Federal Court Cour fédérale

Date: 20210528

Docket: IMM-6518-19

Citation: 2021 FC 493

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 28, 2021

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

ADAM DARDARI, a minor by his litigation guardian, **ABDELAZIZ DARDARI**

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, Adam Dardari [Adam], a minor by his litigation guardian, Abdelaziz Dardari [Mr. Dardari], seeks judicial review of the decision rendered by the visa section of the

Canadian Embassy in Morocco on October 11, 2019, denying his application for a temporary resident visa.

[1] For the following reasons, the application for judicial review will be dismissed.

II. Background

[2] On February 19, 2018, Mr. Dardari and his wife, Hanane Hasni, [the guardians] obtained from the Court of First Instance of Tangier a *Kafala* order for an abandoned child, in favour of the child named Adam Aqalay. They then obtained the change of the child's name to Adam Dardari.

[3] In April 2018, an initial application for a temporary resident visa was submitted on behalf of Adam, a citizen of Morocco, to allow him to travel to Canada with the guardians while procedures to regularize his status were still underway with the authorities in Canada.

[4] On April 16, 2018, this first application for a temporary resident visa was denied, as reflected in notes from the Global Case Management System (GCMS) where the following is recorded:

> Text: Baby born 2017. "Adoptive parents" would like him to travel with them to Cda, where they are CC/PRs who work. (note - of Moroccan origin). They have kafala doc from Moroccan govt, but this is not equivalent to adoption doc. They will have to go through adoption process/sponsorship of child as immigrant. Noted this in refusal ltr. Refused

[5] On September 24, 2019, a second temporary resident visa application was filed for Adam with the Canadian visa section in Morocco.

[6] This second application notes, among other things, that Adam's address is in Quebec and that the planned duration of the visit to Canada is 6 months. The visa application contains the required forms, along with (1) a confirmation of 6 months of travel insurance, which also confirms Adam's residence is in Quebec; (2) affidavits from Mr. Dardari and Ms. Hasni dated September 19, 2019, and a joint affidavit dated September 23, 2019, in which they affirm, among other things, that they are exercising Adam's rights and obligations in accordance with the applicable immigration laws of Canada, and that they have retained a lawyer to assist them in their efforts; (3) a letter of invitation from Mr. Dardari and Ms. Hasni dated September 19, 2019, confirming the invitation to Adam to stay with them, the fact that they are his legal guardians, the fact that they have applied for residency for Adam but have been informed by the immigration authorities that the *Kafala* is not recognized for adoption purposes, and their wish to spend the holiday season in Canada and to introduce Adam to their family; (4) the *Kafala* order; and (5) a copy of Adam's Moroccan passport and photos.

[7] In the meantime, on October 3, 2019, Adam's application for Canadian citizenship was denied because he did not meet the requirements of paragraph 5.1(3)(a) of the *Citizenship Act* (RSC 1985, c C-29). The Quebec authority responsible for international adoptions has not stated in writing that it considers the adoption to meet the requirements. The citizenship officer concluded that [TRANSLATION] "[b]ased on the information provided in your application, the child therefore does not meet the requirements of paragraph 5.1(3)(a) of the *Citizenship Act*

because the Quebec authority responsible for international adoptions has stated in writing that the *Kafala* order for the child Dardari, Adam does not meet the requirements of Quebec law governing adoption".

[8] On October 11, 2019, the officer reviewing the second temporary resident visa application recorded notes in the GCMS. In it, he states, [TRANSLATION] "2 year old child. Judicial *Kafala* on file, adopted 2017/12/21 by Abdelaziz Dardani and Hanane Hasni, CC couple. No sponsorship file. *Kafala* is not recognized in Cda for adoption. As the parents are established in Cda, I do not believe that the child will stay there temporarily".

[9] On the same day, the visa section rejected the second application for a temporary resident visa. The officer was not satisfied that Adam will leave Canada at the end of the period of stay as a temporary resident under paragraph 179(b) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227 [the Regulations]), given the reason for the visit.

[10] The October 11, 2019 refusal letter states, [TRANSLATION] "I refuse your application for the following reasons: I am not satisfied that you will leave Canada at the end of your period of stay as a temporary resident under paragraph 179(b) of *the Immigration and Refugee Protection Regulations*, given the reason for your visit. Please note that the sponsorship process must be followed for an adopted child. Please visit the website: https://www.canada.ca/en/immigration-refugees-citizenship/services/canadians/adopt-child-abroad.html."

III. Arguments of the parties

[11] The applicant did not file an additional memorandum, as he was entitled to do. Through a plan of argument sent to the Court in advance of the hearing, and at the hearing itself, the applicant raised new arguments that are not in his memorandum. In accordance with established jurisprudence, the Court will not consider these arguments.

[12] In his memorandum, the applicant relied on subsections 3(1) and 22(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] and section 179 of the Regulations.

[13] The applicant cited the analytical framework for judicial review under the standard of reasonableness as set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and submitted that the officer's decision does not meet the requirements of intelligibility and transparency, or of the applicable factual and legal constraints.

[14] Regarding the imperatives of intelligibility and transparency, the applicant argued that (a) the statement in relation to the sponsorship and the lack of recognition of the *Kafala* is irrelevant, if not useless, in this case; (b) the application for temporary entry has no connection with the sponsorship file based on the adoption; (c) the sole purpose of the application for temporary entry was to be able to travel to Canada in strict compliance with the immigration laws and regulations; and (d) Mr. Dardani retained the services of a lawyer.

[15] The applicant therefore submitted that the visa officer's decision and the reasons for it are unintelligible. He further submitted that the grounds relied upon are based on irrelevant premises which, moreover, are the subject of entirely separate immigration proceedings.

[16] Regarding the applicable factual and legal constraints, the applicant submitted that the officer drew an inference from the fact that the parents are settled in Canada that he does not believe the child will be in Canada temporarily. The applicant further submits that this inference is a personal opinion that suggests that the guardians will not comply with immigration law and regulations, and that it contradicts evidence on the record without any basis.

[17] The applicant pointed out that Mr. Dardani and Ms. Hasni have signed an affidavit in which they undertake to comply with all legal and regulatory provisions relating to the child's temporary stay.

[18] Relying on paragraph 15 of the Court's decision in *Oliinyk v Canada (Citizenship and Immigration)*, 2016 FC 756 [*Oliinyk*], the applicant submitted that the officer failed to consider or even mention the evidence that contradicts his conclusion. The applicant added that in this case, there is no record of some of the evidence submitted by the guardian and there is, moreover, evidence that contradicts the officer's finding.

[19] The applicant asked the Court to intervene, arguing that the decision clearly does not take into account all the relevant elements that were introduced in evidence.

[20] The Minister of Citizenship and Immigration [the Minister] responded that all statutory provisions expressly provide that the visa officer must be satisfied that the applicant wishes to come to Canada on a temporary basis. He added that the burden is on the applicant to rebut the statutory presumption that a foreign national seeking to enter Canada is presumed to be an immigrant and must satisfy the visa officer that he or she will leave Canada at the end of the authorized period (*Kwasi Obeng v Canada (Citizenship and Immigration)*, 2008 FC 754 at para 20 [*Kwasi Obeng*]).

[21] The Minister submitted that there is no judgment or implication in the officer's decision that the applicant's guardians are not in compliance with the law. He added that the officer is presumed to have considered all the evidence and is not obliged to refer to each piece of evidence submitted by the applicant (*Kotanyan v Canada (Citizenship and Immigration)*, 2014 FC 507).

[22] The Minister submitted that it was relevant for the officer to note the lack of sponsorship because the possibility of going through this process was noted in the refusal of the first temporary resident visa application. The Minister added that this immigration process is one of two processes available to parents who wish to obtain status in Canada for their adopted child.

[23] The Minister noted that Adam's application for citizenship was refused on October 3, 2019, as he did not meet the requirements of paragraph 5.1(3)(a) of the *Citizenship Act*. However, the guardians could have proceeded through the immigration process and invoked section 25 of the Act.

IV. Standard of review

[24] Regarding the standard of review, there is a presumption that the standard of reasonableness applies, and the parties agree that it applies in this case (*Ngalamulume v Canada (Citizenship and Immigration*), 2009 FC 1268).

[25] Judicial review under this standard is both robust and responsive to context (*Vavilov* at para 67). In *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67, the Supreme Court sets out what is required to conclude that a decision is reasonable and what is expected of a court applying the standard of reasonableness:

> [31] 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" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*,

> at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). In this case, that burden lies with the Union.

[26] As my colleague Justice Gascon wrote in *Sharma v Canada (Citizenship and Immigration)*, 2020 FC 381 at para 21:

> The standard of reasonableness requires the reviewing court to pay "respectful attention to the decision maker's demonstrated expertise" and specialized knowledge, as reflected in their reasons (*Vavilov* at para 93). It is anchored in the principle of judicial restraint. The reviewing court must show deference to the decision maker as it is "grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing" (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para 33; *Dunsmuir* at paras 48-49). Under a reasonableness review, when a question of mixed fact and law falls squarely within the expertise of a decision maker, the reviewing court's role is not to impose an approach of its own choosing (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 57). Of course, a reviewing court should ensure that the decision under review is justified in relation to the relevant facts, but deference to decision makers includes more specifically deferring to their findings of facts and assessment of the evidence. Reviewing courts should refrain from "reweighing and reassessing the evidence considered by the decision maker" (*Canada Post* at para 61; *Vavilov* at para 125). This is the situation here.

V. Legal framework

[27] Subsection 11(1) of the Act provides that a foreign national shall, before entering Canada, apply to an officer for any visa or other document required by the regulations.

[28] In addition, an application for a temporary resident visa is governed by paragraph 20(1)(b) of the Act, as well as subsection 7(1) and section 179 of the Regulations. Paragraph 20(1)(b) of the Act provides the following:

Obligation on entry	**Obligation à l'entrée au Canada**
20 (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	20 (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
. . .	. . .
(b) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	b) pour devenir un résident temporaire, qu'il détient les visas ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.

[29] Subsection 7(1) and section 179 of the Regulations provide that:

Temporary resident	**Résident temporaire**
7 (1) A foreign national may not enter Canada to remain on a temporary basis without first obtaining a temporary resident visa.	7 (1) L'étranger ne peut entrer au Canada pour y séjourner temporairement que s'il a préalablement obtenu un visa de résident temporaire.
. . .	. . .
Issuance	**Délivrance**
179 An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national	**179** L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;	a) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;
(b) will leave Canada by the end of the period authorized for their stay under Division 2;	b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;
(c) holds a passport or other document that they may use to enter the country that issued it or another country;	c) il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;
(d) meets the requirements applicable to that class;	d) il se conforme aux exigences applicables à cette catégorie;
(e) is not inadmissible;	e) il n'est pas interdit de territoire;
(f) meets the requirements of subsections 30(2) and (3), if they must submit to a medical examination under paragraph 16(2)(b) of the Act; and	f) s'il est tenu de se soumettre à une visite médicale en application du paragraphe 16(2) de la Loi, il satisfait aux exigences prévues aux paragraphes 30(2) et (3);
(g) is not the subject of a declaration made under subsection 22.1(1) of the Act.	g) il ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.

[30] The applicable provisions clearly state that the visa officer must be satisfied that the applicant will leave Canada at the end of the authorized period of stay.

[31] In addition, the Court confirmed that there is a legal presumption that a foreign national seeking to enter Canada is presumed to be an immigrant, and that the burden is on the applicant

to rebut this presumption. The applicant must prove to the visa officer that he or she is not an immigrant and that he or she will leave Canada at the end of the authorized period for which he or she is seeking entry (*KwasiObeng*; *Danioko v Canada (Minister of Citizenship and Immigration)*, 2006 FC 479).

VI. Decision

[32] The applicant has not satisfied me that the officer's decision does not meet the requirements of intelligibility and transparency or the applicable factual and legal constraints.

[33] As for the imperatives of intelligibility and transparency, first, the statement in relation to sponsorship and non-recognition of the *Kafala* cannot be said to be irrelevant or unnecessary, given the history of the application and the context in which it is presented, and particularly given that this process was noted in the refusal of the first temporary resident visa application.

[34] In addition, and in any event, even if it were unnecessary or irrelevant, the applicant has not shown that this finding, in and of itself, would taint the decision in such a way as to justify the Court's intervention.

[35] The applicant has not persuaded me that the fact he retained counsel, or that the sole purpose of the visa was to be able to travel to Canada in strict compliance with immigration laws and regulations, makes the officer's decision unintelligible.

[36] Within the applicable factual and legal constraints, the officer could consider that the parents are established in Canada. In addition, I agree with the Minister's position that the officer's decision does not make any judgment or implication that his guardians would not comply with applicable immigration law and regulations.

[37] The applicant also alleged that the decision is inadequately reasoned as there is no comment by the officer on certain evidence filed by his guardians. In particular, the applicant referred to the letter of invitation and statements signed by the guardians confirming that they will abide by the law, which would contradict the officer's finding that the applicant has not demonstrated he will leave Canada.

[38] In this regard, the case law confirms that the officer is presumed to have considered the evidence as a whole and is not obliged to refer to each piece of evidence submitted by the applicant (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA); *Ahmed v Canada (Citizenship and Immigration)*, 2013 FC 1083 at para 34). Furthermore, the officer is not required to refer to every piece of evidence that is contrary to the findings of his or her decision, and the reasons given should not be read hypercritically (*Cepeda-Gutierrez v Canada (Citizenship and Immigration)*, [1998] FCJ No 1425 at para 16). The evidence to which the applicant refers does not contradict the officer's finding as it does not address the issue of [TRANSLATION] "leaving Canada at the end of the period of stay".

[39] Finally, even if it did, the applicant has submitted no authority for the proposition that a simple statement is sufficient as a basis for an application for a temporary resident visa and to satisfy the regulatory requirements. *Oliinyk* does not apply in this case, given the facts.

[40] Finally, the officer did not make a credibility finding here. He simply found that the evidence was insufficient to demonstrate that the applicant will leave Canada at the end of the period authorized for his stay. See *Ibabu v Canada (Citizenship and Immigration)*, 2015 FC 1068, where I stated at paragraph 35:

> [35] An adverse finding of credibility is different from a finding of insufficient evidence or an applicant's failure to meet his or her burden of proof. As stated by the Court in *Gao v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 59, at para 32, and reaffirmed in *Herman v Canada (Minister of Citizenship and Immigration)*, 2010 FC 629 at para 17, "it cannot be assumed that in cases where an Officer finds that the evidence does not establish the applicant's claim, that the Officer has not believed the applicant". This was reiterated in a different way in *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 23, where Justice Zinn stated that while an applicant may meet the evidentiary burden because evidence of each essential fact has been presented, he may not meet the legal burden because the evidence presented does not prove the facts required on the balance of probabilities.

[41] Given the context and the record, the officer's decision is not unreasonable.

VII. Conclusion

[42] Despite the sympathy the situation may inspire, the Court must dismiss the application for judicial review. The officer's refusal to approve the application for a temporary resident visa is not unreasonable in light of the statutory provisions and the case law. The decision is based on

an internally coherent and rational chain of analysis and is justified in light of the legal and factual constraints to which the officer is subject.

JUDGMENT in IMM-6518-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question is certified.

"Martine St-Louis"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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