Federal Court  Cour fédérale

Date: 20190411

Docket: IMM-3188-18

Citation: 2019 FC 440

Ottawa, Ontario, April 11, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

XUAN HIEU BUI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks to quash the decision of a visa officer [Officer], dated June 26, 2018, whereby the Officer denied his application for a permanent resident visa as a member of the start-up business class on the basis that he entered into a commitment with a start-up incubator for the primary purpose of acquiring a status or privilege under the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [Act], rather than for the purpose of engaging in a business activity for which the commitment was intended.

II. Context

A. *The Immigration Start-Up Business Class*

[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.

[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)).

[9] In an affidavit filed by the Minister, a representative of Immigration, Refugees and Citizenship Canada explained that:

> During the processing of an application in the Start-up Business Class, a decision-making officer may request a peer review. The purpose of a peer review is not to establish if a proposed business will prove successful. Rather, peer reviews are independent assessments of the commitment given by the designated entity. They also serve to protect against fraud and to ensure that the activities of both the entrepreneur and the designated entity are consistent with industry standards.
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> Peer reviews serve to examine the due diligence that was performed by the designated entity. Peer reviews will further consider the terms of the commitment given by the designated entity to the foreign entrepreneur, which may include an investment made by the designated entity and services provided to the entrepreneur. Peer reviews are an important instrument to ensure that designated entities conduct their activities in accordance with the requirements of the Start-up Business Class.
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> (Affidavit of David Cashaback at paras 6-7).

B. *The Applicant's Visa Application*

[10] The Applicant is a citizen of Vietnam. He applied for a permanent resident visa as a member of the start-up business class in August 2017. His proposed business venture was to create a mobile software application in Vancouver that would bring together regional and local agricultural producers throughout Vietnam with tourist and customer demand, all the while excluding wholesalers and benefiting farmers. His business was eventually incorporated and was named Savago Technologies Ltd. [Savago].

[11] As per the requirements in the *Ministerial Instructions*, he obtained a Start-up Business Class Commitment Certificate [Commitment] from a designated business incubator, Empowered Startups Ltd. [Empowered].

[12] In December 2017, the Officer sought to determine whether due diligence was completed by Empowered when accepting the Applicant's business proposal and therefore requested that the Commitment be independently assessed by a peer review panel [Panel].

[13] On February 14, 2018, the peer review was held by way of conference call that lasted about one hour. Four other applications were considered in the same session. Empowered was represented by its co-founder in addition to its president and general counsel. Two days later, the Panel found that there had been an insufficient level of due diligence performed by Empowered when accepting the Applicant's business proposal for incubation.

[14] In a letter dated March 22, 2018 [Procedural Fairness Letter], the Officer alerted the Applicant of the Panel's concerns regarding the lack of due diligence. Several other issues were raised regarding whether the Applicant had participated in the Commitment with Empowered primarily to acquire permanent residence in Canada rather than to engage in a business activity for which the Commitment was intended:

- The lack of explanation as to why the Applicant did not start his business venture in Vietnam, given his familiarity with that market and clientele, and then launch his idea in Canada;

- The absence of articles of incorporation in the Applicant's reply to a status update request, despite the Applicant having a valid work permit in Canada and having stated that he had been developing the ideas behind his business venture for a number of months;

- The failure to provide any documentary evidence to substantiate claims of Savago's successes : the development of Savago's initial website and Facebook page, in addition to meetings with four Canadian universities and the formation of a team of advisors for Savago; and

- In light of the documents submitted, the lack of evidence demonstrating significant progress in the last seven months.

[15] Counsel for the Applicant at the time requested that the Minister provide him a copy of the peer review report. The Minister replied, presumably on the basis of privacy considerations, that the report could be obtained through an access to information request and the Applicant

proceeded to file such a request in addition to an extension of time to file his response to the Procedural Fairness Letter.

[16] Despite the pending access to information request, counsel for the Applicant at the time replied to the Procedural Fairness Letter in order to "not drag this matter anymore in view of the delay already incurred". He was essentially of the view that the Panel raised issues about the Applicant's business venture in its report without first raising those concerns with Empowered or the Applicant, and thus did not provide them with an opportunity to respond. As he did not receive a copy of the peer review report, he stated that he was unable to discern how the Panel came to its conclusions. Finally, he filed a sworn declaration of the Applicant which explained how Canada was an advantageous business market compared to the bureaucratic communist regime in Vietnam and how he had hired advisors and obtained an agreement with a Vietnamese Ministry to promote Savago.

C. *The Officer's Decision*

[17] On June 26, 2018, the Officer denied the visa application under subsection 2(5) of the *Ministerial Instructions* on the basis that the Applicant did not satisfactorily prove that he had participated in the business venture for the primary purpose of engaging in the business activity for which the Commitment was intended.

[18] The Global Case Management System [GCMS] notes indicate that the Officer acknowledged that the Applicant filed his reply to the Procedural Fairness Letter despite the pending access to information request. The Officer noted that the Applicant provided appropriate

incorporation documents, but failed to provide any documentary evidence that spoke to the business environment in communist Vietnam and observed that the Savago website was only in Vietnamese and that the phone number listed was 123-456-7890. The Officer found that there was a lack of documentary evidence to substantiate the Applicant's claims regarding the discussions with the universities, the agreement with the Vietnamese Ministry and the advisors for Savago.

D. *The Applicant's Claims Against the Officer's Decision*

[19] The Applicant takes issue with the peer review process and states that this process tainted the Officer's decision. He acknowledges that the peer review report was not binding on the Officer, but contends that peer review panels have a duty to act fairly towards an applicant. In his view, this means carrying out a thorough assessment of the file and, during a peer review session, making concerns known and providing an opportunity to respond. Applied to the facts of this case, the Applicant contends that because the Panel believed that his business was not incorporated, it should have raised this at the peer review session. Finally, he submits that the peer review report was deficient, which, in turn, jeopardized the Officer's evaluation of the proposed venture and the Applicant's credibility, akin to the role of a "poison pen letter" such as in *Sapojnikov v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 964 [*Sapojnikov*].

[20] The Applicant also puts forward a number of arguments on the merits of the Officer's decision. He first asserts that the Officer applied the wrong burden of proof and used ambiguous language in the Procedural Fairness Letter, making it impossible to disabuse the Officer's concerns. With respect to the Officer's finding in the refusal decision that Savago's website was

only in Vietnamese and failed to display a working phone number, it was reasonable, he says, to not have a fully developed website yet as he was not yet a permanent resident of Canada, and the website would only require some tweaking to make it fully operational for the business. The same goes, the Applicant claims, for the Officer's finding regarding the discussions with university representatives as one can presume that no university would go ahead with a project without confirming a foreign national's immigration status. Finally, the Applicant underscores the fact that the *Ministerial Instructions* do not require him to first establish a venture outside of Canada and then seek to replicate it within Canada, contrary to what the Officer's decision implies.

III. Issues and Standard of Review

[21] The present case raises the question of whether the Panel or the Officer acted in a procedurally unfair manner. In addition, it asks the question of whether the Officer's decision was reasonable.

[22] It is well settled that procedural fairness issues are reviewed on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Sapojnikov* at para 18) whereas the merits of a visa officer's decision are reviewable on a standard of reasonableness (*Kwan v Canada (Citizenship and Immigration)*, 2019 FC 92 at para 10; *Yang v Canada (Citizenship and Immigration)*, 2019 FC 130 at para 14 [*Yang*]).

[23] The case law has consistently held that on judicial review, visa officers are entitled to considerable deference, given their particular expertise in discretionary decision-making based

on factual findings (*Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at para 19; *Kavugho-Mission v Canada (Citizenship and Immigration)*, 2018 FC 597 at para 13). Reasonableness, as is well established too, is concerned mostly with the existence of justification, transparency and intelligibility of the decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes in regard to the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

IV. Analysis

A. *The Procedural Fairness Issue*

[24] The Applicant challenges the fairness of the decision-making process, as, in his view, the peer review process violated his participation rights, did not provide him with a right of reply, and ultimately tainted the Officer's decision.

[25] The Minister submits that the impact of the peer review process was limited and, in the end, the Applicant should have raised his concerns at the first instance with the Officer, but chose not to by waiving his right to obtain a copy of the Panel's report.

[26] In the context of a visa application, the case law has held that the level of procedural fairness owed by a visa officer to a visa applicant is on the lower end of the spectrum (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (FCA) at para 41; *Sapojnikov* at para 26; *Yang* at para 22).

