Federal Court  Cour fédérale

Date: 20201014

Docket: IMM-5185-19

Citation: 2020 FC 965

Montréal (Québec), October 14, 2020

PRESENT: Mr. Justice Gascon

BETWEEN:

JAMES NDUM TIBEN
FABRICE MUNDU TIBEN
ROMIE ANDUM TIBEN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The principal applicant, Mr. James Ndum Tiben, is a person with refugee status in Canada. He applied for permanent residence in Canada and included his two adopted children, Fabrice Mundu Tiben and Romie Andum Tiben [Dependant Applicants], in the application. In

June 2019, an immigration officer [Officer] based in Dakar, Senegal refused the application of the Dependant Applicants on the basis that they were adopted by Mr. Tiben primarily for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], contrary to subsection 4(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRP Regulations].

[2] Mr. Tiben and the Dependant Applicants now seek judicial review of the Officer's decision [Decision]. They submit that the Decision is unreasonable because the Officer failed to consider a customary adoption in Cameroon (Mr. Tiben's country of origin), made material errors of fact, did not state clearly to whom the Decision is addressed, and expressed vague concerns in her reasons. Mr. Tiben and the Dependant Applicants also claim that the Officer breached their right to procedural fairness because she did not give them an opportunity to respond to her credibility concerns and wrote her procedural fairness letter in French. They ask the Court to quash the Decision and to send it back to a new immigration officer for redetermination.

[3] For the reasons that follow, I will dismiss this application. Having considered the evidence before the Officer, the reasons for the Decision and the applicable law, I can find no basis for overturning the Decision. The Decision is based on an internally coherent and rational chain of analysis and it is amply justified in relation to the facts and law that constrain the Officer. Even though they are succinct and not as detailed as Mr. Tiben and the Dependant Applicants would have hoped, the reasons for the Decision adequately explain how the Officer concluded that the adoption was made for the purpose of obtaining immigration status in Canada.

In addition, I detect no breach of procedural fairness in this case. There are therefore no grounds to justify this Court's intervention.

II. Background

A. *The factual context*

[4] Mr. Tiben and the Dependant Applicants are all citizens of Cameroon. In 2000, the Dependant Applicants' biological father – Mr. Tiben's brother – died. Mr. Tiben and the Dependant Applicants claim that Mr. Tiben adopted the Dependant Applicants in 2002. In 2014, Mr. Tiben came to Canada, and he was granted refugee protection in 2015. In July 2016, he applied for permanent residence and, in September of that year, he formally adopted the Dependant Applicants.

[5] In November 2018, Immigration, Refugees and Citizenship Canada [IRCC] advised Mr. Tiben that the Dependant Applicants met the eligibility requirements and could submit the additional forms necessary for processing. In December 2018, Mr. Tiben submitted to the IRCC, among other documents, the Dependant Applicants' immigration forms, proof of adoption, and birth certificates; evidence that he transferred money to the Dependant Applicants; and a family photograph.

[6] In February 2019, the Officer sent Mr. Tiben a procedural fairness letter. The letter was written in French. In that letter, the Officer expressed concerns that the Dependant Applicants were not "adopted children" under the IRP Regulations on the ground that the adoption took

place for the primary purpose of acquiring a status or privilege under the IRPA. Her concerns were based on the following observations:

- Mr. Tiben adopted the Dependant Applicants in 2016, after his arrival in Canada in 2014;
- There is no proof that Mr. Tiben cared for or lived with the Dependant Applicants between 2002 and the present;
- Cameroon is spelled “Cameroom” in the adoption judgment;
- The family photograph does not contain a legend or a date;
- The proof of money transfers from Mr. Tiben to the Dependant Applicants are either recent (from 2018) or unreadable; and
- The Dependant Applicants’ mother is still alive.

[7] The Officer gave Mr. Tiben the opportunity to respond to these concerns. In two separate written responses, Mr. Tiben explained that the Dependant Applicants are his brother’s biological children; that his brother died in 2000; that the Dependant Applicants began living with him in 2002; that he did not get “adoption paperwork” until 2016 – when he realized he needed it for the application – because it was not customary in Cameroon to do so; and that the family photograph was taken in 2008, and showed himself with his three biological children, the Dependant Applicant Fabrice and two other family members.

B. ***The Decision***

[8] In the Decision refusing the Dependant Applicants' application, the Officer explained why she did not believe that the Dependant Applicants were "adopted children", as that term is understood in the applicable legislation and regulations. The Officer first listed, in the same order, all the reasons that were previously given to Mr. Tiben in the procedural fairness letter. She acknowledged receipt of Mr. Tiben's submissions, noting his claims that he had been the only person to take care of the Dependant Applicants after their father's death; that he had paid for their studies, health and living expenses; that he had submitted other evidence of his support; and that he had apologized for mistakes in the application.

[9] The Officer then gave additional reasons for refusing the application. Most of these rephrased the reasons contained in the procedural fairness letter. They were described as follows in the Decision:

- Even if the adoption judgment is corrected, the Officer would still have concerns about its authenticity;
- The proof of money transfers—"MoneyGram receipts"—seemed to be altered;
- There are contradictions in the evidence regarding the relationship between Mr. Tiben and the Dependant Applicants. On the one hand, the record suggests that Mr. Tiben lived with them since 2002. On the other hand, it suggests that Mr. Tiben cared for the Dependant Applicant Fabrice when he was with his mother;
- The adoption took place after Mr. Tiben left Cameroon;

- Mr. Tiben's support for the Dependant Applicants is not "an adoptive link as described in the regulations";
- The Dependant Applicants are now 22 and 19 years old, respectively. They have been separated from Mr. Tiben since 2014.

[10] Based on the foregoing, the Officer was not satisfied that Mr. Tiben did not adopt the Dependant Applicants for the primary purpose of acquiring a status or privilege under the IRPA. She therefore refused their application.

C. ***The statutory framework***

[11] The relevant provisions of the IRPA and the IPR Regulations can be summarized as follows. A permanent resident applicant may include any family member in his or her application, pursuant to subsection 176(1) of the IRPA. Further to section 2 and subsection 1(3) of the IRP Regulations, any dependent child, including any "adopted child", is a family member. Finally, subsection 4(2) of the IRP Regulations states that a foreign national is not an "adopted child" if the adoption was entered into primarily for the purpose of acquiring a status or privilege under the IRPA.

D. ***The standard of review***

[12] It is not disputed that reasonableness is the standard of review applicable to a decision determining whether an adoption is entered into for the primary purpose of immigration, as it is a question of mixed facts and law and a highly factual determination (*Canada (Citizenship and*

Immigration) v Sohail, 2017 FC 995 at para 12; *Alvarado Dubkov v Canada (Citizenship and Immigration)*, 2014 FC 679 at para 6).

[13] That reasonableness is the appropriate standard has recently been reinforced by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. In that judgment, the majority of the Court set out a revised framework for determining the standard of review with respect to the merits of administrative decisions, holding that they should presumptively be reviewed on the reasonableness standard, unless either legislative intent or the rule of law requires otherwise (*Vavilov* at paras 10, 17). I am satisfied that neither of these two exceptions apply in the present case, and that there is no basis for derogating from the presumption that reasonableness is the applicable standard of review for the Decision.

[14] Regarding the actual content of the reasonableness standard, the *Vavilov* framework does not represent a marked departure from the Supreme Court's previous approach, as set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 and its progeny, which was based on the "hallmarks of reasonableness", namely justification, transparency and intelligibility (*Vavilov* at para 99). The reviewing court must consider "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome", to determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 83, 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paras 2, 31).

[15] *Vavilov*'s revised framework for reasonableness requires the reviewing court to take a "reasons first" approach to judicial review (*Canada Post* at para 26). Where a decision maker has provided reasons, the reviewing court must begin its inquiry into the reasonableness of the decision "by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84). The reasons must be read holistically and contextually in light of the record as a whole and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-94, 97). However, "it is not enough for the outcome of a decision to be *justifiable* […] the decision must also be *justified*" (*Vavilov* at para 86).

[16] Before a decision can be set aside on the basis that it is unreasonable, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). An assessment of the reasonableness of a decision must be robust, but it must remain sensitive to and respectful of the administrative decision maker (*Vavilov* at paras 12-13). Reasonableness review is an approach anchored in the principle of judicial restraint and in a respect for the distinct role and specialized knowledge of administrative decision makers (*Vavilov* at paras 13, 75, 93). In other words, the approach to be followed by the reviewing court is one of deference, especially with respect to findings of facts and the weighing of evidence. Absent exceptional circumstances, the reviewing court will not interfere with an administrative decision maker's factual findings (*Vavilov* at paras 125-126).

[17] Turning to the issues of procedural fairness, the approach to be taken has not changed following *Vavilov* (*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). However, the Federal Court of Appeal has recently affirmed that questions of procedural fairness are not truly decided according to any particular standard of review. Rather, it is more a legal question to be answered by the reviewing court: the court must be satisfied that the procedure was fair having regard to all of the circumstances (*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).

[18] In sum, when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review, the ultimate question raised is whether, taking into account the particular context and circumstances at issue, the process followed by the administrative decision maker was fair and offered the affected parties a right to be heard as well as a full and fair opportunity to know and respond to the case against them (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51-54). No deference is owed to the decision maker on issues of procedural fairness.

III. Analysis

A. *The reasonableness of the Decision*

[19] Mr. Tiben and the Dependant Applicants raise various arguments to challenge the reasonableness of the Decision. I am not persuaded that any of the alleged errors justify the intervention of the Court.

[20] They first argue that the Decision is unreasonable because the Officer did not consider the evidence on customary adoption. They say that, in his response to the procedural fairness letter, Mr. Tiben had expressly stated that the Dependant Applicants "began to live with [him] in 2002 […] after their father died" and that, in Cameroon, "it is not common to get adoption paper work" in such a situation. Mr. Tiben and the Dependant Applicants claim that the Officer failed to take this evidence into account.

[21] I disagree. The Officer did not consider whether Mr. Tiben adopted the Dependant Applicants under a custom other than formal Cameroonian law because there was no evidence put forward to this effect. Mr. Tiben and the Dependant Applicants have simply not provided any evidence to satisfy their burden of proving a customary adoption. In those circumstances, I am satisfied that the Officer could reasonably conclude, based on the adoption judgment, the affidavit supporting it and the adoption certificate, that Mr. Tiben did not adopt the Dependent Applicants until 2016. In the Officer's view, Mr. Tiben's unsupported claims that "Fabrice and Romie began to live with [him] in 2002" and that, in such a situation, "it is not common to get

adoption paper work" did not amount to sufficient evidence. I can identify no grounds for the Court to intervene in such a factual finding.

[22] Second, Mr. Tiben and the Dependant Applicants argue that the Decision is unreasonable because the Officer made material errors of fact. They identify four errors which, in their view, were material to the outcome of the Decision (*Hong v Canada (Citizenship and Immigration)*, 2017 FC 913 at para 33; *Canada (Citizenship and Immigration) v Rahman*, 2013 FC 1274 at para 55; *Romero v Canada (Citizenship and Immigration)*, 2012 FC 265 at para 28). Those errors relate to: 1) the Officer's reference to Mr. Tiben as the Dependant Applicants' "brother", not as their uncle; 2) her reliance on an unidentified January 30, 2019 letter; 3) the erroneous citation to the year 2012 (as opposed to 2002) as the year where Mr. Tiben started to live with the Dependant Applicants; and 4) the fact that the misspelling in Cameroon was not in the adoption judgment but in an affidavit supporting it.

[23] I am not persuaded by these submissions and find that none of the errors identified by Mr. Tiben and the Dependant Applicants renders the Decision unreasonable. A material error of fact is an error that is central to a decision maker's determination. In particular, typographical errors such as incorrect references to dates do not constitute a material error (*Macias v Canada (Citizenship and Immigration)*, 2010 FC 598 at para 27). In this case, the confusion between Mr. Tiben's identity as the brother or uncle of the Dependant Applicants results from the applicants' own materials which contained mixed information on this issue, as expressly flagged by the Officer in the Decision and in the Global Case Management System [GCMS] notes taken by her, which form part of the Decision. It is also clear from the Decision that the Officer's reference to

a letter dated January 30, 2019 was to the procedural fairness letter. Moreover, with respect to the wrong reference to “2012”, I observe that, throughout the Decision and in the GCMS notes, the Officer consistently and correctly referred to the year 2002 as the year where Mr. Tiben claims he adopted the Dependant Applicants.

[24] Mr. Tiben and the Dependant Applicants have not identified how any of the alleged errors of fact has adversely impacted the ultimate Decision. I do not dispute that minor errors can have a cumulative effect, that they can sometimes seriously distort a decision maker’s assessment (*Sarkis v Canada (Minister of Citizenship and Immigration)*, 2006 FC 595 at para 13), and that multiple errors of fact can suggest inattentiveness to the details of the case and undermine the decision as a whole (*Garmenova v Canada (Minister of Citizenship and Immigration)*, 2004 FC 414 at para 11). However, many small, immaterial errors are not enough to render a decision unreasonable (*Bhatia v Canada (Citizenship and Immigration)*, 2017 FC 1000 [*Bhatia*] at para 29; *Canada (Public Safety and Emergency Preparedness) v Louis*, 2016 FC 172 at para 29; *Guerrero Moreno v Canada (Citizenship and Immigration),* 2011 FC 841 at para 15). An imperfect decision can still be a reasonable one. The standard of review is not concerned with the Decision’s degree of perfection but rather its reasonableness (Vavilov at para 91). A decision should be upheld as long as the reviewing court can “trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic” (*Vavilov* at para 102). This is the case here.

[25] The standard of reasonableness requires the reviewing court to begin with the decision and an acknowledgment that the administrative decision maker has the primary responsibility for

making findings of fact. Such findings command deference. The reviewing court examines the reasons, the record and the result and, if there is a logical and consistent explanation for the result, it refrains from intervening. Moreover, the Court must be careful, on judicial review of an administrative decision maker's decision, not to engage in "a line-by-line treasure hunt for error" (Vavilov at para 102). Unfortunately for Mr. Tiben and the Dependant Applicants, this is the trap into which they seem to have fallen in trying to unearth minor and inconsequential errors in the Officer's analysis. These are not sufficient to warrant the Court's intervention.

[26] As a third argument, Mr. Tiben and the Dependant Applicants maintain that the Decision is unreasonable because the addressee is unclear. They complain that, at some points, the Decision letter seems to be addressed to Mr. Tiben (when the Officer says: "you have adopted those children") whereas, elsewhere, it appears to refer to the Dependant Applicants (when the Officer states: "you have been included as family members in a protected person's in-Canada Application"; "there are contradictions in the information regarding the relationship between you and [Mr. Tiben]"). This argument is also without any merit. Nothing in the ambiguities arising from the identity of the persons to whom the Decision was addressed renders it unreasonable. The language used does not cloud the decision maker's reasoning process in such a way that makes the Decision unreasonable under *Vavilov*.

[27] Finally, Mr. Tiben and the Dependant Applicants challenge the Decision on the basis that the Officer's stated concerns are vague. In support of this argument, they cite a long excerpt from the Decision, which includes statements that Mr. Tiben and the Dependant Applicants did not submit "sufficient proof of support and cohabitation"; that the "evidence of [a money] transfer is

recent (2018) or unreadable"; and that "there are some additional MoneyGram receipts submitted which also seem to be altered." Again, after a careful reading of the record, I have no hesitation to conclude that, in both the procedural fairness letter and the Decision, the Officer gave clear reasons for finding that the Dependant Applicants are not Mr. Tiben's adopted children. I fail to see any vagueness in the Officer's reasons.

B. ***The procedural fairness concerns***

[28] Turning to procedural fairness, Mr. Tiben and the Dependant Applicants submit that the Officer breached their right to a fair process because she did not give them an opportunity to respond to her credibility concerns. They also suggest that, when family unification is at stake, an officer owes a higher duty of procedural fairness than in applications in which it is not. They further complain about the procedural fairness letter having been written in French.

[29] I do not agree and, in my view, no breach of procedural fairness occurred here. As pointed out by the Minister, immigration officers are not obligated to give applicants the opportunity to respond to concerns that arise from legislative requirements. In this case, the deficiencies in the application submitted by Mr. Tiben and the Dependant Applicants arose from such legislative requirements (*Rezvani v Canada (Citizenship and Immigration)*, 2015 FC 951 at para 25; *Zeeshan v Canada (Citizenship and Immigration)*, 2013 FC 248 at para 46). Furthermore, permanent resident applicants do not have an absolute right to an interview. The need for an interview depends on the facts of each case (*Bhatia* at para 25). Mr. Tiben and the Dependant Applicants have not explained how or why they were entitled to an interview in this instance. They had an opportunity to respond to the Officer's concerns and effectively used it. In

fact, even though they now complain about the procedural fairness letter being written in French, Mr. Tiben nonetheless responded to it twice, without ever raising the language issue, clearly indicating that the language of the letter had not hindered the process (*Esangbedo Obidigbo v Canada (Citizenship and Immigration)*, 2008 FC 705 at para 34).

[30] Procedural fairness does not require applicants to be given the opportunity to respond to concerns about information that they are aware of and have provided themselves. In this case, the additional reasons given by the Officer in the Decision were not based on extrinsic evidence, but on concerns about information that Mr. Tiben and the Dependant Applicants had themselves provided. As such, the fact that they formed a part of the basis for the Decision does not constitute a breach of procedural fairness. More generally, it is well accepted that visa officers do not have a duty or legal obligation to seek to clarify a deficient application, to reach out and make an applicant's case, to apprise an applicant about concerns arising directly from the legislation or regulations, to provide the applicant with a running score at every step of the application process, or to offer further opportunities to respond to continuing concerns or deficiencies (Sharma v Canada (Citizenship and Immigration), 2020 FC 381 at para 32; Lv v Canada (Citizenship and Immigration), 2018 FC 935 at para 23). To impose such an obligation would be akin to giving advance notice of a negative decision, an obligation that the Court has expressly rejected on many occasions.

[31] The onus is on visa applicants to put together applications that are convincing, to anticipate adverse inferences contained in the evidence and address them, and to demonstrate that they have a right to enter Canada. Procedural fairness does not arise whenever an officer has

concerns that an applicant could not reasonably have anticipated (*Singh v Canada (Citizenship and Immigration)*, 2012 FC 526 at para 52).

[32] For all those reasons, I find that there was no breach of the duty of procedural fairness in the circumstances.

IV. Conclusion

[33] For the reasons set forth above, this application for judicial review is dismissed. Although Mr. Tiben and the Dependant Applicants would have preferred a different decision, I am satisfied that the Officer reasonably considered the evidence before it and adequately explained why she concluded, on a balance of probabilities, that the primary purpose of the adoption was to acquire a status or privilege under the IRPA. On a reasonableness standard, it is sufficient that the reasons detailed in the Decision demonstrate that the conclusion is based on an internally coherent and rational chain of analysis and that it is justified in relation to the facts and law that constrain the decision maker. This is the case here. Furthermore, in all respects, the Officer met the applicable procedural fairness requirements in dealing with the application of Mr. Tiben and the Dependant Applicants. Therefore, the Decision is not vitiated by any error that would warrant the Court's intervention.

[34] Neither party has proposed a question of general importance for me to certify. I agree there is none.

JUDGMENT in IMM-5185-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs.

2. No question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5185-19
STYLE OF CAUSE:	JAMES NDUM TIBEN, FABRICE MUNDU TIBEN AND ROMIE ANDUM TIBEN v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	DECIDED ON THE BASIS OF THE WRITTEN RECORD PURSUANT TO THE ORDER OF THE COURT DATED SEPTEMBER 10, 2020
JUDGMENT AND REASONS:	GASCON J.
DATED:	OCTOBER 14, 2020

APPEARANCES:

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