Federal Court  Cour fédérale

Date: 20200128

Docket: IMM-206-19

Citation: 2020 FC 151

Ottawa, Ontario, January 28, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

YUNPENG WENG

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Yunpeng Weng, is seeking judicial review of a visa officer's decision [the Decision], dated November 9, 2018, denying his application for permanent residency as a member of the self-employed persons class.

[2] The Applicant submits that the visa process was tainted by procedural fairness issues related to the interpretation services offered, the visa officer's decision to grant an interview, and the visa officer's conduct during the interview. The Respondent argues that the interpretation shortcomings are largely the fault of the Applicant, that the Applicant was offered a chance to respond to concerns about his application, and that the Applicant was treated fairly during the visa interview. The Respondent also argues that an affidavit in support of the Applicant's application for judicial review should not be considered because it is overly argumentative.

[3] For the reasons set out below, I would allow the present application for judicial review. In short, the visa officer expressed concerns that the Applicant was evading the payment of taxes prior to even receiving and reviewing additional information which the Applicant offered to obtain, information which the visa officer was convinced would in any event be fraudulent. The visa officer's conduct constituted a breach of the rules of natural justice.

II. Background

[4] On October 6, 2017, the Applicant completed his application for permanent residency. The application was received on December 11, 2017, and a letter confirming receipt of the application was sent to the Applicant on April 9, 2018.

[5] On July 26, 2018, a letter was sent to the Applicant requesting documentation to establish that the Applicant had relevant experience within the five-year period immediately preceding the date of application, and that the Applicant has the ability to be self-employed in Canada; both are

requirements under subsection 88(1) and section 100 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[6] On September 3, 2018, the immigration consultant retained by the Applicant [the Consultant] submitted documentation, including a USB key which contained, amongst other things, photos of the Applicant's latest exhibition, photos of the Applicant's involvement in certain cultural activities and a copy of an art museum certificate. The documentation also included photos and bio-data of the Applicant and his family, original police certificates, and updated immigration forms.

[7] On September 4, 2018, the Immigration Section of Immigration, Refugees and Citizenship Canada requested evidence pertaining to the Applicant's experience as a self-employed person and ability to be self-employed in Canada.

[8] On September 13, 2018, a visa officer reviewing the application noted concerns about the Applicant's period of self-employment preceding the date of application, and the Applicant's ability to find employment opportunities in Canada.

[9] In a letter dated October 10, 2018, the Consulate General of Canada in Hong Kong called the Applicant to an interview. The letter specified that the "interview [would] be conducted in English or French." The letter also stated the following (in bold text): "[i]f you require an interpreter in any other dialect or language — including Mandarin and Cantonese — it is your responsibility to arrange for a competent, professional and impartial interpreter to be present for

the interview." The letter included a list of three "suggested" interpreter services in the Hong Kong area.

[10] On November 8, 2018, the Applicant was interviewed at the Consulate General of Canada in Hong Kong. During the interview, an interpreter was present to assist the Applicant. After the visa officer expressed doubts about the quality of the interpretation, the interview was suspended and the Applicant returned later that same day with another interpreter to complete the interview.

III. The Decision Under Review

[11] On November 9, 2018, a visa officer of the Consulate General of Canada in Hong Kong refused the Applicant's visa application because he did not satisfy the regulatory requirements of a self-employed person. The Decision stated the following, amongst other things:

> I am satisfied that you are an artist and you have been working full-time as a museum director in the [People's Republic of China], receiving a salary since 2012. You are, however, unable to submit satisfactory proof of sales of your artwork in the recent years. I am not satisfied that you are able to demonstrate that you have the relevant experience working as a self-employed person for at least 2 years, from within the 5 years prior to submitting your immigration application up until the present. You are also unable to submit satisfactory evidence to prove that you have made sufficient effort to learn about your job opportunities and your prospects in Canada as a self-employed person. Therefore, based on all documentation and information available, I am also not satisfied that you have the intention nor the ability to become a self-employed person in Canada and make significant contribution to the cultural activities.
>
> After careful consideration of the information on your application and your statements at interview, I am not satisfied that you have established that you have relevant experience, or that you have the ability and intent to make a significant contribution to specified

> economic activities in Canada. I am therefore not satisfied that you meet the definition of a self-employed person as found in subsection 88 (1) of the [IRPR].
>
> [Emphasis added.]

[12] The Applicant seeks judicial review of the Decision.

IV. Preliminary Issue

[13] In support of his application for judicial review, the Applicant filed an affidavit executed by the Consultant. The Respondent argues that this affidavit contains arguments and opinion and should not be considered during this case.

[14] The affidavit in question contains several paragraphs that are opinionated and better suited to written representations. The affidavit in question contains claims that the visa process is unfair and unclear. In essence, the affidavit is a reiteration of the Applicant's arguments and his counsel's assessment of the evidence in the Certified Tribunal Record. The Consultant was not present at the hearing before the visa officer in Hong Kong. This information is, therefore, not information that is within the personal knowledge of the deponent.

[15] Because of the opinionated and argumentative nature of the affidavit, I give no weight to the affidavit, save for paragraphs 1 to 6, and 18 to 19.

V. Issues

[16] This application for judicial review raises three issues:

(1) Did the issues with the interpretation constitute a breach of procedural fairness?

(2) Did the visa officer err in not requesting additional documents or addressing concerns over the documents prior to calling the Applicant to an interview?

(3) Did the visa officer's conduct during the interview constitute a breach of procedural fairness?

VI. Standard of Review

[17] In additional submissions made following *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the parties agree that the visa officer's decision is reviewable on a reasonableness standard. The Applicant argues that the reasonableness standard applies because the issues of this case result from the visa officer's misapprehension of the evidence. The Respondent argues that there is no reason to depart from the presumptive standard of review of reasonableness.

[18] I do not agree with the parties. Consistent with this Court's recent post-*Vavilov* jurisprudence, I do not interpret *Vavilov* in a manner so as to supersede previous jurisprudence on the applicable standard of review for the types of procedural fairness questions raised by the case at bar (*Vavilov* at para 23; *Ntamag v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 40 at para 7; *Trboljevac v Canada (Citizenship and Immigration)*, 2020 FC 26 at para 29; *Adnani v Canada (Citizenship and Immigration)*, 2020 FC 21 at para 12).

[19] The issues of this case engage with the principles of procedural fairness, and are therefore reviewable on a correctness standard of review. As the Supreme Court of Canada determined in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, the correctness standard applies to issues of procedural fairness (see also *Lawal v Canada (Citizenship and*

Immigration), 2008 FC 861 at para 15; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100; *Jin v Canada (Citizenship and Immigration)*, 2008 FC 1129 at para 13; *Bahr v Canada (Citizenship and Immigration)*, 2012 FC 527 at para 15; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 53; *Zingano v Canada (Citizenship and Immigration)*, 2011 FC 1243 at para 23 [*Zingano*]).

[20] The level of procedural fairness owed to a visa applicant is generally viewed as being more relaxed, considering the nature of the administrative process for visa applications (*Haider v Canada (Citizenship and Immigration)*, 2018 FC 686 at para 12; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1381 at para 37; *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 465 at para 21 [*Zhou*]).

[21] However, the Federal Court of Appeal recently dealt with the issue of the standard of review for procedural fairness issues. In *Lipskaia v Canada (Attorney General)*, 2019 FCA 267, in the context of the revocation of a passport, Madam Justice Rivoalen stated the following:

> [14] On questions involving procedural fairness, it is useful to turn to the decision of this Court in *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2018] F.C.J. No. 382. This Court noted that "[a] court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances" and that "[a]ttempting to shoehorn the question of procedural fairness into a standard of review analysis is [. . .] an unprofitable exercise." (at paragraphs 54-55). Although historically referred to as a review on a correctness standard, questions of procedural fairness are not decided according to any particular standard of review. Rather, it is a legal question to be answered by the Court. In assessing procedural fairness, the Court has to be satisfied that procedural fairness has been met.

VII. Analysis

(1) *Did the issues with the interpretation constitute a breach of procedural fairness?*

[22] The Applicant, who speaks primarily Mandarin, arrived at the interview on November 8, 2018, accompanied by an English-speaking interpreter to assist with the interview.

[23] From the interview notes, we see almost immediately upon the commencement of the interview that the visa officer noted a problem with the quality of the interpretation. The visa officer stated that she was not satisfied with the quality of the interpretation and cast doubt on the ability of the individual to act as an interpreter. She advised the Applicant that the interview would be suspended, and that he should return with another interpreter.

[24] The interpreter asked for a second chance; the visa officer agreed but made it clear that the quality of the interpretation had to improve, otherwise the interview would be suspended.

[25] The quality of the interpretation did not improve to the satisfaction of the visa officer, who therefore suspended the interview. The visa officer wrote the following in her interview notes: "[I] advised [the Applicant] that if he is unable to come back before 3pm with another interpreter, we will have to reschedule his interview to another date." The Applicant returned approximately 30 minutes later with a new interpreter; the interview continued.

[26] The Applicant submits that the substandard interpretation during the November 8, 2018 interview constituted a denial of procedural fairness. According to the Applicant, the visa officer should have ended the interview immediately after the first sign of trouble with the interpretation

and found a new interpreter, rather than offer the same interpreter a second chance. Instead, the Applicant answered questions regarding his tax status and other substantive issues after the perceived interpretation issue. The Applicant also suggested that because the Immigration, Refugee and Citizenship Canada website provides a list of companies that provide interpretation services, the responsibility of ensuring quality interpretation somehow rests with the Government of Canada.

[27] The Respondent argues that the visa officer was diligent and acted as soon as there were issues with the interpretation. The Respondent further argues that the alleged interpretation issues were largely of the Applicant's own doing because the Applicant was ultimately responsible for selecting an interpreter and the Applicant did not object to inadequate interpretation at the earliest possible moment. The Respondent also notes that the Applicant failed to identify a specific error in the interpretation.

[28] I agree with the Respondent. First, this Court has consistently maintained that it is the visa applicant's responsibility to arrange for interpretation services (*Baloul v Canada (Citizenship and Immigration)*, 2011 FC 1151 at para 21; *Kazi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 733 at paras 16-18; *Grabowski v Canada (Citizenship and Immigration)*, 2011 FC 1488 at para 18).

[29] The October 10, 2018 letter clearly indicates that the Applicant was responsible for ensuring adequate interpretation for the interview, and the fact that the Immigration, Refugee and Citizenship Canada website may offer a list of suggested interpretation companies does not

suggest that it takes responsibility for the service quality of such companies. Here, it was the Consultant who arranged for the interpretation, and it is not even clear whether the services retained were provided by a company that was even on the list in the October 10, 2018 letter to the Applicant or on the Immigration, Refugee and Citizenship Canada website.

[30] During the interview, the visa officer acted quickly and responsibly once the problem with the quality of the interpretation was noted. At that point, the discussion was strictly preliminary. The visa officer's decisions to offer a second chance to the interpreter and then to request a new interpreter does not discharge the Applicant of the burden to ensure proper interpretation services.

[31] In addition, a copy of a verbatim transcript of the interview has not been produced, so I cannot assess the quality of the interpretation. What has been submitted are the visa officer's GCMS system notes of the interview. As such, the Applicant has not identified a specific interpretation deficiency or an interpretation error that has caused him prejudice.

(2) *Did the visa officer err in not requesting additional documents or addressing concerns over the documents prior to calling the Applicant to an interview?*

[32] I should note that a visa officer does not have the duty to inform an applicant of concerns related to an application in advance of an interview. The applicant has the burden to make his or her case, and to provide evidence that satisfies the visa officer that the requirements of the legislation have been complied with (*Obeta v Canada (Citizenship and Immigration),* 2012 FC 1542 at para 25; *Singh v Canada (Citizenship and Immigration),* 2012 FC 855 at para 32 [*Singh* (FC) 2012]; *Hassani v Canada (Citizenship and Immigration),* 2006 FC 1283

at paras 23-24 [*Hassani*]; *Ahmed v Canada (Citizenship and Immigration)*, 2013 FC 1083 at para 31; *Singh v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 84 at para 29 [*Singh* (FC) 2018]).

[33] During the November 8, 2018 interview, the visa officer requested evidence of the artwork sales and of the taxes paid in respect thereof.

[34] As to the evidence of the sales, the Applicant provided a compilation of artwork sales, as well as corresponding prices. On the basis of the exchanges reflected in the visa officer's interview notes, a comparison of the compilation of artwork sales in the Certified Tribunal Record and the compilation of artwork sales in the Applicant's application material, it seems to me that the compilation of artwork sales before the visa officer was incomplete, as it was missing the first three pages, including an explanatory heading. The page with the heading seems to have been missing from the document submitted by the Consultant as part of the Applicant's visa application, which prompted questions from the visa officer.

[35] More importantly, the visa officer requested evidence that sales tax had been paid on the sale of the artwork. The Applicant replied as follows:

> I don't have them. Matters concerning sales of my artwork are dealt with by the art galleries and by my own assistant.

[36] The interview notes show that the visa officer had reviewed the Applicant's documents prior to the interview. As a result, the Applicant submits that the visa officer should have requested further clarification and evidence of the payment of sales tax on the sale of the artwork

prior to proceeding with an interview, which would have thus allowed the Applicant to better prepare for the interview.

[37] It seems to me that the very reason why visa applicants hire consultants is to foresee what documents may be required and to prepare them for their visa interviews.

[38] Immigration, Refugees and Citizenship Canada provides operational guidelines for the processing of visa applications. Operational Manual OP 8 – Entrepreneur and Self-Employed [OP 8] concerns the overseas processing of entrepreneur and self-employed visa applications. These guidelines are used by visa officers in assessing applications in the context of Canada's business immigration program, which includes self-employed persons. The OP 8 guidelines in particular have been accepted by this Court as a source for interpreting the operational procedures of the visa application process (*Ding v Canada (Citizenship and Immigration)*, 2010 FC 764 at para 10; *Mohitian v Canada (Citizenship and Immigration)*, 2015 FC 1393 at paras 19-22). I quote the relevant portions of OP 8 in the appendix to this judgment.

[39] Section 5.5 of OP 8 lays out the interview process. It is clear from reading this section that personal interviews are the rule, save for when a visa officer is able to make a determination as to the eligibility of an applicant based solely on the provided documentation. If the visa officer cannot make a determination based solely on the submitted documentation, it seems to me that an interview should take place.

[40] The Applicant is in effect asking this Court to dictate new terms to an existing regulatory process. The visa process does not require the visa officer to request specific documents or offer further chances to supplement evidentiary deficiencies unless under certain circumstances the provided documents are questioned on the basis of their credibility, accuracy, or genuineness.

[41] On this point, it is important to clarify each actor's obligations in the visa application process. The Applicant has the burden to show that he has the ability to be self-employed and make a significant contribution to Canada (*Singh* (FC) 2018 at para 29; *Pacheco Silva v Canada (Citizenship and Immigration)*, 2007 FC 733 at para 20). The Federal Court has consistently held that the visa officer is not required to alert the applicant of his or her concerns if the concerns are the result of insufficient evidence (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 465 at para 28; *Bar v Canada (Citizenship and Immigration)*, 2013 FC 317 at para 26 [*Bar*]; *Singh* (FC) 2012 at para 32). The duty to seek further clarification is not triggered if the visa applicant provides inadequate evidence (*Perez Enriquez v Canada (Citizenship and Immigration)*, 2012 FC 1091 at paras 26-27 [*Enriquez*]).

[42] In this case, the Applicant received multiple letters asking him to supplement the application with pertinent evidence of his previous self-employment and job prospects in Canada. The visa officer granted the Applicant an interview to address concerns about the visa application. While a duty to clarify may have arisen in this case, the visa officer discharged this duty by asking questions at the interview (*Enriquez* at para 26). For these reasons, I do not see anything unreasonable in the visa officer's decision to grant the Applicant an interview prior to

seeking further documents from the Applicant or alerting the Applicant to the fact that more information may be sought at the interview.

[43] The Applicant submitted a series of previous decisions of this Court on the obligation of procedural fairness where the credibility of an applicant's documents are at issue. The Applicant cites this Court's decision in *Madadi v Canada (Citizenship and Immigration)*, 2013 FC 716 [*Madadi*], where Mr. Justice Zinn states the following at paragraph 6:

> The jurisprudence of this Court on procedural fairness in this area is clear: Where an applicant provides evidence sufficient to establish that they meet the requirements of the Act or regulations, as the case may be, and the officer doubts the "credibility, accuracy or genuine nature of the information provided" and wishes to deny the application based on those concerns, the duty of fairness is invoked: *Perez Enriquez v Canada (Citizenship and Immigration)*, 2012 FC 1091 at para 26; See also among many decisions *Patel v Canada (Citizenship and Immigration)*, 2011 FC 571; *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264; *Farooq v Canada (Minister of Citizenship and Immigration)*, 2013 FC 164; and *Ghannadi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 515.
>
> [Emphasis added.]

