Federal Court  Cour fédérale

Date: 20200722

Docket: IMM-5162-19

Citation: 2020 FC 779

Ottawa, Ontario, July 22, 2020

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

NGOC LINH TRUONG

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Ngoc Linh Truong, applies under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, [*IRPA*] for review of a visa officer's [Officer] decision refusing her permanent residence application made under the start-up business class [SUBC]. The Officer refused the application after concluding that Ms. Truong was

pursuing her proposed business venture for the primary purpose of acquiring a status or privilege under the *IRPA*.

[2] For the reasons that follow, I am not convinced that the Officer's decision is unreasonable.

II. The SUBC

[3] In *Bui v. Canada (Citizenship and Immigration)*, 2019 FC 440 [*Bui*], Justice René Leblanc provides a detailed and helpful summary of the SUBC. He states:

> [2] The start-up business class is a part of the economic class of immigration pursuant to subsection 12(2) of the Act which provides that a foreign national may acquire permanent residence status in Canada by being selected as a member of the economic class on the basis of their ability to become economically established in Canada. Under subsection 14.1(1) of this same Act, the Minister of Citizenship and Immigration [Minister] may give instructions establishing a class of permanent residents as part of the economic class and may provide rules governing such class.
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> [3] The Minister did just that by giving the *Ministerial Instructions Respecting the Start-up Business Class*, 2017 (2017) C Caz I, 3523 [*Ministerial Instructions*], which have since been incorporated *mutatis mutandis* into sections 98.01 to 99 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The *Ministerial Instructions* form the relevant legal framework for the start-up business class and visa officers must comply with them (Act, s 14.1(7)).
>
> [4] Subsection 2(1) of the *Ministerial Instructions* establishes the start-up business class and defines this class as "foreign nationals who have the ability to become economically established in Canada and who meet the requirements of this section". To qualify for the class, an applicant must: (i) have obtained a commitment from either a designated business incubator, a designated angel investor group or a designated venture capital fund, listed in schedules 1, 2 and 3 of the *Ministerial Instructions*; (ii) have attained a certain level of language proficiency; (iii) have

a certain amount of transferable and available funds; and (iv) have a qualifying business (*Ministerial Instructions*, s 2(2)). Failure to meet these requirements results in a refusal of an application (*Ministerial Instructions*, s 9(1)).

[5] Particularly relevant to the case at bar is the further requirement that an applicant's participation in an agreement or arrangement in respect of a commitment be primarily for the purpose of engaging in the business activity for which the commitment was intended and not for the purpose of acquiring a status or privilege under the Act (*Ministerial Instructions*, s 2(5)).

[6] For business incubators, as is the case here, a commitment consists of an agreement between the incubator and the applicant. The commitment confirms, among other things, that the applicant's business is currently participating in or has been accepted into a business incubator program and that the business incubator has performed a due diligence assessment of the applicant and the business (*Ministerial Instructions*, ss 6(4)(b), 6(4)(i)).

[7] A visa officer may request that a commitment be independently assessed by a "peer review panel" – an organization under contract with the Minister that has expertise in respect of the type of entity making the commitment (*Ministerial Instructions*, ss 3(1)(d), 11(1)). A request for an independent assessment by a peer review panel may be made if the visa officer believes it would assist in the application process or may be made on a random basis (*Ministerial Instructions*, s 11(2)).

[8] The peer review panel must provide the visa officer with an independent assessment of whether the entity that made the commitment assessed the applicant and their business in a manner consistent with industry standards and whether the terms of the commitment are consistent with industry standards (*Ministerial Instructions*, s 11(3)). A visa officer who requests an independent assessment by a peer review panel is not, however, bound by it (*Ministerial Instructions*, s 11(4)).

III. Background

[4] Ms. Truong is a citizen of Vietnam. She has a bachelor's degree in marketing and management. Her work experience includes managing bakeries and a fitness franchise.

[5] In January 2017, she obtained a commitment from Empowered Startups Ltd. [Empowered]—a business incubator that provides support to new companies—to "incubate" her business venture. The venture involves the development and marketing of wearable sensor technology that can record information about a user's weightlifting and conveniently summarise that information for the user.

[6] In April 2017, 1115918 B.C. Ltd. [111] was incorporated for the purpose of pursuing the venture. Ms. Truong and Empowered are the only shareholders in 111.

[7] In May 2017, Ms. Truong applied for permanent residence as a member of the SUBC.

[8] The Officer who first reviewed the application expressed concerns about Ms. Truong's lack of education and experience in developing and marketing technology and the fact that she did not bring any intellectual property to the venture. That Officer was also concerned that Empowered provided the business idea to Ms. Truong. On this basis, the Officer requested an independent assessment of the venture by a peer-review panel.

