Federal Court  Cour fédérale

Date: 20240529

Docket: IMM-996-23

Citation: 2024 FC 818

Ottawa, Ontario, May 29, 2024

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

MAHNAZ KHODAYARINEZHAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Mahnaz Khodayarinezhad, on judicial review seeks to set aside a decision by a visa officer (Officer) with Immigration, Refugees and Citizenship Canada (IRCC) dated November 24, 2022, refusing the Applicant's application for a Canadian work permit under the International Mobility Program (Decision).

[2] The Applicant is an Iranian citizen. She applied for a Labour Market Impact Assessment-exempt code C11 category work permit. This category targets foreign nationals who are

entrepreneurs and self-employed that are seeking temporary residence to operate a business in Canada, which would create or maintain significant social, cultural, or economic benefits or opportunities for Canadian citizens or permanent residents pursuant to Rule 205(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[3] The Applicant applied for a work permit to establish an information technology company—'MK Information Technology Consulting Inc.'—which would specialize in providing information technology consultation services, including web development and design, software engineering, and network design security (IT consultation services). The Applicant submitted a 78-page business plan in support of her application. Her company was incorporated in Ontario on June 28, 2021.

[4] An Officer reviewed the Applicant's work permit application and determined that she did not meet the statutory requirements set out in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and the *IRPR*. The Officer found there was insufficient documentary evidence to establish that the Applicant met the exemption requirements of exemption code C11 under section 205(a) of the *IRPR*.

[5] The notes contained in the Global Case Management System [GCMS], which form part of the reasons, state:

> PA seeks WP under C11 (Self-Employed/Entrepreneur). I am not satisfied the proposed business plan is sound.
>
> Client plans to start a company that "specialize in providing IT consulting services in the area of web development and design, software engineering, and network design and security" in the GTA. The work experience of the client is mostly limited to a technical IT (maintenance, updating software, ect [*sic*]) and has limited overlap with the scope of the company to be founded. The website is a basic template. One would expect that an IT business

> would have the website ready as web development is one of the service offered and it can be done remotely. The proposed salaries are below average for this area (46K for a Web Developer for example). Not clear how business can be competitive.
>
> I am not satisfied there is documentary evidence to establish that the exemption requirements of C11 Significant benefit – Entrepreneurs/self-employed under R 205(a) is met. Application refused

[6] I have considered both the written and oral submissions of the parties. A review of the Applicant's pleadings highlights that the nature of the arguments in support of the application for judicial review have changed significantly between what was set out in the original Memorandum of Argument filed May 26, 2023, the Reply Memorandum filed on June 14, 2023, and the Further Memorandum of Argument filed on April 17, 2024.

[7] I note that the Applicant's written submissions set out in the original Memorandum of Argument focused on an alleged breach of her right to procedural fairness. Specifically, IRCC allegedly breached the Applicant's right of procedural fairness in the following ways:

A. The IRCC had communicated 83 similar refusals en mass in less than one month for the C11 and C12 visa categories prepared by the Applicant's counsel. This indicated that the IRCC made collective decisions regarding a group of applications, rather than performing an independent assessment of each application;
B. The right to a fair hearing was breached, due to the alleged sudden changes to the C11 category guidelines, specifically the definition of "significant benefit;"
C. Legitimate expectations had been breached as a result of the changes to the C11 guidelines;
D. The Applicant did not receive the reasons for her refusal;
E. The Applicant did not know the case to be met;

F. The IRCC's choice to change its procedures was procedurally unfair; and

G. The underlying application warranted a high degree of procedural fairness because the Applicant "waited over 8 months" for her Decision, she "spent considerable amount of time and resources," and "blocked significant funds for commencing her business."

[8] The procedural fairness argument advanced in this case was relatively novel, and I note the recent decisions of Justice Go in *Shidfar v Canada (Citizenship and Immigration)*, 2023 FC 1241 and Justice Aylen in *Shahbazian v Canada (Citizenship and Immigration)*, 2023 FC 1556, both rejecting similar procedural fairness allegations in near-identical circumstances.

[9] In the Applicant's Further Memorandum of Argument and confirmed by counsel at the hearing, the Applicant abandoned the procedural fairness arguments as set out in the Applicant's original Memorandum of Argument at the leave stage.

[10] Recently, Justice Ahmed in *Roodafshani v Canada (Immigration, Refugees and Citizenship)*, 2024 FC 595 and Justice Zinn in *Tehranimotamed v Canada (Citizenship and Immigration)*, 2024 FC 548 [*Tehranimotamed*], found that similar procedural fairness arguments raised in the original application materials were deemed abandoned as the arguments were unmentioned in the further materials.

[11] Based on the foregoing and the Applicant counsel's submissions at the oral hearing, I am satisfied that the procedural fairness arguments were abandoned in the Applicant's Further Memorandum of Argument, which replaced their original submissions per Justice McDonald's Order granting leave dated February 22, 2024, pursuant to Rule 10.

[12] Finally, I note that the Applicant raises reasonableness arguments in her Reply and Further Memorandum of Argument that were not raised in her original Memorandum of Argument, namely:

A. That the Officer's Decision lacked justification, transparency and intelligibility, and appears to have ignored or misunderstood evidence set out in the applicant's business plan and application related to:
    i. The Applicant had limited overlapping work experience to the proposed business;
    ii. The website is a basic template;
    iii. The proposed salaries for the employees were below market rates;
B. The Officer's reasons failed to explain how they determined the proposed application was not compliant with C11 requirements for a business with "significant benefit to Canada" and that the Applicant may not leave Canada.

[13] For the reasons that follow, I am dismissing this application for judicial review.

II. The Applicant's new issues will not be considered

[14] It is for a Court to determine if it will exercise its discretion to permit new issues raised for the first time in a party's Reply or Further Memorandum of Argument. Courts are guided by the following factors:

A. Were all of the facts and matters relevant to the new issue or issues known (or available with reasonable diligence) at the time the application for leave was filed and/or perfected? Does the record disclose all of the facts relevant to the new issues?
B. Is there any suggestion or prejudice to the opposing party if the new issues are considered?

C. Are the new issues related to those in respect of which leave was granted?

D. Will allowing the new issues to be raised unduly delay the hearing of the application?

E. What is the apparent strength of the new issue or issues?

Al Mansuri v Canada (Public Safety and Emergency Preparedness), 2007 FC 22 [*Al Mansuri*] at para 12.

[15] I am not persuaded that this Court ought to exercise its discretion to hear matters that were not properly set out in the application for judicial review.

[16] It is trite law that two of the principle functions of pleadings are to "define with clarity and precision the question in controversy between litigants" and to "give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them." See *Premakumaran v R*, 2003 FCT 635 at paras 10–12.

[17] Leave was granted based on the Application for Judicial Review and the arguments set out in the Application Record, including the original Memorandum of Argument. As noted recently by Justice Zinn in *Tehranimotamed*, "[o]nly arguments included in a party's memorandum can be advanced in oral argument" (*Tehranimotamed* at para 12).

[18] As set out previously, the Applicant abandoned the arguments related to the alleged breaches of procedural fairness. Accordingly, the Applicant proposed to proceed only with respect to the new arguments set out in the Reply and Further Memorandum of Argument related to the reasonableness of the Decision.

A. *Relevant facts*

[19] Counsel for the Applicant did not identify any new facts relevant to the new issues raised that were not known when the application for leave for judicial review was filed. The Court agrees with the Respondent that all the necessary facts and matters relevant to the new issues were known at the time the application for leave was perfected.

B. *Prejudice*

[20] The Respondent alleged that they suffered some prejudice from the Applicant's late introduction of argument. I agree that the Respondent focused their arguments on the procedural fairness issues rather than the new arguments related to the reasonableness of the Decision but, as noted, all the material facts and issues were known to all parties. I am not persuaded that there is significant, substantial prejudice to the Respondent. Indeed, the Respondent set out in its Memorandum of Argument and Reply some argument addressing the reasonableness of the Decision, but this was primarily in respect of the procedural fairness issues, and did not open the door to the new issues.

C. *Related issues*

[21] Counsel for the Applicant suggested that the reasonableness arguments raised in the Reply and Further Memorandum of Argument were not new. Counsel repeatedly pointed to submissions in the Reply in support of this argument. The Court does not accept this. A reply is to respond to matters raised by the opposing party, not to flesh out new arguments that ought to have been in the original application. As noted by Justice Mactavish in *Deegan v Canada (Attorney General)*, 2019 FC 960 [*Deegan*] at paragraph 121:

> It is a well-established principle that new arguments are not the proper subject of Reply. The purpose of a Reply is to respond to matters raised by the opposing party, not to produce new arguments or new evidence that should have been raised in first instance. Proper Reply is limited to issues that a party had no opportunity to deal with, or which could not reasonably have been anticipated…

[22] Justice Tsimberis in *Mousavimianji v Canada (Citizenship and Immigration)*, 2024 FC 726 at para 5 [*Mousavimianji*], noted that while the comments in *Deegan* were in respect of oral submissions on Reply, the comments apply equally to written submissions in Reply. I agree. See also *Murphy v Canada (Attorney General)*, 2023 FC 57 at para 39.

[23] The Applicant did not make an application to amend her pleadings pursuant to Rules 76(b) and 201 of the *Federal Court Rules*, SOR/98-106:

76 With leave of the Court, an amendment may be made	**76** Un document peut être modifié pour l'un des motifs suivants avec l'autorisation de la Cour, sauf lorsqu'il en résulterait un préjudice à une partie qui ne pourrait être réparé au moyen de dépens ou par un ajournement :
…	[…]
(b) to alter the capacity in which a party is bringing a proceeding, if the party could have commenced the proceeding in its altered capacity at the date of commencement of the proceeding,	**b)** changer la qualité en laquelle la partie introduit l'instance, dans le cas où elle aurait pu introduire l'instance en cette nouvelle qualité à la date du début de celle-ci.
unless to do so would result in prejudice to a party that would not be compensable by costs or an adjournment.	

…	[…]
201 An amendment may be made under rule 76 notwithstanding that the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of substantially the same facts as a cause of action in respect of which the party seeking the amendment has already claimed relief in the action.	**201** Il peut être apporté aux termes de la règle 76 une modification qui aura pour effet de remplacer la cause d'action ou d'en ajouter une nouvelle, si la nouvelle cause d'action naît de faits qui sont essentiellement les mêmes que ceux sur lesquels se fonde une cause d'action pour laquelle la partie qui cherche à obtenir la modification a déjà demandé réparation dans l'action.

[24] The Applicant repeatedly pointed to paragraph 6 of her Reply Memorandum as being sufficient notice of the new arguments related to the reasonableness of the Decision. With respect, I do not agree. This paragraph is clearly a response to paragraphs 14–16 of the Respondent's Memorandum of Argument, where the Respondent noted that the Applicant had not addressed the substance of the Officer's findings. While the Respondent's submissions addressed the standard of review they argued was applicable, and they set out why they were of the view the Decision was reasonable, their arguments focused on the procedural fairness issues raised by the Applicant in her application. Indeed, at paragraph 9 of her Reply, the Applicant "…confirms that she did not address the specific reasons for the refusal of her application…"

[25] Paragraph 8 of the Applicant's Reply responds to submissions related to the standard of review applicable to the Decision.

[26] In my opinion, the Applicant is limited by the choices made with respect to the arguments advanced in the original application for which leave was granted. The Applicant is limited to the

procedural fairness arguments raised in the original application, which have now been abandoned.

[27] Similar to *Mousavimianji*, the new issues related to the reasonableness of the Decision are only vaguely related to those issues for which leave was granted; but only to the extent that the Applicant alleged that the Decision was unreasonable because it was procedurally unfair. The substantive issues related to the reasonableness of the Decision were not clearly and properly set out in the original application and were only improperly raised in the Reply and Further Memorandum of Argument.

D. *Delay*

[28] Similarly, I do not think that exercising the Court's discretion to consider the new issues would unduly delay the application. However, on balance, I am not persuaded that the Court should exercise its discretion in this case.

[29] That fact that the facts and issues were known at the time the leave application was filed and perfected are considerations that weigh against the Court exercising its discretion in this case. No new evidence or facts were produced to supplement the Certified Tribunal Record. Counsel for the Applicant provided no clear explanation as to why choices were made not to advance the reasonableness arguments in the original application, instead focusing on a now abandoned procedural fairness argument.

E. *Apparent Strength*

[30] Finally, as per *Al Mansuri* I will consider the strength of the new issues, where I shall conduct an analysis of the alleged merits of these issues, had I exercised my discretion to consider them as part of this application. The new issues are:

A. That the Decision lacked justification, transparency, and intelligibility, and appears to have ignored or misunderstood evidence set out in the Applicant's business plan and applications related to the Applicant's work experience, the nature of the website template, and the proposed salaries were below market rates.

B. The Officer's reasons failed to explain how they determined the proposed application was not compliant with exemption code C11; namely a business with "significant benefit to Canada" and that the Applicant would not leave Canada.

(1) The Officer ignored evidence set out in the Applicant's business plan

[31] Both parties agreed that the standard of review with respect to the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Baran v Canada (Citizenship and Immigration)*, 2019 FC 463 at paras 15-16).

[32] In conducting a reasonableness review, the Court must apply a reasons first approach "and determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified" (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8).

[33] Before intervening, the Court must be satisfied that any shortcomings in the decision are sufficiently central or significant that would render the decision unreasonable. The onus is on the

party challenging the decision to demonstrate that it is not reasonable (*Vavilov* at paras 100–102).

[34] Officers are not required to provide detailed reasons when making decisions on applications for temporary resident visas, including work permits, however, reasons must be responsive to the evidence in the application. Simple and concise reasons are acceptable (*Vavilov* at paras 91, 128; *Wardak v Canada (Citizenship and Immigration)*, 2020 FC 582 at para 71; *Patel v Canada (Citizenship and Immigration)*, 2020 FC 672 at para 17; and *Tehranimotamed* at para 18.

[35] In summary, brief reasons will satisfy the "justification, intelligibility and transparency" criteria if the Court is able to understand the decision (*Vavilov* at paras 85–86).

[36] In my opinion, the Officer did not ignore the Applicant's business plan. While I agree that the GCMS notes are brief, these reasons must be considered in the context of the whole application. The GCMS notes clearly link back to information that was contained in the business plan.

[37] The fact that the Applicant does not agree with the conclusions reached by the Officer does not mean that the Officer ignored or misapprehended the contents of the application and business plan.

[38] In this case, the GCMS notes respond to the application and it is clear that the Officer understood the nature of the proposed business. The Officer notes that the Applicant planed to start a company that "specialize[s] in providing IT consulting services in the area of web

development and design, software engineering and network design and security;" this information came from the business plan.

[39] The Officer's GCMS notes clearly raise concerns about the Applicant's level of experience, particularly with respect to her entrepreneurial experience, rather than as a technician.

[40] With respect to the comments about the development of a website, the Respondent argued that the Officer's notes are clear and the Decision is reasonable. There is no requirement for a website, the C11 application process requires a business plan and for applicants to demonstrate that steps have been taken to initiate the business. Here, the proposed company is to specialise in IT consultation services; in my opinion, considering the nature of the proposed business, it was reasonable for the Officer to note the lack of development on a website. This factor on its own is not determinative, but viewed holistically, this was an additional factor noted by the Officer when considering the entirety of the Applicant's evidence in support of her application.

[41] Finally, the Officer noted that the proposed salaries for the business are "below average" for an IT consultation services company, identifying "46K for a Web Developer" as an example. It is clear the Officer reviewed the business plan, as this information is contained in the plan. While the Officer did not list all the salaries included in the business plan, it is obvious that the Officer reviewed the plan and considered how this plan aligned with similar comparable businesses in Canada.

[42] I note that Justice Tsimberis in *Mousavimianji*, a strikingly similar case to the case a bar, found that "the Applicant's bald assertions that the Officer was unreasonable because they

disagreed with the Applicant's assertion of what the officer's conclusions should have been do not have any merit" (*Mousavimianji* at para 12).

[43] When assessed in context of the evidence submitted, the reasons provided by the Officer, while brief, are justified, intelligible, and transparent; in other words, the reasons were adequate and reasonable.

(2) The Officer's reasons failed to explain how they determined the proposed application was not compliant with exemption code C11

[44] The Officer concluded their assessment of the C11 criteria and was not satisfied that "… there is documentary evidence to establish that the exemption requirements of C11 Significant benefit – Entrepreneurs/self employed under R205(a) is met."

[45] The Officer's reasons are brief, but when viewed holistically, it is my opinion that they provide sufficient explanation to justify their Decision. Because the Officer did not find that there was sufficient information set out in the business plan to establish a viable enterprise in Canada, they were of the view that the Applicant did not satisfy the criteria for C11 applicants under Rule 205(a).

[46] Further as set out in the letter of decision, because of the findings with respect to support for the application under C11, the purpose of the Applicant's visit was not consistent with a temporary stay.

[47] It is clear that the Officer concluded that the Applicant failed to provide sufficient documentary evidence to establish that she met the exemption requirements of exemption code C11 under Rule 205(a).

[48] The reasons the Officer denied the Application are set out in the letter and GCMS notes.

[49] Accordingly, I do not exercise my discretion to consider submissions and new issues raised by the Applicant and this application is dismissed without substantive arguments from the Applicant.

[50] The parties did not pose any questions for certification and I agree that there are none.

JUDGMENT in IMM-996-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No question of general importance is certified.

"Julie Blackhawk"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-996-23
STYLE OF CAUSE:	MAHNAZ KHODAYARINEZHAD v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 15, 2024
JUDGMENT AND REASONS:	BLACKHAWK J.
DATED:	MAY 29, 2024

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