[27] Procedural fairness nevertheless dictates that a visa officer must ensure that an applicant has the opportunity to meaningfully participate in the application process (*Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 326 at para 25). This includes being informed of and provided an opportunity to respond to perceived material inconsistencies, credibility concerns, accuracy or authenticity concerns, or the reliance of a visa officer on extrinsic evidence (*Chawla v Canada (Citizenship and Immigration)*, 2014 FC 434 at para 14 [*Chawla*]; *Madadi v Canada (Citizenship and Immigration)*, 2013 FC 716 at paras 6-7).

[28] When, however, a visa officer's concern arises directly from the requirements of the Act or regulations, the officer is not normally under an obligation to inform or provide the applicant with an opportunity to address the concerns (*Al Aridi v Canada (Citizenship and Immigration)*, 2019 FC 381 at para 20; *Saatchi v Canada (Citizenship and Immigration)*, 2018 FC 1037 at para 40; *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at para 24).

[29] An officer may put concerns to an applicant by way of a procedural fairness letter. Said letter must contain enough detail to enable the applicant to know the case to meet, meaning that the applicant is provided with a reasonable understanding of why the officer is inclined to deny the application (*Bayramov v Canada (Citizenship and Immigration)*, 2019 FC 256 at para 15; *Ezemenari v Canada (Citizenship and Immigration)*, 2012 FC 619 at para 11). In other words, an applicant should not be "kept in the dark" about the information upon which an officer may render a decision (*Chawla* at para 19).

[30] In the instant case, the Officer, by way of the Procedural Fairness Letter, put their concerns to the Applicant regarding the insufficient level of due diligence Empowered performed, as per the Panel's conclusion, and, in turn, regarding the purpose for which the Applicant entered into the Commitment with Empowered. The question is whether that was sufficient notice for the Applicant to be reasonably informed of the case to meet.

[31] Regarding the peer review process, I underscore the fact that the purpose of a peer review, in part, is to protect against fraud (Affidavit of David Cashaback at para 6). The aim is to examine if the designated entity performed due diligence in accepting an applicant's business proposal (Affidavit of David Cashaback at para 7; see also: *Ministerial Instructions*, s 11(3)(a)). This examination thus does not focus on the conduct of the Applicant.

[32] Here, Empowered was afforded the opportunity to participate in some capacity in the peer review. Empowered was provided notice of the peer review and filed its due diligence package to the Panel. I also note that two representatives of Empowered participated in the peer review session.

[33] Even if the peer review process was flawed, ultimately, the decision to grant the visa application or not lay with the Officer. Hence, the Officer was under a duty, depending on the circumstances, to let the Applicant know of their concerns. As the Officer's concerns arose from a requirement under the *Ministerial Instructions*, namely that an applicant must not enter into a commitment for the purpose of obtaining a status or privilege under the Act (*Ministerial*

Instructions s 2(5)), one could argue that the Officer was not obliged to put this to the Applicant. However, in the present case, the Officer did raise this concern with the Applicant.

[34] The terms in which this concern was expressed in the Procedural Fairness Letter meet the required threshold insofar as they permit the Applicant to know the case to meet and to understand why the Officer was inclined to deny his visa application.

[35] Perhaps waiting to obtain the Panel's report via the access to information request would have allowed the Applicant to file more fulsome submissions to the Officer on the merits of the Panel's report. I note that in his reply submissions to the Procedural Fairness Letter, the Applicant's main focus was on the process, and not the substance of the peer review. Namely, he took issue with not being invited to attend the peer review and that the session only lasted 12 minutes. He did not however file evidence to substantiate his procedural concerns, despite filing such evidence in support of his Application for Judicial Review. The substantive issues raised were sparse.

