Federal Court  Cour fédérale

Date: 20231025

Docket: IMM-9330-22

Citation: 2023 FC 1424

Ottawa, Ontario, October 25, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

ANDENET BIRHANE HAILE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review of a decision of a Migration Officer [Officer] at Canada's High Commission in Pretoria, South Africa dated July 8, 2022 [Decision], refusing the Applicant's application for permanent residence as a member of the Convention refugee abroad class.

[2] The Officer determined the Applicant does not meet the requirements listed under subsection 139(1)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] and subsection 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Facts

[3] The Applicant is a citizen of Ethiopia who currently resides in South Africa under Formal Recognition of Refugee Status from South Africa, which technically confers temporary refugee status but in practice may also be more permanent.

[4] The Applicant fled to South Africa from Ethiopia in September 2012 to seek protection from persecution she experienced by Ethiopian security forces because of her political opinions and activism in opposition to the Ethiopian regime.

[5] Upon her arrival, the Applicant sought and obtained said Formal Recognition of Refugee Status from South Africa in November 2012.

[6] Since arriving in South Africa, the Applicant has been self-sufficient and working as a street vendor and hawker. She alleges she has been subject to xenophobic attacks since arriving in South Africa, including being robbed. She reported these instances to police.

[7] The Applicant says that due to the South African government's policies on integration and protection, she faces discrimination for employment opportunities and cannot meaningfully engage with the rights afforded to refugees in the country.

[8] In July 2018, the Applicant applied for permanent residence in Canada as a member of the Convention refugee abroad class, sponsored by five individuals, four of whom are Canadian citizens and one a permanent resident of Canada. Her sponsors were all reviewed and successfully screened by High Commission staff.

[9] In June 2022, the Officer interviewed the Applicant. The Officer refused her application on July 8, 2022, mainly because the Officer found the Applicant has a durable solution for refugee protection in South Africa.

III. Issues

[10] The Applicant raises the following issues:

1. Did the Officer err in finding that the Applicant had a durable solution in South Africa?

2. Did the Officer err in finding that the Applicant faced no risk of refoulement to Ethiopia?

[11] The Respondent, as a preliminary matter, raises the admissibility of additional new evidence that was not before the Officer, that the Applicant had added to her record in this Courtc The new evidence is both personal and country condition evidence. It is agreed this new

evidence was not put before the Officer. On the merits, the Respondent says the Applicant has not shown any errors in the Decision warranting judicial review.

[12] As a result, the preliminary issue of the admissibility of new evidence will be addressed, and the sole issue on the merits is whether the Officer's decision is reasonable.

IV. Decision under review

[13] The Decision notes that since the Applicant resides in a country that signed the *UN Convention Relating to the Status of Refugees* [Convention], the Applicant has benefitted from the protection of South Africa and has been able to obtain formal recognition of refugee status there. In the GCMS notes, the Officer determined the Applicant has formal refugee status in South Africa and the right ("on paper") to study, work, access healthcare, and move freely across that country. Further, the Officer is satisfied the Applicant does not face a risk of refoulement to Ethiopia.

[14] However, the central aspect of the Decision now under judicial review deals with durable solution and says:

> I note that the applicant raised the issue of crime and xenophobia at interview and in their application forms. The applicant provided police reports for consideration. While I note that crime is significantly more pervasive in South Africa than in Canada, I am not satisfied that the applicant does not have a durable solution as a result of crime. I note that the applicant has been able to report incidents of crime to the police. Likewise, I accept that xenophobia may be a greater risk in South Africa than in Canada, may be influenced by general civil unrest and may be compounded by crime. However, I am not satisfied that there is information before me to suggest that xenophobia is such that the applicant does not

> have a durable solution in South Africa nor that they do not have rights and privileges (such as employment, education, healthcare, mobility, etc.) as a formally recognized refugee.

V. Standard of Review

[15] The parties both submit the standard of review is reasonableness, and I agree.

[16] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [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).
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> [Emphasis added]

[17] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
>
> [Emphasis added]

[18] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, 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. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
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> [Emphasis added]

VI. Submissions and analysis

A. *Admissibility of New Evidence*

[19] The Applicant in her affidavit filed with this Court submits both new personal evidence and extensive new country condition evidence. None of this was placed before the Officer. The Respondent submits, and I agree, it is improper on judicial review to raise information for the first time unless it meets limited exceptions. I also agree that neither her personal information nor the new country condition evidence fit the exceptions in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20.

[20] Counsel for the Applicant notes her personal evidence is not procedural case history, but a “narration of her story”, and is therefore admissible as general background exception articulated in *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45. On review, I conclude that is not the case.

[21] Therefore, the Court will not consider either her new personal information or the new country condition evidence. To be considered, that evidence should have been put before the Officer at or before the interview, or shortly thereafter, in the usual course. Judicial review is based on the record before the Officer, not material filed after a negative decision. It is quite improper to treat judicial review as an opportunity to serially re-litigate a case as it moves through the system, as here, by adding information left out at one-step, to a subsequent effort seeking a different determination at a higher level be it judicial review or an appeal.

B. *Durable Solution in South Africa*

[22] The evidence in this connection in terms of her refugee application is set out in her written application at question 3(a) of Schedule 2:

> BECAUSE OF HIGH CRIME AND XENOPHOBIA I DO NOT FEEL SAFE IN SOUTH AFRICA. I HAVE BEEN A VICTIM OF A NUMBER OF CRIMINAL AS WELL AS XENOPHOBIC ATTACKS SINCE MY ARRIVAL IN NOVEMBER 2012. I AM DISCRIMINATED FROM FORMAL EMPLOYMENT DUE TO GOVERNMENT’S ILL-POLICIES TOWARDS INTEGRATION OR PROTECTION. THE RIGHTS CONTAINED IN THE REFUGEE/IMMIGRATION ACTS OF THE COUNTRY ARE IMPRACTICAL. THEREFORE, I DO NOT HAVE THE RIGHT TO WORK OR FREELY MOVE IN SOUTH AFRICA.

> ON ARRIVAL IN SOUTH AFRICA, I MADE A REFUGEE CLAIM. MY CLAIM IS VALID AND CREDIBLE. I WAS GRANTED A REFUGEE STATUS. HOWEVER, I AM NOT RECEIVING THE RIGHTS AND PRIVILEGES AS THE CONSTITUTION STIPULATED. I AM DISCRIMINATED FROM EMPLOYMENT, FORMAL ENGAGEMENT, INTEGRATION BUT MORE IMPORTANTLY PROTECTION. AUTHORITIES AND PRACTITIONERS OFTHESE CONSTITUTIONAL PRIVILEGES ABUSE THE POWER ESPECIALLY WHEN A FOREIGNER IS INVOLVED. AS A RESULT, I WAS ROBBED BY GANGS AND EVEN BY POLICE OFFICERS MANY TIMES. WHEN EVER, I TRIED TO REPORT SUCH INCIDENT, I WAS LAUGHED AT AND EVEN THREATENED BY CLERKS IN THE POLICE STATION. IT BECAME A CONSTANT BATTLE TO BALANCE THE ADVANTAGES AND DISADVANTAGES OF BEING A REFUGEE. MY LIFE AS A REFUGEE IS TANTAMOUNT TO A POWERLESS BEING. THE XENOPHOBIC ATTITUDES OF THE PEOPLE IS EVIDENT EVERYWHERE. I TRIED TO INTEGRATE AND FIND A DURABLE SOLUTION IN SOUTH AFRICA, HOWEVER, AT NO FAULT TO ME I COULDN'T.
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> [Emphasis added-underlining]

[23] The Officer obtained confirmation and additional information at the interview which was brief:

> Q: I have to assess whether you have a durable solution here in South Africa. You have formal recognition of refugee status in South Africa. This means that South Africa has assessed your application and is satisfied that you meet the definition of a Convention refugee. Under Canadian law, a person is not eligible for refugee resettlement in Canada if they have resettlement or an offer of resettlement in another country.
>
> I am satisfied that on paper, you have a durable solution in South Africa. With formal recognition of refugee status, you have right to study, work, move freely within SA, access healthcare and apply for PR. Now I realize that these are the rights you have on paper and that the reality may be different. This is your opportunity to explain why you do not believe you have a durable solution in South Africa.

