Federal Court  Cour fédérale

Date: 20240816

Docket: IMM-4390-23

Citation: 2024 FC 1281

Ottawa, Ontario, August 16, 2024

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

MIKE KILERJIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant Mike Kilerjian, a citizen of Syria who was born in Aleppo and who is living in Lebanon, made an application under the Convention Refugees abroad class or as a member of the country of asylum class, with the assistance of the sponsorship of The Armenian Apostolic Church of British Columbia and a friend of the Applicant's family. This is an application for judicial review of a February 15, 2023 decision of a Migration Officer in the

Embassy of Canada in Lebanon [Officer] that refused the Applicant's application for a permanent residence visa on the basis that he was not satisfied (1) that the Applicant was a member of any of the prescribed classes, and (2) that the Applicant met the requirements of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA] and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] because he has a durable solution in Armenia as an ethnic Armenian [Decision].

[2] The main issues before the Court on this judicial review are breach of procedural fairness and the reasonableness of the Officer's Decision. The Applicant raises three issues:

a) **Issue #1:** Was the Applicant denied procedural fairness by the Officer in the determination of his application for permanent residence in that the Officer did not provide the Applicant with a fair opportunity to address the Officer's concerns that the Applicant had a durable solution in Armenia?

b) **Issue #2:** Was the Officer's finding that the Applicant had not established a well-founded fear of persecution based upon his fear of recruitment into the military?

c) **Issue #3:** In the event the Officer did not err in their consideration of whether the Applicant had a durable solution, or had not established a well-founded fear of persecution, was the Officer's consideration of whether there were sufficient humanitarian and compassionate considerations to approve the application reasonable?

[3] I find the Applicant has met its onus to demonstrate procedural unfairness in the administrative decision-making process in that the Applicant was not provided with a fair opportunity to address the Officer's concerns that the Applicant had a durable solution in Armenia and to know the evidence and case against them. For the reasons below, I find that procedural fairness is determinative of this matter, and therefore grant the Applicant's judicial review application.

II. Standard of Review

[4] The presumptive standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25). To avoid intervention on judicial review, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para 90). The Court must avoid reassessing and reweighing the evidence before the decision maker; a decision may be unreasonable, however, if the decision maker "fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at paras 125-126).

[5] The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the party challenging the decision must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" and that the alleged flaws "must be more than merely superficial or peripheral

to the merits of the decision" (*Vavilov* at para 100). The reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up" (*Vavilov* at para 104).

[6] Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] at para 54). The duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific"; it must be determined with reference to all the circumstances, including the non-exhaustive list of factors referenced in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paragraphs 22-23 (*Vavilov* at para 77). In sum, the focus of the reviewing court is whether the process was fair. In the words of the Federal Court of Appeal, the ultimate or fundamental questions are:

> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains **whether the applicant knew the case to meet and had a full and fair chance to respond**. It would be problematic if an a priori decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice**—was the party given a right to be heard and the opportunity to know the case against them?** Procedural fairness is not sacrificed on the altar of deference.
>
> (*Canadian Pacific* at para 56, emphasis added)

III. Analysis

A. *Procedural Unfairness*

[7] The core of the Applicant's claim regarding procedural fairness turns on whether he was adequately informed about the importance of the availability of a durable solution in Armenia and documents related thereto and whether he had a sufficient opportunity to address this issue.

[8] In refusing the Applicant's application for permanent residence, the Officer found that the Applicant was unable to alleviate the Officer's concerns that he did not meet the Refugee Convention definition due to a durable solution in Armenia. The GCMS notes in the Court Tribunal Record [CTR] reveal the following Case Analysis notes with respect to a durable solution in Armenia:

> Of note, the applicant is part of the Armenian diaspora in Syria that, before the conflict, comprised approximately 100,000 individuals – most living in Aleppo (around 60,000). Since the outset of the conflict in Syria, approximately 15-20% of the 100,000 has relocated to Armenia, with the majority of that number receiving citizenship in that country through a simplified process. This process is based on ethnic Armenian origin, which enables the Armenian global diaspora to obtain citizenship. According to the IRB (https://www.refworld.org/docid/52af02c54.html):
>
> "…people of Armenian origin who wish to acquire Armenian citizenship are exempt from certain requirements imposed on people who are not of Armenian ethnicity.
>
> …in order to obtain Armenian citizenship, people of Armenian origin are exempt from the normal requirements: a residence period of three years in Armenia prior to the application, fluency in the Armenian language and a demonstrated knowledge of the Armenian Constitution. The official added that people of Armenian origin are not required to go to Armenia to apply for citizenship…"

> Additionally, readily found open source information states the Armenian government response to the crises in Syria has further simplified the process. Moreover, through numerous conversations with Armenian diaspora applicants, this is a process known within the Syrian-Armenian, Lebanese- Armenian and Canadian-Armenian communities.
>
> As it pertains to IRPA, pursuant to R139(1)(d), the possibility of applicants either having an Armenian passport, or the possibility of obtaining one within a reasonable period, is a durable solution. It is noted, however, that there are nuances and case particulars that must be explored at interview as each applicant is in their own unique situation. The above information with respect to the Syrian-Armenian diaspora, however, informs select lines of questioning in the interview I conducted with the applicants.
>
> However, taking into account the above, I am not satisfied on balance with respect to my R139(1)(d) concerns, as it appears the applicant had not made an effort to obtain Armenian citizenship nor consider it a safer option. I also weigh the applicant's statement negatively regarding his assessment of Armenia and Syria as being equally dangerous, as numerous open-source country indicators would refute this claim.

[9] The Applicant's visa application documents included the Applicant's Certificate of Birth and Baptism attesting to the Applicant's place of birth being Aleppo, Syria and place of baptism being the St. Forty Martyr's Armenian Apostolic Church in Aleppo. The Applicant's individual civil registration document indicates that the Applicant's religion is Christian Orthodox, old Armenian.

[10] In a convocation email dated January 24, 2023, the Applicant was invited by the Embassy of Canada to attend an interview on February 6, 2023 to assess elements of his application, including his eligibility as a refugee and his admissibility to Canada and to bring with him a number of documents, including valid and expired passports, ID cards, military booklet, family booklet, civil documents, baptism certificate.

[11] On February 6, 2023, the Applicant was interviewed by the Officer. According to the interview notes in the GCMS notes, right after the introduction, the first question the Officer asked was whether or not the Applicant had an Armenian passport and proceeded as follows:

> DOCUMENT VERIFICATION
>
> PPTS: Yes
>
> *do you have an Armenian passport?
>
> No
>
> *how come?
>
> I don’t want it
>
> *Do you speak Armenian?
>
> Yes
>
> *You have an Armenian visa, did you go recently?
>
> I applied for the Armenian visa to be able to come to Lebanon. My friends told me this was the fastest way to come to Lebanon
>
> *What was the purpose of travel? Why didn’t you go to Armenia?
>
> When I was living in Syria, the situation was stable before the war, once I came to Lebanon I didn’t think of coming to Armenia because the situation is unstable there as well
>
> *But you do know the procedure to get the passport right?
>
> I have no idea
>
> *It's quite simple, the instructions are online and is fairly simple to obtain for ethnic Armenians. How come you never thought about it?
>
> I never thought about it, there is no specific reason I didn’t apply, I never thought about it. so there’s no specific reason

[12] The Applicant asserts that the first time that the Applicant was advised that the Officer had a concern that the Applicant did not meet the requirements for permanent residence because

he had a durable solution in Armenia was at the outset of his interview, which is confirmed by the Court's review of the record.

[13] According to the interview notes of the GCMS notes, the Officer verbally communicated procedural fairness and raised again the Officer's concern regarding the Armenian passport:

> *[PROCEDURAL FAIRNESS A96, A16/A11 GIVEN. DEFINITION OF CONVENTION REFUGEE AND THE NEED FOR A NEXUS TO ONE OF THE CONVENTION GROUNDS EXPLAINED]
>
> (…)
>
> * Can you respond to my concern regarding the Armenian passport?
>
> I never thought about it. First, I was living in Syria and I only cared about my Syrian passport, then after the war started I only wanted to go to a safe country. The situation in Armenia is not stable, I know that the instability is far from the capital but you never know when the situation will explode. I didn't want to leave Syria to go to an unstable war.
>
> *I don't quite agree with what you just said. You and I both know that the current situation in Armenia is not comparable to Syria; so why not choose it instead as the obvious choice between the two?
>
> In Syria I was always discriminated against because I am Armenian; in Armenia, I will be called Syrian. I want to go to a country where I will be respected as a human being

[14] No procedural fairness letter was issued to the Applicant after the interview held on February 6, 2023 when he was told about the concerns regarding the durable solution in Armenia. No procedural fairness was issued to the Applicant after the Officer reviewed his notes in GCMS on February 14, 2023. In his February 14, 2023 notes, the Officer makes reference to an IRB article at https://www.refworld.org/docid/52af02c54.html (entitled "Armenia and Syria:

Procedure for Syrians of Armenian origin to obtain Armenian citizenship from other countries, such as Canada" with publication date 11 October 2023) and other unidentified "readily found open source information stating the Armenian government response to the crises in Syria has further simplified the process to acquire citizenship". Nowhere in the record is it indicated that the Applicant was aware of or had seen these documents in advance of his interview.

[15] On February 15, 2023, the Decision (refusal letter) was sent to the Applicant.

[16] The Applicant submits they were not afforded a fair opportunity to respond to the Officer's concerns that the Applicant may have a durable solution in Armenia because he is ethnically Armenian and thus may have an easy route to Armenian citizenship. The Applicant submits that the convocation invitation did not refer to the issues that would be addressed at the interview and particularly the possibility of a durable solution because of the Applicant's Armenian ethnicity. The Applicant also submits that the Officer did not give the Applicant an opportunity after the conclusion of the interview to provide further information/submissions with respect to whether or not Armenia was a durable solution and the possibility of the Applicant being able to obtain an Armenia passport through a relatively easy route. The Applicant relies on the Federal Court decision in *Shahbazian v Canada (Citizenship and Immigration)*, 2020 FC 680 [*Shahbazian*].

[17] The Respondent submits that section 139(1)(d) of the IRPA requires that in order for a permanent resident visa to be granted to foreign nationals in need of refugee protection, it must be "established" that the foreign nationals have "no reasonable prospect, within a reasonable

period, of a durable solution in a country other than Canada". The onus was therefore at all times on the Applicant, as an ethnic Armenian and fluent Armenian speaker, to establish that he had no durable solution in Armenia. While the Respondent concedes the Officer did not specifically reference the Armenian citizenship law to the Applicant, the Officer sufficiently indicated the grounds of the potential refusal in the interview. The Applicant was specifically asked why he had never chosen to pursue obtaining Armenian citizenship, and indicated they "didn't want it", "never thought about it", and "only wanted to go to a safe country". The Respondent argues that the onus is on the Applicant (not the Officer) to demonstrate that the Applicant could not resettle in Armenia, which he failed to do. The Respondent maintains that the Applicant was given an opportunity to address the possible durable solution including access to citizenship or lack thereof in Armenia and relies on *Shahbazian*.

[18] I disagree with the Respondent in the particular circumstances of this case. *Shahbazian* is distinguishable from the case at bar. In *Shahbazian*, the Officer sufficiently indicated the grounds for the potential refusal in *both* the interview and the procedural fairness letter sent to that Applicant after the interview. Moreover, in *Shahbazian*, Justice McVeigh addresses the six-week period between the interview and the procedural fairness letter, and the thirty-day period to respond to the procedural fairness letter by saying that the Applicant had "plenty of time to take some action." In this case, no procedural fairness letter was sent to the Applicant after his interview raising for the first time the concern of a durable solution in Armenia and prior to the Officer rendering its Decision nine days after the interview. As a result of this procedural deficiency, the Applicant did not know the case he had to meet, was challenged with an issue raised during his interview that he arguably was not expecting or prepared to address, and was

not provided adequate time and/or was unable to provide submissions on the issue before the Decision was rendered. Although the Applicant in *Shahbazian* did not succeed in discharging his onus, he was given the chance to send a responsive letter to the Officer after receiving the procedural fairness letter and that Officer gave the Applicant the chance to look into this possibility of a durable solution. Unlike *Shahbazian,* in the case at bar, the Applicant had only the interview to think about it and provide his answers, and arguably only nine days before the Decision was rendered.

[19] Further, the Applicant submits that the IRB article that the Officer relied upon was not presented to the Applicant during the interview or in the context of a procedural fairness letter. The Applicant submits the evidence in support of the Officer's determination that the Applicant had a durable solution in Armenia was based on evidence that was 10 years old at the time of the interview and had vague references to open-source information, none of which is referenced in the GCMS notes, for example by hyperlinks to the open source information. The Applicant argues that fairness required that the Applicant be apprised of the evidence that the Officer was relying upon to establish the access to Armenian citizenship as of right based on Armenian ethnicity so that the Applicant could have a fair opportunity to comment upon the evidence and relies upon *Baybazarov v Canada (Citizenship and Immigration),* 2010 FC 665 that states:

> [13] In determining whether non-disclosure of extrinsic evidence amounts to a breach of procedural fairness, Justice Dawson applied the "instrument of advocacy" test. This asks whether the document was designed "to have such a degree of influence on the decision maker that advance disclosure is required to 'level the playing field'" (*Mekonen*, above, at para. 19).
>
> ….
>
> [15] Applying these principles to the case at hand, two questions must be answered: a) was the extrinsic evidence an instrument of

> advocacy; and b) was disclosure of the CBSA report necessary for the Applicant to reasonably disabuse the Officer's concerns in a meaningful manner?

[20] The Applicant argues that the Officer had the opportunity but did not provide the Applicant with the evidence that he used to make his Decision, which the Applicant qualifies as instruments of advocacy, thereby breaching the duty of fairness owed to the Applicant. The Respondent did not file any written submissions on this point.

[21] The GCMS notes clearly indicate that the Officer made their concern regarding the prospect of a durable solution in Armenia known during the interview, and they further indicate that the Applicant had opportunities during the interview to respond and provide answers to the Officer's concerns, including in the discussion of the Officer's reasoning for their concerns. However, the Applicant rightly highlighted that they were unaware that the prospect of a durable solution in Armenia was a concern for the Officer going into the interview, as they had not received a procedural fairness letter. It was procedurally unfair for the Officer to challenge the Applicant during the interview on an issue that did not directly arise from the Applicant's application materials but from the Officer's own experience without providing notice of said concern through a procedural fairness letter at some point in the administrative process (either before or after the interview). Had the Officer sent a procedural fairness letter to the Applicant after his interview, it would have put the Applicant on notice with their concern of a durable solution in Armenia, and would have communicated the open source and other documents supporting the Officer's position regarding the Applicant's access to citizenship in Armenia based on their ethnic Armenian origin. This would have provided the Applicant with the opportunity, post interview, to consider the Officer's concerns and documentation and provide

their submissions. Had the Officer sent such a procedural letter after the interview and given the Applicant sufficient time to respond thereto, my conclusion would have been, like Justice McVeigh in *Shahbazian*, that the hearing would have been procedurally fair. This not being the case in the circumstances before me, the Applicant was denied their right to procedural fairness.

[22] Given my decision that the Officer's decision was procedurally unfair, it is not necessary to consider whether the decision was reasonable or not – it would be wrong to go on to speculate what the outcome would otherwise have been (*Ghanoum v Canada (Citizenship and Immigration)*, 2011 FC 947 at para 5, citing *Cardinal v Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 SCR 643).

IV. Conclusion

[23] For these reasons, this application for judicial review is granted.

[24] Neither party raised a serious question of general importance for certification and I find that none arises in the circumstances of this matter.

JUDGMENT in IMM-4390-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The Officer's decision is set aside and the matter will be redetermined by a different Migration or Immigration Officer.
3. The Applicant will be provided an opportunity to make submissions on whether they have a durable solution in Armenia, including the relevant immigration legislation in Armenia, as applicable.
4. There is no serious question of general importance for certification.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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