Federal Court  Cour fédérale

Date: 20190307

Docket: IMM-3623-18

Citation: 2019 FC 284

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 7, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

LEI WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, a Chinese national, has been working as a graphic designer in Beijing for several years. His professional background includes several service contracts with various art, design and advertising companies in China. In January 2017, he applied for a permanent resident visa in the self-employed persons class under section 100 of the *Immigration and Refugee*

Protection Regulations, SOR/2002-227 [Regulations]. He says he is willing to invest $100,000 to start and run his own graphic design studio. He plans to settle in the Greater Toronto Area.

[2] On June 6, 2018, the applicant was called for an interview at the Consulate General of Canada visa office in Hong Kong. During this interview, the visa officer handling his case [Officer] raised concerns, which are recorded in the Global Case Management System [GCMS], about the applicant's intention and ability to create his own employment and to make a significant contribution to Canada's economic activities. In particular, the Officer criticizes the applicant for not having a concrete business plan; for conducting only limited research to implement the plan; for having limited knowledge of the local market; and for not disclosing the name of the Canadian agency that is supposed to help him carry out his project. The Officer also criticizes him for never having travelled in Canada or outside China and for not having demonstrated that he is unique in his profession.

[3] The next day, the Officer rejected the visa application on the basis that the applicant does not meet the definition of a "self-employed person" within the meaning of subsection 88(1) of the Regulations because he has not demonstrated an intention and ability to be self-employed and to make a significant contribution to specified economic activities in Canada.

[4] The applicant challenges this decision, arguing that the Officer made two mistakes in its conclusion, by taking into account irrelevant factors and by ignoring the available evidence in his consideration of the relevant factors.

[5] Is it well established that visa officers processing visa applications in the self-employed class enjoy a high degree of discretion and that deference is required when the Court is called upon to review their decisions ((*Sidhu v Canada (Citizenship and Immigration)*, 2017 FC 1139 para 9; *Momeni v Canada (Citizenship and Immigration)*, 2017 FC 304 paras 11-12 [*Momeni*]; *Al-Katanani v Canada (Citizenship and Immigration)*, 2016 FC 1053 para 1). However, this does not mean that they have carte blanche since their decisions, in order to escape the Court's review, must possess the attributes of reasonableness, which are "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v Nouveau-Brunswick*, 2008 SCC 9 para 47).

[6] It is also well established that GCMS notes are in a sense part of the decisions made in this area to the extent that they provide more information on what may have motivated a visa officer to accept or reject an application (*Song v Canada (Citizenship and Immigration)*, 2019 FC 72 para 18; *Wang v Canada (Citizenship and Immigration)*, 2018 FC 368 para 9; *Zhamila v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 88 para 46; *Singh v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 266 para 6).

[7] The statutory and operational framework applicable to this type of visa was summarised by the Court in *Momeni* as follows:

> [5] Subsection 12(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], provides that foreign nationals may be selected for permanent residence as members of the economic class on the basis of their ability to become economically established in Canada.

[6] Division 2 of the [Regulations] establishes classes of business immigrants. One of those classes is the Self-employed Person Class. Section 100 of the [Regulations] provides that based on ability to become economically established in Canada, a foreign national who is self-employed within the meaning of the [Regulations] may become a permanent resident. Section 100 further states that where a foreign national who applies under the Self-employed Person Class is not a self-employed person within the meaning of the [Regulations], the application shall be refused:

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).
(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 and no further assessment is required.	(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.

[7] The [Regulations] define a "self-employed person" at subsection 88(1) (emphasis added):

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.	***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 contribuer de manière importante à des activités économiques déterminées au Canada.

[8] "Relevant experience" is also defined at subsection 88(1). The relevant experience requirements differ depending on whether the self-employed person's experience has been obtained in the

field of (i) cultural activities, (ii) athletics, or (iii) the purchase and management of a farm. Mr. Momeni's claimed experience is in the field of cultural activities:

relevant experience, in respect of (a) a self-employed person, . . . 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 activities, (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), . . .	***expérience utile*** (a) S'agissant d'un travailleur autonome… s'entend de l'expérience d'une durée d'au moins deux ans au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci, composée : (i) relativement à des activités culturelles : (A) soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités culturelles, (B) soit de deux périodes d'un an d'expérience dans la participation à des activités culturelles à l'échelle internationale, (C) soit d'un an d'expérience au titre de la division (A) et d'un an d'expérience au titre de la division (B), […]

[9] The respondent's *Operational Manual OP 8: Entrepreneur and Self-Employed* [Manual] includes further guidance on the definition of "self-employed". That guidance sets out factors for an Officer's consideration including that an applicant show " . . . 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."

[8] According to the case law of this Court, the definition of "self-employed person" is twofold and includes both the intention and ability to establish a business, as well as the

likelihood that the business will contribute significantly to the economic life in Canada, at least in some respects (*Kim v Canada (Citizenship and Immigration)*, 2008 FC 1291 para 27, citing *Ying v Canada (Minister of Citizenship and Immigration)* (1997), 41 IMM LR (2d) 129 (FCTD)).

[9] As I have already indicated, the applicant alleges, in light of the notes that were entered in GCMS, that the Officer took into account irrelevant factors in the analysis of his visa application. In particular, he argues that the Officer could not rely, even in part, on the fact that he had never travelled in Canada or outside China or that he had not demonstrated that he had a unique place in the graphic design profession.

[10] The fact that the applicant has never travelled to Canada or outside China is indeed irrelevant to the analysis of a visa application in the self-employed class (*Singh Sahota v Canada (Minister of Citizenship and Immigration)*, 2005 FC 856 para 12; *Ni v Canada (Minister of Citizenship and Immigration)*, 2001 FCTD 28 paras 11-12). However, the respondent submits that the consideration of these two factors must be understood as part of the assessment of the adequacy of the applicant's business plan, which is also a very relevant factor. He therefore concludes that on this basis there is no reason to interfere with the Officer's decision.

[11] I cannot agree with this view since the Officer had already expressed concern about what he considered to be the lack of a real business plan and the applicant's limited research to carry out that plan. The fact that the applicant has never travelled in Canada or outside China therefore appears to be a separate and independent concern.

[12] It also seems dubious to me that the Officer linked the fate of the visa application, at least in part, to the fact that the applicant failed to demonstrate that he stands out from the people who work as graphic designers ("you failed to demonstrate uniqueness in your profession"). The applicant had to demonstrate his intention and, based on his experience and financial assets, his ability to create his own employment in Canada and to make a significant contribution to specific economic activities. It seems to me that nothing in the Act or Regulations imposes such a high burden on an applicant for a visa in the self-employed class as that of demonstrating that he occupies a unique place among those in the same profession as himself.

[13] The Officer may have meant that the applicant was unlikely to make a significant contribution to specific economic activities given the number of graphic designers already established in the Greater Toronto Area. However, he had already expressed this concern by referring to the highly competitive nature of the market for graphic designers in this region. Again, I must conclude that the Officer has made this factor a separate and independent concern from his analysis.

[14] However, not knowing what weight the Officer may have attributed to each of these factors, since he referred to them in his review of the visa application in question, and therefore not being able to determine whether said application would nevertheless have been rejected had it not taken into account these three factors, I find that the appropriate solution in the circumstances is to return the case to another visa officer for reconsideration (*B'Ghiel v Canada (Minister of Citizenship and Immigration)* (1999), 45 IMM LR (2d) 198 (FCTD) at p 200).

[15] By involving factors that are, on face value, irrelevant into his decision making, the Officer's responsibility is to better articulate his thinking by positioning these three factors squarely in the overall reasoning that led him to reject the applicant's visa application. He has not done so, which undermines the intelligibility, transparency and justification of his decision, in my opinion.

[16] This application for judicial review will therefore be allowed. Neither party considered that this case raised a question of general importance. I agree.

JUDGMENT in IMM-3623-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The visa officer's decision, dated June 7, 2018, to reject the applicant's visa application in the self-employed class is set aside, and the matter is referred to another visa officer for reconsideration.
3. No questions are certified.

"René LeBlanc"
Judge

Certified true translation
This 18th day of April, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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