Federal Court  Cour fédérale

Date: 20200527

Docket: IMM-1596-19

Citation: 2020 FC 647

Ottawa, Ontario, May 27, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

BASHIR ALI ISMAIL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Bashir Ali Ismail is a citizen of Somalia living in South Africa. He applied for permanent residence in Canada as a member of the Convention refugees abroad class and the humanitarian-protected persons abroad designated class as set out in section 95 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. His application was denied because he did not declare his two sons, who live with their mother in Ethiopia. He seeks judicial review of this decision.

I. Context

[2] The Applicant's sponsorship application was initially approved in August 2017, but it did not include any reference to his children. On January 7, 2019, he was invited for an interview. At that time he advised the Respondent of his two sons living in Ethiopia.

[3] On January 30, 2019, a visa officer (the Officer) interviewed the Applicant, and asked a number of questions about why he had failed to include his children on his application. The Applicant explained that his children live with their mother, that he does not have regular contact with them any more, and that his sponsor only wanted to finance the Applicant, not his children. This is described in more detail below.

[4] The responses did not satisfy the Officer, who refused the application for permanent residence, as well as the sponsorship application. In the refusal letter, the Officer cites a number of different provisions in support of the refusal, including the obligation to declare all accompanying family members set out in subparagraph 139(1)(f)(i) and paragraph 140.1(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-2007 [the *Regulations*], as well as the more general requirement to be truthful in an application set out in subsection 16(1) of *IRPA*. Finally, the Officer refers to subsection 11(1) of *IRPA*, which provides that an officer must be satisfied that an applicant is not inadmissible and meets the requirements of *IRPA*, which includes the *Regulations.* The Officer concludes by stating, "I am not satisfied that you meet the requirements of the Act and the regulations for the reasons explained above. I am therefore refusing your application."

II. Issues and Standard of Review

[5] The Applicant argues that there are two issues: (i) whether the failure to comply with paragraph 140.1(a) of the *Regulations* is a valid basis for the refusal of his application; and (ii) whether the failure to comply with subsection 16(1) of *IRPA* is a valid basis for the refusal of his application.

[6] The Respondent submits that there is only one issue: whether the Officer's decision is reasonable.

[7] I would reformulate the issues as follows:

A. Was the Officer's decision reasonable?

B. Was there a breach of procedural fairness?

[8] The standard of review on the issue of whether the Applicant is a member of the Convention refugees abroad class or the humanitarian protected persons class has been found to be reasonableness (*Sivakumaran v Canada (Citizenship and Immigration)*, 2011 FC 590 at para 19; *Tesfamichael v Canada (Citizenship and Immigration)*, 2017 FC 337 at para 8). This is consistent with the guidance in the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[9] When reviewing for reasonableness, the Court asks "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision"

(*Vavilov* at para 99). It must be internally coherent, and display a rational chain of analysis (*Vavilov* at para 85).

[10] Based on this framework, a decision will likely be found to be unreasonable if the reasons read in conjunction with the record do not enable the Court to understand the decision maker's reasoning on a critical point (*Vavilov* at para 103). The framework set by this decision "affirm[s] the need to develop and strengthen a culture of justification in administrative decision-making" by endorsing an approach to judicial review that is both respectful and robust (*Vavilov* at paras 2, 12-13).

[11] In relation to procedural fairness, the Court must apply a standard that most closely resembles correctness, but in reality, what is required is an assessment of whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; see also *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51-54).

III. Analysis

A. *Was the Officer's decision reasonable?*

[12] The Applicant argues that the decision is unreasonable, because the Officer: (i) relied on the wrong provision; (ii) erred in finding the Applicant to have been untruthful; and (iii) failed to take into account his explanation in light of ambiguity in the immigration forms.

[13] The Officer relied on paragraph 140.1(a) of the *Regulations* as a primary basis for refusing the application. The Applicant contends this was a fatal error. Paragraph 140.1(a) requires disclosure of "accompanying family members," but in this case, the Applicant's children lived with his wife in Ethiopia, and he never intended that they would accompany him. Even if the Officer had referred to paragraph 140.1(b), which refers to "non-accompanying family members," the Applicant argues that this would also have been an error, because failure to comply with that provision simply prevents the non-accompanying dependent from applying for permanent residence under the one-year window of opportunity provided for such applications under section 141 of the *Regulations*.

[14] The Applicant notes that paragraph 141(1)(a) of the *Regulations* expressly contemplates that a family member can be omitted from an application at the time it was made, but then added before the applicant's departure. As long as the other family member is declared prior to departure, paragraph 141(1)(a) is complied with. That is what happened here.

[15] The Applicant also submits that it was unreasonable for the Officer to base the refusal on the duty to answer truthfully set out in subsection 16(1) of *IRPA*, because he was, in fact, truthful. He told the Officer of the existence of his two sons on his own initiative, prior to the interview, and he answered the Officer's questions during the interview in a truthful manner. Therefore, it was unreasonable for the Officer to find that he had not complied with subsection 16(1).

[16] Finally, the Applicant argues that the immigration forms are confusing, and it was unreasonable for the Officer to refuse to accept his explanation for why he had not included his

sons in the forms. The sponsorship application had been approved, the Applicant was honest before and during the interview, and it was unreasonable for the Officer to penalize him for the answers he gave on the forms, which are worded in a confusing manner. His children were never applicants to come to Canada, nor were they accompanying family members. Even though the Applicant may have wanted to bring them with him, he did not have custody of the children and therefore he could not do so. The form is not clear that the children had to be included and, in any event, the Applicant disclosed their existence prior to the interview. It was unreasonable to fail to accept his explanation.

[17] The Respondent submits that even if the Officer erred in referring to the wrong paragraph in section 140.1, this is not sufficient to reverse the decision because the Officer's analysis is clear and it corresponds to the Applicant's explanation during the interview. The Applicant's case rests on the theory that this was an innocent mistake, which was later corrected. This does not correspond to the evidence. The notes of the interview indicate that the Applicant wanted to include the children, but his sponsor did not do so. The Applicant stated: "He wanted to finance me and he wanted me to finance my children." This was a deliberate omission from the form, and the Applicant is responsible for the content of his forms (*Patel v Canada (Citizenship and Immigration)*, 2017 FC 401 at para 64 [*Patel*]).

[18] The Respondent argues that both accompanying and non-accompanying family members must be declared, and there is no difference in the legal consequences of failing to comply with paragraphs (a) or (b) of section 140.1 of the *Regulations*. The Applicant's responsibility under this provision is to declare all family members. Subsection 141(1) of the *Regulations* is of no assistance to the Applicant because it relates to obtaining permanent residence for a non-

accompanying family member, and this has no effect on the Applicant's responsibility under section 140.1 to declare all family members. If subsection 141(1) was a vehicle by which to add family members to an application, paragraphs 140.1(a) and (b) would be redundant.

[19] Further, the Respondent contends that the refusal was reasonable because the Officer had a discretion to refuse the sponsorship application pursuant to subparagraph 139(1)(f)(i) of the *Regulations*, and its tentative approval at an earlier stage of the process is irrelevant. Nothing precluded the Officer from refusing the sponsorship based on all of the information in the file, including the results of the interview, and that refusal is itself a basis to deny the Applicant's application. Otherwise, a visa officer would have to grant an application for permanent residence based on a sponsorship application containing false information, and that runs contrary to the entire structure of the statute and regulations.

[20] The Applicant's argument is based on an interpretation of the statute and regulations, and the distinction between "accompanying" and "non-accompanying" family members. He also argues that his disclosure of the existence of his two sons prior to the interview means that the Officer should not have found him to be untruthful. Furthermore, he points to the provisions which allow applicants to add family members prior to departure, and submits that he complied with all of the legal requirements and provided an entirely innocent explanation for the failure to include his sons in the application.

[21] I agree with the Respondent that many of the legal arguments advanced by the Applicant do not match what he said during the interview. He argues that he was confused about the forms, and that he offered several explanations for his failure to include his sons in the forms. However,

the relevant part of the interview notes sets a different explanation and reveal the Officer's line of reasoning:

> …
>
> Where are your two sons?
>
> **Ethiopia**
>
> Do you have contact with them?
>
> **I had, but I do not have anymore**
>
> …
>
> When you submitted your application, you omitted to declare your children. Why is that?
>
> **I claimed that I have tow [*sic*] sons, but the guy did not put it.**
>
> You signed the form and your ex wife is declared but not your sons?
>
> **When the guy helped me he just told me to sign and I signed**
>
> But you knew your children were not there. I do not find this credible. They are your children and as per the immigration law they have to be declared when you submit your application?
>
> **I told him I had children but he did not put it in. Maybe he assumed that they were with my wife in Ethiopia.**
>
> This does not meet the requirements. It is important to declare your dependent family members?
>
> **Even myself I want my children and he did not put them**
>
> Who is this guy?
>
> **… [A] relative**
>
> …
>
> He knew you had children?
>
> **I told him yes.**

> I have concerns you do not meet the requirements of this program because you did not declare all your dependents on your application forms when you submitted them. I have concerns you were not being truthful in your forms because you signed them even though you knew the information was not correct. I am giving you an opportunity to answer my concerns.
>
> **… I could not understand the form.**
>
> Your sponsor did not declare your children.
>
> **… He wanted to finance me and he wanted me to finance my children**
>
> Is that what happened? He did not want to pay for your children?
>
> **Yes**
>
> …
>
> [Formatted for clarity. The Applicant's replies are in bold.]

[22] Two crucial elements emerge from this passage. First, the Officer was concerned about the Applicant's failure to declare his children, noting that he had declared his ex-wife, but not his two sons. The Officer did not explore the issue of whether the children would be accompanying or not, but rather focused on the failure to mention them. Second, the Applicant offered several variations on his explanation for the failure to include his sons in the application, but in the end, admitted that the omission was deliberate and that the sponsor did not want to include them because doing so would have increased the sponsor's financial liability.

[23] I agree with the Respondent that these facts do not support many of the arguments advanced by the Applicant before this Court. It is true that the Applicant says that he did not understand the forms, but his explanation for the omission does not rest on that misunderstanding. In any event, he is responsible for the content of his forms and any omission

by the person who completed them does not excuse him from compliance with the law (*Patel* at paras 62-64).

[24] I agree with the Applicant, however, that there are two fatal flaws in the decision, which make it unreasonable: the Officer treated the children as accompanying family members without explaining how this conclusion was reached on the evidence, and the Officer discounted the Applicant's disclosure of his sons prior to the interview.

[25] In my view, the main problem with the decision is that the Officer consistently referred to the children as "accompanying" family members, both in the interview and the decision letter, yet there is no evidence to support that claim.

[26] During the interview, the Applicant said several things: that his children lived with his ex-wife in Ethiopia; that he did not have contact with them; and that he wanted to include them, but the person who completed the form did not do so. The Officer offers no explanation for the conclusion that the Applicant's children should be treated as "accompanying" family members, based on the evidence in the record. The Applicant did not have custody of them, had no contact with them, and at most expressed a vague desire to bring them to Canada at some later point. In the context of his application, and the interview itself, that is the only way to understand the Applicant's statements during the interview.

[27] Because this was a determinative issue for the Officer, it should have been specifically explored during the interview, and the basis for the conclusion should have been explained in the

decision. As it stands, the Officer's conclusion that the Applicant's failure to declare his sons on the form breached paragraph 140.1(a) is simply untenable.

[28] The Respondent argues that this is a minor detail, and that a wrong reference to a particular statutory provision should not be the basis for overturning the decision. To quote the Respondent's written submissions:

> The Applicant's argument that the Officer's decision is "wrong in law" because the Officer referred to s. 140.1(a) instead of 140.1(b) is exactly the kind of "puzzling over every possible inconsistency, ambiguity or infelicity of expression" that the Federal Court of Appeal discourages. [Citing *Canada (Minister of Citizenship and Immigration) v Ragupathy*, 2006 FCA 151 at para 15 [*Ragupathy*]]

[29] The caution expressed in *Ragupathy* is consistent with the contextual and deferential approach set out in *Vavilov* and, in particular, with the Supreme Court of Canada's statement that:

> [91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[30] However, it is also true that *Vavilov* affirms "the need to develop and strengthen a culture of justification in administrative decision making" (at para 2). A primary element of this is the focus on the actual reasons provided for the administrative decision, which is based on the rationale for providing reasons for decision:

> [79] … Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power…
>
> [86] … In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
>
> [Emphasis in original.]

[31] In order to give effect to these principles, the *Vavilov* framework endorses an approach to reasonableness review that is both robust and respectful. As the Court explains, under this approach "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision" (*Vavilov* at para 85).

[32] Returning to the decision in the case at bar, I am unable to accept the Respondent's argument that the Officer's errors amount to mere "infelicity of expression." This is not a situation where an Officer has referred to a wrong paragraph in *IRPA* or the *Regulations* in passing, in the context of a line of analysis which makes evident that the particular reference is nothing more than an innocent error. Rather, the Officer's notes and the decision letter contain repeated and specific references to the Officer's conclusion that the Applicant had failed to declare his sons as accompanying family members. It is also reflected in the specific references

to subparagraph 139(1)(f)(i) and paragraph 140.1(a) of the *Regulations* in the decision letter, as well as the nature of the questions asked during the interview.

[33] The Officer's repeated references to the failure to declare accompanying family members are not a mere slip or simple error. Rather, they lie at the heart of the Officer's reasoning.

[34] I repeat, this crucial finding is not explained, and is not consistent with the evidence to which the Officer refers in the interview notes. If the Officer concluded that the Applicant did intend for his sons to accompany him, the finding needed to be set out expressly and the basis for it needed to be explained. A "culture of justification" surely requires that, even considering the context of the decision-maker, namely a busy visa officer making a decision on a permanent resident visa. Given the impact of the refusal on the Applicant (per *Vavilov* at paras 133-135) and the nature of the process (per *Vavilov* at paras 91-98) this is not an undue burden to impose on visa officers.

[35] A second significant error in the decision relates to the finding that the Applicant had been untruthful, and therefore failed to meet the requirements of subsection 16(1) of *IRPA*. There can be no doubt that the statute imposes that persons seeking status in Canada are honest and forthright in their applications. This is an integral part of our refugee and immigration systems. The Federal Court of Appeal summarized the general requirement recently, in *Sidhu v Canada (Citizenship and Immigration)*, 2019 FCA 169:

> [17] Before a foreign national enters Canada, the foreign national must apply to an officer for a visa or for any other document required by the regulations made under the Act. The requested visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not

> inadmissible and meets the requirements of the Act (subsection 11(1)). A person who makes an application under the Act "must answer truthfully all questions put to them for the purpose of the examination" (subsection 16(1)). This requirement of candour is an overriding principle of the Act and a principle that aids in the interpretation of various provisions of the Act.

[36] If the Respondent had somehow discovered the existence of the Applicant's children through its own efforts, that could have been a well-founded basis to strip him of his permanent residence. In this case, however, the Applicant revealed their existence prior to the interview entirely of his own volition, and then was honest about the facts when questioned by the Officer.

[37] Once again, the Officer's finding that the Applicant was not truthful in the forms is accurate but incomplete. The Applicant admitted that his forms were not accurate or complete, and he did so voluntarily, well in advance of the interview. He was honest and forthright during the interview. However, there is no acknowledgement or assessment of that fact by the Officer. If this was completely discounted by the Officer, that conclusion needed to be explained. In particular, in light of the fact that subsection 141(1) of the *Regulations* expressly contemplates that non-accompanying family members may be added prior to a person's departure from their country of residence. The Officer needed to explain why the Applicant was found to be untruthful.

[38] The reasons fall short of what is required by the reasonableness framework set out in *Vavilov* on both of these issues. It is not for a reviewing court to fill in the missing dots on the page or to speculate on what the decision-maker may have been thinking. If the conclusion is not

consistent with the evidence, or the assessment of crucial evidence is not explained, the decision may well be found to be unreasonable. That is the case here.

B. *Was there a breach of procedural fairness?*

[39] In light of my conclusions on the first issue, it is not necessary to address this question. I would simply note that had I been required to deal with it, I would not have been persuaded by the Applicant's arguments on this point.

IV. Conclusion

[40] For these reasons, the application for judicial review is granted. The Officer's decision dated March 1, 2019, is set aside, and the matter is returned to a different decision-maker for reconsideration.

[41] There is no question of general importance for certification.

[42] It bears repeating that none of my findings above are meant to foreclose the next decision-maker from assessing the evidence in this case. Rather, my comments signal the need for a careful and thorough consideration of all of the evidence, and an equally careful and thorough explanation of the reasoning process that leads to the conclusion. That is what the *Vavilov* framework requires, and it is what the Applicant is entitled to expect.

JUDGMENT in IMM-1596-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The Officer's decision dated March 1, 2019, is set aside, and the matter is returned to a different decision-maker for reconsideration.

3. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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