[36] In my view, the Panel was not required to invite the Applicant to attend the peer review. This process, I repeat, is to examine if Empowered had conducted due diligence in accepting the Applicant's business proposal, and does not focus on the conduct of the Applicant. The GCMS notes demonstrate that the Officer shared the same substantive concerns as those of the Panel and provided the Applicant a meaningful opportunity to disabuse said concerns. Because the Applicant did not file evidence substantiating his procedural concerns to the Officer, the Officer correctly concluded that these allegations were insufficient, and, in any case, that they

were the ultimate decision-maker. The Applicant's reply was also insufficient to allay the Officer's substantive concerns. By opting not to wait for the access to information request, the Applicant, who, by his own admission, was not in a position to address the Officer's concerns related to the peer review without first seeing the Panel's report, consciously limited his own ability to reply to these concerns. The Officer, who was amenable to extend the Applicant's timeline to respond to the Procedural Fairness Letter, cannot be faulted for that. I note that the Officer was not bound by the Panel's report, and could have decided otherwise in light of the Applicant's submissions in response to the Procedural Fairness Letter (*Ministerial Instructions*, s 11(4)).

[37] With all of this in mind, the Applicant has not convinced me that there was a breach of procedural fairness.

[38] On a final note, the Applicant's reliance on *Sapojnikov*, equating the poison pen letter in that case to, as he characterizes it, a deficient peer review report, can be distinguished on the facts. In *Sapojnikov*, the poison pen letter was sent, unbeknownst to the visa applicant, by a third party to Canadian immigration authorities. The letter put forward unproven accusations of immigration fraud regarding the visa applicant. The Court quashed the visa officer's decision in *Sapojnikov* because the immigration authorities never disclosed the poison pen letter to the applicant. The instant case presents a very different factual matrix in which the Applicant knew of the existence of the peer review report, requested a copy, and then later waived his right to receive one under the relevant access to information legislation.

B. *The Decision is Reasonable*

[39] The Applicant argues that the Officer applied the wrong burden of proof and used ambiguous language in the Procedural Fairness Letter. He points to his lack of permanent residence in Canada to explain why Savago's website was not fully developed and why there was a lack of documentary evidence regarding the discussions with universities. Finally, he opines that he is not required under the *Ministerial Instructions* to commence a venture in Vietnam and then replicate it in Canada.

[40] The Minister points the Court to the lack of documentary evidence to support the Applicant's claims regarding the advantages to doing business in Canada as opposed to Vietnam, the discussions with universities, the agreement with the Vietnamese Ministry, and the relevant agreements with the Savago advisors. He further states that, once equipped with a valid work permit, an applicant must engage in developing the business venture, which includes a functional website. With this in mind, the Minister opines that the Officer's decision was reasonable.

[41] Regarding the merits of the case, I am satisfied that the Officer's decision is reasonable.

[42] Subsection 8(1) of the *Ministerial Instructions* provides that "[a]n applicant must provide documentation to establish that they are a member of the start-up business class". This places the burden on the applicant to prove that they meet the legal requirements under these same *Ministerial Instructions.* This includes particularly, as I have previously stated, that the applicant prove that their 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)).

[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.

[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.

[45] As counsel for the Minister stated at the hearing of this matter, the Applicant was in possession of a valid work permit and was therefore able to engage in meaningful discussions with universities to promote his venture. He was also able to hire advisors for Savago and to create a functioning website. Nevertheless, the Applicant failed to provide any documentary evidence to the Officer to substantiate these claims in his reply submissions to the Procedural Fairness Letter. This lack of evidence reasonably raised concerns with the Officer as to the Applicant's motivation for entering into the Commitment with Empowered.

[46] The Applicant is correct in stating that the *Ministerial Instructions* do not require that a venture be first experimented in a foreign country before being deployed in Canada. However, the facts of this case show that the Officer had concerns with the lack of due diligence that Empowered had performed when accepting the Applicant's venture for incubation, and therefore concluded that the Applicant entered into the Commitment for the purpose of acquiring a status or privilege under the Act. Given the lack of documentary evidence to support the Applicant's claims put before the Officer, this was a reasonable finding.

[47] I note that there is a fine line between immigration being motivated in part by economic motives and participating in an immigration program primarily for the purpose of acquiring a status or privilege under the Act. However, given the facts of this case and the significant level of deference afforded to visa officers for their expertise in fact-finding, the Applicant has not proven that the Officer committed a reviewable error in determining that he entered into the Commitment with Empowered for the primary purpose of acquiring a status or privilege under the Act.

[48] The Application for Judicial Review will therefore be dismissed. The parties agree that no question of general importance for certification arises from the facts of this case.

JUDGMENT in IMM-3188-18

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed;

2. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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