Federal Court Cour fédérale

Date: 20240919

Docket: IMM-12431-22

Citation: 2024 FC 1478

Ottawa, Ontario, September 19, 2024

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ANTONIO JAMAR GIBSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Gibson seeks to set aside a November 22, 2022 decision by a senior immigration officer of Immigration, Refugees and Citizenship Canada [the Officer] refusing his application for permanent residence. It was refused on grounds of inadmissibility due to organized criminality under paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*].

[2] I find the Officer's decision to be unreasonable.

II. Facts

[3] The Applicant is a 36-year-old citizen of Barbados. He first entered Canada in 2008 under the Temporary Foreign Worker program. He has had multiple entries and exits from Canada between 2008 and 2010 under the name Antonio Jamar Waithe, using his mother's surname. He subsequently legally adopted his father's surname, Gibson.

[4] On February 10, 2010, the Applicant attempted to enter Canada again. He was interviewed by an officer of the Canada Border Services Agency [CBSA] who denied him entry. The denial was based in part on the Applicant lying about the purpose of his trip and the officer noting that he had many tattoos. Importantly, the Applicant stated that he was not a member of any gang, a statement he subsequently repeated to the Officer. The relevant part of the section 44 report written by a CBSA officer the next day reads as follows:

> MR. WAITHE ARRIVED IN CANADA ON 10FEB2010 AT LESTER B. PEARSON INT'L AIRPORT - TERMINAL ONE SEEKING ENTRY AS A TEMPORARY RESIDENT (VISITOR).
>
> HE INDICATED THAT THE PURPOSE OF HIS TRIP TO CANADA WAS TO VISIT HIS GIRLFRIEND, ALICIA HINES, WHO IS A CANADIAN CITIZEN. HE INDICATED THAT MS. HINES HAD RECENTLY HAD A MISCARRIAGE AND ASKED THAT HE COME TO CANADA TO COMFORT HER
>
> MS. HINES INDICATED THAT SHE WAS NOT PREGNANT AND HAD NOT HAD A MISCARRIAGE. SHE STATED THAT MR. WAITHE HAD RETURNED TO CANADA FOR A VACATION. SHE HAD PURCHASED HIS AIRLINE TICKET AND PROVIDE HIM WITH ACCOMODATIONS [*sic*]. MS. HINES IS CURRENTLY UNEMPLOYED.
>
> …

> MR. WAITHE ALSO HAS A NUMBER OF TATTOOS ON HIS BODY AND STATED, WHEN ASKED, THAT HE WAS NOT A MEMBER OF A STREET GANG, BUT HAD FRIENDS THAT WERE GANG MEMBERS IN BARBADOS. HE WOULD NOT NAME ANY OF FRIENDS OR WHAT THEIR GANG AFFILIATIONS ARE.
>
> FOR THE ABOVE REASONS, I DO NOT BELIEVE THAT IF MR. WAITHE WAS GRANTED ENTRY TO CANADA, HE WOULD LEAVE CANADA BY THE END OF PERIOD AUTHORIZED FOR HIS STAY.
>
> [emphasis added]

[5] Upon refusal to enter as a visitor, the Applicant requested refugee protection. No copy of the written application for protection, if there was one, is in the certified tribunal record. In his affidavit filed in support of this application, the Applicant swears that the refugee application was suggested by an officer:

> 8. One of the officers told me that I could make a refugee claim if I didn't want to go back.
>
> 9. I asked what that was about, and he asked if I was afraid of anything.
>
> 10. I said I was afraid of the gangs and I talked about the Deugens and the Academics. I described a swordfight I had witnessed between members of the rival gangs. I had tried to intervene to get them to stop, and they threatened that if I didn't mind my own business I would be next. I never said I was a member of any gang. I said I was afraid of them.
>
> 11. At one point they noticed my tattoo and that's when everything shifted. They told me that the tattoo was a gang tattoo. I told them it wasn't. That I just got the tattoo because I liked it.
>
> [emphasis added]

[6] The Respondent relies on a statement in another section 44 Report dated February 10, 2010, that finds the Applicant inadmissible following which he was detained at the Metro Detention Centre. That document reads, in relevant part, as follows:

