Federal Court  Cour fédérale

Date: 20220531

Docket: IMM-4624-20

Citation: 2022 FC 793

Vancouver, British Columbia, May 31, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

HUY ANH PHAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant has asked the Court to set aside the decision of a visa officer dated August 20, 2020, which denied his application for a permanent resident visa as a member of the start-up business class under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*).

[2] The officer concluded that the applicant's primary purpose in participating in an agreement with a business incubator was acquiring a status or privilege under the *IRPA* and not engaging in the business activity that was the subject of a commitment by the incubator.

[3] In this Court, the applicant raised issues about procedural fairness and whether the officer's decision was reasonable under the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

I. Background and Events Leading to this Application

A. *The Start-Up Business Class under the IRPA*

[4] Subsection 12(2) of the *IRPA* 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), the Minister of Citizenship and Immigration may give instructions establishing a class of permanent residents as part of the economic class and may provide rules governing such class.

[5] The Minister issued *Ministerial Instructions Respecting the Start-up Business Class*, 2017 (2017) C Caz I, 3523 (*"Ministerial Instructions"*). In 2018, the *Immigration and Refugee Protection Regulations*, SOR/2002-227 incorporated the program through sections 98.01 to 98.13, which generally correspond to the contents of the *Ministerial Instructions*.

[6] In this case, the parties agreed that the *Ministerial Instructions* formed the relevant legal framework for the applicant's start-up business class application.

[7] Subsection 2(1) of the *Ministerial Instructions* established the start-up business class and defined the class as "foreign nationals who have the ability to become economically established in Canada and meet the requirements of this section". To qualify for the class, an applicant must have: (i) 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) attained a certain level of language proficiency; (iii) a certain amount of transferable and available funds; and (iv) a qualifying business: *Ministerial Instructions*, subsection 2(2).

[8] A commitment consists of an agreement between a designated business incubator and an applicant, in the form of a Commitment Certificate and a letter of support. These documents confirm the applicant's participation in the relevant program, the terms of the agreement, and the due diligence assessment of the applicant and the start-up business: *Ministerial Instructions*, section 6.

[9] In this case, the applicant obtained a Commitment Certificate from Empowered Startups Ltd. ("Empowered"), which was a designated business incubator under Schedule I of the *Ministerial Instructions*.

[10] Subsection 2(5) of the *Ministerial Instructions* specified that an applicant is not a member of the start-up business class if their participation is primarily for the purpose of acquiring a status or privilege under the *IRPA*, rather than for engaging in the identified business activity.

B. ***Mr Pham's Application and the Officer's Procedural Fairness Letter***

[11] The applicant, Huy Anh Pham, is a citizen of Vietnam. Mr Pham's business venture was initially a cloud-based software connecting exporters and importers. On April 1, 2017, he was issued a work permit.

[12] On April 18, 2017, he submitted a permanent residence application as a member of the start-up business class.

[13] By email on March 23, 2018, the officer requested a status report from the applicant regarding the establishment/operation of the start-up business in Canada. The officer requested a response by March 30, 2018. The applicant's counsel responded by email on March 29, 2018, attaching documentation including emails between the applicant and business clients.

[14] The officer sent a procedural fairness letter dated July 19, 2018. The letter set out the contents of subsection 2(5) of the *Ministerial Instructions*. The letter referred to the Commitment Certificate dated January 19, 2017 under which the applicant partnered with Empowered to develop a cloud-based software application escrow service platform for exporters and importers. The letter noted the prior request to the applicant for a status report and that it appeared that his business venture had "changed significantly. You now propose to develop a product authenticity validation application for food and drink product manufacturers and suppliers". The officer's procedural fairness letter further advised that at the time of application, the applicant was pursuing a Bachelor's degree in road bridge construction while working for a construction company. He did not declare any previous entrepreneurial experience and had failed to satisfy

the officer that he was “bringing intellectual property to this business venture”. The letter also referred to the applicant’s work permit issued on April 1, 2017 and certain successes claimed by the applicant. The officer found that the applicant had not provided sufficient documentary evidence to support these claims and has not provided sufficient evidence to demonstrate that he had made significant progress in the last year. The officer therefore had concerns under subsection 2(5) of the *Ministerial Instructions* that the applicant had 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.

