

Federal Court



Cour fédérale

**Date: 20240702**

**Docket: IMM-13169-22**

**Citation: 2024 FC 1033**

**Toronto, Ontario, July 2, 2024**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**SEYEDEH SABA VAGHAYENEGAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] This is an application for judicial review of the decision of an officer [Officer] of Immigration, Refugees and Citizenship Canada [IRCC] dated November 23, 2022 [Decision]. The Officer concluded that the Applicant, a citizen of Iran, had failed to meet the criteria for the issuance of a work permit pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 and the *Immigration and Refugee Protection Regulations*, SOR/2022-227 [IRPR].

[2] As explained in greater detail below, this application is dismissed, because the only arguments now advanced by the Applicant were raised for the first time in the Applicant's Further Memorandum of Arguments [Applicant's Further], and I am not prepared to exercise my discretion to adjudicate those arguments.

## II. Background

[3] The Applicant is a citizen of Iran, who applied for a work permit to work as the executive director of a business of which she is the sole shareholder. The Applicant's business plan was to establish a financial and business management company in the metro Vancouver area. She incorporated the business, SVN Financial and Business Management Consulting Inc., in British Columbia on July 23, 2021.

[4] The Applicant's work permit application was submitted on May 11, 2022, under *IRPR* paragraph 205(a), which allows for issuance of a work permit to a foreign national who intends to perform work that would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents. The parties' materials indicate that IRCC refers to such applications using the administrative code "C11". Such applications are exempt from the requirement to obtain a Labour Market Impact Assessment.

## III. Decision under Review

[5] The Officer's November 23, 2022 letter, which conveyed the Decision refusing the work permit application [Decision Letter], stated that the Applicant's application had not met the

requirements of the *IRPR*. In particular, the Decision Letter listed the following grounds for refusing the Applicant's application:

I am not satisfied that you will leave Canada at the end of your stay as required by paragraph 200(1)(b) of the *IRPR* (<https://laws.justice.gc.ca/eng/regulations/SOR-2002-227/section-200.html>). I am refusing your application because you have not established that you will leave Canada, based on the following factors:

The purpose of your visit to Canada is not consistent with a temporary stay given the details you have provided in your application.

I am not satisfied there is documentary evidence to establish that you meet the exemption requirements of C11 Significant benefit -Entrepreneurs/self-employed under R205(a).

[6] The record before the Court in this matter contains the Officer's Global Case Management System [GCMS] notes, which include the following excerpt dated November 23, 2022:

PA seeks WP under C11 (Self-Employed / Entrepreneur). I am not satisfied the proposed business plan is sound.

Client proposed to start a company that "will provide financial and business management consulting services to a variety of clients operating small and medium-sized businesses within the Metro Vancouver Area." This area is well serviced. The client claims to have multiple experiences in the resume attached. On a previous application, client said she was only working for 2 different employers between 2013 to 2020 both in accounting. The difference between the information given now and the previous information cast a doubt on the actual experience. I am not satisfied the client can perform the task required to launch this company.

I am not satisfied there is documentary evidence to establish that the exemption requirements of C11 Significant benefit - Entrepreneurs/self-employed under R205(a) is met. Application refused.

IV. Issues and Standard of Review

[7] The Applicant's arguments ask the Court to determine whether she was deprived of procedural fairness in the process leading to the Decision.

[8] Issues of procedural fairness are subject to judicial scrutiny to ensure that a fair and just process was followed, an exercise best reflected in the correctness standard even though, strictly speaking, no standard of review is being applied (*Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at paras 46-47).

[9] However, before analyzing the Applicant's procedural fairness arguments, the Court must first decide whether to exercise its discretion to adjudicate those arguments. As explained below, this requirement arises from the stage in this litigation at which those arguments were first raised.

V. Analysis

[10] In the Applicant's Memorandum of Arguments dated February 5, 2023 [Applicant's Memorandum], which the Applicant filed in support of her application for leave in this matter, she raised the following procedural fairness arguments: (a) that within less than a month IRCC communicated refusals of 83 applications for visas in the C11 and C12 categories, which had been prepared by the Applicant's counsel, indicating bias against those applicants; (b) in November 2022, IRCC changed the eligibility requirements for visas in the C11 category, without affording the Applicant an opportunity to address those changes; (c) the doctrine of legitimate expectations supports a conclusion that the Applicant was deprived of procedural fairness; and (d) the Officer did not provide reasons for refusal of the Applicant's application.

[11] After the Respondent addressed these procedural fairness arguments in the Respondent's Memorandum of Argument dated March 14, 2023, the Applicant again engaged with these arguments in the Applicant's Reply Memorandum dated March 22, 2023 [Applicant's Reply].

[12] After the Court issued its Order dated April 12, 2024, which granted leave in this matter and afforded both parties an opportunity to file further memoranda of argument (to replace their earlier memoranda), the Applicant filed the Applicant's Further. The Applicant's Further did not advance the same procedural fairness arguments as set out in the Applicant's Memorandum and Applicant's Reply. Rather, it advanced new procedural fairness issues, arguing that the Applicant was deprived of procedural fairness on the basis that [New Procedural Fairness Issues]:

- A. the Officer had concern about the credibility, accuracy or genuine nature of information related to her work experience provided in her application and, due to that concern, rejected her application without alerting her to the concern and affording her an interview or other opportunity to respond to that concern; and
- B. the doctrine of legitimate expectations required the Officer to alert her to the concern, about the credibility, accuracy or genuine nature of information related to her work experience provided in her application, and afford her an interview or other opportunity to respond to that concern, before relying on that concern to reject her application.

[13] It is implicit in the Applicant's Further's silence on the arguments raised in the Applicant's Memorandum and in the Applicant's reply that the Applicant has abandoned those arguments. The Applicant's counsel confirmed this at the hearing of this application. Also, while the Applicant's Further includes submissions explaining the reasonableness standard of review (as well as the correctness standard applicable to issues of procedural fairness), it does not

actually advance any substantive submissions challenging the reasonableness of the Decision. As such, the only issues that the Applicant is now advancing for adjudication by the Court are the New Procedural Fairness Issues.

[14] The Respondent takes the position that the Court should not entertain the New Procedural Fairness Issues, as the Applicant was aware of the Decision (including the GCMS notes) at the leave stage of this application and has not provided any justification for not including the New Procedural Fairness Issues in the Applicant's Memorandum.

[15] However, the parties agree that the Court has a discretion to allow issues to be raised for the first time in a party's further memorandum of argument (see, e.g., *Naeini v Canada (Citizenship and Immigration)*, 2024 FC 899 [Naeini] at para 12, relying on *Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22 [Al Mansuri] at para 12). These authorities explain that the following non-exhaustive factors are relevant to whether the Court should exercise that discretion (at para 12):

- 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?
- B. Is there any suggestion of prejudice to the opposing party if the new issues are considered?
- C. Does the record disclose all of the facts relevant to the new issues?
- D. Are the new issues related to those in respect of which leave was granted?
- E. What is the apparent strength of the new issue or issues?
- F. Will allowing new issues to be raised unduly delay the hearing of the application?

[16] At the hearing of this application, I advised counsel that the Court would hear their submissions on the above factors, as well as their submissions on the merits of the New Procedural Fairness Issues (noting that the apparent strength of the new issues is one of the above factors). The Court would subsequently release its Judgment in this application, which would: (a) decide, based on these factors, whether the Court was prepared to exercise its discretion to adjudicate the New Procedural Fairness Issues; and (b) if that discretion was exercised in the Applicant's favour, provide the Court's adjudication of the New Procedural Fairness Issues.

[17] Based on the resulting submissions received from the parties, I analyse the application of the relevant factors to the matter at hand as follows.

A. *Knowledge of facts relevant to the New Procedural Fairness Issues*

[18] The New Procedural Fairness Issues both arise from the Officer's explanation in the GCMS notes that the difference between the information as to the Applicant's experience, provided in her successive work permit applications, casts doubt on her actual experience. The GCMS notes were available to the Applicant at the time she filed the Applicant's Memorandum in perfection of her leave application. Based thereon, the parties agree that the facts relevant to the new issues were known at that time.

[19] As such, this factor favours the Respondent. That is, it militates against the Court exercising its discretion to adjudicate the New Procedural Fairness Issues.

B. *Prejudice to the Respondent*

[20] The Applicant submits that the Respondent is not prejudiced, as it had an opportunity to respond to the New Procedural Fairness Issues through the Respondent's Further Memorandum of Argument.

[21] The Respondent disagrees. It submits that, as a result of the Applicant's Memorandum, Applicant's Reply, and Applicant's Further raising different issues, the amount of work the Respondent was required to perform in order to respond to this application was increased significantly beyond what should have been necessary, particularly as the Applicant's Further did not expressly abandon the arguments that had been raised in her earlier pleadings.

[22] I note that, in *Naeini*, a case that arose out of circumstances very similar to those in the case at hand (and indeed involving the same solicitor of record for the applicants), the Court concluded that the respondent was not prejudiced, due to its opportunity to file its further memorandum in response to the new issues raised by the applicant. I understand that reasoning, and I consider it to apply to the case at hand, in the sense that the Respondent has not been prejudiced by being deprived of an opportunity to fully respond to the Applicant's arguments on the New Procedural Fairness Issues.

[23] However, I accept the Respondent's submission that the extra work to which it has been put, as a result of the Applicant's pleadings raising disparate and evolving issues and arguments, represents a form of prejudice that it is appropriate for the Court to take into account. I do not consider this prejudice to weigh as significantly against the Applicant as would prejudice to the Respondent in its ability to respond to the new issues, but I do treat it as sufficient for this factor to favour the Respondent.

C. *Whether the record before the Court discloses all the relevant facts*



[24] The Applicant submits that the Court has before it all the relevant facts necessary to adjudicate the New Procedural Fairness Issues.

[25] The Respondent disagrees. It notes one of the New Procedural Fairness Issues relies on the doctrine of legitimate expectations, arising from a representation made as to the procedure to be followed in administrative decision-making or a consistent past procedural practice. However, the Applicant has adduced no evidence of such a representation or practice.

[26] While the Respondent is correct that the record before the Court includes no such evidence, I do not understand the Applicant to be arguing that such evidence exists. Rather, she appears to be relying upon case law surrounding the administrative law duty of procedural fairness. I will return to this point later in these Reasons, when turning to the factor related to the apparent strength of the new issues. However, for purposes of the present factor, I am satisfied that the facts relevant to the arguments the Applicant wishes to adduce are before the Court.

[27] As such, this factor favours the Applicant.

D. *Relationship between the new issues and those in respect of which leave was granted*

[28] I understand the parties to be effectively in agreement that there is no relationship between the New Procedural Fairness Issues and the issues that were raised at the leave stage. The Applicant's counsel pointed out that the Applicant's Memorandum and Applicant's Reply invoked the doctrine of legitimate expectations, but she recognizes that this was intended to support different arguments that have now been abandoned.

[29] The Applicant's counsel also noted references in the Applicant's Reply to the discrepancies in her work experience cited in her successive work permit applications, as well as

the Officer having resulting doubts about her experience. However, the Applicant's Reply raises these points in the context of arguments that the Officer failed to review documents submitted with the Applicant's application that establish her experience. I do not read such arguments as raising procedural fairness issues of the sort that the Applicant now wishes to advance. As such, to the extent the Applicant may be asserting that there is a relationship between the New Procedural Fairness Issues and the issues raised at the leave stage, I disagree.

[30] This factor therefore favours the Respondent.

E. *Apparent strength of the new issues*

[31] As noted earlier in these Reasons, under the first of the New Procedural Fairness Issues, the Applicant argues that the Officer had concern about the credibility, accuracy or genuine nature of information related to her work experience provided in her application and, due to that concern, rejected her application without alerting her to the concern and affording her an interview or other opportunity to respond to that concern. This argument relies upon a principle, as expressed in authorities such as *Madadi v Canada (Citizenship and Immigration)*, 2013 FC 716 [*Madadi*] at paragraph 6, that where an applicant provides evidence sufficient to establish that they meet relevant immigration requirements, but an officer doubts the credibility, accuracy or genuine nature of the information provided and wishes to deny the application based on those concerns, a duty of fairness is invoked.

[32] Based on the reference in the GCMS notes, to the difference between the work experience in the Applicant's two visa applications casting doubt on her actual experience, she submits that the principle described in *Madadi* applies. She argues that the Officer was therefore

obliged to afford her an interview, or other opportunity to respond to the Officer's concerns, before denying her application based on the doubt as to her work experience.

[33] As I understand the second of the New Procedural Fairness Issues, the Applicant seeks to invoke the doctrine of legitimate expectations in support of the same proposition, *i.e.*, that the Officer was obliged to afford her an interview, or other opportunity to respond to the Officer's doubts about her work experience, before denying her application based on such doubts.

[34] Turning to that latter issue first, it appears to me that it has little merit. As noted earlier in these Reasons, the Applicant does not point to any evidence of a representation or past practice upon which she might rely to invoke the doctrine of legitimate expectations. Rather, I understand her to be hoping to rely on principles of administrative law, such as are expressed in *Madadi*, as a practice that would support application of the doctrine. This strikes me as an ill-considered argument, particularly as the Applicant can simply invoke the principle described in *Madadi* without recourse to the doctrine of legitimate expectations.

[35] In relation to this issue, this factor favours the Respondent.

[36] However, turning to the issue based on the principle described in *Madadi*, I find more strength to the Applicant's position.

[37] In relation to that issue, the Respondent argues that the Officer's analysis represents a weighing of the evidence, as opposed to a credibility determination to which the duty of

procedural fairness would apply. The Respondent also notes that the documents giving rise to the inconsistent information about the Applicant's work experience were both provided by the Applicant. This is not a case of the Officer relying on information obtained from a third party or other source extrinsic to the application process. Therefore, the Respondent submits that, if the Court were to consider the Applicant's argument on its merits, it should not find that the circumstances of this case would give rise to a duty of procedural fairness of the sort for which the Applicant advocates.

[38] I accept that the Respondent's submissions represent arguable positions. I am not at this stage in my analysis adjudicating the merits of the issue, but rather am assessing its strength in a preliminary way for purposes of one of the factors guiding my exercise of discretion whether to perform such adjudication. I am satisfied that the Applicant's position on this issue has sufficient strength that, in relation to this issue (as distinct from the issue related to the doctrine of legitimate expectations), this factor favours the Applicant.

F. *Delay to the hearing of the application*

[39] The final factor considers whether allowing the new issues to be raised would unduly delay the hearing of the application. The parties agree that no such delay would result, as the hearing has proceeded as contemplated by the Order granting leave order.

[40] This factor favours the Applicant.

G. *Conclusion on whether to adjudicate the new issues*

[41] Some of the factors identified in *Al Mansuri* favour the Applicant, and others favour the Respondent. In my view, the factor that weighs most heavily in the Applicant's favour is the conclusion that one of the two new issues has some degree of merit. Weighing most heavily in the Respondent's favour are the conclusions that this issue is unrelated to the issues that were raised at the leave stage, notwithstanding that the information available for the Applicant to have advanced that issue was available to the Applicant at the leave stage, coupled with the Respondent suffering some degree of prejudice as a result of the timing and manner in which the Applicant has raised the new issue. As the Respondent submits, the Applicant has advanced no justification for the manner in which this proceeding has unfolded. While the Court would be capable of adjudicating the new issue at this juncture, I am not convinced that it is in the interests of the proper administration of justice for the Court to do so.

[42] Based on that analysis, taking into account all the factors canvassed in these Reasons, I decline to exercise my discretion to adjudicate the New Procedural Fairness Issues.

[43] As such, this application for judicial review will be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

**JUDGMENT IN IMM-13169-22**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is dismissed.
2. No question is certified for appeal.

"Richard F. Southcott"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-13169-22

**STYLE OF CAUSE:** SEYEDEH SABA VAGHAYENEGAR V. MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 27, 2024

**JUDGMENT AND REASONS:** SOUTHCOTT J.

**DATED:** JULY 2, 2024

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