I note that South Africa has a high level of crime, which affects all persons residing in South Africa throughout the country. If you are going to raise the issue of crime, explain how your situation is different than that of a South African living in similar circumstances (such as living in the same neighbourhood, with similar employment or similar economic situation). Explain why you believe that your risk may be greater than others residing in South Africa when it comes to crime.

You now have and opportunity to respond.

A: For any human being to survive, you need to have protection for your life. They say you have what you listed, but there is nothing in South Africa like those rights. With this paper unless you are working your own job, you cannot access any type of job, and most agents won't allow you to rent from them. Beyond this, more times I was attacked by xenophobia mobs, and lose my stuff- where South Africans were not included - they only focus on us, refugees. Even when I'm using taxis, the taxi drivers rob us then they drop you on the way, where you don't know. I tried many locations. First I was working in Germiston, then I was looted. Then I changed the location to Jeppestown. Then from there they said again that refugees cannot work there. When they chased us away I moved to Soweto. In Soweto I rented a wall display. While I was working there, then Soweto started experiencing xenophobia and I lost everything there. Then after I came to town Johannesburg Jeppe, I borrowed money and I started working as a hawker selling socks, wallets, caps, and cheap eyeglasses. Then again I worked for a while, I got a friend, we opened a starter shop in Jullies*(?). Then we opened in 2018, we worked for one year, in 2019 xenophobia started there. The mob came, and where we are working is beside where we are sleeping, they looted everything, they burned the house than we ran to the police. Also the landlord of the shop, we had asked if we could hide there, and they said if they find you in the shop they will kill us all together. Then they pushed us out into the yard.

Q: Did you file a police report?

A: Yes

Q: Where is it?

A: (Applicant points to the document that was scanned.) Getting armed groups and the house break as a woman, even most of the time when you queue for a taxi, if someone is behind you they push you aside because you are not South African.

> Q: What year were you in Germiston?
>
> A: 2012
>
> Q: What year were you in Jeppestown?
>
> A: Jeppestown and Jullies(?) are side by side. The first time I went to Jeppestown was in 2014. And then I went to Jullies in 2018.
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> Q: When were you in Soweto?
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> A: Went in 2014 and left 2015.
>
> Q: I thought you were in Jeppestown in 2014?
>
> A: It was in 2014, but I worked for a few months there.
>
> (*note: Jullies possibly refers to Jules street in Johannesburg)
>
> Interview ended. I inform the client that a decision will be taken after a review of all information on file.
>
> [Emphasis added]

[24] Durable solution is the central issue in this case. The Applicant's position is essentially found in paras 37, 38, 39 and 40 of counsel's submissions:

> 37. The Applicant provided documentary and oral evidence regarding the discrimination and threats she experienced in South Africa due to her refugee/foreigner status in accessing employment, healthcare services, education, and public spaces. The Officer did not indicate having any credibility concerns regarding any aspect of the Applicant's evidence. Rather, the Officer merely considered her refugee status in South Africa and equates that with having a durable solution in South Africa as South Africa is signatory to the UN refugee Convention. Other than listing the rights and benefits stated in the law and making a boilerplate statement the Officer did not make any meaningful assessment of the Applicant's personal accessibility. The Officer therefore failed to consider the Applicant's ability to exercise her legal rights as refugees in South Africa.
>
> 38. The Officer's decision was completely oblivious of the Applicant's personal circumstances, including the five major attacks she had sustained in different towns and places, the

