Federal Court  Cour fédérale

Date: 20220124

Docket: IMM-3833-20

Citation: 2022 FC 75

Ottawa, Ontario, January 24, 2022

PRESENT: Mr. Justice Gascon

BETWEEN:

MARZIEH MOHAMMADZADEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Marzieh Mohammadzadeh, is a citizen of Iran. In a decision rendered on June 25, 2020 [Decision], an officer of the Visa Section of the Embassy of Canada in Poland [Officer] dismissed Ms. Mohammadzadeh's application for a permanent residency visa in the self-employed person class under subsections 12(2) of the *Immigration and Refugee Protection*

Act, SC 2001, c 27 [IRPA] and 100(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The Officer rejected Ms. Mohammadzadeh's application for several reasons, the most important being that the Officer was not satisfied that Ms. Mohammadzadeh had the "ability and the intention" to become self-employed in Canada. This ability and intention of an applicant is a requisite condition to be considered as a "self-employed person" pursuant to subsection 88(1) of the IRPR.

[2] Ms. Mohammadzadeh claims that the Decision is unreasonable, and she asks the Court to set it aside and to refer her application back to a different visa officer for redetermination. More specifically, she contends that the Officer misconstrued the law by concluding that she lacked the intent to establish a self-employed business in Canada. She also maintains that the Officer breached the rules of procedural fairness by failing to provide her with a fairness letter or another alternative means to respond to the concerns about her visa application.

[3] For the following reasons, I will dismiss Ms. Mohammadzadeh's application for judicial review. After examining the evidence before the Officer and the applicable law, I find no reason to overturn the Decision. The Officer conducted a reasonable analysis of the evidence and the decision maker's reasons to deny Ms. Mohammadzadeh a permanent residency visa for self-employed persons are logical and coherent in light of the relevant legal and factual constraints. Furthermore, the Officer acted fairly towards Ms. Mohammadzadeh at all steps of the process, and no breach of procedural fairness occurred. There are no grounds to justify this Court's intervention.

II. Background

A. *The factual context*

[4] The relevant facts of this case are limited. Ms. Mohammadzadeh is a graphic designer with 11 years of experience in the industry. In October 2018, Ms. Mohammadzadeh applied for permanent residency in Canada under the self-employed class with the intention of starting a medium-size graphic design company in Toronto. The record indicates that Ms. Mohammadzadeh is married to a construction builder/contractor, and that the couple plans to come to Canada with two other individuals, presumably their children. In her visa application, Ms. Mohammadzadeh claims to have a net worth of more than $9 million.

[5] In the Decision, the Officer determined that Ms. Mohammadzadeh could not qualify for the requested visa, because she failed to demonstrate that she had the ability and the intention to become self-employed in Canada. As is often the case for visa applications, the essence of the Decision is found in the Global Case Management System [GCMS] notes taken by the Officer, which form part of the Decision and shed light on the analysis conducted by the Officer and on the grounds for refusing Ms. Mohammadzadeh's application.

[6] In this case, the Officer relied on various elements, which can be summarized as follows. First, the business plan submitted by Ms. Mohammadzadeh in support of her application included only general and high-level information about the graphic design industry in Canada, without specific references to the Toronto market or any personal business insight about the industry in the region. Second, Ms. Mohammadzadeh failed to provide sufficient information

about the financial details of her business, its potential for growth, the basis for her optimistic financial projections and the feasibility of her business project.

[7] For those reasons, the Officer refused Ms. Mohammadzadeh's visa application.

B. ***The relevant provisions***

[8] The relevant statutory provisions are found at subsection 12(2) of the IRPA and at subsections 88(1) and 100(1) and (2) of the IRPR. They respectively read as follows:

IRPA

Selection of Permanent Residents	**Sélection des résidents permanents**
[…]	[…]
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 economically established in Canada.	**12 (2)** La sélection des étrangers de la catégorie "immigration économique" se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

IRPR

Definitions	*Définitions*
88 (1) The definitions in this subsection apply in this Division.	**88 (1)** Les définitions qui suivent s'appliquent à la présente section:
"self-employed person" means a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada	« *travailleur autonome* » Étranger qui a l'expérience utile et qui a l'intention et est en mesure de créer son propre emploi au Canada et de

and to make a significant contribution to specified economic activities in Canada.	contribuer de manière importante à des activités économiques déterminées au Canada.
"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.	**b)** s'agissant d'un travailleur autonome sélectionné par une province, s'entend au sens du droit provincial.
[…]	[…]
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	**(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.

> and no further assessment is required.

