Federal Court  Cour fédérale

**Date: 20181029**

**Docket: IMM-1339-18**

**Citation: 2018 FC 1085**

**Ottawa, Ontario, October 29, 2018**

**PRESENT: The Honourable Madam Justice Gagné**

**BETWEEN:**

**MAHDI SULIMAN NOURELDIN ABDELRAHMAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Nature of the matter

[1] Mr. Mahdi Suliman Noureldin Abdelrahman is a 37-year-old citizen of Sudan who fled his native country and requested refugee protection in Israel. He disagrees with the determination of the Immigration Program Manager [Visa Officer] at the Canadian Embassy in Tel-Aviv, who

refused to grant him a Temporary Resident Permit [TRP] pursuant to subsection 24(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], which reads as follows:

| **Temporary resident permit** | **Permis de séjour temporaire** |
|---|---|
| 24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time. | **24 (1)** Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps. |

[2] The reasons provided by the Visa Officer are so short that they could easily be stated in full:

> This is an application for a Temporary Resident Permit but it reads more like a request for refugee protection. PA fled Sudan seven years ago and has resided as an asylum seeker in Israel ever since. He now wants a TRP to go to Canada for his own protection. His only inadmissibility is that he does not have a visa to enter Canada. There is no compelling reason to issue a TRP in this case. PA's personal circumstances are very similar to thousands of other Sudanese asylum seekers here in Israel. TRP refused.

## II. Issues

[3] The Applicant raises the following issues:

A. *Did the Visa Officer fail to provide sufficient reasons for the decision?*

B. *Did the Visa Officer fetter his discretion?*

C. *Did the Visa Officer act without regard for the evidence?*

[4] Since I am of the view that the first of these issues is determinative of the present application, and since the reasons provided by the Visa Officer are insufficient to allow any meaningful analysis of the two following issues, I will only address the sufficiency of the reasons.

## III. Analysis

[5] The purpose of the TRP is to provide some flexibility in cases where the strict application of the IRPA would lead to a person's exclusion from Canada. Section 24 of the IRPA provides an officer with a broad discretionary power to be used in exceptional cases to allow such a person to enter into or to remain in Canada.

[6] Immigration, Refugees and Citizenship Canada has published guidelines on the eligibility of applicants and the assessment of TRP applications. While these may be useful, they do not have the force of law and are not binding (*Afridi v Canada (Citizenship and Immigration)*, 2014 FC 193 at para 18; *Vaguedano Alvarez v Canada (Citizenship and Immigration)*, 2011 FC 667 at para 35; *Shabdeen v Canada (Citizenship and Immigration)*, 2014 FC 303 at paras 15-16; *Mousa v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1358 at para 11; *Rosenberry v Canada (Citizenship and Immigration)*, 2012 FC 521 at para 82).

[7] The guidelines state that a TRP will be granted where:

> •the need for the foreign national to enter or remain in Canada is compelling; and
>
> •the need for the foreign national's presence in Canada outweighs any risk to Canadians or Canadian society.

[8] Most of the cases in the Federal Court have accepted the "compelling reasons" test (see for example: *Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at paras 22, 38, 40; *César Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 880 at paras 95-97; *Stordock v Canada (Citizenship and Immigration)*, 2013 FC 16 at para 9; *Vaguedano Alvarez*, above at para 36; *Nasso v Canada (Citizenship and Immigration)*, 2008 FC 1003 at paras 13-15), although some have rejected it or at least questioned it (*Krasniqi v Canada (Citizenship and Immigration)*, 2018 FC 743 at para 19; *Palmero v Canada (Citizenship and Immigration)*, 2016 FC 1128 at para 21).

[9] In my opinion, the "compelling reasons" test and the needs versus risk assessment are appropriate considerations to determine whether a TRP should be granted. A TRP should only be granted where the reasons of the foreign national to be in Canada are compelling, and these reasons outweigh the risks posed to the health and safety of Canadians.

[10] With these general principles in mind, the Visa Officer's reasons in this case state that the application for a TRP "reads more like a request for refugee protection". The IRPA and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] do not prohibit making a TRP application for protection reasons. In fact, this possibility is explicitly acknowledged by section 151.1 of the IRPR. For example, a TRP for protection reasons could be granted, in the right circumstances, to an asylum seeker pending the determination of his or her refugee claim.