[9] In November 2017, Dr. Mehrdad Moallem—an engineering professor at Simon Fraser University—received funding from Mitacs—an organisation that funds research projects with industrial potential—to develop the sensor wearable technology central to Ms. Truong's venture. Part of the funding application process involved an expert review of the proposal. The application and acceptance documents from Mitacs identify Dr. Moallem as the funding

applicant and Empowered as a partner organisation. Neither Ms. Truong nor 111 are referenced in that documentation.

[10] In August 2018, the Officer sent Ms. Truong a procedural fairness letter [PFL]. The PFL identifies the two areas of concern relevant to this application. First, the PFL notes that Ms. Truong had not secured funding for the business venture from Mitacs: it was Dr. Moallem who applied for and received the funding; Empowered, as the partner organisation, is responsible for paying partner funds to Mitacs; neither Ms. Truong nor 111 are named in any of the Mitacs documentation; and there is no evidence that Ms. Truong is working in collaboration with Dr. Moallem. Second, the PFL notes that Ms. Truong lacks relevant entrepreneurial experience: her experience is limited to managing bakeries and a fitness franchise; she has no experience marketing technology products; she is relying on a third-party, Dr. Moallem and the university researchers, to research and develop the sensor wearable technology; and the application does not demonstrate that Ms. Truong is bringing any intellectual property to the venture or is otherwise integral to its success.

[11] In responding to the PFL, Ms. Truong's then-counsel addresses the concern that a third party is developing the sensor wearable technology by noting that the arrangement with the university is collaborative and standard for start-up ventures. The response letter also notes Ms. Truong's entrepreneurial experience and her background in the fitness industry, and that there is no requirement for her to bring intellectual property to the venture.

[12] Ms. Truong also submitted a letter from Dr. Moallem in response to the PFL. In it, he states that he is supervising the research and development of "a prototype of a smart fitness wearable" for 111; that he is doing so in collaboration with Mitacs and Ms. Truong; and that the research and development project was subject to an expert review prior to approval for funding.

IV. Decision under Review

[13] The Officer reviewed the relevant portions of the *Ministerial Instructions Respecting the Start-up Business Class*, 2017 (2017) C Gaz I, 3523 [*Ministerial Instructions*], noting that an applicant is not a member of the SUBC if they have participated in an agreement in respect of a commitment primarily for the purpose of acquiring a status or privilege under the *IRPA* and not for the purpose of engaging in the business activity for which the commitment was intended.

[14] The Officer's notes indicate that Ms. Truong's response to the PFL letter did not allay the concern that she was not working with Dr. Moallem. The Officer noted that the Mitacs documents identify Dr. Moallem as the funding applicant and show that Empowered was to pay partner funds to Mitacs. Neither Ms. Truong nor 111 are referenced in those documents. The Officer noted the letter from Dr. Moallem, but concluded that it was not sufficient to allay the concern that Ms. Truong has not secured funding from Mitacs.

[15] Having considered the response to the PFL, the Officer was not satisfied that Ms. Truong had participated in the agreement with Empowered for the purpose of engaging in the business activity for which the commitment was intended. There was insufficient evidence to demonstrate

that Ms. Truong's participation in the commitment was not primarily for the purpose of obtaining a status or privilege under the *IRPA*. The application was refused.

V. Issue and Standard of Review

[16] The application raises one issue: did the Officer err in refusing to grant Ms. Truong permanent resident status as a member of the SUBC?

[17] This issue is reviewable on the presumptive standard of reasonableness (*Ngoc Thien Phuong Le and Viet Nga Le v. Canada (Citizenship and Immigration)*, 2020 FC 734 at para. 26).

[18] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 83 [*Vavilov*]).

VI. Analysis

A. *The Officer did not disregard evidence*

[19] Ms. Truong argues that the Officer's decision was made without regard to the evidence. Specifically, she argues that the Officer failed to consider the letter from Dr. Moallem stating that he is supervising research for 111; that the research is part of a collaboration between Ms. Truong and Empowered to develop a prototype for 111; and that the research proposal underwent an expert review prior to obtaining funding from Mitacs. Ms. Truong further argues

that the evidence clearly links her venture to the Mitacs proposal, the funding decision, and Empowered. This all demonstrates that Ms. Truong and 111 are involved in the research and development process. In addition, Ms. Truong notes that her response to the PFL describes Empowered's role as a business incubator and explains why neither she nor 111 are mentioned in the Mitacs documentation: Empowered, helps non-Canadian start-up businesses "tap into its Canadian network." Finally, Ms. Truong highlights the fact that the venture has been endorsed by Mitacs itself and the review panel.

[20] I am unpersuaded by these arguments. The Officer's decision does not conclude that Ms. Truong had failed to obtain a commitment from Empowered, that Empowered was not pursuing the venture with Mitacs, or that Dr. Moallem was not supervising research and development work relevant to the venture. Rather, the issue before the Officer, and flagged in the PFL, was whether Ms. Truong had entered into these arrangements primarily for the purpose of acquiring a status or privilege under the *IRPA* and not for the purpose of engaging in the business activity for which the commitment was intended (*Ministerial Instructions*, s. 2(5)).

[21] In considering this question, the Officer did identify and consider the evidence. The Officer outlines the commitment with Empowered and the response to the PFL. The Officer identifies the extensive documentation submitted both prior to and in response to the PFL, including the letter from Dr. Moallem.

[22] The Officer relied on the documentary record, including the PFL response, to determine whether Ms. Truong had failed to demonstrate that her primary purpose in entering into the

commitment with Empowered was to engage in the proposed business activity. This was a key concern identified in the PFL.

[23] Although Dr. Moallem's letter acknowledges collaboration with Ms. Truong, it provides no details of her role in the venture. Neither she nor her then-counsel detail the nature of her involvement. Instead, the letter in response to the PFL relies on Dr. Moallem's letter and general descriptions of the role of an incubator to respond to the identified concerns. While Ms. Truong disagrees with the Officer's assessment of the evidence, it was not unreasonable, particularly when considered within the context of the concerns outlined in the PFL.

B. *No higher burden of proof imposed*

[24] In refusing the application, the Officer states that Ms. Truong "has failed to provide sufficient evidence to satisfy me that she and [111] have engaged in serious business." Ms. Truong states that, in requiring "sufficient evidence" of "serious business," the Officer adopted a more stringent evidentiary standard than that of proof on a balance of probabilities.

[25] The Respondent submits, and I agree, that the Officer's use of the phrase "sufficient evidence" does not reflect a departure from the proper evidentiary standard. This phrase is generally applied, implicitly or explicitly, in relation to the evidentiary standard. For example, one could say that a claimant did not present "sufficient evidence" to satisfy a decision maker of a particular fact on a "balance of probabilities." Justice Leblanc's finding in *Bui* is of direct application in this instance:

> [43] It is settled law that, absent statutory language to the contrary, there is only one standard of proof in civil matters: proof on a balance of probabilities (*F.H. v McDougall*, 2008 SCC 53 at para 40). I note that nothing in the language used by the Officer in the Procedural Fairness Letter, refusal letter or the GCMS notes indicates that the *bona fides* determination regarding the Commitment required evidence beyond this burden of proof. I am not satisfied that the Officer committed a reviewable error in this regard.
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> [44] Rather, it is clear from the record that the Applicant did not sufficiently alleviate the Officer's concerns outlined in the Procedural Fairness Letter regarding the purpose for which the Commitment with Empowered was made.

[26] Similarly, the Officer's reference to "serious business" does not demonstrate, as Ms. Truong argues, that she had to prove that her business venture would succeed. Rather, it demonstrates the Officer's concern that the evidence fails to establish that Ms. Truong's primary purpose for engaging in the business activity was other than acquiring a status or privilege under the *IRPA*.

[27] The Officer's observation does not call into question the fact that "serious business" has occurred but rather questions the sufficiency of the evidence connecting Ms. Truong to that "serious business." While the Officer might have adopted more precise language, it is important to remember that judicial review is not a "line-by-line treasure hunt for error" (*Vavilov* at para. 102).

C. *The failure to reference the peer review report was not a reviewable error*

[28] Ms. Truong submits that the peer review requested by the Officer initially reviewing the application weighs in favour of a finding that the decision is unreasonable. I disagree.

[29] In *Mourato Lopes v. Canada (Citizenship and Immigration)*, 2019 FC 564, Justice Russell Zinn dealt with a very similar issue, albeit framed as one of procedural fairness. There, the applicant argued that an officer breached her right to procedural fairness by making a decision without giving her the opportunity to respond to a peer review. Justice Zinn found that there was no breach of procedural fairness: "in the absence of evidence that the concerns raised in the peer review were a factor in the decision, there is no requirement to bring it to the applicant's attention" (para. 8).

[30] Here, there is no indication that the peer review was a factor in the final decision. The Officer was not obligated to reference or otherwise address it in the decision.

VII. Conclusion

[31] The application is dismissed. In light of this conclusion, I need not address Ms. Truong's requests for a directed verdict and for costs. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-5162-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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