Federal Court Cour fédérale

Date: 20250102

Docket: IMM-7822-21

Citation: 2025 FC 4

Ottawa, Ontario, January 2, 2025

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

REZA MORTEZAEI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Reza Mortezaei, asks the Court to set aside a decision made by an Immigration Officer of Immigration, Refugees and Citizenship Canada [IRCC]. The Officer denied the Applicant's request to reopen a decision that had refused to consider him for inclusion, with a humanitarian and compassionate [H&C] exemption under subsection 25(1) of

the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], on his mother's application for permanent residence under the protected person class.

[2] The core issues are whether the Officer breached procedural fairness by denying the Applicant an alleged legitimately expected opportunity to submit H&C considerations, and whether the refusal to reopen was reasonable. For the following reasons, this application is allowed.

II. Facts

[3] The Applicant's mother and brother are protected persons in Canada applying for permanent residence. On February 26, 2021, the Applicant's mother, through representation, sought to amend her application to include the Applicant as a dependent. At that time, the Applicant was 33 years old. He no longer qualified as a dependent child under the *Immigration and Refugee Protection Regulations*, SOR/2002-227. However, the Applicant's counsel indicated to the immigration authority that an exemption under subsection 25(1) of the Act would be sought on H&C grounds to include the Applicant in his mother's application, with submissions to follow once the file was transferred to the responsible visa office overseas:

> Reza currently residence [*sic*] in Germany, and we acknowledge that he is over the age of dependence as defined in the regulations. We, however, seek an exemption from the age requirement pursuant to s. 25(1) of the IRPA. We will make further submissions [*sic*] this effect to the visa office that will become responsible for Reza's file once it is transferred overseas.

[4] On September 26, 2021, the IRCC office in Niagara Falls issued a decision refusing to add the Applicant as a dependent. The next day, the Applicant's counsel responded to the refusal

reiterating the request to include the Applicant on H&C grounds. Soon after, the Officer contacted counsel and indicated that he would seek functional guidance from the National Headquarters.

[5] On October 8, 2021, the Officer issued a formal refusal without providing the Applicant with an opportunity to make H&C submissions. Subsequently, the Applicant requested that the application be reopened to allow for the submission of H&C considerations. On October 15, 2021, the Officer confirmed the refusal and did not reopen the application.

[6] After leave was granted for this application, the Respondent filed an affidavit from Ms. Jacinthe Leveille, an Assistant Director in IRCC's Asylum Policy and Program Branch. She affirmed that the Respondent's operational policy "OP 24 Overseas Processing of Family Members of In-Canada Applicants for Permanent Residence" [OP24] has been gradually replaced by Program Delivery Instructions [PDIs] over several years and that while OP 24 was officially decommissioned on October 19, 2021, its H&C portion had not been updated since 2014. She indicated that PDIs for processing overseas family members had been made available since February 2018.

[7] Ms. Leveille was cross-examined by the Applicant's counsel. She acknowledged that prior to October 19, 2021, officers might consult OP 24 if specific instructions were not found in the PDIs. She explained that for the period in question, the PDIs did not specifically address which office would conduct eligibility assessments. She also clarified that the standard practice remained that family members of protected persons had their applications processed by visa offices covering their place of residence, unless otherwise specified.

[8] On November 8, 2024, following the Applicant's motion for production addressing concerns over deficiencies in the Certified Tribunal Record, the Respondent provided the documents related to the Officer's request for functional guidance.

III. Decision Below

[9] The decision under review is the formal refusal to reopen the application. Given its summary nature and its interconnectedness with the two prior decisions, a discussion of the entire trilogy is necessary.

[10] The first decision made on September 26, 2021 saw the Officer refuse to add the Applicant to his mother's permanent residence application because, at age 30 at the time of his mother's refugee claim, he did not meet the regulatory definition of a dependent child. The Officer also indicated that an H&C exemption under subsection 25(1) of the Act would not be granted.

[11] The second decision made on October 8, 2021 contains the Officer's finding that the Applicant had not demonstrated sufficient H&C grounds or clearly indicated what hardship would result if not granted an exemption. Also noting that subsection 25(1) of the *Act* is an "exceptional measure" rather than an alternate pathway to permanent residence, the Officer denied the application. In the notes found in the Global Case Management System, the Officer considered the Applicant's age, ties to Canada, status in Germany, and ties to Iran in arriving at the decision to deny the H&C request.

[12] The Decision under review summarily denied the request to reopen. Rather than addressing the procedural fairness concerns about the opportunity to make H&C submissions, the Officer treated the request as a reconsideration of the merits. The Officer suggested the Applicant could reapply if he could demonstrate the reasons for refusal had been resolved.

IV. Issue

[13] While the parties have advanced various arguments, including on matters collateral to this application, two core issues emerge:

1) Whether the Officer's breached procedural fairness in not following the procedures outlined in OP 24 when processing the Applicant's request to be added as a dependent to his mother's application for permanent residence; and
2) Whether the Officer's refusal to reopen was reasonable when he treated a procedural fairness-based reopening request as a merit-based reconsideration.

V. Standard of Review

[14] Neither party has made written submissions on the standard of review.

[15] For substantive review, the decision is reviewable on the standard of reasonableness, as articulated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. For procedural fairness, the standard of review is aptly described by Justice Pentney in *Kambasaya v Canada (Citizenship and Immigration)*, 2022 FC 31 at para 19, as requiring the Court to assess the decision by asking "whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railway*

Company v Canada (Attorney General), 2018 FCA 69 at para 54 [*Canadian Pacific*]; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107).

[16] As noted in *Canadian Pacific* at paragraph 56, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond", and at paragraph 54, "[a] reviewing court… asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed."

[17] In the matter at hand, the issues relate to alleged breaches of procedural fairness.

VI. Legal Framework

[18] The doctrine of legitimate expectation is a core part of the principle of procedural fairness. If an applicant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*] at paras 94-95.

[19] For there to be legitimate expectation, the relevant public authority must have made clear, unambiguous, and unqualified representations about the procedure it will follow, or have consistently adhered to certain procedural practices in the past: *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68. Moreover, the representations must be within the authority's power to make, and applicants must have reasonably relied on the representations: *Agraira* at para 94.

[20] Applicants are entitled to rely on the administrative body's established procedures and publicly available policies even if they are in general not legally binding. A failure by the decision-maker to follow its own procedures, or a unilateral departure from established practices without notice, may constitute a breach of procedural fairness: *Tafreshi v Canada (Citizenship and Immigration)*, 2022 FC 1089 [*Tafreshi*] at para 18; *Kandiah v Canada (Citizenship and Immigration)*, 2018 FC 1096 [*Kandiah*] at paras 25-27.

[21] When an administrative body changes its procedures in a way that affects applicants, procedural fairness may require that affected individuals be given notice of the changes and an opportunity to adjust or comply with the new procedures, especially if the changes could have significant or "fatal" consequences for their applications: *Kandiah* at paras 26-27; *Popova v Canada (Citizenship and Immigration)*, 2018 FC 326 at para 11.

VII. Analysis

[22] I find that the Officer breached the duty of fairness owed to the Applicant. OP 24 gave rise to a legitimate expectation about the procedures for overseas family members, which were breached during the decision-making process. The Applicant was prejudiced by being denied the opportunity to have his eligibility and H&C considerations assessed according to these procedures. This procedural flaw is determinative of the application.

A. *The Applicant has established legitimate expectation*

[23] The doctrine of legitimate expectations requires the Applicant to reasonably rely on clear, unambiguous representations made by a public authority acting within its power. I find all these elements are met.

[24] The IRCC's authority to issue operative guidelines like OP 24 is well-established, and this Court has consistently recognized OPs as valuable guides for immigration officers: *Steitie v. Canada (Citizenship and Immigration)*, 2024 FC 946 at para 10; *Frank v. Canada (Citizenship and Immigration*), 2010 FC 270 at para 21.

[25] Sections 7.3, 7.4, and 10.6 of OP 24 contain precisely such clear and unambiguous representations about IRCC's procedures on the overseas processing of family members of in-Canada applicants for permanent residence. The language used in these pertinent sections is directive and employs mandatory terms such as "will" and "must." It leaves no ambiguity regarding the roles and responsibilities of the Case Processing Center CPC-V and the visa office. For instance, section 7.3 states that when the principal applicant has listed family members living abroad, the Case Processing Centre "will do" a list of tasks, including forwarding a paper copy of the original in-Canada application to the visa office. Section 7.4 specifies that upon receiving the application, it is the visa office that "will" open appropriate files, forward application forms to family members, and "assess eligibility." Section 10.6 requires that if the visa office determines that a family member is ineligible, it "must ensure" procedural fairness by informing the applicant of the concerns and providing an opportunity to respond.

[26] The Applicant has also submitted evidence suggesting that these procedures were followed by immigration authorities in practice. The primary evidence comes from an affidavit sworn by a legal assistant at the firm of the Applicant's counsel, which attests that IRCC consistently transmitted in-Canada applications involving overseas family members to the appropriate visa office for assessment. This case marks the first instance of deviation by IRCC, in their experience. The Respondent chose not to cross-examine the assistant on the affidavit. This established practice is further corroborated by judicial precedent, such as *Afzal v Canada (Citizenship and Immigration)*, 2022 FC 1365, where IRCC indeed transferred the file to an overseas visa office for assessment of an H&C exemption from the age requirement for a dependent child. The Respondent has offered no evidence to the contrary.

[27] Instead, the Respondent argues that OP 24 had been gradually replaced by PDIs and OP 24 was "not in operation" before its official October 19, 2021 decommissioning; however, that was four days after the Officer's final decision. Nonetheless, the Respondent says that it had not been in use for some time before that. The Respondent argues that the PDIs were therefore the governing operative guidance, not OP 24.

[28] This position, however, contradicts the evidence of the Respondent's witness, Ms. Jacinthe Leveille, Assistant Director in IRCC's Asylum Policy and Program Branch. Ms. Leveille affirmed during her cross-examination that OP 24 was in fact in use. Specifically, she admitted that prior to October 19, 2021, visa officers might still consult OP 24 if specific instructions were not found in the PDIs. She also explained that for the period in question, the PDIs did not specifically address which office would conduct eligibility assessments for overseas

family members. This meant that OP 24, with its more specific and definitive instructions, would govern the matter.

[29] More importantly, OP 24 remained publicly accessible on IRCC's website throughout the relevant period. The Applicant submitted his request on February 26, 2021, and OP 24 remained accessible until its official decommissioning on October 19, 2021. When shown the Wayback Machine captures of past versions of the relevant IRCC website, Ms. Leveille agreed that on September 21, 2021, OP 24 was listed without any notation about PDI replacement. She also agreed that it was only in the October 22, 2021 web capture that the notation indicating OP 24 was "updated and converted" appeared.

[30] The circumstances mirror those in *Tafreshi*, where Justice Brown found the IRCC had "created a confusing situation for… applicants by continuing to list Manual OP… as an 'active' manual on its website, while also posting the PDI on its website. It is not clear from either document itself which governs. With respect, it is not clear at all - looking at either of these two documents - that PDI has replaced Manual OP…": *Tafreshi* at paras 51. The same issue of concurrent posting of "active" OPs alongside PDIs exists here. At most, therefore, a reasonable person would conclude that the PDIs operated in parallel with OP 24 rather than wholly replacing it.

[31] The Applicant demonstrated clear and reasonable reliance on the procedures articulated by the three sections in OP 24. Applicant counsel's September 27, 2021 amendment request acknowledged his client's age-based ineligibility as a dependent child under the *Regulations*, but indicated a clear intention to pursue an H&C exemption under subsection 25(1) of the *Act* once

the file transferred to the responsible visa office. This approach precisely followed the very specific procedural requirements as to the location of assessment and the opportunity to respond outlined in sections 7.3 and 7.4 framework of OP 24.

[32] I therefore find that the Applicant has established a legitimate expectation that OP 24's procedures would be followed, including transfer of application to overseas visa office for eligibility assessment and an opportunity to present H&C submissions before any final determination.

B. *The Applicant's legitimate expectation was violated*

[33] Having established legitimate expectations, I must determine whether these expectations were violated. The evidence unequivocally demonstrates they were.

[34] Instead of following OP 24's procedures, the Officer made successive decisions that fully departed from the promised process. First, contrary to sections 7.3 and 7.4 of OP 24, the Officer assessed eligibility domestically rather than forwarding the application to the visa office. Second, contrary to section 10.6, the Officer denied the Applicant procedural fairness protections specifically designed for ineligible dependents. Third, the Officer made these decisions without any notice that established procedures would not be followed.

[35] The first decision would not have been fatal had the Officer not compounded it with the second and third decisions above.

[36] In my view, by not forwarding the application to the visa office and prematurely deciding on the H&C request without soliciting submissions, the Officer deprived the Applicant of the opportunity to provide supporting evidence as allowed under OP 24. As indicated in the September 27, 2021 email sent by the Applicant's counsel, the Applicant planned to follow the procedural steps as outlined in OP 24, expecting that he would be contacted by the visa office and given the opportunity to submit his H&C evidence. The Officer's actions circumvented this process and denied the Applicant procedural fairness.

[37] The Respondent made extensive submissions arguing that the Applicant failed to provide H&C submissions upfront and that there was no obligation on the Officer to solicit them. The Respondent maintains that this is the case because once the Applicant was found ineligible, there was no "application" to transfer for processing overseas. According to this interpretation, OP 24's procedural requirements apply only after eligibility is established, and thus H&C submissions should have been included at the initial stage. Additionally, the Respondent emphasizes that this was "his mother's application," implying that the Applicant lacked independent procedural rights.

[38] I am not persuaded. It is unsupported by the text of OP 24 itself, which explicitly contemplates and provides procedures for dealing with ineligible family members. Section 10.6 specifically requires that when a "claimed family member is ineligible (e.g., a child over 22 years of age...)," the visa office must "ensure that procedural fairness is respected and inform the applicant of the concerns so that they can respond." During the hearing, the Respondent directed my attention to section 5.2 of OP 24, which outlines that CPC-V will "notify the appropriate visa office abroad with details of all eligible family members." The Respondent argued that this

provision establishes a sequential reviewing process: initial eligibility assessment happens at CPC-V, and only after eligibility is established does the file go to a visa office. According to this interpretation, the inland offices are where eligibility of all applicants should be first assessed.

[39] Although I agree that section 5.2 is relevant as it provides general processing guidance, I am of the view that, in cases of conflict, the more specific procedures outlined for overseas family members in sections 7.3, 7.4, and 10.6 should take precedence over the general guidance in section 5.2: *National Bank Life Insurance v. Canada*, 2006 FCA 161 at paras 9-10. Even if I were to accept that section 5.2 governs the process, I do not interpret its language as indicating that visa offices are limited to processing only eligible members, nor does it suggest that inland offices are designated to assess eligibility for overseas family members.

[40] Regardless of the dispute on the exact location where the Applicant's eligibility was to be assessed, the fundamental deficiency in this matter is how the immigration authorities systematically failed to observe procedural fairness in handling the Applicant's case. There were multiple instances where the Applicant clearly indicated his intention to make H&C submissions. First in an email following the initial dependent application, then in response to the refusal, and finally in the reopening request. At no point did IRCC or the Officer provide notice about how their intended process differed from that reasonably expected by the Applicant, or an opportunity to make submissions on the H&C exemption before decisions were made.

[41] The Respondent's attempt during the hearing to characterize the sequence of refusal decisions as constituting adequate notice is perplexing. The bedrock of procedural fairness is that persons affected by administrative decisions are to be afforded a meaningful opportunity to

be heard *before* such decisions are made, *not* merely being informed of adverse decisions *after* the fact: *Khawaja v Canada (Attorney General)*, 2007 FCA 388 at para 114; *Gallant v Canada (Deputy Commissioner, Correctional Service Canada)*, 1989 CanLII 9463 (FCA) at pages 341-342. Contrary to what the Respondent has submitted, sequential denials without such opportunity do not cure the initial breach of procedural fairness; they compound it.

[42] Regarding the argument that the Applicant's application under review is effectively "his mother's application," I find it inconsistent with the evidence on record. IRCC has assigned the Applicant distinct application and unique client identifier numbers, separate from those of his mother's application. This argument also misconceives the nature of dependent applications under the immigration scheme. The very purpose of OP 24 – "Overseas Processing of Family Members of In-Canada Applicants" – is to govern situations where overseas family members seek inclusion on the application of an applicant in Canada. If the Respondent's view were correct, the procedural protections provided under OP 24 would never apply to the very individuals they are designed to protect.

[43] The Respondent's position effectively creates a procedural catch-22: one cannot access OP 24's procedural protections for ineligible dependents without first being eligible. This circular reasoning undermines procedural fairness and runs directly contrary to the protections outlined under OP 24.

C. *There are no special reasons to award costs*

[44] The Applicant seeks costs, arguing there are special reasons warranting departure from Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. While costs are not ordinarily awarded in immigration proceedings, special reasons may exist where breaches of procedural fairness are "so obvious and so serious that the application for judicial review should never have been opposed": *Singh Dhaliwal v Canada (Citizenship and Immigration)*, 2011 FC 201 [*Dhaliwal*] at para 33.

[45] Unlike in *Dhaliwal*, the procedural fairness issues here involved complex questions about the applicability and interaction of different processing manuals. The Respondent's position, while ultimately unsuccessful, raised legitimate questions about the operative status of OP 24 and its relationship with PDIs. The Respondent participated in the proceedings in a timely manner, put forward relevant evidence through Ms. Leveille, and made reasonable attempts to resolve document production issues. While Ms. Leveille's affidavit could have been more precise regarding inland processing practices, her cross-examination testimony demonstrates forthright engagement with the issues. She readily acknowledged being on leave during the relevant period, clarified her expertise was primarily in H&C matters rather than protected persons' applications prior to September 2022, and was careful to distinguish between what she could and could not speak to.

VIII. Conclusion

[46] In sum, the Officer violated the Applicant's legitimate expectation arising from the clear procedural framework outlined in OP 24 for processing overseas family members of in-Canada

applicants. The manual remained the operative guidance during the relevant period, required explicitly overseas visa offices to assess eligibility, and outlined procedural fairness protections for ineligible dependents. The Officer's three interconnected decisions departed from these procedures without notice, denying the Applicant his opportunity to present H&C submissions at the appropriate stage provided by OP 24. Nonetheless, while this breach requires the decision to be set aside, the Respondent's litigation conduct does not give rise to special reasons warranting the award of costs.

[47] No question for certification was proposed by either party.

JUDGMENT in IMM-7822-21

THIS COURT'S JUDGMENT is that this application is allowed and the Officer's decision is set aside; the Applicant's application is to be reconsidered by a different Officer and, specifically, the Applicant is to be permitted to advance evidence as to the humanitarian and compassionate grounds for his inclusion in his mother's application, notwithstanding his age; no question is certified; and no costs are awarded.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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