Federal Court Cour fédérale

Date: 20240424

Docket: IMM-11087-22

Citation: 2024 FC 627

Toronto, Ontario, April 24, 2024

PRESENT: Madam Justice Go

BETWEEN:

SAHAND JAMSHIDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Sahand Jamshidi, is a 22-year-old citizen of Iran. This is the Applicant's third study permit application based on an admission offer from Trinity Western University to pursue undergraduate studies in Sports and Leisure Management.

[2] A visa officer [Officer] was not satisfied that the Applicant's evidence of funds or his study plan establish that he would leave Canada at the end of his authorized stay, per paragraph 216(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[3] The Applicant seeks a judicial review of the Decision, raising issues relating to the duty of procedural fairness, as well as reasonableness.

[4] By a letter dated April 4, 2024, about a week before the hearing, counsel for the Applicant wrote to the Court advising that they have received instructions not to attend, and stated that the Applicant advised that no other lawyer would be attending the hearing on the Applicant's behalf. The Applicant, through counsel, requested that the court proceed with the scheduled hearing and to adjudicate the matter based on the documents already submitted.

[5] On the same day, also by letter, the Respondent criticized the Applicant for "unilaterally changing the nature of the proceedings other than Parliament intended." The parties then submitted further letters to the Court over the course of two days on the issue of the Applicant's non-appearance.

[6] At the hearing, the Respondent asked the Court to dismiss the application, arguing that no "special circumstances" exist in this case to allow the Court to dispense with compliance with the *Federal Courts Rules*, SOR/98-106 [*Rules*], relying on Rule 55 of the *Rules*, and that all judicial reviews must proceed by way of an oral hearing.

[7] While I share some of the Respondent's concerns, I am not convinced that the Court should dismiss an application solely on the basis that an applicant does not appear at the hearing.

[8] Instead, I dismiss the Applicant's application as I find the Decision reasonable and I find no breach of procedural fairness.

II. Preliminary Issue

[9] Pursuant to subsection 5(2) Federal Courts Citizenship, *Immigration and Refugee Protection Rules*, SOR/93-22 [FC CIRP Rules]; subsection 4(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]; and Rule 76(a) of the *Rules*, the Respondent's name is amended to the Minister of Citizenship and Immigration.

III. Issues and Standard of Review

[10] The Applicant's memorandum of argument advances several arguments on issues the Officer never raised. These arguments are of no relevance to this judicial review. In *Gholami v Canada (Citizenship and Immigration)*, 2024 FC 201 [*Gholami*] at para 16, I noted the same disconcerting practice involving the same counsel.

[11] The Court reminds all counsel of their professional obligation as an advocate to represent their client within the limits of the law while treating the courts with candour, fairness, courtesy, and respect. Counsel who run their practice like an assembly line by copying and pasting

template submissions with no regard to the case at hand do so at the peril of their professional reputation, not to mention their clients' interests.

[12] Based on the record before me, I will limit my analysis to the following two issues only, as far as the reasonableness of the Decision is concerned:

A. Did the Officer err in finding the Applicant's finances were insufficient to fund his travel to and studies in Canada?

B. Did the Officer err in finding the Applicant's study plan did not correspond to a career path or appear reasonable?

[13] The Applicant also argues the process followed was unfair.

[14] As noted above, the Respondent raised a new issue at the hearing asking the Court to dismiss the application because the Applicant did not appear at the hearing.

[15] The presumptive standard of review for the merits of the Decision is reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[16] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. 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. Whether a decision is reasonable depends on the relevant administrative setting, the record

before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94 and 133-135.

[17] For a decision to be unreasonable, the applicant must establish that the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep:" *Vavilov* at para 100.

[18] For issues of procedural fairness, the standard of review is akin to correctness and no deference is owed to the decision-maker: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54 and 56.

IV. Analysis

A. *Should the Court dismiss the application solely on the basis that the Applicant did not appear at the hearing?*

(i) Parties' submissions to the Court prior to the hearing

[19] As noted above, counsel for the Applicant's letter triggered further submissions from the parties about the Applicant's decision not to attend the hearing.

[20] In their initial response, the Respondent submitted, among other things, that the Applicant's approach is not in "consideration in full acknowledgement of the seriousness of the court proceedings and with the utmost respect for the court's time and resources," contrary to the submission by Applicant's counsel. The Respondent pointed out that this is not the first time this counsel has made such a request of late. The Respondent provided a list of recent files where counsel of record made the same request in proximity to the date of the scheduled judicial review hearing. The Respondent also laid out some of their arguments as to why the *Rules* do not allow the Applicant to "unilaterally" change the nature of the proceedings.

[21] In a second letter also dated April 4, 2024, Applicant's counsel argued the Respondent was attempting to undermine the right to a hearing and urged the Court to uphold the "sanctity of the judicial review process."

[22] In a further reply dated April 5, 2024, the Respondent reiterated their position that the Applicant's counsel is "seeking to alter the practice of this Court, on more than just a one-off or exceptional circumstance …. without consent, without a motion and at the [last] minute."

(ii) Respondent's submissions at the hearing

[23] At the start of the hearing, the Respondent asked the Court to dismiss the application on the basis that the Applicant has "abandoned" the judicial review. While under Rule 55 the Court can dispense or vary one of its rules, the Respondent submitted it can only do so under special circumstances, which are not present in the case at hand.

[24] The Respondent made extensive submissions on this point, citing the *Federal Courts Act*, RSC, 1985, c F-7 [*FC Act*], the *IRPA*, the *Rules*, and the *FC CIRP Rules*, among other sources.

[25] In a nutshell, the Respondent argued that the Federal Court is a creature of statute; its establishment is a reflection of the sovereign will of Canadians, as decided by Parliament. The *FC Act* sets out the requirements for judicial review applications, including that an application "shall be heard" under subsection 18.4(1). Further, Rule 28 of the *Rules* prescribes the Court can sit "at any time and at any place," while Rule 29 sets out when hearings are public and when they should be held in camera. These provisions, the Respondent argued, show that Parliament intends for judicial review applications to be heard orally.

[26] While Rule 38 of the *Rules* allows the Court to proceed in the absence of the party, the Respondent argued that under Rule 55, the Court may vary a rule or dispense with compliance with a rule only in "special circumstances." The Respondent submitted that the requirement for judicial review hearings to be held orally is one such rule that the Court may only vary under special circumstances.

[27] To support that position, the Respondent took the Court through Rules 5(1), 5(1)(e), and 15(1)(a) of the *FC CIRP Rules* and argued these rules envision that judicial reviews for immigration matters are to proceed orally.

[28] The Respondent further submitted that when an applicant abandons the very process they seek to obtain relief, then the relief itself is also abandoned and the application should be

dismissed. While the Court could still proceed with the hearing, the Respondent submitted that the Court has the ability to dismiss the application because the process was abandoned.

[29] Further support, the Respondent argued, is found in section 74 of the *IRPA*, dealing with applications for judicial review, and particularly paragraph 74(c) which states that "the judge shall dispose of the application without delay and in a summary way."

[30] In addition, referring to the standard form for leave and for judicial review, the Respondent suggested that when an applicant seeks to commence an application for leave, if leave is granted, the applicant proposes the place where the application is to be heard, thus conforming with the idea that the judicial review is an oral proceeding.

[31] The Respondent also referred to paragraph 61 of the Federal Court's Amended Consolidated General Practice Guidelines [Guidelines] dated December 20, 2023, and argued it provides that all hearings on the merits are presumptively scheduled to be heard in-person. While the Guidelines give a party the option to seek an alternative mode of hearing, the Respondent argued that under paragraph 65(b), the alternative is limited to a remote hearing, and not a hearing in writing.

[32] Finally, the Respondent submitted court proceedings cost taxpayers money. The Court is here to ensure tribunals conduct their decision-making process in accordance with the rule of law. While acknowledging the Court has the discretion to proceed when a party is absent, the

Respondent stressed the Court has to be cognizant of its own rule, and the Court cannot violate its own rules when exercising such discretion.

[33] In reply to questions from the bench, the Respondent submitted that if the Court is unaware of the special circumstances at play, the Court has many tools at its disposal before dismissing an application, such as reaching out to an applicant to inquire about the reasons for their absence and adjourning the hearing if necessary. The Respondent also proposed that the Court may refer this issue to the appropriate rules committee to consider all possible scenarios in order to develop the proper rules to assist the Court in determining when to exercise its discretion to proceed with the hearing in the absence of a party. Doing so, the Respondent argued, would help ensure fairness to applicants, protect the system Parliament built, and send a message that the Court does not condone such a fundamental practice change that the *Rules* did not envisage.

(iii) Analysis of the Respondent's request to dismiss the application

[34] As much as I share the Respondent's concern about the need to protect the integrity of the judicial review process, and to discourage applicants or their counsel from abusing the Court process for nefarious reasons, I do not agree that the Court should dismiss an application solely on the basis that an applicant does not participate at the hearing.

[35] To start, I reject the Respondent's characterization that an applicant who chooses not to attend thereby abandons their judicial review and unilaterally changes the nature of the proceeding. This is not an accurate portrayal, particularly in the context of this case, when the Applicant advised the Court in advance and asked the Court to consider their written submissions

in their absence. While I acknowledge the Applicant waited until the last minute to notify the Court of his absence, the fact that he did indicates that he did not wish to abandon his judicial review application.

[36] Further, by asking the Court to proceed with the hearing, the Applicant was not seeking to alter the mode of hearing in any way. In fact, it was my decision to convert the in-person hearing into a remote hearing, given no one would be present on the Applicant's behalf.

[37] More fundamentally, I take issue with the Respondent's argument that the Court is violating its own rules by allowing the oral hearing to proceed without the Applicant.

[38] I begin my analysis with Rule 3, which sets out the general principle for interpreting the *Rules*. Paragraph 3(a) provides that the *Rules* should be interpreted and applied so that every proceeding is determined on its own merits in a just, most expeditious and least expensive way.

[39] As the Federal Court of Appeal [FCA] confirmed in *Viiv Healthcare Company v Gilead Sciences Canada, Inc.*, 2021 FCA 122 [*Viiv*]: "[The words in Rule 3] encourage interpretations and applications of the *Rules* that are proactive in preventing, eliminating or minimizing conduct that causes delay and cost:" *Viiv* at para 18. Further, the Federal Courts Practice 2024 explains that the principle of proportionality, as it relates to Rule 3, serves as an interpretive tool that includes consideration of a proceeding's "complexity, the importance of the issues involved and the amount in dispute" citing the *Canada Gazette* Part II, Vol. 155 No. 26, December 22, 2021.

[40] In my view, Rule 3 supports the Court's exercise of its discretion to proceed with an oral hearing in the absence of a party in a judicial review matter, if doing so will allow the Court to determine a proceeding on its own merits in a just, most expeditious and least expensive way.

[41] What is more, irrespective of how judicial reviews are to be conducted, Rule 38 gives judges the discretion to proceed in a party's absence.

[42] Specifically, Rule 38 sets out as follows:

Absence of party	**Absence d'une partie**
38 Where a party fails to appear at a hearing, the Court may proceed in the absence of the party if the Court is satisfied that notice of the hearing was given to that party in accordance with these Rules.	**38** Lorsqu'une partie ne comparaît pas à une audience, la Cour peut procéder en son absence si elle est convaincue qu'un avis de l'audience lui a été donné en conformité avec les présentes règles.

[43] Justice Azmudeh in *Kajal v Canada (Citizenship and Immigration)*, 2023 FC 1709 at paras 5-7, relied on Rule 38 and heard a judicial review even though the applicant was absent because his counsel mistakenly diarized the wrong date of the hearing. Justice Fuhrer, relying on the same rule, proceeded with the judicial review of a study permit refusal involving this counsel of record in *Tabatabaei v Canada (Citizenship and Immigration)*, 2024 FC 521 [*Tabatabaei*] at para 9. Likewise, most recently in *Roodafshani v Canada (Immigration, Refugees and Citizenship)*, 2024 FC 595 [*Roodafshani*] at paras 2-3, Justice Ahmed also allowed counsel of record to rely on the applicant's submissions pursuant to Rule 38. I note in both *Tabatabaei* and *Roodafshani*, the respondent submitted that Rule 38 allows the Court to proceed in the absence of the applicant.

[44] There are other examples where the Court relied on Rule 38 as the basis to continue with the proceeding in the absence of the applicant and their counsel: *So v Canada (Minister of Citizenship and Immigration)*, 2006 FC 606 at paras 3-6; *Amorocho Sanabria v Canada (Citizenship and Immigration)*, 2023 FC 803 at paras 11-12; and *Skenderaj v Canada (Immigration, Refugees and Citizenship)*, 2022 FC 1697 at paras 2-3.

[45] This is also true in non-immigration cases. For instance, in *Dubeau v Canada (Attorney General)*, 2019 FC 725 at paras 4-5, Associate Chief Justice Gagné relied on Rule 38 and refused the respondent's request to dismiss the application by default when the applicant informed the Court of his non-attendance at the last minute.

[46] As already stated, I do not share the Respondent's view that by not appearing at the oral hearing of their judicial review, the Applicant is seeking a dispensation with compliance of a rule under Rule 55. Even if they were, the FCA in *Canada (National Revenue) v McNally*, 2015 FCA 195 at para 9 stated:

> The plenary power and the discretion under Rule 55 to dispense with the Rules are governed by the objectives set out in Rule 3: achieving the "just, most expeditious and least expensive determination of every proceeding on its merits." The Supreme Court's comments in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 now boost the importance of these objectives.

[47] I further note that Rule 56 explicitly indicates that non-compliance, in itself, does not render the proceeding void, rather, it constitutes an irregularity. Rule 58 permits the other party to challenge non-compliance on a motion. I pause to note here that the Respondent did not bring a formal motion when requesting the Court to dismiss the application on the basis of non-

compliance, although I recognize the difficulties in doing so due to the Applicant's last minute request.

[48] Ultimately, whether to set aside a proceeding in whole or in part because of non-compliance rests with the Court's discretion. Furthermore, non-compliance is understood to be a matter of practice, not jurisdiction: *TMR Energy Ltd. v State Property Fund of Ukraine*, 2005 FCA 28 at para 48.

[49] In sum, the Respondent's argument for dismissing the application must be rejected for three reasons. First, it seeks to equate the Applicant's decision not to attend a hearing as a failure to comply with the *Rules*, when the Applicant's non-attendance *per se* does not alter the nature of the oral hearing. Second, the Respondent's argument fails to recognize the discretion granted to the Court under the *Rules* to proceed with a hearing in the absence of a party. Third, the Respondent's argument is inconsistent with the *Rules*' general interpretative principles that require the Court to determine a proceeding on its own merits in a just, most expeditious and least expensive way.

[50] The Respondent made some persuasive statements about the need to protect the system and to respect taxpayers' money and the will of Canadians. I do not disagree with these statements. However, the Court also needs to consider the principle of fairness and equity as between the parties, and the broader principle of access to justice.

[51] Leaving aside the application at hand for a moment, there may be myriad of reasons why an applicant is unable to attend a hearing. An applicant may have signed a limited retainer with counsel and as such would not have legal representation at the hearing. Some applicants may not be able to afford legal counsel but could also be unable to represent themselves due to linguistic and other barriers. I note for instance that while the Court provides interpretation services for the two official languages, applicants who do not speak either of these languages must arrange for interpretation services on their own.

[52] As well, the Court may or may not be made aware of the reasons for the applicant's absence and may not be able to ascertain such reasons in every case. If the Court accepts the Respondent's position, then every time an applicant is absent from the hearing without advising the Court of any special circumstances, the Court may end up dismissing the application, however meritorious.

[53] Having said that, I also want to make clear that I do not condone any attempt on the part of any counsel to fundamentally change the Court's practice by filing leave applications for judicial review without any intention to appear before the Court when leave is granted. Further, I note that Rules 123 and 124 of the *Rules* stipulate the steps an applicant and their counsel must take to notify the court in the case of limited-scope representation. Parties who are on a limited-scope retainer run afoul of the *Rules* if they fail to notify the Court of the same. Finally, rules of professional conduct governing members of the bar require counsel to treat the Court with candour and honesty, in addition to having specific requirements for limited-scope retainers.

[54] I have insufficient information before me to determine whether counsel of record in this case is engaged in any practice that is inconsistent with the *Rules* and/or their professional obligations. I can only note that the same circumstances involving this counsel transpired in *Gholami*, *Tabatabaei*, *Roodafshani*, *Khorasgani v Canada (Immigration, Refugees and Citizenship)*, 2023 FC 1581, and *Salamat v Canada (Citizenship and Immigration)*, 2024 FC 545 where both counsel of record and the applicant were a no show.

[55] Isolated instances, if repeated over time, become a pattern. When the same counsel repeatedly asserts they have no instruction to attend a hearing, it may call into question whether counsel is being forthright in their dealings, both with their clients and the Court. If such behaviour persists, the Court may refuse to exercise its discretion to allow the hearing to proceed in the party's absence without fuller explanations from counsel.

[56] Whether or not the Court shall develop further protocols and rules to deal with non-appearances as a systemic issue is not for me to decide.

[57] With that, I turn now to the merits of the judicial review application.

B. *The Officer did not breach the duty of procedural fairness*

[58] The Applicant appears to raise three procedural fairness arguments. I find none of the arguments have merit.

[59] First, I reject the Applicant's submission that the Decision was "reverse-engineer[ed]" because his file was processed with the assistance of the Chinook 3+ software. In the case at hand, the Global Case Management System notes do not support the Applicant's argument, and there is no indication that the software was used before the Officer decided the matter.

[60] Second, the Applicant raises the issue that the Officer should have provided him the opportunity to respond. I disagree. This Court has held that the level of procedural fairness owed to study permit applicants is on the lower end of the spectrum, and there are limited circumstances where a visa officer would be required to provide an applicant the opportunity to respond: *Ohuaregbe v Canada (Citizenship and Immigration)*, 2023 FC 480 [*Ohuaregbe*] at para 31. Ultimately, the Applicant bore the burden of providing a complete application and establishing his compliance with the statutory requirements: *Ilaka v Canada (Citizenship and Immigration)*, 2022 FC 1622 at paras 18-19 and *Zeinali v Canada (Citizenship and Immigration)*, 2022 FC 1539 [*Zeinali*] at para 24.

[61] Third, the Applicant argues the decision was procedurally unfair as it was rendered by an officer located in the Ottawa Case Processing Centre and it should have been before an officer in Ankara, who would have been better suited and more knowledgeable on Iranian applicants. This argument completely lacks merits especially given that the Applicant relies on a non-existent subsection in the *IRPR* in support of his point.

C. *The Decision was reasonable*

(i) The Officer did not err in finding the Applicant's finances were insufficient to fund his travel to and studies in Canada

[62] The Officer found the Applicant failed to establish he could fund his study program and questioned the deposits and withdrawals in the bank account of the Applicant's mother, which to the Officer indicated the bank account was inflated to demonstrate that the Applicant met the financial requirement.

[63] The Applicant submits the Officer erred by questioning the source and availability of the Applicant's funds, or the fact that the bank account was inflated. The Applicant submits that nowhere in the *IRPR* are study permit applicants required to disclose or prove the origin or history of their funds, and that he was only required to provide he had adequate money to fund his desired study program. The Applicant submits the Officer imposed an arbitrary requirement to address the provenance and sufficiency of funds, citing the Supreme Court of Canada that "a misapplication of the criteria relevant to an exercise of discretion constitutes an error of law," in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para 93.

[64] I reject the Applicant's argument.

[65] The financial requirement for study permit applicants is set out in section 220 of the *IRPR*, which provides that visa officers cannot issue a study permit application unless satisfied that an applicant has sufficient funds to pay tuition and maintain themselves while studying in Canada, and without working. When an applicant does not meet the requirements set out in section 220, the officer has no discretion and must deny the study permit application: *Ohuaregbe* at para 23.

[66] The reasonableness of a finding regarding lump-sum deposits depends on the evidence that was before the officer. In this case, the evidence before the Officer indicates drastic fluctuations in deposits of the Applicant's mother's bank account over a short period of time. As such, I agree with the Respondent that it was reasonable of the Officer to question the ambiguity of the bank account. As Justice Pallotta held in *Kita v Canada (Citizenship and Immigration)*, 2020 FC 1084 at para 20, it is reasonable for an officer to consider the amount and origin of funds when deciding whether an applicant will leave Canada at the end of their stay.

[67] The Applicant adds that Iran is a country struggling with high inflation, and it is therefore common for savings to be kept in the form of goods, gold, or foreign currencies. I note, however, that the Applicant did not point to any evidence on record in support of this assertion.

(ii) The Officer did not err in finding the Applicant's study plan did not correspond to a career path or appear reasonable

[68] In his study plan, the Applicant explained that he is currently enrolled in an aviation program, but his true passion is sports and he wishes to manage a sports team one day. The Applicant expressed his interest in studying at Trinity Western University as it has a program in sports and leisure that aligns with his interest.

[69] The Officer was not convinced the Applicant's study plan indicated a reasonable career path so as to justify the high costs of education in Canada.

[70] The Applicant argues he provided clear reasons for why he wants to pursue the study program and potential employment benefits upon his return to Iran. The Applicant submits the Officer provided no reasons for rejecting his explanation.

[71] The Applicant also submits the Officer should not have based his suspicion on the fact that the Applicant places a high value on higher education, and argues there are many reasons for why someone would choose studying in Canada despite the high costs, citing *Caianda v Canada (Citizenship and Immigration)*, 2019 FC 218 at para 5.

[72] While the high costs of an applicant's proposed study does not, on its own, indicate that the study plan is unreasonable, it is open to an officer to question the disproportionally high costs where there is insufficient evidence of potential career or employment benefits: *Singh v Canada (Citizenship and Immigration)*, 2022 FC 1745 at paras 20-21; *Zeinali* at paras 12-19; and *Barot v Canada (Citizenship and Immigration)*, 2023 FC 284 at para 44.

[73] Having reviewed the study plan, I find the Officer did not base the Decision on suspicion. Rather, I agree with the Respondent that the Applicant failed to provide specific information as to how the proposed study program would be of use to him in Iran. As such, it was not unreasonable of the Officer to consider the expenses of undertaking an education in Canada when considering the reasonableness of the proposed study.

V. Conclusion

[74] The application for judicial review is dismissed.

[75] There is no question for certification.

JUDGMENT in IMM-11087-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. The Respondent's name is amended to the Minister of Citizenship and Immigration.

3. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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