Federal Court  Cour fédérale

Date: 20231130

Docket: IMM-3106-21

Citation: 2023 FC 1604

Ottawa, Ontario, November 30, 2023

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

AMIR ALI HEIDARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Amir Ali Heidari, is an eleven-year-old Afghan refugee living in Iran with his elderly grandfather. The Applicant's purported mother, Roghayeh Heidari, is his sponsor for permanent residence in Canada [Sponsor]. On February 11, 2021, an immigration officer in Ankara, Turkey [Officer] refused the Applicant's application for a permanent resident visa as a member of the family class for three reasons: (i) insufficient documentary evidence to

establish the familial relationship; (ii) no DNA submission in the alternative; and (iii) the Sponsor's failure to declare the child upon landing in Canada [Decision]. The Applicant seeks judicial review of the visa refusal.

[2] The Sponsor married her spouse, Aref Heidari, in 2011 when she was fifteen years old. At that time, her father was in Indonesia. Shortly after her marriage, she had a son. However, her spouse developed a drug addiction and was abusive. The Sponsor's father eventually returned, but he did not know about the marriage or the child.

[3] The Sponsor later arrived in Canada in 2016 as a "dependent child" on her father's application and became a permanent resident. She did not declare either her spouse or the Applicant, thus making the Applicant inadmissible as a member of the family class, pursuant to paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[4] In 2017, the Sponsor applied for her spouse and the Applicant to come to Canada. After her brother informed her that her spouse had not reformed, however, she terminated her relationship with him. She could not obtain a divorce document because the Islamic government states that only a man can divorce a woman. Nonetheless, she is separated from her spouse and considers the marriage deed meaningless. In 2019, she commenced another application, which is the subject of this judicial review, sponsoring the Applicant alone.

[5] For the reasons that follow, I find that the Applicant's judicial review application will be granted, and the Decision set aside, because the Applicant has established that a central sponsorship eligibility finding lacks internal coherence, rendering it unintelligible and, hence, unreasonable. The Applicant also has shown that the Decision is procedurally unfair.

II. Issues and Standard of Review

[6] The judicial review raises the following issues:

A. *Preliminary Issue: is the Sponsor's statutory declaration admissible evidence?*
B. *Preliminary Issue: is the applicability of paragraph 117(9)(d) of the IRPR no longer in issue?*
C. *Did the Officer err by not applying the public policy pilot exemption?*
D. *Did the Officer breach procedural fairness by failing to accommodate the Applicant regarding the DNA test?*
E. *Did the Officer reasonably conclude that the Applicant and Sponsor did not establish a familial relationship?*
F. *Did the Officer err by failing to consider the best interests of the child [BIOC]?*

[7] A reasonable decision is one that exhibits the hallmarks of justification, transparency and intelligibility, and is justified in the context of the applicable factual and legal constraints: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99. The Applicant has the burden of establishing the decision was unreasonable: *Vavilov*, above at para 100.

[8] Questions of procedural fairness attract a correctness like standard of review: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Vavilov*, above at para 77. The focus of the reviewing court is whether the process was fair and just in the circumstances: *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24; *Benchery v Canada (Citizenship and Immigration)*, 2020 FC 217 at para 9.

III. Analysis

A. *Preliminary Issue: is the Sponsor's statutory declaration admissible evidence?*

[9] While I do not accept the Respondent's form over substance argument, I agree that the following paragraphs of the Sponsor's statutory declaration are inadmissible because they contain information that was not before the Officer and are unnecessary to dispose of the judicial review: 5-14, 16-18, 20, 22, 29-30, 35, 39-40, and 44-48.

[10] The Respondent points to the lack of an affidavit sworn by the Applicant, which is required pursuant to the *Federal Courts Citizenship, Immigration, and Refugee Protection Rules*, SOR/93-22, because the Applicant filed instead a statutory declaration sworn by the Sponsor.

[11] This Court previously has held, however, that irregularities in an affidavit, or even an absence of an affidavit, will not lead necessarily to summary dismissal, especially where leave already has been granted without a proper affidavit, and the Certified Tribunal Record [CTR] can be relied on to dispose of the matter: S*ingh v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 455 at para 18.

[12] The Respondent argues further, and I agree, that generally the Court cannot consider any additional or new information in the statutory declaration that was not before the Officer, unless the information falls within a recognized exception, such as background information: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20.

[13] That said, I am of the view that the CTR here contains the information the Court needs to dispose of the judicial review application. As a result, I am not persuaded that the paragraphs of the Sponsor's statutory declaration to which the Respondent has objected should be admitted as necessary background information.

[14] In addition, I note that the Applicant does not take issue with the two post-Decision affidavits submitted by the Respondent, nor the supplementary CTR.

B. *Preliminary Issue: is the applicability of paragraph 117(9)(d) of the IRPR no longer in issue?*

[15] In my view, paragraph 117(9)(d) of the *IRPR* is not applicable to the Court's determination of this judicial review.

[16] Paragraph 117(1)(b) of the *IRPR* provides that a foreign national, who is the dependent child of a sponsor, is a member of the family class by reason of subsection 12(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], which stipulates that a foreign

national who is the child of a Canadian citizen or a permanent resident may be considered a member of the family class based on this relationship.

[17] According to paragraph 117(9)(d) of the *IRPR*, however, a foreign national cannot be considered a member of the family class if the sponsor previously applied for and obtained permanent residence but the foreign national did not accompany the sponsor and was not examined.

[18] On February 23, 2022, some nine months after the Applicant filed his application for leave and judicial review, the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada confirmed that the Applicant was excluded from being a member of the family class, pursuant to paragraph 117(9)(d) because the Sponsor did not declare the Applicant when she arrived in Canada.

[19] I agree with the Respondent that the IAD decision is not in issue on this judicial review, and further, I note that there was no judicial review of that decision. I thus also agree that paragraph 117(9)(d) of the *IRPR* is not in issue here. The Applicant does not dispute this. I add that the IAD decision notes that the IAD does not have jurisdiction to consider humanitarian and compassionate [H&C] grounds or public policy, both of which are applicable to the judicial review presently before the Court.

C. *Did the Officer err by not applying the public policy pilot exemption?*

[20] Contrary to the Respondent's position on this issue, I find the Officer's reasons unintelligible, thus rendering the Decision unreasonable.

[21] I start by observing that there is no copy of the public policy exemption in evidence. In its absence, it is difficult for the Court to ascertain the reasonableness of the Decision. The exemption is described, however, in the Global Case Management System [GCMS] notes.

[22] The Respondent recognizes that there is a public policy exemption in place for members of the family class who were not declared when their sponsor entered Canada. According to the GCMS notes, there are two conditions: (a) the foreign national has applied as either a spouse, common law partner or dependent child under the family class; and (b) the sponsor was granted permanent residence status in Canada as a resettled refugee and their dependents; the foreign national, if declared and examined at the time their sponsor immigrated to Canada would not have made their sponsor ineligible in the class under which the sponsor applied.

[23] The Respondent argues that, had the Sponsor declared her spouse and child, she would not have been a "dependent child" of her father and, therefore, she would have been ineligible in the class under which she applied. This is consistent with the Officer's reasoning in the GCMS notes for August 4, 2020. The Respondent submits that the exemption thus does not apply and the Decision was reasonable.

[24] The Officer wrote, however, that "the existence of a child would not have made [the Sponsor] ineligible to immigrate as a dependent to Canada, and for this reason it is difficult to justify [her] motives in omitting the information on child's existence." In addition, the GCMS notes for November 27, 2020 state: "The question remains as to why the sponsor did not declare her child at the time of her immigration. Declaring the child would not have made her ineligible or inadmissible."

[25] I find that it is unintelligible and internally incoherent for the Officer to reject the public policy exemption on the basis that declaring the Applicant would have made the Sponsor ineligible, while simultaneously finding that the Applicant was not a member of the family class partly because declaring the Applicant would not have made the Sponsor ineligible.

D. *Did the Officer breach procedural fairness by failing to accommodate the Applicant regarding the DNA test?*

[26] The Decision states that other Afghan refugees were able to travel to obtain DNA testing, thus impugning the credibility of the Applicant's attempt to obtain his DNA test. On its face, this finding is unreasonable without context, i.e. whether these comparator Afghan refugees were adults or children. Further, there is no indication whether the Officer obtained this information through extrinsic evidence or whether it was based on the Officer's own experience, thus giving rise to the spectre of reliance on undisclosed extrinsic evidence and procedural unfairness in the circumstances.

[27] The applicable jurisprudence shows that the use of extrinsic evidence "does not automatically trigger a duty to provide the applicant with an opportunity to respond or result in a breach of procedural fairness": *Bhujel v Canada (Citizenship and Immigration)* [*Bhujel*], 2023 FC 828 at para 18. Rather, the Court contextually considers many factors, including reputability of the source, public availability and the extent to which an applicant reasonably could be expected to be aware of the information, its novelty, and its significance: *Bhujel*, above at para 18; *Babafunmi v Canada (Citizenship and Immigration)*, 2022 FC 948 at para 22.

[28] Here, considering the weight given to the failure to obtain the DNA test (i.e. in establishing the familial relationship between the Applicant and his Sponsor) and the Applicant's numerous stated attempts to travel outside Iran to obtain the testing, in my view the extrinsic evidence was central and significant to the Decision. While the DNA test instructions of Immigration, Refugees and Citizenship Canada [IRCC] listed the available offices where the testing could be conducted (which did not include any offices in Iran), it is unclear what extrinsic evidence the Officer relied on for the significant finding that similarly-situated Afghan refugees could travel outside Iran.

[29] I therefore find that the Applicant should have had an opportunity to provide evidence as to his inability to travel outside Iran and, consequently, the Decision was procedurally unfair.

E. *Did the Officer reasonably conclude that the Applicant and Sponsor did not establish a familial relationship?*

[30] I further find the Officer's conclusion that the Applicant and his Sponsor did not establish a familial relationship was unreasonable.

[31] Notably, the Decision reads as if the Applicant were an adult. There is no recognition that the Applicant is a minor (who at the time of his application was under ten years old). There is no indication that the Officer considered the difficulties inherent in a minor travelling outside Iran for DNA testing, especially in light of the Officer's affidavit [Berki Affidavit], which confirms that DNA testing is unavailable in Iran.

[32] Further, the Officer departed from IRCC guidance in at least two respects. The Respondent introduced the IRCC's "Assessment of an application for permanent residence" [PR Assessment Guidance] into evidence as an exhibit to the Berki Affidavit. According to the Berki Affidavit, this document outlines the steps to be followed when assessing a permanent residency application.

[33] The PR Assessment Guidance urges officers to have an applicant sign a statutory declaration in the case of a non-accompanying dependent child who is not examined, to explain why the non-accompanying dependent child is not being examined and acknowledge that the applicant understands they will be ineligible to sponsor the dependent child under the family class in the future. In this case, there is no such statutory declaration because the Sponsor did not

declare her spouse and the Applicant upon landing in 2016. As such, this requirement seemingly does not apply to the Applicant.

[34] The Officer nonetheless assessed the documents submitted by the Applicant to establish identity and relationship. Although the Decision does not mention "identity" *per se*, I am prepared to accept that the PR Assessment Guidance provides context for the Respondent's references to "identity and relationship" throughout the Respondent's submissions.

[35] That said, the CTR contains passports for the Applicant and his Sponsor. In my view, only relationship thus is in issue and the Decision does not suggest otherwise. If the Officer doubted the identity of either party, this was not expressed in the refusal letter. I am not prepared to infer such doubt. If the Officer had credibility issues with the identity documentation, as distinct from the relationship documentation, this should have been stated in clear and unmistakable terms.

[36] Although the PR Assessment Guidance mentions birth certificates or baptismal records as acceptable documents for establishing relationship, it provides a non-exhaustive list of other types of official records and documents that may be acceptable, including hospital records.

[37] The Applicant submitted a newborn card, a hospital card and a vaccination card (along with translations and amended translations), all three of which have the appearance of medical records (all three mention "medical science and health services" of different universities in their title).

[38] The refusal letter states that, in response to multiple requests for evidence of the relationship: “you have only provided hospital birth report with your sponsor’s name and your name on it, and a temporary residency card which only lists your father’s name.” When asked at the oral hearing about the Officer’s use of the word “only” in the context of the other medical records that were submitted, Respondent’s counsel responded that only the vaccination card has both their names on it.

[39] The Berki Affidavit indicates at paragraph 8 that instead of “hospital birth report,” she meant to say “newborn card” as having both the Sponsor’s and the Applicant’s names on it. The newborn card, however, does not have both their names on it; rather, only the vaccination card does. I am not prepared to accept the Respondent’s imputed position that the Berki Affidavit also contains an error in mentioning the newborn card by mistake, instead of the vaccination card. Overall, this issue highlights the unreasonableness of the Decision rooted, in part, in the lack of care and resultant confusion in assessing the supporting documentation.

[40] More to the point, in my view, the Decision, the Berki Affidavit, and the Respondent’s submissions all overlook the following key guidance from the PR Assessment Guidance: “If a document does not definitively establish identity or relationship on its own, consider all the documents and compare them for consistency, reliability and relevance.” This was not done.

[41] Further, while the Respondent describes discrepancies and shortcomings in the Applicant’s documentation that, in the Respondent’s view, justify the Decision, nowhere does

the Decision discuss these shortcomings and discrepancies. In other words, I find that the submissions in this regard represent unacceptable bolstering.

[42] Similarly, the Respondent suggests that, in the five years the Sponsor has been in Canada and if the Applicant really is her son, she should have travelled to Iran to assist with the process. Again, this is inexplicable and unwarranted bolstering, to say the least. There is no mention of this concern in the Decision, and, further, the Sponsor's evidence is that she is employed by Value Village and she had to save to be able to visit the Applicant at all, let alone travel to neighbouring countries to obtain DNA testing. If the Respondent had an issue with the Applicant's or the Sponsor's credibility, this should have been stated clearly and unmistakably in the Decision. It is inappropriate for the Respondent to raise it in written and oral submissions, and it is inexcusable backfilling or bolstering: *Maarouf v Canada (Citizenship and Immigration)*, 2023 FC 787 at para 56.

[43] For the reasons above, I conclude that the Officer's finding that the Applicant and the Sponsor did not establish a familial relationship is unreasonable.

F. *Did the Officer err by failing to consider the BIOC?*

[44] I find that the Officer did not err by failing to conduct a BIOC analysis.

[45] Generally, an officer must consider the BIOC when assessing an application for permanent residency, including where the sponsor is arguing a *de facto* familial relationship: *Addae v Canada (Citizenship and Immigration)*, 2022 FC 375. In this case, however, the

sponsorship application was based on H&C grounds in the context of a mother-son relationship. Absent establishment of this relationship, the BIOC are not engaged.

IV. Conclusion

[46] The IRCC's commitment to prevent human trafficking and child smuggling, while laudable, needs to be balanced against the *IRPA*'s objective of family reunification, as set out in paragraph 3(1)(d) of the *IRPA*.

[47] For the reasons above, the Applicant has met his onus to demonstrate that the Decision was unreasonable and procedurally unfair. This application for judicial review therefore is granted. The Decision is set aside and the matter will be remitted to a different decision maker for reconsideration.

[48] Neither party proposed a question for certification, and I find that none arises in the circumstances.

JUDGMENT in IMM-3106-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The February 11, 2021 decision of the visa officer refusing the Applicant's application for permanent residence is set aside.
3. The matter will be remitted to a different decision maker for reconsideration.
4. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27**

Objectives - immigration **3 (1)** The objectives of this Act with respect to immigration are … **(d)** to see that families are reunited in Canada;	**Objet en matière d'immigration** **3 (1)** En matière d'immigration, la présente loi a pour objet : … **d)** de veiller à la réunification des familles au Canada;
Family reunification **12 (1)** A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**Regroupement familial** **12 (1)** La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

Immigration and Refugee Protection Regulations, SOR/2002-227
***Règlement sur l'immigration et la protection des réfugiés*, (DORS/2002-227)**

Member **117 (1)** A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is … **(b)** a dependent child of the sponsor;	**Regroupement familial** **117 (1)** Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants : … **b)** ses enfants à charge;
Excluded relationships **117 (9)** A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if … **(d)** subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-	**Restrictions** **117 (9)** Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes : … **d)** sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la

accompanying family member of the sponsor and was not examined.	famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

***Federal Courts Citizenship, Immigration, and Refugee Protection Rules*, SOR/93-22**
***Règles des cours fédérales en matière de citoyenneté, d'immigration et de protection des réfugiés*, DORS/93-22**

Perfecting Application for Leave	**Mise en état de la demande d'autorisation**
10 (2) The applicant shall	**10 (2)** Le demandeur :
(a) serve on every respondent who has filed and served a notice of appearance, a record containing the following, on consecutively numbered pages, and in the following order:	**a)** signifie à chacun des défendeurs qui a déposé et signifié un avis de comparution un dossier composé des pièces ci-après, disposées dans l'ordre suivant sur des pages numérotées consécutivement :
…	…
(v) one or more supporting affidavits that verify the facts relied on by the applicant in support of the application or a request for an anonymity order under rule 8.1, if any,	**(v)** un ou plusieurs affidavits établissant les faits invoqués à l'appui de sa demande ou de sa demande pour une ordonnance d'anonymat prévue à la règle 8.1, le cas échéant,

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3106-21
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APPEARANCES:

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