> monthly or bimonthly robberies, and the discrimination she experienced in accessing employment, healthcare services, education, and public spaces. By failing to give due regard to the Applicant's personal circumstances, the Officer failed to consider their duties stipulated in the caselaw including *Kediye* and *Anku* and the CIC Manual. As Mr. Justice Sébastien Grammond said in *Kediye*, the officer's failure to consider the Applicant's "individual circumstances pertaining to [her] integration" in her country of asylum, South Africa, renders the decision unreasonable. For this reason alone, the Officer's decision is reviewable and must be set aside.
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> 39. Further, it is respectfully submitted that the Officer's decision is unreasonable as it was made by misapprehending the Applicant's evidence. The Officer completely failed to mention the Applicant's plight and the factual elements of the 2019 xenophobic attack. Granted, decision makers are presumed to have considered all evidence. However, in situations where they fail to mention crucial evidence, their decision will be suspicious.
>
> 40. In sum, since the Applicant's arrival in South Africa, she was a victim and target of various xenophobic attacks including in 2012, in the town of Germiston, in 2014 in Jeppestown, in 2015 in Soweto, in 2017 and 2019 in Jules, Johannesburg. She has lost everything to the mob attack and numerous robberies. Her business was destroyed, and she escaped from the mob attack through the back door of her home. Police sided with the attackers, harassed and intimidated her with deportation. She escaped multiple mob attacks. Despite all these, by completely ignoring the Applicant's personal circumstances the Officer's decision trivializes the Applicant's reasonable fear and resort into a boilerplate decision. This demonstrates the Officer's misapprehension of the extent of threats the Applicant have endured in South Africa for more many years. Hence the decision lacks justification, and transparency and responsiveness that is reasonably expected from the Officer's decision. Therefore, the decision must be set aside for this reason alone.

[25] I note that durable solution is not defined in IRPA or its regulations. However, the Minister's *Operational Manual 5 Overseas Selection and Processing of Convention Refugees and members of the Humanitarian-protected persons Abroad Classes* [OP-5] has long been recognized as providing a useful guide as to whether a durable solution exists. Notably,

subsection 13.2 of OP-5 recognizes local integration is a long-lasting solution to a refugee's situation and is "more than the granting of safe conditions of asylum", which of course is a key obligation of signatories of the Convention. OP-5 goes on to note that local integration is such that allows the refugee "to live permanently in safety" in the country of refuge. To my mind, the claimant's safety undoubtedly forms a central part of both local integration and any durable solution. This of course reinforces and relates to the protection of refugee claimants set out in sections 96 and 97 of *IRPA*, and indeed the concept of safety is central to the statute's very title in its use of the word "protection".

[26] With respect, having considered the record and submissions of both counsel, I agree substantially with the submissions of the Applicant. The Officer's reasons considered in conjunction with the record, sparse as they were, do not reasonably grapple or come to grips with the personal circumstances of the Applicant, namely seemingly the persistent race-based violence and criminality coupled with some degree of official indifference she alleges.

[27] I note her evidence was not challenged. No adverse credibility or inferences were drawn against her, nor did the Officer say any of her evidence was given reduced weight.

[28] While in the refugee context one might expect less extensive reasons from a migration officer than from the RPD or RAD, this case is still an application for refugee protection, which the Respondent is obliged to reasonably assess.

[29] In this case, the Court is concerned with her allegations against police and her alleged lack of protection. In my respectful view, and despite the able submissions of Mr. Jarvis for the Respondent, it is not safe to simply dismiss this application.

[30] The Applicant also alleged the Officer's findings are boilerplate and identical to the decision of the same or a different officer in Pretoria made the day before as judicially reviewed by this Court in *Woldemariam v Canada (Citizenship and Immigration)*, 2023 FC 891. It is apparent the *conclusions* in both are the same. There is nothing inherently unreasonable in conclusions in one case being the same as in another, provided of course the reasons for the conclusions when considered with the record, meet the tests set out in *Vavilov*. While the decision made the day before was upheld, the same cannot be done in respect of the Decision in the case at bar.

VII. Conclusion

[31] The application for judicial review will be granted.

VIII. Certified question

[32] Neither party proposed a question of general importance to certify, and I agree none arises in this case.

IX. Costs

[33] This is not a case for costs.

JUDGMENT in IMM-9330-22

THIS COURT'S JUDGMENT is that the application is granted, the Decision is set aside, this matter is remanded to a different officer for reconsideration, no question of general importance is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Gebremariam Hailemariam	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

The Law Office of Teklemichael Ab Sahlemariam Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT