigration officer. Given this conclusion, I do not have to deal with the other arguments challenging the reasonableness of the Decision or the insufficiency of the Officer's reasons.

II. Background

A. *The factual context*

[4] Mr. Radiyeh, a surgeon, and Ms. Farah, a dermatologist, met when working as physicians in Libya. In 1994, the couple married in that country and had three children: William, born in

1995; Petra, born in 1996; and Sergio, born in 2004. Now adults, Petra and William made separate requests for permanent residence and are not concerned by the Decision.

[5] In 2011, when a civil war erupted in Libya, the family fled Libya for Syria, their country of citizenship. The family owned significant assets in Syria, including apartments, empty land lots and a commercial venue. Unfortunately, political turmoil was also brewing in Syria at the time of their return, and the family soon had to flee again. Ms. Farah fled to Egypt with Petra and Sergio, while Mr. Radiyeh went to Lebanon with William. The family eventually reunited in Beirut, Lebanon, but it has kept moving significantly since then. Mr. Radiyeh and Ms. Farah are not authorized to practise medicine in Lebanon.

[6] In September 2018, the family applied, via three distinct applications due to Petra and William's age, for permanent residence in Canada through the Private Sponsorship of Refugees program. The sponsorship agreement holder for their applications was The Presbyterian Church in Canada.

[7] In June 2019, the family underwent an initial eligibility interview at the Canadian Embassy in Beirut. Petra's application was accepted following that interview, but Mr. Radiyeh, Ms. Farah and William were asked to attend a second interview to be held in early February 2020[1]. That second interview pertained to admissibility and security concerns. Of note, different visa officers held the two interviews, and the second interview was conducted in the presence of an interpreter.

[1] The Decision erroneously states that the second interview was held on January 30, 2020.

[8] William did not attend the second interview due to an alleged argument with his father, and his case was resolved in a distinct administrative decision. Further to the second interview, the Officer dismissed Mr. Radiyeh and Ms. Farah's application.

B. *The Decision under review*

[9] In the Decision, the Officer indicated he had reminded Mr. Radiyeh and Ms. Farah that they had agreed, at the interview, to be truthful in their responses. He/she warned them that a finding to the contrary could result in the refusal of their application. The Officer further reminded the couple that they had confirmed they could understand the interpreter, and that they had never signalled any difficulty in this regard during the interview. The Officer continued by stating that the objective of the second interview was to ensure Mr. Radiyeh and Ms. Farah were "not inadmissible" to Canada.

[10] At the end of the interview, the Officer shared with the couple that "concerns" remained with their application. The Officer offered Mr. Radiyeh and Ms. Farah the opportunity to clarify their responses, but their clarifications did not disabuse the Officer of his/her concerns. For the Officer, these concerns pertained to the vagueness and inconsistencies in Mr. Radiyeh and Ms. Farah's responses to questions regarding their work, employment, and frequent returns to Syria.

[11] Having set aside the information at the source of his/her credibility concerns, the Officer refused the application for resettlement, on the ground that the couple had not satisfied him/her that they met the statutory requirements for their permanent residence application and were not

inadmissible to Canada. A copy of the Global Case Management System [GCMS] notes, which form part of the Decision and contain a transcription of the two interviews, was attached to the Decision.

[12] In his/her post-interview notes, the Officer mentioned that the vagueness in the couple's responses to his/her questions was "seemingly intentional," and essentially had to do with Mr. Radiyeh's residence, return and medical work in Syria. More specifically, the Officer observed that this information was "material" to an assessment of the couple's admissibility to Canada, given that it could help determine whether they had been in contact with fighters or government agents in Syria, Egypt and Libya who may have been implicated "in war crimes or crimes against humanity". The Officer added that "medical personnel" used to be present for the "monitoring of prisoners" and the "treatment of prisoners". The Officer further noted that both Mr. Radiyeh and Ms. Farah had difficulty providing a consistent basic history of residence, work and travel during the interview, and that their clarifications had not alleviated his/her credibility concerns.

[13] For those reasons, the Officer dismissed Mr. Radiyeh and Ms. Farah's application.

C. *The standard of review*

[14] Mr. Radiyeh and Ms. Farah submit, and I agree, that the Decision gives rise to a multitude of issues that are reviewable on the standards of either reasonableness or correctness (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817).

[15] In *Vavilov*, the Supreme Court of Canada set out a revised framework for determining the standard of review with respect to the merits of administrative decisions (*Vavilov* at para 10). In that decision, the court held that administrative decisions should presumptively be reviewed on a standard of reasonableness, unless either the legislative intent or the rule of law requires the standard of correctness (*Vavilov* at paras 10, 17). None of these exceptions applies in this case, and the standard of reasonableness governs the review of the Decision's merits.

[16] *Vavilov* did not deal directly with issues of procedural fairness, and the approach to be taken on this front has therefore not been modified (*Vavilov* at para 23). It has typically been held that correctness is the applicable standard of review for determining whether a decision maker complies with the duty of procedural fairness and the principles of fundamental justice (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107).

[17] However, the Federal Court of Appeal has affirmed that questions of procedural fairness are not truly decided according to any particular standard of review. Rather, it is a legal question for the reviewing courts, and the courts must be satisfied that the procedure was fair, having regard to all of the circumstances (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*,

2018 FCA 69 [*CPR*] at para 54). The ultimate question raised when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review is not so much whether the decision was "correct". It is rather whether, taking into account the particular context and circumstances at issue, the process followed by the decision maker was fair and offered the affected parties a right to be heard as well as a full and fair opportunity to know the case they have to meet and to respond to it (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration),* 2018 FC 940 at paras 51–54). No deference is owed to administrative decision makers on matters raising procedural fairness concerns.

III. Analysis

[18] In their challenge of the Officer's Decision, Mr. Radiyeh and Ms. Farah argue that the Officer breached the rules of procedural fairness in several respects, the main one being that he/she refused to clarify his/her admissibility concerns with their application and failed to provide them with an opportunity to respond to them.

[19] I agree with the applicants. The post-interview notes of the Officer reveal that in this case, he/she had highly specific concerns, but failed to voice any of them despite the express statements made by Mr. Radiyeh and Ms. Farah to the effect that they simply could not understand them.

[20] I agree with the Minister that an immigration officer generally has no duty to tell an applicant how he/she falls short of the requirements that permanent residence applicants need to meet under particular provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[IRPA] and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] (*Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283 at para 24). When seeking immigration to Canada, the onus lies on the applicant to demonstrate that he/she meets the requirements set out in the legislation regarding the relevant type of visa sought. Here, Mr. Radiyeh and Ms. Farah hoped to be selected for permanent residence in Canada as refugees under subsection 12(3) of the IRPA and, more specifically, as humanitarian-protected persons abroad under sections 146 and 147 of the IRPR. One of the general requirements for this category of permanent residence applicants is that they satisfy the immigration officer that they are "not inadmissible" to Canada (paragraph 139(1)(i) of the IRPR).

[21] I also do not dispute that in interview settings such as this one, the duty to inform applicants of concerns with their permanent resident applications is generally met where "the visa officer adopts an appropriate line of questioning or makes reasonable inquiries which give the applicant the opportunity to respond" and where the "applicant is confronted with the concerns of the officer […] and […] given a reasonable opportunity to respond" (*Adil v Canada (Citizenship and Immigration)*, 2010 FC 987 at para 46, citing *Rahim v Canada (Citizenship and Immigration)*, 2006 FC 1252 at paras 15–16). In addition, I am mindful of the fact that the duty of fairness owed in the context of permanent residence interviews abroad falls at the relatively low end of the spectrum (*Lyu v Canada (Citizenship and Immigration)*, 2020 FC 134 at para 13; *Gur v Canada (Citizenship and Immigration)*, 2019 FC 1275 at paras 16–17).

[22] Furthermore, it is true that, before ruling that an applicant is "not inadmissible," an officer does not have to make a specific finding of inadmissibility or to identify any particular

ground for “inadmissibility” (*Puigdemont Casamajo v Canada (Immigration, Refugees and Citizenship)*, 2021 FC 975 at para 40; *Ramalingam v Canada (Citizenship and Immigration)*, 2011 FC 278 [*Ramalingam*] at paras 37, 48). It is notably the case when an officer cannot determine that an applicant is “not inadmissible” because an applicant has failed to provide a complete picture of his background (*Ramalingam* at para 37).

[23] However, the circumstances of the present case are particular. Immediately after the interview ended, the Officer expressly penned down, in the GCMS notes, the specific issues and concerns he/she had relating to potential war crimes and crimes against humanity in Syria, Egypt and Libya, and to medical personnel — such as the couple, presumably — having been used to monitor or treat prisoners. Needless to say, those were highly specific concerns, and very serious ones. None of those concerns were apparent at the interview or transpired from the Officer’s questioning of Mr. Radiyeh and Ms. Farah.

[24] I acknowledge that, over the course of the interview, the Officer provided Mr. Radiyeh and Ms. Farah with opportunities to address the inconsistencies and contradictions in their answers to questions about their admissibility. For instance, the Officer repeated and reformulated his/her questions on different occasions, and reminded the couple that they were under an obligation to tell the truth. The Officer also formally provided an opportunity to Mr. Radiyeh and Ms. Farah to address his/her concerns at the end of the interview.

[25] But in response to the Officer, Mr. Radiyeh and Ms. Farah repeatedly said they did not understand or know what the Officer meant when he/she was expressing concerns about the

information they had provided. Impervious to the couple's lack of understanding, the Officer made no effort whatsoever to explain what his/her concerns amounted to, and to give Mr. Radiyeh and Ms. Farah an opportunity to respond to them. In my view, in a situation like this one — where the Officer clearly had highly specific reasons underpinning his concerns and the applicants expressly stated that they did not understand the general "concerns" raised —, the Officer breached his/her duty of procedural fairness by failing to articulate those concerns at the interview itself and to provide Mr. Radiyeh and Ms. Farah a reasonable opportunity to respond to them.

[26] The Minister claims that it is not a matter of not having had a chance to address the Officer's concerns but rather one of unsatisfactory answers by Mr. Radiyeh and Ms. Farah. With respect, I cannot agree. Here, the Officer evidently had very precise apprehensions that he immediately entered in his/her post-interview notes. However, none of these basic elements underlying the Officer's concerns were brought to Mr. Radiyeh and Ms. Farah's attention. The couple was instead left to speculate on the actual grounds for the Officer's concerns. Despite repeated statements by Mr. Radiyeh and Ms. Farah indicating that they did not understand the Officer's questions and issues, the Officer never explained, nor even tried to explain, what those concerns were. In sum, the Officer exhibited a Kafkaesque indifference to the applicants' lack of understanding, denying them a full and fair opportunity to know the case they had to meet and to meaningfully participate in the administrative process before the Officer (*Helal v Canada (Citizenship and Immigration)*, 2019 FC 37 at para 23).

[27] Procedural fairness was never intended to be a cat and mouse game between decision makers and the persons appearing before them, nor should it ever become one. It is rather a process that decision makers are vested to embrace and protect.

[28] I accept that a visa officer has no obligation to ask questions about an applicant's admissibility to Canada and can rely on inconsistencies in the evidence to conclude that he/she is unable to establish that an applicant is "not inadmissible" (*Noori v Canada (Citizenship and Immigration)*, 2017 FC 1095 at paras 17–18; *Muthui v Canada (Citizenship and Immigration)*, 2014 FC 105 at para 33). However, when a visa officer doubts the credibility of an applicant, he/she is required to make disclosure of the specific concerns, issues, facts or documents of which the applicant is unaware, so that the applicant knows the case to meet and has a reasonable opportunity to adduce additional evidence and/or to make submissions in relation to that disclosure (*Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 at paras 37–38; *Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321 at para 80). Here, the Officer had real concerns regarding Mr. Radiyeh and Ms. Farah's application, but decided not to forthrightly share those concerns with them before rendering his/her Decision.

[29] Procedural unfairness needs darkness to survive and grow. This is precisely where the Officer has kept Mr. Radiyeh and Ms. Farah regarding the specific concerns that he/she evidently had about their application.

[30] I must add that, in this case, the Officer's Decision hurts common sense just as much as the rules of procedural fairness. It is troubling to see that the Officer ended up writing elaborate

concerns in the GCMS notes in the minutes following the interview, after having turned a deaf ear to Mr. Radiyeh and Ms. Farah's repeated affirmations that they simply did not understand his/her concerns. When a person voices a lack of understanding to an administrative decision maker, the bare minimum is for this decision maker to provide at least some explanation or clarification.

[31] In light of my conclusions on the breach of procedural fairness, I need not address Mr. Radiyeh and Ms. Farah's other arguments regarding the reasonableness of the Decision or the Officer's alleged failure to provide sufficient reasons.

[32] Mr. Radiyeh and Ms. Farah further submit that the Court should award costs in their favour in this matter. They rely on *Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262 [*Johnson*], where the Court stated that costs can be granted in cases where, for example, a party acted in a manner that could be characterized as "unfair, oppressive, improper or actuated by bad faith" (*Johnson* at para 26). Mr. Radiyeh and Ms. Farah claim that the Minister's conduct in this matter can be characterized as such.

[33] I disagree.

[34] In immigration matters, an award of costs is subject to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, which provides that no costs shall be awarded on applications for leave and judicial review but for "special reasons". The threshold for establishing the existence of "special reasons" is high (*Aleaf v Canada*

(Citizenship and Immigration), 2015 FC 445 at para 45). These "special reasons" can pertain, among others, to the nature of the case, the behaviour of the applicant, the behaviour of the Minister or of an immigration official, or to the behaviour of counsel (*Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 [*Ndungu*] at para 7).

[35] The cases in which the Minister's or an immigration official's conduct led to an award of costs include, among others, situations where:

> - The Minister causes an applicant to suffer a significant waste of time and resources by taking inconsistent positions before the courts;
> - An immigration official circumvents a court order;
> - An immigration official engages in conduct that is misleading or abusive;
> - An immigration official issues a decision only after an unreasonable and unjustified delay;
> - The Minister unreasonably opposes an obviously meritorious application for judicial review.
>
> *Canada (Citizenship and Immigration) v Suleiman*, 2015 FC 891 at para 48, referring to *Ndungu*

[36] None of these situations exists here, even though I found that the Officer breached the rules of procedural fairness in rendering the Decision. No award of costs is therefore justified in this case.

IV. Conclusion

[37] For all the reasons detailed above, I conclude that the administrative process followed by the Officer did not achieve the basic level of procedural fairness required in the circumstances of this case, and that it was procedurally unfair. Since Mr. Radiyeh and Ms. Farah were not given a full and fair opportunity to be heard and to understand the case they had to meet, I must allow this application for judicial review and return the matter to have their application redetermined by a different immigration officer, in accordance with the Court's reasons.

[38] No costs are awarded and there are no questions of general importance to be certified.

JUDGMENT in IMM-2336-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted, without costs.

2. The decision of the international migration officer dated February 7, 2020, rejecting the applicants' application for permanent residence, is set aside and the matter is referred back to a different immigration officer for redetermination on the merits, in accordance with the Court's reasons.

3. No question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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