Federal Court  Cour fédérale

Date: 20241003

Docket: IMM-6463-23

Citation: 2024 FC 1554

Toronto, Ontario, October 3, 2024

PRESENT: The Honourable Justice Battista

BETWEEN:

FATEMAH MEHRARA
MOHAMMAD AMIN RASTEGAR MOVAHED

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application concerns the reasonableness of the Applicants' temporary visa application refusals as well as issues arising from the use of assistive processing technology.

[2] The Applicants challenge the reasonableness of a refused study permit application and an associated temporary resident visa application. Those decisions were made with the assistance of processing technology named "Chinook." The Applicants have raised arguments related to the fettering of the discretion of a visa officer (Officer) as well as a breach of fairness due the limited

information regarding Chinook's role in the decision making process. The Applicants raise an additional procedural fairness issue concerning the existence of veiled credibility findings.

[3] For the reasons that follow, I find the decisions to be unreasonable, but I find that no breach of procedural fairness or fettering occurred in the decision making process. The application for judicial review is granted.

II. Background

[4] The Principal Applicant, Fatemah, and her son, the Associated Applicant, Mohammad, are citizens of Iran. The Principal Applicant was accepted to study in Canada at Royal Roads University in a Master of Global Management program.

[5] The study plan that the Principal Applicant submitted in support of her application indicated that she sought to use the management program in conjunction with her education in chemical engineering to run a production business. She previously ran a production business, but the COVID-19 pandemic led to a halt in the company's operations. She presented her proposed education as a chance "to provide [her] with the necessary skills and knowledge to establish and manage a successful production workshop." She also described the supply chain management, project management, and financial management skills she hoped to develop which would allow her "to create a sustainable and profitable business."

[6] The application was refused based on doubts that the Principal Applicant would return to Iran in light of weak remaining family ties there, as well as the incoherence of her planned studies. The Officer described the reasons for refusal in the Global Case Management System (GCMS) computer file notes as follows:

> Although PA is traveling without their spouse, PA will be accompanied by their child. The ties to their home country are weakened with the intended travel to Canada involving their immediate family. I have concerns that the remaining ties to Iran are not sufficiently great to motivate departure from Canada, especially considering the current socio-economic situation in this country.
>
> The applicant is 38 years old self-employed in workshop management. I fail to see how the proposed program adequately demonstrates a logical progression of studies and career. It is unclear why the applicant would choose to study if currently self-employed and having to maintain a business in the country of residence. In view of these facts, I am not satisfied that the proposed studies make sense in the context of the applicant's economic background, prior studies and career plans. I am also not satisfied that the professional ties in country of residence would be sufficient following the studies to compel departure from Canada.
>
> Weighing the factors in this application. I am not satisfied that the applicant will depart Canada at the end of the period authorized for their stay.

[7] The GCMS notes also state: "File processed with the assistance of Chinook 3+," referring to the file processing technology giving rise to the Applicants' concerns regarding decision making.

[8] Chinook is an Excel-based software that was developed in 2018 to respond to the growing number of temporary resident applications. Officers use Chinook to view information found in the GCMS in a more visually assistive manner.

[9] Officers used "Module 3" of Chinook during their decision-making; they use "Module 4" to make the decision. Module 3 contains columns that categorize information by, for example, age, martial status, etc. Officers can review application materials contemporaneously while using Chinook. Module 4 provides officers with pre-generated reasons for refusal that can be tailored to an applicant's circumstances.

[10] Specific components of information produced by Chinook are described more fully below.

III. Issues and Standard of Review

A. *Preliminary issue: the Tao affidavit*

[11] A preliminary issue arose based on the Respondent's request that the affidavit of William Tao sworn/affirmed June 24, 2024 (Tao affidavit), be struck in its entirety.

[12] The Applicants submitted the Tao affidavit as expert evidence in order to provide information to the Court regarding the background and function of the Chinook technological processing tool and related technology, as well as evidence demonstrating a breach of natural justice.

[13] The Respondent objected to the Tao affidavit based on a number of grounds, including its argumentative nature.

[14] This issue will be resolved below pursuant to jurisprudence concerning the admissibility of evidence that was not before the administrative decision maker in judicial review proceedings.

B. *Main issues*

[15] The main issues presented by the Applicants evolved from the commencement of the litigation to the hearing of the application.

[16] In arguments supporting the application for leave, the Applicants identified the main issues as the reasonableness of the Officer's decision and a breach of fairness involved in alleged veiled credibility findings. The use of Chinook was identified as a "preliminary issue," and a number of general concerns were raised in relation to the use of processing technology in decision making.

The claim was made that "[w]ithout a transparent governing structure for Chinook to overcome these administrative law concerns, the decisions rendered with the assistance of Chinook are procedurally unfair and must be overturned."

[17] After leave was granted, the Applicants filed a further memorandum of argument incorporating and replacing the memorandum of argument presented in the Applicants' record. The reasonableness of the decision was again identified as an issue, together with the breach of fairness connected to the alleged veiled credibility finding.

[18] In the further memorandum, the concerns related to Chinook were identified as a concern about Chinook fettering the Officer's decision and a breach of procedural fairness due to the fact that the Certified Tribunal Record (CTR)—the record of evidence from the visa office—was incomplete. The Applicants state that the CTR is missing information describing the involvement of Chinook in the decision making process. This is because certain information and records produced by Chinook during the process are not retained by the Respondent. The Applicants' argument on this point is that a reviewing court—this Court—cannot properly exercise its function without having documents and information produced by Chinook and viewed by the Officer.

[19] There are cases in which an incomplete CTR has resulted in the quashing of an administrative decision (see *Akram v Canada (Citizenship and Immigration)*, 2018 FC 1105; *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581). However, these situations are factually different from the present case. In the cases above, there was uncertainty regarding whether evidence provided to the administrative decision maker actually made it to the decision maker because it did not appear in the CTR. Once the Court verified that relevant evidence was

submitted to the decision maker, the decision maker's inability to confirm receipt and consideration of the evidence by producing it in the CTR was treated as a breach of fairness.

[20] By contrast, the Applicants' allegation is that this Court cannot properly carry out its role in conducting judicial review due to the absence of Chinook material that was before the decision maker but not before this Court. The defect, if it exists, materializes in this Court's judicial review process, not the visa office decision making process.

[21] The remedy for the Applicants' concern about the incomplete CTR would normally be addressed in a motion for production of evidence under Rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [Immigration Rules], which is the immigration law equivalent of Rule 317 in the *Federal Courts Rules*, SOR/98-106 [Federal Courts Rules] (*Canadian National Railway Company v Canada (Transportation Agency)*, 2023 FCA 245 at para 12 [*Canadian National Railway*]).

[22] No motion was brought under Rule 17, because according to the Applicants it would be pointless. Evidence related to Chinook is not preserved; nothing therefore exists for production under Rule 17.

[23] Notwithstanding the Applicants' perceived futility of the Rule 17 process, that process remains the appropriate route to assess the sufficiency of the CTR for the purpose of judicial review. The jurisprudence concerning the relevance of material missing from the CTR rather than the principles of procedural fairness provide the proper analytic framework for this examination of the CTR. If the production order process proves to be fruitless, the absence of relevant information from the CTR should be addressed using the principles of justification, accountability, and transparency in the substantive judicial review hearing. In the words of Justice David Stratas,

"[i]f an administrative decision-maker improperly withholds the documents and information it relied upon for its decision, the spectre of immunization of decision-making arises. The party trying to have the decision reviewed and the reviewing court itself cannot test whether the decision had a legitimate, rational basis and was consistent with the laws passed by our elected representatives" (*Canadian National Railway* at para 10).

[24] Nevertheless, given that extensive arguments were made on the issue by both parties, the issue will be resolved in the context of this application, using the principles developed under Rule 17. This will essentially amount to a decision on a Rule 17 motion within this application.

[25] The other issues in this application related to the fettering of the Officer's discretion and the substance of the decision attract the reasonableness standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], affirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*]). Decisions must be justified in respect of their legal and factual constraints and must have logical and rational reasoning (*Vavilov* at paras 101–102).

[26] In resolving issues of procedural fairness, such as the allegation of a veiled credibility finding, the question is whether the decision making process was fair in all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69).

IV. Analysis

A. *Preliminary issue: the Tao affidavit*

[27] The Tao affidavit is comprised of 1,105 pages, including 1,046 pages of exhibits containing documentary evidence. It was filed with the intention of providing expert evidence regarding

Chinook technology and its interaction with other technological tools. The affiant William Tao is an immigration lawyer and graduate student at the Allard School of Law where he focuses on the role of automation in Canada's administrative state. The Applicants describe him as "arguably the most experienced researcher with advanced knowledge of Chinook and related technological tools."

[28] The Respondent states that the affidavit is inadmissible and requested that it be struck in its entirety. The Respondent claims that the affidavit mostly goes beyond facts into argument, legal opinion, and conclusions regarding the evidence.

[29] On judicial review, evidence that is not in the record and is related to the merits of the decision under review is generally inadmissible. However, there are exceptions to this general rule, including: (1) an affidavit providing general background where the information might assist the Court in understanding the issues; (2) an affidavit bringing the Court's attention to procedural defects; and (3) an affidavit that highlights the absence of evidence before the decision maker when it made a finding (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20).

[30] Even if the above criteria are met, affidavit evidence should not contain argument (*Bolduc v Canada (Attorney General)*, 2023 FC 1497 at para 49).

[31] The Tao affidavit is admissible based on its role in assisting the Court to understand the technology used by the administrative decision maker and for its support of the Applicants' arguments related to procedural fairness, regardless of the Court's ultimate decision on those arguments.

[32] However, I agree with the Respondent that many portions of the affidavit are argumentative and present legal opinion and legal conclusions on the evidence. Rather than striking the affidavit in its entirety, it is preferable to preserve the affidavit's useful portions by admitting it into the record but ignoring the offending portions, assigning no weight to them.

B. *Main issues*

[33] As stated above, the main issues in the application are: (1) whether the Officer's decision was reasonable on the merits; (2) whether a veiled credibility finding resulted in a breach of fairness; and (3) whether Chinook technology fettered the Officer's decision.

(1) The Officer's decision to refuse the study permit application was unreasonable

[34] As stated above, the Officer's decision was based on a concern that the Principal Applicant would not depart Canada at the end of her stay. This concern stemmed from her remaining family ties in Iran and the incoherence of her study and career plans. The reasons for both bases of the refusal of the application are unjustified and unintelligible. On both issues, greater explanation was required given the evidence.

[35] Regarding the Principal Applicant's family ties, the Officer noted that she intended to travel to Canada with her child, the Associated Applicant, but that her spouse would remain in Iran. The Officer failed to explain why traveling with one immediate family member while leaving another immediate family member behind led to diminished incentive to return to Iran. Further, as noted by this Court, "to refuse an applicant's study permit because a minor child will also travel with the Applicant, is a *de facto* refusal of all applicants who have a family member accompanying them to Canada" (*Ahadi v Canada (Citizenship and Immigration)*, 2023 FC 25 at para 18).

[36] Further, the Officer's findings related to the Principal Applicant's study and career plan contradicted the evidence submitted with the application. That evidence included the Principal Applicant's study plan, which stated specifically that she sought out the management program to be able to better run a production workshop, given her previous experience running such a shop and her educational background in chemical engineering. The Principal Applicant specifically mentioned the steps she had taken to start the business, her previous work experience in the field, the fact she needed further skills that the proposed program would provide, and that her previous company halted operations due to COVID-19, thus prompting her to pursue further education. She provided details of her desire to pursue the management program specifically, alluding to the expertise she would gain and how it would help her establish a business.

[37] Despite this detailed and specific evidence, the Officer expressed doubt regarding the "logical progression" of the Principal Applicant's career and studies. The Officer had an obligation to explain how this conclusion was preferred over the Principal Applicant's evidence (*Penez v Canada (Citizenship and Immigration)*, 2017 FC 1001 at para 26). The Officer also seemed to find a contradiction between the Principal Applicant's self-employment and her plan to study, but failed to explain the contradiction.

[38] For these reasons, the Officer's conclusion that the Principal Applicant would not be motivated to leave Canada was unreasonable. Because the refusal of the Associated Applicant's application was dependent on the refusal of the Applicant's application, that decision will also be set aside.

(2) The Officer did not make a veiled credibility finding

[39] The Officer's reasons provide no basis for concluding that an adverse credibility finding was made. There is no suggestion in the reasons that the Principal Applicant or the evidence was perceived to be untruthful. Therefore, no breach of fairness occurred due to disguised or veiled credibility concerns.

(3) Impact of Chinook on the decision is not established and the record is not incomplete

[40] The Applicants assert that the use of Chinook and other technological processing software fettered the Officer's discretion and that the record is incomplete due to the absence of documents generated by Chinook. From these claims, the Applicants make two requests of the Court.

[41] First, the Applicants assert that the CTR should be found incomplete due to its lack of information regarding Chinook's role in the decision-making process.

[42] Second, the Applicants assert that in this case and all cases using Chinook, the Court should waive the presumption from the jurisprudence that officers have viewed and considered all evidence before them.

(a) *Fettering of the Officer's discretion*

[43] The Applicants assert that the Officer was fettered through the use of Chinook, questioning the Officer's expertise and credibility. This assertion is based on the Officer's failure to produce Chinook's user manuals, the similarity of the Officer's affidavit to another officer's affidavit in a similar proceeding, and on the Applicants' calculation of how much time was available to review the application.

[44] The Applicants' concerns about Chinook fettering the Officer's discretion are speculative. The Officer's failure to produce Chinook training materials is not reasonably connected to her capacity to render an independent decision on the substance of the Applicants' applications. The similarity of her affidavit to another officer's affidavit in a separate application does not imply that the affidavit is not based on her personal experience or knowledge; legal counsel who assisted in drafting the application may have chosen the similar wording. Finally, the Applicants' estimate of time available to the Officer for assessing their applications was based on the Applicants' untested assumptions and is disputed by the Respondent.

[45] The Applicants' main concern, as I understand it, is that Chinook's role in increasing efficiency by organizing and summarizing information provided by the Applicants raises the probability that the Officer did not view all the information submitted by the Applicants. This appears to be the basis for the Applicants' request that the legal presumption of an officer's consideration of all evidence is removed in cases processed with Chinook.

[46] I disagree that this legal presumption should be waived in cases processed with Chinook. The Respondent is correct in identifying the presumption that a decision maker has considered all of the evidence before it as a longstanding presumption in administrative law (see *Chatrath v Canada (Citizenship and Immigration)*, 2024 FC 958 at para 35). The presumption has been described as a necessity of decision-making efficiency, particularly appropriate in the administrative law context, because otherwise a decision maker would need to itemize and analyze each piece of evidence before it (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 52 (FC) [*Cepeda*] at para 16).

[47] The presumption operates to place the onus on the challenger of an administrative decision to demonstrate that the decision maker failed to consider important evidence (*Singh v Canada (Citizenship and Immigration)*, 2020 FC 350 at para 38). However, this burden should not prove to be onerous in situations involving evidence that is important and part of the factual matrix bearing on the decision (*Cepeda* at para 17; *Vavilov* at para 126). It is not necessary for an Applicant to have full access to a decision maker's entire file to demonstrate that evidence was not considered, particularly in the "reasons first" exercise of post-*Vavilov* judicial review. The presence or absence of an analysis of relevant evidence in the reasons is sufficient to establish whether a decision maker considered it.

(b) *Incomplete certified tribunal record*

[48] The Applicants argue that the CTR is incomplete due to the absence of materials reflecting Chinook's role in the decision making process. As stated above, in my view the proper vehicle for seeking the release of this information is a motion for production under Rule 17, not an allegation of a breach of procedural fairness.

[49] Under Rule 17(b) of the Immigration Rules, a tribunal shall prepare a record containing "all relevant documents that are in the possession or control of the tribunal." The question, therefore, is what constitutes relevance for the purpose of judicial review.

[50] The Federal Court of Appeal dealt with this question in the context of Rule 317 of the Federal Courts Rules in *Canadian National Railway*. It determined that the relevance of documents is determined by the pleading, which in judicial review applications is the notice of application. The Court of Appeal advised that the pleading should be read to determine "the real essence" or "essential character" of the application (at paras 13–14).

[51] In the present case, the Applicants filed their application for leave and judicial review alleging that the Officer's decision was unreasonable based on the evidence that was before the Officer. The Applicants also alleged that fundamental justice was denied by a failure to provide reasons.

[52] As described above, the characterization of errors in the application evolved as the proceedings evolved. A breach of natural justice was raised based on an alleged veiled credibility finding, and the impact of Chinook technology on the decision was also raised.

[53] However, at its essence, the main challenge to the decision remained an alleged mismatch between the evidence that was provided and the reasons for the decision that were rendered. This mismatch is ultimately the basis on which this application for judicial review is being decided. Nothing more is necessary for effective judicial review, in this case, than the Applicants' evidence and the reasons.

[54] The Applicants specifically identify working notes, risk indicators, and the Chinook spreadsheet as key items that should have been disclosed in the CTR to enable the Court to carry out its function in conducting judicial review. The Applicants alternatively characterize these documents as evidence before the decision maker, and also as "notes" reflective of reasons as described in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at paragraph 44.

[55] As can be seen from the description of Chinook material that follows, information regarding Chinook's role in the decision making process is not relevant to this application because the alleged error is not connected to the involvement of Chinook. The evidence establishes that Chinook is in essence an information management system, described by Justice Shirzad Ahmed as

not intending "to process, assess evidence, or make decisions on applications" (*Raja v Canada (Citizenship and Immigration)*, 2023 FC 719 at para 30). At least in its current iteration, Chinook does not in itself provide information external to the application or influence an officer's decision by reworking or making characterizations about the evidence.

(c) *Working notes*

[56] Working notes as they currently exist in the Chinook system are not relevant to this application. Working notes are transitory notes made by an officer as the decision making process unfolds. A Chinook User Manual refers to working notes as a "'post-it note' to mark any particular or special action required on an application" (Tao affidavit at page 172). They are referred to as transitory, or "reminders," because they reflect an officer's thoughts at a given time in the decision making process (Tao affidavit at page 172; Daponte affidavit at para 31.c). They are distinct from, and are superseded by, an officer's ultimate notes reflecting the reasoning behind the final decision.

[57] Working notes cannot be classified as officer's notes serving as reasons within the description found in *Baker*. Reasons are the focus of a court on judicial review and have been described by the Supreme Court of Canada as "the primary mechanism by which administrative decision makers show their decisions are reasonable" and "the means by which the decision maker communicates the rationale for its decision" (*Vavilov* at paras 81, 84). Chinook working notes are made prior to a decision and they are not intended to justify those decisions. They cannot serve as reasons within the description given by the Supreme Court and their production cannot be compelled on that basis.

[58] Working notes are properly classified as evidence of an officer's thought process, but thoughts are only marginally relevant, if relevant at all, to the assessment of reasons, which is the

heart of judicial review. As stated by Justice John Norris: “It has never been suggested that reasonableness review should also consider the reasons that may have been considered by the decision-maker but were ultimately not advanced in the final decision” (*Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 193 at para 52).

[59] On a practical level, judicial review would become unworkable if a decision-maker’s notes reflecting their thoughts throughout the decision making process were placed before a court when reasons for a decision have already been provided.

(d) *Risk indicators*

[60] Risk indicators within the Chinook system are also not relevant to this application for judicial review because none were identified in the Applicants’ file.

[61] A “risk indicator” refers to information provided to a visa officer about “trends the IRCC has detected” with respect to areas of concern. Approved risk indicators, as found in Chinook, can be adopted through their identification by the Integrity Trends Analysis Tool (ITAT) (Tao affidavit at pages 25, 28, 52; Daponte affidavit at paras 39–43). This tool “functions by scanning all incoming temporary resident applications for specific pieces of data that together allegedly match a pre-determined pattern indicating a high-risk client. These patterns are constructed by algorithms that data mine IRCC’s existing database of immigration applications linked to known adverse outcomes – such as the historic study permits of applicants later determined by IRCC officers to have committed misrepresentation” (Tao affidavit at page 41).

[62] Indicators of a high-risk applicant are determined in reference to adverse characteristics, including “potential refugee claimant, misrepresentations, criminality, fraud, or other grounds of

inadmissibility or cause of enforcement action under the *IRPA* or *IRPR*" (Tao Affidavit at page 41). Once the ITAT completes its analysis, a summary is provided to a Risk Assessment Unit (RAU) officer. Once brought to their attention, the RAU officer then decides "whether to initiate verification investigations" and the results of these investigations are "passed onto the front-line IRCC decision-maker on an immigration application" (Tao affidavit at pages 41, 47–48). Risk indicators are flagged in the GCMS; if there are none, "N/A" is recorded in GCMS (Daponte affidavit at para 52). "N/A" was indicated in the Applicants' file.

[63] The Applicants did present evidence raising legitimate concerns regarding the potential for the ITAT to mine data, generally speaking (see *e.g.*, Tao affidavit at pages 53–55, 819, 827). If the ITAT generates problematic risk indicator categories, which are then imported into Chinook, concerns regarding bias or improper considerations could arise. However, the Applicants' evidence also indicated that there is currently a firewall and anti-bias process between the information spotted by the ITAT and risk indicator categories appearing in Chinook (Tao affidavit at pages 691, 694–696).

[64] In the present case, the Officer testified under cross-examination that she did not know what the risk indicators in Chinook were (Transcript of Cross-examination at pages 61–62, 65). The GCMS notes in this matter confirm that no risk indicator was flagged in the Applicants' application. Therefore, in this matter, the evidence establishes that risk indicators played no part in the Officer's decision-making. They were not external information that should have been included in the CTR.

(e) *Spreadsheets*

[65] Chinook spreadsheets are conglomerative, containing the working notes, risk indicators, and other information in an application. As such, they are not relevant to this application for judicial review.

[66] These spreadsheets organize working notes, risk indicators, and other information in an application (Daponte affidavit at paras 28-31, see also Exhibit B). I find no evidence that they independently generate information such as statistics, as alleged by the Applicants. The evidence stablishes that all the information organized in Chinook spreadsheets is contained in the GCMS, other than working notes (Daponte affidavit at paras 12, 54; Transcript of Cross-examination at pages 58–61). Mr. Tao stated that "I do not know if historical trend information is still presented to the final Decision-Maker in Chinook as of November 12, 2023" (Tao affidavit at page 21). Therefore, no concern arises regarding this omitted information. Chinook's spreadsheets simply organize application information that appears in the GCMS, along with risk indicators. Their production is not required.

V. Conclusion

[67] The decisions rendered on the Applicants' student and temporary resident visa applications are not reasonable based on the evidence before the Officer, and therefore the application for judicial review is granted.

[68] The use of Chinook processing technology in these applications does not raise concerns regarding a fettering of the Officer's decision, and the record provided by the Respondent is not

incomplete for the lack of information generated by Chinook. There is no sufficient connection in this case between the involvement of Chinook and the nature of the error made by the Officer.

[69] However, while I have found the record to be complete for the purposes of reviewing this decision based on the nature of the error, the reasons of the Officer, and the current evidence regarding the function of Chinook, this may not be the case in other judicial reviews of applications processed using processing technology, particularly in applications where risk indicators are present. For this reason, the Respondent's systematic daily deletion of all material generated by processing technology may not reflect best practice. The growing recognition that the exercise of public power must be justified, as articulated in *Vavilov* and affirmed in *Mason*, would be hollow without a basic understanding of how the exercise of that power occurs.

JUDGMENT in IMM-6463-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, and the applications will be redetermined by a different officer.

2. There is no question for certification.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6463-23
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