C. *The standard of review*

[9] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada [SCC] set out a revised framework for determining the standard of review with respect to the merits of administrative decisions (*Vavilov* at para 10). In that decision, the SCC held that administrative decisions should presumptively be reviewed on a standard of reasonableness, unless either the legislative intent or the rule of law requires that the standard of correctness be applied (*Vavilov* at paras 10, 17). There is no reason to conclude otherwise, as the circumstances germane to Ms. Mohammadzadeh's case do not lend themselves to the application of any of the exceptions to the presumption of reasonableness identified by the SCC (*Vavilov* at para 17). Furthermore, the parties agree that reasonableness continues to be the appropriate standard of review when assessing the merits of a visa officer's decision (*Ebrahimshani v Canada (Citizenship and Immigration)*, 2020 FC 89 [*Ebrahimshani*] at para 10).

[10] When applying the standard of reasonableness, the reviewing court must consider "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome," and must determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 83, 85; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paras 2, 31).

[11] *Vavilov* did not deal directly with issues of procedural fairness, and the approach to be taken on this front has therefore not been modified (*Vavilov* at para 23). It has typically been held that correctness is the applicable standard of review for determining whether a decision maker complies with the duty of procedural fairness and the principles of fundamental justice (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 43; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107).

[12] However, the Federal Court of Appeal has affirmed that questions of procedural fairness are not truly decided according to any particular standard of review. Rather, it is a legal question for the reviewing courts, and the courts must be satisfied that procedural fairness has been met. When the duty of an administrative decision maker to act fairly is questioned or a breach of fundamental justice is invoked, it requires the reviewing courts to verify whether the procedure was fair having regard to all of the circumstances (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 54). This assessment includes the five, non-exhaustive contextual factors set out by the SCC in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] (*Vavilov* at para 77; *Baker* at paras 23–28).

[13] It is up to the reviewing courts to make that determination and, in conducting this exercise, the courts are called upon to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*CPR* at para 54). Therefore, the ultimate question raised when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review is not so much whether the decision was "correct." It is rather whether, taking into account the particular context and circumstances at issue, the process followed by the decision maker was fair and offered the affected parties a right to be heard and a full and fair opportunity to know the case they have to meet and to respond to it (*CPR* at para 56; *Tiben v Canada (Citizenship and Immigration)*, 2020 FC 965 at paras 17–18; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51–54). No deference is owed to administrative decision makers on matters raising procedural fairness concerns.

III. Analysis

A. *Did the Officer misconstrue the law by concluding that Ms. Mohammadzadeh lacked the intent to establish a self-employed business in Canada*

[14] It is not disputed that, to obtain a permanent residency visa for self-employed persons, a foreign applicant must prove that he/she: (i) possesses relevant experience; (ii) has the ability and the intention to be self-employed in Canada; and (iii) makes a significant contribution to a specified economic activity. The language of subsection 88(1) of the IRPR leaves no doubt about this. Here, the Officer determined that Ms. Mohammadzadeh had failed to prove the second of these three elements.

[15] Ms. Mohammadzadeh argues that the Officer disregarded the evidence submitted and preferred to speculate about her lack of intent to establish a self-employed business in Canada. According to her, the evidence clearly establishes that she is an experienced graphic designer with the necessary financial capacity to start a business in Toronto. More specifically, Ms. Mohammadzadeh claims that the Officer made an error by drawing a negative inference from the fact that she relied mostly on high-level, publicly available information about the Canadian market for graphic designers. Ms. Mohammadzadeh submits that it is normal to use such information given that, nowadays, information is increasingly open source. Moreover, Ms. Mohammadzadeh maintains that the business plan she submitted in support of her visa application was sufficiently detailed, given that it provided a projection for the first three years of business operations.

[16] I am not persuaded by Ms. Mohammadzadeh's arguments.

[17] It was the Officer's responsibility to assess the evidence submitted by Ms. Mohammadzadeh (*Vavilov* at para 125; *Gulia v Canada (Attorney General)*, 2021 FCA 106 at para 13). It was therefore open to the Officer to draw a negative inference about the intention of Ms. Mohammadzadeh from the fact that her business plan did not contain sufficient details and that her financial projections fell short of the mark due to unspecified sources and lack of precision. In *Ebrahimshani*, the Court determined that it is reasonable for a visa officer to expect an applicant to provide detailed information about the particular area where he/she wants to start a self-employed business, the state of the industry in that area, and whether he/she has made business contacts in the area (*Ebrahimshani* at paras 47–53; *Singh Sahota v Canada (Minister of*

Citizenship and Immigration, 2005 FC 856 [*Singh Sahota*] at para 13). Additionally, the case law is clear on the fact that a decision maker can assess the realistic nature of a business plan – notably its financial projections – in determining whether to grant a visa for self-employed persons (*Al-Katanani v Canada (Citizenship and Immigration)*, 2016 FC 1053 at para 24; *Singh Sahota* at para 13).

[18] I can appreciate that Ms. Mohammadzadeh may disagree with the Officer's assessment and may wish to challenge the weight given to her business plan and financial projections. However, on judicial review, the Court is not permitted to substitute its own assessment of the evidence for that of the administrative decision maker. Deference to an administrative decision maker includes deferring to its findings and assessment of the evidence (*Canada Post* at para 61). The reviewing court must in fact "refrain from reweighing and reassessing the evidence considered by the decision maker" (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55, referring to *Khosa* at para 64). I would add that visa officers have considerable expertise in hearing and determining visa applications such as Ms. Mohammadzadeh's, and this requires the Court to accord them a high degree of deference on evidentiary issues.

[19] In this case, the Officer was not satisfied with the amount of information provided by Ms. Mohammadzadeh and found it insufficient to meet the regulatory requirements. I point out that, three times in the Decision, the Officer expressly referred to the fact that Ms. Mohammadzadeh had provided "insufficient" information to support her visa application. The arguments raised by Ms. Mohammadzadeh essentially express her disagreement with the

analysis of the evidence and the weight given to it by the Officer in the exercise of its discretion and expertise. This is not a situation where the administrative decision maker has misconstrued the law, ignored the evidence on the record and the general factual matrix that bears on its decision, or "fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para 126). In my view, there is nothing unreasonable in the Officer's Decision.

B. *Did the Officer breach procedural fairness by failing to provide Ms. Mohammadzadeh with a fairness letter or another alternative to respond to his concerns*

[20] Ms. Mohammadzadeh further submits that the Officer should have provided her with an opportunity to either rebut or clarify the content of the visa assessment, notably when it comes to the credibility issues identified. Relying on this Court's decision in *Mohitian v Canada (Citizenship and Immigration)*, 2015 FC 1393 [*Mohitian*], Ms. Mohammadzadeh argues that the Officer was required to give her such opportunity, and that the decision maker breached its duty of procedural fairness by failing to do so (*Mohitian* at paras 22–24).

[21] I do not agree.

[22] It is well recognized that a visa officer's duty of procedural fairness on an application for permanent residence under a specific class (such as the self-employed class sought by Ms. Mohammadzadeh) is relaxed and sits at the "lower end of the range" (*Canada (Minister of Citizenship and Immigration) v Patel*, 2002 FCA 55 at para 10; *Ebrahimshani* at paras 27–28; *Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 [*Lv*] at para 22). In the context of permanent residence applications, a visa officer has no legal obligation to seek to clarify a

deficient application, to reach out and make the applicant's case, to apprise an applicant of concerns relating to whether the requirements set out in the legislation have been met, to provide the applicant with a running score at every step of the application process, or to offer further opportunities to respond to continuing concerns or deficiencies (*Lv* at para 23). To impose such an obligation on a visa officer would be akin to giving advance notice of a negative decision, an obligation that has been expressly rejected by this Court on many occasions (*Lv* at para 23). In general, an opportunity to respond will only be granted when a visa officer may base a decision on information not known to the applicant, or where there are concerns about an applicant's credibility or the authenticity of documents (*Tollerene v Canada (Citizenship and Immigration)*, 2015 FC 538 at para 16).

[23] Ms. Mohammadzadeh frames the Officer's concerns with her business plan and financial projections as being one of credibility. She believes that she was entitled to a fairness letter allowing her to clarify the Officer's credibility concerns. With respect, I do not share Ms. Mohammadzadeh's understanding and reading of the Officer's Decision. In my view, the GCMS notes make it obvious that the Officer had concerns relating to the sufficiency of the evidence provided, not with the credibility of Ms. Mohammadzadeh. I again observe that, in the Decision, the Officer specifically used the term "insufficient" on three occasions. This is not a case where credibility findings are involved.

[24] An adverse finding of credibility is not to be confused with a finding of insufficient probative evidence. The case law is clear that a lack of thorough information to support a visa application can give rise to concerns about the sufficiency of the evidence (*Ebrahimshani* at

paras 30–34; *Sandhu v Canada (Citizenship and Immigration)*, 2020 FC 1021 at para 18). The case law is equally clear on the point that an officer is not required to give the applicant an opportunity to clarify his/her submissions when the case relates to sufficiency concerns (*Ebrahimshani* at paras 31–34; *Lv* at para 40; *Gur v Canada (Citizenship and Immigration)*, 2019 FC 1275 [*Gur*] at para 15; *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at paras 24–25; *Tineo Luongo v Canada (Citizenship and Immigration)*, 2011 FC 618 at paras 16–18).

[25] A sufficiency assessment goes to the nature and quality of the evidence needed to be brought forward by an applicant in order to obtain relief, to its probative value, and to the weight to be given to the evidence by the trier of fact, be it a court or an administrative decision maker. The law of evidence operates a binary system in which only two possibilities exist: a fact either happened or it did not. If the trier of fact is left in doubt, the doubt is resolved by the rule that one party carries the burden of proof and must ensure that there is sufficient evidence of the existence or non-existence of the fact to satisfy the applicable standard of proof. In *FH v McDougall*, 2008 SCC 53 [*McDougall*], the SCC established that there is only one civil standard of proof in Canada, the balance of probabilities. The evidence "must be scrutinized with care by the trial judge" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45–46). In all civil cases, it is up to the trier of fact to "scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred" (*McDougall* at para 49).

[26] When frailties have been highlighted in the evidence, it is appropriate for the trier of fact to consider whether the evidentiary threshold has been satisfied by an applicant. By doing so, the trier of fact does not question the applicant's credibility. Rather, the trier of fact determines whether the evidence provided – assuming it is credible – is sufficient to establish, on a balance of probabilities, the alleged facts (*Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305 at paras 17–18). In other words, not being convinced by the evidence does not necessarily mean that the trier of fact disbelieves the applicant.

[27] In the case of Ms. Mohammadzadeh, the Officer found that there was insufficient objective evidence to prove, on a balance of probabilities, that she had the required ability and intention to establish her business. The Officer was simply unconvinced by what was provided as there was insufficient objective evidence to establish that Ms. Mohammadzadeh met the regulatory requirements of the self-employed class. In my view, there is no doubt that the Officer made this conclusion on the basis of insufficiency of evidence, not credibility. The Officer found that the evidence tendered by Ms. Mohammadzadeh lacked detail and did not have sufficient probative value, either on its own or coupled with other tendered evidence, to establish, on a balance of probabilities, the fact for which it had been tendered. Such an assessment and weighing of evidence does not need to be put to an applicant and does not raise any issues of procedural fairness.

[28] Ms. Mohammadzadeh sought to argue that her case is *ad idem* with *Mohitian*. I disagree. In the case at bar, the Officer was simply not satisfied with the information supplied by Ms. Mohammadzadeh. The GCMS notes address specifically this lack of evidence as the Officer

faults Ms. Mohammadzadeh for not submitting sufficient details concerning her intentions or plan of activities leading to her self-employment in Canada. There was no way for the Officer to be satisfied of her ability to become economically established in Canada. This "constitutes a far cry from the finding in *Mohitian* that a request for more information, which was not the equivalent of a business plan, was turned into an unrealistic business plan" (*Gur* at para 15). I underline that, in *Mohitian*, the visa officer was satisfied with the applicant's relevant experience, and had some specific concerns that were not voiced to the applicant. Here, insufficiency of evidence was the main issue in the Officer's Decision.

[29] In sum, the Officer did not breach Ms. Mohammadzadeh's right to procedural fairness by failing to give her an opportunity to respond to concerns about the sufficiency of her evidence. In the end, the arguments put forward by Ms. Mohammadzadeh again simply express her disagreement with the Officer's assessment of the evidence and in fact invite the Court to prefer her opinion and her re-weighing of the evidence to the analysis made by the Officer. This is not the role of a reviewing court on judicial review.

IV. Conclusion

[30] For the reasons detailed above, Ms. Mohammadzadeh's application for judicial review is dismissed. I see nothing in the record to suggest that Ms. Mohammadzadeh's right to be heard was violated or that the decision-making process followed by the Officer was unfair. In all respects, the Officer met the requirements of procedural fairness in processing Ms. Mohammadzadeh's application. Moreover, I conclude that the Officer's analysis of the evidence

has all the required attributes of transparency, reasonableness and intelligibility, and that there is no reviewable error in the Decision.

[31] Neither party suggested any question of general importance to certify, and I agree that there is none.

JUDGMENT in IMM-3833-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs.

2. No serious question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3833-20
STYLE OF CAUSE:	MARZIEH MOHAMMADZADEH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 27, 2021
REASONS FOR JUDGMENT AND JUDGMENT:	GASCON J.
DATED:	JANUARY 24, 2022

APPEARANCES:

Mehran Youssefi	FOR THE APPLICANT
Samina Essajee	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Youssefi Law Firm, Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT