

Federal Court



Cour fédérale

Date: 20250422

Docket: IMM-1067-24

Citation: 2025 FC 716

Ottawa, Ontario, April 22, 2025

PRESENT: Madam Justice Pallotta

BETWEEN:

CESAR YUSIF MIKHAIL

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant, Cesar Yusif Mikhail, seeks judicial review of a December 22, 2023 decision that refused his application for permanent residence under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], based on humanitarian and compassionate (H&C) grounds.

[2] Mr. Mikhail claims to be an Iraqi citizen of Kurdish descent. He arrived in Canada in 2008, sought refugee protection, and was found to be a Convention refugee in 2011.

[3] Mr. Mikhail represented to Canadian immigration officials that he was a citizen of Iraq and no other country, had never used other names, and had never claimed asylum in any country. However, it was later learned through a fingerprint match that he had claimed asylum in the UK in 2005 under a different name and date of birth as a Syrian citizen of Kurdish descent. Mr. Mikhail also failed to disclose that he had been living in the UK from 2005 until his appeal rights were exhausted in 2006, at which point he went to Iraq, the country of his claimed fear, where he lived for several years before seeking Canada's protection. Mr. Mikhail's refugee status was vacated in 2019 on the basis that it was obtained as a result of a misrepresentation and the remaining evidence would not have justified protection, as it could not have established core requirements including identity and country of citizenship. He was referred to an inadmissibility hearing and found to be inadmissible to Canada for misrepresentation.

[4] Mr. Mikhail filed an application to remain in Canada as a permanent resident based on his establishment, the hardship he would suffer if returned to Iraq, and other H&C grounds. The H&C application was rejected by a first officer whose decision was set aside on judicial review: *Mikhail v Canada (Citizenship and Immigration)*, 2022 FC 1030. In this proceeding, Mr. Mikhail seeks judicial review of a second officer's (Officer) redetermination decision concluding that H&C factors did not warrant a section 25 exemption from *IRPA* requirements.

[5] Identity was a key issue on redetermination. To establish his identity, Mr. Mikhail presented a 2019 Iraqi passport that he obtained after the vacation decision with his uncle's help. This was the only government-issued identity document presented on the H&C application. The Officer found the passport to be invalid, gave it no weight, and found there was insufficient evidence to establish Mr. Mikhail's identity. As Mr. Mikhail had not shown by his identity that

he would be returned to Iraq, the Officer did not accept his allegations that he would suffer hardship if an exemption were not granted. The Officer attributed diminished weight to his establishment in Canada that resulted from his misrepresentation.

[6] Mr. Mikhail alleges the Officer's decision was both procedurally unfair and unreasonable.

[7] Mr. Mikhail's oral submissions focused on two allegations of procedural unfairness: (i) the certified record of the materials that were before the Officer (CTR) is missing two sets of his submissions, raising questions about whether all relevant documents were considered; and (ii) the Officer failed to afford any opportunity to respond to concerns about the authenticity of his Iraqi passport.

[8] For the reasons below, I find that Mr. Mikhail has established a breach of procedural fairness that warrants setting aside the decision, based on the second allegation noted above but not the first. In view of this finding, it is unnecessary to address Mr. Mikhail's allegations that the decision was unreasonable and the Officer was biased.

[9] Allegations of procedural unfairness are reviewed on a standard that is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is "eminently variable", inherently flexible, and context-specific: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77 [*Vavilov*], citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 22-23, 174 DLR (4th) 193, among other cases. The

central question is whether the procedure was fair and just, having regard to all the circumstances: *Canadian Pacific Railway* at para 54.

[10] On the first issue, Mr. Mikhail states that the CTR is missing around 300 pages of supplemental submissions that were filed prior to the redetermination. He argues that the Officer's reasons do not list or mention all of the documents in the supplemental submissions, it is unclear exactly what the Officer considered, the Court cannot properly review the decision, and therefore the matter should be returned.

[11] According to *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 at paragraph 16 [*Togtokh*], three scenarios may arise when a document is not in the CTR: (i) if it is unknown whether the applicant submitted the document, the CTR is presumed to be complete absent evidence to the contrary; (ii) if the document was properly submitted and it is unclear if it was before the decision maker, the decision should be set aside; and (iii) if it is known that the document was before the decision maker, the decision should be set aside if the document is not in the record that is before the Court and it was central to a finding that is under review.

[12] Mr. Mikhail argues that the second scenario applies. He states there is no question he filed the supplementary documents, they are not in the CTR, and the Officer's lack of substantive engagement with some of the documents raises questions about whether the Officer considered the complete record. Mr. Mikhail submits that this prevents a proper review.

[13] The respondent submits that the deficient CTR does not give rise to procedural unfairness. The Officer's reasons refer to several documents in the submissions and it is apparent

that both sets of submissions were considered. The Court is not prevented from conducting a proper review because the submissions are in Mr. Mikhail's record. Consequently, the respondent argues that the circumstances of this case are in line with the third scenario in *Togtokh*.

[14] On this first procedural fairness issue, I agree with the respondent.

[15] Turning to the second issue, Mr. Mikhail submits the Officer breached procedural fairness by failing to afford any opportunity to respond to concerns that the Iraqi passport is not authentic. He states the concerns were clearly related to the credibility, veracity, or authenticity of the document. The Officer: (i) examined the physical characteristics of a black and white copy of Mr. Mikhail's passport (Canadian officials seized the original) and noted alleged "oddities"; (ii) consulted the Council of the European Union's publicly accessible register of travel document security features (PRADO) and noted the differences between Mr. Mikhail's passport and the samples in the PRADO register; (iii) found reasons to question the provenance of the passport; and (iv) consulted a Stolen/Lost Travel Document database of the International Criminal Police Organization/INTERPOL and noted that the Iraqi passport number had been declared invalid by the issuing authority because in 2015 it was reported as a lost or stolen blank passport booklet. Mr. Mikhail alleges the Officer attempted to frame the issue as insufficient evidence of identity in order to avoid giving notice, but there is no way to characterize the findings as sufficiency concerns.

[16] Mr. Mikhail acknowledges that he knew he would have to prove his identity, but he believed his passport did so. In this regard, he notes that the first officer who examined his H&C

application raised no concerns about his identity and accepted his Iraqi nationality. Also, the second Officer recognized that he had obtained the passport through an uncle in Iraq and acknowledged his belief that it was genuine, stating, “I accept that the applicant believes that the copy of the passport provided is evidence of his identity and do not have credibility concerns with respect to the applicant’s belief”. Mr. Mikhail adds that he was entitled to a higher level of procedural fairness in view of the hardship described in his H&C application, namely that he would face persecution as an Iraqi Kurd.

[17] In all the circumstances of his case, Mr. Mikhail submits the Officer owed a duty to afford him an opportunity to respond to the concerns about the credibility, veracity, or authenticity of the documentation he had provided: *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at paras 24-25 [*Hamza*].

[18] The respondent points out that *Hamza* says a duty may arise if an officer has concerns about the credibility, veracity, or authenticity of documentation. Furthermore, the respondent contends it is important to understand the origin of the statement in *Hamza*. According to the respondent, *Hamza* relies on a chain of prior cases—*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at paragraph 24, which cites to *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 at paragraph 24 [*Rukmangathan*], which in turn cites to *Cornea v Canada (Minister of Citizenship and Immigration)*, 2003 FC 972 at paragraph 8 [*Cornea*]. In *Cornea*, the Court held that the procedural fairness requirement that arises when a submitted document is suspected to be fraudulent takes root in the notion that an officer may be, in effect, accusing an applicant of a serious offence or disreputable conduct

without knowing the full picture. That concern does not arise in this case because the Officer accepted that Mr. Mikhail believed he provided a legitimate passport.

[19] The respondent submits the Court's decision in *Gan v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1186 [*Gan*] is instructive. Just as in *Gan*, an interview would not add to the understanding of the evidence as Mr. Mikhail could only repeat what is already known—that a family member sourced the passport and he cannot speak to its provenance. Furthermore, as in *Gan*, Mr. Mikhail had notice of credibility issues regarding his identity from a previous proceeding. The decision in the vacation proceeding outlined repeated misrepresentations to immigration authorities in multiple countries, and Mr. Mikhail was sufficiently on notice that identity and nationality would be central elements to a claim for H&C relief just as they were for the vacation hearing. Mr. Mikhail knew the case to meet, it was his onus to make a convincing case about his identity, and he was not owed an opportunity to respond to concerns that the evidence he provided failed to establish his identity.

[20] Mr. Mikhail acknowledges that the officer's concern in *Cornea* related to an applicant's disreputable conduct but rejects the contention that *Cornea* or any of the subsequent cases limit the procedural fairness duty to situations where an officer has impugned the applicant's conduct. He states this would be logically incoherent, as it would mean that a person who is suspected of supplying fraudulent documents or engaging in reprehensible conduct is afforded an opportunity to respond but a person who is the victim of circumstance or made a mistake is not.

[21] Mr. Mikhail argues that *Hamza* and other cases, including *Perez Enriquez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1091 and *Rukmangathan*, both cited in

Hamza, stand for a broad principle that an officer's reliance on extrinsic evidence or on concerns with the veracity and authenticity of an applicant's documents may trigger a procedural fairness duty to provide an opportunity to respond. He states the duty was triggered in his case, where the stakes were high, the decision was a redetermination, and the first officer had accepted his identity and citizenship based on the same passport.

[22] I agree with Mr. Mikhail that *Hamza* stands for the principle that an officer's reliance on extrinsic evidence or on concerns with the veracity and authenticity of an applicant's documents may trigger a procedural fairness duty to provide an opportunity to respond. Even *Cornea* did not hold that such duty will only arise when the officer's concerns impugn an applicant's conduct. As the Supreme Court of Canada noted in *Vavilov*, the duty of procedural fairness is variable, flexible, and context-specific: *Vavilov* at para 77. Concerns that would impugn an applicant's conduct may be a factor giving rise to a duty, but it all depends on context. In *Gan*, the applicants' conduct was clearly impugned, yet the Court held that that the duty did not arise based on the particular circumstances of that case.

[23] I would agree with the respondent that Mr. Mikhail's case is similar to *Gan* in that he had notice of credibility issues regarding his identity from the vacation proceeding, and that he was sufficiently on notice that identity and nationality would be central elements to a claim for H&C relief. However, in my view there is a key distinction. Mr. Mikhail's H&C application had been assessed by a first officer who raised no issue with his identity or the passport, noting that Mr. Mikhail "holds a passport from Iraq valid until 08 JULY 2027; supporting his status in that country." The first officer assessed hardship based on a return to Iraq as an ethnically Kurdish man.

[24] Mr. Mikhail had submitted evidence that could have established his identity and status in Iraq, and indeed the very same evidence had been accepted as such the first time his H&C application was considered. On redetermination, despite accepting Mr. Mikhail's belief that the document established his identity, the Officer gave the document no weight based on concerns about its authenticity and the finding that Mr. Mikhail failed to establish his identity was determinative of the decision to reject his H&C application.

[25] As both parties acknowledge, the language in *Hamza* is that the duty to afford an opportunity to respond "may arise"—there is no rule that an officer who is concerned with the credibility, the veracity, or the authenticity of the applicant's documentation must always provide an opportunity to respond to the concerns. However, for the reasons that I have articulated, I am persuaded that the duty was triggered in Mr. Mikhail's case. Mr. Mikhail has established that the Officer breached procedural fairness by failing to provide an opportunity to respond to concerns about the authenticity of the Iraqi passport.

[26] For these reasons, the application for judicial review is allowed. The Officer's decision is set aside and the matter shall be remitted to a different officer for reconsideration.

[27] The parties do not propose a question for certification. In my view, there is no question for certification.

JUDGMENT IN IMM-1067-24

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.
2. The December 22, 2023 decision refusing the applicant's H&C application is set aside and the matter shall be remitted to a different officer for redetermination.
3. There is no question of general importance to certify.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1067-24

STYLE OF CAUSE: CESAR YUSIF MIKHAIL v THE MINISTER OF
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DATE OF HEARING: OCTOBER 29, 2024

**JUDGEMENT AND
REASONS:** PALLOTTA J.

DATED: APRIL 22, 2025

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