

Federal Court



Cour fédérale

**Date: 20200826**

**Docket: IMM-4928-19**

**Citation: 2020 FC 856**

**Ottawa, Ontario, August 26, 2020**

**PRESENT: Madam Justice Walker**

**BETWEEN:**

**CHESIYAO MINNIE KAZEMBE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Ms. Kazembe seeks the Court's review of the August 7, 2019 decision of an immigration officer (Officer) refusing her application for: (1) a temporary resident permit (TRP) pursuant to subsection 24(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (*IRPA*); and (2) a study permit pursuant to paragraph 215(1)(e) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*Regulations*).

[2] I find that the Officer's decision (Decision) was not reasonable. The Officer drew inaccurate factual conclusions from the evidence and failed to consider the circumstances surrounding Ms. Kazembe's late application to restore her study permit in the fall of 2018. As a result, the Decision does not reflect a coherent and justified analysis of Ms. Kazembe's TRP and study permit application against the facts and law that constrain an officer's exercise of discretion under subsection 24(1) of the *IRPA*. For this reason, I will allow Ms. Kazembe's application for judicial review.

### I. Background

[3] Ms. Kazembe came to Canada in 2013 to study and has pursued her studies since that time via successive study permits. The following timeline is taken from the Certified Tribunal Record and Ms. Kazembe's affidavit filed in support of this application:

January 2013	Ms. Kazembe arrived in Canada on a study permit and began her studies at Mohawk College (Hamilton, Ontario).
March 31, 2015	Expiration of first study permit. The permit was extended until July 30, 2016.
Winter 2016 semester	Ms. Kazembe transferred to the McMaster University Centre for Continuing Education, Human Resources Management diploma program.
July 30, 2016	Expiration of renewed study permit.
August 2016	Ms. Kazembe applied to restore her study permit. The permit was restored until March 31, 2017.

March 31, 2017	Expiration of restored study permit.
June 2017	Ms. Kazembe applied to extend her restored study permit. The permit was extended until August 31, 2017.
August 31, 2017	Expiration of the extension of the restored study permit.
November 3, 2017	Ms. Kazembe's study permit was extended until July 10, 2018.
May 2018	Ms. Kazembe graduated from the McMaster Human Resources Management diploma program.
July 10, 2018	Expiration of Ms. Kazembe's study permit.
August 20, 2018	Ms. Kazembe was accepted to McMaster University's pathway program, Bachelor of Arts.
September 12/20, 2018	Ms. Kazembe applied to restore her expired study permit but her online submission was not successful due to technical issues with the Immigration, Refugees and Citizenship Canada (IRCC) website.
October 8, 2018	Expiration of eligibility period to restore study permit.
October 30, 2018- November 2, 2018	IRCC error message screen shots: October 30, 2018, November 1, 2018 and November 2, 2018.
November 1, 2018	Ms. Kazembe contacted IRCC regarding her technical issues.
November 2 and 5, 2018	November 2: Ms. Kazembe received an IRCC email with suggestions to address the technical issues.
	November 5: Ms. Kazembe received an IRCC email explaining that the technical problems she experienced

	resulted from an IRCC system update and advising her to delete her application and submit a new one to prevent further issues.
November 6, 2018	Ms. Kazembe submitted her online application to restore her study permit.
December 10, 2018	Ms. Kazembe received an IRCC email stating that her information had been verified and that everything appeared to be in order with her application.
December 17, 2018	Ms. Kazembe's application to restore her study permit was refused.
January 31, 2019	Ms. Kazembe submitted her application for a TRP and study permit.
August 7, 2019	Refusal of Ms. Kazembe's application for a TRP and study permit (the Decision).

[4] Ms. Kazembe has remained in Canada without status since her study permit expired on July 10, 2018. She wishes to remain in Canada for one year to complete her program at McMaster.

## II. Decision under Review

[5] The Decision consists of (1) a letter setting out the Officer's refusal of Ms. Kazembe's TRP and study permit application; and (2) the Officer's Global Case Management System (GCMS) notes which form part of the Decision (*Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 at para 15).

[6] In the GCMS notes, the Officer cited a number of concerns with Ms. Kazembe's history of restoring and extending her Canadian study permits and with her apparent failure to attend school in 2015-2016.

[7] The Officer first described Ms. Kazembe's late submission of her application to restore her study permit in 2018. The study permit expired on July 10, 2018 and the eligibility period for restoration of the permit expired on October 8, 2018. Ms. Kazembe did not successfully file her restoration application until November 6, 2018. The Officer acknowledged Ms. Kazembe's explanation that she had experienced technical issues with the IRCC website when attempting to upload her application in September 2018 and stated:

[Ms. Kazembe] submitted screenshots of her online applications dated September 12, 2018, October 30, 2018, November 1, 2018, November 2, 2018. However, [Ms. Kazembe] has not provided evidence that [she] attempted to submit an application after September 12, 2018 and before restoration eligibility expiry date. As per provided documentation [Ms. Kazembe] tried only once to submit application for restoration during the allowed 90 day restoration period.

[8] The Officer then raised additional concerns:

- Ms. Kazembe's study permit had been restored three times in the past and it appeared she was knowledgeable about the process for restoration;
- Ms. Kazembe had not explained why she did not submit a paper restoration application once she encountered technical issues; and
- Ms. Kazembe had not attended school from Winter 2015 to Fall 2016 and, therefore, it appeared she had not complied with her study permit condition to actively pursue her studies.

[9] Finally, the Officer observed that there is a mechanism available to Ms. Kazembe to rectify her inadmissibility by leaving Canada and applying abroad for a visa to return to Canada. The Officer concluded that the issuance of a TRP to Ms. Kazembe was not justified on the facts laid out in her application and submissions.

### III. Issues and Standard of Review

[10] Ms. Kazembe argues that (1) the Decision was not reasonable; and (2) the Officer breached Ms. Kazembe's right to procedural fairness by failing to inform her of the concerns regarding her failure to file a paper restoration application and her non-compliance with her study permits.

[11] My conclusion that the Decision was not reasonable is the determinative issue in this application. As Ms. Kazembe's TRP and study permit application will be returned for reconsideration, I will not assess her arguments concerning the fairness of the Officer's process.

[12] The parties submit and I agree that the Decision is subject to review by this Court for reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 (*Vavilov*)). None of the situations identified by the Supreme Court of Canada (SCC) in *Vavilov* for departing from the presumptive standard of review apply in this case. A review of the Decision for reasonableness is also consistent with the pre-*Vavilov* jurisprudence (see, e.g., *Krasniqi v Canada (Citizenship and Immigration)*, 2018 FC 743 at para 21 (*Krasniqi*)).

[13] The majority in *Vavilov* set out guidance for reviewing courts in the application of the reasonableness standard, emphasizing the decision actually made, the decision maker’s reasoning process and the outcome for the person affected by the decision (*Vavilov* at para 83). The Supreme Court stated that the hallmark of a reasonable decision is “an internally coherent and rational chain of analysis” that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85; *Canada Post Corp. v Canada Union of Postal Workers*, 2019 SCC 67 at para 32). I have applied the Supreme Court’s guidance to my review of the Decision.

#### IV. Analysis

[14] Ms. Kazembe submits that the Decision was unreasonable because the Officer made two significant factual findings that were not consistent with the evidence and failed to consider all of the circumstances of her case. In this latter regard, Ms. Kazembe submits that the Officer erred in omitting to consider the factors set out in the IRCC’s own eligibility and assessment guidelines for the issuance of TRPs (Guidelines). She emphasizes that an administrative decision must be justified and not merely justifiable, and that “an otherwise reasonable outcome also cannot stand if it was reached on an improper basis” (*Vavilov* at para 86).

[15] Subsection 24(1) of the *IRPA* governs the issuance of a TRP:

#### **Temporary resident permit**

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

#### **Permis de séjour temporaire**

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

circumstances and issues a temporary resident permit, which may be cancelled at any time.	permis de séjour temporaire — titre révocable en tout temps.
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[16] The provision is intended to alleviate the sometimes harsh consequences of the strict application of the *IRPA* (*Douglas v Canada (Citizenship and Immigration)*, 2019 FC 1101 at para 14 (*Douglas*)). In other words, the subsection presupposes that a foreign national has failed to comply with one or more provisions of the *IRPA* or the *Regulations*. In exercising their discretion, an officer must weigh the nature of the non-compliance against the particular individual's circumstances.

A. *Basis of the Decision*

[17] The Respondent submits that the Decision was reasonable because the Officer's reason for refusing Ms. Kazembe's TRP application was her failure to file her 2018 restoration application within the eligibility period. The Respondent argues that the remainder of the Officer's comments in the GCMS notes were observations only, akin to *obiter dicta* in a judicial decision, and cannot be used to undermine the reasonableness of the Decision (*Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130).

[18] The Respondent's submission is not persuasive for two reasons. First, the Officer does not distinguish in the Decision the reason(s) for the refusal from comments that were intended as ancillary observations. Ms. Kazembe's failure to respect the time period within which she was permitted to restore her study permit was the first finding in the Decision and was an important factor in the Officer's analysis. However, the Officer's findings regarding other aspects of the



evidence were not couched in different or subordinate analytical terms. Rather, the Officer made a series of findings in the Decision and then concluded that the grant of a TRP was not justified. There is no indication that the Decision was intended to be read in the manner suggested by the Respondent.

[19] Second, if the Officer refused Ms. Kazembe's TRP application based solely on the fact that she submitted her restoration application outside of the eligibility period, the Officer committed a reviewable error. The Officer was required to assess all of Ms. Kazembe's submissions and evidence in deciding whether to exercise the discretion contemplated by subsection 24(1).

B. *Officer's factual errors*

[20] I find that the Officer made material factual errors in concluding that Ms. Kazembe (1) previously applied to restore her study permit on three occasions; and (2) was absent from her studies for the period of Winter 2015 to Fall 2016. These two errors are important as they resulted in the Officer drawing two equally erroneous inferences. The Officer's factual errors and resulting adverse conclusions are sufficient to render the Decision unreasonable. The reasons given by the Officer for the refusal of Ms. Kazembe's TRP application are not justified on the record.

[21] The Officer stated that Ms. Kazembe was "restored onto her previous SPs three times". In contrast, the evidence in the record demonstrates that Ms. Kazembe only once previously restored her study permit. On two other occasions, she secured extensions of her study permits

and did not need to avail herself of the restoration process. Although the Respondent submits that the number of times Ms. Kazembe previously used the restoration process is not important because her one prior application supports the Officer's finding of familiarity, I disagree. The Officer misconstrued the evidence, a factual error that undermines the coherence of the Decision.

[22] In addition, the Officer found that, as a result of her three previous restoration efforts, Ms. Kazembe was familiar with the process. The Officer's conclusion improperly casts Ms. Kazembe as more blameworthy in light of her repeated use of the restoration process and highlights the Officer's reliance on the underlying factual error.

[23] The Officer then found that Ms. Kazembe "did not attend school from Winter 2015 to Fall 2016". The evidence before the Officer contradicts this finding. Transcripts from Mohawk College in the record establish that Ms. Kazembe actively pursued her studies throughout the Winter 2015 semester (January-April) and Fall 2015 semester (September-December). The Officer relied on what would have been an extended absence (January 2015 through December 2016 based on the semester system) from school to suggest Ms. Kazembe had not complied with the terms of her then valid study permits. The Officer's reliance on the factual error to infer such non-compliance was unreasonable. The Officer's statement that Ms. Kazembe "appears" to have failed to comply with her study permits also ignores the fact that those permits were extended on a number of occasions. Her extension requests would have been reviewed for compliance and accepted by an IRCC officer.

C. *Circumstances of Ms. Kazembe's TRP and study application*

[24] As stated above, the Respondent submits that the Officer had no obligation to consider all of Ms. Kazembe's circumstances because the Decision was based on the late filing of her 2018 restoration application and the absence of evidence that she attempted to comply with the 90-day deadline. The Respondent states that the Officer could not ignore Ms. Kazembe's non-compliance. I find the submission unduly narrow. It confuses the refusal of the 2018 restoration application, which is not before me, and the exercise of discretion contemplated by subsection 24(1) of the *IRPA* in the assessment of Ms. Kazembe's 2019 TRP application.

[25] Ms. Kazembe submits that the Officer failed to reasonably consider the circumstances of her case, including:

- the late arrival (August 2018) of her acceptance from McMaster University which prevented her from extending her study permit before its expiry in July 2018;
- her repeated attempts to file her restoration application both within and after the 90-day eligibility period;
- the IRCC's technical issues and its responses to her inquiries as to how best to proceed;
- Ms. Kazembe's history of studies in Canada and compliance with the terms of her study permits; and,
- more generally, the considerations set forth in the Guidelines (purpose of the request, the individual's immigration history and credibility, controversy).

[26] Although the Officer had no legal obligation to consider and apply the Guidelines, the Court's jurisprudence requires an officer reviewing a TRP application to consider all relevant

circumstances put forth by the applicant (*Krasniqi* at para 20; *Douglas* at paras 28-29). I find that the Officer did not do so in Ms. Kazembe's case.

[27] The Respondent submits that Ms. Kazembe provided no evidence to the Officer that she attempted to overcome the IRCC technical issue that prevented her from filing her restoration application prior to October 8, 2018. However, Ms. Kazembe provided a statutory declaration in support of her TRP application in which she stated that she tried to file her restoration application every other day in September 2018, during the eligibility period. The Officer drew no adverse credibility conclusions in the Decision but appears to have discounted or ignored Ms. Kazembe's sworn statement that she made a number of filing attempts within the eligibility period.

[28] Ms. Kazembe also described her Canadian study history in the statutory declaration and recounted her interactions with the IRCC regarding her difficulties with their filing process. She included as exhibits copies of her college and university transcripts, study permits, computer screenshots from the IRCC website informing users of technical issues, and correspondence to and from IRCC regarding her inability to file her restoration application. She also referred to her late acceptance by McMaster University and how that delay precluded her from acting in a more timely manner vis-à-vis the extension, rather than restoration, of her 2018 study permit.

[29] The Officer made no mention in the Decision of Ms. Kazembe's submissions and evidence. Specifically, the Officer did not assess the impact of McMaster's delayed acceptance letter that was the genesis of Ms. Kazembe's resort to the restoration process. There is no

reference in the Decision to her correspondence with the IRCC or to the IRCC's advice to her. The Officer's assessment of Ms. Kazembe's study permit and compliance history was confined to two apparent issues the Officer identified in error. Whether or not the Officer would have found Ms. Kazembe's circumstances as a whole justified a TRP is not at issue and I make no comment in this regard. It is the Officer's failure to fully and accurately consider Ms. Kazembe's evidence that results in a decision that lacks a "coherent and rational chain of analysis and that is justified in relation to the facts and law" (*Vavilov* at para 85). I find that the Decision was not reasonable.

V. Conclusion

[30] The application is allowed.

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

**JUDGMENT in IMM-4928-19**

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

1. The application for judicial review is allowed.
2. No question of general importance is certified.

**"Elizabeth Walker"**

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4928-19

**STYLE OF CAUSE:** CHESIYAO MINNIE KAZEMBE v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE BETWEEN  
TORONTO, ONTARIO AND OTTAWA, ONTARIO

**DATE OF HEARING:** AUGUST 19, 2020

**JUDGMENT AND REASONS:** WALKER J.

**DATED:** AUGUST 26, 2020

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