> IS NOT A CANADIAN CITIZEN.
>
> IS NOT A RESIDENT PERMANENT OF CANADA.
>
> MR WAITHE, BY HIS OWN ADMISSION STATED THAT HE IS AFFILIATED WITH A GANG THAT IS ENGAGED IN VIOLENT ACTIVITIES USING GUNS AND OTHER WEAPONS. HE STATED ALSO THAT THE NAME OF THE GANG IS, PRONOUNCED DUNGEON BUT SPELLED AS PER CLIENT:DEUGON. HE SPECIFIED THAT THE GROUP IS INVOLVED IN DRUG DEALING AND AT WAR WITH ANOTHER GANG CALLED THE ACADEMICS. MEMBERS OF DEUGON AND THE ACADEMICS WERE SHOT DEAD AS A RESULT OF THIS GANG WAR.
>
> THE SUBJECT STATED THAT HE CARRIED A KNIFE WITH HIM WHILE IN BARBADOS HOWEVER STATED THAT HE NEVER USED IT TO INFLICT ANY HARM.
>
> THE CLIENT HAS SEVERAL TATTOOS, SPECIFICALLY A FIVE POINT CROWN WITH THE WORDS "LOYALTY IS ROYALTY" ON HIS NECK THAT IS ASSOCIATED WITH OTHER KNOWN GANGS.
>
> GIVEN THE ABOVE,THERE ARE REASONABLE GROUNDS TO BELIEVE THAT SUBJECT IS INADIMISSIBLE [*sic*] ON GROUNDS OF ORGANIZED CRIMINALITY FOR BEING A MEMBER OF AN ORGANIZATION THAT ENGAGES, HAS ENGAGED OR WILL ENGAGE IN ACTIVITY THAT IS A PATTERN OF CRIMINAL ACTIVITY PLANNED AND ORGANIZED AS OF SECTION 37(1) (A) OF THE IMMIGRATION AND REFUGEE PROTECTION ACT.
>
> [emphasis added]

[7] In yet another document from the Respondent dated February 12, 2010, supporting the arrest of the Applicant, an officer writes, in relevant part, as follows:

> IS NOT A CANADIAN CITZEN.
>
> IS NOT A PERMANENT RESIDENT OF CANADA.
>
> BY HIS OWN ADMISSION, MR. WAITHE STATED THAT HE IS A MEMBER OF A STREET GANG IN BARBADOS NAMED THE DEUGONS. HE HAS BEEN A MEMBER OF THIS GANG SINCE HE WAS 17 YEARS OLD. THEY ARE INVOLVED IN THE DRUG TRADE IN BARBADOS. THEY ARE AT WAR WITH A RIVAL GANG NAMED THE ACADEMICS.
>
> …
>
> MR. WAITHE HAS SEVERAL TATTOOS ON HIS BODY WHICH ARE KNOWN TO BE GANG AFFILIATED AS PER OPEN SOURCE INFORMATION. THIS INCLUDES A FIVE POINT CROWN ON HIS NECK.
>
> MR. WAITHE HAS NOW ENTERED A CLAIM FOR REFUGEE PROTECTION AFTER BEING REFUSED ENTRY TO CANADA ON 10FEB2010. IT IS POSSIBLE THAT THIS MAY HAVE BEEN DONE IN ORDER FOR HIM TO STAY IN CANADA. HE HAD NO LUGAGGE OR CARRY ON BAGGAGE UPON HIS ARRIVAL TO CANADA THAT NIGHT.
>
> MOREOVER, HE IS NOW THE SUBJECT OF AN A37(1)(B) REPORT WHICH HAS BEEN REFERRED TO AN ADMISSIBILITY HEARING. FOR THE ABOVE REASONS, IT IS UNLIKELY THAT IF MR. WAITHE WAS RELEASED THAT HE WOULD APPEAR FOR HIS ADMISSIBILITY HEARING OR ANY FURTURE [*sic*] IMMIGRATION PROCEEDING.
>
> [emphasis added]

[8] On September 14, 2017, the Applicant submitted an application for permanent residence under the Family Class, sponsored by his Canadian wife. They have three Canadian-born children, aged 12, 9, and 7, at the time of the application.

[9] The Applicant has never been charged with or convicted of a crime in any country and has spent the better part of the past 15 years in Canada without being charged or convicted of any offence.

III. Decision Below

[10] On November 22, 2022, the Officer refused the Applicant's application for permanent residence. The Officer found the Applicant inadmissible to Canada under section 37(1)(a) of the *Act* for having been a member of an organized criminal organization, the Deugons Gang in Barbados.

[11] The Officer relied on information found in the Global Case Management System [GCMS], referenced above, where it reported what the Applicant had told officers when he entered Canada in February 2010, including the alleged admission of his membership of the Deugons gang in Barbados. It was also reported that the Applicant stated that the gang was involved in the drug trade and was at war with a rival gang.

[12] These criminal involvements raised doubts to the Applicant's admissibility; the Officer sent two procedural fairness letters to the Applicant, on July 19, 2022, and August 23, 2022. In response, the Applicant denied ever stating he was a gang member, claiming to have said he was around gangs and was threatened by and afraid of them. He also provided evidence contradicting the Officer's information regarding his neck tattoo, which was described as a five-pointed crown with the words "loyalty is royalty," identified as a gang symbol.

[13] The Officer considered the Applicant's responses but concluded that they contradicted his initial statements made to previous officers in 2010. The Officer found insufficient evidence to support that the Applicant had been untruthful in his initial statements. The Officer also considered the Applicant's explanation and evidence regarding the tattoo. The Officer then investigated the Deugons gang, and found it to be an "organization" for the purpose of paragraph 37(1)(a) of *Act*, citing open-source evidence of its size, involvement in territorial disputes, and gun battles with a rival gang.

IV. Issue

[14] The sole issue for determination is whether the Officer's decision to find the Applicant inadmissible due to organized criminality was reasonable.

V. Standard of Review

[15] On assessing the merits of the decision, I agree with the parties that the standard of review is reasonableness, as articulated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[16] Reasonableness is a deferential, yet robust, standard of review: *Vavilov* at paras 12-13. The court must give considerable deference to the decision-maker, recognizing that this entity is empowered by Parliament and equipped with specialized knowledge and understanding of the "purposes and practical realities of the relevant administrative regime" and "consequences and the operational impact of the decision" that the reviewing court may not be attentive towards: *Vavilov* at para 93. Absent exceptional circumstances, reviewing courts must not interfere with

the decision maker's factual findings and cannot reweigh and reassess evidence considered by the decision-maker: *Vavilov* at para 125.

[17] However, reasonableness review is not a mere "rubber-stamping" process: *Vavilov* at para 13. It is the reviewing court's task to assess whether the decision as a whole is reasonable; that is, it 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.

[18] In assessing reasonableness, the Court must consider the relevant administrative setting, the record before the decision-maker, and "the impact of the decision on those affected by its consequences." This last aspect has a material relevance here, as the decision under review has significant impacts on the Applicant, his Canadian wife and their three Canadian children. Finding that the Applicant is inadmissible to Canada under s.37(1)(a) of the *Act* not only renders him inadmissible in respect of his sponsorship application, but also precludes the Minister from considering any humanitarian and compassionate considerations that may warrant an exemption from any requirements under the legislation.

[19] The Supreme Court of Canada at paragraphs 133-135 of *Vavilov* notes that the greater the impact on an individual, the greater the procedural protection to which the applicant is entitled:

> It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The

> principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.
>
> Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.
>
> Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.
>
> [emphasis added]

VI. Legal Framework

[20] Paragraph 37(1)(a) of the *Act* governs inadmissibility on the grounds of organized criminality:

Organized criminality	**Activités de criminalité organisée**
37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	**37 (1)** Emportent interdiction de territoire pour criminalité organisée les faits suivants :
(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in	**a)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est

activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or	livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction prévue sous le régime d'une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

[emphasis added]

[21] The "reasonable grounds" standard falls between mere suspicion and a balance of probabilities, "[t]here must be an objective basis for the belief which is based on compelling and credible information": *Athie v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 425 at para 46, citing *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114.

[22] The Respondent bears the burden of proving that an individual meets the criteria for inadmissibility under this provision: *Lennon Sr. v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1122 at para 8; *Akanbi v Canada (Citizenship and Immigration)*, 2023 FC 309 at para 31.

VII. Analysis

[23] There is no challenge by the Applicant that the Deugons gang is a criminal organization. The challenge is whether the Officer made a reasonable assessment based on compelling and credible information that the Applicant is a member of that organization.

[24] In my view, the Officer's decision is unreasonable; it lacks justification and transparency because the Officer's reasons do not meaningfully account for the central issues and concerns raised by the parties, namely the dispute about the Applicant's gang membership. The "reasonable grounds" standard requires an objective basis for the belief, supported by credible and compelling information. The Officer's reasoning falls short of this objective standard.

[25] The Applicant contends that the Officer erred by relying on notes taken during the port of entry examination and refugee eligibility determination as to the alleged admission by the Applicant that he was a member of the Deugons, particularly because these same notes contained an erroneous description of his tattoo. He argues that this error calls into question the reliability of the entire set of notes. Considering that the Officer relied on other information in the notes, the Applicant submits that this reliance, coupled with the failure to consider his later denial of gang affiliation, renders the Officer's analysis regarding his gang membership, and by extension, the whole decision, unreasonable.

[26] Let me say at the outset, in response to the invitation from counsel for the Respondent, that I have no doubt that the Applicant's crown tattoo bears little resemblance to the gang related five-point crown tattoo illustrated in the record. Moreover, that tattoo is the symbol of the Latin

Kings gang "which is one of the biggest Hispanic gangs in the U.S. based out of Chicago." None of these descriptors relates to the Applicant's characteristics. I therefore accept that the Applicant has no gang tattoos and it was always an error to suggest otherwise.

[27] The Officer's analysis under paragraph 37(1)(a) of the *Act* is as follows:

> The applicant stated in his 2010 refugee eligibility that he was a member of a street gang in Barbados that was involved in the drug trade and engaged in violent activities using guns and other weapons. In a conversation with immigration officers the applicant indicated that he was affiliated with a gang pronounced Dungeon but spelled Deugon. The applicant stated that the group was involved in drug dealing and a war with another gang called the Academics.
>
> I find that the applicant is now indicating that he never disclosed that he was a member of the dungeon gang. I do not find the applicant has established that the statements he made in 2010 were not truthful at that time. The applicant stated that he left Barbados due to his involved [*sic*] with the organization. I do not find the applicants [*sic*] new remarks refutes those initial statements.
>
> [emphasis added]

[28] As will be seen from the Officer's reasons, he fails to grapple with the evidence of the Applicant that he never made the statements attributed to him in the notes that are relied on by the Officer. Rather, the Officer simply accepts the notes as true without any discussion or rationale for preferring them to the Applicant's later denials.

[29] While the Respondent argues that there were multiple recorded instances of the Applicant allegedly admitting gang membership, and points to the Applicant's history of providing misleading information to immigration authorities, these arguments at most go to the credibility of the Applicant. They do not render a flawed decision reasonable. They do not help explain the

Officer's failure to address the discrepancies between the alleged admissions and the Applicant's earlier and subsequent denials, nor do they help clarify why the Officer gave these statements more weight despite evidence calling their reliability into question.

[30] Moreover, the Officer writes that in the notes the previous "officer also disclosed that the individual had several tattoos, specifically a five point crown with the words "loyalty is royalty" on his neck that is associated with other known gangs." The Officer also writes that in response to the procedural fairness letter "the applicant explained the tattoo is not a five point crown but a 3D crown he got because he liked it." Nowhere does the Officer grapple with the divergence between the statement in the notes and the Applicant's evidence (which I accept) that his tattoo is not gang related.

[31] Significantly, having failed to address this matter, the Officer also fails to consider what impact the error in the notes has on the remaining statements contained therein. This uncritical acceptance of notes containing a demonstrable error, without addressing its implications on the reliability and credibility of other information in those notes, does not meet the "reasonable grounds" standard. It leaves a large gap in the chain of reasoning required for a reasonable decision under *Vavilov*.

[32] The Applicant draws parallels to *Neto v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 565 [*Neto*], where the Court found it a reviewable error to rely on port of entry notes in decision-making without verifying their accuracy, particularly when other evidence suggested inaccuracies. It emphasized that when key evidence, like port of entry notes,

is shown to be unreliable and they form the basis of a negative credibility finding, the resulting decision cannot be reasonable.

[33] The Applicant submits that his case is even stronger than *Neto* because, unlike in *Neto*, where the notes were a direct and signed record of an interview, the notes in this case are merely summaries by unidentified officers. Moreover, the clearly incorrect description of the tattoo provides concrete evidence of the unreliability of the notes, unlike the mere claim of mistranslation in *Neto* that was unsubstantiated.

[34] I agree. I find that the misidentification of the Applicant's tattoo in the notes raises similar concerns about reliability. The Officer's failure to address this discrepancy and consider its implications for the overall reliability of the notes is even more serious than the oversight in *Neto*. Here, the error is clear when one examines photographic evidence contradicting the description of the Applicant's tattoos in the notes, which is more evident than a mere allegation of mistranslation. In my view, while the facts differ from *Neto*, the principle from that case applies with even greater force here.

[35] These oversights are significant, especially when one considers the impact of the decision on the Applicant and his family. The Applicant is married to a Canadian citizen and has three Canadian-born children. The decision will separate him from his family, adversely affecting not just his life but also those of his spouse and children. The Applicant has spent a significant portion of the past 15 years in Canada with a clean criminal record. A finding of inadmissibility threatens to uproot his established law-abiding life and livelihood in the country.

VIII. Conclusion

[36] In summary, the Officer relied uncritically on notes containing a demonstrable error regarding the Applicant's tattoo, did not consider how this error might affect the overall reliability of those notes, and failed to explain the different weighing of the Applicant's purported early admission and subsequent denial of alleged gang membership. These shortcomings break the chain of reasoning necessary for a reasonable decision, especially given the significant consequences for the Applicant and his family. For these reasons, the decision under review is unreasonable and cannot stand. It will be set aside.

[37] No question was proposed for certification, and there is none on these facts.

JUDGMENT in IMM-12431-22

THIS COURT'S JUDGMENT is that this application is allowed, the decision under review relating to the admissibility of the Applicant is set aside, and the application for permanent residence is to be determined by a different officer based on the reasons and findings herein. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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