Federal Court Cour fédérale

Date: 20220722

Docket: IMM-2767-18 and others

Citation: 2022 FC 1089

Ottawa, Ontario, July 22, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

(SEE SCHEDULE A FOR ALL APPLICATIONS CASE MANAGED WITH THESE EIGHT TEST CASES)

Docket: IMM-2767-18

SANAM NEZAMI TAFRESHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-148-20

ASGHAR HASHEMI SARACHEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-5019-18

MEHRNEGAR HARIRFOROUSH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-5020-18

NAVID FARAHANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-6473-18

ABDOLRASOUL DARYOUSH KARIMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-1164-19

SAEID TAGHIZADEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-3166-18

RAMIN MAZAHERI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-6476-18

NAHID HEIDARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Procedural history

[1] These eight applications for judicial review are test cases concerning 107 decisions made by the Immigration, Refugees and Citizenship Canada's [IRCC] Visa Section in Warsaw, Poland. Each decision refused an application made by an Iranian national for permanent resident status under the Self-Employed [SE] class. The 107 SE visas applications were in three SE categories: cultural activities, athletics and the purchase and management of a farm (for applicants before March 10, 2018). In each case, the Warsaw Visa Section was not satisfied the claimant met the definition of a "Self-employed person" per subsection 12(a) of *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*] and subsections 88(1) and 100(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-27 [*IRPR*].

[2] By Order of the Chief Justice, these matters have been case managed since the outset, initially in 2018 by Justice Boswell until September 2020, and thereafter by Associate Judge Aalto [CMJ]. The hearing took place over four days at Ottawa in June 2022.

[3] Leave has been granted in these eight test cases. Leave has not been granted in the remaining 102 cases in respect of which leave and judicial review are to be guided by the Court's determination in these test cases.

[4] A great deal of new evidence was filed. The record before the Court comprises of 4,434 pages. It may be that much if not most of the new evidence in this case was not considered by

this Court in judicial review applications concerning other Iranian SE applications. It appears some of the Minister's evidence was filed in those cases, and it may be that some cases had some of the evidence filed by these Applicants. I was not asked to and make no assessment or Order in that regard.

[5] The determinative issue common to all eight test cases is the absence of adequate procedural fairness. Notably, the new evidence concerns new and different procedures put in place by the Warsaw visa post to handle Iranian SE applications transferred to it from IRCC's Ankara visa post where they were previously processed. In addition, there is new evidence concerning background events and procedures for handling SE applications generally.

[6] Although there are a number of problematic procedural issues illustrated in these test cases, two principle changes in IRCC's procedure underlie the allegations and my findings of procedural unfairness in these matters.

[7] The first principle change in procedure occurred in 2016 when IRCC purported to replaced its Operational Manual designed to guide visa officers charged with processing applications under the SE class. This Operational Manual is referred to as "Manual OP 8" and applied to all SE applications from all countries. While still on IRCC's website as an Active manual, IRCC replaced Manual OP 8 with Program Delivery Instructions (or PDI as I will refer to it) in 2016.

[8] The second major change affecting the procedural rights of Iranian SE applicants took place on March 7, 2018. Before then, all SE applications from Iran were handled by IRCC visa officers in Ankara. However, due to Ankara having a very substantial backlog issue, IRCC transferred virtually all of Ankara's Iranian SE inventory to IRCC's visa post in Warsaw for processing. The transfer included all new Iranian SE applications filed thereafter. As discussed later, the transfer from Ankara to Warsaw entailed a significant and material reduction in procedural fairness for Iranian SE applicants. Therefore, and not surprisingly, the number of successful SE applications fell dramatically after the transfer from Ankara to Warsaw.

[9] I should say at once that the law does not require IRCC to provide a high degree of procedural fairness to visa applicants; indeed the Federal Court of Appeal has ruled the level of procedural fairness required is at the low end of the spectrum, see *Canada (Minister of Citizenship and Immigration) v Patel*, 2002 FCA 55 at para 10; *Rezaei v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 444 [per LeBlanc J as he then was] at para 11; *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 [per Bédard J] at para 23; *Tollerene v Canada (Citizenship and Immigration),* 2015 FC 538 [per Fothergill J] at para 15 [*Tollerene*]; *Gur v Canada (Citizenship and Immigration)*, 2019 FC 1275 [per Roy J] at para 16 [*Gur*].

[10] That said, procedural fairness remained and remains a requirement in IRCC's processing of these SE applications.

[11] I have concluded, mainly for these two reasons but for other reasons also, that the provision of procedural fairness owed to these eight Applicants did not meet the legal standard

required. Therefore, judicial review will be granted and redetermination ordered in all eight, as set out below.

II. Standard of review and applicable law

A. *Principles concerning procedural fairness*

(1) Content and consequences of procedural fairness

[12] The principle case on nature of procedural fairness is the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 [*Baker*]. Importantly for the case at bar, *Baker* recognizes the doctrine of legitimate expectations which may determine what procedures the duty of fairness requires in given circumstances. The doctrine of legitimate expectation states that if a claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of procedural fairness. Importantly, the circumstances to be considered will take into account the promises or regular practices of administrative decision-makers. It will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights: see *Baker* at para 26:

> 26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed,

> this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 5233 (FCA), [1989] 3 F.C. 16 (C.A.). …. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.
>
> [Emphasis added]

[13] Additionally, in determining what procedures the duty of fairness requires, the analysis should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, as in the cases at bar. This is set out in para 27 of *Baker*:

> 27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, *per* Gonthier J.

[14] To the same effect is the Supreme Court's subsequent decision in *Agraira v Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36. This judgment reiterates the doctrine of legitimate expectations. It holds that if a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently

adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been:

> [94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.
>
> [Emphasis added]

[15] Central to procedural fairness is that the claimant know the case to meet, see *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 at para 56 per Rennie JA [*Canadian Pacific*]:

> [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.
>
> [Emphasis added]

[16] See also *Alabi v Canada (Citizenship and Immigration),* 2018 FC 1163 at paras 27:

> [27] As Justice Rennie concluded in *Canadian Pacific* (at para 56), in assessing whether a process was fair, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond". In the present case, the Applicant did not know the case he had to meet.
>
> [Emphasis added]

[17] The jurisprudence of this Court confirms two additional principles which I accept.

[18] First, those whose applications are filed before a decision-maker institutes material changes in procedure are entitled to have notice of and be given an opportunity to refile or otherwise so as to comply with the new procedures (see *Kandiah v Canada (Citizenship and Immigration),* 2018 FC 1096 [per Walker J] at paras 25-27 [*Kandiah*]). This is particularly the case where the change may result in potentially "fatal" consequences (*Popova v Canada (Citizenship and Immigration),* 2018 FC 326 [per Diner J] at para 11 [*Popova*]).

[19] Second, failure by a decision maker to provide an applicant with notice of the case to meet constitutes a breach of procedural fairness likely requiring the matter to be sent back for proper redetermination (see *Khadr v Canada (Attorney General),* 2006 FC 727 [per Phelan J] at para 132 [*Khadr*]; *Edison v Mnr,* 2001 FCT 734 [per Blanchard J] at paras 37-39; *Khandiah* at paras 25 to 27).

[20] *Popova v Canada (Citizenship and Immigration),* 2018 FC 326 at para 11 [per Diner J]:

> [11] However, despite the fact that the duty of fairness is relaxed in study permit cases, it nonetheless continues to exist. There are circumstances where a visa officer will be required to inform an

> applicant of concerns with an application, even where those concerns arise from the applicant's own evidence *(Rukmangathan v Canada (Citizenship and Immigration)*, 2004 FC 284 at paras 22-23, cited in *Hassani* at para 23). This is such a case. Given the conclusions of the 2016 Refusal, I am satisfied that Ms. Popova had no reason to believe that her study history would be fatal to her new application; she thus should have been given an opportunity to respond to the Officer's concerns.

[21] *Khadr v Canada (Attorney General),* 2006 FC 727 at para 132 [per Phelan J]:

> [132] The doctrine of legitimate expectation is a significant procedural protection to the public at large from arbitrary government action. It has as its goal to put the person, at least procedurally, in the same position as if the impugned decision or action had not occurred. The only way in which that can occur is to remit the matter back to the Passport Office to be dealt with by it in accordance with the *Canadian Passport Order* as it was when the passport application was submitted.

[22] *Kandiah v Canada (Citizenship and Immigration),* 2018 FC 1096 at paras 25-27 [per Walker J]:

> [25] The fourth *Baker* factor is that of the legitimate expectation of the individual (*Baker* at para 26). The principle of legitimate expectation derives from the requirements of procedural fairness. If a public entity or official has, by its conduct, led an individual to expect that a process would be conducted in a certain manner, the Court will protect the individual's expectation. …
>
> [26] I find that the Applicant's legitimate expectation that he would be interviewed was unfairly denied by the Respondent and the Applicant's right to procedural fairness breached. From March 2010 to June 2016, the Applicant, his sponsors and his counsel reasonably assumed that the Applicant would be interviewed by the Officer prior to a decision regarding his application. They relied on the clear and repeated representations of CIC to this effect. The Applicant then received the Procedural Fairness Letter in October 2016 requesting updated submissions regarding his personal circumstances, current country conditions in Sri Lanka and any H&C considerations. The Procedural Fairness Letter contained no indication that the Applicant's written submissions

> were requested in lieu of an interview. It did not state or suggest that CIC was changing the review process it had established and communicated to the Applicant. It may well be that the Officer genuinely assumed that this change was implicit in the Procedural Fairness Letter. To the Applicant, it was not.
>
> [27] The Respondent submits that an administrative process can be changed as long as the change to the process is fair and is properly communicated. I agree with the Respondent. <u>However, I find that insufficient notice of the change in process was given to the Applicant.</u>
>
> [Emphasis added]

[23] *Edison v Mnr,* 2001 FCT 734 at paras 37-39 [per Blanchard J]:

> [37] Mr. Justice Evans in *Apotex Inc.*, (*supra* at paragraph 23) underscored the public interest that is sought to be protected by the doctrine of legitimate expectation, namely, the protection of the individual from an abuse of power through the breach of an undertaking. The implied undertaking in the case at bar is the non-discriminatory application of procedural norms set out by published guidelines in the application of the fairness legislation.
>
> [38] The applicants had a legitimate expectation, in the legal sense, that the procedural norms set out by the Minister in the published guidelines would be followed, specifically that a second impartial review be conducted independently of the original decision maker. It cannot be said that such a review was conducted on the facts before me in this case. It is in the failure of the respondent to follow his own published procedural guidelines that I find a breach of the duty of fairness owed to the applicants under the rules of natural justice and procedural fairness.
>
> [39] I reiterate my earlier comments in these reasons that the fairness legislation is discretionary and it is not for this court to substitute its decision to that of the Minister. The procedural guidelines to be followed are also in the discretion of the Minister. However, <u>once set, such guidelines must be adhered to at least in so far as to meet the legitimate expectation, of any applicant, created by the said procedural norms.</u>
>
> [Emphasis added]

(2) Standard of review for procedural fairness is correctness

[24] The foregoing outlines the content and likely consequences of procedural unfairness.

[25] Turning to the standard of review, issues of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." See also *Canadian Pacific* per Rennie JA. In this connection I also note the Federal Court of Appeal's recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[26] I also understand from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*] that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added]

[27] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 [*Dunsmuir*], the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.
>
> [Emphasis added]

III. Legislative framework for the self-employed persons class

[28] Subsection 12(2) of *IRPA* provides that a foreign national may be selected as a member of the economic class "on the basis of their ability to become economically established in Canada":

Economic immigration	**Immigration économique**
12(2) A foreign national may be selected as a member of the economic class on the basis of their ability to become	**12(2)** La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur

economically established in Canada.	établissement économique au Canada.
[Emphasis added]	[Je souligne]

[29] Section 100 of *IRPR* prescribes the self-employed persons class as a subset of the economic class, intended for a particular type of business immigrant, namely those with the ability to become economically established in Canada and who are self-employed persons within the meaning of subsection 88(1) of the *IRPR*:

Members of the class	**Qualité**
100 (1) For the purposes of subsection 12(2) of the Act, the self-employed persons class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada and who are self-employed persons within the meaning of subsection 88(1).	**100 (1)** Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs autonomes est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada et qui sont des travailleurs autonomes au sens du paragraphe 88(1).
Minimal requirements	**Exigences minimales**
(2) If a foreign national who applies as a member of the self-employed persons class is not a self-employed person within the meaning of subsection 88(1), the application shall be refused and no further assessment is required.	**(2)** Si le demandeur au titre de la catégorie des travailleurs autonomes n'est pas un travailleur autonome au sens du paragraphe 88(1), l'agent met fin à l'examen de la demande et la rejette.
[Emphasis added]	[Je souligne]

[30] Subsection 88(1) of the *IRPR* defines a "self-employed person" as one who has relevant experience and has the intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada:

self-employed person means a foreign national who has <u>relevant experience</u> and has <u>the intention and ability to be self-employed</u> in Canada and to make a significant contribution to <u>specified economic activities</u> in Canada. (*travailleur autonome*)	**travailleur autonome** Étranger qui a <u>l'expérience utile</u> et qui a l'intention et est en mesure de créer son propre emploi au Canada et de contribuer de manière importante à des <u>activités économiques déterminées</u> au Canada. (*self-employed person*)
[Emphasis added]	[Je souligne]

[31] Subsection 88(1) of the *IRPR* then defines "relevant experience" and "specific economic activities" as two years of experience in the particular category under which they are applying, be it cultural activities, athletics or farming:

Relevant experience, in respect of	**Expérience utile**
(a) a self-employed person, other than a self-employed person selected by a province, means a minimum of two years of experience, during the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in respect of the application, consisting of	**a)** S'agissant d'un travailleur autonome autre qu'un travailleur autonome sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci, composée:

(i) in respect of cultural activities,

(A) two one-year periods of experience in self-employment in cultural activities,

(B) two one-year periods of experience in participation at a world class level in cultural activities, or

(C) a combination of a one-year period of experience described in clause (A) and a one-year period of experience described in clause (B),

(ii) in respect of athletics,

(A) two one-year periods of experience in self-employment in athletics,

(B) two one-year periods of experience in participation at a world class level in athletics, or

(C) a combination of a one-year period of experience described in clause (A) and a one-year period of

(i) relativement à des activités culturelles:

(A) soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités culturelles,

(B) soit de deux périodes d'un an d'expérience dans la participation à des activités culturelles à l'échelle internationale,

(C) soit d'un an d'expérience au titre de la division (A) et d'un an d'expérience au titre de la division (B),

(ii) relativement à des activités sportives:

(A) soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités sportives,

(B) soit de deux périodes d'un an d'expérience dans la participation à des activités sportives à l'échelle internationale,

(C) soit d'un an d'expérience au titre de la division (A) et d'un an d'expérience au titre de la division (B),

experience described in clause (B), and	
(iii) in respect of the purchase and management of a farm, two one-year periods of experience in the management of a farm; and	**(iii)** relativement à l'achat et à la gestion d'une ferme, de deux périodes d'un an d'expérience dans la gestion d'une ferme;
…	…
specified economic activities, in respect of	**activités économiques déterminées**
(a) a self-employed person, other than a self-employed person selected by a province, means cultural activities, athletics or the purchase and management of a farm; and	**a)** S'agissant d'un travailleur autonome, autre qu'un travailleur autonome sélectionné par une province, s'entend, d'une part, des activités culturelles et sportives et, d'autre part, de l'achat et de la gestion d'une ferme;
(b) a self-employed person selected by a province, has the meaning provided by the laws of the province. (*activités économiques déterminées*)	**b)** s'agissant d'un travailleur autonome sélectionné par une province, s'entend au sens du droit provincial. (*specified economic activities*)
[Emphasis added]	[Je souligne]

[32] IRCC has provided guidance in terms of cultural activities and athletics (and farming) in two guidance documents prepared for visa officers, namely Manual OP 8 issued in 2008, and Program Delivery Instructions issued in 2016. These guidance documents will be discussed in more detail later but for present purposes each provides:

- Self-employed experience in cultural activities or athletics will capture those traditionally applying in this category, for example, music teachers, painters, illustrators, film makers, freelance journalists. Beyond that, the category is intended to capture those people who work behind the scenes as a self-employed person, for example, choreographers, set designers, coaches and trainers. If you want to apply under the self-employed program, check if your occupation can be considered self-employment. This is not a definitive or exhaustive list.
- Participation at a world-class level in cultural activities or athletics intends to capture performers. This describes those who perform in the arts, and in the world of sport. "World class" identifies persons who are known internationally. It also identifies persons who may not be known internationally but perform at the highest levels in their discipline.

[33] Moreover, per the Respondent's affidavit evidence: "Cultural activities include jobs generally seen as part of Canada's artistic and cultural fields. Examples include: authors and writers; creative and performing artists; musicians; painters; sculptors and other visual artists; technical support and other jobs in motion pictures; creative designers and craftspeople. The National Occupational Classification (NOC) lists these under Group 5 – Occupations in art, culture, creation and sport."

[34] If an applicant is found to have the requisite experience, ability and intentions, they are assessed in order to determine whether they "will be able to become economically established in Canada" pursuant to subsection 102(1) of the *IRPR*. This assessment is based on points awarded per various selection criteria for factors, such as age, education, language, experience and adaptability pursuant to sections 102 to 108 of the *IRPR*.

[35] Alternatively, if an applicant is not found to have the experience, ability and intentions required of self-employed people, “the application shall be refused and no further assessment is required” pursuant to subsection 100(2) of the *IRPR.*

[36] As mentioned already, in addition to the statutory and regulatory provisions, IRCC issued two sets of guidelines to visa officers processing SE applications. The first, issued in 2008, is Manual OP 8. While still on IRCC’s website as an Active manual, IRCC set out to replace Manual OP 8 with Program Delivery Instructions [PDI] in 2016. I discuss each in detail in my Analysis.

IV. Evidence in these applications

[37] Both sides provided evidence in these proceedings. Two witnesses gave affidavit evidence and exhibits for the Applicants – Mr Alireza Parsai and Mr Ramin Asadi. Both are experienced immigration consultants duly certified by Immigration Consultants of Canada Regulatory Council [ICCRC]. Mr Parsai had experience in cases such as the test cases, having represented approximately 500 SE category applicants of Iranian descent. Mr Asadi was also very experienced in matters such as these test cases, having been retained by more than 60 Iranian SE class applicants living in Iran. Together they acted for some 560 Iranian applicants in the SE class. They recounted their experience in relation to such applicants, in respect of which they had personal knowledge. Neither were cross-examined.

[38] The Respondent Minister put forward the affidavit of Thomas Richter. Pursuant to subsection 6(1) of *IRPA,* Mr Richter is designated as an immigration officer by the Minister of

Citizenship and Immigration for the purposes of issuing visas under *IRPA* and his duties include the assessment of visa applications for admission to Canada, including permanent residence applications. Notably, Mr Richter was in charge of managing IRCC's decision to transfer responsibility for handling virtually all Iranian SE class applications from IRCC's Ankara visa office to its Warsaw office. His title was "Migration Program Manager" at IRCC. Mr Richter was cross-examined.

[39] I accept the evidence of both the Applicants' and Respondent's witnesses under the recognized exceptions to the general rule that judicial review proceeds on the record before the decision-maker. I do so because and to the extent they provided evidence on issues of alleged procedural unfairness and general background in this case: see *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22; *Connolly v Canada (Attorney General),* 2014 FCA 294 at para 7; *Bernard v Canada (Revenue Agency*), 2015 FCA 263, at paras 13-28; *Bell Canada v 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123 at paras 7-11; *Canada (Citizenship and Immigration) v Mason,* 2021 FCA 156 at para 74.

[40] In this connection, I rely on the Federal Court of Appeal's decision in *Bernard v Canada (Revenue Agency),* 2015 FCA 263 per Stratas JA:

> [20] The first recognized exception is the background information exception. Sometimes on judicial review parties will file an affidavit that contains summaries and background aimed at assisting the reviewing court in understanding the record before it. For example, where there is a large record consisting of many thousands of documents, it is permissible for a party to file an affidavit identifying, summarizing and highlighting, without

argumentation, the documents that are key to the reviewing court's understanding of the record.

[21] In *Delios*, above, I put it this way (at paragraph 45):

> The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy – that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule.

…

[25] The third recognized exception concerns evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider: see *Keeprite* and *Access Copyright*, both above; see also *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69, 274 N.B.R. (2d) 340 (improper purpose); *St. John's Transportation Commission v. Amalgamated Transit Union, Local 1662* (1998), 1998 CanLII 18670 (NL SC), 161 Nfld. & P.E.I.R. 199 (fraud). To illustrate this exception, suppose that after an administrative decision was made and the decision-maker has become *functus* a party discovers that the decision was prompted by a bribe. Also suppose that the party introduces into its notice of application the ground of the failure of natural justice resulting from the bribe. The evidence of the bribe is admissible by way of an affidavit filed with the reviewing court.

[26] I note parenthetically that if the evidence of natural justice, procedural fairness, improper purpose or fraud were available at the time of the administrative proceedings, the aggrieved party would have to object and adduce the evidence supporting the objection before the administrative decision-maker. Where the

> party could reasonably be taken to have had the capacity to object before the administrative decision-maker and does not do so, the objection cannot be made later on judicial review: *Zündel v. Canada (Human Rights Commission)*, (2000), 2000 CanLII 16575 (FCA), 195 D.L.R. (4th) 399; 264 N.R. 174; *In re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (C.A.).
>
> [27] The third recognized exception is entirely consistent with the rationale behind the general rule and administrative law values more generally. The evidence in issue could not have been raised before the merits-decider and so in no way does it interfere with the role of the administrative decision-maker as merits-decider. It also facilitates this court's ability to review the administrative decision-maker on a permissible ground of review (*i.e.*, this Court's task of applying rule of law standards).

[41] None of these witnesses were certified as experts. I accept the Applicants' evidence on the volume of files they handled, and the results they obtained: this evidence was not seriously challenged and likely could be verified by the Respondent in any event. I caution myself because the Applicants' affiants represented the applicants whose claims they refer to, but I do not doubt their file counts or the documents they submitted as exhibits. I also accept the evidence of the Respondent's witness with the same caveats.

[42] In accepting their evidence, I have ignored expressions of opinion, spin, advocacy and other irrelevant or inadmissible content.

V. Analysis of procedural fairness

[43] I now turn to the several issues of procedural fairness raised in these applications. The first deals with IRCC's decision to replace OP 8 with PDI and its impact. The second, and more

important, concerns IRCC's decision to transfer all Iranian SE applications then being processed by its Ankara visa post, to IRCC's visa post in Warsaw for processing.

A. *Replacing IRCC's Manual OP 8 with Program Delivery Instructions on the Self-Employed Persons Class [PDI]*

[44] Manual OP 8 is a set of guidelines prepared by IRCC for use by visa officers processing SE and other applications. It was put in place in 2008. It remained in force at least until 2016. The Respondent's evidence is that effective August 2, 2016, IRCC replaced "section 11" of Manual OP 8 with IRCC's Program Delivery Instructions for Self-Employed Persons Class [PDI]. After that date, IRCC's evidence is that "Officers assessing applications made in the Self-Employed persons Class after August 2, 2016 only consult the PDI" (Richter affidavit para. 17).

[45] According to the Richter affidavit at para 15:

> PDIs are manuals consulted by employees of IRCC and the Canada Border Services Agency in the exercise of their functions under the *Immigration and Refugee Protection Act,* the *Immigration and Refugee Protection Regulations,* the *Citizenship Act,* and the *Citizenship Regulations.* PDIs are available publicly.

[46] On the evidence before me, I have determined the change from Manual OP 8 to the PDI materially reduced procedural rights for SE applicants. I have concluded that IRCC's longstanding and regular practice of using Manual OP 8 and IRCC's consistent and regular adherence with Manual OP 8's procedural practices created a legitimate expectation that IRCC would continue to assess Iranian SE application based on Manual OP 8 at least for some time after August, 2016, and come to this conclusion per *Baker* at para 26 and *Agraira* at para 94.

[47] I have also concluded in the circumstances of these cases that the change from Manual OP 8 to PDI deprived claimants of their ability to know the case to meet and to have a full and fair chance to respond, contrary to *Canadian Pacific* at para 56. The change in manuals also increased the substantive requirements for SE visa applicants. The effect made it more difficult to obtain SE visas.

(1) Preliminary observations

[48] I wish to make two preliminary observations about Manual OP 8 and its continuing relevance.

[49] First, notwithstanding Mr Richter's evidence that "section 11" of Manual OP 8 was replaced effective August 2, 2016, I find IRCC replaced or at least intended to replace the entirety of Manual OP 8 with the PDI. I make this finding because of IRCC's additional evidence that "Officers assessing applications made in the Self-Employed persons Class after August 2, 2016 only consult the PDI." My finding in this respect comports with other determinations by this Court: see *Azani v Canada (Citizenship and Immigration),* 2022 FC 99 [per Favel J] at para 11; *Kucukerman v Canada (Citizenship and Immigration)*, 2022 FC 50 [per McHaffie J] at para 18; *Mahmoudzadeh v Canada (Citizenship and Immigration),* 2022 FC 453 [per Strickland J] at para 24, citing to *Jumalieva v Canada (Citizenship and Immigration)*, 2020 FC 385 [per Heneghan J].

[50] Secondly, it is important to note Manual OP 8 is still, i.e., "presently" shown on IRCC's website as per Mr Parsai's evidence. IRCC explains this is because "there are applications being

processed by IRCC that were submitted when OP 8 was operationally relevant." I note OP 8, as it read prior to August 2, 2016, applies to at least one of the eight test cases (*Heidari v Canada (Minister of Citizenship and Immigration)*) and perhaps others among the 102 additional case managed applications.

[51] In my view, IRCC created a confusing situation for SE applicants by continuing to list Manual OP 8 as an "active" manual on its website, while also posting the PDI on its website. It is not clear from either document itself which governs. With respect, it is not clear at all - looking at either of these two documents - that PDI has replaced Manual OP 8. Nowhere does either document state that.

[52] In this connection and as a matter of interest, a Google search of "IRCC self-employed class" takes one directly to a web page which at the upper left hand corner has a link to "Operational instructions and guidelines".

Français

Government of Canada Gouvernement du Canada

Search IRCC

MENU

Canada.ca > Immigration, Refugees and Citizenship Canada > Corporate information > Publications and Manuals > Operational instructions and guidelines > Permanent Residence > Permanent resident program: Economic classes > Self-employed persons class

Self-employed persons class: Assessing the application against selection criteria

This section contains policy, procedures and guidance used by IRCC staff. It is posted on the department's website as a courtesy to stakeholders.

Note: New applications under the farm management stream of the self-employed program will **no longer be accepted**. See the Ministerial Instructions on the self-employed persons class.

In order to be eligible for consideration in the Self-Employed Persons Class, the applicant must meet the regulatory definition [R88].

The following information will assist officers in assessing an applicant's experience, intent and ability to create their own employment in Canada.

[53] Clicking the link "Operational instructions and guidelines" takes one to a webpage where Manual OP 8 is shown as an "Active manual" under the category "Operational manuals:"

Operational manuals

Operational manuals are divided into different categories. Each manual, in turn, is divided into specific chapters and assigned a chapter number.

Active manuals (PDF format)

Manual	Chapter	Title
. . .		
Overseas Processing (OP)	OP 8	Entrepreneur and Self-Employed (PDF, 488.13 KB)

[54] However, as noted the pages on IRCC's website containing Manual OP 8 say nothing about Manual OP 8 being replaced by the PDI. In fact the converse is true: IRCC continued to and indeed presently lists Manual OP 8 as an "Active", "Operational instructions and guideline". Importantly, the Respondent's evidence in cross-examination was that both Manual OP 8 and PDI are "references that we may use but are not compelled to use" in assessing applications. Mr Richter further explained: "One is a manual and … one is an instruction." On the record, I find both are still in use.

[55] In my respectful view, to prevent the risk of procedural unfairness, and to ensure applicants know the case they have to meet, documents on IRCC's website should state on their face if they are no longer generally applicable. This was not done with respect to Manual OP 8. Likewise, documents on IRCC's website that replace others should say on their face they are replacements, particularly where (as here) the original documents are still listed as "Active". This was not done either. Taking either step could help eliminate confusion in knowing the case SE applicants must make: is it the PDI or is it Manual OP 8.

[56] With respect, IRCC's labelling of Manual OP 8 and PDI created and continues to create a confusing situation, one which I am unable to ignore in considering the Applicants' allegations of procedural unfairness because it clouds the issue of what case SE applicants must meet.

(2) Change from Manual OP 8 to PDI reduced procedural fairness

[57] It is not disputed Manual OP 8 was put in place in 2008. It therefore applied for some eight years before 2016. Accepting IRCC's statement subject to the foregoing, IRCC replaced Manual OP 8 with PDI effective August 2, 2016.

[58] The record in these cases demonstrates, and I have no doubt IRCC used Manual OP 8 to assess SE Iranian applications for a very considerable period of time. It is clear Manual OP 8 was initially written and given to IRCC visa officers in 2008. While of course visa officers may not have their discretion fettered (see for example *Ching-Chu v Canada (Citizenship and Immigration)*, 2007 FC 855 [per Kelen J] at para 25), nothing in the record suggests other than that IRCC visa officers regularly and consistently adhered to Manual OP 8 in assessing SE applicants whether from Iran or elsewhere. It is also clear that Manual OP 8 was in place at least until August 2, 2018 – a period of almost exactly 8 years.

[59] On these bases, I conclude IRCC's longstanding and regular practice of using Manual OP 8 and IRCC's consistent adherence with Manual OP 8's procedural practices, created a legitimate expectation in SE applicants from Iran (and possibly elsewhere) that IRCC visa officers would continued to assess SE application based on Manual OP 8 at least until August 2, 2016, and for some time after August, 2016, per *Baker* at para 26 and *Agraira* at para 94.

[60] I also consider that Manual OP 8 sets out important information for applicants in terms of their knowing the case they have to meet. In my view, visa applicants may legitimately infer parts at least of the case they have to meet from such manuals and guidance documents provided

to visa officers posted on IRCC's website. This reality appears to have been known and accepted by the parties in these cases.

[61] I have also concluded the changes from Manual OP 8 to PDI in the circumstances of these cases deprived claimants of their ability to know the case to meet and to have a full and fair chance to respond, per *Canadian Pacific* at para 56.

[62] I come to this conclusion because of material differences between Manual OP 8 and PDI in terms of both procedural considerations and the expected content of SE claims. In my view, the principle differences are threefold.

[63] First, section 5.5 of Manual OP 8 refers to the possibility of interviews. It states an SE (or business class) claimant may or may not be interviewed. It adds however, "waiving the interview may be appropriate" in some circumstances. The Applicant argues the implication is that interviews would be the norm, and waiver the exception. While there is merit in this submission, the evidence does not persuade me that interviews were the norm at material times. What is clear however, and in any event, is that the PDI eliminated any and all reference to and discussion of interviews. To the extent OP 8 may have given rise to a legitimate expectation of at least the consideration of an interview, no such expectation may be drawn from the PDI's total silence on the matter of interviews. The matter of interviews fell to be determined by the general rule that interviews are only required as a matter of procedural fairness in relation to credibility assessments (*Tollerene, supra* at para 16, citing to *Singh v Canada (Citizenship and*

Immigration), 2009 FC 620 at para 7), subject of course to the doctrine of legitimate expectations.

[64] Overall, it seems to me the Applicant is correct that legitimate expectations of procedural fairness under PDI would be lower in terms of interviews than under Manual OP 8.

[65] Secondly, section 11.7 of OP 8 addressed business plans, actually instructing visa officers that formal business plans should be "discouraged" where they "would entail unnecessary expense and administrative burden". I do not take this as a discouragement of any form of a business plan. But it is definitely a specific direction by IRCC to visa officers processing SE cases to avoid insisting on costly or burdensome business plans. That might be something to require from other economic or business applications, but not for those in the SE class of cultural, athletics and farming applicants. I accept the Applicants' submissions this was a reflection of a desire by IRCC not to discourage SE claimants by placing the bar too high, particularly because to succeed, the claimant had to demonstrate prior success in their category.

[66] As the Respondent's witness testified in cross-examination, for example, if a claimant was already successful in an area of cultural endeavour, such as book writing with a number of well known publications under their belt and the intention to continue to write such publications in Canada, then income projections "would be almost superfluous", i.e., little more would be required by way of business plan because they met the onus on them (Richter cross-examination at page 95).

[67] See also Richter Examinations – Day 1, pg. 95: “Because each case is assessed on its own merits, if for example a person is a successful author with a number of well known publications under his belt and the intention is to continue to write such publications in Canada and I am satisfied that these publications do actually exist then income projections would be almost superfluous because this person has met the onus of previous experience and Intent and Ability. So, anything else would be not really necessary to make a decision, the decision is actually very straight forward.”

[68] See also Richter Examinations – Day 1, pg. 97: “Alternatively another case was of a person that was a North American distributor of or who owned the distribution rights to a large number of Iranian performing artists and he was able to provide a limited number of contracts with Sony and other major labels as evidence of his already existing establishment in Canada. So, there we did not require a lot of documentation to substantiate it so there wasn’t a formal business plan required”.

[69] The PDI, on the other hand, removes all reference to “discouraging” expensive or burdensome business plans.

[70] In my respectful view, the change from Manual OP 8 to PDI in terms of discouraging costly or burdensome business plans signalled the possibility of some elevated demand for business plans filed by SE applicants. This is another material and significant change in the case SE applicants had to meet.

[71] In my view, Iranians and others applying under the SE class had a legitimate expectation that costly or burdensome business plans would be and were discouraged under Manual OP 8. In my view, the change in posture from Manual OP 8 to PDI breached their legitimate expectations giving rise to a right in such applicants to have their claims assessed under OP 8 and not PDI if they filed before August 2, 2016, and for a reasonable period of time afterwards. Anything less would fail to afford these applicants the right to know the case they had to meet, a breach of procedural fairness per *Baker, Agraira,* and *Canadian Pacific* as noted already.

[72] Third, section 5.14 of OP 8 specifically addressed procedural fairness, expressly advising visa officers that if they had "concerns about eligibility or inadmissibility, the applicant must be given a fair opportunity to correct or contradict those concerns. … The officer has an obligation to provide a thorough and fair assessment in compliance with the terms and spirit of the legislation and procedural fairness requirements" [emphasis added]. The use of the word "concerns" is very broad, and is not limited for example to issues of credibility. In my view, this language placed a special emphasis on visa officers providing procedural fairness when considering SE applications.

[73] I was not pointed to similar language in other IRCC manuals and I take this as evidence IRCC wanted SE applicants – from those in the cultural, athletic and farming communities – to be given particularly fair treatment. It seems to me this language strongly tends to require visa officers to deal with these concerns through procedural fairness letters, or possibly even through interviews.

[74] Most notably, the entirety of this procedural fairness-focussed provision was eliminated in the PDI. Its wholesale removal cannot be seen as other than a deliberate, significant and material reduction in the legitimate expectations of procedural fairness when compared to those created by Manual OP 8.

[75] In this connection, IRCC moving from one set of guidelines, manuals or instructions to another is not objectionable in itself. IRCC is free to publish and change non-binding manuals, guidelines and instructions setting out how its visa officers may apply and construe relevant legislation (*IRPA*) and regulations (*IRPR*) as IRCC considers best, within of course the bounds of reasonableness, procedural fairness and without fettering discretion. This is what IRCC did in publishing OP 8, and what IRCC attempted to do in setting out to replace Manual OP 8 with PDI.

[76] The difficulty in these cases is that while the Respondent set out to replace the longstanding Manual OP 8, in respect of which legitimate expectations had undoubtedly arisen, it did so without notice to SE claimants already in the system or prospective SE claimants. Nor did IRCC provide an opportunity to refile to meet these significantly different requirements. Indeed, as noted above, IRCC left and continues to leave Manual OP 8 on its website as an Active manual. In my respectful view, on these bases certain claimants were denied not only their legitimate expectations but their right to know the substantive case they had to meet and procedural protections they had a legitimate expectation to receive.

[77] In the result, the replacement of Manual OP 8 with PDI created a class of claimants already in the system, i.e., those who filed their SE claims on or before August 2, 2016, whose procedural rights were breached if they were assessed under the PDI instead of OP 8. In my view, judicial review must be granted in all such cases with a direction that they have their claims assessed under Manual OP 8 as they would have been assessed prior to August 2, 2016, i.e., and not under PDI. One such claimant is the Applicant in test case 8, *Heidari v Canada (Minister of Citizenship and Immigration)*, IMM-6476-18, whose application under the SE class was filed May 6, 2016. There may be others in the 102 additional cases case managed on this judicial review.

[78] I wish to make clear I do not see August 2, 2016 as a sharp cut off date. As noted above, persons have the right to know the case they have to meet including procedural benefits (*Canadian Pacific, supra* at para 56 per Rennie JA). The jurisprudence also establishes a duty on IRCC to process claims in accordance with procedures matching the legitimate expectations of claimants (*Baker, supra* at para 26). In the normal course, claims filed within a reasonable time after the change from Manual OP 8 to PDI would have to be reconsidered if they were not assessed in accordance with Manual OP 8 unless notice otherwise was given.

[79] The issue then becomes what is a reasonable time. Given the lack of notice, that would depend on the circumstances including whether an applicant was self-represented or used an immigration consultant, and the delays in decision-making for these Iranian applications.

[80] I would expect the consultancy community to learn of the change at some reasonable time after IRCC's decisions started to reflect the change.

[81] Given the very long delays at that time (2016), and assuming an applicant used an immigration consultant or (legal counsel) I find a reasonable time would be six months after August 2, 2016, such that cases filed with IRCC on or before February 2, 2017 should have been assessed procedurally and substantively under Manual OP 8.

[82] For self-represented applications, I find a reasonable time would be nine months after the change, such that cases filed with IRCC on or before May 2, 2017 should have been assessed procedurally and substantively under Manual OP 8.

B. *Transfer of processing Iranian SE applications from IRCCs' Ankara to its Warsaw visa post*

[83] The second - more material and significant - breach of procedural fairness arose out of IRCC's decision to transfer all Iranian SE applications then being processed in its Ankara visa post to its visa post in Warsaw for processing.

[84] By way of background, all Iranian SE applications were processed by the Ankara visa post since at least 2015. I was given nothing to suggest Iranian SE applications started at that time; Ankara may have been processing them well before 2015.

[85] This changed in March 2018. For the following narrative, I rely on the evidence of the Respondent's witness, his cross-examination, and numerous documents the Respondent produced under *Access to Information Act,* RSC, 1985, c A-1 [*ATIP*] requests.

[86] The evidence is clear the Ankara visa post was accumulating a backlog of undecided SE applications from Iranian nationals. At some point in 2017 or 2018, there were close to 500 Iranian SE applications backlogged in Ankara representing claims under the cultural, athletics and farm management categories.

[87] Delays were considerable, amounting to years in many cases. Mr Parsai's evidence was the posted processing delays in the SE category in 2016 was 96 months (8 years). He testified in his own experience processing times were about 28 months for most applications. A screenshot of IRCC's website for January 10, 2021 shows processing time for SE applications of 23 months across the IRCC system.

[88] At the same time, the record shows IRCC's Warsaw visa post had an excess visa processing capacity. Warsaw also had some experience with processing claims in the economic category, particularly skilled workers. To recall, the SE category is a class within the economic or business category. While Warsaw had experience in handling SE claimants, Ankara had more experience with Iranian SE applicants but was overwhelmed by the large backlog.

[89] IRCC decided to transfer responsibility for processing Iranian SE application from its Ankara visa post to Warsaw. Appropriate instructions were given in 2018. In the result, the

Ankara office transferred virtually its entire inventory of Iranian SE applications to the Warsaw office for processing. 479 Iranian SE applications had been transferred from Ankara to Warsaw by March 7, 2018. All new SE applications from Iranians after that date were also assigned for processing by IRCC's Warsaw office.

[90] Immediately after the transfer from Ankara to Warsaw, the evidence of the Applicants is that the success rate of SE applications by Iranians plummeted from around 80 percent to 85 percent success rate between 2015 to 2017, when they were processed by Ankara, to less than 50 percent when processed by the Warsaw office, leading to the filing of these applications for judicial review and the Court's decision to case manage these 107 applications.

[91] The change from Ankara to Warsaw was accompanied by several procedural changes. These were the subject of unsuccessful requests for reconsideration and several letters from the Applicants' witnesses to the Warsaw visa post, Members of Parliament, the Minister of Immigration, Refugees and Citizenship Mr John McCallum, and IRCC officials in Ottawa. All applications for reconsideration were rejected so far as the record indicates.

(1) IRCC Warsaw ends practice of sending supplementary document requests

[92] The most concerning procedural change involved requests for supplementary documents. Applications processed by the Ankara office were acknowledged by an Acknowledgement of Receipt [AOR] letter or email. *ATIP* documentation produced by the Respondent indicates the AOR "advises clients not to make additional submissions until asked to do so." Additionally, the general Document Checklist filed by applicants as part of their original application states: "Do

not send any additional documents when submitting your application o the Centralized Intake Office."

[93] As noted, delays were significant due to the backlog – 28 to 96 months according to the evidence. Accordingly, when Ankara visa officers were readying themselves to start their review, they invariably sent a fairly detailed supplementary document request letter giving the SE claimant 60 days to file updated documents (Ankara gave 90 days until 2015). The Ankara visa post's document request letter was often accompanied by a detailed checklist requesting specific additional information.

[94] In my view, sending such supplementary document requests and additional document checklists giving applicants an opportunity to update their applications was a procedurally fair and necessary step for the visa post to take, given lengthy backlog and delays.

[95] I find this because, and with respect, it is obvious that for many if not most applicants, much might have changed in their cultural or athletic careers between the time they filed their SE applications and the time their applications were eventually reviewed by visa officers. Assessing such applications based on very out-of-date filings, particularly given IRCC's prohibition against filing updated information unless asked, could and in many cases would unnecessarily and perhaps fatally jeopardize such applicants. In this connection, recent performances and concerts might have been given; national and international awards might have been received; movies may have premiered; successful sets might have been designed; successful screen makeup work may have been featured; television works may have been created or broadcast; successful contracts

might have been signed; books written, sold or published; tournaments successfully entered and won; and recognition both financial and other successes might have accrued. These are obvious examples of new events necessary to update an out of date filing.

[96] In my view, Ankara's consistent adherence and regular practice of asking for supplementary documents often accompanied by a detailed list of other documents required created a legitimate expectation that requests for supplementary documents and in some cases supplementary checklists would continue to be made, which legitimate expectation IRCC was required to continue to meet to meet to satisfy procedural fairness per *Baker* at para 26.

[97] However, the record establishes upon the transfer, IRCC's Warsaw visa post immediately and entirely ended the practice of requesting supplementary documents and document checklists before completing its assessment of Iranian SE applications. Indeed, the first batch of IRCC refusals made without benefit of supplementary document or checklist requests were received in the second and third weeks of April 2018.

[98] Moreover, *ATIP* records confirm IRCC officials discussed and considered what additional information should be requested from SE applicants after their files were transferred to Warsaw.

[99] In the course of these discussions IRCC officials considered legal and other advice – advice which is redacted from the *ATIP* documents produced.

[100] Notably, officials of IRCC actually considered a draft document for Warsaw visa officers to send SE applicants transferred to it.

[101] On the record before me, I have no difficulty finding IRCC senior management – its witness could not say who in particular – made a deliberate and calculated decision to cease IRCC Ankara's practice of sending supplementary document and checklist requests upon the transfer of these SE applications to the Warsaw office.

[102] Notably also, this decision was made in the face of what appears to have been advice to the contrary, i.e., to continue to send supplementary documents requests "to avoid litigation" [AR 888].

[103] After representations from Mr Parsai, and two years after the commencement of judicial review applications in this Court, on or about September 30, 2020, Warsaw began to send brief three or four line letters or emails requesting updated documentation. Many of these were sent without even client numbers, although that information appears to have been added later on.

[104] Thus, on the record before me, I concluded SE applications from Iranians (and likely from other nationals being processed by the Warsaw visa post) were assessed for some two and a half years after the March 2018 transfer, on the basis of increasingly out of date information.

[105] Worse, as already noted, these applicants were actually restrained from filing updates on their own, both by the terms of IRCC's AORs, and by IRCC's Document Checklist required with the original filings.

[106] With respect, judicial review must be granted in respect of any of the test cases in which Warsaw visa officers did not request updated supplementary documents before completing their assessments. This includes test case number 2: *Asghar Hashemi Saracheh v Canada (Minister of Citizenship and Immigration),* and test case number 6: *Saied Taghizadeh v Canada (Minister of Citizenship and Immigration).* In the other seven, supplementary document requests were sent by Ankara before the cases were transferred to Warsaw.

(2) Material change in treatment of business plans and evidence of intent and ability

[107] A second change in regular processing practice implemented after the transfer of SE applications from Iran to the Warsaw concerned the attention visa officers gave to business plans, and evidence of intent and ability. Under the SE class, this Court held in *Mohitian v Canada (Citizenship and Immigration),* 2015 FC 1393 at para 21 that visa officers could not ask for detailed business plans, i.e., those that were expensive and burdensome. This had been codified in Manual OP 8 introduced in 2008 (repeating language found in Manual OP 6 at least as early as *Dalanguerban v Canada (Minister of Citizenship and Immigration),* 2001 FCT 1081 per McKeown J), specifically instructing visa officers to "discourage" formal business plans because they "would entail unnecessary expense and administrative burden".

[108] This all changed with the introduction of the PDI in 2016.

[109] That said, and while Ankara started to request business plans even before August 2016 when the PDI was initiated, the Ankara visa office "never took issue with the level of specificity" in SE business plans, but only general level business plans for the relevant activity (Parsai affidavit, para 12). In saying this, I acknowledge there was older authority for the Courts to review business plans of SE applicants, see *Zhang v Canada (Minister of Citizenship and Immigration),* 2001 FCT 399 [per Dawson J] at para 9.

[110] However, the Applicant's point is that the level of review and procedure regularly taken by Ankara changed materially and significantly when these Iranian SE applications were transferred to Warsaw, and with respect, I agree. On the record before me, Ankara regularly did not take serious issue with the ability or intention of SE applicants to settle in Canada except at a general level business plan for the specific activity type. In this connection, the Applicants' witness deposed that "evidence of ability and intention to become self-employed in Canada that I have submitted for all 500 + clients in the SEC that I have represented included only general level business plans for the specific activity type".

[111] With respect, it is beyond dispute IRCC took a significant and materially different approach to business plans of these SE applicants, and to the information IRCC considered in relation to issues of intent and ability per subsection 88(1) of *IRPR*.

[112] I am persuaded the Ankara visa post had the regular practice of approving Iranian SE applications without going into a great deal of specifics in terms of business plans. In my view, this regular practice gave rise to a legitimate expectation that issues would not be taken with the

level of specificity of business plans, and that evidence of ability and intention to become self-employed in Canada included only the filing of only general level business plans for the specific activity type. This legitimate expectation was not carried over to the Warsaw visa post, which rejected a great number of Iranian SE applications based in whole or part on perceived inadequacies of business plans filed in support of ability and intent.

[113] Examples of new and often fatal criteria in "the case to meet" imposed on these Iranian applicants include:

> a) "the business plan provided by her includes very high-level, general, open source information about the industry in Canada as a whole with only a modest amount of information on Toronto and the surrounding area where subject intends to settle";
>
> b) "Subject provided insufficient evidence to show that she has done in-depth research of the Canadian market, specifically the city of Toronto (her intended destination), in her proposed business activity field and that she has adopted a plan that would reasonably be expected to lead to their future self-employment and penetration of the market in the field of her intended self-employment";
>
> c) "Unclear if, other than listing their information, contacted any of the companies mentioned in the plan to determined demand for his services"; and
>
> d) "Submissions further indicate that primary source of information in the plan was from a market report done by IBIS World and unclear if he validated this for proposed location or undertook any research of his own in proposed business activity".

[114] In my respectful view, adding these new criteria in the assessment processes not only breached the legitimate expectations of applicants, but their sudden imposition deprived

applicants of knowing the case they had to meet and a full and fair chance to respond, contrary to *Canadian Pacific* at para 56.

[115] While I agree the jurisprudence allows visa officers to inquire into business plans in assessing ability and intent, it remains a fact this was *not* pressed by visa officers in Ankara to anywhere near the extent such alleged faults were identified and found fatal by IRCC's Warsaw visa post. Instead, what resulted was a material change in regular practice and procedure per *Baker* at para 26. This resulted in claims being dismissed without the applicants knowing the case they had to meet or having a full and fair chance to respond, as required by *Canadian Pacific* at para 56.

[116] On this basis as well, I have concluded SE applications in respect of Iranians processed in Warsaw should have been treated as they would have been had they been processed in Ankara at least where filed before March 7, 2018, and for a reasonable time thereafter.

[117] Once again, the issue becomes what is a reasonable time. Given the lack of notice, that would depend on the circumstances including whether an applicant was self-represented or used an immigration consultant, and the delays in decision-making for these applications. As noted above, I would expect the consultancy and legal communities to learn of the change at some reasonable time after IRCC's decisions started to reflect the change. It would be longer in the case of self-represented applicants.

[118] Assuming an applicant used an immigration consultant or (legal counsel) I find a reasonable time would be six months after March 7, 2018, such that cases filed with IRCC on or before September 7, 2018 should have been assessed procedurally and substantively in terms of business plans as they had been by the Ankara visa post.

[119] For self-represented applications, I find a reasonable time would be nine months after the change, such that cases filed with IRCC on or before December 7, 2018 should have been assessed procedurally and substantively in terms of business plans as they had been by the Ankara visa post.

VI. Application of the foregoing to the eight test cases

A. *Lead Case 1: IMM-2767-18 (Sanam Nezami Tafreshi)*

[120] The Applicant applied for permanent residence as a self-employed person, seeking to be a basketball "coach and referee" in Canada. She submitted her application on February 24, 2017. She was represented in her application by Mr Parsai. On March 16, 2017, Ankara sent the Applicant a "REQUEST FOR UPDATED DOCUMENTS – BUSINESS CLASS" including a Business Document Checklist of required documents.

[121] On April 11, 2018, the application was refused by the Warsaw visa office because the Officer was not satisfied the Applicant has the intention and ability to become self-employed in Canada and to make a significant contribution to specified economic activities in Canada.

[122] The Officer reviewed the Applicant's submissions and business plan and found that the plan contained very high-level, general open source information about the fitness industry in Canada as a whole with only a modest amount of information on Toronto, where the Applicant intends to settle.

[123] The Officer also negatively considered an email exchange between the Applicant's sister and Clifton Grant, York Region Association of Basketball Officials (YRABO) President. This brief communication states any definitive answer would require a meeting with the applicant in person.

[124] The Officer also noted that no further contacts were made with entities in Canada in order to explore the feasibility of the applicant's intended self-employment. The Officer was not satisfied that the Applicant has the ability and intent to become self-employed in Canada and refused her application.

[125] Her application was filed before the relevant cut off dates for the change from Ankara to Warsaw regarding business plans (September 7, 2018). The assessment of the business plan was not in accord with the general procedures followed by Ankara given the legitimate expectations created by the Ankara practice per *Baker* at para 26, *Agraira* at para 94 and *Canadian Pacific* at para 56.

[126] Therefore, judicial review must be granted.

B. *Lead Case 2: IMM-148-20 (Asghar Hashemi Saracheh)*

[127] The Applicant applied for permanent residence as a self-employed person, seeking to do "Graphic Design and Artistic Painting" in Canada. He submitted his application on July 18, 2019 and was represented in his application by Mr Parsai.

[128] The Applicant was NOT sent a "REQUEST FOR UPDATED DOCUMENTS – BUSINESS CLASS" including a Business Document Checklist of required documents because he was processed by Warsaw. He also did not receive a brief three or four line letter requesting updated documentation from Warsaw.

[129] On November 14, 2019, the application was refused because the Warsaw Officer was not satisfied the Applicant has the intention and ability to become self-employed in Canada and to make a significant contribution to specified economic activities in Canada.

[130] The Officer noted as evidence for his work experience that the Applicant submitted numerous invoices, several contracts and recommendation letters, pension fund statements showing number of insured employees, etc. The contracts identify the Applicant as the manager of a company and the pension fund statement clearly indicate employing graphic designers/print operators and other support staff. However, the Officer found the submissions were insufficient to show he was personally involved in the actual graphic design/printing other than management of the business.

[131] The Officer also reviewed the business plan and was not satisfied that the Applicant has the intention and ability to become self-employed in Canada, noting:

A. the plan includes very general, high-level and open source information about the industry in Canada and specific market information for proposed destination (Toronto) is not apparent in the analysis;

B. it was unclear if he was contacted by any of the companies mentioned in the plan to determine demand for services;

C. it was unclear if he validated the market report done by IBIS World which he heavily relied on for the proposed location or undertook any research of his own in proposed business activity; and

D. the financial projections were not sourced and it was not clear that sales of +200k Cdn with a profit of +80Cdn in the first year indeed realistic.

[132] Overall, the Officer was not satisfied the Applicant has the relevant experience or ability and intent to become self-employed in Canada and refused his application.

[133] This Applicant should have but did not receive a supplementary document request, nor even the three or four line request for documents later sent by Warsaw starting around September, 2020, permitting him to update his circumstances given the legitimate expectations created by the Ankara practice per *Baker* at para 26, *Agraira* at para 94 and *Canadian Pacific* at para 56.

[134] Therefore, judicial review must be granted.

C. *Lead Case 3: IMM-5019-18 (Mehrnegar Harirforoush)*

[135] The Applicant applied for permanent residence as a self-employed person, seeking to be a “Karate Coach” in Canada. She submitted her application on September 23, 2016 and was

represented in her application by Mr Parsai. On July 26, 2017, Ankara sent the Applicant a "REQUEST FOR UPDATED DOCUMENTS – BUSINESS CLASS" including a Business Document Checklist of required documents. Her response was received on September 22, 2017.

[136] On June 13, 2018, the application was refused by the Warsaw office because the Officer was not satisfied the Applicant has the intention and ability to become self-employed in Canada and to make a significant contribution to specified economic activities in Canada.

[137] The Officer noted:

- Applicant did not participate in Karate at a world class level;
- the Applicant's business plan includes very general, high-level and open source information about the industry in Canada and specific market information for city of destination is not apparent in the analysis;
- it was unclear to the Officer if, other than listing their information, the Applicant contacted any of the companies mentioned in the plan to determine demand for her services;
- the Applicant provided insufficient evidence to demonstrate she has done any research in the Canadian market in the proposed business activity or adopted a plan to that would reasonably be expected to lead to future self-employment.

[138] Overall, the Officer was not satisfied the Applicant has the relevant experience or ability and intent to become self-employed in Canada and refused her application.

[139] Her application was filed before the relevant cut off dates both for the change from Manual OP 8 to PDI (February 2, 2017) and for the change from Ankara to Warsaw regarding

business plans (September 7, 2018). The assessment of the business plan was not in accord with the general procedures followed by Ankara. There was a delay of 9 months between receipt of the supplementary document request and refusal. With respect this Applicant did not receive the required procedural fairness given the legitimate expectations created by the Ankara practice per *Baker* at para 26, *Agraira* at para 94 and *Canadian Pacific* at para 56.

[140] Therefore judicial review must be granted.

D. *Lead Case 4: IMM-5020-18 (Navid Farahani)*

[141] The Applicant applied for permanent residence as a self-employed person, seeking to be a “professional athlete” (basketball player) in Canada. He submitted his application on November 16, 2016 and was represented in his application by Mr Parsai. On August 18, 2017, Ankara sent the Applicant a “REQUEST FOR UPDATED DOCUMENTS – BUSINESS CLASS” including a Business Document Checklist of required documents and his response was received on November 15, 2017. He also presented an updated declaration on May 4, 2018 and submitted additional documents on June 26, 2018.

[142] On October 4, 2018, the application was refused by the Warsaw office because the Officer was not satisfied the Applicant has the intention and ability to become self-employed in Canada and to make a significant contribution to specified economic activities in Canada.

[143] The Officer noted that during the 5 years preceding the application, the Applicant had participated in competitions in Iran only and the evidence did not support participation in athletics at the world class level.

[144] The Officer also noted the Business Plan included very general, high-level and open source information about the industry in Canada and a lack of analysis of the specific market conditions in his proposed destination (Toronto). In his business plan, the Applicant listed Canadian clubs such as the Toronto Raptors as a parallel business, stating “there are many Canadian clubs that I can play basketball for or sign a contract with” but there was no evidence he had contacted any of the companies mentioned to determine demand for his services.

[145] Overall, the Officer was not satisfied the Applicant has the relevant experience or ability and intent to become self-employed in Canada and refused his application.

[146] His application was filed before the relevant cut off dates both for the change from Manual OP 8 to PDI (February 2, 2017) and for the change from Ankara to Warsaw regarding business plans (September 7, 2018). The assessment of the business plan was not in accord with the general procedures followed by Ankara. He did not receive the required procedural fairness given the legitimate expectations created by the Ankara practice per *Baker* at para 26, *Agraira* at para 94 and *Canadian Pacific* at para 56.

[147] Therefore judicial review must be granted.

E. *Lead Case 5: IMM-6473-18 (Abdolrasoul Daryoush Karimi)*

[148] The Applicant applied for permanent residence as a self-employed person, seeking to do "Fish & Duck Farming, Animal Farming, Agriculture" in Canada. He submitted his application on January 12, 2017 and was represented in his application by Mr Parsai. On August 23, 2017, Ankara sent the Applicant a "REQUEST FOR UPDATED DOCUMENTS – BUSINESS CLASS" including a Business Document Checklist of required documents and his response was received on October 18, 2017.

[149] On October 20, 2018, a year later, the application was refused because the Officer in Warsaw was not satisfied the Applicant has the intention and ability to become self-employed in Canada and to make a significant contribution to specified economic activities in Canada.

[150] The Officer noted:

- the Applicant's business plan included very general, high-level and open source information about the industry in Canada;
- specific market information for proposed destination (Winnipeg) is not apparent in the analysis;
- other than listing parallel businesses and/or institutions related to the industry unclear if made contact with any of them to determine demand or feasibility of his proposed plan;
- the Applicant's submissions do not indicate he has considered any competition in his proposed field of activity which is a very significant factor or has had exposure to the level of mechanization found in Canadian farming; and
- the Applicant provided insufficient evidence to show he has done in-depth research of the Canadian market, specifically for his intended destination of Winnipeg, in his proposed business activity field or that he has adopted a plan that

> would reasonably be expected to lead to his future self-employment.

[151] Overall, the Officer was not satisfied the Applicant has the relevant experience or ability and intent to become self-employed in Canada and refused his application.

[152] His application was filed before the relevant cut off dates both for the change from Manual OP 8 to PDI (February 2, 2017) and for the change from Ankara to Warsaw regarding business plans (September 7, 2018). The assessment of the business plan was not in accord with the general procedures followed by Ankara. Moreover, given the one year delay since he provided supplementary documents, in my respectful view a further supplementary document request should have been sent. He did not receive the required procedural fairness given the legitimate expectations created by the Ankara practice per *Baker* at para 26, *Agraira* at para 94 and *Canadian Pacific* at para 56.

[153] Therefore judicial review must be granted.

F. *Lead Case 6: IMM-1164-19 (Saied Taghizadeh)*

[154] The Applicant applied for permanent residence as a self-employed person. He declared his present occupation as “wrestling coach” and intended occupation as “anything related to my field of job.” He submitted his application on March 27, 2017 and was represented in his application by Mr Asadi.

[155] The Applicant was NOT sent a "REQUEST FOR UPDATED DOCUMENTS – BUSINESS CLASS" including a Business Document Checklist of required documents because he was processed by Warsaw. He also did not receive a brief three or four line letter requesting updated documentation from Warsaw.

[156] On January 19, 2019, the application was refused because the Warsaw Visa Officer was not satisfied the Applicant has the intention and ability to become self-employed in Canada and to make a significant contribution to specified economic activities in Canada.

[157] The Officer found the business proposal does not make sense because he would be the only coach as well as performing all of the management and office administrative duties required to run the business on a daily basis. Frankly, in my respectful view, this is quite possibly an unreasonable assessment given entrepreneurs often multi-task at least in early stages of their careers.

[158] The Officer also noted:

- The business plan indicates that the Applicant intends to open wrestling club in New Market, Ontario. He intends to use part of his residential property as his office. This space will be leased for $1000 per month would an office and perhaps workshop for wrestling to allow for coaching of 6 persons in the facility;
- All coaching services are to be provided by Applicant. He will be responsible for the management, sales, education and training, highest quality customer service, manage all financial transactions, day to day sales, and accounts payable in addition to coaching;

- The Business Plan includes industry analysis research includes very general information not supported by an evidence of research, unclear where the statistics he provided came from.

[159] Overall, the Officer was not satisfied the Applicant has the relevant experience or ability and intent to become self-employed in Canada and refused his application.

[160] His application was filed before the relevant cut off date of September 7, 2018 for business plans. The assessment of the business plan was not in accord with the general procedures followed by Ankara. He also should have but did not receive a supplementary document request, nor even the three or four line request for documents later sent by Warsaw starting around September 2020, permitting him to up date his circumstances. He did not receive the required procedural fairness given the legitimate expectations created by the Ankara practice per *Baker* at para 26, *Agraira* at para 94 and *Canadian Pacific* at para 56.

[161] Therefore judicial review must be granted.

G. *Lead Case 7: IMM-3166-18 (Ramin Mazaheri)*

[162] The Applicant applied for permanent residence as a self-employed person, seeking to be an "Audio Engineer and Music Producer" in Canada. He submitted his application on August 5, 2016 and was represented in his application by Mr Parsai. On July 21, 2017, Ankara sent the Applicant a "REQUEST FOR UPDATED DOCUMENTS – BUSINESS CLASS" including a Business Document Checklist of required documents and his response was received on September 27, 2017.

[163] On April 26, 2018, the Warsaw visa office refused his application because the Officer was not satisfied the Applicant has the intention and ability to become self-employed in Canada and to make a significant contribution to specified economic activities in Canada.

[164] In reviewing the business plan, the Officer also noted:

- The business plan provided by the Applicant features content of which a significant part has been copied from an industry report prepared by IBISWorld: https://www.ibisworld.ca/industry-trends/marketresearch-reports/information/music-publishing.html;
- This plan includes very general, high-level and open source information about the industry in Canada and specific market information for proposed destination (Toronto) is no apparent in the analysis;
- The Business Plan submitted by the Applicant indicates, “although I plan to eventually plan to establish my own music studio, I can work with these music studios in the beginning.” It was unclear if, other than listing their information, the Applicant contacted any of the companies mentioned in the plan to determine demand for his services;
- In addition, the Business Plan states he “will hire Canadians to work in my studio” which would appear the Applicant does not have the intent or ability to be self-employed.

[165] Overall, the Officer was not satisfied the Applicant has the relevant experience or ability and intent to become self-employed in Canada and refused his application.

[166] His application was filed before the relevant cut off dates both for the change from Manual OP 8 to PDI (February 2, 2017) and for the change from Ankara to Warsaw regarding business plans (September 7, 2018). The assessment of the business plan was not in accord with the general procedures followed by Ankara. He did not receive the required procedural fairness

given the legitimate expectations created by the Ankara practice per *Baker* at para 26, *Agraira* at para 94 and *Canadian Pacific* at para 56.

[167] Therefore judicial review must be granted.

H. *Lead Case 8: IMM-6476-18 (Nahid Heidari)*

[168] The Applicant applied for permanent residence as a self-employed person, seeking to "continue her profession as a tailor and clothing designer in Canada" in Canada. She submitted her application on May 6, 2016 and was represented in her application by Mr Parsai. On March 14, 2017, Ankara sent the Applicant a "REQUEST FOR UPDATED DOCUMENTS – BUSINESS CLASS" including a Business Document Checklist of required documents and his response was received on May 4, 2017.

[169] On December 3, 2018, nineteen months later, the application was refused by the Warsaw office because the Officer was not satisfied the Applicant has the intention and ability to become self-employed in Canada and to make a significant contribution to specified economic activities in Canada.

[170] The Officer found the Applicant did not have relevant experience in a cultural activity. Specifically, the Applicant applied under NOC 5245 Patternmakers which is part of the NOC Major Group 52 "Occupations in art, culture, recreation and sport". However, her experience is in selling dresses, not patterns for dresses and is more closely linked to NOC 6342 "Tailors,

dressmakers, furriers and milliners" which does not fall under the Major Group 52 and is therefore not a cultural activity.

[171] The Officer also found the Applicant's business plan consisted of very general, high-level and open source information about the industry in Canada and specific market information for proposed destination (Toronto) was not apparent in the analysis. It was unclear if, other than listing their information, the Applicant contacted any of the companies mentioned in the plan to determine whether there was a demand for her proposed services.

[172] Overall, the Officer was not satisfied the Applicant has the relevant experience in cultural activities or the ability and intent to become self-employed in Canada and refused his application.

[173] Her application was filed before the relevant cut off dates both for the change from Manual OP 8 to PDI (February 2, 2017) and for the change from Ankara to Warsaw regarding business plans (September 7, 2018). The assessment of the business plan was not in accord with the general procedures followed by Ankara. Moreover, given the 19 month delay since she provided supplementary documents, in my respectful view a further supplementary document request should have been sent permitting her to up date his circumstances. She did not receive the required procedural fairness given the legitimate expectations created by the Ankara practice per *Baker* at para 26, *Agraira* at para 94 and *Canadian Pacific* at para 56.

[174] Therefore judicial review must be granted.

VII. Admissibility of certain reply evidence

[175] At the hearing, the Applicants asked the Court to admit additional evidence to support allegations of bad faith and or reasonable apprehension of bias. While initially I said I would proceed on an "as if" basis and reserve a decision, as the matter unfolded, and then after hearing from counsel for both parties, I concluded the motion would be dismissed, with reasons to follow. These are my reasons.

[176] Some background is necessary. The following is the timeline of relevant filings:

- February 9, 2021: Applicants file Application record [3712 pages]
- May 28, 2021: Respondent files memorandum of argument [59 pages]
- November 15, 2021: Applicants file notice of motion to adduce further evidence in support of allegations of bad faith and reasonable apprehension of bias
- January 13, 2022: Order of Case Management Judge Aalto granting some relief (no longer in issue) but dismissed motion regarding evidence in respect of bad faith and or reasonable apprehension of bias
- May 12, 2022: Applicants file further application record [619 pages] without disputed new evidence
- May 24, 2022: Respondent files supplementary memorandum of argument [25 pages]
- June 6, 2022: Applicants file further reply memorandum [19 pages]

[177] At the hearing, counsel for the Applicants brought an informal verbal motion to appeal the Order of Case Management Judge Aalto dated January 13, 2022. In the interim, counsel had

not sought this from a Judge during general sittings, nor did counsel apply for a special sitting. Counsel did not file a Notice of Motion, a motion record, nor an affidavit in this respect. Therefore, I did not have the materials counsel wished to put into evidence.

[178] However, it became clear the Applicants wished put on the record certain evidence which CMJ Aalto had refused to accept, submitting it was proper reply evidence in support of "pivotal" new issues of bad faith and or reasonable apprehension of bias.

[179] Notably however, the lead application of the eight before me was filed on June 13, 2018 (almost four years ago) and the original Notice of Motion to file this new evidence was filed on November 15, 2021 – nearly two and a half years later. Moreover, this motion comes after cross-examination of the Respondent's witness.

[180] At the hearing, I questioned how I could make a decision overruling the CMJ without the material they wanted me to admit. Counsel for the Applicants argued "complexity of the case" and submitted the CMJ's Order did not respond to submissions.

[181] The Order of the CMJ was made on January 13, 2022. Counsel said the new evidence supports there being a reasonable apprehension of bias, namely the decision makers had a closed mind, proof of which was the speed with which Decisions were made by the Warsaw office. Counsel noted there should be a motion but indicated an inability to obtain instructions from 100+ clients. Counsel pleaded prejudice to the potential bias argument and the uniqueness of this

litigation. Counsel indicated a difficulty meeting the high standard for a finding of bias without this evidence.

[182] In the alternative, counsel asked me to create a new legal principle to allow evidence in reply on a new issue where inability to obtain documents were caused by matters outside their control. Counsel submits the case at hand warrants "special circumstances" and relies on Rule 3 and 55 of the *Federal Courts Rules,* SOR/98-106 and the Court's plenary powers over its procedures:

General principle	**Principe général**
3 These Rules shall be interpreted and applied	**3** Les présentes règles sont interprétées et appliquées:
(a) so as to secure the just, most expeditious and least expensive outcome of every proceeding; and	**a)** de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible;
(b) with consideration being given to the principle of proportionality, including consideration of the proceeding's complexity, the importance of the issues involved and the amount in dispute	**b)** compte tenu du principe de proportionnalité, notamment de la complexité de l'instance ainsi que de l'importance des questions et de la somme en litige.
Varying rule and dispensing with compliance	**Modification de règles et exemption d'application**
55 In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.	**55** Dans des circonstances spéciales, la Cour peut, dans une instance, modifier une règle ou exempter une partie ou une personne de son application.

[183] The Applicants cite to *Amgen Canada Inc. v Apotex Inc.,* 2016 FCA 121 [per Stratas JA] [*Amgen*] for the test for admitting additional affidavits in applications:

> [13] Much guidance can also be found in the case law that has developed under Rule 312 concerning the admission of additional affidavits in applications. Additional affidavits are permitted only where it is "in the interests of justice": *Atlantic Engraving Ltd. v. LaPointe Rosenstein*, 2002 FCA 503, 299 N.R. 244 at paras. 8-9. That means that the Court must have regard to whether:
>
> > • the evidence will assist the court (in particular, its relevance and sufficient probative value);
> >
> > • admitting the evidence will cause substantial or serious prejudice to the other side;
> >
> > • the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence.
>
> (*Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101 at para. 2; *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 88 at para. 6; *House of Gwasslaam v. Canada (Minister of Fisheries & Oceans)*, 2009 FCA 25, 387 N.R. 179 at para 4.) I note that this Court has applied these same factors in deciding whether a reply affidavit should be permitted to be filed in an application for leave to appeal under Rule 355, a rule that, like Rule 369(3), does not explicitly allow reply affidavits: *Quarmby v. National Energy Board of Canada*, 2015 FCA 19.

[184] The Applicants further cite to *Canada (National Revenue) v Edward Enterprise International Group Inc.,* 2020 FC 1044 [per Southcott J] at para 22 to submit this additional evidence results in no detriment to the Minister, suggesting the Respondent had nothing to file in response because they had not filed responding material previously. Moreover, counsel submit paragraph 18 of *Merck-Frosst v Canada (Health)*, 2009 FC 914 is essentially what happened in this case:

> [18] What is required is an analysis of the materials filed and proposed to determine on an objective analysis whether the proposed reply evidence could reasonably have been anticipated as relevant. That was not done in this case as the learned Prothonotary permitted form to rule over substance.

[185] However, the Applicants' filed their further application record on May 12, 2022 – 4 months after the Case Management Judge issued his Order.

[186] The Respondent objected to the filing of new evidence because the lead case was filed on June 13, 2018, and the Applicant prepared a statement of issues in August 2020: bias was not one of them. The Applicant's notice of motion to file further evidence was filed November 15, 2021; the CMJ dismissed the motion January 13, 2022; Applicants' further application record was filed May 12, 2022; the Respondent's supplementary memorandum of argument was filed May 24, 2022; and the Applicants' further reply memorandum was filed June 6, 2022. Therefore, the Respondent submits, and I agree, they were given no proper chance to respond to the Applicants' new issue of bad faith and reasonable apprehension of bias.

[187] Notably, the Respondent submitted no appeal lies from a CMJ's interlocutory Order pursuant to paragraph 72(2)(e) of *IRPA*. Moreover, and I agree, counsel submitted the informal motion constitutes an impermissible attack on the Decision of the CMJ.

[188] In any event, in my view the appeal threshold is very high and considerable deference is owed to case management judges, see *Apotex Inc v Canada (Health),* 2016 FC 776 [per Kane J] at para 13-15, citing to *J2 Global Communications Inc. v Protus IP Solutions Inc.,* 2009 FCA 41:

> [16] It has often been said in this Court that, because of their intimate knowledge of the litigation and its dynamics, prothonotaries and trial judges are to be afforded ample scope in the exercise of their discretion when managing cases: see also *Federal Courts Rules*, rules 75 and 385. Since this Court is far removed from the fray, it should only intervene in order to prevent undoubted injustices and to correct clear material errors. None have been demonstrated here. On the contrary, Prothonotary Tabib's order seems to me a creative and efficient solution for moving along litigation that appears to have become bogged down.

[189] For these reasons, I dismissed the motion to adduce new evidence.

VIII. Basis on which redetermination is to take place

[190] The Applicants asked that if judicial review is granted, the Court order that visa officers conducting redeterminations should only consider case law available at the time of the applicant's original filing (2016 to early 2017, with the exception of test case number 2: *Asghar Hashemi Saracheh v Canada (Minister of Citizenship and Immigration)*) because recent cases have "suddenly established it is reasonable for officers to expect significant pre-establishment efforts and/or detailed costing projections in their business plans".

[191] As noted earlier in these Reasons, Warsaw visa officers departed markedly from Ankara's practice and began to rely upon a number of new and detailed grounds on which SE applications might be refused, often using identical or very similar language from one case in another. I agree with the Applicant that the redeterminations to take place as ordered herein should not simply apply those same bases for rejection: that would defeat the Court's broader objective which is expressed in the Judgment herein requiring "redetermination on the basis of the legitimate expectations of the parties identified in these Reasons".

[192] I should not need to say more, and am confident counsel will work out the details in good faith and in each case.

IX. Conclusion

[193] In my respectful view, the Applicants have demonstrated a breach of their right to procedural fairness. Judicial review must therefore be granted to the eight test cases. The cases are to be determined on the basis of the legitimate expectations identified in these reasons.

[194] I will remain seized of the 102 remaining cases in Schedule A in the event disputes arise with respect to the implementation of this Judgment; the said 102 remaining cases are to be considered for redetermination guided by and in accordance with the Reasons for Judgment reasons in the eight test cases where possible, to which end counsel are to discuss and where possible agree on a disposition and advise me accordingly, except where after good faith discussions no agreement is reached, in which counsel are to submit their differences to me.

X. Certified Question

[195] The Applicants submitted the following questions for certification:

> 1. Where the requirements for eligibility in an administrative scheme are not provided in the publicly available regulations, operational directions, document checklist, applicant's guide, and forms, does the Respondent owe a duty of procedural fairness to inform an applicant of them prior to making a determination?
>
> 2. Where an administrative decision maker has adhered to a particular process and procedure in its assessment of an applicant's eligibility for an administrative scheme, does the

> duty of procedural fairness require that the decision maker give notice of a change in that process to prospective applicants?

[196] The Respondent did not propose certification of a serious question of general importance, and opposed the Applicants' questions because the questions are arguments and not dispositive.

[197] In my respectful view, these eight test cases involve the application of settled law to the circumstances of each case. I therefore decline to certify a question of general importance in this case. The questions proposed and those underlying these cases have already been asked and answered in the jurisprudence, specifically by the Supreme Court of Canada in *Baker* and *Agraira* and by the Federal Court of Appeal in *Canadian Pacific*. See also *Mahjoub (Re),* 2017 FC 334.

XI. Costs

[198] The Applicants request costs of $25,000.00 (plus HST) for fees plus $24,667.93 in disbursements (including taxes). Their solicitor client bill in this case would be $166,369.93 which only includes $141,702.00 in fees (representing 66% of total solicitor client fees) plus the $24,667.93 in disbursements. Based on Column 5 of Tariff B, fees would total $18,400.00 before taxes. I agree Column 5 is an appropriate reference point in this case, see *Geza v Canada (Minister of Citizenship and Immigration),* 2004 FC 1039,but would increase it to the amount requested in the circumstances including a four day hearing, the *ATIP* evidence, and the number of cases. I appreciate some disbursements reflects costs of printing some material from some of

the other 102 case managed cases, but and with respect, I am not persuaded these claims are unreasonable.

[199] Rule 22 of the *Immigration Rules* provides no costs shall be awarded unless there are special reasons to do so. The threshold for an award of costs for special reasons is high, see *Park v Canada (Public Safety and Emergency Preparedness),* 2021 FC 786 [per Southcott J], citing to *Balepo v Canada (Citizenship and Immigration)*, 2017 FC 1104 [per Boswell J] at para 35-41. In my view, these Applicants have met the high threshold for an award of costs.

[200] I agree with the Applicants these cases are indeed “unusual circumstance of litigation”, constituting “special reasons” to award of costs, citing Justice Snider’s Order in *Chirmatsion v Canada (Citizenship and Immigration),* 2011 FC 773:

> [4] The first – and most significant – special reason is the context of the four lead cases. These cases were representative of more than 40 cases that were held in abeyance pending the disposition of the judicial review applications in the four lead cases. I have recently been advised that the Minister has consented to judgment in all of the remaining cases. Without the need for further litigation, all remaining cases will be sent back for reconsideration. In the unusual circumstances, the careful selection and preparation of the four lead cases obviated the need for extensive preparation and further litigation costs for both parties in respect of the remaining files. This context supports an award of costs.

[201] In my view, reasonable costs payable by the Respondent to the Applicants are as proposed by the Applicants and I will so Order.

JUDGMENT in IMM-2767-18, IMM-148-20, IMM-5019-18, IMM-5020-18, IMM-6473-18, IMM-1164-19, IMM-3166-18, IMM-6476-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted in each of the eight test cases, namely SANAM NEZAMI TARFESHI v MCI (IMM-2767-18); ASGHAR HASHEMI SARACHEH v MCI (IMM-148-20); MEHRNEGAR HARIRFOROUSH v MCI (IMM-5019-18); NAVID FARAHANI v MCI (IMM-5020-18); ABDOLRASOUL DARYOUSH KARIMI v MCI (IMM-6473-18); SAEID TAGHIZADEH v MCI (IMM-1164-19); RAMIN MAZAHERI v MCI (IMM-3166-18); AND NAHID HEIDARI v MCI (IMM-6476-18), the decision under review in each is set aside, and each is remanded to a different decision-maker for redetermination on the basis of the legitimate expectations of the parties identified in these Reasons.

2. Notwithstanding the generality of the foregoing, each Applicant on each of the said redeterminations shall be provided with a supplementary document request and a checklist of additional documents in the manner and form provided by IRCC's Ankara visa post prior to the transfer of processing of these matters to IRCC's Warsaw visa post, to which requests each Applicant shall be given 90 days to respond.

3. In addition, the said redeterminations shall each be completed within 90 days of receipt of responses by the Applicants to the said supplementary and additional document requests, unless further concerns arise in respect of which the decision-

maker may requests additional information, to be supplied within a reasonable time.

4. The Respondent shall pay to the Applicants $25,000.00 (plus GST) for fees and in addition $24,667.93 (inclusive of taxes) for disbursements, as the Respondents all-inclusive cost award.

5. No serious question of general importance is certified.

6. I will remain seized of the 102 remaining cases in Schedule A should disputes arise with respect to the implementation of this Judgment; the said 102 remaining cases are to be disposed of in accordance with these Judgment and Reasons where possible and applicable, to which end counsel are to discuss and where possible agree on a disposition and advise me accordingly, except in a case or cases where after good faith discussions no agreement is reached, in which case counsel are to submit their differences to me.

7. A copy of these Judgment and Reasons shall be placed in each Court file identified in Schedule A hereto.

"Henry S. Brown"

Judge

SCHEDULE A

DOCKET #		STYLE OF CAUSE
1.	IMM-3162-18	MINA PEZESHKI v MCI
2.	IMM-3163-18	MALEKMOHAMMAD TAVANA v MCI
3.	IMM-3167-18	SARA MONADIZADEH v MCI
4.	IMM-3168-18	BHEROOZ LOTFIPOUR v MCI
5.	IMM-3568-18	LEILA SADEGHI SOLOUJEH v MCI
6.	IMM-3569-18	MAHDI NEJADAKBARI MAHANI v MCI
7.	IMM-3570-18	DAVOOD MORADI v MCI
8.	IMM-3571-18	SHOKOUFEH FALLAH v MCI
9.	IMM-3572-18	MASOUD MORADI v MCI
10.	IMM-3573-18	SEYED JALAL HOSSEINI v MCI
11.	IMM-3574-18	NEDA GHOBADIHAFSHEJANI v MCI
12.	IMM-3575-18	SAEED MORADI v MCI
13.	IMM-3576-18	SEYED AMIR RAHMANYAN v MCI
14.	IMM-3577-18	MOHAMMADHOSSEIN EGHBAL v MCI
15.	IMM-3578-18	MASOUD FATEHAIN v MCI
16.	IMM-3579-18	ASAL HOOSHMANDGHOMI v MCI
17.	IMM-3580-18	EDRIS MORADI v MCI
18.	IMM-3581-18	ELHAMALSADAT SAJADI v MCI
19.	IMM-3583-18	GHAZALEH SAHRAEI KHANGHAH v MCI
20.	IMM-3584-18	FATEMEH MEMAR v MCI
21.	IMM-5016-18	SARA KESHAVARZI v MCI
22.	IMM-5017-18	MAHSA SADAT KHATAMI v MCI

DOCKET #		STYLE OF CAUSE
23.	IMM-5018-18	MASOUMEH MASOUDI TAREMSARI v MCI
24.	IMM-5552-18	ALI BABAESFAHANI v MCI
25.	IMM-5555-18	MEHRDAD DARYOUSH KARIMI v MCI
26.	IMM-5556-18	RAMIN GALESHI v MCI
27.	IMM-5557-18	MASOUD POURREZA v MCI
28.	IMM-5558-18	BAHAREH TAVAKOLI GHEINANI v MCI
29.	IMM-5559-18	ROKHSAR MOUSAVINEZHAD v MCI
30.	IMM-5561-18	SEYEDJAMALEDDIN MOKHTARI RANG AMIZ v MCI
31.	IMM-5562-18	SHIVA HAGHGOSHA v MCI
32.	IMM-6016-18	ZOYA TAVAKOLII v MCI
33.	IMM-6017-18	HAMED POOYAN v MCI
34.	IMM-6018-18	SHAGHAYEGH MORADIANNEJAD v MCI
35.	IMM-6021-18	LEILA KHOSHSOWLAT v MCI
36.	IMM-6475-18	AFSHIN PARTOVI AZAR v MCI
37.	IMM-6478-18	SOMAYEH DADPEY v MCI
38.	IMM-51-19	SIRANOUSH AKHGARANDOUZ v MCI
39.	IMM-1421-19	LEILA ROOHBAKHSH v MCI
40.	IMM-1422-19	ALI MEHRVARZ v MCI
41.	IMM-1423-19	MOHSEN OLYAEI v MCI
42.	IMM-1424-19	MOZGHAN TALIAN NIKSEFAT RASHTI v MCI
43.	IMM-1425-19	MAHSHID POORSARTIP v MCI
44.	IMM-1426-19	MAHMOUD AGHAAMADI v MCI
45.	IMM-1427-19	SAMINEH SARVGHAD BATTN MOGHADAM v MCI

DOCKET #		STYLE OF CAUSE
46.	IMM-1441-19	AMIRPOUYAN BIKLAR v MCI
47.	IMM-1862-19	MINOO IRANPOUR MOBARAKEH v MCI
48.	IMM-2402-19	SAMANEH NAJAFI v MCI
49.	IMM-2688-19	MOHSEN AHMADI v MCI
50.	IMM-2689-19	BEHZAD KHEIRY v MCI
51.	IMM-2691-19	SEYED MOHAMMAD ALI HOSSEINI NASAB v MCI
52.	IMM-2694-19	HOORAD GORJI v MCI
53.	IMM-2696-19	IRAJ DASHTIZADEH v MCI
54.	IMM-3501-19	ALIREZA SHAFIEI ROUDHENI v MCI
55.	IMM-3502-19	FERESHTEH MARDANEH v MCI
56.	IMM-3867-19	RAMIN DEHNAVI v MCI
57.	IMM-3868-19	SEPIDEH KASIRIAN v MCI
58.	IMM-3869-19	SAMAN SAMANDAR v MCI
59.	IMM-3870-19	REZA POURRAZAVI v MCI
60.	IMM-4104-19	MOHAMMADREZA AZIZI v MCI
61.	IMM-4996-19	ALIREZA GHASEMIAN v MCI
62.	IMM-4997-19	SHAYESTEH EBRAHIMI v MCI
63.	IMM-5258-19	MOHAMMADBAGHER GHANBARI v MCI
64.	IMM-5866-19	ALIREZA KHAGHANI v MCI
65.	IMM-7214-19	ZAHRA IRANPOUR v MCI
66.	IMM-144-20	MEHDI BEHROUZI VAJARI v MCI
67.	IMM-145-20	AFSHIN DEHGHANI v MCI
68.	IMM-146-20	FARHAD ALIZADEH PIRAGHAJI v MCI

DOCKET #		STYLE OF CAUSE
69.	IMM-147-20	ROZ FATHI v MCI
70.	IMM-149-20	SAEED AGHAI v MCI
71.	IMM-152-20	ELHAM KAZEMI v MCI
72.	IMM-154-20	ALIREZA VAFAEE HOSSEINI v MCI
73.	IMM-2989-20	VAHID ZARRABI NASAB v MCI
74.	IMM-3668-20	MARJAN SADEGHI ZAHED v MCI
75.	IMM-5349-20	MILAD BAGHERI v MCI
76.	IMM-1134-21	ALIAKBAR MEHRAZAD v MCI
77.	IMM-1348-21	MASOUD ASGHARNEZHADNAMINI v MCI
78.	IMM-1738-21	MASOUD HASHEMIKHAHMASOULEH v MCI
79.	IMM-1739-21	REZA RAFIE v MCI
80.	IMM-2464-21	NARIMAN PIRASTEH BOROUJENI v MCI
81.	IMM-2470-21	BAHRAM HOSSEINZADEH FIROUZI v MCI
82.	IMM-2597-21	ALIREZA SALEHNIA v MCI
83.	IMM-2864-21	SASAN SALASALI v MCI
84.	IMM-2867-21	BEHNAZ BEHNAM NIA v MCI
85.	IMM-2971-21	MEYSAM KHATAMINIA v MCI
86.	IMM-2972-21	MAJID KOLIVAND v MCI
87.	IMM-3014-21	FARIDEH AMINROAYAYEJAZEH v MCI
88.	IMM-3630-21	EHSAN SHOKROLLAHI v MCI
89.	IMM-3631-21	ARTA DOKHT ZAHEDI v MCI
90.	IMM-3768-21	KEYVANI v MCI
91.	IMM-4068-21	MODARESSI YAZDI v MCI

DOCKET #		STYLE OF CAUSE
92.	IMM-8239-21	POURAZARY DIZAJY v MCI
93.	IMM-9216-21	ZAKERAMELI RENANI v MCI
94.	IMM-9651-21	BORNA v MCI
95.	IMM-3367-22	NAZANIN KHOSRAVI v MIRCC
96.	IMM-3695-22	MOHAMMAD NASLESOHRAB v MCI
97.	IMM-4139-22	AHMAD KIA v MCI
98.	IMM-4248-22	AYOOB KHODAVERDIANDEHKORDI v MCI
99.	IMM-5469-22	NAFISEH SAADATI v MCI
100.	IMM-3731-22	HAMED HASSANI v MCI
101.	IMM-5278-22	SHIVA JAHANI GOLBAR v MCI
102.	IMM-5525-22	SEYED MILAD RAVANSHID SHIRAZI v MCI

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2767-18 AND OTHERS
STYLE OF CAUSE:	SANAM NEZAMI TAFRESHI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	JUNE 13-16, 2022
JUDGMENT AND REASONS:	BROWN J.
DATED:	JULY 22, 2022

APPEARANCES:

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Kareena Wilding	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT