Federal Court  Cour fédérale

Date: 20220504

Docket: IMM-1401-20

Citation: 2022 FC 653

Ottawa, Ontario, May 4, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

MICHEL MAZZEK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Michel Mazzek, is a citizen of Syria living in Dubai, United Arab Emirates [UAE] with his spouse who is a citizen of Syria and Armenia. The Applicant submitted an application for permanent residence under the Convention refugee abroad or the country of asylum class. A migration officer [Officer] rejected the application on the basis that the

Applicant has a durable solution in Armenia [Decision]. The Applicant now seeks judicial review of the Decision.

[2] The Applicant challenges the Decision for lack of procedural fairness and unreasonableness. I find that the Decision is both procedurally unfair and unreasonable, not because of the fact that two migration officers considered the Applicant's permanent residence application and came to different conclusions, as explained below in these reasons, but because of the manner in which the issue of a durable solution unfolded. I therefore grant the Applicant's judicial review application.

[3] These reasons also address a preliminary issue regarding the admissibility of both parties' evidence.

II. Additional Background

[4] A migration officer [MO], other than the Officer who rendered the Decision, interviewed the Applicant and his spouse at the Canadian Embassy in Abu Dhabi, UAE. According to the notes in the Global Case Management System [GCMS], the Applicant's spouse was able to transfer from the company where she worked in Syria to UAE in 2015; the Applicant followed in 2016.

[5] The Applicant's spouse explained that she obtained an Armenian passport because of a baptism certificate, and that she needed the passport to get to UAE and get a job. The Applicant's spouse further described that she has never been to Armenia, however, and cannot

settle there because she cannot obtain permanent residence for the Applicant. They tried about 2 years before the interview but it did not work because “all new applications for Syrians are on hold.” In addition, the Applicant has not been able to work since the conflict in Syria started in 2012. While he has been freelancing, he does not have a fixed job. The Applicant’s status in UAE is based on his spouse’s status from her sales job, a job that is dependent on her performance and the applicable market.

[6] At the conclusion of the interview, the MO accepted the permanent residence application, subject to the outcome of pending medical and security assessments. Almost 1½ years later, the Officer (i.e. a different migration officer) issued a procedural fairness letter [PFL] expressing concern that the Applicant has a durable solution in Armenia because of his wife’s Armenian nationality.

[7] In his response to the PFL, the Applicant explained that he and his spouse married in 2015 and he was recalled to military service. Her Armenian passport, which she got in 2012, meant that they could leave Syria; she left first for UAE and after 6 months she could sponsor him on her temporary residency. Because the Applicant could not find a job, however, he must renew his residency visa in UAE every year.

[8] The Applicant explained further that he tried to apply for an Armenian passport but his request was not approved because they stopped giving them to Syrians who are not of Armenian origin. In their circumstances, if the Applicant’s spouse were to lose her status in UAE, she could

return to Armenia but the Applicant would not be able to accompany her and no longer would have status in UAE. When the opportunity arose to apply to Canada, therefore, they took it.

[9] The Officer found that the Applicant has a reasonable prospect of a durable solution in Armenia, should he choose to fulfill the necessary requirements, such as but not limited to, the one-year residency requirement under Article 13 of the Law of the Republic of Armenia on the Citizenship of the Republic of Armenia [Armenian Citizenship Law]. According to the Officer, this provision stipulates that a person can be granted Armenian citizenship on the basis of being in a registered marriage with an Armenian citizen for the last two years, and if, during those two years, the person has resided legally on the territory of Armenia for at least 365 days. The Officer noted that, since his marriage, the Applicant has resided in Germany (from April 2015 to January 2016) and then in UAE, where he continues to live.

[10] The Officer concluded that the Applicant therefore did not meet the requirements of subsection 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and subparagraph 139(1)(d)(ii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. (See Annex "A" below for relevant provisions.) The Officer also rejected the Applicant's subsequent request for a reconsideration.

III. Standard of Review

[11] Breaches of procedural fairness in administrative contexts have been considered subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v*

Canada (Attorney General), 2018 FCA 69, at para 54. The duty of procedural fairness is context-specific, flexible and variable: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 77. In sum, the focus of the reviewing court is whether the process was fair and just.

[12] Otherwise, to avoid judicial intervention in the context of a reasonableness review, the decision must bear the hallmarks of justification, transparency and intelligibility: *Vavilov*, at para 99. A decision may be unreasonable "if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise," or if the decision maker misapprehended the evidence before it or did not meaningfully account for or grapple with central or key issues and arguments raised by the parties: *Vavilov*, at paras 104, 125-127. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

IV. Analysis

(1) Preliminary Admissibility Issue

[13] I find that both parties' evidence suffers from admissibility issues. For the reasons below, I conclude that the Affidavit of Marlene Altman adduced by the Applicant is only partially admissible, while the Respondent's Affidavit of Irena Krakowska is wholly inadmissible.

[14] Both parties sought to rely on new evidence before this Court involving Armenian Citizenship Law. There is no dispute that the Officer did not attach to the Decision, a copy of the

Armenian Citizenship Law on which the Officer relied. The Applicant's new evidence includes the Affidavit of Marlene Altman, a legal assistant, who attaches two exhibits to her affidavit. The affiant describes Exhibit "A" as a copy of the Armenian Citizenship Law in the NDP of the Refugee Protection Division of the Immigration and Refugee Board of Canada [IRB], dated March 31, 2020. Article 13 of the Armenian Citizenship Law, which comprises this exhibit, tracks or confirms what the Officer cited in the Decision but did not attach. I agree with the Applicant that this exhibit is admissible as background information: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 20(a); *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 [*Bernard*] at paras 20-21; *Shahbazian v Canada (Citizenship and Immigration)*, 2020 FC 680 [*Shahbazian*] at para 15.

[15] Ms. Altman describes Exhibit "B" as a copy of the Armenian Law on Foreigners that she found online, published December 25, 2006 and updated to 2019, with the uniform resource locator or URL: https://www.refworld.org/docid/3ae6b4ec2c.html. This is new evidence for which the Applicant has not provided context nor argued admissibility. Bearing in mind the Federal Court of Appeal's caution against admitting fresh evidence under the rubric of background information, I am not satisfied regarding the necessity of this exhibit and thus, I find it inadmissible, along with the applicable paragraphs in the affiant's affidavit that introduce it: *Bernard*, above at para 22; *R v Khan*, 1990 CanLII 77 (SCC), [1990] 2 SCR 531.

[16] The Respondent's new evidence includes the Affidavit of Irena Krakowska, a paralegal, who similarly attaches two exhibits to her affidavit. The affiant describes Exhibit "A" as a copy

of Article 13 of the Law of the Republic of Armenia on the Citizenship of the Republic of Armenia that she retrieved from the National Assembly of the Republic of Armenia's website on August 5, 2020. The affiant describes Exhibit "B" as an excerpt from the Ministry of Foreign Affairs of the Republic of Armenia's website about the terms and procedure of acquiring Armenian citizenship that the affiant retrieved on the same date.

[17] In response to the Applicant's admissibility objection to such evidence, the Respondent submits that Exhibit "A" to the Krakowska Affidavit accords with the updated version of the IRB's NDP for Armenia that reflects the 2019 amendment to the Armenian Citizenship Law eliminating the residency requirement. The Respondent further submits that this is "open source" background of the nature contemplated in *Shahbazian* at para 15. I agree with the Applicant that such characterization does not apply to Exhibit "A" to the Krakowska Affidavit, but rather, in my view, it applies to Exhibit "A" to the Altman Affidavit. The Officer did not refer generally to Armenian Citizenship Law but instead to very specific provisions that, as I note above, are tracked or confirmed in the latter exhibit.

[18] Ultimately, I find that the Krakowska Affidavit seeks to introduce evidence retrieved from a website well after the date of the Decision (February 13, 2020) and, hence, simply was not before the Officer, and further is not a justifiable exception, per *Access Copyright* and *Bernard*.

(a) *Procedural Fairness*

[19] I am satisfied that, in the circumstances, the Officer breached procedural fairness by not providing the Applicant with a meaningful opportunity to respond to the PFL.

[20] While I do not disagree with the Respondent that the onus was on the Applicant to establish that there was no durable solution in his situation, I do not agree that the combination of the interview and the PFL were adequate notice to the Applicant of the concern in this case. I find that the decision in *Shahbazian,* on which the Respondent relies in this regard, is distinguishable.

[21] In *Shahbazian,* the Court noted that the officer specifically mentioned concern during the interview about whether the principal applicant may have had access to a durable solution in Armenia. While the GCMS notes in the matter before me disclose some of the questions, in point form, that the MO posed during the interview, there is no indication in the notes of what questions were posed or what was said to the Applicant in connection with the spouse's Armenian passport and efforts to obtain Armenian status for the Applicant.

[22] I note, however, that the Applicant's spouse mentioned the term "durable solution" when explaining that she had never been to Armenia before, that her husband could not obtain status there (because they tried 2 years ago and all new applications for Syrians are on hold), and that their status in UAE is temporary. This situation differs from that in *Shahbazian* where the principal applicant indicated in the interview that they had not looked into the possibility of a durable solution in Armenia. Even so, the context in which the MO here may have raised the issue of a "durable solution" is not clear – was it in relation to Armenia, UAE or both?

