Federal Court  Cour fédérale

Date: 20220412

Docket: IMM-3181-20

Citation: 2022 FC 532

Ottawa, Ontario, April 12, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MOHAMMED QASIM M S AL KHAYYAT
IBTISSEM MOSTFAOUI
QASSIM AL KHAYYAT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mohammed Qasim M S Al Khayyat, his wife Ibtissem Mostfaoui, and their minor son Qassim Al Khayyat [collectively the Applicants] seek judicial review of a decision by a Migration Officer [Officer] with Immigration, Citizenship and Refugees Canada at the Canadian

Embassy in Abu Dhabi, United Arab Emirates. The Officer refused the Applicants' request for permanent resident visas pursuant to s 139(1)(d)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[2] Mr. Al Khayyat is a citizen of Iraq. His wife and son are both citizens of Algeria. The Officer found that Mr. Khayaat would be eligible for temporary residence in Algeria, and would eventually qualify for citizenship after seven years of residence. The Officer therefore concluded that Mr. Al Khayyat had a reasonable prospect, within a reasonable period, of a durable solution in Algeria.

[3] The Officer unreasonably found that Algeria was Mr. Al Khayyat's country of "habitual residence" for the purposes of s 139(1)(d)(i) of the IRPR. The Officer also failed to grapple meaningfully with the central purpose of Mr. Al Khayyat's request to be resettled in Canada, namely his desire to be reunited with his elderly father and other family members in this country. Having accepted that the Applicants had been referred for resettlement in Canada by the United Nations High Commissioner for Refugees [UNHCR], the Officer was obliged to provide an explanation for rejecting the referral. He failed to do so.

[4] The application for judicial review is therefore allowed.

II. Background

[5] The Applicants applied to be sponsored as refugees to Canada on September 27, 2017. Mr. Al Khayyat claimed to have a well-founded fear of persecution in Iraq as a Sunni Muslim living in Basrah, where the majority of residents are Shia Muslim. None of the Applicants claimed to fear persecution in Algeria.

[6] Mr. Al Khayyat and his wife were interviewed in Abu Dhabi twice, on November 20, 2017 and again on November 18, 2019. During the second interview, Mr. Al Khayyat was asked to address the possibility of a durable solution in Algeria. According to the Officer's notes in the Global Case Management System [GCMS], Mr. Al Khayyat acknowledged that his wife is an Algerian citizen and he would potentially be eligible for residence and eventually citizenship in that country. However, he indicated a strong desire to be resettled in Canada: "The rest of my family are in Canada, I want to go live with my family there".

[7] On May 17, 2020, the Officer refused the Applicants' request for permanent resident visas pursuant to s 139(1)(d)(i) of the IRPR, which provides as follows:

139 (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that	**139 (1)** Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis:
[…]	[…]

(d) the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely	**d)** aucune possibilité raisonnable de solution durable n'est, à son égard, réalisable dans un délai raisonnable dans un pays autre que le Canada, à savoir:
(i) voluntary repatriation or resettlement in their country of nationality or habitual residence […]	**(i)** soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle, […]

[8] Subparagraph 139(1)(d)(ii) of the IRPR states that a permanent resident visa may also be refused where there is a reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada due to "resettlement or an offer of resettlement in another country". However, it is clear from the refusal letter and the Officer's GCMS notes that the request was denied pursuant to s 139(1)(d)(i) of the IRPR, not s 139(1)(d)(ii).

[9] The Officer found that "permanent residence *per se* does not exist in Algeria", but a foreign national spouse may apply for temporary residency permits for a duration of two to three years, and may eventually apply for citizenship after seven years' residence in Algeria. The Officer therefore concluded that Mr. Al Khayyat had a "reasonable prospect, within a reasonable period, of a durable solution in Algeria".

III. Issue

[10] The sole issue raised by this application for judicial review is whether the Officer's decision was reasonable.

IV. Analysis

[11] The Officer's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). The Court will intervene only if "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).

[12] The Officer's GCMS notes form a part of the decision under review (*Ebrahimshani v Canada (Citizenship and Immigration)*, 2020 FC 89 at para 5).

[13] Mr. Al Khayyat is not a citizen of Algeria. Nor can Algeria be reasonably described as his country of habitual residence. Mr. Al Khayyat's passport shows that he has visited Algeria only twice, for approximately two weeks each time, amounting to fewer than 30 days in total. The first time was when he married Ms. Mostfaoui, and the second time was when their son was born.

[14] Counsel for the Applicants was unable to find any jurisprudence concerning the meaning of habitual residence for the purposes of s 139(1)(d)(i) of the IRPR. In other contexts, the term has been interpreted to mean a country in which an applicant has a significant period of *de facto* residence (*Qassim v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 226 at para 40). The length and quality of time spent in a country is a central factor to be considered.

[15] In *Maarouf v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 723 (TD), Justice Bud Cullen described "former habitual residence" as broadly comparable to the relationship established between a citizen and his or her country of nationality. While there should be no requirement to reside in a country for any specified period of time, an individual should be able to show that "he has made it his abode or the centre of his interests".

[16] Counsel for the Respondent acknowledges that the Officer's reliance on s 139(1)(d)(i) of the IRPR, rather than s 139(1)(d)(ii), was likely a mistake. Nevertheless, the Respondent says the onus is on an applicant to establish that a reasonable prospect of a durable solution in another country does not exist (*Shahbazian v Canada (Citizenship and Immigration)*, 2020 FC 680 at para 33, citing *Al-Anbagi v Canada (Citizenship and Immigration)*, 2016 FC 273 at para 16). The Respondent notes Mr. Al Khayyat acknowledged he was potentially eligible to reside in Algeria, but he preferred to come to Canada to be reunited with his family.

[17] Even if the outcome of a decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion (*Vavilov* at para 96).

[18] Mr. Al Khayyat has never made Algeria his abode or the centre of his interests. The Officer's refusal of the Applicants' request to resettle in Canada was clearly made pursuant to s

139(1)(d)(i) of the IRPR, which is limited to resettlement in a country of an applicant's nationality and/or habitual residence, rather than in a third country. This Court cannot disregard the flawed basis for the Officer's decision or substitute its own justification for the outcome. The application for judicial review must be allowed on this ground alone.

[19] The Applicants acknowledge that family reunification is not a determinative factor. However, there is nothing in the GCMS notes to indicate the Officer engaged with this central aspect of their request for resettlement in Canada. At the time of his interview, Mr. Al Khayyat's father Qasim, his sister Zahra, and his brother Al Hussein had all been accepted as refugees and were living in Canada, while the refugee claims of his brother Omar and mother Reham were in process.

[20] A decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it (*Vavilov* at para 128). In this further respect, the Officer's decision was unreasonable.

[21] Finally, the Officer failed to provide a rationale for departing from the UNHCR's referral of the Applicants for resettlement in Canada. While the record is not entirely clear, the Officer's GCMS notes for November 21, 2017 state: "the applicant(s) understand that their case has been referred to Canada by the UNHCR".

[22] According to operational instructions and guidelines published by the Government of Canada, “UNHCR normally refers refugees to Canada for resettlement only if they have determined that there is no other durable solution available in a reasonable time” (REF-OVS-4-5: *Another durable solution apart from resettlement to Canada*). According to the same document, “a referral by the UNHCR is a good indicator that local integration is not an option”.

[23] Migration officers should explain in their assessments why they do not concur with the UNHCR’s referral of refugees for resettlement in Canada. Officers are not obliged to blindly follow UNHCR designations; however, they must have regard to them. Unless a migration officer explains why a UNHCR designation is not being followed, the Court has no way of knowing whether regard was had to this highly relevant consideration (*Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at para 58).

[24] In *Amanuel v Canada (Citizenship and Immigration)*, 2021 FC 662, Justice Andrew Little reviewed this Court’s extensive jurisprudence regarding the significance of a UNHCR designation, and provided the following summary of the applicable legal principles (at paras 51-55):

> A. An applicant’s UNHCR status as a refugee is important but not determinative;
>
> B. An officer must determine the merits of the applicant’s claim under Canadian law in accordance with the evidence in the record. In doing so, the officer may assess credibility;
>
> C. In making this determination, the officer must have regard to the UNHCR’s determination. If the officer does not concur with it, the officer should explain why;

D. It is a reviewable error if an officer does not mention an applicant's UNHCR status in the officer's decision and/or in the GCMS notes; and

E. If the Court reviews the officer's decision and reasons and finds it is clear that (i) the officer was aware of the applicant's UNHCR status as a refugee; (ii) the officer conducted a thorough assessment of the applicant's application on the merits under Canadian law; and (iii) in doing so, the officer explained why the UNHCR's status was not followed, the Court may conclude that the officer's decision was reasonable. The officer's assessment of credibility may contain the required explanation for why the UNHCR's status was not followed.

[25] No question of credibility arises in this case. Having accepted that the Applicants had been referred by the UNCHR for resettlement in Canada, the Officer's failure to provide an explanation for rejecting the referral also renders the decision unreasonable.

V. Conclusion

[26] The application for judicial review is allowed, and the matter is remitted to a different migration officer for redetermination in accordance with these reasons. None of the parties proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a different migration officer for redetermination in accordance with the Reasons for Judgment.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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