Federal Court  Cour fédérale

Date: 20230503

Docket: IMM-4125-22

Citation: 2023 FC 647

Ottawa, Ontario, May 3, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ABOUBACAR SIRIKI DIARRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Aboubacar Siriki Diarra, seeks judicial review of a decision dated April 12, 2022, by a Senior Immigration Officer (the "Officer") with Immigration, Refugees and Citizenship Canada ("IRCC"). The Officer refused the Applicant's application for permanent residence on humanitarian and compassionate ("H&C") grounds, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Officer first found that the Applicant failed to credibly establish his identity. The Officer also found that upon considering the Applicant's identity, his establishment in Canada, the adverse country conditions, and potential hardship, an H&C exemption is not warranted in the Applicant's case.

[3] The Applicant submits that the Officer breached procedural fairness by failing to provide notice of, or an opportunity to respond to, concerns relating to his identity, and engaged in an unreasonable assessment of his establishment and potential hardship in the H&C assessment.

[4] For the reasons that follow, I find that the Officer's decision is unreasonable. This application for judicial review is granted.

II. Facts

A. *The Applicant*

[5] The Applicant is a 28-year-old citizen of Ivory Coast. His mother, father, stepmother and three siblings reside in Ivory Coast. He has no relatives in Canada.

[6] The Applicant arrived in Montreal, Quebec in December 2011, at the age of 17. He traveled to Canada with an adult acquaintance, Khadija, whom he claims abandoned him upon their arrival. As he was still a minor and had no immigration knowledge or experience, the Applicant claims he eventually contacted a family friend, who advised him to travel to Prince George, British Columbia to find work.

[7] Once in British Columbia, the Applicant connected with the British Columbia Ministry of Children and Family Development to seek advice about regularizing his status as a minor with no guardian in Canada. In April 2012, the Applicant made a claim for refugee protection with the assistance of a child protection worker.

[8] The Applicant claims he asked his family in Ivory Coast to send him any identity documents they could, to help him with his claim. The only documents they could send were false. The Applicant claims that he felt he had no choice but to use these documents for his refugee claim, as he had nothing else.

[9] On June 13, 2013, the Refugee Protection Division ("RPD") refused the Applicant's claim for refugee protection due to concerns regarding the authenticity of his identity documents. This Court dismissed the Applicant's application for leave and judicial review of the RPD's refusal on February 13, 2014.

[10] The Canada Border Services Agency ("CBSA") issued the Applicant a conditional removal order, after which the Applicant sought a *Laissez Passer* document to Ivory Coast through the Ivory Coast Embassy. He has yet to receive this document or a response from the Embassy.

[11] The Applicant has received seven work permits in Canada. He was refused a work permit once, for failing to pay the fee, and otherwise complied with the conditions to maintain

authorization to work under these permits. Since 2014, the Applicant's work permits have only been valid for a year or six months at a time, resulting in the Applicant's "maintained status".

[12] In June 2021, the Applicant made an application for permanent residence on H&C grounds. He claims that after 11 years of residing and acquiring life experience in Canada, he was able to acquire adequate identity documents from his mother, who was not able to do so when the Applicant was a minor and had initially made his refugee claim in 2012. The Applicant's H&C application included a birth certificate, child vaccination card, national identification card, his mother's medical card, and his father's identification card.

B. *Decision Under Review*

[13] In a decision dated April 8, 2022, the Officer refused the Applicant's permanent residence application on H&C grounds.

(1) Identity

[14] The Officer found that the Applicant failed to credibly establish his identity, despite his awareness that this has been an outstanding issue since his arrival in Canada in 2011. The finding that the Applicant did not establish his identity was based on the following factors:

A. The Applicant failed to submit any new and valid primary identification documents in his H&C application, such as an Ivory Coast passport;

B. The Applicant indicated three different dates of birth on his application forms;

C. The Applicant indicated several different first names on his application forms;

D. On his Background Information form, the Applicant indicated that he is uncertain about his age when he first arrived in Canada in 2011;

E. The Applicant indicated that he doubts the authenticity of his own identification documents upon entering Canada in 2011, stating that he does not know "whether [he] travelled on a genuine passport or a false one," and "it had someone else's name on it but my photo"; and

F. The Applicant indicated various different names and dates of birth for his parents.

[15] The Officer noted the RPD's refusal of the Applicant's refugee claim, in which the RPD stated its dissatisfaction with the Applicant's identity documents and found them to be fraudulent. The Officer found that although the RPD's refusal is not binding on the H&C assessment, its findings warrant considerable weight.

[16] The Officer also raised the additional concern that the Applicant failed to make further efforts to obtain a *Laissez Passer* document from the Ivory Coast Embassy, following up from his initial attempt in 2015. The Officer found that the Applicant did not approach the Ivory Coast Embassy directly since his arrival in 2011, to obtain an Ivory Coast passport or other primary identification document, despite such a document being critical to his initial refugee

claim. The Officer noted that while the lack of identity documents is not the sole determining factor of the Applicant's H&C application, it remains a significant consideration, particularly given the Applicant's lack of demonstrated effort to obtain these documents. The Officer therefore afforded negative weight to the issues surrounding the Applicant's identity.

(2) Establishment

[17] The Officer noted the Applicant's seasonal work as a tree planter in British Columbia since 2013, his modest and highly variable income over the years, his partial dependence on employment insurance, and his lack of employment since November 2020. The Officer also noted the Applicant's secondary school studies and his failure to complete a high school diploma. The Officer stated that the Applicant failed to provide any evidence to demonstrate his integration in or ties to the community. For these reasons, the Officer provided little weight to the Applicant's establishment in Canada.

(3) Hardship

[18] The Applicant's H&C application asserted that when he left Ivory Coast in 2011, the country was fraught with poor living conditions and unrest as a result of the civil war, and those widespread negative conditions and human rights violations still plague the population. The Applicant further asserts that he would face hardship as a result of the country's poor health care system, the lack of independence in the judiciary, and the country's restrictions on the freedom of expression and right to assembly. The Applicant's parents, stepmother and three siblings reside in Ivory Coast and he has no relatives in Canada.

[19] The Officer found that while the Applicant may experience some hardship in reintegrating in Ivory Coast, such difficulties are mitigated by the various improvements in Ivory Coast since the Applicant arrived in Canada. The Officer referenced a January 2017 report on the United Nations Operation in Ivory Coast stating that the human rights situation in the country has been improving and violations have decreased since the crisis in 2010 and 2011. The Officer also cited the Ivory Coast Country Report from 2022, which states that the country's economic situation and healthcare system have improved significantly in the past 10 years. The Officer also found that there have been positive changes in the justice system and the freedom of press has improved since the end of the 2011 conflict. Considering the cumulative evidence pointing to positive shifts in Ivory Coast since 2011, as well as the existence of family ties for the Applicant in Ivory Coast, the Officer found that hardship faced by the Applicant would be mitigated, thereby granting modest weight to the factor of hardship.

[20] The Officer stated that the H&C exemption is intended to be an exceptional measure, not a means to circumvent Canadian laws and regulations bearing on the process to obtain permanent residency, nor to provide an avenue for "citizens of other countries to escape weak economic circumstances by simply arriving in Canada through illegal means." The Officer stated that the Applicant "entered Canada illegally with false documents and a false story," did not complete high school, did not take efforts to improve his employable skills, has only had "intermittent, low wage" employment with a supplemental income through employment insurance, and is currently unemployed.

[21] The Officer concluded that on a global assessment of the relevant factors, including concerns surrounding the Applicant's identity, his weak establishment in Canada, and some hardship conditions in Ivory Coast, the Applicant's circumstances do not warrant an H&C exemption under section 25 of *IRPA*.

III. Issues and Standard of Review

[22] This application for judicial review raises the following issues:

A. Whether the Officer's decision is reasonable.

B. Whether there was a breach of procedural fairness.

[23] The applicable standard of review of the Officer's decision is reasonableness (*Zhang v Canada (Citizenship and Immigration)*, 2019 FC 764 at para 12). The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35)). I find that this conclusion accords with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paragraphs 16-17.

[24] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both

its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A decision that is reasonable as a whole 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[25] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

[26] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

IV. Analysis

[27] The Applicant submits that the Officer failed to reasonably consider the Applicant's establishment and potential hardship in the overall H&C assessment, and unreasonably minimized relevant circumstances. The Applicant further submits that the decision breached procedural fairness by failing to provide notice to the Applicant or an opportunity for him to respond to concerns surrounding his identity.

[28] In my view, the Officer conducted an unreasonable assessment of the Applicant's circumstances in the assessment of the H&C factors. As I find this issue to be determinative of this review, my analysis will not include the procedural fairness issue.

[29] The Applicant submits that on the factor of establishment, the Officer failed to consider several key circumstances affecting the Applicant's employment. The Officer concluded that the Applicant has been unemployed since November 2020, despite contrary evidence that he has had seasonal employment as a tree planter since November 2020, and ignored the information demonstrating that the Applicant's "intermittent, low wage" work history is attributed to his insecure immigration status, his continuous need to apply for work permits, and the resulting insecurity in employment. The Applicant submits that the Officer also ignored his failure to pursue further studies due to the difficulties caused by his precarious immigration status. The Applicant submits that the Officer unreasonably ignored this evidence and demonstrated a critical view of the Applicant's circumstances that fail to adhere to the compassionate approach required in an H&C assessment.

[30] The Applicant submits that the Officer applied a Western-centric idea of establishment in impugning him for his lack of community involvement or failure to pursue higher education. The Applicant contends that an individual's lack of higher education, religious activities, or volunteer engagement does not preclude them from being established in Canada. The Applicant submits that the Officer failed to meaningfully engage with his circumstances, which provide necessary context to his establishment in Canada.

[31] The Applicant further submits that the Officer engaged in an unreasonable assessment of the potential hardship facing him upon return to Ivory Coast. The Applicant contends that the Officer's conclusion that the situation in the country has improved in the past 10 years failed to account for the present conditions in Ivory Coast and their potential impact on the Applicant. The Applicant submits that the Officer's finding that the Applicant may rely on his family in Ivory Coast for support is speculative and unfounded in evidence, given that the Applicant has had minimal contact with them and they have also lived unstable lives as a result of the civil war.

[32] The Respondent maintains that the Officer's decision is based on a reasonable assessment of the Applicant's evidence and circumstances. The Respondent notes that the Applicant's degree of establishment alone is insufficient to warrant an H&C exemption and it is not the Court's role on reasonableness review to reweigh the Applicant's evidence regarding his establishment. The Respondent contends that the Officer adequately considered the country conditions and the potential risks the Applicant may face upon his return, and reasonably found that these risks are mitigated by the evidence pointing to improvements in the country.

[33] In my view, the Officer's decision is unreasonable. I find the Officer's assessment of the Applicant's circumstances, and failure to address key contextual factors in the Applicant's case, to be troubling and unintelligible. I take particular note of the following excerpts of the Officer's reasons for refusing the Applicant's H&C application:

> The exemption under s. 25 of the IRPA was intended to provide access to Permanent Residency based on exceptional humanitarian and compassionate circumstances. It was not intended as a new and independent program to be used to circumvent existing laws and regulations with respect to obtaining Canadian Permanent Residency. Nor was s. 25 of the IRPA intended as a means for citizens of other countries to escape weak economic circumstances by simply arriving in Canada through illegal means.
>
> The Applicant has now been in Canada for approximately a decade. He entered Canada illegally with false documents and a false story. He has not as yet completed high school, nor has he taken any other training courses that might improve his employment prospects. He does not participate in any volunteer or charity work, has no ties to any religious organization or congregation, and has not participated in any advocacy for immigrants such as himself.
>
> Moreover, the Applicant's employment is intermittent, low wage, and is supplemented by the Employment Insurance Benefits between contracts. He is currently unemployed as of the time of this Application.

[34] The Officer did not simply base the final decision on a reasoned analysis of the Applicant's minimal establishment, minimal evidence of hardship in Ivory Coast, and lack of credible identity documents. Instead, the Officer went beyond grounding the findings in the Applicant's evidence and based the refusal of the application on irrelevant and unintelligible factors. The reasoning reflects a failure to engage meaningfully with the Applicant's full record. For instance, the Officer states multiple times that the Applicant arrived in Canada illegally,

implying that he does not warrant an H&C exemption partly because he arrived illegally, without ever mentioning the circumstances in which the Applicant claims he arrived to Canada, as a minor and under the guidance of an adult acquaintance who quickly abandoned him upon arrival. I do not find it is possible to impugn the Applicant for the manner in which he arrived to Canada to seek protection without the contextual factors that colour his story.

[35] Further, the Officer assesses the Applicant's establishment in Canada, in part, on the basis of the fact that he has only performed intermittent and low wage work. While it would have been reasonable for the Officer to consider the full picture of the Applicant's financial establishment and ultimately find that it is insufficient to warrant H&C relief, I do not find it reasonable to make such a finding without regard to the wider contextual factors that impeded on the Applicant's ability to establish himself financially, essentially punishing the Applicant for his precarious immigration status and other systemic barriers. The Officer's analysis of the Applicant's work history is not balanced with a consideration of his need to continuously apply for work permits, remaining on maintained status, or a consideration that the Applicant was likely only able to access seasonal and low wage work as a result of his circumstances, arriving in Canada as a minor with no connections or support. An unreasonable decision is one that fails to "meaningfully account for the central issues and concerns raised by the parties" (*Vavilov* at para 127), as reflected in the Officer's reasoning.

[36] An H&C application must be assessed through a compassionate and empathetic lens, as found by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 21, citing *Chirwa v Canada (Minister of Manpower and Immigration)*

(1970), 4 IAC 338 (Imm App Bd) at 350. However, the Officer's assessment of the Applicant's case demonstrates a failure of compassion and empathy for the Applicant's unique circumstances and context. In failing to accord with these legal constraints bearing on the H&C assessment, the Officer's decision is unreasonable as a whole.

V. Conclusion

[37] For the foregoing reasons, I find the Officer's decision is unreasonable. This application for judicial review is granted. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-4125-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision under review is set aside and the matter returned back for redetermination by a different officer.

2. The style of cause is amended to designate the Minister of Citizenship and Immigration as the proper Respondent.

3. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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