[15] By letter dated August 15, 2018, the applicant’s counsel responded to the officer’s procedural fairness letter, again with attached documentation. The applicant provided a “venture activities timeline” to address the officer’s concern that the business venture had changed significantly. With respect to intellectual property, the applicant noted that there seemed to have been a misunderstanding; the applicant was bringing an idea to the venture that he had been working on and developing with the assistance of Empowered. The plan was to create intellectual property, goodwill and other assets; the application did not mention bringing intellectual property to the business venture, something that was also not a requirement of the start-up business program. With respect to “significant progress”, the letter advised that one of the main reasons the applicant partnered with Empowered and obtained a work permit was to help validate the assumptions underlying the proposed Canadian venture, discover the “problem–solution fit” and start developing the business in Canada. The letter noted that the applicant had launched a venture through a British Columbia incorporated company and that the “significant

progress" concern seemed to originate from outside the regulatory requirements of the start-up business program. The letter advised that the applicant had been active and did progress a lot on his entrepreneurial path since the beginning. The letter noted that the applicant met and exceeded all of the requirements of the *Ministerial Instructions* and that the business was currently in active operations.

[16] The applicant attached pictures, screenshots of the website, emails and Messenger messages, as well as a Certificate of Change of Name for the company dated March 9, 2018. He also attached the timeline of venture activities, as noted, and a competitor analysis.

II. The Decision under Review

[17] In a decision letter dated August 20, 2020, the officer rejected the application. Referring to subsection 2(5) of the *Ministerial Instructions*, the letter advised that the officer was not satisfied that the applicant had satisfactorily disabused all of the concerns outlined in the procedural fairness letter dated July 19, 2018. The officer was not satisfied that the applicant had participated in the business venture for the purpose of engaging in the business activity for which the commitment was intended.

[18] The officer's notes dated August 20, 2018, in the Global Case Management System ("GCMS") stated that the applicant has not provided sufficient evidence that he and his business, now named Sip Life Food and Drink, had engaged in serious business. After setting out the procedural history and reference to the documents provided in response to the procedural fairness letter, the GCMS notes stated that the applicant had indicated that the business had

significantly changed and he was now focusing on developing a product authenticity validity application to allow Canadian food and drink manufacturers and suppliers to export globally.

[19] However, the officer stated that the applicant had not provided "any evidence" that Empowered was still involved and supported the new direction of the business, nor had the applicant provided any evidence of having the necessary education, experience or skills to succeed in this new venture. The officer was not satisfied on a balance of probabilities that the applicant entered the commitment with Empowered primarily for the purpose of engaging in the business activity for which the commitment was intended. Instead, the officer found that the applicant has done so for the purpose of acquiring status or privilege under the *IRPA*, contrary to subsection 2(5) of *Ministerial Instructions*. The officer was therefore not satisfied that the applicant was a member of the start-up business class and refused the application.

[20] The information in the Certified Tribunal Record did not disclose why it took two years from August 2018 until August 2020 to render a decision on the application.

III. Analysis

[21] In my view, this application for judicial review should be resolved on an analysis of procedural fairness.

[22] The applicant's procedural fairness submissions focused on the finding in the officer's GCMS notes that he had not provided any evidence that Empowered was still involved in supporting the new direction of the business venture. The applicant submitted that this was a key

finding that was central and material to the officer's determination, but had not been identified by the officer to the applicant at any time, including in the procedural fairness letter dated July 19, 2018. The applicant submitted that he did not know the case to meet and therefore was denied procedural fairness.

[23] The respondent submitted that the level of procedural fairness owed to the applicant was on the lower end of the spectrum and was met if an applicant was given a reasonable opportunity to respond to the case against him. The respondent acknowledged that a procedural fairness letter must contain details so the applicant knows the case to meet and that the applicant must have the opportunity to present their case fully and fairly.

[24] According to the respondent, the officer met this duty by providing the procedural fairness letter to the applicant, which comprehensively outlined the officer's concerns and provided the applicant an opportunity to respond and provide more information. The respondent submitted that the officer's procedural fairness letter outlined the case the applicant needed to meet including all of the officer's concerns about Empowered's involvement in the new direction of the business venture. The procedural fairness letter noted the officer's concern that the applicant had a Commitment Certificate with Empowered for one venture but he had changed direction in a manner that did not align with the agreement with Empowered.

[25] Alternatively, the respondent submitted that Empowered's involvement was not central to the officer's decision.

[26] A court assessing procedural fairness determines whether the procedure used by the decision maker was fair, having regard to all of the circumstances including the nature of the substantive rights involved and the consequences for the individual(s) affected: Gordillo v Canada (Attorney General), 2022 FCA 23, at para 63. The review exercise is essentially conducted on a correctness standard: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA, at para 54; *Nguyen v Canada (Citizenship and Immigration)*, 2019 FC 439, at para 24.

[27] The level of procedural fairness owed by a visa officer in respect of an application of this nature is on "the lower end of the spectrum": *Nguyen*, at para 27; *Sapojnikov v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 964, at para 26. However, a visa officer has an obligation to inform an applicant and provide an opportunity to respond to any concerns that do not arise directly from the requirements of the *IRPA* or the applicable program: *Bui v Canada (Citizenship and Immigration)*, 2019 FC 440, at paras 26–29, 33; *Sapojnikov*, at para 26; *Nguyen*, at para 28.

[28] For the reasons that follow, I have concluded that the officer did not provide the applicant with procedural fairness.

[29] First, one of the principal reasons provided by the officer to refuse the application under subsection 2(5) of the *Ministerial Instructions* was that Empowered was no longer involved and did not support the new direction of the applicant's business venture. The officer's conclusion on this issue was fundamental to the overall decision.

[30] Second, although the procedural fairness letter raised a number of issues related to compliance with subsection 2(5), Empowered's ongoing involvement and support was not among those issues. Reading the procedural fairness letter, the applicant could not have known or reasonably inferred that the officer had identified an issue about Empowered's continued role in applicant's business venture.

[31] Reading the GCMS notes, including the officer's statement that that the applicant had not provided "any evidence" that Empowered was still involved and supported the new direction of the business, it also appears that the officer did not appreciate that there was evidence in the record related to this issue, some of which indicated that Empowered remained involved. The applicant's response to the procedural fairness letter acknowledged the change in the direction of the business venture and expressly referred to the assistance of Empowered. The response addressed the issues raised by the officer. It also provided a certificate showing that the applicant's British Columbia company has changed its name to Sip Life as of March 9, 2018 and provided evidence of communications with potential business customers as late as May 2018. In addition, several of the emails provided to the officer were addressed or copied to the Empowered employee who has been involved with the applicant's business venture from the outset. The latest emails included information indicating that Empowered continued to be involved in the business venture after it changed direction. Further, the evidence confirmed that 40% of the company's shares had been issued to Empowered and there was no evidence of any transfer of those shares to another party, including the applicant.

[32] I recognize that the procedural fairness letter raised an overall concern about compliance with subsection 2(5) of the *Ministerial Instructions* and that, as Justice LeBlanc observed in *Bui*, one could argue that the officer was not obliged to disclose and seek the applicant's input on an concern that arose from a requirement of the *Ministerial Instructions*: *Bui*, at para 33. However, in my view, that general principle does not apply to the circumstances of this case. The officer here expressly raised a number of specific issues related to compliance with that provision in the *Ministerial Instructions*, without raising one of the two critical issues on which the officer based the refusal of the application. In general, a procedural fairness letter should identify the issues with sufficient clarity and particularity for an individual to have a meaningful opportunity to address them: *Kaur v. Canada (Citizenship and Immigration)*, 2020 FC 809, at para 42. In this way, the affected person can understand why the officer is inclined to deny the application: *Bui*, at para 29. In this case, having specified several issues in the procedural fairness letter that gave rise to a concern under subsection 2(5), the officer could not later identify an additional issue and rely upon it as a significant reason for rendering a negative decision without allowing the applicant an opportunity to address that additional, undisclosed issue: see e.g. *Tshibangile v Canada (Citizenship and Immigration)*, 2021 FC 451, at paras 18, 24-25; *Dimgba v Canada (Citizenship and Immigration)*, 2018 FC 14, at paras 23-24.

[33] The existence of evidence contrary to the officer's conclusion and the applicant's mention of Empowered's assistance in response to the procedural fairness letter both further support the conclusion that the officer should have provided the applicant with an opportunity to address Empowered's ongoing involvement and support.

[34] In the circumstances, I conclude that the applicant did not know the case to meet and therefore was not afforded procedural fairness. The decision was based significantly on the determination of an issue not raised in the procedural fairness letter, and there was evidence on the issue that the officer apparently overlooked that ran against the officer's finding. The officer's decision refusing the application must be set aside and the matter remitted for redetermination by another officer.

[35] As a result of this conclusion, there is no need to determine whether the officer's decision was unreasonable under the principles in *Vavilov*.

IV. Conclusion

[36] The application is allowed. Neither party raised a question to certify for appeal and none will be stated.

JUDGMENT in IMM-4624-20

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision dated August 20, 2020 is set aside and the matter is remitted to another officer for redetermination.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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