[11] It is telling that the guidelines contain a section dealing explicitly with TRP applicants raising refugee protection-related risks. In such cases, officers are expressly advised not to consider grounds under section 96 or section 97 of the IRPA:

> When the foreign national has already had a final determination on a refugee claim or a pre-removal risk assessment (PRRA), the officer should assess the TRP without consideration of any section A96 or section A97 risks identified by the foreign national, as these have already been assessed.
>
> The officer should advise the client that their risk was not assessed, as it was already assessed through their refugee claim and/or PRRA application. If applicable, the officer should advise the client that they may apply for a subsequent PRRA or for permanent residence (if they are a protected person).
>
> **If the applicant has not had a refugee claim or PRRA**, the officer should assess the TRP without consideration of any section A96 or section A97 risks identified by the foreign national. The officer may advise the client that they may be able to have this risk assessed through the refugee claim process.
>
> [Emphasis in original.]

[12] The proper forum for an application invoking section 96 or section 97 risks is the refugee claim process. In this case, the Applicant has not made a refugee claim.

[13] In his application for a TRP, the Applicant alleges a serious fear of persecution in Sudan. However, he enumerates the following reasons why he would be inadmissible or would not meet the IRPA requirements, which would, in his opinion, justify granting him a TRP:

> He does not hold of a valid passport or traveling document (Section 151 of IRPR);
>
> He does not have a referral letter (section 140.3(1) of IRPR);
>
> He is unable to apply through the refugee sponsorship process (section 140.3(4) of IRPR);

> He does not meet the requirement for a visa (section 70 of IRPR); and
>
> He does not benefit from a private sponsorship (sections 136, 152 and 157 of IRPR).

[14] Neither the alleged risk nor these impediments were considered by the Visa Officer.

[15] In my opinion, absent truly exceptional circumstances, it would be unfair to allow the Applicant to bypass the refugee determination process only because he alleges risks under section 96 or section 97 of the IRPA. The refugee determination process, when it can be accessed, is the proper channel to evaluate those risks.

[16] I do not intend the above comments to entail that a TRP application should always be denied if an applicant alleges risks under sections 96 and 97 of the IRPA, as nothing in section 24 of the IRPA limits the grounds for which a TRP may be granted. In a case such as this one, the Visa Officer remains under a duty to assess whether there are compelling reasons, including risks under section 96 or section 97 of the IRPA, to allow the refugee to bypass the normal refugee determination process and to grant a TRP.

[17] Accordingly, the Visa Officer had to determine whether the Applicant's circumstances involved sufficiently compelling reasons to bypass the refugee determination process and to resort to a TRP (*Betesh v Canada (Citizenship and Immigration)*, 2008 FC 1374 at paras 63-64). With respect, it is unclear whether the Visa Officer rejected the TRP application because it reads like a refugee claim or because the Visa Officer did not find the Applicant's circumstances sufficiently compelling to issue a TRP.

[18] If it is the former, the Visa Officer did not adequately fulfil his duty under section 24 of the IRPA. If it is the latter, the reasons given do not allow this Court to understand why the Visa Officer did not find the Applicant's circumstances sufficiently compelling (*Mousa*, above at paras 19-20). The sole fact that others may be in a similar situation does not necessarily render the Applicant's circumstances any less compelling.

## IV. Conclusion

[19] For these reasons, this application for judicial review is allowed. The parties did not propose any question of general importance for certification and none arises from the facts of this case.

[20] Finally, and although it was not raised by the parties, the style of cause will be amended to properly identify the Respondent as the Minister of Citizenship and Immigration, instead of the Minister of Immigration, Refugees and Citizenship (see subsection 4(1) of the IRPA and paragraph 5(2)(*b*) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22).

**JUDGMENT in IMM-1339-18**

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is allowed;
2. The decision dated August 15, 2017 is set aside and the matter is remitted for a new determination by a different visa officer;
3. The style of cause is amended to replace the "Minister of Immigration, Refugees and Citizenship" with the "Minister of Citizenship and Immigration";
4. No question of general importance is certified.

"Jocelyne Gagné"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1339-18 |
| **STYLE OF CAUSE:** | MAHDI SULIMAN NOURELDIN ABDELRAHMA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | SEPTEMBER 27, 2018 |
| **JUDGMENT AND REASONS:** | GAGNÉ J. |
| **DATED:** | OCTOBER 29, 2018 |

**APPEARANCES:**

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| Mitchell Goldberg | FOR THE APPLICANT |
| Zoé Richard | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Montréal, Quebec | FOR THE RESPONDENT |