[23] Further, the MO concluded the interview by explaining to the Applicant and his spouse that "I am accepting the application, but that medical assessment and security screening is still pending. Clients must undergo medical examination and a background will be completed before a final decision can be made." Notwithstanding, as the Respondent argues, that a final decision had not been made, in light of the explanation provided to the Applicant at the conclusion of the interview, it behooved the Officer, in my view, to indicate more specifically in the PFL, with reference to the interview, what about the "durable solution" issue remained of concern: *Kaur v Canada (Citizenship and Immigration)*, 2020 FC 809 at para 42.

[24] Given the discussion on the issue that transpired during the interview, particularly that all new applications for Syrians are on hold, and the MO's conclusion, I find it was insufficient, that is procedurally unfair, in the circumstances for the PFL simply to parrot the *IRPA* s 11(1), the *IRPR* s 139(1)(d)(ii), to note the spouse's Syrian and Armenian nationalities, and to state only that "I am concerned that you have a durable solution in Armenia."

(b) *Reasonableness*

[25] I find that the Decision also is unreasonable for at least two reasons: first, the Officer inexplicably premised the Decision on an older version of Armenian Citizenship Law, and second, the Officer failed to engage with the significant evidence imparted by the Applicant and his spouse during their interview with the MO that applications for Syrians were on hold.

[26] Regarding the first reason, the Respondent submits that, in the alternative to the admission of the Krakowska Affidavit, because the IRB's database now reflects the same

information contained in that affidavit, it no longer may be necessary to refer to it. While that may be the case, it is not assistive to the Respondent, in my view.

[27] Even if one accepts that the amended Armenian Citizenship Law (as of 2019, with the residency requirement removed) was in the NDP before the Officer, the Officer nonetheless inexplicably referred to an older version of the Armenian Citizenship Law. The parties do not dispute that the Officer did so. I find this was a reviewable error.

[28] I disagree with the Respondent's resultant submission that, regardless of which version of the Armenian Citizenship Law were applied, the outcome would not differ and, therefore, the Court's intervention is not warranted: *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 SCR 202 [*Mobil Oil*]. The Supreme Court indeed cites *Mobil Oil* in support of the proposition that "[d]eclining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose": *Vavilov*, above at para 142. Nonetheless, the Supreme Court recognizes (in the same paragraph 142 of *Vavilov*) that elements that may bear on a court's exercise of discretion to remit a matter, also may influence the exercise of its discretion to quash a flawed decision. Further, "judicial review is concerned with *both* outcome and process" [emphasis in original]: *Vavilov*, above at para 87.

[29] I agree with the Applicant that, in the circumstances, the outcome is not a given because the Officer did not grapple with the evidence regarding applications for Syrians being on hold,

and it is unknowable how a different decision maker would assess such evidence in the context of applicable Armenian Citizenship Law, were the matter remitted for redetermination.

[30] Regarding the second reason, while the Respondent argues that there was no documentary evidence (such as in the NDP) to support the assertion that applications from Syrians were on hold, I note that neither the Applicant's credibility nor that of his spouse is in issue. Although the presumption of an applicant's truthfulness is rebuttable (per *Maldonado v Canada (Minister of Employment and Immigration)*, 1979 CarswellNat 168 at para 5, [1980] 2 FC 302 (FCA)), there is no evidence in the certified tribunal record that would rebut the presumption here, in my view, nor has the Respondent pointed to any such evidence.

[31] In the end, I am satisfied that the Officer's failure to engage with this key evidence was unreasonable.

V. Conclusion

[32] For the above reasons, I conclude the Decision is procedurally unfair and unreasonable. I therefore grant the Applicant's judicial review application. The Decision is set aside and the matter will be remitted for redetermination by a different officer or decision maker.

[33] Neither party proposed a serious question of general importance for certification. Satisfied that, as the parties submit, this matter turns on its facts, I find that no question for certification arises in the circumstances.

JUDGMENT in IMM-1401-20

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is granted.
2. The Decision dated February 13, 2020 is set aside and the matter is to be remitted to a different migration officer or decision maker for redetermination.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27**

Requirements and Selection	**Formalités et sélection**
Requirements **Application before entering Canada**	**Formalités** **Visa et documents**
11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The 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 this Act.	**11 (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

***Immigration and Refugee Protection Regulations*, SOR/2002-227**
***Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227**

Convention Refugees Abroad, Humanitarian-protected Persons Abroad and Protected Temporary Residents	**Réfugiés au sens de la Convention outre-frontières, personnes protégées à titre humanitaire outre-frontières et résidents temporaires protégés**
General **General requirements**	**Dispositions générales** **Exigences générales**
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 :
…	…
(ii) resettlement or an offer of resettlement in another country	**(ii)** soit la réinstallation ou une offre de réinstallation dans un autre pays;

FEDERAL COURT

SOLICITORS OF RECORD

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