Federal Court  Cour fédérale

Date: 20210430

Docket: IMM-3003-20

Citation: 2021 FC 376

Ottawa, Ontario, April 30, 2021

PRESENT: Mr. Justice Gascon

BETWEEN:

ALMA VASQUEZ ANGARA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Alma Vasquez Angara, is a citizen of the Philippines and became a permanent resident of Canada in December 2017. She is seeking judicial review of a decision issued in July 2020 by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada [Decision]. The IAD then confirmed a prior decision of an Immigration Officer

[Officer] who had refused Ms. Angara's application to sponsor her adult son for permanent residence, on the basis that he was not a member of the family class as described in paragraph 117(1)(h) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[2] Ms. Angara asserts that, in issuing the Decision, the IAD contravened the fundamental principles of natural justice and violated her right to procedural fairness as she did not receive the appeal record mandated by section 4 of the *Immigration Appeal Division Rules*, SOR/2002-230 [IAD Rules], thus preventing her from knowing the case she had to meet. She is asking the Court to set aside the Decision and order that another decision maker reconsider her appeal. In response, the Minister of Citizenship and Immigration [Minister] argues that the Decision is reasonable in all respects and that no breach of procedural fairness occurred.

[3] The only issue to be determined is whether the IAD breached its duty of procedural fairness by rendering the Decision and dismissing Ms. Angara's appeal in a context where Ms. Angara had not been provided with the appeal record pursuant to Rule 4 of the IAD Rules, and the IAD did not have the appeal record before it. For the following reasons, I will grant Ms. Angara's application for judicial review.

II. Background

A. *The factual context*

[4] Ms. Angara was born in the Philippines and became a permanent resident of Canada on December 22, 2017.

[5] Ms. Angara's 90-year-old mother is still alive and resides in the Philippines.

[6] In February 2019, Ms. Angara undertook to sponsor the application of her adult son, Mr. Aldwyn Vasquez Angara, a national of the Philippines, for permanent residence under paragraph 117(1)(h) of the IRPR.

[7] On October 3, 2019, a procedural fairness letter [Procedural Fairness Letter] was sent to Mr. Angara, informing him that it appeared from the information on file that his sponsor, Ms. Angara, still had a parent who may be sponsored to Canada (i.e., her mother) and that, as such, he did not appear to qualify as a member of the family class under paragraph 117(1)(h) of the IRPR. The case law has interpreted paragraph 117(1)(h) as a provision of last resort that could only be relied upon where an applicant has no living enumerated relatives to sponsor (*Sendwa v Canada (Citizenship and Immigration)*, 2019 FCA 314 at paras 19-23).

[8] Ms. Angara responded to the Procedural Fairness Letter and stated that, while her mother is still alive and could theoretically be sponsored to Canada, she would be refused on medical grounds. Ms. Angara provided a medical certificate indicating that her mother is unfit to travel and requires a constant caregiver. Ms. Angara further explained that she was also basing her request to sponsor her adult son on humanitarian and compassionate considerations, as she is alone in Canada, with no family in the country.

[9] By letter dated January 8, 2020, the Officer informed Ms. Angara that her son's permanent resident application had been refused because he did not meet the requirements of the

IRPR. In his correspondence, the Officer attached the refusal letter sent to her son, also dated January 8, 2020, which further explained the reasons for refusal as follows [Refusal Letter]:

> On the basis of the information before me, I find that your sponsor's mother is still alive and residing in the Philippines and can therefore be sponsored to come to Canada as a permanent resident. As such, I am not satisfied that you qualify as a member of the family class per section R117(1)(h) of the Regulations.
>
> I have considered the request for humanitarian and compassionate consideration brought forward by your sponsor however I find that there are insufficient humanitarian and compassionate grounds to warrant relief from your ineligibility to meet the definition of a family member in the any of the abovementioned classes.

[10] No other documents were sent to Ms. Angara or her son with the Refusal Letter.

B. *Decision*

[11] On February 4, 2020, Ms. Angara filed a Notice of Appeal of the Officer's refusal of her sponsored application to the IAD.

[12] On February 18, 2020, the IAD sent a letter to Ms. Angara [IAD Letter], requesting her to provide written information or arguments, by March 10, 2020, in support of her position that her son was a person described in paragraph 117(1)(h) of the IRPR. The letter contained the following information:

> **Why was the visa refused?**
>
> The person you want to sponsor does not appear to be a member of the Family Class because you are a major child. Canada's Immigration and Refugee Protection Regulations (the "Regulations") outline who is part of the Family Class. It most commonly includes:

- the sponsor's partner,
- a dependent child of the sponsor,
- the mother or father of the sponsor, and
- the grandparents of the sponsor.

[…]

Can you show that the person you applied to sponsor is a member of the Family Class?

If you have documents or if you want to make written arguments that show that the person you applied to sponsor is a member of the family class listed in subsection 117(1) of the Regulations, please send them to us as this will assist in our assessment of your file.

[...]

What happens if you do not respond to this letter?

If we do not hear from you by the deadline, the IAD can dismiss your appeal or declare it "abandoned". This would mean that your appeal is over and the original decision about your case stands. If this happens, you will receive a Notice of Decision from the IAD.

What happens after we receive your documents?

[…]

The IAD will use all of this information to decide whether or not to hold a hearing on your appeal. It will schedule a hearing if it needs more information. If this happens, you will receive a letter from the IAD called a Notice to Appear. This will tell you when and where the hearing will take place. However, in many cases there is enough information for the IAD to decide the appeal based on the information on file.

What happens next?

If the IAD decides that the person you applied to sponsor is a member of the Family Class, it can allow your appeal.

If the IAD decides that the person you applied to sponsor is not a member of the family class, your appeal can be dismissed. What this means is that the IAD can find that the refusal of the sponsorship was valid if you cannot show that the person you sponsored is a member of the Family Class. If the IAD makes this

> decision, it cannot allow your appeal on humanitarian and compassionate grounds and cannot allow your appeal to proceed.

[13] Neither Ms. Angara nor her counsel responded to the IAD Letter.

[14] It also appears from the Certified Tribunal Record that no appeal record was provided to the IAD as part of its appeal process.

[15] On July 2, 2020, the IAD issued its Decision dismissing Ms. Angara's sponsorship appeal. In the Decision, the IAD stated that "[a]fter review," it found that Ms. Angara had failed to meet her "onus of establishing that [her son] qualifies as a member of the family class under section 117(1)(h) of the [IRPR]."

C. *The relevant provisions*

[16] The relevant provisions are contained in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the IRPR and the IAD Rules.

[17] Subsection 162(2) of the IRPA provides that each division of the Immigration and Refugee Board, including the IAD, "shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit." Pursuant to subsection 168(1) of the IRPA, each division "may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by

the Division or to communicate with the Division on being requested to do so." Finally, sections 174 and 175 of the IRPA apply specifically to the IAD and notably establish that the IAD is a "court of record."

[18] Turning to the IRPR, sections 116 and 117 contain the detailed requirements for the family class of persons who may become permanent residents of Canada.

[19] As to the IAD Rules, they describe the procedural rules governing proceedings before the IAD. Sections 3 and 4 apply to appeals by a sponsor. The requirements regarding the production of an appeal record before the IAD, which are at the heart of Ms. Angara's application for judicial review, are detailed in section 4 of the IAD Rules. It reads as follows:

Appeal record	**Dossier d'appel**
4 (1) The Minister must prepare an appeal record that contains	4 (1) Le ministre prépare un dossier d'appel comportant :
(a) a table of contents;	a) une table des matières;
(b) the application for a permanent resident visa that was refused;	b) la demande de visa qui a été refusée;
(c) the application for sponsorship and the sponsor's undertaking;	c) la demande de parrainage et l'engagement du répondant;
(d) any document that the Minister has that is relevant to the applications, to the reasons for the refusal or to any issue in the appeal; and	d) tout document en la possession du ministre qui a trait aux demandes, aux motifs du refus ou à toute question en litige;
(e) the written reasons for the refusal.	e) les motifs écrits du refus.

Providing the appeal record

(2) The Minister must provide the appeal record to the appellant and the Division.

Transmission du dossier d'appel

(2) Le ministre transmet le dossier d'appel à l'appelant et à la Section.

Proof that record was provided

(3) The Minister must provide to the Division, together with the appeal record, a written statement of how and when the appeal record was provided to the appellant.

Preuve de transmission

(3) En même temps qu'il transmet le dossier d'appel à la Section, le ministre lui transmet une déclaration écrite indiquant à quel moment et de quelle façon il a transmis le dossier d'appel à l'appelant.

Time limit

(4) Documents provided under this rule must be received by their recipients no later than 120 days after the Minister received the notice of appeal

Délai

(4) Les documents transmis selon la présente règle doivent être reçus par leurs destinataires au plus tard cent vingt jours suivant la date à laquelle le ministre reçoit l'avis d'appel.

Late appeal record

(5) If the Division does not receive the appeal record within the time limit set out in subrule (4), the Division may

(a) ask the Minister to explain, orally or in writing, why the appeal record was not provided on time and to give reasons why the appeal record should be accepted late; or

Retard de transmission

(5) Si la Section ne reçoit pas le dossier d'appel dans le délai prévu au paragraphe (4), elle peut :

a) soit demander au ministre d'expliquer, oralement ou par écrit, son retard et de justifier pourquoi le dossier en retard devrait être accepté;

(b) schedule and start the hearing without the appeal record or with only part of the appeal record.	b) soit fixer une date d'audience et commencer sans le dossier ou avec seulement une partie de celui-ci.

[20] Section 4 of the IAD Rules thus expressly provides, in clear and strict terms, that the Minister must prepare an appeal record and provide it to the appellant and the IAD within 120 days of receiving the Notice of Appeal. As the Minister pointed out in his submissions, pursuant to paragraph 4(5)(b) of the IAD Rules, the IAD may schedule and start the hearing of an appeal without the appeal record or with only part of the appeal record, if the IAD does not receive the appeal record from the Minister within the prescribed time limit. I observe, however, that the IAD Rules only allow the IAD to "start the hearing" without the appeal record. Nowhere do the IAD Rules state that the IAD is allowed or authorized to finish the appeal process, to make a determination and to issue a decision without the appeal record.

D. *The standard of review*

[21] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada [SCC] set out a revised framework for determining the standard of review with respect to the merits of administrative decisions (*Vavilov* at para 10). In that decision, the SCC articulated a new approach to determining the applicable standard of review, holding that administrative decisions should presumptively be reviewed on a standard of reasonableness, unless either the legislative intent or the rule of law requires that the standard of correctness be applied (*Vavilov* at paras 10, 17).

[22] The *Vavilov* decision did not deal directly with issues of procedural fairness, and the approach to be taken on this front has therefore not been modified (*Vavilov* at para 23). It has typically been held that correctness is the applicable standard of review for determining whether a decision maker complies with the duty of procedural fairness and the principles of fundamental justice (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107).

[23] However, the Federal Court of Appeal has affirmed that questions of procedural fairness are not truly decided according to any particular standard of review. Rather, it is a legal question for the reviewing courts, and the courts must be satisfied that procedural fairness has been met. When the duty of an administrative decision maker to act fairly is questioned or a breach of fundamental justice is invoked, it requires the reviewing courts to verify whether the procedure was fair having regard to all of the circumstances (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24-25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 54). This assessment includes the five, non-exhaustive contextual factors set out by the SCC in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] (*Vavilov* at para 77). Those factors are: (1) the nature of the decision being made and the decision-making process followed by the public body in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the public body operates;

(3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the public body itself, and the nature of the deference accorded to it (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 5; *Baker* at paras 23-28).

[24] It is up to the reviewing courts to make that determination and, in conducting this exercise, the courts are called upon to ask, "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" (*CPR* at para 54). Therefore, the ultimate question raised when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review is not so much whether the decision was "correct." It is rather whether, taking into account the particular context and circumstances at issue, the process followed by the decision maker was fair and offered the affected parties a right to be heard and a full and fair opportunity to know the case they have to meet and to respond to it (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51-54). No deference is owed to administrative decision makers on matters raising procedural fairness concerns.

III. Analysis

[25] The Minister submits that nothing prevented the IAD from proceeding and dismissing Ms. Angara's sponsorship appeal without the appeal record, as the wording of subsection 4(5) of the IAD Rules in fact confirms that the IAD may proceed without it. The Minister further argues that, in the IAD Letter, the IAD had clearly indicated what kind of information was requested

from Ms. Angara and that her appeal could be dismissed or declared abandoned if she did not respond to this letter. Ms. Angara indeed failed to provide any response to the IAD Letter. The Minister adds that Ms. Angara did not offer any explanation as to why she would require the appeal record in order to respond to the IAD Letter, even if only to inform the IAD that she felt she required the appeal record in order to properly present her submissions on appeal. Moreover, according to the Minister, Ms. Angara knew the case she had to meet and could therefore respond to it, as this was not the first time that she was required to explain why her adult son should be considered a member of the family class under paragraph 117(1)(h) of the IRPR Rules. For all these reasons, argues the Minister, no breach of procedural fairness occurred.

[26] I do not agree. I instead find that, in the circumstances of this case, the process followed by the IAD was unfair and prevented Ms. Angara from having a full and fair opportunity to know the case she had to meet and to respond to it.

A. ***Extent of the IAD's duty of procedural fairness***

[27] The duty to act fairly has two components: (1) the right to be heard and the opportunity to respond to the evidence that must be rebutted; and (2) the right to a fair and impartial hearing before an independent tribunal (*Therrien (Re)*, 2001 SCC 35 at para 82). Ms. Angara's case solely relates to the first component.

[28] It is well established that the requirements of the duty of procedural fairness are "eminently variable," inherently flexible and context-specific (*Vavilov* at para 77; *Baker* at para 21; *CPR* at para 40; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 113; *Foster*

Farms LLC v Canada (International Trade Diversification), 2020 FC 656 at paras 43-52). They do "not reside in a set of enacted rules" (*Green v Law Society of Manitoba*, 2017 SCC 20 at para 53). The actual level and extent of the duty will vary with the specific context and the different factual situations dealt with by the administrative body, as well as the nature of the disputes it must resolve (*Baker* at paras 25-26). In any situation, the exact nature and scope of the duty of procedural fairness will fluctuate depending on the attributes of the administrative tribunal and its enabling statute (*Canada (Attorney General) v Mavi*, 2011 SCC 30 at paras 39-42). In other words, whether a decision is procedurally fair must be determined on a case-by-case basis.

[29] The purpose of the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and to the statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and to have them considered by the decision maker before the decision is rendered (*Baker* at paras 21-22; *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 18). Issues of procedural fairness and the duty to act fairly are not concerned with the merits of the decision, but rather relate to the process followed by the decision maker. Similarly, procedural fairness does not create substantive rights nor does it entitle a person to a given outcome or a particular result in the treatment of a matter. Ms. Angara cannot claim to have a right to the IAD agreeing with her on her sponsorship appeal.

[30] In *Baker*, the SCC set out five non-exhaustive factors to be considered in determining the duty of procedural fairness owed in a particular situation. Applying the *Baker* factors to the Decision, I find that, in the circumstances of this case, the level of procedural fairness owed to

Ms. Angara by the IAD falls at the higher end of the spectrum. The first *Baker* factor refers to the nature of the decision being made and the process followed in making it. The closer an administrative process (and decision) resembles a court process, the higher the level of procedural protection will need to be (*Baker* at para 23). In this case, section 174 of the IRPA provides that the IAD is a court of record having all the powers, rights and privileges vested in a superior court of record with respect to any matter necessary for the exercise of its jurisdiction. While the nature of the process to arrive at the Decision is more informal and differs from the usual court process, the IAD is tasked with making an adjudicative decision based on its appreciation of the evidence and the application of strict requirements for enumerated relatives able to be sponsored into Canada under section 117 of the IRPR. As mentioned above, the IRPA and the IAD Rules set up a detailed set of rules governing appeals by a sponsor. This is not a purely discretionary decision made from a ministerial position, and this suggests a situation calling for a higher level of procedural fairness.

[31] The second factor relates to the role of the decision within the statutory scheme, the statutory language itself and the institutional and social context. These elements all inform the processes owed to a party (*Baker* at paras 22, 28). A statute should not be read as to insert procedural steps that do not exist or are not contemplated. However, in this case, the IRPA, the IRPR and the IAD Rules provide for specific procedural steps in the consideration of appeals of sponsorship requests. For instance, the IAD Rules contain provisions governing the different types of appeals heard by the decision maker as well as processes for obtaining the record, presenting documents, testifying in hearings and issuing decisions. The statutory process set out in section 117 of the IRPR and in the IAD Rules is meant to ensure that applicants make their

case in their initial submissions, and put their best foot forward in their application materials, but it provides that applicants are entitled to receive an appeal record. Since the IRPA does not contain a further appeal procedure of the IAD's appeal decisions, these are determinative of the issues being appealed (subject to judicial review before this Court). Therefore, this second factor also weighs in favour of solid procedural protections (*Baker* at para 24).

[32] The third *Baker* factor is the importance of the decision to the individuals affected. Generally, the more important a decision is to the life of an affected individual, the greater the level of procedural fairness that will be mandated. Ms. Angara states that the Decision is of major importance to her as sponsoring her adult son is the only option she has to be surrounded by a family member in Canada. In this case, I am satisfied that the Decision is far from being negligible for Ms. Angara, and that this third factor also supports a heightened level of fairness and procedural rights.

[33] The next factor mentioned in *Baker* is the legitimate expectations of the person challenging the administrative decision. In essence, if a legitimate expectation is found to exist with respect to a procedure to be followed, it will affect the content of the duty of fairness owed to the individuals affected by the decision (*Baker* at para 26). In the present case, the specific provisions of the IAD Rules dealing with the availability of an appeal record certainly establish a particular practice and process, to which Ms. Angara was entitled and which she could legitimately expect to benefit from. Furthermore, as mentioned by Ms. Angara in her submissions, the provisions of the IAD Rules on the appeal record are echoed in one of the IAD's own operational bulletins. More specifically, the *Operations Bulletin ENF 19 – Appeals before the Immigration Appeal Division (IAD) of the*

Immigration and Refugee Board (IRB) [Bulletin] sets out instructions and directions to its officers regarding the preparation of the appeal record, which parallel the provisions of the IAD Rules. In the section dealing with the procedure for family class sponsorship appeals, the Bulletin notably states, at section 8.6, that the "[Canada Border Service Agency] hearings office must provide the appeal record to the appellant or their counsel and a copy to the IAD," and that the record provided to the IAD "must be accompanied by a written statement saying how and when the appeal record was provided to the appellant." In these circumstances, I accept that this could have caused Ms. Angara to have a legitimate expectation that the IAD would follow the specific process set out in the IAD Rules and in its own administrative guidelines. Again, this attracts a higher level of procedural fairness.

[34] The last *Baker* factor refers to the decision maker's process and the choice of procedures made in a given case. Where, as here, the statute is not silent on the applicable procedural mechanisms and Parliament has instead itemized specific procedures to be followed by the decision maker, this militates in favour of a level of procedural fairness located towards the higher end of the range. In the case of Ms. Angara, there was a need to follow a particular process, namely the preparation of an appeal record to be made available to Ms. Angara and to be provided to the IAD by the Minister.

[35] In light of the foregoing, and after balancing the various *Baker* factors against the particular circumstances surrounding Ms. Angara's sponsorship appeal, I conclude that the level of procedural fairness owed to Ms. Angara in the context of her sponsorship appeal resided towards the higher end of the spectrum.

B. ***Application to this case***

[36] In this case, the conjunction of three elements leads me to conclude that, in issuing the Decision, the IAD breached its duty of procedural fairness towards Ms. Angara.

(1) Section 4 of the IAD Rules

[37] First, as mentioned above, section 4 of the IAD Rules dictates in clear terms that the Minister must prepare an appeal record and provide it to both the appellant and the IAD. This was not done in this case.

[38] The Minister argues that no legal disposition requires the IAD to wait until the Minister has provided the appeal record before proceeding with the hearing of a sponsorship appeal, and that this opened the door for the IAD to act as it did. I am not persuaded by this argument as it goes far beyond the permissive language found in section 4 of the IAD Rules. True, paragraph 4(5)(b) of the IAD Rules allows the IAD to schedule and start the hearing without the appeal record. Nevertheless, it does not go beyond that. Nowhere do the IAD Rules state that the IAD can make a determination on the merits of an appeal without the benefit of the appeal record that the Minister is otherwise required to provide, or that it can proceed to adjudicate a matter on the merits when the appellant has not received the appeal record. In other words, there is no provision in the IAD Rules vesting the IAD with the power to dismiss an appeal without an appeal record, or to indirectly deny an appellant's unequivocal legal right to receive the appeal record. As rightly stated by Ms. Angara, there is no authority or precedent allowing the IAD to

circumvent section 4 of the IAD Rules and to render a decision without eventually ensuring that the appellant has been provided with the appeal record.

[39] In a context where the IAD owed a high level of procedural fairness to Ms. Angara, the IAD breached its duty to act fairly in proceeding as it did and in dismissing Ms. Angara's appeal before she had received the appeal record.

[40] I pause to point out that, pursuant to subsection 4(1) of the IAD Rules, the appeal record to be prepared by the Minister must contain "any document that the Minister has that is relevant to the application, to the reasons for the refusal or to any issue in the appeal" as well as "the written reasons for the refusal."

[41] The principles of natural justice dictate that an appellant must have knowledge of the case to be met before a decision is rendered by the decision maker. Here, I am satisfied that, without the appeal record, Ms. Angara could not have had a full and fair opportunity to know the case against her, as she was not informed of all the written reasons for the Officer's refusal of her sponsorship appeal. Section 4 of the IAD Rules is an important procedural protection of the right to be heard and, in the circumstances of this case, the failure to ensure that the appeal record was provided to Ms. Angara and that the IAD had it before dismissing the appeal was a breach of procedural fairness.

[42] I make one other observation. In the Decision, the IAD ultimately determined that, "after review," Ms. Angara had not met her onus under paragraph 117(1)(h) of the IRPR and that her

appeal was “dismissed.” I cannot help but wonder what the IAD could have actually “reviewed” before making its determination on Ms. Angara’s sponsorship appeal, as the IAD did not have the benefit of having the Minister’s appeal record before it at the time of the Decision. Arguably, this not only reflects the unfairness of the process followed but it also calls into question the reasonableness of the Decision, as a conclusion based on an absent record can hardly be found to be intelligible, to constitute “an internally coherent and rational chain of analysis” or be “justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85).

(2) The Decision and the Officer’s notes

[43] Second, in the circumstances of this case, the failure to act fairly is compounded by the fact that Ms. Angara had never received the entirety of the Officer’s decision, which she appealed to the IAD.

[44] On January 8, 2020, the Officer had sent the Refusal Letter to Ms. Angara and to her son. However, nothing else was provided to Ms. Angara at the time. In particular, the Global Case Management System [GCMS] notes supporting the Officer’s conclusion were not provided to Ms. Angara. These GCMS notes, which were attached to the affidavit of Hélène Jarry submitted by the Minister in his response to Ms. Angara’s application for judicial review, read as follows:

> Reply to PFL reviewed. Sponsor submits a letter stating that while her mother is still alive and can be sponsored to immigrate to Canada, the latter would be refused on medical grounds anyway. The sponsor provides a medical certificate issued to her mother who currently 90 years old. The medical certificate states that PA's mother has been diagnosed with "greater trochanter fracture secondary to fall". The medical certificate further states that a physical examination revealed muscle wasting on both lower extremities and that apart from being unfit to travel short or long

> distances, the patient needs a constant caregiver. The sponsor requests humanitarian and compassionate consideration citing that she is lonely in Canada with no family there. While I understand the sponsor's desire to have someone in Canada, PA does not qualify as an eligible family member as sponsor has a parent that is eligible to be sponsored. Apart from the fact that it is not for the sponsor to determine whether her mother would be inadmissible to Canada on medical grounds, I also see no barrier for sponsor to return to the Philippines to be with her son. I have considered the request for humanitarian and compassionate consideration however there are insufficient H&C grounds to warrant the overcoming of PA's ineligibility under the class he has submitted the application. I am satisfied that PA is not a member of the family class in respect to the sponsor under R117(1)(h)(ii). Application is therefore refused.

[45] It is settled law that an immigration officer's GCMS notes form part of his or her reasons for a decision (*Song v Canada (Citizenship and Immigration)*, 2019 FC 72 at para 18), and that these notes must be considered by a reviewing court on judicial review of an administrative decision. In the case of Ms. Angara, the Officer's GCMS notes provided more detailed information on the reasoning behind the Officer's refusal of the sponsorship application, and on his treatment of Ms. Angara's claims regarding her mother's medical condition and inability to travel.

[46] Here, those GCMS notes were not provided to Ms. Angara with the Officer's decision and, when she filed her appeal before the IAD, Ms. Angara was unaware of all the reasons why her response to the Officer's Procedural Fairness Letter was insufficient and inadequate to alleviate the Officer's concerns. The first opportunity she had to review the Officer's GCMS notes was when she received the Minister's response in the context of this application for judicial review. I agree with Ms. Angara that these GCMS notes would have been included in the appeal record required to be prepared by the Minister under the IAD Rules (as they are part of the

written reasons for the refusal) and that, since these notes were not provided to Ms. Angara with the Refusal Letter, the only way for Ms. Angara to be made aware of them and to know fully the case she had to meet would have been through the appeal record. In other words, given that the GCMS notes were not included with the Officer's Refusal Letter sent to Ms. Angara in January 2020, only the appeal record would have allowed Ms. Angara to fully know the reasons for the refusal, and would have given her access to the Officer's notes.

[47] Ms. Angara's application to sponsor a family member was refused by the Officer despite Ms. Angara's representations about her mother's medical condition and inability to travel, and the Refusal Letter did not provide Ms. Angara with the complete analysis made by the Officer. I acknowledge that, had the Officer's GCMS notes been provided to Ms. Angara with the Refusal Letter, it would have been more difficult for her to claim that the failure to receive the appeal record prevented her from knowing the case she had to meet in her appeal to the IAD. However, in this case, the GCMS notes were not included with the Refusal Letter and it is precisely for that reason that Ms. Angara required the appeal record in order to know the case she had to face in her sponsorship appeal.

[48] In light of the higher level of procedural fairness due to Ms. Angara, I am satisfied that, in the present circumstances, Ms. Angara did not sufficiently know the case she had to meet, had not received all relevant documents and was not given a fair opportunity to respond to the decision maker's concerns. I am mindful of the fact that the GCMS notes remain succinct and that the only additional information contained in these notes is the fact that the Officer thought "it [was] not for the sponsor to determine whether her mother would be inadmissible to Canada

on medical grounds" and that the Officer "[saw] no barrier for [the] sponsor to return to the Philippines to be with her son." But Ms. Angara was unaware of these reasons underlying for the Officer's refusal, and it was her right to know about them in the context of her appeal. Ms. Angara had a right to have the opportunity to make arguments on the reasons invoked by the Officer and to address, in her appeal, the reasons explaining why her mother could not travel and be sponsored. The failure to provide the appeal record (or to have included the GCMS notes with the Officer's Refusal Letter) means that Ms. Angara was deprived of her right to a fair process.

(3) The IAD Letter

[49] Third, I do not accept the Minister's claim that, in any event, Ms. Angara's failure to respond to the IAD Letter was sufficient to dismiss her sponsorship appeal. I instead agree with Ms. Angara that she was not required to demonstrate that her failure to answer the IAD Letter was reasonable in the circumstances.

[50] The Minister contends that Ms. Angara only has herself to blame for not having received the appeal record, as she failed to respond to the IAD's request for information and arguments contained in the IAD Letter and never indicated that she needed the appeal record in order to prepare her case. In other words, the Minister suggests that, by failing to respond to the IAD Letter, Ms. Angara would have indirectly waived her right to the appeal record. I am not persuaded by this argument. I acknowledge that it might have been preferable for Ms. Angara to be more proactive and to tell the IAD that she needed or wanted to have the appeal record before responding to the IAD Letter. Had Ms. Angara sent a letter to the IAD informing the decision maker that she required the Officer's record and file prior to making arguments in support of her

appeal, the situation in which Ms. Angara finds herself now would likely not have arisen. However, I do not agree that the failure of Ms. Angara to do so removes her legal right to the appeal record, entrenched in the IAD Rules, or could be construed as a waiver of her right to a fair process.

[51] Having access to the appeal record and to the full reasons for the Officer's refusal decision is a process different from the IAD's request for information and arguments made through the IAD Letter. The two processes must not be conflated. Ms. Angara's failure to respond to the IAD Letter does not and cannot imply a waiver of her distinct right to the appeal record. Nothing in the IAD Rules empowers the IAD to proceed and dismiss a sponsorship appeal on the merits without the appeal record, and the absence of a response to the IAD Letter does not change that.

[52] I further underline that, in the Decision, the IAD determined that, "after review," Ms. Angara had not met her onus under paragraph 117(1)(h) of the IRPR and that her appeal was "dismissed." This is not a situation where the IAD determined that, pursuant to subsection 168(1) of the IRPA, the proceeding before it had been "abandoned" further to a failure to provide information required by the decision maker. If the IAD intended to sanction Ms. Angara for her failure to respond to the IAD Letter and to provide the information and arguments, the proper decision would have been to consider the appeal abandoned under subsection 168(1) of the IRPA. In such a situation, the failure to provide the appeal record to Ms. Angara and its absence before the IAD would likely not have constituted a breach of procedural fairness vitiating the IAD's determination, as the IAD would have deemed the appeal abandoned further to

Ms. Angara's default to respond. Here, however, this is not what the IAD did and decided, as the IAD elected to dismiss Ms. Angara's appeal, without the appeal record.

IV. Conclusion

[53] For all the reasons detailed above, there was a breach of the principles of procedural fairness in the decision-making process followed by the IAD. I am satisfied that, without the appeal record and considering that the Officer's Refusal Letter did not include the GCMS notes, Ms. Angara could not have been aware of the substance of the case against her and that she did not have a full and fair opportunity to be heard, to respond to the evidence against her and to understand the case she had to meet. I am convinced that the administrative process followed by the IAD did not achieve the high level of procedural fairness required by the circumstances of this matter, and that it was procedurally unfair. I must therefore allow Ms. Angara's application for judicial review and return the matter to the IAD to have Ms. Angara's sponsorship appeal redetermined by a differently constituted panel, in accordance with the Court's reasons.

[54] Ms. Angara requested that this Court grant party-to-party costs in her favour, pursuant to subsection 420(1) of the *Federal Courts Rules*, SOR/98-106, because she presented an offer of terms of settlement on January 29, 2021 in order to avoid further financial expenditure, unnecessary delays and the wasting of court resources, which offer was rejected by the Minister. I cannot agree with Ms. Angara on this point.

[55] It is not disputed that, pursuant to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, costs are not usually granted in immigration matters,

except when special reasons exist. The threshold for establishing “special reasons” is high and must be assessed in the context of the particular circumstances of each case (*Taghiyeva v Canada (Citizenship and Immigration)*, 2019 FC 1262 at paras 17-22; *Singh Dhaliwal v Canada (Citizenship and Immigration)*, 2011 FC 201 at paras 29-30). I do not find that the circumstances of this case are similar or close to those rare situations which have justified an order of costs in immigration matters, and I decline to make such an order against the Minister. I am not convinced that, in contesting Ms. Angara’s application for judicial review, the Minister or his counsel acted in such an unfair, oppressive or improper manner or engaged in such an abusive conduct that an award of costs could be triggered. Special reasons do not arise merely because a party elects to exercise a legal option and is not successful.

[56] There are no questions of general importance to be certified.

JUDGMENT in IMM-3003-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, without costs.

2. The July 2, 2020 decision of the Immigration Appeal Division dismissing the sponsorship appeal of the applicant is set aside.

3. The matter is referred back to the Immigration Appeal Division for re-determination on the merits by a differently constituted panel, in accordance with the Court's reasons.

4. No question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3003-20
STYLE OF CAUSE:	ALMA VASQUEZ ANGARA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN MONTRÉAL, QUEBEC AND OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 7, 2021
JUDGMENT AND REASONS:	GASCON J.
DATED:	APRIL 30, 2021

APPEARANCES:

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