Federal Court  Cour fédérale

Date: 20240415

Docket: IMM-12264-22

Citation: 2024 FC 585

Ottawa, Ontario, April 15, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

THANH PHONG HO

Applicant

and

THE MINISTER OF CITIZENHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Thanh Phong Ho [Applicant] seeks judicial review of a decision by an immigration officer [officer] dated November 12, 2022, which had refused the application for permanent residence under the Spouse and Common-Law family class category [Decision].

[2] The Applicant contends that the officer focused on trivial things in the review of his application and required him “to jump through hoops” to provide additional information and documentation. The Applicant states that the officer made a hasty decision and did not consider the evidence that was submitted to substantiate the marriage. He further alleges that the officer did not give him an opportunity to be heard, to articulate his case, and to address the concerns that the officer may have had.

[3] The Respondent states that the Applicant was given a second opportunity to submit documents and submissions to make the validity of his marriage clear. The Applicant is asking this Court for a third opportunity to submit evidence, which he is not entitled to. On the issue of procedural fairness, the Respondent argues that nothing prevented the Applicant to ask for more time to respond to the officer’s concerns addressed in a procedural fairness letter. Since the Applicant failed to request for more time, the Respondent submits there are no procedural fairness concerns.

[4] For the reasons set out below, this application for judicial review is dismissed, because the Applicant has not demonstrated that the Decision is unreasonable. The issue in this case is whether the Applicant submitted sufficient evidence to demonstrate cohabitation. I also find that there was no breach of procedural fairness.

II. Issues and Standard of Review

[5] The issues I am to review on judicial review is whether the Decision was reasonable and whether there was a breach of procedural fairness.

[6] Both parties agree that the applicable standard of review on the merits of the Decision is reasonableness and correctness for breaches of procedural fairness. I also agree that this is the appropriate standard of review.

[7] A reviewing court applying the reasonableness standard must focus on the decision actually made, including the reasoning process and the outcome. It does not ask what decision it would have made instead, does not attempt to ascertain the "range" of possible conclusions, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem (*Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653 [*Vavilov*] at para 83). The decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker" (*Vavilov* at para 125).

[8] A reasonable decision is one based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision (*Vavilov* at para 85). Reasonableness review is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102).

[9] A reviewing court "must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do 'not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred' is not on its own a basis to set the decision aside"

(*Vavilov* at para 91). Moreover, “even where elements of the analysis are left out and, in the whole scheme of the things, the decision is not undermined as a whole and must stand” (*Vavilov* at para 122).

[10] The burden of proof lies with the party claiming that the decision is unreasonable. The party must prove to the reviewing court that the decision is so seriously flawed that it cannot be said to meet the requirements of justification, intelligibility and transparency (*Vavilov* at para 100).

[11] In respect to procedural fairness, the Court asks whether, having regard to all of the circumstances, including the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, and “with a sharp focus on the nature of the substantive rights involved and the consequences for an individual,” a fair and just process was followed. The standard of review is correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] at paras 34, 54).

III. Background

[12] The Applicant is a citizen of Vietnam. In 2017, he entered Canada on a visa as an international student and has remained since his arrival. At the time of his application, he was out of status.

[13] In August 2020, he met his spouse. On October 30, 2021, they married.

[14] On March 3, 2022, through his legal counsel, the Applicant submitted an application for permanent residence under the Spouse and Common-Law partner in Canada class with his spouse as his sponsor. In his application, the Applicant provided documents such as a joint bank account, insurance documents that listed the sponsor's mother as beneficiary, and photographs.

[15] The Global Case Management System notes [Notes] indicate that upon review of the application, there was insufficient evidence provided and "a procedural fairness letter" was sent to the Applicant on November 5, 2022 [procedural fairness letter].

[16] By letter dated November 5, 2022, an officer of Immigration, Refugees and Citizenship Canada wrote to the Applicant advising that his application for permanent residence may have to be refused "as you and/or your family member(s) do not appear to meet immigration requirements." The procedural fairness letter stated that, "[i]n order to continue processing your application in Canada, further information is required." A list of specific documents were described in the procedural fairness letter.

[17] Without duplicating the entire list set out in the procedural fairness letter, 11 bullet points referred to specific documents required of the Applicant. The last, or 11th bullet point, invited the Applicant to submit "any other updated documentation to support your relationship and establish when cohabitation with your sponsor began." The procedural fairness letter also confirmed the Applicant's "opportunity to make any submissions related to this matter."

[18] Finally, the procedural fairness letter indicated that should the Applicant wish to make submissions, the deadline was within seven days from the date of the letter. The procedural fairness letter advised that if the Applicant "did not make a submission, a decision regarding your ability to comply with these requirements will be taken on the basis of the information on your file."

[19] The Applicant did not make a request to the officer for additional time after he received the procedural fairness letter.

[20] On November 11, 2022, the Applicant submitted tax documents, an amendment to a lease agreement, joint bank account statements, credit card statements, and additional photos. The Applicant did not provide all of the listed documents required by the procedural fairness letter.

[21] By letter dated November 12, 2022, the officer wrote to the Applicant indicating that his application for permanent residence was refused, because the applicant did not meet the requirements for immigration to Canada, as set out under subsection 12(1) of the *Immigration and Refugee Protection Act* [IRPA] and subsections 4(1), 72(1), and 124(a) of the *Immigration and Refugee Protection Regulation* [IRPR]. The letter explains that the officer was not satisfied that the Applicant did not enter into marriage with his sponsor primarily to acquire status under the IRPA and IRPR.

IV. Analysis

[22] The Applicant relies on the Notes to argue that the officer undertook a microscopic examination of the evidence and relied on peripheral or minor problems in the analysis of the application and the supporting documents.

[23] The Applicant cited two Immigration and Refugee Board of Canada [IRB] decisions, *Chavez, Rodrigo v Canada (Citizenship and Immigration Canada)*, IAD TA3-24409, which was cited with approval of *Shaikh v Canada (Citizenship and Immigration Canada)*, 2021 CanLII 141689 (CA IRB), to support his argument that the officer did not properly consider the applicable factors for assessing the genuineness of the marriage. The Applicant suggests that the evidence submitted demonstrated that his relationship met the factors as referred to in these two IRB decisions, and thus their marriage was genuine.

[24] The Respondent states that the Applicant's argument is untenable. The onus is on the Applicant to prove cohabitation and the limited documents provided did not do so. The argument presupposes that the *bona fides* of the marriage was established. The Respondent argues that the Applicant has the onus to prove the validity of the marriage. The officer had determined that based on the evidence, there was not enough to demonstrate the genuineness of the marriage. The officer sent a procedural fairness letter to advise the Applicant of the issues with his application. The Applicant never raised issues about the deadlines to respond, nor did he request an extension of time. As a result, the Applicant failed to satisfy to the officer that his application

met the requirements for immigration. The Decision was not unreasonable based on the record before the officer.

[25] I agree with the Respondent. Despite the vigorous assertions by the Applicant, the officer was not satisfied that the Applicant and his spouse demonstrated sufficient interdependence expected from a relationship of the duration that was identified. Upon review of the materials that were submitted and the comments in the Notes, I cannot find that the officer's conclusions to be unreasonable or unjustified.

[26] The officer's Notes clarify the main reason for having denied the Applicant's application: the officer found that the Applicant provided insufficient documentation in response to the procedural fairness letter. The Notes mention that the documents submitted, "do not address the concerns identified." I find that the record supports the officer's findings that the bank account statements had no expected daily transactions such as rent or utilities, and that the credit card statements mostly referred to Uber transactions, for example. The officer's Notes also mention that, "additionally, several requested documents were not provided and no reasonable explanation for this omission was given."

[27] It is not disputed that the Applicant did not submit all of the listed documents as required by the procedural fairness letter. However, the Applicant argues that the officer was unreasonable to request that the Applicant provide all of the documents in a short time period, notably "five (5) business days" as most documents on the list were with third parties (i.e. Canadian Revenue Agency).

[28] In his affidavit sworn on March 6, 2023, and attached to the Applicant's Record, the Applicant provided additional information and documentation, as well as explanations addressing the officer's concerns. The information and documentation set out in the affidavit are two agreements for leases signed on August 15, 2021, and October 1, 2023, as well as medical records dated July 12, 2022.

[29] The Respondent underlines that the Applicant makes spurious and bald statements in this affidavit. The Respondent states that the Court cannot rely on "vague assertions and innuendo."

[30] I agree that the affidavit is not helpful to the Court.

[31] It is a well-established principle that the essential purpose of judicial review is the review of decisions, not the determination by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court. As a general rule, the evidentiary record before this Court on judicial review should be restricted to the evidentiary record that was before the decision-maker. In other words, evidence that was not before the decision-maker and that goes to the merits of the matter before them is not admissible in an application for judicial review (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 19).

[32] There are exceptions to this general rule (*Access Copyright* at para 20) but the exceptions do not apply here. It appears that the Applicant is attempting to argue why he was unable to provide

additional documents to the officer, to rebut the officer's conclusion that "no reasonable explanation for this omission was given."

[33] The Court notes that the information and documents appended in the Applicant's affidavit were not before the officer at the time the Decision was made. Some of the evidence in the affidavit as well as some documents were available to the Applicant in November 2022, but were not submitted to the officer. Particularly, some of the documents appended to the affidavit are dated after the Decision was made.

[34] Judicial review is not the avenue for introducing new evidence to rectify the Applicant's application. The affidavit goes further than providing general background, for example, it provides evidence relevant to the merits of the Decision (*Access Copyright* at para 20).

[35] The Applicant provided no argument or any authority that I can rely on to use this affidavit in addressing the central issue of whether the Decision under review was unreasonable. Therefore, I give little weight to the affidavit.

[36] I understand that the Applicant believes that he had sufficient evidence to support a favourable outcome of his application for permanent residence. However, the procedural fairness letter clearly confirms this was not the case, and the letter had specifically listed the documentation required to satisfy the officer's concerns. Since the Applicant did not provide the requested documentation to meet his burden, the officer refused his application on November 12, 2022.

[37] Taken as a whole, the officer's conclusion, that there was insufficient evidence to demonstrate the level of interdependence expected for his relationship, had not resulted in an unreasonable Decision. Applying the guidance in *Vavilov*, I find that the Decision bears the hallmarks of justification, intelligibility and transparency.

V. No breach of procedural fairness

[38] On the issue of the breach of procedural fairness, the Applicant alleges that the officer gave him too little time to compile the documents requested. Furthermore, the Applicant contends that the circumstances of his case warranted an invitation for an interview to provide the Applicant an opportunity to clarify the officer's concerns.

[39] In respect to allegations of procedural fairness, the Court's task is to determine "whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific* at para 54). The Court will review the alleged breach on the standard of correctness (*Canadian Pacific* at para 34, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79). The principle of procedural fairness is rooted in the notion that the affected party knows the case he has to meet.

[40] The procedural fairness letter was clear that the application for permanent residence may be rejected due to insufficient information. The letter further provided a list of the documentation that was required. I note that the procedural letter "required" the information found within the list of documents and informed the Applicant about his right to "make any other submissions" in order to address the officer's concerns.

[41] In the circumstances, I find that as of November 5, 2022, the Applicant would have been given notice of concerns about his application, and that the officer, with the procedural fairness letter, advised the Applicant of the burden he had to meet to satisfy the officer.

[42] The Applicant did not request additional time, by communicating that more time had been required to submit the remaining documents. The Applicant did not explain that he had a medical issue that would have hindered his ability to submit the documents referred to in the procedural fairness letter on time. The issue of a motor vehicle accident in July 2022 was only raised on judicial review. This evidence was not before the decision-maker.

[43] Having never requested an extension of time, nor informed the officer of his difficulties, the officer would have had no knowledge of the allegations the Applicant is now advancing on judicial review. I cannot agree with the Applicant that the officer breached procedural fairness.

[44] I also disagree with the Applicant's argument of a breach of procedural fairness on the issue of an interview.

[45] The Applicant admits that an officer has discretion to decide whether to extend an invitation for an interview, although he states that his circumstances required one.

[46] The Respondent points to *Perez v Canada (Citizenship and Immigration)*, 2020 FC 1171 [*Perez*] at paragraph 22, to argue that the Applicant is asking this Court to provide him with a

third opportunity to demonstrate that he satisfies the requirements for permanent residence under IRPA and IRPR.

[47] In *Perez*, Justice MacHaffie indicated that the principle of procedural fairness is the overarching right to be heard. However, this does not provide for an "untrammeled right to be heard," but rather the right to a reasonable opportunity to be heard. Where a party does not take advantage of that opportunity, or their actions or omissions result in them being unable to do so, procedural fairness does not give them an automatic right for another opportunity to be heard.

[48] I also agree, and further underline the Court's conclusion in *Perez* at paragraph 26, that "a failure to comply with procedural obligations does not automatically disqualify a claimant from relief on fairness grounds, but at some point a claimant will be considered the author of their own misfortune. The line between these two, and thus the assessment of procedural fairness, will be heavily dependent on the overall factual matrix and the conduct of the claimant."

[49] In this case, the factual matrix and conduct of the Applicant do not support a breach of procedural fairness.

[50] The Applicant is required to provide a fulsome application from the beginning, when he submitted his documents in March 2022. The procedural fairness letter identified concerns and provided him a clear opportunity to address those concerns, and identified the documents that

would be required to address these concerns. This was the time to address the gaps of his application and supplement the record.

[51] Again, considering the fact that the Applicant had not made the request for more time, and failed to explain to the officer that his health concerns would have impeded his burden for meeting the deadline, the Applicant failed to seize the opportunity that was given to him to submit a complete application.

[52] The Applicant has not persuaded me that the officer erred by not extending an invitation for an interview or that he was somehow entitled to one in these circumstances. The Applicant's procedural fairness arguments arrived after the refusal, which, unfortunately, is too late.

[53] Accordingly, I do not find that there has been a breach of procedural fairness.

VI. Conclusion

[54] This application for judicial review is dismissed.

[55] The parties confirmed that there was no question of general importance to certify and I agree that none arises.

JUDGMENT in IMM-12264-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There are no questions for certification.

"Phuong T.V. Ngo"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-12264-22
STYLE OF CAUSE:	THANH PHONG HO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 6, 2024
JUDGMENT AND RESONS:	NGO J.
DATED:	APRIL 15, 2024

APPEARANCES:

Sunny Vincent	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sunny Vincent Law Office Barristers and Solicitors Toronto (Ontario)	FOR THE APPLICANT
Attorney General of Canada Toronto (Ontario)	FOR THE RESPONDENT