Federal Court  Cour fédérale

Date: 20110613

Docket: IMM-4988-10

Citation: 2011 FC 677

Ottawa, Ontario, June 13, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ZHI MING YE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, RSC 2001, c 27 (the Act) for judicial review of a decision of a designated immigration officer of the Canadian Consulate General in Hong Kong, China (the officer), dated June 23, 2010, wherein the officer determined that the applicant did not meet the requirements for a permanent resident visa as an investor.

[2] The applicant requests that the decision of the officer be set aside and the application remitted for redetermination by a different officer.

Background

[3] Zhi Ming Ye (the applicant) was born on January 2, 1966 and is a citizen of the People's Republic of China. He is currently a vice general manager of a handbag manufacturing company.

[4] On June 25, 2008, the applicant submitted an application for permanent residence in Canada as a member of the investor class. He declared that he had an estimated personal net worth (PNW) of C$864,000, of which C$332,000 was from a property located at Production Team 12 in Renhe Township, Renhe District Commune, Baiyun District, Guangzhou, China (the property).

[5] The application was refused on May 12, 2010. The applicant subsequently submitted further documentation and the officer reconsidered the application, but it was again refused on June 23, 2010.

Officer's Decision

[6] The officer found that pursuant to subsection 12(2) of the Act and subsection 90(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, (the Regulations), a foreign

national may become a permanent resident based on his or her ability to become economically established in Canada as an investor defined in subsection 88(1) of the Regulations.

[7] At the time, subsection 88(1) defined an investor as a foreign national who (a) has business experience, (b) has a legally obtained minimum net worth of at least $800,000 and (c) intends to make an investment.

[8] Subsection 88(1) also defines net worth as, in respect of the foreign national and their spouse or common-law partner, the fair market value of all their assets minus the fair market value of all their liabilities.

[9] The officer was not satisfied that the applicant had a minimum net worth of at least $800,000. The officer's concern was with the value of the property noted above.

[10] The officer found that:

1. The applicant had not demonstrated that he has ownership of the land on which the property was built;

2. The applicant had the right to construct houses and related facilities for personal residential purposes, but had built a five storey building with a commercial store on the ground floor, apparently violating the terms of the use for the land; and

3. The applicant only had the right to transfer the use of the land to the members of the same collective economic organization. However, the appraisal report submitted by the applicant stated that the property was appraised based on free transferability on the open market. The officer was not satisfied that the appraisal report accurately reflected the fair market value of the property.

[11] The officer concluded that the applicant had not presented sufficient and credible evidence of his ability to meet the minimum PNW requirement for an investor.

Issues

[12] The applicant submitted the following issue for consideration:

Did the officer err in excluding the value of the property from the applicant's assets, or reducing its value to zero?

[13] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer err in finding that the applicant had not demonstrated a personal net worth of at least $800,000?
3. Did the officer breach the applicant's right to procedural fairness?

Applicant's Written Submissions

[14] The applicant submits that the officer's reasons were not adequate as it was unclear how the value of the property was treated. The applicant submits that it was unreasonable for the officer to determine that the value of the property was zero due to perceived problems with the appraisal report. If the officer had concerns about the use of the terms "open market" and "free

transferability" in the appraisal, she ought to have convened an interview to disabuse those concerns. Failure to do so was a breach of procedural fairness.

[15] The applicant also argues that the appraisal company clearly understood the nature of the property by stating that it was a land using certificate which the applicant held and including the certificate in the appendix of the appraisal. The appraisal company also compared similar property in the area to reach the appraisal. The applicant submits that the term market value does not suggest the appraisal company valued the property as if it were not subject to the requirements of the land use certificate. Rather, market value takes into account the highest and best use of the property.

[16] Further, the applicant argues that the land use certificate gives the applicant the right to build and own buildings on the land covered by the certificate, as well as the right to transfer the certificate to others in the collective. Thus, the buildings and land use certificate itself were assets of the applicant.

[17] Finally, the applicant submits that it was unreasonable for the officer to find that an alleged breach of the land use certificate resulted in the property being of no or little value. There was no evidence to suggest the effect of the commercial store on the ability to transfer the land use certificate.

Respondent's Written Submissions

[18] The respondent emphasizes that the onus was on the applicant to provide all necessary and credible supporting documentation to the immigration officer in support his application. The

evidence provided by the applicant on the value of the property was ambiguous. The applicant acknowledged this by stating that it was not clear what impact the violation of the land use certificate would have on the property. The respondent submits that ambiguous evidence is not sufficient to meet the onus on the applicant that he has a PNW of at least $800,000.

[19] The respondent also submits that while the applicant has argued that the appraisal company did take into account the transfer restrictions on the land use certificate, this is merely an alternative view of the evidence. It does not demonstrate the officer's interpretation of the evidence was unreasonable. The conflicting evidence is ambiguous and the officer was not required to request a new valuation.

[20] Finally, the respondent submits that the officer provided the applicant an opportunity to respond to her concerns by accepting new evidence and reconsidering the application. She was not required to provide the applicant a further opportunity to clarify his application.

Analysis and Decision

[21] **Issue 1**

What is the appropriate standard of review?

The officer found that the applicant did not have sufficient PNW to be an investor under section 90 of the Regulations. This was a finding of fact. The Supreme Court emphasized in *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 SCR 339, at paragraph 46, that paragraph 18.1(4)(d) of the *Federal Courts Act*, RS, 1985, c F-7, demonstrates

that Parliament intended for the Court to afford a high degree of defence to administrative fact finding. This finding will therefore be reviewed on the reasonableness standard.

[22] The applicant has also raised issues of procedural fairness which will be assessed on the correctness standard (see *Khosa* above, at paragraph 43).

[23] **Issue 2**

Did the officer err in finding that the applicant had not demonstrated a personal net worth of at least $800,000?

Generally, the onus is on the applicant to provide evidence to support his application. As Mr. Justice Paul Crampton stated in *Pan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 838 at paragraph 27:

> In general, the onus is on a visa applicant to put his best foot forward by providing all relevant supporting documentation and sufficient credible evidence in support of his application.

[24] The duty, in this case, was for the applicant to show that he had a PNW of at least $800,000 as per the version of subsection 88(1) of the Regulations at the time of the application. The applicant included the appraisal of the Renhe township property as evidence of his PNW.

[25] The immigration officer took issue with the fact that the applicant did not own the land on which the buildings were constructed and could not transfer the land to others outside of his collective and yet, the appraisal of the property was based on a “complete property right and free transferability in open market”.

[26] The applicant submitted a letter from the appraisal company in his additional materials for reconsideration of the application. In this letter, the appraisal company explains Chinese land use rights and details the restrictions on properties that have land use certificates. However, the letter does not state that the appraisal company took into consideration the land use certificate restrictions when appraising the property in question. This is confusing at best.

[27] The onus was on the applicant to demonstrate through sufficient and credible evidence, not ambiguous evidence, that he had a personal net worth of at least $800,000. I cannot find that the immigration officer's interpretation of the appraisal report and additional materials was unreasonable. Therefore, the conclusion that the applicant had not clearly shown he had a PNW of at least $800,000 was also not unreasonable.

[28] **Issue 3**

Did the officer breach the applicant's right to procedural fairness?

The officer did not breach procedural fairness for the following reasons.

[29] As noted above, the onus is on the applicant to satisfy the officer of all parts of his application. The case law specifies that an immigration officer is not under a duty to inform the applicant about any concerns regarding the application which arise directly from the requirements of the legislation or regulations (see *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at paragraphs 23 and 24). Neither is the officer under an obligation to ask for additional information where the applicant's material is insufficient (see *Madan v Canada (Minister*

of Citizenship and Immigration) (1999), 172 FTR 262 (FCTD), [1999] FCJ No 1198 (QL) at paragraph 6).

[30] However, an immigration officer is obligated to inform the applicant of any concerns related to the veracity of documents and will be required to make further inquires (see *Hassani* above, at paragraph 24).

[31] The Regulations define investor in subsection 88(1) as a person with a PNW of at least $800,000. The onus was on the applicant to demonstrate that he met this requirement which included demonstrating clearly that he owned the property and that its value put him above the required PNW necessary.

[32] The officer refused the applicant's application initially because the applicant had not proven ownership as required by the Regulations. She sent a letter of refusal indicating her concerns with the appraisal report in particular. The applicant then submitted additional materials and requested the officer to reconsider. The officer considered these materials and reassessed the application finding that the applicant had not assuaged her concerns that the applicant did not meet the $800,000 requirement in the Regulations. The officer was not obliged to provide the applicant with further opportunities to satisfy her concerns.

[33] I would therefore dismiss the application for judicial review.

[34] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[35] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, RS 2001, c 27)

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.
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Immigration and Refugee Protection Regulations (SOR/2002-227)

90. (1) For the purposes of subsection 12(2) of the Act, the investor 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 investors within the meaning of subsection 88(1).	90. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des investisseurs 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 investisseurs au sens du paragraphe 88(1).

FEDERAL COURT

SOLICITORS OF RECORD

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