

Federal Court



Cour fédérale

Date: 20241125

Docket: IMM-1295-24

Citation: 2024 FC 1889

Toronto, Ontario, November 25, 2024

PRESENT: Madam Justice Go

BETWEEN:

ZOHREH SAGHAFI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Zohreh Saghafi [Applicant], a citizen of Iran and a renowned artist, applied for a permanent resident [PR] visa under the self-employed persons class, wishing to establish herself as a self-employed artist in Canada.

[2] On December 4, 2023, a migration officer [Officer] with Immigration, Refugees and Citizenship Canada [IRCC] issued a decision refusing the Applicant's PR application because they were not satisfied that the Applicant met the definition of a "self-employed person" and that she had the ability and intent to become self-employed in Canada [Decision].

[3] The Applicant brings this application for judicial review on the ground that the Officer erred by unreasonably overlooking critical evidence.

[4] As a preliminary issue, the Respondent contends that the Applicant improperly introduced new evidence in her application for judicial review that was not before the Officer, to which the Applicant argues an exception for admitting new evidence applies in the circumstances of this case.

[5] I find the exceptions for admitting new evidence do not apply in this case. I also find the Decision reasonable. I therefore dismiss the application.

II. Issues and Standard of Review

[6] The two issues before me are as follows:

- a. Do the exceptions for admitting new evidence apply?
- b. Was the Decision reasonable?

[7] The standard of review of a decision's merits is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 10, 25. The Court

should assess whether the decision bears the requisite hallmarks of justification, transparency and intelligibility: *Vavilov* at para 99. The Applicant bears the onus of demonstrating that the decision was unreasonable: *Vavilov* at para 100.

III. Analysis

A. *Do the exceptions for admitting new evidence apply?*

[8] The Respondent argues that the Applicant's Application Record contains new evidence that was not put before the Officer and is therefore not admissible on judicial review: *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8. The new evidence includes the Applicant's business plan and the Applicant's IELTS English proficiency test scores [IELTS test results]. The Respondent also filed an affidavit from the Officer affirming that the Applicant's business plan and IELTS test results were not included in the Applicant's PR application. The Respondent accordingly submits that the Court should disregard the new evidence.

[9] The Applicant stated in her affidavit that she submitted both the IELTS test results and the business plan to the Officer with the assistance of her former legal representative, Amir Ali Mirsayah [Amir]. The Applicant asks the Court to admit the new evidence.

[10] Having reviewed the materials before me, including the Certified Tribunal Record [CTR], the Applicant's affidavit in support of her judicial review application, and the Officer's affidavit, I agree with the Respondent that the Applicant's new evidence is not admissible.

[11] It is well-settled law that the judicial review of a decision must be based only on the evidence that was before the decision-maker: *Association of Universities and Colleges of Canada and the University of Manitoba v The Canadian Copyright Licensing Agency operating as "Access Copyright"*, 2012 FCA 22 [*Access Copyright*] at para 19; *Lemiecha (Litigation Guardian of) v Canada (Employment and Immigration)*, [1993] FCJ No 1333 at para 4; *Samsonov v Canada (Citizenship and Immigration)*, 2006 FC 1158 at para 7; *Sidhu v Canada (Citizenship and Immigration)*, 2008 FC 260 at para 22.

[12] While the list is non-exhaustive, the Federal Court of Appeal in *Access Copyright* at para 20 prescribed limited exceptions to allow certain new evidence in judicial review matters:

- a. Affidavits that provide general background information to assist the court in understanding the issues relevant to the judicial review;
- b. Affidavits that bring to the court's attention procedural defects that cannot be found in the evidentiary record, for example, evidence that supports a bias argument; or
- c. Affidavits that highlight the complete absence of evidence before the decision-maker when it made a particular finding.

[13] In this case, the Applicant relies on the last two exemptions to submit new evidence: first, to highlight the absence of evidence before the Officer, and in the alternative, to bring to the Court's attention procedural defects.

[14] Before considering whether either of these two exceptions apply, I first review the Applicant's evidence in support of her assertion that she submitted the IELTS test results and the business plan to the Officer.

[15] With respect to the IELTS test results, the Applicant points out that Amir indicated in his initial letter to IRCC that the official IELTS test results would be submitted as soon as they became available, thereby demonstrating her intent to do so.

[16] In addition, at para 8 of the Applicant's affidavit, the Applicant declared that after receiving a letter from IRCC on March 25, 2023 inquiring about additional information, the Applicant submitted, on April 14, 2023, a response to IRCC with the assistance of Amir. The Applicant attached as exhibits, a copy of the letter from IRCC and a copy of her response. The Applicant also attached a copy of what the Applicant described as "proof of submission," namely, a confirmation generated by the Government of Canada website stating that the Applicant had successfully submitted her application or profile, with the date modified showing as 2023-04-14.

[17] At para 9 of her affidavit, the Applicant declared that she received another letter from IRCC on October 5, 2023 requesting a signed and completed Use of Representative form, and she submitted the same with the assistance of Amir. The Applicant attached the IRCC letter, the Use of Representative form, as well as a confirmation generated by the Government of Canada website stating that the Applicant had successfully submitted her application or profile, with a date modified noted as 2023-09-14.

[18] I pause here to note that the parties do not make any submission as to whether the date noted on the confirmation reflects the date that IRCC received the submission. If this is the case, it is unclear why the date of confirmation for the submission of the Use of Representative Form

would pre-date the IRCC letter requesting it. I also note that the confirmations for both the April 14, 2023 submission and the submission of the Use of Representative Form do not confirm the content of the submission.

[19] More importantly, I note that while the Applicant included the IELTS test results as being part of her submission on April 14, 2023, she did not include the business plan as part of her response to either of the two IRCC requests for information. Instead, the Applicant's evidence on how and when she submitted the business plan is equivocal, to say the least. At para 7 of the Applicant's affidavit, she stated:

7. In January 2020, after submitting my application for PR, I created a business plan for "Saghafi Art Studio and Workshop" which to my information and belief Amir provided to IRCC through webform. Attached and marked as Exhibit "B" is a true copy of my business plan, dated January 2020.

[20] In contrast to the IELTS test results, the Applicant did not include any confirmation from IRCC that the business plan was submitted. The Applicant also did not clarify what information, if any, she was relying on for believing that the business plan was submitted. The above-cited paragraph also did not indicate when the business plan was submitted.

[21] As the Respondent rightly pointed out at the hearing, the Applicant knew as early as April 4, 2024 that the Respondent objected to the Applicant's filing of new evidence. As per Justice McVeigh's order dated September 10, 2024 granting leave for judicial review, the Applicant had until October 4, 2024 to file further affidavits. The Applicant did not do so, nor did she file any affidavit from Amir confirming that they had submitted the business plan, or the IELTS results, for that matter.

[22] Thus, even if I were to accept that there was some evidence suggesting that the Applicant submitted the IELTS test results, I find the Applicant has failed to provide any evidence that she submitted the business plan to the Officer. I reject the Applicant's argument that the absence of evidence is not evidence that it was not submitted. The onus is on the Applicant to demonstrate, beyond bare assertion, that she submitted the relevant documents to the Officer. The Applicant fails to discharge her onus.

[23] I also find that the Applicant fails to demonstrate that her case falls within the exceptions set out in *Access Copyright*.

[24] With respect to the exception based on an absence of evidence, the Applicant relies on *Vulevic v Canada (Citizenship and Immigration)*, 2014 FC 872 [*Vulevic*] at para 6, where the Court emphasized that “[w]hen the complete application is not before the decision-maker, it can hardly be argued that the party has been heard.”

[25] I find *Vulevic* distinguishable. In *Vulevic*, the applicant brought her application for judicial review on the basis that the CTR was incomplete, a fact not disputed by the respondent. In the case before me, the Respondent disputes the Applicant's assertion that she has submitted the IELTS test results and the business plan, and has provided an affidavit from the Officer stating that they have “reviewed all the documents submitted in the application provided by the Applicant.”

[26] In the alternative, the Applicant seeks an exception under the heading of procedural fairness. However, the Applicant did not allege in her affidavit any issues of procedural unfairness with respect to the decision-making process. Further, the Applicant's application for judicial review raises only one question, namely, the reasonableness of the Decision. The Applicant only raised the issue of procedural fairness in response to the Respondent's preliminary objection to the Applicant's new evidence. Even in that context, the Applicant characterizes the issue of unfairness by pointing to the Officer's evidence stating that the PR application package did not include IELTS test results and the business plan, and that the Officer's confirmation reflects a failure to engage with the pertinent evidence. I note the Officer's affidavit simply reflects the Respondent's position on the issue. I also observe that an argument about a decision-maker's failure to engage with pertinent evidence is not an allegation of procedural fairness breach, which is what the Applicant needs to establish in order to fall within the exceptions for admitting new evidence.

[27] I find this case is similar to that of *Iqbal v Canada (Minister of Citizenship and Immigration)*, 2022 FC 727, wherein the applicant alleged that he submitted the IELTS test result with his work permit application, and that result did not appear in the CTR. The respondent in that case filed an affidavit of the officer deposing that the IELTS test result was not included with the applicant's work permit application. The Court found the applicant's IELTS test result was inadmissible, noting that there was no evidence that the applicant did in fact submit the IELTS test result other than his own assertion. The Court concluded the exceptions under *Access Copyright* were not engaged for the following reasons: the applicant's IELTS test result was clearly relevant to the merits of the matter; the IELTS test result did not bring procedural defects

to the attention of the Court, and the new evidence was not intended to highlight the lack of evidence before the officer.

[28] Here, I am similarly faced with two divergent accounts, one from the Applicant asserting that she has submitted the business plan and the IELTS test results, and another from the Respondent stating the opposite. I find there is no evidence that the Applicant submitted the business plan, and insufficient evidence to support the Applicant's assertion that she submitted the IELTS test results. Moreover, the Applicant does not raise any procedural fairness argument with respect to the decision-making process. As such, I find the new evidence does not bring procedural fairness defects to the Court's attention.

[29] The Applicant carries the burden of establishing that she meets the exceptions for admitting new evidence. In light of the evidence before me and the Applicant's submissions, I find the Applicant fails to discharge her burden.

B. *Was the Decision unreasonable?*

[30] The Applicant submits the Decision was unreasonable because the Officer overlooked critical evidence that squarely contradicts the conclusions the Officer reached, namely her business plan. Specifically, the Applicant points to the Officer's Global Case Management System [GCMS] notes that indicate "insufficient further information about [the Applicant's] planned self-employment in Canada has been provided," that the "[i]nformation provided is lacking in the concrete details pertaining to their specific activities," and that the Applicant "has failed to sufficiently define and quantify how their contribution would be significant to Canada."

The Applicant argues that these findings are not responsive to the detailed business plan submitted in support of her PR application, as the business plan explicitly offers comprehensive insights into her planned activities and intentions.

[31] I reject the Applicant's arguments. The Officer did not overlook the business plan as no business plan was submitted as part of the Applicant's application materials, despite it now being provided before the Court. Even if I were to accept the business plan into evidence, I could not consider this new evidence when assessing the reasonableness of the Decision, as it would be tantamount to substituting my decision on the merits for the Officer's: *Marcusa v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 1092 at para 20.

[32] The Applicant also submits that the Officer's findings lack transparency, intelligibility, and justification, as the GCMS notes indicate that documents such as the marriage certificate, the child's birth certificate, and submission from the Applicant's representative (in addition to the business plan) were not submitted, despite the Applicant having provided these documents. The Applicant argues that the Officer ignored this critical and relevant information and her submissions that clearly explained how the Applicant plans to expand her painting business in Canada.

[33] I reject this argument for two reasons. First, I agree with the Respondent that documents such as the marriage certificate and child's birth certificate are not determinative of whether the Applicant has the ability and intent to become self-employed. Second, the notation in the GCMS notes about the documents not provided was made by a different officer who was not the

decision-maker. Instead, in his affidavit, the Officer confirmed only that the Applicant did not submit her IELTS test results and the business plan. The Officer did not assert that the Applicant did not provide other documents.

[34] For these reasons, I therefore conclude that the Applicant fails to establish that the Decision was unreasonable.

IV. Conclusion

[35] The application for judicial review is dismissed.

[36] There is no question for certification.

JUDGMENT in IMM-1295-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question for certification.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1295-24

STYLE OF CAUSE: ZOHREH SAGHAFI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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