Federal Court  Cour fédérale

Date: 20200211

Docket: IMM-3019-19

Citation: 2020 FC 227

Ottawa, Ontario, February 11, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MATTHEW JOHN DONNELLAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [the *Act*] of the refusal of a visa officer to issue a temporary resident visa to this applicant.

[2] This application must be granted because of a complete lack of justification for the refusal. Although the obtaining of a visa is in the nature of a privilege, there is still a requirement

at law that there be a justification for the decision made. In the case at hand, not even a minimal justification is provided for the decision, whether it be in the decision letter itself or in the Global Case Management System (GCMS) which complements the decision letter; the notes found therein are part of a decision made (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para 44).

[3] Here, the decision letter is simply that, a decision letter. It does not provide any information as to why the temporary resident permit, which is sought by the applicant, is denied. The letter, dated March 22, 2019, simply states that the applicant is inadmissible having been found guilty of an offence abroad, which falls in the category described at paragraph 36(2)(b) of the *Act*. It further states that the Temporary Resident Permit (TRP) will be issued only in exceptional circumstances and, in this case, "there are insufficient grounds to merit the issuance of a permit in your case". No explanation is given for reaching that conclusion.

[4] The GCMS notes provide the reader with the facts in this case, but little more. One can read the following in the notes:

> SUMMARY: -PA is an Irish national residing and working in Galway, Ireland as a lead carpenter. … At a house party to celebrate a friend's graduation, the celebration became more jubilant as more friends arrived. Despite not intending to drink heavily or stay late, PA drank more than intended. PA fell asleep for a short time, waking in the early morning. He needed to go home prior to going to work, so he drove the 15 minutes home. - PA expresses his regret at his decision to drive, referring to it variously as irresponsible, ill-considered, stupid, and dangerous. He expresses his remorse repeatedly. He states that it is fortunate that he did not cause any injuries or damage, and that he has no intention of taking such a decision again. PA states that the 24 month driving ban was onerous for him, particularly in relation to his job and driving to work sites. PA states that his family was

> supportive of him, and helped him during that time. -CADCIT girlfriend provides letter of invitation/character ref. She speaks positively of PA, noting that he is an honest, generous, open and forthcoming person. She speaks highly of his work ethic and his progression in his career. She provides examples of his generous and unselfish nature, and of his going out of his way to help others, including strangers. She states that PA has expressed to her his remorse over his conviction, and that he is now more responsible wrt his alcohol consumption. She states that they intend to get married and live in Canada, and provides their rationale for wanting to make their life in Canada vs in Ireland - she is well established as an engineer and his career is more portable than hers. She states that he is not eligible for rehab at this time, but that a TRP will enable them to continue their lives together, in Canada, whilst he cannot permanently overcome the conviction. She states she visits him frequently in Ireland, every 3-4 months.

[5] The issuance of a TRP is certainly a measure of exception. Subsection 24(1) of the *Act* provides specifically for that measure:

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.

Obviously, the visa officer would have to state why she is of the opinion that the temporary resident visa is not justified in the circumstances. The *Act* provides specifically that the Minister can issue guidance in the application of subsection 24(4) as "the officer shall act in accordance with any instructions that the Minister may make" (subsection 24(3)).

[6] In effect, such instructions have been issued. The operational instructions on TRP include the following considerations specific to inadmissibility on criminality grounds:

> *Risk assessment*
>
> *In reviewing criminal cases, officers should verify the time elapsed since the sentence was served to determine whether the client might be eligible for rehabilitation or is deemed rehabilitated. The onus is on the client to demonstrate their level of risk and that further criminal activity is unlikely.*
>
> *Officers should assess:*
>
> - *the seriousness of the offence*
> - *the chances of committing further offences*
> - *any behavioural or medical factors involved*
> - *evidence of reform or rehabilitation*
> - *whether the influence of drugs, alcohol or a medical condition was a factor in the commission of the crime*
> - *if there is a pattern of criminal behaviour (e. g., the offence was a single event and out of character)*
> - *if all sentences have been completed, fines paid or restitution made*
> - *if there are any outstanding criminal charges*
> - *if there is any restriction of travel following probation or parole*
> - *eligibility for rehabilitation or a record of suspension*
> - *time elapsed since the offence occurred*
> - *controversy or risk caused by the presence of the person in Canada.*

(Applicant's factum, para 9)

[7] Given the facts of this case as found by the visa officer and the factors that are to be considered (subsection 24(3) of the *Act* speaks of "shall act in accordance with any instructions") in exercising the discretion, one will expect to have some sense as to why the TRP is denied. I could not find any justification on the record. The respondent put it at its highest that "in this case the Officer met that duty by considering the submissions and evidence and concluding that they did not rise to the level of compelling circumstances" (Respondent's factum, para 9).

[8] With all due respect, this does not meet the requirement of the law for justification. Just a few weeks ago, the Supreme Court of Canada in the case of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] stressed that justification must be the focus of attention when a Court considers on judicial review a decision of a tribunal. At paragraph 97 of *Vavilov*, the Court refers again to this Court's decision in *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431(per Rennie J. as he then was) where it can be read that the minimal requirements for reasons are expressed through an illustration:

> [11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.
>
> [My emphasis.]

It is in my view the situation in which the Court finds itself in this case. There are no dots on the page.

[9] The *Vavilov* Court requires that there be an understanding of the decision maker's reasoning process to find the hallmarks of reasonableness: justification, transparency and intelligibility (para 99).

[10] In this case, there are no reasons given, no justification offered. It is said that the decision must be internally coherent. The tribunal ought to show how the evidence leads to the conclusion reached. There is no way on this record to understand how the factors listed allow the visa officer to reach the decision arrived at. The Supreme Court writes at paragraph 102:

> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

This is precisely the situation encountered here.

[11] In the case at hand, it is not so much that the reasons given were insufficient as it is rather that there is absence of reasons: there is no bridge, no reasoning path, between considering the submissions and the evidence and the conclusion that this did not rise to the level of compelling circumstances. That is what *Vavilov* requires and that is dearly missing in this case.

[12] As a result, there is no choice but to grant the judicial review application and to return the matter to a different visa officer for the purpose of making a new determination.

[13] There is no question that ought to be certified pursuant to s. 74 of the *Act*.

JUDGMENT in IMM-3019-19

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted. There is no question to be certified.

2. The matter is returned to a different visa officer for the purpose of making a new determination.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3019-19
STYLE OF CAUSE:	MATTHEW JOHN DONNELLAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 28, 2020
JUDGMENT AND REASONS:	ROY J.
DATED:	FEBRUARY 11, 2020

APPEARANCES:

Brian Koh	FOR THE APPLICANT
Aleksandra Lipska	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Niren and Associates Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT