Federal Court  Cour fédérale

Date: 20210222

Docket: IMM-4817-19

Citation: 2021 FC 173

Ottawa, Ontario, February 22, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

JONATHAN CARTER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Jonathan Carter is a 25 year-old citizen of Liberia who resides in a refugee camp in Ghana. He is HIV positive and receives monthly care at a hospital in Ghana. Both the government of Ghana and the United Nations High Commission for Refugees [UNHCR] have recognized Mr. Carter as a Convention refugee.

[2] Mr. Carter alleges that he fled Liberia when he was 4 years old with his aunt and sister because soldiers beat him and his sister and murdered his stepmother, in retaliation for his father having informed on the soldiers under the previous political regime. He fears the same soldiers will target and murder him if he returns to Liberia. He further alleges that his aunt and parents are all deceased now and that he has lost touch with his sister; otherwise, he has no family in Ghana, Liberia or Canada.

[3] Mr. Carter also describes incidents in which he has been shunned, harassed, and assaulted in various public settings both inside and outside the Ghanaian refugee camp because of his HIV positive status. He alleges that the shame and humiliation of these experiences, and resulting trauma, have caused him to think about killing himself.

[4] The Roman Catholic Episcopal Corporation for the Diocese of Toronto in Canada sponsored Mr. Carter's application for resettlement as a member of the Convention refugees abroad and the humanitarian-protected persons abroad classes. Immigration, Refugees and Citizenship Canada approved the sponsorship. A migration officer [Officer] interviewed Mr. Carter and two days later, on May 31, 2019, rejected his claim for permanent residence. Mr. Carter now seeks judicial review of the Officer's decision.

[5] The parties agree, as do I, that the applicable standard of in this matter is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. A decision may be

unreasonable if the decision maker misapprehended the evidence before it: *Vavilov*, above at paras 125-126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[6] Having reviewed the record and considered the parties' written and oral submissions, I find that the Officer's decision was unreasonable because it lacks justification and transparency. The latter in particular is cast in to doubt by reason of the Respondent's affidavit sworn or affirmed several months after Mr. Carter brought his application for leave and for judicial review. For the more detailed reasons that follow, I therefore grant this judicial review application.

[7] My analysis addresses first the admissibility of the Respondent's affidavit, followed by the reasonableness of the Officer's decision.

II. Analysis

(i) *Respondent's Affidavit*

[8] I find the Respondent's affidavit inadmissible, or alternatively, I give it no weight. The certified tribunal record contains the affidavit of the Second Secretary (Immigration) at the High Commission in Accra, Ghana who oversaw the (Temporary Duty) Officer who processed Mr. Carter's application. The Second Secretary's affidavit describes that the Officer is retired and no longer acting as a Temporary Duty Officer. The affidavit further describes the Second Secretary

having reviewed Mr. Carter's file and found country condition documentation on Liberia in the file. A true copy of such documentation is attached to the affidavit as an exhibit.

[9] But for the Second Secretary's affidavit, however, the country conditions documentation is not present anywhere else in the certified tribunal record. Because the affidavit describes the exhibit as comprising a true copy of the documentation, this raises at the very least the questions of what happened to the documentation from which the copy was made and what precisely did the Officer consider in so far as country conditions about Liberia are concerned?

[10] The Global Case Management System [GCMS] notes, which form part of the Officer's reasons, indicate expressly that the Officer considered objective documentation about Liberia. I find, however, the Respondent's self-described strategy for highlighting the country conditions documentation obscures any transparency around what the Officer may have considered in this regard. This is especially so because the GCMS notes also indicate that the Officer searched the internet. The Second Secretary's affidavit is silent about whether the attached exhibit comprises any printouts of what the Officer consulted on the internet.

[11] This strategy is highly questionable and is tantamount to the judicial review applicant "being asked to hit a moving target": *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 [*Sellathurai*] at para 45-47. The fact that the affidavit is contained in the certified tribunal record does not shield it from judicial scrutiny.

[12] With this after-the-fact affidavit, I find the Respondent impermissibly has strayed into "provid[ing] evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20. This is compounded in the case before me by the fact that the affidavit was sworn or affirmed by someone other than the Officer who decided the matter and, thus, could not know what was in the mind of Officer, or what the Officer considered regarding country conditions for Liberia, at the time when the decision was made.

[13] I therefore find the Respondent's affidavit is inadmissible. Alternatively, because it is contained in the CTR, I give it no weight.

(ii) *Officer's Decision*

[14] I find the Officer's decision unreasonable in several respects. First, I agree with Mr. Carter that the Respondent, relying on the Second Secretary's affidavit, impermissibly has attempted to reframe the decision as one relating to whether he has a "durable solution" in Liberia, his country of nationality, as contemplated by paragraph 139(1)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. Because the decision mentions other specific *IRPR* provisions, but not *IRPR* s 139(1)(d), I consider it from the perspective of what it states, rather than what it does not state. Further, the Respondent acknowledges that the decision does not state explicitly (or at all, in my view) that it relates to the question of whether Mr. Carter has a durable solution in Liberia.

[15] Second, I disagree with the Respondent's argument that Mr. Carter's failure to raise any fears of persecution in Liberia because of his HIV status was fatal to his s 96 claim under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The "First and Only Notice to Attend an Interview" sent to Mr. Carter makes no mention of Liberia; rather it states that an interview is required to assess his application for permanent residence to Canada and determine whether he is able to meet the criteria for admission through the Refugee Class.

[16] Further, the GCMS notes disclose that the Officer questioned Mr. Carter about the medical treatment he was receiving in Ghana for HIV. The Officer did not question him, however, about either his lived experiences in Ghana, or country conditions in Liberia, a country he fled at 4 years of age, in respect of persons living with HIV. There are no country conditions documentation about Liberia and the treatment of persons with HIV in the certified tribunal record. In addition, the GCMS notes do not disclose that the Officer considered the potential ground of protection rooted in persons with HIV as members of a "particular social group" for the purpose of the *IRPA* s 96. This is underscored by the Officer's indications of "[c]oncern that the reason is applying for refugee have no link with the reason someone can be refugee" and that Mr. Carter's "medical situation is not link to one of the refugee protection ground."

[17] This segues into the third concern I have with the decision. When asked what else he wanted to tell the Officer in support of his application, Mr. Carter responded that he wishes to have a better life, to go to school, and be lived better; life is difficult. Rather than exploring or confirming what Mr. Carter meant, the Officer unreasonably concluded it is for economical reasons. While that may be the case, in addition to whatever other reasons Mr. Carter might

have, the GCMS notes are silent about whether the issue was put to him at all. I thus find the conclusion lacks transparency and justification in the circumstances.

[18] Fourth, when questioning Mr. Carter about Liberia, the Officer asked, "If you search on the internet, you may also know that 1000 people went back, what do you thing [*sic*] of that? There was a civil war, the war is finish now?" There is no indication in the notes that Mr. Carter was shown any documentation, either electronic or a printout, of what the Officer located on the internet in this regard or of how Mr. Carter responded to these questions. I find it unreasonable in the circumstances, bearing in mind that Mr. Carter was 4 years old when he came to Ghana and lived most of his life in a refugee camp, that Mr. Carter would be asked these questions without apparently having an opportunity to review the material to which the Officer was referring.

III. Conclusion

[19] For all the above reasons, I find the Officer's decision and reasons do not meet the level of transparency and justification demanded in *Vavilov* in connection with an administrative decision maker's exercise of "an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us": *Vavilov*, above at para 135. I therefore grant this judicial review application. The Officer's May 31, 2019 decision is set aside and the matter is to be remitted to a different migration officer for redetermination.

[20] Neither party has proposed a serious question of general importance for certification, and I find that none arises.

JUDGMENT in IMM-4817-19

THIS COURT'S JUDGMENT is that:

1. This judicial review application is granted.
2. The Officer's May 31, 2019 decision is set aside and the matter is to be remitted to a different migration officer for redetermination.
3. There is no serious question of general importance for certification.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4817-19
STYLE OF CAUSE:	JONATHAN CARTER v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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