[44] I agree with Mr. Justice Zinn; however, in *Madadi*, the issue was not the sufficiency of the documents but rather the genuineness of the documents. Here, it is a matter of sufficiency. Evidence of the payment of taxes on the sale of the Applicant's artwork had not been submitted, hence the enquiry by the visa officer as to whether the Applicant had such evidence with him.

[45] I can, therefore, not see how there was a failure of procedural fairness by the visa officer in not alerting the Applicant in advance of the interview to the fact that a request would be made for evidence of sales tax having been paid on the sale of his artwork.

(3) *Did the visa officer's conduct during the interview constitute a breach of procedural fairness?*

[46] The Applicant submits that the visa officer accused him of tax fraud without cause. The Respondent submits that there is no evidence of bias on the part of the visa officer. The visa officer merely observed that the Applicant provided insufficient documentation and did not provide evidence of sales taxes paid on his artwork. The Respondent argues that a reasonable person would not conclude that these decisions constitute evidence of bias.

[47] According to the Respondent, the visa officer's conclusions are based on the insufficient evidence provided by the Applicant, and the Respondent cites *Wei v Canada (Citizenship and Immigration)*, 2019 FC 982, as a case similar to the one before me, where the subject matter of the application for judicial review involved the decision of an immigration officer to refuse an application for permanent residence under the self-employed person class.

[48] In the case before me, however, I do not think the matter is that simple. The present case involves a visa officer who was too quick to jump to a conclusion and refused an opportunity to correct that conclusion.

[49] Here, the Applicant provided the compilation showing the recent sales of his artwork, as well as corresponding sale prices. The visa officer then raised concerns as to whether the Applicant was paying taxes on his artwork sales. According to the visa officer's notes, their interaction proceeded as follows:

- Visa officer: are you artist?
- Applicant: yes

- Visa officer: do you sell your artwork?

- Applicant: yes

- Visa officer: can you show me evidence of you having sold your artwork from 2012 to now?

[. . .]

- Applicant: this list was prepared by my immig (sic) consultant and they did not do a good job.

[. . .]

- Visa officer: the prices of these artwork on your list are not exactly inexpensive. May I please see evidence of the sales taxes paid on the sales of your artwork?

- Applicant: I don't have them. Matters concerning sales of my artwork are dealt with by the art galleries and by my own assistant.

- Visa officer: I have concerns that you have evaded taxes in the PRC.

- ([The Applicant] laughed).

- Visa officer: I am not satisfied that you have the ability to properly operate a [self-employed] business in Cda.

[Verbatim, although the underlining is my own.]

[50] At this point, the visa officer noted further problems with the interpretation and suspended the interview. When the Applicant returned 30 minutes later with another interpreter, the interview continued:

- Visa officer: so let's continue.

- Visa officer: tax evasion in Cda is not acceptable. You are unable to provide satisfactory proof of the sales of your artwork from 2012 to 2017.

- Applicant: I have been selling my artwork for 30 yrs thru agents in USA and SPORE [Singapore]. I have a dedicated agent through which I sell my artwork. Matters concerns the

> sales of my artwork are handled by my agents and my own assistant.
>
> - Applicant: I can go back and ask my agents to provide proof of sales of my artwork.
> - Visa officer: you are supposed to bring all docs to this interview to demonstrate your ability to meet the [self-employed] definition. I don't know how reliable are the docs provided by you after the fact. I don't know if sales receipts, sales agreements and other proof of sales will be fabricated after this interview for submission to this office.
> - Applicant: I can provide legal docs provided by my USA and SPORE agents.
>
> [Verbatim, although the underlining is mine.]

[51] I accept that it is certainly within a visa officer's jurisdiction to seek evidence of compliance with local tax laws in the context of a visa application of this type. The visa officer's line of questioning seeks to determine the profitability of the Applicant's self-employment as an artist. Questions as to the provenance of the Applicant's funds and the payment of taxes by the Applicant are legitimate lines of inquiry (section 8.19 of the OP 8).

[52] Although, it is proper for a visa officer to raise concerns over the payment of taxes with an applicant and have that discussion with him or her, it is out of place for a visa officer to jump to the conclusion that any document that the applicant may bring forth is likely to be fraudulent, before even having reviewed such document. The Applicant offered to obtain evidence of the sales from his art agents in the United States and Singapore. Without accepting the offer, or having seen any of these documents, the visa officer suggested that the Applicant was evading taxes, and thus discounted the credibility of any documents to be produced as fraudulent.

[53] Had the Applicant's previous testimony, or any document submitted, lent itself to suspicion of tax evasion, it would have been open to the visa officer to challenge the Applicant on this issue. But here, I can see nothing to suggest that this was the case.

[54] I also accept that a visa officer may rely on his or her own experience in the jurisdiction in which an applicant's application was filed to assess the applicant's application. However, to prejudge evidence, without any review, as fraudulent, in particular when that evidence emanates from countries where fiscal laws are generally respected, seems to me to fall below the normal standard of fairness on the part of the visa officer.

[55] It is one thing to review documents that are submitted and determine that they carry little weight or lack credibility. It is quite another to make these determinations in advance, without having seen the documents, documents that may go to alleviate any concerns of the visa officer as regards the proper payment of taxes by the Applicant.

[56] While the duty of procedural fairness at the visa application stage is low, the visa officer's conduct constituted a breach of procedural fairness. In this case, this breach of procedural fairness touched on core issues related to the visa application, namely, the profitability of the Applicant's artwork, the legitimacy of the Applicant's business operations, the Applicant's ability to operate a business as a self-employed person in Canada, and the Applicant's general credibility.

[57] As Mr. Justice Mosley recognized in *Hassani* at paragraph 24, procedural fairness requires visa officers to address concerns that do not "directly" arise "from the requirements of the legislation or related regulations". These concerns typically arise when "the credibility, accuracy or genuine nature of information submitted by the applicant" is contested (see also *Zingano* at para 66; *Bar* at para 29; *Ekpenyong v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1245 at paras 37-41).

[58] I have also reviewed this matter with the view of determining whether the conduct and attitude of the visa officer were determinative, or whether they could somehow be extracted from the overriding shortcomings of the Applicant's application as regards the sufficiency of the documents.

[59] I find that they cannot be so extracted and thus are determinative of the Decision issued by the visa officer. As a result, I find that this shortcoming is sufficiently significant to warrant juridical review.

[60] In addition, although the Decision itself makes no specific mention of the failure to provide evidence of the payment of sales taxes, it does state that the Applicant was "unable to submit satisfactory proof of sales of [his] artwork in the recent years." My reading of the interview notes along with the Decision leads me to believe that the visa officer confused the lack of proof of sales with the lack of evidence showing the payment of sales taxes. There is, therefore, a risk that the attitude of the visa officer unfairly played a part in the determination that was made to deny the Applicant's request for a visa.

[61] For this reason, I would allow the present application for judicial review and return the matter to a new visa officer for redetermination.

JUDGMENT in IMM-206-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is returned to a different visa officer for redetermination.

2. No question has been submitted for certification.

"Peter G. Pamel"
Judge

Appendix

Relevant portions of OP 8

[…]

2 Program objectives

The Business Immigration Program includes three classes of applicants:

[…]

- self-employed persons.

[…]

5.4 Obtaining relevant information (A11**)**

The onus is on the applicant to produce all relevant information in support of their application.

- The applicant is expected to provide original supporting documentation or certified copies as part of the application. If copies are provided with the application, originals must be produced at interview if requested.

- The applicant will need to provide certified translations in English or French, and an interpreter, as required. The interpreter must be a professional, and not a friend, relative, employee, lawyer or consultant of the applicant.

5.5 Interviews

Members of the business immigrant class may or may not be called to an interview; this puts them on a par with other classes of immigrants.

- Where the documentation submitted with the application clearly establishes eligibility, and the officer is satisfied it is authentic, waiving the interview may be appropriate. Local experience will drive office interview policy.

- Where it clearly establishes that the applicant is not an entrepreneur within the meaning of R88(1), officers will refuse as per R97(2).

[…]

5.14 Applying procedural fairness

When the officer has concerns about eligibility or admissibility, the applicant must be given a fair opportunity to correct or contradict those concerns. The applicant must be given an opportunity to rebut the content of any negative provincial assessment that may influence the

final decision. 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.

[…]

6.15 Self-employed (R88)

A "self-employed person" means a foreign national 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.

"Relevant experience" in respect of

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

> i) in respect of cultural acitivities [*sic*],
> (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 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

b) a self-employed person selected by a province, has the meaning provided by the law of the province.

Specified economic activities in respect of a self-employed person, other than a self-employed person selected by a province, means cultural activities, athletics or purchasing and managing a farm. A self-employed person selected by a province has the meaning provided by the law of the province.

7 Procedures: General guidelines for assessing eligibility

The following sections outline procedures officers will follow to assess the eligibility of entrepreneurs and self-employed applicants.

For more information, see:

- Forms required, section 7.1 below;
- Roles and responsibilities for processing entrepreneurs and self-employed persons, section 7.2 below;
- Pre-application counselling, Section 8.1 below;
- Assessing eligibility, Section 8.4 below;
- Assessing admissibility, Section 8.15 below;
- Allowing early entry, Section 8.36;
- Issuing the visa, Section 9;
- Entrepreneurs destined to Quebec, Section 10;
- Refusal of an entrepreneur application, Section 8.33.

[…]

8.19 Documentation and provenance of funds concerns

Business immigrants require a net worth as well as business experience. Officers have authority to require evidence to establish an applicant's admissibility and the power to reject an applicant for failing to discharge the obligation.

A16(1) imposes the obligation on applicants "to answer truthfully" and "produce … all relevant evidence and documents" reasonably required by the officer. A11(1) requires that a visa may only be granted if the officer "is satisfied that the foreign national is not inadmissible and meets the requirements of the Act."

The IRPA provides broad grounds to reject applicants. A40(1)(a) provides for the rejection of applicants for misrepresentation of a material fact, namely "for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act." A41(a) provides officers authority to find applicants inadmissible for "an act or omission which contravenes directly or indirectly a provision of this Act." The IRPA provides officers with the tools to reasonably require evidence to establish admissibility A16(1); to refuse the applicant when not satisfied as they are not inadmissible A11(1); or to refuse when provided with false material information relating, among other things, to control and ownership of the business and net worth A40(1)(a) . Similarly, officers may refuse applicants under A41 for any act or omission.

A common practice of organized crime is to present a legally sound business as a front for criminal activity. The Regulations ensure officers can go beyond the specific requirements of the qualifying business and net worth to examine their context. This can be achieved by obliging applicants to establish the legality of their assets. In this manner officers can reasonably require evidence to establish the legality of assets and can refuse applicants who do not comply A16(1), do not meet the presumption A11(1), or who purposely dissemble A40(1)(a). This is achieved by requiring that entrepreneurs' and investors' "net worth be legally obtained."

The risks of applying a "legally obtained" provision poorly and inaccurately can lead to poor case decisions and jurisprudence. Its successful use places a significant evidentiary burden on the officer. A legally sustainable refusal will also have to deal with issues of defining both "legal" and "obtained." To meet the policy objective, the provision for legally obtained net worth

provides a context to examine the provenance of funds that can support sustainable rejections under A11.

Providing a regulatory obligation for business applicants to establish the legality of their net worth:

- provides clear rules and expectations for clients and officials;
- serves as a deterrent;
- provides the legal context for officers to examine the provenance of funds of business immigrants and to make legally sustainable refusals.

Relevant documents include:

- personal net worth statement;
- business balance sheet;
- business financial statements;
- corporate employee payroll.

These documents provide an accounting of the applicant's assets and liabilities and help the officer to determine whether the applicant has the required business experience. They are discussed in the following sections.

[…]

8.21 What should be included in a personal net worth statement

A personal worth statement is included in form IMM 0008Esch6.

The personal net worth statement includes both business and personal assets and liabilities of the applicant as well as those of the spouse or common-law /conjugal partner.

