

Federal Court



Cour fédérale

Date: 20211130

**Dockets: IMM-4259-20
IMM-4260-20**

Citation: 2021 FC 1296

Ottawa, Ontario, November 30, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

Docket: IMM-4259-20

MAHSA GHASEMI

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

AND BETWEEN:

Docket: IMM-4260-20

PEYMAN SADEGHI TOHIDI

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] In IMM-4259-20, Ms. Ghasemi [Female Applicant], applies for judicial review of an August 27, 2020 decision of a visa officer [Officer] pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], denying her study permit [Study Permit] application.

[2] In IMM-4260-20, the Female Applicant's husband, Mr. Tohidi [Male Applicant], applies for judicial review of an August 27, 2020 decision of the Officer pursuant to section 72(1) of the *IRPA*, denying his open work permit [OWP] application.

[3] The matters were heard concurrently. The Female Applicant and the Male Applicant both seek an Order quashing the respective decisions and remitting the matters to a different officer for redetermination.

[4] Both applications for judicial review are allowed.

II. Background

[5] A representative of the Female Applicant and Male Applicant made a joint submission for the Study Permit and OWP by letter dated June 23, 2020. The submission included travel

documents, passports, proof of funds, affidavits, work documentation, business information, study and education documentation, and resumes.

(1) Female Applicant

[6] The Female Applicant is a citizen of Iran. She completed a bachelor's degree in nursing in July 2012. She was employed from 2015 until 2019, but has been unemployed since August 2019. In June 2020, she applied to the Embassy of Canada in Ankara, Turkey for a Study Permit to undertake a one-year English as a Second Language program followed by a two-year degree in Business Administration at Langara College in Vancouver, British Columbia. The program would start on September 2, 2020 and finish on December 31, 2023. She intended to pursue these studies to assist her husband's family business, Koosha Karan Saba Services Company [Koosha Company].

[7] Her application included an offer of employment as Health Manager from Koosha Company contingent upon the completion of her studies in Canada. She also provided documentation showing she had pre-paid \$5,967 CAD in tuition and deposited approximately \$96,565 CAD into her husband's bank account.

(2) Male Applicant

[8] The Male Applicant, also a citizen of Iran, intended to travel and live with the Female Applicant in Canada. He submitted an application for an OWP based on the Female Applicant's Study Permit application, pursuant to subsection 205(c) of the *Immigration and Refugee*

Protection Regulations, SOR/2002-227 [*IRPR*]. He applied under the Labour Market Impact Assessment [LMIA] exemption code C42. To qualify, applicants must provide evidence of their spouse's enrollment as a full-time student.

[9] He is a manager, director, and a 25% shareholder in Koosha Company.

III. The Decisions

(1) The Female Applicant's Study Permit Application

[10] The Study Permit was refused because the Officer was not satisfied that the Female Applicant would leave Canada at the end of her stay, as required by subsection 216(1) of the *IRPR*. The Officer based this conclusion on her family ties in Canada and Iran, the purpose of her visit, and on personal assets and financial status.

[11] The Officer's Global Case Management System [GCMS] notes state: "[the Female Applicant] is 31 years old and unemployed since August 2019. Study plan is vague and unclear. Origin of funds are not cleared and large deposits made in bank account. With husband asking for OWP, heavy ties in Canada if both were to travel together. Adding the current political and economic situations in Iran, on balance, refused."

(2) The Male Applicant's OWP Application

[12] Like the Female Applicant, the Male Applicant's OWP was refused because the Officer was not satisfied that he would leave Canada at the end of his stay, as required by subsection

200(1) of the *IRPR*. There are only two notes in the GCMS regarding the Male Applicant's OWP application. First, there is an August 27, 2020 note that his wife's Study Permit was refused. Second, there is a June 23, 2020 note that an employer was to be determined and that the Male Applicant fell into the accompanying spouse or common law category. There is no other explanation in the GCMS notes regarding the denial of his application.

IV. Issues and Standard of Review

[13] The issues in this case are:

- (1) Did the Officer breach the Female Applicant's rights to procedural fairness?
- (2) Were the Study Permit and the OWP decisions unreasonable?

[14] Issues of procedural fairness are subject to a correctness standard of review and a Court is to assess whether the procedure was fair in all circumstances (*Alvarez Rivera c Canada (Citoyenneté et Immigration)*, 2021 FC 99 at para 13 citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 and *Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[15] When determining whether a decision is reasonable, a Court must consider both the outcome and the underlying rationale to assess whether the "decision as a whole is transparent, intelligible and justified" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 15 [*Vavilov*]). For a decision to be reasonable, a decision-maker must adequately

account for the evidence before it and be responsive to the Applicant's submissions (*Vavilov* at paras 89-96, 125-128).

[16] The Court will not interfere with a decision unless it is satisfied that there are "sufficiently serious shortcomings such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at paras 12-13, 99-100).

V. The Parties' Positions

A. *Applicants' Positions*

(1) Female Applicant

[17] First, the Female Applicant submits that the Officer breached her rights to procedural fairness because she was not provided an opportunity to respond to credibility concerns.

Furthermore, the Officer fettered their discretion by basing their decision on the current political and economic situation in Iran (*Matharoo v Canada (Citizenship and Immigration)*, 2020 FC 664). On this point, she submits that the Officer ignored and did not follow Immigration, Refugees and Citizenship Canada operational instructions and guidelines. She submits that the Officer should have focused on her own individual circumstances, rather than the current political and economical situation in Iran.

[18] The Female Applicant also submits that the Study Permit decision is unreasonable because the Officer ignored critical evidence and the reasons are inadequate. She states there is no connection between the Officer's reasons and her application. Further, the Officer refused her

fulsome application based on generalizations and stereotypes. She states that she presented a complete application that met all the legal requirements, including a detailed study plan that showed a logical progression in her educational and career path.

(2) Male Applicant

[19] The Male Applicant's submissions focus on the rejection of the Female Applicant's Study Permit application. He echoes her submission that the Officer breached her rights to procedural fairness and ignored critical evidence that rendered the Study Permit decision unreasonable. Therefore, he submits that the Officer unreasonably concluded that his trip was being made for an improper purpose.

B. *The Respondent's Position*

(1) Female Applicant

[20] The Respondent submits that the Officer's reasons are clear, cogent, and comprehensive and clearly identified concerns with the Female Applicant's study permit application. The law is well established that an officer's decision on a study permit is discretionary in nature and is entitled to deference. For this type of application, reasons can be minimal.

[21] Concerning the alleged breach of procedural fairness, the Respondent submits that a credibility determination was not at issue. The Respondent states that the Officer reasonably refused the Female Applicant's study permit. The Officer's concerns arose from the legislation and the Officer was not convinced that she would leave Canada at the end of the period

authorized for her stay. The Respondent points out that the Female Applicant has not demonstrated that the Officer's conclusions were reached on the basis of erroneous findings and were not supported by evidence (*Tabari v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1046 at para 19; *Solopova v Canada (Minister of Citizenship and Immigration)*, 2016 FC 690 at para 12).

(2) Male Applicant

[22] The Respondent states that it was reasonable for the Officer to refuse the Male Applicant's OWP since his spouse was not a study permit holder nor a full-time student at the time of his application. The Respondent also submits that there was no breach of the Male Applicant's right to procedural fairness.

[23] Furthermore, the Respondent submits that the Male Applicant has not challenged the reasonableness of the OWP decision. The Male Applicant only challenges the Study Permit decision concerning the Female Applicant. This is not a valid basis to challenge the OWP refusal.

VI. Analysis

[24] While the submissions of the parties are based on the same facts, it is necessary to deal with each decision separately.

(1) The Female Applicant's Study Permit Application

(a) *Breach of Procedural Fairness*

[25] It is well established that the scope of the duty of procedural fairness owed to study permit applicants is at the low end of the spectrum (*Hamad v Canada (Citizenship and Immigration)*, 2017 FC 600 at para 21). In the present matter, I do not find that the Female Applicant's procedural fairness rights were breached. First, in my view, the Officer did not make an adverse credibility finding. The Officer's statement concerning the source of the funds in the bank account borders on a credibility finding, as there appears to be some uncertainty about the origin of the funds and/or whether they are "cleared". However, I find that the Officer did not disbelieve the Female Applicant. They merely had a question about the funds, which they failed to clearly articulate. For this reason, as discussed below, the Officer's Study Permit decision is unreasonable. The Officer was not required to put forward any credibility issues to the Female Applicant because the Officer relied on materials she submitted, such as bank statements (*Huang v Canada (MCI)*, 2012 FC 145 at para 7).

[26] Furthermore, the Officer did not fetter his discretion in making the decision. The record indicates that the Officer applied the law and policies to the circumstances before him. There is no evidence, however, that the Officer restricted their consideration of the Female Applicant's application due to those laws or policies. Nevertheless, as will be demonstrated below, the Study Permit decision is still unreasonable.

(b) *Reasonableness of the Decision*

[27] I find that the Officer's decision is unreasonable for three reasons. First, I agree with the Female Applicant that there was evidence that the deposits into her husband's bank account were made by both her parents and her husband's parents as financial aid for living and for the cost of education in Canada. This evidence can be found in the Female Applicant's June 23, 2020 application submissions. The evidence clearly shows the origin of the funds, the amount of the transfers, and the reasons for the transfer. The Officer's note states that the "Origin of funds are not cleared and large deposits are made in bank account." It is difficult to ascertain what the Officer meant by this. Were the origins of the funds unclear, or had insufficient time passed for the funds to clear the bank? This was a very important factor and the Officer's determination had to be clear. In my view, the Officer's reasons lack the requisite degree of intelligibility to be reasonable.

[28] Second, the Officer's statement that the Female Applicant's study plan is vague and unclear is unreasonable. The June 23, 2020 application submissions and the permits for Koosha Company establish that the company was involved in catering. Furthermore, her study plan indicated that she was going to be hired back as the health manager once her studies were completed. The reasons do not indicate how the plan is vague in relation to what the Female Applicant submitted in the Study Permit application.

[29] Lastly, the reasons refer to political and economic considerations in Iran but the record does not indicate what those conditions are. While an Officer can rely on common sense and reason, they must also engage with the evidence before them (*Motala v Canada (Citizenship and Immigration)*, 2020 FC 726 at para 13). When an Officer bases their decision on a hunch or

speculation, and it is not supported by the record or sufficiently articulated, that decision will be unreasonable (*Demyati v Canada (Citizenship and Immigration)*, 2018 FC 701 at paras 16, 20).

[30] For all these reasons, I find the Study Permit decision unreasonable.

(2) The Male Applicant's OWP Application

(a) *Reasonableness of the Decision*

[31] While the Male Applicant's submissions focus on the denial of his spouse's application and add little more, his OWP application was directly linked to the approval of the Female Applicant's Study Permit. Therefore, I also find the OWP decision unreasonable.

[32] I agree with the Respondent that without the Female Applicant obtaining the Study Permit, the Male Applicant had no grounds of approval for his OWP. The Program Delivery Initiative for section 205(c)(ii) of the *IRPR* states:

Spouses or common law partners of certain foreign students are allowed to accept employment in the general labour market without the need for an LMIA. This exemption is intended for spouses who are not, themselves full-time students.

Eligibility

Applicants must provide evidence that they are the spouse or common-law partner of a study permit holder who is a full time student...

[33] The Respondent cites *Badial v Canada (Citizenship and Immigration)*, 2020 FC 108. The Court in *Badial*, at paragraphs 36-39, noted that the applicant did not provide evidence that his

spouse was a full-time student. Therefore, the Court dismissed the application for judicial review:

[36] The Applicant's obligation is to provide all the evidence required to satisfy the governing *Regulations*, and the Applicant failed to do so in this case. See *Belen v. Canada (Citizenship and Immigration)*, 2019 FC 1175 (F.C.) at para 11 and *Hamza v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 264 (F.C.) at paras 22-23. The governing Program Delivery Initiative for s 205(c)(ii) makes it clear that applicants must be the "spouse or common-law partner of a study permit holder who is a full-time student [...]."

[37] The fact that Ms. Kaur may have been a "full-time" student in the past does not mean that she was at the time of the Applicant's application for an open work permit, and that is the operative date when the application was assessed.

[38] The Officer weighed the evidence submitted and concluded that there was some doubt as to the "full-time" status of the Applicant's spouse. There was a reasonable basis for this doubt, and the Court is not in the business of re-weighing evidence. See *Vavilov* at para 125 and *Oladihinde v. Canada (Citizenship and Immigration)*, 2019 FC 1246 (F.C.) at para 16.

[39] Overall, I cannot say that the Decision was procedurally unfair or unreasonable.

[34] In *Badial*, unlike the present matter, the studying spouse had already been granted a study permit and was already in Canada. In that case, at the time of the applicant's OWP application, there was insufficient evidence that his spouse still had full-time status. In comparison, in the present matter, the Male Applicant's OWP application was submitted at the same time as the Female Applicant's Study Permit application. Since her application was unreasonably refused, I find that the Male Applicant's OWP application was also unreasonably refused, as it clearly was tied to his wife's application. Furthermore, the Officer's GCMS notes do not indicate that any

analysis was undertaken with respect to his application, nor were the reasons for the OWP refusal clear.

VII. Conclusion

[35] Both applications for judicial review are allowed and the matters are remitted to a different officer for re-determination.

[36] The parties did not raise any question of general importance for certification and none arises.

JUDGMENT in IMM-4259-20 and IMM-4260-20

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are allowed. The matters are remitted to a different officer for re-determination.
2. There is no question for certification in either matter.
3. There is no order as to costs.

“Paul Favel”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS: IMM-4259-20 AND IMM-4260-20

STYLE OF CAUSE: MAHSA GHASEMI v MINISTER OF
CITIZENSHIP AND IMMIGRATION AND
PAYMAN SADEGHI TOHIDI v MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

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JUDGMENT AND REASONS: FAVEL J.

DATED: NOVEMBER 30, 2021

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