

Federal Court



Cour fédérale

Date: 20190122

Docket: IMM-3100-18

Citation: 2019 FC 92

Ottawa, Ontario, January 22, 2019

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

CHI KAN KWAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review challenges a visa officer's [the Visa Officer] decision dated June 28, 2018 refusing the application of Chi Kan Kwan for a permanent resident visa as a member of the Start-up Business Class. The stated basis for the decision was a finding that Ms. Kwan's application for landing was primarily brought for the purpose of acquiring immigration status and not for the required purpose of engaging in an authorized business activity.

[2] It is common ground that Ms. Kwan's application met the initial technical requirements to qualify as a start-up business venture under the applicable program. Among other things, Ms. Kwan was required to demonstrate an intention to operate a business in Canada. It was also necessary for Ms. Kwan to enter into an agreement with a designated entity which would provide various forms of support to the proposed venture. In Ms. Kwan's case, an agreement was reached with a designated business incubator based in Vancouver, namely Empowered Startups Ltd. [Empowered]. The agreement described the proposed joint venture as a fee based "one stop information platform (Financial Website)" linking Chinese investors with institutions offering Canadian financial products.

[3] When Ms. Kwan's application came up for initial review a concern was raised about a possible conflicting venture being supported by Empowered. The reviewing Visa Officer noted that this "raises concerns about possible [Empowered] involvement in assisting applicants in acquiring status or privilege under IRPA". This concern led the officer to ask the Canadian Association of Business Incubation [CABI] for a peer review of the proposed business model. CABI's peer review report dated February 16, 2018 identified problems with the proposal and noted that the business model had "changed significantly since the initial application was submitted". The report also stated that Ms. Kwan "has committed to paying \$300,000 for a year of incubation services. This is not normal for an incubator in Canada".

[4] On February 28, 2018, Ms. Kwan was asked to provide a status update on the establishment and operation of her business. This request was followed up with a second request on March 9, 2018. Ms. Kwan then provided a three page "Venture Update" describing a new business model involving a chatbot platform connecting financial institutions with potential

customers. She also explained that the initial business model had been abandoned because of financial regulation concerns.

[5] Ms. Kwan's update gave rise to a new concern about "lack of seriousness". This is outlined in the following passage from the Visa Officer's file notes:

Item 2(5) of the Ministerial Instructions (MIs) states that an applicant is not to be considered a member of the start-up business class if they intend to participate, or have participated, in an agreement or arrangement in respect of the commitment primarily for the purpose of acquiring a status or privilege under the Act and not for the purpose of engaging in the business activity for which the commitment was intended. According to the Commitment Certificate provided by Empowered Startups Ltd., dated December 01, 2016, the PA has partnered with Empowered Startups Ltd. to develop a Robo-Advisor for Chinese investors to search for Canadian financial products. However, on March 9, 2018, PA was asked to provide a status report on the establishment/operation of her start-up business in Canada and it appears that her business venture has changed significantly. She now proposes to develop "Chatwithbanks.com" which will help consumers to select different banks by hosting and setting up bank 'chatbots' in a single platform. I note that she obtained work permit #W302370595 on February 25, 2017 in order to work on her business venture in Canada. She indicated that her successes to date include the development of the initial website for Chatwithbanks.com and the formation of a chatbot development team, yet she has not provided any documentary evidence to support this. Upon review of the documents PA submitted, she has failed to provide sufficient evidence to demonstrate that she has made significant progress in the last year. I also note that Empowered Startups Ltd. has accepted and is investing in a business venture similar to her initial proposal which would have directly competed with her business. This is atypical of a venture capital investor. The lack of seriousness by PA and designated entity in entering the proposal leads me to conclude that her intentions were other than carrying out a business in Canada. I therefore have concerns that PA has participated in an agreement or arrangement in respect of the commitment for the purpose of acquiring permanent residence in Canada and not for the purpose of engaging in the business activity for which the commitment was intended. PFL to be sent via email. BF 30 days. [emphasis added]

[6] The Visa Officer followed up with a procedural fairness letter to Ms. Kwan raising all of the same concerns and questioning the bona fides of her application. Included in the letter was a specific concern about the lack of information provided about the progress of the venture during the previous year.

[7] Ms. Kwan responded to the fairness letter in a four page reply and enclosed copies of her communications with the representatives from Empowered. Her reply explained the rationale behind the change to the business model and described the work that had gone into the new proposal. She claimed to have been actively engaged in the incubation process to the extent of “about” 10 hours of work per week. Ms. Kwan also explained that the work being done by Empowered in the development of another chatbot venture did not compete with her business idea. Her letter concluded with a criticism that the Visa Officer was second guessing her business decisions and with a threat that she was exploring her legal options in the event of a negative decision. It is of some significance that, despite Empowered’s significant involvement in the development of Ms. Kwan’s venture, nothing from that source was provided with her response.

[8] Notwithstanding Ms. Kwan’s answers, the Visa Officer concluded that the application was primarily motivated by a desire to acquire immigration status in Canada and not to pursue a legitimate business opportunity.

[9] The Visa Officer’s assessment of the evidence is contained in the following passage recorded in the file notes:

On June 6, 2018, the PA made the following submissions in response to my PFL on May 15, 2018: explanation letter, emails with Empowered, WeChat logs, incorporation documents,

screenshots of website, Collaborative Research Agreement, and e-mails between UBC and Empowered. I acknowledge that the PA raised concerns with regards to Empowered Startups Ltd. being referred to as a venture capital investor in my PFL. However, I am satisfied that this terminology does not impact the clarity of my concerns conveyed to the application. The PA was made aware of the case to be met and was given the opportunity to submit all evidence that she wanted considered. Certificate of Incorporation provided indicates that the PA's business venture was incorporated on March 1, 2017 in BC, after her arrival in Canada. PA obtained work permit #W302370595 on February 25, 2017 in order to work on her business venture in Canada. According to the chat logs provided between the PA and Chang of Empowered Startups Ltd., the PA was no longer in Canada as of at least March 17, 2017. In her letter of explanation, the PA repeatedly indicates that the discussions about the business took place over email, WeChat call, and WeChat message. Based on the information provided by the PA, I am not satisfied that the PA has been in Canada exercising her work permit to develop her business venture. I am not satisfied that the PA will provide active and ongoing management of this business from within Canada. In the PA's letter of explanation, she indicated that Appendices A and B are solid evidence demonstrating her active business discussion and activities for her business venture. The chat logs (Appendix B) suggest that Chang of Empowered Startups Ltd. was developing the PA's business venture and providing the PA with updates. According to the April 2, 2017 e-mail between the PA and Chang (Appendix A), it appears as though Chang created the survey questions. Furthermore, Chang built the company website as per the April 21, 2017 e-mail between the PA and Chang. Chang continued to make changes and develop the websites and informed the PA when to have her friends test the website. According to the February 20, 2018 e-mail, the PA did not hear from Chang on her venture. The PA has failed to provide sufficient evidence to satisfy me that she is actively involved in developing her business. Moreover, I note that the Collaborative Research Agreement was signed by UBC and Empowered (Appendix F). It did not include the PA or name her business venture. All e-mail correspondence provided took place between UBC and Empowered as well. I note that the PA was not CC'd on these e-mails (Appendix G). The PA's response to my PFL was carefully considered; however, it did not satisfactorily disabuse all of my concerns. Upon careful consideration of all information on file, I am not satisfied on the balance of probabilities that the PA participated in the agreement or arrangement in respect of the commitment primarily for the purpose of engaging in the business activity for which the

commitment was intended. Rather I am satisfied that the PA participated in the agreement and arrangement in respect of the commitment primarily for the purpose of acquiring a status or privilege under the Act, contrary to MI 2(5). Therefore, I am not satisfied that the PA is a member of the start-up business class. Application refused on this date.

[10] Ms. Kwan challenges the reasonableness of the decision and argues, as well, that it is tainted by procedural unfairness. The first issue attracts a deferential standard of review and the fairness issue must be examined for correctness.

I. REASONABLENESS

[11] Ms. Kwan asserts that it was unreasonable for the Visa Officer to attribute an improper purpose to her application based solely on a lack of progress in the development of her business. This argument, however, mischaracterizes the Visa Officer's primary concern.

[12] It was Ms. Kwan's lack of meaningful engagement in the development of the business that led the Visa Officer to doubt her motives. This concern is best reflected in the Visa Officer's observation that Ms. Kwan had almost immediately returned to Hong Kong and had not provided active and ongoing management of the business from within Canada. This history of minimal engagement stands in stark contrast to Ms. Kwan's stated commitment to the development of her business.

[13] As an applicant seeking a visa under the Start-Up Business Class, Ms. Kwan was required to provide a Commitment Certificate outlining her intended role in the business. Ms. Kwan's Commitment Certificate stated that she was "essential" to the business and would be a Director, the primary shareholder, and the Chief Executive Officer of the company to be incorporated. The Certificate also described Ms. Kwan's operational role in considerable detail

and stated that she would be employed in a full-time position based in Vancouver working out of premises supplied by Empowered. A work permit was also requested for “urgent business reasons” to permit Ms. Kwan to assume her employment responsibilities within Canada.

[14] It is also noteworthy that Empowered provided a letter of support for the project stating that Ms. Kwan would “attend and remain located in Vancouver” between January 2017 and December 2017.

[15] Notwithstanding these assurances and the issuance of a work permit on February 25, 2017, Ms. Kwan came to Canada for only one week between the dates of February 28, 2017 and March 7, 2017 after which she returned to Hong Kong and remained there. During her brief visit to Vancouver she incorporated the business and met twice with Empowered representatives. After that visit, Ms. Kwan’s active operational involvement in the business venture was limited to mostly cursory email and WeChat exchanges with representatives of Empowered.

[16] This history shows that Ms. Kwan almost immediately reneged on her firm commitment to live in Vancouver and to devote her time and energy in Canada to her business. No effort was made to inform the visa authorities that Ms. Kwan had left Canada and was working from Hong Kong. Similarly, Ms. Kwan neglected to inform program officials in a timely way about the significant change that had been made to the business model. All of this is surprising in the face of Ms. Kwan’s WeChat exchanges with Empowered representatives about these issues and the advice she was given (see CTR at pages 158 and 163).

[17] I reject Ms. Kwan's argument that the Visa Officer erred by assessing her motivations at a time subsequent to the application. In my view, a good faith obligation continues to exist beyond the initiation of an application under this program. If it were otherwise, no purpose would be served by requiring a commitment from the applicant going forward, for regular progress reporting, and for a post-application peer review.

[18] I would add that there is nothing in the Visa Officer's decision suggesting that Ms. Kwan's motives were ascertained at some point subsequent to the date of her application. A person's past motivations can be reasonably assessed by examining their subsequent behaviour and clearly that was what happened here. Ms. Kwan's initial motives were questioned based on her almost immediate failure to live up to the clear commitments she had given about the details of her intended operational involvement.

[19] Finally, Ministerial Instruction 7 provides that an applicant will not be considered a member of the start-up business class "if they intend to participate, or have participated, in an agreement or arrangement in respect of a commitment primarily for the purpose of acquiring [immigration] status". This language belies Ms. Kwan's argument that a temporal limitation applied to the assessment of her motives.

[20] I am satisfied that the Visa Officer's finding of a lack of a bona fide intent on the part of Ms. Kwan was reasonable. While it may well be open to applicants in Ms. Kwan's situation to hold back from initiating business activity until permanent residency has been obtained, that is not what Ms. Kwan did. She gave clear commitments that she failed to honour and the level of her business activity was minimal at best. The problem was not that Empowered was actively engaged with the business venture but, rather the problem was that Ms. Kwan was not. On this

record it was open to the Visa Officer to conclude that Ms. Kwan was not serious about the business and was instead primarily seeking immigration status.

II. FAIRNESS

[21] Ms. Kwan's fairness argument is based on a reference in the CABI peer review report to the atypical commitment by Ms. Kwan to pay \$300,000 to Empowered for its support during the first year of the start-up. Ms. Kwan contends that the Visa Officer must have taken this extrinsic evidence into account and, therefore, had a duty to bring it to her attention. Indeed, Ms. Kwan argues that the Visa Officer's actual rationale for rejecting her application had more to do with a concern about Empowered's motivations than hers. This suspicion, she says, was also reflected in the Visa Officer's file note of September 12, 2017 – a concern that was not fully addressed in the Visa Officer's procedural fairness letter.

[22] I accept Ms. Kwan's point that the Visa Officer harboured an initial concern about Empowered's business model and its motives. It is also apparent that Ms. Kwan was not told about the issue. Ms. Kwan's argument that she should have been informed about this concern is, however, wholly undermined by the fact that there is nothing in the Visa Officer's decision indicating that Empowered's conduct was ultimately taken into account in the rejection of Ms. Kwan's application. The stated basis for the decision was Ms. Kwan's lack of meaningful operational involvement with the start-up and that was, on its own, a reasonable justification for the decision. On this record, there is simply no basis to conclude that the Visa Officer harboured some disguised motive for the decision. Indeed, if an inference is to be drawn it would be that Ms. Kwan's explanation for Empowered's assistance to a similar venture was accepted and the Visa Officer's conflict of interest concern was dispelled.

[23] In the absence of evidence that the Visa Officer's initial concerns about Empowered were a factor in the decision, there was no requirement to bring that issue to Ms. Kwan's attention. This situation is very different from the case of *Sapojnikov v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 964, 285 ACWS (3d) 153, involving a failure to disclose a "poison pen" letter received one day before the sending of a procedural fairness letter.

[24] The content of the letter directly impugned the applicant's credibility and Justice Anne Mactavish drew an inference that it must have been a factor in the decision to send the procedural fairness letter. Accordingly, there was a duty to disclose the letter to the applicant.

[25] In this case, the Visa Officer's tentative reservations about Empowered had no relevance to the assessment of Ms. Kwan's motives or her credibility. In fact, CABI's reference to Ms. Kwan's \$300,000 commitment to Empowered was, not surprisingly, never taken up by the Visa Officer as a point of subsequent interest.

[26] For the foregoing reasons, this application is dismissed.

[27] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT in IMM-3100-18

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3100-18

STYLE OF CAUSE: CHI KAN KWAN v THE MINISTER OF CITIZENSHIP
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