Officers should:

- review this document to satisfy themselves as to the completeness, valuation, ownership, existence and presentation of the component assets and liabilities;
- require applicants to provide documentation to support the value of assets referred to on this statement (bank statements, property valuations, etc.);
    - funds may be in non-convertible currencies;
    - exchange controls may restrict movement of capital to Canada;

[…]

8.27 Personal income tax returns

Officers may wish to review:

- proprietor's profit and loss;

- supporting financial statements.

[…]

11.1 Assessing eligibility: selection criteria

In order to be eligible for consideration in the self-employed category, the applicant must first meet the regulatory definition. Most applicants are selected or refused because they meet, or fail to meet, the definition.

11.2 Does the applicant meet the definition of "self-employed"?

The self-employed applicant is one who:

- has relevant experience; and
- has the intention and ability to be self–employed in Canada; and
- intends to make a significant contribution in specified economic activities as defined in the Regulations through either:
    - self-employment in cultural activities;
    - self-employment in athletics, or;
    - self-employment in the purchase and management of a farm.

11.3 Determining experience, intention and ability

The officer must consider the following in assessing an applicant's experience, intent and ability to create their own employment in Canada:

- Self-employed experience in cultural activities or athletics. This 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, for example, choreographers, set designers, coaches and trainers.
- Management experience in the world of arts and culture may also be a viable measure of self-employment; for example, theatrical or musical directors and impresarios.
- A person's financial assets may also be a measure of intent and ability to establish economically in Canada. There is no minimum investment level for a self-employed person. The capital required depends on the nature of the work. Applicants must have sufficient funds to create an employment opportunity for themselves and maintain themselves and their family members. They must show you that they have been able to support themselves and their family through their talents and would be likely to continue to do so in Canada. This includes the ability to be self-supporting until the self-employment has been created.
- 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.

- It is important, when determining an applicant's intent and ability to purchase and manage a farm, to be aware that farming is a highly skilled and capital-intensive industry with real estate making up 54% of an average farmer's assets. The Canadian Federation of Agriculture (CFA) reports that in Canada the average value of farmland varies significantly from province to province but ranges from $330 to $4,600 per acre. Farmland closest to urban centres has a higher market price. Average farm size varies from province to province with Newfoundland reporting an average farm size of 146 acres while Saskatchewan reports an average farm size of 1,152 acres.

In the 1996 census, 98% of farms are family-operated businesses. The CFA advises that "more than ever before, the successful Canadian farmer must be adaptable to the different requirements of running a farm business. The farmer must be able to recognise an animal that is ill, fix a malfunctioning combine and finish off the day by hooking up to the Internet to check the state of the world markets."

Farming has become a business that requires, in addition to more traditional agricultural skills, a working knowledge of computers and other high-tech equipment. According to the 1996 census, more than 21% of Canadian farm households own one or more computers. There is also a trend to higher education in the farm community.

In other words, the successful applicant must meet a rigorous threshold: sufficient capital, appropriate experience and appropriate skills.

11.4 Making a significant contribution to cultural or artistic life or to athletics

It is intended that the self-employed class enrich Canadian culture and sports. In other words, when applicants meet the test of experience, intent and ability and there is a reasonable expectation they will be self-employed in culture or sport, the test of significant contribution becomes relative. For example, a music teacher destined to a small town can be considered significant at the local level. Likewise, a freelance journalist who contributes to a Canadian publication will meet the test. In the end, the definition of "significant contribution" is left to the discretion of the officer, but is not intended to bar qualified self-employed persons who are applying in good faith. Its inclusion in the definition is intended to bar frivolous applications.

Note: If an applicant does not meet the regulatory definition of a self-employed person, R100(2) mandates the refusal of the application without further assessment.

[…]

11.7 Requesting and reviewing documentation

Documentation should provide evidence of the applicant's financial position and previous self-employment or experience. It should provide reasonable evidence that the applicant merits consideration under the program.

Officers may request that self-employed applicants show evidence of having researched the Canadian labour market and adopted a realistic plan that would reasonably be expected to lead to self-employment.

However, a formal business plan that would entail unnecessary expense and administrative burden is discouraged.

FEDERAL COURT

SOLICITORS OF RECORD

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