

Federal Court



Cour fédérale

Date: 20191211

Docket: IMM-2180-19

Citation: 2019 FC 1591

Calgary, Alberta, December 11, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

ABUZAR MUSA ABASHER

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision by an immigration officer [Officer] dated March 7, 2019, whereby the Applicant's application for a permanent resident visa to Canada as a member of the Convention Refugees Abroad and Humanitarian-Protected Persons Abroad Class was refused [Decision]. For the reasons that follow, I will grant this judicial review.

I. Background

[2] The Applicant is a 34-year old citizen of Sudan who currently resides in Turkey. The United Nations High Commissioner for Refugees [UNHCR] recognized him as a refugee in 2016. A group of five individuals, including two of his brothers, subsequently sponsored him to come to Canada.

[3] He accordingly completed an application for permanent residence as a member of the Convention Refugees Abroad Class [CRAC], as well as the Humanitarian-Protected Persons Abroad Class – specifically, the Country of Asylum Class [COAC]. As part of that application, the Applicant provided a statement containing his narrative, detailing (in Arabic) the reasons he fled Sudan.

[4] The Applicant deposes in this judicial review that this statement was sent to his brothers in Canada to be translated. The Applicant, along with a brother, confirm in their respective Affidavits that his brothers had someone in Canada assist with translating the statement from Arabic to English. The Applicant further explains that he does not read or understand English, and as such, he has never read the translated statement. The brothers sent the statement directly to the Immigration, Refugees and Citizenship Canada [IRCC] processing centre in Winnipeg, Manitoba, which the adjudicating Officer ultimately reviewed at the Embassy of Canada in Ankara, Turkey.

[5] On January 8, 2019, the Officer interviewed the Applicant. An interpreter was present during the interview, sitting behind the glass with the Officer. The Officer asked the Applicant if he could understand the interpreter. The Applicant answered in the affirmative. The Officer also told the Applicant to advise if, at any time during the interview, the Applicant did not understand or was having difficulties. In his affidavit, the Applicant deposes that it was difficult to hear the interpreter properly, and he wonders whether the interpreter could also hear him properly.

[6] On January 30, 2019, the Officer sent the Applicant a procedural fairness letter [Fairness Letter]. In the Fairness Letter, the Officer indicated that the Applicant presented information that was not credible during the interview. The Officer particularly noted that while the Applicant stated that he feared for his life in Sudan, he was still able to obtain a passport and go to Egypt. Later, he was able to return to Sudan by ‘conventional means’, i.e. air travel. The Officer then noted that if the Applicant feared for his life, he would not have openly returned to Sudan.

[7] On February 16, 2019, the Applicant provided a response to the Fairness Letter [Response], which he deposes his brother wrote and sent to the Officer by a word document attached to an e-mail, in the Applicant’s name. According to the Applicant, his brother had not informed him of the content of the Response before it was sent. Prior to the Decision being made, the Applicant’s brother verbally translated the document to him. The Applicant contends in his Affidavit, that there were several errors in the translated document, but he and his brother both state in their respective affidavits that they did not know how to fix those errors since the Response had already been sent to the Visa Office.

II. Decision under Review

[8] In the Decision, the Officer determined that the Applicant did not meet the requirements for immigration to Canada. The Officer noted that the Applicant was assisted by an interpreter during the interview, and at no point did the Applicant indicate that he had difficulty in understanding the interpreter or in having the interpreter understand him.

[9] After reviewing the application, the Officer was not satisfied that the Applicant established a well-founded fear of persecution or that he has been seriously and personally affected by civil war, armed conflict, or a violation of human rights. Consequently, the Officer was not satisfied that there is a reasonable chance or good grounds that the Applicant is a member of either of the CRAC or COAC classes. The Officer stated that he was not satisfied that the Applicant had been truthful and forthcoming with the information provided.

[10] In particular, regarding his activities in Egypt, the Officer indicated that the Applicant's Response contained information that was inconsistent with what he had provided at the interview. The Response therefore did not allay the Officer's credibility concerns. The Officer further noted the following inconsistencies between the Global Case Management System [GCMS] notes, the Applicant's Response, and the information previously provided by the Applicant at both the interview and in the original application materials:

- a) the date he was terminated by his employer in Sudan, i.e. whether August or September 2011;

- b) employment in Egypt: in his interview, he stated he was not working; his Response indicated that he was; his original forms were silent regarding any work in Egypt;
- c) whether his Sudanese colleague in Egypt was arrested by the Sudanese or Egyptian security services, which prompted his return back to Sudan;
- d) that co-workers at the farm in Egypt warned him not to return, a fact not mentioned in the interview (during which he also stated he was not working); and
- e) where he stayed after his return to Sudan –whether in Khartoum (as in his Response) or in Al Halfa for 3 to 4 months with another month in Khartoum (as stated in the interview).

[11] The Officer found these inconsistencies impugned the credibility of the Applicant’s account of why he left Sudan the first time, as well as the reason he returned by “legal” and “conventional” means when he feared persecution. The Officer refused his application.

III. Analysis

[12] The Applicant contends that the Decision was both unfair and unreasonable, in that the Officer failed to (i) confront the Applicant with various concerns and provide him with an opportunity to respond to them, and (ii) properly consider the requirements of the refugee classes in question. The parties agree that (i) correctness (*Pushparasa v Canada (Minister of Citizenship and Immigration)*, 2015 FC 828, at para 19), and (ii) reasonableness (*Habte v Canada (Citizenship and Immigration)*, 2019 FC 327, at para 17) standards of review apply, respectively.

[13] First, regarding procedural fairness, the Applicant claims that the Officer failed in his obligation to advise on the case that he had to meet and the concerns, specifically with respect to the five credibility issues outlined in (a) through (e) above, which the Officer neither raised in the interview nor in the Fairness Letter. The Applicant relies, in part on the relevant Immigration, Refugee and Citizenship Canada policy, as contained in the “Program Delivery Instructions” [Instructions] entitled “*Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes*” (COAC falls into the latter Class). Regarding credibility and fairness, the Instructions state:

Address applicant with credibility concerns

Applicants should be questioned about the contradictions in their story. Moreover, any explanation provided by the applicant should be addressed by the officer and they must consider whether the explanation is reasonable in all circumstances. Also, any unresolved inconsistency or concerns regarding an explanation are to be raised by the officer.

Do not show undue eagerness in attempting to find contradictions

Officers should not be over-vigilant by microscopically examining the applicant. This is especially so where an interpreter is being used. Officers must not search through the evidence looking for inconsistencies or for evidence that lacks credibility thereby “building a case” against the applicant’s credibility.

[14] The Respondent counters that the five inconsistencies and the credibility concerns arising from them, only arose upon receipt of the Applicant’s Response. Therefore, the Officer could not have alerted the Applicant to them in the earlier Fairness Letter, as the Applicant had not yet provided the inconsistent information. The Applicant cannot now argue that he is surprised that credibility concerns arose because his written response was inconsistent with his interview responses.

[15] For the most part, I find the process to have been fair to the Applicant. The Officer called him in for an interview, ensured the presence of an interpreter, checked with the Applicant that he understood the interpreter, and advised him to ask any questions or raise any concerns should he be unclear about any of the proceedings. The Officer then issued the Fairness Letter, and awaited the Response before making the decision. Thus, in form at least, the process had the hallmarks of fairness.

[16] However, I find that the Officer missed one important step in ensuring fairness for the Applicant. To understand this step, I will first reproduce the central part of the Officer's Fairness Letter:

In your case, I have concerns that you have not been truthful and forthcoming with the information you provided in support of this application. At interview, your obligation to be truthful and honest was made clear to you from the outset. Still, you presented information which was not credible. In particular, you stated that you feared for your life after you were released from detention, yet you were freely able to obtain a passport and depart Sudan four months later without incident. You then returned to Sudan by conventionally [sic] means, as shown by the entry and exit stamps in your passport copy that you provided and you continued to reside in Sudan until you departed the country to go to Turkey in September 2013. It is reasonable to believe that if you feared for your life, you would not openly return to the country you were fleeing from.

[Emphasis added.]

Clearly, the focus in the Fairness Letter was on the “conventional” entry and exit from Sudan. The Officer only raised the exit from Sudan and reavilment to Sudan from Egypt, and the relative ease with which those occurred.

[17] However, the Decision grounded the credibility concerns on the inconsistencies (outlined in (a) through (e), above) between the Applicant's Response, interview and/or prior submissions, which went beyond the concern raised in the Fairness Letter about the relative ease of departing and re-entering Sudan. The credibility issues raised by the Officer in these five points contained in the GCMS notes (again, part of the Decision) focus on details outside of the departure and return to Sudan; rather they encompass work and residency details both in the Sudan and subsequently in Egypt. Indeed, the key paragraph in the Decision begins with exactly the same language cited above from the Fairness Letter, with a change in focus in the second half of the letter:

In your case, I am not satisfied that you have been truthful and forthcoming with the information you provided in support of this application. At interview, your obligation to be truthful and honest was made clear to you from the outset. Still, you presented information which was not credible. In particular, you presented information at interview about what you were doing in Egypt that was inconsistent with information you presented in your response to the procedural fairness letter. You also presented information in your interview that was not credible concerning your departure and return to Sudan.

[Emphasis added.]

[18] The focus of the credibility finding changed without providing the Applicant a chance to explain. Contrary to the Instructions, the unresolved inconsistency or concerns regarding an explanation were not raised by the Officer. Indeed, even the Applicant's Response to the Fairness Letter speaking to the exit and entry issues were not addressed by the Officer. Rather, s/he simply stated that the movements were "not credible".

[19] The error here in failing to properly alert the Applicant of decisive credibility concerns is reminiscent of that discussed by Justice Southcott in *Ge v Canada (Citizenship and Immigration)*, 2017 FC 594, [*Ge*], who found that the officer should have provided the applicants for permanent resident status with a second opportunity to address the concerns which arose based on their response to the first procedural fairness letter. Like in *Ge*, the Officer's credibility concerns arose from the Applicants' Response to the Fairness Letter. Those fatal concerns were unrelated to the concerns earlier set out in the letter (see *Ge*, at para 27). There, Justice Southcott went on to write at para 29:

In my view, the concerns on the basis of which the Respondent now seeks to sustain the Officer's decision were clearly credibility concerns, being determinations that the Applicants were not being candid in their procedural fairness responses. Yet the Applicants were not made aware of these concerns, as they arose only after the Officer received the Applicants' responses, and the Officer made the decisions without any further communications with the Applicants.

[Emphasis added.]

[20] Here too, I find that the new concerns raised in grounds (a) through (e), which differed from those raised in the Fairness Letter, should have been put to the Applicant, giving him an opportunity to respond. In other words, the Officer should have provided a second procedural fairness letter.

[21] The Respondent raises the point that ultimately there was no credible story upon which to base a claim. The Respondent cautions that there was no need to revisit all of the points with the Applicant through another letter, which would create an endless cycle of fairness notices.

[22] I am mindful that in occasional circumstances, a decision can be upheld despite a procedural fairness violation, where the outcome is inevitable (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at para 53). Here, I do not find that we are in the presence of any such foregone conclusion, as the Applicant may have been able to explain the reason for the inconsistencies (see also *Olah v Canada (Citizenship and Immigration)*, 2016 FC 316 at para 28).

[23] Having said that, I make this finding with caution and given three very unique factors present that distinguish this Applicant from the average applicant for permanent residence. First, the Applicant had been privately sponsored by a group of Canadians, and was applying for refugee status abroad. Second, the Applicant had already been recognized as a refugee by the UNHCR, living in another country. Third, neither the Applicant nor the Canadian sponsorship group were represented by counsel. These combined factors suggest that this Applicant is in a vulnerable place, and thus differs from a plain vanilla application for Canadian permanent residence from abroad, whether that be in a skilled worker, family class, or other category. I would heed the Respondent's cautions regarding deference owed to credibility findings, and specifically those made in this case.

[24] The Applicant raised another procedural fairness issue regarding the quality of interpretation, both at the interview, and of the original narrative, which he states impacted fairness. The Respondent opposed those arguments. I will not address the merits of the translation issue, given the gap in fairness that arises simply from the nature of the credibility findings made, and the lack of opportunity to explain them. Indeed, in my view, had the

Applicant been given an opportunity to explain the inconsistencies, the interpreter and translation issues would likely have been addressed.

[25] Similarly, there is no need to address the merits of the second issue raised, that of the reasonableness of the Decision. However, I will say that, should this issue come up in the redetermination of this visa application, when dealing with an individual who has already been determined by the UNHCR to be a refugee such as this Applicant, the IRCC officer should address, in clear terms, whether the Applicant would face persecution (under CRAC) or a related risk (under COAC) in the future, based on the Applicant's profile. There are differences between CRAC and COAC. If refusing the application, the reviewing officer should explain – even if briefly - why there is no forward-looking risk for the Applicant under each category, given his profile (see *Khedri v Canada (Citizenship and Immigration)*, 2015 FC 326 at paras 19-20).

IV. Conclusion

[26] In sum, to say that the Officer complied with the requirements of fairness would be to elevate form over substance: while the Applicant had the hallmarks of a fair process given his interview, access to an interpreter, follow-up Fairness Letter, and receipt of his Response, fairness was illusory given that the refusal was based on credibility grounds not raised until the final Decision was issued. As I find this procedural fairness issue to be determinative, none will be made on the reasonableness grounds challenged.

JUDGMENT in IMM-2180-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The matter will be returned to Immigration, Refugees and Citizenship Canada for reconsideration by a different officer.
3. No questions for certification were argued, and I agree none arise.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2180-19

STYLE OF CAUSE: ABUZAR MUSA ABASHER V THE MINISTER OF
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