Federal Court  Cour fédérale

**Date: 20210617**

**Docket: IMM-1457-20**

**Citation: 2021 FC 617**

**Ottawa, Ontario, June 17, 2021**

**PRESENT: Madam Justice Walker**

**BETWEEN:**

**MARGARET MUSASIWA**
**TINOONGA THANDO BUHLE MUSASIWA (Minor)**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] Ms. Margaret Musasiwa, the Principal Applicant, and her minor daughter seek judicial review of a February 21, 2020 decision (the Decision) of a visa officer at the High Commission of Canada in South Africa. The officer refused the Principal Applicant's application for a study permit pursuant to sections 179 and 216 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the IRPR). The officer was not satisfied that the Principal Applicant would leave Canada at the end of her stay as a temporary visitor.

[2] The Applicants argue that (1) the visa officer breached their right to procedural fairness by making adverse credibility findings and failing to provide them an opportunity to respond; and (2) the Decision was not reasonable.

[3] While I have found that the officer's process was fair and that the Decision was not based on veiled credibility findings, I agree with the Applicants that the Decision is not reasonable within the framework established in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*). As a result, the application will be granted and the matter returned to another visa officer for redetermination.

## I. Overview

[4] The Applicants are citizens of Zimbabwe and permanent residents of South Africa. The Principal Applicant obtained an Honours Bachelor of Commerce in Finance from the National University of Science and Technology in Zimbabwe in 1997. After graduating, she worked in Zimbabwe for five years as a local money market dealer and investment consultant. The Principal Applicant has since been out of the workforce for 15 years to focus on raising her family.

[5] In March 2019, the Principal Applicant applied for a study permit to attend the Southern Alberta Institute of Technology (the SAIT) and pursue a two-year Business Administration Diploma program. She also applied for a study permit for her teenage daughter, the minor applicant, who was to accompany her to Canada.

[6] The Applicants' study permit applications were refused in October 2019. They sought leave and judicial review of the refusals but discontinued their applications once the Respondent agreed to set aside the refusals and remit the applications for redetermination.

[7] On redetermination, the study permits were again refused in the Decision now under review.

[8] The Decision is comprised of a decision letter and Global Case Management System (GCMS) notes. In the decision letter, the officer stated that they were not satisfied the Principal Applicant would leave Canada at the end of her stay based on the purpose of her visit, limited employment prospects in her country of residence, and her current employment situation.

[9] The officer's analysis of the substance of the Principal Applicant's study permit application is set out in the GCMS notes. The officer's refusal was based on the following concerns:

1. The Principal Applicant had not adequately explained how the two-year business administration program at the SAIT would be a progression from her existing commerce degree or would support her professional development.

2. The officer acknowledged the Principal Applicant's intention to re-enter the workforce and to return to Zimbabwe to start a consulting firm with her spouse after completion of the SAIT program. The officer stated, however, that the Principal Applicant had not explained how the vocational diploma course would further her stated purposes, particularly her desire to focus on the international financial services industry, or why her existing degree would not be sufficient.

3. Despite the Principal Applicant's ability to fund her studies in Canada, the officer queried why she would shoulder those expenses when the same type of programs could be found in South Africa.

4. The officer referred to the Principal Applicant's statements that the political and economic situation in Zimbabwe had improved since the ouster of Robert Mugabe but, following a review of the economic and political situations in Zimbabwe and South Africa, the officer reached the opposite conclusion.

## II. Analysis

### 1. *Procedural fairness*

[10] The Applicants submit that the visa officer acted unfairly in basing the refusal of the Principal Applicant's study permit on credibility concerns without notification to them. They argue that this is not a case of insufficiency of evidence but of credibility findings dressed to look like evidentiary shortcomings (*Patel v Canada (Citizenship and Immigration)*, 2020 FC 77 (*Patel*)).

[11] The parties agree that issues of procedural fairness are effectively reviewed for correctness (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56 (*Canadian Pacific*)). My review asks whether the officer's process was just and fair focusing on the Applicants' substantive rights and the consequences to them of the refusal of the Principal Applicant's study permit (*Canadian Pacific* at para 54; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817).

[12] The level of procedural fairness owed to visa and study permit applicants falls at the low end of the spectrum (see, e.g., *Al Aridi v Canada (Citizenship and Immigration)*, 2019 FC 381 at para 20 (*Al Aridi*). Nevertheless, a visa officer is required to raise credibility issues with an

applicant and afford the applicant an opportunity to respond, whether orally or in writing. The requirement is simply stated but can be difficult to apply in practical terms. One recurring difficulty lies in distinguishing an officer's concerns regarding the sufficiency of supporting materials or evidence and concerns regarding an applicant's credibility (*Patel* at para 10).

[13] The Applicants submit that the Decision is based virtually entirely on adverse credibility findings even though the officer did not overtly impugn the Principal Applicant's credibility. They rely on similarities between the visa officers' analyses in *Patel* and *Al Aridi* to that of the officer in the present case, and argue that the officer was required to alert them to credibility issues prior to finalizing the Decision. I do not agree.

[14] The Principal Applicant relied on her letter of explanation filed in support of her application (Application Letter) to explain her interest in the SAIT program and intention to return to Zimbabwe to establish a new financial consultancy business with her husband. The officer examined the Application Letter and identified a number of deficiencies in the explanation. The officer also referred to objective documentary evidence regarding the economic situations in Zimbabwe and South Africa that contradicts the Principal Applicant's assertions.

[15] The Applicants' argue that the officer must have disbelieved the Principal Applicant's explanations in identifying the deficiencies and contradictions set out in the Decision. Their argument is essentially the following: if an applicant states that a program will assist their future employment plan when they leave Canada, a finding of insufficiency of evidence is necessarily an adverse credibility finding.

[16] I have reviewed the cases discussed by the Applicants against the officer's analysis of the Principal Applicant's evidence, notably the Application Letter. The officer's conclusion reads as follows:

> As the application is viewed as a whole, although funds appear sufficient on balance given the applicant's previous educational history, purpose of study, the overall motivation to pursue studies in Canada at this point does not seem reasonable rather than studying within the region based on the many factors listed earlier in this assessment.

[17] At the heart of the officer's analysis, which I discuss in the next section of this judgment, was the apparent absence of a connection between the Principal Applicant's stated purpose for continuing her studies and the substance of the proposed SAIT program together with the worsening economic situation in Zimbabwe and South Africa. While there are deficiencies in that analysis, the Decision as a whole reflects evidentiary and not credibility concerns.

[18] An officer may conclude that an applicant's request for a study permit is not reasonable due to insufficiency of evidence without making adverse credibility findings (*Ibabu v Canada (Citizenship and Immigration)*, 2015 FC 1068 at para 35):

> [35] An adverse finding of credibility is different from a finding of insufficient evidence or an applicant's failure to meet his or her burden of proof. As stated by the Court in *Gao v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 59, at para 32, and reaffirmed in *Herman v Canada (Minister of Citizenship and Immigration)*, 2010 FC 629 at para 17, "it cannot be assumed that in cases where an Officer finds that the evidence does not establish the applicant's claim, that the Officer has not believed the applicant". […]

[19] Although there are similarities in the vocabulary used in the impugned decisions in *Patel* and *Al Aridi* to the officer's explanation of the refusal in the Decision, there are material

evidentiary differences in each of the three cases. The decision of my colleague Justice Elliott in *D'Almeida v Canada (Citizenship and Immigration),* 2019 FC 308, cautions against relying on specific words used by a visa officer, in that case the term '*bona fides*', to conclude that the officer must have been making a credibility finding.

[20] The Principal Applicant described the SAIT program as being hands-on and focused on simulations, case studies and team projects. However, she provided no explanation of the content of the SAIT program and submitted no supporting objective evidence regarding either the program (e.g., a syllabus) or the improving economic circumstances she asserts will assist her intended new business. I find that the officer could reasonably conclude that the Principal Applicant had provided insufficient evidence that the SAIT program would further her employment goals.

[21] The fairness of a visa officer's assessment process must be considered on the particular evidentiary record and the officer's analysis and conclusion. In this case, I find no suggestion of adverse credibility findings on the part of the officer and no breach of the Applicants' right to procedural fairness.

2. *Was the Decision reasonable?*

[22] The merits of the Decision are subject to review for reasonableness (*Vavilov* at paras 10, 23). A visa officer's decision is owed a high level of deference by the Court and may be brief but it must respond to the requirements for a reasonable decision: 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).

[23] The Supreme Court emphasizes two components to a reasonable decision: the decision maker's reasoning process and the outcome. The reasons given must reflect a logical chain of analysis and intelligibly explain the outcome. While an outcome may be reasonable, it "cannot stand if it was reached on an improper basis" (*Vavilov* at para 86). Here, the visa officer's reasoning process and analysis is flawed. The reasons given in the Decision suffer from three reviewable errors.

[24] First, the officer did not consider the Applicants' significant ties to Zimbabwe and South Africa. There is no reference in the Decision to the Applicants' evidence of their familial and economic connections to the region. The Principal Applicant described those ties in her Application Letter and counsel highlighted them in his submissions to the officer.

[25] The existence of substantial ties to a home country is an important consideration in an officer's assessment of whether an applicant will leave Canada and return to their country upon completion of their studies. I find the officer's failure to assess this aspect of the Applicants' evidence is itself a reviewable error (*Vavilov* at paras 102-103).

[26] Second, a material factor in the officer's conclusion that the Principal Applicant was not a genuine student was the fact that "the very same type of programs and courses can be found in South Africa, at world class education facilities, including universities and colleges [in]

Johannesburg and Pretoria". The officer relied on the existence of such programs closer to home to question the Principal Applicant's rationale for decamping to southern Alberta and incurring significant cost and family disruption.

[27] The difficulty with the officer's reference to equivalent programs is that there is neither evidence in the record supporting the reference nor does the officer refer in the Decision to any objective source for the availability of equivalent programs in South Africa. I find that the officer's conclusion that the same types of programs as the proposed SAIT program are available in the Principal Applicant's home region was unreasonable (*Aghaalikhani v Canada (Citizenship and Immigration)*, 2019 FC 1080 at para 20).

[28] Third, and finally, one of the reasons the officer was not satisfied the Principal Applicant would leave Canada at the end of her authorized stay was her lack of current employment. The officer stated in the decision letter:

> I am not satisfied that you will leave Canada at the end of your stay as a temporary resident, as stipulated in paragraph 179(b) of the IRPR, based on your current employment situation.

[29] The officer provides no rationale in the GCMS notes for the inclusion of an adverse finding based on current employment status in the decision letter.

[30] The Principal Applicant explained in her Application Letter that she has been out of the workforce for 15 years while raising her family. One of the reasons for her desire to pursue further education is to refresh her skills originally developed in a four-year honours commerce degree and during five years of work in the financial industry. In my opinion, the officer was not

justified in relying on the Principal Applicant's current unemployed status as a negative factor in assessing her application. The Principal Applicant's reason for updating her education to re-enter the workforce is logical and persuasive.

[31] The Applicants raise a number of additional alleged errors in the Decision. Specifically, they argue that the officer's conclusion that the Principal Applicant provided insufficient evidence of a connection between her intention to focus on the international financial services industry and the substance of the proposed SAIT program was unreasonable. I do not find their argument persuasive.

[32] The officer's analysis of this aspect of the evidence was logical and fully justified. The Principal Applicant provided no evidence of the content of the two-year vocational program she intends to pursue. Whether that evidence consisted of a paragraph in her Application Letter or a copy of the program syllabus matters not. In the absence of such evidence or an obvious link between the program and the Principal Applicant's employment plan, it was open to the officer to conclude that it is difficult to understand how the SAIT program would refresh the Principal Applicant's knowledge and skills in international finance.

[33] The Applicants also submit that the officer erred in assessing the economic viability of the Principal Applicant's business plan for her return to Zimbabwe and South Africa. The Principal Applicant referred to positive economic developments in Zimbabwe in the Application Letter to bolster the viability of her business plan. In the Decision, the officer countered her statements with a review of documentary evidence pointing to significantly worsening economic

conditions in the country and, to a lesser extent, in South Africa. I find no reviewable error in the officer's analysis. The fact that the officer did not engage with the Principal Applicant's intention to rely on the Zimbabwe diaspora as a client source is not a reviewable error.

[34] In summary, the officer's analysis of the evidence and conclusions in the Decision are significantly undermined by the three errors discussed above. The conclusion that the Principal Applicant will not leave Canada at the end of her authorized stay is not intelligibly and logically justified against the evidence. Therefore, I will set aside the Decision and remit this matter for redetermination.

[35] No question for certification was proposed by the parties and none arises in this case.

**JUDGMENT IN IMM-1457-20**

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

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1457-20 |
| **STYLE OF CAUSE:** | MARGARET MUSASIWA and TINOONGA THANDO BUHLE MUSASIWA (Minor) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | JUNE 2, 2021 |
| **JUDGMENT AND REASONS:** | WALKER J. |
| **DATED:** | JUNE 17, 2021 |

**APPEARANCES:**

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|---|---|
| Leo Rayner | FOR THE APPLICANTS |
| Jocelyn Espejo-Clarke | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Legally Canadian<br>Barristers and Solicitors<br>Mississauga, Ontario | FOR THE APPLICANTS |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |